

No 340.

A majority of the Court were for sustaining the jurisdiction of the Justices, on the grounds stated for the Procurator-fiscal.

Several Judges, however, delivered an opposite opinion. The Justices (it was observed) derive all their powers from statute; and it is admitted, that there is none from which it can be positively inferred, that the regulation of posting makes part of their jurisdiction; a circumstance which is much to be regretted, and which ought to be remedied by an act of Parliament.

The Court, (15th January 1796,) by the narrowest majority, instructed the Lord Ordinary to refuse the bill, as to the competency of the Justices of Peace; but to pass the bill, to the effect of trying the question, as to the amount of the fares for posting; the complainers being, in the mean time, at liberty to charge 1s. 2d. *per* mile, duty included.

On advising a reclaiming petition, with answers, the Court "adhered."

Lord Ordinary, <i>Swinton.</i>	For the Procurator-fiscal, <i>Lord Advocate Dundas, Tait, Hope,</i>
<i>James Clerk, James Gordon.</i>	<i>Alt. H. Erskine, Catcart. Clerk, Menzies.</i>
<i>R. D.</i>	<i>Fac. Coll. No. 230. p. 534.</i>

* * * This case was appealed.

The House of Lords (8th January 1798) ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed. *

1797. *January 19.*

WILLIAM MURRAY, with concurrence of the Procurator-fiscal of the County of Haddington, *against* ROBERT TURNBULL and ADAM RUSSELL.

No 341.
A complaint for shooting pigeons, founded on the acts 1567, c. 16. and 1597, c. 270. cannot be competently brought before the Justices of Peace.

WILLIAM MURRAY, portioner in the village of Tranent, and proprietor of a pigeon-house in it, which had been built by the family of Winton, while the barony of Tranent belonged them, presented a complaint to the Justices of Peace for the county of Haddington, with concurrence of the procurator-fiscal, against Robert Turnbull and Adam Russell, for shooting pigeons. The complaint stated, 'That, by sundry laws and acts of Parliament, and particularly acts 1567, c. 16. and 1597, c. 270. all persons are discharged from shooting at or slaying of doves, (pigeons) with hagbuts, hand-guns, cross-bows, and pistols, and taking of them with nets and guns, under certain penalties, payable

* It is believed, that the appeal was dismissed entirely on the ground of the appellants having been guilty of an illegal combination to raise the price of posting, and that it was thought by the House of Lords, that, had it not been for this circumstance, the Justices of Peace would have had no jurisdiction in the matter.

‘ to the judge and apprehender ; and more particularly, by the British statute, 2d Geo. III. c. 29. persons are discharged from shooting with intent to kill, or by any means killing, or taking with intent to destroy, any house-dove or pigeon, under the penalty of twenty shillings, upon conviction on oath of party, or one witness, payable to the informer or prosecutor.’

The defenders admitted they had killed a few pigeons ; but they stated, that there were no less than thirteen pigeon-houses in the village, twelve of which belonged to persons not qualified to build a pigeon-house ; and that what they had done was absolutely necessary to protect a field belonging to the father of Turnbull, in the immediate vicinity of the village, while it was sowing with barley.

The Justices ordered Turnbull to pay fifteen shillings, and Russel five shillings, in name of fine and expenses.

An appeal to the Quarter-sessions was dismissed, with expenses.

In a suspension, the Lord Ordinary found the letters orderly proceeded, and expenses due.

In a reclaiming petition and answers, besides arguing the case on the merits, parties differed as to the competency of the complaint. The suspenders

Pleaded ; The two Scotch acts founded on introduced a general prohibition against killing game with fire-arms, and are now in desuetude. Besides, if they were in force, the Justices, under them, would be limited to inflicting the special penalties therein mentioned, which are escheat of moveables, imprisonment, placing on the stocks, and cutting off the right hand. From the nature of these penalties, it is farther evident, that such complaints can only be insisted in *ad vindictam publicam*, and not at the instance of an individual, particularly when no proof of the damage sustained is offered.

The statute 2d Geo. III. c. 29. was passed merely for the purpose of amending certain English statutes, and does not apply to Scotland.

Answered ; The Scotch acts founded on are still in force. It is no objection to the judgment of the Justices, that a severer punishment might have been inflicted by them. The action introduced by the statutes is popular ; and accordingly part of the penalties is declared payable to the ‘ apprehender.’

The Court had no occasion to determine the merits of the complaint. But it was observed, that Lord Bankton’s opinion, as to the legality of shooting pigeons, b. 2. tit. 3. § 167. is ill founded, and that his Lordship afterwards admitted it to be so.

As to the competency of the complaint, it was

Observed ; The right to have a pigeon-house is inseparable from property in land. The complainer, therefore, having no right to a pigeon house, has no title to insist in the action. Besides, the Justices of Peace have no jurisdiction under the Scots statutes founded on, which were passed long before their appointment ; and the 2d Geo. III. c. 29. does not apply to Scotland.

No 341.

THE LORDS dismissed the action as not competent in its present shape.

Lord Ordinary, *Craig.* For the Charger, *Chas. Brown.* Alt. Lord Advocate *Dundas.*
 Clerk, *Menzies.*

D. D.

Fac. Col. No 9. p. 19.

No 342.

The minister of a parish having, while the office of session-clerk was vacant, received the fees on proclamation of banns and registration of births, the treasurer appointed by the heritors for collecting the funds for maintenance of the poor, brought an action against him before the Justices of the Peace, under the small debt act, for a proportion of the fees, as belonging to the poor; and having obtained decree, a suspension of it was found incompetent.

1797. December 5. THOMAS HAMILTON against The Rev. JOHN SCOTT.

THOMAS HAMILTON, who had been appointed by the heritors of the parish of Avondale to collect the funds for maintenance of the poor, brought an action before the Justices of Peace acting under the small debt-act, (35th Geo. III. c. 123.) against the Reverend John Scott, minister of the parish, for L. 3 : 6 : 8, as the proportion of the fees received by the defender during the vacancy of the office of session-clerk, on proclamation of banns and registration of births, from Martinmas 1794 to Whitsunday 1795, which he alleged had always been appropriated to the support of the poor of the parish.

The defender wrote to the Justices, declining their jurisdiction, upon which they decerned against him, in terms of the libel.

A bill of suspension having been passed, the charger *contended*, that the judgment of the Justices could only be reviewed by reduction, § 10.

Mr Scott, on the other hand, while he admitted that a part of the fees on proclamation of banns, had, in practice, been paid to the treasurer for the poor, *contended*, that this was a misapplication, and that the kirk-session, after paying their beadle and clerk, had a discretionary power as to the disposal of them: That, even if the charger had right to them, the sum concluded for exceeded their amount, and that the suspension was competent, as the Justices, in determining the question, had exceeded their powers, it being evident, from the whole tenor of the act, that the jurisdiction under it was meant to be confined to small questions of debt arising from the ordinary transactions of life, and could not be extended to a case like the present, which was of a declaratory nature, and involved a question with regard to a public fund.

Answered; The act empowers the Justices to determine 'all causes and complaints brought before them, concerning the recovery of debts, and the determining of small causes, or making effectual any demand arising out of personal contract or obligation,' provided the sum at issue do not exceed L. 40 Scots. The words, therefore, as well as the spirit of the enactment, reach all cases where the dispute resolves into a personal obligation to pay a sum of money, in contradistinction to those questions which relate to heritable subjects, or which are of a declaratory nature.

The object of the present claim was not to have the right ascertained in future, but to obtain payment of a debt alleged to be already due, and for which the suspender was personally liable in consequence of his intrusions.