

[4th March, 1842.]

JAMES BALFOUR, Clerk to the Edinburgh Water Company,
on behalf of the Company, Appellants.

JAMES MALCOLM, Writer in Edinburgh, Respondent.

Jurisdiction.— A statute enabling a Water Company to levy certain rates on the inhabitants of a city, and declaring, that “all actions, “or suits relative to this act, and all fines, penalties,” &c. should be sued for by summary complaint before the Sheriff, and should not “be subject to the review of any court or courts whatever,” held to exclude the jurisdiction of the Court of Session, over an action put into a declaratory form, as to the rights of the Company to levy the rate after a certain mode.

Process.— *Semble* Where a statute gives a right to a Water Company to levy a rate of water duty, the right under the statute cannot be the subject of declarator, so as to form an exception to exclusive jurisdiction, given by the statute to the local court, but is matter of ordinary interpretation for the local court.

BY the 29 Geo. II. cap. 74, and 25 Geo. III. cap. 28, the Magistrates of Edinburgh had powers given to them to supply the inhabitants of the city with water. By the 59 Geo. III. cap. 116, and 7 Geo. IV. cap. 108, the Edinburgh Water Company was incorporated, the powers previously vested in the Magistrates were transferred to the Company, and certain regulations were enacted in regard to the supply of water, and the mode of rating the inhabitants. By the 59 Geo. III. the Company were empowered to levy a rate not exceeding five per cent on the real rent of the houses. By the 7 Geo. IV. this was altered to a rate not exceeding 10d per pound, on the real rent of the houses, “at

BALFOUR *v.* MALCOLM. — 4th March, 1842.

“ which they may be assessed for the police tax of the city.” At the time when the 7 Geo. IV. was passed, the rating to the police tax was regulated under 3 Geo. IV. cap 78, and was so much upon “ the real yearly rent without deduction.” But by 7 Will. IV. the police rating was altered, and the commissioners under the act were required to assess “ on the yearly rent or “ value of premises, which assessment shall be made on four-
“ fifths of the rent or value of the premises.”

The Water Company, on the assumption that their rating was not affected by the 7 Will. IV., laid an assessment on the full “ real rent” as they had been in use to do, while the 3 Geo. IV. regulated the police rating. Malcolm, one of the inhabitants, refused to pay the rate made upon his house, and insisted that as the Company were by 7 Geo. IV. empowered to rate houses on the rent “ at which they may be assessed for the Police Tax;” and the rent on which this assessment was levied, was by 7 Will. IV., altered to four-fifths of the rent, the Company could not assess on a greater proportion of the rent than four-fifths.

In consequence of Malcolm’s refusal to pay his rate, the Company threatened to cut off the pipes for supplying his house. By the 59 Geo. III., various remedies were to be obtained by application to the Sheriff; but by sect. 26, all calls made by the Company upon the partners, were to be sued for “ in any com-
x “ petent Court in Scotland, or in any of his Majesty’s Courts of
“ Record at Westminster,” and by the 80th sect. of 7 Geo. IV., it was enacted, “ That all actions or suits relative to this
“ act, and all fines, penalties, damages, and expenses, to be re-
“ covered under this act, and the before recited act,” (59 Geo. III.) “ and for which no remedy is previously provided, shall be
“ sued for by summary complaint before and judged of by his
“ Majesty’s Sheriff-depute for the county of Edinburgh, and
“ before no other court or courts, and his judgments shall be

BALFOUR *v.* MALCOLM. — 4th March, 1842.

“ final and conclusive and not subject to the review of any
“ court or courts whatever, any law or custom to the contrary
“ notwithstanding, unless where the sum in dispute is of so small
“ amount as to be recoverable before the Justices of the Peace
“ for the city and county of Edinburgh, in which case their
“ jurisdiction shall not be excluded.”

Malcolm, under this provision of the statute, presented a petition to the Sheriff of Edinburgh against the Water Company, in which he set forth, that his house during the first year of his occupancy was assessed for L.1, 17s. 6d., but on his shewing the assessment for the Police tax, the Company had reduced their assessment to L.1, 12s., and taken payment accordingly; but that they had now increased the assessment to L.1, 17s. 6d. and threatened to enforce payment. On this narrative he prayed the Sheriff to interdict the Company from stopping the supply of water to his house, on account of the non-payment of the rate, and “ to find that the said Company have no lawful right to
“ exact from the petitioner more than the foresaid sum of L.1
“ 12s. as the water rate corresponding to the rent of his said
“ dwelling-house, for the current year.”

The Water Company thereupon brought an action against Malcolm, in the Court of Session, by a summons, which set forth the various provisions of the different statutes — that the Company had on 26th April, 1838, determined that the rate should be 10d. in the pound, on nine-tenths of the full yearly rent of houses, as disclosed by the amount of rents on which the Police assessment was levied. “ That some individuals, and
“ amongst the rest” Malcolm, had refused to pay the rate charged against them, on the ground that they were not liable to pay on a greater proportion of the rent than that upon which the Police rate was levied, — that the total rent of Malcolm’s house was L.48, that the water rate payable on nine-tenths of that sum, amounted to L.1, 16s. The summons then set forth

BALFOUR v. MALCOLM. — 4th March, 1842.

Malcolm's refusal to pay, and the petition which he had presented to the Sheriff, — that the Sheriff had appointed the petition to be served upon them, and granted interim interdict, — that their right to collect the rate levied by them, “being thus called in question, it is necessary that the said Company should have their right and title to exact the said water duty of 10d. in the pound, on the full yearly rent or value of dwelling-houses situated within the bounds of Police, ascertained and adjudged.” Therefore, it should be “declared, that the said Company are authorized, and have full right and title, under the statute 7 Geo. IV. cap. 108, before recited, to levy and exact from the defender, a water rate or duty, which shall not exceed 10d. in the pound, on the full yearly rent of his said house, as disclosed by the police rental, in manner foresaid, and to levy and exact from him the foresaid sum of L.1, 16s. being a duty which does not exceed 10d. in the pound, of nine-tenths of the said full yearly rent of his said house, as disclosed by the said police rental, and also, in the event of the rates and duties, exigible from the defender not being paid, that the said Company have right under and by virtue of the said recited act, to cut off and separate the private pipe or pipes by which the water is conveyed from the pipes and reservoirs of the said Company, to the said house of the defender, so as to prevent water being conveyed to the said house, aye and until the said rate or duty shall be paid, and also to exercise and enforce all the other provisions made by the said statutes, in relation to the recovery of the said rate and duty,” with a conclusion for expenses.

Malcolm pleaded preliminarily, — 1st, That all parties interested had not been called; 2d, That the subject matter of the action was *lis alibi pendens*; 3d, That the action was incompetent under the statute; 4th, That the action was farther incompetent, as not involving matter of sufficient value.

BALFOUR *v.* MALCOLM. — 4th March, 1842.

The Lord Ordinary, 1st March, 1839, “sustained the second, third, and fourth preliminary defences,” and “dismissed the action.” The Water Company reclaimed to the Inner House, and there cases were ordered. And on the 15th of January, 1840, the Court pronounced the following interlocutor:—“The Lords having advised the mutual cases, and heard counsel for the parties, recall the interlocutor complained of, in so far as it sustains the second and fourth preliminary defences; *quoad ultra*, adhere to the same, and to that extent refuse the desire of the reclaiming note, and decern.”

The Water Company appealed against the interlocutor, both of the Lord Ordinary and the Court. And Malcolm took a cross appeal against the interlocutor of the Court, in so far as it recalled that part of the Lord Ordinary’s interlocutor which sustained the second and fourth defences.

B. Andrews and Austin, for appellant.—The 80th sect. of 7 Geo. IV. was only meant to confine to the jurisdiction of the Sheriff, actions which by their nature are competent before him, but in which his jurisdiction is cumulative with that of the Supreme Court. This action is one purely declaratory, both in its subsumption and conclusions, its only petitory conclusion is for expenses. Such an action never was competent before the Sheriff, but is confined to the Court of Session. There is nothing in the statute conferring a new jurisdiction upon the Sheriff, and making such an action for the first time competent before him. If then the action be not competent before the Court of Session, by reason of its exclusion in this section, and no new jurisdiction be given to the Sheriff, the action is taken away altogether.

[*Lord Chancellor.* — It may have been the intention of legislature to do so, by taking away means of harassing the subject.]

BALFOUR *v.* MALCOLM. — 4th March, 1842.

But this House will not presume that the jurisdiction of the Supreme Court is excluded, or a form of action destroyed, from inference as to the intention of the legislature. The language for this purpose must be express and unequivocal, *Buchanan v. Tenant*, *Mor.* 7347; *Russell v. Glasgow Road Trustees*, *Mor.* 7353.

[*Lord Chancellor.*—You need not cite cases to prove that,—the question is, whether the act does not take away the jurisdiction.]

Though the section sets out with saying all actions and suits, yet these expressions are followed by a particular enumeration. The general words, therefore, must be restrained by the particular words, and these apply only to matters, the subject of a petitory action. The section must be construed with reference to the existing rule as to actions competent before one judicature or another.

[*Lord Chancellor.*—In your view the previous words would be wholly unnecessary.]

Lord Brougham.—The expression “sued *for*,” would seem to be more applicable to penalties; you cannot “sue for” a “suit,” or “action.”

Lord Chancellor.—“Shall be judged,” would apply to suits and actions.]

There is much confusion and ambiguity in the terms of the section; too much to make it possible to exclude the jurisdiction of the Supreme Court, in an action competent before it alone. Besides, the House will observe, that in the 13th section of 7 W. IV. the 80th section of 7 Geo. IV. is adopted, with the omission of the general expressions “all actions and suits,” plainly shewing the intention of the legislature to guard against the clause in the prior statute, receiving application to other matters than those of a petitory nature. In *Balfour v. Waugh*, 2 *S.* and *M.* 530, the objection of want of jurisdiction was never suggested, even though it would have been equally open as in this case.

BALFOUR v. MALCOLM. — 4th March, 1842.

[*Lord Chancellor.* — The 13th section of 7 W. IV. may go all the length that was necessary for the purpose of that act. It and the 80th section of 7 Geo. IV. may very well subsist together.]

The acts must be construed as *in pari materia*, and as they leave the question of jurisdiction doubtful, the jurisdiction cannot be held to be taken away. There are many suits “relative to the act,” which surely could not be competent before the Sheriff, under the 80th section: Such as questions respecting the purchase of land by the Company: Reduction of a contract to supply a whole street with water, on the ground of fraud. It will hardly be maintained that the jurisdiction of the Supreme Court is ousted, and the form of action destroyed, as to actions embracing these questions, which are confessedly not competent before the Sheriff; but the argument must be carried to that extent, to shew that the jurisdiction is taken away as to this declarator, which, though it embraces only an annual payment of 4s. will affect by its decision nearly one-fifth of the revenue of the appellants.

[*Lord Chancellor.* — Are you to have that question determined at the cost of the appellant?]

No doubt the respondent has parties behind him, and if we cannot have relief by this action, we cannot have it at all, but must contest the right with every rate payer.

We will not trouble the house on the matter of the cross appeal, but reserve ourselves for the reply, in case it should then be necessary to make any observation upon it.

Pemberton and Anderson, for respondent. — I. The case has been argued for the appellant as if the action were to declare a general right, but if the conclusions of the summons are looked at, there is nothing in the case but the right of the appellants to the sum of 4s. Though judgment were given in terms of the

BALFOUR *v.* MALCOLM. — 4th March, 1842.

conclusions of their action, it would not bind the rights of any body, not even of the respondent himself, except to the extent of 4s. All that the summons asks is, that the appellants are entitled to levy from the respondent the sum of L.1, 16s. “on his said house,” instead of L.1, 12s. as he says; next year the respondent may leave the house, or the rent of it may be raised, or it may be lowered, the assessment will then be altered, and the judgment will no longer be of any avail. There is no declarator of any general right asked, except as regards this particular house, nor any thing that was not perfectly competent for the Sheriff to entertain.

[*Lord Brougham.* — May be a good declaration as to the purposes of this suit, but none which could apply to the public generally.]

Exactly so. The respondent does not represent any body, neither the person who will occupy his house next year, should he leave it; the persons who live next door to him, or in the same street, or any body, in short, who could be affected by the judgment against him.

All that is asked by the summons, was raised by the prayer of the petition for interdict before the Sheriff, and so far as any declaration could have been necessary by the Sheriff in explicating his jurisdiction in a suit otherwise competently before him, there is nothing to prevent his making it, *Hall v. Grant*, 9 *S. D.* and *B.* 612. The suit before the Sheriff involved, as this action does, and as every application for payment of rates under the statute must do, the construction of the statute, and no more; so that, in truth, any argument about the competency of a declarator before the Sheriff cannot arise.

But even as to that, the terms of the section are as express for the exclusion of the jurisdiction of any other Court than that of the Sheriff, as could be framed; and if any doubt on the subject could be entertained, it is removed by the other clauses of the

BALFOUR *v.* MALCOLM. — 4th March, 1842.

act, where the special tribunal of the Sheriff is put aside, and the ordinary jurisdiction left open when that is intended. In *Aberdeenshire Trustees v. Kennedy*, *Hume's Coll.* p. 262, the jurisdiction of the Court of Session was held to be excluded, where words were merely, that the Sheriff should “finally determine.” So also *Merry v. Dallas*, 7 *S. and D.* 90; *Simpson v. Harley*, 8 *S. and D.* 977; *Lindsay*, 9 *S. and D.* 426; *Lang v. Craig*, 11 *S. and D.* 424.

The effect of the appellant's proceeding is first to ask a declaration of his right by the Court of Session, and then he will bring his action for payment before the Sheriff Court.

[*Lord Brougham.* — Can there be a declaratory action to declare the construction of an act of Parliament, and consequent on that to charge the party with liability for payment of money?]

Surely not, and if it could, the consequences would be intolerable, for then such a proceeding would be open to every rate-payer against the Company, and to the Company against every rate-payer.

II. The matter of the suit was raised before the Sheriff, and this action, therefore, was incompetent. The process of interdict asked the same declaration as the summons.

[*Lord Chancellor.* — The declaration asked for in the interdict amounts to nothing; it merely asks the Sheriff to state the reasons of his judgment; it cannot amount to more.]

III. But at all events, the action is incompetent, as the summons shews upon its face that the value is below L.25; the capital of 4s., the sum in dispute, would not be that amount, even taking the right sought to be declared to be in perpetuity, whereas it is only for one year.

[*Lord Chancellor.* — If the summons is not one of declarator, what is it? Whether it is competent as a declarator is another

question, and if it is a declarator, then it comes under a class of cases as to which value has no application.]

LORD BROUGHAM. — My Lords, I believe your Lordships have no doubt that the Court of Session has well decided this case upon all the points, that of the jurisdiction of the Court being taken away by the right construction of these words in the act of Parliament, and the other two grounds on which the Lord Ordinary grounded his interlocutor, namely, the *lis alibi pendens*, and the finding as to L.20; all of them being inapplicable to this case. I am of opinion that the Court rightly decided in the judgment they gave upon those findings of the Lord Ordinary, which judgment is brought under review by the cross appeal.

I have very great doubts, indeed, whether this action of declarator was competent; but be that as it may, we have no reason to enter into that inquiry, for if competent as an action of declarator, it appears to be the intention of the legislature to take it away, and to leave the remedy only to be prosecuted in the Court of the Sheriff. The words of the act are somewhat inartificial, and somewhat clumsily applied, if we may venture to say so with reference to any words which have obtained the sanction of the legislature, as an expression of its intention; but on the sound construction of the clause, I am of opinion with the Court below, that the jurisdiction is taken away as regards the Court of Session, and is confined to the Sheriff.

With respect to the action of declarator, it is sufficient to say this is an action of declarator, or it is not. It seeks something to be declared which the action before the Sheriff does not seek to have declared. The action before the Sheriff seeks to have something found due, and something ordered to be paid, and as the ground of that finding of something due, and something ordered to be paid, it seeks for the Sheriff to assume a certain

BALFOUR *v.* MALCOLM. — 4th March, 1842.

proposition; but that is not the subject matter of the action, that is not the thing sought at the hands of the Court of Session. The thing sought at the hands of the Sheriff's Court is, that something should be declared to be due, that is the ground on which they state the summons before the Sheriff, that the finding of the Sheriff ought to be in favour of the party; but the action before the Court of Session does not seek that something may be found due, and that something may be ordered to be paid, it seeks a declaration of the right; whether that was competent, with a view to the *lis alibi pendens*, is quite immaterial; it is sufficient to say, that the conclusion of the summons in the action before the Court of Session is one thing, and that that which is sought in the action before the Sheriff is another thing.

On these grounds I am of opinion, differing from the Lord Ordinary, that the decision of the Second Division of the Court of Session is right.

Lord Campbell. — My Lords, I entirely agree with my noble and learned friend in the view he has taken of the different points which arise in this case. With regard to the main question, there is no doubt that the jurisdiction of the Supreme Court is only to be taken away by positive acts of Parliament: but the words here appear to me to be positive and express, for it is enacted, that “all actions or suits relative to
“ this act, and all fines, penalties, damages, and expenses to be re-
“ covered under this act, and the before recited act, and for which
“ no remedy is previously provided, shall be sued for by summary
“ complaint before the Sheriff-Depute for the County of Edin-
“ burgh, and before no other court or courts, and his judg-
“ ment shall be final and conclusive, and not subject to the
“ review of any court or courts whatever.” Now, language hardly can be more pointed for the purpose of taking away the jurisdiction of all other courts. The only question, therefore, that can be made is, whether this action of declarator is included

BALFOUR *v.* MALCOLM. — 4th March, 1842.

within this clause, “all actions or suits relative to this act.” It is not necessary to give an opinion whether, if a dispute were to arise over which the Sheriff had no jurisdiction in any shape, such as respecting the particular rates demanded, the Court of Session would be deprived of its jurisdiction by these words; but this is a subject matter over which the Sheriff clearly has jurisdiction, for there may be a remedy before the Sheriff, and the Sheriff would put a construction on the act of Parliament, not in an action of declarator, but he would say whether the rate should be levied on four-fifths of the rent, or the whole rent, and would decide accordingly. It appears to me, that this remedy must be pursued before the Sheriff-Depute for the County of Edinburgh, and that the jurisdiction of the Court of Session is taken away, and that it is a very reasonable enactment. The Sheriff for the County of Edinburgh is a Judge always of high rank, taken from the Bar of Scotland, and deserving of great confidence; and this act is quite analogous to one to be found in this country, where the writ of certiorari is taken away; where the decision of the Quarter Sessions is quite conclusive, and the Court of Queen’s Bench is ousted of its jurisdiction. ✕

Then, with regard to the *lis alibi pendens*, I entirely concur in what has fallen from my noble and learned friend, that, whether the action was competent or incompetent, you cannot say it is the same. As at present advised, I should say such an action, requiring an abstract decision on a public act of Parliament, could not be maintained; but still we must treat it as an action of declarator, or it is none, there is no petitory conclusion. There is a clear defence to the action on that ground. Then, if it is to be treated as an action of declarator, that not only is not the same as the action before the Sheriff, but it is not embraced in that action. If it were a part of that embraced in the action, it would be said to be *lis alibi pendens*; for though the remedy sought before the Sheriff may be more extensive, this may be included;

BALFOUR *v.* MALCOLM. — 4th March, 1842.

but it does not embrace it, it merely calls on the Sheriff to make this declaration *ratione decidendi*, but not to be followed by the consequences of an action of declarator.

Entertaining, my Lords, the most sincere respect for the Lord Ordinary, I am rather surprised that he should have thought that was a bar to the proceeding, because one can hardly say, that because that act of Parliament on which the defence is founded clearly applies only to actions before the inferior Court, an action of declarator cannot be brought before the inferior court; with regard to value, an action of declarator does not sue for damages, or for the payment of a sum of money, it is almost impossible to put any value upon a declaration. The object is merely to have the declaration of a right.

On these grounds I have no difficulty at all in coming to the opinion that the decision of the Inner House on all the three points is perfectly correct, and that the judgment should be affirmed.

Lord Chancellor. — My Lords, I am entirely of the same opinion. Some reliance was placed in the Court below on the statute of William the Fourth, but that has not been insisted upon at the bar. It appears to me that that statute does not at all take the case out of the operation of the act of 59 George III. I agree in that which has been said by my noble and learned friend, that the clauses of this act are clumsily expressed, but it appears to me impossible to put any other construction upon them, than that the jurisdiction of the superior Court is taken away; and I come to this conclusion with the less regret, because it is quite clear the parties can have as effectual a remedy in the Court below as to ascertaining the question of law, and as to recovering the amount as they can have in the superior Court. I think, therefore, the judgment of the Court below should be affirmed.

BALFOUR *v.* MALCOLM. — 4th March, 1842.

Lord Brougham. — The costs of the original appeal should be given, but not on the judgment in the cross appeal.

Ordered and Adjudged, That the original appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs. And it is farther Ordered and Adjudged, That the cross appeal be dismissed this House, and that the interlocutor, in so far as therein complained of, be affirmed.

G. and T. W. WEBSTER — JOHNSTON and FARQUHAR, Agents.