No 351. of the House of Commons, and many others who have no property in Scotland, are put into every Scots commission of the peace. Justices of the Peace in Scotland are equally liable to vexatious prosecutions for things done in execution of their offices, as Justices in England, and by consequence are equally intitled to the remedy provided by this act.

In the last place, the defender chiefly rests upon the last clause of this act, which is entirely general, and has no reference to any English form of procedure whatever. Supposing, therefore, a difficulty in applying the other clauses to Scotland, there appears no reason for not applying this.

In this case, the Lords, by their first interlocutor, found the act to extend to Scotland; but they did not give costs. By their second interlocutor, they found the act did not extend; but, by their third and fourth interlocutors, they adhered to the first, and

"Found the act extends to Scotland."

Act. *Lockhart et Pringle.* Alt. *Ferguson, Millar et Swinton.* Clerk, *Gibson.*

S. *Fac. Col.* No 93. *p.* 142.

*** This case was appealed:

The House of Lords "Ordered, That the interlocutors complained of (viz. those which found, that the act 24th Geo. II. c. 44. exetended to Scotland), be reversed."

No 352.
The Justices of Peace act in a ministerial, and not in a judicial capacity, with regard to summoning tenants to perform the statute work, and granting warrant for poinding the non-compliants; and they, and not the overseer who obtains the warrant, are the proper persons to be sued, as defenders for an illegal warrant, or an irregular poinding.

1760. *December* 17. Walker and Herd *against* Thomsons.

The Justices of Peace and Commissioners of Supply of the county of Kincardine, had divided the county into districts in the year 1755, allotting the work for the inhabitants of each district to the roads within it; and they permitted a certain composition to be taken in lieu of the statute work.

At a general meeting in May 1757, they continued the same division of the county into districts, and fixed the composition-money to 1s. Sterling for the annual labour of a man, providing the same was paid against the 15th of June; otherwise the whole six days labour was appointed to be exacted.

In consequence of this resolution, the Committee on the road from Stonehaven to the bridge of Dee, caused notice to be given, in the church of Dunnottar, on the 29th May 1757, That persons liable in statute-work should pay in to their clerk, before the 15th of June, the composition aforesaid; 'with 'certification, That if they failed, their statute service for six days that year 'would be exacted to the utmost.' Another notification was made, on Sunday the 14th of August, That the deficients should come out, and work at the highway, on the 15th, 16th, and 17th days of that month, or else to pay in their respective compositions. Numbers of people in the district accordingly paid

the composition required, but a good many neither wrought nor paid. And on the 13th September, upon an application by the collector of the district to the defenders, as being three of the Justices of Peace and Commissioners of Supply, they granted a warrant for poinding the deficients in the parish of Dunnottar, conform to a particular list and attestation thereto subjoined, to the extent of 1s. 6d. for each of the three days absence from the statute work preceding harvest 1757; and notice was given to all the deficients before execution was ordered. No 352.

Alexander Walker, tenant in Aquhire, and Peter Herd, his herdsman and cottar, were in the list of deficients.

This warrant having been afterwards put in execution, by poinding Walker's effects, to the amount of 1s. 6d. for each of the three days he and three servants were absent, and also by poinding Herd's effects for his three days absence, they brought an action for restitution of the goods poinded, and damages and expenses, against the Justices who signed the warrant, and the constable who executed it, on these grounds; *1st*, In point of fact, That the pursuers were called out in the time of harvest, which was a time excepted in all the Scots acts, respecting the reparation of highways; and *2dly*, In point of law, That the periods for calling out the inhabitants to perform the statute-work at the highways was repealed by the act *anno 5to* Geo. I. and the period limited to the spring half year, to be before the last day of June; which not having been observed by the Justices, the poinding was clearly illegal.

Pleaded for the Justices, That by the Scots acts of Parliament, it is lawful to call out the inhabitants of the country to perform the statute-work at any time in the year, seed-time and harvest excepted; that the 15th, 16th, and 17th days of August, upon which the pursuers were called out to work, did not fall within the harvest of that part of the country; and particularly, that Mr Walker had then no harvest, other than that, of purpose to afford an excuse, he had cut some green bear. And it was much insisted on, That this pursuer had all along manifested the most unjustifiable intention of opposing every scheme that could be suggested by the Justices or Commissioners for repairing the highways of the county. The poinding did therefore lawfully proceed; for that the direction of the British statute, relative to the calling out the people to work, ought to be understood as specially applicable to the year 1719, in which the statute was made, as it does not in express terms direct, that in all succeeding years they should *only* be called out before the end of June, or discharge the calling them out after the close of that month, and not as a repeal of the Scots acts.

Notwithstanding this statute, the Justices and Commissioners, through most, if not all parts of Scotland, have considered the act 1670, c. 9, as in full force, and have accordingly adhered thereto, by calling out the people at such times as were found most convenient for them, either before or after the end of June, seed-time and harvest only excepted. Long and universal custom, in opposi-

No 352.

tion to a statute, will annul it; *a fortiori* must it serve to explain the meaning of a doubtful law. The words of the statute in question do not clearly fix the point; and therefore the sense of the country, and decisions of this Court, may give it that explanation that is most conducive to the public utility. If the time of calling out the country people to the roads for the spring season, is limited to the end of June, the good purposes of the law will be in a great measure defeated; as the summer's work is that on which the chief dependence can be had, and the people, as soon as the bear-seed is over, which is scarce before the end of June, fall to casting their peats, and then to the cutting their hay, which commonly employ them till the end of July; so that the beginning of August, before the harvest comes on, is as convenient a time for calling them out as any in the year.

Supposing the regulation of the act 1670, as to the time of calling out the people to work, to be repealed by the British statute, the poinding complained of was regular on a separate footing. The Justices of Peace and Commissioners of Supply, by another branch of the act 1670, which stands unrepealed, have a discretionary power of exacting either the labour or the composition substituted in place thereof; and a publication having been made in May, of the intention of taking the composition, the poinding did lawfully proceed against the pursuers, as they neither paid the composition, nor offered to work within the time limited, when such work unquestionably might have been exacted; whereby the pursuers did subject themselves to execution for the penalty imposed by law on deficients; and the subsequent advertisement calling them out to work was made *ex superabundanti*. And, after all, the poinding would have been stopped, had Mr Walker thought fit to pay the trifle required of him; as the Justices gave order, when they granted the warrant, that on payment of the composition of 1s. for the whole year's statute work, the poinding should be stopped. Nor was there any particular design to distress Mr Walker; the warrant was directed in general, against him, and about a hundred more, although he, and Herd, who stood out through his influence, only were poinded, as all the others, who were able, prevented the execution by payment.

In the *last* place, Supposing the poinding had been irregular, the defenders cannot be subjected to damages. There is a wide difference between such actings as void a poinding, so as to entitle the party to restitution of the goods, and those that, beside restitution, subject the poinders to damages and expenses. The least inaccuracy, in point of form, may produce the first effect; but there must be a *mala fides* to occasion the latter. The defenders acted *optima fide* for the public good, and with an apprehension of law, founded on the universal practice of the country. Should that apprehension be now found wrong, it could not operate *retro*, so as to punish them as if they had acted contrary to known and certain law.—If any wrong was done, the officer only who applied for the warrant is accountable for it.—The defenders signed the order, in the capacity of judges specially empowered by statute, and not as parties; and there-

fore the officer who obtains the warrant, like a creditor who obtains undue diligence, ought only to be answerable for it. No 352.

Pleaded for the pursuers, Mr Walker does not merit the character given him, of a seditious tribune, and a violent obstructor of that useful work, the repairing of the high roads; unless the maintaining the laws of his country is to be constructed sedition; or a high desire to have the roads repaired in the manner most effectual, and agreeable to law, and having done more in repairing of them than any other person of his circumstances in the country, is to be held as opposition to so good a work.—He has indeed been always averse to the paying of compositions in place of the statute-work, as being often unequally distributed, in the application, of which, of late, he has had solid experience, and that the work might be more hastily, and to greater purpose, done by the labour of the inhabitants required of them by law. And as he understood the calling him out in the time of his harvest, to have been done with an intention of forcing him to pay a composition, so he flatly refused on this occasion either to do the one or pay the other.

The defenders are grossly mistaken both in the fact and in their interpretation of the law. For, as to the *first*, The pursuers are in a condition to prove, if it shall be thought necessary, that harvest was, in the year 1757, begun in that part of the country where they reside before the 15th August; and particularly that Mr Walker did begin his harvest on the 6th August, and had most of his bear cut down before the expiry of the days in which he was called out to work; not unripe bear, but in a state of maturity.—And, with respect to the *second*, There can be nothing more clear, than that by the enactment of the British statute, an universal regulation is established as to the not calling out the inhabitants to the performance of the statute work for the spring half-year after the month of June.—The statute provides, That the inhabitants shall be called out before the end of June, in the year 1719, and then follow these words; 'and so yearly, and every year, until the said high-ways are sufficient-'ly repaired.' Here there is an effectual regulation, to take effect in all time thereafter. And as it is provided by the first clause of the statute, that the Scots acts shall only be in force, in so far as not altered or repealed by that statute; so it follows of consequence, that the general regulation established by the statute is a direct alteration of the law of Scotland, so far as respects the time of calling out the inhabitants to perform the statute work.

Although expediency cannot be listened to against the positive enactment of statute, yet even here the defenders seem to be greatly mistaken, in arguing, that there would not be a sufficient time between the seed-time and the end of June, for calling out the inhabitants to work.—The pursuers have no occasion to impugn the defender's arguments upon the force of custom against the statute, because of its having been laid upon a wrong hypothesis. For it is well known, that the British statute is in observance, in all its parts, through the whole country; and these very defenders have so far paid a perfect regard to it,

No 352. as to levy the penalties as directed by that statute, which are different from those in the Scots statutes, but not more expressly altered by the British statute than the time is of calling out the people to work.

Both the words of the statute 1670, and of the intimation for payment of the composition, destroy the argument founded upon them. By the act 1670, it is only made lawful to dispense with the work of those persons who live at a great distance, and to accept of a composition from them. But this dispensing power, in favour of the inhabitants who are so circumstanced, can never vest a power in the justices of forcing payment of the composition, when the favour of the law is not asked of them, and the inhabitants are willing to perform their work, if called out as the law requires.—The certification annexed to their intimation for payment of the composition, that who fails to pay, will be called out to the performance of the labour, shows they were sensible of this being the proper construction of the law. And accordingly thereafter, upon the not-payment, the Justices did not think of poinding, but did make an intimation for calling out the inhabitants to work; and which, if it had been done agreeable to law, would have sufficiently justified the subsequent poinding. Further, the Justices, in this case, have not made the act 1670 the rule of their conduct. For by that statute, where persons are called out at too great a distance, they are only to pay a composition of 6s. Scots yearly for each man; whereas the composition ordered by the Justices of Peace and Commissioners of Supply was at the rate of 12s. Scots for each man.—Nor was there any offer made to Mr Walker to stop the poinding, upon receiving payment of the composition-money.—He had fallen under the displeasure of these three justices upon other accounts; no favour was to be shown to him; insomuch that, although the practice, as to many, had been only to poind for the composition-money, yet he was to be poinded to the very rigour of the law, not only for the absence of his servants, but for himself, although it is well known that he is not able to labour himself, and that he is one of a committee for directing the repairing, and an overseer in another parish; and therefore had always been dispensed with from working in any other place.

In matters of spuilzie, the distinction of *bona* and *mala fides* may sometimes take place, and the circumstances may be such, as in one case to induce the Court to give damages, and in another to refuse them.—But in all cases where a spuilzie is committed by an unlawful poinding of goods, not only the goods themselves are to be restored, but the prosecutor is to be indemnified of the expense incurred in obtaining his redress.

The overseer, against whom the defenders contend this action ought to have been directed, is not the creditor in the statute-work. Nor do the justices, in that matter, properly act in a judicative capacity. The overseer is the servant of the justices, and they act in a ministerial capacity, having ministerial powers vested in them, for forcing the inhabitants out to work as the law directs or levying penalties in place thereof, to be by them applied in place of the work; so they are properly the creditors. And there is nothing better known,

than that in all such actions, of which there have been several late instances, the Justices are only called as defenders who sign the warrants.—And as to the supposed ignorance of the Justices, founded upon the practice of the country, the statute of the 5th of the late King is *in viridi observantia* over the whole country. 2*do*, Two of the Justices are advocates in Aberdeen, in the practice of the law; and therefore are presumed to know it. 3*tio*, By a letter written to them by Mr Walker, immediately after signing the warrant for poinding, they were put upon their guard, of their having done an illegal thing, and that complaint would be made of it, if the poinding should be executed. And, *lastly*, They appeared to have had in their hands, or to be in the knowledge of the statute of the 5th of the late King, as they grant their warrant for levying the fines agreeable to the direction of that statute. Further, it appears, that at executing the poinding, the officers had an intimation made to them, before witnesses, of their being executing a warrant which had been granted contrary to law. No 352.

"THE LORDS found, that the act of Parliament 5*to* Geo. I. does so far repeal the former acts, as to limit the time for calling out people liable to work before harvest, that it should be before the end of June; and as the pursuers, in this case, were warned to work at the high-ways in August, found the warrant granted for poinding their effects for not-compliance, and the poinding thereupon, was irregular; and therefore found the defenders liable to the pursuers in restitution of the goods libelled, and expenses of process.'

Reporter, *Colston.* Act. *Montgomery.* Alt. *Rae.*

D. R. *Fol. Dic. v.* 3. *p.* 359. *Fac. Col. No* 261. *p.* 483.

DIVISION XII.

Lyon Court.

1627. *December* 12. A. *against* B.

No 353.

A MESSENGER being employed by letters to take a rebel, after the taking suffers him to escape; the creditor pursues the messenger before the Lyon for the sum addebted by the rebel to him. The messenger raises advocation, as not pertaining to the Lyon to judge. THE LORDS advocate the cause.

Fol. Dic. v. 1. *p.* 509. *Auchinleck, MS. p.* 8.