

1761. July 31.

ROBERT WOOD *against* The JUSTICES of PEACE of the Shire of Berwick.

THE Justices of Peace of the district of Swinton appointed Wood an overseer; and, among other instructions, they directed him and the other overseers to make up lists of all the roads in their respective parishes, mentioning the principal places they lead to and pass by, the computed lengths, and the towns and villages which can be most conveniently called out to work upon them.

Wood called out the persons liable to perform statute-work, superintended them, and reported a list of the deficient. The Justices, because he did not obey the above instructions, fined him in L. 5 Sterling, and Wood suspended. The LORD ORDINARY pronounced the following interlocutor: "In respect that the suspender was appointed overseer by three Justices only, and not in the manner directed by the act 5th of George I, that he performed the proper duties of an overseer, by calling out the inhabitants, and reporting a list of the deficient; and that the charge against him is his neglecting to do what was more properly the duty of the surveyor employed in the county of Berwick; therefore, and in respect of the other informalities of the decret and charge, suspends the letters *simpliciter*," &c.

Pleaded for the Justices in a reclaiming petition, *imo*, Though the suspender was only appointed an overseer by three Justices, that is sufficient. By the law of Scotland, three Justices are a quorum to execute all their powers. That though the act of George I. gives power to five Justices or Commissioners to name overseers, &c. it does not take any powers from the former quorum of Justices of Peace. That three Justices undoubtedly could name overseers before this act, and they may do so still; more especially as the act provides, that all the laws and statutes in force at the time it was made, not thereby altered or repealed, shall be duly put in execution. That a general meeting of the county, at which nineteen Justices were present, had delegated the power of naming overseers to the different districts; and that, whatever is *jurisdictionis ordinariæ*, may be delegated. That the suspender accepted of the office of overseer, in so far as he called out the people to work, and reported a list of the deficient; and therefore he ought also to have obeyed the above instructions.

Answered for the suspender, The act of George I. expressly requires five Justices or Commissioners to be present at naming overseers, &c.; though three might have been sufficient before this act, five are now necessary. It is needless to inquire whether the former laws with regard to the highways were repealed by that act, because they are undoubtedly altered in this particular: As therefore no more than three Justices were present at the meeting when the suspender was named an overseer, this appointment was null and void, and he cannot be fined though he had refused to act as an overseer, when he

No 331.
Three Justices of Peace appointed a person to call out the people liable to perform statute work on the highways, and to levy fines from those deficient. He reported a list of deficient, but having failed in levying the fines, the Justices imposed a fine on him. The Lords suspended this sentence, because he had been appointed by three Justices instead of five, as required by the act of Parliament, and because levying fines was not the proper duty of an overseer.

No 331.

was appointed in a manner so contrary to law. The general meeting could not delegate this power to the districts; because, the act of George I. expressly requires, that these officers shall be named at the head boroughs of every county, upon the third Tuesday of May, or at an adjournment of this general meeting. That though the suspender called out the people to work, and reported a list of deficient, he was not bound to do any more. The appointing him an overseer was null and void from the beginning; and therefore he was not obliged to pay any regard to this nomination. What he did was out of zeal for so useful a work as the reparation of the highways, and his having done so much cannot infer an homologation of the appointment, because nothing that is contrary to law can be homologated.

2do, The Justices *pleaded*, That the above instructions undoubtedly fall within the duty of an overseer; and that there is no difference betwixt an overseer and a surveyor: That this is the case in England, where the surveyors are expressly directed to call out the people to work, to superintend the making of the roads, and to perform all the other duties of overseers. In the act of George I. no difference is made betwixt these officers; but through the whole of the act, they are used as synonymous terms; and therefore, the suspender was undoubtedly bound to obey the instructions given him by the district meeting.

It was *answered* for the suspender, That the duty of an overseer is entirely different from that of a surveyor: That all that an overseer has to do is to, make up lists of the persons liable to perform statute-work, to call them out, to superintend the making of the roads, and to report to the Justices, lists of the deficient. That it is the business of a surveyor to execute the above instructions, and in general to inform the Justices of the state of the highways within the county, what may be necessary for putting them in good order, and to inform against and prosecute all those who are guilty of any encroachments upon the highways. That accordingly, overseers have no salaries; but are commonly sensible tenants, or other men of skill, who undertake for a year the care of seeing the roads made adjacent to their own houses; and in every county there are a great number of overseers. That, on the contrary, in all or most of the counties of Scotland, there is a surveyor of the highways, who has a yearly salary, and whose duty it is to execute the instructions in question. That in particular, in the shire of Berwick, there is a person called a surveyor of the highways, who has a yearly salary; and therefore the Justices cannot make this useful office a sinecure, and lay the burden upon the overseers who work for nothing. That this distinction is well established by practice; and when the statutes are attentively considered, it will appear not only that there is nothing contrary to this doctrine, but that this difference is not without foundation.

3tio, The Justices *insisted*, That the suspender neglected his duty in so far as, though they pronounced a judgment fining the deficient, he did not take

care to have these fines levied, though this was undoubtedly a part of his office.

No 331.

It was *answered*, That it is no part of the duty of an overseer to levy the fines. All he is to do is to give in his list of deficient; and the act of George I. expressly declares, that the Justices shall grant warrant to the officers to levy their fines. This duty, therefore, belonged to the constables, and not to the suspender.

“THE LORDS, in respect of the irregular proceedings in the beginning, adhered to the Lord Ordinary’s interlocutor.

For the Justices, *Alex. Murray.* For Wood, *Pat. Murray.* Clerk, *Pringle.*
P. M. *Fol. Dic. v. 3. p. 357.* *Fac. Col. No 56. p. 137.*

1762. June 14.

EARL of MORAY and JUSTICES of the PEACE of Fifeshire *against* MAGISTRATES of Kinghorn.

THE LORDS found, That the regulation of the ferry at Kinghorn, and fixing its dues, belonged to the Justices of the Peace of the county.

No 332.

Fol. Dic. v. 3. p. 358. *Fac. Col.*

* * * This case is No 102. p. 1988. *voce* BURGH ROYAL.

1769. January 24.

ROBERT BOYD Suspender, *against* ADAM and THOMAS MILLARS, &c. Chargers.

ROBERT BOYD was sued before the Justices of Peace for the shire of Ayr, for payment of grass-mail, and being found liable, suspended their decret. The question before the Court turned on these points: *1mo*, How far the Justices of Peace had a proper jurisdiction to try this case; and, *2do*, Supposing they had no proper jurisdiction, how far their jurisdiction was, or could be prorogated by the parties.

No 333.
 The Lords sustained a decree of the Justices, pronounced in an action for payment of rent.

Pleaded for the suspender; Justices of Peace have no ordinary or radical jurisdiction in civil matters. They are appointed for preserving the peace, for preventing delinquencies, and for punishing those who offend against the peace, but not for chastising other delinquents. Their jurisdiction is entirely criminal, not can it be extended, except as to citation in servants fees, and other small matters specially enacted by statute. Having no proper jurisdiction in private property, the Court of Session has checked every attempt to extend their bounds, and Justices of Peace have been found incompetent judges on the pas-