

family of Kilmarnock at that time, (15th November 1700,) the baron or overlord power had been given the bailies to hold courts within the Town, and to determine in all actions, civil and criminal, as freely as any other burgh in the kingdom. And although the family reserved a power, as already said, of naming two bailies out of a leet presented by the Council, this did not make the jurisdiction dependent on the baron, or bring it under the general clause in the Act, and out of the exception; the rather that, in case of the family's failing to name the bailies, the Council had power to do so without them.

In the case of the Royal Burgh of Wick, where the nomination of the Provost was in the family of Sinclair of Ulbster, it was never imagined that this had any effect upon the jurisdiction of the burgh.

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1772. *July*. EARLS of HOME and TANKERNESSE *against* DUKE of ROXBURGH.

AN action was brought, at the instance of the Procurator-Fiscal of Perth, against certain Burgesses of that burgh, for a rebellious usurpation of the government, *anno* 1715, in breach not only of their duty to the public but of their burgh oath, &c.; and the libel concluded, that the persons complained had forfeited and lost their burgh-ship—and that it ought to be so found and declared;—and further, That they should be punished in their persons and goods, and banished the Town, never to return. The Magistrates, by their sentence, 14th September 1716, decerned and declared in terms of the libel, and ordained the sentence to be published at the market-cross of the burgh, and extracts of their burgh tickets to be torn at the market-cross. In a suspension and reduction of this decree, the Lords repelled the reasons of suspension and reduction; and, *anno* 1718, affirmed the sentence of the Magistrates, notwithstanding the objections to their jurisdiction and form of procedure.

See, to the same purpose, *anno* 1719, *Magistrates of Glasgow against Laudon*.

See also a decision of the Lords, *anno* 1665, affirming a sentence of the Magistrates of Edinburgh, depriving Sir William Thomson, their Town-Clerk, of his office, for neglect.

The Earl of Kintore, as Knight Marshall, and Robert Freebairn, as King's Printer, were declared to have lost their offices by decree of the Lords.

In the year 1758, Mr Alexander Ferguson, minister at Kilwinning, with concurrence of his Majesty's advocate, brought an action of oppression and damages against Leitch, the baron-bailie of Kilwinning. The Lords sustained the action, and, by sentence, inflicted a fine, deprivation, and incapacity. The judgment was in these words:—"Find the defender liable to the pursuer in damages and expenses of process; and, before answer, as to the *vindicta publica*, grant warrant for committing the defender to the tolbooth of Edinburgh, there to remain till brought to the bar." And thereafter the private prosecutor having, out of compassion, departed from his claim of damages, they pronounced this interlocutor:—"Find the defender liable in the expense of process; and, in regard the pursuer has passed from his claim of damages, therefore fines and amercciates the defender in L.5 sterling, in respect of his circumstances, for the

use of the poor, and deprive him of the office of bailie of the barony of Kilwinning, and declare him incapable of any such office in time coming."

Andrew Darling and William Montgomery, two officers of the customs of Inverness, brought an action of oppression, injustice, and wrongous imprisonment against the Provost of Inverness and three Justices of the Peace, concluding for damages, costs, deprivation, and incapacity. The libel was objected to as incompetent, but the objection was repelled, process was sustained; but, upon advising a proof, though the defenders were found liable in damages and expenses, they were assoilyed *quoad ultra*.

Peter Johnston raised a libel against Andrew Ross, chamberlain of Orkney, and six Justices of the Peace, for oppression by an unjust sentence; concluding for damages and expenses, incapacity, and further punishment. "The Lords, *anno* 1757, found the decrees of the Justices illegal and oppressive; and therefore reduced the same; found the defenders, conjunctly and severally, liable in damages and expenses; and superseded determination of the question, Whether the defenders shall be liable in a fine, until the account of damages and expenses come to be advised."

In the year 1739 a process of oppression was raised by a number of burghesses, inhabitants of Canongate, against Bailie Jack, bailie of Canongate. The libel concluded for deprivation, incapacity, punishment, and damages. After strong debate it was sustained, and went to proof; but was not more heard of.

An action was brought, at the instance of Nicol, with concurrence of his Majesty's Advocate, against Sir John Ogilvy, for a train of alleged oppressions and tyrannical actings. The jurisdiction was not disputed; the relevancy was; it went to proof, but was taken away.

By the Act 1st Geo. I. c. 18, it is enacted, "That, if any person cut down timber-trees or fruit-trees, it shall be lawful for two Justices of the Peace, on complaint of the owner, to cause such offenders to be apprehended, and to hear, and *finally* determine and adjudge all and every the offence or offences aforesaid." Upon this statute, *anno* 1735, Durham of Luffnes brought a complaint, before the Justices of East Lothian, against Cuninghame, one of his tenants. After some proceedings, Cuninghame advocated the cause to the Lords; in which the Lords proceeded, and pronounced interlocutors, notwithstanding it being objected by Luffnes that the Lords had a privative and final jurisdiction in the matter.

The Trustees of the road from Queensferry to Perth issued an order for calling out the householders of Perth to work upon that road. The Magistrates of Perth complained of this by suspension; and the trustees, in answer, objected to the jurisdiction of the Lords, and contended, that, by the Act, an appeal lay from their proceedings to the Justices of the Peace, who were expressly empowered to hear, and *finally* determine the same. The Lords, after most mature deliberation, pronounced this interlocutor:—"On report of the Lord Bankton, the Lords find themselves competent judges, notwithstanding the orders of the trustees; and find the suspenders liable in the statute-work of the turnpike-road in question." On an appeal, this judgment was affirmed. *Vide supra*, p. 318.

By the turnpike act for repairing the road from Livingston by Kirk of Shots to Glasgow, it is provided, that, in case the trustees and owners of grounds should differ as to the value of ground, or materials taken for said road, the Justices of Peace, at their Quarter Sessions, shall and may adjudge, assess, and *finally* determine the same. In the 1755, William Boutcher of Comely Garden, having feued a field from Corbet of Tollcross,—the trustees, in making the road, incroached upon the same. Mr Boutcher claimed damages, and, the matter having lain over for two years, at last brought an action for them before the Lords. The trustees objected to the competency, in respect of the final and privative jurisdiction given to the Justices; and the Lord Kames, Ordinary, “Found the action not competent in this Court.” But a reclaiming petition was so well received that the trustees dropt the opposition, and thought it best to compromise matters.

By the Act of the 13th Geo. I. for better regulating the linen manufacture, all offences against the same shall be determined by one or more Justices of the Peace, or Magistrates of burrows, subject to an appeal to the Quarter Session; who are empowered to hear, and *finally* determine the same. And, with regard to the penalty for offences, it enacts, that the warrant for poinding should not be stopt or sisted by any suspension, sist, or other process whatsoever, except an appeal entered in manner therein mentioned. By a subsequent Act of the 24th of Geo. the Second, concerning the same manufacture, the like power is continued to Justices and Magistrates:—“And it is further provided, that all offences against this and the former acts shall, and may also be heard, and finally determined by any of his Majesty’s Sheriffs, or Steward-deputes, or substitutes, subject only to an appeal to the Lords of Justiciary in their circuit courts.” In the year 1765, Thomas Wilson, inspector of yarn, having seized some yarn from Patrick Somerville, as illegally made up, brought an action before the Sheriff of Edinburgh, for forfeiture of the yarn and the penalties of the statute. The Sheriff decerned in both: Somerville complained by bill of suspension, which was refused as to forfeiture of the yarn; but past as to the penalties, notwithstanding that the incompetency was strenuously insisted on. And, on a petition from Somerville, the Lords adhered.

The above decisions were quoted in the memorials, Earls of Home and Tankerness against Duke of Roxburgh, &c. Summer Session 1772, concerning the fishings of Tweed, and the competency of the Court to judge in offences committed against the late Act of Parliament with regard to these fishings: And, in conformity thereto, the Lords sustained their jurisdiction.

See Erskine, p. 24, *Law Tracts*, p. 424. &c.; and 111 *New Coll.*, No. 126.

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