

No 226.

ed to a factor
in Scotland
for the price
of goods sent
to him from
abroad to be
sold here, as
not being a
maritime
cause.

had sold the wines and fruits to, or otherwise to pay a great sum to the pursuer as a partner in these goods.

THE LORDS advocated the cause from the Admiral, as not being maritime; because an exhibition of writs, granted for the price of goods sent from abroad to a factor in Scotland, to be sold there, is no more a sea-faring cause, than the sending letters about business by a Council post, could drag the party employed before the Council. Because, the nature of a contract is to be judged from the place in which it is to receive execution, without respect to the manner of sending the commission for that effect, or to the condition of the bearer of the commission; and 'tis as absurd for the Admiral to judge in this affair, as to set up a privative claim to cognosce all factor accounts.

Fol. Dic. v. I. p. 503. Forbes, p. 164.

1738. July 21.

No 227.

PROCURATOR-FISCAL of the High Court of Admiralty *against* MACKENZIE.

THE Judge-Admiral is not so much confined even as other Judges may be, to try crimes by an inquest, being not only Justiciary *super mare*, but also a Magistrate of Police, and as such in use to try trespasses upon the sea *de plano*; on which ground chiefly, the reason of suspension of a decree of the Judge-Admiral, that he had proceeded to the trial of an atrocious crime without a jury, was repelled.

Kilkerran, (JURISDICTION.) No 1. p. 299.

* * * C. Home reports this case :

THE question betwixt these parties was, Whether the Admiral could judge without a jury, on a libel brought at the Fiscal's instance only, against Mackenzie of Corrie, charging him with plundering and pillaging boats on the high seas, exacting foreland dues, &c. contrary to the statute 1705; concluding for a fine of L. 100 Sterling; and that he should be declared incapable to exercise the office of bailiary in time coming.

For the Procurator-Fiscal, it was *contended*; That, neither by law nor custom, an assize was requisite or competent, the matter libelled not being capital, or what was punishable; and, as the Judge-Admiral has a sovereign jurisdiction, both civil and criminal, in matters done upon, or concerning affairs at sea, he has likewise a mixed jurisdiction in matters betwixt the two, which are of the nature of trespass and damage; and, as Bailies of regality, Sheriffs, &c. can judge in trespasses or spuilzies, *per modum querelæ*, without an assize, in the same manner may the Judge-Admiral.

For the defender, it was *answered*; That the transgressions set forth in the libel were, in the most strict sense, crimes which ought to have been judged by an assize. To enforce which, it was observed, that anciently, not only criminal, but civil causes were tried by a jury *per pares curiæ*; and, though that practice, in civil matters, had, for the most part, gone into desuetude, yet there still remained some instances where it was observed, as in perambulations and the like; but as to criminal causes, the ancient law still obtained, in so much that the smallest verbal injury, that was triable in the Court of Justiciary, behoved to go to the knowledge of an inquest. It is true, that, since the constitution of Justices of the Peace, who have power to try small breaches of the peace, *de plano*, it has become the practice of other inferior courts to try lesser delicts without the aid of an assize; yet it is remarkable, that it continued a long while a doubt if such trials were legal, as appears Dickson against Hallidays, *voce SPULZIE*. But, where the crimes libelled are of an heinous nature, such as those charged against the defender, it is believed, there is no instance can be given where such a trial has been countenanced without a jury. Nor is it any ways conclusive, that, because the law has entrusted inferior judges with a power to inflict an unlash of L. 50 Scots, without the intervention of a jury, that therefore it has entrusted any judge with the inflicting a penalty of L. 1000 Sterling; and incapacity in the same manner.

Replied; Where a Court, such as the Justiciary, was vested with a pure and simple criminal jurisdiction, all crimes and delicts, whether atrocious in their own nature or not, behoved to be tried by an assize; but that could have no influence in the present disquisition, as the Court of Admiralty is endued with mixed jurisdiction, and has the cognizance of all maritime affairs, both civil and criminal; so, in the manner of explicating that jurisdiction, it is not restricted to the method of procedure in the Court of Justiciary, but has the same latitude either to try crimes and delicts by way of complaint, or by jury, that Sheriff-courts, and others, possessed of a mixed jurisdiction, have; it must therefore be the circumstances and quality of the crimes that must point out the method of procedure, otherwise all crimes whatever behoved to be tried by an inquest, before whatever Court they are brought; by which means the well-known distinction between capital crimes, punished with loss of life, or limb, and such as are not capital, but ordinary, where the punishment is determined by law, and extraordinary, or arbitrary crimes, which are left to the discretion of the judge, must vanish; a distinction which is founded in the civil law, as Matheus observes, in his title *De Acquisitionibus*. And, as the criminal facts complained of do not amount to tinsel of life or limb, therefore it is apprehended, that the trial, by way of complaint, was extremely competent, without the necessity of a jury.

THE LORDS found, that the Judge-Admiral could judge in this libel without a jury.

C. Home, No 99. p. 157.