

bound to maintain his wife. The defence pleaded was a denial of the marriage; and consequently that, as the question resolved into a declarator of marriage, the Court was incompetent. The Sheriff ordered the defender to be examined, and thereupon, and production of marriage lines, decerned for the aliment. But, on an advocacy, the Lords passed the bill. They demurred greatly upon the point of jurisdiction, and thought, that, if modes of evading the jurisdiction of the Commissaries, as in this case, were allowed, it would tend to abolish the Commissary Court in one great article, and bring all questions of this sort before inferior judges; for, although cases often occur where a question, which is not in itself, *in prima instantia*, competent to be tried before a particular court, is yet the proper subject of determination when occurring incidentally; yet these cases are to be strictly interpreted; and, when plainly calculated to evade the proper jurisdiction, ought to be disallowed. See Law Tracts, Vol. I. p. 343.

1766.

MARTIN *against* WATT.

IN Summer Session 1766 a case came before the Court betwixt Martin and Watt, two custom-house officers, concerning the division of a seizure. The Sheriff of Haddington had given judgment in the merits; from him it came into Court by advocacy. The question as to competency having been suggested, the Lords ordered memorials; and, though both parties waved the declinature, the cause was dismissed, and found not competent. The Lords thought it was a revenue question, as originating from a revenue matter, and competent only before Exchequer. See ADVOCATION, *Forsyths against Shank*.

1771. February 13.

REID *against* GRAY.

By the charters of erection of the Town and territory of Kilmarnock into a burgh of barony, it is appointed that the Town Council present a leet of five of their own number to the baron at Michaelmas yearly, out of which the baron elects two bailies, and returns them to the Council; and, if the baron does not do this within a time certain, then they are chosen by the Council.

This being the set of Kilmarnock, a doubt arose how far the bailies were entitled to judge in any cause where the debt or damage exceeded forty shillings. In terms of the jurisdiction Act, and the point being stated in a cause before Lord Auchinleck, Ordinary, his Lordship found, "That the corporation or community of the burgh of Kilmarnock is independent of the baron; and, therefore, in a suspension of a decree of the bailies, he repelled the reasons of suspension." And, on advising a reclaiming petition with answers, the Lords adhered.

By the Jurisdiction Act, all jurisdiction is saved to burghs of barony which are independent of the baron. In the case of Kilmarnock, by grants from the

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 amerces the defender in L.5 sterling, in respect of his circumstances, for the