No. 62. they did by the pretence of a commission to two of them to act as officers of the Customs, and a writ of assistance from the Exchequer; that a writ of *certiorari* from the Exchequer had been served on these Justices to remove that process into the Court of Exchequer; that they having thereafter fined the defenders and committed them to prison till payment, the Court of Exchequer had issued an order to the keeper of the prison to set them at liberty; and praying relief. As we had no jurisdiction over the Exchequer, we thought that we could not receive this petition. *Vide* the proceedings upon it. (NOTES.)

1753. *December* 18.

The DUKE of DOUGLAS *against* TWO JUSTICES OF PEACE.

No. 63.

IN a question betwixt the Duke of Douglas and two Justices of Peace, reported by Lord Kilkerran for advice, the Lords found, that the 44th act 24. Geo. II., for rendering Justices of Peace, &c. more safe in the execution of their offices, extends to Scotland as well as England, though the procedure must be according to our forms, 28th July 1752. And on a reclaiming bill and answers, they found, 19th December, that it did extend to Scotland, but as the fact charged was a wilful transgression, and collusive, they found that this action did not fall under the act. But, upon another reclaiming bill and answers, it was observed, that it was impossible that any action could in Scotland be brought in terms of that act but before the Court of Justiciary, where alone the Justices of Peace could be tried by a Jury; that no action could be brought without giving previous notice, and if an amends was offered, it must be tried whether that amends was sufficient, and that by the act could only be tried by a Jury, and not by any Court of law; and as the Legislature could not mean without express words, to make such an alteration of our law and of the jurisdiction of this Court, no part of the act could extend to Scotland, if it was not the last clause limiting the action, and that it was impossible to separate that clause from the act: And as to the second part of the interlocutor, that the preamble of the act proposes a remedy for all sorts of transgressions, not only innocent and through ignorance, but wilful and oppressive, and the rest of the act is calculated to answer both; and the limitation in the last clause is of all sorts of actions against Justices of Peace, and the defenders' transgression in this case could not possibly be worse than what is mentioned in the preamble, and therefore if the act extends to Scotland, that they were entitled

to the benefit of it. And upon the question, it was found that the act does not extend to Scotland, 6th February 1753; but 20th July we altered this last, and found that the act extends to Scotland, and that this case is within the act.—Adhered, 18th December, 5 against 5. No. 63.

1754. *February* 1.

SIR ROBERT GORDON *against* DUNBAR of Newton.

No. 64.

IN a declarator of marches, I remitted to the Sheriff-Depute of Murray and his substitutes to try the marches by an inquest; and he accordingly summoned an inquest of gentlemen of credit, who with great labour took the proof upon the ground, which they perambulated with most of the witnesses, and as is too common in such proofs, their depositions were directly contrary to one another in the march most controverted. But the Jury took a middle march different from both. To this they seemed to have been led by some very unsuspected witnesses, and thereon returned their verdict, bearing, " that to their conviction the boundaries were," &c. When this proof and verdict was reported, Sir Robert Gordon, pursuer, alleged that the inquest had acted as arbiters, not as judges, and had not followed the proof adduced by either party, but made a new march unsupported by any proof, and that his proof was the most pregnant, having nineteen witnesses to six. The defender Mr Dunbar also contended that his proof was the most pregnant, but was willing to acquiesce in the verdict, and insisted that we could not alter the verdict. We agreed that we were not by law tied down to the verdict; but we thought that great regard was due to the verdict on oath of gentlemen of character, in whose presence the proof was taken on the ground, and who acted not as arbiters to decern what should be the march, but that to their conviction such was the march; and upon the question, it carried to approve the verdict.

See Steedman against Couper, 20th January 1744, *voce* ADULTERY.

See NOTES.