

\*\*\* This case is reported in the Faculty Collection.

No 90.

THE magistrates of Aberbrothock intended to set one of their mills to Wallace and company, who had established a manufactory of Osnaburghs in that place. This scheme was opposed by Bailie Wilkie, a member of Council; and Wallace, in a memorial that he presented to the council, having made use of some expressions injurious to Wilkie's character, and accusing him of selfish and sinister intentions, Wilkie sued them for scandal before the Court of Session.

Against this action, Wallace offered a declinator to the jurisdiction; as actions for scandal were competent, in the first instance, before no other judges but those of the commissary-court.

"THE LORDS repelled this declinator, and judged the cause themselves."

A&C. *Lockhart.*

Alt. *Rae.*

A. C.

*Fac. Col. No 5. p. 8.*

1765. July 19. WILLIAM REID, Merchant in Edinburgh, Supplicant.

Mr REID, on the 15th of July, preferred a petition, setting forth, that, some time ago, he had erected at Woodhall, in the parish of Collington, a mill of a particular construction, and his own invention, which manufactures tobacco into snuff with more expedition and less expense than ordinary mills do; for which reason, he had always been extremely anxious to keep the mechanism of this mill a secret.

That, on Friday the 5th of April last, some mill-wrights and smiths in Collington, along with some excise-officers, and a constable, forcibly entered into the pursuer's mill, on pretence of searching for smuggled goods, but in reality, as he believes, to discover the machinery, the assistants to the officers of Excise being all tradesmen skilled in works of this kind, and employed at another snuff-mill near Collington, belonging to Mr Gillespie, tobaccoist in Edinburgh; and the petitioner never having given any reason for suspecting that he concealed smuggled goods in his mill-house.

That the tradesmen and officers above mentioned, after staying as long as they thought proper in the petitioner's mill-house without finding any smuggled goods, retired; and the petitioner raised a summons against them before this Court, concluding for damages and expenses, which summons had not yet been called, the days of compareance not being run till the 17th current.

That, on the 10th current, the petitioner was served with a writ from the Court of Exchequer, by which he is ordered to show cause against the first day of next term, (which is the 18th current,) why the action he had brought before this Court should not be removed into the Exchequer?

No 91.

An action brought before the Court of Session against an officer of the revenue, for a trespass, cannot be stayed and removed into the Exchequer by an injunction from that court.

No 91. And he and his attornies are enjoined, in the mean time, to surcease all further proceedings before this Court. This writ, it appears, was issued upon a motion from his Majesty's Advocate, on behalf of his Majesty, and the persons above mentioned, for whom the writ bears it was prayed, 'That the said action might be removed from the said Court of Session into this court, and all further proceedings before the said Court of Session stayed.' And the petitioner was certainly informed, that a copy of his summons had been read in the court of Exchequer.

That the petitioner thought it his duty to submit, in this manner, to the consideration of their Lordships, the competency and propriety of the said motion and injunction. He was advised, that every action of debt, from whatever cause it springs, or against whatever person it is brought, is competent before the Court of Session. And that, as his action against the above mentioned persons concluded for damages and expenses, on account of their having broke into his mill, it was evidently an action of debt, and consequently competent before this court. Though it were true, as alleged by the persons above mentioned, that they had acted in virtue of their office, and under the authority of a writ of assistants, that would not be just ground for the injunction. The officers of either court may be either tried criminally, or pursued civilly before other courts than those to whom they belong, for an alleged abuse or excess committed by them in the execution of their office. The courts to whom they belong have no power of repledging them; nor have the officers any privilege of claiming an exemption from the jurisdiction of other courts. As to the writ of assistants, the validity and legality of it may very probably come to be canvassed in this action. As the petitioner is informed, the writ of assistants the persons above mentioned had with them, was not a legal writ in terms of the statutes authorising writs of assistants, and of the same tenor with those in use to be granted in England, the law of which ought to regulate those matters here, but a general and unjustifiable warrant. But, supposing that a formal declarator of the legality of such writ would not be competent before this court, yet a question as to its validity arising incidentally, and from the plea offered in defence, could not render the Court incompetent to an action to which it certainly would otherwise have been competent; as it is established law, that it is competent for courts to judge of points proposed as a defence, to which they would not have been competent in an original process.

That, supposing the petitioner's action to be altogether incompetent, the petitioner could not but doubt, whether the Court of Exchequer could remove it themselves, or stop procedure before this Court by an injunction; as the Court of Session is a supreme and sovereign court, and as the persons above named were commanded by the summons at his instance to appear before that Court, they ought to have appeared, and, if advised that the Court was incompetent, to have pleaded a declinature, which this court would have sus-

tained or repelled as it saw cause; and, if the defenders thought themselves aggrieved, they had a remedy in the ordinary course of law, by an appeal to the House of Lords.

But, *separatim*, the competency of the pursuer's action was put out of all doubt, by that part of his libel which alleged, that the defenders had broke open and entered his mill, not really from a suspicion or information that smuggled goods were concealed in it, but with an intention to discover the secret of the machinery.

The petitioner therefore prayed their Lordships to take the premises into their consideration, and to grant him such relief as to them should seem proper.

When this petition was moved, his Majesty's Advocate agreed to withdraw the motion in Exchequer; upon which the Court superseded advising the petition till that was done, and then pronounced an interlocutor finding the petition competent, and bearing the discharge of the motion.

*Pet. M'Laurin. Crosby.*

*J. M.*

*Fol. Dic. v. 3. p. 345. Fac. Col. No 25. p. 41.*

1766. November 26. ALEXANDER GRANT *against* Captain SUTHERLAND.

UPON a complaint, that Lieutenant Forbes of the Earl of Sutherland's regiment, had charged Captain Gordon with L. 6 : 9 : 4, as disbursed to recruits, but which appearing not to have been paid, was again paid to the recruits themselves by Captain Gordon, a regimental court-martial gave it as their opinion, that Lieutenant Forbes was due that sum to Captain Gordon, and that the commanding officer should be pleased to order it to be paid.

The Lieutenant-Colonel, as the commanding officer of the regiment for the time, issued a warrant to Captain Sutherland, the paymaster, to pay the sum to Captain Gordon, and state it to accompt of Lieutenant Forbes's subsistence-money.

Lieutenant Forbes brought an action for payment of his subsistence-money, in which the question was, how far the above sentence and warrant were effectual in law.

*Pleaded* for the defender, The acts for preventing mutiny and desertion provide, "That, if any paymaster wilfully detain or withhold; by the space of one month, the pay of any officer or soldier, then, upon proof thereof, before a court-martial," he shall be discharged, and forfeit L. 100 Sterling. They likewise provide, "That, if any inferior officer or soldier shall think himself wronged by his captain or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding-officer of the regiment, who is hereby ordered to summon a regimental court-martial for doing justice to the complainant."

No 91.

No 92.

A regimental court-martial ordered retention of part of an officer's subsistence money. In an action at the instance of the officer against the paymaster of the regiment for payment of the sums retained, the court repelled the defence, that a civil court has no jurisdiction in matters of this kind.