

No. 10. lodged in the council; and therefore, when the Crown conferred that power on the Council in this case, it was not an act of the prerogative, but of justice in restoring the burgh to its right. For it was too thin a distinction, that the Crown could not restore the council, but only the town to a poll-election; as now for two centuries, since the days of James III. the town's right of election had lain in the council. The restoring the council was, in other words, restoring the burgh against their omission; and as the Court has an inherent jurisdiction in all questions touching the legality of elections, there was no reason for depriving them of it in this case.

Accordingly the Lords "repelled the objection to the jurisdiction of the Court, and adhered to their former interlocutor as to that point." They adhered also as to the competency of the summary complaint, though by a narrow plurality, several of the Lords being of opinion that this case was *casus improvisus et omissus*.

The Lords also adhered on the *third* point, allowing the proof before answer. For although some were of opinion, that there could be no relevancy without alleging that the commitment was unlawful, and that its illegality could not be proved without a discovery from the Duke of the cause of the commitment, which could not be obtained; yet the contrary opinion prevailed, that as a commitment might be lawful, although the warrant for it had been illegally obtained, so the concert and combination as qualified was relevant.

Kilkerran, (BURGH ROYAL) No. 6. p. 104.

1747. December. 23.

No. 11.
Whether a
summary ap-
plication be
competent in
the case of
fraudulent
bankruptcy?

MACKENZIE, WILSON, and Others, Creditors of FORRESTER, Complainers.

Robert Forrester, having for some years carried on a small trade in the pedlar way, between Glasgow and England, introduced by degrees a younger brother George, who found means to purchase, upon credit, large parcels from several different merchants, who knew not what trust others had given; and having gone to England, he broke with the full hand.

The two brothers having thereafter returned to Glasgow, George proposed a composition at 7s. or 8s. *per* pound, for which Robert, the eldest brother, was willing to become bound. But by this time, the merchants having ground to suspect, that Robert had been in the concert with George to cheat them, set forth the circumstances of their suspicion to certain Justices of the Peace, and obtained their warrant to apprehend both George and Robert; and the Justices, after examining them, committed both to prison.

Of this procedure of the Justices, Robert complained by a bill of suspension and liberation.

It appeared to be the opinion of the Court, that it was a matter not within the province of the Justices of the Peace. And it is uncertain what judgment the Lords would have given, had not the complainer's procurator come to the bar,

after the Ordinary had reported the bill, and, not knowing what had been said by the Lords, offered caution *judicio sisti*, which superseded the entering farther on the question as to the legality of the proceedings of the Justices; and accordingly the bill was passed on finding caution *judicio sisti*; but as the penalty was made much higher than the complainer had expected, no less than £.500 Sterling, and as he was unable to find caution for so great a sum, he remained in prison.

No. 11.

And now an application being made to the Lords, setting forth the circumstances of suspicison of fraudulent bankruptcy, and craving a warrant to transmit the prisoners from the tolbooth of Glasgow to the tolbooth of Edinbrugh, a doubt was stirred how far such warrant could be granted on a summary complaint for fraudulent bankruptcy without a process. Some instances were indeed given, where the like had been granted, as in the case of Philip Peck, and that of Joseph Cave; but whether or not there were processes in these cases could not with certainty be said.

But be that as it will, here is a precedent for it; for the Lords, upon this application, “ granted warrant to transmit the prisoners to the tolbooth of Edinbrugh.

Fol. Dic. v. 4. p. 309. Kilkerran, No. 2. p. 525.

1784. June 8. ELIZABETH MONTGOMERY, Complainer.

Elizabeth Montgomery having, as factrix for her husband Niel M'Vicar, writer in Edinburgh, charged Robert and David Lusks, his tenants, for the tack-duty of £. 437 in money, and other prestations due and resting for some years bygone, and in time coming, &c. for which they were by their tack bound conjunctly and severally, they offered a bill of suspension thereof in common form; to which she made no opposition, being willing it should pass, that she might have a cautioner.

Accordingly the suspension was expedite, but without any cautioner farther than that the one became bound for the other; which, how soon Mrs. M'Vicar observed, she gave in a summary complaint against Charles Inglis, depute-clerk to the bills; the advising whereof, the Lords, upon the 12th February, 1745, superseded till the suspension should be discussed.

The suspension being now discussed, the letters found orderly proceeded, and the tenants, after ultimate diligence, unable to pay, the complaint was again renewed.

But the Lords “ Found the complaint not competent otherwise than by Ordinary action;” though some of them were of opinion, that it had been no heresy to have sustained the summary complaint.

Fol. Dic. v. 4. p. 310. Kilkerran, No. 3. p. 526.

No. 12.

Whether a summary complaint be competent against the clerk to the bills for expediting a suspension upon insufficient caution.