

‘ Mary Lindsay Craufurd from her service was not warrant-
 ‘ ed;’ and found him entitled to wages and board-wages to the
 term of Martinmas subsequent to the dismissal. To this inter-
 locutor they adhered on the 19th of November 1816.* Lady
 Mary then entered an appeal, 1. Because Reid had no right,
 without special leave, to be absent from her service for four
 days; and, 2. Because, as he had not shown any sufficient justifi-
 cation, and it had been proved that he had gone upon his own pri-
 vate business, and as there was no evidence of the alleged general
 instructions, she had a right forthwith to dismiss him; and conse-
 quently he had no claim to wages subsequent to that period. To
 this it was answered, that he had, in point of fact, been absent on
 the business of his mistress; and that although he had not ob-
 tained special leave to go at the particular time, yet, from former
 practice, he was led to suppose that this was left to his own dis-
 cretion. The House of Lords ‘ Ordered and adjudged that the
 ‘ interlocutors complained of be reversed.’

March 13. 1822.

J. CHALMER,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 10.*)

ROBERT DOWIE, Appellant.—*Clerk—L’Amy—Brownlee.*

No. 29.

JAMES DOUGLAS, Respondent.—*Jeffrey—Hunter.*

Jurisdiction—Consuetude—Reparation.—Held (affirming the judgment of the Court
 of Session,)—1.—That the Bailies of the burgh of barony of South Leith have, by
 consuetude, a jurisdiction over the inhabitants of the separate and independent terri-
 tory of the Citadel of North Leith, notwithstanding a declinature.—2.—That they
 are entitled to exercise that jurisdiction, when sitting within the territory of South
 Leith.—3.—That the jurisdiction of burghs of regality, of which the Magistrates of
 a royal burgh are superiors, is not affected by 20. Geo. II. chap. 43; and,—4.—
 That damages are due for a blow inflicted with a heavy iron bar on the head, to the
 danger of life, although the party so struck had previously given a slight blow or push
 with his hand, and was alleged to have begun the affray.

DOWIE was proprietor of a small house situated in Citadel
 street, North Leith, which was possessed by the respondent Dou-
 glas as his tenant, and his own residence was also in that street.
 In the month of December 1814, Dowie having gone into the
 shop of Donald M’Kenzie, smith in North Leith, where Douglas
 happened to be, a dispute occurred between them relative to
 the payment of the rent of the above house; and after a good deal of
 altercation, in the course of which Douglas had made use of some

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1ST DIVISION.
 Lord Alloway.

* Not reported.

March 27. 1822. irritating expressions, and had given Dowie a slight blow on the shoulder with his fist, the latter took up a heavy bar of iron, and struck Douglas a severe blow upon the head, by which he was knocked to the ground, and his life put in danger. Douglas thereafter brought an action before the Bailies of South Leith, in which he stated, ‘ That upon the morning of the 20th of
 ‘ December 1814, while the pursuer was quietly standing in the
 ‘ workshop of Donald M’Kenzie, smith, North Leith, Robert
 ‘ Dowie, Citadel street, Leith; did, in a violent and outrageous
 ‘ manner, without cause or provocation, strike the complainer
 ‘ a blow upon the head with a large bar of iron, in consequence
 ‘ whereof he was knocked down and severely wounded, to the
 ‘ great effusion of his blood, and manifest danger of his life;
 ‘ and he concluded for £500 damages.’ Dowie declined the jurisdiction on various grounds to be hereafter stated, but the Bailies repelled them, and, after allowing a proof, found it proved that,
 ‘ on the morning of the day libelled, the defender was guilty of a
 ‘ barbarous and unjustifiable assault on the person of the pursuer
 ‘ in the shop of Donald M’Kenzie, smith in Leith ;—that the
 ‘ defender struck the pursuer a most severe blow on the head
 ‘ with a bar of wrought iron, of the weight of at least 20 lbs ;—
 ‘ that, in consequence of the injury thereby done to him, the pur-
 ‘ suer was for a fortnight in danger of his life—was for nine
 ‘ weeks confined to bed, and for several weeks thereafter inca-
 ‘ pacitated from gaining his livelihood by working at his usual
 ‘ occupation ;—that no evidence has been adduced on the part
 ‘ of the defender, and that nothing is established by the evidence
 ‘ of the pursuer’s witnesses, which can be held to justify the con-
 ‘ duct of the defender, or even in any material degree to alleviate
 ‘ his guilt.’ They therefore decerned against him for £150 of damages, besides the amount of the surgeon’s account, and expenses.—This decree having been extracted, and Dowie having been imprisoned in virtue of it, he brought a bill of suspension and liberation, which was passed. In support of it he contended,
 1. That the bailies of Leith, being only bailies of barony, and not independent of the superiors, (the Magistrates of Edinburgh,) had, according to the 20. Geo. II. c. 43, § 17, no power to decide in any civil action to a greater extent than forty shillings sterling ; 2. That the Bailies of South Leith had no jurisdiction over North Leith or the Citadel, where he resided, and where the alleged offence was committed, both of these places being within the bounds of the burgh of regality of Canongate, and subject to the jurisdiction of the Magistrates of that burgh , 3. That, supposing that the Bailies of South Leith had a juris-

diction by consuetude over the Citadel, still their decision was null, because it was pronounced when sitting in the court-house of South Leith, and not within the territory of the burgh of regality to which the Citadel belonged; and, 4. That as Douglas was the first aggressor, damages were not due to him; and, at all events, those which had been awarded were excessive. To this it was answered, 1. That the Citadel of Leith was erected into a burgh of regality in 1662, of which the Magistrates of Edinburgh were the supreme lords; and that the jurisdiction was reserved in its full original extent under the 26th section of the statute, by which it was declared that the general enactment should not 'prejudice any jurisdiction or privilege by law vested in, or competent to the corporation or community of any royal burgh in Scotland;' 2. That the Bailies of South Leith had, from 1709 downwards, exercised a jurisdiction over the inhabitants both of the Citadel and of North Leith, as was proved by the records, and had done so in the court-house of South Leith; and, 3. That, in point of fact, Dowie had been the aggressor; but that, at all events, the slight blow which had been given could not justify the violent assault which was made in return.

Lord Alloway found the letters orderly proceeded; and the Court, after being equally divided on the question of jurisdiction, and Lord Alloway having been called in, adhered to his interlocutor on the 30th of May 1817.*—Dowie having appealed on the above grounds, the Lord Chancellor, without making any observations, moved, and the House of Lords 'Ordered and adjudged, that the interlocutors complained of be affirmed.'

Appellant's Authorities.—(1.)—20. Geo. II. c. 43. § 17.—1. Ersk. 4. 30; Sheriff Clerk of Renfrewshire, May 27. 1794, (Bell's Cases, 15, and 7714.)—(3.)—1. Ersk. 2. 29; Lawrie, Jan. 21. 1812, (not rep.)—(4.) Hume, 58.

Respondent's Authorities.—(1.)—20. Geo. II. c. 43. § 26.—3. Bank. 10. 48.—4. Ersk. 4. 21.—Maxwell, Dec. 16. 1775, (7381); Begbie, Jan. 26. 1776, (7709);—(2.)—Innes, Dec. 8. 1622, (3110); Innes, Dec. 7. 1622, (3100); Blair, July 1730, (3099.)

SPOTTISWOODE and ROBERTSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 12.*)

* See Fac. Coll. May 30. 1817, No. 180, where the following opinions are reported to have been delivered:—

'LORD HERMAND said, he did not think the objection to the jurisdiction well founded. The jurisdiction was clearly good before the passing of the act 20. Geo. II. c. 43, and it never could be the intention of that act to do away such jurisdiction; and he held that the consuetude rendered the jurisdiction good as to the place in which it was exercised.

'LORD BALGRAY said, that he did not conceive the jurisdiction act could touch this

No. 30. JAMES GLASS and Others, for the Corporation of HAMMERMEN
of LEITH, Appellants.—*Gifford—Baird.*

WILLIAM HUNTER, Respondent.—*Lord Advocate Rae—Cullen.*

Local Militiaman—Stat. 54. Geo. III. c. 19.—Held (affirming the judgment of the Court of Session,) that a corporal of the First or Highland Regiment of Local Militia for the county of the city of Edinburgh having volunteered his services, and served at Musselburgh in terms of the above statute, was entitled to the privileges of a freeman, without entering with the incorporation of the particular trade which he exercised.

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2^D DIVISION.
Lord Pitmilley.

By the 179th section of the 52. Geo. III. c. 68. it is enacted, that ‘ every person having served in the local militia, when
‘ drawn out into actual service, being a married man, may set up
‘ and exercise any trade in any town or place within Great Britain,
‘ without any let, suit, or molestation of or from any person or per-
‘ sons whomsoever, for or by reason of using or exercising such trade,
‘ as freely, and with the same provisions, and under the same re-
‘ gulations, and with the like exception to the two Universities in
‘ England, as any mariner or soldier can or may do by virtue of an
‘ act passed in the 24th year of his present Majesty’s reign.’ In
1814, the ‘ Legislature, by the 54th Geo. III. c. 9, and on the
‘ preamble that it is highly expedient, in the present circumstances,
‘ that his Majesty should be enabled to make the most effectual
‘ use of the disposable military forces in his realms in aid of the

‘ case. If there had been no consuetude as to the place where the jurisdiction was
‘ exercised, there might have been some difficulty upon the other point of the case; but,
‘ as the fact stood, there could be none; for a clear consuetude had been proved for up-
‘ wards of 100 years. This being proved, the cases of Portsburgh and the Gorbals
‘ must regulate the decision of the present question.

‘ The LORD PRESIDENT observed, that all the cases that had been produced to
‘ prove a consuetude went only to show that, in such a number of instances, the parties
‘ had found it convenient to submit to the jurisdiction. In the case of Blair there was
‘ no declinature, which distinguished it from the present, in which the jurisdiction
‘ had been objected to ab initio, and consequently had not been prorogated by the
‘ suspender. His Lordship did not conceive that the Bailies of Leith had any more
‘ jurisdiction, in questions relating to inhabitants of the Citadel, than the Court of
‘ Session has in cases of teinds. He, however, concurred in thinking that the juris-
‘ diction, as to its extent, was reserved by the jurisdiction act, as found in the cases
‘ of Gorbals and Portsburgh.

‘ LORD BALMUTO having expressed a similar opinion, the cause stood over for the
‘ decision of LORD ALLOWAY, who said, that although it was quite clear that no
‘ Judge had a right to exercise jurisdiction extra territorium, yet that full effect must
‘ be given to an established practice. The Bailies of Leith have exercised this juris-
‘ diction beyond the memory of man. There is no court-house within the Citadel;
‘ and the uniform practice of the Bailies has been to judge of the Citadel causes.
‘ The decided cases cited for the charger leave no doubt as to the effect of this estab-
‘ lished practice.’

‘ efforts now making upon the continent of Europe ; and for that March 27. 1822.
 ‘ purpose should be empowered to accept the services of such parts
 ‘ of the local militia of Great Britain as may make voluntary offers,
 ‘ duly certified by the respective commanding officers, of serving
 ‘ under the act, out of the counties within which they shall be en-
 ‘ rolled, and as his Majesty may think proper to permit, so to,
 ‘ extend their service in consequence of such voluntary offers as
 ‘ aforesaid,’ enacted, ‘ That it shall be lawful for his Majesty, by
 ‘ any order signed by the Principal Secretary of State, directed to
 ‘ the commanding officer of any regiment, battalion, or corps of the
 ‘ said local militia foresaid of Great Britain, to propose to such
 ‘ regiment, battalion, or corps, or any part or parts thereof, so to
 ‘ extend their services, under such rules and regulations, and upon
 ‘ such allowances, as his Majesty may think fit to make and ap-
 ‘ point in that behalf, subject nevertheless to the restrictions
 ‘ contained in this act ; and it shall be lawful for his Majesty to
 ‘ call out and employ from time to time any such parts or pro-
 ‘ portions of any local militia so volunteering as aforesaid, at
 ‘ such times and in such manner as he shall think fit, out of their
 ‘ counties, for any period not exceeding such as are allowed by
 ‘ this act.’ It was further declared, that this period of ‘ extend-
 ‘ ed service’ should not exceed 42 days in any one year, and
 ‘ that all the rules, regulations, provisos, powers, authorities,
 ‘ penalties, forfeitures, clauses, matters and things in the said
 ‘ acts respectively contained as to the local militia, when embo-
 ‘ died for service in case of invasion, shall extend and be con-
 ‘ strued to extend to the local militia when serving under any
 ‘ such voluntary offers under this act, out of the counties within
 ‘ which they are enrolled.’

In consequence of this act, a proposal was made to the first or Highland regiment of Edinburgh local militia to volunteer in terms of it, and accordingly they agreed to do so. . The respondent Reid was at that time a corporal in the regiment, and he, along with the other officers and soldiers, duly subscribed an obligation to subject themselves to the enactments of the statute. Immediately thereafter a precept was issued by the Lieutenancy of the county of the city of Edinburgh, requiring the regiment to assemble at Edinburgh, with the view of being called out for service, under the 54th of his present Majesty, chap. 19. Previous, however, to the assembling of the regiment, official orders were given to the commander that the regiment was to muster at Musselburgh and Fisherrow, and he was desired immediately thereafter to report himself to the General of the district. These orders were obeyed, and the regiment did duty at these re-

March 27. 1822. spective places (in the neighbourhood of which there was an extensive depôt of French prisoners) for 42 days, the men receiving the marching guinea, and being otherwise put on the same footing as the regular militia. Reid served during that period as a corporal, and received a certificate from the proper officer to that effect, and that he had been called out under the provisions of 54th Geo. III. Having thereafter commenced trade as a blacksmith in South Leith, without entering with the Incorporation of Hammermen, Glass and others, as officé-bearers, presented a petition to the Bailies of Leith, praying for interdict, damages, and fine. Decree in absence was pronounced; and a charge having been given to Reid, he brought a suspension, on the ground that he was entitled, by virtue of the above statute, and by having been on actual service, to the privileges of a freeman. Lord Pitmilley suspended the letters simpliciter; and the Court, on the 19th of November 1818, adhered to his interlocutor.* Glass and others then appealed to the House of Lords, and contended that Reid was not entitled to the privileges claimed by him, because the regiment had not been marched out of its county, seeing that it had done duty at Musselburgh, situated in the county of Mid Lothian; and, 2. Because the service was not of that nature for which the benefits and privileges were intended to be conferred, there having been merely an extension of the time for the ordinary annual training, and not that actual service which was contemplated by the Legislature. To this it was answered, 1. That in relation to the militia, the city of Edinburgh is a separate county from that of Mid Lothian, and has accordingly a separate lieutenancy; that Musselburgh is not within the bounds of the county of the city of Edinburgh, but is under a different lieutenancy, and therefore the regiment must be considered as having served out of the county within which it was enrolled; 2. That the regiment was called out for service in terms of and under the provisions of the 54th Geo. III., and that the respondent performed the service required by that statute; and, 3. That having done so, he was entitled to the privileges thereby bestowed. The House of Lords ‘Ordered and adjudged that the interlocutors complained of be affirmed, with £100 costs.’

Respondent's Authority.—Kirkwood, Jan. 19. 1811, (F. C.)

SPOTTISWOODE and ROBERTSON,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 13.*)

* Not reported.