

No. 2. of the act of Parliament, which specially excepts those who are disobedient and contumacious to church-censures as he was, and allows their imprisonment, as before the act; and by the 23d act of Parliament 1693, all Judges and Magistrates are commanded to give assistance in making church-sentences effectual; *3tio*, The refusing of a bail is denied, but only he took twenty-four hours, (as the act allows), to advise on the penalty; and as to the second offer, there were names indeed given in to him, but they were neither present, nor any subscribed bond of caution offered to him, as the act requires. Replied, As to the sentence of deprivation, he had an appeal yet depending before the Assembly, (only these appeals do not stop execution, and when not insisted on are reputed deserted); and as to his being unqualified, he had taken the oaths to King William, and was ready to do the same to Queen Anne; and that noble and excellent law being the great charter of our personal liberty, must not be diminished by quibbles, for it was never intended that an Episcopal Minister may be imprisoned summarily for preaching the Gospel peaceably, neither ought it to be ranked as a crime; and the act was calculated to bridle the lawless and arbitrary power of rash Magistrates in casting people into prison at their pleasure; and therefore he should have given a warrant, mentioning the cause to the jailor, and the double of it to the party incarcerated; neither ought he to have delayed or refused the bail, seeing, under that pretence, one may, in defraud of that good law, keep free subjects long enough in prison. The Lords found there was no necessity of a written information in this case, seeing the Bailie himself came to the place where he was contravening the acts of Parliament, and the act of his own deprivation; and that being under church-censures, he was in the exception of the act of Parliament; and that a subscribed bond of cautionry not being offered, the Bailie committed no fault in refusing to set him at liberty; and therefore assolizied them from Mr. Peacock's process, which is the first raised upon that new act of Parliament.

Mr. Peacock having given a bill against this interlocutor, reclaiming on sundry grounds of law; and the Lords, by plurality, having refused his bill, and adhered to the former interlocutor, he gave in his appeal for redress to the Parliament, which was admitted conform to that article of the claim of right relating thereto.

Fountainhall, v. 2. p. 209.

No. 3.

1705. February 10.

GORDON *against* HOPE.

Mr. William Gordon of Balcomy, Advocate, raises a process for wrongous imprisonment, against Sir William Hope, on this ground, That having taken an assignation to a debt of the said Mr. William's, he had incarcerated him thereon, notwithstanding it was paid by his intromissions with his rents; and craving this might be summarily called, as is appointed by the 6th act of Parliament 1701, anent personal liberty. The Lords found it could claim no such privilege of summary discussing, seeing that act relates only to imprisonment for crimes, and not

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for civil debts; but thought if any were illegally and unwarrantably incarcerated, though for debts, that they had an action in law for damages sustained by the said illegal imprisonment, by virtue of the common law, before that act 1701 was made.

No. 3.

Fountainhall v. 2. p. 267.

1705. February 10.

ROBERTSON *against* PEDISON.

At this same time a process of this kind was pursued by Alexander Robertson, taylor, against Rory Pedison shoemaker. They having adjacent tenements lying at the head of the Canongate, Rory alleged, That Alexander had encroached upon a too-fall of his, and caused pare it four inches, and put sundry joists in it whereby his wall was much weakened; and having obtained a decreet against him for repairing the too-fall, and putting it into its pristine condition, he did imprison him. Robertson suspended, and also raised a process of wrongous imprisonment against the said Roderick, for incarcerating him for doing a fact which was implemented and done before; and so he having given full obedience to the decreet, he could not be legally incarcerated on the same decreet, and therefore claimed £2000 of damages; which process the Lords sustained, and admitted to his probation, though it does not fall under the compass of the act 1701, but is only founded on the common law. The English are very exact in their pursuits on false imprisonments, determining in what cases it is lawful, and in what not, and how remediable; and modifying so much expense for every hour they are unjustly detained. As to the putting in my joists to rest in my neighbour's wall, Robertson was ordered to take them out, because he had not a servitude; for law says, non licet lignum in alienum parietem immittere sine jure servitutis L. 2. et L. 33. D. De servitut. urb. præd.

No. 4.
Found as
above.

Fountainhall, v. 2. p. 257.

1736. November 26.

ARCHIBALD CAMPBELL, Merchant in Edinburgh, *against* GILBERT RAMSAY,
Bailie in Kelso.

The said Archibald Campbell set out from Edinburgh to London, along with Mr. Joseph M'Kenzie; but, when they came to Kelso, an information, signed by Quarter-master Stewart, &c. was given in to Mr. Ramsay as Bailie of that place, setting forth, That Campbell had clandestinely carried away M'Kenzie from his wife and family; and that he had likewise prevailed upon him to carry off several writs and evidents of his estate; therefore praying a warrant to detain Campbell

No. 5.
Whether
the penal-
ties in the
act 1701,
reach other
cases than
those which
are therein
particularly
enumerated?