

No 10.

to this ; that she coming to her brother's house of Cary, they caused her to alight and took the horse ; and she desiring to lodge all night in his house, that she might reason with him about the justice of her cause, he refused it, but ordained six or seven armed men to carry her away to the mill ; where she was detained all night, and sentries set upon her at the door, that she might not escape. *Alleged*, No such violence proven here as to infer the severe penalty of the act of Parliament for tinsel of the cause ; for, *1mo*, No man is bound to admit any within his house except he please ; especially if they have disabled him, as she had done. *2do*, The very commons in that part of the country go armed ; so that was no singularity, and she was dismissed the next day. THE LORDS read the act of Parliament, and found it spoke not only of striking, beating, bleeding, wounding, but also of invasion any manner of way, whereon they might be criminally accused ; now the detaining one *in carcere privato*, without the warrant and authority of a judge, is a very high crime, both in the common law and ours ; our personal liberty being one of the most valuable interests of mankind, and the restraining it affecting us more than a cuff or a blow would : And therefore found the detaining her prisoner under sentries fell under the meaning of the act of Parliament. Then he *alleged*, it was remitted by the Queen's indemnity, and its Parliamentary ratification in 1709. *Answered*, That remits only the Crown's part of the fines arising from delinquencies, and accreting to the silk ; but noways takes off the private interest of parties, or the *vindicta privata*, of which kind that act is, and very necessary for restraining the fervid keeness in our Scots tempers ; and which appropriates the whole penalty to the use of the party invaded, and provides nothing to the silk. THE LORDS finding it dipped on the interpretation of a new act, they ordained them to inform on this last point of the indemnity. On the 29th February 1712, an appeal was given in against this interlocutor*.

Ed. Dic. v. 1. p. 94. Fountainball, v. 2. p. 722.

1715. January 19.

THE MAGISTRATES and COUNCIL of PEEBLES *against* MURRAY of CRINGILTY, Younger.

No 11.
During the dependence of an action against the Magistrates of a town ; the pursuer attacked the person of one of the burgeses. This person not being *nomi-*

DURING the dependence of a declarator of commonty, at Cringilty's instance, against the Magistrates and Council of Peebles, for declaring his right of commonty upon the lands of Hamilton, there being a complaint given in by the Magistrates, of battery committed by Cringilty upon the person of one Wylie a weaver, burgeses of the said town :

It was *answered* for Cringilty, That the complaint in no manner fell under the act of Parliament, because Wylie was neither pursuer nor defender in the cause ; the act (which is 219th Parl. 14th Ja. VI.) bearing precisely, ' Gif it fall happen,

* Affirmed with costs, on 4th June 1712. See JOURNALS of the HOUSE of LORDS for that year, p. 467.

‘ either the defender or pursuer to flae or wound, to the effusion of blood, or otherways to invade ane of them ane other.’ By which it is plain, that none can come under that act, but either pursuers or defenders, and who are *nominatim* as such in the summons; for so it further bears, ‘ After the raising of summons or precepts, and lawful execution thereof.’ So that pursuers and defenders names must be both in summons and execution, and it is their persons only that are protected by the special guard of the law. *2dly*, The statute is to a high degree penal, and therefore strictly to be interpreted: And to *allege*, That by citing of Magistrates, every burges is virtually cited, is indeed to bring on a heavy penalty by implication, contrary to the nature of all punishments of crimes.

Replied for the complainers, That Wylie being a burges, and having houses in the town, is as properly a defender in this present principal process as any other; nor are the Provost and Counsellors convened in this process, under any other quality, but as co-burgeses: And Wylie is not only virtually, but in a manner *nominatim* cited, the council being cited as representing the community, whereof Wylie is one; so that he is really *nominatim* cited, seeing *constat de persona*.

Dupled for the defender, *imo*, That however every burges has a consequential interest in that which belongs to the community, yet certainly the direct right belongs to the collective body represented by the Magistrates; but every particular burges is under a distinct consideration from the collective body: And, therefore, if the community be pursuer or defender, it does not follow that every burges is so too; and therefore cannot be brought under penal laws, which concern pursuer or defender as such: For if this were, then every burges must be cited in actions pursued against a town, which was never said. *2do*, If this were sustained, there could be no equality in the case: For it cannot with any reason be alleged, That if Wylie, who is not called, had been the aggressor, therefore he made the community lose the plea; which shows, that really in the case of a community there are hardly habile terms for this act of Parliament. *3tio*, The *argumentum ab incommodo* is invincible; for this should oblige every person that has an action against a community to know every particular member, and every pursuer to know all persons who may claim any remote and consequential interest in the cause.

THE LORDS found the complaint not relevant to infer the penalty of the act of Parliament anent batteries during the dependence of a process; and therefore absolved from the complaint.

Act. Sir Wal. Pringle.

Alt. Sir Ja. Nasmyth.

Clerk, Alexander.

Bruce, No 32. p. 41.

NO II.
natin a party, although having an interest, the act of Parliament found inapplicable.