

to Thomson, for payment of the annualrent, prior to the public infeftment. Which was found sufficient, though thereby the public infeftment was excluded.

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1673. *November 27.* DAVID KENNOWAY *against* JAMES DAVIE.

DAVID Kennoway, having incarcerated William Cassils, by an act of warding, in the tolbooth of Linlithgow, for £1700, uplifted by Cassils, as his sub-collector of the excise of Linlithgow,—James Davie obtained Kennoway's consent to his liberation, upon granting a bond, betwixt and such a day, to cause Cassils count and pay, or to enter him then in prison, or otherways to pay the sum. Kennoway charges upon this bond. Davie suspends, and alleges That he had fulfilled the same, in so far as, upon the day prefixed in his bond, he presented Cassils to the bailie of Linlithgow, who gave the act of warding, and he refused to accept him; as an instrument, produced, bears; and that day falling to be Saturday, he actually entered Cassils in prison on Monday, where he continued several months. It was answered, That the offer to the bailie was not sufficient without intimation to Kennoway, and actual entry into prison, conform to the bond. *2do.* That Davie consented to let Cassils out of prison thereafter. *3tio.* That, the same day, after that he had offered himself to the bailie, there was a requisition to him to enter in the prison, which he refused, and so was wilfully contumacious, upon the day prefixed; so that Kennoway was not obliged to notice what he did after, nor to dispute whether his condition became worse than before he entered. It was replied, That this being a penal obligation, delay was purgeable, when the difference was inconsiderable, being the next week day, without detriment, and when obedience was offered the very day, though all formalities had not been exactly observed,—seeing it was no pretence, but a true imprisonment for several months; nor is it relevant that the cautioner consented to his liberation thereafter, for the bailies could not warrantably liberate upon his consent; [for] he, having performed his obligation to re-imprisonment, was not further interested. The Lords found the reasons of suspension relevant to liberate the cautioner; but, as to the charger's answer,—of requiring the cautioner to enter Cassils that same day after his offer to the bailie,—it not being debated, the Lords ordained them to be heard before the Ordinary thereupon.

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1673. *December 3.* SIR ROBERT DALZELL *against* The LAIRD of TINWALL.

SIR Robert Dalzell, being infeft in the ten-pound land of Achnan, which is a part of the barony of Amisfield, pursues a declarator of property of the moor of Achnan, and that the Laird of Tinwall hath no right thereto, or servitude of pasturage, moss, feal, or divot, therein. Tinwall pursues a declarator of his right of pasturage, moss, feal, and divot, in the said moor of Achnan, as part and pertinent of his lands of Tinwall. Upon both processes, the Lords, before answer, ordained either party to produce such writs and evidents, and to adduce