

1712. February 12.

ROBERTSON *against* STROWAN.

MRS MARGARET ROBERTSON being provided by her father to 2500 merks of portion, she pursues Strowan her brother for payment. *Alleged*, The sum is more than paid, in so far as, in my absence out of the kingdom, our mother having applied in 1690 to the privy council, craving an aliment to her children, out of the estate then under forfeiture, she obtained a locality on his saw-mill, by virtue whereof she uplifted near as much as would pay the whole bonds of provision to the rest, as well as the said Margaret, counting the fir-dales at sevenpence the piece, a very moderate price. *Answered*, The council's grant was a mere donative, and related to no bond: and therefore could never be ascribed in payment of any part of the debt. THE LORDS found, it being given as an aliment to the younger children, it behoved to come in place of their annualrents, and extinguish the same. But *quoad excessum* it could not impute in the principal sum, though the intromission considerably exceeded their annualrents; that not being the design of the council's gift. Whereupon Strowan gave in a protest for remeid of law to the British Peers, *alleging* the intromission should extinguish the principal as well as the interest. At the ingiving of the appeal, she objected he had no *persona standi*, being forfeited. *Answered*, He was remitted by the Queen's general pardon and indemnity: But the Lords did not think themselves concerned to meddle with this objection, but left her to insist on it before the Peers, if she thought fit.

Mrs Margaret had another summary action, by way of complaint, against him, that he had lost the plea by the certification in the 219th act 1594, because he had invaded her during the dependence; which being admitted to her probation, she desired the same might be advised this day. *Alleged* for Strowan, You cannot recur to this action now, because you having insisted in the principal cause for payment of your tocher, you have got a decret against him therein, and so cannot seek the same thing over again; for where ever there are two actions competent, the one *rei persecutoria*, and the other penal, and you have got the first, and prevailed in it; by your election you have consumed and absorbed the other, and cannot return to it; no more than a party could pursue both a *rei vindicatio* and a *condictio furtiva*; but must content himself with one of them. *Answered*, If the first decret had been total for my whole claim, then there might be some preterence to exclude me from my second subsidiary remedy; but so it is, by that first decret, 15 or 16 years annualrents are cut off, so my second action being *pinguior et uberior* than the first, in so far as I proving invasion, get my full libel in its whole extent, I may therefore insist in it, to make up what I want by the restriction of the first. But, *2do*, I must have its full value, because you have appealed from the Lords, and so loosed their decret, and laid it open: But if you will pay what is decerned to me, then I'll restrict my second action only to the superplus. THE LORDS found she might insist in this complaint. Then the Lords proceeded to advise the probation, the sum of which amounted

No 10.

Detaining in *privato carcere*, found such invading as to incur the penalty of the act of Parliament. A sister obtained decree against her brother for her provision. The decree did not give her whole claim; and her brother had appealed to the House of Lords. She insisted for the penalty of a battery. Found not to be precluded.

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.