1744. *November* 22. KER *against* ORR and FULTON.

No 134.
The Court of Session admitted to bail, on the act 1701, a person whom they had committed to prison, to take trial for subornation of perjury.

IN an improbation at the instance of James Ker of Crummock against Orr and Fulton, the witnesses called for the pursuer, deponed to the truth of the deeds. Before the proof was concluded, an application was made to the Court by Kerr, setting forth, That the said witnesses had come to a sense of their sin and folly, in deponing as they had done; and in evidence thereof, a letter and declaration from one of them was produced, bearing, that if a protection was granted to him, he would come before the Court and declare the truth.

It occurred to the Court, that though the witnesses should be called and give contrary depositions, it would be of little effect against the defenders; but as this Kerr had been formerly convicted of subornation, it was much suspected that he had been guilty of the like practice here, and therefore the Court was desirous to have the witnesses brought before them; but, for that end, took a different method from what had been proposed by Ker in his application, which was to have granted them a protection, and without which he had represented they would not appear. The Court gave a warrant to macers and messengers to apprehend them; and accordingly, one of them being brought, deponed clearly to Ker's attempting to suborn him; and he having pointed out other persons, these were also apprehended, and upon oath confirmed his evidence; whereupon the Lords committed Ker to the tolbooth of Edinburgh, in order to trial; and he having applied to be admitted to bail, a question arose this day in Court, Whether the case fell under the act 6th, parliament 1701.

It was the opinion of some of the LORDS, That it did not fall under the act of parliament, for that the act only concerned imprisonment for crimes proceeding upon informations, and was particularly intended to correct the abuse of committing officers, which did not apply to the case of persons committed by authority of this Court, who are no otherwise judges of crimes, than as they arise *incidenter* upon cases coming before them. And the case of forgery was mentioned, as what the Lords had, on former occasions, found, did not fall under the act of parliament, with respect to the time of commencing and finishing the trial, and for the same reason neither would it as to the case of admitting to bail.

On the other hand, it was answered, That of all laws whatsoever, a law for securing the liberty of the subject was to be most favourably and extensively explained; that as the words of it were general, so it might be of bad consequence to give any court power, upon suspicion of a person's having done any thing criminal in the course of a process before them, to commit the person to gaol, there to lie without having it in his power to obtain his liberation, although the crime charged were nowise capital. The law itself supposes wrongs to have been done at that time, and wrongs may yet be done in succeeding times, were the court left arbitrary, but which the generality of the expression

No 134. of the act of parliament will not admit. And as to the case of forgery, for that very reason that it is competent before this Court, the act of parliament could not take place with respect to the time of commencing and finishing trial, that being what the forms and time of the sitting of the Court could not admit; but as to bail for forgery, it fell under the act of parliament as other crimes; that is, where from the fact charged it appears capital, bail is not admitted; but where it is not clearly capital, the Lords are in use to admit bail.

It carried by a great plurality, 'To admit the petitioner to bail;' but as it had likewise been observed in the argument, that he had been formerly convicted of the like practice of subornation, and that should he get his liberty, he might still continue the practice upon other witnesses in the principal cause of improbation, which was not yet closed; although that was not a sufficient consideration to deprive him of the benefit of the act of parliament, it had this weight, that the Lords put him under the highest bail, which by the British statute they were empowered to do.

Fol. Dic. v. 3. *p.* 345. *Kilkerran,* (Jurisdiction.) *No* 4. *p.* 316.

1774. *November* 29.

William Kerr, and Agnes Shaw, his wife, *against* Matthew Hay.

No 135.
It is competent to the Court to judge in a reduction of a sentence pronounced by an inferior court, upon a criminal charge, and awarding a pecuniary reparation, which the private prosecutors deemed inadequate to the injury sustained.

An action was brought by Kerr and Shaw, with concourse of the procurator fiscal, before the Sheriff court of Ayr, against Matthew Hay, charging Hay with an assault and battery committed upon the private prosecutors, when they were going about their lawful affairs along the high-way, and without any manner of provocation; and concluding for L. 20 of assythment, damages, and expenses, and of the like sum to the procurator fiscal of court.

This battery and assault being committed when none were present, a reference was made to the oath of party; and, upon advising the defender's oath, the Sheriff-substitute pronounced an interlocutor, imposing a fine of a small sum, in full of assythment, damages, and expenses to the private prosecutor; and of five shillings sterling to the fiscal.

The private prosecutors, dissatisfied with the reparation awarded to them, brought a process of reduction of the Sheriff-substitute's judgment.

Argued for Hay; That a pursuer of a criminal action, brought before an inferior court, cannot, after decree, raise a reduction in this Court, so as to make way for a heavier sentence than the inferior court have thought proper to pronounce.

The Lord Ordinary found this action of reduction not competent before this Court, therefore dismissed the same; but, upon a reclaiming bill and answers,