June 28. 1825. although it does bear upon the face of it a discharge of the marriage settlement, still, if it was obtained from her by fraud, it ought to be set aside. But I must confess, that I can offer to your Lordships no other advice upon the present question, but that the interlocutor should be reversed; because I think, for the reasons I have given, that the deed is a discharge of the rights under her mother's marriage-contract. The judgment of your Lordships will be, to reverse the finding, and remit the case back to the Court of Session, to proceed further upon it as they may think advisable.

Appellants' Authority.—Todd, Dec. 12. 1770.

Respondent's Authorities.—1. Stair, 18. 2.; 3. Ersk. 4. 9.; Swan, June 17. 1620, (5038.); Weems, July 24. 1706, (912.); Gordon, Dec. 25. 1702, (5050.); Monro, Dec. 16. 1712, (5052.); Anderson, Nov. 22. 1743, (5054.); Hepburn, June 24. 1785, (5056.); Fife, Nov. 29. 1751; Nisbett, Jan. 18. 1726, (8181.); Sinclair, July 29. 1768, (8188.); Irvine, Dec. 15. 1744, (2304.); Maxwell, Feb. 1722, (3194.)

DUTHIE—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 53.

JAMES DUNCAN, Appellant.

HIS MAJESTY'S ADVOCATE, Respondent.

Jurisdiction—Fraudulent Bankruptcy—Stat. 1701, *c.* 6.—*Wrongous Imprisonment.*—Held, (affirming the judgment of the Court of Session), 1. That under the Act 1696, c. 6. the Court of Session has jurisdiction, exclusive of the Court of Justiciary, as to fraudulent bankruptcy; 2. That although a party was imprisoned on a charge of fraud and fraudulent bankruptcy by a warrant of the Court of Justiciary, yet that letters of intimation under the Act 1701, c. 6. from that Court were unavailing to the effect of getting liberation from imprisonment under a charge of fraudulent bankruptcy; and, 3. Question raised as to whether the Act 1701, c. 6. applied to proceedings before the Court of Session, and the finding of that Court in the negative superseded.

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1ST DIVISION.

ON the 12th of August 1822 the Lord Advocate presented a petition to the High Court of Justiciary against James Duncan, grocer and spirit-dealer in Leith, praying for warrant to incarcerate him in the tolbooth of Edinburgh, 'as guilty of fraud 'and fraudulent bankruptcy, till liberated in due course of law;' and warrant was upon the same day granted accordingly, in virtue of which he was imprisoned in the jail of Edinburgh. On the 14th Duncan applied to the Court of Justiciary for letters of intimation, in terms of the statute 1701, cap. 6. which were issued and served on the Lord Advocate on the 16th. On the 12th of October the Lord Advocate presented a petition and

complaint to the Lords of Council and Session, and the Lord Ordinary on the Bills, charging Duncan with fraudulent bankruptcy, and praying for warrant of service. This was granted by Lord Cringletie, as Ordinary upon the Bills, on the 14th, and Duncan was ordained to lodge answers by the 12th of November. This warrant having been served, and the sixty days having expired upon the 15th of October, Duncan on the following day, being the 16th, applied for liberation to the Court of Justiciary in terms of the statute. This was refused on the 18th by Lord Meadowbank, in respect of the petition and complaint to the Court of Session. No answers having been lodged, the Court of Session, on the 13th of November, granted warrant to bring Duncan to the Bar on the following day, which was accordingly done, and answers were thereafter lodged by him. Thereafter, on the 28th, Duncan, alleging that his trial had not been brought to a conclusion within thirty days, in terms of the statute 1701, presented a petition to the Court of Session to be discharged. This gave rise to two questions: 1st, Whether the Act 1701 was applicable to proceedings before the Court of Session, and particularly relative to fraudulent bankruptcy? and, 2d, Supposing that it was, whether the letters of intimation from the Court of Justiciary were available in relation to a charge of fraudulent bankruptcy? which, again, gave rise to the question, whether the Court of Session had an exclusive jurisdiction in regard to such a crime? The Court, on the 21st January 1823, after a hearing in presence, found, 'that the provisions 'of the Act of Parliament 1701, cap. 6. do not apply to cases of 'fraudulent bankruptcy, which are cognizable only in the Court 'of Session, and therefore refused the petition.'*

Duncan appealed, and both the above questions were fully argued: but as that relative to the Act 1701 was superseded by the judgment of the House of Lords; and the other, in regard to the Court of Session having a jurisdiction exclusive of the Court of Justiciary, has been regulated by the 7. and 8. Geo. IV. cap. 20. declaring that the Court of Justiciary shall be competent to try the offence; it is unnecessary to give any detail of the argument, or of the proceedings, which are fully set forth in the speech of Lord Gifford.

The House of Lords ordered and adjudged, 'that the said

* See 2. Shaw and Dunlop, No. 129.

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'interlocutors complained of be affirmed, without reference to 'the special finding in the last interlocutor, as to which the 'Lords, viewing all the circumstances, do not think it necessary 'to come to any determination.'

LORD GIFFORD.—I will call your Lordships' attention to a case, in which James Duncan is the appellant, and Sir William Rae, the Lord Advocate of Scotland, is the respondent. My Lords, the question raised upon this appeal is, whether the appellant was properly detained in custody by an interlocutor of the Court of Session, having reference to the application of the Act of 1701, chapter 6.?

My Lords,—It will be necessary to draw your Lordships' attention to the circumstances out of which the question arises, and the whole of the proceedings which have taken place in the Court of Session and the Court of Justiciary. It appears that the appellant, who formerly carried on trade in Scotland, having become a bankrupt, a charge was preferred against him of fraud. Upon the 12th of August, in the year 1822, a petition was presented to the High Court of Justiciary, in the name of his Majesty's Advocate, which prayed for a warrant to incarcerate the appellant in the tolbooth of Edinburgh, as guilty of fraud and fraudulent bankruptcy, till liberated in due course of law. In consequence of that petition a warrant was issued, bearing date the 12th of August (the same day), granted by the Lord Justice-Clerk, and the appellant was, by virtue of that warrant, removed from the tolbooth of the Abbey of Holyrood-House to that of the city of Edinburgh, in which he has been ever since confined.

My Lords,—The appellant being thus imprisoned, he immediately applied, in terms of the 6th Act of the first Parliament of King William, for letters of intimation, calling on his Majesty's Advocate to fix a diet for his trial within sixty days. That was a proceeding which he was authorized to take under the Wrongous Imprisonment Act; and the effect of that proceeding, as it must be in your Lordships' recollection, was to force on the prosecutor to a trial, or to fix a trial within sixty days. My Lords, letters of intimation were accordingly ordered by the Lord Pitmilly to be issued on the 14th of August 1822, and they were regularly served on his Majesty's Advocate on the 16th of the same month of August. Now, your Lordships understand, that, supposing the appellant was regularly proceeding, the diet being to be fixed within sixty days from the service of the letters of intimation, those sixty days would expire on the 15th day of October.

After these letters of intimation had been thus served, it was discovered by the prosecutors that they had taken a wrong course of proceeding; at least that was their impression; for that the offence with which they wished to charge the appellant, that of fraudulent bankruptcy, being an offence, as they conceived, created by a statute which passed so long ago as the year 1696, under that statute the cognizance of that offence was intrusted solely to the Court of

Session: this, I say, being discovered on the part of the prosecutors, they, on the 12th of October, three days before the expiry of the sixty days of the letters of intimation, preferred a petition and complaint to the Court of Session; which petition and complaint proceeded entirely upon the charge against the appellant of having been guilty of fraudulent bankruptcy, within the intent and meaning of that statute passed in the year 1696. The petition and complaint began with a short recital of that Act, and then of the facts which were alleged against the appellant, and which were supposed to bring him within the provision of that Act; and then the prayer of that petition was, that the Lords of Session should grant warrant for serving this petition and complaint upon the said James Duncan, and ordain him to put in answers thereto on the 12th day of November next, or on such other day as their Lordships should judge proper; and thereafter, on resuming consideration thereof, to inflict on the said James Duncan such punishment as their Lordships should deem adequate to his offence; and in the mean time to grant warrant for detaining him in the jail of Edinburgh until liberated in due course of law. June 28. 1825.

In consequence of that petition and complaint, the Lord Ordinary, Lord Cringletie, before whom it was heard, pronounced an interlocutor on the 14th of October 1822, in which he stated this:—'Having considered this petition, grants warrant for serving the 'same, with a copy of this deliverance, upon the said James Duncan, 'and appoints him to put in answers thereto on the 12th day of No-'vember next; and ordains this petition and complaint to be boxed to 'the Court, with or without answers, on that day.'

My Lords,—The appellant Mr Duncan conceiving, that at the expiration of the sixty days, which terminated on the 15th of October, no diet having been fixed for the trial on the original charge before the High Court of Justiciary, he was entitled to his discharge, he, on the 16th of October, presented a petition to the Court of Justiciary for his discharge. That petition for liberation, which had been presented to the High Court of Justiciary, came to be advised by the Lord Meadowbank, one of the Lords of Justiciary, who pronounced an interlocutor refusing the desire of the petition, 'in respect of the petition 'and complaint presented by his Majesty's Advocate to the Court of 'Session, and the deliverance thereon by the Lord Ordinary on the 'Bills; and also, in respect that it is to be inferred from the terms of 'the Act 1696, cap. 5., and is laid down by the authorities in point 'of law, that the crime with which the petitioner stands charged, and 'for which the warrant on which he is incarcerated was granted, is 'only cognizable by the Court of Session, and not by the Court of 'Justiciary; reserving to the petitioner, if so advised, to apply for 'liberation to the Court of Session, or Lord Ordinary on the Bills.'

Now, your Lordships perceive, that the effect of this interlocutor pronounced by Lord Meadowbank is, that in as much as he considered that the crime of which the petitioner stood charged, and for which

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the warrant on which he was incarcerated was granted, was only cognizable by the Court of Session, he was not authorized to discharge him at the time when this petition of liberation was presented. My Lords, there has been no question in this cause, whether or not my Lord Meadowbank, or the Court of Justiciary, were bound, at the time this petition of liberation was presented, to have granted to the appellant the liberation, so far as the warrant for incarcerating him from the Court of Justiciary was concerned, he being to receive his discharge from the Court of Session: the effect of the decision of Lord Meadowbank was, perhaps, that the case was considered as being in the Court of Session.

The matter was brought before the Court of Session on the 13th of November. It appeared that the appellant had not thought fit to obey the order pronounced by the Lord Ordinary on the Bills, ordaining him to put in answers to the petition and complaint. On the 13th of November the matter was moved in the First Division of the Court, and then this interlocutor was pronounced: 'The Lords having con-'sidered this petition and complaint, and no answers having been given 'in thereto, grant warrants at the petitioner's instance, in terms of the 'prayer of the petition to the Magistrates of Edinburgh, and keepers 'of their tolbooth, wherein the said James Duncan is presently incar-'cerated, to keep and detain the person of the said James Duncan in 'prison until he shall be liberated in due course of law; and further, 'appoint the said James Duncan to appear at the Bar of this Court 'to-morrow at ten o'clock, and grant warrant to macers of Court, or 'messengers at arms, to receive the said James Duncan from the tol-'booth and produce him in Court accordingly; and dispense with the 'minute-book.'

My Lords,—It appears that on the following day Mr Duncan appeared at the Bar of the Court of Session, when he applied to be admitted to the benefit of the poor's roll, and to have Counsel assigned to him. This of course led to an extension of the time for giving his answer to the petition and complaint. The Court, upon that occasion, pronounced this interlocutor: 'The Lords having resumed 'the consideration of this petition, with the note given in for the said 'James Duncan, who appeared at the Bar in terms of the deliverance 'of the Court of yesterday, in respect of the circumstances of the case 'they admit the said James Duncan to the benefit of the poor's roll, 'so far as regards the question at issue; appoint Messrs Francis Jeffrey 'and James Allan Maconochie, advocates, to act as Counsel for the 'said James Duncan, and Robert Playfair, solicitor, to act as agent 'in conducting and carrying on his defence; and farther, ordain an-'swers to the complaint to be given in, printed, and put into the boxes, 'within ten days from this date, and direct the said James Duncan to be 'carried back from the Bar to the prison.' The appellant accordingly gave in answers to the petition and complaint, in which, while he denied the whole of the facts alleged against him, he maintained that they

were not set forth with that minuteness and precision requisite in a criminal charge, and that the facts, even if proved, did not amount to the crime of fraudulent bankruptcy. On these points no judgment has been pronounced by the Court below, the case having been superseded by the Court of Session till the issue of the present appeal. June 28. 1825.

In the mean time, the period of thirty days, to which I am about to call your Lordships' attention, within which, as the appellant contends, the trial against him ought to have taken place, had expired; for the thirty days expired on the 13th of November, the day before that on which he appeared at the Bar of the Court, and prayed to have Counsel assigned him: however, my Lords, he applied on the 28th of November 1822 to the Court of Session by petition, praying their Lordships, 'in terms of the statute 1701, cap. 6., within twenty-four 'hours to issue out letters or precepts direct to messengers, for charg-'ing the Magistrates of Edinburgh, or keepers of their tolbooth, for 'setting the petitioner at liberty, under the penalty of wrongous impri-'sonment.' The Court, being of opinion that the point mooted was one of great importance, were desirous that it should be considered with greater deliberation than the short period of twenty-four hours specified in the statute admitted of. Accordingly, a minute on behalf of the appellant was given in by his Counsel, consenting to the final deliverance on the petition being delayed for such reasonable period as the Court might deem necessary for the due consideration of its merits, without losing sight of its urgency, and the summary decision to which it is entitled. The Court pronounced an interlocutor, on the 29th November 1822, in these terms:—'The Lords having consider-'ed this petition, with the minute of consent by the petitioner's Coun-'sel, in respect thereof appoint the petition to be seen and answered 'by his Majesty's Advocate, the answers to be printed and put into 'the boxes within eight days from this date, under an amand of forty 'shillings sterling.' Answers were accordingly given in on behalf of the respondent, and the case was appointed to be argued at the Bar before their Lordships in the month of December; and on the 23d of January an interlocutor in these terms was signed:—'The Lords hav-'ing resumed consideration of this petition, and advised the same with 'the answers thereto, and having heard Counsel for the parties in their 'own presence, they find, that the provisions of the Act of Parliament '1701, cap. 6. do not apply to cases of fraudulent bankruptcy, which 'are cognizable only in the Court of Session; therefore refuse the 'desire of this petition, and decern;' and, my Lords, as I have stated to your Lordships, from this interlocutor the appeal has been brought.

Before I again call your Lordships' attention to the facts of this case, I would just advert to the provisions of the Wrongous Imprisonment Act, as they apply to this part of the case. After directing with respect to the warrants, and so on, the statute goes on, 'His Ma-'jesty, with advice and consent foresaid, further statutes and ordains, 'that, upon application of any prisoner for custody in order to trial,

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'whether for capital or bailable crimes, to any of the Lords of Justi-
'ciary, or other Judge or judicatory competent for judging the crime
'or offence for which he is imprisoned, and the said prisoner his pro-
'ducing the said double of the warrant of his imprisonment under the
'keeper's hands, the said Judge or judicatory competent, under the
'pain of wrongous imprisonment, are hereby ordained, within twenty-
'four hours after the said application and petition is presented to
'him or them, to give out letters or precepts direct to messengers,
'for intimating to his Majesty's Advocate or Procurator-fiscal, and
'the party appearing by the warrant to be concerned, if any be within
'the kingdom, to fix a diet for the trial within sixty days after the in-
'timation, certifying his Majesty's Advocate and Procurator-fiscal, and
'the said party concerned, that if they fail the prisoner shall be dis-
'charged and set at liberty without delay; for doing whereof, the
'said Judge or judicatory competent are hereby expressly warranted;
'and strictly required and ordained to do the same, under the penal-
'ty foresaid, unless the delay be upon the prisoner's petition or desire:
'And the diet of trial being prefixed, the Magistrates of the place, or
'keeper of the prison, shall then be obliged to deliver the prisoner to a
'sufficient guard, to be provided by the Judge, his Majesty's Advocate,
'or Procurator-fiscal, that the prisoner may be sisted before the Judge
'competent; and his Majesty's Advocate or Procurator-fiscal, shall in-
'sist in the libel, and the Judge put the same to a trial, and the same
'shall be determined by a final sentence within forty days, if before the
'Lords of Justiciary, and thirty days if before any other Judge.'

Now, my Lords, according to the facts of this case, the first charge against this appellant, and the warrant upon it, as I have stated to your Lordships, occurred on the 12th of August 1822. That warrant issued from the Court of Justiciary, and it charged the appellant with fraud and fraudulent bankruptcy. My Lords, letters of intimation were accordingly, as I have stated to your Lordships, granted by the Court of Justiciary on the 14th of August 1822, and were regularly served on the Lord Advocate on the 16th of August. Now, with respect to the sixty days, therefore, from the letters of intimation, the warrant expired on the 15th of October; but, in the mean time, a new charge was preferred—when I say a new charge, I should rather say, a charge of the same nature as the original charge, but before a different tribunal—namely, before the Court of Session, and that charge was preferred on the 14th of October 1822. Now I think I may represent the question, whether or not the Court was competent, as depending upon the question, how far the previous letters of intimation could be applied to that charge preferred on the 14th of October 1822? and another question occurs in this case, which does not seem to have been adverted to, or reasoned upon in the Court below, whether it was competent for this appellant, after having himself acquiesced in the competence of that second charge, by asking further time to give in his answer on that petition and complaint, which farther time extended

beyond the time at which he says he ought to have been liberated;— whether, I say, it was competent for him to complain after that, as he has done, that he was not brought to trial sooner, that petition having been preferred on the 14th October 1822? However, certainly, we find the decision did not turn upon any such point; and I only mention these as points which might be deserving of very serious consideration. The questions which were discussed in this cause were three: First, Whether the offence of fraudulent bankruptcy under the statute of 1696, (for which offence, and for which offence only, this charge in the Court of Session was preferred), was cognizable solely by the Court of Session—whether the Court of Session had, according to the language used in this paper, an exclusive jurisdiction with reference to that offence? The next question was, Whether, after the letters of intimation obtained from the Court of Justiciary, the Court were, in that view of the case, competent to try the offence? The third question—certainly a much larger question, and one of greater importance—was, Whether the provisions of the Wrongous Imprisonment Act apply at all to criminal proceedings in the Court of Session? My Lords, upon all those questions a difference of opinion appears to have prevailed among the members of the Court of Session. A very elaborate opinion was given by both those who were in favour of the interlocutor and those against it. The first question to be considered is with respect to the nature of this offence of fraudulent bankruptcy under that statute of 1696? It was admitted in the argument, that the Court of Justiciary in Scotland has jurisdiction, generally speaking, over all offences; and therefore, if any offence was created by statute, though the same statute advanced nothing on the subject of jurisdiction, the Court of Justiciary would have cognizance. But it was contended on the other side, that where the statute creates a new offence, and at the same time gives jurisdiction to a particular Court, and directs that that particular Court shall judge of the punishment to be inflicted for that offence; in that case, (which they contended was the present), that Court, to which jurisdiction is given by the Act of Parliament, is the Court alone in which that jurisdiction lies, or that offence can be taken cognizance of, or adjudicated upon.

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Now, my Lords, I will beg to call your attention to the Act of 1696. It is an Act to declare the law with respect to bankruptcy. The first part of the statute contains enactments as to those acts which shall be considered proofs of bankruptcy—and then it goes on, 'And, 'lastly, His Majesty, and the Estates in Parliament, do hereby sta- 'tute and ordain, that if any person shall hereafter defraud his credi- 'tors, and be found, by sentence of the Lords, to be a fraudulent 'bankrupt,'—'Lords' here meaning the Lords of Session,—'the 'degree of his fraud shall also be determined by the same sentence, 'and the person guilty not only held to be infamous infamia juris, 'but also be by them punished by banishment or otherwise, (death 'excepted), as they shall see cause.'

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Now, my Lords, looking at the language of this statute, when you see that a discretion is placed in the Court respecting the degree of punishment which shall be inflicted on the party who is adjudged a fraudulent bankrupt; and when you find that the sentence by which the party is thus adjudged a fraudulent bankrupt, is to be a sentence of the Court of Session, in whom this discretion is vested; I must confess, upon considering this statute and the language of it, for my own part, it does appear to me that it was intended by this statute, that as far as this specific sentence was concerned, namely, declaring a man a fraudulent bankrupt within the meaning of this Act, the jurisdiction should be given to the Lords of Session, and can be exercised by no other. My Lords, I say that is my opinion, looking at the statute of 1696.

But then we come to consider, how this statute has been considered in practice in Scotland from that period to the present. It was admitted at the Bar, and is admitted in these papers, that no instance has ever occurred of a prosecution for this offence under the statute of 1696 (and I beg to impress that upon your Lordships' minds) having been preferred in the Court of Justiciary, while, on the other hand, frequent instances have occurred of men being accused of fraudulent bankruptcy before the Court of Session, and the Court of Session having adjudged upon them.

What say their institutional writers upon the subject? Why, my Lords, an authority to which reference is frequently made at your Lordships' Bar and in the Court below, I mean the authority of my Lord Bankton, says, that the offence is statutory, and that the Court of Session alone is competent to punish the fraudulent bankrupt. That is in Bankton, book i. tit. 10. par. 122.; (which is referred to in the respondent's case): he considers the offence as statutory, and that the Court of Session alone is competent to punish the fraudulent bankrupt.

Mr Erskine delivers the same opinion in book iv. tit. 4. sect. 79. He says, 'Fraudulent bankruptcy may be accounted a particular kind of 'stellionate, the cognizance of which is by special statute, 1696, cap. 5. 'appropriated to the Session, who may inflict any punishment upon the 'offender that shall to them appear proportioned to his guilt, death ex-'cepted.' And, my Lords, in his smaller work, in his Principles, to which I have referred to see in what manner he states the proposition there, it is stated perhaps rather more strongly; for there he says, book iv. tit. 4. sect. 41. 'That the cognizance of fraudulent bank-'rupts is exclusively in the Court of Session, who may inflict any 'punishment on the offender that appears proportioned to his offence, 'death excepted.' My Lords, Baron Hume in his Commentaries states the same proposition; so that your Lordships find not only the absence of any prosecution from the time of the statute in the Court of Justiciary, which absence corroborates the construction of that statute, but you have the opinion of the institutional writers upon the subject,

and the fact that this crime has been taken cognizance of by the Court of Session. I cannot, therefore, help concurring in the opinion of the Judges of the Court below, who were of opinion that the Court of Session had exclusive jurisdiction over the offence stated in this petition and complaint. I have all along stated, (and your Lordships will keep this in view), that this petition and complaint proceeds upon the statute of 1696. June 28. 1825.

My Lords,—If the Court of Session had an exclusive jurisdiction over this offence, then the next question is, Were the letters of intimation properly issued from the Court of Justiciary? The language of the statute of 1701 is, 'that upon application of any prisoner for cus-'tody in order to trial, whether for capital or bailable crimes, to any 'of the Lords of Justiciary, or other Judge or judicatory competent 'for judging the crime or offence for which he is imprisoned.' Now, I apprehend it is quite clear it was intended by this statute, that the Court granting the letters of intimation should, in the language of the statute, be competent to try the offence; and it would be singular if it were not so. A case is referred to in these papers—a case to be found in Baron Hume's work, that of Spittal—it was with respect to an inferior jurisdiction. There the application was to the Sheriff of the county; and it was held that he was not competent to try the offence, and therefore it was held that the letters of intimation were improperly issued. The case is stated in a note in Hume, vol. ii. p. 98. He says, 'Effect was accordingly given to that limitation in the trial '(27th of November 1809) of Robert Spittal for robbery. It was ob-'jected in bar of trial, that it had not been brought on in due time 'after intimation made under the Act to the procurator-fiscal of Perth-'shire, the pannel being a prisoner in the gaol of Perth. Mr Solicitor 'General answers, that in this case no letters of intimation had either 'been applied for or granted by any Judge competent to issue the 'same, in terms of the Act of Parliament referred to. The Act 1701 'allows a person for trial to apply to a Judge competent to the trial 'of the offence for letters of intimation. But in this case the pannel 'was imprisoned for trial for the offence of robbing Andrew Harley 'near to Carubrae, in the county of Kinross; yet the pretended appli-'cation for letters of intimation was made to the Sheriff of Perth, who 'was competent neither to the trial of robbery, nor to that of an 'offence committed in Kinross-shire. The Lords find the intimation 'irregular, and therefore repel the objection stated in bar of trial.'

Undoubtedly there the application was made to the Sheriff, who had no competent jurisdiction to try the offence; but here the principle is equally applicable, because if jurisdiction with respect to the offence of fraudulent bankruptcy under the statute of 1696 is confined to the Court of Session, it seems to be equally incompetent to the Court of Justiciary to grant letters of intimation to controul the proceedings to take place in another Court of ordinary, if not superior jurisdiction; and

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therefore, supposing the letters of intimation in this case might have been sufficient, if applied for to a Court of competent jurisdiction at the time they were applied for, and to have been compulsory on the Lord Advocate to fix the diet for trial—I say, assuming that—for at the time the letters of intimation were applied for, the party was in custody, not under a warrant from the Court of Session, but from the Court of Justiciary on a charge preferred there, but which it was afterwards found it was not competent for the party to prefer in that Court, though being preferred, it was competent for the party to apply under the statute of 1701 to that Court; but finding their mistake, they subsequently preferred another petition and complaint before the Court of Session,—I say, assuming that, under these circumstances, letters of intimation could have been applied for to the Court of Session when they were applied for to the Court of Justiciary, still it appears to me, the letters of intimation having issued from the Court of Justiciary, they have issued from a Court not competent to grant them within the statute of 1701, and that therefore those letters of intimation could have no effect.

My Lords,—These grounds are fully sufficient for your Lordships to sustain the interlocutor which has been pronounced; and being so, I apprehend your Lordships will not feel it necessary to go beyond that which is necessary for the determination of the particular case. My Lords, I mention this, because the other, which is a very important question, perhaps the most important, if it fairly arises, is, Whether the Wrongous Imprisonment Act can be applicable to this proceeding? Whenever this question shall come fairly before your Lordships, and is necessarily to be decided, it will be of the greatest importance to attend not only to the language of the statute of 1701, but, I apprehend, also to the course of decisions which has taken place since the statute was passed; because, my Lords, although I am perfectly willing to concede, that if the statute be, in its enactments, clear and express, perhaps no continued chain of decisions upon the construction of that statute would bind your Lordships, where you clearly see that those decisions are at variance with the express clear language of it; yet, in a case which does not appear to be so perfectly clear, I should submit to your Lordships, that, in deciding what is the law of Scotland, (the same as with respect to the law of England), you would consider the opinions of Judges, sitting from time to time on the construction of that Act of Parliament, as deserving of attention, and therefore would consider, as entitled to great weight, the decisions which have taken place: and I would mention this fact, which cannot be denied, that several cases have occurred since the statute 1701, in which the Court below has been of opinion, that the provisions of the statute of 1701 were not, and could not be applicable to the decision of the Court of Session. Your Lordships are perfectly aware, that though the Court of Session is a Court for the adjudication of civil

rights between party and party, there are cases besides that of fraudulent bankruptcy with which it has an exclusive jurisdiction, or in which it has a concurrent jurisdiction with the Court of Justiciary.

On the one hand, it is said that the statute of 1701, an Act highly valued in the law of Scotland, and justly so, because its provisions, though not analogous to our Habeas Corpus Act, were intended to confer privileges of the same nature on the lieges of Scotland, and to enable them to relieve themselves from false imprisonment, or to prevent delay in their being brought to trial; whilst that statute, in its enactments, is very clear, and might therefore be intended to apply to all proceedings, whether before the Court of Session or the Court of Justiciary, yet, when you come to consider this Act, and how it is to be applied to the mode of proceeding in the Court of Session, the cases which have been decided upon that subject seem to be of great importance in enabling your Lordships finally to determine, if you should be ever called upon so to do, whether the Wrongous Imprisonment Act can be applied to the proceedings of the Court of Session, or whether, if it cannot be so applied, the subject is not entitled to the benefit which it is intended should be conferred upon it by that Act of Parliament. But, my Lords, it is my opinion, that by the form of proceeding adopted, the offence for which the party was proceeded against was cognizable under that Act of Parliament solely in the Court of Session; and that that being so, letters of intimation ought to have been applied for, and ought to have been obtained from the Court of Session; and that not having been so, the party had not brought himself within the terms of the Act of Parliament, and was not entitled, therefore, to call upon the Court of Session. We have nothing to do in the present appeal with whether he was entitled to be discharged from the warrant in the Court of Justiciary, which probably was intended to be the effect of Lord Meadowbank's interlocutor. The question is, Whether, at the time he preferred that petition to the Court of Session to be discharged from the warrant issued by the Court of Session, he had at that time, by letters of intimation issued by the Court of Justiciary, brought himself within the terms of this Act of Parliament, and entitled to call upon the Court to discharge him. For the reasons I have ventured to submit to your Lordships, it appears to me he was not at the time so entitled,—that the offence with which he was chargeable as a fraudulent bankrupt was cognizable only by the Court of Session, and that the letters of intimation ought not to have issued from that Court. The other point to which I have adverted in my introductory observations on this case, I think also entitled to serious consideration. My Lords, upon those two grounds, it appears to me the interlocutor which has been pronounced by the Court of Session, in substance refusing the desire of the petitioner, and decerning, is an interlocutor to which your Lordships will adhere; but inasmuch as I have not called upon your Lordships to pronounce a decision upon that very important question, (since it is unnecessary

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in this case), whether the provisions of the statute of 1701 do apply to the Court of Session or not, I think it would be right, lest it should be conceived that the decision which may be made has rested upon that ground, that some words should be introduced to guard against that inference. I will therefore take care, in the form of the judgment I shall propose to your Lordships to pronounce upon this case, that your Lordships shall not, by affirming this interlocutor, be supposed to affirm that general proposition, which may be supposed to be included in the interlocutor as pronounced. They say, 'The Lords 'having resumed consideration of this petition, and advised the same 'with the answers thereto, and having heard Counsel for the parties 'in their own presence, they find that the provisions of the Act of Par-'liament 1701, c. 6. do not apply to cases of fraudulent bankruptcy, 'which are cognizable only in the Court of Session;' from whence it might be supposed, that they meant to decide this solely on the ground that the provisions of the statute of 1701 do not apply to the Court of Session. My Lords, the other ground argued upon, but not expressly decided by the Judges in the Court below, appears to me to be quite sufficient to justify the interlocutor which has been pronounced; and therefore I would propose to affirm this judgment, at the same time taking care to introduce some words to shew that this case has not been decided upon that ground.

Appellant's Authorities.—Stat. 1555, cap. 47.; 1581, cap. 118.; 2. Hume, 32. 37, 38.; Kilk. 316.; 2. Mackenzie, p. 5.; Blackstone, b. 1. § 3.; 1. Hume, 502.; Burnet, p. 167. 380.

Respondent's Authorities.—2. Hume, 37.; 1696, cap. 5.; 1. Bank. 10. 122.; 4. Ersk. 4. 79.; 1. Hume, 503.; 2. Hume, 98.; Burnet, 355.; 4. Ersk. 4. 85.; 2. Hume, 107.; Burnet, 380.; Rodger, Feb. 4. 1737, (Elchies, Wrong. Imp. No. 3.); Kerr, Nov. 22. 1744, (No. 8. Ib. and 7419.); Stark, July 29. 1748, (3442.); Cameron, Aug. 9. 1754.

——— A. MUNDELL,—Solicitors.

No. 54.

EARL OF BREADALBANE AND HOLLAND, Appellant.
CLAUD RUSSELL, (CAMPBELL'S Trustee), Respondent.

Assignation in Security—Lease.—Two parties being joint tenants of certain quarries, and sole partners of a company for working them; and one of them having become the landlord, and advanced a sum of money for the other, who, in security, granted an assignation of his share in the concern; and there being no publication of this deed, or express intimation to the manager of the quarries, till within sixty days of the granter's bankruptcy; and the Court of Session having found, in a question with his creditors, that the assignee had acquired no preference;—The House of Lords remitted to take the opinions of all the Judges.