

1806. *June 20.* *Andrew against Murdoch.*

THIS was an action of damages for wrongous imprisonment, brought against the Sheriff-substitute of Ayrshire, on account of an alleged violation of the act 1701.

On the 28th of June 1800, a petition was presented to John Murdoch, Sheriff-substitute of Ayrshire, by the Procurator-fiscal of the county, stating, That a society existed in Maybole, under the name of a Mason Lodge, the object of which was to propagate seditious and irreligious opinions; and praying for a warrant to apprehend John Andrew and Robert Ramsay, the leading members of this association. The warrant was granted and these persons were apprehended on the 30th June, when a precognition was taken by the Sheriff-substitute, and several persons were examined. At the end of this precognition, an interlocutor was written out, authorising the officers of court to apprehend Andrew and Ramsay, and to incarcerate them in the tolbooth of Ayr, 'therein to remain until they shall be further examined anent the crimes of which they are accused.' At the same time, the Sheriff-substitute directed a warrant to the Magistrates of Ayr, in these terms:

GENTLEMEN, *Maybole, 30th June, 1800.*  
 'You will please receive, and detain in your tolbooth, the persons of John Andrew, shoemaker, and Robert Ramsay, cart-wright, both in Maybole, accused of seditious practices, until they shall be liberated in due course of law; for which this shall be your warrant. And you are requested to put these two persons into separate apartments in your jail, that they may have no communication with each other, nor with any other person, without your liberty. I am, Gentlemen, your most obedient servant,  
 (Signed) 'JOHN MURDOCH.

'To the Honourable the Magistrates of }  
 'Ayr, and keepers of their tolbooth.' }

Upon this warrant, Andrew and Ramsay were committed.

The Sheriff-substitute transmitted the precognition to Edinburgh, to have the advice of the Crown-counsel with regard to the amount of the bail, and also to know whether any application was to be made to the Court of Justiciary, to have the amount of bail in this case augmented, in terms of the 39th Geo. III.

Upon the 2d of July, as asserted by the one party, or the 9th of July, as maintained by the other, a petition was presented by John Andrew to be admitted to bail, on which 'the Sheriff (on the 9th of July) delays giving any deliverance until he hear from the Crown lawyers.' In consequence, however, of some circumstances in his family, Ramsay was allowed to leave pri-

No. 3.

The provisions of the act 1701 do not apply to imprisonment for further examination.

In cases of sedition, the Magistrate by whom a warrant of imprisonment is granted, may delay giving a deliverance on a petition for bail, until he have communication with the Crown-counsel with regard to the bail to be required.

No. 3.

son, on finding caution to return in a few days; but Andrew remained in confinement till the 12th July, when the Sheriff having heard from the Crown-counsel, pronounced an interlocutor, finding the crime bailable, and admitting him to bail. Andrew and Ramsay were tried for sedition at the Ayr circuit, and acquitted.

Andrew raised an action of wrongous imprisonment against the Sheriff-substitute, libelling on the act 1701, Cap. 6. and concluding for the penalties fixed by that act, or at least for damages at common-law on account of oppression.

The Lord Ordinary 'sustained the defences;' and the Court (20th June 1804) adhered, upon advising a petition, with answers. The case having again been brought before the Court, counsel were heard in presence.

The pursuer

Pleaded: The object of the act 1701, is to protect the subject from the oppressive acts of those entrusted with executive or ministerial authority. It is founded upon a jealousy of judges and magistrates, and, accordingly, all its provisions are absolute and explicit. Nothing is left to the discretion of the judge; and the strict observance of the act is enforced, by imposing penalties, and providing that no power whatever shall modify these penalties. The defender has made himself liable in the pains of wrongous imprisonment, under the act, 1<sup>st</sup>, by not giving a deliverance on the petition for bail within the time prescribed; 2<sup>dly</sup>, by not admitting the pursuer to bail, though accused of a bailable offence.

The general terms of the act 1701, apply to all kinds of imprisonment, except such as proceeds either from the consent of the party, or the authority of a Judge. It applies, therefore, to imprisonment for further examination; and if it did not, the provisions of the act might easily be eluded altogether, by making out the commitment for further examination, whether such was really intended or not. It is not to be presumed, that an act of Parliament, which is so jealous of the liberty of the subject, is to be evaded by a device of this sort, or that a person imprisoned for trial, against whom there are substantial grounds of suspicion, should be in a better situation than him of whose guilt there are only surmises, which on further investigation may be entirely done away.

But even supposing that the act 1701 does not extend to imprisonment for further examination, it is clear, that the imprisonment of which the pursuer complains was in consequence of a commitment in order to trial. The warrant to the Magistrates of Ayr is, that the pursuer be imprisoned 'until liberated in due course of law,' which is the form used in commitments in order to trial. It is to no purpose that the defender wrote out a warrant in different terms at the end of the precognition. The warrant used is the only warrant which can be regarded; and it is clear, that by that warrant the pursuer was imprisoned in order to trial. This is further evident from the terms

of the interlocutor of the 12th of July. Had the pursuer been committed merely for further examination, the Sheriff's interlocutor, upon finding that no further examination was necessary, should have ordered his liberation. But by admitting him to bail, it is evident, the Judge understood that he was committed in order to trial, and that no further examination was intended. It is unnecessary, however, to resort to inferences, when the terms of the warrant addressed to the Magistrates of Ayr are direct and explicit.

The 39th Geo. III. Cap. 49. which allows a higher bail to be demanded in cases of sedition, upon application to the Court of Justiciary, expressly provides, that except so far as regards the increased bail, nothing contained in the act shall be construed to deprive the lieges of the benefits and provisions of the act 1701. It was the duty of the Sheriff to comply with the provisions of the act 1701, by cognoscing whether the crime wasailable, and by giving a deliverance within the time prescribed. If application was regularly made, in terms of the 39th Geo. III. then certainly it was his duty to require the higher bail; but until such application was made, he was bound to conform strictly to the provisions of the act 1701. It was altogether foreign to his province to dispense with the one act, because application might afterward be made in terms of the other. And if magistrates were entitled to dispense with the act 1701, until they had an opportunity of corresponding with the Crown-counsel, imprisonment might be grievously protracted in the remote corners of the kingdom.

Answered: The Sheriff's defence is founded, 1st, On the warrant on which the pursuer was committed; 2dly, On the crime of which he was accused. The presumption certainly is, that the Sheriff did not mean to grant, *unies contentu*, two warrants of altogether an opposite nature. The warrant annexed to the precognition, is a warrant for further examination. And though the warrant addressed to the Magistrates did not bear this expressly, it is clear, that it was likewise understood as a warrant for further examination. The expression in the latter warrant being general, is to be explained by the particular expression of the other. And besides, the circumstance of the Magistrates being directed to keep the prisoners in separate places of confinement, shews very distinctly, that the Sheriff intended they should be again examined, though this measure was not judged necessary by the King's counsel. The act 1701 is not understood to apply to imprisonment for further examination; Cameron, August 9. 1754; No. 69. p. 11742; Paterson, December 14. 1736, No. 6. p. 17069; Fife and Maclaren against Ogilvie, July 29, 1762, No. 74. p. 11750; Henderson, February 7. 1793, No. 11. p. 17072. Unless the act were to be so interpreted, a person under examination might easily contrive to obstruct and defeat the purposes of justice. And there are many offences of such a nature, that it is impossible to determine whether the crime beailable, until the facts be completely ascertained, and the examination concluded.

No. 3. By the 39th Geo. III. C. 49. it is enacted, That in cases of treason and sedition, his Majesty's advocate may apply to the Court of Justiciary to have the bail increased, who, if they see cause, may extend it to such a sum as, under all the circumstances of the case, may be sufficient for insuring the attendance of the person accused. It was the duty of the Sheriff to learn whether there was any intention of making such an application in this case, before admitting the person to bail. The provisions of the act would be nugatory, if the person accused must instantly, on the application, be admitted at the ordinary bail, so as to have an opportunity of escaping before any application could be made to the Court of Justiciary; and if a Judge were obliged to pronounce a deliverance on such application, within the time prescribed by the act 1701, the provisions of the 39th Geo. III. could only be enforced in the immediate vicinity of the capital, which could never be the intention of the Legislature. If a magistrate, under pretence of this communication, were to delay admitting a prisoner to bail longer than was absolutely necessary for that purpose, he would unquestionably be liable in damages. But, in the present case, there was no undue delay, and the pursuer was admitted to bail immediately upon receiving the directions of the Crown-lawyers on the subject.

The Lords, upon hearing counsel, adhered to their former interlocutor.

There was considerable difference of opinion on the Bench. One of the Judges thought, that the provisions of the act 1701, applied to imprisonment for further examination; but the general opinion was, that the act applied only to commitments in order to trial. Some of the Judges held, that as the defender had granted two warrants, the one was to be explained by the other; and though the warrant, addressed to the Magistrates, was incorrectly expressed, it was evidently meant by the Sheriff as a commitment for further examination; while others sustained the defence of the Sheriff, chiefly upon the provisions of the 39th George III. and the impossibility of giving effect to that act, which was intended as a general law, if a magistrate were bound, in cases of sedition, to pronounce an immediate deliverance on a petition for bail. Several of the Judges in the minority expressed themselves very decidedly against the decision, which they conceived to be an infringement on the act 1701, the great security of the liberty of the subject in this part of the kingdom.

Lord Ordinary, *Armadale.* Act. Clerk, *Gillies, Moncrieff.* James Gibson, W. S. Agent.  
 Alt. Blair, *Burnet, Cranston.* H. Warrender, W. S. Agent. Clerk, *Mackenzie.*

J.

*Fac. Coll. No. 254. p. 569.*