

that day fortnight ; and, in case it was not paid, they decerned him to pay the expenses of the extract, as they should be certified by the collector of the clerk's dues at extracting ; but found the libel as laid upon, and concluding the penalties of the statute anent wrongous imprisonment, was groundless and vexatious ; and therefore found no expenses due, except the expense of extracting, unless payment should be made as aforesaid." A reclaiming bill was offered and refused.

Act. *Lockhart, & Ja. Dundas.* Alt. *Graham, jun. & Williamson.* Clerk, *Gibson.*

It was noticed, That libels were always thus laid, though the *species facti* seldom came up to the case of the statute, which was thought wrong.

THE LORDS here were of opinion, that the Bailie was only mistaken, in taking care of the police of the town, and the pursuer glad to catch him in a slip.

D. Falconer, v. I. p. 79.

No 36.
penses were given, in respect the case fell not under the statute.

1748. June 23. 1748. PHILP *against* MAGISTRATES OF EASTER-ANSTRUTHER.

DUNCAN PHILIP being, on the signed examination of Wilkie, accused as being accessory with him in breaking a shop in Easter-Anstruther, was by the Magistrates committed to prison without a written order ; whereupon he pursued them for wrongous imprisonment, concluding for damages.

Pleaded, As the conclusion was not for the penalty in the statute, no damages were due in this case, where there was a sufficient ground of commitment ; for the pursuer suffered nothing in being committed without a written order, when he might have been committed upon one.

THE LORDS, 9th June, "found damages due." And

This day refused a bill and adhered. See WRONGOUS IMPRISONMENT.

Act. *R. Dundas.*

Alt. *Lockhart.*

Fol. Dic. v. 4. p. 226. D. Falconer, v. I. No. 265. p. 357.

. Kilkerran reports this case :

JOHN DRUMMOND, Bailie in Anstruther Easter, having had his shop broke in the night between the last of June and first of July 1746, and a parcel of stockings and other goods stolen from him; the same were, upon search, found in the house of Alexander Wilkie mason in Collinsburgh, who thereupon was committed to prison ; and being examined upon the 3d of July 1746, in presence of Thomas White, likewise Bailie in Anstruther Easter, he emitted a declaration, acknowledging the fact, and averring in substance, that Duncan Philp was the proposer, aider, and principal actor in it ; whereupon Philp was, upon Bailie White's order, also committed to the prison ; but being brought

No 37.
A person imprisoned without a written warrant, is entitled to damages, tho' there were a sufficient ground of commitment.

No 37. face to face with Wilkie, notwithstanding Wilkie charged him with the guilt, he persisted in denial thereof.

Sometime after Philp's imprisonment, he signified his apprehension that Wilkie might escape, and required the Bailies, under form of instrument, to take care that he should not make his escape. Accordingly strict charge was given to the jailor, and the townsmen were appointed to watch by turns; but one night the persons summoned by the jailor to attend, did not attend, and Wilkie made his escape.

Soon thereafter, Philp having applied to be set at liberty, the same was granted, as there was no other witness against him but Wilkie; and then he brought a process against the said Bailies for themselves, and as representing the community, of oppression and damages, on this ground, that he had been imprisoned without any signed information against him, as guilty of any crime, and without any warrant of commitment in writing, expressing the cause of his commitment, as by law required.

The defenders, after setting forth the above circumstances in order to shew the uprightness of their attentions, their innocence of any design to injure or oppress the pursuer, the necessity their duty laid them under to commit the pursuer after Wilkie's declaration, and the hardship it would be on Magistrates *bona fide* endeavouring to do their duty, were they to be treated as criminals for every slight escape in point of form; *pleaded* this defence, that the statute 1701, requiring signed informations and written warrants of commitment, excepts pickering and thieving; and such is the present case; *2do*, Though the case should not fall under the exception, yet the consequence could only be, that action would lie for the statutory penalty; but so it is, the action is not brought on the statute, but only for oppression and damages.

But neither of these defences being satisfying, as house and shop-breaking was not thought to fall under pickery; and that as an action laid upon the act only, has been sustained for damages, when the fact did not come up to the statute; so where the fact charged is such as might have warranted an action on the statute, *multo magis* should it be sustained when laid for oppression and damage; the LORDS, of this date, "found the defenders, Thomas White the Judge, and John Drummond the party, liable in damages to the pursuer, which they modified to L. 10 Sterling, and in the expense of process;" and "refused a bill against this interlocutor, without answers."

N. B. Had Wilkie's declaration been taken down in writing, and signed by him, that would have been a signed information, on which a written warrant of commitment might have been regularly granted; but the error lay in that all was verbal.