

No 73.

thing is paid ; and his being booked for the whole debt could do him no other hurt, than that he was obliged to pay a few shillings more for liberation-money.

*Answered* for the pursuer, The defender has admitted enough to subject him to the conclusions of this process. He has admitted, that he gave repeated injunctions to his doer to use the diligence complained of: ' That he expressly limited these injunctions to the sums truly due, no where appears, nor can well be made appear, as the doer is now dead ; the defender must be liable *primo loco*, for every thing done in consequence of his orders ; and, though it should appear that his doer was in the knowledge that partial payments had been made, even that would afford no relevant defence to the defender, who must seek recourse as he best can against such as he may allege have gone beyond his orders. It cannot be disputed, that, to put a man in jail for a larger sum than what is due, is unjust and illegal, because the jailor will not enlarge him without payment or consignment of the whole sum for which he is booked ; and a man may have credit for a small sum, when he cannot have credit for a large sum ; by this means he must lie the longer in jail, whereof the consequences must be imputed to the incarcerator alone.

" THE LORDS found that the pursuer had acted irregularly, and therefore found him liable in damages, which they modified to L. 15 Sterling."

Reporter, *Lord Kaimers.*Act. *Sawinton.*Alt. *Macqueen.*Clerk, *Hume.**J. M.**Fol. Dic. v. 4. p. 135. Fac. Col. No. 62. p. 145.*

1762. July 29.

GILBERT FIFE, and ALEXANDER M'LAREN in Wardend, *against* MARGARET OGILVIE, Relict of JOHN OGILVIE of Airly ; ROBERT WEDDERBURN of Pearcy ; GEORGE YEAMAN, Provost of Dundee ; THOMAS BOYES of Dudhope ; and THOMAS MITCHELL, Factor upon the estate of Airly.

No 74.  
Where a person is committed to prison till further examination, relative to a capital offence, is a Magistrate culpable who refuses bail when offered?

THE house and lands of Craig belonged in property to Margaret Ogilvie, Lady Airly. As she had no occasion for the house, she put it under the charge of Gilbert Fife, who had a lease of the adjacent farm, and who had a dwelling-house and other proper buildings for his own accommodation, adjacent to the house of Craig. Fife executed this charge for some years, and, according to his instructions, put on fires from time to time, for which purpose he had an allowance of coals.

In the year 1759, when Fife's lease was near expired, Lady Airly resolved to give the possession of the house of Craig to Thomas Mitchell. This resolution was intimated to Fife, who used various solicitations to be allowed to continue in his possession, and who at last unwillingly consented to remove at Whitsunday 1760. Alexander M'Laren, who lived in the neighbourhood, had dropped some expressions, which showed that he was not thoroughly satisfied with the

prospect of Mr Mitchell's settling in his neighbourhood. Upon the 26th December 1759, Fife went to make a visit to M'Laren, and did not return home till 10 o'clock at night. His servants had, as usual, put on a fire in one of the rooms, and they attended the fire till it was near extinguished, after which they went to bed, leaving Fife sitting by his own fire-side. About two hours thereafter, one of the servants observed the house of Craig in flames; and any endeavours used to extinguish the fire were vain; and the house was burned to the ground.

Mrs Ogilvie the next day applied to some of the neighbouring Justices of Peace, setting forth, That her house of Craig had been burned; that Gilbert Fife, in the Mains of Craig, had the charge and management of the said house; and she had reason to think that he, or some of his family, could account for the burning of it; and craved warrant for apprehending the said Gilbert Fife, and others residing in the Mains of Craig. Accordingly a warrant was granted to that effect; and a precognition having been taken, the following deliverance was given upon it, by Robert Wedderburn of Percy, George Yeaman, Provost of Dundee, and Thomas Boyes of Dudhope: "Having considered the foregoing precognition, grant warrant to incarcerate the said Gilbert Fife and Alexander M'Laren within the tolbooth of Dundee, there to remain till further examination."

Some days thereafter, M'Laren was set at liberty, and Gilbert Fife applied to be liberated upon bail, which having been refused by the Justices, he applied to the Court of Justiciary for his liberation, which he obtained, after having been twenty-four days in prison; and, not long thereafter, he and M'Laren commenced an action of wrongous imprisonment, oppression, and damages, against Mrs Ogilvie, the three above-mentioned justices, and Mr Mitchell the factor.

*Pleaded* for the pursuers, That the behaviour of the defenders had been, in every particular, oppressive, and contrary to the act of parliament, 1701, cap. 6. That, instead of a direct accusation against any person, as the law required, Lady Airly's application contained no more than a surmise, that Gilbert Fife, or some of his family, might probably know something about burning of the house of Craig; *2do*, It contained an application for an indefinite warrant, to apprehend not only Fife, but all others residing in the house of Craig; *3tio*, The warrant itself is even broader and more indefinite than the application; *4to*, The warrant of commitment only bore till further examination. In such case, it was the duty of the justices to have brought the prisoners to examination as soon as possible, and either to have ended their imprisonment by liberation, or to have granted warrant to commit them specially, for a crime on which they might run their letters of liberation; but instead of this, M'Laren was detained eight days, and Gilbert Fife no less than twenty-four days, without further examination, or without the prospect of an end to his confinement; *5to*, When bail was offered, it was most unjustly refused, in direct contradiction to the terms of the statute, as, upon the precognition, no evidence of guilt whatever

No 74. appeared against the pursuers. All these things were highly oppressive, and afforded a just ground for damages, both at common law, and upon the act 1701.

*Answered* for the defenders, That Lady Airly's information appears to have been exceedingly proper, and plainly amounts to this, that she suspected her house had been wilfully burned by Fife, or some of his family, living in the house of Craig; and therefore she prays, that warrant may be granted for apprehending them, in order to examination.

The warrant granted upon this information applies directly to it, nor was any person apprehended upon it but Gilbert Fife and his family, residing at the house of Craig. The after procedure, and warrant of commitment of Fife and M'Laren, until further examination, proceeded upon the precognition, and are fully justified by the contents of it, from which many very suspicious circumstances arise; and, when that is the case, precognitions are always held as a sufficient ground for commitment, even in order to trial, because it is the strongest information in writing; and the warrant subjoined to it sufficiently expresses the cause of commitment, by reference to the preceding recognition.

Neither can the Justices be blamed for having refused bail, where strong suspicious circumstances of guilt appeared upon the precognition, as, in such case, it is neither proper nor expedient that inferior judges should take upon themselves to grant liberations upon bail, especially where the crime is of so latent and pernicious a nature.

But, besides this, the *species facti* is such, that there is not one clause in the act against wrongous imprisonment which applies to it; for that act relates only to commitment in order to trial, but does not in the least relate to commitments till further examination; and, if either that act of Parliament, or the common law or practice of the country, make detention in prison till further examination criminal, the crime of fire raising is of such a nature, that it never could be detected, because it can be executed in so private a manner, that nothing but slight grounds of suspicion can at first be expected; and, as the crime is capital, and notailable, the judge must have a discretionary power of determining how far the grounds of suspicion are such as to afford a probability that convincing evidence of the crime may soon be discovered. If, indeed, a Judge has acted in a matter of this kind with a malicious intention to oppress, there he would deserve the cognisance of this Court; but if, on the other hand, no malice appears, the law will not allow either the party or the Judge to be subjected to punishment.

"THE LORDS assoilzied the hail defenders, and, upon the reclaiming petition, adhered."

J. M.

*Fol. Dic. v. 4. p. 137. Fac. Col. No. 93. p. 209.*

Act. Crosby.

Alt. Johnston, Garden.