

terwards called on to support his oath, and must prove sufficient reasons to justify his application, otherwise he will be liable in damages; Erskine, b. 1. t. 2. §. 21.

No 39.

Answered for the defender; The law of Scotland requires nothing more to entitle any person to letters of lawburrows, but that he is in dread of harm; A. 1449, c. 13. They are given to quiet the minds of those under such apprehensions; and the only effect of them is to oblige the person against whom they are directed to find caution not to injure the obtainer of the letters, which, at any rate, the law would restrain him from doing.

As the dread of harm is entirely a matter of feeling in a person's own mind, it is capable of no proof but by the oath of the person himself. When he depones that he is under such dread, he has proved all that the law judges to be necessary for justifying his application; and, consequently, though it were that the fear he depones to did not proceed from a sufficient cause, he is not liable afterwards in damages on that account. He is not, therefore, in defence against an action of this kind, obliged to specify, or prove the causes of his fear.

The principle on which lawburrows are granted, does not apply to the case of a *meditatio fuga*. The effect of the caution likewise required in that case, is to restrain the debtor from what he would be otherwise entitled to do.

THE COURT were of opinion, That the oath required by the Judge, from the person applying for lawburrows, being only that he is under dread of harm, no action of damages lies merely on account of his not having a good cause for his fear. Malice, or any undue motive in making the application, are relevant grounds for an action of damages. The judgment was, 'finding that the petitioner, after application for letters of lawburrows, and his oath taken, is not bound further to justify the facts upon which his application proceeded.'

Act. Cullen.

Alt. Craig.

Fol. Dic. v. 3: p. 373. Fac. Col. No 27. p. 44.

1799. January 26.

ISABEL SMITH *against* The Reverend JOHN BAIRD, and Others.

ISABEL SMITH and Charles Macnab, on taking the usual oath, obtained letters of lawburrows from the Court of Justiciary against the Reverend John Baird, minister of the parish of Dunning, his son, and David Balmain, schoolmaster of the parish.

When the letters were executed against them, instead of finding caution, they presented bills of suspension, in which they stated, that a riotous opposition having been made in the parish, to the execution of the militia acts, the minister had endeavoured to convince the people of the impropriety of their conduct: That his son, a student, residing with him during the vacation of the

No 40.

The charge to find caution in letters of lawburrows, may be suspended, if the application be malicious.

No 40. university, had taken no share in the business; and that the schoolmaster had become particularly obnoxious, in consequence of its having been his duty to make up the list of persons liable to serve; insomuch, that he had been grossly threatened and insulted, actually obliged to leave the parish for some time, and at last forced to take out letters of lawburrows against Isabel Smith, Charles Macnab, and others: That out of revenge, 20 of the ringleaders had, at one time, resolved to apply for lawburrows against the suspenders; but that the resolution had been carried into effect only by the chargers, whose application ought to be suspended as groundless and malicious.

The Lord Ordinary on the bills, after advising with the Court, passed the bills, without caution or consignation, and found the chargers liable in expenses.

Macnab acquiesced.

But the decrees for expenses being extracted, and charges of horning executed, Isabel Smith presented suspensions, which were passed; she likewise insisted on discussing the original suspensions.

The Lord Ordinary, in the latter, found the letters orderly proceeded, and suspended the letters in the former.

Mr Baird, &c. in reclaiming petitions,

Pleaded; The oath in a lawburrows, like that given by a creditor applying for a warrant against his debtor, as *in meditatione fugæ*, may be redargued; 1429, c. 129; Bank. v. I. p. 286. If it could not, it would be a source of much oppression; for although the security required is only to keep the peace, it is a great hardship to be held out as a person against whom such a precaution is necessary. A malicious application for a lawburrows, may be made the ground of an action of damages; 3d July 1778, Sellars against Anderson, No 39. p. 8042; and consequently of a suspension.

The circumstances of the case afford real evidence, that the oath here given was of this description.

Isabel Smith, in the suspension of lawburrows,

Answered; The oath in a lawburrows has always been considered as complete legal evidence of apprehension of danger by the party applying for it; 1429, c. 129; 1449, c. 13; Stair, b. 4. t. 48. § 1, 2, 15; Ersk. b. 4. t. 1. § 16. If other evidence were required, the mischief would frequently be done in the mean time, which the application was meant to prevent. Damages, however, may be awarded, if, in a proper action, it be afterwards established to have been made maliciously.

The oath cannot with propriety be assimilated to that of a creditor craving a warrant against his debtor, as *in meditatione fugæ*. The former relates entirely to the feelings of the party; the security required is merely to keep the peace, a duty incumbent on every member of society; and the letters are issued without citation of the party complained of; whereas, the object of the latter is to deprive the debtor of his personal liberty; and it is not granted without his be-

ing examined, and an enquiry into the circumstances on which the apprehensions of the creditor are founded.

No 40.

In the suspensions at her instance, Isabel Smith

Answered; It is incompetent to find a charger liable in expenses at passing a bill. The Bill Chamber is not a court of record. Formerly decrees in it could not regularly be extracted; and when they were extracted, letters of horning could not be issued on them. Expenses, therefore, were never awarded in it; and this was not attended with much hardship, because, if the bill was passed, either party could afterwards be subjected in expenses; and if it was refused, little had been incurred by the charger; the answers for him, generally made *viva voce*, being in all cases very short. But when the expense of litigation in the Bill Chamber was afterwards much increased, the act of sederunt 19th December 1778, on the narrative of this circumstance, and of there being no mode of giving expenses to the charger when a bill was refused provided, that the Lord Ordinary, on refusing a bill with answers, might award expenses to the charger, and fix their amount; and that the clerk to the bills should insert such cases in a minute-book, an extract from which should be a warrant for letters of horning. But it still remains incompetent to award expenses against a charger, when a bill is passed.

Upon advising the petitions, with answers, the Court were satisfied that the application for lawburrows by Isabel Smith was malicious, and that it was competent to establish this in a suspension; but they were equally clear, that her argument, in the suspension at her instance, was well founded.

THE LORDS "found it sufficiently instructed, from the particular circumstances of this case, that the letters of lawburrows taken out against the petitioners were groundless, malicious, and oppressive, and therefore suspended them *simpliciter*; but adhered to the interlocutors of the Lord Ordinary, in so far as they suspended the charges given by the petitioners to the respondent, for expenses."

Lord Ordinary, *Swinton*.
Clerk, *Pringle*.

For Isabel Smith, *Inglis*.

Alt. *W. Erskine*.

D. D.

Fac. Col. No 108. p. 246.

See APPENDIX.

VOL. XIX.

44 X