

PATRICK LAING, Tanner in Brechin, JAMES WATSON, Merchant in Brechin, and } THOMAS MOLLISON, }	Appellant ; Respondents.	1791. <hr style="width: 80%; margin: 0 auto;"/> LAING v. WATSON, &c.
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House of Lords, April 1791.

WRONGOUS IMPRISONMENT—FUGÆ WARRANT.—Circumstances in which creditor and magistrate, held liable in damages for irregularities in the proceedings adopted against a debtor, under a *fugæ warrant*, whereby he was imprisoned.

This was an action raised by the appellant against the respondents, for damages on account of wrongous imprisonment under a *fugæ warrant*.

The respondent, Watson the creditor, applied to Mollison, Provost of Brechin, for the warrant, upon the declaration that Laing, his debtor, was about leaving the country. Warrant was granted, and he imprisoned under it. The grounds on which damages were sought, were : 1. That when the petition for warrant was presented to Provost Mollison, the name and designation of James Watson were not inserted therein ; and that the warrant was granted and put in execution in this imperfect state. 2. No regular ground of debt, nor evidence of debt was produced to Provost Mollison ; and the respondent Watson did not make oath to the truth or *existence of any debt*. 3. The petition did not set forth that the appellant intended to leave the kingdom, on purpose to defraud his creditors, while the fact was well known to Watson that he was only going to Edinburgh to reside ; and, 4. The warrant did not order the party to be brought before him *for examination*, but ordained him *forthwith to be imprisoned*.

After some discussion in the Court of Session their Lordships, of this date, pronounced an interlocutor, finding Watson Dec. 19.1789. and Mollison liable in damages and expenses:—" But, before " answer as to the quantum thereof, ordain a condescence " of the damages, and account of expenses to be given into " Court."*

* NOTE.—Opinions of the Judges ; taken from President Campbell's Session Papers, Vol. lvi.

LORD MONBODDO.—" No document of debt even produced. No oath to verity, and no oath in proper terms of *meditatione fugæ warrants*. I am clear that damages are due."

LORD HAILES.—" Doubt of the propriety of Justice of the Peace acting in such matters, but proceedings otherwise totally irregular.

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The appellant gave in his condescendence, containing an account of his damages and account of expenses, amounting in all to £151. 14s. 4d.

The Court, of this date, thereupon modified the damages

My only difficulty is, Why did he continue so long in prison,—his man of business, I fancy, saw that he could make more by staying in, than by making pumps.”

LORD GARDENSTONE.—“ This is a case of importance as it relates to the duty of inferior judges, and the risks which they run ; and, on the other hand, the liberty of the subject. I should not think it enough that the document of debt was produced. Neither perhaps is it absolutely necessary that there should be an oath to the verity of the debt. Neither is it necessary to bring the person of the debtor before him—neither is the want of limitation in point of time material, where in fact action was soon after brought. But there is one ground clear in this case. Vide Erskine. If a judge not only gives his opinion, but acts,—if he stretches out his hand, he is answerable. Besides, suppose every thing regular as to the judge.—Watson had no ground for supposing that he was *in meditatione* to leave the kingdom.”

LORD ESKGROVE.—“ It is clear as to Watson, that even if he swore in proper time, he was bound to justify his conduct afterwards. If he has no document of debt, he must at least swear grounds *subjectum materiam*, that his demand is well founded.”

LORD SWINTON.—“ I feel a difficulty as to the judge. He is not answerable for wrong opinion. It must appear that he proceeds *ex dolo*, see Stair’s description of *meditatione fugæ*. The judge must have a discretionary power. A considerate judge may do one thing, an inconsiderate judge another thing. Case of List and Baillie judges were divided.”

PRESIDENT.—“ The proceedings were highly irregular, and therefore imprisonment illegal. No oath to debt. No document produced. No oath in proper terms to *meditatione fugæ*. No limitation in point of time as to cautionary. The judge is responsible as well as the private party. In cases of patrimonial damage, excuses of error, and *bona fides* have sometimes been admitted. But not in cases of false imprisonment. The liberty of the subject is so secured that it cannot be violated with impunity even by mistake. See Dict. vol. iii. voce ‘ Wrongous Imprisonment.’ The law admits of no probable cause in such a case. Certain precise forms are established by law or custom, which every judge must observe in granting warrants of imprisonment. If he neglects these, he acts at his peril. In the present case, however, there are circumstances which may be considered in extenuation.”

“ Both equally guilty—interlocutor right.—Adhere, and find pursuer entitled to £120 of damages, and expenses.”

and expenses to the sum of one hundred and twenty pounds.

Dissatisfied with this modification of the damages, the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Wm. Adam, Ar. Cullen.*

For Respondents, *Alex. Wight.*

1791.

LIVINGSTONE
v.
EARL OF
BREADALBANE

[M. 4999.]

THOMAS LIVINGSTONE, Esq., of Parkhall,	<i>Appellant ;</i>
JOHN, EARL OF BREADALBANE,	<i>Respondent.</i>

House of Lords, 13th April 1791.

GAME—RIGHT OF SHOOTING IN ANOTHER'S GROUNDS.—Held, that there was no law which entitled a person to enter the uninclosed grounds of another proprietor to shoot game, although the game itself was *res nullius*, and common to all ; as this did not prevent the owner of the ground from debarring all and sundry from entering his grounds, to the prejudice of his exclusive right of property.

The question which arises in this appeal is, Whether by the law of Scotland the proprietor of an estate has a right to monopolize the game upon that estate for the use of himself and particular friends, and to exclude all gentlemen legally qualified from following that amusement over his *waste* and other grounds not specially protected by any particular statute ?

The facts out of which this question arose are : That the appellant, along with a friend, made an excursion to the Highlands of Perthshire, for the purpose of enjoying a few days shooting. They took up their residence in the neighbourhood of Glenquoich, where there is an extensive range of open uncultivated hills belonging to the respondent. They were duly licensed, and the appellant had the necessary land qualification, but had no consent to shoot from the proprietor ; and thus they continued for several days shooting the game on these hills.