July 7, 1815.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

" due to the Appellant on the bond of the 18th " October, 1800, according to the declaration afore- " said. And it is further declared that in taking " such account the Respondent, the Marquis, must " under the circumstances be bound by the accounts " settled between the said Edward May and the " Appellant, except so far as the said Marquis shall " be able to falsify the same, or show any errors " or over charges therein, &c. &c." The remaining part of the judgment consisted of directions for taking the accounts on the above principles.

The decree of dismissal in the cross cause was *reversed.*

Agent for Appellant, COLE.
Agent for Respondents, LYON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (1ST DIV.)

ARBUCKLE—*Appellant.*
TAYLOR AND OTHERS—*Respondents.*

April 27, May 1, 1815.

ALLEGED MALICIOUS PROSECUTION AND WRONGOUS IMPRISONMENT.

It seems that where a partner of a firm prosecutes for an alleged theft of property belonging to the partnership, and an action is brought for a malicious prosecution and wrongous imprisonment, neither the company nor the other individual partners can be dealt with as prosecutors merely because the property belonged to the firm.

It seems that an action for a malicious prosecution cannot be sustained; though the accusation be false, if the prosecutor can show probable cause for the charge.

Dicente Lord Eldon, Chancellor, that a magistrate is

bound to terminate his commitment for further examination within a reasonable time, otherwise he will be liable in damages; but the inclination of his opinion was that the provisions of the act 1701, cap. 6, did not apply to commitments for further examination.

April 27, May 1, 1815.

ALLEGED MALICIOUS PROSECUTION AND WRONGOUS IMPRISONMENT.

AT a sale of the thinnings of Lord Roseberry's woods near the Queen's-ferry, Arbuckle the Appellant, and Messrs. Taylor and Sons Respondents, Wood-merchants, in Queen's-ferry, purchased several lots. Arbuckle and his servant in bringing home their wood by mistake, as the Appellant maintained, fixed upon a lot belonging to the Taylors, and carried with them some small trees worth about 10*s*. out of it. William Taylor, one of the partners of the firm of Taylor and Sons, wrote to the Respondent, Salmond, Procurator Fiscal for the county of Linlithgow, to prosecute Arbuckle for theft, in his (Taylor's) name. Mr. Salmond accordingly, in his own name and that of Taylor, petitioned the Sheriff Substitute of Linlithgow, who granted a warrant to apprehend Arbuckle and his servant for examination, and they were apprehended accordingly, on the 23d March, 1809. Arbuckle verbally offered bail to any amount, but the Sheriff Substitute refused it, and committed him to prison, under a warrant dated 25th March, 1809, for further examination, or until he should be otherwise liberated by due course of law. No copy of this warrant was given to the Appellant. Arbuckle then wrote a petition to the Sheriff Substitute repeating the offer of bail, but his agent neglected to present it. The Appellant then petitioned the Court of Justiciary,

Facts and circumstances of the case.

April 27, May 1, 1815.

ALLEGED MALICIOUS PROSECUTION AND WRONGOUS IMPRISONMENT.

and Lord Armadale made an order appointing him to produce a certified copy of the warrant, but none such could be immediately found. The application to Lord Armadale was read to the Sheriff Substitute, who still refused bail. The warrant, or a copy of it, had been sent to the Sheriff Depute, who sent instructions to receive bail, and transmitted a copy of the warrant in obedience to Lord Armadale's order. On the 28th March, Cunningham intimated to Arbuckle that though he was committed for further examination, he was ready to bail him. Arbuckle took no notice of this, expecting to be liberated on bail by the Court of Justiciary, and he was accordingly liberated on 29th March, by warrant of Lord Armadale, on bail for 100*l*., to appear and stand trial within six months.

Action.

The Appellant then brought an action for a malicious prosecution and wrongous imprisonment, at common law and under the statute 1701, cap. 6, against the Taylors as a company and as individuals, and against Salmond the Procurator Fiscal; and against Cunningham the Sheriff Substitute, concluding alternately for the penalties under the statute 1701, or damages at common law.

Defences.

For William Taylor it was stated in defence, that he had probable grounds for the accusation, and acted *bonâ fide*. For the firm and the other individual partners it was answered that the petition on which the warrant of commitment was granted was in the name of William Taylor only, without the knowledge of the others, and that they had no concern with the matter. For Salmond the Procurator Fiscal, it was stated that he granted his con-

currence in consequence of a written information signed by the private complainer; and for Cunningham, the Sheriff Substitute, it was answered that he acted legally and according to his duty.

April 27, May 1, 1815.

ALLEGED MALICIOUS PROSECUTION AND WRONGOUS IMPRISONMENT.

After some previous proceedings, the Lord Ordinary (Bannatyne) pronounced an interlocutor assoilzieing Cunningham, on the ground that no written petition for being admitted to bail was presented to him, and that even if it had, the commitment being for further examination, he was entitled to refuse the liberation on bail, and that there was nothing stated as a ground at common law for holding the commitment malicious or injurious; assoilzieing Salmond, because the signed information would have warranted an application by him as Procurator Fiscal, and that the only concern he had with the matter, further than giving his concurrence as Procurator Fiscal, was as agent for William Taylor, in which view no circumstances had been stated which could make him personally responsible for any irregularity or wrong supposed to have taken place in the proceedings; also assoilzieing the firm of Taylor and Sons, and the partners as individuals, who had taken no part in the proceedings, and therefore were not responsible. As to William Taylor, an additional condescendance was ordered. To this judgment the Court adhered, except as to the Taylors, with respect to whom the Lord Ordinary was instructed to receive an additional condescendance of what he averred and offered to prove against them, both as a company and as individuals. A condescendance and answers were given in, and

Judgment of the Lord Ordinary and Court of Session assoilzieing the Defenders.

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ALLEGED MALICIOUS PROSECUTION AND WRONGOUS IMPRISONMENT.

a proof taken, from which it appeared that there was probable cause for the prosecution, and the Court unanimously assoilzied the Defenders. From this judgment Arbuckle appealed.

For the Appellant, with reference to the alleged illegality of the mode of prosecution by Taylor in his own name, *ad vindictam publicam*, were cited the cases of *Lockart v. Lee*, July 1751.—*Robb v. Halliday*, 1767, Maclaurin Crim. Ca. 299.—*Geddie v. Dempster*, Nov. 1767.—*La Motte v. Jardine*, July 1797, Macl. Crim. Ca. 382.—*Dundas v. Belsh*, Jan. 1806. And as to the point of *Bona fides*, *Jardine v. Creech*, 22d June, 1776.—*Anderson v. Ormiston*, Jan. 1750.—*Græme v. Cunningham*, March 1765.—*Woods v. Gordon*, March 1812.

For the Respondent, W. Taylor, with reference to the point of probable cause, were cited; *Lindsay v. Kinloch*, Burnet Crim. Law, 328, n.—*Jamieson v. Napier*, Kilk. 160.—*Henderson v. Scott*, Feb. 1793, Fac. Coll. *Græme v. Cunningham*, March 1765, Sel. Dec. For the Respondent, Cunningham, *Fife v. Ogilvie*, 1762.

Sir S. Romilly and *Mr. Adam* for Appellant; *Solicitor General for Scotland* for Respondents.

July 10, 1815. Judgment.

Lord Eldon, (C.) A cause, in many respects of great importance, was heard before your Lordships, in which Hugh Arbuckle, a wood-merchant, and Burgess of the Royal Burgh of Queen's-ferry, is the Appellant; and this case embraces demands for damages against William Taylor and Sons, merchants, in Queen's-ferry, as a company, and against William,

John, and Patrick Taylor, individual partners of the said company; George Cunningham, Sheriff Substitute of Linlithgowshire; and William Salmond, Procurator Fiscal of the Sheriff Court of the County of Linlithgow; and when I have had the honour of stating to your Lordships the nature of the several demands made by the summons, in this case, against the several defendants, I am satisfied that such of your Lordships as are conversant with the proceedings in English Courts of Justice, will be surprised to find that, according to Scotch forms, persons can be joined in an action for damages, where the causes of the damages are so perfectly different in their nature as these are stated to be. This action was raised by a summons which is printed in the book now before me, and which I shall take the liberty to read. The summons is in these terms:—"Hugh Arbuckle, Pursuer, insists in "an action of wrongous imprisonment, damages, &c. "against Messrs. John Taylor and Sons, merchants, "in Queen's-ferry; and John Taylor, Patrick Tay- "lor, and William Taylor, all merchants there, the "individual partners of that firm." When I state that this is an action of wrongous imprisonment, it will strike your Lordships as singular that the summons is against Taylor and Sons, as a company, and against the individuals who form the firm, taking both the company as prosecutors, and the individuals as prosecutors. The summons is also against William Salmond, who is here stated to be Procurator Fiscal; and George Cunningham, Sheriff Substitute of the county of Linlithgow; and when I come further to read the summons, you will find

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Singular practice of joining persons in an action for damages where the causes of damage are totally different.

Summons.

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ALLEGED MALICIOUS PROSECUTION AND WRONGOUS IMPRISONMENT.

that this is an action of damages against a company, and the individuals of it supposed to be prosecutors, and also against the magistrates, that is, involving the prosecutors, and the magistrates acting on the information given by the prosecutors in one action of damages, saying as to some of them, "you ought "not to have prosecuted, this is a malicious prose-"cution;" and to others (the magistrates) "you "ought not to have committed me, and therefore "for that wrongous imprisonment I seek damages "against you." The inconvenience we should feel in this part of the island from such a proceeding is this; that when the question as to the magistrate is a short one, whether he has acted rightly as a magistrate, or not, he is made party to a proceeding in which all the examination is gone into, as to what were the motives of the prosecutors, and what the circumstances that might furnish an inference as to whether others acted rightly or not: however, this I understand is not contrary to their practice.

Inconvenience of the practice.

Then it goes on to state, "that by the common law "of this kingdom, the wrongous imprisonment of "any of his majesty's liege subjects upon illegal "warrants, maliciously or unduly obtained, or ob-"tained or used on false pretences, or wrongous "imprisonment in any way, or wrongous personal "apprehension or detention in prison, without just "cause and legal warrant; and in general the op-"pressive and illegal infringement of the liberty of "the subject in any manner, are grievous injuries, "more especially to a merchant in considerable "trade, whose credit may be thus ruined; which, or "any of their, entitle the suffering party to ample

"redress." Then the summons proceeds to state the Act of the 8th and 9th Sessions of the first Parliament of King William, cap. 6, by which it is provided "that all informers shall sign their informations, and that no person shall be hereafter "imprisoned for custody, in order to trial." (Reads the provisions of the Act, pointing the attention of the House particularly to the words "*for custody* "*in order to trial.*")

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Act against wrongous imprisonment 1701.

Your Lordships will find that this summons has no such conclusion as there was in the case of *Andrews and Murdoch*, viz. to have it declared that the magistrate had lost his office, and was incapacitated from holding any public trust in future. This summons concluded only for the damages which the statute gives, and I mark that circumstance because it enables me to lay out of the case a point agitated at the bar, in that case of *Andrews v. Murdoch*, whether it was competent for the injured party to proceed in Scotland, without what they call in that country, the concourse of his Majesty's Advocate, when he concluded that a magistrate should be deprived of his office, and be declared incapable of public trust. In that case it was further contended,—not successfully contended,—that, with respect to those sums which are given to the party imprisoned, these being pains in the nature of penalty, the party could not sue for them without the concurrence of his Majesty's Advocate. But I think it was pretty well understood both at the bar and by your Lordships, that as those pains and penalties were given in the nature of damages to a subject who had been injured, it was not necessary, if he concluded on the Act of

No conclusion in the summons to remove and incapacitate the magistrates, as there was in Andrews v. Murdoch, vid. *ante*, vol. ii. 401.

In an action against a magistrate concluding only for the money penaltiesunder

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stat. 1701, cap. 6, the concurrence of the King's Advocate is not necessary:—*secus* where the conclusion is for incapacitation and deprivation.

Whether the act relates solely to commitments for custody in order to trial, or relates also to commitments for further examination.

Parliament only for these pains and penalties, that he should have the concurrence of his Majesty's Advocate; and indeed it is obvious that a proceeding requiring a magistrate to be prosecuted to the extent of being declared incapable of acting again is very different from that which merely calls upon him to make compensation in the shape of damages; and it would be an extraordinary proposition to say that a subject could not ask for compensation in damages, unless the King's Advocate joined with him in so doing. I mention this, however, because it becomes very material when we are considering whether this is a commitment for further examination in a case where no double of the warrant has been given, to advert to the circumstance, that it is a point of contention between the parties, whether this act of wrongous imprisonment relates only to commitment for custody in order to trial, or whether, under some general words in a subsequent part of the Act, it relates also to commitments for further examination; for if your Lordships should be of opinion that it relates to a commitment for further examination, with reference to the damages to be recovered, it would follow also that commitments for further examination had connexion with the clause disabling the magistrate, if his Majesty's Advocate chose to concur, and it is with that view I have pointed out to your Lordships the importance of that distinction.

I would just notice as I pass, that the Appellant in one of the cases is stated to be a timber-merchant, and in the Respondent's case he is stated somewhat flippantly, I think, to be Hugh Arbuckle, describing himself as a timber-merchant, a circumstance which

was noticed at the bar, and led perhaps to our hearing more evidence on that head than was necessary. July 10, 1815.

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The summons then states, "that Messrs. John "Taylor and Sons, &c. and the individual partners "of the firm, especially William Taylor the acting "partner, as an individual, and W. Salmond the "private agent, employed by W. Taylor, in behalf "of himself and the company, and Procurator Fiscal, "&c. and George Cunningham, Sheriff-substitute, "&c. had committed these injuries against the Pur-"suer in the following manner:—Upon the 23d "and 24th days of February, 1809, he attended "Sales of the Weedings of Lord Roseberry's "Woods," &c. &c. (His Lordship here read at length from the summons the facts as there set forth, and of which the substance has been before stated; and after reading that passage where the Pursuer stated his apprehension, and that "no double or "copy of the warrant, &c. was then, or had since "been, served on the Pursuer, or in any way fur-"nished to him," his Lordship continued.) With reference to this I would state that, unless it be different by the common law, it appears to me that the statute does not require, where an information is given to a magistrate, and where the warrant goes merely to bring the party before him, that there should be a copy of that warrant given to the party. This is not the warrant upon which this question turns; it turns upon the warrant for further examination, which the warrant afterwards made out has been contended to be.

The statute does not require that a copy of the magistrate's warrant merely to bring a party before him, should be served on the party.

The Pursuer then proceeds to state—"That the "officer merely showed him the paper, which he

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" termed the warrant against him, and also against
" Wm. Allan his carter, as charging them with the
" crime of theft, and appointing them to be carried
" to Linlithgow for examination. They were ac-
" cordingly then carried from the Pursuer's house
" and trade at Queen's-ferry, like common felons,
" in the custody of two sheriff's officers, to Lin-
" lithgow, between seven and eight o'clock of the
" evening of the 23d of March, 1809. When they
" arrived at Linlithgow upon this evening, it was
" however found too late to examine them that
" night; they were therefore dismissed under con-
" dition that they should return on the morning of
" the 25th of March, then current."

This circumstance has been observed upon as a circumstance of aggravation; that when they came before the magistrate on the evening of that day, he took their word of promise that they would return the next morning but one. It might perhaps be irregular on the part of the magistrate so to act, and I do not mean to say that the circumstance of his having done so might not be considered as evidence of the motives upon which he acted in other parts of the proceeding; but it is impossible to say that that irregularity, taking it merely as such, could prove that his motives were malicious, or that the irregularity can be treated as a circumstance in itself decisive, and I am surprised that it has been so much dwelt upon. Then the summons proceeds—

" The sheriff required no security for his re-
" appearance. Accordingly they did voluntarily re-
" turn for re-examination at the time appointed;
" and being examined, the Pursuer stated the whole

"facts above set forth, every circumstance of which July 10, 1815.
" was before, and all along, perfectly known to the
" accusers." And as frequently happens, they on ALLEGED MALICIOUS PROSECUTION AND WRONGOUS IMPRISONMENT.
the other hand say, " many of these circumstances
" we did know, many we did not know; but there
" were many other circumstances which both you
" and we know, and which you have not stated."

Immediately after this examination, the following deliverance, it appears, was pronounced by George Cunningham:—"Linlithgow, March 25, 1809—The
" Sheriff-substitute having considered the foregoing
" petition (viz. of Taylor) and declaration emitted
" by Hugh Arbuckle, wood-merchant, in Queen's-
" ferry, one of the persons therein complained upon
" before him this day, as on paper apart, grants
" warrant to the officers of Court, to carry the per- Warrant of commitment.
" son of the said Hugh Arbuckle to the gaol of
" Linlithgow, and to incarcerate him therein; the
" keepers whereof are hereby required to receive and
" detain the said Hugh Arbuckle in gaol *for further*
" *examination, or that he is otherwise liberate in*
" *due course of law.*" Your Lordships see that this is a warrant as it is expressed, for further examination; but then it is contended on the other side, that it is only colourably a warrant for further examination, and that these words—*or that he is otherwise liberated in due course of law*—make it not a warrant for further examination, but a warrant for safe custody, in order to trial; that is what they contend.

The Pursuer then states, and the fact is, " that Verbal offer of bail rejected.
" he instantly offered security for his appearance at
" any after diet of examination, and bail to any

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" amount to underlie (as they call it) the law, for " the crime of which he was accused, and demand- " ed on these conditions to be set at liberty; but " this application was rejected by the said George " Cunningham, who declared that the crime was " common theft, and not bailable, and verbally or- " dered that the Pursuer should be instantly lodged " in the lower room of the prison of Linlithgow, " which is set apart for the confinement of common " thieves." I do not find that in this warrant; " and " this order would have been carried into execution " if the magistrates of Linlithgow had not taken it " upon themselves to instruct their gaoler, that he " should be confined in a more suitable apartment " of that gaol. As soon as he found himself thus " most illegally committed to prison, the Pursuer " with his own hand likewise wrote out and sub- " scribed an application to be admitted to bail. This " petition was immediately carried to a person of the " name of James Watson, writer, in Linlithgow, to be " presented to the Sheriff-substitute, by him, as agent " for the Pursuer; but that he afterwards on the same " evening returned it to the Pursuer, and informed " him that the Sheriff-substitute would not receive " bail; and the said George Cunningham, in direct " violation of the said Act, did refuse to admit the " Pursuer to bail, and did not serve him with a war- " rant of commitment within 24 hours, as required " by the statute, and did not till between the hours " of ten and eleven o'clock in the forenoon of the " 28th of March following, intimate that he was " then ready to admit the Pursuer to bail, as will " appear from a written instrument of intimation to

" that effect, to be also produced with the said sum- " mons, in which it was falsely pretended that the " Pursuer had been imprisoned and detained for " further examination, although no further exami- " nation ever was sought, or took place."

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Your Lordships will permit me to observe here, that where a person is committed to custody for trial, by the Act to which I have referred, a petition may be presented to the magistrate, requiring that the party may be bailed; and it has I believe been universally agreed, that the petition must be in writing. The House will recollect that in the case of *Andrews v. Murdoch*, we had a great deal of discussion as to whether we could falsify a date, but it seemed to be admitted that the petition must be in writing, and then the magistrate was to cognosce whether the offence was bailable; if it is bailable, he is within a certain number of hours to admit the party to bail; and here your Lordships observe the materiality of the exact date of the petition. Now in this case there can be no doubt whatever with reference to this application, that the petitioner fails, because in point of fact, though the party did write out his petition—considering this as a commitment not merely for further examination, and insisting that even if it was, he had a right to be liberated on bail —though he did prepare such a petition, he gave it to this Mr. Watson in order to be carried to the Sheriff, and Watson never did carry it; and the consequence is, that the Sheriff never having received the petition, it is utterly impossible to charge him with neglect of duty, as if it had been delivered.

Under the statute, the petition for being admitted to bail must be in writing.

The petition for bail not presented, so that the magistrate could not be charged with the consequences.

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Then the Pursuer states, that "he remained in "the prison to which he was committed in manner "above mentioned, at one o'clock of the afternoon "of March 25, 1809;" and he further states, "that "Messrs. John Taylor and Sons, and William "Taylor as an individual, and William Salmond, "the accusers, and George Cunningham, *most ille-* "*gally* omitted to lodge with any of the magistrates "of Linlithgow, or their gaoler, or keeper of their "prison, a warrant expressing the cause of the Pur- "suer's imprisonment, in terms of the foresaid Act."

It seems that by the statute, the written warrant expressing the cause of commitment need be lodged with the keeper of the prison, in order that a double thereof may be furnished to the party committed, only where the commitment is for custody in order to trial.

Now if a warrant expressing the cause of the Pursuer's imprisonment must be so lodged, though the commitment be only for further examination, then this allegation is right; but on the other hand, if the statute means only that the warrant is to be lodged where the commitment is for custody for trial, then, as there was no such commitment for custody for trial, unless this can be considered as such, in consequence of the insertion of the words, "or that he is otherwise liberated in due course of "law," that allegation likewise must fail.

The Pursuer further states, that he afterwards presented a petition to the High Court of Justiciary, and that Lord Armadale gave a deliverance, and appointed the petitioner to produce a certified copy of the warrant; but he was not able to get a copy of it, for that neither the warrant nor a copy thereof was to be found even in the possession of the Sheriff's clerk nor in his office, nor in the possession of George Cunningham, which facts he next morning reported in writing to the Lord Armadale. It appears that a copy was afterwards transmitted by

Mr. Hume, the Sheriff-depute of the county, and upon the receipt of that, Lord Armadale bailed the Pursuer in the amount of 100*l.* to stand trial within six months on any indictment for the crime alleged; and in consequence of this, after having obtained this warrant for his liberation, he was at last released from his confinement, after having been confined a close prisoner three days and a half upon what he calls "the above-mentioned most groundless, false, "and malicious charges, and without being allowed "to find bail, or having access to the warrant of his "commitment, notwithstanding the terms of the "statute above quoted." He then alleges himself to be a wood-merchant in considerable trade, both home and foreign, with a large stock on hand, and many dealings that required his constant presence and superintendance, and that he had until he sustained this most grievous injury always preserved his character and credit unimpeached; and then the conclusion of the summons was as follows; and here your Lordships will see the manner in which they join together persons in the same action for different species of injury, and involve them all in the expense of the litigation, not merely as it affects themselves, but as it affects others. He first concludes "that John Taylor and Sons, merchants in "Queen's-ferry as a company, and J. Taylor, P. "Taylor, and W. Taylor, all merchants, and indi- "vidual partners thereof, and the said W. Taylor "personally and as an individual, and the said "William Salmond, Procurator Fiscal of the said "Sheriff's Court of Linlithgow, and the said George "Cunningham, Sheriff-substitute thereof, ought

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Conclusions in the summons.

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" and should be decerned and ordained by decree of " the Lords, &c. to make payment to the Pursuer " of the sums of money following, viz. the said " Messrs. J. Taylor, &c. as a company, and the said " J. Taylor, P. Taylor, and W. Taylor, individual " partners thereof, and the said W. Salmond, con- " junctly and severally." Your Lordships know very well what would become of pleadings in this country if we were to hear from an English lawyer the words I am now about to state—" or at least " such or any of them as may be found to have " committed the wrongs or injuries libelled, of " 5,000*l.* of *solatium*, damages, and expenses, sus- " tained by the aforesaid wanton and groundless " charge exhibited against the Pursuer, and by his " being wrongously imprisoned and detained in " prison in consequence thereof." Then he proceeds to pray as to the said George Cunningham " that " he may pay 2,000*l.* Scots, which is the statutable " penalty, together with 33*l.* 6*s.* 8*d.* for each day " the Pursuer was detained in prison after refusing " his application to be admitted to bail, being the " pains of wrongous imprisonment inflicted by the " aforesaid Act of Parliament on the transgressors " thereof, or of such other penalty as the said Lords " shall determine to have been incurred by the said " George Cunningham in terms of the aforesaid Act " or otherwise. And in case the said George Cun- " ningham should not be found liable in penalties " according to the said statute, that he ought and " should be decerned, &c. to make payment to the " Pursuer of the sum of 200*l.* in name of damages " at common law. 'And further that the said Messrs.

" John Taylor and Sons as a company, and the said, July 10, 1815.
" &c. individual partners thereof, and the said W.
" Salmond and G. Cunningham, ought also to be ALLEGED MALICIOUS
" decerned by decree aforesaid jointly and severally PROSECUTION AND WRONG-
" to make payment to the Pursuer of 1,000*l.* as the OUS IMPRI-
" expense of this process." SONMENT.

This being the summons, the defences for John Defences.
Taylor and Sons, and John Taylor as an individual partner, were to this effect. The present action concludes against the defenders John Taylor and Sons, and John Taylor as an individual partner of that concern, for 5,000*l.* damages, for an alleged wrongous imprisonment of the Pursuer. The defence against this action is, that the petition on which the warrant of commitment was granted was not made out in the name of John Taylor, nor of John Taylor and Sons, but in the name of William Taylor, one of the partners, and without the knowledge of the others, and they therefore insist that they should be assoilzied with expenses. Patrick Taylor puts in the same defence. William Taylor, Defence of W. Taylor that he had probable cause for the complaint.
who is the individual who gave in the information, insists that he is not liable in damages, for that he had good, or at least probable, grounds for the petition and complaint which was presented to the Sheriff by the Procurator Fiscal in his name; and that the facts having been proved by the declaration of the Pursuer himself, he was incarcerated for further examination by the Sheriff: that the facts were also proved in a precognition which was taken before the Sheriff, and that the defender acted *bonâ fide* in the whole transaction. The Procurator says he had nothing to do with it but in his character of agent,

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and Cunningham says he is not liable under the circumstances, which as far as they related to him are not correctly stated by the Pursuer.

First as to the Taylors as a company, and as individuals, except W. Taylor.

To dispose first of the whole of the Taylors, except William Taylor, it is a singular thing to be sure to be contended that if an individual thinks proper to prosecute for stealing property which belonged to that individual and others in partnership, though nobody appears in that prosecution but that individual, yet because the property was the property of the partnership, it is therefore to be dealt with as a prosecution by all the individuals in that partnership. However, the Court gave Arbuckle an opportunity of making out this sort of case; that this was a proceeding on the part of the partnership; that William Taylor acted under their directions; that all the expenses and trouble the Pursuer was at was in consequence of the conduct of the partnership, and that it was in truth their prosecution, that is, a prosecution of the company. It appears to me at least, upon looking into the evidence, that there is no possibility of maintaining these facts, and the consequence is that William Taylor must be looked upon as the only prosecutor. The interlocutor, therefore, in as far as it assoilzied all the other persons of the name of Taylor, appears to me to be clearly indisputable.

The judgment assoilzieing them clearly right.

Then as to the Procurator Fiscal.

With respect to Salmond, it was contended that because having the character of Procurator Fiscal, he also interposed himself in this instance by his advice and assistance to the person who was the prosecutor, he was conjunctly liable. It seems to me, however, that unless he appeared, not merely

as an adviser, but actually as a prosecutor, there could be no ground for including him as a party, and therefore I think the suit was by the Court of Session rightly disposed of as to him.

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He also was properly assoilzied.

With respect to those, then, alleged to have been concerned in the prosecution, there remains only the case of William Taylor, which deserves a good deal more consideration.

Case of W. Taylor, the actual prosecutor.

It was said that the property alleged to be stolen was of the value of 10*s.* only, and that it was impossible for any man under the circumstances to conceive that Taylor could honestly charge Arbuckle with a 10*s.* theft in these articles. With respect to that, your Lordships will permit me to say that I have found considerable difficulty in the case, not because I should not know how to deal with it if it were an English case, for then I should know what were the proper modes of proceeding; and I think I should know the principles upon which, if an action for a malicious prosecution were brought, I ought to adjudge that case. But I cannot be sure what are the principles (and I do not think I have had a great deal of assistance upon that point) upon which the Court of Session acts in such cases—first, as to the form of proceeding; and, secondly, as to the grounds upon which such an action for a malicious prosecution can or cannot be supported. In this case it was very strongly objected at the bar that the magistrate, Mr. Cunningham, proceeded on nothing more than a petition of Taylor, signed by Taylor, but not sworn by him. On the other hand it was contended that that was the usual mode of proceeding in Scotland; and if your Lordships will look at the

Whether the information must be sworn as well as signed.

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Though it were true that the information ought to be sworn, yet a prosecutor proceeding on an unsworn information cannot on that account be liable in damages for a malicious prosecution, unless it was put to him to swear to his information, and he refused.

terms of the Act of Parliament to which I have referred, you will find that it speaks of the information being signed by the party. Whether that information signed by the party must by the Scotch form be also sworn by the party signing it, is more than I can undertake at this moment to state. Supposing it, however, to be insufficient for the magistrate to proceed upon without oath, I do not apprehend that an action for a malicious prosecution can be sustained against the person who gave the information without swearing to it; for it is not an injury on the part of the person who gave the information, unless it can be shown that it was put to him to swear to it, and he refused to do so.

By the law of England an action for a malicious prosecution cannot be supported unless it was malicious, and also without probable cause.

With respect to the history which William Taylor gives of this transaction, I cannot undertake to state it fully; but I think I can give your Lordships a general representation of it, which will enable you to understand it, after first stating that I conceive that by the law of England an action for a malicious prosecution cannot be supported unless it is proved to the satisfaction of the jury that it was malicious, and that it was without probable cause. It has been stated, and I think correctly, that admitting it to be malicious, yet if there was probable cause for it the verdict cannot be for the Plaintiff; and that admitting it to be without probable cause, if it was not malicious, the verdict cannot be for the Plaintiff, the fact of the want of probable cause, however, being to be considered as evidence of the malice. But still it is but evidence; and if the jury should conclude upon the whole that there was not malice, such an action cannot be maintained. And the reason is

this, that if there be probable cause for the prosecu- July 10, 1815.
tion, the policy of the law requires that men should
be protected who bring forward accusations founded ALLEGED MALICIOUS PROSECUTION AND WRONGOUS IMPRISONMENT.
upon probable cause; and it would be a great deal too much to say that every prosecution which failed, though there should be ever so much probable cause for it, must be considered as a prosecution for which the prosecutor is liable in damages. The law therefore protects the prosecutor, unless you can say that he has acted maliciously, and that there was no probable cause for his proceeding.

Now it was very strongly represented at the bar that this was a most flagrant and iniquitous case of malice and oppression—of malice most evident by the nature of the information given by Taylor—of malice most evident by the nature of the evidence which was stated. I think it does appear that Taylor did not like Arbuckle. It is probable that they had disputes about elections, and that Taylor had in his mind a determination to prosecute Arbuckle if there was probable cause for the proceeding. But it appears from the evidence that when these two parties were contending to whom the property belonged, Arbuckle himself, while asserting that the property was his, had no difficulty in stating to Taylor, who was likewise a merchant in considerable trade, that he (Taylor) was a thief with respect to those articles, and that he (Arbuckle) was determined to prosecute him.

It appears that there had been previous sales at these plantations; and it is a fact clear from all the evidence that theft, or something like it, had been very common. Upon this occasion Taylor and

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Arbuckle had both attended at the sale. (His Lordship here stated the evidence as bearing upon the question whether there was probable cause for the prosecution, and then continued.) Under these circumstances, the question is not what any one of us may believe as to whether Arbuckle did or did not steal this wood. I should be sorry if any thing said by me should make any one suppose that I thought he did. I think no such thing. But the question is whether these circumstances do not afford that sort of probable cause upon which one might be charged with this species of theft who himself said that he would charge another with this sort of theft under pretty nearly the same circumstances; and whether, regard being had to the policy of the law, the charge can be said to have been made both maliciously and without probable cause. I do not mean here to conclude the subject, for a reason which I shall presently state; but I take it to be a principle of Scotch law, because I think it ought to be a principle of every law, that a suit would not lie against William Taylor, the prosecutor, if there was probable cause for the charge, even taking the accusation, when you come to sift the matter, to be perfectly false, and taking Arbuckle to be just as honest a man as Taylor himself can be.

Conduct of the magistrate;

The next thing to be considered is the conduct of Mr. Cunningham, the Sheriff-substitute. It has been asserted at this bar that the case, with respect to proceedings in Scotland as to magistrates, is of so much consequence, and protection is so justly due to those who are to act in the administration of the law, that I am sure your Lordships will not refuse

a further consideration of this point in the way I put it. I am quite ready to admit, and I think it would be improper if I did not avow it as a principle admitting of no judicial denial, that where an act of parliament points out to a judge that he is to do a thing which is prescribed by that act of parliament, do it he must. It signifies nothing what his motives may be. He must obey the legislature, and give to the king's subjects the benefit of that law which the legislature has enacted: and therefore if he declined to do any thing which he was bound by the act to do, it is not enough to say (that which I dare say may be said) that he meant to act most accurately and honestly; but the question will be whether he has omitted to do that which he was bound to do.

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Where an act of parliament prescribes any thing to a magistrate, if he does not do it he is liable in the penalty, whatever his motives may be.

I see it argued in the cases here that, attending to the principles of this statute of 1701, a commitment for further examination ought to be considered as standing upon the same principle as a commitment for custody in order to trial. It would be quite answer enough to say that if it is not so considered by the statute, the statute must decide, for the present, upon the subject. And supposing the statute not to have decided it, I cannot bring myself to think it would be a wholesome doctrine that a commitment for further examination should be looked to in the same way, or upon the same principle, as a commitment for custody in order to trial. If I understand the law upon this subject, a commitment for further examination is not a proceeding against the party, but a proceeding for his benefit. It is a proceeding with a view to protect him against

Commitments for further examination stand upon grounds and principles different from commitments for custody in order to trial.

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a commitment for trial, if during a reasonable time for examination it can be found that there is no ground upon which there ought to be a commitment for custody in order to trial. And if you were to say that where a party is committed for further examination bail shall be required before that further examination takes place, you put him to this inconvenience, that he must give security to stand a trial which he may never have to stand. I take it therefore to rest upon quite a different principle. At the same time what I said in the case of *Andrew v. Murdoch*, I repeat in this; a commitment for further examination must not be made use of as a commitment for custody in order to trial, and therefore the law has very properly limited it; the law has said that it shall be a commitment for further examination, to take place within a reasonable time. What is a reasonable time may be difficult to say; whether one, two, three, four, or five days; for what may be a reasonable time in one case may not be so in another, but a magistrate is bound to terminate his commitment for further examination within a reasonable time, and I cannot entertain a doubt that an action might be maintained against a magistrate for committing for further examination, if his view and purpose in so doing were to put the party under the same hardship and oppression as would belong to a commitment for custody in order to trial; but then, if you can sustain an action upon that ground, you must state your cause of action accordingly.

A commitment for further examination must not be made use of as a commitment for trial, and the examination must take place in a reasonable time, otherwise an action will lie against the magistrate.

Andrews v. Murdoch, *vid. ante*, vol. ii. 401.

Now in the case of *Andrews v. Murdoch*, if I do not misrecollect the circumstances of that case—it is

very difficult to pledge myself to accuracy, with a head which has so much upon it as mine has—but if I do not misrecollect the circumstances of that case, it was there argued that the commitment was for further examination, to which the statute of 1701 did not apply. It was contended on the other hand, that according to the terms of the warrant it was not a commitment for further examination, but for trial, and that even if it were for further examination the statute applied. It was then again said, that even if the act of 1701 applied to commitments for further examination, which the commitment there was contended to be, yet as a late statute (39 G. 3. c. 49) had passed, which in consequence of supposed seditious crimes had given the magistrate a power of requiring bail in a larger amount than had been authorized by the former statute, the party must be kept under that warrant, while a correspondence took place with the Lord Advocate in Edinburgh, in order to know whether he would have more bail than was required under the statute of 1701, and eventually there he did insist upon further bail. If that case of *Andrews v. Murdoch* is cited for what was done there, it will be recollected that in consequence of the importance of that case, both to the subject and to the judges of the country, which judges always deserve every protection that can be given them, as far as protection is given on the principle that justice must be done them, and that they must not be harassed for acts which they have done in the fair and conscientious administration of justice, without fear or favour, it was thought proper to remit that case to the Court of Session.

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Then we are told further that the magistrate did wrong—and I am sure I cannot take upon myself to say it is otherwise—in taking the declaration without the oath of the party, and in taking the precognition under the subsequent circumstances stated at the bar.

Lord Chancellor inclined to think that terms of statute of 1701 do not apply to warrants, &c. for further examination.

If I were to state my own opinion upon the subject, I should say that the strong inclination of that opinion is that a warrant for further examination is not a warrant in respect of which the terms of the statute apply. But I do not mean to conclude myself by any thing I shall now say upon the subject; I think, however, that this warrant may fairly be considered as a warrant for further examination; for though the words are "for further examination, or "that he is otherwise liberated in due course of law," he might be liberated by due course of law before any further examination. If, for instance, the Prosecutor had come and stated that he had discovered circumstances which satisfied him that there was no intention to steal, there would have been no occasion for further examination, and I think it would have been rather too much to say that, because the warrant had these concluding words, it was not a commitment for further examination. But then it is said, if it was a commitment for further examination, you did not further examine. The question, however, is whether the reasonable time for further examination had elapsed before the Pursuer was relieved by Lord Armadale's order; and next, whether the action could be sustained upon such a summons as this, supposing the warrant to be under colour of a warrant for further examination, a warrant for quite a

different purpose, which it would be wrong to impute, unless that was specifically complained of as such, and precisely proved to be so. July 10, 1815.

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It has therefore struck me that the proper way of disposing of this case at present will be to affirm the interlocutors as to the complaint against the company, and the individuals of that company, who were not Prosecutors; to affirm them, also, as far as they assoilzie Salmond, who was acting in the character I have mentioned; and with respect tó William Taylor, my judgment certainly as an English Judge would be conformable to the judgment of the Court of Session, that he also ought to be assoilzied; not because I think Arbuckle guilty, or that he is otherwise than innocent, or that he would not turn out to be innocent if the case were sifted to the bottom, but because on English principles such an action could not be maintained, unless the Prosecutor had acted maliciously, and without probable cause. I think under the circumstances it cannot be justly said that there was not probable cause to accuse; and indeed Arbuckle himself has so far given evidence against himself, that he threatened the same accusation against the other, if they turned out to be his property; and I cannot say that the circumstances do not amount to a probable cause for inquiry and investigation, carried on under the form of accusation. Upon these grounds I should be for assoilzieing William Taylor, but not being quite sure what are the grounds upon which, in administering the law of Scotland, I should proceed, I should humbly call on the Court of Session to review their determination. And with respect to the

Lord Chancellor thinks that the Prosecutor ought to be assoilzied because he had probable cause for the proceeding.

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Sheriff-substitute, though it is my own individual opinion that he ought to be assoilzied also, yet considering what this House did in the case of *Andrews v. Murdoch*, and considering of how much importance it is to the magistrates of Scotland that this matter should be fully investigated, and clearly understood; and likewise considering that it is of still greater importance to the Lieges in Scotland that they should clearly understand what the duty of the magistrate is, I should propose to remit the cause for review as to Taylor and Cunningham, and to affirm the interlocutors as to the rest. If your Lordships should adopt this mode of proceeding, I think the whole will be settled. I am, however, anxious to say that the view I take of this case is not one in which I ought to be understood as parting with this case under any notion that I impute to Mr. Arbuckle any thing, but only maintaining that principle of law, which in this part of the island is established, that the public interest requires that a prosecutor should be protected if he acts without malice, and has probable cause for the proceeding.

And also thinks that the magistrate ought to be assoilzied;

But is of opinion that the cause as to them should be remitted for review.

Judgment remitted for review as to Taylor the Prosecutor, and Cunningham the Magistrate;—affirmed as to the other parties.

Agent for Appellant, CAMPBELL.
Agent for Respondent, GRANT.