

November. 22. 1743. and November. 2. 1744.

BELL *against* MAXWELL Bailie of Wigtoun, and Others.

No. 7.

A person found entitled to damages, who, without any decree being taken against him, was summarily imprisoned for refusing to depone to the number of cattle carried out of the county without paying the customary dues.

Kilkerran.

* * This case is No. 35. p. 13951. *voce* REPARATION.

1747. November 27.

JAMIESON *against* NAPIER.

No. 8.

Some general rules with respect to commitments in order to trial.

Mr. Napier of Blackstoun having had the lock of his drawers picked and money stolen, whereof, in the nature of the thing, he could have no other evidence but his own word, as men do not let any body know what money they have in their repositories, applied to the Sheriff-substitute of Renfrew for a warrant to commit John Jamieson one of his own workmen to prison, wherein he set furth the grounds of suspicion, that he was the person guilty; and, on this application, the Sheriff-substitute, without taking any precognition, granted warrant for committing Jamieson to prison, which was done accordingly. Jamieson having brought an action of wrongous imprisonment and damages against both Blackstoun and the Sheriff, wherein appearance was made for Blackstoun (for as to the Sheriff, he neither compeared, nor was insisted against) a condescence *hinc inde* was made of facts, and a proof led; which the Lords, on advising, having found no evidence of the theft, by their first interlocutor, found Blackstoun liable in damages; but, on advising bill and answers, assoilzied him.

It is unnecessary to state the particular facts, as circumstantial cases can be of little use in the decision of any other; all that is intended is, to lay down the general rules whereon the Lords proceeded.

1st, That where a man finds the lock of his repository picked, and misses money, it is what in the nature of the thing he can produce no other evidence of than his own word or oath, as men are not in use to let any body know what money they have by them. One may prove by those of his family, what bulky goods he had, and in what place they used to lie, but the case is different as to money.

2dly, That in the proof of theft, or accession to theft, the greater the opportunity the person accused has to commit it, and the greater difficulty there is to guard against it, the more slender evidence is to be admitted in proof of the fact, or to justify an application for a warrant of commitment.

3dly, Far less evidence is necessary to justify an information for commitment

in order to trial than is necessary for conviction of the party accused; and, if the informer acted *bona fide*, and upon any plausible ground of suspicion, he is not to be found liable in damage, though the person should be acquitted; for, when men are robbed, they are not to be put in terror of damages, and thereby to be restrained from taking the legal method of obtaining redress.

Kilkerran, p. 160.

No. 8.

1748. June 23.

PHILP *against* MAGISTRATES OF EASTER ENSTRUTHER.

A person imprisoned without a written warrant, is entitled to damages, although there were a sufficient ground of commitment.

Kilkerran. D. Falconer.

No. 9.

* * This case is No. 37. p. 13953. *voce* REPARATION.

1752. June 3. Ross *against* JAMES and WILLIAM ROSE.

William Ross, late clerk to Mowat and others, the Banking Company at Aberdeen, was committed prisoner to the tolbooth of Aberdeen, upon a warrant by the Magistrates, proceeding upon a complaint in name of James and William Rose, who had joined as cautioners in a bond with Ross for his fidelity as clerk to the Company, to the extent of £700 Sterling, representing that he had embezzled £400 of the Company's money, and craving he might be imprisoned till he should find caution for their relief. And he being brought before the Magistrates, and alleging that part of the £400 amissing had been employed in trade with the Company's allowance; and as to the residue thereof, owning he could give no account what had become of it, the Magistrates gave warrant for his imprisonment, till he should find caution *judicio sisti et judicatum solvi*.

Ross applied, by bill of suspension and liberation, to three Ordinaries in time of vacance, Murkle, Kilkerran, and Shewaltoun, on this ground, That this summary imprisonment was for a civil debt, and therefore unwarrantable.

But the Ordinaries were not of that opinion. They considered it as a crime in the clerk to embezzle the Company's money, and therefore refused the bill, but restricted the caution to caution *judicio sisti*.

Upon the sitting down of the Session, a new bill was presented to Lord Elchies Ordinary on the bills, who reported the case, and stated the only doubt to be, How far the application was competent to the cautioners? For he made no doubt, but that the Company might have applied for the warrant as for a crime.

No. 10.

Summary imprisonment of a clerk to a company for embezzlement of company's effects, at the instance of his cautioners.