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exact toll for any cattle carried out of the shire of Wigton, other than such as passed the water of Cree, which the cattle in question had not done; and on the part of the defenders, that it was the custom of the burgh summarily to apprehend persons even *ex intervallo*, a conjunct proof before answer was allowed to either party: Upon advising whereof, the LORDS, 22d November 1743, "Found the commitment illegal, and that therefore the defenders were liable in damages."

Upon advising this proof, it was the unanimous opinion of the Court, That the town had no right to a toll, except for cattle passing the water of Cree; but judgment could not be given upon that point for want of parties, the town not being in the field, farther than to the effect of suspending the decree, which was left to the Ordinary, and judgment only given as above, that the commitment was illegal.

As to which, it was the opinion of the Court, that supposing the toll due, the person liable, being found within the town, might be summarily apprehended even *ex intervallo*, and carried before the Magistrate, and obliged to find caution *judicio sisti*, or be sent to prison; or that he might, when summarily apprehended, be directly libelled against, and the fact offered to be proved by his oath; and upon refusing to depone, he might be held as confessed and decerned, and upon that decree committed to prison; for it were absurd to say, that, in such a case, it is necessary to pursue for every trifling toll in another county. But the error in the present case lay in this, that it appeared from the instrument taken upon the imprisonment, that the pursuer was, without taking decree, imprisoned for refusing to set forth upon oath what number he had carried out of the shire.

N. B. The defenders having reclaimed, it appeared in the after proceedings, that, after the pursuer had been some days in prison, he had offered caution to answer in any process that might be brought against him, and that the offer was refused. But it was thought proper to state the case as it lay before the Court, when the above interlocutor was pronounced, as what the Court would have adhered to, without that circumstance, whereof the proof was only allowed, as it might have influence on the point of damages.

Kilkerran, (WRONGOUS IMPRISONMENT.) No 1. p. 617.

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Damages being given for oppression, in an action libelled on the statute anent wrongous imprisonment, no ex-

1745. February 14. ALEXANDER STEEL *against* Bailie RAMSAY.

ALEXANDER STEEL, dyer in Dundee, pursued Bailie John Ramsay for wrongous imprisonment, oppression, and damages. THE LORDS, 1st February 1745, "Found the proceedings of the Bailie irregular; and in respect of the imprisonment, found him liable in damages to the pursuer, which they taxed to 100 merks Scots, and decerned the defender to pay the same to the pursuer against

that day fortnight ; and, in case it was not paid, they decerned him to pay the expenses of the extract, as they should be certified by the collector of the clerk's dues at extracting ; but found the libel as laid upon, and concluding the penalties of the statute anent wrongous imprisonment, was groundless and vexatious ; and therefore found no expenses due, except the expense of extracting, unless payment should be made as aforesaid." A reclaiming bill was offered and refused.

Act. Lockhart, & Ja. Dundas. Alt. Graham, jun. & Williamson. Clerk, Gibson.

It was noticed, That libels were always thus laid, though the *species facti* seldom came up to the case of the statute, which was thought wrong.

THE LORDS here were of opinion, that the Bailie was only mistaken, in taking care of the police of the town, and the pursuer glad to catch him in a slip.

D. Falconer, v. I. p. 79.

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penses were given, in respect the case fell not under the statute.

1748. June 23. 1748. PHILP *against* MAGISTRATES OF EASTER-ANSTRUTHER.

DUNCAN PHILIP being, on the signed examination of Wilkie, accused as being accessory with him in breaking a shop in Easter-Anstruther, was by the Magistrates committed to prison without a written order ; whereupon he pursued them for wrongous imprisonment, concluding for damages.

Pleaded, As the conclusion was not for the penalty in the statute, no damages were due in this case, where there was a sufficient ground of commitment ; for the pursuer suffered nothing in being committed without a written order, when he might have been committed upon one.

THE LORDS, 9th June, "found damages due." And

This day refused a bill and adhered. See WRONGOUS IMPRISONMENT.

Act. R. Dundas.

Alt. Lockhart.

Fol. Dic. v. 4. p. 226. D. Falconer, v. I. No. 265. p. 357.

. Kilkerran reports this case :

JOHN DRUMMOND, Bailie in Anstruther Easter, having had his shop broke in the night between the last of June and first of July 1746, and a parcel of stockings and other goods stolen from him; the same were, upon search, found in the house of Alexander Wilkie mason in Collinsburgh, who thereupon was committed to prison ; and being examined upon the 3d of July 1746, in presence of Thomas White, likewise Bailie in Anstruther Easter, he emitted a declaration, acknowledging the fact, and averring in substance, that Duncan Philp was the proposer, aider, and principal actor in it ; whereupon Philp was, upon Bailie White's order, also committed to the prison ; but being brought

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