1712. *January* 8. HERIOT *against* HAMILTON.

No 37.

THE LORDS refused to restrict the penalty in a lawburrows which was 1,000 merks to 200, (as was pleaded, because the master was not infeft, and so an unlanded gentleman,) because, though he was not infeft, he was an apparent heir to a freeholder who stood infeft, and so was liable to same penalty.

Fol. Dic. v. 1. *p.* 533. *Fountainhall.*

*** This case is No 5. p. 2911, *voce* CONCURSUS ACTIONUM.

1752. *February* 21. MARION FORREST, Complainer.

No 38.
Where caution is found within six days of the charge, no suspension is sought; but if the caution is found after the lapse of six days, then the practice is to suspend, and to intimate the suspension.

WILLIAM NICOL taylor in Hamilton, obtained letters of lawburrows against Marion Forrest, and thereon charged her on the January to find caution, which accordingly she did upon the 23d of said month; notwithstanding which, Nicol proceeded to denounce her, and procured letters of caption, in virtue whereof she was apprehended and committed to the tolbooth of Hamilton, although she told the messenger that she had found caution, and would shew him the certificate thereof, if he would go along with her to her house, which was hard by, but which he refused. On the 10th current, a procurator for her went to Nicol's house with a notary and witnesses, and there made intimation to him, that caution had been found, and required him to consent to her being set at liberty, otherways protested he should be liable in damages; and the same intimation and requisition was made to the keeper of the prison, but all to no effect.

She now applies by summary complaint, and, after observing that she was not obliged to intimate to the charger that she had found caution, that the only command of the letters is to find caution, which she obeyed, and it was the charger's business to enquire at the proper office, whether or not she had given obedience, before he proceeded to diligence; prays that the charger may be found liable in her damages, and in respect of the certificate now produced, that she may be ordered to be set at liberty.

On moving this complaint, it was stated as a doubt, whether where caution in a lawburrows is found, there should not also be a suspension of the charge, and that, as other suspensions, intimated to the charger; and the clerk to the bills being called upon to inform what the practice is, he *answered*, That where caution is found within six days of the charge, no suspension is sought; but if the caution is found after the lapse of six days, then the practice is to suspend, and to intimate the suspension.

THE LORDS " appointed the charger to be served with a copy of the complaint, and to answer in days after service; but refused on this petition to

No 38. grant liberation, leaving to the petitioner to present a bill of suspension on obedience, which would pass without caution."

Fol. Dic. v. 3. *p.* 373. *Kilkeran*, (LAWBURROWS.) *No* 1. *p.* 325.

1778. *July* 3. JAMES SELLARS *against* NINIAN ANDERSON.

No 39.
After application for letters of lawburrows, and oath that he dreads bodily harm, the person who applies is not bound to specify the facts on which his application proceeded.

JAMES SELLARS and his brother and sister were all apprehended on letters of lawburrows, obtained from the Sheriff, by Ninian Anderson, and were liberated soon after, on finding the usual caution. They afterwards brought an action of damages against Anderson, on this ground, that the application for the lawburrows was calumnious and without cause.

In this action, the pursuers insisted, that the defender should specially condescend on, and prove the grounds and causes of his dreading harm. The defender gave in a condescendence; but, at the same time, contended, that he was not obliged to assign any causes why he dreaded the harm mentioned in his oath, still less to establish them by proof.

Pleaded for the pursuers; The manner in which lawburrows are obtained, without citation of the accused, or enquiry into the causes of the application, gives room to the committing of much injustice. From the nature of this proceeding, there is no check on a groundless application, nor any means of avoiding the oppressive consequence of imprisonment till caution is found. The laws of other countries are attentive to prevent this injury. Those of England, in granting surety of the peace, require a citation of the party, and an oath specifying sufficient causes of dreading harm; Blackstone, b. 4. c. 18. In other nations, precautions of a like nature are required; *Christen. Comment. in leg. Mecklin. t.* 4. *art.* 5. Anciently in Scotland, though citation was not necessary, it would seem that the complainer was bound to prove some cause of his fear, by his oath or otherwise; A. 1429, c. 129. Stair, b. 4. t. 48.

But although, in practice now, the complainer is not obliged to specify the causes of his fear, or prove them when the application is made; yet both ought to be required of him, when called in an action for a groundless application. It is impossible for the pursuer to prove the negative, that the defender had no cause of fear, except by proving that such as he shall specify are without foundation. If, therefore, he is not obliged to condescend, all evidence that the application was groundless is necessarily shut out.

This cannot be the meaning of the law, which allows this diligence to be granted in a summary manner, but does not therefore authorise wanton and groundless applications. In the present action, the defender must assign and prove a rational cause of fear, otherwise damages must be given according to the established rule, that a person injured is entitled to reparation of what he suffers from the rashness and folly of another, as well as from bad design. In the similar case of an application on a *meditatio fugæ*, the creditor may be af-