

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 condescence; 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-

terwards called on to support his oath, and must prove sufficient reasons to justify his application, otherwise he will be liable in damages; Erskine, b. 1. t. 2. §. 21.

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*Answered* for the defender; The law of Scotland requires nothing more to entitle any person to letters of lawburrows, but that he is in dread of harm; A. 1449, c. 13. They are given to quiet the minds of those under such apprehensions; and the only effect of them is to oblige the person against whom they are directed to find caution not to injure the obtainer of the letters, which, at any rate, the law would restrain him from doing.

As the dread of harm is entirely a matter of feeling in a person's own mind, it is capable of no proof but by the oath of the person himself. When he depones that he is under such dread, he has proved all that the law judges to be necessary for justifying his application; and, consequently, though it were that the fear he depones to did not proceed from a sufficient cause, he is not liable afterwards in damages on that account. He is not, therefore, in defence against an action of this kind, obliged to specify, or prove the causes of his fear.

The principle on which lawburrows are granted, does not apply to the case of a *meditatio fuga*. The effect of the caution likewise required in that case, is to restrain the debtor from what he would be otherwise entitled to do.

THE COURT were of opinion, That the oath required by the Judge, from the person applying for lawburrows, being only that he is under dread of harm, no action of damages lies merely on account of his not having a good cause for his fear. Malice, or any undue motive in making the application, are relevant grounds for an action of damages. The judgment was, 'finding that the petitioner, after application for letters of lawburrows, and his oath taken, is not bound further to justify the facts upon which his application proceeded.'

Act. Cullen.

Alt. Craig.

Fol. Dic. v. 3: p. 373. Fac. Col. No 27. p. 44.

1799. January 26.

ISABEL SMITH *against* The Reverend JOHN BAIRD, and Others.

ISABEL SMITH and Charles Macnab, on taking the usual oath, obtained letters of lawburrows from the Court of Justiciary against the Reverend John Baird, minister of the parish of Dunning, his son, and David Balmain, schoolmaster of the parish.

When the letters were executed against them, instead of finding caution, they presented bills of suspension, in which they stated, that a riotous opposition having been made in the parish, to the execution of the militia acts, the minister had endeavoured to convince the people of the impropriety of their conduct: That his son, a student, residing with him during the vacation of the

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The charge to find caution in letters of lawburrows, may be suspended, if the application be malicious.