

No. 10. But the Lords, upon reasoning the case among themselves, found it no less competent to the cautioners for his fidelity, than to the Company, to make the application; and therefore the prayer of this new bill, which was to find the imprisonment irregular, and to grant warrant for his liberation, or at least to liberate on juratory caution, was refused; and the bill only appointed to be passed on his finding caution in common form for the sum of £200 8s. 2½d. Sterling, in respect the cautioners had now compounded the Company's claim for that sum.

*Kilkerran, No. 2. p. 618.*

No. 11.

A person in suspicious circumstances may be imprisoned, though no information has been lodged, that the crime of which he is suspected has been committed.

A public officer is to be judged of favourably, when acting *bona fide* in the discharge of his duty.

1793. February 7. JAMES HENDERSON *against* WILLIAM SCOTT.

On the 13th November 1788, a reputable jeweller in Edinburgh sent information to the office of the Sheriff-clerk, that a valuable diamond-ring had been left at his shop by James Henderson, a person of a mean appearance, who might be suspected of having got it by dishonest means, and who had promised to return at a certain hour, to get his opinion of its value. Henderson was in consequence apprehended, and brought before the Sheriff, when being examined, he declared, that on his return from London, where he had been for some time a menial servant, having occasion to stay some days at Berwick, he bought the ring there for 7s. 6d. from a glazier's apprentice, whose Christian name was Thomas, but whose surname was unknown to him. He was confirmed in this account of the matter by another person who had been present at the purchase.

Mr. Scott the procurator-fiscal suspecting the truth of this story, applied for a warrant of commitment, which was obtained, and put in execution. On the same day he wrote to the Mayor of Berwick, making enquires concerning Henderson's story. By return of post, he received an answer, by which it appeared, that Henderson had told the truth, and he was in consequence immediately liberated.

Henderson then commenced an action of wrongous imprisonment, oppression and damages, in which he called as defenders the Sheriff-substitute, the jailor, and Mr. Scott, and founded both on the common law and the act 1701. But at an early stage of the process he consented, that the jailor should be assoilzied, and limited his conclusions against the other defenders to a claim of damages at common law, in which he

Pleaded: A Magistrate is not warranted to grant, nor a public officer to apply for an order to apprehend, and still less an order to incarcerate, for a criminal cause, without previous knowledge, or at least credible information of a particular offence having been committed. Where this has been obtained, the officer of police must indeed be allowed a considerable latitude in proceeding against whatsoever person, any, even slight, if probable grounds of suspicion fall; and if in this way an innocent person shall suffer confinement, it is an injury which must

be submitted to for the sake of the general safety. But he cannot be allowed to infer from circumstances, though seemingly unaccountable, both the *corpus delicti* itself, (of which no intelligence has been got), and the guilt of the suspected person. In this case a few days were sufficient to vindicate the pursuer from suspicion; but the same principle, had a much longer delay been necessary, would have justified a similar conduct. This distinction, which is not contradicted by any authority in the law of Scotland, is completely established by the law of England. Blackst. B. 4. Chap. 21. § 1.

At any rate, an innocent person imprisoned in such circumstances, should recover the actual loss sustained by him.

Answered: A Magistrate may imprison on suspicion of an intention to commit a crime. A constable may detain a suspicious person till he is examined by a Magistrate. A private person may do the same thing when he sees people quarrelling, or using threatening expressions to each other; and surely the detection of a crime, which may, and is on likely grounds believed to have happened, is as important to society as the prevention of a crime which may possibly be committed.

Yet the unavoidable consequence of the pursuer's doctrine would be to allow the most notorious thief or robber, however incredible his story, or suspicious his situation, to dispose of his goods with impunity, provided he could outrun the news of his guilt.

As there are scarcely any systematic authors on the criminal law of Scotland, no direct authority can be adduced in support of what has been said; but it may be inferred from Mackenzie, from the act 1661, Chap. 38. and from the act 1701, which relates chiefly to commitment for trial, and not to commitment for examination and enquiry, as in the present case; and it is ascertained by daily practice, both in this country, and in England, whatever may be the theory in the latter kingdom.

Replied: Greater latitude may frequently be allowed for the prevention than for the detection of crimes; to prevent a murder, than to detect the person guilty of it; to prevent a riot, by which the lives of thousands may be endangered, than to detect the rioters after the quiet of the country is restored.

The statute 1661, Chap. 38. introduces certain exceptions to the general rule, and is in other respects a confirmation of it.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: The act 1701 is inapplicable. When the information on which a warrant is granted is calumnious, the only remedy is an action of oppression and damages at common law; but here the conduct of the defenders was completely justified by the circumstances of the case and daily practice.

A second branch of the pursuer's claim it may be sufficient barely to mention. By a second letter from the Mayor of Berwick, received a few days after the former, Mr. Scott was informed, that the ring in dispute had been found upon the Calf-hill, which is situated about a quarter of a mile north from Berwick on the Scotch road. On this information Mr. Scott kept the ring, both in order to dis-

No. 11. cover the real owner, and because, as a waif, it belonged to the Crown. The pursuer presented two petitions to the Sheriff to have it restored, which being refused, he complained by bill of advocation. A proof was allowed, from which it appeared, that the Calf-hill was within the territory of the Town of Berwick. The right to the ring was therefore to be regulated by the law of England, by which waifs belong to the finder. The ring was accordingly restored. The pursuer claimed from Mr. Scott damages for its being so long withheld, and the expense of recovering it\*.

Observed on the Bench: Perhaps Mr. Scott ought to have restored the ring after keeping it a year. But there being this material difference between the situation of a public officer and an individual, that the former is obliged in duty to interfere, while the latter is not, it would be dangerous to subject him to damages, when he acted *bona fide*, and without any view to his own interest, as he could not have been the King's donatary.

The Court unanimously "sustained the defences, and found no ground for damages" on either conclusion of this action. And by a narrow majority, chiefly because there was no fund from which Mr. Scott could be indemnified, they found the pursuer not entitled to the expense of the former litigation.

Reporter, *Lord Eskgrove.*

Alt. Lord Advocate, *Cha. Hope.*

Act. Dean of Faculty, *D. Douglas.*

Clerk, *Mitchelson.*

*D. D.*

*Fac. Coll. No. 23. pt. 47.*

See DELINQUENCY.

See APPENDIX.

\* The process for recovery of the ring had been remitted to the action of damages, in order to obtain a judgment of the Court on the article of expenses.