

No 37. a debt owing to the pursuer, and therefore concluding payment against the Magistrates *actione subsidiaria*. It was *alleged*, That the prisoner escaped *vi majore*, having broken the prison in the roof by which he came forth. It was *answered*, *Non relevat*; because the Magistrates, and others under them, were obliged to guard and watch the prison, that the prisoner might not escape; so that unless he had escaped by the assistance of such power as they were not able to resist, his escaping by their negligence either at the roof or doors, cannot defend them.

THE LORDS repelled the allegiance.

Gilmour, No 112. p. 83.

* * * Gosford reports the same case:

1670. June 18.—IN the subsidiary action at Colin Hay's instance, *super hoc medio*, that his debtor being incarcerated in the tolbooth of Elgin by virtue of letters of horning and caption raised at his instance, caused arrest him by a messenger, and intimated the same to the Provost and one of the Bailies, and to the clerk; the defenders having offered to improve the executions by witnesses inserted, whereof one was dead, and two living, whose depositions were advised, bearing, that the arrestment was only made by chalking the tolbooth door, and not personal, as the messenger's executions did bear; as likewise, that no intimation was made, either to Provost, Bailie, or clerk, which was contrary to the execution; the LORDS did assoilzie the Magistrates, and found it not sufficient, that some of the town-officers were witnesses at the chalking of the tolbooth, as was urged by some; but found it necessary, that where the arrestment was only in manner foresaid, that intimation should have been made to some of the Magistrates or town-clerk, without which they could not be liable for the debt.

Gosford, MS. No 273. p. 116.

No 38.

1664. December 2. WILSON against HOME of Linthall.

JAMES WILSON pursued Alexander Home of Linthall, as Sheriff of the shire, for the debt of a rebel, whom he suffered to escape.

In which, this defence was found relevant, that the rebel in the taking had wounded those that were taking him, and had escaped *vi majore*.

Fol. Dic. v. 2. p. 167. Stair, v. 1. p. 234.