

No 43. Lords of Privy Council, or their own warrant specially; it being proved, that they suffered him to lie many nights out of prison before that time.

Fol. Dic. v. 2. p. 169. Gosford, MS. No 31. p. 11.

1669. July 2. FARQUHAR *against* The MAGISTRATES of ELGIN.

No 44.

The Lords found Magistrates, being charged, obliged to take a rebel, and, without delay, to search any house within the town that was particularly shown to them, unless they had been repulsed by force, or the doors by violence kept close against them.

FARQUHAR having caused a messenger charge the Magistrates of Elgin to take my Lord Lovat, and the Bailies being together upon the street about eight or nine o'clock in the morning, the messenger, with several persons present, charged them to go into an house near by, which they designed to them, and to take Lovat, being then in bed; and the messenger offered to go with them and enter first; yet the Bailies did not obey, but said they would go at their conveniency, when they had convened their neighbours to assist. There is an execution and instrument upon the back of the caption to the effect foresaid produced, whereupon Farquhar pursues the Magistrates for payment of the debt contained in the caption. The defenders *alleged*, Absolvitor; *1mo*, Because they were no further obliged but to convene the neighbours of the town, and send them with the messengers to assist, which they offered to do; *2do*, Albeit themselves were obliged to take the rebel if he were shown to them within their jurisdiction, yet they were not obliged to search every house of the town for him, or to enter within close doors; *3tio*, The Lord Lovat being known to be a fierce young man, who ordinarily had a minzie attending him, they were not obliged to adventure upon him, without calling the assistance of their neighbours, which they did within an hour or two thereafter, and he was gone.

THE LORDS repelled all these defences, in respect of the execution and instrument produced, and found the Magistrates, being charged, obliged to take the rebel, and without delay, to search any house within the town that was particularly shown to them, unless they had been repulsed by force, or the doors by violence kept close against them by the master of the house, and ordained the pursuers to adduce the witnesses in the instrument and others to prove the particulars foresaid to have been so done as is therein expressed.

Fol. Dic. v. 2. p. 168. Stair, v. 1. p. 628.

* * * Gosford reports this case:

IN a subsidiary action pursued against the Magistrates for payment of a debt due to Farquhar by the Lord Lovat, in respect they being charged by virtue of letters of caption to apprehend, for which an instrument was produced, bearing, that the messenger did intimate to the Bailies, that the Lord Lovat was lying in bed in a house of the town, and that the messenger offered to go with them, and enter the room before them, and that the Magistrates refused,

upon reason that he was not *in conspectu*, and that the rebel being a nobleman, and well attended, might make resistance, in which case, they were not obliged to obey the charge;—the LORDS did find the Magistrates liable to the debt, as being obliged to go and search until they found resistance; but ordained, that their refusing should be proved by witnesses, and would not sustain the instrument of a notary to be a sufficient probation.

Gosford, MS. No 152. p. 60.

No 44.

1669. July 28.

GRANT *against* GRANT.

ONE Grant being imprisoned in the tolbooth of Nairn for a riot, was arrested for a civil debt, whereupon he craved to be set at liberty, pretending, that only prisoners arrested for debt could be arrested by creditors, and that he had satisfied for the riot. THE LORDS did refuse the desire, and found no difference betwixt imprisonments for civil debt, and for a riot or crime; but upon sufficient caution did grant suspension.

Fol. Dic. v. 2. p. 169. Gosford, MS. No 197. p. 79.

No 45.
Prisoner for a crime may be arrested for a civil debt.

1670. June 18.

CHEAP *against* MAGISTRATES OF FALKLAND.

MR JAMES CHEAP pursues the Bailies of Falkland to pay their debt due to him by Provost Mains, who being taken by caption, and delivered to the Bailies by the messengers, they kept him in a private house for the space of ten days, for which they are as well liable for the debt, as if they had brought him out of the tolbooth, and kept him in the town during so much time; and also they were liable in so far as having put him thereafter in the tolbooth, they suffered him to escape forth thereof. It was *alleged* for the defenders, They were not obliged to keep prisoners, not being a burgh royal, but only a burgh within a stewartry, which no law obliges to receive prisoners, and the caption is only direct to Sheriffs, Bailies of regality, or royalty, Stewards, and Magistrates of burghs royal, but not to burghs within stewartries, or within regalities, albeit they were the head burghs of the stewartry or regality, not being burghs royal. *2do*, The defenders cannot be liable for keeping the prisoner some days out of the tolbooth, seeing he did not then escape; and albeit it be a fault for which they may be censured, to keep a prisoner in a private house, yet the doing thereof, if the rebel escape not, makes them not liable to the debt, but especially where the rebel was never in the tolbooth, and when there was treaty betwixt him and the pursuer and his servant, for an agreement and satisfaction and security for the sum. *3dly*, They offered to prove, that the tolbooth was sufficient, and that the prisoner escaped *vi majore*,

No 46.
The Magistrates of a head burgh of a stewartry received a prisoner who afterwards escaped. Found it was then incompetent to allege, that they were not bound to receive him.