No 47.

his escape put him, not in the Tolbooth of Perth, but in the Tolbooth of Edinburgh.

The Lords being unwilling to give either party the choice of witnesses for probation, had, before answer, appointed either to party adduce witnesses anent the condition of the tolbooth, and the manner of the rebel's escape, which being now advised;

The Lords found, That by the most pregnant probation, it was proved, that the catband used sometimes to be on in the day time, and sometimes not, and that prisoners for debt had the liberty in the day time of all the rooms of the tolbooth. The probation was very contrary, as to the breaking off the stone wherein the bolt entered, but it seemed access could not be had to the bolt without some breach of the stone. It was also proved, the catband was not then on, and that the bolt when it got the double cast, could not be prest back, and could when it got the single cast; and therefore the Lords found, that the Magistrates proved not their first exception, that the rebel had escaped *vi majore*, without their fault or negligence, and found the second exception of puting him again in prison, not relevant.

Fol. Dic. v. 2. *p.* 169. *Stair, v.* 1. *p.* 700.

No 48.

Magistrates found liable, there being no catbands on the outside of the prison door, nor outward chains locked.

1671. *February* 11. John Will *against* The Town of Kirkcaldy.

John Will pursues the Magistrates of Kirkcaldy, for paying the debt of a person incarcerated in their tolbooth, who was letten escape by them. It was *alleged* for the Town, That the person incarcerated had escaped *vi majore*, and that they had not failed in their duty, having had a sufficient tolbooth, having four doors, and the inmost an iron door, and that all being locked, the person incarcerated having gotten secretly conveyed in some mason or wrights tools, had in the night broken all the locks, and escaped. It was *answered*, That the defence was not relevant, neither had the Magistrates done their duty and diligence, for they ought to have had chains and catbands upon the outer sides of the doors, with locks thereon, unto which the incarcerated person could not reach, and it was alike how many doors they had upon the Tolbooth with their locks inward, for the same means that would break up one, would break up twenty, and if such a pretence should liberate the Magistrates, it were an easy way to elide all captions, and let all person for debt free. It was *answered* for the Town, That the having of catbands without, closed and locked, was not the custom of their tolbooth, who past all memory did never lock the outward chains but upon malefactors, and such is the custom of Edinburgh and other burghs of Scotland.

The Lords having, before answer, ordained witnesses to be examined on both parts, anent the condition of the tolbooth, and finding thereby, that

there was no catbands or outward chains locked when the prisoner escaped, they found the Magistrates had not done their duty, and so decerned against them.

No 48.

Fol. Dic. v. 2. p. 170. Stair, v. 1. p. 718.

1671. *June* 14. TOWN of BRECHIN *against* TOWN of DUNDEE

No 49.
Magistrates are not entitled to allow a prisoner to go at large with a guard, except in extremity of sickness certified by a physician.

LAURENCE DUNDAS having been debtor to the Earl of Seaforth in L. 200 Sterling, was incarcerated in the tolbooth of Brechin, and being suffered to go out of prison, Mr Roderick M'Kenzie as assignee to the Earl, obtained decreet against the Town, for payment of the sum, and took assignation to the caption, and therewith incarcerated Laurence in the tolbooth of Dundee, and now pursues the town of Dundee for suffering Laurence to go out of prison; and condescends, that they suffered him to go ordinarily to the kirk on the Sabbath, and that they suffered him to go to the river by boat, and over to Fife, another shire, and ordinarily to go the street, and to taverns, without necessary affairs. The defenders *answered*, That the prisoner returned still to the prison every night, and went always abroad with a guard, and his going to the water was because of his indisposition, and for his health; that if he touched upon the other side in Fife, he did return that same night to the prison; and that his going to the kirk with a keeper can be no relevant ground, and even the going out upon other occasions with a keeper, though not absolutely necessary, cannot make the Magistrates liable, it being the constant custom of all burghs so to do, and that a prisoner being under a guard, is in prison, albeit not in the tolbooth. The pursuers *answered*, That Magistrates of burghs were but public servants in keeping of prisoners, and were obliged to give punctual obedience to the letters of caption, bearing to keep the rebel in sure firmance within their tolbooth, which is founded on very good reason, that the prisoner may be necessitated *squalore carceris* to do all deeds in his power to satisfy his debt, which would be eluded, if the Magistrates at their pleasure might let them go out with a guard, and would but turn to a confinement, or entertainment and gratification to an officer for a guard; and even though there were necessary causes of the prisoner coming out, the Magistrate is not to judge thereof, nor has any power of it, but the parties ought to apply themselves to the Council or Session, and obtain their warrant, which will not be granted even by them, but upon instruction of a necessary cause, upon oath of physicians or others. The defenders *answered*, That incarceration was a civil effect of law, and no punishment, and that it were against all humanity, to put prisoners for civil debt in that condition, that the Magistrates could not let them out for a little, even for the safety of their life, in extremity of sickness, which oftentimes would not admit of delay till application were made to the Council or Session. 2*dly*, Whatsoever may be found just by the Lords in time com-