

1685. February 13. MAGISTRATES OF KIRKCALDY *against* The TOWN-CLERK.

No 53.

ONE being pursued upon his bond, That a prisoner for debt should not escape out of the tolbooth, *alleged*, That the roof of the prison having fallen, and endangered the smothering of the prisoner, he was carried out in a consternation upon a man's back; and the Provost did not offer to secure him, though he saw him upon the street, and so he did not escape by any fault of his.

Answered, The design of the bond imports that the prison was looked on as sufficient, and the prisoner ought not to have gone away to Edinburgh, as he did, and obtained since a *cessio bonorum*: The Magistrates being decerned, in a subsidiary action, to pay the debt, at Sir William Binning's instance, who raised the caption, they ought to be relieved by the said bond.

Replied, The Magistrates being justly liable to the subsidiary action, because of the insufficiency of the prison, that cannot be obtruded against the prisoner, nor this defender.

Harcarse, (CAPTION.) No 230. p. 55.

* * * Fountainhall reports this case :

THE LORDS advised the cause pursued by Sir William Binning, against the Magistrates of Kirkcaldy, for suffering a prisoner he had put in there for debt to escape. THE LORDS found, by the probation, there was no negligence on the Magistrates' or jailor's part; for they being about the repairing of their prison, there fell down an old wall, and in the rubbish this prisoner was near overwhelmed, but in the night time wrought himself out and escaped; which the LORDS found to be *casus fortuitus et improvisus*, and therefore assoilzied the said Town from the debt.

Fol. Dic. v. 2. p. 170. Fountainhall, v. 1. p. 341.

1685. February 28. STEVENSON *against* MANSON.

No 54.

BAILIE STEVENSON, in Edinburgh, having pursued Manson, bailie of Wick in Caithness, by a subsidiary action, to pay the debt, for suffering a rebel to escape, and this defence being proponed, that they were not bound to accept the prisoner, because the messenger refused to show the caption, or other warrant to apprehend him, and this as relevant being admitted to probation, and the report of the witnesses this day advised; the LORDS found the defence proved, and assoilzied Manson; though they *alleged*, that they had accepted the prisoner, and kept him some weeks, but then pretended, that being like to

No 54. starve, they might liberated him, seeing the in-putter did not offer caution to aliment him. .

Fol. Dic. v. 2. p. 167. Fountainhall, v. 1. p. 345.

1685. *March* Sir JAMES COCKBURN *against* NASMITH of POSSO.

No 55.

Found in conformity with Cheap against the Magistrates of Falkland, No 46. p. 11715. that the Magistrates of a burgh of barony become liable for diligence to detain a prisoner, although they might not have originally been obliged to receive him.

SIR JAMES COCKBURN being pursued in a subsidiary action, for the escape of a prisoner for debt out of the tolbooth of Dunse, it was *alleged* for the defender, That Dunse was but a burgh of barony, which, by the act of Parliament, is not obliged to have prisons; and the LORDS found, by several decisions marked (*Supra*), That no person was liable for the escape of prisoners out of the tolbooth of Dunse; and these were received *periculo creditoris*; and it cannot be alleged, in this case, but there was ordinary care and diligence used for keeping of the prisoner. *2do*, The tolbooth is as sufficient now as it has been for many years, and the prisoner made his escape by breaking the roof *vi majore*, which would assoilzie even magistrates of royal burghs.

Answered: By an act of Parliament 1661, Dunse is made one of the head burghs of the shire, at which legal diligence is to be done, and is the place where the Sheriff-court holds; and therefore they ought to have a sufficient prison, the Sheriffs having many times occasion to commit persons to prison, both for debts and capital crimes. *2do*, The prisoner having been received into the tolbooth, the town becomes liable for all hazards, as in the prisons of royal burghs.

Replied: The burden of having prisons is, by reason of the privilege and advantage of trade, which is only competent to royal burghs; and the Sheriff sits at Dunse only for his own conveniency, for he may sit at Lauder, the head burgh of the shire, when he pleases. *2do*, Sir James not having given warrant to the bailie to receive him, cannot be liable for the bailie's act.

THE LORDS found the bailie liable for the escape of the prisoner, but not the Baron, unless he had given warrant to receive him, and sustained the defence to liberate the bailie, that the prisoner escaped *vi majore*; as also sustained this reply to take it off, viz. That the prisoner was suffered to walk abroad before his escape, relevant *per se*, as contrary to the act of sederunt, to infer this subsidiary action against the bailie.

This decision seems not very consistent with itself.

Fol. Dic. v. 2. p. 166. Harcarse, (CAPTION.) No 231. p. 55.

No 56.

1687. *June* LOWS and CHEESLY *against* Earl of WINTON.

MY LORD WINTON being pursued in a subsidiary action for a debt due by one English, upon this ground, That a messenger did intimate to the defender