

No 58.  
Magistrates of  
Falkland, No.  
46, p. 11715.

for suffering the debtor to escape. *Alleged*, Dunse being but a burgh of barony, they are not bound to receive prisoners, and though they do, there is no necessity on them to detain them; and cited decisions out of Durie, Bailies of Dunse *contra* Mudie's Creditors, No. 13, p. 11691, Langton *contra* the Bailies of Dunse, No. 15, p. 11693, and 20th July 1624, Bell *contra eosdem*, voce REPARATION; *2do*, The prisoner not being delivered to the Bailie, he cannot be liable; *3tio*, The prison was insufficient, and so the creditor should not have chosen it. *Answered*, Whatever might have been said, had the prisoner been refused, yet all this has no weight, since they accepted of the debtor; and so nothing can exoner them but to present him when required; and these old decisions do not militate now, since the act of Parliament 1661, constituting Dunse the head burgh of the shire of Berwick for all executions, denunciations and legal diligences; and the 277th act 1597, anent prisoners, seems to require them wherever the judicatories sit. And by a late interlocutor in 1687, between Nasmyth of Posso and the said Town of Dunse, they were made liable for the escape of a rebel, and though it was not intimated to the constituent, yet he must be made liable for the negligence of the servants put in by him, and he should either keep the prison fencible, or else give orders to his jailor not to accept prisoners. The LORDS found not only the jailor, but his constituent liable.

*Fol. Dic. v. 2. p. 166. Fountainhall, v. 1. p. 631.*

No 59.

1699. January 31. THOMAS YOUNG *against* WILLIAM LIVINGSTON.

THOMAS YOUNG of Rosebank, merchant in Edinburgh, pursues William Livingston, bailie of the regality of Falkirk, for suffering a Highlandman, his debtor, whom he had imprisoned there, to escape, and concludes payment of the debt. *Alleged*, there was neither *dolus*, *culpa*, nor negligence in the case, but he escaped *vi majore et casu fortuito*; having got in some instruments and tools, he lifted out the stanchel of the window, and escaped thereat. *Answered*, The prison has not been sufficient, else it had not been so easily broken; *2do*, The jailor should suffer no such things to be imported, but should search for them; *3tio*, This could not be done without hammers, and much noise, and he ought to have a servant lying in the tolbooth all night; and 11th of February 1671, Will against Kirkcaldy, No. 48, p. 11720, the LORDS found them liable for the debt, because they wanted catbands or chains on their doors. Some were for repelling the defence here; but at last it was agreed to take a probation, before answer, anent the condition of the prison, and the manner of the debtor's escape.

*Fol. Dic. v. 2. p. 170. Fountainhall, v. 2. p. 39.*