

1704. *January 21.*ALEXANDER CLARK *against* The MAGISTRATES of Leith.

LORD ANSTRUTHER reported the case of Alexander Clark, merchant in Edinburgh, against the Magistrates of Leith, and the keeper of their tolbooth. Clark having taken a cellar in Leith from Thomas Jamieson, cooper, and put some hogsheads of tobacco therein, three of Jamieson's apprentices and servants, by a false key, entered the cellar, and at sundry times took out great quantities of the tobacco, and sold it; but this being at last discovered, they are apprehended, and, after examination by the bailie of Leith, having confessed their embezzling some of the said tobacco, they are imprisoned; but, after some time, they break through the chimney of the prison wall, where it was thinnest, and escape. Alexander Clark raises a subsidiary action against the Magistrates of Leith, and their jailor, for suffering the prisoners to escape, and therefore to pay his damage, which he libels to be L. 100 Sterling, and craves his oath *in litem* for the same. *Alleged*, for the Magistrates and jailor, *1mo*, The imprisonment was not legal, seeing there was no written warrant nor information previous to their incarceration, as is required by the 6th act of Parliament, 1701, anent personal liberty. *Answered*, This is *jus tertii* to the Magistrates, and you were obliged to look to that before you imprisoned them; likeas, you found ground on their examination and confession; and the act cited expressly bears an exception as to thieves, &c. THE LORDS repelled this defence, in respect of the answer. *2do*, *Alleged*, That Magistrates are not liable, except where the party imprisoned is booked in the tolbooth-register; and the LORDS found the subsidiary action not competent where that was omitted, on the 4th of December 1679, Maccalla against the Magistrates of Ayr, *voce* PROOF. *Answered*, That is indeed required where one is imprisoned for debt, but not where the incarceration proceeds on a delinquency or crime. *3tio*, *Alleged*, That the debt not being constituted against the principal parties, no subsidiary action can be sustained against the Magistrates and their jailor, who are only convened *ex quasi delicto*; and what if he succumb in proving against the persons imprisoned on suspicion, how could the town be liable? And in a late case, in 1692, Murray of Livingston, *contra* the Bailies of Linlithgow, (*see* APPENDIX.), he having imprisoned some wrights, by whose negligence his house was burnt, and they making their escape, the LORDS would not sustain the subsidiary action against the Magistrates till the fact were proven against the principal delinquents, and the damage liquidated. *4to*, *Alleged*, Their escape was *vi majore*, which no common prudence could foresee, they having digged through the stone wall, and so there is neither *dolus* nor *culpa* imputable to the Magistrates or keeper. *Answered*, for Clark, the pursuer, That a part of the debt is already constituted by their own confessions and declarations lying in process, and he must have his *juramentum in litem quoad* the rest, as is done in spuilzies, and particularly was

No 60.
Magistrates
are bound
only in sub-
sidium, and
therefore
the claim
must be con-
stituted a-
gainst the
principals,
and they
must be
discussed.

No 60.

found on the 4th of November 1682, Campbell *contra* Christie, No 22. p. 10608., marked by President Newton, where the Lords found that one of the particulars robbed being found in his custody, made him answerable for the whole; and, as to their breaking prison, *imo*, You transported them from the low rooms to the upper, which yourself acknowledged to be less secure, whereupon I took an instrument against you; *2do*, You were *in culpa* to let them get in tools and iron instruments to break through the walls, and ropes to go down in, without which they could not have escaped. *Replied*, Their can be no oath *in litem* against the Magistrates, whatever might be sought, if the principal delinquents were convened; and the case adduced was in a Highland depredation, where the clans and chieftans are liable for all that dwell on their ground, whereas the Magistrates are neither art nor part of the theft and pickery libelled, nor resetters of the stolen goods; and it were an odd decision to find them liable for all that are committed to their prisons on suspicion of theft; and what if the crime required no reparation or damage, but only a corporal punishment, if they escape, it were ridiculous to say the Magistrates should undergo the like punishment, *poena talionis*; all that could be done in that case, were to be subject to censure, fining, and deprivation, at the instance of the public for their negligence. Some of the Lords thought that the damage not having been liquidated by a sentence before their escape, the constituting the same now would not be sufficient to make the Magistrates liable for what shall be proven against them, *ex post facto*; but the generality of the Lords thought this would make the Magistrates too remiss in keeping prisoners, and therefore they only found no process could be sustained against the Magistrates *subsidiarie*, till his claim of damages were proven against the principal delinquents, seeing they cannot be bound as accessories *et in subsidium*, till the principals be discussed; and then they would consider whether they would allow the pursuer his oath *in litem*, so as to reach the Magistrates for all he should swear.

Fol. Dic. v. 2. p. 171. Fountainhall; v. 2. p. 213.

1704. November 11. BLAIR *against* The TOWN of EDINBURGH.

No 61.

FOUND that the pursuer could claim no more than the restricted sum for which the prisoner was booked, though far less than the sum contained in the caption, without prejudice to him, to insist for the superplus of the debt not booked, as accords.

Fol. Dic. v. 2. p. 171. Fountainhall.

* * * This case is No 4. p. 3468. *Voce* DIES INCEPTUS.