

1710. July 26. HASWELL *against* The MAGISTRATES of Jedburgh.

HASWELL having incarcerated his debtor in the tolbooth of Jedburgh, and he having made his escape, Haswell pursues the Magistrates by a subsidiary action to pay the debt. *Alleged, imo*, This did not happen during our time; and though we be liable, *ratione officii*, yet you must call the Magistrates during whose administration the fault was committed; for they may have defences to elide the pursuit which are unknown to us. *Answered*, He is concerned with none but the present Magistrates; and, if they please, they may recur for relief against their predecessors; but it has been found, this allegiance could not stop their being decerned. The lords repelled this defence. *2do, Alleged*, This action arising *ex delicto vel quasi*, being either the fraud or the fault of the Magistrates and their jailor, that their prisoner escaped, either *dolo* or *lata culpa quæ dolo æquiparatur*, the same is pardoned by the Queen's last indemnity, this escape being prior thereto. *Answered*, The Queen did pardon all fines or forfeitures arising to her by crimes, but never intended to take away the interest of private parties; and here the Magistrates came directly in the place of the rebel imprisoned, and become liable as he was, and no casualty by this escape arising to the Crown, it can never be reputed to be remitted; and when it was pretended that denunciations prior to that indemnity were taken away, as to their penal consequences and effects, the LORDS found they fell not under the indemnity. And, upon these grounds, the LORDS likewise repelled this second defence, and found the indemnity did not comprehend this case.

*Fol. Dic. v. 2. p. 171. Fountainball, v. 2. p. 593.*

1714. June 25.

JAMES HASWEL, Portioner of Hulstoun, *against* The MAGISTRATES of Jedburgh.

IN a subsidiary action at the instance of James Haswell, against the Magistrates of Jedburgh, for payment of a debt owing to him by Thomas Rutherford, late Bailie there, on pretence that, in the year 1688, the said Thomas Rutherford had been apprehended by virtue of a caption at the instance of the pursuer's cedent by John M'Ubbin messenger, and offered to the then Magistrates of Jedburgh as prisoner, they refused to receive him, and suffered him to escape;

*Answered* for the defenders; That there was no execution of the caption or charge against the Magistrates to apprehend the prisoner produced, without which, there could be no action against the defenders; they being liable only in two cases, either if they refuse to obey or comply with the will of the cap-

No 62.

Found in conformity with Paplay against Magistrates of Edinburgh, No 41. p. 11714.

No 63.

The Lords found that an instrument under the hand of a notary is not sufficient to supply the want of an execution and charge against magistrates.