

No 66.

party was "summoned, warned, and charged; after which follows the delivery of a copy of the charge, "This I did conform to the summons, whereof I delivered a double, with a just and authentic copy at the end thereof." And the like is observed in other executions. And in general no legal solemnity is presumed, but must be expressed.

"THE LORDS repelled the objection."

Rem. Dec. v. 2. No 88. & 89. p. 146.

1751. November 21.

PARKER and MITCHEL *against* The BURGH of New-Galloway.

No 67.

Magistrates found liable because they delayed to search for a prisoner, till the day after he had escaped.

WILLIAM PARKER and Alexander Mitchel, Merchants in Kilmarnock, pursued the Magistrates and Council of New-Galloway for the debt due to them by James Corsan, whom they had taken with caption, and incarcerated in their tolbooth, he having escaped. And the sole question was, whether the prison was sufficiently secured, and whether the Magistrates had adhibited sufficient diligence in searching for the prisoner? The doors and windows were sufficiently secured; but the room where the prisoner was kept was over a shop let for rent, the door and windows of which had catbands; but these catbands had no locks; and the jailor did not concern himself with securing the shop. The floor consisted of oak dales, laid on thick oak joists; but there were small holes, which let the light pass from the one place to the other; and one or two of the dales were wrapt and started from the joists; but, it was deponed, they were so secured, by the end under the wall, that they could not be raised without some instrument. However, this way the prisoner escaped, on the night betwixt Sunday and Monday, and, on Tuesday, the Magistrates got a warrant from a Justice of Peace, and sent in search of him. It was deponed, they could not get a warrant sooner, as there was no other Justice within ten miles; and this one lived across the river from them; and that the boat was carried down the river, and stranded on an island. But it did not appear there was any search in the town till then.

THE LORDS found the defenders liable.

Act. Lockhart.

Alt. T. Hay.

Fol. Dic. v. 4. p. 137. D. Falconer, v. 2. No 231. p. 280.

* * * Kilkerran reports this case:

THE Magistrates of New-Galloway were pursued at the instance of Parker and Mitchel, merchants in Kilmarnock, for payment of the debt due to them by James Corsan, chapman, on this ground, That the said Corsan being imprisoned

in their tolbooth by virtue of a caption following on a horning upon a decree for said debt, had escaped through the insufficiency of their prison, and that they had made no proper search for recovering the person of the prisoner.

It came out upon proof, that the prison is much in the same situation that it has been in for many years; that the room where the prisoners for debt are kept is floored with large oak boards upon oak joists, which are thicker laid joists than those used in ordinary houses; that one of the boards was sprung a little in the end, and some small holes in some places of the floor, whence there came light from the room below; but the floor was otherwise firm; and that the prisoner had escaped by forcing up, in the night-time, three of those boards, and thereby getting down to a shop, which is immediately below the prison-room (and which has been there past memory), and by getting out at the window of said shop, which, as usual in shops, was bolted on the inside; that this happened on the night between Sunday and Monday; and, upon the Tuesday, search was made by several parties sent out for that purpose, to a considerable distance.

On advising this proof, the LORDS " Found the Magistrates liable for the debt in the horning."

All agreed that they were liable, on this ground, That they had not early enough sent in quest of the prisoner. But the Lords were not unanimous on the question, How far they were liable upon account of the insufficiency of the prison? Some thought they were upon that ground also; for that no prison can be called sufficient that has a shop below it. That Magistrates had been found liable, on the single ground, that the prison doors had not catbands upon the outside of the door, whereby it was left in the power of the prisoner, by the help of instruments from within, to break open the door; *multo magis* should they be found liable for leaving it in the power of a prisoner to escape by lifting a deal board, though the floor should be ever so apparently sufficient.

On the other hand, it was said, that even the prison of Edinburgh was in that sense insufficient; for that there was no vault below the floor of the prison, and the space below the prison floor was all in shops, just as in this case of New-Galloway. And the case of Sir Godfrey M'Culloch was remembered, who got down through the floor of the prison, (which is laid indeed with flag-stones, but only above earth and wood, as it has no vault), and who, in the morning, was found in the shop below. However, there was no occasion to give judgment upon the point, as all agreed they were liable on the other; and so the interlocutor was given in general, finding them liable as above.

Kilkerran, (PRISONER) No 3. p. 433.