

No 71. of the warrant, or for what purpose it was granted, they cannot be made liable to the pursuer in damages.

“ THE LORDS found the Magistrates of Tain and Roderick Macculloch of Glastullich liable, conjunctly and severally, to the pursuers in the debts contained in the warrant granted by the Sheriff against William Ross; but found the Magistrates entitled to relief from the said Roderick Macculloch; and that the pursuers must assign the debts contained in the warrant to the Magistrates, upon their making payment of these debts, to the end they may operate their said relief; and assoilzied the Magistrates from the expenses of process; but found Glastullich liable in said expenses.”

Act. Lockhart.

Alt. And. Pringle.

G. G.

Fol. Dic. v. 4. p. 137. Fac. Col. No. 68. p. 115.

1759. July 13. CHARLES BRODIE *against* The MAGISTRATES of Elgin.

No 72.

A prisoner having escaped by means of false keys, the Magistrates were found not liable.

CHARLES BRODIE brought an action against the Magistrates of Elgin for payment of L. 149 : 10s. and interest, on account of their having allowed Gilbert Barclay, his debtor, to escape from the prison of Elgin, where he had been confined for that debt.

It was *proved*, in defence, That Barclay had made his escape, not by the insufficiency of the prison, nor the connivance of the jailor, but by means of false keys, which he had procured to be made at a neighbouring town; and that he had an accomplice in making his escape, who, from without, opened the doors with these keys.

*Answered*, The prisoner could not have procured the impression of the keys from which the false keys were made, without the connivance, or at least the negligence, of the jailor. *2dly*, It was proved, That, the night of the escape, as well as upon other occasions, the jailor had neglected to put on the catbands and padlock on the outward door; which ought to make the Magistrates liable, in terms of the act of sederunt 11th February 1671; by which it is declared, ‘ That, in all time thereafter, the Court would find the Magistrates of boroughs ‘ liable for the debts of rebels who should escape from the prison, in case they ‘ have not sufficient catbands upon the doors of their prisons, *and lock the same ‘ ilk night*, lest the rebels pick or break up the locks.’

*Replied*, It is clear, by the proof, and particularly by the oath of the accomplice, that the jailor had no accession to the escape; and it was easy for the prisoner, during the course of a long confinement, by the assistance of an accomplice, to get the impression of the keys, without any culpable neglect of the jailor. *2dly*, Though the catbands were not locked the night of the escape, yet, as the escape was not facilitated by this omission, it cannot be a good

ground for subjecting the Magistrates. The escape was made by false keys, and the doors were opened by the accomplice from without; so that the catbands, though locked, could not have prevented it.

No 72.

“THE LORDS found the defences relevant and proved; and therefore-assoilzied the defenders.”

Act. *Lockhart.*Alt. *Hamilton-Gordon.**W. 7.**Fol. Dic. v. 4. p. 137. Fac. Col. No 191. p. 341.*

1761. November 18.

JAMES LESLY Senior, Writer in Edinburgh, *against* GILBERT PRINGLE of Torsonce.

IN April 1751, the pursuer, David Lesly merchant, and James Lesly junior, borrowed L. 30 : 10 : 0 Sterling, from Mr Pringle the defender, for which they accepted a conjunct bill, payable four months thereafter. The bill having expired, the defender, in August 1753, obtained a decret before the Bailies of Edinburgh, for the whole debt and bygone annual-rent, and L. 3 Sterling of expences of plea, and made no allowance for L. 12 : 12 : 0, which it was alleged he was at that time due to James Lesly, junior, one of the co-obligants. Upon this decret horning was raised, and caption followed in January 1754.

After this the defender received from David Lesly, and James Lesly, junior, payment of L. 24 Sterling.

In the 1739, the caption was put in execution against the pursuer, and he was accordingly imprisoned and booked for the whole debt, without any deduction being made on account of the former payments. The pursuer having obtained the benefit of the act of grace, was alimeted in prison by the defender, where he continued about two months. Having at last been set at liberty, he brought a process of oppression and damages against Mr Pringle.

*Pleaded* for the defender, That he had acted with the greatest lenity, in having patience from the 1751 to the 1759, which plainly shewed, that if any irregularity had been committed, it could not have been done with a view to harrass or distress the pursuer; That he had sent a note of the partial payments to his doer, with orders to put the caption in execution with regard to the remainder of the debt; and that, though it may be true in general, that a mandant is liable for the person he employs, yet, where that person acts *extra fines mandati*, the employer is not answerable for him; but, even supposing the employer in this case answerable, still there was no foundation for damages, as the only error truly committed in the whole of the procedure was, booking him for the whole, in place of that part of the debt that was outstanding. The caption was properly raised for the whole debt: some part of that debt was then and still is due, he was therefore justly apprehended, and justly thrown into prison, as the creditor is surely entitled to incarcerate his debtor, until the utmost far-

No 73.  
If a person incarcerate his debtor for a larger sum than what is truly remaining due, he is liable in damages.