

No 54. starve, they might liberated him, seeing the in-putter did not offer caution to aliment him. .

Fol. Dic. v. 2. p. 167. Fountainhall, v. 1. p. 345.

1685. *March* Sir JAMES COCKBURN *against* NASMITH of POSSO.

No 55.

Found in conformity with Cheap against the Magistrates of Falkland, No 46. p. 11715. that the Magistrates of a burgh of barony become liable for diligence to detain a prisoner, although they might not have originally been obliged to receive him.

SIR JAMES COCKBURN being pursued in a subsidiary action, for the escape of a prisoner for debt out of the tolbooth of Dunse, it was *alleged* for the defender, That Dunse was but a burgh of barony, which, by the act of Parliament, is not obliged to have prisons; and the LORDS found, by several decisions marked (*Supra*), That no person was liable for the escape of prisoners out of the tolbooth of Dunse; and these were received *periculo creditoris*; and it cannot be alleged, in this case, but there was ordinary care and diligence used for keeping of the prisoner. *2do*, The tolbooth is as sufficient now as it has been for many years, and the prisoner made his escape by breaking the roof *vi majore*, which would assoilzie even magistrates of royal burghs.

Answered: By an act of Parliament 1661, Dunse is made one of the head burghs of the shire, at which legal diligence is to be done, and is the place where the Sheriff-court holds; and therefore they ought to have a sufficient prison, the Sheriffs having many times occasion to commit persons to prison, both for debts and capital crimes. *2do*, The prisoner having been received into the tolbooth, the town becomes liable for all hazards, as in the prisons of royal burghs.

Replied: The burden of having prisons is, by reason of the privilege and advantage of trade, which is only competent to royal burghs; and the Sheriff sits at Dunse only for his own conveniency, for he may sit at Lauder, the head burgh of the shire, when he pleases. *2do*, Sir James not having given warrant to the bailie to receive him, cannot be liable for the bailie's act.

THE LORDS found the bailie liable for the escape of the prisoner, but not the Baron, unless he had given warrant to receive him, and sustained the defence to liberate the bailie, that the prisoner escaped *vi majore*; as also sustained this reply to take it off, viz. That the prisoner was suffered to walk abroad before his escape, relevant *per se*, as contrary to the act of sederunt, to infer this subsidiary action against the bailie.

This decision seems not very consistent with itself.

Fol. Dic. v. 2. p. 166. Harcarse, (CAPTION.) No 231. p. 55.

No 56.

1687. *June* LOWS and CHEESLY *against* Earl of WINTON.

MY LORD WINTON being pursued in a subsidiary action for a debt due by one English, upon this ground, That a messenger did intimate to the defender

a caption against the debtor, then in the defender's house, it was *alleged* for the defender, That the intimation being made a little before my Lord went to dinner, the gates were shut immediately after, according to the custom of the family; and, when dinner was over, the messenger was allowed to search, my Lord having searched by his servants; and my Lord was willing to depone he knew not that the rebel was in the house, or that any absconded, or conveyed him away.

No 56.

Answered: The messenger intimated his caption to my Lord, who was looking out at the window, and the gates were, immediately thereafter, shut upon the messenger for some hours, whereas he ought to have been allowed to search presently for the rebel.

THE LORDS sustained the answer relevant.

Harcarse, (CAPTION.) No232. p. 56.

1687. December 14.

THOMAS FEUDAR *against* The MAGISTRATES of HADDINGTON.

REDFORD reported the subsidiary action pursued by Thomas Feudar, servant to Sir Patrick Home, Advocate, against Sir William Paterson, Provost, and the other Magistrates of Haddington, for suffering one Cowan to escape out of their tolbooth. The defence was, that his escape was fortuitous, &c. and the act of sederunt, made in July 1671, and the occasion thereof, (being the debate between the Town of Brechin and Laurence Dundass) were cited, with other practiques. The LORDS found the defence relevant, that the prisoner escaped *casu improviso*, in so far as Claver's troop being at Haddington on the 14th of October, and having the keys of the tolbooth where they kept guard, and they in a frolic having caused the prisoner drink the king's health, in the disorder and confusion the rebel had escaped; and that the Magistrates, within two or three days, after a search, did apprehend and put him again in prison; and recommended to the reporter to inquire into that point, anent the pursuer's taking an assignation during the dependence of the plea, because he was a member of the house, contrary to the act of parliament.

No. 57.

Fol. Dic. v. 2. p. 171. Fountainhall, v. 1. p. 499.

1694. July 13.

SIR JAMES ROCHEAD of Inverleith's RELICT, *against* MESSRS COCKBURN and BROWN.

THE Relict of Sir James Rothead of Inverleith, in a subsidiary action *contra* John Cockburn, baron bailie of Dunse, and Brown his jailor, for paying a debt

No 58.

Found again
in confor-
mity to
Cheap against