

No. 110. "The Lords granted warrant to cite him before them, to answer for his said unwarrantable procedure; and recommended to the Solicitor to execute this order, and to the Lord Advocate to prosecute the same."

Act. Dun. Forbes.

Alt. Horn.

Gibson, Clerk.

Fol. Dic. v. 2. p. 385. Bruce, v. 2. No. 1. p. 1.

SECT. XVIII.

Magistrates who allow a Prisoner to Escape.

1609. December 7.

CRAIG against SHEARER.

No. 111.

Found, that a prisoner having escaped, one of the Bailies could not be convened, except the whole Magistrates and Council were called; but found, that the part of the libel was relevant, which bore, that the prisoner was set at liberty by this particular Bailie, who therefore ought to be convened *ob propriam culpam.*

THE Laird of Craig Achindorie having pursued John Shearer, sometime one of the Bailies of Dundee, to pay to him a certain great sum of money owing to the pursuer by the Laird of Bandovie, whom he had taken and warded in the tolbooth of Dundee, and the Bailies had thereafter suffered him to escape, this defender being one of the number;—it was alleged by the defender, that if any way he was suffered to escape, it was by occasion of the pest which raged so vehemently at that time in Dundee, as the hail magistrates were forced to retire themselves and their families forth of the town, and so could not be answerable for keeping the tolbooth and warders therein. It was replied by the pursuer, that he offered to prove, that the Bailies had of set purpose freed Bandovie, and taken a bond of my Lord Balmerino for their warrant and relief. The Lords found, that the pursuer not insisting against the rest of the Bailies, could not have action against this one man for any thing wherewith he was challenged to have transgressed his office, except he had libelled that he himself particularly had demitted, or caused Bandovie to be demitted forth of ward, or that he had been present and consented to his liberty, or to the taking of the bond for the relief of the Bailies.

Fol. Dic. v. 2. p. 386. Haddington MS. No. 1682.

* * A similar decision was pronounced 12th January, 1615, Gray against Mellis, No. 6. p. 11689. *voce PRISONER.*