

No 34. 1642. *June 25.* WYLIE *against* MAGISTRATES of Wigton.

MAGISTRATES found liable for the debt, having set a prisoner at liberty on a bare suspension containing no charge to set at liberty.

*Fol. Dic. v. 2. p. 171. Durie.*

\* \* \* This case is No 16. p. 7793, *voce* JUS TERTII.

No 35. 1662. *January 10.* ASHURST *against* CUMING.

WILLIAM CUMING, Bailie of Glasgow, is pursued by Henry Ashurst, merchant in London, for suffering Robert Gray, merchant, to escape, being taken with caption, and was presented to the Bailie by the messenger who took him, and required, by way of instrument, to put him in firmance. It was *answered*, That the Bailie was only required at ten o'clock in the night, when he was going to bed: That the Bailie commanded an officer to wait upon the messenger, and take the rebel to prison, there being other two with him; but he did by speed of foot run away, leaving his cloak behind him, before he went to the prison-house; and that now the rebel is re-taken and imprisoned, without any prejudice to the pursuer. It was *replied*, That the Bailie's fault or neglect did render him debtor to the pursuer; and the rebel's incarceration cannot liberate him therefrom,

THE LORDS, before answer, ordained the pursuer to condescend, whether the rebel be in worse condition or not, the time of his incarceration.

*Gilmour, No 16. p. 14.*

No 36. 1662. *February. 7.* BONNAR *against* FOULIS.

Magistrates found liable for the debts of a rebel, incarcerated on act of warding, and set at liberty by them without warrant.

JOHN BONNAR pursues Robert Foulis to pay the debt of a person incarcerated by act of warding, whom the Bailie set at liberty without warrant. The defender *alleged*, No process, because the person incarcerated was not called, who might have proponed exceptions against the debt, that it was paid, &c. *2dly*, That thereafter the pursuer had taken himself to the incarcerated person, and gotten part of payment from him.

THE LORDS repelled the defences, and decerned; but because there was a reduction depending of the decreet, whereupon the person was incarcerated, and that he was set at liberty *in anno* 1659, when there was no judicatory sitting, they superceded extracting for the time, till the reduction was discussed.

*Stair, v. 1. p. 93.*