

No 40.

good case as before, or being bankrupt the time of the charge, the Magistrates may be denounced upon the caption, or censured for their contempt, but ought not to be liable for the debt *in solidum*.

Clerk, *Scot.**Dirleton, No 78. p. 32.*

No 41.

Magistrates of a burgh found liable in the debt of a prisoner escaping, tho' they were not magistrates at the time of his escape.

1668. *January 31.* JOHN PAPLAY *against* The MAGISTRATES of Edinburgh.

JOHN PAPLAY pursues the present Magistrates of Edinburgh, for payment of a debt due to him by a person incarcerated in their tolbooth, who escaped.— The defender alleged no process, till the Magistrates who then were, especially Bailie Boyd (by whose warrant the rebel came out) be called. *2dly*, The present Magistrates cannot be liable personally, having done no fault; neither can they be liable, as representing the burgh, at least but *subsidiarie* after the Magistrates, who then were *in culpa*, were discussed now after six or seven years time. The pursuer *answered*, That the prison being the prison of the burgh, the burgh was liable *principaliter*; and if only the Magistrate doing the fault were liable, the creditor might oft-times lose his debt, these being oft-times of no fortune, or fit to govern, and the town who chooseth them is answerable for them; neither is the pursuer obliged to know who were Bailies at that time, or who did the fault, and so is not bound to cite them.

THE LORDS repelled the defences, and found the present Magistrates (as representing the town) liable, but prejudice to them to cite those who did the fault.

*Fol. Dic. v. 2. p. 171. Stair, v. 1. p. 517.*

\*.\* Dirleton reports this case:

JOHN PAPLAY pursued the Magistrates of Edinburgh for payment of a sum of money, because his debtor, Henry Henderson, had escaped out of their prison. It was *alleged*, after six years silence, such a pursuit could not be sustained against the town, and that those who were Magistrates for the time ought to be pursued and discussed in the first place.

THE LORDS sustained the process; and found, That the incorporation being *persona quæ non moritur*, the present Magistrates may be pursued for payment of the debt out of the patrimony of the town, without citing those Magistrates for the time when the debtor escaped, reserving action against the delinquent who suffered the rebel to escape.

*Dirleton, No 152. p. 61.*

\*.\* A similar decision was pronounced, 26th July 1710, Haswell against the Town of Jedburgh, No 7. p. 6827, *voce* INDEMNITY.