

1668. July 7.

HAMILTON *against* CALLENDER.

JAMES HAMILTON having taken his debtor with caption, offered him to James Callender, Bailie of Falkirk, to be incarcerated in the tolbooth of Falkirk, and he refusing, he now pursues a subsidiary action against the Bailie, for payment of the debt; who *alleged*, Absolvitor, because he is no Magistrate of a burgh royal, but of a burgh of regality, the Bailies whereof were never in custom to be charged with rebels. The pursuer opposed the act of Parliament 1597, cap. 277, bearing expressly, Bailies of stewartries and regalities, according to which, the tenor of all captions bears the letters to be direct against all Bailies of regalities. The defender *answered*, That for the letters, it is but *stylus curiæ*; and, for the act of Parliament, the narrative and reason thereof relates only to burghs having Provost, Bailies, and common good.

THE LORDS having considered the act of Parliament, repelled the defence, and decerned. Here the rebel was residenter within the burgh of regality, where there was known to be a convenient prison.

*Fol. Dic. v. 2. p. 168. Stair, v. 1. p. 549.*

\* \* \* Gosford reports this case:

JAMES CALLENDER, Bailie of Falkirk, being required to incarcerate William Hodge, debtor to James Hamilton, who was taken by virtue of letters of caption, was pursued for payment of the debt, for not imprisoning of the rebel. This pursuit was sustained, notwithstanding it was *alleged*, That the Bailies of regalities were not obliged to have jails and prison-houses, and to keep prison-houses for civil debtors, to which Bailies of royal burghs were only liable by act of Parliament 277, Parl. 15th, King James VI.; because the LORDS found, That Bailies of regalities were comprehended in the foresaid act of Parliament, and that letters were orderly directed against them, as well as to Sheriffs and Bailies within burghs.

*Gosford, MS. No 21. p. 8.*

1668. July 14. PAPLAY *against* The MAGISTRATES of Edinburgh.

JOHN PAPLAY having obtained decret against Henry Henryson for a blank sum, and thereupon arrested him when he was prisoner in the tolbooth of Edinburgh, did obtain decret against the Magistrates for payment of the debt for suffering him to escape; notwithstanding it was *alleged*, That they had only permitted him to go to a friend's house, when he was *extremis agens*, and where he died shortly after; for the Lords found, That the Magistrates could not, at their own hand, permit him to go out of prison without a warrant from the

No 42.  
Magistrates of a burgh of regality found liable in a debt, they having refused to receive a prisoner taken on caption.

No 43.