

upon reason that he was not *in conspectu*, and that the rebel being a nobleman, and well attended, might make resistance, in which case, they were not obliged to obey the charge;—the LORDS did find the Magistrates liable to the debt, as being obliged to go and search until they found resistance; but ordained, that their refusing should be proved by witnesses, and would not sustain the instrument of a notary to be a sufficient probation.

Gosford, MS. No 152. p. 60.

No 44.

1669. July 28.

GRANT *against* GRANT.

ONE Grant being imprisoned in the tolbooth of Nairn for a riot, was arrested for a civil debt, whereupon he craved to be set at liberty, pretending, that only prisoners arrested for debt could be arrested by creditors, and that he had satisfied for the riot. THE LORDS did refuse the desire, and found no difference betwixt imprisonments for civil debt, and for a riot or crime; but upon sufficient caution did grant suspension.

Fol. Dic. v. 2. p. 169. Gosford, MS. No 197. p. 79.

No 45.
Prisoner for a crime may be arrested for a civil debt.

1670. June 18.

CHEAP *against* MAGISTRATES OF FALKLAND.

MR JAMES CHEAP pursues the Bailies of Falkland to pay their debt due to him by Provost Mains, who being taken by caption, and delivered to the Bailies by the messengers, they kept him in a private house for the space of ten days, for which they are as well liable for the debt, as if they had brought him out of the tolbooth, and kept him in the town during so much time; and also they were liable in so far as having put him thereafter in the tolbooth, they suffered him to escape forth thereof. It was *alleged* for the defenders, They were not obliged to keep prisoners, not being a burgh royal, but only a burgh within a stewartry, which no law obliges to receive prisoners, and the caption is only direct to Sheriffs, Bailies of regality, or royalty, Stewards, and Magistrates of burghs royal, but not to burghs within stewartries, or within regalities, albeit they were the head burghs of the stewartry or regality, not being burghs royal. *2do*, The defenders cannot be liable for keeping the prisoner some days out of the tolbooth, seeing he did not then escape; and albeit it be a fault for which they may be censured, to keep a prisoner in a private house, yet the doing thereof, if the rebel escape not, makes them not liable to the debt, but especially where the rebel was never in the tolbooth, and when there was treaty betwixt him and the pursuer and his servant, for an agreement and satisfaction and security for the sum. *3dly*, They offered to prove, that the tolbooth was sufficient, and that the prisoner escaped *vi majore*,

No 46.
The Magistrates of a head burgh of a stewartry received a prisoner who afterwards escaped. Found it was then incompetent to allege, that they were not bound to receive him.

No 46.

by breaking the roof of the prison without their fault. The pursuer *answered* to the *first*, That he opposed the act of Parliament, ordaining sufficient prison-houses in all burghs, Parl. 1597, cap. 277. *2do*, Whatever this burgh might have pretended for refusing to accept the prisoner, yet having accepted him, and suffered him to escape, they are liable as having acknowledged themselves to be liable; and if they had refused the prisoner, the pursuer would have him in another uncontroverted burgh. To the *second* defence, it was *answered*, That Magistrates are liable for the debt of rebels offered to them, if they do not put them in prison, or if they suffer them to come out of prison without warrant, and the pursuer needs not dispute that the prisoner went out by the Magistrates' fault, and their contumacy is sufficient in not obeying the letters, by putting him in their public prison, but keeping him so long in a private house. To the *third* defence the pursuer offered him to prove, that the prison was insufficient, and that thereby the rebel did escape.

THE LORDS found, That seeing the defenders did receive the rebel upon the caption, they could not now dispute, whether they were liable to receive or not, as being the head burgh of the stewartry, and therefore the LORDS did not determine that point. Likewise, the LORDS found, That the keeping of the rebel ten days before he was imprisoned, there being treaty in the time, and they not urged to put him in the prison, did not oblige them. As to the *last* point concerning the sufficiency, or insufficiency of the prison, the allegiances being contrary, the LORDS would prefer neither party in the probation; but, before answer, ordained either party to adduce witnesses concerning the condition of the prison, and manner of the rebel's escape.

Fol. Dic. v. 2. p. 166. Stair, v. 1. p. 682.

. Gosford reports this case:

IN a subsidiary action pursued at the instance of Mr James Cheap, against the Bailies, for suffering the prisoner to escape, and for keeping him in a private house ten days before he was put in prison, it was *alleged, imo*, That Falkland not being a royal burgh, but only the burgh of a stewartry, they were not liable to receive prisoners for civil debts, nor the bailies obliged by the act of Parliament to have sufficient prisons for that effect. This defence was repelled, in respect the bailies had once received the rebel, which the LORDS found sufficient to make them liable for the debts, unless they had intimated to the creditor, that they could not be answerable for him, and put him in his hands. But the LORDS did consider the act of Parliament, if the debate had run, if the bailies of a stewartry had refused to receive the prisoner, or had not taken him in their custody, if they did fall within the act of Parliament 277, Parliament 15, King James VI, which, albeit it be unclear, as it is conceived, making mention only of stewarts and bailies of regalties, and not of the bailie of the burgh, as of provost bairnes and council of royal burghs;

yet most part were of that opinion, that bailies of the head of burghs of stewarties and regalities are liable, and fall within the act of Parliament; but no interlocutor passed thereupon. *2do*, It was *alleged*, That the defenders were not liable *super hoc medio* only that they had kept the rebel eight or ten days in their custody in a private house, before they had put him in prison, since thereafter they did imprison him, and he escaped *vi majeure*. THE LORDS would not sustain the libel *super hoc medio* only that he was kept for some days in a private house, since the rebel made no escape during that time, but after he was in prison; and therefore ordained witnesses to be led *hinc inde* for proving the sufficiency or insufficiency of the prison house.

No 45.

Gosford, MS. No 271. p. 115.

1670. July 26.

HUGH MONCRIEF of Tippermalloch *against* MAGISTRATES of PERTH.

HUGH MONCRIEF of Tippermalloch, having incarcerated Ogilbie of Channaly in the Tolbooth of Perth, from whence he having escaped, he pursues the Magistrates of Perth for payment of the debt; who *alleged*, Absolvitor, *1mo*, Because their Tolbooth was sufficient, and the rebel had escaped *vi majeure*, having broken the stone in which the bolt of the Tolbooth door entered, and forced the lock in the time of sermon, and that immediately after the rebel escaped out of the town, and was met with friends that were trysted there at the time of his escape. *2do*, They had laid out all ways thereafter to search for him, and had at last found him in the Tolbooth of Edinburgh for the same debt, where he yet was in as good condition as when he first escaped. The pursuer *answered*, That the rebel had escaped by the fault or neglect of the jailor, for whom the town was answerable, in so far as they had given him the liberty of all the rooms in the Tolbooth, and that when he escaped, he was left in the outmost room, and his brother's son was permitted to abide within with him, and the catband on the outside of the tolbooth door was not put on and locked, which would have so secured the door, that nothing the prisoner could have done within, could have opened the same, and that the tolbooth lock had a double and single cast, and when it was locked only with the single cast, the bolt might be thrust back, but when with the double cast, it had a strong backsprent, and could not be thrust back; and that at the time of the escape, the lock had but the single cast, so that the edge of the stone being broken off, there was access to press back the bolt. To the *second* it was *answered*, That the rebel having escaped through the town's, or their servants neglect, *jur erat acquisitum* to the pursuer, making them liable, which could not be taken off by any incarceration thereafter, unless the Magistrates had followed him in the very act of escape, and recovered him; but now they have six months after

No 47.

A Magistrate being pursued for the debt, for suffering a prisoner to escape, the defence that the debtor was again put in prison was repelled.