

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.

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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

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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.

No 47.

his escape put him, not in the Tolbooth of Perth, but in the Tolbooth of Edinburgh.

THE LORDS being unwilling to give either party the choice of witnesses for probation, had, before answer, appointed either to party adduce witnesses anent the condition of the tolbooth, and the manner of the rebel's escape, which being now advised;

THE LORDS found, That by the most pregnant probation, it was proved, that the catband used sometimes to be on in the day time, and sometimes not, and that prisoners for debt had the liberty in the day time of all the rooms of the tolbooth. The probation was very contrary, as to the breaking off the stone wherein the bolt entered, but it seemed access could not be had to the bolt without some breach of the stone. It was also proved, the catband was not then on, and that the bolt when it got the double cast, could not be prest back, and could when it got the single cast; and therefore the LORDS found, that the Magistrates proved not their first exception, that the rebel had escaped *vi majore*, without their fault or negligence, and found the second exception of putting him again in prison, not relevant.

*Fol. Dic. v. 2. p. 169. Stair, v. 1. p. 700.*

No 48.

Magistrates found liable, there being no catbands on the outside of the prison door, nor outward chains locked.

1671. February 11. JOHN WILL against The TOWN of KIRKCALDY.

JOHN WILL pursues the Magistrates of Kirkcaldy, for paying the debt of a person incarcerated in their tolbooth, who was letten escape by them. It was *alleged* for the Town, That the person incarcerated had escaped *vi majore*, and that they had not failed in their duty, having had a sufficient tolbooth, having four doors, and the inmost an iron door, and that all being locked, the person incarcerated having gotten secretly conveyed in some mason or wrights tools, had in the night broken all the locks, and escaped. It was *answered*, That the defence was not relevant, neither had the Magistrates done their duty and diligence, for they ought to have had chains and catbands upon the outer sides of the doors, with locks thereon, unto which the incarcerated person could not reach, and it was alike how many doors they had upon the Tolbooth with their locks inward, for the same means that would break up one, would break up twenty, and if such a pretence should liberate the Magistrates, it were an easy way to elide all captions, and let all person for debt free. It was *answered* for the Town, That the having of catbands without, closed and locked, was not the custom of their tolbooth, who past all memory did never lock the outward chains but upon malefactors, and such is the custom of Edinburgh and other burghs of Scotland.

THE LORDS having, before answer, ordained witnesses to be examined on both parts, anent the condition of the tolbooth, and finding thereby, that