

there was no catbands or outward chains locked when the prisoner escaped, they found the Magistrates had not done their duty, and so decerned against them.

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Fol. Dic. v. 2. p. 170. Stair, v. 1. p. 718.

1671. June 14. TOWN of BRECHIN against TOWN of DUNDEE

LAURENCE DUNDAS having been debtor to the Earl of Seaforth in L. 200 Sterling, was incarcerated in the tolbooth of Brechin, and being suffered to go out of prison, Mr Roderick M'Kenzie as assignee to the Earl, obtained decret against the Town, for payment of the sum, and took assignation to the caption, and therewith incarcerated Laurence in the tolbooth of Dundee, and now pursues the town of Dundee for suffering Laurence to go out of prison; and condescends, that they suffered him to go ordinarily to the kirk on the Sabbath, and that they suffered him to go to the river by boat, and over to Fife, another shire, and ordinarily to go the street, and to taverns, without necessary affairs. The defenders *answered*, That the prisoner returned still to the prison every night, and went always abroad with a guard, and his going to the water was because of his indisposition, and for his health; that if he touched upon the other side in Fife, he did return that same night to the prison; and that his going to the kirk with a keeper can be no relevant ground, and even the going out upon other occasions with a keeper, though not absolutely necessary, cannot make the Magistrates liable, it being the constant custom of all burghs so to do, and that a prisoner being under a guard, is in prison, albeit not in the tolbooth. The pursuers *answered*, That Magistrates of burghs were but public servants in keeping of prisoners, and were obliged to give punctual obedience to the letters of caption, bearing to keep the rebel in sure firmance within their tolbooth, which is founded on very good reason, that the prisoner may be necessitated *squalore carceris* to do all deeds in his power to satisfy his debt, which would be eluded, if the Magistrates at their pleasure might let them go out with a guard, and would but turn to a confinement, or entertainment and gratification to an officer for a guard; and even though there were necessary causes of the prisoner coming out, the Magistrate is not to judge thereof, nor has any power of it, but the parties ought to apply themselves to the Council or Session, and obtain their warrant, which will not be granted even by them, but upon instruction of a necessary cause, upon oath of physicians or others. The defenders *answered*, That incarceration was a civil effect of law, and no punishment, and that it were against all humanity, to put prisoners for civil debt in that condition, that the Magistrates could not let them out for a little, even for the safety of their life, in extremity of sickness, which oftentimes would not admit of delay till application were made to the Council or Session. *2dly*, Whatsoever may be found just by the Lords in time com-

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Magistrates are not entitled to allow a prisoner to go at large with a guard, except in extremity of sickness certified by a physician.

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ing, yet the constant and universal custom of this and all other burghs, to let prisoners go out with a guard when they saw convenient cause, did introduce a privilege to burghs, or put the defenders *in bona fide*, to act as all their predecessors had been accustomed to do, without any question or decision in the contrary; and alleged a late practick in the case of the town of Culross, who suffering a prisoner, that was a poor man, to go out to an hospital, where he got bread, and thence he immediately returned to prison, and to go and see his nearest relation that was a-dying in the town, or to their burial, was not found liable for the debt.

THE LORDS considering the ordinary custom of burghs, found, That as to the time past, they would not find them liable for suffering prisoners to go out with a guard for any necessary cause, and found the defence relevant, that this prisoner was let go out with a guard for his health, or to the kirk on the Sabbath, but found that member of the condescendence relevant, that he went out to the street and taverns without a necessary cause relevant to infer the debt; but found, that in time coming, they would have no regard to that unwarrantable custom, but that Magistrates of burghs should only have power to let prisoners come out of the tolbooth under a guard, in the extreme hazard of their life by sickness, and not without certificates by physicians or skilled persons, upon oath, bearing the parties' condition to require the same, and that without great hazard, they could not suffer delay to make supplication to the Council or Session.

Fol. Dic. v. 2. p. 169. Stair, v. 1. p. 732.

* * * Gosford reports this case:

IN a subsidiary action at the instance of the town of Brechin, against the Magistrates of Dundee, for suffering Laurence Dundas, as he who was incarcerated at their instance, frequently to go abroad, and cross the ferry at Dundee in a boat, and to go to church, to pay the debt contained in the letters of caption; it was *alleged* for the defenders, That they offered them to prove, that whensoever he was permitted to go abroad, it was with a keeper, and that he was returned prisoner and lay in the tolbooth, which was usually done in many royal burghs, and yet they were never found liable for the debt, upon that account; and by a late decision, the town of Culross was assoilzied, being pursued upon that same ground; and as to the suffering him to cross the ferry, it was only for his health, and he went with a guard in the town's own boat, and was not suffered to land in Fife-side, but was brought back, and immediately incarcerated. It was *replied* for the pursuers, That the Magistrates of burghs had no such power, and the customs of other burghs being against law, and the express will of letters of caption to incarcerate and detain in prison, did oblige the Magistrates to give obedience, or otherwise they were liable to the debt.

THE LORDS as to this case, did find, that the suffering the prisoner to go abroad frequently, if it was upon necessary occasions, could not make them liable, neither the suffering him to go to church with a keeper, it being the general custom of burrows; but for his crossing the ferry, they ordained the defenders to prove, that it was because of his sickness and indisposition, which was sufficient to free them. But being resolved as to the future, by an act of sederunt, to declare the power of Magistrates as to the prisoners for debt, did ordain, that no prisoner should be suffered to go out of prison, upon any cause whatsoever, except in the case of extreme sickness, and where they are in danger of their life, and that upon a certificate from a physician, apothecary, or minister, upon soul and conscience, that they are in that condition, which, if they transgress, they shall be liable for the debt, unless there be an express warrant, or order, from the Lords of Privy Council, or Lords of Session, empowering them for that effect.

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Gosford, MS. No 347. p. 166.

1675. February 3.

VANSE, Supplicant.

THE Goodman of the tolbooth of Edinburgh having given in a petition to the LORDS, craving that he being at a great loss by reason of a custom of the Town of Edinburgh not allowing any prisoner for debt to be set at liberty except by warrant from the LORDS, and letters under the Signet, which was the occasion of great prejudice to the complainer; seeing, in the tolbooth of the Cannon-gate, or other prisons, upon a naked consent of the creditor, the debtor is set at liberty, without any such warrant or charge, which occasions most part of debtors under caption to go to those prisons where they have that liberty. THE LORDS did consider the bill, and that point, that debtors being incarcerated by letters directed in the King's name, as disobedient; and for punishment, if upon a private warrant of the party concerned he could be set at liberty, which was of a general concernment; as likewise, on the other part, that the only cause of the imprisonment being for a civil debt, which was satisfied to the party only concerned who consented to the liberation, if notwithstanding he should be kept prisoner, the King did want the benefit of a free subject, and the consequence was only to put the party to unnecessary charges in procuring relaxation, and charges to put at liberty; they did at last resolve upon this expedient, that in case the debt did not exceed 200 merks, a discharge, and consent of the party, intimated to the keeper of the prison, should be sufficient to liberate the prisoner; but, if the debt exceeded that sum, it must be by warrant from the LORDS.

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Found that if the debt did not exceed 200 marks, a debtor might be liberated, with consent of the creditor: if the sum was greater, warrant of the Lords was requisite.

Fol. Dic. v. 2. p. 171. Gosford, MS. No 744. p. 457.