And though the Lords have a great latitude in thir cases, yet this modification, all things being rightly considered, was most exorbitantly high as any that had been of a long time decerned.

Though we dealt to have this declared to be in satisfaction to him, not only of the marriage, but also of the ward and non-entry, to which he was also constituted donatar; yet we could not prevail: only it was not very material, seeing the ward and non-entry, as I have told before, will resolve in a very mean matter. And, in regard, this sum decerned is in law *debitum fundi*, so that the donatar might poind the ground for it; therefore, the mother for her right of liferent, and the daughter as fiar, assented to assign him to as many bonds as would make up the sum decerned: and which he accordingly accepted of: and the mother protested that her daughter, as heir to her father, should be liable to make up that loss she had sustained in quitting her liferent of the sums assigned; and which protestation the Lords admitted.

In the canvassing of this affair, the following case fell transiently in: John Ramsay had granted a bond to Mr. George Gibsone, his goodson, for 6000 merks; this bond he kept beside him till near his death, at which time, for reasons known to himself, he cancelled the bond, with this elogium on the back of it, that the said party had disobliged him, and deserved no favour at his hand: the question moved was,—if a man may, upon death-bed, cancel an heritable bond (whether it bear a destination for infeftment, or only a clause for payment of annual-rent, *non refert*,) lying beside him in his own custody, and which was never delivered, but bore a clause dispensing with the not delivery. I thought it very lawful; for, if the law hath had so special a care of heirs, that it incapacitates any to do deeds to burden them, or to their prejudice, while they are in *lecto*, then certainly, *a contrario sensu*, it approves of any deeds he shall then do to liberate his heir of a debt, such as this deed is: that the whole strain of law is so contrived that it may be ever *pronior ad liberandum quam obligandum, l. Arrianus, 47 D. de obligationibus et actionibus*. Likeas, who can dispose so well and adjust so rationally the portions and several distributions of children as the father, and who can justly impede him in abstracting his favours from those whom he has found ungrate and impious, and whereof he must be presumed absolutely the best and most knowing judge?

Advocates' MS. No. 373, folio 151.

1672. *January and November.* JAMES DUNDAS and OTHERS, Creditors of PARK WHYTHEAD, *against* THE TOWN OF EDINBURGH.

January.—In January this Session, was called the action pursued against the Town of Edinburgh by James Dundas and other the creditors of Park Whythead, for payment of their respective debts, because he having been incarcerated within their tolbooth of the Cannogate, he had escaped.

Against which it was ALLEGED, that the 173 act of the Parliament 1597, appointing all burghs to have sufficient gaols for detaining of prisoners, must only be understood of burghs royal (who, in regard of the many privileges granted to them by the King and his ancestors, must not complain of this burden imposed on

them,) but noways of burghs of regality, such as the Cannogate is: that burghs of barony, *first*, are not bound to accept the King's rebels offered to them; next, though they receive them and let them escape, yet they are not liable for the debt. *Vide* Dury, 13*th March* 1623, *Moody* against *the Bailies of Dunce; item*, 12*th February* 1624, *L. Langton* against *the Bailies of Dunce.** *Ergo*, the same must obtain in a burgh of regality, there being no assignable disparity.

To this it was ANSWERED, whatever exemption burghs of regality may pretend to, of being free either to accept prisoners or not at their pleasure (which is not leasum to burghs royal,) but *esto* it be *voluntatis ab initio*, yet having once accepted them, it becomes *necessitatis*, and they must answer for them, else the lieges should have no security: but this needs not be reasoned now, seeing it was debated, *in foro contentiosissimo* for *the town of Falkirk* against *James Hamilton, merchant in Edinburgh*, in 1688, that being only a burgh of regality, they could not be liable for the escaping of prisoners; and the Lords found they were answerable for all they received: and though the same was alleged in behalf of the town of Falkland, pursued *actione hac subsidiaria* by Mr. James Cheap, yet were found liable notwithstanding. But for Falkland, it seems to be a burgh royal as I observed *supra*, at number 132.

My Lord Castlehill repelled the said first allegeance made for the town, and ordained us to say farther. *Advocates' MS. No.* 331, *folio* 131.

1672. *November.*—In the subsidiary action mentioned *supra* at number 331, pursued by James Dundas and others against the Magistrates of Edinburgh, for suffering Park Whythead to escape out of their prison of the Cannogate, the defence then proponed by us being repelled, we ALLEGED, 2*do*, absolvitor from this pursuit, because neither fraud, negligence, connivance, nor insufficiency could be any way qualified, either against the prison, the jailer, or the Magistrates, defenders, in so far as the manner of the rebel's escape was truly in law *vis major et casus improvisus et fortuitus*, which could not be obviated by common human providence, and which the Magistrates *non tenentur præstare*, in so far as the tolbooth of the Cannogate is most sufficient, and in the same condition it hath been now past all memory; that this rebel was kept with more jealousy and strictness than any other prisoners for civil debt were; that the manner of his escape was by winning into the bell-house and towing himself down from a window thereof five story high, which no rational man that had any regard to his life would attempt. *Vide infra, No.* 473, *Captain Martin.*

To this it was REPLIED, that, in his escape, the negligence and carelessness of the keepers† did no less evidently appear, than did the insufficiency of the jail, for, 1*mo*, The jailer was advertised of his design to escape, and therefore was required to keep him in the iron-house, and which he obeyed not. 2*do*, It was a palpable negligence that he suffered tows to be brought in to him. 3*tio*, It was blameable that he permitted him to have access to the bell house. 4*to*, As also, that either he should have got the key or its impression. 5*to*, The prison's weakness is clear in this, that his escape was made without the least violence done either to door, window, or wall, and so cannot be termed *vis major*. 6*to*, Its insufficiency is yet

* Yet, by the consequence of the decision marked by Dury, 21*st March* 1627, *Earl of Cassills*, though none beneath bailies of regalities are liable to obey these charges, yet they are; as also appears from the 19*th of November* 1628, *Ray* against *Douglas*.

† And which the Lords require oft in such cases. See *Dury*, 6*th of July* 1631, against *Bailies of Perth*, with its marginal citations; and which might have been pertinently urged in this cause.

farther demonstrable, that there was no stanchells in the window out at which he escaped; that they have stanchelled it since; and that a woman imprisoned in that tolbooth for being suspected as accessory to the murder of Mr. Bedford in Leith, escaped forth thereat of before; and so could not be such a desperate attempt as was never undertaken. *7mo,* There was no such hazard in the descent as was represented, because there are two flat roofs in the way, upon which they may rest in the downcoming.—*(See all more fully in both parties' informations.)*

My Lord Castlehill, before answer to the relevancy of the debate and mutual condescendences made by both parties, as to the manner of the escape, ordained them both to adduce witnesses for proving the points of their mutual condescendencies. (For though conjunct probation be very dangerous, yet in defences and replies simply consisting *in facto,* as this, it is both ordinary and just.)

I dealt extremely to have had it allenarly an act before answer as to the whole; both our first defence, founded upon its being only a burgh of regality, and this second, founded on the casual way of the escape; and not to have been in an act of litiscontestation. But the pursuers opposed it, that so they might get us bound in an act of litiscontestation; and I could not prevail, in regard defences consisting *in jure* cannot be reserved before answer; but their relevancy must ever be discussed and premised to the probation of points standing *in facto.*

The probation being closed, and in the beginning of November 1672 being advised, and the advocates called in; and the pursuers having resumed the cause, and enlarged the articles of negligence and insufficiency aforesaid, it was ANSWERED for the defenders, that the ground and foundation of this subsidiary action in law is either the insufficiency of the prison, or the neglect and default of the keeper. As to the *first,* it was well known that the tolbooth of the Cannogate had been a most sufficient prison past all memory, and few better in the kingdom, and wherein hundred of prisoners for civil debts, and malefactors upon criminal accounts, have been safely detained, and never able to make their escape; at least it was now, and at the time of the rebel's escape, in the same very case and condition, and as strong and as well in repair now as it was at the beginning, or hath been at any time since past memory. As to the *second,* there is no qualification of negligence can be justly inforced upon the jailer, for it cannot be instanced that ever a prisoner for debt did attempt so dangerous an escape. And as for the woman they instance, 1*mo,* She was imprisoned for a capital crime. *2do,* In the escape, she fell, and so bruised herself that within a few days she died. And as to the bringing in of ropes, it is supposed to be proven by the witnesses' depositions, that they were knit together of many pieces, the inbringing whereof no keeper of prisoners for civil debt could obviate or remeid; seeing they may bring them in into their breeches, or wrapt about their waist, and no keeper hath power to search them, though he did suspect them, as he cannot probably do; likeas he can hinder none from having access to such prisoners. As to the window from whence he came, it was ordinary for prisoners to escape even out of the castle of Edenbrugh; and yet none will think the castle an insufficient prison for all that. That the measures of these things were not to be taken from what desperation and hard usage might prompt one man to, but the general rule of law was what the most of men, or a rational man, would undergo in such a case. That the rebel, concerning whose escape they now controvert, was driven to that despair by the unusual strictness and severity of the pursuers, in causing keep him in

the iron house, as if he had been a malefactor: so that the keeper is so far from deserving censure for his remissness, that if he were to be punished at all, he rather deserves it for his cruelty to him, and which he used by some of the pursuers their instigation allenarly. And hoped it was clear, by the witnesses adduced that he was better and more narrowly watched than any other prisoner. Likeas the witnesses adduced for the town, are far more famous and honest persons, and to whom more credit was to be adhibited, as more pregnant and knowing, than the pursuers', in so far as some of them were fellow-prisoners with him at the time of the escape.

We caused make most diligent search for finding out the rebel, that so we might have sifted him again, *in eadem causa.* Yet the Lords have never sustained that as sufficient to assoilyie magistrates. So Dury, *27th March*, 1623, *Smith;* and *22d January*, 1629, *Scrimgeor;* though the same be downright contrary to the common law, *L.* 8, *p.* 7, *D. de Pœnis, Carcer ad continendos homines, non ad puniendos, haberi debet:* but our reason in making the prison a part of their punishment, is *ut squalore carceris* they may be at length forced to pay their debt; but if this were a good or adequate argument, then to make it truly irksome and loathsome to debtors, prisons should only be built in the most noxious and unwholesome airs; their diet should be restricted, and all other severe courses followed, that may render their life grievous and wearisome to them. *L. 2 C. de Exactoribus tributorum.* That the jailer is liable by the common law, *vide L. 4 C. de custodia reorum;* yet that that law seems only to be anent malefactors.

The Lords upon this debate, (which was on the 9th of November,) and after consideration of the testimonies, found no fault nor negligence of the jailer, and therefore assoilyied him and the magistrates upon that account; but before advising of that member, of the insufficiency of the prison, through the not stanchelling of the window whereat the rebel escaped, they ordained the Lords Colinton and Newbayth to visit the said prison and window, and to consider if a prisoner might, without danger, make his escape forth of the said window by the help of tows; and they to report their opinion therein.

We were very glad at the gaining of this step, taking it for a good omen to the whole cause: but we did not at first discover my Lord President's design and draught in it. He had been strongly solicited by his Lady, in behalf of Daniel Rosse, the keeper; therefore, for securing of him, he passed the first part of the interlocutor assoilyieing him from all fault, but resolved in the last part to ensnare the town, and find them solely liable for the debts, upon this ground of the prison's being insufficient; and this to gratify the Dundasses, for whom Sir Jo. Dalrymple and his Lady agented shamefully. But when we felt his breath, it made S. A. R. bestir himself more actively with the rest of the Lords, to break the President's project: and who were concerned, for reasons of state, to see it succeed well; his enemies at that time, as Sir George Lockhart told me, lying at a wait for this advantage against him, yea, wishing and soliciting the town to lose the cause. However, bowls rolled so well, that, whether through importunity or through a timorousness of nature, the foresaid two Lords reported verbally, this 16th day of November, that there was hazard in the descent: though the pursuers and sundry others offered to go out at that same window, and come down without the least

hurt or cause of fear of danger. Whereupon the major part of the Lords assoilyied from the whole libel.

When the cause was first consulted, Sir George Lockhart was mighty diffident of it, abusing Daniel, and telling it was impossible but the town would tyne it, and be found liable; and recommended to me to see the debts, hornings, captions, and arrestments were clear, that as little debt might be fixed upon the town as could be; yet, Mr. G. Norvell had ever hopes of it: but we had so good a care of the probation, and managed it so dexterously, that when we came back with the depositions to him to advise, he became more confident, and asserted, if the Lords judged aright, and considered all the qualifications of diligence proven, and especially that the prison, though it were insufficient, yet that it was in as good case now as at the first building or ever, they could not but assoilyie.

The president was in a great chaff, pretending the absolvitor was contrary to all law, and that if such slender grounds as these were sufficient to free and acquit magistrates from thir pursuits, there should never be magistrates found liable to the world's end; and that in the like cases there have been stronger condescendencies made, and more pregnantly proven, for defenders, and yet they condemned: and therefore would not insert it as a practique in his book he was composing of his daily observes.

The judgment and censure of the advocates upon this decision was various, (as it is in most other cases;) but many condemned it as strange and dangerous.

In case we had lost that part about his casual escape, we were resolved to have recurred and questioned the relevancy of that part of the summons wherein they craved not only the jailer and bailies of the Cannogate to pay them their respective sums, in respect they had suffered the rebel to escape, but also the provost, bailies, council, and commonty of the burgh of Edenbrugh, as lords superiors of the said regality and barony of Cannogate, and from whom the bailies thereof derive their power, authority, and jurisdiction, and so are liable for their malversation; and also as the persons from whom the said jailer has his commission, and to whom he has found caution, and so must answer for his negligencies and omissions; and which was entire unto us, in respect of a reservation contained in the act of litiscontestation, of all our other defences; which I think was scarcely regular: but we were not put to this dead lift.—*Pœnæ depensæ non solent repeti, lege* 42. *D. de condictione indebiti;* and so the bailies of the Cannogate could never in law have recurred upon the magistrates of Edenbrugh, their constituents. We were also resolved to have craved absolvitor from annualrents since the horning, on Durie's decision, marked *29th June* 1626, *Haliburton*, &c.

Advocates' MS. No. 374, *folio* 153.

1672. *November.* GEORGE HOME *against* WILLIAM BROWN.

IN the same month of November, 1672, in an action pursued by George Home, merchant in Edinburgh, against William Brown, writer there, it fell to be debated, but not decided,—1*mo*, If a base right, with a pursuit for mails and duties thereupon some three days before the date of a public infeftment by confirmation, will be sufficient to prefer the said base right to the public infeftment,