

* * * Dirleton reports this case :

No 50.

1675. February 5.—Mr VANSE, jailor of the tolbooth of Edinburgh, did give in a bill, complaining that the jailor of the Canongate was in use to enlarge prisoners put in for debt, upon the warrant and consent of the creditor at whose instance they were imprisoned; whereas the complainer did not enlarge any such prisoners, without warrant of the LORDS' letters; and therefore desired, that either he should be allowed to have the same liberty, or that it should be denied to other jailors.

THE LORDS did consider what was fit to be done in all such like cases; and in end, the plurality did resolve, that where the sums were small, not exceeding 200 merks, the jailor might enlarge prisoners for debt, without any other warrant but the consent of the parties at whose instance they were imprisoned; which they did upon that consideration, that poor people, if they should be forced to suspend and relax, with a warrant to put them out, would be sometime put to more charges than the debt doth amount to. Five of the LORDS did dissent, being of the opinion, That the prison being his Majesty's prison, no person could be put in upon letters of caption, unless the same were under the Signet; and no person put in by warrant of the said letters, could be enlarged without letters to that effect; *nam unumquodque dissolvitur eo modo quo contrahitur*; and the prisoner being put in for his rebellion, could not be enlarged, unless he were relaxed; and if parties did suffer themselves to be taken and incarcerated for small sums, it was their own fault, and more inexcusable the less the sum be; and *majus & minus non variant speciem*; and it being acknowledged by the law, they being prisoners for greater sums, they could not be enlarged without a warrant to put them to liberty; and the law making no distinction of greater and less sums, the LORDS had not a legislative power to alter or qualify the same without an act of Parliament.

Dirleton, No 238. p. 114.

1675. November 17. HALYBURTON of Innerleith.

No 51.

THE LORDS, upon a bill presented by ——— Halyburton, late of Innerleith, prisoner in Edinburgh for debt, did permit that, until January next, he should in the day time go out with a keeper, the magistrates being liable if he should escape: This was done upon pretence that he intended to settle with his creditors, which he could not do unless he were allowed the liberty foresaid: But some of the LORDS were of the opinion, that the imprisonment of a debtor being the ultimate length of execution, and not only *custodiæ causa*, but in that effect *tædio* and *fetore carceris* debtors may be driven to take a course with their creditors; that therefore the LORDS had not power to give any indulgence

or permission, contrary to law, and in prejudice of creditors, without their consent. No 51.

Dirleton, No 298. p. 145.

1678. February 20. M'NEILL *against* The BAILIE of FALKIRK.

M'NEILL of Crear having pursued the Bailie of Falkirk, which is a burgh of regality, for the escape of his debtor, a flesher in Falkirk, the defender *alleged* absolvitor, because he had given sufficient concourse to the messenger who apprehended the rebel, by sending a town-officer with him; and that the rebel had escaped from the messenger and officer *vi majore*, which was found relevant; and for proving whereof, witnesses were adduced, who proved that the Bailie sent a town-officer, and that the rebel run away from the messenger and officer, and that they overtook and apprehended him, and that he pulled from the officer the Bailie's staff which he had given him; and after struggling with the messenger and officer, he got from them and run away; and that he neither made use of gun, sword, whinger, or any other instrument to make his escape. At advising of which cause the LORDS were of different judgements, whether the defence was sufficiently proven or not, some being of opinion that the Bailie had done his duty, and others not; and the matter being of consequence, that both Parties and Magistrates might know their duty, the LORDS ordained the parties to be heard on these points, viz. Whether magistrates being charged upon caption to take rebels, and employed officers to incarcerate them, who are not answerable for the fault or failzie of these officers, if they were either negligent, or colluded; and whether a rebel, having struggled with a messenger and officer, escaping, that it was thereby proved or presumed that it was *vi majore*, or rather that it was to be presumed by the negligence or collusion of the officers. Whereupon it was *alleged* for the pursuer, That the defence was not sufficiently proved, or that the Bailie had done his duty, because, by the execution of the caption produced, it appeareth that the messenger did attack the rebel, and touched him with his wand in presence of the Bailie, and that he charged the Bailie to take and incarcerate him, and that the Bailie only sent an officer with the messenger to carry him to prison, which officer had not a halbert, but only the Bailie's staff: And albeit messengers have two ways to execute captions, one by making the rebel the messenger's own prisoner, and requiring magistrates in burgh or landwart to concur, if the rebel offer violence to escape, the messenger may require any of his Majesty's lieges, in which case the ordinary course is an officer; or otherwise the messenger doth by the letters of caption, which bear warrant to all magistrates in burgh or landwart to take the rebel and incarcerate him, accordingly charge the magistrate to take and incarcerate the rebel; in which case the rebel be-

No 52.

Want of assistance afforded by the creditor with the messenger was found no defence to magistrates who suffered a rebel to escape.

If the persons employed by a magistrate to take a rebel neglect to do so, the magistrate is answerable.