

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-

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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.

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comes the magistrates' prisoner, and he is liable if he escape *sine vi majore*, which is not to be accounted by over-powering one or two officers, but the magistrate is obliged, as he sees the strength and condition of the rebel, to adhibit sufficient force, and whom he employs are upon his hazard if he collude, or neglect; and whatever may be pretended, where the magistrates' concurrence is only required, that the sending an officer may be sufficient, if more be not required by the messenger, nothing can be pretended after the rebel becomes the magistrates' own prisoner; but that if he escape, either before or after he is incarcerated, and not by force which the magistrate could not withstand, or by an accident he could not foresee, he is liable, and at his peril must make use of such officers and others as may securely put the rebel in prison, and the employing an officer without an halbert, or arms, but a staff, cannot be sufficient; and when one man unarmed, struggling, escapes from two, it cannot be presumed to be *vi majore*, but by collusion or negligence, otherwise all execution by caption will certainly be eluded by seeming to struggle with the rebel, and yet letting him go either by favour or reward. It was *answered* for the defender, That his defence is sufficiently proved, for magistrates serving gratis without salary are not obliged for the most exact diligence; and it having been the ordinary custom, that when messengers require concurrence of magistrates, to send a towns-officer, it must exoner at least for what is past, in regard of the custom; but if the LORDS will declare more diligence requisite for the future, they may in this case, as they have in others, by act of sederunt, admit the bygone custom, but for the time coming may require more exact diligence; and in this case the rebel being a flesher, and a robust fellow, it must be presumed that he did escape by force, and not by collusion or negligence. *2do*, Creditors are obliged to give messengers sufficient assistance in their charges, and magistrates obliged to receive rebels in their tolbooths, and in this case the messenger did not require more concurrence, but acquiesced with an officer, though unarmed.

THE LORDS found, that the Bailie being charged by the caption to incarcerate the rebel, he was obliged to do the same effectually, being within his burgh, and offered to be shown to him, and that the creditor was not obliged to furnish assistance to the messenger, who, by the letters, might and did charge the magistrates to take and incarcerate the rebel, and therefore found, that the negligence or collusion of the persons employed by the magistrate was upon his peril, and found that he had not done his duty to incarcerate the rebel, and that the rebel had not escaped *vi majore*, therefore decerned the Bailie to pay the sum.

*Fol. Dic. v. 2 p. 167. Stair, v. 2. p. 616.*