

1685. February 13. MAGISTRATES OF KIRKCALDY *against* The TOWN-CLERK.

No 53.

ONE being pursued upon his bond, That a prisoner for debt should not escape out of the tolbooth, *alleged*, That the roof of the prison having fallen, and endangered the smothering of the prisoner, he was carried out in a consternation upon a man's back; and the Provost did not offer to secure him, though he saw him upon the street, and so he did not escape by any fault of his.

Answered, The design of the bond imports that the prison was looked on as sufficient, and the prisoner ought not to have gone away to Edinburgh, as he did, and obtained since a *cessio bonorum*: The Magistrates being decerned, in a subsidiary action, to pay the debt, at Sir William Binning's instance, who raised the caption, they ought to be relieved by the said bond.

Replied, The Magistrates being justly liable to the subsidiary action, because of the insufficiency of the prison, that cannot be obtruded against the prisoner, nor this defender.

Harcarse, (CAPTION.) No 230. p. 55.

* * * Fountainhall reports this case :

THE LORDS advised the cause pursued by Sir William Binning, against the Magistrates of Kirkcaldy, for suffering a prisoner he had put in there for debt to escape. THE LORDS found, by the probation, there was no negligence on the Magistrates' or jailor's part; for they being about the repairing of their prison, there fell down an old wall, and in the rubbish this prisoner was near overwhelmed, but in the night time wrought himself out and escaped; which the LORDS found to be *casus fortuitus et improvisus*, and therefore assoilzied the said Town from the debt.

Fol. Dic. v. 2. p. 170. Fountainhall, v. 1. p. 341.

1685. February 28. STEVENSON *against* MANSON.

No 54.

BAILIE STEVENSON, in Edinburgh, having pursued Manson, bailie of Wick in Caithness, by a subsidiary action, to pay the debt, for suffering a rebel to escape, and this defence being proponed, that they were not bound to accept the prisoner, because the messenger refused to show the caption, or other warrant to apprehend him, and this as relevant being admitted to probation, and the report of the witnesses this day advised; the LORDS found the defence proved, and assoilzied Manson; though they *alleged*, that they had accepted the prisoner, and kept him some weeks, but then pretended, that being like to