

a caption against the debtor, then in the defender's house, it was *alleged* for the defender, That the intimation being made a little before my Lord went to dinner, the gates were shut immediately after, according to the custom of the family; and, when dinner was over, the messenger was allowed to search, my Lord having searched by his servants; and my Lord was willing to depone he knew not that the rebel was in the house, or that any absconded, or conveyed him away.

No 56.

Answered: The messenger intimated his caption to my Lord, who was looking out at the window, and the gates were, immediately thereafter, shut upon the messenger for some hours, whereas he ought to have been allowed to search presently for the rebel.

THE LORDS sustained the answer relevant.

Harcarse, (CAPTION.) No 232. p. 56.

1687. December 14.

THOMAS FEUDAR *against* The MAGISTRATES of HADDINGTON.

REDFORD reported the subsidiary action pursued by Thomas Feudar, servant to Sir Patrick Home, Advocate, against Sir William Paterson, Provost, and the other Magistrates of Haddington, for suffering one Cowan to escape out of their tolbooth. The defence was, that his escape was fortuitous, &c. and the act of sederunt, made in July 1671, and the occasion thereof, (being the debate between the Town of Brechin and Laurence Dundass) were cited, with other practiques. The LORDS found the defence relevant, that the prisoner escaped *casu improviso*, in so far as Claver's troop being at Haddington on the 14th of October, and having the keys of the tolbooth where they kept guard, and they in a frolic having caused the prisoner drink the king's health, in the disorder and confusion the rebel had escaped; and that the Magistrates, within two or three days, after a search, did apprehend and put him again in prison; and recommended to the reporter to inquire into that point, anent the pursuer's taking an assignation during the dependence of the plea, because he was a member of the house, contrary to the act of parliament.

No 57.

Fol. Dic. v. 2. p. 171. Fountainhall, v. 1. p. 499.

1694. July 13.

SIR JAMES ROCHEAD of Inverleith's RELICT, *against* MESSRS COCKBURN and BROWN.

THE Relict of Sir James Rothead of Inverleith, in a subsidiary action *contra* John Cockburn, baron bailie of Dunse, and Brown his jailor, for paying a debt

No 58.

Found again
in confor-
mity to
Cheap against

No 58.
Magistrates of
Falkland, No.
46, p. 11715.

for suffering the debtor to escape. *Alleged*, Dunse being but a burgh of barony, they are not bound to receive prisoners, and though they do, there is no necessity on them to detain them; and cited decisions out of Durie, Bailies of Dunse *contra* Mudie's Creditors, No. 13, p. 11691, Langton *contra* the Bailies of Dunse, No. 15, p. 11693, and 20th July 1624, Bell *contra eosdem*, voce REPARATION; *2do*, The prisoner not being delivered to the Bailie, he cannot be liable; *3tio*, The prison was insufficient, and so the creditor should not have chosen it. *Answered*, Whatever might have been said, had the prisoner been refused, yet all this has no weight, since they accepted of the debtor; and so nothing can exoner them but to present him when required; and these old decisions do not militate now, since the act of Parliament 1661, constituting Dunse the head burgh of the shire of Berwick for all executions, denunciations and legal diligences; and the 277th act 1597, anent prisoners, seems to require them wherever the judicatories sit. And by a late interlocutor in 1687, between Nasmyth of Posso and the said Town of Dunse, they were made liable for the escape of a rebel, and though it was not intimated to the constituent, yet he must be made liable for the negligence of the servants put in by him, and he should either keep the prison fencible, or else give orders to his jailor not to accept prisoners. The LORDS found not only the jailor, but his constituent liable.

Fol. Dic. v. 2. p. 166. Fountainhall, v. 1. p. 631.

No 59.

1699. January 31. THOMAS YOUNG *against* WILLIAM LIVINGSTON.

THOMAS YOUNG of Rosebank, merchant in Edinburgh, pursues William Livingston, bailie of the regality of Falkirk, for suffering a Highlandman, his debtor, whom he had imprisoned there, to escape, and concludes payment of the debt. *Alleged*, there was neither *dolus*, *culpa*, nor negligence in the case, but he escaped *vi majore et casu fortuito*; having got in some instruments and tools, he lifted out the stanchel of the window, and escaped thereat. *Answered*, The prison has not been sufficient, else it had not been so easily broken; *2do*, The jailor should suffer no such things to be imported, but should search for them; *3tio*, This could not be done without hammers, and much noise, and he ought to have a servant lying in the tolbooth all night; and 11th of February 1671, Will against Kirkcaldy, No. 48, p. 11720, the LORDS found them liable for the debt, because they wanted catbands or chains on their doors. Some were for repelling the defence here; but at last it was agreed to take a probation, before answer, anent the condition of the prison, and the manner of the debtor's escape.

Fol. Dic. v. 2. p. 170. Fountainhall, v. 2. p. 39.