

1710. July 26. HASWELL *against* The MAGISTRATES of Jedburgh.

HASWELL having incarcerated his debtor in the tolbooth of Jedburgh, and he having made his escape, Haswell pursues the Magistrates by a subsidiary action to pay the debt. *Alleged, imo*, This did not happen during our time; and though we be liable, *ratione officii*, yet you must call the Magistrates during whose administration the fault was committed; for they may have defences to elide the pursuit which are unknown to us. *Answered*, He is concerned with none but the present Magistrates; and, if they please, they may recur for relief against their predecessors; but it has been found, this allegiance could not stop their being decerned. The lords repelled this defence. *2do, Alleged*, This action arising *ex delicto vel quasi*, being either the fraud or the fault of the Magistrates and their jailor, that their prisoner escaped, either *dolo* or *lata culpa quæ dolo æquiparatur*, the same is pardoned by the Queen's last indemnity, this escape being prior thereto. *Answered*, The Queen did pardon all fines or forfeitures arising to her by crimes, but never intended to take away the interest of private parties; and here the Magistrates came directly in the place of the rebel imprisoned, and become liable as he was, and no casualty by this escape arising to the Crown, it can never be reputed to be remitted; and when it was pretended that denunciations prior to that indemnity were taken away, as to their penal consequences and effects, the LORDS found they fell not under the indemnity. And, upon these grounds, the LORDS likewise repelled this second defence, and found the indemnity did not comprehend this case.

*Fol. Dic. v. 2. p. 171. Fountainball, v. 2. p. 593.*

1714. June 25.

JAMES HASWEL, Portioner of Hulstoun, *against* The MAGISTRATES of Jedburgh.

In a subsidiary action at the instance of James Haswell, against the Magistrates of Jedburgh, for payment of a debt owing to him by Thomas Rutherford, late Bailie there, on pretence that, in the year 1688, the said Thomas Rutherford had been apprehended by virtue of a caption at the instance of the pursuer's cedent by John M'Ubbin messenger, and offered to the then Magistrates of Jedburgh as prisoner, they refused to receive him, and suffered him to escape;

*Answered* for the defenders; That there was no execution of the caption or charge against the Magistrates to apprehend the prisoner produced, without which, there could be no action against the defenders; they being liable only in two cases, either if they refuse to obey or comply with the will of the cap-

No 62.

Found in conformity with Paplay against Magistrates of Edinburgh, No 41. p. 11714.

No 63.

The Lords found that an instrument under the hand of a notary is not sufficient to supply the want of an execution and charge against magistrates.

No 63.

tion in apprehending the prisoner, or if, after the caption was put to execution, and the prisoner lawfully incarcerated, they suffered him to escape.

*Replied* for the pursuers; For instructing that the Magistrates were duly required, and deficient in their duty, he produced the caption, with a subscribed note on the back by a messenger, containing the fact of his apprehending the said Thomas Rutherford within the council-house, where the Magistrates were sitting (the ordinary prison for persons of the debtor's quality) delivery of a copy of the letters to the Provost; and referring to an instrument taken upon the facts, both by the messenger and party, together with the instrument itself, duly subscribed before witnesses, containing the facts; and offered to prove, if need were, the verity of the facts by the instrumentary witnesses; in which case an execution is not necessary; because the letters were answered by the person's being apprehended and in prison; and the not detaining him was the fault of the Magistrates, who ought to have kept him, or put him in the jailor their servant's hands; for this was equivalent as if he had been *de facto* imprisoned and suffered to escape; in which case, the imprisonment may be proved by recording in the book or otherwise, without necessity of any execution of the messenger, (12th February 1709, Elliot *contra* Magistrates of Selkirk, *see* APPENDIX.), who is functus by the incarceration.

*Duplied* for the defenders; An execution is as necessary to prove that the will of the letters was fulfilled, as it is to prove in the other case, that the Magistrates refused to fulfil the will thereof. So 4th December 1679, M'Kalla *contra* Magistrates of Ayr, *voce* PROOF. THE LORDS refused to sustain any proof of the incarceration by witnesses, even where the jailor was offered to be led as witness, without an execution of the caption, bearing that the party was put in prison by virtue of the caption, or was arrested in prison, or at least was booked in the jailer's books for the debt pursued on, which is conform to reason and practice in the like cases. For executions in writ of summonses or other letters, are solemnities required as absolutely necessary by law; and, in no case is it allowed to prove the facts of a person's being charged, inhibited, or apprehended by caption by witnesses; seeing otherwise property should, after forty years, depend upon the memory of two witnesses adduced to depone upon particular solemnities and formalities which no man's memory is thought able to retain, where he has not given it under his hand at the time that he was witness to the performing thereof.

THE LORDS found that the instrument under the hand of a notary, is not sufficient to supply the want of an execution and charge against the Magistrates; and therefore assoilzied the defenders.

*Forbes, MS. p. 67.*