

1744. December 7. SCOT against SANDILANDS and MANDERSTON.

LIEUTENANT WILLIAM SCOT of General Handyside's regiment, being in a course of dealing with Patrick Manderston, merchant in Edinburgh, came to Edinburgh November 1742, where he had a house, and his wife and children, and lived there till April 1743, when he went to the regiment.

Mr Manderston, March 29. 1743, presented a petition to the Magistrates, setting forth, That the defender owed him a balance of L. 51 Sterling, and was about to leave the country; and therefore craving warrant to take him up; which being granted by Bailie Mark Sandilands, and he examined on the account, he acknowledged the same, but could not be particular as to the balance, his papers being with the regiment in England; and also owned he was going to it, on which he was committed to prison till he should find caution *judicio sisti & judicatum solvi*, where, to obtain his liberty, he granted two bills for L. 10 each, and his obligation besides to pay the balance as it should be liquidated, though he afterwards deponed in a process, that he was owing no more than L. 12 : 19s. Sterling.

Mr Scot brought a reduction and action of damages against the bailie and complainer, in which the Lord Ordinary ' found the commitment of the pursuer, Lieutenant Scot, to prison, dated 29th March 1743, was unwarrantable, ' not only in respect the pursuer was burghess and guild-brother of the city of ' Edinburgh, and therefore not in the sense of the act 1672 a stranger, but that ' the commitment was until he should find caution to make payment to the ' defender Manderston; whereas, had the pursuer been a stranger, he should ' only have been committed, in case he had failed to find caution *judicio sisti*; ' and therefore found the docquetted account, dated 6th April 1743, and the ' two bills of the same date produced, granted by the pursuer to the defender ' Manderston, while the pursuer was in prison, and in order to obtain his liberation, were upon that account reducible. And having considered the pursuer's ' oath, in the process at Manderston's instance against him, for payment of the ' account alleged due by Lieutenant Scot, the pursuer of the above reduction, ' found it thereby proven, that, of the account aforesaid, no more was resting but the sum of L. 12 : 19s. Sterling, for which decerned against the said Lieutenant Scot; and found Lieutenant Scot was entitled to damages on account ' of his commitment aforesaid, and to the full expence of this process of reduction.' And to this, 11th January 1744, his Lordship adhered.

Against this a petition was given in; and, upon answers, the LORDS adhered with regard to the complainer Manderston. They observed, That he had been in use to trust the pursuer, and to receive from him partial payments; that it was not a debt contracted in the place by a stranger; that he had been all winter in Edinburgh, where he had a house and family; and that he owned he was going to the regiment, which was no *fuga*.

No 63.

Burgesses have the privilege of arresting *strangers* for debts contracted within burgh; but an officer in the army, who was a burghess of Edinburgh, and had contracted debt during a residence of some continuance there, being apprehended on a summary warrant of a magistrate, when he intended to go to his regiment, was found entitled to damages.

No 63.

With regard to the bailie, whom they inclined to assoilzie, it being alleged for the pursuer, that he was not informed he might avoid going to prison by finding caution, it was remitted to the Ordinary to inquire into that fact.

Act. *H. Home.*Alt. *R. Pringle.**Fol. Dic. v. 3. p. 111. D. Falconer, v. 1. p. 18.*

* * * Kilkerran reports the same case :

MARK SANDILANDS, one of the bailies of Edinburgh, having, upon the application of Patrick Manderston merchant, summarily committed Lieutenant William Scot to prison, upon the act 1672, until he should make payment to the complainer of the sum libelled ; in the action of wrongous imprisonment pursued against both judge and party, the Ordinary found, ' That the commitment of ' Lieutenant Scot was unwarrantable, not only in respect that he was a burghess ' and guild-brother of the city of Edinburgh, and therefore not in the sense of ' the act 1672 a stranger, but that the commitment was until he should find ' caution to make payment to the defender Manderston ; whereas, had he been ' a stranger, he could only have been committed until he should find caution ' *judicio sisti* ;' and found, ' Both Manderston the private party, at whose in- ' stance the warrant of commitment was obtained, and Sandilands, the magis- ' trate who granted it, liable to the pursuer's damage, and full expence of pro- ' cess.'

And on advising bill and answers, the Lords ' Adhered as to the private ' party ;' but as to the magistrate, ' remitted to the Ordinary to inquire into ' certain contraverted facts.'

There is no doubt, but that the reasons assigned in the Ordinary's interlocutor, and especially the second, was sufficient. But it is fit to take notice, that two other reasons occurred to the Lords at advising bill and answers, which also had weight. One was, that the debt due to Manderston appeared to be the balance of an account current, whereof a great part had been paid ; and it was thought that the act of Parliament did not extend to such a case, but only to particular contractions. The *second* was, That it also appeared that Lieutenant Scot, the pursuer, had a house in Edinburgh where his wife and family resided, and where he himself was in use to reside, except when obliged to attend the regiment ; and therefore, whether burghess or not, he was no more a stranger than a judge or a lawyer who leaves the town in vacation. See CAUTIO JUDICIO SISTI, &c.

Kilkerran, (BURGH ROYAL.) No 4. p. 101.