

1757. *December 14.*

ANDREW CHALMER, Writer in Edinburgh, and ALEXANDER ROSS, Sheriff-clerk of ROSS, Pursuers, *against* RODERICK MACCULLOCH, of Glastullich, and the MAGISTRATES and TOWN-COUNCIL of the Burgh of TAIN, Defenders.

No 71.

The Court found Magistrates liable for the escape of a prisoner; but found them entitled to relief against the person by whose means the escape was effected.

IN 1731, William Ross, sometime merchant in Fortrose, having failed in his circumstances, made his elopement and fled to Holland, carrying off with him such of his effects as he could remove.

In 1735, he having returned clandestinely to this country, a petition was presented by the pursuer Alexander Ross to the Sheriff of Ross-shire, in name of the other pursuer Andrew Chalmer, as creditor to the said William Ross in several sums contained in three bills, upon which horning and caption had followed before William Ross had left the country, and in name of the said Alexander Ross, his agent and factor, setting forth the grounds of debt, Ross's absconding and return, and his intention to secrete the remainder of his effects; and praying for a warrant to the officers of the law to search for, seize, and imprison the person of the said William Ross, and to keep him in sure firmance until liberated by due course of law.

The Sheriff granted warrant in the above terms; and, by virtue thereof, William Ross was apprehended, and incarcerated in the prison of Tain, by one of the Bailies of that burgh. He remained in prison for some days; till, by the assistance of Roderick Macculloch of Glastullich, his brother-in-law, and alleged negligence of the jailor, he made his escape out of prison, in the day-time.

The pursuers brought their action in this Court against the Magistrates of the burgh of Tain, as liable for the debt, in respect of their having suffered the prisoner to escape, either by the negligence of the jailor, or the insufficiency of the jail; and against Roderick Macculloch of Glastullich, as aiding and assisting to the prisoner in his escape.

A full and distinct proof was brought of the manner in which the prisoner made his escape. The prison was proved to have been abundantly sufficient; That there were no less than three doors through which the prisoner must have made his way before he could escape, viz. the room-door, the door at the foot of the steeple, and the outer door of the prison: That all these had catbands, and iron chains for hanging locks on the outside, to which no access could be had from within. But it was also proved, That the jailor allowed Glastullich access to the prisoner the morning he made his escape, after he had reason to suspect that an escape was intended: That the jailor was called away from the prison about some business, with some of the towns people: That he left Glastullich in the room with the prisoner, and the room-door open: That he locked the door at the foot of the steeple; but to this lock there was access from the inside of the door; and it was so insufficient, that it could be opened

with a crooked bit of iron: That the catband on the outside of this door was not locked: That a younger brother of Glastullich's was in the hall or outer room of the prison, between the door of the steeple and the outer door of the prison, and was left there when the jailor went away: That the outer door of the prison was left quite open: That the coast being thus clear, Glastullich's brother, from without, took off the catband, and the prisoner from within, with a bit of crooked iron, picked the inside-lock of the door at the foot of the steeple, and so walked out into the street, with Glastullich's sword in his hand, followed by Glastullich at a little distance: That they walked up streets to the outskirts of the town, where Glastullich's horses were waiting for them; and thus got clear off. And, from these circumstances, it was *argued*, That the prisoner's escape was plainly owing to the culpable neglect of the jailor, as well as to the assistance given by Glastullich: and that, therefore, both the Magistrates and Glastullich ought to be found jointly liable for the debt.

Pleaded for the Magistrates; Neither the Magistrates nor the jailor were guilty of any culpable negligence. The prison was sufficient; and the jailor was likewise proved to be a careful and diligent officer. And, in this case, when no body could have suspected that a prisoner would have attempted to escape in broad day-light, in the face of the people, he was even so provident as to lock at least one of the doors of the prison, hung the outer chain upon the hasp, and carried the keys along with him; and, had it not been for a combination of persons without, as well as within the prison, nothing amiss could have happened: and, therefore, as there was neither connivance nor culpable neglect, the accidental concurrence of circumstances, which could not be foreseen, and fraudulent assistance given by Glastulloch, were not sufficient to subject the Magistrates to the conclusion of this penal action. *2do*, In this case, the warrant of commitment was of an uncommon nature, and, indeed, altogether improper and illegal. The prisoner was not committed upon a caption, nor for payment of a debt. He was committed upon this single ground, That being indebted to Andrew Chalmer in certain sums, he was *in meditatione fugæ*, and intended to secrete his effects, and fly the country. The commitment, therefore, was for an alleged fraud or delict; and the warrant accordingly bore, as in criminal cases, That he should remain in prison until liberated in due course of law. And therefore, as there is no precedent for subjecting Magistrates to the damages of a private party, upon account of the escape of a prisoner, in any case but where the commitment was expressly made for the satisfaction of a debt, it would be dangerous, and unreasonable, to extend the penal action against the Magistrates, in this case, beyond the former practice. *3tio*, In the present case, neither the principal warrant of commitment, nor a copy thereof, was left with the Magistrates or jailor; which was necessary, in order to certify to them the nature of the commitment, that they might have conducted themselves accordingly. And therefore, as the Magistrates could not know the nature

No 71. of the warrant, or for what purpose it was granted, they cannot be made liable to the pursuer in damages.

“ THE LORDS found the Magistrates of Tain and Roderick Macculloch of Glastullich liable, conjunctly and severally, to the pursuers in the debts contained in the warrant granted by the Sheriff against William Ross; but found the Magistrates entitled to relief from the said Roderick Macculloch; and that the pursuers must assign the debts contained in the warrant to the Magistrates, upon their making payment of these debts, to the end they may operate their said relief; and assoilzied the Magistrates from the expenses of process; but found Glastullich liable in said expenses.”

Act. Lockhart.

Alt. And. Pringle.

G. G.

Fol. Dic. v. 4. p. 137. Fac. Col. No. 68. p. 115.

1759. July 13. CHARLES BRODIE *against* The MAGISTRATES of Elgin.

No 72.
A prisoner having escaped by means of false keys, the Magistrates were found not liable.

CHARLES BRODIE brought an action against the Magistrates of Elgin for payment of L. 149 : 10s. and interest, on account of their having allowed Gilbert Barclay, his debtor, to escape from the prison of Elgin, where he had been confined for that debt.

It was *proved*, in defence, That Barclay had made his escape, not by the insufficiency of the prison, nor the connivance of the jailor, but by means of false keys, which he had procured to be made at a neighbouring town; and that he had an accomplice in making his escape, who, from without, opened the doors with these keys.

Answered, The prisoner could not have procured the impression of the keys from which the false keys were made, without the connivance, or at least the negligence, of the jailor. *2dly*, It was proved, That, the night of the escape, as well as upon other occasions, the jailor had neglected to put on the catbands and padlock on the outward door; which ought to make the Magistrates liable, in terms of the act of sederunt 11th February 1671; by which it is declared, ‘ That, in all time thereafter, the Court would find the Magistrates of boroughs ‘ liable for the debts of rebels who should escape from the prison, in case they ‘ have not sufficient catbands upon the doors of their prisons, *and lock the same ‘ ilk night*, lest the rebels pick or break up the locks.’

Replied, It is clear, by the proof, and particularly by the oath of the accomplice, that the jailor had no accession to the escape; and it was easy for the prisoner, during the course of a long confinement, by the assistance of an accomplice, to get the impression of the keys, without any culpable neglect of the jailor. *2dly*, Though the catbands were not locked the night of the escape, yet, as the escape was not facilitated by this omission, it cannot be a good