

1668. July 7.

HAMILTON *against* CALLENDER.

JAMES HAMILTON having taken his debtor with caption, offered him to James Callender, Bailie of Falkirk, to be incarcerated in the tolbooth of Falkirk, and he refusing, he now pursues a subsidiary action against the Bailie, for payment of the debt; who *alleged*, Absolvitor, because he is no Magistrate of a burgh royal, but of a burgh of regality, the Bailies whereof were never in custom to be charged with rebels. The pursuer opposed the act of Parliament 1597, cap. 277, bearing expressly, Bailies of stewardries and regalities, according to which, the tenor of all captions bears the letters to be direct against all Bailies of regalities. The defender *answered*, That for the letters, it is but *stylus curiæ*; and, for the act of Parliament, the narrative and reason thereof relates only to burghs having Provost, Bailies, and common good.

THE LORDS having considered the act of Parliament, repelled the defence, and decerned. Here the rebel was residenter within the burgh of regality, where there was known to be a convenient prison.

*Fol. Dic. v. 2. p. 168. Stair, v. 1. p. 549.*

\* \* \* Gosford reports this case:

JAMES CALLENDER, Bailie of Falkirk, being required to incarcerate William Hodge, debtor to James Hamilton, who was taken by virtue of letters of caption, was pursued for payment of the debt, for not imprisoning of the rebel. This pursuit was sustained, notwithstanding it was *alleged*, That the Bailies of regalities were not obliged to have jails and prison-houses, and to keep prison-houses for civil debtors, to which Bailies of royal burghs were only liable by act of Parliament 277, Parl. 15th, King James VI.; because the LORDS found, That Bailies of regalities were comprehended in the foresaid act of Parliament, and that letters were orderly directed against them, as well as to Sheriffs and Bailies within burghs.

*Gosford, MS. No 21. p. 8.*

1668. July 14. PAPLAY *against* The MAGISTRATES of Edinburgh.

JOHN PAPLAY having obtained decret against Henry Henryson for a blank sum, and thereupon arrested him when he was prisoner in the tolbooth of Edinburgh, did obtain decret against the Magistrates for payment of the debt for suffering him to escape; notwithstanding it was *alleged*, That they had only permitted him to go to a friend's house, when he was *extremis agens*, and where he died shortly after; for the Lords found, That the Magistrates could not, at their own hand, permit him to go out of prison without a warrant from the

No 42.  
Magistrates of a burgh of regality found liable in a debt, they having refused to receive a prisoner taken on caption.

No 43.

No 43. Lords of Privy Council, or their own warrant specially; it being proved, that they suffered him to lie many nights out of prison before that time.

*Fol. Dic. v. 2. p. 169. Gosford, MS. No 31. p. 11.*

1669. July 2. FARQUHAR *against* The MAGISTRATES of ELGIN.

No 44.

The Lords found Magistrates, being charged, obliged to take a rebel, and, without delay, to search any house within the town that was particularly shown to them, unless they had been repulsed by force, or the doors by violence kept close against them.

FARQUHAR having caused a messenger charge the Magistrates of Elgin to take my Lord Lovat, and the Bailies being together upon the street about eight or nine o'clock in the morning, the messenger, with several persons present, charged them to go into an house near by, which they designed to them, and to take Lovat, being then in bed; and the messenger offered to go with them and enter first; yet the Bailies did not obey, but said they would go at their conveniency, when they had convened their neighbours to assist. There is an execution and instrument upon the back of the caption to the effect foresaid produced, whereupon Farquhar pursues the Magistrates for payment of the debt contained in the caption. The defenders *alleged*, Absolvitor; *1mo*, Because they were no further obliged but to convene the neighbours of the town, and send them with the messengers to assist, which they offered to do; *2do*, Albeit themselves were obliged to take the rebel if he were shown to them within their jurisdiction, yet they were not obliged to search every house of the town for him, or to enter within close doors; *3tio*, The Lord Lovat being known to be a fierce young man, who ordinarily had a minzie attending him, they were not obliged to adventure upon him, without calling the assistance of their neighbours, which they did within an hour or two thereafter, and he was gone.

THE LORDS repelled all these defences, in respect of the execution and instrument produced, and found the Magistrates, being charged, obliged to take the rebel, and without delay, to search any house within the town that was particularly shown to them, unless they had been repulsed by force, or the doors by violence kept close against them by the master of the house, and ordained the pursuers to adduce the witnesses in the instrument and others to prove the particulars foresaid to have been so done as is therein expressed.

*Fol. Dic. v. 2. p. 168. Stair, v. 1. p. 628.*

\* \* \* Gosford reports this case:

IN a subsidiary action pursued against the Magistrates for payment of a debt due to Farquhar by the Lord Lovat, in respect they being charged by virtue of letters of caption to apprehend, for which an instrument was produced, bearing, that the messenger did intimate to the Bailies, that the Lord Lovat was lying in bed in a house of the town, and that the messenger offered to go with them, and enter the room before them, and that the Magistrates refused,