

upon reason that he was not *in conspectu*, and that the rebel being a nobleman, and well attended, might make resistance, in which case, they were not obliged to obey the charge;—the LORDS did find the Magistrates liable to the debt, as being obliged to go and search until they found resistance; but ordained, that their refusing should be proved by witnesses, and would not sustain the instrument of a notary to be a sufficient probation.

Gosford, MS. No 152. p. 60.

No 44.

1669. July 28.

GRANT *against* GRANT.

ONE Grant being imprisoned in the tolbooth of Nairn for a riot, was arrested for a civil debt, whereupon he craved to be set at liberty, pretending, that only prisoners arrested for debt could be arrested by creditors, and that he had satisfied for the riot. THE LORDS did refuse the desire, and found no difference betwixt imprisonments for civil debt, and for a riot or crime; but upon sufficient caution did grant suspension.

Fol. Dic. v. 2. p. 169. Gosford, MS. No 197. p. 79.

No 45.
Prisoner for a crime may be arrested for a civil debt.

1670. June 18.

CHEAP *against* MAGISTRATES OF FALKLAND.

MR JAMES CHEAP pursues the Bailies of Falkland to pay their debt due to him by Provost Mains, who being taken by caption, and delivered to the Bailies by the messengers, they kept him in a private house for the space of ten days, for which they are as well liable for the debt, as if they had brought him out of the tolbooth, and kept him in the town during so much time; and also they were liable in so far as having put him thereafter in the tolbooth, they suffered him to escape forth thereof. It was *alleged* for the defenders, They were not obliged to keep prisoners, not being a burgh royal, but only a burgh within a stewartry, which no law obliges to receive prisoners, and the caption is only direct to Sheriffs, Bailies of regality, or royalty, Stewards, and Magistrates of burghs royal, but not to burghs within stewartries, or within regalities, albeit they were the head burghs of the stewartry or regality, not being burghs royal. *2do*, The defenders cannot be liable for keeping the prisoner some days out of the tolbooth, seeing he did not then escape; and albeit it be a fault for which they may be censured, to keep a prisoner in a private house, yet the doing thereof, if the rebel escape not, makes them not liable to the debt, but especially where the rebel was never in the tolbooth, and when there was treaty betwixt him and the pursuer and his servant, for an agreement and satisfaction and security for the sum. *3dly*, They offered to prove, that the tolbooth was sufficient, and that the prisoner escaped *vi majore*,

No 46.
The Magistrates of a head burgh of a stewartry received a prisoner who afterwards escaped. Found it was then incompetent to allege, that they were not bound to receive him.