

1675. November 18. VANS against SANDILANDS and Others.

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A procurator having a mandate to pursue for the behoof of strangers out of the country, was found obliged to sustain a process at the instance of the defender; the reconvention being upon a fact which arose out of, and was incident to, the principal process.

SOME strangers in Hamburgh gave an ample commission to Robert Sandilands to pursue Captain Henry Martin for piratical depredations at sea of their goods, with power to do all things requisite and necessary for that effect; whereupon a process was intented against Martin before the Admiral. Martin gave in a bill of advocation, and found caution to appear before the Lords; whereupon three of the Lords, in the vacation, stopped procedure, and the cautioner having presented Martin before the Lords, and the reasons of advocation heard upon the bill, they repelled the reasons, and liberated the cautioner, but ordained Martin to go to prison, in the tolbooth of Edinburgh, till he were sent to the Admiral *in statu quo*, or till he found caution to appear before the Admiral; and accordingly he was sent by a macer to prison from the Bar, without a written order, but was received in the prison, and shortly after escaped in womens clothes. Patrick Vans, keeper of the tolbooth, obtained several persons examined as accessory to the escape; and gave in a bill, desiring that it might be found that he had done his duty, and that neither he nor the Magistrates of Edinburgh were liable *accessorie* for the debt upon which he was incarcerated. Robert Sandilands being cited upon the bill, *alleged* no process upon the bill against the strangers, for absolving the Magistrates or the keeper of the tolbooth, as now become liable for the debt of Martin escaping, because that was a several important cause, not receivable summarily upon a bill, but upon a solemn process of the strangers upon 60 days; and the citation of Sandilands as his procurator was not sufficient, because he had only power to pursue Martin, but was not obliged to defend the strangers against any other pursuit; and though the strangers were present, they were not obliged to answer summarily to this bill. It was *answered*, That in all processes whatsoever, what occurs *incidenter* in the process is determinable without a several citation, if the pursuer be present, or if his special procurator in his place be present by a written commission from a stranger; so that if the strangers were at the Bar, it were most competent, that seeing *incidenter* in the process, Martin being imprisoned by an act of process, and having escaped, whereby there ariseth this ground of debate, whether the Magistrates or keeper were liable for the debt, they might very well desire themselves by supplication to be liberated without any distinct process, but by supplication intimated; much more in the case of a stranger, who is not subject to the Lords' jurisdiction; and a citation against him at the market cross could not render him contumacious, not being obliged to appear, as all Scots men are, as *in domicilio originis*; and therefore it is ordinary to refuse process to strangers, unless they find caution to be liable by reconvention, which is competent to all defenders, and all those who become liable for them; so that Sandilands should have no process if he refuse to answer for clearing any thing incident in the process; and it is ordinary to receive incidents more heterogenious than this, viz. the improbation of any writ that is produced

in process without new citation; and in all the processes at the instance of strangers against capers, where multitudes of bills were given in against the strangers upon any thing incident in the process, they were ever sustained without this pretence.

THE LORDS sustained the bill.

Fol. Dic. v. 1. p. 329. Stair, v. 2. p. 371.

* * * Dirleton reports the same case :

CAPTAIN MARTIN being pursued before the Admiral, for wrongs done by him in taking free ships and goods, upon pretence that he was a caper, and that the same belonged to the King's enemies; and having desired an advocation, the Lords thought fit that he should find caution; and because he refused, and pretended he was not able, did commit him; and thereafter, he having escaped out of the tolbooth of Edinburgh in a disguise, and in womens' clothes, Mr Vans, keeper of the tolbooth, did give in a bill, representing, That there being so great a number of prisoners, upon account of conventicles, and for criminal causes, and the said Captain being incarcerated, not for a crime, but for not finding caution, he was *in bona fide* not to look upon him as a person that would escape; and there being so many persons who had access to other prisoners, to furnish them meat, and upon other occasions, the said Captain's escape, in manner foresaid, was such as the most faithful and diligent keepers might have been surprised and imposed upon; and therefore did desire that his carriage might be tried by the Lords, and if they should find him innocent, that he may be cleared.

It was thought by some of us, that the desire foresaid, resolving either in an absolvitor, or a declarator of his innocency, the Lords could not give a sentence as to either in form, unless either there were a pursuit against Mr Vans, at the instance of the persons concerned, or a declarator at his instance against them being called; and any sentence that the Lords should give, the parties concerned not being called, will be no security to the petitioner. And whereas it was pretended, that this being an incident, and a dependence before the Lords, they may proceed upon it as accessory to the said dependence,

It was thought, that the suffering the prisoner to escape, though it had a dependence upon the process, yet could not be called an incident, but a *delictum*, whereupon did arise a ground of action against the petitioner, both at the instance of the town of Edinburgh, who were directly liable to creditors for the escape of prisoners, and at the instance of the parties concerned; and, therefore, their interest and action could not be prejudged in so summary a way upon a petition, they not being called; whereas such actions, being both of importance as to the matter, and of difficulty and intricacy, do require not only citation of parties, but all the ordinary solemnities of process, both for introducing and discussing the same.

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1675. November 23.—IN the case above-mentioned, concerning the escape of Captain Martin, and the bill given in by Patrick Vans, which was given up to ——— Sandilands, commissioner for the parties concerned, and to his procurators to see and answer this day, it was represented for Patrick Vans, that keepers of prisons are in effect *depositarii*; and that prisoners are entrusted and deposited to be kept by them; and in law, *depositarius tenetur, only de dolo et lata culpa*; and the petitioner could be charged with neither; and the prisoner's escape in a disguise is such as might have surprised and imposed upon the most circumspect and diligent keeper; and divers instances, from lawyers and story, were adduced of escapes of that nature, of prisoners in disguise, and of the impunity of jailors being free of fraud, and any accession to the same. Whereunto it was *answered*, That the keepers of prisons are not *depositarii*, but public servants and officers; and in all cases of any trust or charge, when the same is not gratuitous and *dantis causa*, but likewise *causa accipientis*, and *ubi intervenit merces*, those who are trusted *tenentur præstare culpam levissimam*; and seeing it cannot be said, that the prisoner escaped *vi majore*, which could not be resisted, nor *casu fortuito*, which could not be foreseen or prevented, the keeper and his servants, for whom he should answer, cannot be said to be free of *culpa*: And albeit, *quævis causa excusat a pœna*, where there is no *dolus*, and the instances adduced do militate only to that purpose; it cannot be instanced either at home or abroad, that Magistrates, and *custodes carcerum* under them, were found not to be liable *in subsidium*, for damage and interest for the escape of prisoners; and yet the Lords inclined to free the petitioner; and, that it may appear to be done the more warrantably, they ordained him and his servants to be examined concerning their knowlege of the said escape.

Some of the LORDS were of the opinion, That it was to no purpose to examine the parties themselves; and, though they had charity for the petitioner, that he was not conscious or accessory to the said escape, yet that he and his servants, for whom he should answer, could not be thought to be free of *culpa* and negligence; and that it was hard, for securing him from prejudice, to unsecure the people; and if such a preparative should be sustained, it would be of dangerous consequence, and not only a prejudice, but a discouragement to the people, if, after the extremity of diligence and trouble, prisoners for debt, or upon other accounts, should escape *impune* upon such pretences: And it was remembered, that, upon the occasion of the indulgence and favour to keepers of prisons in Edinburgh, there had been of late divers attempts and escapes; and in this instant year, one being taken for a highway robber, and imprisoned in Edinburgh, had escaped without any censure or punishment of the servants of the house.

1675. December 1.—IN the case abovementioned, the LORDS having examined the servants of the tolbooth, and Captain Martin's wife, found, that Mr

Vans being free of any suspicion of fraud, or knowledge and accession to the escape of Captain Martin, ought not to be liable to any hazard for the same. See PRISONER. *Dirleton, No 299. p. 146. No 301. p. 147. & No 306. p. 151.*

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. This case is also reported by Gosford :

CAPTAIN MARTIN, master of a privateer during the late wars with Holland, being pursued before the Admiral for his unjust seizure of a merchant ship belonging to the Hamburgers, who had granted a factory to Robert Sandilands for recovering the value of a ship and loading, extending to a great sum; the said Captain had found caution before the Admiral at the first diet *judicio sisti*; but thereafter, there being a bill of advocation passed from the Admiral to the Lords of Session, and the cause being called, he compearing at the bar, his cautioner did thereupon take instruments, and craved, that he might be free of his cautionry, which was granted; and both parties being heard upon the reasons of advocation, the LORDS did remit the cause to the Admiral, and did ordain Martin to find new caution, that he should answer before that Court, which he not being able to do, they did send him with a macer to the tolbooth, there to remain until he should find new caution; and he having remained only four or five days, did make his escape, being disguised in a woman's clothes: Whereupon there was a bill given in by Patrick Vans, keeper of the tolbooth, craving diligence for citing of witnesses upon the manner of his escape, and that he might be declared free of all damage and prejudice, that could be laid to his charge by the Hamburgers and others concerned; upon that reason, that he was neither guilty of fraud nor connivance, nor any neglect in his office, having been most careful in placing servants under him, who, by a disguise, being no way apprehensive of such a contrivance, were deceived: It was impossible to have prevented it. Likeas the prisoner was only sent by a verbal order, not specifying the cause, that it was for debt, so that he could not in law be liable. It was answered for Sandilands, That he, being only a factor, was not obliged to answer any such bills, which contained a declarator; and, therefore, his constituents ought to be cited upon a formal libel, bearing that conclusion, upon threescore days, they being strangers; and the cause ought to be inrolled *in communi forma*. It was replied, That this escape being accidental, and such as both the town of Edinburgh and Lords of Session were concerned in, as well as the Hamburgers, and the matter being so recent, that it ought to have an immediate trial, and his petition granted, and he declared free.—THE LORDS did much reason amongst themselves if this could be sustained in form; and at last being voted, it was carried by plurality, that, without raising any new libel against the Hamburgers, all probation might be led that a sentence might proceed; which seems very hard, the desire being a civil conclusion against parties who were not called, and whose factor had no warrant to compear in any such action, but only to pursue Captain Martin for his piracy; but as to any

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Gosford, MS. No 806. p. 507.

DIVISION VI.

Forum competens with regard to Executors, Factors appointed by the Lords, &c.

1684. *March.*

No 53.

ELISABETH DRYDEN *against* ELLIOT of Dunlabyres, and ANDREW AINSLEY.

AN Englishwoman, who was administratrix in law to her husband in England, pursuing for a debt resting to herself in Scotland; the defender *alleged* compensation upon a debt owing to him by the pursuer's husband, for which she is liable as administratrix.

Answered for the pursuer; By the law of England administrators are not liable to foreign debts. *2do*, The pursuer cannot be liable as administratrix in England for debts due in Scotland, seeing she is not confirmed executrix as to any sums owing there to her husband; and as administratrix of his English debts, can only be pursued in England, where he, who was an Englishman, died.

THE LORDS sustained the second answer made for the pursuer.

Fol. Dic. v. 1. p. 330. Harcarse, (EXECUTRY.) No 460. p. 126.

1732. *July.*

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WHITE *against* SKENE of that Ilk.

THOUGH regularly an English executor is not bound to account in Scotland, or any where, save in the court whence he derives his powers; yet a creditor having got letters of administration in England, and thereupon intromitted with the defunct's moveables; and thereafter pursuing the heir in Scotland; the defence was sustained, *quod præsumitur intus habere*, though the creditor alleged she had applied her intromissions otherwise, and was not bound to account in Scotland. For no law can justify twice payment. *See APPENDIX.*

Fol. Dic. v. 1. p. 330.