

No 60.

found on the 4th of November 1682, Campbell *contra* Christie, No 22. p. 10608., marked by President Newton, where the Lords found that one of the particulars robbed being found in his custody, made him answerable for the whole; and, as to their breaking prison, *imo*, You transported them from the low rooms to the upper, which yourself acknowledged to be less secure, whereupon I took an instrument against you; *2do*, You were *in culpa* to let them get in tools and iron instruments to break through the walls, and ropes to go down in, without which they could not have escaped. *Replied*, Their can be no oath *in litem* against the Magistrates, whatever might be sought, if the principal delinquents were convened; and the case adduced was in a Highland depredation, where the clans and chieftans are liable for all that dwell on their ground, whereas the Magistrates are neither art nor part of the theft and pickery libelled, nor resetters of the stolen goods; and it were an odd decision to find them liable for all that are committed to their prisons on suspicion of theft; and what if the crime required no reparation or damage, but only a corporal punishment, if they escape, it were ridiculous to say the Magistrates should undergo the like punishment, *poena talionis*; all that could be done in that case, were to be subject to censure, fining, and deprivation, at the instance of the public for their negligence. Some of the Lords thought that the damage not having been liquidated by a sentence before their escape, the constituting the same now would not be sufficient to make the Magistrates liable for what shall be proven against them, *ex post facto*; but the generality of the Lords thought this would make the Magistrates too remiss in keeping prisoners, and therefore they only found no process could be sustained against the Magistrates *subsidiarie*, till his claim of damages were proven against the principal delinquents, seeing they cannot be bound as accessories *et in subsidium*, till the principals be discussed; and then they would consider whether they would allow the pursuer his oath *in litem*, so as to reach the Magistrates for all he should swear.

Fol. Dic. v. 2. p. 171. Fountainhall; v. 2. p. 213.

1704. November 11. BLAIR *against* The TOWN of EDINBURGH.

No 61.

FOUND that the pursuer could claim no more than the restricted sum for which the prisoner was booked, though far less than the sum contained in the caption, without prejudice to him, to insist for the superplus of the debt not booked, as accords.

Fol. Dic. v. 2. p. 171. Fountainhall.

*** This case is No 4. p. 3468. *Voce* DIES INCEPTUS.