

scribe the houses, inhabitants, or master, where they craved the search to be made.—3tio, *Alleged*, He acted *bona fide*, and, by probable ignorance, seeing the clause of this new act of Parliament was dubious, and he might rationally stumble, especially having the town assessor's advice for him; and, by the 83d act of Parliament 1426, judges are commanded to determine *secundum scientias suas*, which he did.—THE LORDS affoizied the Bailie from the fine of 500 merks imposed by the law, and found his excuse relevant as to bygones; but expected these acts would meet with punctual execution hereafter. See LEGAL DILIGENCE.

*Fol. Dic. v. 1. p. 106. Fountainhall, v. 2. p. 194.*

No 14.

1709. December 3.

Sir JOHN M'KENZIE of Coull, *against* The MAGISTRATES of INVERNESS.

IN the subsidiary action at the instance of Sir John M'Kenzie, against The Town of Inverness, for payment of 600 merks due by William and Duncan M'Intoshes to Sir John, upon this ground, That the Magistrates, when required by a messenger, refused to receive the debtors into their prison, by virtue of a caption at Sir John's instance against them.

*Alleged* for the Magistrates: That they could not warrantably incarcerate the said persons, because the ground of debt whereupon the caption was raised, stood suspended.

*Replied* for the pursuer: When the defenders were required to incarcerate his debtors, there was no principal suspension produced to them, but only an attested copy under the hand of the messenger who executed and intimated the same, which could not warrant them to disobey the authentic letters of caption: For, when the Sovereign's will is intimated in the form of law to Magistrates (who are but executors of the law) they are obliged to obey till the Sovereign's countermand be shewn in the form of law. Which is so far true, That Magistrates of a burgh cannot dismiss a prisoner after incarceration, upon instruction, that the charge was satisfied and paid before, without a warrant from the Lords of Session.

*Duplied* for the defenders: They knowing that the caption was countermanded by a suspension of the debt, were not *in tuto* to obey the caption; for it is not the intimation of the suspension to them, but the expeding of it at the signet, that takes off the effect of the caption: And the production of the attested double was at least a probable ground for them to demur to put the caption to execution, and doth sufficiently purge all contempt of authority.

THE LORDS found, That the seeing the double of a suspension, attested on the back by the messenger who intimated the same, was no sufficient excuse for the Magistrates for not obeying the letters of caption; but, in respect the action was subsidiary, remitted to the Lord Ordinary to hear the Magistrates upon any reason of suspension against payment of the debt, that they could instantly verify.

*Fol. Dic. v. 1. p. 106. Forbes, p. 361.*

No 15.  
Magistrates were found liable *subsidiarie* for a debt, having refused to receive the debtor into prison. An attested copy of a suspension had been shown to them; but they ought to have regarded nothing except the suspension itself.