

1712. June 10.

The QUEEN'S ADVOCATE against ROBERT RUTHERFORD and JOHN GRAY.

No 119.

Two poor persons, having suffered the punishment appointed for their offence, being detained in prison for the jail dues, the Court paid the jailor themselves, that they might not encroach on the jailor's right.

THE Queen's Advocate gave in an indictment and complaint against Robert Rutherford and John Gray, indwellers in Edinburgh, showing, that there was a ticket made use of, as signed by Dean of Guild Warrender, whereby he became caution for L. 25 Scots, as the house-rent of one Isobel Guild, wherein the said Gray and Rutherford are the two subscribing witnesses; and upon inspection it is found, that Warrender's name is forged; and they being apprehended, and brought before the Magistrates of Edinburgh, they confessed they did not see Warrender sign the bond, nor did he at any time own it to be his subscription before them; but that one Alexander Pitblado, an agent, brought it to them, and affirmed it was Warrender's hand, and, on his assertion, they signed witnesses, he having promised to cause the Dean of Guild own it; which he never did, but now quarrelled it as false; and that Pitblado was carried away a recruit to Flanders; and thence the Advocate concluded they should be punished as accessory to the forgery, in terms of the 5th act 1681. And being brought before the LORDS *in præsentia*, it was started by some, that they were not obliged to answer without a formal libel, and a citation on fifteen days; but on advising the processes against Hunter, Strachan, and Hannay, it was found the LORDS proceeded summarily in the trial of falsehood; and they were offered lawyers to plead for them gratis, and to get the *induciae*; but they told, being poor men, they could not maintain themselves long in prison, and therefore desired to be brought to a present trial. The next question was, If it might be done with open doors, or if the LORDS might remove all, but the parties or their procurators, which, on reading the 27th act 1693, the LORDS found they had power to do; and their declarations before the bailies being read to them, Gray adhered to his confession, but Rutherford retracted that part where he had acknowledged his subscription; but afterwards finding the LORDS did not extend it to death, (in which case they behoved to remit it to the justiciary,) but only to inflict an arbitrary punishment, he did acknowledge that Gray ensnared him to sign it, which he did simply, not knowing the hazard. THE LORDS considered, though it was in a very small sum, yet it was a dangerous case to let witnesses escape, on the pretence of simplicity, where they neither see the party sign, nor own his subscription, though the common practice of forgers is to antedate writs, and insert dead witnesses; therefore the LORDS resolved to impose some stigma and censure to terrify others; and so ordained them to be brought on Wednesday, being the market day, to the great door of the Parliament-house, by the hand of the hangman, with a paper on their breasts, bearing their crime, and there to stand betwixt ten and eleven in the forenoon; and from that to be conducted to the pillory at the Trone, and there to stand the other hour between eleven and twelve,

with papers on their breast: And in regard Gray had seduced Rutherford to sign, they ordained his lug to be nailed to the Trone; and being informed Rutherford was a notary, they deprived him, and declared them both infamous.

No 119.

1712. *June 14.*—THE two prisoners, Rutherford and Gray, mentioned *supra* 10th June 1712, having undergone their sentence, petitioned to be liberate out of prison, which was granted; but George Drummond, keeper of the tolbooth, refused till he were paid his dues. THE LORDS thought it was private right and perquisite of his office, which he could not be deprived of. In the former days, when the government was in our own hands, we had excellent rules, the Treasury and Exchequer paid for those public criminal prisoners, but now we are utterly at a loss; therefore the LORDS, till some course were fallen on, did contribute out of their own pockets to relieve these poor men, who could not pay their dues, seeing they could not force the goodman of the tolbooth to quit them.

Fol. Dic. v. 2. p. 175. Fountainhall, v. 2. p. 735 & 738.

1713. *February 2.*

WILLIAM GRIERSON of Bargaton, Supplicant, *against* THE MAGISTRATES OF DUMFRIES.

UPON advising a supplication presented by William Grierson, craving an order to the Magistrates of Dumfries, either to let him at liberty out of their prison, where he lay incarcerated at the instance of John Kennan, bailie, and John Rae, merchant in the said burgh, or to modify an aliment to him, payable by the said John Kennan and John Rae, and take security for the same in the terms of the act 32d Par. 1696; the LORDS ordained the Magistrates, either to modify an aliment to the prisoner, payable by the persons who did incarcerate him, or to aliment him themselves. For the LORDS thought, That magistrates had not, by the said act of Parliament, a discretionary power to liberate or detain as they thought fit, a prisoner, whom the creditor or person at whose instance he was committed to prison declines to aliment, but behoved either to aliment such prisoner themselves, or let him go free.

Fol. Dic. v. 2. p. 173. Forbes, p. 674.

No 120.

Magistrates are obliged either to modify an aliment to a prisoner for debt, payable by the persons who incarcerated him, or to aliment him themselves so long as they detain him in prison.

1714. *July 8.*

JOHN BOYLE, Writer to the Signet, *against* BAILIES OF HAMILTON.

IN the subsidiary action at the instance of John Boyle against the Magistrates of Hamilton, for unwarrantably setting at liberty Walter Gilchrist, incarcerated

No 121.

Form of proceeding upon the act of grace.