

No 65.

1733. July 4. HENDERSON *against* MAGISTRATES of Irvine.

MAGISTRATES found liable for the debt upon a prisoner's escape, in respect the prison was not sufficient; for, though there were cat-bands on the door, they were on the inside, to undo which the prisoner had ready access. See APPENDIX.

*Fol. Dic. v. 2. p. 170.*

No 66.

1747. February 10. AGNES GALL *against* The TOWN of Forfar.

A creditor apprehended a debtor by caption, and presented him to a magistrate of a burgh, who neglected to incarcerate him. The Lords found the magistrates and their successors in office liable.

An execution bearing delivery of a debtor's person, without saying to whom, before witnesses, but adding, after inserting the witnesses, the person delivered to a bailie, was sustained.

AGNES GALL being creditrix to Alexander Binning of Whitewall, Provost of Forfar, caused him to be taken by caption, and presented to John Jeffrey, one of the Bailies of the said burgh, who did not incarcerate him, but suffered him to escape; and thereon she pursued the burgh for the debt.

THE LORD ORDINARY, 14th January 1747, "Found the defenders (the Magistrates) and their successors in office, for themselves, and as representing the community of Forfar, liable for the principal sum, annualrents, and expenses libelled, contained in, and due upon the debt for which Bailie Jeffrey was charged to imprison and detain Provost Binning."

*Pleaded* against this interlocutor; That the community could not be made liable for this debt, since the pursuer had not followed out a course of diligence proper to affect the burgh; that the charge given upon letters of caption to Magistrates of burghs, was to search for and apprehend the rebel, under this certification, "That if they did not, other letters would be direct, charging them thereto *simpliciter*;" and these other letters, which were called letters of horning against Magistrates, or letters of second caption, contained a command to search for and apprehend, under the penalty of being put to the horn, in case of disobedience, Dallas's Styles, p. 12.

The pursuer *contended*, That it was only the disobedience of these second letters that subjected the burgh, if it could at all be made liable, when the debtor was not incarcerated, as they being executed against the whole Magistrates, and at the market-cross, behoved to be taken notice of by all; whereas the charge upon the first letters was only given to one Magistrate, who might collude with a creditor to fix a debt on the burgh, when he was not in circumstances to indemnify them for his fraud.

The decisions had gone in this course, Hope's Practicks, Title CAPTION, Case of the Town of Linlithgow, (*see* APPENDIX.); James Drummond, Bailie of Perth, against Wemyss, (*see* APPENDIX.); and other cases, proceeded on the supposition of the law standing so, as 16th January 1622, Drumlanrig against Carhogle, No 8. p. 1169c.; 11th July 1628, Dunbar against Moody, *voce* PROOF.