

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.

*Pleaded* further; That the duty of searching for, and apprehending rebels, when required, was principally incumbent on the officers of the law, as Sheriffs or Magistrates of burghs; but that this was personal, and only affected the officer who neglected it when he was charged; and therefore, neither did the neglect of a Sheriff-depute affect the principal, nor of a Magistrate the burgh or burgesses, who were not liable in this service any further than all other subjects were: But when once a prisoner was incarcerated, the burgh was by its tenure obliged to ward, and on that foundation only was liable for him.

N. B. In this case the rebel was apprehended, and offered to the Magistrate, and not they only required to search for him.

THE LORDS refused two bills and adhered.

*Pet. Ferguson & H. Home-*

1748. February 10.—AGNES GALL pursuing the Town of Forfar for the escape of her debtor, who had been delivered to one of the Magistrates; the execution was produced in these terms, "I delivered a full copy of the within caption, with a charge upon the back thereof, with the person of —— to be detained within the prison of Forfar, in terms of the within caption, before these witnesses, —— the double and copy and person delivered to Bailie John Jaffray," signed.

*Objected*, That the witnesses were not said to have witnessed the delivery of the person to Bailie Jaffray, but in general, the delivery, without mentioning to whom: That indeed, after designing the witnesses, it was said there was a delivery, but not that they, or any body witnessed it; and the clause might have been added after the subscription.

THE LORD ORDINARY, 27th January, repelled the objection, and the LORDS refused a bill and adhered.

*Pet. H. Home.*

*D. Falconer, v. I. No 164. p. 215. & No 237. p. 322.*

\* \* \* Kilkerran reports this case :

1747. January 29.—ALEXANDER BINNING, Provost of Forfar, having been apprehended by a messenger upon a caption at the instance of Agnes Gall, and by him delivered over to John Jaffray, one of the Bailies of the burgh, to be by him put and detained in prison; and he having allowed him to escape, without being at all put in prison, a process was brought at the instance of Agnes Gall against the burgh for the debt; wherein "THE LORDS found the Magistrates and their successors in office, for themselves, and as representing the community, liable for the principal sum, annualrents, and expenses libelled;" notwithstanding it was *pleaded*, That the community could not be subjected for the fault of one Magistrate, where no notification was made to the other Magistrates; nor had practice ever gone that length, as appeared from the style

No 66.

of this and all other captions, wherein the certification of the charge to be thereon given to the Magistrates, is no other than that in case they fail to obey, other letters will be directed for charging them *simpliciter*, under pain of being denounced and put to the horn ; which are called letters of simple charge against Magistrates, or letters of second caption, the style whereof we have in St Martin's Styles, page 12. ; and that accordingly communities have, by repeated decisions, been assoilzied, because no charge had been given on such second caption ; in respect of the answer, that such second caption is only necessary where the charge is given to the Magistrate to apprehend the rebel ; whereas, he was in this case apprehended by the messenger ; and, how soon he was delivered over to the Magistrate, he was in the eye of the law in prison ; and the complaint was for letting him escape.

*Kilkerran, (PRISONER.) No 2. p. 431.*

\* \* Lord Kames also reports this case :

1748. *February 11.*—AGNES GALL having raised letters of caption against Alexander Binning, Provost of Forfar, for payment of L. 1000 Scots contained in a bond, gave the same to a messenger, who, having apprehended the debtor, delivered him to John Jaffrey, one of the Bailies of Forfar, with a charge to put him in prison ; but the Bailie, in place of doing his duty, allowed the debtor to escape. This produced a process against the burgh, in which the Magistrates and Town-council were called, concluding for payment of the sum with damages. The Court having adhered to an interlocutor of the Lord Ordinary, finding " the defenders, and their successors in office, liable as representing the community of the burgh of Forfar," the Magistrates reclaimed, admitting that when a debtor is delivered over to prison, he is in custody of the incorporation, as the incorporation is bound to perform the service of warding as well as of watching ; and therefore, if they fail in this service, they must be liable. At the same time it was *contended*, That the incorporation is not liable to the service of searching for and apprehending rebels ; that Magistrates indeed are bound, *qua* officers of the law, like Sheriffs, messengers, &c. but not as representing the town ; and consequently that the neglect of this service must affect them personally and not the corporation.

" THE LORDS adhered upon this ground, that though Bailie Jaffray was not bound to take the rebel off the messenger's hands, but only to take care that no insult was offered him in doing his duty ; yet since he received the rebel within the town, this act was a legal delivery of the rebel to the town, just as much as if he had been delivered to the jailor ; and that the town must be liable for the rebel's escape, as it would have been if the escape had been from the prison.

A MESSENGER, by virtue of a caption against Alexander Binning, Provost of Forfar, having seized him within the town, delivered him to John Jaffray, one

of the Bailies, to be put in prison. But the Bailie having suffered the debtor to escape, a process was brought against the town for the debt contained in the bond. Among other defences it was *objected*, That the execution of the messenger is defective in its most essential solemnity; not bearing that a charge was given to Bailie Jaffray to imprison the debtor. And to understand the nature of the objection with the answers, the execution writ upon the back of the letters of caption, must be set forth, which is of the following tenor: "At Forfar the 28th January 1745 years, I Charles M'Hardie messenger, delivered a full copy of the within caption, with a charge upon the back thereof, with the person of the within designed Alexander Binning, to be detained in the prison of Forfar, in terms of the within caption, before these witnesses, &c."

With regard to this objection it was premised, that in executing the King's letters, it is the duty of the messenger, *imo*, To signify or declare to the party the will of the letters; and to charge him to obey the same; *2do*, To deliver to the party a note in writing of what he is charged to do. The words pronounced by the messenger, acquainting the party that he must do so and so, are called the 'Charge;' and the note delivered to the party is called the 'Copy of the Charge.' And upon the whole the messenger frames an instrument, which is called the 'Execution of the Charge.'

It appears then that the most essential part of the solemnity is neglected, *viz.* the charge, which ought to be given *viva voce* to the party. The execution affirms no more, but that the messenger delivered to Bailie Jaffray a full copy of the caption, and a charge upon the back of it, with the person of the debtor. The execution is evidence that a copy was delivered of a charge, which was one branch of the messenger's duty; but it is not said, that the messenger intimated to the Bailie the will of the letters, and charged him *viva voce* to incarcerate the prisoner, which was the principal branch of his duty. Nor is this to be looked upon as a minute objection; for, where so great a trust is given, every step of the execution ought to be followed out with the greatest precision. And, were messengers allowed latitude in this matter, they might be the occasion of much mischief; and daily experience shews, that they are abundantly prone to take liberties. This execution is perfectly consistent with the following supposition, that the copy of the caption, with a written charge on the back thereof, were slipped into the Bailie's pocket, or put into his hand, without being told what was the intendment of it. And the corporation who are brought in to answer for the alleged delict of one of their Magistrates, are at liberty to suppose any fact that is not contradictory to the execution.

It was *answered*, That the execution is in the common style; that a debtor is charged with horning in no other manner than by delivering to him a copy of the charge; that when a summons is executed personally, the execution certifies no more but the delivering to the defender a copy of the summons; and that such delivery does in law imply an antecedent charge given *viva voce*. To this it was *replied*, That the execution of a summons bears expressly, that the

No 66.

party was "summoned, warned, and charged; after which follows the delivery of a copy of the charge, "This I did conform to the summons, whereof I delivered a double, with a just and authentic copy at the end thereof." And the like is observed in other executions. And in general no legal solemnity is presumed, but must be expressed.

"THE LORDS repelled the objection."

*Rem. Dec. v. 2. No 88. & 89. p. 146.*

1751. November 21.

PARKER and MITCHEL *against* The BURGH of New-Galloway.

No 67.

Magistrates found liable because they delayed to search for a prisoner, till the day after he had escaped.

WILLIAM PARKER and Alexander Mitchel, Merchants in Kilmarnock, pursued the Magistrates and Council of New-Galloway for the debt due to them by James Corsan, whom they had taken with caption, and incarcerated in their tolbooth, he having escaped. And the sole question was, whether the prison was sufficiently secured, and whether the Magistrates had adhibited sufficient diligence in searching for the prisoner? The doors and windows were sufficiently secured; but the room where the prisoner was kept was over a shop let for rent, the door and windows of which had catbands; but these catbands had no locks; and the jailor did not concern himself with securing the shop. The floor consisted of oak dales, laid on thick oak joists; but there were small holes, which let the light pass from the one place to the other; and one or two of the dales were wrapt and started from the joists; but, it was deponed, they were so secured, by the end under the wall, that they could not be raised without some instrument. However, this way the prisoner escaped, on the night betwixt Sunday and Monday, and, on Tuesday, the Magistrates got a warrant from a Justice of Peace, and sent in search of him. It was deponed, they could not get a warrant sooner, as there was no other Justice within ten miles; and this one lived across the river from them; and that the boat was carried down the river, and stranded on an island. But it did not appear there was any search in the town till then.

THE LORDS found the defenders liable.

*Act. Lockhart.*

*Alt. T. Hay.*

*Fol. Dic. v. 4. p. 137. D. Falconer, v. 2. No 231. p. 280.*

\* \* \* Kilkerran reports this case:

THE Magistrates of New-Galloway were pursued at the instance of Parker and Mitchel, merchants in Kilmarnock, for payment of the debt due to them by James Corsan, chapman, on this ground, That the said Corsan being imprisoned