

1664. November 22. HAY against MAGISTRATES of Elgin.

COLIN HAY pursues the Magistrates of Elgin for the debt of a rebel, escaping out of their prison. They *alleged*, Absolvitor; *imo*, Because it was in the time of Richard the Usurper; *2do*, The rebel escaped, by breaking through the roof of the prison, and they searched for him immediately after.

THE LORDS repelled both defences, seeing the escape was in day light, during which the town's officer should guard the prison.

1666. June 12.—COLIN HAY pursues the Magistrates of Elgin, for the debt of a rebel escaping out of the prison of Elgin, whom he had arrested there. It was *alleged* for the defenders, Absolvitor; because the rebel was not incarcerated by the pursuer upon his caption, but being incarcerated by another, was only arrested in the tolbooth by the pursuer, and all that is produced to instruct the same, is only the execution of a messenger, who arrested the rebel. It was *answered*, There was no difference, whether the rebel had been incarcerated upon the pursuer's caption, or had been arrested; for, in both cases, the Magistrates are liable; and the keeper of the tolbooth ought to have a book for certifying the Magistrates of all incarcerations and arrests in prison; and if they be neglective therein, it is on their perils; and yet here the messenger not only arrested, but the executions bore, that he intimated the same to the Provost and Bailies.

Which the LORDS found sufficient, and repelled the defence; and found no difference betwixt incarceration and arresting in prison.

1666. July 5.—COLIN HAY insists in his pursuit against the Magistrates of Elgin, for payment of a debt due to him by a debtor. It was *alleged* by the defenders, That the prisoner escaped *vi majori*, without their fault, in so far as on a sabbath, when the people were all at preaching, the officer, keeper of the prison, opening the door, a woman did cast a plaid over the officer's head, and pulled him at unawares to the ground; in the meantime, the rebel escaped, whom the officer followed, and was wounded by several persons, whom he had lying darn't in the town, to assist him.

THE LORDS found the condescendence not relevant, and that the Magistrates should have had their tolbooth better secured, than the same could be forced by one woman; for there was no other alleged present, before the prisoner got out, neither was it a competent time to open the tolbooth upon the sabbath, when the people could not concur in case of force.

1670. June 18.—COLIN HAY having pursued the Magistrates of Elgin for a debt of a rebel arrested by him in their tolbooth upon caption, and suffered to escape, and the town having failed in all their defences, did at last offer to

No 37.  
Magistrates found liable for the debts of a person escaping out of jail, by breaking the roof in the day-time.

In pursuits against Magistrates for suffering a prisoner to escape, it makes no difference whether the prisoner had been imprisoned on a caption, or arrested when in jail.

It is not necessary that intimation should be made to Ma-

No 37.  
Magistrates of  
the arrest-  
ment of a  
prisoner in  
their tol-  
booth.

prove, that the execution of the messenger bearing, that he arrested the prisoner, and made intimation of the arrestment to the Magistrates, was false, whereupon there being three witnesses inserted, and one dead, the messenger and one of the living witnesses deponed and acknowledged the arrestment, but differed in the manner of it; the execution and the messenger's oath bear, that he came to the rebel, being in prison, and commanded him to remain there, by virtue of the caption, till the debt was paid; the affirming witnesses deponed, that the messenger came with the caption to the tolbooth door, but that he went not in, and do not remember that he knocked at the door, but that he chalked the door, and commanded the prisoner to remain; but the witnesses denied, that they remembered any thing of the intimation to the Magistrates, and the other of the living witnesses denied that he was witness to the arrestment or intimation; whence the question arose, whether the intimation was necessary, or though it were improved, if the arrestment did stand, and were sufficient to oblige the Magistrates, who were obliged to have a jailor, and to keep a book of arrestments; and next, whether this arrestment was sufficient, not being made to, or in presence of the jailor. It was *alleged* for the defenders, That few towns in Scotland kept a record of incarcerations, and here the Magistrates and clerk had sworn, that there was none in that town at that time, neither did the execution bear, that the jailor was commanded to detain the prisoner; and albeit one of the witnesses depones, that he was jailor at that time, and the messenger and other witnesses depone, that he was present at the arrestment, yet the execution bears not any command to him to detain the prisoner, but only to the prisoner to remain in prison, and the jailor is a witness in the execution, and not a party, and denies the same even that he was so much as witness, by his oath; neither do the messenger and the affirming witnesses agree in the substantial of the arrestment; and for the messenger, he is a party whose execution is quarrelled, and is infamous, and excommunicated for great crimes. It was *answered* for the pursuer, That the arrestment stood valid, and was not improved but approved as to the substantial requisite thereto, for the messenger and one of the two living witnesses do agree, that the arrestment was made by the caption at the tolbooth door, in presence of the jailor; and though it was not so formally done, by commanding the jailor, yet it was sufficient, that the prisoner was commanded in the jailor's presence, which is sufficient, albeit not so formal, in making the jailor witness; neither can respect be had to the jailor's oath, denying that he was witness, because confessing he is jailor, he is a party liable for suffering the rebel to escape; neither doth it import, that after so long a time, the affirming witnesses do not remember all the circumstances, seeing he affirms the arrestment to be made, and that by his own advice, he being also a messenger; nor is the pursuer obliged to dispute the fame of the messenger, who lived at so great a distance from him, and was continued in that public trust undeposed; so that there being three witnesses inserted in the execution of the arrestment,

one of them is an *inhabile* witness, as a party denying, another affirming, the third being dead doth unquestionably stand as a proving witness; for where there are many witnesses in a writ or execution, if there be one living that affirms, all that are dead affirm with him, though other living witnesses deny; much more here, where of three, two being alive, the one affirms, the other denies, but is a party concerned, and the messenger also affirms.

THE LORDS found, That there being here no formal arrestment made to the jailor, astructed by the testimonies of the witnesses, and that the intimation thereof was clearly improved, they assoilzied the Magistrates; but if the arrestment had been good, they would not have found the intimation necessary, whether the town kept a book or not, but that the arrestment, made to the keeper of the tolbooth, whom they intrusted, was sufficient.

*Fol. Dic. v. 2. p. 169. & 170. Stair, v. 1. p. 230, 374, 389, & 683.*

\* \* \* Newbyth reports this case :

1664. *November 23.*—COLIN HAY pursues the Magistrates of Elgin for suffering one Andrew Ross, who was his debtor, and incarcerated at his instance, to escape out of prison, and consequently for payment of the debt. It was *excepted* by the Town of Elgin, That the rebel escaped *vi majore* in so far as upon a week day, the time of sermon, he brake the roof of the tolbooth; and that albeit the officers did their utmost, yet the Psalms being singing in the church, to which the tolbooth is adjoined, they could not be heard. THE LORDS repelled the allegiance, and found the Magistrates liable to pay the debt; and found no necessity to the pursuer to allege, that he escaped out of the prison door.

*November 25.*—COLIN HAY pursues the Magistrates of Elgin in a subsidiary action for suffering a prisoner to escape. It was *alleged*, Absolvitor, because they offered them to prove, that upon a sunday, the time of preaching, some of their officers having opened the tolbooth door, six or seven armed men came and beat the officers, and violently took the rebel out of prison; to which it was *answered*, That the Magistrates are answerable for their officers, and the officers were *in mala fide* to open the tolbooth door such a time of day. THE LORDS, before answer, ordained the defenders to condescend upon the names of their witnesses, and declared they would examine them, and thereafter consider the allegiance.

*Newbyth, MS. p. 6. & 8.*

\* \* \* Gilmour also reports this case :

IN an action pursued by Colin Hay against the Bailies of Elgin, for suffering Andrew Ross to escape forth out of their prison, where he was incarcerated for

No 37. a debt owing to the pursuer, and therefore concluding payment against the Magistrates *actione subsidiaria*. It was *alleged*, That the prisoner escaped *vi majore*, having broken the prison in the roof by which he came forth. It was *answered*, *Non relevat*; because the Magistrates, and others under them, were obliged to guard and watch the prison, that the prisoner might not escape; so that unless he had escaped by the assistance of such power as they were not able to resist, his escaping by their negligence either at the roof or doors, cannot defend them.

THE LORDS repelled the allegiance.

*Gilmour, No 112. p. 83.*

\* \* \* Gosford reports the same case:

1670. June 18.—IN the subsidiary action at Colin Hay's instance, *super hoc medio*, that his debtor being incarcerated in the tolbooth of Elgin by virtue of letters of horning and caption raised at his instance, caused arrest him by a messenger, and intimated the same to the Provost and one of the Bailies, and to the clerk; the defenders having offered to improve the executions by witnesses inserted, whereof one was dead, and two living, whose depositions were advised, bearing, that the arrestment was only made by chalking the tolbooth door, and not personal, as the messenger's executions did bear; as likewise, that no intimation was made, either to Provost, Bailie, or clerk, which was contrary to the execution; the LORDS did assoilzie the Magistrates, and found it not sufficient, that some of the town-officers were witnesses at the chalking of the tolbooth, as was urged by some; but found it necessary, that where the arrestment was only in manner foresaid, that intimation should have been made to some of the Magistrates or town-clerk, without which they could not be liable for the debt.

*Gosford, MS. No 273. p. 116.*

No 38.

1664. December 2. WILSON against HOME of Linthall.

JAMES WILSON pursued Alexander Home of Linthall, as Sheriff of the shire, for the debt of a rebel, whom he suffered to escape.

In which, this defence was found relevant, that the rebel in the taking had wounded those that were taking him, and had escaped *vi majore*.

*Fol. Dic. v. 2. p. 167. Stair, v. 1. p. 234.*