

ground for subjecting the Magistrates. The escape was made by false keys, and the doors were opened by the accomplice from without; so that the catbands, though locked, could not have prevented it.

No 72.

“THE LORDS found the defences relevant and proved; and therefore-assoilzied the defenders.”

Act. *Lockhart.*Alt. *Hamilton-Gordon.**W. 7.**Fol. Dic. v. 4. p. 137. Fac. Col. No 191. p. 341.*

1761. November 18.

JAMES LESLY Senior, Writer in Edinburgh, *against* GILBERT PRINGLE of Torsonce.

IN April 1751, the pursuer, David Lesly merchant, and James Lesly junior, borrowed L. 30 : 10 : 0 Sterling, from Mr Pringle the defender, for which they accepted a conjunct bill, payable four months thereafter. The bill having expired, the defender, in August 1753, obtained a decret before the Bailies of Edinburgh, for the whole debt and bygone annual-rent, and L. 3 Sterling of expences of plea, and made no allowance for L. 12 : 12 : 0, which it was alleged he was at that time due to James Lesly, junior, one of the co-obligants. Upon this decret horning was raised, and caption followed in January 1754.

After this the defender received from David Lesly, and James Lesly, junior, payment of L. 24 Sterling.

In the 1739, the caption was put in execution against the pursuer, and he was accordingly imprisoned and booked for the whole debt, without any deduction being made on account of the former payments. The pursuer having obtained the benefit of the act of grace, was alimeted in prison by the defender, where he continued about two months. Having at last been set at liberty, he brought a process of oppression and damages against Mr Pringle.

*Pleaded* for the defender, That he had acted with the greatest lenity, in having patience from the 1751 to the 1759, which plainly shewed, that if any irregularity had been committed, it could not have been done with a view to harrass or distress the pursuer; That he had sent a note of the partial payments to his doer, with orders to put the caption in execution with regard to the remainder of the debt; and that, though it may be true in general, that a mandant is liable for the person he employs, yet, where that person acts *extra fines mandati*, the employer is not answerable for him; but, even supposing the employer in this case answerable, still there was no foundation for damages, as the only error truly committed in the whole of the procedure was, booking him for the whole, in place of that part of the debt that was outstanding. The caption was properly raised for the whole debt: some part of that debt was then and still is due, he was therefore justly apprehended, and justly thrown into prison, as the creditor is surely entitled to incarcerate his debtor, until the utmost far-

No 73.  
If a person incarcerate his debtor for a larger sum than what is truly remaining due, he is liable in damages.

No 73.

thing is paid ; and his being booked for the whole debt could do him no other hurt, than that he was obliged to pay a few shillings more for liberation-money.

*Answered* for the pursuer, The defender has admitted enough to subject him to the conclusions of this process. He has admitted, that he gave repeated injunctions to his doer to use the diligence complained of: ' That he expressly limited these injunctions to the sums truly due, no where appears, nor can well be made appear, as the doer is now dead ; the defender must be liable *primo loco*, for every thing done in consequence of his orders ; and, though it should appear that his doer was in the knowledge that partial payments had been made, even that would afford no relevant defence to the defender, who must seek recourse as he best can against such as he may allege have gone beyond his orders. It cannot be disputed, that, to put a man in jail for a larger sum than what is due, is unjust and illegal, because the jailor will not enlarge him without payment or consignment of the whole sum for which he is booked ; and a man may have credit for a small sum, when he cannot have credit for a large sum ; by this means he must lie the longer in jail, whereof the consequences must be imputed to the incarcerator alone.

" THE LORDS found that the pursuer had acted irregularly, and therefore found him liable in damages, which they modified to L. 15 Sterling."

Reporter, *Lord Kaimers.*Act. *Sawinton.*Alt. *Macqueen.*Clerk, *Hume.*

F. M.

*Fol. Dic. v. 4. p. 135. Fac. Col. No. 62. p. 145.*

1762. July 29.

GILBERT FIFE, and ALEXANDER M'LAREN in Wardend, *against* MARGARET OGILVIE, Relict of JOHN OGILVIE of Airly ; ROBERT WEDDERBURN of Pearcy ; GEORGE YEAMAN, Provost of Dundee ; THOMAS BOYES of Dudhope ; and THOMAS MITCHELL, Factor upon the estate of Airly.

No 74.

Where a person is committed to prison till further examination, relative to a capital offence, is a Magistrate culpable who refuses bail when offered?

THE house and lands of Craig belonged in property to Margaret Ogilvie, Lady Airly. As she had no occasion for the house, she put it under the charge of Gilbert Fife, who had a lease of the adjacent farm, and who had a dwelling-house and other proper buildings for his own accommodation, adjacent to the house of Craig. Fife executed this charge for some years, and, according to his instructions, put on fires from time to time, for which purpose he had an allowance of coals.

In the year 1759, when Fife's lease was near expired, Lady Airly resolved to give the possession of the house of Craig to Thomas Mitchell. This resolution was intimated to Fife, who used various solicitations to be allowed to continue in his possession, and who at last unwillingly consented to remove at Whitsunday 1760. Alexander M'Laren, who lived in the neighbourhood, had dropped some expressions, which showed that he was not thoroughly satisfied with the