

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.

No 121. in their tolbooth by virtue of a caption for payment of L. 450 Scots, annual rent and penalty ;

*Answered* for the defenders ; It appeared by an instrument in process, that the prisoner complained to and demanded from them the benefit of the act of Parliament 1696, intituled, ' act anent the aliment of prisoners,' and made faith that he was not able to aliment himself ; and, by another instrument, that his complaint, and making faith, was duly intimated to the pursuer, by showing him the first instrument, and he required to aliment the prisoner or consent to his liberation ; and, by a third instrument, that full ten days after this intimation to the pursuer, the prisoner required the defender to set him at liberty, in terms of the act of Parliament, in regard the pursuer had offered no aliment ; whereupon the defenders thought themselves warranted to dismiss the prisoner.

*Replied* for the pursuers, *imo*, None of these instruments bearing any intimation to the pursuer, by the Magistrates or their procurator, or by any person in their name, or requiring him in their name to aliment the prisoner, but only being in the name of the debtor, cannot afford a defence for the Magistrates to bring them within the terms of the act. *2do*, ' Though the intimation by the debtor to the pursuer were sufficient, yet the intimation of the instrument of another notary, bearing the prisoner's offering his oath that he was not able to aliment himself, and craving the benefit of the act, and that the bailie had taken his oath accordingly, being only a notary required for that effect by the debtor, and not by the Magistrates, and not bearing that the bailies had found him in the terms of the act, and without producing any one judicial act by the Magistrates appointing requisition to be made to the pursuer to aliment, could be no legal certioration to the pursuer. ' For though a notary's instrument makes faith in things which fall under his office, yet as to the judicial acts of a court, which are proper to the clerks of that office, and expedite in another form than the instrument of a common notary, they signify nothing. So this instrument might have certiorated the pursuer of the prisoner's requiring the benefit of the act, but was not to be regarded as to his deponing, or what he had deponed, that being only proper to be instructed under the clerk of court's hand, or producing the principals. And suppose the instrument could be held as probative, yet what is narrated therein to have been done could never oblige the pursuer to offer alimenter. Because, though the instrument doth bear the oath, yet it doth not bear any order of the Magistrates thereanent, or their finding the prisoner in the terms of the act. It is true, on giving the oath, the Magistrates are at liberty to require the creditor, but he can never be *in mora* till he advise the oath and intimate so to him. *3tio*, There was no intimation to the pursuer previous to the taking of the prisoner's oath, which should have been done, that he might be present and heard as a party principally concerned ; as bills of suspension, or for liberation, upon juratory caution, must, before passing, be previously intimated to the creditor.

*Duplied* for the defenders, *imo*, Law never required magistrates of burghs to leave their charges, and go personally to the several corners of the kingdom to make such intimation. It must then be sufficient that they send to the creditor-committer authentic instruments taken upon the indigent person's complaint and making faith, and that the creditor be thereupon required to aliment or consent to the prisoner's liberation, as was done in this case. The defenders can appeal to the general custom of the nation, if such intimations are not negotiated by the prisoners themselves, or for them, they being the persons most concerned. Nor hath the creditor any prejudice, he being duly certified. *2do*, Is not the instrument of intimation to the pursuer as authentic and probative as any other writ which could have come from the Magistrates? and they were not bound to go personally. The act does not require any cognition or trial of the prisoner's poverty; it is enough, says the law, 'that any prisoner shall be found so poor as he cannot aliment himself, and shall complain and make faith that it is so.' This is all the trial, and all the proof that the law requires, the prisoner's own complaint and making faith, which is most consequential to the design of the law, viz. to afford a speedy remedy *ventri qui non patitur moram*. If a cognition of poverty were requisite, it were easy for an industrious creditor to throw in such objections as the prisoner should starve, and need no remedy before his poverty could be tried. *3tio*, The act doth not require intimation to the creditor before the prisoner make faith, nor hath any prejudice thereby; seeing thereafter he must be required, and the prisoner continue ten days, during which time the creditors may consider whether he will aliment or not. And the debtor's making faith in this manner, is no such judicial act as can exclude the creditor from condescending upon any particular fund belonging to the prisoner, and demanding a right thereto, this being *juramentum delatum* by law, and not by the creditor; in order to aliment, or a temporary releasement, and not to liberate from the debt.

*Triplid* for the pursuer, *imo*, The defenders should remember they are not to make laws, but to execute them; and here the law directs its intimation to be by the Magistrates, which was not done. And this was a necessary solemnity, because though the debtor should require an aliment, and the creditor neglect to give it, yet if the Magistrate be willing to take burden of the aliment upon himself, he may continue the debtor in prison, and while he makes no intimation to the contrary, he is understood to acquiesce under that burden, and the creditor is in safety not to interpose. THE LORDS have always strictly observed the law in matters of citation, whereof intimation is a kind. *2do*, All that was intimated to the pursuer was an instrument of a notary reciting the bailie's procedure in taking the debtor's oath; whereas there ought to have been produced to the creditor either the principal deposition; with the bailie's interlocutor advising his oath, or a judicial act extracted thereon.

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THE LORDS having considered the instrument mentioning the prisoner's offering his oath that he was not able to aliment himself in prison, and craving the benefit of the act of Parliament, and the bailies their taking his oath accordingly, together with the instrument intimating and exhibiting the said former instrument, personally, to the creditor, sustained the defences proponed for the Magistrates, and therefore assoilzied.

*Fol. Dic. v. 2. p. 174. Forbes, MS. p. 81.*

1724. July 8.

ADAM BOYLE, Merchant in Borrowstounness, *against* The MAGISTRATES of the Burgh of FORRES.

No 122.

A debtor being incarcerated for a debt, and liberated upon the act of grace, the magistrates of a burgh may refuse to incarcerate him again for the same debt, although the creditor offer to aliment him.

Mr BOYLE insisted in a process against the said Magistrates for payment of L. 405 Scots, contained in a bill accepted by John Roy, merchant in Forres, upon this ground, That he having raised horning and caption on the bill, caused Alexander Maclean, messenger, upon the 18th of December 1722, apprehend Roy, with orders to carry him to the prison of Inverness; that notwithstanding thereof, upon the 19th of the said month, the said Magistrates ordered Maclean to carry Roy to the prison of Forres; which he refusing, because of his orders to carry him to Inverness, they caused one Nicolson a messenger apprehended Roy upon another caption, and commit him prisoner to their own tolbooth, where they allowed him to go out and in at his pleasure.

The Magistrates, without admitting the facts, rested their defence upon this single point, ' That the prisoner had been formerly incarcerated at the pursuer's instance for the same debt in their tolbooth, and was duly liberated ' from prison upon the act of grace after intimation to the pursuer; and therefore he could not be again imprisoned for the same debt.'

It was *answered* for the pursuer, That nothing could hinder him to imprison Roy of new, being content to aliment him; the act 32. Parl. 1. Sess. 6. of K. William, being only in favours of the royal burghs, and not in favours of prisoners.

*Replied*, That as the act was designed for the ease of royal burghs, so it likewise designed to favour poor prisoners, and prevent their starving; that if the same creditor could of new imprison one duly liberated upon the act, then a debtor might be harassed out of his life; for he behoved to lie till a new intimation and for ten days thereafter, and even when then liberated, he might be immediately apprehended again, and incarcerated in the same or any other prison without end; that the royal burghs by such a practice would have no ease by the act, the liberation would be so short and precarious.