

1756. December 8.

GEORGE THOMSON, Merchant in Falkirk, *against* The MAGISTRATES of STIRLING, and THOMAS BLACKADER, Jailor there.

No 70.

Magistrates and jailor not liable for a debt, where the prisoner escaped by knocking down the jailor, and was re-committed a few days after.

In November 1750, John Rankine was imprisoned within the Tolbooth of Stirling, by virtue of a caption raised against him at the instance of George Thomson, for a debt due by Rankine to Thomson; and, about the same time, Robert Brown was imprisoned within the said tolbooth, at the instance of some of his creditors.

These prisoners were kept in goal in the same manner that other prisoners for debt in the tolbooth of Stirling are usually kept; that is, they were permitted, in the day-time, to go through the prison, being only secured from escaping by the street-door, which was locked on them; but, in the night-time, they were locked up in a room.

In December 1750, these two prisoners formed a scheme for making their escape; which they executed in this manner: When the jailor came into prison, about 6 o'clock in the evening, they pretended that they wanted some paper to write letters to their friends, and desired the jailor to bring them the paper; upon his return with it, they were standing behind the street-door, and upon his opening it, they knocked him down, and run off.

The Magistrates immediately made search for the prisoners; and in a few days they were apprehended, and again committed to the tolbooth of Stirling.

George Thomson brought a process before the Sheriff of Stirling against the Magistrates and jailor, in order to have them found liable for the debt due to him, on account of their allowing Rankine to escape; and the Sheriff pronounced decret against them.

Of this decret the Magistrates and jailor obtained suspension; and *pleaded*, That they ought not to be found liable for the debt, *1st*, Because the prisoner had not escaped through any fault of theirs, but *vi majore*, for which they were not liable.

2dly, That they had *ex incontinenti* made search for and apprehended the prisoner, and re-committed him to the tolbooth of Stirling; so that the charger sustained no damage by the escape.

Answered for the charger, to the *first* reason of suspension, That the prisoner had not been properly kept, for he ought not to have been permitted to go about the prison, but should have been locked up in a room; in which case, he could not have put in execution the stratagem by which he escaped.

And to the *2d* reason of suspension, That the re-committing of Rankine to prison could not liberate the suspenders; for, by the escape, there was a *jus quæsitum* to the charger, which could not be taken from him; and the keeping

a prisoner perpetually under the *squalor carceris* is one thing which is in view by the caption, in order thereby to force him to make payment; from this he was for some time relieved by his escape; and he might, perhaps, when out of prison, have secreted his effects, to the prejudice of the charger.

No 70.

“THE LORDS found the Magistrates and their jailor, having committed no fault, were not liable; and therefore suspended the letter *simpliciter*.”

For the Charger, *Williamson*.

Alt. *Brown & Bruce*.

B.

Fol. Dic. v. 4. p. 136. Fac. Col. No 218. p. 318.

* * * Lord Kames reports this case :

RANKINE, a prisoner for debt in the tolbooth of Stirling, having made his escape, the Magistrates, after diligent search, were so lucky as to get hold of him; and he was returned to the prison, about ten days after the escape. The prisoner being utterly insolvent, the creditor at whose instance he was incarcerated thought this a favourable opportunity for obtaining payment from the Magistrates. Their defences in the process which he raised against them, were, *imo*, That the prisoner had escaped, not by their fault or negligence, but *casu improviso et vi majore*, having knocked down the jailor as he came into the room. *2do*, That the fault or negligence of the defenders, supposing them to have been guilty, was purged by the re-imprisonment; and that the pursuer cannot qualify any damage by an escape that was so soon redressed. A proof was taken; which was lame. The Magistrates did not prove the fact alleged; but only that, *de recenti*, the jailor averred this to be the fact.

With respect to the *first* defence, it was *observed* for the defenders, That the pursuer has brought no proof of any fault or neglect in the Magistrates. That in a process for damages against Magistrates for suffering a prisoner to escape, it is not sufficient to libel barely an escape; it must be qualified, that the Magistrates or their jailor were negligent. And it is incumbent upon the pursuer to give evidence of this fact, *quia actori incumbit probatio*. It was *answered*, That Magistrates, with respect to the present point, are in a singular case. The custody of prisoners is trusted to them: It is incumbent on them to render an account of their trust; and if they cannot show that they have been faithful in the execution of their trust, neglect of duty will be presumed against them, and they will be made liable accordingly. The *second* defence was what the Court put their judgment upon. They thought the neglect, if any, was purged by the recent re-imprisonment; and that, at any rate, the pursuer could have no claim, unless he could show damages by his debtor's being at liberty for a few days.

“And accordingly the defenders were assolizied.”

Sel. Dec. No 122. p. 174.