

1789. June 18.

JAMES SHOOLBRED, and Others, against WILLIAM OSBORNE.

No 18.

It is illegal in the Magistrates of a Royal Burgh to stipulate an indemnification from prisoners in case of their escape.

A DEBTOR, arrested in virtue of letters of caption, having been presented for incarceration to James Shoolbred, one of the Magistrates of Auchtermuchty, and the jail of that town being quite unfit for the reception of prisoners, it was resolved, for this purpose, to make use of the Court-house, which is immediately above the jail, but not secured, as a prison ought to be, with iron bars, &c.

In order to indemnify the Magistrates, in case of an escape, the prisoner indorsed to them a bill of exchange for L. 42, drawn by him and accepted by William Osborne. For this acceptance Osborne had received no value, it being solely intended to create a fund of credit to the drawer.

Very soon after, the prisoner made his escape.—The Magistrates, in an action at the instance of the incarcerating creditor, were found liable for the debt. And they having sued William Osborne for payment of the bill indorsed to them, he, in defence,

Pleaded, The confinement of a debtor in prison is founded on a presumption, that, by the *squalor carceris*, he may be compelled to pay the sums due by him. To permit his escape is, in the contemplation of law, an injury to the creditor; and whether this has been owing to collusion or neglect, it implies a breach of duty in those who had him in custody. Hence it must be illegal for the Magistrates of a burgh to enlarge a person confined even for a civil cause, on getting any sort of assurance that they shall be relieved from the penal consequences following from it. And an agreement, such as occurred in the present case, whereby the Magistrates obtained a security, in case of the prisoner's escaping, seems to be equally exceptionable. Indeed, when, after a stipulation of this sort, the debtor actually elopes, the one case can hardly be distinguished from the other. Thus the indorsation of the bill here sued on, having been obtained by means to which the law refuses its sanction, it must be considered as ineffectual; and the same defences, which, if the bill had been put in suit by the drawer, would have been good against him, must be equally so against his indorsees.

Answered, When Magistrates are required to put a debtor in prison, they may pay the sums due to the incarcerating creditor, and then set him at liberty. In such a case, too, they may, with propriety, obtain every security that the debtor is able to give for their indemnification. In the same manner, when, from the insufficiency of the jail, there is reason to fear that the debtor may make his escape, the Magistrates may, with equal propriety, take every precaution that is necessary for their own security. So far from injuring the incarcerating creditor, such foresight must, in the end, prove beneficial to him. Where, then, can be discovered the illegality of the transaction here occur-

ring; or what solid reason can be given for maintaining, that the Magistrates, who are unquestionably entitled to sue a person who has escaped from prison, in order to their recovering the sums paid to his creditors, may not, by a previous agreement, voluntarily entered into on his part, provide for their indemnification? Erskine, b. 3. tit. 2. § 31.; Kilkerran, 1st February 1749, Thomson against Colvill, No 190. p. 1632.

“THE LORD ORDINARY over-ruled the defences.”

After advising a reclaiming petition with answers, one of the Judges seemed to think, that, independently of the alleged illegality of the transaction, the indorsation not being in security of a debt, but of a contingent or eventual claim, could not give the holder the privileges of an onerous indorsee. But the majority of the Court being of opinion, that such an agreement as here occurred, if not absolutely illegal in its own nature, was of an improper tendency, and not to be permitted; it was on this principle that

“THE LORDS altered the judgment of the Lord Ordinary, and sustained the defences.”

Lord Ordinary, <i>Dreghorn.</i>	Act. <i>Blair.</i>	Alt. <i>Cullen.</i>	Clerk, <i>Gordon.</i>
C.	<i>Fol. Dic. v. 4. p. 31.</i>	<i>Fac. Col. No. 71. p. 128.</i>	

SECT. V.

Bond granted *Causa Adulterii.*

1622. July 20.

DURHAM against BLACKWOOD.

THE LORDS found a bond of 5000 merks given by the Laird of Blackwood to Helenor Durham, daughter to Sir James Durham, and to Weir, daughter procreated in adultery betwixt the pursuer and defender, to be null, by way of exception, as given *ob turpem causam adulterii.*

-*Fol. Dic. v. 2. p. 21. Haddington, MS. No 2654.*

. Kerse reports this case.

BOND made by the adulterer to the adultress, and bairns gotten betwixt them, found null *ipso jure*, and ordained to be riven.

Kerse, MS. fol. 46.

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No 19.