

"THE LORDS having considered the informations for the parties, find the Magistrates of Edinburgh liable to Alexander Wilson for the full sums contained in the diligence at his instance, in virtue of which Alexander Crichton, his his debtor, was imprisoned in the jail of Canongate."

No 81.

Reporter, Lord Henderland.

Act. Dean of Faculty.

Alt. Buchan Hepburn.

Clerk, Menzies.

C.

Fol. Dic. v. 4. p. 136. Fac. Col. No 29. p. 47.

1789. June 18.

JOHN THOMSON *against* The KEEPER of the Tolbooth of Edinburgh.

No 82.

WILLIAM THOMSON, as charged with accession to the crime of forgery, was committed to the prison of Edinburgh, from which, about five months afterwards, he was liberated, on condition of banishing himself, but without having been brought to trial. Immediately before his enlargement the jailor demanded L. 7, as the prison-fees, which were so much the higher, that at the request of Thomson and of his friends he had been accommodated in the apartments of the civil debtors, instead of being put into that part of the prison which is allotted for criminals. For that sum John Thomson, the brother of William, granted his bill; of which, however, he instituted an action of reduction, on the ground of injustice and concussion; and

Whether jail-fees be due by persons imprisoned on a criminal accusation, as well as by those incarcerated for a civil debt?

Pleaded, In the case of a person imprisoned for a civil debt, jail-fees, it is true, are exigible, and even the creditor-incarcerator is liable for them in the first instance, it being requisite that a fund for the jailor's subsistence should be thus provided. But imprisonment on a criminal accusation is to be viewed in a different light. If the party prove to be innocent, it would be hard, that after having suffered confinement unjustly for the public benefit, he should moreover be compelled to pay for the means of that suffering. On the other hand, if he be found guilty, and, by punishment, answer the demands of justice, it will belong to the public to defray all the expense necessary for accomplishing so salutary a purpose. Accordingly, though the Crown always pays for the aliment of prisoners accused of crimes, nothing is ever allowed by it in name of jail-fees, the obvious reason being, that the former is, but that the latter are not exigible.

Answered, The act of Parliament of 1701, cap. 6. provides, that any liberation from prison under its authority, shall be 'without prejudice to the keeper of the prison asking his dues as formerly before the making of this act; the right of exacting prison-fees from persons accused of crimes being thus recognised. On that principle, the Court decided in the case of Rutherford and Gray, 14th June 1712, Fountainhall, Sect. 3. b. t. And the constant practice of exacting jail-fees, indiscriminately, from all prisoners in the tol-

No 82. dooth of Edinburgh, appears from a table of those fees made up by the Magistrates, 17th July 1728.

THE LORD ORDINARY reported the cause.

A considerable number of the Court were moved by the circumstance of the jailor's having, at the desire of the prisoner and of his friends, allowed him an apartment in the debtor's quarter of the prison, when otherwise he must have gone to that of the criminals, as if this implied a sort of paction for payment of the fees. Others considered the matter as fixed by the statute, decision, and usage, pleaded on by the defender; but independently of these, all seemed to acquiesce in the argument stated as above for the pursuer.

THE LORDS repelled the reasons of reduction.

Reporter, Lord Swinton.

Act. Dickson.

Alt. Geo. Fergusson.

Clerk, Colquhoun.

S.

Fol. Dic. v. 4. p. 138. Fac. Col. No 72. p. 130.

1790. June 8.

Mrs NANCY SHORTEID *against* The PROVOST and MAGISTRATES of the Burgh of ANNAN.

No 83.
Magistrates having delayed for twenty-four hours to incarcerate a debtor, and having afterwards, according to the custom of the burgh, allowed him the privilege of open jail, found liable for the debt.

ON 26th October 1787, a debtor of Mrs Shortreid's was apprehended in the town of Annan, in virtue of a caption at her instance, and delivered over by the messenger to the Provost of that burgh. The Provost, however, allowed him to remain at an inn, until the evening of the 27th, when he was committed to prison.

Even then, instead of being kept in close custody, he was indulged with the privilege of open jail, as it was termed, by which was meant, the freedom of going through the different apartments of the prison, and likewise of access to the town-hall or court-house that was contiguous, the door of which was not locked during the day-time. This hall the debtor used as his dining-room; and being Sheriff-depute of the county, he at the same time held his court there, and determined causes as he had been accustomed to do. On the other hand, the Magistrates received a bond from certain other persons, containing an obligation to pay the debt in the event of his escape.

The debtor afterwards raised a process of *cessio bonorum*, to which Mrs Shortreid made opposition. From this, however, on receiving from a third person payment of a part of the debt, she desisted, and the debtor obtained decree.

She then instituted an action against the Provost and Magistrates, as having become liable for the debt, by acting contrary to their duty; first, in failing timidously to incarcerate her debtor; and, secondly, in not having subjected him to such a state of confinement as the law required.