

No 83. berty to go out when he pleases, is no more a prisoner than if he were walking about the fields at his pleasure. He may remain in prison constrained by considerations of honour, or from other motives, but he cannot be understood as confined by the hand of the law.

That no partial usage can justify such a deviation from the duty of magistrates, has been determined in various similar cases; 7th December 1780, Gray *contra* Magistrates of Dumfries, No 76. p. 11754.; 29th June 1786, Purdie and Company *contra* Magistrates of Montrose, No 80. p. 11757.

Nor is there any solidity in the other ground of defence. The defenders are not to be viewed in the light of cautioners. They have incurred a debt directly *ex delicto*, and are truly become principal debtors, and not cautioners. Among *correi delinquendi* there is no society.

THE LORD ORDINARY pronounced this interlocutor: " In respect of the circumstances of the case, particularly that this is an action highly penal, and that the defenders appear to have followed a practice which, however erroneous, had long subsisted unchallenged in the town of Annan, and some other burghs, of allowing prisoners for debt the benefit of what is called open jail, assoilzies the defenders."

To that interlocutor the Court at first adhered, adding to the *rationes decidendi* there stated, the consideration ' of the conduct of the pursuer in the process of *cessio bonorum*;' but afterwards, on advising another reclaiming petition and answers,

" THE LORDS repelled the defences, and found the defenders conjunctly and severally liable in payment to the pursuer in the sums libelled, deducting therefrom the money paid when the pursuer withdrew her opposition to the process of *cessio bonorum*."

A petition reclaiming against that judgment was refused without answers.

Lord Ordinary, *Eskegrove*. Act. *Dean of Faculty*. Alt. *Solicitor-General*, *Maconochie*, *Corbet*.  
Clerk, *Menzies*.

S. *Fol. Dic. v. 4. p. 137. Fac. Col. No 136. p. 269.*

\*\*\* This case was appealed.

1791. April 15.—The House of Lords ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of be affirmed.

No 84. 1791. June 13. FORBES *against* MAGISTRATES OF CANONGATE.

IN an action against the Magistrates of Canongate for a debt, as having liberated the debtor from jail without a certificate of the bad state of his health, upon oath, in terms of the act of sederunt 14th June 1671, the LORDS found

it a sufficient defence, that they had the declaration of a surgeon and physician upon soul and conscience. See APPENDIX.

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Fol. Dic. v. 4. p. 137.

1792. November 16. COLIN BROWN *against* The MAGISTRATES of LANARK.

JOHN MARSHALL, who had been incarcerated in the jail of Lanark, on suspicion of horse-stealing, was arrested in prison, (13th August 1791), on a warrant *meditatione fugæ*, at the instance of his creditor Colin Brown.

On the following night, Marshall escaped, owing, it was alleged, to the insufficiency of the prison, or negligence of the jailor.

A few days afterwards, Brown constituted his debt by a decree in absence before the Sheriff. In February following, Marshall was again imprisoned; and at the next circuit-court he was sentenced to be transported beyond seas, for the crime on account of which he had been originally incarcerated.

Brown pursued the Magistrates of Lanark for payment of his debt, founding chiefly on the act of sederunt, February 11. 1671.

THE LORD ORDINARY sustained the action, and ordered a condescence of facts; against which interlocutor the Magistrates reclaimed, and

*Pleaded*; 1<sup>mo</sup>, The responsibility of Magistrates for the escape of a prisoner, a circumstance from which they reap no advantage, and from which perhaps the creditor suffers no loss, is evidently of a penal nature, and founded solely on the act of sederunt, which must therefore receive a strict interpretation. Now, the act speaks only of the debts of rebels, *i. e.* of persons imprisoned on horning and caption, and therefore does not apply to this case.

2<sup>do</sup>, When a debtor is imprisoned on ultimate diligence, the object of the creditor is to compel payment by the rigour of confinement, whereof any interruption, by the debtor's escape, though he be afterwards recommitted, is in that case a damage, and a ground of claim against the Magistrates; but the sole object of imprisonment on a warrant *meditatione fugæ*, is to obtain security for the prisoner's continuance within the kingdom. And as Marshall has since been recommitted, and is now forthcoming, that object is attained, and no damage can be qualified; 24th January 1786, Gordon *against* Mellis, No 79. p. 11756.

At all events, the Magistrates can only be liable as if they were cautioners for Marshall's appearance. As such, they should have been required to produce him in the course of the pursuer's action; but no such requisition was made.

3<sup>tio</sup>, Even if Marshall had remained in prison, so as to entitle the pursuer to arrest him on the Sheriff's decree, for the purpose of compelling payment, his

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When a prisoner on a warrant *meditatione fugæ*, escapes through the insufficiency of the prison, or negligence of the jailor, the Magistrates of the burgh are not liable for the debt, but they are considered as cautioners *judicio sisti*; and if the prisoner is recommitted before they are required to present him in Court, no claim lies against them.