Agreeing in these findings of the Lord Ordinary and the Court, I think the result under this instrument is such as they have found it to be; and it appears to me that other passages in this instrument lead to the same result. I propose therefore to find that, under the particular circumstances mentioned in the Lord Ordinary's interlocutor, and adverting also to the whole of the circumstances as they appear in this instrument (I am anxious to have these words introduced), the word *members*, as used in this deed, does not include the institute—and that the judgment should be affirmed.

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BALDASTARD ENTAIL.—THE INSTITUTE NOT BOUND BY RESTRICTIONS UPON MEMBERS OF TAILZIE, AS THE WORD MEMBERS IS USED IN THIS ENTAIL.

The word *members* (of entail), as used in this deed, does not include the institute.

Judgment AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

RITCHIE—*Appellant.*

MAGISTRATES OF CANONGATE and others . . . . . } *Respondents.*

THE magistrates of Canongate, upon a certificate on oath by a physician, that the life of a debtor, confined in their gaol by the Appellant, was in imminent danger, permitted his liberation from the gaol to some house within the burgh, on his giving bonds with two sureties to conform to the conditions of the act of sederunt, 1671, by residing in some house within the burgh, and on no account going beyond the jurisdiction of the same, and returning to prison on recovery of his health, or when required, under penalty of paying the debt. A parti-

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cular house within the burgh was assigned for the residence of the debtor; but he never was there, and was frequently seen at his house in Surgeons' Square and other places without the burgh, apparently in good health. The Appellant commenced an action against the magistrates for the debt, on the ground that the debtor's residing out of the jurisdiction of the burgh of Canongate was an escape, which made the magistrates liable. The Court below decided in favour of the magistrates; and this decision was affirmed in the House of Lords, both on the general ground that the circumstances were not such as rendered the magistrates liable under the act of sederunt, and also upon certain specialties in this case.

The Lord Chancellor stating, that he would have had some difficulty in saying that the magistrates were not liable on the general ground, if the construction, as to this point, to be put on the act, had not been, in some measure, settled by the decisions in the cases of *Forbes v. Magistrates of Canongate*, and *Fordyce v. Magistrates of Aberdeen* in 1792.

Debtor imprisoned.

THE material facts of this case were these:—on the 6th July, 1808, Wight was imprisoned for debt (300*l.*) in the Canongate gaol by Ritchie, and after the lapse of the requisite time, Wight commenced a process of *cessio bonorum* against his creditors. This was opposed; and Wight, after being confined about five months, on the 13th Dec. 1808, presented a petition to the baillies of Canongate to be liberated under the act of sederunt, 1671, which was accompanied by a certificate from a physician, that the life of the prisoner was in imminent danger from the confinement. The physician having sworn to the truth of the certificate, copies of the petition and deposition were served upon Mr. Ritchie; and, no answer or objection having been made, the magistrates, on the 15th Dec. 1808, pronounced an

Petition for liberation under Act of Sederunt, 1671.

interlocutor of liberation in the usual form, viz.: "The baillies having considered this petition, with "the deposition of the physician and execution of "service, admit protestation against the aforesaid "Mr. Alexander Ritchie, writer to the signet, for "non-appearance, and answering the same. In "respect of the physician's deposition, grant warrant "to the keepers of the tolbooth of Canongate to "permit the petitioner's liberation therefrom, to "some house within the burgh, for the recovery of "his health, pursuant to the act of sederunt, 14th "June, 1671, on his lodging with the clerk a bond "to restrict and conform himself agreeably to the "conditions and limitations of the said act, and to "return to prison on the recovery of his health, "or when required, under penalty of payment of "the debt for which he is detained in prison, as "also to indemnify and freely keep the burgh and "magistrates, of all damages, costs, or expenses, "whatever, anent the premises."

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Dec. 15, 1808. Interlocutor of liberation by the baillies of Canongate.

Of the same date, a bond of caution was granted by Archibald Wight, and by John Craw, writer to the signet, and John M'Tavish, writer in Edinburgh, as his sureties. After reciting the aforesaid petition, the deposition of Dr. Mitchell, and the interlocutor of the magistrates, the bond proceeds thus: "We the said John Craw and John M'Tavish "judicially enact, bind, and oblige ourselves and "our heirs, jointly and severally, in the burgh court "books of Canongate enacted, that the said Archi-"bald Wight shall, during his temporary release-"ment for the recovery of his health, restrict and "conform himself agreeably to the terms and con-

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" ditions of the said act of sederunt, by residing in " some house within the burgh, and on no account " going beyond the jurisdiction of the same; and " immediately on recovery of his health, or when " required, shall return to and surrender himself " prisoner within the said tolbooth, under the " penalty of forfeiting and paying the debts for " which he stands imprisoned and arrested, amount- " ing to sums between two and three hundred " pounds sterling money; as also to indemnify, free " and harmless keep, the magistrates and burgh of " Canongate, of all costs, damages, or expenses " whatsoever, in, by, through, or anent the pre- " mises: and the said Archibald Wight enacts and " binds himself and his heirs, not only duly to per- " form the premises on his part, by a strict observ- " ance of the conditions and limitations of the said " act of sederunt, and returning to prison upon re- " convalescence, but also to relieve and freely keep " his said sureties, and their foresaids, of all loss " and damage whatever in the premises: and all " and each of us do hereby subject ourselves to the " jurisdiction of the Canongate, and nominate the " court-house thereof as a domicile whereat either " of us (being for the time resident without the said " jurisdiction) may be legally summoned and " charged to the performance of the premises or any " part thereof."

Wight was accordingly liberated without objection; and ten days after this liberation, viz. on

Dec. 24. 1808. Interlocutor, finding the

24th Dec. 1808, he was found entitled to the benefit of the process of *cessio bonorum* by interlocutor of the Court of session. On the 19th of January,

1809, Mr. Ritchie applied by his agent, Mr. Grant, and obtained a copy of the bond of caution granted by Mr. Wight and his sureties to the magistrates, on his liberation. When this copy was furnished, the assistant clerk of the Court of Canongate, who is keeper of the prison records, desired Mr. Grant to say, "whether he wished Mr. Wight "to be returned to prison;" and told him that a memorial was ready to be presented to counsel for advice on the part of the magistrates. Mr. Grant in reply desired that nothing might be done till he gave notice, and declared that he, on the other hand, would take no step without giving previous notice to the magistrates.

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debtor entitled to the benefit of *cessio*.

In Feb. 1809, Mr. Ritchie, having borrowed the caption from the Canongate gaol, reclaimed against the interlocutor in the process of *cessio bonorum*; and ultimately the *cessio* was refused, both by the Court of Session and House of Lords; and on the 8th of May, 1809, intimated to the magistrates of Canongate, under the form of a protest, that they had suffered Wight to escape, and were liable in payment of the debt. On the 12th May, Wight surrendered himself, but was not then received, the gaoler not thinking that he had power to receive him without having the caption in his possession. On the 13th May, Mr. Ritchie returned the caption, and Wight was re-incarcerated; but on the 24th May, 1809, he was again liberated in terms of the act of sederunt.

Feb. 1809. Interlocutor reclaimed against.

In the mean time Mr. Ritchie, on the 10th May, 1809, raised an action against the magistrates, setting forth in the summons, "that by an act of

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"sederunt of the Lords of Council and Session, "dated 14th June, 1671, it is enacted, that hereafter "it shall not be lawful to the magistrates of burghs, "upon any occasion whatsoever, without a warrant "from His Majesty's Privy Council, or the Lords "of Session, to permit any person incarcerated in "their tolbooth for debt, to go out of prison, except "only in the case of *parties sickness*, and *extreme* "*danger of life*, the same being always attested "upon oath under the hand of a physician, chirur- "geon, apothecary, or minister of the gospel in "the place; which certificate shall be recorded in "the town court books; and in that case, that the "magistrates allowed the party only liberty to re- "side in some house within the town during the "continuance of his sickness, they being always an- "swerable *that the party escape not*, and upon his "recovery to return to prison: and the Lords de- "clare, that any magistrates of burghs, who shall "contravene the premises, shall be liable in pay- "ment of the debt for which the rebel was incar- "cerate. That notwithstanding the said Archibald "Wight was so incarcerated in manner foresaid, yet "true it is and of verity, that George Rae, fish- "hook-maker, Canongate, and Joseph Brown, baker "there, baillies of the said burgh thereof, the Right "Honourable William Coulter, Lord Provost of the "city of Edinburgh, Peter Hill, John Turnbull, "Archibald Campbell younger, and Alexander "Manners, Esq. baillies of the said burgh, suffered "the said Archibald Wight to escape out of prison, "without payment of the debt above specified, or "a charge to set at liberty to that effect; and that

" the said Archibald Wight has accordingly, for
" many months past, being going at liberty in per-
" fect health, and residing without the jurisdiction
" of the burgh of Canongate; whereby the said
" magistrates, not only as magistrates, but also they
" themselves personally, and their heirs and repre-
" sentatives, and also their successors in office, are
" liable to the said Alexander Ritchie in payment
" of said debt, interest, and expenses.

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And concluding, " that it ought and should be
" found and declared by decreet of the Lords of
" Council and Session that the said defenders (Re-
" spondents) suffered the said Archibald Wight to
" escape out of prison, at least permitted him to go
" out, without payment of the foresaid debt; or a
" charge to set at liberty, and the same being so
" found and declared, the said defenders not only
" as magistrates, but as individuals, and their suc-
" cessors in office, ought and should be decerned
" and ordained, conjunctly and severally, to make
" payment to the pursuer (Appellant) of the foresaid
" principal sums and interest since due and till pay-
" ment, &c."

The truth of the allegations in the summons being denied by the magistrates, the Lord Ordinary, on the 8th July, 1809, ordered the pursuer to give in a condescendance of the facts, which he averred and offered to prove in support of his action; and the following condescendance was accordingly given in.

The Appellant's condescendance.

" 1st. That Archibald Wight, late starch manufac-
" turer at Ormiston, was incarcerated at the instance
" of the pursuer (Appellant) within the tolbooth of

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"Canongate, in virtue of a legal diligence, for pay-
"ment of the debt mentioned in the libel, upon
"the 6th July, 1808.

"2d. That the defenders (Respondents) allowed
"the said Archibald Wight, contrary to law, and
"to the act of sederunt relative to the custody of
"prisoners, to go out of gaol without payment of
"the debts for which he was so imprisoned, as is
"specifically stated in a protest against the de-
"fenders, produced in process and here referred to.

"3d. That the said Archibald Wight has ac-
"cordingly for many months past been going at
"perfect liberty, residing without the jurisdiction
"of the burgh of Canongate, and has never slept
"one night in the house appointed for his residence
"within the jurisdiction of the Canongate.

"4th. That the said Archibald Wight has been
"seen at Portobello, Leith, and other places without
"the said jurisdiction, in apparently good health:
"and,

"5th. That upon many days the said Archibald
"Wight was out of the jurisdiction of the magis-
"trates of Canongate; and particularly upon Satur-
"day last, the 16th Dec. 1809, the said Archibald
"Wight was seen in the Parliament House attend-
"ing at the bar of the inner house, instructing
"counsel at the advising of his process of *cessio*
"*bonorum*."

The Lord Ordinary, on the 6th Feb. 1810, allowed both parties a proof, and witnesses were examined on the part of the pursuer.

Evidence.

Mrs. Greig, in whose house a room had been taken for Wight's residence, deponed, "That she knows Ar-

" chibald Wight, and that there was a room taken
" for him by a woman from the Canongate jail,
" where he was then incarcerated, in the deponent's
" house: that Wight *never took possession, nor ever*
" *was in the room taken for him:* that the room was
" kept open for him for five or six weeks: that
" about three weeks after the room was taken for
" him, the deponent went to the gaol, where she
" was informed he was to be that evening, and en-
" quired of him whether or not he meant to keep
" the room? and why he did not take possession?
" to which Wight replied, that it was no business
" of hers whether he possessed it or not; that she
" would be paid her rent, and that genteelly: that
" she has never, to this day, received a sixpence for
" the rent: that she recollects of waiting again upon
" Wight at his own house in Surgeons' Square, upon
" two different occasions: that upon the first of
" these she did not see Wight: that upon the se-
" cond she went between nine and ten in the morn-
" ing, and *found him in bed:* that she got nothing
" from him, and that she cannot specify at what
" time these meetings took place, but they were
" within six months subsequent to the time the
" room was taken for him."

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John Gow, painter, " recollects dining with Mr.
" Wight after his liberation, and, as he thinks, very
" early in the month of January, 1809: that Mr.
" Wight then received the deponent at dinner in
" his own house, in Surgeons' Square; but whether
" Mr. Wight at that time slept there or not the
" deponent cannot say: that, to the best of his re-
" collection, he left Mr. Wight's house between

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" eight and nine o'clock that evening, and that Mr. " Wight was then in his own house: that in spring, " 1809, he recollects of being in company with " Mr. Wight in a house at the back of the Fountain " Well: that this might be in the month of March, " or thereabouts."

Margaret Turnbull depones, " That she recol- " lects seeing Wight in Surgeons' Square after the " time he was imprisoned, and that she cannot pre- " cisely say, whether it was before or after Christmas " that she saw Mr. Wight as above, but that she " saw him often." And James and Walter Lock-hart stated the same circumstance.

The Reverend Joseph Robertson depones, " That " upon two occasions subsequent to Wight's libera- " tion on the bill of health, the deponent was in " company with him at Morris's tavern, opposite to " or at the back of the Fountain Well: that upon the " first of these occasions, the deponent left Wight " in Morris's: that upon the second they came away " together, when Wight told the deponent that he " was going home to his own house in Surgeons' " Square; and parted from him with that intention: " that upon another occasion, also subsequent to " Wight's liberation, the deponent met him coming " down a small close near the foot of the Cowgate, as " from Surgeons' Square: that he knows Wight to " have been a second time incarcerated, but that " these meetings all took place prior to his second " incarceration; and that the two meetings at " Morris's happened very soon after his liberation " upon the bill of health: that all these times " Wight appeared to the deponent to be in good

"health:" and that upon another occasion, the date of which he did not specify, he "met Wight "at the foot of the Canongate, opposite to the "Abbey, who then told him that he had been at "Leith the preceding day; and that if the depo- "nent would accompany him there at that time he "would give him a bottle of wine; which invita- "tion the deponent declined, and he did not see "Wight at that time leave the Canongate."

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John M'Gregor depones, "That he recollects "having met Wight in the High School Wynd, "after a liberation which he obtained upon a bill of "health, and prior to his second incarceration: "that he met him several times in Surgeons' Square, "also previous to his second incarceration: that he "recollects of meeting Wight in company with "Mr. Pattison, near St. Leonard's Hill, also pre- "vious to the second incarceration."

Hamilton Robertson depones to his recollection of meeting Wight "on two occasions after his li- "beration, once opposite the Fountain Well, and "once upon the South Bridge, and of remarking "that he was then beyond the bounds." But adds, "that he cannot say how long this was after his "liberation.

It was not disputed that Surgeons' Square, the Fountain Well, and South Bridge, were without the particular jurisdiction of the Canongate: but it was remarked that the evidence was defective as to dates, and that for any thing that appeared it might apply to the period between the date of the interlocutor in the *cessio*, and the reclamation.

The Magistrates gave in evidence the written pro-

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ceedings respecting Wight's liberation, the protest against them, and several documents relative to Wight's *cessio bonorum*, in order to show that Wight's health, after his surrender, was such as rendered it necessary again to liberate him. The borrowing of the caption, by Ritchie, in February, and the other facts, as above stated, were proved by these writings, or were admitted by the Pursuer.

Judgment below for the magistrates.

The cause having come before the Lords of the first division, the Court, on the 6th July, 1813, sustained the defences, assoilzied the defenders, and decerned, and found the pursuer liable in expenses; and, after advising a reclaiming petition with answers, they adhered to this interlocutor. From this judgment the pursuer appealed.

Appeal.

The REASONS of Appeal, given in the Appellant's case, were these:

Reasons for the Appellant.

All the authorities of the law of Scotland are agreed, that a debtor, liberated from prison on account of sickness, remains under the custody of the magistrates; and they are responsible for his custody during that time, and must have him guarded.

Stair's Inst. B. 4. T. 47. S. 22.

Lord Stair, in his Institute of the Law of Scotland, says, "It will not be a relevant defence, or reason "of suspension, for magistrates suffering prisoners "to escape, that they will yet take the party, albeit "he be in as good condition as when he escaped, "or that upon testificates of physicians they suffered the prisoner, for his health, to go out to "take the air, or to go to a private house; albeit "in either case there were two to guard him; for "the Lords, by act of sederunt, June 14, 1671,

" prohibited the magistrates of Edinburgh to suffer June 27, 1817.
" prisoners to go out without particular warrant, or
" the magistrates of other burghs, not far distant, ex-
" cept in the imminency of death. And where such
" warrant is granted, the magistrates *ought to*
" *choose the place of the prisoner's abode, that the*
" *same be secure, and guards attending.* Like as,
" they do declare, that if magistrates let prisoners
" go out upon any other pretence, although they
" restore them to prison, they shall be liable for the
" debt; for *squalor carceris* is an interest of the
" creditor to cause the debtor to satisfy or to dis-
" cover his means, which magistrates ought not to
" prejudge them in."

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Bankton, B. 1 S. 10. s. 198, 202. Erkine, B. 4. T. 3. s. 14.

That this was the law of Scotland before the act of sederunt, 1671, appears from various decisions of the Court before the act was passed.

The following cases are reported by Haddington and Gosford before the year 1671.—" A magistrate
" setting at liberty a party incarcerate for debt, will
" not evite payment thereof by re-entering him to
" prison; because the incarceration is a kind of pu-
" nishment of his rebellion, and presumeable that
" thereby he might have been induced to make pay-
" ment if he had not been eased by being set at
" liberty."—" A person in prison being sick, and
" having the same attested under the hand of a
" doctor of medicine, was allowed to be transported
" to a house in the town, upon caution, to be a true
" prisoner there, and to return to prison upon re-
" covery."—" A magistrate suffering a prisoner for
" debt to lie out of the tolbooth, though he was *in*

Dict. vol. 2. p. 169. Haddington, July 23, 1605. Nisbet v. Drummond.

Ibid. Dec. 1609, Lord Applegirth supplicant.

Gosford, July 14, 1668. Paplay v. Magistrates of Edinburgh.

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Town of Brechin v. Town of Dundee, 14th July, 1671.

" *extremis agens*, and died, was found liable for " the debt, seeing he ought to have had a warrant " from the Lords for that effect. Here it was " proved, that formerly they had suffered him to lie " several nights out of prison."

The act of sederunt therefore declared the law, and was intended to put magistrates of burghs against undue laxity in the custody of debtors.

This appears from the act of sederunt itself, and the decision of the Court in a case which occurred at that time, reported by Lord Stair and Lord Gosford, and thus abridged by Lord Kaimes: " Ma- " gistrates of a town being pursued for allowing " their prisoner to go abroad frequently out of their " tolbooth into the street and taverns, it was found " no relevant defence that the prisoner was always " guarded; for the Lords were of opinion, that ma- " gistrates of burghs have only power to let pri- " soners come out of their tolbooth, under a guard, " in the extreme hazard of their life by sickness, " and not without testificates by physicians, or " skilled persons, upon oath, bearing the party's " condition to require the same, and that without " great hazard, they could not suffer delay to make " application to the Council or Session."

The principles laid down by Lord Stair and other authorities on the law of Scotland, have been enforced by the Court in various cases: *Fullarton and Kennedy against Magistrates of Ayr*, 7th March, 1781; *Shortbread against Magistrates of Annan*, 8th June, 1790; *Gray against Magistrates of Dumfries*, 7th December, 1780; *Purdie, &c. against*

Magistrates of Montrose, 29th June, 1786; *Wilson against Magistrates of Edinburgh*, 8th July, 1788.

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It is clear that, in point of fact, Wight was under no custody or restraint. He never went to the lodging appointed for him, and does not appear to have been within the jurisdiction of the Canongate, unless when he visited the jail for his own amusement.

OBJECTION 1st.—That Wight's application on account of sickness was intimated to the Appellant; and he did not oppose it, or insist on a guard.

Answer 1st.—The custody of a debtor is with the Magistrates, not with the creditor; and as the Appellant gave no consent to his liberation, the responsibility remained with them.

Answer 2d.—The Magistrates transferred the debtor to a lodging within their jurisdiction; the creditor had therefore a right to expect that he should be confined in that lodging, and not allowed to go at large, and reside beyond the jurisdiction.

OBJECTION 2d.—That prisoners who are sick will not be benefited by being removed from prison, unless they are allowed to use exercise, and go freely about.

Answer 1st.—This doctrine (which is not that of the law of Scotland) would put it in the power of magistrates with the assistance of false certificates, to put an end to imprisonment for debt altogether, under pretext of sickness.

Answer 2d.—Supposing, but not admitting, that in certain cases on cause specially shown, prisoners may be allowed to take exercise for recovery of their health, there must in that case be a guard, and the

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debtor must not exceed the precise limits appointed for that purpose, and necessary for his health.

Answer 3d.—Wight did not take exercise for recovery of his health; but went to taverns, and resided in his own house, beyond the jurisdiction of the magistrates.

Case for the magistrates.

In the case for the Respondents, two cases, those of Forbes and Fordyce, were stated, upon which the Respondents particularly relied; and, as these cases were not reported, the statement is here transcribed at length, together with the observations on the cases cited for the Appellant.

Decisions on the point now in question. Forbes v. Magistrates of Canongate, Jan 31, 1793, not reported.

Alexander Robertson, a prisoner for debt, in January, 1790, applied for liberation, producing merely a certificate, on soul and conscience, by Mr. James Arrot, surgeon, and Dr. Henry Cullen, physician, that, for the preservation of his life, he needed "free air, in a situation where proper care "and medicines might be administered." His petition was answered, and the prayer of it was objected to, on the grounds that by the act of sederunt, the certificate should "be upon oath," and that "the magistrates should only give liberty to "reside in some house within the town," and with a protest in writing that the creditors did not give any consent even under the conditions of the act of sederunt. These objections were renewed by written minute, when the caution found was intimated, the sufficiency of which likewise was not admitted. But the magistrates "in respect of the attestation, and the certificates of the "petitioner's indisposi- "tion, granted warrant to the keeper of the tol- "booth of Canongate, to liberate the petitioner in

"terms of the act of sederunt." In this deliverance they made no special appointment for his residence within the burgh; and it proceeded upon no deposition or examination of any medical person in their presence, and in the face of written objections repeatedly urged upon these grounds. Robertson, however, chose his own lodgings, and changed these from one house to another in the Canongate; but, during nine months, only frequented these lodgings when he had company to entertain there; and was seen daily in the most public places of resort, such as the Parliament-house, Leith races, &c.; and went at perfect freedom to Gogar, Inveresk, Bonnington, and other places within a forenoon's ride of Edinburgh; and commonly spent his afternoons in drinking parties, and his nights out of the limits of the burgh of Canongate. While he was going on in this course, the pursuer raised his action against the magistrates, on the 17th of August, 1790. But this measure produced no step on the part of the magistrates, or change in the habits of Robertson. All this was fully proved. Confessedly too, during the whole nine months, at the close of which this course of dissipation terminated in his death, the magistrates had taken no charge of him whatever. But upon the other hand it was likewise admitted that the incarcerating creditors took as little; and did never apply for his reincarceration, or for any inquiry as to the state of his health.

Nevertheless it was strenuously contended by the pursuer in that case (as in the present), that the magistrates were bound to guard the prisoner constantly, and keep him in custody at some house

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within the burgh, during the whole period of his liberation, and that their failure to do so amounted in law to an escape. No question was ever more fully argued. The interlocutors of the Lord Ordinary assoilzieing the defenders were reclaimed against. On advising the first petition with answers, a condescendance was ordered. The deliverance on this condescendance with answers "repelled the "objection as to the certificate not being upon oath, "but allowed a proof." Both parties reclaimed, and the Court, upon these papers and minutes of debate, "ordained the parties to prepare interrogatories "either by mutual agreement, or at the sight of the "Court, to be transmitted to the clerks of the most "considerable royal burghs in Scotland, respecting "what has been the general practice thereof in li-"berating persons confined for civil debts, in terms "of the act of sederunt, labouring under dangerous "diseases, whether such liberations do proceed upon "certificates granted by their medical attendants "upon soul and conscience, or upon oath taken "before the magistrates."

By agreement of the parties, these inquiries were extended to many other burghs, and were made by interrogatories in these terms:

"1. In liberating a prisoner confined for debt in "the case of sickness, what evidence do you require "of the state of his health? Send copies of the "form of that certificate from your records."

"2. Do you assign the prisoner any particular "place of residence during the continuance of his "indisposition? Or upon what terms do you grant "his liberation."

"3. Do you take any security or bond of caution "from the prisoner at his liberation? What is the "nature of the security? Transmit a copy thereof."

"4. Do you take any charge of, or make any in- "quiries after, the conduct and behaviour of the pri- "soner during his being out of prison? Do you "place him under any guard?"

"5. Has any alteration taken place in the man- "ner and form of certificates, or part of the pro- "cedure, of late years? If so, point the same out, "and transmit copies of both old and new forms."

"6. Do you make any difference, or in any "manner of way vary your proceeding, certificates, "or bond, where there is opposition on the part of "the creditor to the liberation of the debtor, or "where there is no opposition?"

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Answers were obtained on all of these points, and a proof at large was also taken. With respect to the form of the certificate, it appeared that the Court itself had recently before appointed liberation in the case of a Mr. Rankin from Falkirk, on a certificate of Mr. Alexander Wood, surgeon, upon soul and conscience, and that the practice of the burghs was various. As to residence, one half of the burgh answered that they "were not in use "to fix any house for the residence of the debtor." In the other half it appeared that they sometimes pitched upon the debtor's own house, "whether "within the burgh or not;" sometimes upon other houses within the burgh. All without a single exception answered, that it was "not the practice to "keep any guard on, or take any charge of, the "debtor after he was liberated, or to make any in-

Memorial for Defenders, p. 10.

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"quiry into his conduct;" and no fewer than thirty cases were stated to illustrate the practice of the burgh of Canongate itself.

With respect again to the actual conduct and habits of Robertson, the proof fully established the whole particulars which have been already stated upon the case, which was fully pleaded in mutual memorials. The Court sustained the defences and assoilzied; and a long and able petition against this interlocutor was refused without answers.

The Respondents have had access to notes, from which it appears that the distinguished Judge then in the chair was of opinion, that "the form of cer-"tificate had in practice been various, and that it "would be wrong in the Court to put too narrow "and rigid a construction upon the act of sederunt; "for the power of the Court to introduce such a re-"gulation, and to throw the load off themselves "upon the burghs, might be doubted." His Lordship indeed observed, that the chief "difficulty of "the case arose from the circumstance that the "agent of the creditors had required the certificate "to be sworn to, yet this was overlooked;" but he also remarked that "the situation of magistrates is "hard, and the act of sederunt ought to be re-con-"sidered. The oath required by the act of sede-"runt must for the most part be extra-judicial, *i. e.* "*ex parte*, as intimation is not necessary, nor is any "precise form of an oath prescribed. The practice "of the Canongate is material. Prisoners for debt "are oftenest confined there. Either a new act of "sederunt should be made, laying down the forms "more precisely, or a clause introduced in the pro-

" posed act of parliament for burgh reform, or new " bankrupt act. The prisoner ought to be removed " to a certain house named; *and if country air is* " *necessary, why may not a house in the country,* " *as near to the burgh as possible, with a garden or* " *certain other grounds, be fixed upon, with con-* " *currence of the sheriff or substitute? And if* " *caution cannot be found to the extent of the debt,* " *let him and his friends at least pay or find security* " *for indemnifying the magistrates of the expense* " *of a guard.*"

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The Lord Justice Clerk (M'Queen) inclined to think, that *squalor* is " out of the question, and " confinement within the burgh not necessary; as " the very purpose of the liberation is, that the " prisoner may recover health. It is enough to find " sufficient security to recommit him when required. " The hardship on magistrates would be intolerable " if otherwise."

" Lord Henderland concurred, and likewise " founded his opinion upon the circumstance that " the creditors did not apply to recommit him."

Lord Esgrove and a majority of the other Judges were of the same opinion; but Lords Dreghorn, Craig, and Abercromby, thought that the magistrates had failed in their duty, " particularly as to " the neglect of the oath, and not appointing a " place of residence, and in taking no step after the " summons was executed." These, however, it will be recollected, are circumstances as to all of which the Respondents, in the present case, have acted most correctly.

The second and only other case which, so far as Fordyce v.

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Magistrates of Aberdeen, 1793, not reported.

the Respondents have discovered, was ever tried on this point, was that of *Dr. Dingwall Fordyce* against the *Magistrates of Aberdeen*, likewise decided in the year 1793, after that of Forbes. It was reported to the whole Court by the Lord Justice Clerk, Ordinary, upon a proof and informations drawn by Lord Newton, and Lord Meadowbank, then at the bar. From the proof, it was established that Ross, a butcher in Aberdeen, the debtor, imprisoned in the tolbooth of that burgh, had been liberated without the consent of Dr. Fordyce, his incarcerating creditor; that he went home to his own house and trade during his liberation; and, upon one occasion, was at Inverugie in Banffshire, thirty-three miles from Aberdeen; upon another occasion had been at Overhills in the parish of Belhelvie, six miles from Aberdeen, and had staid two days there attending a cattle market; and that he was habitually and constantly, not only free from any guard or restraint, but living and employed as he would have been when at large in perfect health. Nevertheless, the Court, upon the same considerations which dictated the judgment in the previous case of Forbes, not only assoilzied the magistrates of Aberdeen, but found them entitled to expenses of process.

It will not be overlooked in this case, that the matter at present in question is the meaning of an act of sederunt, or rule of Court. The judgments in these two cases were precisely upon the same point which is at issue in the present case, and given in favour of the defenders, in cases stronger than the present for the pursuers. It was peculiarly the pro-

vince of the Court of Session to interpret the meaning of their own rule of court. From the words of the act of sederunt, and from the practice which, it appears from these cases, had been had under it, it seems to be abundantly clear, that these cases were well decided.

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But even if the decisions in these cases had been more doubtful, and had introduced a practice consonant to them, the Respondents conceive that the magistrates of royal burghs were entitled to look to these cases, as having given the true interpretation to the act of sederunt; and that if a pursuer, as in the present case, had sustained no injury whatever, the courts of law would have hesitated to give judgment in his favour in a case so highly penal, where magistrates had only acted in conformity to decided cases.

But the Respondents submit that it is not necessary for them to argue their case thus: they found upon no new practice introduced since these cases were decided, but upon the true sense and meaning of the act of sederunt, and the practice which all the burghs have had under it, downwards to this day.

On the other hand, the Appellant founded upon several cases, decided before the date of the act of sederunt: *Nisbet v. Drummond,* Haddington, 23d July, 1605; Lord Applegirth, supplicant, 1st Dec. 1609; and *Poplay v. Magistrates of Edinburgh,* 14th July, 1668. In the first of these cases it was found that, if a magistrate liberated a person confined for debt, it did not excuse the magistrate that the party re-entered himself to prison; this had no

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relation to a case of liberation for ill health. In the second of them, a liberation was permitted on account of bad health, the party being ordered to be "transported to a house in the town, upon caution "to be a prisoner there, and to return to prison upon "recovery." In the third of them, the magistrates of Edinburgh appear to have been found liable for a debt, having released the debtor *in extremis*, who died out of goal.

In these cases there is nothing hostile to the argument maintained by the Respondents; besides, the matter has since been regulated by the act of sederunt.

Town of Brechin v. Town of Dundee.

The Appellant founded also upon the before-mentioned case of *the Town of Brechin v. Town of Dundee*, which occasioned the making of the act of sederunt, particularly upon that part of the case which mentioned, "that magistrates of burghs have "only power to let prisoners come out of their tol-"booths *under a guard*, in the extreme hazard of "their life by sickness." It is sufficient also upon this, to refer to the act of sederunt itself; when it regulates the mode of enlarging prisoners on a bill of health, it says nothing of the necessity of a *guard*.

Stair, B. 4. tit. 47. § 22.

The Appellant also founded upon a passage in Lord Stair's Institute on this point, in which his Lordship says, that "the Lords, by act of sederunt, "14th June, 1761, prohibited the magistrates of "Edinburgh to suffer prisoners to go out without "particular warrant, or the magistrates of other "burghs not far distant, except in the imminency of "death: and where such warrant is granted, the

" magistrates ought to choose the place of the pri- " soner's abode, that the same be secure, and guards " attending." The Appellant stated that this doctrine of Lord Stair's was the more worthy of attention, as his Lordship had been appointed President of the Court of Session recently before this act of sederunt was made.

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It is not necessary to say any thing of the authority which is due to the opinions of that most eminent person; but in several particulars he does not state this act of sederunt accurately: it says nothing as to the " magistrates of Edinburgh, or the magis- " trates of other burghs not far distant," to whom, in his Lordship's view, the act of sederunt had been confined; nor does it say any thing of the " place " of the prisoner's abode being secure, and guards " attending." It is sufficient as to this to say, that universal practice has explained the act in this respect.

The Appellant also referred to a *dictum* of Lord Bankton on this subject. His Lordship, treating of a prisoner liberated on a bill of health, says: " And if he is returned to prison on his convales- " cence, the magistrates are free; but if he *escape* " they are liable for the debt, because they ought " to *have had a guard upon him* to prevent his es- " cape: and this is settled by act of sederunt." It appears strange that the Appellant should have relied on this passage; in the first part of it, it is clear that his Lordship considered that there was no *escape* if the person liberated was " *returned to* " *prison on his convalescence.*" According to Lord Bankton's view, the magistrates in this case " *are*

Bankton, B. 1. tit. 10. § 198.

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"*free.*" It cannot be disputed that Wight was returned to prison even before his convalescence. With regard to the latter part of it, which mentions that "the magistrates ought to have had a guard upon "him to prevent his escape," and that "this was "settled by act of sederunt," it appears that his Lordship had implicitly followed Lord Stair as to this: it has already been noticed that the act is silent as to this point of a guard.

The Appellant also founded on a passage in Erskine, B. 4. tit. 3. § 14. on this subject, to which the Respondents also implicitly subscribe.

Fullarton and Kennedy v. Magistrates of Ayr, Fac. Coll. 7th March, 1781.

The Appellant also referred to a case of *Fullarton and Kennedy v. the Magistrates of Ayr*, where in a circumstantiate case (very indistinctly stated in the report) the magistrates had been found liable for the debt of a person liberated on a bill of health. It is impossible to discover upon what grounds that case was decided; but it seems clear that there was one good ground for decision against the magistrates, the *not remanding the debtor to prison on his recovery*. The facts of the present case were very different.

The Appellant also founded upon the cases of *Gray v. the Magistrates of Dumfries*, 7th Dec. 1780; *Purdie and Co. v. the Magistrates of Montrose*, 29th June, 1786; *Wilson v. Magistrates of Edinburgh*, 8th July, 1788; and *Shortbread v. Magistrates of Annan*, 8th June, 1790; but none of these have relation to the case of liberation on a bill of health, but to ordinary cases of imprisonment. As such they can have no application here.

The Appellant also founded upon certain cases

relating to liberation of debtors on account of ill health, but of a class totally different from the present. These were the cases of *Charles Stewart v. the Magistrates of Edinburgh*, 20th Nov. 1799, and *Macqueen v. the Magistrates of Dundee*, in 1798 and 1799, (not reported). These cases relate to the question, what degree of freedom the magistrates of burghs can be compelled to allow to debtors liberated on account of ill health. It is obvious that this is a matter of extreme delicacy. In the first of these cases, the magistrates had sent a person liberated for ill health to the house of the captain of the town-guard, where he had a private room; in the other case Macqueen had been unable to obtain a *cessio bonorum*, and the magistrates of Dundee having reason to suspect that he meant to leave the country, though obliged to liberate him, guarded him in a private house. In neither case did the Court interfere to give explicit directions to the magistrates.

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The Appellant also referred to the cases of Lindsay, 27th Nov. 1797; Donaldson, 6th Feb. 1798; and Mackenzie, 9th March, 1799, for the purpose of showing what species of imprisonment will entitle a person to obtain a *cessio bonorum*. The Respondents do not find it necessary to enter into these cases; they have been well decided, and have no relation to the present case.

The Appellant also urged, that the magistrates of Canongate themselves had put the same construction on the act of sederunt that the Appellant contended for; that they had assigned him a particular house to reside in; and that the bond of caution

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stipulated that he should reside within the burgh, and not go out of the jurisdiction. These points, however, relate to the question what the magistrates are *entitled to require* from the prisoner before undertaking the responsibility of his liberation on a bill of health. But the question of their *liability* must be judged of upon other and very different grounds; upon the meaning of the act of sederunt, the usage had under it, and the authority of decided cases, all which the Respondents consider to be clearly with them.

Mr. Leach and *Mr. Abercromby* (for the Appellant.) The act was made in consequence of the case of *the Town of Brechin v. the Town of Dundee*, 1671, and was declaratory of what the law was, and intended to explain more distinctly the magistrates' duty, without doing away that restraint which was a means of recovering the debt. The Judges however thought themselves bound by the two cases of Forbes and Fordyce. The decision in the case of Forbes was most extraordinary, for the Court appeared to have thought that the magistrates might give any liberty to the prisoner, preventing only his escape out of the kingdom: and this was what they considered as the meaning of the act. In the present case two of the Judges were for the defendants, on the ground of the act of sederunt, independently of the authority of the cases; two of the Judges were for the pursuer, and one Judge (the President) was for the pursuer on the principle, but thought that as a Judge he was bound by the two cases. The President was astonished at the decision in the cas

of Forbes, and; among his able observations on that case, asked why, if the magistrates had no more to do than to prevent the prisoner's escape out of the kingdom, they took him bound to reside within the burgh? If there were specialties in the case, the Judges had not decided upon them, but entirely on the general principle. The meaning of the act was clear, that the prisoner should reside within the burgh; and on the evidence it was an undoubted fact that Wight had never resided in the place appointed for him within the burgh. They gave no answer to that, but that the non-residence might have taken place during the six weeks from the time of the interlocutor in the *cessio*, and the time of the reclamation by the Appellant. This was a singular statement, because then the sureties were discharged; and how came they to call upon him to render himself to prison, and he to do so? But there was no necessity to reason from this inference; for Wight was not entitled to his discharge under the interlocutor till extract of the decreet, which however never was extracted, as it was opposed with success. It was true that the Appellant's agent was asked whether he wished that Wight should return to prison, and he answered, no: but did that excuse the manner in which Wight was at large out of prison? As to the promise to give notice, that was fulfilled by the protest; and as to the borrowing of the caption, the letters of caption were required in order to be stated in the action; and it was not necessary that the magistrates should have them for the purpose of bringing the prisoner back again, as he was bound under the obligation to return when

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called upon. The true question was, whether it was the meaning of the act of *sederunt* that magistrates should be at liberty entirely to release prisoners on the ground of ill health. The law on this subject was the same before as it was after the act of sederunt, but a laxity had taken place in practice, which occasioned that act. The same laxity however seemed to have taken place lately, which appeared to be sanctioned by the case of Forbes, a decision made in direct contradiction to the act. (*Lord Eldon*, C. When the Court made an act of sederunt, and then declared in these cases what the meaning of its own act was, was it for a gaoler to say, No, you don't mean that?) That was a circumstance which rendered it of great consequence to appeal this case.

Sir S. Romilly and *Mr. Simpson* (for the Respondents). There were two views to be taken of this case: 1st, on the general principle; 2d, on the specialties. The Court below had decided on the general question, not thinking it necessary to advert to the specialties. If the judgment of this house should turn on the general principle, the present case was most important, not only with respect to the liberty of the subject and the responsibility of magistrates, but with regard to the state of the general law of the land. It was for their Lordships to determine, whether, where a point of law was laid down in a long train of decisions, and acted upon for a long course of years, it was not to be considered as settled till that point came to be decided by the House of Lords, leaving it uncertain

what the law was in England as well as in Scotland. *Fytche v. Bishop of London*, was the only case in which it had been said here that the law was unsettled till settled by the House of Lords. There was no case but that, in which this House had acted on such a principle; and the decision had been received with great surprise by the whole profession, and considered as a solitary instance not likely to occur again. (*Lord Eldon*, C. Lord Thurlow and Eyre, Ch. J. said they did not mean to contradict the decisions. The way in which they argued was, that there was no such train of decisions.) It was certainly too strong to say, that the decision of the House proceeded on that principle. But here the case of Forbes had been decided more than twenty years ago; and it had been acted upon uniformly till the year 1813, when it was questioned in this case. The Court too there decided upon its own act of sederunt. Then what their Lordships were called upon to say was, that the decisions of the Court below, interpreting their own act of sederunt, were of no authority till sanctioned by this House, which was to tell them the meaning of their own act. The long acquiescence in these decisions was equivalent to confirmation by this House; and the decision in the case of Forbes went further than the present, for it did not appear that there a certificate on oath was required, or that a house was appointed. They must argue that, if the prisoner was out of the jurisdiction one yard (that is, out of the precincts of the town, for the act did not there mention the word burgh, and town had no clear meaning, and was not a *nomen juris* in Scotland), the magistrates were

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liable for the debt. Attending then to the terms of the act they had to consider what the situation of the magistrates would be, if their construction were to prevail. By the act, the magistrates were bound to enlarge the prisoner upon evidence that his life would be endangered by confinement. And it signified nothing that the sickness was produced by the intemperance of the prisoner himself, if, in fact, his life was in imminent danger. Besides, there was no evidence that the magistrates were in any way apprized of his being out of the burgh. It would be a most extraordinary law which would compel the magistrates to set the prisoner at liberty, and then to be answerable for his escape. The act was of a penal nature, and ought to be construed strictly. The magistrates were not to permit the prisoner "to go out of prison, except in case of "the party's sickness and extreme danger of life, "&c. and that in that case the magistrates allow "the party only liberty to reside in some house "within the town." How could it be said that in this case the magistrates allowed him any other liberty? They did not allow it. A man did not allow what he had no notice of; and the magistrates had no notice of the debtor's non-compliance with the conditions till two days before the commencement of the action. All that the act required was mentioned in the bond. They did not contend for a guard; and Bankton said, that if the debtor returned to prison the magistrates were free, and here he did return. The Judges in the case of Forbes took the precaution to get answers from the magistrates of different burghs, as to what had been

done under the act; and the answers were that they had not been in the the habit of employing any guard, or making any inquiry, whether the debtor complied with the conditions. It must therefore be the business of the creditor to observe him, and to give notice to the magistrates that he did not comply with the conditions of his release, and had forfeited his title to the indulgence. The case of Fordyce followed, in which it was proved that the debtor was thirty-three miles from prison. The law therefore on the general principle had been settled, and it was no longer open to this House to question it. But secondly, though the opinion of the House should be against the Respondents on that point, yet the Appellant was precluded by his own acts from succeeding in his action. The debtor was at large on the 19th of January; and then the Appellant's agent, when asked whether he wished that Wight should be returned to prison, desired that nothing might be done till he gave notice, and promised that he would take no step without giving previous notice to the magistrates. All complaint was thus waived until notice; and immediately upon notice by the protest, Wight was called upon, and did surrender himself; and the gaoler refused to take him, as the Appellant had taken away the original caption, which by the law of Scotland it was necessary for him to have as his authority for keeping the debtor in custody.

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Acts of sederunt were now with great propriety limited to matters of judicial form, and any alteration in the law must be made in another manner. All that the creditor could require was that the

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debtor should be confined on his convalescence, and that during his release he should reside near enough to be subject to the observation of the creditor. The bond and caution were the security of the magistrates, with which the creditor had nothing to do. They might relax if they chose. All the creditor could require was that the debtor should be imprisoned on convalescence. By the act, the residence must be limited to the town, which was a loose word, as town was not a *nomen juris* in Scotland. It was not the meaning that the debtor should not breathe the air of the country. If at any time of the day he was within the limits, the word *reside* was complied with. The sole criterion of escape was, the debtor's not returning on convalescence; and in no case were the magistrates liable if he did return on convalescence; the essential point was the sickness, and, in the cases cited on the other side, that circumstance was wanting. The precedents, since the time the act was made, were decidedly in favour of the Respondents. The evidence amounted only to this, that Wight was, during the period of his release on account of ill health, in some places out of the burgh, particularly in Surgeon's Square, which was however within the jurisdiction of the magistrates of Edinburgh, the superiors of the Canongate.

Mr. Leach (in reply). Their Lordships were called upon to give a general construction to the act, but were not called upon to reverse a train of decisions. There was only one case to be reversed; and that was one where the Court, instead of looking at the act, sent to the gaolers to ascertain the practice.

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The act said there must be a certificate on oath; that case decided that the magistrates might discharge without oath. The act said that the debtor must reside in a house within the burgh; that case decided that the magistrates might permit him to go any where. The object of the act was to remedy the mischief of too much indulgence. The magistrates were restrained from suffering persons in their custody to go out of prison except only in case of sickness and extreme danger of life; and if they granted this indulgence except with the conditions prescribed by the act, they were to pay the debt. This was the true principle: it was not an obligation upon, but a permission to the magistrates to grant this indulgence upon certain conditions; and what were the conditions? The magistrates were "to allow the party only liberty to reside in some house "within the town during the continuance of his "sickness, they being always answerable that the "party escape not." But now it was said that the magistrates might allow the party to go wherever he pleased within the kingdom. Where was the hardship that the magistrates should pay the debt, in case the party did not comply with the conditions? They might appoint a guard at the prisoner's expense, or take proper security, which they did in this instance. Even their own interlocutor showed that the debtor ought to be confined to a particular house within the burgh, and that if he was out of the burgh it was an escape. They did assign him a particular house within the burgh, but their keeper did not confine him there. He never was there. It was all mere mummery. It was impos-

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sible to look at the act without being convinced that this one judgment in 1793 was in direct contradiction to it. (*Lord Eldon*, C. Does it appear what the law of Scotland is on this subject, where there is a recapture before action brought?) The action commenced with the protest on the 10th May, 1809, and the debtor was not then in prison. They said indeed that they could not then imprison him, as the Appellant had taken the caption from them. But there was nothing in the objection; for the debtor was taken bound to return when required; and at any rate the caption, though in the hands of the Appellant, might be considered for this purpose as in the hands of the gaoler, and might have been actually in his possession if necessary. The debtor was never called upon to return till after the protest had commenced the action. With respect to the specialties they were not considered in the Court below as affecting the case. The debtor had been at large ten days before the interlocutor in the *cessio*, and the escape had been perfected before that judgment. But at any rate a debtor was not entitled to his discharge under it till the decreet was extracted, and so it had been decided. Then they said that, after the 19th January, he was out by the Appellant's permission. But where was the permission? The agent asked for a copy of the bond and caution, and found that the debtor was bound not to leave the jurisdiction. That being the case, the agent said he did not wish that Wight should be returned to prison, and promised to take no step without notice. That proceeded on the supposition that the conditions were to be complied with, and did not dis-

charge the magistrates from the performance of their duty under the act of sederunt.

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Lord Eldon, (C.) This is an appeal in which it is contended that the magistrates of Canongate are answerable to the Appellant for a debt due to him from a person of the name of Wight, in consequence of their having allowed Wight to escape out of their custody. I do not mean to state the circumstances of the case at length; but the Court below thought that under the act of sederunt, 1671, the Respondents were not liable; and yet I should have some difficulty upon that point, if the construction of the act had not been in some measure settled by prior decisions.

It appears that, before the act of sederunt was made, magistrates were, by law, bound to great diligence in the confinement of prisoners; but by the humanity of some, and the negligence of others, the practice became a good deal relaxed; and in consequence of that circumstance this act of sederunt was made.

Act of sederunt, June 14, 1671.

"The Lords considering, that albeit by the law "magistrates of burghs are obliged to detain in sure "ward and firmance persons incarcerate in their "tolbooths for debt; yet hitherto they have been "in use to indulge prisoners to go abroad upon se-"veral occasions, and it being expedient that in "time coming the foresaid liberty taken by magis-"trates of burghs should be restrained, and the law "duly observed, therefore the said Lords do declare, "that hereafter it shall not be lawful to the magis-"trates of burghs upon any occasion whatsomever,

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" without a warrant from his Majesty's Privy Coun- " cil, or the Lords of Session, to permit any per- " son incarcerate in their tolbooth for debt, to go " out of prison, except only in the case of the " party's sickness and extreme danger of life; the " same being always attested upon oath under the " hand of a physician, chirurgeon, apothecary, or " minister of the gospel in the place" (the persons holding these characters being therefore made judges of the fact); " which testificates shall be recorded in " the town court books. And in that case, that the " magistrates allow the party only liberty to reside " in some house within the town, during the con- " tinuance of his sickness; they being always an- " swerable that the party escape not, and upon his " recovery return to prison. And the Lords declare " that any magistrates of burghs who shall contra- " vene the premises, shall be liable in payment of " the debt for which the rebel was incarcerate."

Your Lordships perceive, therefore, that, upon such an attestation of sickness and extreme danger of life, the magistrates are to allow the prisoner liberty to reside in some house within the town, during the continuance of sickness, they being answerable that he escape not.

Wight had been incarcerated in the Canongate gaol, and, in consequence of the certificate upon oath of a physician, that his life was in imminent danger, had been liberated on the security of himself and two sureties, that Wight, during his temporary releasement for the recovery of his health, would restrict and conform himself agreeably to the terms and conditions of the said act of sederunt,

by residing in some house within the burgh, and would on no account go beyond the jurisdiction of the same, and that he would return as soon as he recovered his health, or when required: and the Appellant insists that the magistrates, in their proceedings with respect to Wight, contravened the provisions of the act of sederunt.

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Setting aside the specialties of the case, it appears that Wight was liberated, and remained out of custody for about nine months; and that during that period he had been spending his time sometimes in taverns, at other times in the gaol, and had been sometimes seen out of the jurisdiction of the burgh. Now, whatever opinion might have been entertained as to the proper construction of this act if the point had come before us twenty-two or twenty-three years ago; yet now, when the construction to be put upon it has been settled, by the Court which made the act, in two previous decisions, and has been acquiesced in since 1793, it is rather too much to say that the judgment in this case ought to be reversed upon that ground. Your Lordships will observe that this is not an act of parliament, but an act of sederunt, an act of the Court itself; and, in 1793, two cases, depending on the construction of this act, came before the Court, *Forbes v. Magistrates of Canongate*, and *Fordyce v. Magistrates of Aberdeen*. And there the persons liberated paid as little attention to the obligations of their bonds as Wight is alleged to have done here; and yet, in these cases, the Court, construing its own act, held that the magistrates were not liable; and when the magistrates have been so

The construction of the act settled by the cases of Forbes and Fordyce.

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Both on the general ground and on the special circumstances, the judgment to be affirmed.

instructed by the Court twenty-two or twenty-three years ago, and have acted on these instructions ever since, it seems to be too much now to depart from that principle. Upon that ground, therefore, and also upon the special circumstances of the case, independent of the general principle, it appears to me that the judgment in this case ought to be affirmed.

With respect to the special circumstances, the Appellant knew that Wight was out of prison; he allowed him to obtain his *cessio bonorum* without opposition; * he himself took away and kept the letters of caption for some time: and one strong fact is, that when the Appellant, by his solicitor, Mr. Nathaniel Grant, applied for a copy of the bond of caution granted by Wight and his sureties to the Magistrates of Canongate upon his enlargement under the act of sederunt, and when the keeper of the prison records desired Mr. Grant to say "whether he wished Mr. Wight to be returned to "prison," Mr. Grant in reply "expressly desired "that nothing might be done till he gave notice, "and declared that he on the other hand would "take no step without giving previous notice to the "magistrates." And yet it appears that he raised this action before he gave the magistrates notice that he wished that Wight should be re-incarcerated.

But on the general principle it is impossible to place the magistrates of burghs in this state, that

* Meaning, that no objection to the *cessio* was made till after Wight had been found entitled to it by interlocutor of 24th December, 1808. That interlocutor was afterwards reclaimed against, and the cessio was ultimately refused both by the Court of Session and House of Lords. (*Vid. ante* vol. ii. p. 377.)

they should be liable for an escape when acting in conformity to the construction which the Court put upon its own act; and if any alteration in the mode of proceeding in cases of this nature is necessary, it is more fitting that it should be made by act of parliament operating in future, than to say that those who were acting on the law as laid down twenty-two or twenty-three years ago by the Court of Session without question till this time, should be held liable for the debt as in case of an escape. It appears to me therefore that upon both grounds the judgment ought to be *affirmed*.

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Judgment *affirmed*.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MACDOWAL (ANDREW)—*Appellant*.
BUCHAN (JOHN)—*Respondent*.

June 2, July 2, 1817.

PACTOR NOT LIABLE, UNDER THE CIRCUMSTANCES OF THIS CASE, FOR RENTS LOST BY HIS NEGLECT TO ENFORCE PAYMENT BY ULTIMATE DILIGENCE.

A PERSON employed as a gentleman's general law agent in purchasing lands, making payments, in conveyancing and expeding titles, receives, in behalf of his employer, the rents of a small detached property let to inferior tenants, without any written commission as factor, and under circumstances which showed that it was not expected that he should compel payment of the rents by ultimate diligence, as in the case of a country factor, though he charged factor's fees. A considerable arrear of rent having accrued due, and several of the tenants having become insolvent, the son of the original em-