

No 180.

By one interlocutor, the LORDS dismissed the complaint as incompetent. But after advising a reclaiming petition for the complainer, with answers in behalf of Robert Ramsay, they altered that judgment, and

‘ Found the respondent liable in a penalty of L. 15 Sterling.’

Reporter, *Lord Henderland.* Act. *Geo. Fergusson.* Alt. *Dean of Faculty.* Clerk, *Home.*  
G. *Fac. Col. No 329. p. 504.*

## S E C T. IX.

Interference of the Court of Session in the modification of Prisoners' aliment, and in the modification of the Fiars.

1710. December 23. JOHN GLASWELL *against* JOHN DURHAM.

No 181.

Where Magistrates allow a greater aliment than is reasonable, the Lords are competent to modify it.

JOHN DURHAM, merchant in Montrose, being debtor to Mr John Glaswell, merchant in London, in L. 53 Sterling by bond; he grants a factory to Harry Hawthorn, merchant in Edinburgh, to prosecute Durham for the said debt. Hawthorn raises caption, and imprisons him in the tolbooth of Forfar, who, after some weeks, applies to the Magistrates on the 32d act 1696, craving he may be either alimented by his creditor incarcerator, or set at liberty in terms of that law. Whereupon the Magistrates take his oath, that he was not able to maintain himself, and modified sixpence *per diem*; but order him to intimate the same to his creditor, which he does by way of instrument to Hawthorn, the factor; and upon the return of this, he requires the Magistrates to set him at liberty, seeing no obedience was given, nor aliment paid him. But the Magistrates demurred, seeing no intimation was made to the creditor. This forces him to apply to the Lords by bill, that they may ordain the Magistrates to liberate him, seeing he had done all the law required, and yet they refused to set him at liberty. *Answered* for the creditor, That intimation to the factor was not sufficient, seeing his trade lay mostly in England, and so they would know better than the factor the fraudulent conveyances of his effects. *Replied*, This would put an intolerable hardship upon the poor prisoner where his creditor lived in another kingdom; for, *in*, He behoved to take out letters of supplement to cite him, whereas he had not bread to put in his mouth; *2do*, It would oblige him to wait 60 days ere he could be relieved; whereas strangers in such cases should design a domicil, at which they may be cited. The Lords thought the factor, who had power to put him in, had likewise power to

discharge, and take him out; and therefore sustained the intimation made to the factor as sufficient. The next point was, Whether the act of Parliament laid any obligation on the Magistrates to liberate him, when aliment was not secured or paid by the creditor? or if it was in their power and option still to detain him? It was certain, before that act they had no power to liberate them; but the royal burghs having addressed the Parliament in 1696, that they were overcharged with the maintenance of poor prisoners for debts, where the creditors declined to aliment them; for redress of this grievance and heavy burden, the Lords declared it should be leisome for Magistrates to liberate them, if the creditors did not secure an aliment on them, which was neither command nor injunction, but merely permissive and discretionary. Though it was *urged* against this, That, by this interpretation, poor debtors might starve, if Magistrates might still detain them; yet the LORDS, by plurality, thought they might renounce the privilege of this act introduced in their favours, and that it was a discretionary power which they might use or not as they pleased. The 3<sup>d</sup> question was anent their modification, whether the Lords might not restrict it, if exorbitant? For it was observed, that, since this act, bankrupts sought no more the benefit of the *cessio bonorum*, but came out of prison without any stigma, or deserved note of infamy, by persuading the Magistrates to modify a greater sum than the creditors could comply with. But the LORDS found this act correctory and unfavourable, nowise to be extended; and if they colluded with the prisoners, they might rectify it, and were as competent judges of the party's circumstances as they. All knew that there was a mistake in the act, which should have fixed a *maximum*, (beyond which they should not go), as well as it had made threepence the *minimum*; but this was forgot. *Canis festinans, &c.* The 4<sup>th</sup> questions tarted was, Whether the Magistrates should not oblige him, before he came out, to dispone all his effects in favours of his creditor-imprisoner, as is done when one craves a suspension on juratory caution; there being no reason that he, against whom there is ultimate diligence by caption, should have less security than he who had only charged with horning. *Answered*, That though it was reasonable, yet the act of Parliament had adjected no such quality to his liberation, and therefore we might not do it; it was remembered, that the act of Parliament introducing sales, and ordaining the purchaser to pay the price to the creditors, spoke nothing of caution; and yet the LORDS, for the creditors' better security, caused the highest offerer always find caution to make the price forthcoming. THE LORDS here would not burden the liberty with a disposition, but left it to the Magistrates to require it if they think fit; and in Edinburgh they always exact such a disposition from them before they let them out.

1711. December 13.—IN the cause mentioned, *supra* 28th December 1710, about alimentering a prisoner, the LORDS then found that Glaswell, the creditor, being at London, the requisition to Hawthorn, his factor at Edinburgh, was

No 181. sufficient; and that, by the 32d act 1696, the Magistrates had a discretionary power, either to retain the prisoner, though not alimented by the creditor, or to set him at liberty, the words being conceived in permissive terms; 'it shall be leisome to them;' and the act being introduced in favours of the royal burghs, to free them of the aliment of poor prisoners, they can renounce it if they please. Since that time, Durham, by deceiving the keeper, having made his escape, Glaswell and Hawthorn pursue the town of Forfar, in a subsidiary action for payment of the debt. *Alleged*, This being *ex quasi delicto*, it must be strictly interpreted against the pursuers, and favourably for the Town; for *esto* he had escaped, yet they can never be liable, for it was optional to us either to detain him or let him go: For though you once sent him 10s. Sterling, yet that was spent many months ere he went out; and you failing to send more, we were not obliged to keep him any longer, but might by the act dismiss him when we pleased; and cited two cases, Baird *contra* The Magistrates of Elgin, Jan. 25. 1665, *voce* PRISONER; and Feb. 14. 1671, Bairn *contra* The Town of Culross, *IBIDEM*; and the Magistrates were assoilzied in both. *Answered*, Whatever power they had to set him at liberty, yet they did not use it; for the truth is, he beguiled his keeper, whom they imprisoned for his negligence, and they ought to have done it in a legal way, by a judicial act of their Town Council, ordaining him to be set out, in regard the creditor did not aliment him; but this they did not. And so *fecerunt id quod non potuerunt, et non fecerunt quod jure facere potuerunt*. THE LORDS, by the plurality of one vote, assoilzied the Town, and found them not liable.

*Fol. Dic. v. 1. p. 500. Fountainhall, v. 2. p. 616. & p. 687.*

\* \* \* Forbes reports the same case:

1711. December 13.—IN the subsidiary action at the instance of John Glaswell and his factor against the Magistrates of Forfar, for payment of L. 52 : 7 : 5 Sterling, contained in a decret obtained by the pursuers against John Durham, merchant in Montrose, upon this ground, That the said John Durham being incarcerated by a caption for that debt, was suffered to escape out of their prison through the fault or negligence of the jailor, for which the defenders are answerable; the LORDS found the defenders not liable *subsidiarie* to the pursuer; because the act 32d Parl. 1696, empowers Magistrates to set at liberty a prisoner complaining to them that he is not able to aliment himself and deponing thereupon, if the creditor refuse or delay to provide and give security for the prisoner's aliment within ten days after intimation to him for that effect. And in this case, the creditor delayed to provide and give security for such aliment, albeit he was twice required to do it. And whether the prisoner obtained his liberty by a formal order of the Magistrates, or by an escape, *perinde est* to the pursuer, *cui nihil deest*, the one way more than the other.

*Forbes, p. 553,*