

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 timously to incarcerate her debtor; and, secondly, in not having subjected him to such a state of confinement as the law required.

A proof of the usage in similar cases was taken, and it appeared, that in Annan this privilege of open jail had been so commonly bestowed, that there were few examples of its being with-held, where security was afforded against the consequences of the prisoner's escape; and that the Magistrates had been even threatened with prosecution for refusing it, as being an instance of illegal rigour. It farther appeared, that the same custom prevailed in the burghs of Dumfries, Lochmaben, and Ayr.

The defenders *pleaded*, The short delay of imprisonment that is objected to was justifiable. 'By the law of England,' says Lord Bankton, 'messengers ought not immediately to commit to jail the person arrested, but keep him in some safe house for twenty-four hours, that he may have opportunity to order his affairs, and, if possible, to discharge the debt. The same rule,' he adds, 'may be followed by our officers of the law, being founded in reason and humanity.' B. 4. tit. 37. § 14.

The indulgence afterwards granted to the debtor, was the result of an ancient established practice, and accompanied with *optima fides* on the part of the defenders. Even the circumstance of holding a court was not singular in this prisoner, as it has appeared, that another person in the same circumstances, a justice of the peace, had formerly done so there. Acting thus *bona fide* in a public capacity, the defenders ought not to be made liable to so high a penalty for an error, if such it be, into which they have been so innocently betrayed.

It is at the same time an error from which no damage has arisen to the pursuer, nor has she been deprived thus of any legal compulsory. The law does not prohibit any kind of indulgence to prisoners that is given within doors, provided that no danger is to be apprehended from their escape; and here the pursuer was in the most effectual manner warranted against any such hazard.

Another defence arises from the circumstance of the pursuer's accepting a sum of money, as the price of her consent to the debtor's obtaining the benefit the *cessio bonorum*. As the defenders, who are sued in the character of cautioners, have been thus, by the creditor herself, deprived of the use of personal diligence as the means of effecting their relief, her claim against them ought on that account to be debarred. Nay, 'a creditor's dismissing the principal debtor after he is incarcerated,' would, according to the opinion of Lord Bankton, have the effect of liberating the cautioners: B. 1. tit. 10. § 204.

Answered, in every case, without exception, where any unnecessary delay to incarcerate a debtor takes place on the part of the magistrate, the latter is subjected to the payment of the debt; 14th July and 30th Nov. 1622, Sibbald *contra* Blyth, No 12. p. 11691.; 2d July 1669, Farquhar *contra* Magistrates of Elgin, No 44. p. 11716.; 13th June 1781, Bell *contra* Magistrate of Lochmaben, No 78. p. 11756.

With respect to the mode of the imprisonment in question, it is a jest to call it legal. A person in prison who is left with the doors open, and thus at li-

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