

damage so caused. And if he could not be liable to himself, he could not assign any right, either expressly or by implication of law, to any third person, as he had none to convey. No doubt the rights of underwriters are well established, and it is one of these that on payment of the risk as for a total loss they are entitled to all the rights in the injured ship which belonged to its owner, but they are not entitled to more. And if the owner of the "Dunluce Castle" had no right to sue the owner of the "Fitzmaurice," neither can the underwriters on the "Dunluce Castle," whose rights were derived from the owner of that vessel.

I therefore concur in the judgment which my noble and learned friend on the woolsack proposes.

Interlocutor of Court of Session 24th November 1876 varied by inserting after the words "rank and prefer the whole of the other claimants" the words "other than the underwriters" and by inserting a finding that the underwriters Thomas Thomson and others are jointly and severally liable to the applicants Simpson & Co. and others with regard to the expenses occasioned by the discussion between the claimants Thomas Thomson and others and Simpson & Co. and others; and interlocutor of the 10th March 1877 reversed, with a declaration that the objections for Simpson & Co. and Henderson, Hogg, & Co. ought to have been received; and cause remitted with this declaration to the Court of Session; and respondents, the underwriters, ordered to pay to the appellants the costs of this appeal.

Counsel for Simpson & Coy. (Appellants)—Watkin Williams, Q.C. — Mathew. Agents—Waltons, Rubb, & Waltons, Solicitors.

Counsel for Underwriters (Respondents)—Benjamin, Q.C.—Clarkson. Agents—Grahames & Wardlaw, Solicitors.

## COURT OF SESSION.

Wednesday, January 23.

### SECOND DIVISION.

[Sheriff of Kirkcudbright.

#### THOMSON v. MAGISTRATES OF KIRKCUDBRIGHT AND GEDDES.

*Reparation—Act of Grace—Liability of a Governor of a Jail for Release of a Prisoner.*

The governor of a jail on the morning of the tenth day after an award of aliment to a prisoner under the Act of Grace, certified, as was the fact, that there was no aliment in his hands. The prisoner was thereafter upon that certificate liberated by the magistrates. In an action of damages against the magistrates and the governor of the jail—held that the action, as laid against the magistrates was irrelevant, and that the governor could not be held liable, he having merely certified to a fact within his knowledge.

*Opinion per Lord Justice-Clerk, that the*

*maxim dies inceptus pro completo habetur* does not apply where such a limitation would cut off some right of action or deprive a creditor of some advantage.

James Craik was imprisoned in the County Jail of Kirkcudbright on 26th of July 1876 for a debt of £31, 3s. 2d., being the amount of inlying expenses and aliment of an illegitimate child and expenses of process for which decree had been given against him at the instance of Elizabeth Thomson, the pursuer in the present action. Decree for the expenses had been taken out in name of Robert Broatch as agent disburser, and Broatch for the purposes of this action had granted an assignation to Thomson of his right and interest in the decree and expenses.

On 18th August 1876 Craik presented a petition to the magistrates for the benefit of the Act of Grace, and aliment of 1s. a-day was awarded, to be payable from the date of incarceration so long as he should be detained in jail. The prisoner's deposition and the deliverance were intimated to Mr Broatch, the pursuer's agent, by registered letter, received at 6.40 P.M. of 19th August. On the morning of the 29th of August William Geddes, the governor of the prison, issued the following certificate:—

"29th August 1876.—I certify that no aliment is in my hands for maintaining the within designed James Craik.

"WILLIAM GEDDES, Governor of Prison."

This was laid before one of the magistrates, who issued this order for Craik's liberation:—

"Kirkcudbright, 29th August 1876.—On above certificate you are authorised to liberate the prisoner.

"C. FINLAYSON, Magistrate."

He was liberated about 8.30 A.M. About an hour or an hour and a-half after the liberation, by that morning's post, Geddes received a letter from Broatch, posted on the previous day, enclosing £2 as aliment. Craik soon after his liberation obtained decree of *cessio honorum*.

The pursuer raised this action against the Provost and Magistrates of Kirkcudbright and also against Geddes for payment of the £31, 3s. 2d., in respect that the prisoner Craik was wrongfully liberated.

She pleaded, *inter alia*—" (1) By liberating the prisoner within the ten days from the date of the intimation of the deliverance and awarding aliment, notwithstanding sufficient aliment being in the defender William Geddes' hands within that time, the whole defenders, being responsible for the prisoner's safe custody, ought to be held liable for the debt due by the prisoner, or damages sustained by the pursuer and her cedent in consequence of said liberation equivalent to said debt. (2) Said liberation having been granted by the defender William Geddes, and acquiesced in or approved of by the other defenders without authority, or payment of the debt, or a certificate or warrant, they ought to be held liable in the debt or damages as concluded for."

After various procedure the Sheriff-Substitute (Nicolson), on 16th January 1877, pronounced an interlocutor in which he assuaged both the defenders. He added this note:—

"Note.—[After stating the facts]—It thus appears that the prisoner was liberated before the

expiry of the ten days allowed by the Act of Grace within which aliment must be provided; and if this action had been brought before the passing of the Act 2 and 3 Vict. c. 42, the magistrates and town council, in accordance with various decisions to that effect, would have been held liable in respect of the premature liberation for the debt due to the incarcerating creditor. But by that Act (section 18) magistrates of royal burghs are relieved from all responsibility connected with the aliment and custody of prisoners, except such as attaches to them in their judicial capacity as individuals, in common with Sheriffs, to whom similar duties in this relation are committed by the Acts 7 and 8 Vict. cap. 34, sect. 13, and 23 and 24 Vict. cap. 105, sect. 76. The jailor is no longer the servant of the corporation, and only the individual magistrate who grants warrant for the liberation of a prisoner is responsible for it.

“Nor can the jailor be found liable for the premature liberation of a prisoner if the aliment lodged in his hands was exhausted before he granted the certificate in respect of which the warrant for liberation was granted. That it was so long before then is very plain, for the prisoner was incarcerated on 26th July, and, saving the 10s. necessarily deposited by the incarcerating creditors, no aliment was in the jailor's hands till 29th August. The aliment was awarded by the magistrates' interlocutor from the date of incarceration, so that it was actually exhausted on the 5th of August. Even if it had only been allowed from the date of that interlocutor, 18th August, it would have been exhausted on the 28th. The governor, in certifying that there was no aliment in his hands for that prisoner, did no more than his duty, there being no provision for maintaining debtors at the public expense; when the magistrates granted the warrant for the prisoner's liberation the governor's duty was manifestly to carry it into effect.

“The views above embodied are founded on those expressed by the Court in the case of *Lamb v. The Provost and Magistrates of Jedburgh and C. Sprunt*, July 1865, 37 Scot. Jurist 580, to which it seems sufficient to refer in lieu of any more elaborate discussion of the question raised in this case, which in that case were identical. The circumstances were, so far as liability is concerned, exactly the same, save that the liberation in that case was two days before the time instead of one as here.”

The Sheriff (NAPIER) adhered, and the pursuer appealed.

It was then stated for the pursuer that the case as against the magistrates would be abandoned.

Authorities—*Lamb v. Provost and Magistrates of Jedburgh and Sprunt*, July 18, 1865, 37 Scot. Jur. 580; *Smith v. Nicholson and Others*, May 31, 1853, 15 D. 697; *Blair v. Magistrates of Edinburgh*, 1704, M. 3468; *Hood, Henderson, & Company v. M'Kirdy*, December 14, 1813, F.C.; *Ashley v. Magistrates of Rothesay*, June 20, 1873, 11 Macph. 708, (H. of L.) 1 Rettie 14; *Gibb v. Magistrates of Hamilton*, November 13, 1833, 12 S. 28; Bell's Comm., vol. ii. (M'L.) 448.

At advising—

LORD JUSTICE-CLERK—James Craik, who had been imprisoned in the jail of Kirkcudbright for debt, presented on the 18th of August 1876 to

the magistrates of the burgh a petition for aliment, and was awarded 1s. a-day. Mr Broatch, the pursuer's agent, was present, and must have been perfectly well aware of what was done. I reserve my opinion as to what the effect of that amount of intimation might have been. I think it not altogether as clear as has been assumed, that it would have been sufficient, and I assume therefore that the ten days did not begin to run until Mr Broatch heard through the post-office. On the tenth day the governor of the jail was applied to by the prisoner to give a certificate to the effect that no aliment was in his hands for his behoof, and this was done, and in consequence the prisoner was liberated by an order of a magistrate at about half-past eight o'clock on the morning of that day. It was alleged at the hearing that the initiative in applying for the certificate was taken by the defender Geddes, and that he gave the certificate without being asked to do so, but there is no averment to this effect.

It has been suggested, but is scarcely averred, that the prisoner was liberated before the warrant for his liberation was obtained, but the statement on that point is not explicit enough to render it a fact in dispute in the case.

In these circumstances, it was contended that 8.30 A.M. was too early an hour on the tenth day to liberate the prisoner, and that the creditor was entitled to more of that day than was given. It was stated to us at the bar, but not on record, that the jailor had aliment in his hands before the prisoner was liberated, and time was given to have the record amended to this effect, but this has not been done. If such an allegation had been made, we should have allowed the pursuer an opportunity of proving it, but it has not been made, and therefore we come to a consideration of the case on the footing that the prisoner was liberated before any aliment was received.

It is admitted that the magistrates are not responsible—the question is, Is the jailor responsible? I have found no case where it has been held that the jailor in such circumstances is responsible. In *Gibb's* case (quoted *supra*) a false certificate had been given, and even there there was no such finding as is sought in the present case. All that was, then done was that the magistrates' claim of recourse against the jailor was reserved.

The facts as here stated are quite sufficient for a judgment that the jailor is not responsible, and therefore I do not require to deal with the more difficult question about the computation of time.

I have already indicated my opinion that the maxim *dies inceptus pro completo habetur* does not apply in such cases as the present—that is, where such a limitation would cut off some right of action or deprive the creditors of some advantage.

On the whole matter I think we should dismiss the appeal.

LORD ORMDALE—I am of the same opinion, though with a little difficulty on one point.

First, take the case as averred by the pursuer herself. According to her statement, the jailor did not grant the warrant of liberation; he merely certified that no aliment was in his hands, and this he was bound to do on application being made to him by the prisoner.

If the pursuer could have proved that the jailor had granted a false certificate—that while he had alimint in his hands he had certified there was none—the case would have a different aspect, and he might be answerable in damages. But we have no such allegation, and we must assume that the jailor merely stated the fact, and therefore on that certificate he cannot be held liable in damages. He was bound to grant it. He could not have refused it, it being the fact that there was no alimint in his hands. All he had to do was to grant the certificate and leave the question of liberation to the magistrates.

But it is now said that we can see on record an averment that he had liberated the prisoner before granting the certificate. Such a statement ought to have been made in the pursuer's condescendence, but it is not there. We are told that we can find it in the pursuer's answers to the statement of facts of the magistrates, and no doubt something like it is there, but that is not the proper place for it. But even supposing it had been properly averred, I doubt very much if, where in point of fact a certificate is granted that there is no alimint and the debtor is liberated, the mere fact of the warrant being got afterwards would found a claim of damages at the instance of a creditor. I do not see what the creditors had to complain of in this, and on the whole matter I think the appeal should be dismissed.

LORD GIFFORD—I am of the same opinion. I do not doubt that a direct action lies against a jailor who wrongfully lets a prisoner out. But for such an action to lie the creditor must make very precise and accurate allegations in regard to the wrongdoing, and we have not such here.

I take it that the jailor is not the proper judge of when the ten days have elapsed in point of law; all the jailor has to do is to certify any fact within his knowledge.

We are also told that the jailor had superseded the town-clerk, and had taken the certificate to the magistrates himself. I think he did nothing wrong in this. It is said that he interfered at the examination, but I cannot assume that without a far more precise statement than is made.

I concur, that upon the record as it stands there are sufficient circumstances to enable us to assize the defender.

The Court dismissed the appeal.

BLAIR, for the magistrates, moved for expenses against the appellant, and also against Robert Broatch, who he stated was the true *dominus litis*. He argued that the parties could only have been brought here by the assignation above referred to, which was granted by Broatch for his own benefit only. The assignee was suing entirely for the benefit of the cedent.

Authorities—*Hepburn v. Tait*, May 12, 1874, 1 R. 875; *Mathieson v. Thomson*, Nov. 8, 1853, 16 D. 19.

Expenses were granted against the appellant, reserving the parties' claims against Robert Broatch.

Counsel for Pursuer (Appellant)—Nevay. Agent—W. N. Masterton, Solicitor.

Counsel for Magistrates (Respondents)—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Geddes (Respondent)—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Wednesday, January 23.

## SECOND DIVISION.

[Lord Rutherford Clark,  
Ordinary.

### JOHNSTON AND OTHERS (ALLAN'S TRUSTEES) v. HAIRSTENS.

*Trust—Limited Power of Assumption—Stat. 24 and 25 Vict. cap. 84 (Trusts Act 1861), sec. 1.*

By a trust-deed executed in 1857 power was given to assume new trustees in the place of those who should resign, die, or become incapacitated. In 1864 two of the trustees, who were a quorum, assumed two additional trustees, and thereafter resigned. —Held (*rev.* the Lord Ordinary (Rutherford Clark) and following the decision in the case of *Maxwell Trs. v. Maxwell*, Nov. 4, 1874, 2 R. 71), that, under the Trusts Act of 1861, sec. 1, the new trustees were well assumed, and that the qualification stated in that section, that it was only to operate provided "nothing to the contrary was expressed in the deed," did not prevent its application in the circumstances.

*Opinion (per Lord Justice-Clerk) that to limit the powers of assumption conferred by the Act there must be in the deed an express limitation in terms, and that an implication to that effect will not be sufficient.*

The pursuers in this action were the assumed trustees under a trust-disposition in contemplation of marriage, dated in 1857, executed by Miss Helen Hairstens, afterwards Mrs Allan, and its purpose was the reduction of certain deeds executed by the late Mrs Hairstens, Mrs Allan's mother. The defenders were certain children of Mrs Hairstens, beneficiaries under the deeds sought to be reduced. By the above-mentioned trust-disposition Miss Hairstens had, in contemplation of her marriage, made over certain estate which she possessed to the following trustees, whom she named, viz.—Miss Barbara Hairstens and Miss Annie Thorburn Hairstens, and her brother James M'Whir Hairstens. Power was given them under the deed to assume new trustees in certain events. The clause was in these terms—"With power to the trustees, and survivor of them, to assume from time to time other trustees in place of such of their number as shall die or resign or become incapacitated, who shall have the same power as the original trustees."

In 1864 the Misses Hairstens assumed as new trustees the pursuers James Johnston, bank agent, Dumfries, and John Symons, writer there, and a few months thereafter they themselves resigned. James M'Whir Hairstens had all along refused to act with the assumed trustees, and though he was made a party to this action, he stated that it was against his will and authority.