No 75. But there seems to be a ground in equity for a variation, which is, that the Magistrates be made liable *prima instantia*, leaving them upon an assignment from the creditor to discuss the debtor; for it appears more equitable to lay the burden of discussion upon the Magistrates, *in pœnam* of their negligence, than upon the innocent creditor.

Upon this equitable ground, the Magistrates of a burgh having disobeyed a charge to apprehend a debtor under caption, were found liable directly to pay the debt, even after the debtor's death, without necessity of transferring against his representatives the decree upon which the caption proceeded, 26th March 1634, Dunbar *contra* Provost of Elgin, No. 30, p. 11701.

But this rule of equity supposes that the debt is liquidated by a bond or by a decree; for there is no equity to oblige Magistrates to pay any sum in name of reparation, while it remains uncertain whether it may not exceed the debt truly due. And, accordingly, in the case Clerk *contra* Magistrates of Leith, 21st January 1704, No 60, p. 11731, where the claim was illiquid, it was justly found that process could not be sustained against the Magistrates till the extent of the claim should first be ascertained in a process against the debtor.

In the present case the claim is ascertained by decree against the debtor, and one of the articles is ascertained by a bill. And the extent of the debt being thus aseertained, equity, as above, requires that the Magistrates should be directly found liable, reserving to them to discuss the debtor, if they hope to make the debt effectual against him. Upon this ground the foregoing judgment appears to stand, and in that view it appears to be right.

Sel. Dec. No. 219, *p.* 283.

1780. *December* 7.

ANDREW GRAY *against* The MAGISTRATES of Dumfries.

No 76.

IN an action against the Magistrates of Dumfries, for not receiviug and incarcerating a prisoner for debt, duly presented to one of their number by a messenger, it was

Pleaded in defence, 1*mo*, The Town of Dumfries being the head borough of a border county, where debtors attempting to escape from the one country to the other are daily apprehended, it had been their immemorial custom to require the creditor-incarcerator to fix a domicil within the borough, at which intimation might be made, in terms of the statute 1696, c. 32. "Anent the aliment of Poor Prisoners." And this demand not having been complied with in the present case, the Magistrate, who refused to receive the prisoner, was justified by the practice of the borough, however erroneous it might be; *See* CONSUETUDE, SECT. 3.

2*do*, The prisoner was a notour bankrupt: he had no heritable estate: his moveable subjects were under sequestration, and payment could not have been

operated by the *squalor carceris*. The pursuer, therefore, has suffered no damage by the supposed *culpa* of the Magistrates, and, of course, can have no claim against them on that head, Erskine, Book 3. tit. 1. §. 14. Late case, Gillies *contra* Walkers, *see* APPENDIX. No 76.

Answered, Did such a practice, as that alleged by the defender, really exist, it would be very unnecessary and improper. It is, however, sufficient to observe, that the law supposes that, by the *squalor carceris*, payment may be obtained; and this is the foundation of ultimate personal diligence. It is not the part of a Magistrate to retard the execution of that diligence, upon any pretence. If, in breach of his duty, he does so, he must answer for the consequences.

The Court, without entering into an investigation, either of the alleged practice, or of the other circumstances, were of opinion, that the Magistrate, in refusing to aid the diligence of the law, was culpable, and therefore adhered to the judgment of the Lord Ordinary, which was,

"Repels the defences, and finds the defenders liable in the contents of the bills pursued for."

Lord Ordinary, *Braxfield.* Act. *MacLaurin.* Alt. *Crosbie.* Clerk, *Menzies.*

L. *Fol. Dic. v.* 4. *p.* 136. *Fac. Col. No* 6. *p.* 12.

1781. *March* 7.

WILLIAM FULLERTON and DAVID KENNEDY *against* The MAGISTRATES of AYR. No 77.

THE following circumstances were found sufficient to subject the magistrates of a burgh to the payment of a debt due by a prisoner, in terms of the act of sederunt 14th June 1671, entitled, 'An act against the magistrates of burghs 'for letting prisoners for debts go out of the tolbooth.'

Instead of complying with the act, by requiring the attestation of a physician upon oath, bearing that the debtor actually laboured under a disease, attended with deadly symptoms, they had dismissed the debtor, upon the physician's declaring, upon soul and conscience, that the debtor's continuance in confinement might, by reason of his valetudinary state of health, prove fatal to his life; and, instead of confining the debtor in a house within the burgh, and remanding him to prison upon his recovery, they had allowed him to go through the country for the space of five months, in the exercise of his profession as a country surgeon.

It may likewise be remarked, that the magistrates had accepted a bond from the debtor's friends, securing them against the consequences of their procedure.

Lord Ordinary, *Hailes.* Act. *Robertson.* Alt. *Crosbie.*

C. *Fol. Dic. v.* 4. *p.* 136. *Fac. Col. No* 47. *p.* 85.