

it a sufficient defence, that they had the declaration of a surgeon and physician upon soul and conscience. See APPENDIX.

No 84.

Fol. Dic. v. 4. p. 137.

1792. November 16. COLIN BROWN *against* The MAGISTRATES of LANARK.

JOHN MARSHALL, who had been incarcerated in the jail of Lanark, on suspicion of horse-stealing, was arrested in prison, (13th August 1791), on a warrant *meditatione fugæ*, at the instance of his creditor Colin Brown.

On the following night, Marshall escaped, owing, it was alleged, to the insufficiency of the prison, or negligence of the jailor.

A few days afterwards, Brown constituted his debt by a decree in absence before the Sheriff. In February following, Marshall was again imprisoned; and at the next circuit-court he was sentenced to be transported beyond seas, for the crime on account of which he had been originally incarcerated.

Brown pursued the Magistrates of Lanark for payment of his debt, founding chiefly on the act of sederunt, February 11. 1671.

THE LORD ORDINARY sustained the action, and ordered a condescence of facts; against which interlocutor the Magistrates reclaimed, and

Pleaded; 1^{mo}, The responsibility of Magistrates for the escape of a prisoner, a circumstance from which they reap no advantage, and from which perhaps the creditor suffers no loss, is evidently of a penal nature, and founded solely on the act of sederunt, which must therefore receive a strict interpretation. Now, the act speaks only of the debts of rebels, *i. e.* of persons imprisoned on horning and caption, and therefore does not apply to this case.

2^{do}, When a debtor is imprisoned on ultimate diligence, the object of the creditor is to compel payment by the rigour of confinement, whereof any interruption, by the debtor's escape, though he be afterwards recommitted, is in that case a damage, and a ground of claim against the Magistrates; but the sole object of imprisonment on a warrant *meditatione fugæ*, is to obtain security for the prisoner's continuance within the kingdom. And as Marshall has since been recommitted, and is now forthcoming, that object is attained, and no damage can be qualified; 24th January 1786, Gordon *against* Mellis, No 79. p. 11756.

At all events, the Magistrates can only be liable as if they were cautioners for Marshall's appearance. As such, they should have been required to produce him in the course of the pursuer's action; but no such requisition was made.

3^{tio}, Even if Marshall had remained in prison, so as to entitle the pursuer to arrest him on the Sheriff's decree, for the purpose of compelling payment, his

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No 85.

When a prisoner on a warrant *meditatione fugæ*, escapes through the insufficiency of the prison, or negligence of the jailor, the Magistrates of the burgh are not liable for the debt, but they are considered as cautioners *judicio sisti*; and if the prisoner is recommitted before they are required to present him in Court, no claim lies against them.

No 85. person would still have been liable to be withdrawn, on the sentence since pronounced.

Answered; 1mo, The claim against a Magistrate, for the escape of a debtor, lies at common law, on the ground of fault or neglect in the administration of his office. The act of sederunt was merely declaratory of the common law, and thus far in aid of it, that it fixed upon the want of locked doors, or of sufficient fastenings, as facts from which negligence must be presumed. It is therefore to be liberally construed.

2do, Whatever be the object of imprisonment, the Magistrate is equally bound to keep the prisoner safe, and must be equally liable for any culpable failure of attention in that respect.

The recommitment of Marshall does not alter the case. As the debt was constituted only a few days after the debtor's escape, had it not been for that event, he would immediately have been arrested in prison; so that the creditor lost the opportunity of compelling payment *squalore carceris*, during the time he was at liberty. In the case of Gordon, the debtor had been recommitted before the action of constitution was commenced.

Besides a cautioner *judicio sisti* may be required to sist the debtor in Court at any period of the process; and particularly at the final pronouncing of decree, the creditor may insist for caution to produce his person during such a time as shall be requisite for carrying the decree into effect by a caption; Masterton against Hutton, and case of Jean Duncan petitioner, in 1790*.

The situation of the defenders is different from that of ordinary cautioners *judicio sisti*, only in so far as there could be no need of a requisition to them to present a person in Court, whom the pursuer was entitled to believe to be already safe in prison.

3tio, The case of the defenders is no way more favourable, from the circumstance of the first imprisonment having been for a criminal cause, than if it had been at the instance of other creditors. The pursuer was entitled to detain him at his instance, till public justice interfered.

Observed on the Bench; The distinction between imprisonment on ultimate diligence, in order to enforce payment, and on a warrant *meditatione fugæ*, is well founded. The act of sederunt, which is merely declaratory of common law, applies only to the former. When a prisoner on a warrant *meditatione fugæ*, escapes through the fault of the Magistrates, they become cautioners *judicio sisti*, and like other such cautioners, they must be required to present the person of the debtor in Court. The defenders might still raise a suspension of the decree in absence, which would be turned into a libel. The pursuer would then be *in petitorio*, and as the person of the debtor has since been recovered, no claim could lie against the defenders.

* Neither of these cases are reported. See APPENDIX.

One Judge thought that the act of sederunt might apply to this case, because the escape had prevented the pursuer from arresting his debtor on the Sheriff's decree.

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THE COURT assoilzied the defenders.

Lord Ordinary, *Monboddo*. Act. *John Miller junior*: Alt. *Robert Hamilton*.
Clerk, *Colquhoun*.

D. D.

Fol. Dic. v. 4. p. 137. Fac. Col. No 4. p. 10.

1803. *January 27.*

DEAN and ATTORNEY *against* MAGISTRATES and JAILORS of AYR.

WILLIAM THORP, formerly of Buckminster, carried on trade for some time in Bristol, in the course of which he became largely indebted to Niblock and Burgess, merchants there, as well as to William Dean. Before the promissory-notes which he had granted to them became due, he absconded; and in November 1799, an Englishman, who went by the same name, was found living in the burgh of Ayr, along with a woman in the character of his wife.

Niblock and Burgess accordingly, along with James Lang, writer in Edinburgh, their attorney, presented a petition to the Sheriff of Ayr, narrating these circumstances, and concluding, that as there could not be the smallest doubt that Thorp's intention was to defraud the petitioners of their property, and as he appeared to have no fixed residence, that the Sheriff should grant warrant to apprehend him and his pretended wife; and, as the debt was instructed by the promissory-notes, to imprison him till he should find sufficient security to continue within the Sheriff's jurisdiction for six months, and until he should pay the debt with expenses.

They were both brought before the Sheriff for examination.

On examining Thorp, he denied having been in Bristol for seven years; denied his knowledge of Niblock and Burgess, or ever having granted promissory-notes to them, and denied the subscription to the notes to be his. He declared his having been married for eleven years, although he did not know his wife's surname; and for five years had been going from place to place in Scotland and England. The woman, again, denied being his wife, having been married to another man five years before; acknowledged she had lived with Thorp three or four years, travelling with him from place to place, as well as that she had once passed through Bristol with him.

The Sheriff also made Thorp subscribe his name and designation; which seemed to be the handwriting of the subscription to the promissory notes.

Being thus satisfied that he was the real debtor, and that he had eloped from England to avoid the claims of his creditors, and that he would leave Scotland for the same purpose, the Sheriff granted warrant (9th March 1799) to appre-

No 86.

A debtor incarcerated on a *meditatione fugæ* warrant, which had been granted without any oath of credulity, and for a debt to which the creditor had not made oath, having escaped through the negligence of the jailors, the Magistrates were found liable for the debt.