The COURT altered that judgment, and assoilzied the defender. No 79.

Lord Ordinary, *Hailes.* Act. *Corbet.* Alt. *Macenochie.* Clerk, *Menzies.*

S. *Fol. Dic. v.* 4. *p.* 136. *Fac. Col. No* 249. *p.* 382.

No 80.
Magistrates of a burgh found liable for the escape of a prisoner.

1786. *June* 29. PURDIE and COMPANY *against* MAGISTRATES of MONTROSE.

HAY, a debtor of Purdie and Company, having been incarcerated, at their instance, in the prison of Montrose, made his escape from thence in the day-time, by picking the lock of the door of the apartment in which he was lodged,

The Creditors brought an action against the Magistrates for payment of the debt, in terms of the act of sederunt of 11th February 1671.

THE LORD ORDINARY pronounced this interlocutor: 'In respect it is not denied, that upon Sunday, 27th June 1784, when Hay made his escape, the prison of Montrose was kept and secured in the usual way in which it had been kept and secured for many years past, and that the said escape was made by picking a padlock upon an iron lattice-door of the said prison, as to which padlock, no former apparent insufficiency is alleged, assoilzies the defenders."

But the COURT altered that judgment, and found the Magistrates liable for the debt.

Lord Ordinary, *Henderland.* Act. *Baillie.* Alt. *Dean of Faculty & J. Erskine.* Clerk, *Colquhoun.*

S. *Fol. Dic. v.* 4. *p.* 136. *Fac. Col. No* 285. *p.* 440.

1788. *July* 8.

ALEXANDER WILSON *against* The MAGISTRATES of EDINBURGH.

No 81.
Magistrates found liable for the sums due to an incarcerating creditor, even where the debtor had before his release obtained the *cessio bonorum.*

A DEBTOR of Alexander Wilson having been imprisoned in the jail of Canongate, obtained a judgment of the Court of Session, finding him entitled to a *cessio bonorum.* This judgment was pronounced on 11th March, being the last day of the Winter-Session, and immediatejy after he was set at liberty by the jailor.

An action, founded on these proceedings, was brought by Alexander Wilson, against the Magistrates of Edinburgh, as proprietors of the burgh of Canongate, and responsible for the custody of persons confined in the jail belonging to it; when it was

Pleaded in defence, The obligation of magistrates with regard to the keeping of persons arrested for debt has been partly established by the common law,

No 81. and partly by the act of rederunt in 1671. But the present claim is incapable of receiving any support either from the one or from the other.

In the action created by the common law, it is necessary for the pursuer to show some actual loss to have arisen from the enlargement of the debtor, which, however, cannot in the present case be done. After the commencement of the vacation, it was impossible to prevent the extracting of the decreet, so that the debtor must have unavoidably obtained his liberty in a few days. Besides, if it had been competent to bring the question under review, it will not be pretended that the creditor could have urged sufficient reasons for obtaining an alteration of the judgment.

Again, in the action founded on the act of sederunt, it is not perhaps necessary for the pursuer to qualify any actual damage to have ensued from his debtor being set at liberty. But this regulation was merely intended to punish magistrates, who, from motives of personal favour, had permitted those committed for debt to go out of prison, without a necessary cause; whereas, in the present instance, the release of the debtor was not occasioned by any indulgence shown to him by the Magistrates, but by the misapprehension of the jailor, who conceived, that in the peculiar circumstances of the case, it would have been unjust to detain him any longer.

Answered, The general presumption of law undoubtedly is, that by means of the *squalor carceris*, a creditor may obtain payment of what is due to him, either from the debtor himself, or from those who are interested in his enlargement.

And there is nothing in the present case which can give rise to an exception from the general rule. A decreet of *cessio*, before it is extracted, and still more at a time when, by the forms of Court, it is incapable of being extracted, is of no avail. Although it could not be set aside in the Court of Session, it might have been suspended by an appeal to the House of Lords. At any rate, even during the short space that ought here to have intervened between the determination and the complete execution of it, the liberty of the debtor might have been of such importance to his friends, as to have secured the payment of his debts.

As to the meaning put on the act of sederunt, it is entirely destitute of foundation. It is the magistrates alone who, in the contemplation of law, are the keepers of prisons; and, instead of providing only for the case of a release obtained from motives of personal favour, the words of the regulation are quite general, declaring, that without a warrant from the Privy Council, or from the Court of Session, no prisoner shall on any account be discharged, unless in the particular circumstances therein mentioned.

The COURT, considering a creditor to be entitled to demand a rigid confinement of his debtor, during the whole period prescribed by law, pronounced the following interlocutor:

" THE LORDS having considered the informations for the parties, find the Magistrates of Edinburgh liable to Alexander Wilson for the full sums contained in the diligence at his instance, in virtue of which Alexander Crichton, his his debtor, was imprisoned in the jail of Canongate." No 81.

Reporter, *Lord Henderland.* Act. *Dean of Faculty.* Alt. *Buchan Hepburn.*
Clerk, *Menzies.*

C. *Fol. Dic. v.* 4. *p.* 136. *Fac. Col. No* 29. *p.* 47.

1789. *June* 18.

JOHN THOMSON *against* The KEEPER of the Tolbooth of Edinburgh.

No 82.
Whether jail-fees be due by persons imprisoned on a criminal accusation, as well as by those incarcerated for a civil debt?

WILLIAM THOMSON, as charged with accession to the crime of forgery, was committed to the prison of Edinburgh, from which, about five months afterwards, he was liberated, on condition of banishing himself, but without having been brought to trial. Immediately before his enlargement the jailor demanded L. 7, as the prison-fees, which were so much the higher, that at the request of Thomson and of his friends he had been accommodated in the apartments of the civil debtors, instead of being put into that part of the prison which is allotted for criminals. For that sum John Thomson, the brother of William, granted his bill; of which, however, he instituted an action of reduction, on the ground of injustice and concussion; and

Pleaded, In the case of a person imprisoned for a civil debt, jail-fees, it is true, are exigible, and even the creditor-incarcerator is liable for them in the first instance, it being requisite that a fund for the jailor's subsistence should be thus provided. But imprisonment on a criminal accusation is to be viewed in a different light. If the party prove to be innocent, it would be hard, that after having suffered confinement unjustly for the public benefit, he should moreover be compelled to pay for the means of that suffering. On the other hand, if he be found guilty, and, by punishment, answer the demands of justice, it will belong to the public to defray all the expense necessary for accomplishing so salutary a purpose. Accordingly, though the Crown always pays for the aliment of prisoners accused of crimes, nothing is ever allowed by it in name of jail-fees, the obvious reason being, that the former is, but that the latter are not exigible.

Answered, The act of Parliament of 1701, cap. 6. provides, that any liberation from prison under its authority, shall be ' without prejudice to the keeper ' of the prison asking his dues as formerly before the making of this act; the right of exacting prison-fees from persons accused of crimes being thus recognised. On that principle, the Court decided in the case of Rutherford and Gray, 14th June 1712, Fountainhall, Sect. 3. *h. t.* And the constant practice of exacting jail-fees, indiscriminately, from all prisoners in the tol-