1630. *July* 14. JOHN HAY *against* SHERIFF of KINCARDINE.

No 29.
A charge given to a Magistrate to take a rebel, is good for a year and a day.

THE Earl of Marischall, Sheriff of Kincardine, being charged to take James Keith, at the instance of John Hay, burgess of Aberdeen, *in anno* 1629, and for not obeying, the Sheriff is pursued for the sum, 2d July 1630. It was *alleged* for the Sheriff, That he was willing to have taken the rebel, but the pursuer offered not to go with him to shew where he was; likeas, yet he was content to take a day for taking and putting him *cum omni causa*. To which it was *replied*, That the pursuer offers him to prove, that diverse times the rebel was in the Sheriff's house since the charge, and in his company; he might have taken him, and that within a year after the charge; neither was it reason now, after so long a space, the Sheriff should offer to present the rebel; which offer the LORDS repelled, and admitted the reply to the probation of the pursuer. But this was so controverted, that it was delayed to be reasoned again, and further heard.

Fol. Dic. v. 2. *p.* 167. *Auchinleck, MS. p.* 23.

*** Durie's and Spottiswood's reports of this case are No 15. p. 7792. *voce* JUS TERTII.

1634. *March* 26. DUMBAR *against* PROVOST of ELGIN.

No 30.

ONE Dumbar pursuing the Provost of Elgin for payment of a debt owing to him by ——— his debtor, who was rebel, and for not taking of which rebel he had charged the defender, as is usual in such cases, and for not doing whereof he had pursued the Magistrates; who *alleging*, That seeing the rebel, who was debtor, was dead before the intenting of this action, therefore, that no process can be granted against them, while the decreet were first transferred in some to represent him; this allegeance was repelled, and the action sustained, without necessity of transferring in the person of any to represent the principal debtor, seeing the heirs and executors to represent him were called in this pursuit for their interests; which the LORDS found enough, and so sustained the action. See TRANSFERENCE.

Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 168. *Durie, p.* 717.

1634. *November* 11. BROWN *against* TOWN of INVERNESS.

No 31.
Magistrates found liable

ALEXANDER BROWN pursues the Provost and Bailies of Inverness for payment of a debt of L. 90 owing to him by his debtor, because his debtor being incar-

No 31.
for the debt of a person who opened the prison doors by means of quicksilver, because they did not search for him.

cerated by them in their ward, they suffered him to escape. And it being *alleged*, That the debtor, by applying quicksilver to the lock of the prison door, under silence of night, thereby made the door open, and escaped out of the ward, albeit the prison was sufficient, and the lock and door sufficient, if the rebel had not adhibited these unlawful means whereby he escaped, which being in effect *vis major*, the Magistrates ought not therefore to be punished, who are not obliged, nor cannot keep a guard about the tolbooth to attend such accidents; this allegeance was repelled, in respect the Magistrates did no diligence to search and make enquiry for the rebel, whereby it might appear that they were and are excusable from the said escaping, seeing they ought to have sought and followed and asked for him, wherever he might have been apprehended again. And sicklike, it being *alleged* for one of the Bailies convened, That he ought to be assoilzied, because another of the Bailies of the town being in office for the time libelled, when the rebel escaped, whose name he condescended upon, received payment of the debt for which the rebel was incarcerated from the rebel, and thereafter put him to liberty; which Bailie at that time, and by the space of two years thereafter, was responsible to have paid that debt to the creditor, and after that space, the said Bailie becoming irresponsible, *et lapsus bonis*, and the creditor all that time when he was answerable doing nothing to recover payment, nor pursuing the Magistrate, who would have got relief off the Bailie who demitted the debtor, if the pursuer had moved his action in due time, therefore, after so long time, this other Bailie, who committed no fault, ought not to be punished for the wrong done by another, especially where the cause flows most from the creditor's own negligence and cessation, especially also seeing the Bailie who faulted was in equal authority and power with the excipient, and he could not stay him to put the debtor to liberty, albeit he had known it before he demitted him, as indeed he knew it not; for if he had known it, they might have provided for the indemnity of the town, and for the parties' satisfaction. It was *answered* for the pursuer, That every one of the Bailies are obliged to him *in solidum*, and one of their faults burdens all and every one of them, and the rest may either have their relief against the delinquent, or against the Town and whole body thereof. THE LORDS repelled this allegeance, and found the Bailie for whom the exception was proponed liable to the debt, notwithstanding that the other Bailie put him out of ward, and albeit that Bailie was so long responsible, and now is *lapsus bonis*; for Magistrates who are chosen to serve the King and his lieges have this incumbent to them, that parties suffer not by any of their oversights, and any of them failing in duty, is alike as if all had failed; neither was the creditor's negligence imputed to him, to liberate them, because there is no law tying the party in these cases within two years after the fact to pursue the Magistrates: And the Lords reserved action to the Bailies, compearing for their relief, against the Bailie who failed, and also against the town, if he be found irresponsible, for refunding again of this debt, quia propter nexum culpæ omnes tenentur in these cases,

albeit otherwise, regulariter, delicta sequuntur suos auctores; but here, in a case of such circumstances, it deserves consideration, that the debt may be divided amongst the Bailies, and not one to pay all, and to suffer in solidum propter alterius culpam; as also, it might be considered, (as is also consonant in law) that he who failed ought first to have been discussed, as in tutors, qui gessit, primo est conveniendus, qui si non sufficiat, tum demum collega teneatur; but this here needed not, seeing the Bailie proponer of the allegeance confessed the other, qui deliquit, to be irresponsible; and also it might have been considered, that the Bailie being so long responsible tempore offici, et post depositum officium, and the creditor doing no diligence, that *hoc casu* his negligence, (whereby the other Magistrates and the town are frustrated of their relief against the Bailie who failed, and which they would have sought if the creditor had pursued, or intimated to them *debito tempore*) that therethrough the creditor should take himself to his direct party, viz. the Bailie who received his prisoner's money, with whom possibly the creditor might have transacted, or received satisfaction, or otherwise may collude with him, to the prejudice of the other Bailies, and not to have this action sustained against them, who are free of all fault; for it is of hard consequence to insnare Magistrates, after so long time, for another's fault, never made known to them, and which, if the party had signified then, when both he and they might have been safe from the prejudice, they might better have discovered how matters were carried betwixt the Bailie and the party: But it was decided *ut supra*. See SOLIDUM ET PRO RATA.

No 31.

Act. *M'Gill.* Alt. *Gibson.* Clerk, *Hay.*

Fol. Dic. v. 2. *p.* 170. *Durie, p.* 736.

*** Auchinleck reports this case:

A. B. pursues James Cuthbert, Bailie of Inverness, for having committed B. P. to P. ward, at the pursuer's instance, by letters of caption, for the sum of L. 95, and suffered him to escape; and therefore convenes the said James for the debt. It was *alleged* for the defender, That he cannot be pursued for the debt, because he committed the debtor to ward, conform to the caption, there to remain upon his own expenses; and he offers him to prove, that the debtor remained in ward till he had no means to sustain himself; 2*do*, He offered him to prove, that the debtor blew up the lock of the tolbooth door with quicksilver; 3*tio*, He ought to be assoilzied, because he offers him to prove, that Bishop, who was conjunct Bailie with him the time, was the outputter of the rebel, for whose deed he ought not to be answerable, especially seeing the said Bailie was of equal power with him, and is now become bankrupt. To which it was *replied*, That although the rebel was poor, yet the Bailie had no power by his magistracy to put him to liberty, but should have caused the rebel to mean himself to the Lords; To the *second*, It was not relevant, seeing the defender used no diligence for apprehending the rebel again after he had escaped; To the *third*, It was lawful for him to pursue the Bailies, or any one of them that was most responsible,

No 31. because they are *conjunctim in officio*, and if his colleague be irresponsible, the other Bailie pursued may seek his relief off the Town, for choosing an irresponsible Bailie. THE LORDS repelled the whole allegeances, in respect of the reply.

Auchinleck, MS. p. 24.

1635. *December* 3. PATERSON *against* BAILIES of STIRLING.

No 32.
Effect of a qualified or conditional protection.

JOHN PATERSON charged the Bailies of Stirling, by virtue of letters of caption, to apprehend the Laird of Abercairnie; and in respect they having him in their power suffered him to escape, he convened them to hear and see them decerned to pay him the sum. *Alleged*, Absolvitor, in respect they having done diligence against him, and apprehended him, he shewed to them a protection under the Great Seal standing unexpired, whereupon they dismissed him. *Replied*, They were *in mala fide* to let him go, notwithstanding of the protection, in respect it was conditional, bearing in it a provision that he should in the mean time pay his annualrents, which was shewn to the Bailies not to have been fulfilled; and they were charged to apprehend him both for principal and annualrents; and the annualrents not being paid, the protection was void: Likeas, they being conscious thereof, have taken bond of the Lords of Mar and Stormont, and the Laird of Glenagies to warrant them. *Duplied*, It was not the Bailie's part to examine whether the protection was void or not, or to take trial whether the annualrents were paid or not; but finding the rebel sheltered with a protection, they could not commit him to ward, the protection standing unexpired, and no declarator being upon the failzie of payment of annualrents. THE LORDS sustained the exception, this concurring withal, that the rebel had come at that time to Stirling, to assist at the funerals of the Earl of Mar, to whom he was cousin-german.

Spottiswood, (CAPTION.) *p.* 33.

*** Durie reports this case:

JOHN PATERSON pursuing the Bailies of Stirling, for payment of the sum of addebted to him by the Laird of Abercairnie, because they being charged to put him in prison, he being rebel, they demitted him; and the Bailies *alleging*, that he had a protection under the King's Great Seal, which was shewn to them, and was unexpired; likeas, they were charged upon the morrow immediately after the Earl of Mar's burial, the said Laird of Abercairnie being then coming therefrom, he being sister-bairns with the defunct, and then actually at the same, which was a probable cause to excuse the Bailies; and the party *replying*, That the protection cannot excuse the Bailies, because the same hath an express clause inserted therein, providing that the party pay his annualrent to his creditors, which not being done, the protection becomes void; and which