

- No 13. rator of his lands, because he is infeft therein by the King with a gift *de novo damus*, including all non-entries, &c. and must stop his declarator, especially seeing he offers to prove, thar, since the date of his infeftment, he has been in continual possession thereof. *Replied*, Not relevant to purge any non-entry posterior to the said gift *de novo damus*, though it will take away all before, for the King could give no more than was vacant in his own hand the time of the said gift, and therefore he may gift any posterior non-entry, falling by the decease of any vassal after the infeftment, and the same gift ought to be declared. THE LORDS found this exception relevant. After this the pursuer *protested*, That in respect that his declarator of these last lands is stopped by proponing of this allegiance, he might have the benefit to reduce the rights whereupon this allegiance is founded, and to pursue for the mails and duties of the lands, and to make warning, sicklike as if his gift had been declared. Which protestation the LORDS admitted. See NON-ENTRY.

Fol. Dic. v. 1. p. 517. Spottiswood, (NON-ENTRY.) p. 222.

1629. July 27.

LADY CATHCART *against* LAIRD OF CROSSCRAWFORD.

No 14.

IF a Lady be infeft in the annualrent of ward-lands and her infeftment confirmed by the superior, after the decease of her spouse, if she shall take a gift of the ward-land and misken her own infeftment, by virtue of her gift pursue removing of her husband's vassals during the time of the ward; the LORDS will find she can not quarrel her vassal's rights of the said lands, or any part of them, wherein she stood infeft and confirmed by the superior.

Fol. Dic. v. 1. p. 516. Auchinleck, MS. p. 247.

1630. July 14. HAY *against* The EARL of MARISHALL.

No 15.

A MAGISTRATE being charged (even by the first charge) to apprehend a rebel, if he after that have communication with him at any time within year and day, after the charge, and do not apprehend him, he will be liable for the debt owing by the rebel. But attour year and day this will not be sustained upon an old charge.

Fol. Dic. v. 1. p. 516. Spottiswood, (CAPTION.) p. 32.

* * Durie reports this case :

THE Earl of Marshall, as Sheriff of the Mearns, being pursued by a creditor to pay the debt for not taking of the rebel, he being charged to take him.

because he kept company with him divers times thereafter; the LORDS found, that that charge given to the Magistrate should make him liable for obedience thereunto, for the space of a whole year after the date of that charge given to him; and that the same lasted, and was effectual against him during all that space of one year, but for no longer time; and albeit the debt was paid to the principal creditor by one of the cautioners for the rebel, yet that thereby the Magistrate was holden to obey the charge given to him at the said creditor's instance, the rebel not being relaxed, seeing the cautioner, who paid for the rebel, might use the creditor's name for his relief, by charging to take the rebel; and albeit the creditor conversed after the charge with the rebel in Aberdeen diverse times, the said creditor being then Bailie, whereby he had power and occasion to take the rebel; yet the LORDS found the Sheriff not liberate thereby, from obeying the charge given unto him; neither was the Sheriff's offer, to enter the rebel in as good estate, *et cum omni causa*, as he was the time of the first charge, sustained nor received, seeing there were three years past since he was charged; albeit the Sheriff excused himself with a treaty, which was diverse times thereafter kept betwixt the creditor and the rebel for his satisfaction, whereby he had probable cause not to take him; and albeit also that he took him, and incarcerate him in Dunnottar, out of which ward he escaped, and left the keeper for dead; which was not respected, seeing he was not put in ward in a public goal, and was not detained in that ward in Dunnottar in sure firmance, having escaped for want of a sufficient number to guard him, there being only an old potter to attend him, whom the rebel wounded and escaped, whereas, if there had been a sufficient guard, he would not have escaped. See PRISONER.

Act. *Hay et Davidson.*Alt. *Nicolson.*Clerk, *Hay.**Durie, p. 530.*

1642. June 25. WYLLIE against BAILIES of Wigton.

ONE John Ross being taken and warded, by letters of caption, at the instance of Thomas Wyllie, by the Bailies of Wigtoun, and thereafter they setting him at liberty, they are pursued for payment of the debt therefore. And they suspending, that, after he was incarcerate, there was, in a space thereafter, shown to them, a suspension of that decret and debt for which he was incarcerate; to the which the creditors *answered*, That that suspension was impetrate before the party was warded, and was not shown as it ought to have been the time he was warded, nor long thereafter; and after he was warded, the Magistrates could not, at their own hands, put him to liberty, they never being charged to that effect, and the suspension bearing no such clause; likeas, the party remains still rebel, and was never relaxed, and the charger was never summoned.

No 15.

No 16.

Magistrates who had liberated a prisoner without warrant, and were liable for the debt, were found entitled to plead every objection to the debt, which would have been competent to the debtor.