

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.

No 16. to the day of the suspension; so that they cannot be excused to have enlarged the rebel at their own hands, without warrant.—And the Bailies further *answering*, That they had dealt with the Sheriff of Wigtoun to take the rebel again, who took him; and, since he was taken, he died in his company, at which time he was in that same state undeteriorate, as he was in when he was taken; all which being considered, should be enough to liberate the Bailies, who are but of a mean burgh, and ignorant of the strict points of law; the LORDS repelled the exception, and sustained the pursuit, seeing it was found, that they could not enlarge the party, once warded, at their own hands without warrant, specially when the debtor was three years at liberty after he was put out of ward, before he died. But the LORDS permitted the Bailies to say all which the party might say against the debt, if he were living, and to insist in the suspension.

Fol. Dic. v. 1. p. 516. Durie, p. 897.

1671. June 23. The LADY BALLAGAN *against* The LORD DRUMLANRIG.

No 17.

A wife, in her contract of marriage, accepted of certain lands in satisfaction of her terce. These lands holding ward, were found to fall to the superior on the death of her husband, though it was pleaded for the widow, that her right ought to be sustained to the extent of a terce, which excludes ward, and her renunciation of a terce was a private agreement with her husband, not intended to benefit the superior.

IN an action for mails and duties, pursued at the Lady's instance, as liferentrix of the lands of Birks; compearance was made for the Lord Drumlanrig, who *alleged*, That the said lands held ward of him as superior, and the pursuers liferent right not being confirmed, the rents did belong to him during the ward, which is yet running. It was *replied*, That the pursuer's liferent being constitute by a contract of marriage, bearing, that she accepted thereof in satisfaction of all further provision, terce, and third, that acceptation was only in favours of her husband's heirs, but not of the superior; so that, notwithstanding thereof, she might crave the benefit of a terce, as to the said ward lands, which she hath not renounced. *2do*, The superior, founding upon the contract of marriage, cannot quarrel the liferent of the lands of Birks, provided to her by that common brocard of law, *quod approbo non reprobo*. It was *answered* for the superior, That the acceptation of the liferent lands in full satisfaction, as said is, was a renunciation as to all persons whatsoever, that either had, or might have, a real interest in the fee and property; and that the Lady ought to have advised her security better, and obtained a confirmation from the superior of the ward lands, otherwise she might have her recourse against the heir to warrant the same, but cannot prejudice the superior. Likeas the said clause of acceptation, as it will undoubtedly seclude her from all third of moveables, so it ought from all terce; neither can that brocard of law be obtruded in this case, *quod approbo non reprobo*, which is only where in one instrument or writ, such as is a fitted account of debit and credit, or where a person grants, that as he hath right to any thing acclaimed, so he is liable himself to the performance of some other deed, or is debtor as well as creditor; whereas here, the question is only, whether or not the liferenter, by her contract of marriage,