

clause was by the messenger who charged the Bailies intimated to them, and who shewed that the party had not got payment of his annualrents; likeas, they were charged to take him both for principal and annualrents; the LORDS found this exception upon the protection relevant to liberate the Magistrate, albeit it bore the provision foresaid; for the words of the provision were only nakedly conceived, viz. that the party should pay to his creditors their annualrents, but had no other word subjoined thereto, appointing the same to expire or to be null in case of not paying thereof: And the LORDS found, that it was not the Bailie's part, nor of any other inferior judge, to examine and cognosce if the party paid his annualrents or not; neither was there any trial taken if the party had incurred that failzie, which might have put the Magistrates *in mala fide*; and this was the more sustained, seeing the party was desired to be taken the morrow after the Earl Mar's burial, he being his kinsman, coming therefrom.

Clerk, *Scott.**Durie, p. 782.*

1642. January 24.

SMITH against WILLIAMSON.

GEORGE WILSON, smith in Edinburgh, having charged Gilbert Williamson, one of the Bailies of Edinburgh, to incarcerate one Hay, rebel, at his instance, and conform to the charge being put within the tolbooth of Edinburgh, whereout of he escaped; pursues George Suitie and George Rynd, who were two Bailies with the said Gilbert, (he being now deceased) conjunctly and severally to pay the debt; and they *alleging*, That they could not be convened, but only the heirs and executors of the Bailie who did the wrong; the LORDS found, that the party had good action against any of the Magistrates surviving, conjunctly and severally, as well as against the Magistrate deceased, if he were living; and sustained the process against the parties called, without necessity to pursue the heirs or executors of the Magistrate deceased. In this process, the LORDS found it not enough, to prove it by the messenger's execution, that the rebel was warded by that Bailie's command; but found, that it ought to be proved by the witnesses of the execution and the messenger, or by other lawful witnesses or other legal probation; and found no necessity to prove it by the note of the jaylor's book, seeing this pursuer was but a poor smith, and had not so much money to pay the jaylor as he uses to take for in-booking of warders, which he affirmed to be ten or thereby for every hundred for which he was incarcerated; which the Lords found that they would try, and take order for to amend that abuse. See PROOF.—SOLIDUM ET PRO RATA.

Act. ———.

Alt. *Stuart.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 168. Durie, p. 888.*

No 33.

Magistrates will not be excused by the circumstance that the prisoner has not been booked, that being the duty of the keeper.

* * * A similar decision as to booking was pronounced, 6th November 1683, Shaw against Vanse, No 6. p. 9354, *voce* OATH.

No 34. 1642. *June 25.* WYLIE *against* MAGISTRATES of Wigton.

MAGISTRATES found liable for the debt, having set a prisoner at liberty on a bare suspension containing no charge to set at liberty.

Fol. Dic. v. 2. p. 171. Durie.

* * * This case is No 16. p. 7793, *voce* JUS TERTII.

No 35. 1662. *January 10.* ASHURST *against* CUMING.

WILLIAM CUMING, Bailie of Glasgow, is pursued by Henry Ashurst, merchant in London, for suffering Robert Gray, merchant, to escape, being taken with caption, and was presented to the Bailie by the messenger who took him, and required, by way of instrument, to put him in firmance. It was *answered*, That the Bailie was only required at ten o'clock in the night, when he was going to bed: That the Bailie commanded an officer to wait upon the messenger, and take the rebel to prison, there being other two with him; but he did by speed of foot run away, leaving his cloak behind him, before he went to the prison-house; and that now the rebel is re-taken and imprisoned, without any prejudice to the pursuer. It was *replied*, That the Bailie's fault or neglect did render him debtor to the pursuer; and the rebel's incarceration cannot liberate him therefrom,

THE LORDS, before answer, ordained the pursuer to condescend, whether the rebel be in worse condition or not, the time of his incarceration.

Gilmour, No 16. p. 14.

No 36. 1662. *February. 7.* BONNAR *against* FOULIS.

Magistrates found liable for the debts of a rebel, incarcerated on act of warding, and set at liberty by them without warrant.

JOHN BONNAR pursues Robert Foulis to pay the debt of a person incarcerated by act of warding, whom the Bailie set at liberty without warrant. The defender *alleged*, No process, because the person incarcerated was not called, who might have proponed exceptions against the debt, that it was paid, &c. *2dly*, That thereafter the pursuer had taken himself to the incarcerated person, and gotten part of payment from him.

THE LORDS repelled the defences, and decerned; but because there was a reduction depending of the decreet, whereupon the person was incarcerated, and that he was set at liberty *in anno* 1659, when there was no judicatory sitting, they superceded extracting for the time, till the reduction was discussed.

Stair, v. 1. p. 93.