

1665. *January 25.* SIR JOHN BAIRD *against* The MAGISTRATES of Elgin.

SIR JOHN BAIRD pursues the Magistrates of Elgin for the debt of a rebel, whom they suffered to escape forth of their prison. It was *alleged* for the Magistrates, Absolvitor; because they could be obliged no further, but for their ordinary diligence of custody, but not *contra vim majorem*, and offered to prove, that about six o'clock at night, in the winter time, the rebel's Lady going in to sup with him, the keeper opening the prison door to let her in, six or seven armed men pressed in with her, and that there were sixty more at the gate. The pursuer *answered*, *Non relevat*, because it was the keeper's fault to let in any body at that time of night.

THE LORDS found the defence relevant to be proved by witnesses above exception, which were condescended on.

1665. *February 17.* SIR JOHN BAIRD pursues the Magistrates of Elgin for the debt of a rebel, escaping out of their prison, who *alleged*, Absolvitor, because the rebel had the benefit of the act, Debtor and Creditor; and produced the clerk of the bills' certificate thereupon, when he was offered to prison, and being imprisoned jointly for another debt. The Magistrates protested, that they accepted him not prisoner for this debt. It was *answered*, That the benefit of the act contains an express nullity, if the annualrents be not paid conform thereto. The defenders *answered*, That they could not be judge to the discharge, and that upon the like case of a protection of the King's, the Magistrates of Stirling were liberated.

THE LORDS repelled the defence, unless the clerks attest the discharge had been first produced, or shown to the Magistrates before the prisoner was let go. In which case, they might either have refused him, or let him go free.

Fol. Dic. v. 2. p. 170. Stair, v. 1. p. 254. & 272.

* * * Gilmour reports this case ::

ROBERT DUNBAR of Burgie being apprehended upon a caption at the instance of Sir John Baird, and delivered to the Magistrates of Elgin, for non-payment of two debts, one above L. 1000, and another beneath; after he was a fortnight in prison, he escaped, whereupon the Magistrates are convened *actione subsidiaria* for suffering him to escape out of their prison; and for payment of the debt. It was *alleged*, That they could not be decerned to pay the greater sum, because the rebel had taken the benefit of the act of Parliament betwixt debtor and and creditor, and shew a testificate thereof under the clerk to the bills his hand the time of his apprehension; whereupon the Magistrates took instruments, and protested, they should not be holden to detain him in prison for that debt. It was *answered*, That the allegiance was not relevant, unless it had been made appear, that the rebel had paid his annualrents con-

No 39.
Magistrates
not liable for
a prisoner es-
caping *vi ma-
jore*.

Magistrates
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debt of a per-
son escaping,
tho' he had
taken the be-
nefit of the
act Debtor
and Creditor.

No 39.

form to the act. *Replied*, That the Magistrates were not judges to the payment or not-payment of the annualrents; and alleged a practick, where the Magistrates of Stirling being charged to take a rebel who had the King's protection, suffered the rebel to pass, without taking notice whether the annualrent was paid or not. *Duplied*, That the rebel had not the benefit of the act, unless the annualrents had been paid, according to the express condition thereof. Likeas, the rebel being imprisoned, they were *in mala fide* to suffer him to escape, unless upon the said act they had gotten a charge to put him at liberty, which he could not have obtained, except he had shown, that the annualrents were paid; and the practick meets not, for, in the other case, the rebel was not at all imprisoned.

THE LORDS repelled the allegiance and duply; and thereafter, it was alleged that he had escaped *vi majore*, which the Magistrates could not foresee, nor prevent, which, as it was qualified and found relevant, was admitted to probation.

Gilmour, No 143. p. 103.

1667. June 13.

ANTROBUS *against* WILLIAM ANDERSON, Provost of Glasgow.

No 40.
Magistrates were exculpated, because when concurrence was required, the Magistrate was necessarily taken up in the King's service; the concourse of the town-officers was offered; it was late at night; and the rebel was previously bankrupt.

WILLIAM ANTROBUS having caption against John Herbertson in Glasgow, the messenger having therewith taken Herbertson in his own house, and having required William Anderson present Provost to concur and put him in prison, and he refusing, pursues now the Provost for payment of the debt. The defender *alleged*, *imo*, That the libel was not relevant, because it did not subsume, that the rebel was shown to the defender; *2do*, The defender was required, at an unlawful time, being betwixt eleven and twelve at night; *3tio*, The defender offered the concourse of the town-officers; *4to*, The army being come to Glasgow that night, the Provost was taken up at the time he was required, with the ordering of their quarters, which being a public service of greater importance, the offering of the officers was sufficient; *5to*, This subsidiary action being but for the pursuer's damage, he can pretend none, because the rebel was bankrupt and insolvent long before, and he was incarcerated within some few days, where he remained a long time, during which the pursuer might have arrested him; and the defender yet offers to put him in prison in as good case as he then was. The pursuer *answered*, that his libel was most relevant, because the letters being directed to Provosts and Bailies of burghs, if they be required, albeit the rebel be not in their sight, they must go with the user thereof, to any place within their jurisdiction, which they must do in their own persons, and it will not be sufficient to send their officers, and as to the time of requiring, any time that men do use to go about their affairs is sufficient, and the defender was required between seven and eight at