

merks, addrested by the said Sir George to the said Mungo. It was *alleged* for the Sheriff, That the charge was not good, because it was *extra territorium*, neither did the party offer to shew him the rebel, or to go foot for foot with him as he ought to do. To which it was *replied*, That the pursuer offered to prove, that the Sheriff was with the rebel diverse times since the charge given, which is relevant, as he was of sufficient power to take him; and being urged to condescend, he *alleged*, that the rebel had been diverse times in the Sheriff's own house, accompanied by one and himself.—Undecided.

*Auchinleck, MS. p. 23.*

No 26.

1630. *January 16.* ROXBURGH against RENTON.

ROXBURGH had charged Renton, Sheriff of Berwick, to take and apprehend a rebel, and delivers him to the Bailies of Dumfries. After warding, the rebel escaped. The creditor pursues the Sheriff for the debt. THE LORDS absolve him in respect of his diligence.

*Auchinleck, MS. p. 213.*

No 27.

1630. *June 12.* MOWAT against The MAGISTRATES of STIRLING.

MR ROGER MOWAT's charges being suspended by the Bailies of Stirling, who were charged by the first letters upon caption to take one Archibald, rebel, his debtor, wherein the Magistrates disputing, That seeing they had done diligence to take him, and searched for him in the town, and offered to pass with the officer, to take him in any part within their jurisdiction where he would shew them the rebel, as instruments produced bear, therefore they contended, that this obedience of their's should free them, and that letters of horning could not be directed upon the second charge against them, as use was in these cases, while they were charged again of new by other new letters of caption, which supplied again the first new charge and the first letters; seing by their obedience foresaid, these first charges behoved to be held as extinct, and as if they never had been charged by virtue thereof; and the charger *alleging*, That that obedience given by the Magistrates at that one special time, when they were charged by the officer, could not liberate them for time to come; but that the charge once given to them was sufficient, and ought to be effectual to make them liable at any time thereafter to take the rebel, whensoever they should find him within their jurisdiction, and might take him without necessity to use a new charge against them for that effect; for it were a great iniquity, that such obedience at that time should ever liberate the Magistrates, for then at any time thereafter they might converse with the rebel, and intercommune and traffick with him

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Magistrates being charged to take a rebel for debt, are obliged at any time thereafter, without a new charge, to apprehend him, if it is in their power.

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without danger, which were against the law; and it were also hard, that the creditor should be held ever to keep a messenger beside the Magistrates, to be ready ay upon such occasion to charge him, which will tend rather to make him quit his debt, than to bestow such costs thereon, which would exhaust the same;—the Lords found, that the Magistrates once lawfully charged to take the rebel, were held still thereafter to take him, whenever they might conveniently have the occasion, and whenever they should find him within their jurisdiction, and might take him; and that they needed not to be of new charged again for that effect, but that the first charge sufficed therefor, to put them *in mala fide* for not doing of the same thereafter; at least, that they ought to do all lawful diligence to take him, and to qualify some lawful impediment why his diligence was not effectual, which being shewn, he was thereby excusable; as if the rebel had been riding on horseback and had outrun the Magistrates, or had more company with him for the time, and had by force escaped, while others were convening to help the Magistrates, or some such other impediment; in all which cases it is required, that all things were done *bona fide* upon the Magistrates' part. And it being here *alleged*, That after this charge and obedience, the Bailies had seen the rebel within their town, and so that the charge should be found orderly proceeded against them; and the Bailies *contending*, That this was not enough, except it were alleged, that they had seen him at such a time when they had power to take him within their jurisdiction; the Lords found it sufficient to allege, that they had seen him after that disobedience of their's within their jurisdiction, and that it needed not to be alleged, that they then had power to take him, seeing it was presumed that they had power, the rebel being their burghess, and offered to be proved to have been a man past sixty years; which was found to be enough, seeing they alleged no presumption, impediment, or circumstance, to excuse their not obedience, nor to qualify, that the rebel did any deed, or used any force or means to hinder them to take him; and so this allegiance was sustained against the reason. But it is to be considered, that it is not decided how long the Magistrates remain obliged after the charge to take the rebel; for it may be the creditor agree with him, (but that is no excuse to the Magistrate, who is held to do what he is liable in law); and if he cease either for his knowledge of any thing *in facto*, or for presumption of that which may be *in facto*, he ceases *suo periculo*: And in Magistrates in burgh, and other Magistrates whose offices are annual, it may appear that these charges should last during their office, which at furthest is a year; but in hereditary offices, the question is greater.

Act. Prasens &amp; Nicolson.

Alt. Cunninghame.

Clerk, Gibson.

Fol. Dic. v. 2. p. 163. Durie, p. 517.