

No 31.

because they are *conjunctim in officio*, and if his colleague be irresponsible, the other Bailie pursued may seek his relief off the Town, for choosing an irresponsible Bailie. THE LORDS repelled the whole allegiances, in respect of the reply.

Auchinleck, MS. p. 24.

1635. December 3.

PATERSON against BAILIES of STIRLING.

No 32.

Effect of a
qualified or
conditional
protection.

JOHN PATERSON charged the Bailies of Stirling, by virtue of letters of caption, to apprehend the Laird of Abercairnie; and in respect they having him in their power suffered him to escape, he convened them to hear and see them decerned to pay him the sum. *Alleged*, Absolvitor, in respect they having done diligence against him, and apprehended him, he shewed to them a protection under the Great Seal standing unexpired, whereupon they dismissed him. *Replied*, They were *in mala fide* to let him go, notwithstanding of the protection, in respect it was conditional, bearing in it a provision that he should in the meantime pay his annualrents, which was shewn to the Bailies not to have been fulfilled; and they were charged to apprehend him both for principal and annualrents; and the annualrents not being paid, the protection was void: Likeas, they being conscious thereof, have taken bond of the Lords of Mar and Stomont, and the Laird of Glenagies to warrant them. *Duplied*, It was not the Bailie's part to examine whether the protection was void or not, or to take trial whether the annualrents were paid or not; but finding the rebel sheltered with a protection, they could not commit him to ward, the protection standing unexpired, and no declarator being upon the failzie of payment of annualrents. THE LORDS sustained the exception, this concurring withal, that the rebel had come at that time to Stirling, to assist at the funerals of the Earl of Mar, to whom he was cousin-german.

Spottiswood, (CAPTION.) p. 33.

* * * Durie reports this case :

JOHN PATERSON pursuing the Bailies of Stirling, for payment of the sum of addebted to him by the Laird of Abercairnie, because they being charged to put him in prison, he being rebel, they demitted him; and the Bailies *alleging*, that he had a protection under the King's Great Seal, which was shewn to them, and was unexpired; likeas, they were charged upon the morrow immediately after the Earl of Mar's burial, the said Laird of Abercairnie being then coming therefrom, he being sister-bairns with the defunct, and then actually at the same, which was a probable cause to excuse the Bailies; and the party *replying*, That the protection cannot excuse the Bailies, because the same hath an express clause inserted therein, providing that the party pay his annualrent to his creditors, which not being done, the protection becomes void; and which

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.