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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.

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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

night, and albeit that it had been later, that the defender might be excusable not to come out of his own house to search, yet here he was in the same house with the rebel, and in the next room to him, and heard the noise of those that deforced the messenger, which was done by the town's officers; neither can any pretence of ordering of quarters stop the execution of the King's letters, which might have been done with so little diversion, and the quarters might have been ordered by the Bailies.

THE LORDS found the libel relevant; but found the defences jointly also relevant, viz. The ordering of the quarters of the army, the ordering of the officers, and the offer now to put the rebel in prison, in as good case, and the time of night.

Fol. Dic. v. 2. p. 168. Stair, v. 1. p. 460.

* * Dirleton reports this case :

GEORGE ANTROBUS, Englishman, pursues William Anderson, Provost of Glasgow, for L. 234 : 13s. Sterling, due by John Herbertson, sometime Bailie of Glasgow, upon that ground, that being charged to take the debtor upon letters of caption, he had refused to concur with the messenger. It was *alleged*, That the defender was not in sight of the rebel; and thought it be pretended, that it was shown to the defender, that the rebel was in the same house in another room for the time, yet the defender being chief Magistrate and Provost of the town, he was not obliged to go himself to seek the rebel; and it was sufficient he was willing to send his officers, and did send them to that effect, especially it being considered, that the Provost was charged about nine of the clock under night; and the army having come that same night to Glasgow, he was, the very time that the messenger charged, with the Quarter-Master, and other officers, about the business of quartering the forces; all which amounteth to a relevant defence to free the defender of an odious pursuit; the pursuer having no prejudice, in respect the rebel was and is notourly bankrupt, and was imprisoned a few days after, and continued a long time prisoner in Glasgow.

THE LORDS found the allegiance relevant.

THE LORDS are in use to sustain such actions *in subsidium* against Magistrates for payment of the debt, when they suffer the debtor to escape out of prison; but when a Magistrate is charged with letters of caption, bearing no certification, but horning, it appears hard to me, that the law having defined and prescribed the pain and certification, that the LORDS should sustain any other penal action without the warrant of an act of Parliament; and that the Magistrates for a *culpa* or neglect, should be liable to the whole debt, which may be a great sum. If the action be considered, not as a penal action, but for damage and interest, it should be only sustained, in so far as the creditor is prejudged; so that the debt being either recoverable, and the debtor in as

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good case as before, or being bankrupt the time of the charge, the Magistrates may be denounced upon the caption, or censured for their contempt, but ought not to be liable for the debt *in solidum*.

Clerk, *Scot.**Dirleton, No 78. p. 32.*

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Magistrates of a burgh found liable in the debt of a prisoner escaping, tho' they were not magistrates at the time of his escape.

1668. *January 31.* JOHN PAPLAY *against* The MAGISTRATES of Edinburgh.

JOHN PAPLAY pursues the present Magistrates of Edinburgh, for payment of a debt due to him by a person incarcerated in their tolbooth, who escaped.— The defender alleged no process, till the Magistrates who then were, especially Bailie Boyd (by whose warrant the rebel came out) be called. *2dly*, The present Magistrates cannot be liable personally, having done no fault; neither can they be liable, as representing the burgh, at least but *subsidiarie* after the Magistrates, who then were *in culpa*, were discussed now after six or seven years time. The pursuer *answered*, That the prison being the prison of the burgh, the burgh was liable *principaliter*; and if only the Magistrate doing the fault were liable, the creditor might oft-times lose his debt, these being oft-times of no fortune, or fit to govern, and the town who chooseth them is answerable for them; neither is the pursuer obliged to know who were Bailies at that time, or who did the fault, and so is not bound to cite them.

THE LORDS repelled the defences, and found the present Magistrates (as representing the town) liable, but prejudice to them to cite those who did the fault.

Fol. Dic. v. 2. p. 171. Stair, v. 1. p. 517.

. Dirleton reports this case:

JOHN PAPLAY pursued the Magistrates of Edinburgh for payment of a sum of money, because his debtor, Henry Henderson, had escaped out of their prison. It was *alleged*, after six years silence, such a pursuit could not be sustained against the town, and that those who were Magistrates for the time ought to be pursued and discussed in the first place.

THE LORDS sustained the process; and found, That the incorporation being *persona quæ non moritur*, the present Magistrates may be pursued for payment of the debt out of the patrimony of the town, without citing those Magistrates for the time when the debtor escaped, reserving action against the delinquent who suffered the rebel to escape.

Dirleton, No 152. p. 61.

. A similar decision was pronounced, 26th July 1710, Haswell against the Town of Jedburgh, No 7. p. 6827, *voce* INDEMNITY.