

1696. *January 8.* BEATRIX and MARY FLETCHERS *against* FLETCHER.

BEATRIX and Mary Fletchers, daughters to Sir A. Fletcher of Aberlady, gave in a petition against their nephew, representing they had a decret against his father for 200 merks of yearly aliment to each of them out of the estate in 1679, and in time coming; and he being heir served and retoured to him, craved he might be decerned to pay it, as was done formerly. ANSWERED, *1mo.* This ought to be done by a process *via ordinaria*, and not summarily on a bill. *2do.* When that decret was obtained, it was sisters against their brother. *3tio.* They were then minors, and now they are majors. *4to.* The estate was then in better condition than now, by supervenient burdens. REPLIED,---Aliments might be continued without processes, and their favour pleaded to receive it summarily.

The Lords found this case might be taken in by way of bill; but, as to the other defences, they found a nephew was not bound to aliment his aunts, who were now long past their minority, (though it was alleged they were infirm gentlewomen, and unfit for service;) especially seeing, by the condescendence given in of the rental of the estate, and debts affecting the same, it appears not to be very able to bear any farther burden; and if nephews might be obliged to aliment, why not cousins-german, and as far as consanguinity reaches. And, as for the time it ought to last, the Lords, in 1691, would not modify to Jacobina Inglis, a posthumous child of Cramond, longer than to the 12th year of her age; though I find, in a decision recorded by Stair, *10th November 1671, Hasty*, the Lords continued the aliment during minority, at least till he got a calling, or other means to aliment himself. *Vol. I. Page 697.*

1696. *January 9.* HOPPRINGLE of TORSONCE *against* JAMES BORTHWICK of STOW.

THE Lords advised the debate between Hoppringle of Torsonce and Mr James Borthwick of Stow, anent the privilege of building a mill, which Torsonce impeded, alleging the hail lands within the barony were thirled and astricted to his mill; and Stow had raised a declarator of exemption and immunity. The lands held of the Archbishopric of St Andrews, and neither of the parties produced a clear progress:—Torsonce's first right being in 1543, from Ker of Cessford, who was the Bishop's immediate vassal, dispoing the mill *cum astrictis multuris*: Stow's right was prior some months, being a seasine and charter of confirmation, bearing, in the *tenendas, Cum molendinis et multuris*; but the charter confirmed was not produced: so that the Lords found that Torsonce's old charter founded a presumption of a constituted thirlage; and that Stow's charter of confirmation did not supply the want of the charter confirmed, though it was an adminicle thereof; but thought that presumed thirlage might be taken off by more pregnant and stronger presumptions; and allowed them to be farther heard on the nullity of Torsonce's right for not confirmation, neither by the Pope nor King, conform to the Acts of Parliament in 1584, &c. and anent the prescription. Upon a new hearing, the parties enlarged on many grounds,—the one to infer an astriction, and the other to enforce immunity and freedom; out of

which the Lords could not fix on a precise relevancy, but allowed either party, before answer, to prove what qualifications they could adduce, either for astricting thirlage or exemption. Stow did much insist on this ground, That the Lords had oft sustained a charter and seisine not bearing astrictio sufficient to import the lands were disponed *cum omni jure tanquam optimum maximum*, and free of any servitude:—see *26th Noveml<sup>r</sup> 1631, Oliphant*; *7th December 1677, Henderson*; and, though the contrary was once decided, *17th July 1629, L. of Newliston*, yet that decision never had a marrow; and this being a church regality, and an ecclesiastic feu, the Lords were always averse to sustain the astrictio of such lands without a positive constitution; as appears, *12th July 1621, Douglass*; *13th July 1632, The Earls of Morton and Crawford* against *The Feuars of Muckart*.  
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1696. *January 14.* ROBERT ALLAN against JOHN AIRD.

MERSINGTON reported Robert Allan, merchant, against John Aird, bailie of Glasgow, for not obeying the will of the caption by imprisoning Thomas Weir; and so, by a subsidiary action, concluding payment of the debt against him. ALLEGED, *1mo.* The rebel was not presented to me, and magistrates are not bound to search for them up and down their burgh. *2do.* By the Act of Sederunt, 14th July 1671, magistrates are permitted, upon testificates of the prisoner's sickness, and probability of the hazard of death, to set them at liberty till they recover; and this is no more but *debitum humanitatis et misericordiæ*; ergo, *a pari*, a bailie may refuse to imprison a man whom he knows, by attestation of physicians, upon soul and conscience, to be dangerously sick; and, *de facto*, Weir died shortly after. *3tio.* By paction between the bailie and messenger, his incarceration was forborne for some weeks, to see whether he should recover or not.

ANSWERED to the *first*, He opposed the messenger's execution, bearing that he had apprehended the rebel; and so it must be presumed that he presented him to the bailie, unless they would take it off, by offering positively to prove that he was not then in the messenger's custody, but lying sick at home. As to the *second*, The act of sederunt does not meet this case, relating only to debtors already incarcerated; and it were very dangerous to make magistrates judges whether the rebel's sickness be such as he ought not to be incarcerated; for though cruelty is not to be authorised, yet this would open a door to disobey all captions, under pretence that the party feigns himself to be indisposed; and the testificates here are long subsequent to the instrument offering the prisoner. To the *third*, Employers are not to stand to pactions and agreements made by messengers, (only the question is, who shall be liable,—the messenger, malverser, or the magistrate, or both?) without their knowledge, consent, or allowance; else few rebels but will capitulate withthem by the help of a little money.

The Lords, before answer, ordained probation to be led whether the rebel was in the messenger's hands at the time of requiring the bailie; and if he was actually presented to him; and what was his condition of health or sickness at that time.  
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