

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^r 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*.
Vol. I. Page 698.

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.
Vol. I. Page 700.