

1704. November 11. MARGARET BLAIR *against* the TOWN of EDINBURGH.

No 4.

A creditor being required to aliment a prisoner, and no offer of aliment being made, the magistrates set him at liberty on the 10th day at 12 o'clock, alleging that in such favourable cases *dies inceptus habetur pro completo*. The Lords repelled the allegiance.

MARGARET BLAIR pursues the Town of Edinburgh, for suffering Oliver Sinclair, her debtor, to escape out of their tolbooth. *Alleged*, Absolvitor, because by the 32d act, Parliament 1696, it is provided, that if the creditor, ten days after the incarceration, being required, shall not aliment the prisoner, it shall be lawful for the Magistrates to set him at liberty; and *ita est*, this pursuer being required did not aliment, and therefore the Magistrates did liberate him in terms of the act; for they kept him in till the tenth day at 12 o'clock, and no offer of alimentering being made, they were *in bona fide* to let him out, and in such favourable cases *dies inceptus habetur pro completo*. THE LORDS repelled the allegiance, and found the days in the act of Parliament were *tempus continuum*, and to be counted *de momento in momentum*; and they having anticipated some hours, behoved to be liable. *2do*, *Alleged*, That, by this subsidiary action, they could not be decerned for the whole debt in the caption, but only for the sum to which, in booking the prisoner in the tolbooth register, she and the messenger had restricted it, viz. to 210 merks. *Answered*, That, by the common practice, they used not to insert the whole sum for which they were taken, because that made the dues payable to the goodman of the tolbooth, and his under-keepers, very heavy, they exacting a penny for each pound; and therefore, to prevent this, they ordinarily entered them within the debt of the horning and caption to diminish the jailor's fees, and made it about 200 merks; because, by an act of sederunt, 5th February 1675, Magistrates are allowed, where the sum is *within* 200 merks, to set the debtors at liberty in some cases, without putting them to the expense of a charge to set at liberty; and therefore, marking the sum *above* that, whenever they get the charge, they arrest them upon the remanent debt in the caption, and so hinder their liberation. *Replied*, On whatever politic consideration you restrict, we are not concerned; for a Magistrate finding a prisoner entered for 210 merks, if he please he can set him at liberty, and say he will pay the debt himself, and take his hazard; in that case, the creditor-incarcerator could claim no more, neither could he in justice burden him with the rest of the debt contained in the caption, not booked in the tolbooth-records. THE LORDS found the pursuer could crave no more than the restricted sum, but prejudice to her to insist for the superplus of her debt not booked as accords. *3tio*, They craved compensation for the sum of L. 34 Scots she was resting, and whereunto they had acquired right. *Answered*, I must have recompensation upon the remainder of the debt in my caption, not allowed me in this subsidiary action. THE LORDS sustained the recompensation to take off the compensation craved. Then, *4to*, *alleged*, There was neither penalty nor expenses of process due, *ob pœnam plus petitionis*, having pursued for more than what you had imprisoned him for. *Answered*, You must be liable in expenses, because you put me to an act to prove my requiring the

prisoner before the ten days were expired, and I have expended more than all the sum now decerned to me. The LORDS considered this was only a pursuit *ex quasi delicto*, for setting the prisoner at liberty, and that they had a probable ground of mistake and ignorance, on a new statute not yet fully interpreted, to think they might liberate at any time of the tenth day if the creditor did not offer to aliment the prisoner; therefore they assoilzied the Magistrates from expenses; but the LORDS thought the jailor's exaction too high and exorbitant, on the sums due.

No 4.

*Fol. Dic. v. 1. p. 236. Fountainball, v. 2. p. 238.*

1740. February 22.

EXECUTORS of the deceased MRS ANNA LEITH *against* the CREDITORS of the deceased WILLIAM FORBES of Tolquhon, her Husband.

THE said Mrs Anna Leith being provided to an annuity of 20 chalders victual, computing the chalder at 100 merks Scots money, after her husband's decease, and she having lived till the morning of Martinmas 1738, this question occurred betwixt her Executors and her husband's Creditors, which of them was preferable for the same.

THE LORDS found, That the liferentrix having lived to the Martinmas-day, albeit she died on the morning of that day, had right to the term's annuity, which fell due at Martinmas 1738; and therefore preferred the executors of the liferentrix to the creditors.

*Fol. Dic. v. 3. p. 180. C. Home, No. 148. p. 254.*

1762. January 15.

WILLIAM ELLIOT of Arkleton *against* MR JAMES FERGUSSON of Craigharroch, Advocate.

AT the Michaelmas meeting of the freeholders for the county of Dumfries, upon the 6th of October 1761, William Elliot of Arkleton claimed to be enrolled upon titles altogether unexceptionable. It was however *objected* by Mr Fergusson of Craigharroch, a freeholder present, That, as the law requires a claim for enrollment to be lodged two calendar months at least before the Michaelmas meeting; so, by two calendar months were meant, two of those months whereof their names are found in the calendar. And that, of consequence, all claims for enrollment upon the 6th of October ought to have been lodged some time in July, that the months of August and September might be free.

No 6.

A claim for enrollment lodged with the sheriff-clerk at four o'clock in the afternoon of the 6th of August, held sufficient, tho' the Michaelmas head-court convened upon the 6th of October, before two o'clock.