

admitted, that if it had been this way, 'and farther, I assign the heritable bond,' it would have been good.

"It was ANSWERED,—That there is no difference; if it would have been good in the one, so is it in the other; for the cause assigned, 'and for the better enabling,' is only the motive, which can have no influence; and as for the decision in 1670, which seems to determine, in general, that heritage cannot be disposed in a deed which is principally a testament, it is altered by the later decision quoted in the information for the defenders.

"The Lords found as above."

---

1736. *January 27.* THOMAS DOWIE, Merchant in Dundee, *against* THOMAS CROCKET, one of the BAILIES of Edinburgh.

THE question in this case, was whether, when an application for aliment has been made by an indigent debtor, under the Act of Grace, and intimation has been made, in terms of the act, to the creditors at whose instance he was committed; if the debtor, after such intimation, be arrested in prison by another creditor during the running of the ten days, or after the lapse thereof, it is necessary that the magistrates make a new intimation to that other creditor; and if there must be a second running of ten days before the debtor can be liberated? It was found that no such new intimation was necessary, and that unless the creditor arresting after intimation find security to aliment the debtor, he may be liberated immediately on the expiry of the ten days.

Lord KILKERRAN has the following note of what passed at the advising.

"The question is, whether after intimation made, and the ten days elapsed, and no aliment provided, another creditor arresting, new intimation must be made to him on ten days; or if the magistrates may, notwithstanding of such arrestment, liberate the prisoner without any new intimation, unless the creditor arresting, without intimation for that purpose, come and offer security for the aliment.

"It would appear to me that the question turns only upon the general statutory words, requiring only one intimation, and that the last provisional clause, in the end of the statute, alters not the case: for that provision being in these words, 'provided the creditor, at whose instance he is made or detained,' would seem to be no more than an expressing what would have been merely implied, though no such provision had been made, when the provision relates not only to any other creditor detaining, but expressly to him at whose instance the prisoner was made prisoner.

"*Nota.*—The words 'any other creditor, at whose instance he was made or detained prisoner,' seem inept, for that either the word '*other*' is an error in the print, or that between the word '*creditor*' and the word '*at*' there should be the words '*than he*.'

“ The Lords found the defender not liable. In the reasoning some of the Lords laid their opinion upon the law being penal, and that, therefore, as it might be dubious, the Magistrates should be assoilyied. But yet were of opinion that, according to the just construction of the law, there should have been a new intimation to the arrester, and ten days allowed him ; and that such should be the method observed in time coming : *Ita*, Newhall. Others were of opinion that the last clause in the act, ‘ *providing always, that if any other creditor*’ &c. applied to such creditors as should arrest posterior to the intimation, and that these behoved upon this clause, either along with their arrestment to offer security for aliment, or the Magistrates was not bound to take notice of their arrestment after the ten days run : *Ita*, Elchies. And, indeed, the word ‘ other’ would seem to favour this construction ‘ any other creditor.’ But then the following words, ‘ at whose instance he is made or detained prisoner,’ do not seem well to admit this, when these words expressly respect even the creditor at whose instance he was *made* prisoner, and, therefore, this provision is no other than *ex superabundantia*, declaring what the former part of the law implied, as Newhall also observed. In this I agreed with Newhall, but then I was of opinion that the Magistrates ought to be assoilyied, upon the construction of the statutory part of the act, as only requiring intimation at one period, and then to all the creditors who had either made him prisoner, or arrested him after such intimation was made, and the ten days run. The Magistrates was not bound to notice any after arrester of the prisoner. When we came to the vote, which was put thus—find the defender liable or not—it carried by a great plurality not liable ; Newhall, and a few more, voting liable, the vote being understood put upon the construction of the statute ; though, as has been said, we who voted not liable did not all take it upon the same footing.

“ *Nota.*—I had yesterday observed in private to Royston that I inclined to call for the record, doubting there was an error in printing of the said last clause in the act. Upon which he had gone down to the Register, and told on the bench that he had compared the record, and that it was in the same words as we have it printed.”

*N. B.* This case is reported in Fol. Dict. 2—174, (Mor. 11809.)

1736. *January 27.* MISS HENRIETTA MONCREIFF *against* FAIRHOLM of Pilton, her father-in-law, and MRS. FAIRHOLM, her mother.

THE pursuer’s portion, consisting of 12,000 merks, was liferented by her mother, who contracted a second marriage with the defender Fairholm. By the contract of marriage, Mr. Fairholm became bound to aliment and educate the pursuer until she should be married, or until the death of her mother, conform to her rank and quality.

Miss Moncreiff raised an action, concluding for a liquid sum in name of aliment, upon the ground, *Imo*, That it was due by the law of nature, seeing the pursuer was entitled to aliment from her mother, who liferented her fortune, and must, therefore, have a similar claim against her mother’s husband. *2do*, Upon the