

disposition was to be made by him to the whole creditors, or singly to the incarcerator; and that it then carried by the President's casting vote, it behoved to be granted to the incarcerator; and that he did not know if there had been any judgment to the contrary since that time.

“ At the same time, he had no small difficulty upon this point, for that he did not see how such disposition to the incarcerator could subsist, in respect of the act 1696, for that act has effect in favours of every creditor, even where the debtor has become bankrupt on the diligence of the incarcerator himself; that, therefore, he had a difficulty as to the interlocutor, albeit there were such proof as the interlocutor finds there is of the voluntary consent of Elmslie to Forbes's disposing of the goods.

“ I own these were material considerations, and well deserves appointing the petition to be seen.

“ *March 5, 1755.*—It was observed by the PRESIDENT, that agreeable to the decision between Earl Hopeton and Dirleton, (vide *Mor.* p. 1098.) every deed of a notour bankrupt is void and

“ The Lords adhered to the Ordinary's interlocutor, but remitted to Ordinary to hear how far the goods are to belong proportionally to the several creditors.

“ This I have reason to think to be the opinion of the Court, and that I shall so find accordingly.”

1755. *March 6.* JAMES SMITH, Chairman in Edinburgh,—*Petitioner.*

A summary application was made to the Court, setting forth that the said James Smith, who was a chairman in Edinburgh, had been apprehended upon a verbal order from one of the bailies of the city, and committed to prison; that application had been made by him for liberation upon bail, which was refused without any cause being assigned; and that two days thereafter he was taken from prison, and delivered over to a party of the military, and by them carried off.

The fact appeared to be, that the petitioner had been laid hold of under the authority of a press-warrant, and that he was put on board a tender at Leith. The petition prayed that the Magistrate might be ordained to give in answers to the petition, and therein to set forth to what party of the military the petitioner was thus delivered over, to what purpose he was so delivered; and if your Lordships think it proper to make it part of said order, that the petitioner shall either be produced at your Lordships' bar, subject to such after orders as your Lordships shall think proper to make, or that he be lodged in some of his Majesty's prisons, there to remain until liberated by due course of law; or to give the petitioner such other relief in the premises as to your Lordships shall seem just.

Lord KILKERRAN gives the following statement of what passed on the Bench at moving this petition.

“ The PRESIDENT,—In respect of the present circumstances of the nation, when all know press-warrants are issued,—should we interpose, it were to set ourselves in opposition to the law, which is, that the Admiralty have power to issue press-warrants, which the Privy-Council are bound to support. *2d.* A Magistrate not to be complained of summarily; wherefore, he was for finding the

complaint incompetent. He added, that the remedy lay in the Privy-Council or Admiralty, but in no court civil or maritime.

“ ANSWERED,—This is not a complaint against a press-gang, which, if it were, the above first argument might apply.

“ The Lords dismissed the complaint as incompetent.

“ From the showing of the petition, it is out of Bailie Stewart’s power to stop the order which is already execute. It, therefore, resolves into an action of damages, which is not competent by way of summary complaint.

“ I should have no doubt but a summary complaint might be competent to stop the execution of an order which is immediately to be put into execution.”

A second petition was presented by Smith, praying for an alteration of the interlocutor, but it was also refused without answers. Lord KILKERRAN says, “ After differing much, a motion was made to intimate to the lawyers for the Crown, to set forth whether the petitioner is pressed for the King’s service; and the agent for the Crown being present, and averring that he was aboard one of the King’s tenders at Leith,—The Lords refused the petition.”

1755. *March 7.* JOHN HERRIES *against* THOMAS and JOHN LIDDERDALE and THOMAS CARLISLE.

THIS case is reported by Lord Kames, (*Sel. Dec. No. 86. Mor. 2046.*) and in *Fac. Coll. (Mor. 2044.)*

Lord KILKERRAN’S note of what passed on the Bench is as follows:—

“ On advising this complaint, with the answers, it was agreed, that whatever was competent in the case of a foreigner’s coming into this country, for his creditors to do, was in this case competent, as the debtor in this case had his fixed residence in a foreign country. And then the question was, Whether a foreigner could be arrested till he found caution, *judicio sisti et judicatum solvi*?

“ And that he could not be obliged to find caution *judicatum solvi* was given up, as that is in no case allowed but in the Admiralty, and that in causes properly maritime.

“ And as to the caution *judicio sisti*, the question turned upon this, whether as *arresta jurisdictionis fundandæ gratia* were allowed in this country, of effects, it was also competent to arrest the person, which some thought to be competent in no case but where there was a *meditatio fugæ*. But on the other hand, it being observed, that even the arrestment of effects was, for the first time known in Scotland, in the case of Captain Hamilton and the East India Company, from the example of other nations, there was thought more reason (from the example of other nations) to extend it to the arrestment of the person; and accordingly, the Lords ordain the Magistrates not to dismiss the prisoner, unless he found caution *judicio sisti* in any process to be brought in the space of six months.”