DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR JAMES FERGUSON OF KILKERRAN.

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1735. *December* 4.   BRAND *against* BRAND.

FOR a statement of the circumstances of this case, see Morrison, p. 15941, and Folio Dictionary, vol. ii. p. 459.

Lord Kilkerran makes the following observations upon it.

" The Lords sustained the reasons of reduction upon this ground, that heritage could not be disponed in a testament, and so it appears to have been decided 13th July, 1670.

" It was on the other hand observed, that it had been by later Decisions found that a testament and a disposition, *inter vivos*, might be in one writ; and that the doctrine of our law, that heritage cannot be conveyed in testaments, means no other than this, that heritage cannot be conveyed by testamentary words, *legate, bequeath*; as Newhall further observed, in our law, if a man only nominate an heir without disposition, it will have no effect, though the nomination is onerous.

" ANSWERED,—The law is general, that heritage cannot be disponed in testaments : that it is an incongruous thing at best, to sustain in any case a disposition of heritage, and a testament in one deed ; and wherever it is done, they ought to be distinct, whereas here the assignation to the heritable bond is but by way of an executive clause, for the better enabling the executor; and it seems to be

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 disponed 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 commit-
ted; if the debtor, after such intimation, be arrested in prison by another credit-
or 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 liberat-
ed 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 im-
plied, 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 de-
tained 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.*'