

1755. *February 19.* WILLIAM DUFF *against* JOHN CHAPMAN.

THIS case is reported in *Fac. Coll. (Mor. 10046.)* Lord KILKERRAN has the following note of what passed on the bench:—

“*7th February, 1755.*—On moving this petition, the *President* said he had no doubt but that where one is infert upon an heritable bond, he is as much secured by his infertment for the penalty, to the extent of his necessary expenses, as he is for the principal and annualrent.

“The Ordinary answered that he was of the same opinion, but that there had been here no expense laid out in prosecution of the heritable bond on the lands of Alterlies, but upon a separate estate, which also was contained in the heritable bond belonging to another debtor, who was jointly bound in the bond; and on that ground he had pronounced his interlocutor.

“*Feb. 19, 1755.*—The Lords found the petitioner entitled to the penalty to the extent of the expenses laid out by him.

“In the infertment of annualrent in the old form, the principal sum and annualrents only, and expense of the infertment, were heritably secured, but in the heritable bond now in use, the creditor is secured by the infertment, no less for the penalty to the extent of his expenses.

“And of that principle the Ordinary had no doubt, but put his interlocutor on this specialty, that the expenses were not laid out in prosecuting the debt on the subject of this ranking.

“But the Lords did not take this circumstance as sufficient to avoid the demand of expense. It was an heritable bond granted by two persons who were jointly and severally bound in the personal obligation.”

1755. *March 5.* COPLAND and OTHERS *against* GEORGE and ALEX. FORBES.

GEORGE ELMSLIE, merchant in Aberdeen, was debtor to the defender, George Forbes, in L.94, 15s. 9d.; and having been incarcerated, 17th May, 1748, upon a caption raised by Forbes, he applied to the Magistrates of Aberdeen, 10th June, for an aliment under the act of grace. At the time of his imprisonment, Elmslie was also debtor to the pursuer Copland, and others, but the defender Forbes was the only creditor who had raised diligence.

16th June.—Of this date, Elmslie gave in an inventory of his whole effects, and at the same time, without any order to that effect, he also lodged with the clerk of Court a disposition of his whole effects in favour of George Forbes, the incarcerating creditor, *and of the pursuers*, or any two of them, for themselves, and as trustees for his other creditors, for payment of the several debts due to them.

Some time after Elmslie's imprisonment, but before his application for aliment, (7th June,) Forbes attempted to poind his effects; but the messenger being denied access to the house, the poinding was delayed until letters of open doors could be obtained. Elmslie, however, after consulting his friends, gave up the keys to the defender, who, of this date, *25th June*, (being *subsequent* to the disposition *omnium*

*bonorum* above mentioned, by Elmslie, for behoof of his whole creditors) took possession of them and sold them by public roup for his own behoof.

The pursuer complained of these proceedings, and the parties took different steps to assert their several claims.

On the one hand, the defender gave in a petition, (28th June,) to the bailie, setting forth, that Elmslie had been incarcerated at his instance; that an aliment had been decerned to him by the bailie; that in such cases it was usual for the debtor to be ordained to grant a disposition of his effects in favour of the creditor incarcerator; that nevertheless, Elmslie had executed a disposition in favour of his whole creditors, and, therefore, praying that he might be ordained to grant a disposition of his effects in favour of the defender alone. The bailie, accordingly, 2d July, "Having considered the petition, &c. and having considered former decisions in like cases, and that there is no diligence in the field against George Elmslie, at the instance of any other of his creditors; finds that he must dispone his whole effects in favour of the said George Forbes."

On the other hand, the pursuers conceiving that they were entitled to a share of Elmslie's effects, applied to the Magistrates to order the defender to deliver up the first disposition granted by the debtor, (of which he had got possession,) that it might be registered. This having been done, and the disposition registered, the pursuers next brought a process of spulyie against the defender before the Sheriff. After taking a proof, the Sheriff assoilyied from the spulyie, (Oct. 27, 1749,) but found the defenders, George and Alexander Forbes, (Alexander Forbes was the agent of the defender, George Forbes in the previous proceedings,) liable in damages and expenses to the pursuers.

The defenders brought an advocacion, which, having come before Lord Kilkerran, the following interlocutor was pronounced. July 18, 1749.—"Having advised the foregoing debate, and considered the proceedings before the Magistrates of Aberdeen, on Elmslie's application for aliment, and the depositions of the witnesses adduced before the Sheriff in the present process; finds, that notwithstanding the loose and random pleading of the pursuer's procurator before the inferior court, there is no evidence that the defenders had ever approbated the disposition which Elmslie had voluntarily made to his creditors in general, in order to obtain an aliment, and whereof it is a real evidence, that a disposition to himself was thereafter granted by appointment of the magistrates; and finds, that notwithstanding of the said disposition first mentioned, its being lodged in the hands of the clerk of court, it was lawful for the defender, the only creditor who had ultimate diligence, upon authority voluntarily given him by Elmslie, to expose the goods to roup; and finds it instructed, from the depositions in process, and other circumstances of the case, that he had such authority; and that the roup was fairly conducted, and assoilyies the defender from the spulyie; and as to the damage, in respect on comparing the roup-roll with the inventory given in by the pursuer upon oath in his process of aliment, it appears that every particular in said inventory was exposed to roup, and that the pursuers acknowledge they cannot condescend upon any article *ultra* of the said inventory, or upon any article as sold at an under value; sustains the defences, and assoilyies the defender."

The pursuers petitioned against this interlocutor; and the following is Lord KILKERRAN'S note of the subsequent proceedings:—

"November 22, 1752.—When this petition was moved, *Elchies* took notice, that in 1733, upon the question, whether, in the case of one seeking aliment, the

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