coming back of the cause shows, that the order of the House of Lords applies not.

On the 2d July 1774, "The Lords repelled the objection, and found the inhibition valid and subsisting;" altering their interlocutor 1st March 1774.

For Dr Heron, A. Lockhart. *Alt.* P. Murray.

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1774. *July* 3. ALEXANDER FRASER of Torbreck *against* GEORGE MUNRO of Culcairn.

## BANKRUPT.

**Liberal interpretation of the word imprisonment.**

[*Faculty Collection, VI.* 326; *Dict.* 1109.]

GARDENSTON. The judgment of the House of Lords in the case of Woodston, makes *apprehending by a messenger* equal to *imprisonment.* We cannot distinguish between apprehending for a day or apprehending for an hour.

HAILES. A case occurred before me, as Ordinary, *Elliot* against *Scott.* I gave the judgment which this Court gave in the case of *Woodstoun;* but the Court altered my interlocutor, and followed the judgment which the House of Peers gave in that case.

PITFOUR. My doubt is, Whether the House of Peers determined the point of law. The statute 1696 is a salutary one, but the boldest ever made in this country with regard to the retrospect. Had it only determined as to facts, which might have come to the knowledge of creditors, it would not have been so extraordinary.

JUSTICE-CLERK. There is strong evidence of diligence of all kinds having been out against this debtor. He was apprehended more than once, kept in custody for some hours at one time, and an hour at another time. I cannot allow myself to distinguish between custody for *one* hour or *ten* hours. Such distinction would lead to arbitrary conclusions. The taking a man into custody is a matter of more notoriety than the not finding a man at home; but we are not to judge from notoriety. I should be sorry to see the Court waver in a point which has been so well established ever since the decision of the House of Lords in the case of Woodstoun.

KENNET. This statute deserves a liberal interpretation, and so the House of Peers has found, by making custody in the hands of a messenger equal to imprisonment.

COALSTON. Before the decision of Woodstoun the case was doubtful. Judgments to that effect had been given in the Outer-House, and acquiesced in, holding it as a doubtful point. It is now determined in the House of Peers. I think that the judgment of the House of Peers, in a doubtful point, must be the rule. The only question is, Whether there are any special circumstances that tend to distinguish this case from that of Woodstoun. I expected that

Lord Pitfour would have pointed out the distinction. I see none. I cannot enter into the doctrine of notoriety. If I could, the circumstances of notoriety here are as strong as any thing required by the statute.

KAIMES. Here is a statute calculated to obviate different undue preferences. The case which now occurs is not mentioned in the statute. *Quær.* Can we extend the statute to it? I look upon it as a *casus incogitatus omissus per incuriam.* It belongs to a Court of equity to supply that defect. If that is competent to the Court of Session, it is still more to the House of Peers.

ALVA. The nation must have considered this as a settled point for some time. It is dangerous to remove land-marks, although the marches may not be so straight as we would wish.

PRESIDENT. Read the argument in the case of Woodstoun. Lord Hardwicke's opinion lay on this, that a man apprehended was legally in prison. I am entitled to inquire into the proceedings of the House of Lords, as being a court of equity; but the House of Lords has no more power than we have.

[This, in answer to a rash expression of Lord Kaimes, that the House of Lords had still more power in equity than the Court of Session; but which opinion he retracted.]

On the 3d July 1774, the Lords found that the debtor fell within the statute 1696.

*Act.* Ilay Campbell. *Alt.* R. M'Queen.

*Reporter,* Gardenston.

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1774. *July 5.* JAMES HILL *against* MARY HILL.

PERSONAL AND REAL.

**A faculty to burden, to the extent of a certain sum, being reserved in a disposition by a mother to a son, who, of even date, granted a relative personal obligation therefor—whether that sum was thereby made a real burden *de præsenti?* whether the faculty was exercised *habili modo,* by after deeds of the mother's executed with that view?**

[*Fac. Coll. VI.* 321; *Dict.* 10,180.]

MONBODDO. A great deal of the argument goes to matters distinct from the merits of the cause; which turns upon this single point, Whether the 8000 merks are a real burden on the land? I am clear that there is a real burden.

COALSTON. A reserved faculty does not create a real burden on lands. *Here* there was a real burden, if exercised. The difficulty is, that the power has not been exercised in a proper manner: it is in a *personal* not an *heritable* bond. Intention is not sufficient. In the case of a bond secluding executors, intention is not carried into execution.

KAIMES. A *faculty* is not a *burden.* It is neither a moveable nor an heritable subject. But this is an anomalous case; a marriage contract, *ex facie,* containing a *faculty,* but, in another deed of the same date, converted into a