" 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, 1*mo*, 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. 2*do*, Upon the

common law, which, on the analogy of the statute concerning wards, gives an aliment to every fiar whose fee is liferented. *3tio,* On the obligation in the contract of marriage.

In defence, it was pleaded that it was only to the heir of a landed estate that aliment was due by a liferenter; that, moreover, such aliment was due only while the heir was minor, whereas the pursuer was of age; and, lastly, that at all events, Mr. Fairholm was only bound to entertain her in his own family, but not to give her a separate aliment.

The Court found the pursuer entitled to demand a separate aliment. Lord Kilkerran has the following note of the case.

"Whether a father-in-law, in his contract of marriage, obliging himself to aliment his wife's daughter of a former marriage, according to her rank and quality, her whole portion being liferented by her mother, will be obliged to give her a certain sum for her aliment. Or if he can say, it is sufficient that he aliment and educates her in his family?

"I say this is the question as to the topic of *jus naturæ.* I doubt that would not extend to a second husband.

"And as to the topic of liferentrix, though that will extend to the husband who, when he marries the wife, undertook that burden, yet it has never yet been determined, if that held where the liferent was of a personal debt; and indeed the original extension of the act anent wardatars being obliged to aliment the minor, to that of liferenters, seems never to have had any foundation, either from the Act of Parliament, or from analogy of it, when that act speaks of two things that lie upon the wardatar, namely, to aliment the minor, and keep the houses in repair; and when it comes to speak of liferenters, omits the first."

Nota.—"The Lords refused to decide the point as to the liferenter of a sum, in 1667, as far as obliged on the act. But now, as to the question, when put upon Fairholm's obligation, I observed, that in every case where one is obliged for aliment, except that of *jus naturæ,* he cannot free himself by offering aliment in his house; and so a superior cannot *durante warda;* but would it not seem that so was here the intention?

"When this case came to be reported, NEWHALL observed, that where aliments are only craved *super jure naturæ,* the person craving it must accept of it in family, with the father or others liable in it. But that in respect of the obligation in this case, and that the granter was not father, but father-in-law, he thought the pursuer entitled to a separate aliment, and to choose her own residence.

"ELCHIES again that he thought it dangerous to put it upon the footing of an obligation, because often there were such obligations in contracts of marriage to aliment children, *e. g.* daughters to a certain age. But that he thought it should be laid upon the third point, viz. the Act of Parliament obliging the liferenter to aliment the fiar.

"The PRESIDENT finding none of the Lords to be against giving a separate aliment, proposed it should go in general, for which reason no more was said, and it went in general; but had it come to question upon what particular ground to lay it, I had been of Newhall's opinion, agreeable to what I noted yesternight, on readin of the informations."