[He said a great deal more; but his voice is so low that no one could hear his argument.]

On the 28th June 1774, "The Lords preferred the heir of conquest."

Act. W. Baillie. *Alt.* R. M'Queen.

Reporter, Coalston.

1774. *June* 28. JOSEPH CAVE and his ATTORNEY *against* The GOVERNORS of the MERCHANT MAIDEN HOSPITAL of Edinburgh.

HEIR APPARENT.

The Heir Apparent of a person originally vested with a right of presentation to an hospital, by the deed of a third party, was found entitled, without a service, to present upon a vacancy.

[*Faculty Collection, VI.* 318; *Dict.* 5290.]

PITFOUR. This right of presentation may be assimilated to a title of honour, which infers no passive title.

COALSTON. I should have some doubt whether a service, in this case, would not imply a passive title; but I do not think a service necessary. When Mr Cave gives a presentation, he does it *suo periculo.*

N.B.—In this case, there was a material circumstance which escaped the parties. A right of presentation is given when a donation amounts to L.2400, or 3600 merks: *Here* the donation was only 2000, and consequently Cave had no pretence for presenting.]

Act. Ilay Campbell. *Alt.* J. M'Laurin.

Reporter, Gardenston.

1774. *March* 1. PATRICK HERON of Heron, Esq. *against* DOCTOR ANDREW HERON.

INHIBITION—APPEAL.

After appeal taken from judgments of this Court, and served *hinc inde,* it is competent to the pursuer to use an Inhibition against the defender as on a dependance.

[*Faculty Collection, VI. p.* 320; *Dictionary,* 7007.]

HAILES. The order of the House of Lords, 1709, respects not inhibitions; so, by authorising such letters, we offend not against that order. The House

of Lords cannot issue a warrant for letters of inhibition. If we cannot, there is a danger and a wrong without remedy.

GARDENSTON. If the judgment of this Court is affirmed, the inhibition may support that affirmance. If it is altered, the inhibition will not hurt it.

PITFOUR. I doubt how far a distinction can be made between an arrestment which is within the order of the House of Lords and an inhibition.

MONBODDO. Much has been said of the opulence of the debtor; but *that* is out of the question: The creditor may use the diligence of the law. I doubt as to the second point, not on account of the case of *Carlisle*, which is nothing to the purpose. The scruple as to the order of the House of Peers occurred in 1712, as appears from Fountainhall. Indeed the words of that order are strong.

ALVA. Here is nothing more than taking a step in order to preserve the subject in controversy; just like stopping a person *in meditatione fugæ*.

AUCHINLECK. How can *that* be called *execution* which may be used on the very first day of the dependance?

JUSTICE-CLERK. I cannot go upon the consideration of the impropriety of the inhibition. I do not think that the inhibition can be called a diligence in execution, or that it is contrary to the order of the House of Lords. It seems odd, that a man may secure his debtor's estate *in initio litis*, and not after judgment given. The only difficulty is as to the dependance: How can the Court hold that there is a dependance, after that the cause has been removed by both parties into the House of Lords?

COALSTON. Upon the supposition of a dependance, the Court cannot interpose to recal the inhibition: it may be recalled where the libel *ex facie* is calumnious, or when it is nimious,—the debt being fully secured. The only difficulty is, that the inhibition has been raised after an appeal served. It is not perfectly clear that an appeal puts a total end to the dependance in this Court. It is most inexpedient to stop the diligence of inhibition. We are not hampered by the order of the House of Lords.

On the 1st March 1774, "The Lords found, that, after appeal taken in the cause, within mentioned, by both parties, *hinc inde*, and served, there was no dependance in this Court upon which inhibition could proceed; therefore recalled the inhibition complained of."

For the petitioners, A. Crosbie. *Alt.* A. Lockhart.

Diss. Auchinleck, Coalston, Kennet, Hailes.

1774. *July* 2.—COALSTON. The interlocutor stands upon this, that there was no dependance in this Court: *that* is no good *ratio decidendi*. There must be a dependance, but it matters not in what court. It is acknowledged that this Court authorises inhibitions in causes before inferior courts; but it is said *this* is because such quesions *may* be agitated in this Court. This seems an insufficient reason: *here*, however, it is unluckily used, for the cause *must* have come from the House of Lords, and *has* come into this Court. The order of the House of Lords must not be judaically interpreted. It applies not to this cause.

PRESIDENT. I can find no argument to support this interlocutor. The

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.

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