

1755. February 18.

CREDITORS upon the Estate of Woodstone *against* COLONEL SCOT of Cornistone.

No 178.

A debtor was apprehended upon a caption. The messenger detained him in custody for the night, and part of next day, but did not imprison him. He was liberated upon payment of a part of the debt. He was insolvent at the time. The Court found he was not bankrupt in terms of the act 1696; but the decision was reversed on appeal.

FOR several years preceding the 1742, a variety of hornings and captions were taken out against Alexander Turnbull of Woodstone.

On the 31st of March 1742, upon a caption at the instance of one of his creditors, he was apprehended by a messenger, who detained him prisoner for that night and part of next day, but without putting him into a jail; and then liberated him upon payment of part of the debt.

At this time Alexander's debts equalled his subject, so that he was legally insolvent.

On the 17th June 1742, when a caption was again out against him, Alexander Turnbull granted an heritable bond upon the lands of Woodstone for 10,000 merks to General Scot, for security of former claims the General had on him.

In a ranking of the creditors, upon the judicial sale of the estate of Woodstone, Colonel Scot, the son of the general, claimed a preference, upon this heritable bond, to the personal creditors of Alexander Turnbull.

The personal creditors *objected* to the security in the bond: That it was null on the act 1696, cap. 5. in respect that it was granted by Alexander Turnbull when insolvent and a notour bankrupt, in terms of the statute, which was qualified from this circumstance of his having been in the hands of the messenger, as above narrated.

The question came to be, Whether insolvency, joined to custody, for some time, in a messenger's hands, though not in actual jail, made a debtor a notour bankrupt, in terms of the act 1696?

Pleaded for the creditors: At common law, it is wrong in a bankrupt to prefer one creditor to another. To assist the common law, and to prevent the frauds of bankrupt debtors, the statute 1696 was made.

A statute made for preventing fraud is not to be taken literally, but ought to be extended, in order to prevent frauds, to all cases which fall under the purview and reason of the act.

The statute in question enumerates the most common descriptions of bankrupts, as imprisonment, retiring, flying, &c. joined with insolvency; but these exclude not others; they are enumerated only as examples; but all situations of the debtor, which show him to be bankrupt, make him fall under the act.

The strict word *imprisonment* has its equivalents in the law of England; if one escapes from the house of the constable, or even from his arrest, he is guilty of breach of prison.

Imprisonment has its equivalents even in the law of Scotland. If a debtor is in custody of a messenger, a sist on a bill of suspension will not protect him from imprisonment; for his imprisonment after custody is deemed to be no more than a continuation of the same situation; and that, consequently, he is incapable of receiving the benefit of a sist.

That actual imprisonment was not required by the statute, will appear from the consequences of a contrary construction. If a messenger attempts to seize a debtor, and he makes his escape, the debtor is confessedly bankrupt; if he seizes him, but afterwards lets him escape, the debtor, according to this construction, would not be bankrupt. Here, then, the attempt to seize would have a stronger effect than the actual seizure itself. A jail may be at so great a distance, that the debtor for some time cannot be put into it, or he might be in so bad health that he could not be put in prison, or he might die before he was imprisoned; if, in terms of the act, he was not under imprisonment, then all the preferences granted by him during the time of his custody would be good.

Answered for Colonel Scot. The view of the statute 1696 was to bar men in the use of their own property; and therefore it was very precise in describing and ascertaining the particular persons whom it barred; to wit, those who being insolvent were imprisoned, or retired to the Abbey, or fled, or absconded, or had forcibly defended themselves. The notoriety of these acts, by which the lieges were put upon their guard against contracting any more with the debtor, made the law fix upon them as criteria of the bankruptcy of the debtor.

The remedy of the statute is violent. It founds a reduction not only in favour of all creditors doing diligence, but in favour of all having prior debts; it reduces not only deeds granted to anterior creditors for security of their debts, but even all deeds granted to them in satisfaction or payment; and not only conveyances of heritable subjects, but also assignations or other deeds; and this not confined to preferences taken at the time of the bankruptcy, but extended to all those taken during sixty days before it.

A statute, barring the common use of property, and voiding rights validly established according to common law, cannot be extended. It admits of no equivalents; it can be directed against none but those named in it.

The English law, which punishes escape from an officer with the penalties of breaking prison, punishes only the guilty contemners of the law. But the statute 1696 would by this construction punish innocent creditors: the extension, then, which in the one case is proper, in the other is not.

The law of Scotland admits no equivalent upon this statute. Imprisonment upon an act of warding has not been deemed imprisonment within the act, because it had not proceeded upon diligences by homing and caption. (See p. 1095.)

The consequences urged of the difficulty of finding a prison, or of the sickness or death of a prisoner, are so special, that a general law may have overlooked them. It is no objection to a law, that it cannot provide for every unlooked-for contingency.

‘THE LORDS repelled the objections made to the heritable bond, and preferred Colonel Scot to the personal creditors of Woodstone.’

A. & R. Dundas, Lockhart, & Co. Alt. Ferguson, Elliot, & Co. Clerk, Gibson.
J. Dalrymple. Fol. Dic. v. 3. p. 53. Fac. Col. No 139. p. 208.

No. 178.

* * * This Decision was reversed on Appeal; relative to which the following extract is made from the Journals of the House of Lords :

1756. February 27.—AFTER hearing counsel, as well yesterday as this day, upon the petition and appeal of Francis Erskine of Kirkbuddo, George Turnbull writer to the signet, and Jean Turnbull his spouse, and other personal creditors of the deceased Alexander Turnbull of Woodstone, merchant in Montrose, complaining of two interlocutors of the Lords of Session in Scotland, of 22d November 1754, and 18th February 1755, made on the behalf of Colonel John Scott of Comiston, and praying, ' That the same might be reversed, varied, or altered; and that this house would give the appellants such other relief in the premises as to their Lordships, in their great wisdom and justice, should seem meet: ' As also, upon the answer of the said Colonel John Scott, put in to the said appeal, and due consideration had of what was offered on either side in this cause: It is ORDERED and ADJUDGED by the Lords Spiritual and Temporal in Parliament assembled, that the said interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is hereby declared, that Alexander Turnbull having been arrested, and actually in custody of the messenger, upon the caption at the suit of Sir William Ogilvie, was imprisoned within the true intent and meaning of the act of Parliament 1696; and it is therefore ORDERED, that the objection made to the heritable bond of corroboration obtained by General Scott be sustained; and that the respondent Colonel Scott have no preference to the other creditors of the said Alexander Turnbull by virtue of the said bond.

Journals of the House of Lords, p. 501.

1764. November 14.

ELIZABETH MUDIE *against* JAMES DICKSON and JAMES MITCHELL, Trustees for the Creditors of ROBERT STRACHAN.

No 179.

Found, that where a debtor's insolvency is notorious, and he is under diligence by horning and caption; fruitless searches following on a caption, at his usual place of residence, are sufficient evidence of his having absconded.

In the year 1759, Elizabeth Mudie lent to Robert Strachan merchant in Montrose, the sum of two hundred and ten pounds, for which she received his bond.

Strachan becoming embarrassed in his circumstances, on the 11th of June 1762, executed a disposition in favours of James Dickson and James Mitchell, for themselves, and as trustees for the rest of his creditors, of all his effects both heritable and moveable. This disposition was acquiesced in by all concerned, Elizabeth Mudie excepted, who never gave her consent, but went on to operate her payment in the ordinary course of law.

On the 7th of June she executed a horning against the debtor, and afterwards used arrestment in the hands of the trustees, who were then in possession of a great part of the debtor's effects; and also in the hands of two other gentlemen who were owing him considerable sums. On the 30th of the same month, she raised a caption against him, and obtained five executions of search, all of which were within sixty days of the date of the disposition to the trustees.

The trustees, in consequence of the trust-right, disposed of the debtor's effects; but, before they had made any division of the value, two processes were brought