

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 Lord- ' ships, 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 AD- JUDGED 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 re- versed; 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 Wil- liam 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 heri- table 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.

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Found, that where a debtor's in- solvency is notorious, and he is un- der diligence by horning and caption; fruitless searches fol- lowing on a caption, at his usual place of residence, are sufficient evi- dence of his having ab- rounded.

In the year 1759, Elizabeth Mudie lent to Robert Strachan merchant in Mon- trose, 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 them- selves, 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 pay- ment 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

by Elizabeth Mudie, the one a reduction of the trust-disposition upon the bankrupt's acts; and the other a furthcoming against the trustees and the two other gentlemen in whose hands she had used arrestments.

In bar of these actions, three points were *pleaded* by the defenders: *1st*, That Robert Strachan was not rendered a bankrupt in terms of the act 1696, as the several executions of the messengers who searched for him only bore, that he was not to be found in his own house, from which he had removed, and the furniture whereof had been roused some time before the search began; and as he had made several public appearances in the town of Montrose; had frequently transacted business in that place; and had never behaved himself like a man who was under the apprehension of legal diligence: *2^{dly}*, Upon supposition that he was rendered a bankrupt within sixty days of the trust-deed; yet the truth of this ought not to operate a reduction of the disposition; as it was evident, from the spirit and words of the act 1696, that the legislature only intended to prevent partial preferences in favour of particular creditors; and not to render ineffectual dispositions, that were granted for the good of all concerned, without any unfair advantage being intended to individuals: That the trust-right here was conceived in favour of two creditors, for the behoof of the whole, without any preference to them prejudicial to the rest: And, *3^{dly}*, That, though the dispositions were reducible, the pursuer could be entitled to no preference on that account, as the rest of the creditors had been prevented, from employing the same diligence which she had done, from an opinion that the disposition was a sufficient security, and incapable of being reduced; at least, that the defenders were entitled to retain the goods, or prices thereof; of which they were lawfully possessed, before the pursuers' arrestments, for behoof of themselves and other lawful creditors accepting of the disposition, without prejudice to the pursuers taking her share thereof.

It was *answered*, on the part of the pursuer, That Strachan was rendered a bankrupt precisely in the terms of the act of Parliament: That the executions of the messenger were a sufficient evidence in such a question as this, and could not be over-ruled by contrary circumstances being proven, a proof of which was altogether unprecedented and incompetent: That the different searches at the debtor's house were all that could be required; and that his family having left it, on account of his furniture being disposed of, was entirely immaterial: For his children were dispatched to different places; he himself was wandering up and down the country; to be found no where that he was looked for; and destitute of any residence or domicile, except his former habitation, where legal diligence could be executed against him: In fact, however, he had been searched for at his father-in-law's house, where he was suspected to be; but this search proved ineffectual, as appears from the execution produced: That his public appearance in Montrose was mostly on a Sunday; and, when he once appeared on another day, he was obliged to make his escape by a back-lane, otherways he would have been apprehended: *2^{dly}*, That the words of the act of Parliament were general, and intended to frustrate every alienation or other deed done by a bankrupt, within 60 days of his bankruptcy, whereby he might diminish the right of one or

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more of his creditors in favour of the rest : That the law has introduced a preference in favour of such creditors, as follow the measures thereby pointed out, for recovering payment of their debts ; and it would be unjust if any act of the bankrupt could deprive a creditor of this preference, without his own consent : That the disposition in question was never acceded to by the pursuer, and consequently was reducible at her instance. 3dly, As to the hardship with which it would be attended to those creditors who had acquiesced in the disposition, that was a matter of no concern to the pursuer. They had themselves only to blame, if they trusted to a false security, and withheld their diligences, from an opinion that a deed would stand, which they either did know, or ought to have known, was illegal and contrary to law ; and if the trustees were to be allowed to retain the effects, which they had become possessed of, it would resolve into a repeal of this salutary act ; for every creditor whom the bankrupt intended to favour, would only have to get himself named a trustee in such dispositions, and thereby would have an opportunity, not only to secure his own debt, but also to make profit to himself by simulate sales, and other arts in the management of the effects conveyed to him.

“ THE LORDS repelled all these defences ; found the bankruptcy proven ; reduced the disposition ; and preferred the pursuer, in virtue of her diligence, to the effects in the hands of the trustees, and of the other persons in whose hands arrestments had been used.” See Div. 4th, b. t.*

A&A. *Fergusson* and *Ja. Fergusson, junior.* Alt. *Lockhart* and *D. Rae.* Clerk, *Gibson.*
Arch. *Cockburn.* Fac. Col. No 149. p. 353.

1767. January 21.

JOHN and HUGH FINLAYS, Merchants in Glasgow, against JAMES AITCHISON and WILLIAM MOFFAT.

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The execution of a messenger, bearing, that being refused access to the debtor's house, and having broken it open, he had not found the debtor, was not held to be sufficient evidence, that the debtor had fled and absconded, so as to constitute him bankrupt, in terms of the act 1696.

JOHN ROMANIS, merchant in Lauder, February 1. 1762, granted an heritable bond to James Aitchison, on a house belonging to him, for L. 40 Sterling, and on this bond infestment followed next day.

On the 4th February 1762, Romanis granted another heritable bond to William Moffat, on a burghs-acre in Lauder for L. 25 Sterling, on which infestment was taken the day it was granted.

On the 11th February 1762, Romanis executed a trust-disposition of all his moveable subjects, in favours of certain trustees, of whom Robert Henderson messenger was one ; upon which disposition, an instrument of possession was taken next day.

John and Hugh Finlays being creditors to John Romanis in a bill for L. 32 Sterling, raised horning, and transmitted it, with an inhibition on the same ground of debt, to Robert Henderson the messenger, who, unknown to the Finlays, was one of Romanis's trustees, with orders to execute the diligence immediately.

Henderson delayed executing the Finlays diligence ; but, in consequence of a poiding and other steps, he, as trustee, had collected considerable sums belonging to Romanis, upon which the Finlays used arrestments in the hands of Henderson,

* This case is by mistake called MOODIE against LESLY, in Fol. Dic. v. 3. p. 54.