

joined with insolvency, is not sufficient to constitute him a bankrupt, in terms of the act 1696. No 181.

For Elliot, *Wight.*

Alt. *Crosbie.*

Fac. Col. No 66. p. 306.

G. Ferguson.

1771.

FERGUSON *against* SMITH.

No 182.

FOUND that where a debtor's insolvency is notorious, and he is under diligence by horning and caption, a fruitless search following on the caption, at his usual place of residence, is sufficient evidence of his having absconded. See No 179. p. 1104.

Fol. Dic. v. 3. p. 54.

1774. July 5.

ALEXANDER FRASER *against* GEORGE MONRO.

No 183.

THE question which here occurred was, Whether a person (Francis Knowles) who had granted a disposition in favour of one of the parties, of date 5th November 1766, which was now challenged by the other, as falling under the sanction of the statute 1696, was, at the time of granting, within the description of the aforesaid statute?

This case decided in conformity with the judgment of the House of Lords in No 178. p. 1102.

Upon this point, the pursuer condescended upon hornings and captions that had been issued against Knowles; and he offered to prove that Knowles was, about the same period, and within sixty days of the disposition, apprehended by messengers, and taken into custody by them; and although he was not actually imprisoned, yet the foresaid circumstances ought to be held as equivalent, to the effect of rendering him bankrupt, in terms of the statute 1696, agreeably to what was found by the House of Lords, in the case of the Creditors of Woodstone *contra* Colonel Scot, No 178. p. 1102.

A proof was accordingly brought, which amounted to this, That Knowles had been apprehended upon a caption upon the 17th October 1766; and remained with the messenger in a public-house for about the space of two hours, until a bond of presentation was made out; and, upon another occasion, having been apprehended, had remained in a public-house with the messenger for about three or four hours, at which time the whole debt was paid up, except about L. 3 Sterling; and the question came to be, Whether these circumstances were sufficient to bring him under the description of the statute?

Pleaded for the defender: As the criteria of bankruptcy are expressly pointed out in the statute, so, in constructing this statute, productive of so strong and extraordinary effects, the Court have been in use to admit of no equivalents, or

No 183.

to allow it to take effect against any, but those who fall under the literal description of the statute; Snodgrafs and Haldane against the Trustees of Beat's creditors, November 13. 1744, No 174. p. 1095.

The judgment of the House of Lords, in the case of Woodstone, was undoubtedly an extension of the statute, and there is no reason for extending that case to others which are not precisely similar. The two cases, however, are extremely different; for there Woodstone was not only apprehended, but he remained in custody during the remainder of that day, as also during the whole of the night, and part of the next day. His being confined so long in the custody of the messenger was understood, by the House of Lords, as equal to an actual imprisonment; his being confined through the whole of the night, during which time no transaction appears, nor can be presumed to have been going on, might be, with a good deal of reason, considered in the light of an actual imprisonment. But that is very different from the present case, where it would appear, from the proof, that Knowles was not above half an hour in the custody of one of the messengers, nor above an hour at most in the custody of the other; and, as for the rest of the time deponed to, it must have been consumed in drinking, as is always the case on such occasions, after the business is over.

Answered: It cannot surely be expected, that the Court will now go back upon a question which has received the solemn determination of the Supreme Court, and has been understood, ever since that time, to be indisputable. The act 1696 does not say that the bankrupt must be within the walls of a prison. The word *imprisonment* is another word for being in custody, and is put on the same footing with retiring, flying, absconding, or forcibly defending. An execution of search is undoubtedly sufficient to bring a bankrupt under the statute; and it would be unreasonable if actual custody, in consequence of ultimate diligence, should not have the same effect.

The Court were clear to adhere to the decision of the House of Lords, in the case of Woodstone, as establishing a rule that ought to be permanent, and not arbitrary; and that, for the same reason, there was no room for going into a distinction, as to the time or number of hours of a bankrupt's being in the messenger's custody; and, therefore, pronounced the interlocutor following:

'Find sufficient evidence, that, at the time of granting the disposition challenged, Francis Knowles was bankrupt, in terms of the act 1696.'

A&T. *Ilay Campbell.*Alt. *M'Queen.*Clerk, *Tait.**Fol. Dic. v. 3. p. 53. Fac. Col. No 121. p. 326.*

No 184.

An execution
of search
found to af-
ford, *per se,*

1775. July 4.

The CARRON COMPANY, *against* JAMES BERRIE and Others.

JAMES BERRIE and others, creditors of James Wright, merchant in Glasgow, having, in the course of a competition, taken exceptions to an heritable security