in the form of a wadſet, granted by him in favour of the Carron Company, upon the footing of the act of 1696, as having been granted within 60 days of Wright's being notour bankrupt in terms of that ſtatute; the Lord Ordinary, after hearing parties, pronounced the following interlocutor: 'Finds the execution of the 'ſearch is ſufficient evidence of Wright's abſconding from the diligence of his 'creditors; therefore prefers the ſaid James Berrie, and the other creditors men-'tioned in the intereſts produced for them.'

No 184. ſufficient evidence of abſconding, unleſs redargued by proof of very pregnant circumſtances of a contrary tendency.

In a reclaiming bill, on the part of the Carron Company, it was inſiſted, that the execution of the ſearch produced was not ſufficient evidence to bring Wright within the deſcription of a notour bankrupt in terms of the act 1696: That the purpoſe of the act would indeed be ſadly defective, if an execution ſuch as the preſent, (in many inſtances colluſive, and a mere ſham, as in fact it was in this very caſe), were to be held as ſufficient evidence of a debtor's abſconding from diligence: That he did not abſcond, in the proper ſenſe of the word: That there was no ſtop in carrying on his buſineſs: That the Carron Company, in particular, dealt with him afterwards, furniſhed him with goods, and received payments, never dreaming that they were all the while correſponding with a perſon notour bankrupt, and rendered incapable by law of granting any valid ſecurity.

'The Lords, before adviſing the petition with anſwers, allowed the reſpondents, the ſaid James Berrie and others, to prove that James Wright abſconded from the diligence of the law, and all facts and circumſtances material for proving the ſame; and allowed the Carron Company to prove that Wright continued his buſineſs without interruption at the time, and after the date of the ſearch produced, and did not abſcond from the diligence of the law.'

But the proof, when reported, not appearing ſuch as to detract from the meſſenger's returned execution, but rather tending to confirm it; while the burden of the proof in this caſe undoubtedly lay chiefly upon the party who ſought to redargue it: After adviſing the proof, with the petition and anſwers,

'The Court adhered to the Lord Ordinary's interlocutor.'

Act. *Blair.* Alt. *B. W. M'Leod.* Clerk, *Roſs.*

Fol. Dic. v. 3. *p.* 54. *Fac. Col. No* 176. *p.* 92.

1782. *June* 25. ALEXANDER ROSS *againſt* JAMES CHALMERS.

No 185. Found, in conformity with Carron Company againſt Berrie, *ſupra.*

LEARMONTH indorſed ſundry bills to Chalmers, in ſecurity of a prior debt, and ſoon after ſtopped payment. On the ſixtieth day poſterior to the indorſation, a meſſenger, poſſeſſed of letters of caption, ſearched the bankrupt's houſe between the hours of eleven and twelve at night, in order to apprehend and incarcerate him, though without ſucceſs.

A proof offered, that the debtor had left his houſe, not to avoid diligence, but to

An action, for ſetting aſide the indorſations above mentioned, was brought by Mr Roſs, as truſtee for Learmonth's creditors; in which the queſtion occur-

No 185. visit his wife, was held, although it ſhould be made out, not ſufficient to redargue the execution.

red, whether this execution of ſearch was *per ſe* complete evidence of the bankrupt's having abſconded, in terms of the ſtatute 1696.

Pleaded for the defender: The mere abſence of a debtor from his houſe, when a meſſenger intended to have executed a caption againſt him, cannot eſtabliſh this legal qualification of bankruptcy. It is, at the utmoſt, only a circumſtance tending to ſupport ſuch an allegation, and may be elided by proof, that it did not proceed from any purpoſe of avoiding the diligence of creditors. Hence the practice in queſtions of this kind has been, to allow a proof of collateral circumſtances, upon the reſult of which the deciſion is underſtood to depend. This method was followed in the caſes of Finlay *contra* Aitchiſon and Moffat, No 180. p. 1106. and of James Berrie and others *contra* the Carron Company, No 184. p. 1110.: And, in the preſent inſtance, the defender offers to prove, that the common debtor left his houſe that day on which his houſe was ſearched, for the purpoſe of viſiting his wife, who at that time reſided with her father.

Answered for the purſuer: The intention of abſconding being an act of the mind, is only capable of proof from external circumſtances. When, therefore, the debtor's inſolvency is notorious, and he is under diligence by horning and caption, a ſearch, following on the caption, at his uſual place of reſidence, muſt afford legal evidence of this qualification of notour bankruptcy. Accordingly the general ſcope of the deciſions upon this point has been, to hold this circumſtance as ſufficient; Mudie *contra* Dickſon, No 179. p. 1104.; Ferguſſon *contra* Smith, No 182. p. 1109. Nor can the force of this evidence be removed, by the defender's proving, that the debtor's abſence aroſe from different cauſes, which might be alleged in every caſe, and would in a great meaſure fruſtrate the purpoſes of the act.

THE LORDS ſeemed to be of opinion, That the excution of ſearch was of itſelf concluſive evidence of the debtor's having abſconded, and could not be redargued by the proof here offered. They therefore

'Suſtained the reaſons of reduction.'

Reporter, *Lord Stonefield.* Act. *Mat. Ross.* Alt. *Maclaurin.* Clerk, *Menzies.*
Craigie. *Fol. Dic. v.* 3. *p.* 54. *Fac. Col. No* 49. *p.* 78.

1783. *July* 4. EDWARD YOUNG *againſt* JOHN GRIEVE and Others.

No 186.

IN this caſe, the circumſtances of a debtor's not being found in his dwelling-houſe by a meſſenger ready to execute a caption againſt him, and of his family not giving information whither he had betaken himſelf, were conſtrued to be ſuch an abſconding as is founded on, in the act of 1696.

Lord Ordinary, *Westhall.* Act. *Maclaurin.* Alt. *Henry Erskine.* Clerk, *Campbell.*
Fol. Dic. v. 3. *p.* 54. *Fac. Col. No* 111. *p.* 175.
Stewart.