No 179.

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 with-held 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, *h. t.**

Act. *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.

No 180.
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 infeftment followed next day.

On the 4th February 1762, Romanis granted another heritable bond to William Moffat, on a burgess-acre in Lauder for L. 25 Sterling, on which infeftment 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 poinding 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.

and the other truftees; and, having got their diligence executed by another mef-fenger, upon the charge elapfing, a caption was taken out againft Romanis; upon which, on the 12th March 1762, an execution was returned, bearing that the meffenger had broke open, and fearched Romanis's houfe, but could not find him; and had reafon to believe he made his efcape by a back door.

No 180.

Pofterior to thefe proceedings, on the 7th December 1762, Romanis, with confent of his truftees, and William Moffat, expofed the burgefs-acre, in which Moffat had been infeft in confequence of his bond, to roup; and the fame was purchafed by a coufin of John Romanis; and, upon a narrative of having received the price, Romanis difponed the acre to his coufin.

John and Hugh Finlays brought an action upon the ftatute 1696, concluding for reduction of the forefaid heritable bonds and infeftments granted by Romanis to Aitchifon and Moffat, as being within 60 days of his bankruptcy, and in defraud of his creditors.

The Lord Coalfton, Ordinary, allowed a proof, to fhew that Romanis had fled or abfconded, to prevent the execution of the diligence; and afterwards pronounced an interlocutor, finding it proved, that Romanis had abfconded; and therefore reducing the bonds in favour of Aitchifon and Moffat, as granted within 60 days of Romanis's bankruptcy. But afterwards his Lordfhip took the caufe to report to the Court.

Pleaded for John and Hugh Finlays, purfuers: The act 1696 intended that it fhould be in the power of creditors to fruftrate the partial defigns of bankrupt debtors, by making their bankruptcy notorious, whether the debtor would or not; and therefore the act does not ftop at the alternatives of imprifonment, forcibly defending or entering into fanctuary; as it might have been in the power of a debtor to have avoided thefe alternatives, by moving from his ordinary place of refidence; and therefore the act adds, 'or flee or abfcond for his perfonal fecurity.' That from the execution and depofition of the meffenger, in this cafe, it appeared, that he had been refufed accefs into Romanis's houfe, to fearch for him, and that, upon breaking open the door, and fearching the houfe, Romanis was not to be found; and this they contended was fufficient to bring him within the act 1696; as Romanis, though allowed a proof, had not fhown that his abfence was owing to any other caufe than flying from diligence; and, in fupport of this, a decifion, Mudie *contra* Dickfon, &c. November 14. 1764 was referred to. (No 179. p. 1104.)

Answered for the defenders: It is indeed true, that Romanis happened to be from home the night on which the meffenger fearched the houfe; but that was purely accidental; and a fingle act of abfence at the time a fearch happens to be made, can never be conftrued abfconding in the fenfe of the act of Parliament, which exprefsly requires abfconding, for perfonal fecurity; that an execution, although it may be evidence of the facts that happened on the occafion, and prove either that a perfon could not be apprehended, or was not found in a houfe, cannot be admitted as evidence of any other fact, like abfconding, which is extraneous, as the abfence may proceed from various reafons.

No 180.

'The Lords found no sufficient evidence to show that Romanis had absconded, in terms of the act 1696; and therefore repelled the reasons of reduction.'

Reporter *Coalston*. For Finlays, *Jo. Maclaurin*. For Aitchison, *Geo Wallace*. —— *Clerk*.

Fol. Dic. v. 3. *p.* 54. *Fac. Col. No* 54. *p.* 95.

A. Elphingston.

No 181.

A debtor in the custody of a messenger, but not imprisoned, procured a bond of presentation, and failed to appear at the time appointed. These facts, joined with insolvency, found insufficient to constitute him bankrupt in terms of the act 1696.

1768. *March* 3. Elliot *against* Scot.

The common debtor having been apprehended upon caption, escaped imprisonment, by finding security in a bond of presentation, but failed to appear; whereupon a protest was taken, and diligence raised upon the bond.

In a ranking, certain securities, granted within 60 days of the arrest, were objected to, as falling under the sanction of the statute 1696.

Pleaded for the objector: 1*mo*, The design of the statute was to provide a remedy against the frauds of bankrupts; and, though it specifies certain particular alternatives, the remedy was meant to extend to every case, where ultimate personal diligence should be used, without effect. Equivalents, therefore, will supply the place of those alternatives. Being in the custody of a messenger is equivalent to actual imprisonment: A sist, on a bill of suspension, is equally ineffectual in the one case as in the other: And, though a simple arrest may be attended with less notoriety than imprisonment, it is more publicly notorious than the other alternatives of absconding or deforcement. Upon these principles, it was determined in the House of Lords, that a debtor, being actually in the custody of a messenger, was imprisoned in the true intent and meaning of the act 1696; 18th February 1755, Creditors of Woodstone *contra* Scot, No 178. p. 1102.

2*do*, The debtor became notour bankrupt in another view; by failing to appear in terms of the bond of presentation, which must be considered as absconding from diligence.

Answered to the 1*st*:—The statute is correctory, and, therefore, does not admit of equivalents. Accordingly, incarceration on an act of warding, is not deemed imprisonment within the statute: Far less will detention for an hour or two in the hands of a messenger; a thing which might well escape the observation of the lieges, who would be ensnared by such an extension of the law. The decision, in the case of the Creditors of Woodstone, is a single judgment, and hardly reconcileable to principles.

To the 2*d*:—The debtor may have failed to present himself from different accidental circumstances, without an intention to abscond, which will not be presumed without evidence.

'The Lords found, That, although the principal debtor be proved to have been in the custody of a messenger, in virtue of letters of caption; yet this,