

1785. August 9.

JAMES SPEDDING *against* MESSRS HODGSON and DONALDSON.

A MESSENGER having gone to the house of Thomas Bushby, in order to execute a caption against him, and having searched for him there, without being able to find him, reported this proceeding in his *execution*.

In a competition of Bushby's creditors, it was afterwards debated, Whether the above circumstances, joined to his insolvency, were sufficient to bring him under the description of the statute of 1696.

Observed on the Bench: The absence of a debtor from his dwelling-house at a time when he is notoriously insolvent, will create a *presumptio juris* of absconding. Not being, however, a *presumptio juris et de jure*, it may be elided by a contrary proof.

THE LORDS found, 'That Thomas Bushby, by the execution of search produced, fell under the description of the statute 1696.'

Lord Ordinary, *Alva*. A&. *Elphinston*. Alt. *G. Fergusson*. Clerk, *Home*.
Stewart. *Fac. Col. No 229. p. 356.*

No 187.

In this case, likewise, the execution of search sustained as evidence. There is a *presumptio juris* of absconding, if a person notoriously insolvent be absent from his house; but this presumption may be elided by contrary proof.

1785. November 17: GEORGE MAXWELL and Others, *against* ADAM GIB.

MAXWELL, and other creditors of Ebenezer McGeorge, who was insolvent, sued on the act of Parliament of 1696, for reduction of an heritable security granted by their debtor in favour of Gib. In order to establish the statutory bankruptcy, the pursuers produced several executions of caption, bearing, 'That the messenger had apprehended the debtor; but that, without imprisoning or taking him into custody, he had afterwards liberated him on promise of payment.'

The Court repelled that reason of reduction.

Reporter, *Lord Alva*. A&. *Corbet*. Alt. *H. Erskine*. Clerk, *Home*.
Stewart. *Fol. Dic. v. 3. p. 53. Fac. Col. No 231. p. 359.*

No 188.

The apprehending of an insolvent debtor without imprisonment, or taking into custody, held to be insufficient to qualify the statutory bankruptcy.

1789. January 14.

JAMES RICHMOND and Others *against* TRUSTEES of CHARLES DALRYMPLE.

AN assignation by a debtor, in favour of the Trustees of Dalrymple, one of his creditors, was brought under reduction by Richmond and others of his creditors, as having been executed within 60 days of his bankruptcy, contrary to the statute of 1696, cap. 5.

No 189.

Other proof of a bankrupt's imprisonment in

No 189.

terms of the statute, besides a messenger's execution, is admissible. To establish the bankruptcy in this case, parole proof was brought that the bankrupt had been repeatedly apprehended by messengers within the 60 days, but not imprisoned or detained in custody; circumstances held not to be sufficient to constitute bankruptcy in terms of the act.

To establish the debtor's bankruptcy in terms of the statute, the pursuers adduced a parole-proof, of his having been repeatedly apprehended by messengers during the 60 days, but without being imprisoned or detained in their custody.

The defenders *pleaded*: The execution of a caption is an *actus legitimus*; of which no other evidence can be admitted than a regular and formal document; Dirleton, No 102. p. 40. Duke and Duchefs of Monmouth *contra* Scott, *voce* PROOF; Forbes, MS. 25th June 1714, Hafswell *contra* Magistrates of Jedburgh, *voce* PRISONER; Fountainhall, v. 1. p. 356. Glendining *contra* Glendining, *voce* MUTUAL CONTRACT. On this principle, and not on the ground stated in the Faculty Collection, was determined the case of Maxwell *contra* Gibb, No 188. p. 1113.

Answered: Where certain forms are prescribed for giving validity to any legal deed; as the instrument of a notary in sasines, and perhaps too in the consignation of redemption-money, or as the *execution* of a messenger in poidings; these being requisite steps of procedure, are indeed indispensable. But the statute of 1696 has not required, as a solemnity or necessary form, the execution of a messenger. The facts therefore on which that enactment proceeds, may be proved *prout de jure*; nor do any of the cases quoted by the defenders exceed the bounds of the above admission. Their ill-founded idea of the decision, Maxwell *contra* Gibb, is acknowledged to be contradicted by the report of the case.

The Court expressed an unanimous opinion, That there was no ground for supposing the execution of a messenger to be essential to the proof of the facts respecting a bankrupt's imprisonment, which might be equally well established by parole-testimony. But as in this case that evidence was deemed inconclusive, the circumstances proved not amounting to imprisonment, in the sense of the statute, more than in the case of Maxwell and Gibb,

THE LORDS adhered to the Lord Ordinary's interlocutor, annulling the defenders.

Lord Ordinary, *Stonfield*.

A. Tait.

Alt. Hay.

Clerk, Sinclair.

Fol. Dic. v. 3. p. 53. Fac. Col. No 54. p. 95.

Stewart.

1791. March 1.

The CREDITORS of NEIL MACKELLAR *against* DONALD MACMATH.

So early as the year 1771 Mackellar was in embarrassed circumstances, and a great variety of diligences, by horning, inhibition, and caption, was issued against him in the subsequent years.

In the year 1776 he was in the custody of a messenger for some hours, after which he paid the sums due to the creditor at whose instance the caption had been obtained, amounting to L. 150; but he never was put in prison, nor was any written execution of his having been apprehended made out by the messenger.

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After a legal bankruptcy, incapacity continues, till solvency proved. In this case, a debtor who had been indisputably bankrupt in 1771, was, in 1776, for some hours in