country, so far as regards moveables, which are supposed to have no *sinus*, but follow the person of the proprietor: Strother, 1st July 1803, APPENDIX, PART II. *voce* FOREIGN. But although the issuing of a commission may impose a lien upon property within the jurisdiction where it is issued, it cannot be extended to impose a lien upon property not within its jurisdiction, the distribution of which must be regulated according to the legal diligence which has attached it previous to the divestment of the debtor by the assignment. No. 26.

Answered: An assignee under the commission of bankruptcy, must be preferable to an arrester using his diligence subsequent to the date of issuing the commission; for the assignment, whatever be its date, operates *retro*, and vests the assignee with all the effects of the bankrupt from the date of the commission; Blackstone, B. 2. C. 31. § 4. The bankrupt is completely divested by the commision; so much so, that it is the commissioner, and not the bankrupt, who grants the assignment. In the case of bankruptcy, as in the case of death, the law of the domicil must regulate the distribution of the effects belonging to the bankrupt; and a commission of bankruptcy awarded in England or America must have the same effect in regard to moveables situated in Scotland, that that it has in regard to moveables situated in England or America; and as in both these countries it is undeniable, that from the date of the commission, the whole property of the bankrupt is legally vested in the assignees, the competing diligence used subsequently cannot interfere with this transfer. The regulations of every civilized country, in which the bankrupt-law is reduced to a system, are to be received in this country, and regulate the distribution of moveable effects belonging to a foreign debtor.

The Court adhered.

Upon the same day, the Court decided a similar question, Morisons against Isaac Watt, which was the case of an English commission of bankruptcy, which was held to exclude an arrestment used in the country subsequent to its date, but prior to the date of the assignment.

Lord Ordinary, *Cullen*. Act. *Boswell*. Agent, *R. Rankine*.
Alt. *Gillies*. Agent, *J. Taylor*, W. S.

F. *Fac. Coll. No.* 276. *p.* 622.

1808. *May* 17.

JAMES EWING, Trustee on the Sequestrated Estate of MACALLISTER and BRYSON, *against* WILLIAM JAMESON.

No. 27.
The circumstances that a caption was raised against a debtor, and that a messenger with that caption

WILLIAM MACALLISTER, merchant in Glasgow, on the 17th June 1801, granted a disposition of a dwelling-house in Glasgow to William Jameson, who took infeftment thereon on the 19th of that month.

William Macallister's estate was sequestrated soon after; and James Ewing was appointed trustee upon it. He brought an action for reducing the disposition to William Jameson under the act 1696, ch. 5. on the grounds,

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in his possession, but without instructions from the creditor to put the debtor in jail, and without displaying his blazon, or by any form executing the caption, but merely notifying that he had a caption, compelled the debtor to go with him to the chamber of the agent for the creditor, where he (the debtor) remained for an hour, and then was allowed to go away by the consent of the agent for the creditor, no execution being returned by the messenger, are not sufficient to constitute imprisonment in terms of the act 696, ch. 5.

1st, That the disposition was not given for a price then paid, but in extinction of a debt previously due by Macallister to Jameson. *2dly*, That Macallister was then insolvent. *3dly*, That Macallister was imprisoned within 60 days of the date of the sasine.

Jameson in defence denied all these circumstances.

A proof was allowed to both parties (2d December) by the Lord Ordinary; and a state having been prepared and reported, counsel were heard in presence, and memorials were ordered on the whole cause.

On advising these, the interlocutor of the Court (May 15, 1807.) was, "Repel the reasons of reduction, assoilzie the defender from the conclusions "of the action, and decern." This interlocutor was given on this reason, which rendered the consideration of the other points unnecessary, that the Court did not think Macallister had been imprisoned in terms of the act 1696.

The pursuer presented a reclaiming petition, in which he directed his argument chiefly to this point *; and this petition was answered.

The facts of the case in relation to this point, sufficiently appear in the following extracts from the proof. James Elder, writer in Glasgow, who was the law agent of Sir Michael Cromie and Company, depones, "That he was em- "ployed by Leckie, Ewing, and Company, merchants in Glasgow, to raise "ultimate diligence, at the instance of Sir Michael Cromie and Company, "bankers in London, against Macallister and Bryson, merchants in Glasgow, "and William Macallister, one of the individual partners of that Company. "That he accordingly raised such diligence; and for this purpose he put the "caption already in process, soon after its date, into the hands of Macrone and "Fullarton, messengers in Glasgow, with instructions to endeavour to recover "the debt, and for that purpose to apprehend William Macallister; but he "does not recollect that he gave any instructions to incarcerate him. De- "pones, That in consequence of these instructions he has reason to believe "that William Macallister was accordingly apprehended, and kept for some "time in the writing-room of James Macrone, messenger; and his ground of "belief is, that while Macallister was thus in custody of the messenger, he "either came along with the messenger, or sent a message to the deponent, or "to D. Macnayr, writer in Glasgow, then the deponent's partner, requesting "to be liberated; upon which, either the deponent or D. Macnayr communi- "cated the request to Leckie, Ewing, and Company, their employers, who "consented to his liberation; and the deponent further thinks, that the date of "Macallister's being taken into custody, as above described, was the 1st of "August 1801, both from the certificate to that purpose on the back of the

* The defender objected to the competency of parole evidence in this case, on the ground that apprehension by a messenger was an *actus legitimus*, which could only be proved by a regular execution. But the Court did not pay any regard to that plea. It was held to be settled law that parole evidence of apprehension or imprisonment constituting bankruptcy was admissible.

" caption, and from a charge being made in Macrone and Fullarton's books, No. 27.
" against the deponent, for apprehending William Macallister of that date."

Allan Fullarton depones, That " the deponent is certain, from the entry in " the books kept by him and Mr. Macrone, that William Macallister was ap- " prehended on the 1st of August 1801." And he further depones, " That, " after being so apprehended, the deponent carried him to the office of Macnayr " and Elder; and that the deponent, after detaining Macallister there for a short " time, got orders from D. Macnayr to liberate him; and he does not think " that the time from which he apprehended Macallister till the time he liberated " him exceeded an hour. Depones, That he never received any instructions " from Macnayr and Elder to imprison Macallister, but merely to bring him " to their office, in case he did not pay the debt."

John Macausland, a clerk to Macallister, depones, " That in the summer of " that year (1801) but the particular month he cannot recollect, he remembers " that Mr. Macallister went along with Allan Fullarton, a preceding witness, " to the counting-room of Macnayr and Elder, and the deponent understood " that he did so in consequence of Fullarton's having a caption against him at " the instance of Sir Michael Cromie and Company; and when Mr. Macallister " returned to his counting-room, he informed the deponent that he had ob- " tained a delay in payment of the debt for which the caption was raised. " Depones, That he does not think there was an interval of an hour between " the time Macallister went out with Fullarton and his returning to his count- " ing-house."

There was a certificate on the back of the caption, which in substance agreed with Fullarton's deposition, and it was admitted not to be a regular execution. On the facts thus proved, it was argued,

For the pursuer.

The apprehension of a debtor upon a caption, and his being actually in the custody of a messenger, is imprisonment in the meaning of the act 1696, ch. 5. This is fixed by the judgment of the House of Lords in the case of Woodston against Scott in 1755, No. 178. p. 1102. and by a variety of cases since decided agreeably to that judgment.—Macadam against M'Ilwraith, 23d November 1771, No. 8. *supra*. Fraser against Munro, 5th July 1774, No. 183. p. 1109; Mackellar's Trustees against Macmath, 1st March 1791 *, No. 190. p. 1114.

The case of Elliot against Scott, 3d March 1768, No. 181. p. 1108. is not of an opposite nature, for in it there was no actual custody, but a simple arrest. The same remark applies to the case of Maxwell against Gibb, 17th November 1785, No. 188. p. 1113. in which the messenger expressly said he had not apprehended the debtor, nor taken him into custody, and to the case of Richmond against Dalrymple's Trustees, 14th January 1789, No. 189. p. 1113.

* See observations on these cases in Bell's Bankrupt Law, vol. i. p. 28. and following pages.

No. 27. But in this case, there was apprehension and custody. The debtor was taken by virtue of the caption, and kept for an hour. So far from his not being in custody, the messenger would not, and did not, liberate him, till he had orders from Messrs. Macnayr and Elder, nor did they give such orders till they had received authority from their employers. It is therefore clear, that Macallister was "in custody of the messenger," which, according to the terms of the judgment in the case of Woodston, constitutes imprisonment under the act 1696.

It is of no consequence that the apprehension took place without display of blazon. This may be a necessary circumstance in a charge of deforcement, because it may be said that the person accused did not know the character of the messenger. But when the debtor acknowledges and submits to the messenger's authority, such formality is not necessary to the valid execution of the caption. This is laid down by all our writers, Stair, B. 4. Tit. 47. § 14.; Bankton, B. 1. Tit. 10. § 195.; Erskine, B. 4. Tit. 4. § 33. Accordingly, in none of the cases above quoted, was that circumstance at all enquired into or regarded.

For the defender.

The Scotch Legislature, when it made use of the word imprisonment in the act 1696, did certainly mean *putting into prison.*

For, in the *first* place, the word is hardly susceptible of another meaning.

In the *second* place, there were good reasons, arising out of the nature of the Scotch bankrupt law, which must have determined the Legislature to require actual incarceration as a constituent of bankruptcy.

Previous to the act 1696, we had reductions on the head of bankruptcy; and it is plain that the Court of Session had adopted a distinction between insolvency and notour bankruptcy. It was decided not to be sufficient in these actions that a person was insolvent, and even known to the defender to be so, unless he was also holden and repute bankrupt. Circumstances were required to be proved sufficient to establish this notour bankruptcy. Moncrief against Langton, 8th February 1694, No. 146. p. 1054; Creditors of Carlourie against Lord Mersington, 21st December 1694, and 16th January 1695, No. 37. p. 4929.

These cases seem to have given rise to the act 1695, which was made for the purpose of establishing a test of *notour* bankruptcy. For this purpose some public event was necessary. Such an event was the debtor's being put into a public jail, or his flying to a sanctuary, or his absconding. But his being merely apprehended, and in the custody of the messenger, is not such an event, since it is quite private. It might be a test of insolvency; but no test of that was wanted. On the contrary, by the act, insolvency is to be proved, and itself forms part of the test of notour bankruptcy.

Considering, too, the nature of bankruptcy, and its effects under this statute, it was necessary that the test of it should be very decisive and very public.

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The essence of bankruptcy is the necessity of dividing the debtor's estate among his creditors; it is the knowledge of this in the debtor, and in those who have received rights from him, that makes those rights proper subjects of reduction. But to constitute a proper test of this knowledge, and still more, a test that was to operate by presumption retrospectively, it was necessary to have some event which should not merely prove insolvency, but should be of a nature to bring in the creditors to a claim for division of the insolvent estate, and should demonstrate to the world as well as to the debtor, the necessity of dividing that estate among them. Such an event was the putting of the debtor into a public jail, but such was not mere private custody of him by the messenger. Actual incarceration, too, was an event of easy and certain proof, and therefore fit to be pitched upon as a criterion on which important legal consequences should depend, but mere custody by a messenger was just the reverse.

Thirdly, From the nature of personal execution in Scotland at the time the act 1696 was passed, the word imprisonment in that act must have meant actual putting in prison. For the only imprisonment it mentions, is imprisonment on a caption. Now the style of a caption itself shews what is imprisonment on it, for it orders the messenger to apprehend the person of the debtor; "and "being so apprehended, to put him in sure ward, firmance, and captivity within "their respective tolbooths," &c.

The judgment in the case of Woodston was not a general decision that custody in the hands of a messenger was imprisonment in the meaning of the act, but only that it was so in the special circumstances of that case. And it appears that there were specialties in it. If it had been in point, however, it was contrary to the spirit of our Scotch bankrupt law, and must have been given from the House of Lords looking too much to the peculiarities of the law of England, which in this respect is in a different situation from ours; so that this case did in no view deserve the respect that has been paid to it as a precedent; and cases resting solely upon its authority must be regarded as erroneous. At the same time, none of the cases quoted for the pursuer are nearly so strong as the present, supposing the situation of Macallister, during the hour he was with the messenger, to have been custody in his hands; and the case of Elliot against Scott, 3d March 1768, No. 181. p. 1108. affords an instance where there was custody in the hands of the messenger, and this was found not to be imprisonment in terms of the act 1696.

But in truth, in this present case, there was no custody in the hands of the messenger. The messenger never had instructions to imprison Macallister in any sense of the word, but merely to find him out, and to recover the debt; accordingly he never displayed his blazon, nor in any form took him into custody. But all our law books require the display of the blazon, and the touching with the rod of peace in order to an effectual execution of the caption; Stair, B. 4. Tit. 47. § 14; Bankton, B. 4. Tit. 37. § 13; Duty of a Messenger, p. 6. Here, however, the messenger did none of these things, but, merely

No. 27. by letting Macallister know he had a caption, made him go to Macnayr and Elder's office, where he staid a short time, without any further compulsion, and then was told that he might go away. The caption was not therefore executed against him at all; he not only was never in prison, but never in the custody of the messenger. He was, in short, merely apprehended, which it was determined in the case of Maxwell against Gibb, 17th November 1785, No. 188. p. 1113; and of Richmond against Dalrymple, 14th January 1789, No. 189. p. 1113. was not imprisonment in the sense of the act 1696.

Some Judges thought this case similar to that of Woodston, and were for deciding it accordingly; at the same time it was observed by them, that that case seemed to have been decided from views relative to the English practice, where custody in the hands of the bailiff, in a spunging house, precedes putting into the common jail in all cases, if the debtor chuses it, and where this is a sort of imprisonment that has all the effects of actually putting in jail.

But the majority expressed their opinion, that though the case of Woodston was good authority, so far as it went, and though it decided that proper apprehension and custody in the hands of the messenger were equivalent to putting in jail; yet that this rule was not to be stretched beyond that decision, and that in this case there was no custody in the hands of the messenger, nor even apprehension in the legal sense of the word. For there was no execution of the caption, such as would have made it deforcement to have rescued the debtor; there was nothing more than a proposal to go to the office of Macnayr, enforced no doubt by the power of executing the caption, but not by the actual execution of it; that the character of a messenger was now commonly combined with that of an agent for settling the debt; and the messenger made use of the caption to give weight to his proposals, by telling that he had it ready; but that the execution of it required a further and more solemn act, though perhaps this solemnity was not so precisely defined as could be desired.

The judgment of the Court was, "Adhere."

Lord Ordinary, *Hermand.* Act. *Ar. Fletcher.* Alt. *Dun. Macfarlane.*
M. Montgomerie and John Dillon, Agents. *M.* Clerk.

M. *Fac. Coll. No. 38. p. 131.*

1808. *June* 2.

JAMES DUNDAS, Trustee on the sequestrated estate of RICHMOND and FREEBAIRN, *against* JAMES SMITH.

No 28.
An indorsation of a bill in payment, in the ordinary course of trade, is not

RICHMOND and Freebairn were insurance-brokers in Edinburgh, James Smith was underwriter in their office for behoof of himself, his father, and others. He had underwritten there during the year 1800, and they had received the premiums up to the end of that year. He had also underwritten