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

there during the year 1801, though it did not appear that they ever received any of the premiums of that year, (see Bertram against Trustee for Richmond, &c. 26th November 1802, No. 33. p. 7122.)

No. 28. liable to reduction on the statute 1696, though it be within sixty days of the indorser's bankruptcy.

On the 4th of August 1801, Richmond and Freebairn indorsed to James Smith two bills for £.200 each, drawn upon and accepted by James Beveridge of London, due on the 12th—15th October, the other 16th—19th October. Smith remitted the bills to his father at York on account of the premiums due to him. At that date, there had been no balance of accounts struck between Smith and Richmond and Freebairn for the transactions of the year 1800; but Smith was creditor in account for more than the sums contained in these bills. There did not appear to have existed at that time any apprehension of Richmond and Freebairn becoming bankrupt. They were, however, made bankrupt in terms of the act 1696, on the 6th of September 1801; their estate was sequestrated; and James Dundas was appointed trustee upon it.

The trustee brought an action against James Smith, for reducing, under the act 1696, the indorsations of the two bills above mentioned. The interlocutor of the Lord Ordinary, (May 24th 1803,) was,—" Finds, that in practice there " is a current account, debit and credit, between the broker and underwriter " who do business at his office, fluctuating from time to time, so long as the " parties continue in credit, and till the actual failure of the one or the other; " so that it would be unjust to allow the creditors of either to avail themselves " of one side of the account, without taking the other side of it into view. " That the bills passing between them cannot be considered in the light of " securities for anterior debts, so as to fall under the act 1696, and that such " bills, especially when remitted to persons at a distance, are properly payments " in cash. Finds, in terms of the report, that there was no mutual settlement " of accounts betwixt the parties, striking an acknowledged balance previous " to, or at the period of the indorsations in question, and that such transactions " as took place between them went on posterior to the indorsations in question, " in the same manner as previous thereto. Finds, that upon the 6th day of " August, Richmond and Freebairn indorsed to the defender bills for £400, " accepted by James Beveridge, which bills the defender indorsed to his father " Thomas Smith, and other correspondents at York, for whom he was in use " to underwrite at Richmond and Freebairn's office here. Finds, that although " there may be no valid distinction, in a general view of the act 1696, between " foreign and inland bills, so as that the one should be exempted from the sanc- " tion of that statute, and the other liable to it; yet if, in the ordinary course " of business, an underwriter in this country, unconscious of failure in the " circumstances of the broker whom he employs, not only for himself, but for " his correspondents in England, accepts of an indorsation of bills of exchange " from that broker, and remits them to such correspondent, while the credit " of the broker is unimpeached, the transaction cannot be set aside upon the act " 1696, unless it shall appear that such remittance was in payment of a debt

No. 28.

"already liquidated. Finds no evidence that the debt due to the debtor's "English correspondents, who received the remittance of the £400. under "challenge, had been liquidated at the time of the remittance; the alleged "delay of which, as well as the circumstance that the bills are said to have been "indorsed indefinitely to account of the balance which might ultimately be "due to the defender, affords real evidence, as well of the *bona fides*, as of the "application of the general doctrine assumed, in the first part of this interlocu- "tor, to the circumstances of the case; assoilzies from the reduction in regard "to this article."

The cause came before the Inner-House by petition and answers.

Argument for the pursuer.

These indorsations were, in terms of the act 1696, "dispositions, as- "signations, or other deeds, made by the bankrupt, in the space of sixty days "before his becoming bankrupt, in favour of his creditor, either for his satis- "faction or further security."

For it is clear law, that they are not taken out of the statute merely by being indorsations of bills, 2d February, 1700, Durward against Wilson, No. 191. p. 1119, 16th January 1713, Campbell against Graham, No. 192. p. 1120. Manson against Angus, 16th July 1771, in which this point was determined on full discussion, and the judgment of this Court was affirmed in the House of Lords, 22d March 1774, No. 7. *supra*; M'Hutcheon against Welsh, 29th January 1794, not reported, (See APPENDIX, PART II.) See Bell's Law of Bankruptcy, v. 1. p. 171.

2dly, There is no authority whatever for saying, that indorsations of foreign bills are in a different situation from indorsations of inland bills. The observation of the collector in the case of Campbell against M'Gibbon, No. 202. p. 1139. is now admitted, on all hands,t o have been onerous; and it was decided that there was no such difference in the case of M'Hutcheon against Welsh.

3dly, It cannot take the indorsations out of the act that they were in *payment;* for the statute expressly includes deeds made "for satisfaction."

4thly, It cannot have this effect, that the indorsations were given *bona fide*, without contemplation of bankruptcy; for the very object of the statute, in fixing the retrospective term of 60 days, was to supersede all inquiry into that circumstance, by adopting a general presumption from a circumstance that was always certain;—accordingly, this plea has uniformly been disregarded in actions on this statute.

5thly, These indorsations are not taken out of the statute merely by the circumstance that they were made during the existence of an open account. The Court may just as well rescind the statute *in toto*, as deny effect to it in all cases, where the parties happen to have an open account. There is not the smallest authority for such an exception. Indeed, it would destroy the effect of the statute altogether; for not only are open accounts very common,

but it is quite easy to keep an account open for the very purpose of eluding this statute. The case of Sir William Forbes and Company, No. 204. p. 1142. did not establish any such rule. In that case, the indorsation was sustained because a subsequent advance to a greater amount had been made by the indorsee. The case of the Pelican Insurance office, No. 24. *supra*, was circumstantiate; but at the utmost only established, that indorsations within the 60 days must compensate advances by the indorsee within the 60 days.

The mere existence of an open account on which no advances at all have been made subsequent to indorsations, or even within the 60 days, has never been found to take those indorsations out of the act 1696.

These are all the circumstances that can be imagined to take this case out of the statute.

Argument for defender.

It is not necessary for the defender to dispute simply and precisely any of the pursuer's propositions. He maintains, that the indorsations do not fall under the act 1696:

1*st*, Because they were payments made *bona fide in the ordinary course of business*.

The deeds, &c. which the act declares reducible, are "granted in favour "of creditors, and in preference to other creditors;" but payments, made in the ordinary course of business, are neither of these; so that they do not come under the words of the act. Still less do they come under the spirit of it. For it never was intended to rescind all the ordinary dealings of every person who became bankrupt for 60 days back. Such a provision would have done far more harm than good;—accordingly, payments in money have always been held not to fall under the statute, because these were presumed to be of this description, Bean against Strachan, 1st August 1760, No. 37. p. 907. Ersk. B. 4. Tit. 1. § 41. But now that the use of cash is almost entirely superseded, payments in the ordinary course of trade are generally made by indorsation of bills. In this form, however, they are still payments in the ordinary course of trade, and as such must be exempted from the reduction on the act 1696.

2*dly*, This is still clearer where a current account of debit and credit subsists between the parties, as in this case. For there it is obvious, that the payment is not only not given in contemplation of bankruptcy, but it is not given merely either for satisfaction or security of a prior debt. It is given with a view to future transactions as much as past; and can never be said to be given to one creditor in preference to others, since not only there can be no view to a preference, but it is quite uncertain whether the person, to whom it is given, may ultimately be a creditor or not, even independently of such payment.

This view was adopted by the Court in the case of Sir William Forbes, and still more clearly in that of the Pelican Company *.

* See also Thomson's Trustee, 28th February 1806, No. 25. *supra*.

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The idea that deeds of any kind within the 60 days would be sustained, merely because they were in satisfaction or security of debts contracted within the 60 days, is supported by no authority; and there is no reason to suppose it was the principle of decision in either of these cases.

The majority of the Court adopted the first argument of the defender; and founded their opinion upon this, that, in the circumstances of this case, the indorsations of the bills must be viewed as payments in the ordinary course of trade; and, therefore, did not fall under the act 1696.

It was observed by several Judges, that indorsation of bills were certainly not exempted in general from the operation of the act 1696; and one Judge (Lord Armadale) expressed a decided opinion, that the mere circumstance of a current account existing between the parties was by itself of no relevancy in defence against a reduction on the act. That if in fact the bankrupt was debtor to the indorsee at the commencement of the 60 days, it signified very little whether the account had been balanced or not previously to that period; and that none of the cases quoted went upon this circumstance alone, but on advances being made by the indorsee subsequent to the indorsations, or at least within the 60 days.

The interlocutor of the Court (2d June 1808,) was, "Adhere to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Hermand*. Act. *Dav. Cathcart*. Alt. *John Connell*.
Tho. Scotland, W. S. and *Dav. Murray*, W. S. Agents. *P.* Clerk.

M. *Fac. Coll. No.* 47. *p.* 174.

1808. *June* 17.

ALEXANDER LAMONT, Trustee on the sequestrated Estate of Lambert and Company, *against* ROBERT and WILLIAM STEWART.

No. 29.
Imprisonment in terms of the act 1695, what?

Similar to case Ewing against Jamieson, 17th May, 808, No. 27. *supra*.

BENJAMIN LAMBERT granted, on the 16th August 1802, to Robert and William Stewart, a disposition of his heritable subjects, on which they were infeft the same day. Lambert's estate was sequestrated on 30th of December 1802, and Alexander Lamont was appointed trustee on it. He raised a reduction of the disposition by Lambert to the Stewarts, under the act 1696, on the grounds, 1st, Of Lambert's insolvency at the date of it; 2d, Of its being granted in security of a prior debt; and, 3dly, Of Lambert's having been imprisoned on a caption in the sense of the act 1696, within sixty days of the date of the disposition.

In defence, the Stewarts denied the two last circumstances.

A proof was allowed by the Lord Ordinary; on advising which, his Lordship pronounced this interlocutor: "Finds it sufficiently instructed that Benjamin Lambert was rendered bankrupt in terms of the act 1696, upon the