No. 28. 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. Catheart.* 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

No 29.

" 30th day of August 1802, within sixty days of the conveyance under chal-
" lenge, which was granted on the 16th day of the said month of August and
" year foresaid; therefore, sustains the reasons of reduction, repels the defences,
" and decerns in terms of the conclusions of the libel."

This interlocutor was brought under review of the Inner House by the defenders.

The fact of the disposition being granted in security of a prior debt was disputed. But the majority of the Court did not think it necessary to go into the evidence on that point.

As to the imprisonment of Lambert, the facts appeared from the following depositions:

Allan Fullarton depones, 'That during the year 1802, the deponent was in 'partnership with James Macrone, messenger in Glasgow: That towards the 'end of the month of August of that year, there was put into the hands of the 'deponent and his partner, a caption, at the instance of David Allan, jun. and 'Company, against Benjamin Lambert and Company: That, as far as he re-'collects, the instructions given him by the creditors were to go to Kilmarnock 'and get a settlement with Benjamin Lambert, on the best terms he could, 'either by payment or security: That the deponent went to Kilmarnock on a 'Sunday, the 29th of August, for the sole purpose of getting the said settlement 'accomplished: That he did not see Benjamin Lambert on the Sunday even-'ing, but found him at home early on the Monday morning, when he inform-'ed the deponent that he was so embarrassed in his circumstances, that he could 'neither pay the debt nor find security: That upon this the deponent inform-'ed Lambert he behoved to come to Glasgow with him, which he readily 'agreed to do: That the deponent remained in Lambert's house till they set 'out for Glasgow, and breakfasted with him: That Lambert did not, during 'the interval, leave his house, but may have gone into another room to dress, 'although the deponent does not recollect whether he did so or not; and the 'deponent all along considered that he had Lambert in his custody: That the 'deponent rode with Lambert on horseback to Glasgow: That on arriving at 'Glasgow, the deponent might call with Lambert at his own office, but does 'not recollect whether he did so or not; and he is certain that very little delay 'took place before he carried Lambert to the counting-office of the creditors: 'That on reaching the counting-office, a good deal of conversation took place 'between the creditors and Lambert, which he does not distinctly recollect, 'further than it related to the assignment of a policy by Lambert to the credi-'tors: That after remaining about an hour in the counting-house of the credi-'tors,' the deponent was desired by them to liberate Lambert. Interrogated 'for the defenders, depones, That he had the caption with him when he went 'to Kilmarnock: That he does not recollect whether he shewed it to Lambert 'or not, only he thinks it highly probable he did, but he did not read it over to 'him; the witness adding of his own accord, that it is never his practice to read.

No. 29. 'over his caption to a debtor: That the deponent did not display his blazon to 'Lambert, nor did he touch him with his wand of peace, and say that he was 'his prisoner, in so many words, but gave him to understand that he was so.' And being shewn the caption No. 13. of process, and interrogated for the pursuer, depones, 'That he believes it is the caption before mentioned; and he is 'certain Lambert knew he was a messenger, at least, he once before waited on 'Lambert with diligence for the purpose of procuring a settlement.'

James Macrone, messenger in Glasgow, depones, 'That he recollects that 'towards the end of the month of August 1802, a caption at the instance of 'David Allan, jun. and Company, was put into the hands of him and his partner Allan Fullarton, to execute against Benjamin Lambert and Company of 'Kilmarnock: That his said partner accordingly went to Kilmarnock for the 'sole purpose of apprehending Benjamin Lambert.' And being shown the caption No. 13. of process, depones, 'That it is the caption above-mentioned, 'and that the marking on the back thereof is of his hand-writing: That his 'said partner, on the 30th of August, which he thinks was a Monday, (which 'he recollects from having inspected his books,) brought the said Benjamin 'Lambert to Glasgow, to the office of the deponent and his partner, when the 'deponent saw him in the custody of his said partner; and the deponent saw 'the said Benjamin Lambert leave the deponent's office along with his said 'partner, for the purpose of going to the counting-office of the creditors, and 'the deponent learned from his partner when he returned, that the said creditors had accepted of some draft or bill, and had liberated Lambert.' The deposition of Alexander Allan, merchant in Glasgow, was sealed up, but was afterward opened by consent of parties. He depones, 'That during the year '1802, his warehouse was immediately adjacent to the counting-house of David Allan, jun. and Company; and he recollects that towards the end of the 'month of August that year, he thinks on the 30th of that month, David 'Allan, junior, came into his warehouse, and informed him that Allan Fullarton, messenger, had brought Benjamin Lambert from Kilmarnock, and that 'the latter was then in the counting-house of David Allan, jun. and Company: 'That upon this the deponent went into the said counting-house, where he saw 'the said Benjamin Lambert and Allan Fullarton, and was informed that 'Mr. Lambert had been brought from Kilmarnock, and was then in custody. And farther, that the said David Allan, jun. expressed his surprise that Mr. Lambert had been brought from Kilmarnock; and upon the said David Allan, jun. asking the deponent's advice, whether they 'should put Lambert in the jail of Glasgow, the deponent advised him that, 'rather than incarcerate Lambert, to endeavour to get payment of the debt in 'goods, or get security; and, accordingly, David Allan, jun. and Company, 'followed the deponent's advice, and liberated Lambert upon his promise that 'a Mr. Haddow of Glasgow would pay them a loss due to Lambert, as soon as 'it was recovered from the underwriters; and the deponent is certain that

'Lambert was detained at least an hour on the above occasion in the counting- No. 29.
'house of David Allan, jun. and Company.'

On these facts, it was argued,

For the defenders, there was in this case no execution of the caption at all. The messenger did not read it;—it does not appear he even shewed it to the debtor,—he did not display his blazon,—he did not touch the debtor with his wand of peace,—he did not even say, "you are my prisoner;" but all these these things are necessary to the execution of a caption. Duty of a Messenger, p. 6. Erskine, B. 4. Tit. 4. § 33. There was a mere notice that the messenger had a caption, and a proposal that the debtor should go with him, not to jail, but to Glasgow. There was, therefore, no legal custody, nor even legal apprehension; there could have been no deforcement; the debtor was still free to escape if he could.

But neither the case of Woodstone, nor any subsequent decision, has gone the length of finding that imprisonment, under the act 1696, can be constituted without legal custody, founded upon a valid execution of the caption in proper form, (see cases quoted in case of Ewing against Jamieson.) It may well be doubted if these decisions were founded in an accurate view of Scotch law, and the rule they establish will certainly not be extended.

The mere circumstances that the caption was mentioned to the debtor, and that he went with the messenger, are quite ambiguous. They might have taken place though it had been expressly resolved and understood by all parties that there was to be no custody or execution of the caption whatever.

If then it is said that there may be custody, without any other circumstance to mark it, this must depend on the mere opinion of the messenger, who may say that he intended to take the debtor into custody, or did not, just as he pleases.

But it would be highly dangerous to trust the important fact of bankruptcy to such evidence. A plain and certain test of it was undoubtedly in the view of the statute 1696, and even of the House of Lords in the case of Woodstone. That case had in view custody in itself public, and, at all events, legal custody on a regular certain unambiguous execution against the debtor, (No. 178. p. 1102.)

But, in this case, there is not even any appearance of an intention to take the debtor into custody, for the instructions were merely to get a settlement by payment or security.

For the pursuer.

Captions are generally executed, not for the purpose of constituting bankruptcy, but to enforce payment of debt. The creditor, using the caption, has no interest to give any solemnity or publicity to this execution which he can avoid, but rather the contrary, since that would only tend to bring other creditors into the field against him; and all such publicity must be very offensive to the debtor. Accordingly, it is the invariable practice of messengers to exe-

No. 29. cute captions with as little show as possible. They do never now, in practice, use the solemnity of the baton, blazon, touch of the wand, or reading of the caption, nor even call in witnesses unless there is resistance. Where the debtor, who is previously warned by the charge of horning, on seeing the messenger, acknowleges his authority, and holds himself at his disposal and in his custody, no ceremony is necessary, and none is ever used. The debtor is nevertheless completely imprisoned; and it is the almost only way in which debtors ever are imprisoned.

But if this be usual, and sufficient apprehension, and imprisonment in relation to the creditor who uses the caption, it must also be sufficient apprehension and imprisonment in relation to other creditors, who are proving bankruptcy. For creditors, who wish to prove a bankruptcy, must take for that purpose such imprisonment of the debtor, as other creditors who did not mean to constitute bankruptcy have been satisfied with; and if such imprisonment as satisfies a creditor executing a caption for payment of his debt, be not admitted as a sufficient constituent of bankruptcy, the act 1696 must be defeated.

For this reason, in the *first* place, it was necessary to hold, that custody by the messenger, without actual putting into jail, was imprisonment in the sense of the act 1696; for it frequently happened that creditors, executing captions for payment of debt, were satisfied with this species of imprisonment. Accordingly this was decided by the House of Lords, in the case of Woodston, not on any views of English law, but on a full consideration of the statute and the law of Scotland. This was declared from the Bench, by the Lord President Dundas, in the case of Fraser against Munro, No. 183. p. 1109. in which the judgment of the Court accordingly was: "The Court was clear to adhere "to the direction of the House of Peers, in the case of Woodstone, as establish-"ing a rule that ought to be permanent and not arbitrary." And it has since been admitted as a fixed point.

For the same reason *a fortiori*, it is necessary to hold, that imprisonment or custody by the messenger is sufficient in questions of bankruptcy, though the solemnities of blazon, &c. be not used, if it be such imprisonment or custody as satisfies a creditor using the caption to recover payment. Accordingly, neither in the case of Woodston, nor in any of the cases that followed, was there any thing said at all about these solemnities. No inquiry was made whether they had been used or not, though in all probability, indeed almost certainly, they had not.

Here there can be no doubt, that *de facto* Lambert was in custody of the messenger. The messenger came to him with a caption; and both he and the messenger understood he was made a prisoner. Accordingly he was carried to Glasgow, and kept there till liberated by an express authority from the creditors who used the caption.

As to the instructions, they of necessity implied that the messenger was to take Lambert into custody, unless he received from him payment or security.

The delivery of the caption to him was sufficient instruction to do that, and it was done accordingly. No. 29.

There was considerable division of opinion on the Bench.

The majority of Judges adopted the arguments of the defender, and repeated the opinions that had been expressed in the case of Ewing against Jamieson. It was also observed, that if messengers and men of business formed negligent and erroneous ideas as to the forms of legal proceedings, that could not change the law, nor required any statute to correct it, the natural and best corrective being the decisions of the Supreme Court. That the case of Woodstone had decided that imprisonment might be constituted without putting into a public jail and by the custody of the messenger only, yet it must still be a plain unambiguous custody. That it was quite impossible to suppose that the creditor or a messenger should have it in his power to stop the currency of trade by a private act which gave no indication whatever of bankruptcy to the public, and which he might conceal and explain away if he pleased.

That, in this case, the messenger had acted not in that capacity, but in his joint character of *agent*. That accordingly he had not carried the debtor to the nearest jail (Kilmarnock) in terms of the caption but to Glasgow.

On the other side, it was observed that the effect arising from the decision in the case of Woodstone would be greatly increased, if not only the plain test of actual incarceration was to be given up, but nice inquiries to be made into the legality of custody. That Lambert was *de facto* in custody, and would have gone to jail if the creditors had not liberated him.

The judgment of the Court was, " alter the interlocutor reclaimed against; " and assoilzie the petitioners from the whole conclusions of the libel."

Against this judgment the pursuer reclaimed, but this reclaiming petition was refused without answers.

Lord Ordinary, *Cullen*. Act. *Dav. Cathcart*. Alt. *G. J. Bell*.
R. Young and *J. Thorburn*, Agents. *M* Clerk.

F. *Fac. Coll. No. 55. p. 204.*