1756.

TURNBULL
*v.*
SCOTT.

TURNBULL'S CREDITORS (Erskine and Others, - - - - ) *Appellants.*

COLONEL SCOTT of Comiston, - *Respondent.*

House of Lords, 27*th February* 1756.

NOTOUR BANKRUPTCY—STATUTE 1696.—Held that apprehension by a messenger under a caption, with detention for a whole night, but without being put in jail, and afterwards allowed to go on part payment of the debt, was a sufficient imprisonment under the act, so as to constitute notour bankruptcy.

No. 114. ALEXANDER TURNBULL of Woodstown becoming embarrassed and insolvent in 1738, a real creditor took possession of his estate for a debt of 13,000 merks, and between that date and 1742, some of his creditors had raised horning and caption on their debts, which obliged him in 1740 to retire for a short time to England, in order to avoid imprisonment. In 1742, his debts, including provisions secured to his children, amounted to 63,000 merks, of which 23,000 were heritably secured on the estate, which only yielded L.1000 Scots yearly rent.

Sir Alexander Ogilvie, one of his creditors, having raised diligence against him by caption, he was apprehended on 31st March 1742, and detained in custody of the messenger for one night and part of next day (1st April), at his own request, until he could communicate with his friend; whereupon General Scott came forward and paid L.45 of the debt, upon which he was liberated from the messenger without ever having been imprisoned.

31st March, 1st April, 1742.

Turnbull in the same month (April) obtained a sist

of execution under a suspension, as to the remainder of the debt, which being removed by the Court in June following, the caption was again put into the hands of the messenger, with instructions to appre-hend and incarcerate, unless the debt was paid. General Scott again interposed and paid L.593 Scots, of this date. 17th June, 1742.

Having made these advances, General Scott, of same date, took from Turnbull an heritable bond secured over his estate, in security thereof, amounting to 10,000 merks, and was thereupon infeft.

A ranking and sale was brought of Turnbull's estate, in which a competition arose among the preferable creditors.

It was objected to General Scott's heritable bond, that it was granted in satisfaction and security of a prior debt by Turnbull, after he had become a notour bankrupt, and so null by the statutes 1621 and 1696, as well as void, as an undue preference given to one creditor over another. In supporting this objection, they referred to the act 1696, which declares, "That "if any debtor under diligence by horning and cap-"tion at the instance of his creditor, be either im-"prisoned or retire to the abbey, &c., and be after-"wards found, by sentence of the Lords of Session "to be insolvent, shall be holden and reputed on "these three joint grounds, viz., diligence by horning "and caption, and insolvency, joined with one or "other of the said alternatives of imprisonment, or "retiring, or flying, or absconding, or forcibly de-"fending, to be a notour bankrupt." The act then proceeds to declare that all voluntary or other deeds granted by such a person shall be void and null.

General Scott's bond being granted on 17th June 1742, the question was, whether at or before this

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date Turnbull was notour bankrupt; and whether there was imprisonment, retiring, and absconding in the sense of the act, so as to constitute notour bankruptcy.

Novem. 22, 1754. The Lords pronounced this interlocutor:—"Having advised the prepared state, repel the objections "made to the heritable bond of corroboration, and "prefer Colonel Scott, to the personal creditors of "Alexander Turnbull of Woodstown." And on re-

February 18, 1755. claiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellants:*—That at the time the heritable bond was granted to General Scott, Turnbull, the granter, was a notour bankrupt in terms of the statute 1696. His insolvency is proved by the documents of debt lodged in this ranking and sale, all which debts were due at that date. It was also proved by the diligence executed—by several captions being out against him—by imprisonment; for although he was not put actually in jail, yet being apprehended and detained in the custody of the messenger for a night and part of next day, this was sufficient imprisonment in law, and in the sense of the statute: Also, by his concealing himself when sought to be apprehended under these captions, and on one occasion retiring to England to avoid execution. So that the whole requisites of the statute, which go to constitute notour bankruptcy, concur to establish that at the time he executed this bond he was in the eye of law a notour bankrupt. But the granting of this bond was also objectionable under the act 1621, c. 18, which act not only annuls deeds granted by persons in insolvent circumstances to the prejudice of prior creditors, but also all deeds

granted by them to any conjunct or confident person. The debtor here was insolvent, and in these circumstances he grants the bond in question to a person who is his own uncle, thereby securing to him a preference over every other creditor.

*Pleaded by the Respondent*:—The very notion and term bankruptcy and bankrupt, are statutory and unknown to the common law either of England or Scotland; there can, therefore, be no equitable but a legal bankruptcy, and none is a bankrupt but he who comes under the description of the statute. No deed therefore is affectable, unless the debtor who granted it was, at the time of granting the security, within the description of notour bankrupt described by the act. In the present case the debtor was neither insolvent at the time the security was granted, nor was he at any time bankrupt, according to the words of the statute. That statute points at notorious bankruptcy, not to any one mere isolated act. Apprehension by the messenger, and detention for one night, and enlarged on payment of the debt next day, is not that commitment into the jail which infers imprisonment under the statute. The law intends by such bankruptcy notoriety, by making the debtor's situation known and public, so as to interpel creditors from dealing with him;—that this is not to be inferred from merely apprehending the debtor by the hands of a messenger, for this in all cases may end in payment of the debt. Nor is it to be inferred from insolvency *per se;* because, though a person may be so circumstanced, yet he may continue to enjoy good credit in business, and may retrieve his circumstances. The alternatives of imprisonment, retiring, flying, absconding, or forcibly defending, are the requisites described by the statute. These

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requisites cannot be dispensed with, and equipollents cannot be received.

After hearing counsel, it was

*Ordered and adjudged that the said interlocutor complained of be* reversed; *and it is hereby declared, that, Alexander Turnbull having been arrested and actually in custody of the messenger upon the caption at the suit of Sir Wm. Ogilvie, was imprisoned within the true intent and meaning of the act of Parliament of* 1696: *And it is therefore ordered that the objections made to the heritable bond of corroboration obtained by General Scott be sustained, and that the respondent Colonel Scott have no preference to the other creditors of the said Alexander Turnbull, by virtue of said bond.*

For Appellants, *W. Murray, R. Dundas.*
For Respondent, *Al. Forrester, Gilb. Elliot.*

*Note.*—Unreported in Court of Session; but the judgment in the House of Lords has been founded on, and is the leading authority upon which all the subsequent cases have been decided :—M'Adam *v.* M'Ilwraith, 23d Nov. 1771, Fac. Col.; Frazer *v.* Munro, 5th July 1774, M. 1109; M'Meath *v.* M'Kellar, 1 March 1791, Bell's Cases, p. 22.

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[Mor. 15399.]

Lord CATHCART, &c., - - *Appellants.*
JOHN STEWART N. SHAW of Greenock, by his Guardian, - - } *Respondent.*

## House of Lords, 19*th March* 1756.

ENTAIL—POWERS OF FEUING AND LEASING—INTEREST OF DEBT.—1. Question, whether an heir of entail in possession is bound