

1771. *November 23.*

JOHN MACADAM of Craigengillen, and Others, *against* WILLIAM MACILWRAITH, JAMES GRAY, and DUNCAN NIVEN.

No. 8.

Act 1696, C. 5.—The apprehension of a debtor, and his being in custody of the messenger upon a caption, held to be imprisonment within the meaning of the statute.

JOHN ALISON being in debt to a number of creditors, upon the 31st March 1768 was apprehended upon a caption at the instance of Macilwraith; when, upon making a partial payment of the debt, and granting an heritable bond for the residue, he was dismissed from the custody of the messenger, the caption being still kept hanging over his head undischarged.

In the month of April and on the 21st of May, thereafter, Alison, being perfectly insolvent, granted several heritable securities in favour of the defenders his creditors; which were accordingly challenged by the pursuer upon the act 1696, c. 5. as having been granted within less than sixty days of his notour bankruptcy.

The argument used by both parties, in this case, was precisely the same that had been urged in the case, 18th Feb. 1755, *Creditors of Woodston contra Colonel Scott of Comistone*, No. 178. p. 1102.

The pursuers insisted, That the statute being intended to aid the common law in preventing frauds, was entitled to a liberal construction; that imprisonment was only a mark of bankruptcy, and being in the custody of a messenger was equivalent to imprisonment; and so it had been decided, in the case mentioned, in the House of Lords, where it was declared, “That the debtor having been arrested, and actually in custody of the messenger upon the caption, was imprisoned within the true intent and meaning of the act.”

The defenders, on the other hand, maintained, That the statute was to be strictly interpreted, and that the law admitted of no equivalent for actual imprisonment; and that, in the present instance, there had been no *cessio fori*, as the debtor had, after his apprehension, carried on business as usual.

The pursuer separately urged and founded on two acts of warding, that, on the 27th of May, had been executed against the bankrupt upon two registered protests; but upon which, on account of his being then at the point of death, no imprisonment had followed.

The Lords, in giving judgment, paid no regard to the acts of warding, which they deemed insufficient; but were clearly of opinion, That the apprehension upon the caption, which, notwithstanding his liberation, had still been kept up in force, was a sufficient fulfilment of the statute, and that the case of *Woodston* must be followed.

The following judgment was given: “In respect John Alison’s insolvency, at the time of granting the deeds challenged, is sufficiently instructed; and that it is also instructed, that, on the 31st March 1768, he was apprehended and in custody of a messenger, in virtue of a caption, on a debt due to William Macilwraith, from which, though he was afterward dismissed, yet the

“debt and caption were never discharged; therefore the Lords sustain the reasons of the reduction of the deeds challenged as falling under the act 1696, and remit to the Ordinary accordingly.”

Lord Ordinary, *Auchinleck*.
Clerk, *Tait*.

For Macadam, *A. Lockhart*.
For Macilwraith, *G. Wallace*.

R. H.

Fac. Coll. No. 110. p. 331.

No. 8.

1798. November 17. JOHN SINCLAIR against ROBERT LOCHHEAD and Others.

THOMAS SHIELDS, the lessee of a small farm, having become embarrassed in his circumstances, his stock was sequestrated, and about to be sold by his landlord, when his neighbours, who were likewise creditors to him, named two of their number as cautioners for the rent.

In order to relieve the cautioners, and divide the residue equally among his creditors, Shields, at their desire, exposed his small stock to public sale. The whole was sold for little more than £50. Sterling.

By the articles of sale, which were subscribed by Shields, and attested by witnesses, it was declared, that the sale was “for behoof of his whole creditors only,” and that the purchasers were to grant bills to Robert Lochhead, one of the creditors, or to Robert Gillies, the auctioneer, “who is to be the collector thereof, for behoof of the said creditors.”

The bills, however, were taken payable to Shields himself, but he immediately indorsed them to Lochhead, who gave them to Gillies to collect payment.

John Sinclair, the only creditor of Shields who had not taken a share in the previous measures, afterward arrested in the hands of Lochhead and Gillies, and brought a forthcoming; upon which they raised a multiplepoinding.

The Sheriff preferred Sinclair.

In an advocacy, the creditors

Pleaded: A trust was here created, *bona fide*, for behoof of the whole creditors. It was not reducible on the act 1696; and the funds were transferred to a trustee for their behoof before the arrestment, which, therefore, can give no partial preference; 8th December 1791; *Hutchison against the Creditors of Gibson*, No. 256. p. 1221. A formal deed of transference was not necessary, as the funds were moveable; Dictionary, *voce* PRESUMPTION, more particularly as they were of small value, and the transaction took place *inter rusticos*.

Answered: As the sale was brought by Shields himself, and the bills taken payable to him, the mere indorsation of them to Lochhead could not create a trust sufficient to prevent a non-acceding creditor from obtaining a preference by diligence.

The Lord Ordinary repelled the reasons of advocacy.

No. 9.

The lessee of a small farm having, by desire of his creditors, sold his stock by auction, for their behoof, and indorsed the bills for the price to one of their number who was to hold them as trustee for the whole, it was found, that a non-acceding creditor could not obtain a preference by arresting in his hands.