

1737. June 29. YAXLY DAVIDSON *against* ANNA BROWN.

No 172.

The act 1696 reaches cases where the bankrupt flies before the days of the charge are elapsed.

IN the reduction betwixt these parties, of an heritable bond on the act 1696, as having been granted by Andrew Brown within the sixty days of his bankruptcy, it was *objected*, That, from the proof which had been adduced, it appeared that the granter, who was a sailor and merchant, had gone abroad, in the way of his business, before the caption was taken out, so that he could not be said to fly or abscond, in terms of the act, from diligence which was not taken out until after he had left the kingdom. If indeed he had retired into the Abbey before the caption, it might have implied a confession of bankruptcy; but the following out the course of one's trade cannot admit of such a construction.

*Answered*, Diligence by horning and caption are named in the act before the alternatives of flying, absconding, &c. because that is the case which most commonly happens. But it does not follow, That one, who goes off upon the horning, without waiting till the caption can be got, which might perhaps be a hindrance to his design, can never be constitute a bankrupt, so as to have his unjust preferences reduced; and with what view Andrew Brown went off, is not easy to determine, that being *actus animi*: but, from the several circumstances of this case, it is presumeable, the fear of being thrown into prison was the reason why he fled, which is the more probable, as he has continued for two years out of the country, longer than his ordinary business as a merchant can be supposed to detain him; and, if the act shall be otherwise interpreted, it will open a door to many frauds.

THE LORDS sustained the reason of reduction on the act 1696.

*C. Home, No 64. p. 112.*

1743. February 9.

CREDITORS of AGNES HAMILTON, Relict of Campbell of Rachan, *against* The REPRESENTATIVES of JAMES HENRY.

No 173.

Found, that a minute of sale, executed by a person, who had, six months before, been in jail, but then liberated, and the debt paid and discharged, did not fall under the act 1696.

THE said James Henry entered into a minute of sale with the said Agnes Hamilton and two others, whereby they disposed to him a house in Edinburgh; and one of the articles was, That Henry should be allowed to retain as much of the price as should pay him two debts due by one of the disponers. Agnes Hamilton's creditors brought a reduction of the minute, upon the act 1696, *alleging*, That she was bankrupt at the date thereof; and, for verifying their allegiance, condescended on this fact, *scil.* that she had been incarcerated about six months before the minute of sale, in the tolbooth of Edinburgh, in virtue of a caption, at the instance of John Miln.

*Answered*: That the debt due by Agnes to John Miln was paid and discharged, and she liberated six months before the deed under challenge was granted: This being the case, she cannot be reputed a notour bankrupt, unless she shall be held to be such upon one of the three joint grounds, which the law requires,