

calling is now by the clerk, without the presence of a judge. It is a piece of form, and there is no harm done. An Ordinary signing by mistake for another, is frequent. It matters not whether such interlocutor is scored or no, or by whom it is scored. Here the party went *brevi manu* to Lord Haining, without letting him know of the scoring: This of no consequence; for, if the fact had been set forth in a minute, Lord Haining would have proceeded just as he did. In an expired legal, I should have had more difficulty.

MONBODDO. If it is common to put up protestation on the *first* day after compearance, as I understand the practice to be, then the calling may be on the last day of compearance.

BARJARG. Without form we can have no justice. I cannot get over the difficulty of an interlocutor scored after it had gone to the minute-book.

On the 21st November 1771, the Lords “restricted the adjudication to a security for principal and interest accumulated at the date of the adjudication;” varying their own interlocutor of 31st July 1771, as well as Lord Auchinleck’s interlocutor.

*Act. G. Wallace. Alt. D. Armstrong.*

1771. November 22. JOHN MACADAM of Craigengillan and OTHERS *against*  
WILLIAM MACILWRATH and OTHERS.

BANKRUPT—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.—Effect of an Act of Warding.

[*Fac. Coll. V. 331; Dict. App. I.—Bankrupt, No. 8.*]

PITFOUR. It is not necessary to determine upon the effect of the Act of warding. Here Allison was in the *custody* of the messenger upon the caption: this is just the case of *Woodstoun*, determined in the House of Peers. Something, however, may be urged for the effect of an Act of warding. The Act 1696 meant to make notoriety the rule. It is true that the decision in the case of *Bent’s Creditors*, goes the other way; but *there* a disposition to trustees, for the behoof of creditors, was in the field; and such dispositions, at that time, were considered exceedingly favourable, however they may have been considered since.

MONBODDO. If the cause rested upon the act of warding, I should have difficulty. I do not think that an act of warding produces such notoriety as a horning and caption; neither do I think that this act of warding was ever executed. Diligence by horning and caption, and apprehending by messengers, are sufficient to establish bankruptcy. So it was determined by the House of

Peers in the case of *Woodstoun*. The caption was never discharged: Allison was never a man of credit after it.

HAILES. It is unnecessary to inquire into the effects of an act of warding, for here there was none such. The supposed execution in effect bears, that the officer did not touch Allison by reason of his bodily distress. He ought not to have conveyed him to prison; *that* would have been an inhuman action meriting punishment; but neither ought he to have left him at full liberty: He ought to have taken the middle course, put him in the hands of some of the people about him, and returned the *res gesta* in his execution. As to the other point, I do not see the difference between this case and that of *Nisbet of Dirleton* joined to that of *Woodstoun*.

KENNET. The caption was never discharged, and therefore this case is the same with that of *Woodstoun*. The act of warding is not of the same notoriety with the alternatives in the statute 1696.

PRESIDENT. I do not think that the act of warding is sufficient, for that does not operate beyond the narrow territory of the magistrate who issues it. Besides, Allison was not apprehended upon that act: the officer left him in no custody at all. This question, upon act of warding, decided formerly.

PITFOUR. Admitted the weight of the President's observation, upon the narrow territory over which an act of warding is effectual.

On the 22d November 1771, "The Lords sustained the reasons of reduction, upon the Act 1696, in respect that Allison had been apprehended upon a caption; that the caption was not discharged, and that the insolvency was sufficiently proved."

Act. A. Lockhart. *Alt.* G. Wallace.  
Reporter, Auchinleck.

[The President wished to have the question put upon the act of warding also; but Lord Coalston objected to the determining a point not necessary, as there was no difference in opinion upon the other.]

1771. November 27. ALEXANDER MACLATCHIE *against* MARY BRAND.

WITNESS.

Objection of Partial Counsel.

[*Faculty Collection*, V. 334; *Dictionary*, 16,776.]

IN a reduction on the head of deathbed, the defender cited Archibald Malcolm, town-clerk of Dumfries, the writer of the deed, and an instrumentary witness to it. The pursuer OBJECTED,—That Malcolm could not be received as a witness, for he had acted as doer for the defender,—had suggested what