

[15th August 1834.]

JAMES DUNCAN, Trustee of Scougall and Company,  
Appellant.

No. 28.

Mrs. ELIZABETH HOUSTON and others, Respondents.

*Diligence—Bankruptcy—Writ.*—The name of the debtor, in the Will of a caption, being written on an erasure,—Held (affirming the judgment of the Court of Session) that the caption did not afford legal evidence of bankruptcy, although the name was written correctly in the horning and charge, in the narrative of the caption, and the messenger's execution of search.

THE appellant, as trustee on the sequestrated estates of Scougall and Co., brought an action of reduction against the respondents before the Court of Session of certain deeds granted to them by the bankrupts, on the allegation that they were made and delivered within sixty days of the bankruptcy, and therefore were reducible under the act of parliament 1696, c.5. The respondents stated various pleas in defence, but the only one necessary to be noticed is,—that there was no legal evidence of the bankruptcy, in respect that the diligence, in virtue of which it was said to have been constituted, was vitiated in essentialibus, and therefore improbativ.

1st DIVISION.

Ld. Moncreiff.

The facts in regard to this point were these:—Scougall and Co., on 31st Jan. 1814, accepted a bill in favour of Robert Paterson, for 764*l.*, payable six months after date, drawn by James Brunton and Co., who indorsed it to John Paterson. When the bill fell due it was protested for nonpayment, and letters of horning were raised and executed, on the 9th of August,

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both against Scougall and Co., and Richard Scougall as the individual partner, and also against Brunton and Co., and James Brunton and James Thomson the partners thereof. The parties were denounced on the 16th; and so far the diligence was quite regular. On the same day letters of caption were expedite, which narrated “that  
 “ upon the 16th day of August 1814 Richard Scougall  
 “ and Co., merchants in Leith, as a company, and  
 “ Richard Scougall, merchant in Leith, as an individual,  
 “ and James Brunton and Co., merchants there, as a  
 “ company, and *James Brunton and James Thomson,*  
 “ merchants in Leith, as individuals, were orderly de-  
 “ nounced rebels,” &c. The words printed in italics were written on an erasure, but the name of Richard Scougall was not so. The Will then directed “our sheriffs to  
 “ pass and apprehend the said *Richard Scougall, James*  
 “ *Brunton, and James Thomson,*” &c. These latter words, printed in italics, were all written on an erasure. An execution of search was returned by the messenger on the same day, which was correct.

The respondents contended, that as the words “Richard Scougall” in the Will were written on an erasure, they must be held *pro non scriptis*, and therefore there was no legal warrant to apprehend Scougall, and consequently no bankruptcy duly constituted. The appellant answered, that as the letters of horning, execution of charge, denunciation, and the narrative of the caption were unobjectionable, and directed against Richard Scougall, it was competent to refer back to them to show that the words appearing on the erasure were the only words which could have been meant to stand there, and that the erasure had been made merely to correct a clerical error.

The Lord Ordinary pronounced an articulate interlocutor on all the points in dispute, and specially found “that by the execution of search produced the company of Richard Scougall and Co. was, on the 16th August 1814, rendered legally bankrupt in terms of the act 1696.” His Lordship, at the same time, issued this note: — “The question whether Scougall and Co. were made legally bankrupt on the 16th August 1814, has been treated as involving various points. The Lord Ordinary is of opinion that there is but one point of difficulty. The letters of caption founded on (which were afterwards the ground of the sequestration) have the name of ‘Richard Scougall’ in the Will written on an erasure, in connexion with the names of the other persons charged, and the Lord Ordinary is sensible of the difficulty thereby created. The case of *Cowan v. Watt*, March 6th 1829, was quoted to him. That was a case of a warrant *sub meditatione fugæ*, which being an extraordinary remedy, liable to the strictest construction, the rule adopted might not be held to apply to cases of ordinary diligence. But the only question tried was, whether a bill of suspension and liberation should be passed. That did not necessarily determine the illegality of the warrant; it only imported that there was enough of doubt to render it just to liberate the prisoner. Upon the expedite letters, the warrant might still have been found legal after full discussion, and the party have been committed. In the present case it appears that in narrating the letters of horning the name of Richard Scougall and Co., and of Richard Scougall, as an individual, are distinctly set forth as the parties charged,

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“ without any erasure; they were the acceptors of the  
 “ bill, the other parties to it were also charged, and  
 “ there is an erasure in the part where their names are  
 “ written. But this clearly is of no consequence.  
 “ Then, after a full narrative of the letters of horning,  
 “ the warrant or Will is, ‘to pass and apprehend the  
 “ ‘said’ and the names ‘Richard Scougall, James  
 “ ‘Brunton, and James Thomson,’ are written on an  
 “ erasure. The letters of caption (signed by Mr. John  
 “ Russell, W. S.) are dated 16th August 1814, and  
 “ the execution on the back thereof is of the same date.  
 “ There is no averment on the record that the writ was  
 “ altered after passing the signet, and no ground to  
 “ suspect any fraudulent purpose. It may be taken,  
 “ therefore, as a blunder very inconsiderately cor-  
 “ rected before the letters were issued. Under these  
 “ circumstances, the Lord Ordinary, though not without  
 “ hesitation, has come to the opinion, that, as the first  
 “ part of the letters of caption shows, beyond all  
 “ doubt, that they were meant to be directed against  
 “ Richard Scougall, as a partner of the company, and  
 “ as on calling for the letters of horning he finds, from  
 “ the extract, that they and the execution of charge did  
 “ precisely warrant the caption, as it now stands, it  
 “ would be too strong to hold that the execution of  
 “ diligence (publicly and judicially acted on, and never  
 “ complained of) was rendered void and null by this  
 “ fault in the transcription of the letters of caption. It  
 “ was argued to the Lord Ordinary, and he thinks with  
 “ effect, that if the Will had stood blank in the names,  
 “ after the words ‘the said,’ or had borne ‘the said  
 “ ‘persons,’ or ‘the persons above designed,’ the warrant  
 “ would have been unexceptionable; and that in sub-

“ stance the case as it stands would be the same if the  
 “ names were held pro non scriptis. The point how-  
 “ ever is delicate and difficult, in so far as it might  
 “ involve a question of personal liberty.”

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The respondents having reclaimed to the Inner House, their Lordships, on the 13th February 1833\*, pronounced this interlocutor:—“ In respect that the caption  
 “ produced to instruct the bankruptcy of Richard Scougall and Co. is not legal evidence to be received of the  
 “ requisites of the act of parliament made in the year  
 “ 1696, c. 5., libelled on, the names of the parties mentioned in the Will being written on an erasure, alter  
 “ the interlocutor of the Lord Ordinary reclaimed  
 “ against, and assoilzie the defenders from the conclusions of this action, and decern, but find no  
 “ expenses due.”

Duncan appealed.

*Appellant.*—Although the caption may be improbativè with regard to Brunton and Thomson, whose names were written on erasures both in the narrative and in the Will, yet it is not so as to Scougall; his name is set forth in the narrative without erasure, and the Will could refer to him and to no one else. Besides, even if the name should be held blank, still as the relative term “said” is not written on an erasure, and as no other person could be referred to than Scougall, the objection is unavailing. Such a reference from one part of a document to another is quite legitimate, and has been repeatedly sanctioned. †

\* 11 S. & D. 383.

† Gordon v. Earl of Fife, 9th March 1827, 5 S. & D., 559; Morrison v. Nisbet, 30th June 1829, 7 S. & D. 810; Martin v. Hunter and Co., 26th Nov. 1830, 7 S. & D. 172; ante, vol. iv. p. 382.

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*Respondents.*—There could be no bankruptcy lawfully constituted unless there was legal diligence to accomplish the steps required by the statute.\* But the most important part of the diligence is the caption, and the most important part of that is the name of the party against whom the warrant is granted. If there be no name, no execution can take place. A name written on an erasure is equivalent to no name, as whatever is written on an erasure makes no faith.†

But it has been said that because the relative word “said” is not on an erasure, the Court may look back, and from the reference fill up the blank, as if it were correctly written. But an erasure is not a mere blank. It creates a presumption that other words have been formerly written, and new ones substituted, and the words so substituted must therefore be discarded. If the words originally placed could be of no materiality, then the erasure may be of no importance. But here the erasure must have been of the name of some other person than Scougall, and consequently the warrant was not originally against him. Even, however, if there had been a blank, free from erasure, a warrant to apprehend and imprison would not have been legal, nor would it have been competent to have read it as filled up with any particular name.

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\* 2 Bell's Com. 170.

† Balfour, 368, 371, 382; Mack. Obs., p. 24; Craig, b. ii. tit. 5. sec. 214.; Stair, b. iv. tit. 42. sec. 19.; Erskine, b. iii. tit. 2. sec. 20.; A. v. B., 22d July 1625, Mor. 16925; M'Culloch v. M'Culloch, 27th July 1626, Mor. 6856; Pitillo v. Forrester, 23d Nov. 1671, Mor. 11536; Macdowall v. Kennedy's Representatives, 26th Nov. 1723, Mor. 17063; Merry v. Howie, 6th Feb. 1801, Mor. voce Writ, Appendix, No. 3.; Gibson v. Walker, 16th June 1809, Fac. Coll.; Innes v. Earl of Fife, 10th March 1827, 5 S. & D. 559; ante, vol ii. p. 637; Taylor v. Malcolm, 5th March 1829, 7 S. & D. 547; Elliot v. Johnstone, 26th June 1829, 7 S. & D. 1800; Cowan v. Watt, 6th March 1829, 7 S. & D. 553.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor therein complained of be and the same is hereby affirmed; and it is further ordered, That the appellant do pay or cause to be paid to the said respondents the sum of two hundred pounds for their costs in respect of the said appeal.

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R. M. CRAWFORD—GREGGSON & FONNEREAU,  
Solicitors.