

1705. February 9.

SOMERVEL of Kennock *against* HAMILTON of Wislaw and Others, Creditors
of CLELAND.

CLELAND of that ilk having engaged Wislaw his father-in-law, and several other of his relations, in considerable cautionries, and also being debtor to his said relations and others in great sums of money, he disposed his lands and estate in favours of Wislaw and others, for their payment and relief, and for payment of certain other debts contained in a list, exceeding the value of his estate; whereupon infestment followed, and also a process of sale.

In the ranking, in order to a sale, compearance was made for Somervel and other creditors, who were omitted in the list of debts; who *alleged*, That the disposition to Wislaw was made by a bankrupt, and repeated a declarator of bankrupt and reduction upon the act of Parliament 1696; wherein a mutual probation being allowed before answer, it was proven, that Cleland was insolvent, by the list of debts exceeding the value of his estate; and diligence by caption was also produced. And as to the third qualification, viz. Imprisonment, absconding, &c. before the disposition, or within 60 days thereafter, it was proven, that a messenger came to the house of Cleland upon the 21st of March with a caption against Cleland, and searched for him, but found him not; and that the same day, and the same time when the messenger was there, he was in company with several friends, but disappeared for a short while till the messenger was gone, and then returned to his friends and dined with them; and that the *saïne* being dated the 23d of January preceding, he had continued openly about his own house, sometimes also going abroad, till the beginning of April, without any appearance of absconding, except upon the said 21st of March: So the question arose, Whether the disappearing upon the approach of that messenger for an hour, was sufficient to make up the third qualification of the act of Parliament 1696.

It was *alleged* for the defender: That absconding could not be inferred by a single act, which continued not for an hour, but must be for some considerable tract of time; as, by the civil law, *missio in possessionem* would not have been competent upon a momentary absconding, but it behoved to be instructed *debitorem latitare*, which signifies a continued tract; so the like is requisite in the case of bankrupts.

It was *answered*: The precise terms of the act of Parliament run all in the singular number, insolvency, diligence by horning, caption, absconding, which was all proven; and it would be uncertain and arbitrary how many acts would be requisite and of what continuance, if the act were otherwise interpret; whereas in this way there is no hazard, because insolvency, as well as diligence, is always requisite jointly with absconding or imprisonment, &c.

THE LORDS found the qualifications of the act of Parliament 1696 sufficiently proven, and therefore declared.

Fol. Dic. v. 1. p. 81. Dalrymple, No 59. p. 74.

No 169.
A single act of absconding found sufficient to prove that qualification of bankrupt. There were only one horning and caption; so a concurrence of diligence not necessary.

* * * The same case is reported by Fountainhall :

February 8.

No 169.

THE Laird of Cleland being owing more than the value of his estate extended to, he granted a disposition, on the 17th of January 1702, to William Hamilton of Wislaw, his father-in-law, and some other friends, who stood bound as cautioners for him in many of his debts, conform to a list then given in, and on this they were infest on the 23d of January that year. But Sommervell of Kennox, and sundry others of his lawful creditors, being omitted out of that list, they raise a reduction of the said disposition on the act of Parliament 1621; but they instructing the onerosity of their debts, though it was *inter conjunctas personas*, the disposition was sustained. Then Kennox insisted on the 5th act of Parliament 1696, that either he was bankrupt at the time of his making that disposition, or at the taking of the sasine, or at least within 60 days of the date of the sasine; and this being debated, it was found relevant for Kennox to prove, that the common debtor was under diligence by horning and caption the time of the disposition and sasine, and that *scripto*; as also that, within 60 days thereafter, he was either imprisoned, or retired to a privileged sanctuary, or absconded, or forcibly defended his person against the messengers, each of them relevant *separatim prout de jure*; but as to the alternative of absconding or flying, allowed Wislaw and the creditors in the disposition a conjunct probation, that Cleland, during these 60 days, went publicly to kirk and market about his affairs as formerly. Upon this act mutual probation being led, Kennox proved, that, before his signing the disposition, he was under horning and caption for 1200 merks, and that Patrick Cockburn messenger, came, on the 21st of March 1704. (which is the fifty-eighth day after the sasine,) to the house of Cleland, with a caption at the instance of Nisbet of Carfen and Rosehall, to apprehend him; and that Cleland being in his own close, on the noise of the messenger's being there, he retired into his house, and hid himself, so that the messenger and his assistants, after search, could not find him, and so removed; which Kennox alleged was a sufficient qualification of his absconding in the terms of the act of Parliament 1696. —*Answered*, Wislaw had proven that Cleland went openly and publicly to Glasgow and Hamilton till the 3d of April 1702, which is several days after the 60; and that very responsible persons may retire to shun a messenger when they are under caption, and yet *that* will not prove them to be bankrupt. Next, *absconding* is when one forsakes his house, which he did not, but returned within a very short time; and the words of the act of Parliament, anent flying and absconding, cannot be understood of one single act or instance, but of a tract and habit; and so it is taken in the common law, where *latitare et copiam sui creditoribus non facere* were only inferred from a variety of acts, and such a consistency of time as moved the Prætor to decree the *missio in bonorum possessionem*. —*Replied*, That the said act was made for ascertaining creditors, and fixing a standard of bankrupts; whereas, if more acts than one be required for proving a habit,

where shall we make the boundary? This were to leave it arbitrary and loose; besides, relations being nearest these debtors, they are always sure to get themselves preferred and others left out, which partial gratification is not to be encouraged; and his retiring was evident till the messenger was gone, and then he crept out of his hole; and if this were not sustained, the said act 1696 might easily be eluded, especially by friends who knew him to be insolvent and broke, as the very list contained in the narrative of this disposition bore more debt than his estate was worth; so being *obscured* above his fortune, they were *in mala fide* to take such a right to the exclusion of the others. — THE LORDS found he had absconded within the 60 days after the disposition, and so it fell under the act of Parliament; and so reduced it. — Then it was *alleged*, That one charge of horning and caption prior to the *fine*, was not sufficient, unless there were a concurrence of diligences against him. — But the LORDS remembered, that in the late case betwixt Man and Wales, No 168, p. 1083. they had found one horning and caption sufficient. This being repelled, they recurred to another allegiance, That the said caption could never be sustained as satisfying the terms of the act 1696, because they offered to prove it was paid off and purged before the disposition or *fine*; and so being extinct, it cannot be founded on. — THE LORDS, before answer, ordained the instructions of its being paid before the said right to be produced.

Fountainhall, v. 2. p. 266.

1712. January 5.

COCHRAN and OTHERS, Personal Creditors of SIR WILLIAM FORBES of Monimusk,
against His Real Creditors.

MONIMUSK having broke in December 1707, his creditors affected his estate by adjudications and other diligences, and a ranking being raised with a sale, a competition arose, wherein the personal creditors repeated a reduction of the *infester's* rights, on this ground, that, by the 5th act of Parliament 1696, all voluntary rights granted by debtors within 60 days of their breaking are declared void and null; that being an unlawful gratification whereby he prefers one creditor and omits to secure others whose debts are as just and onerous as these he partially gratifies: But so it is, your heritable bonds, or at least your *finances* taken thereon are within the 60 days of December 1707, at which time it is proven he was under caption and absconded, and so in the sense of the act of Parliament was bankrupt. *Answered*, That statute 1696 has very wisely fixed and determined the marks and characteristics of a notour bankrupt, they being, before that, very uncertain and much *in arbitrio judicis*; and the periods are horning and caption, imprisonment, retiring to the Abbey, Cuzie-house, or any other sanctuary, flying, and absconding, or forcible defending and resisting, &c. but with these, the act requires to be conjoined insolvency. So all the former though concurring

No 170.

Found that the computation, to determine whether a party had been solvent, in order to quarrel his deeds, must be made as at the time of retiring, incarceration, &c. If, at that period, his funds exceeded his debts; *infestments*, &c. granted by him within 60 days would stand good, although *ex post facto*, his