of the said first comprising, and not from the date of the infeftment following thereupon, though it may be alleged that by the very words of the act of Parliament in 1661, it is not an effectual comprising till seasine follow thereon, at least a charge against the superior; [28*th January* 1671,] *vide supra numerum* 116. 2*do*, That the bringing in of creditors within year and day is most favourable, and *favores sunt ampliandi, vide 27th July*, 1678. This was betwixt the Laird of Balfour and my Lord Airlie.

Advocates' MS. No. 196, *folio* 101.

1671. *June* 30, and *July* 5. Anent Discussion.

June 30.—Arelict being pursued as executrix to her husband, who was cautioner for a curator in the act of curatory. Alleged, 1*mo*, That her husband being but a cautioner for a curator, the most that was granted against him by law was a subsidiary action, the principal being first discussed; which method they had not observed, *ergo*. To this it was answered, That he had convened the principal and obtained a decreet against him. Replied, A decreet is not sufficient discussion without horning, denunciation, poinding for moveables, and apprising for heritage. Duplied, Though that was ordinarily requisite, yet a decreet was sufficient here, in regard the principal was notoriously bankrupt the time of the decreet; and it cannot be condescended on that, either at that time, or before, he had any goods or gear; *quorsum* then should we do farther diligence?

My Lord Gosford would not find a decreet sufficient discussion, unless he would say he was notourly bankrupt, either because he had a *bonorum*, or because he was at that time lying registrate at the horne, and so the king's rebell at whatsoever persons' instance, and though the year and day was not run. If this only makes a bankrupt *non est certi juris*. *Vide infra, No.* 281, [*Eleis and Wishaw, 5th December* 1671.]

2*do*, Alleged,—That as executrix to her husband, she could never be liable to fulfil any of his obligements or debts, because she was confirmed executrix as creditrix to her husband upon her contract of marriage, and so was not countable to any other for her intromission. Replied, If she had confirmed no more than what precisely paid herself, then he confessed she could be liable to none; but the truth is, she being creditrix only for L.1400, she had confirmed near L.3000 of her husband's goods, and so must be countable to him for the superplus. Duplied, If she have uplifted any more than what paid herself, then it is just she should count therefore: but *ita est* she has meddled with no more, (whatever she confirmed,) than what paid herself, and all that in law or reason she can be decerned to do, is *cedere actionem*. Triplied, An executor creditor confirming more than his sum, ought and should do diligence to recover the whole, else he might suffer the superplus to perish, and none else could have a title to intromit therewith, which were a very dangerous preparative.

Gosford inclined to find them bound no farther but to assign the action; yet on Mr. David Falconer's consigning an amand, he gave him the Lords' answer. *Vide* 20*th November* 1678, *Lundy and Wishaw. Vide supra, No.* 181.

Advocates' MS. No. 191, *folio* 101.

1671, *July* 4.—In the foregoing case about the executor creditor's diligence, taken to interlocutor at No. 191; the Lords, because it was a general leading case, ordained both parties to produce practiques anent it *hinc inde*.

Advocates' MS. No. 197, *folio* 101.

1671. *July* 5. PROCESS.

A CERTAIN person pursuing on a bond for payment-making to him of the sum therein contained, and the annualrent thereof from the date. Against which it was ALLEGED, No process for the annualrent, because the bond bears none. REPLIED, Though it bears no annualrent, yet shortly after its date, the debtor being charged, he was denounced and registrate at the horn; from which time he must be liable to the creditor, now pursuer, in annualrent. DUPLIED, This is noway receivable by way of reply; but in all form and justice he should have libelled thereupon, and given out the horning with the process as one of its instructions, and *in modum tituli*. Craigie inclined to sustain it by way of reply; but I observed Sir G. Lockhart and the most learned in the house, to differ from him therein.

Advocates' MS. No. 200, *folio* 102.

1671. *July* 5. HEW DALLAS KENNEDIE, Sheriff-Clerk of Aberdeen, &c. *against* SIR GEORGE MACKENZIE of Tarbet.

HEW DALLAS KENNEDIE, sheriff-clerk of Aberdeen, &c. having charged Sir George Mackenzie of Tarbet, to make payment of 20,000 merks conform to his bond. He suspends upon this reason, that the bond was conditional, *viz.* if the gift of Innerallochie's ward and marriage, (the right whereof he had acquired from this pursuer,) should prove effectual and profitable to him; but *ita est*, this condition was never purified; but to the contrary, a second donatar to the said ward and marriage *in foro contentioso*, was preferred.

ANSWERED,—They confess the condition; but Tarbet *in quantum lucratus est* by that gift must be liable to the pursuer: but so it is, by that decreet of preference, there is 5000 merks appointed to be paid to him out of the said ward by the second donatar, and that in consideration of his gift: *ergo*, his bond must stand good against him as to that 5000 merks, and the pursuer is content to restrict it thereto.

REPLIED,—The bond can never subsist *quoad* that 5000 merks; because expressly by the decreet it appears to have been granted by the Lords, in respect of the vast expenses Tarbet was at in defending the plea against the said second donatar; and so in effect he had no benefit by that gift.

DUPLIED,—He can never be heard to impute the said 5000 merks as the re-