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 *aberatus* 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 ſaſine, was not ſufficient, unleſs there were a concourſe 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 allegeance, 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 ſaſine; 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. No 169.

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 infefter'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 ſaſines 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, Cunzie-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; infeftments, &c. granted by him within 60 days would ſtand good, although *ex poſt facto*, his

No 170. eſtate might come to be overburdened. Principal ſums, annualrents, and penalties, then incurred, might be taken into computation; not accumulations, or penalties incurred afterwards.

together will not make him bankrupt, without inſolvency at the ſame time of the diligence be likewiſe proven: Now the perſonal creditors cannot ſubſume that Monimuſk in December 1707 was inſolvent, in ſo far as his eſtate is now in the roup proven to be worth L. 125,000 at 19 or 20 years purchaſe, and his debt then was not above L. 95,000, ſo his eſtate then exceeded his debt in L. 30,000 Scots; and where a man has effects and means, either perſonal or real, to pay all his debts, and an excreſce over and above, that man can never be declared a bankrupt by the Lords; and ſo Monimuſk not being inſolvent abſolutely at the time he granted our heritable bonds and infeftments, though he for ſecuring his perſon fled and abſconded within the 60 days of theſe ſaſines, (which many ſufficient men at ſome pinch are forced to do) he cannot be reputed inſolvent; and our ſecurities ſtand good; and a poſterior inſolvency *ex post facto*, by running on of annualrents, penalties, and accumulations in adjudications can never enter *in computo* to make him bankrupt the time of granting their rights, or in the 60 days after. *Replied*, The real creditors do violence to the act of Parliament, by which it is evident, the period for calculating the bankrupt's inſolvency is not his condition at the time of his abſconding or flying, but as it ſtands at the time, the LORDS find and declare him bankrupt. Now, in this view, it is unconteſtable that Monimuſk's debt does far exceed the value of his eſtate: For *esto*, it is worth L. 125,000, and his debt at his retiring was only L. 95,000, yet ſince by the annualrents fallen due, the penalties of his bonds now incurred, and the other accumulations with his mother's and lady's liferents valued at 6 or 7 years purchaſe, the debt will be now more than L. 145,000, and ſo be L. 20,000 above the value of the eſtate. It is true his mother is a very old woman, and ſo her liferent cannot be eſtimate ſo high as 6 or 7 years. And his lady's was not exiſting the time of his breaking, he having lived a year or two after, and ſo being only an uncertain conditional debt, it could not be repute as actually exiſting: Yet the hazard brings it *in computo*, and *de facto* it has eventually exiſted. So conſidering the preſent condition of the eſtate by a retroſpect to his firſt abſconding, he was certainly inſolvent when he gave them theſe heritable bonds and infeftments; eſpecially ſeeing the annualrents and penalties now computed are not new contracted debts, (which is acknowledged would not enter in computation to make him a bankrupt, ſo as to quarrel their rights by theſe new contracted debts), but are native conſequences reſulting from the original bonds, due long before his breaking. Neither is that ſo firm a principle, that he is only to be repute a bankrupt who has more debt than eſtate: But it is ſufficient where his eſtate is ſo incumbered that none will buy it ſafely, unleſs the whole be ſold together; and that he cannot ſatisfy his creditors without ſelling the whole, though he may have a reverſion coming into him after the debt is paid: But here we need not recur to theſe ſpeculations, when the penalties in the anterior bonds and the liferents exceed his fortune; and ſo he was incapable to give theſe infeftments. *Duplied*, This arguing comes from a wrong application of the word 'afterwards' in the clauſe of the act cited; as if it were to be referred to the word inſolvent, whereas

in true grammatical conſtruction it connects with the word ſentence, and runs thus, 'And afterwards found by ſentence of the LORDS to be inſolvent:' So that the inſolvency muſt be at the time of the abſconding and other requiſite qualifications ſet down in the act.—THE LORDS proceeded the more deliberately, that it was the interpretation of a new act, and the fixing a period when he is to be repute inſolvent, in order to quarrel his voluntary infeftments; whether at the time of the granting, or as his eſtate is burdened by increaſing annualrents, penalties, and accumulations, at the time he is declared by the LORDS' decreet to be bankrupt; and they found the computation muſt be as the ſtate of his debt and fortune was at his retiring, incarceration, &c. and if his effects and eſtate were better than his debt at that period, then the infeftments he had given within the 60 days could not be reduced and annulled, though *ex poſt facto* his eſtate come to be overburdened with diligences; and in the computation no more was to be reckoned but the principal ſums and annualrents then owing, with ſuch penalties then incurred; but annualrents falling due after, or penalties incurred, by hornings poſterior, and accumulations ariſing from diligences led after it, none of theſe were to enter into the computation *quoad hunc effectum* to annul the heritable ſecurities he gave at the time of his breaking, ſo as to make him inſolvent at that period; and neither the *actio pauliana* in the Roman law, nor our act againſt bankrupts in 1621, go any farther, and never made him bankrupt who had ſufficiency of means at the time to pay all his debt, though afterwards by heaping up of diligences, the debt came to exceed his eſtate: But at his abſconding it was not ſo, but occaſioned by a ſupervenient inſolvency, not in being when he granted theſe rights. No 170.

The ſupervening inſolvency is ſufficient in law to expoſe the lands to ſale for paying the bankrupt's debts; but the debate here to fix the commencement of the inſolvency was to determine whether the voluntary rights he gave within the 60 days before his abſconding were legal and valid rights, or void and null by the foreſaid new law? and the LORDS found them in this caſe good; which I have ſet down more largely, becauſe it is the firſt deciſion on this point ſince the act, and is to be the rule when it occurs in time coming.

Fol. Dic. v. 1. *p.* 82. *Fountainhall, v.* 2. *p.* 698.

*** Forbes reports the ſame caſe:

IN the reduction and declarator at the inſtance of Sir William Forbes's perſonal creditors, for reducing upon the act 5th, ſeſſ. 6. Parl. K. W. ſuch real rights as had been granted to their prejudice, at, after, or ſixty days before his becoming bankrupt:—The purſuers *alleged*, That the common debtor's inſolvency, one of the requiſite overt acts of notour bankrupt in the ſtatute, is not to be calculated at the time of the concurrence of theſe requiſites. For though a debtor is conſtrued to be bankrupt from that time, his inſolvency is to be conſidered with reſpect to his after eventual condition, when his creditors come to affect his eſtate for debts contracted before his impriſonment, retiring, abſconding, flying, or for-

No. 176. ably defending himself; as is clear from the words of the act, 'If any debtor 'under diligence by horning, &c. be either imprisoned or retire, &c. and be afterwards found by sentence of the Lords to be insolvent, shall be holden and 'reputed,' &c. So that penalties and accumulations must be reckoned as much a part of the bankrupt's debt, as if they had been actually constituted before his imprisonment, retiring, &c. For these do not arise from any new deed or obligement of the debtor, but are a necessary consequence of the original debt, and when fallen due, become *fictione juris*, as much a part thereof, as if they had been added thereto at the beginning. Can therefore any thing appear more absurd, than to suppose that a man's being bankrupt should not be reckoned from the extent of his debt, but depend upon the accident of the creditors charging or not charging him? Though a bankrupt (according to the import of the word) be one who hath more debt than gear, the Lords understand a man to be bankrupt in a process of sale, who (though his debts exceed not the value of his estate) is yet so incumbered, that he cannot satisfy his creditors without selling his whole estate together. And in Moncrieff against Creditors of Langtoun, No 9. p. 884. & No 146. p. 1054. one was found bankrupt, who was only *obæratus*, burdened with great debts, and beginning to be distressed by several diligences: Albeit he did not at the time appear, or prove in the event, to be altogether insolvent. Seeing the circumstances of the common debtor's incarceration, retiring, &c. (which the creditors could not foresee) do but alarm and push them on to do diligence for their security: At which time, if his estate sufficeth not to pay his debt, he is insolvent in the sense of law, which establisheth the presumption, that anterior voluntary rights granted by him to some of his creditors, within sixty days of his foresaid imprisonment, absconding, &c. are fraudulent in prejudice of others.

Answered for the real creditors:—The act 1696, in so far as it contains a retrospect, or looks back to deeds within sixty days, and brings them to the date of the infeftments, is new and correctory, and to be strictly interpreted. Now, the word *afterwards* refers not (as the pursuers would have it) to the word *insolvent*, but *to the sentence of the Lords of Session*, which must find, That the debtor was insolvent at the time of some one or other of the circumstances of imprisonment, retiring, &c. required by the act. So in the civil law, *actio pauliana*, rescinds what is done in prejudice of creditors by one insolvent at the time of the deed, or who thereby became insolvent. And if it were otherwise, no creditor could ever be in any manner of security: Seeing the debtor, though solvent at the time of his borrowing the money, might, by granting gratuitous deeds or securities within sixty days, or granting bonds for debt contracted any time before declarator of bankrupt, turn insolvent; and thereby overturn heritable debts contracted while he was solvent. At which rate, the statute designed for a further security to the lieges against the fraud of bankrupts, would turn to their prejudice, and a door be cast open to all imaginable fraud: It being always in the power of a common debtor, to evacuate the most onerous and best secured debt, by after contracting.

THE LORDS found, That Monimuſk's inſolvency, he being under diligence by horning and caption, joined with any of the alternatives of impriſonment or retiring, or flying or abſconding, or forcibly defending, in order to make him notour bankrupt, in the terms of the act of Parliament 1696, muſt be reckoned at the time of the concurrence of the above qualifications of bankrupt, in the terms of the ſaid act of Parliament, and not at the time of purſuing the declarator of bankrupt. And found, That in proving the inſolvency, there muſt be only brought *in computo*, the principal ſums, annualrents due and reſting thereupon, penalties incurred, and accumulations eſtabliſhed the time foreſaid of the concurrence of the above qualifications of bankrupt. No 170.

Forbes, p. 570.

1737. *February* 24. LORD KILKERRAN *againſt* COUPER.

No 171.
A horning, informal in this reſpect, that the debitor had left the kingdom before it was executed at his dwelling houſe, found, notwithſtanding, effectual for the purpoſes of the act of Parliament.

IN a proceſs upon the act 1696, the queſtion occurred, whether a horning or caption, labouring under a legal objection, is, notwithſtanding, ſufficient to render the debitor notour bankrupt.—The *objection* was, That the horning was executed at the debitor's dwelling-houſe, though he had removed out of the kingdom about a fortnight before; whereas it ought to have been at the market-croſs of Edinburgh, pier and ſhore of Lieth,—*Anſwered*, It is ſufficient there be a horning and caption; neither the meaning nor the words of the law require that the diligence be above all exception; and a horning or caption, though challengeable by one or other ground of law, is ſufficient to make the bankruptcy notour, equally as if no exception lay againſt it. And the conſtruction put upon the act by the other party, would open a door to elide the act altogether; a bankrupt would have no more ado, but upon making over his effects to his favourite creditor, to ſtep over to the other ſide of the border, and reſt ſecure that his fraudulent deed muſt ſtand unexceptionable, becauſe a horning executed on 60 days, muſt come too late to bring the deed within the retroſpect of the ſtatute.—*Replied*, *Esto* the horning and caption in this caſe, ſhould be ſuſtained to infer one of the qualifications of bankruptcy; yet the other is wanting, viz. flying or abſconding for his perſonal ſecurity: Now the debtor's retiring out of the kingdom, poſſibly, about his neceſſary affairs, before any diligence done againſt him, can never come up to the qualification of 'flying and abſconding for perſonal ſecurity,' which muſt preſuppoſe diligence already raiſed, to ſhun the effect of which, the debtor finds it convenient to keep out of the way.—*Duplied*, The act does not pre-ſuppoſe diligence done; a bankrupt who retires to avoid the effect of diligence ready to be raiſed, and which, it is morally certain, will be poured out againſt him, is as properly ſaid to fly or abſcond for his preſonal ſecurity, as if diligence were already raiſed.——THE LORDS found the horning and caption produced relevant to infer one of the qualifications of the act 1696, notwithſtanding of the objection made againſt it.

Fol. Dic. v. 1. *p.* 81.