

THE LORDS found, That Monimus'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.

*Forbes, p. 570.*

No 170.

1737. February 24. LORD KILKERRAN against COUPER.

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 debtor notour bankrupt.—The *objection* was, That the horning was executed at the debtor'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 personal 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.

No 171.

A horning, informal in this respect, that the debtor had left the kingdom before it was executed at his dwelling house, found, notwithstanding, effectual for the purposes of the act of Parliament.