differed, as to what they called a notour bankrupt, and if the circumſtances alleged againſt Lanton made him ſuch; for ſome made a difference between one notourly bankrupt, and one notourly inſolvent. They acknowledged that Lanton fell under the laſt of theſe two, when he granted the corroborative rights now quarrelled, but that nothing could make him a notour bankrupt but what the law had ſo declared, by diligence done againſt him, which was not at that time. At laſt the LORDS fell on this condeſcendence, that he had before the granting of theſe rights fled to the Abbey, or abſconded; that many bonds and hornings were then given in againſt him to be paſſed and regiſtrated; that he diſponed his whole moveables, and it was intimated at the croſs of Dunſe; that he gave theſe corroborations over his whole eſtate, ſo they were like a *cessio bonorum*, and he broke ſuddenly and unexpectedly. Theſe circumſtances the LORDS found, by a vote of five *contra* four, to be ſufficient to make him a notour bankrupt, and incapable after that to grant any heritable bonds; and admitted to Sir Thomas Moncrief to prove theſe qualifications. But a new debate was ſtarted, whether this ſhould give Sir Thomas Moncrief a preference, or only to bring him and all the reſt in *pari paſſu*, otherwiſe theſe creditors who got the corroborative rights will be ruined, for they reſted on their infeftments, and did not ſo much as adjudge: Now, if theſe infeftments fall, they will be in no better caſe than perſonal creditors; ſo all ſhould come in equally, except ſuch as before his breaking were infeft, and either confirmed or in poſſeſſion. Next, many of the corroborations were given by young Lanton, againſt whom the foreſaid qualifications of fraud, and being notour bankrupt, will not militate, though they meet the father. *See* No 9. p. 884. *Fountainhall, v.* 1. *p.* 596. 605.

No 146.

1696. *January* 9.

JAMES BROWN, Advocate, *againſt* CAMPBELL of Gargunnock, DOCTOR BRISBANE, and other Creditors of BRUCE of Kennet.

No 147.
An inhibition raiſed againſt two conjunct debtors, and executed againſt one of them, was found ſufficient upon the ſecond clauſe of the act 1621, to reduce a diſpoſition, granted by the other in prejudice of the inhibiter, who was *in curſu diligentiæ*.

IN 1678, when Clackmannan broke, Bruce of Kennet, one of his cautioners, grants a diſpoſition of his eſtate to Robert Bruce, his uncle, for the behoof of himſelf and his own proper creditors, whoſe names are both inſert in the body of the diſpoſition, and in a liſt a part, whereto the diſpoſition is made relative; and infeftment being taken thereon, a decreet for mails and duties is obtained before the ſheriff depute of Clackmannan to render it public. James Brown and other creditors of Clackmannan, who had likewiſe Kennet cautioner in their bonds, raiſed a reduction of this diſpoſition as done to their prejudice, preferring his own creditors, and omitting them, and falling under the act of Parliament 1621, in favours of a conjunct perſon, and who was now dead, and ſo his right could not accreſce to the reſt mentioned in the diſpoſition, till it were eſtabliſhed in the perſon of ſome repreſenting Bruce the *fide-commissarius*; and the decreet was null, ſeeing Clackmannan was denuded of the juriſdiction of the ſheriffſhip by diligences, and ſo his depute's right fell in conſequence.—*Answered*, The preſumption ariſing from his being the diſponer's uncle, is elided two ways; both by inſtructing the onerous adequate cauſes, and that he is in moſt of it but a truſtee

No 147. for the other creditors behoof, who cannot be prejudged by his deceaſe, nor put to a tedious diligence for denuding his heirs; and Clackmannan's deputes being in the exerciſe of the office, by holding courts uncontroverted, it was ſufficient to ſuſtain the decreet on the Roman practique of Barbarius Phillipus. And as to the qualification of his being bankrupt, the debts for ſecurity whereof he diſpones, are within 60,000 merks, whereas the lands are worth 100,000; and in conſidering him to be bankrupt, not only his eſtate muſt be reckoned, but alſo the eſtate of Clackmannan, the principal debtor, and Newton's, and the other co-cautioner's lands, (againſt which principal he would have relief *in ſolidum*, ſo far as the eſtate can afford, and againſt his co-cautioners *pro rata*,) all which muſt enter *in computo;* and after calculating between the debts and the whole eſtates *in cumulo*, he cannot be repute bankrupt, unleſs the debts exceed the whole.—THE LORDS found the taking the diſpoſition in Robert Bruce's name, could not exclude the creditors from founding on it, though he was dead; and that the decreet was obtained before a competent judicatory, being then holden and repute ſuch; and that he could not be eſteemed bankrupt, till not only his eſtate, but alſo thoſe of the principal and co-cautioners were alſo computed, the whole being the ſubject of the creditors payment, as well as Kennet's eſtate conſidered alone: And found his diſpoſition of lands, in ſecurity of ſums, far within the value of the lands, could neither make him bankrupt, nor be called *diſpoſitio omnium bonorum*. James Brown alſo founded on an inhibition he had raiſed againſt them before the ſaid diſpoſition, and executed againſt Newton, one of the cautioners, before the ſaid diſpoſition, though not againſt Kennet.—THE LORDS found this inchoate diligence ſufficient to put him in the caſe of the act of Parliament 1621, diſcharging voluntary deeds in prejudice of creditors doing diligence. *See* Gordon againſt Seaton, Stair, v. 2. p. 360. *voce* INHIBITION. It was alſo *urged*, this diſpoſition was farther quarrellable, not only from the common law of *actio Pauliana*, but on the head of the ſaid act, requiring the right to be for juſt, onerous, true and neceſſary cauſes; whereas this could not be called a neceſſary cauſe; for though *ſuberat cauſa debiti anterior*, yet *nullum jus cogebat ad disponendum;* likeas the diſponer continued ſtill in poſſeſſion, which was *dare et retinere:* Next the leaving of blanks for inſerting creditors names in diſpoſitions, lays a foundation, and opens a door to fraud; for *quomodo conſtat* theſe names were all filled up before the other creditors legal diligences. And, on this ground, the LORDS, on the 15th of January 1670, Lady Lucie Hamilton againſt Dunlop, &c. Stair, v. 1. p. 660. *voce* PRESUMPTION, found they were bound to prove the time of filling up theſe blanks, elſe it was to be preſumed they were filled up after the inhibition; and there may be yet more legerdemain and ſhuffling in liſts of creditors ſigned a-part, whereto diſpoſitions are ſometimes made relative; for theſe may be altered and changed at pleaſure. But theſe points were not decided at this time. *Fol. Dic. v.* 1. *p.* 78. *Fountainhall, v.* 1. *p.* 697.

Obſerve, that in the caſe Miln againſt Nicolſon's Creditors, No 136, p. 1046, the Lords conſidered that a charge of horning is a foundation for affecting either the perſonal or heritable eſtate of the debtor; and that it ſatisfies the terms of the act 1621. They ſuſtained a ſimple charge of horning, as ſufficient to reduce ſecurities granted afterwards to other creditors, the common debtor's inſolvency at the time being proven.