was, on some presumptions, ordered to prison till farther trial; but he offering bail, it was accepted, conform to the late Act of personal liberty in 1701; and he standing on his denial of his knowledge and accession thereto, the Lords appointed the Queen's advocate to insist against him, and called the deacon and several others of that trade, and advertised them to be more cautious when broken silver work was brought to them to be sold, to detain it when they did not know the bringer and had a suspicion of its being stolen, whether the party who had lost it had caused book it in their records or not.

Then the macers gave in a bill against Thomas Kennedy and John Johnston, the two keepers of the Session-house, to make them liable, for suffering the mace to be stolen, whereof they had the custody and trust.

ANSWERED,—That they acknowledged they had the charge of the Lords' and advocates' gowns, and had a salary for it, but never looked upon themselves as concerned to answer for the maces, whereof they had no trust; the macers leaving them lying on the bench, or on chairs and trunks, and ofttimes lending them to the Privy-council macers, when they had not brought their own. And they had no salary nor allowance from the macers, who had their own servants to look after them; and, *esto* they were *depositarii*, it being merely gratuitous, they ought only to be liable *pro dolo et lata culpa.*

The affair was compounded and taken up, and so came not to a decision; though it were very fit it should be known whether the macers should be answerable, and losers in such a case, or the keepers of the house. Since the institution of the College of Justice, which is upwards of 160 years, the like theft had never been attempted before. *Vol. II. Page 265*

1705. *February* 8. WILLIAM HAMILTON of WISHAW *against* The CREDITORS of CLELAND of that ilk.

THE competition among the Creditors of Cleland of that ilk was advised. 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 Wishaw, 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 infeft on the 23d of January that year. But Sommerveil 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 seasine, or at least within sixty days of the date of the seasine. 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 seasine; and that *scripto:* as also that, within sixty 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 Wishaw and the creditors in the disposition a conjunct probation, that Cleland, during the sixty 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 March, 1704, (which is the fifty-eighth day after the seasine,) to the house of Cleland, with a caption at the instance of Nisbet of Carsen 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,—Wishaw had proven that Cleland went openly and publicly to Glasgow and Hamilton till the 3d of April 1702, which is several days after the sixty; 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 and instance, but of a track 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 *obæratus* above his fortune, they were *in mala fide* to take such a right to the exclusion of others.

The Lords found he had absconded within the sixty 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 seasine was not sufficient, unless there were a concourse of diligences against him. But the Lords remembered, that, in the late case betwixt *Man and Walls, 25th July* 1702, 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 seasine; 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. *Vol. II. Page* 266.

[See a farther competition between Hamilton of Wishaw and Cleland's Creditors, 1705, July 5, Dictionary, p. 10,397.]