SECT. III.

Contractions or Alienations where Money inſtantly advanced.

1665. *June* 28. ALEXANDER MONTEITH *againſt* ANDERSON.

No 133.
Notwithſtanding of diligence, a bankrupt may grant bond for borrowed money,

THERE being mutual reductions betwixt Monteith and Anderſon, the former having right to an appriſing, led in anno 1619, and the other, Mr John Anderſon, having adjudged in anno 1656, Mr John Anderſon inſiſted on this reaſon, that Monteith's appriſing proceeded, (was) on a ſum of 5000 merks, due by James Niſbet, the common debtor, to Gilbert Gourlay, after that James was rebel, at Mr John Anderſon's author's inſtance: After which, no bond granted, could prejudge the other creditor, having uſed diligence before; but the bond is null by the act of Parliament 1621 againſt bankrupts.—It was *answered* for Monteith, That that act was only againſt fraudulent diſpoſitions, between confident perſons, without cauſe onerous: But here a bond of borrowed money was onerous, and no man was thereby hindered to borrow money.—Anderſon *answered*, That the narrative of the rebel's bond, bearing borrowed money, could not inſtruct againſt a creditor uſing prior diligence.

This the LORDS repelled.

Anderſon inſiſted upon this reaſon, That Gourlay's bond was granted by James Niſbet, James and William Arnots, all conjunct principals, without a clauſe of relief; and this bond was aſſigned by Gourlay, with this expreſs proviſion, that no execution ſhould proceed thereupon, or upon the bond, or inhibition againſt the Arnots; and ſo if the aſſignee had been purſuing James Niſbet for all, he might have anſwered, that the aſſignee had accepted his aſſignation, with this proviſion, that James Niſbet could not uſe execution againſt the other two co-principals; and therefore he being excluded from his relief, could be only liable for his third part, for he would not have ſubſcribed the bond, but upon conſideration of his relief.—Monteith *answered*, That all the three principals being bound conjunctly and ſeverally, the creditor might renounce all execution againſt two of them, and yet crave the whole from the third; and there was no more done in this caſe; and albeit there be no clauſe of mutual relief expreſſed, yet *hoc inest de natura rei:* So that albeit Niſbet, by virtue of the aſſignation, though it had been transferred to him, could not have purſued the two Arnots; yet by the obligement of mutual relief implied he might, not as aſſignee, but as *coreus debendi*.—Anderſon *answered*, That if the clauſe had born only a provi-

sion, that no execution should pass upon the assignation, it might have been consistent; but it bears, that no execution should pass upon the assignation or bond. No 133.

The Lords found, That the obligement of mutual relief was implied, where parties were bound conjunctly and severally, albeit not expressed; and that the provision related only to the bond, *quantum ad creditorum*, and did not restrict the implied obligement of the co-principal, and therefore repelled this reason also. (*See* Debtor and Creditor. *See* Proof. *See* Cautioner.)

Fol. Dic. v. 1. *p.* 77. *Stair, v.* 1. *p.* 288.

1681. *February* 8. Neilson *against* Ross.

No 134.
Notwithstanding diligence, a bankrupt may sell his lands for a price instantly paid; such alienation is no preference of one creditor to another.

Gilbert Anderson having apprised from James Farquharson in anno 1640, the lands of Kelleis, whereunto John Wilson having right, pursues reduction of a voluntary disposition and infeftment of the same lands, granted by the said James Farquharson to Sutherland of Skelbo, whereupon he was infeft, and Mr John Ross as having right from him, upon these reasons, 1*mo*, That after legal diligence of a lawful creditor, though it were but inchoate by denouncing of lands to be apprised, or using exhibition against the person inhibited, any voluntary disposition by the debtor to prevent the effect of such diligence, are annullable thereby, as hath been oft-times decided, much more when an apprising was consummate. 2*do*, By the act of Parliament 1621, anent fraudulent alienations, and the last clause thereof, it is statute, That if a debtor, after legal diligence, by apprising, horning, or inhibition, shall, by gratification, prefer any other creditor, and dispone to them, such dispositions shall be null.—It was *answered* for the defender, to the *first* reason, That albeit when any lawful creditor is in *cursu diligentiæ*, no voluntary disposition by his debtor can exclude him; which cannot be applied to this case, where the appriser was silent and negligent by the space of 10 years without infeftment, or giving a charge, and without pursuing for mails and duties, and so could not be said to be in *cursu diligentiæ*. As to the *second* reason, the voluntary disposition here is no gratification or preference, but a fair bargain of sale for a price then paid *bona fide*, the buyer having been no creditor before, and therefore falls not within the act of Parliament, and no purchaser could secure himself against asprisings, which at that time were not upon record.

The Lords found both these defences relevant to exclude the reasons of reduction. (*See* Litigious.)

Fol. Dic. v. 1. *p.* 77. *Stair, v.* 1. *p.* 856.