1694. *January* 23.

SIR THOMAS MONCRIEF *against* CREDITORS of COCKBURN of Lanton.

No 146.
Circumſtances inferring bankruptcy, although no diligence done, found ſufficient to annul preferences. This cauſe occaſioned an act of ſederunt to fix the *criteria* of bankruptcy, which was followed by the act of Parliament 1696.

THE LORDS adviſed Sir Thomas Moncrief's reduction, againſt the other preferable Creditors of Cockburn of Lanton, whereby he quarrelled all the corroborative ſecurities he had granted in March 1690, (on the noiſe of his breaking,) to his perſonal creditors, viz. giving them heritable bonds, whereon they immediately took infeftment, and confirmed, and ſo were preferable to Sir Thomas's debt. His reaſon of reduction was, that though the act 1621 did not reach this caſe, yet fraud was regulate and determined from the common law; and many citations were adduced for proving that a notour bankrupt could give no rights in prejudice of his creditors; and that our deciſions had gone on the ſame principles, as in Street and Maſon's caſe in 1673*, and the Lady Tarperſie and Kinfawn's†, and many others; ſo that Sir Thomas needs ſay no more, ſave that Lanton was a notour bankrupt at the time when he granted theſe bonds.—*Anſwered*, That our law knew no ſuch definition of a bankrupt, unleſs incapacitate by diligence againſt him at his creditors inſtance. The vote being ſtated, whether Lanton's being notour bankrupt, and fled, at the time of ſubſcribing theſe corroborations, was a relevant ground in law to reduce them as fraudulent, the receivers knowing the report of his being broken at that time, albeit there was no diligence actually execute againſt them at the time, but very ſhortly after, a deluge of hornings, &c.:——THE LORDS, by a plurality, found, That there was no law yet in Scotland whereupon the ſecurities could be annulled, though granted by a notour bankrupt, *in fuga, et qui ceſſit foro*, and had taken ſanctuary in the Abbey, ſeeing we had no ſtandard whereby to render and declare a man bankrupt, ſave only diligences, &c.: Whereunto ſome of the LORDS were moved, becauſe the creditors who got theſe corroborations did rely ſo little thereon, that they betook themſelves to the legal ſecurity by adjudications. Others thought Lanton was as effectually bankrupt then as now, and that no deed then done by him was to be regarded, unleſs the Lords would allow him to rank his creditors in the Abbey, by partial preferences; and, after one was reduced to that caſe, they thought all the creditors ſhould come in *pari paſſu*. THE LORDS were ſo ſenſible of the defect of law in this point, that they named a committee to prepare an Act of Sederunt, to fix when one is repute to be ſuch a dyvour and bankrupt as that afterwards he can do nothing that ſhall ſubſiſt in prejudice of any creditor, and that the marches may be ſo diſtinct and clear that every man may know it, without leaving it at the arbitriment of judges.

February 8. 1694.—THE LORDS, upon a bill given in by Sir Thomas Moncrief, and the Creditors of Lanton's anſwers, re-adviſed that point decided *ſupra*, 23d January 1694; and the LORDS now, by a plurality, the Chancellor being preſent, altered their former interlocutor; and generally agreed in this, that a notour bankrupt could not gratify nor prefer one creditor before another; but they

* Stair, v. 2. p. 197. *voce* FRAUD. † No 29. p. 900.

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