

No 3. which in this, and every such action, libels, that the creditors are in possession of the estate.

Answered for the pursuers; The summons proceeds on an heritable bond and infetment, as the pursuer's title; and subsumes, in the common stile, that the defender is bankrupt, and some of the creditors in possession; and concludes, that the creditors should be ranked, and the estate sold. In practice, it is understood, that when such an action is first called in the Outer-house, the powers of the Lord Ordinary are limited, and he can only judge, *1mo*, of the pursuer's title; *2do*, of the relevancy of the rebel; and, *3tio*, if the debtor and his creditors are properly brought into Court. All other points, such as the bankruptcy; the creditors being in possession; the rental, value, and holding of the lands, are reserved for the cognizance of the Court. The Lord Ordinary is not entitled to inquire into these particulars. This was said to be agreeable to practice, and to the act of Parliament 1681.

The Lord Ordinary had repelled the objections, and appointed the sale to proceed in common form.

Mr Marshall gave in a petition to the Court, and this interlocutor was pronounced:

"THE LORDS having advised this petition, with the answers thereto, refuse the desire of the petition, and remit to the Lord Ordinary immediately to call the cause, and pronounce the act in common form."

For Pursuers, *William Craig, Ro. Blair.*

Alt. Ilay Campbell, Ro. Cullen.

Fol. Dic. v. 4. p. 207. Fac. Col. No 13. p. 23.

SECT. II.

What understood Bankruptcy.

1705. July 3. Sir WILLIAM HOPE *against* GORDON.

No 4.
Where five parts of six of the price of the lands was due to creditors, the estate was held to be bankrupt.

IN the process of sale of the lands of Balcomy, pertaining to the deceased Sir James Learmont, pursued by Sir William Hope against Mr William Gordon, advocate, the question arose, whether the estate could be reckoned bankrupt, seeing the price put upon it by the Lords was L. 90,000 Scots, according to the proved rental, and all the debts and principal sums affecting the said estate were only L. 75,000, so the value of the estate exceeded the debt in L. 15,000, or thereby; and where a party has more than will pay his debt, he cannot be called bankrupt, that being only where *debita excedunt bona*. It

was *contended* for the creditors, pursuers of the roup, That this calcul was altogether erroneous; for it went on this false supposition, that all the annual-rents of that principal sum were paid up; whereas it was notour that many creditors of Balcomy could not get a farthing of their annual-rents these twenty years bygone, they being far behind in diligence, and consequently postponed in the decret of ranking; and even some of the preferable creditors got not their full annual-rents by the negligence or fraud of the factors, and the other emergent burdens on the estate, so that the debts were now swelled to more than double what they were at the beginning, which makes it uncontrovertedly bankrupt. But the LORDS went on the supposition there were no more owing but precisely the principal sum of L. 75,000 Scots, and yet thought such a man in construction of law was insolvent; for it is naturally impossible for him to pay that debt out of that estate by any other way than selling his lands; for deducting public burdens, dead, waste, and poor, and other casualties and accidents, it will do little more than pay the annual-rent of the debt, and can never diminish any part of the principal sums, nor extricate the debtor, without exposing the lands to sale; and therefore found, by the scheme of the probation given in, that the debtor was *obæratu*s and insolvent, and the estate bankrupt. Then it was *contended*, That this estate could not go to a roup, because Mrs Katharine Learmont, one of the two apparent heirs portioners, was lately dead, and Sir James Gordon of Lesmore, her nephew and apparent heir, was not called to the process. *Answered*; His mother having been the eldest daughter, and deceasing, he was called for his intetest, and so was in the field, and needed not be again called as heir to Mrs Katharine his aunt, because she never had any other right but that of apparency, the estate being under sequestration, at the creditor's instance, these thirty years past. THE LORDS thought the right of apparency vanished with the apparent heir's death, and to have an apparent heir to another apparent heir was a *fiotio fictionis*, for he stood as apparent heir to them who died last vest and seised; and, therefore, seeing Lesmore was apparent heir to both, and was already called in the process, there was no necessity to cite him over again. If Mrs Katharine had been infert, or had some other positive right to the lands, there might have been ground for this allegiance of citing her heir; but that not being so much as pretended, the LORDS repelled the objection, and ordained the roup to go on. See No 13. p. 8119. *voce* LEGAL DILIGENCE.

Fol. Dic. v. 2. p. 310. Fountainhall, v. 2. p. 281.