No 2.

Answered for the pursuer; Even though the defender's authors had taken the proper steps for completing their right before the adjudications were led, the lands of Crossburn must still have been burdened with the bond for 1200 merks, upon which infeftment had followed, so far back as the 1754. But, as matters now stand, these lands cannot be struck out of the sale, because the process was commenced before the date of the disposition, and Clyde was bankrupt when he granted it.

A sale differs from an inhibition. The latter perhaps excludes only voluntary deeds; but, in the former, it is an established maxim, *pendente lite nihil innovandum*. No diligence begun, or even completed after its commencement, can have the effect to alter the preference of the creditors. Nor is the distinction of deeds necessary or voluntary founded on the bankrupt-acts. This is plain from the statute 1621, and Lord Bankton, in express terms, says, I. 10. 104. that 'it is extended to deeds that appear to be necessary,' which he exemplifies by a case similar to the present.

THE LORDS, moved principally by the latency of the roup, 'Refused to strike the lands out of the sale.'

Act. *Wight.* Alt. *Macqueen.*

G. F. *Fol. Dic. v. 4. p. 207. Fac. Col. No 95. p. 175.*

1780. *December* 23.

Messrs CUNNINGHAM, DOUGAL, and Company, *against* WILLIAM MARSHALL.

No 3.
Title to bring the action of ranking and sale.

MESSRS CUNNINGHAM, DOUGAL, and Company, being creditors to Mr Marshall, by an heritable bond and infeftment, brought a process of ranking and sale against Mr Marshall, which coming to be called before the Lord Ordinary in the Outer-house, the pursuers craved the common interloctor, allowing a proof of the libel, &c.

Objected for Mr Marshall; A ranking and sale is a process of a most serious nature, and of all others the most important to the defender. The direct tendency of the action is to strip him of his whole fortune, and declare him to all the world a notorous bankrupt; and this must be the consequence of pronouncing the interlocutor insisted for by the pursuers, by which a publication of the defender's bankruptcy must be made in the newspapers, and diligence granted for recovering the title-deeds of his estates. By the act 1681, cap. 17, no such action can proceed, unless the debtor's affairs be manifestly desperate, his estate affected by diligence, and the creditors in the actual possession of the same. But in this case, there is no bankruptcy, no diligence against the estate by adjudication, nor is any creditor in possession, and, therefore, no action of ranking and sale can proceed; as appears from the stile of the summons,

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 infeftment, 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.

No 4.

Where five parts of six of the price of the lands was due to creditors, the estate was held to be bankrupt.

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

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 *débita excedunt bona.* It