1694. *February* 29. PAUL *against* DAVIDSON.

No 35.
An assignation by a father to his children, in implement of a contract of marriage, and while he was in good circumstances, found effectual; altho' not intimated, and challenged as in defraud of posterior creditors.

THE debate between Sir John Paul and Sir William Davidson's daughters is reported by Redford; and the LORDS preferred the daughters upon the transport or assignation they had from their father to the town of Edinburgh's bond, though he was a creditor, and it was not intimated; because the transport depended on the onerous cause of implementing to them their mother's contract of marriage; and Paul's debt was contracted long after that marriage, and after the transport; and he was in an opulent and flourishing condition when he made that assignation, and so made it not in defraud of creditors, especially of future creditors, such as Paul was; and thus there was no place here for the *actio pauliana revocatoria;* and Street and Mason's case in 1673, No 32. p. 4911. did not meet this; for though Mason disponed his lands to his son before contraction of the debts, yet it was reduced, because there was a current tract of correspondence between them prior to his son's fee, and his design appeared evidently to be fraudulent.

Fol. Dic. v. 1. *p.* 335. *Fountainhall, v.* 1. *p.* 277.

1688. *February* 10.

The CREDITORS of WILLIAM ROBERTSON *against* His CHILDREN.

No 36.
A bond of provision to children, more favourable to them than stipulated by contract of marriage, reduced at the instance of posterior creditors.

THE reduction pursued by the Creditors of William Robertson of his Children's bond of provision was reported by Harcarse, viz. that it was a latent deed, never known till he broke, and so presumed not to have been delivered. 2*do*, It is disconform to the contract of marriage, which is in favours of heirs, and only payable after his decease; whereas this is to bairns, and adds 10,000 merks more, and is payable at their age of twenty-one, and so wants an onerous cause. *Answered*, They offered to prove its delivery; and that the creditors debts are all long posterior to it. THE LORDS decerned in the reduction of the bond, and preferred the creditors to the children. They cited for the creditors, 10th January 1668, Bothwell of Glencorse, *voce* WRIT; Pollock, No 31. p. 4909.; 11th July 1673, Street, No 32. p. 4911.; 4th December 1673, Reid, No 33. p. 4923.

Fol. Dic. v. 1. *p.* 135. *Fountainhall, v.* 1. *p.* 497.

1694. *December* 21.

CREDITORS of CARLOURY and HALYARDS *against* LORD MERSINGTON, &c.

No 37.
Heritable securities in relief granted to cautioners, were sustain-

RANKIELER reported the Creditors of Carloury *contra* my Lord Mersington, Mr Thomas Skeen, and Hugh Brown, for reducing an infeftment of relief

No 37.
ed, although the debtor was insolvent at the time; it not being proved that he was notour bankrupt, and the private knowledge of his circumstances by his cautioner, not being sufficient to affect their rights.

given to them by Skeen of Halyards and Drummond of Carloury, after they were *obærati et in meditatione fugæ*. *Answered*, They were cautioners and just creditors, and might lawfully take any security for their relief; and, though there were hornings, inhibitions, and other diligences against them, at the instance of others, yet none of these now pursuing had done any before it. *Replied*, They were in the case of Sir Thomas Moncrieff *contra* the other Creditors of Lanton, where the Lords found, in February 1694, No 146. p. 1054., not from the act of Parl. 1621, but on the head of fraud, from the common law, that Lanton, after he began to be pressed with diligences, and had retired out of town, and made a disposition of his whole moveables, could not grant heritable securities in favour of one creditor in prejudice of another. But it was *contended*, That there was a farther qualification required in Lanton's case, which cannot be subsumed here, viz. that he was then holden and repute a bankrupt. The Lords thought it deserved a hearing in presence, that they might settle the limits of bankruptcy, when one should be utterly incapacitated to dispone or grant any rights or gratification in favours of one creditor before another.

1695. *January* 15.—This was a reduction of heritable bonds of relief granted by these two debtors to the foresaid persons engaged for them in several cautionries, not only on the act of Parliament 1621, but on the common law, and Prætor's edict, *Quæ in fraudem creditorum*. The qualifications against the bond given by Carlourie was, that he had retired to the sanctuary of the Abbay, and it was signed there, and he was then *obæratus* and insolvent, his debts exceeding his estate; and there were sundry diligences against him, both hornings and inhibitions, and which, conjoined with the bonds then given in to be registrate against him, exceeded the value of his lands. *Answered*, Flying to the Abbay is no mark of a bankrupt; for some will retire there for a season, on the account of a very small debt: And *quoad* the creditors who had done diligence, they acknowledged their right was reducible on the act of Parliament 1621, but not *in toto*, nor at the instance of those who had not done any prior to their bond; and that the being bankrupt was not enough, unless they joined notoriety to it; seeing a man is not *particeps fraudis suum recipere, nec est in dolo qui jure suo utitur*; as was lately found between Sir Thomas Moncrieff and Lanton's Creditors, No 146. p. 1054.; and 2d February 1632, Jack and Gray, No 26. p. 897.; and if this were not, we should have no marks nor limits of bankrupts. The Lords found these qualifications not sufficient to reduce, unless they also offered to prove he was then holden and reputed bankrupt. On this, they *alleged* it was equivalent that the party-receiver knew at the time he got the right that the granter of it was bankrupt. *Answered*, Private knowledge did not supply the notoriety, unless they would refer to their oath, that they then knew he was commonly holden to be a bankrupt; and

what hinders a creditor, when he begins to suspect his debtor's condition *sibi vigilare*, and to get a security? THE LORDS did not find private knowledge sufficient in this case. No 37.

Fountainhall, *v.* 1. *p.* 652. & 659.

1709. *February* 10.

ROBERT M'CHRISTIAN *against* WALTER MONTEITH, Merchant in London, and WILLIAM CUNINGHAM his Factor.

No 38.
A reduction of a disposition of lands granted by a nephew to his uncle, was raised at the instance of a creditor of the granter, whose debt was contracted after the disposition, upon presumed fraud, that the disposition being betwixt conjunct persons, did not prove its onerous cause, but must be presumed to have been granted to protect the subject from the disponer's debts, and to have been kept latent to ensnare creditors. The Lords assoilzied the defender.

DAVID M'CHRISTIAN, apparent heir in a piece of land called Monkhill, dispones the same to Robert M'Christian his uncle in 1699, and turns a merchant-chapman in England; and taking ware to the value of L. 40 or L. 50 Sterling from William Monteith factor in London, he takes bond for the same; whereupon he causes charge him to enter heir special to his grand-father, who died last vest and seized in these lands of Monkhill; and thereon obtains a decreet of adjudication against him in February 1707. This awakens Robert, who, in July thereafter, compleats his disposition, and infefts David his author by hasp and staple, and himself on the procuratory of resignation; whereupon Monteith, the adjudger, and he competing about the mails and duties of the said lands; it was *objected* by Monteith, that Robert M'Christian's right was *inter conjunctos*, uncle and nephew; and so did not prove its own narrative to be onerous, till it were otherwise instructed; and was a latent right kept up *animo decipiendi creditores*; and was never compleated till I had fully denuded him by my adjudication, which is some months prior to your infeftment; and so intervening betwixt your disposition and sasine, it was a *medium impedimentum* to hinder the retrotracting of your sasine to the date of your disposition; and the Lords, on the 21st January 1669, Pollock's Creditors *contra* Pollock, No 31. p. 4909., found the latency a great presumption of fraud; and, although the act of Parl. 1621, against the alienations of bankrupts, mentions only anterior creditors, yet the Lords, from the common law, have allowed posterior creditors to quarrel the same, as was found in the case of Street and Jackson *contra* Mason, 2d July 1673, No 32. p. 4911.; where the Lords reduced a disposition he had made to his son, though their debt was contracted thereafter, and declared him infamous. *Answered*, You Monteith was not so much as creditor at the time of my disposition, nor for several years after; and though you have inhibited and adjudged, yet this is all but personal, because you neglected to infeft yourself thereupon; so I having the first compleat real right, must be preferred; and Street and Mason's case *toto cælo* differs from this; for there a long tract of correspondence in trade preceded his infefting his son, an infant, of the same name with himself, which ensnared his creditors; and the current trade continued after, which made them upon the matter creditors *ab ante*,