No 215. conſidered as ſuch, than the advancer of it was to be regarded as principal creditor; for it does not ſtamp either of them with the character, that they have come under obligations to do what is future, the one in advancing the money, the other in becoming ſurety for ſuch advance.

Answered: Such ſecurities for relief of cautioner in caſh-credits are in practice extremely common;* nor do they ſeem leſs agreeable to law that thoſe granted to cautioners for perſons obtaining offices of truſt, with reſpect to the validity of which however no doubt can be entertained. There is not an argument which can be urged for ſupporting an heritable ſecurity in either of the caſes, that does not apply with equal force to the other.

It has been ſaid, that before the money was actually advanced there was no exiſting debt, nor any room for a ſecurity in relief. But it is plain, that the cautioner had previouſly come under an effectual obligation to be reſponſible for the debtor's operations on the caſh-credit, while over theſe he poſſeſſed no means of controul; againſt which obligation, therefore, he was entitled to preſent relief, ſo that it cannot be regarded as a future debt.

The caſes of Pickering and of Newnham, as they related to ſecurities obtained by the creditor, afford not any precedent for the preſent, which reſpects a cautioner.

THE LORD ORDINARY pronounced this interlocutor: 'In reſpect that in the bond of relief John Brough, the principal debtor, is bound to relieve, free, and harmleſs keep, Robert Selby, the cautioner, from the payment of the contents of the bond of credit, and for that effect to deliver it up to him cancelled, or report a valid diſcharge thereof, duly regiſtered, againſt the term of Whitſunday then next; repels the objection.'

On adviſing, however, a relaiming petition, with the anſwers,

THE LORDS altered this interlocutor, and found, 'That the heirs of the deceaſed Robert Selby are only preferable, in virtue of his infeftment, for the ſums they can inſtruct to have been advanced at the date of the ſaid infeftment.'

Lord Ordinary, *Dreghorn.* For the Creditors, *Cullen.* Alt. *Abercromby.* Clerk, *Mitchelſon.*
Fol. Dic. v. 3. *p.* 59. *Fac. Col. No* 171. *p.* 351.

Stewart.

1793. *June* 5.

The TRUSTEES for the Creditors of JOHN BROUGH, *againſt* ALEXANDER DUNCAN and JAMES JOLLIE.

No 216. An heritable bond of relief granted to cautioners

On the 23d March 1784, John Brough obtained a caſh-credit for L. 500 from the Royal Bank, upon the ſecurity of a bond granted by himſelf, Alexander Duncan, and James Jollie; and on the 18th May thereafter, he granted to Meſſrs

* A variety of late inſtances were produced from the regiſter of ſaſines.

No 216.
more than seven weeks after the date of the original obligation, and upon which infeftment had not been taken till within sixty days of bankruptcy, found to fall under the statute 1696.

Duncan and Jollie an heritable bond of relief. This bond remained a latent personal deed, till the 20th November 1787, when infeftment was taken upon it. The sasine was recorded on the 23d of the same month.

Mr Brough's affairs having gone into disorder, a meeting of his creditors was held on the 17th January 1788. At this meeting, Mr Jollie, for Mr Duncan and himself, agreed, in order to save expence and trouble, that all objections to their security should be reserved to the creditors at large, as fully as if Mr Brough had been of that date rendered bankrupt in terms of the act 1696.

Brough's estate having afterwards been sequestrated, the trustee for his creditors *contended*, that the heritable bond granted to Messrs Duncan and Jollie was reducible, in terms of the act 1696, because, although granted in May 1784, no infeftment had been taken on it till the 20th November 1787, that is only fifty-eight days before the 17th January 1788, when they agreed, that Mr Brough should be held to be bankrupt.

The defenders stated, that, although by accident, the heritable bond was not executed for more than seven weeks after the date of the original obligation, it was, *ab initio*, stipulated for, as the condition of their entering into it; a fact which they offered to prove, and which they alleged it was competent for them to establish by the oath of the bankrupt, Kilkerran, p. 441. 7th February 1744, Pringle against Biggar; 9th July 1745, Blair against Balfour, Kilkerran, p. 444.; 7th November 1749, Sinclair against Johnston, Kilkerran, p. 446. (all *voce* PROOF); and that both the bond of relief, and instrument of sasine, were extended so early as the 31st March 1784, as appears from the books of the person by whom they were drawn. In these circumstances, they

Pleaded, The bond of relief must be considered as of the same date, and as *pars ejusdem negotii* with the principal obligation, as a *novum debitum*, and not a farther security for a debt already contracted. Indeed, if Brough's credit had been suspected, which could be the only reason for demanding an additional security, infeftment would certainly have been taken the moment the bond was granted. Now, the act 1696 strikes only at securities for prior debts. It was intended to remedy the defects of the act 1621, and prevent all partial preferences of creditors; but not to deprive a person, on the eve of bankruptcy, of the free administration of his affairs. A person, the day before his failure, may sell his property for an adequate price, may borrow money, and grant heritable securities; and surely therefore there can be no objection to the validity of a security granted many years before, though infeftment has not been taken till within sixty days of bankruptcy.

The clause in the statute, declaring, that heritable rights shall be held as granted of the date of the sasine taken on them, does not apply to *nova debita*; for if it did, this preposterous consequence would follow, that a security obtained for such a debt on the sixty-first day before bankruptcy, and sasine taken on it upon

No 216. the fifty-ninth, would be null, while a bond and ſaſine both within ſixty days would be ſuſtained.

The defenders admit, that an explanation different from that which they have now given, was put on the act 1696, in the caſe of Grant againſt Duncan, *infra h. t.*; and in that of Merchiſton's Creditors in 1731, *infra h. t.*; but the doctrine now contended for was eſtabliſhed 19th January 1726, Chalmers againſt the Creditors of Riccarton, *infra h. t.*; 29th January 1751, Johnſton againſt Burnet and Home, No 200. p. 1130. *See* alſo 20th February 1772, Houſton and Company againſt Stewarts, No 220. p. 1170.; 19th November 1783, Spottiſwoode againſt Robertſon Barclay, No 221.

Answered, The objecting creditors have no occaſion to diſpute, that the act 1696 has been found not to apply to *nova debita* properly ſo called. But the bond of relief to Meſſrs Duncan and Jollie, granted ſeveral weeks after the date of the original obligation, falls not under this deſcription. It is, in the ſtricteſt ſenſe, a further ſecurity for the debt which the bankrupt owed them from the moment they became his cautioners.

But further, the ſecurity in queſtion would have been reducible, although it had been granted of the ſame date with the obligation to the bank; becauſe infeftment was not taken upon it for three years after, and not till within ſixty days of the bankruptcy of the debtor. The danger of ſupporting ſuch tranſactions is evident. By means of them, a tradeſman, after burdening his heritable property to its utmoſt value, may carry on extenſive dealings, and maintain his credit, on the ſuppoſition that it is quite clear of incumbrances, till at laſt he becomes completely ruined, when, and within ſixty days of his bankruptcy, ſaſines are taken upon latent bonds, which entirely exhauſt the ſubject, 19th June 1731, Creditors of Merchiſton againſt Charteris, *infra h. t.*; 25th November 1735, Truſtees of Mathieſon's Creditors againſt Smith, *infra h. t.* *See* alſo 29th November 1783, Robertſon Barclay againſt Lennox, No 209. p. 1151.

Replied, The other creditors ſuffered nothing from the delay in taking infeftment. Brough was an upholſterer and builder. His debts were contracted in the way of his profeſſion, and his creditors relying upon his apparently proſperous ſituation, never thought of conſulting the records, as to the ſtate of his heritable property.

The Lord Ordinary at firſt repelled the objection; but afterwards took it to report on informations.

Observed on the Bench, It is perhaps to be regretted, that the later deciſions of the Court have gone contrary to that of Merchiſton's Creditors. For although the act 1696 was not intended to apply to *nova debita* in the proper ſenſe of that term, it is a very different queſtion, whether it ought not to ſtrike at new obligations, where infeftment has been unneceſſarily delayed. Such infeftments may give riſe to innumerable frauds in bankrupts and their confederates, which it was the expreſs deſign of the ſtatute to prevent. But it is too late to go back upon

the queſtion of their validity, which was thoroughly conſidered in the caſe of Johnſton againſt Home, a deciſion which has been uniformly followed ſince that time. No 216.

The preſent caſe, however, is attended with no difficulty whatever. The debt to the bank was contracted in March, and the heritable bond was not granted till May. During this interval, Meſſrs Jollie and Duncan had only a perſonal claim of relief againſt Brough; the heritable bond, therefore, being clearly a further ſecurity, falls under the act 1696.

THE LORDS unanimouſly ſuſtained the objection.

A reclaiming petition was refuſed, without anſwers, on 2d July 1793.

At adviſing this cauſe, it was alſo obſerved, that if a ſtatute was to be made explanatory of the act 1696, it ſhould fix the interval of time within which infeftment muſt follow on a *novum debitum*, in order to place it beyond the reach of the ſtatute, as it would be very diſagreeable for Judges, even if they were not tied down by the deciſions of the Court, that every queſtion of *mora* ſhould be left arbitrary to their deciſion; and that it would alſo be an improvement on the act, if the ſixty days were only to run from the regiſtration, and not from the date of the ſaſine.

Lord Ordinary, *Dreghorn.* For the Perſonal Creditors, *Solicitor-General, Patiſon.*
For Meſſrs Duncan and Jollie, *Dean of Faculty, Cullen.* Clerk, *Mitchelſon.*

Davidſon. *Fol. Dic. v.* 3. *p.* 60. *Fac. Col. No* 56. *p.* 123.

1795. *July* 8.

WILLIAM KEITH, Truſtee for the Creditors of JOHN SYME, *againſt* JOHN MAXWELL.

No 217.
A debtor diſponed his eſtate abſolutely, under a back-bond to rediſpone, upon payment of the debt. The extent of the debt came to be notour, by means of an action in Court regarding it. Being rendered bankrupt; found he could not diſcharge the back-bond, ſo as to diminiſh the reverſion, to the prejudice of his creditors.

ON a ſettlement of accounts between Mr Conſtable and the late John Syme, writer to the ſignet, his agent, there was a balance of L. 6000 againſt the latter, for which it was concerted, that he ſhould grant a bond to John Maxwell, one of Mr Conſtable's commiſſioners, which he accordingly did, on the 3d December 1779.

Maxwell, a few days after, granted a back-bond to Mr Conſtable, declaring, that the bond, though *ex facie* ſimply in his favour, was truly granted to him in truſt for Mr Conſtable.

And on the ſame 3d December 1779, Syme likewiſe granted an abſolute and irredeemable diſpoſition of the lands of Barncailzie, and others, to Maxwell; who, on the other hand, on the 6th of that month, granted a back-bond to Syme, declaring, that the diſpoſition was granted only in ſecurity of the bond for L. 6000; and therefore he obliged himſelf, whenever it was paid, to rediſpone the lands to Syme.

Maxwell was infeft on the diſpoſition, 17th February 1781; and his ſaſine recorded 17th April thereafter. But Syme, till his death, remained in poſſeſſion of the houſe and parks of Barncailzie.