No 199. ſtatute, ſubjected to the debt; and that the ſubjects, which the ſtatute ſuppoſes to be affected, are only the debtor's lands, or his goods, or the price thereof, none of which comprehended his ready money; and as none of the ſtatutes do reſtrain him from ſpending or ſquandering his ready money, it would have been ſtrange to have reſtrained him from giving it to his creditors.

There was no occaſion in this caſe to determine, what the caſe would be of payment made by delivery of moveables; though it was mentioned in the reaſoning as a thing not to be doubted, that ſuch payment would fall under the ſtatute. (*See* No 131. p. 1042.)

Kilkerran, (BANKRUPT.) *No* 15. *p.* 62.

No 200.
A perſon became bound as cautioner in a bond of relief. He diſponed, in ſecurity of this obligation, an heritable ſubject. Before infeftment was taken, he became bankrupt. The caſe found not to fall under either of the acts 1621 or 1696. The act 1696 held not to extend to *nova debita*.

1751. *January* 29. ANDREW JOHNSTON *againſt* HOME of Manderſton.

ALEXANDER HOME of Manderſton, having become bound as cautioner with and for Hugh Thomſon to the Britiſh Linen Company for L. 100 Sterling, by bond dated the 20th July 1747, got, of the ſame date with the principal bond, a bond of relief by Hugh Thomſon, and George Burnet, his brother-in-law, in which a brewery and certain houſes in Edinburgh are made over to him for the ſecurity of his relief by Burnet, who himſelf had right to the ſame by a diſpoſition without infeftment. In April 1748, Manderſton finding that Burnet was become bankrupt, took infeftment, by executing the procuratory contained in the diſpoſition by Burnet's author to him. And Thomſon having alſo failed, Manderſton paid the debt to the Britiſh Linen Company, and took an aſſignment.

Andrew Johnſton, creditor to Burnet in the ſum of L. 55 Sterling, by bill dated January 1747, inſiſted in a reduction, upon the act 1696, of the ſaid real ſecurity granted by Burnet to Manderſton. And the reaſon of reduction was, that the defender having taken infeftment after Burnet's notour bankruptcy, the diſpoſition in his favours, by a clauſe in the act 1696, muſt be conſidered as of the date of the ſaſine, and conſequently null and void upon another clauſe in the act, as being *fictione juris* a ſecurity granted to a prior creditor within threeſcore days of notour bankruptcy. Two anſwers were made to this reaſon of reduction, 1*mo*, That the clauſe declaring diſpoſitions, &c. granted by bankrupts, to be reckoned as of the date of the ſaſines lawfully taken thereon, does not concern *nova debita*, ſuch as the preſent is, but only ſecurities granted to prior creditors. 2*do*, That the clauſe does not, at any rate, relate to the preſent caſe, which is a conveyance of a diſpoſition upon which the bankrupt himſelf never was infeft: whereas the words, as well as the ſpirit of the clauſe, regard only ſubjects in which the bankrupts are infeft.

With reſpect to the firſt point, the defender, becauſe of the diſcrepancy among the deciſions of this Court, ſtated at great length the argument for evincing that the clauſe does not relate to *nova debita*. It is obvious in the *firſt* place, that the

whole intendment of this ſtatute is to ſupply the defects of the act 1621, and to complete the remedy, by tying up the hands of bankrupts from acting partially among their creditors. All other acts of ordinary and extraordinary adminiſtration are reſerved to them; they can levy their rents, and ſquander the ſame; they can borrow money and grant ſecurity for the ſame; nay, they can ſell their eſtates for a juſt price. Hence, as the plain intention of the ſtatute is, to prevent partiality with regard to creditors, every dark and doubtful clauſe muſt be ſo interpreted as to relate to that caſe, and not to a caſe which the ſtatute had not in view, which is that of borrowing money, or of ſelling land, and which plainly is not reached by any other clauſe in the ſtatute, if it be reached by this. No 200.

In the *ſecond* place, the clauſe is ſo conceived, that it is only applicable to ſecurities granted in favour of prior creditors; for it ſays expreſsly, that diſpoſitions, heritable bonds, &c. ſhall only be reckoned to be of the date of the ſaſine, as to this caſe of bankrupt. Now, the circumſtance of bankruptcy is of no earthly weight, but ſingly with regard to ſecurities granted to prior creditors: It is of no importance in the caſe of bankruptcy, what is the date of a bond of borrowed money, ſeeing it is true in law that a man, even after his notour bankruptcy, may borrow money.

But what the defender principally reſts upon, is the following conſideration, that, if the clauſe in queſtion be found to relate to *nova debita*, it will have a ſtronger effect than any perſon who eſpouſes that interpretation can juſtify. It muſt not only cut down heritable bonds for money inſtantly advanced, where infeftment has been long delayed, but it muſt cut down every ſuch heritable bond, with regard to real ſecurity, where infeftment is taken within threeſcore days of the bankruptcy, though there be no delay in taking infeftment. The clauſe makes no diſtinction whether the infeftment taken be recent or not: It is enacted in general, 'That as to the caſe of bankrupt, all diſpoſitions, heritable bonds, '&c. ſhall be reckoned to be of the date of the ſaſine lawfully taken thereon.' At this rate, an heritable bond granted 61 days before the notour bankruptcy, for money inſtantly advanced, upon which ſaſine is taken two days thereafter, muſt be annulled, at leaſt as to the infeftment: Nay, a creditor who lends his money during the running of the threeſcore days, upon an heritable bond, muſt loſe his preference, though he take his infeftment without delaying an hour; for there muſt always be ſome interval betwixt the date of the bond and the date of the ſaſine. It clearly follows from this argument, that the clauſe under conſideration cannot relate to *nova debita*; for, if it did, no man could have the leaſt ſecurity to lend his money to a bankrupt, or for 60 days before the bankruptcy; and yet this conſequence was never maintained, nor imagined to be law.

And this opens another view, which is, that unleſs this clauſe were intended to prevent the borrowing money, or ſelling land within threeſcore days of bankruptcy, which certainly never was intended, it would ſignify nothing to extend it to *nova debita*. All that this clauſe enacts is, that the bond ſhall be of the ſame dame date with the ſaſine: Be it ſo; the bond is ſtill effectual, and the in-

No 200. feſtment upon it; unleſs it can be maintained, that the commerce of borrowing money within threeſcore days of bankruptcy is diſcharged. Had ſuch a thing been intended, the legiſlature would not have left it to be implied by dark and doubtful inferences. But when the clauſe is confined to ſecurities granted to creditors, the meaning comes out clear and perſpicuous: To declare, that a ſecurity granted for a prior debt ſhall be held of the date of the ſaſine, is, in other words, to declare, that not only ſuch ſecurities granted within threeſcore days of the bankruptcy, ſhall be annulled; but alſo, that thoſe granted before ſhall have no preference as real ſecurities, if infeftment be not taken before the threeſcore days.

To bring *nova debita* under this clauſe, a ſenſe is given to it, which is very much ſtrained. It ſignifies nothing to make an original heritable bond to be conſidered as of the date of the ſaſine, though this is all the ſtatute ſays: In order to come at a challenge, the heritable bond muſt be ſplit in two; the date of the perſonal obligation is left entire, and the acceſſory real ſecurity is *fictione juris* made to be of the ſame date with the ſaſine; and the bond being thus metamorphoſed into a fictitious corroboration, the former clauſe of the act is made to ſtrike againſt it, as if it were a ſecurity granted for a prior debt. But not to inſiſt upon it, that there is not the leaſt foundation in the clauſe for this conſtruction, it muſt be obſerved that the reaſoning is applicable to heritable bonds only, and not to diſpoſitions of land, where the price is paid at the time of the purchaſe: No ſlight of hand can convert ſuch a right into a corroboration, when there is no debt ſubſiſting to be corroborated. Will it be ſaid then, that the clauſe in queſtion was intended only to force a creditor, who has an heritable bond, to take infeftment? This cannot be, becauſe diſpoſitions and heritable bonds are put upon the ſame footing: And if it muſt be admitted, that diſpoſitions in this clauſe can only mean diſpoſitions granted in ſecurity, it muſt follow, that heritable bonds in this clauſe muſt alſo mean heritable bonds granted in ſecurity.

With regard to the ſecond point, the defender inſiſted, that it is evident, both from the words and ſpirit of the clauſe, that it only regards deeds granted by bankrupts infeft in their eſtates. The words are, 'Likeas, it is declared, that all 'diſpoſitions, heritable bonds, or other heritable rights, whereupon infeftment 'may follow, granted by the foreſaid bankrupts, ſhall only be reckoned as to 'this caſe of bankrupt, to be of the date of the ſaſine lawfully taken thereon, 'without prejudice to the validity of the ſaid heritable rights as to all other 'effects, as formerly.' Here the words are plain, that ſuch diſpoſitions, heritable bonds, &c. are only comprehended, whereupon infeftment may follow, and upon which ſaſine can be taken. Theſe can only be diſpoſitions, or heritable bonds, containing procuratories or precepts, where the granter himſelf is infeft. A conveyance of a diſpoſition, or of an heritable bond, is not a deed upon which infeftment can follow, or which can be the warrant of a ſaſine; becauſe ſuch a conveyance never carries either procuratory or precept: The ſaſine is not

taken upon the conveyance; but upon the deed which is conveyed, containing procuratory and precept. No 200.

Nor is this conſtruction ſupported by the ſpirit more than by the words of the clauſe. If the clauſe have any meaning, it muſt be to compel creditors to take infeftment, in order to put others upon their guard who deal with the debtor, that they may not truſt their money upon the faith of what muſt appear to them a free fund, when it may be pre-occupied by heritable ſecurities upon which infeftment may be taken in an inſtant: Now this view is only applicable to the caſe where the debtor is infeft, becauſe no man can truſt his money upon the faith of a perſonal right to land in his debtor, which may be qualified by a back-bond, or in a hundred different ways, to render it of very little ſignificancy; but where a debtor is infeft in a land eſtate, people truſt him with their money upon the faith of the records, finding there no notification of any incumbrance: And the ſtatute, juſtly jealous of private deeds betwixt a perſon in labouring circumſtances and his favourites, gives no preference to ſecurities granted by the bankrupt out of his eſtate, where they are kept latent, and infeftment only taken after bankruptcy: But it ſeems unneceſſary to enlarge upon a point which has been ſolemnly decided in this Court, January 1734, Creditors of Scot of Blair *contra* Charteris of Amisfield, (*infra h. t.*)

The Judges were unanimous to aſſoilzie from the reduction, but they differed about the *ratio decidendi.* Arniſton gave it upon this point, that the clauſe making diſpoſitions as of the date of the ſaſines, relates not to *nova debita.*—Elchies was of a different opinion, moved principally by the deciſion 19th June 1731, Creditors of Merchiſton *contra* Colonel Charteris, (*infra h. t.*) but was clear for the defender upon the other point, That Burnet was not infeft.—Arniſton again, upon this point, thought it was the ſame, infeft or not infeft.

Rem. Dec. v. 2. *No* 120. *p.* 246.

*** D. Falconer reports the ſame caſe:

George Burnet, brewer in Edinburgh, was debtor to Andrew Johnſton, merchant in Anſtruther, 55l. Sterling per bill, dated 22d January 1747, payable two months thereafter.

Hugh Thomſon, weaver in Canongate, Burnet's brother-in-law, and Alexander Home of Manderſton, became bound, 20th July 1747, to pay to the Britiſh Linen Company, on demand, at any time after ſix months from the date, 100l. Sterling, credit furniſhed to Thomſon: For which, of the ſame date, Burnet and Thomſon granted to Manderſton their bond of relief; and Burnet diſponed to him in ſecurity, a tenement in Edinburgh, which had been diſponed by the proprietor, to a perſon who diſponed it to him; but there had yet no infeftment been taken on the conveyance.

Andrew Johnſton rendered Burnet bankrupt by diligence, 9th October 1747, and Manderſton completed his right by infeftment, 14th April 1748.

No 200.

Johnſton purſued a reduction of Burnet's diſpoſition to Manderſton.

Pleaded for the purſuer: Manderſton falls to be conſidered either as acquiring directly from Burnet, and then there was no cauſe for granting the diſpoſition; for though he was cautioner for Thomſon, yet there was no cauſe intervened betwixt him and Burnet; conſequently the diſpoſition was gratuitous, and fraudulent, after contracting debt: Or, as acquiring from Thomſon, who acquired from Burnet; and then, though there intervened a cauſe betwixt him and Thomſon, yet as Burnet's ſuppoſed diſpoſition to Thomſon was gratuitous and reducible, ſo is Thomſon's to the defender, who knew the relation betwixt them, 24th January 1680, Crawford againſt Ker, No 118. p. 1012.

To this argument the defender made no anſwer.

Pleaded further, the diſpoſition in ſecurity is to be held of the date of the infeftment taken thereon; and is reducible on the act of Parliament 1696.

Pleaded for the defender: This act regards only ſecurities granted for old debts, not new contractions; and if the ground of debt aroſe on granting the ſecurity, it imports not whether the infeftment was delayed to be taken till bankruptcy ſupervened; or whether the debtor was already bankrupt or not, 19th January 1726, Chalmers againſt the Creditors of Riccarton, (*infra h. t.*)

2*dly*, The clauſe in the act does not relate to diſpoſitions of perſonal rights, *anno* 1734, Creditors of Scot of Blair againſt Charteris, (*infra h. t.*)

Replied: The diſpoſition in ſecurity is held to be of the date of the ſaſine, without prejudice to the perſonal obligation: And thus the contracting the debt being of a prior date, the diſpoſition comes to be for a prior debt, and reducible, 12th December 1717, Duncan againſt Grant of Bonhard, (*infra h. t.*); and 19th June 1731, Creditors of Lowis of Merchiſton againſt Charteris, (*infra h. t.*) Burnet's binding himſelf perſonally to Manderſton for relief was a new debt; but the real ſecurity being to be held of the date of the diſpoſition, was a ſecurity granted for a prior debt.

Obſerved, That it was once thought perſonal rights being conveyed, the diſponer was denuded; from which it was a conſequence the act did not relate to diſpoſitions of ſuch rights; but it being now found that perſonal rights might be diſponed to different perſons; and the firſt completing his title by infeftment, would be preferred; the ſanction of the act was applicable to ſuch diſpoſitions.

The Lords found that this caſe did not fall under either the act of parliament 1621, or that of 1696.

Reporter, *Elchies.* Act. *Swinton.* Alt. *H. Home.* Clerk, *Forbes.*
D. Falconer, v. 2. No 189. *p.* 227.

*** The ſame caſe is alſo reported by Lord Kilkerran:

Hugh Thomson weaver having obtained a credit from the Britiſh Linen-Company to the extent of L. 100 Sterling, for which he and Home of Manderſton granted bond to the Company on the 20th July 1747; of the ſame date with the ſaid bond, Hugh Thomſon, and with him George Burnet, granted bond of relief

to Manderſton, in which a brewery and certain houſes in Edinburgh were diſponed by Burnet to Manderſton, in ſecurity of his ſaid relief; whereupon Manderſton took infeftment upon the 14th April 1748. No 200.

Andrew Johnſton creditor to Burnet in the ſum of L. 55: 10 Sterling, conſtituted by bill dated in January 1747, purſues a reduction of this heritable bond, upon the act 1696; on this ground, that Burnet was become notour bankrupt, in terms of the ſaid ſtatute, before Manderſton had taken ſaſine on the bond; and by an expreſs clauſe in the ſtatute the bond was to be conſidered as of the date of the ſaſine.

Two anſwers were made, 1*mo*, That the ſaid clauſe in the ſtatute, declaring diſpoſitions by bankrupts to be reckoned as of the date of the ſaſine, concerns only ſecurities granted to prior creditors, but does not concern *nova debita*, ſuch as the debt was, for which the preſent ſecurity was granted. 2*do*, That the clauſe in the ſtatute regards only ſubjects in which the bankrupt-diſponer is himſelf infeft, and on whoſe diſpoſition therefore infeftment may follow; ſo the words are, 'That all diſpoſitions, heritable bonds, or other heritable rights, on which infeftment may follow, granted by the foreſaid bankrupts, ſhall only be reckoned as to this caſe of bankrupt, to be of the date of the ſaſine lawfully taken thereon.' Whereas in this caſe no infeftment at all could follow on Burnet's diſpoſition, his own right being only a tranſlation from Burnet of Logie, who derived right from one Moffat, the perſon laſt infeft, containing procuratory of reſignation, and on which procuratory it was that Manderſton's infeftment proceeded.

The Lords, without expreſſing on what point they put their judgment, in general found, 'That the caſe did not fall under the act of Parliament 1696, and aſſoilzied from the reduction.'

Upon the firſt point, the deciſions had varied: it was found, 12th December 1717, Duncan againſt Grant of Bonhard, (*infra h. t.*) that an heritable bond, which bore date ſome time before the bankruptcy, though granted for ready money, was void and null as to the point of bankrupt, in reſpect the ſaſine had not been taken on it till within ſixty days of the bankruptcy, and ſo was to be conſidered as granted of the date of the ſaſine; when the Lords ſeem to have underſtood the ſtatute as intended to oblige creditors to publiſh their rights by taking infeftment, whereby others might be put on their guard; without diſtinguiſhing, whether the ſecurities were for old or new debts; the contrary whereof was found 19th January 1726*, viz. That the act 1696 concerning bankrupts reaches only ſecurities granted for former debts and not *nova debita*.

The like queſtion again occurring, 19th June 1731†, where the heritable bond had been granted in 1721, and ſaſine not taken on it till the 1727, within ſixty days of the debtor's notour bankruptcy, the Lords found, that this bond, dated ſo long before the bankruptcy, fell under the act 1696, that clauſe in it being intended *in pœnam* of him who kept his precept of ſaſine latent; and it may be remembered that the Court at that time put this upon a reaſoning too ſtrained to

* Chalmers againſt Creditors of Riccarton, *(infra h. t.)*

† Creditors of Merchiſton againſt Charteris, *(infra h. t.)*

No 208. be maintained. There is no denying that the ſtatute reaches only ſecurities for former debts. The words are, 'All diſpoſitions, &c. made and granted in favour 'of his creditors, &c. in preference to other creditors to be void.' But to bring the caſe within the deſcription of a ſecurity for a former debt, they conſidered the perſonal obligation for the money to be of the date it bore, but conſidered the acceſſory real ſecurity to be of the date of the ſaſine, and ſo to be a ſecurity for a former debt.

But this conſtruction appearing to be altogether imaginary, and to have no foundation in the ſtatute; the Lords were now unanimous that the ſtatute did not reach *nova debita*.

They conſidered that the ſtatute was only intended to ſupply the defects of the act 1621, and to prevent the debtor's giving ſecurities to ſome in prejudice of his other prior creditors; that he nevertheleſs remains to have power to exerciſe all other acts of ordinary or extraordinary adminiſtration, and therefore may, however notour bankrupt, borrow money and grant ſecurities for the ſame, or he may ſell his land for a juſt price paid, whereof no creditor can complain, as the bankrupt's funds are not thereby leſſened. But to ſuppoſe the clauſe in the ſtatute, which enacts, that the diſpoſitions or aſſignations ſhall be held to be of the date of the ſaſine, did extend to ſuch *nova debita*, were to ſuppoſe, what no body ever dreamed of, that the ſtatute was intended to reſtrain the commerce of borrowing money by bankrupts; for as the clauſe makes no diſtinction, whether the ſaſine be taken recently or not, a creditor who lends his money upon heritable ſecurity, during the running of the 60 days, would loſe his preference though he took his infeftment without delaying an hour, as there muſt always be ſome interval between the date of the bond and the date of the ſaſine.

And to add but one conſideration more, the moſt ſanguine advocates for extending the ſtatute to *nova debita* can have no pretence for underſtanding it to comprehend irredeemable diſpoſitions for a price paid; and ſurely, if the ſtatute had been intended to oblige creditors, even for *nova debita*, not to defer taking their ſaſine, or *in pœnam*, to be ſubject to that certification in the ſtatute, it muſt have, with equal reaſon, done the ſame with reſpect to the ſaſines upon irredeemable diſpoſitions.

As to the 2d point, Whether the clauſe in the ſtatute reſpects only diſpoſitions to ſubjects wherein the bankrupt himſelf was infeft? The Lords were not ſo unanimous: That it did only reſpect ſuch, was found in the 1734, Creditors of Scot of Blair *contra* Colonel Charteris, (*infra h. t.*) which was ſaid to be agreeable as to the words, ſo to the ſpirit of the law; as it is only to ſuch ſubjects as a debtor is infeft in, that creditors are ſuppoſed to truſt. Others again doubted if this was a juſt conſtruction of the ſtatute; for that the words might well bear a more extenſive conſtruction, that every deed, by the means whereof the creditor was entitled to obtain himſelf infeft, ſhould fall under the clauſe in the ſtatute: and as to the deciſion 1734, as it was ſingle, ſo as the law was then ſuppoſed to ſtand, that by the conveyance of a perſonal right, the granter was fully denuded, there

was more reaſon for ſo finding, than now, that, ſince the deciſion in the caſe of Bell of Blackwoodhouſe *, it is the firſt infeftment that carries even ſuch perſonal right. But be that as it will, the LORDS, as has been ſaid, gave no ſpecial judgment upon it. No 200.

Kilkerran, No 17. p. 64.

1758. *July* 6.

ROBERT SYM, Truſtee for JACKSON'S CREDITORS, *againſt* GEORGE THOMSON.

No 201.
A Scotch merchant went into England and executed, in the Engliſh form, an aſſignment of debts due to him there, in favour of one of his creditors. Returning to Scotland he was rendered bankrupt within 60 days. The aſſignment reduced, as made *in fraudem legis*.

JACKSON, a conſiderable merchant in Dalkeith, had due to him in the north of England debts to the amount of above L. 800.

In October 1752, finding his circumſtances deſperate, he went, with Thomſon, one of his creditors, for a few days into the north of England; where he granted to Thomſon an aſſignment, in the Engliſh form, of the above debts; and then both returned together to Scotland.

Within ſixty days after this aſſignment, Jackſon became notour bankrupt, in terms of the law of Scotland.

Robert Sym, acting as truſtee for the other creditors of Jackſon, brought a reduction of this aſſignment, as granted fraudfully to their prejudice by Jackſon.

Pleaded for the truſtee for the creditors, The aſſignment was an offence and fraud at common law. When a man becomes bankrupt, equity points out, that his creditors ſhould all get their ſhares of his effects, according to the merits of their reſpective debts. The ſtatutes of bankruptcy in England bring in all creditors equally. The ſame is the law of Holland and France; and indeed of all commercial nations. The ſtatutes of Scotland, the acts of ſederunt, the deciſions of the court, have all, for a long time, been favouring the equality of creditors: but, in the preſent caſe, this equality has been broke, and a fraudful preference granted to one creditor to the prejudice of all the reſt.

2*do*, The aſſignment is reducible on the act 1696. That act proceeds on a narrative, 'That notwithſtanding the acts of Parliament already made againſt 'fraudful alienations by bankrupts, in prejudice of their creditors; yet their 'frauds and abuſes are ſtill very frequent.' Here the narrative makes no diſtinction whether the fraudful alienation has been made in Scotland, or has been made in a foreign country: all it regards is, whether a fraud has been committed, and whether it can come under an act of Parliament in Scotland. This ſtatute goes on, and enacts, or rather declares, 'That all and 'whatſoever voluntary diſpoſitions, aſſignations, or other deeds, which ſhall be 'found to be made and granted, directly or indirectly, by the foreſaid dyvor 'or bankrupt, either at or after his becoming bankrupt, or in the ſpace of 'ſixty days before, in favour of his creditor, either for his ſatisfaction or further 'ſecurity, in preference to other creditors, to be void and null.' Here the ſtatute makes no diſtinction, whether the aſſignation by the bankrupt, to the prejudice

* Rem. Dec. v. 2. No 8. p. 15. *voce* COMPETITION.