

1772. February 20.

ALEXANDER HOUSTON and Co. Merchants in Glasgow, *against* CLAUD and
WALTER STEWARTS.

No 220.

An heritable security granted by a debtor, bankrupt in terms of the act 1696, found not to fall under it; as being in consequence of an anterior obligation, co-eval with the contraction of the debt, and prior to the bankruptcy.

JAMES MAXWELL, carrier in Glasgow, having become notour bankrupt, and being incarcerated February 27th 1767, Houston and Company proceeded to adjudge a small heritable subject belonging to him in the town of Glasgow, for payment of debts he was owing them. Upon this title they insisted in a reduction of an heritable bond and infestment granted by Maxwell to Claud and Walter Stewarts, on the 13th January 1767, as falling under the act 1696.

The defence *pleaded* for Stewarts was: That, though the heritable bond itself, and the infestment, were both within the 60 days; yet, at the time when the debt was contracted, and which was seven months before the bankruptcy, Maxwell had come under a specific obligation to grant this security, and had even pledged his title-deeds in their hands till the bond should be made out; and authorised them to employ a writer for that purpose; which, however, they delayed doing for some time, as they were told by Maxwell, that he owed only a trifle of debt, so that it was needless to put him to the charge of completing the security; and they did not think the delaying it would be of any prejudice.

They set forth the *species facti* to be this; that, some time in June 1766, Maxwell being in want of money, applied to Alexander Stevenson for the loan of L. 60, and to Thomas Blackstock to be his cautioner. Stevenson advanced the money upon their conjunct bill, payable seven months after date. And Blackstock being desirous of having security for his relief, Maxwell applied to Claud and Walter Stewarts, who, at the intercession of Donald Bain, agreed to give their bill to Blackstock, for the same sum which had been advanced by Stevenson to Maxwell, of the following date and tenor: '*Glasgow, 24th June 1766. Conjunctly and severally, pay to me, or order, seven months after date, at my house in Glasgow, the sum of sixty-one pounds, fifteen shillings Sterling, for value received by you from. (Signed) Thomas Blackstock.*' And this bill, being at seven months date, included L. 1:15s. of interest upon the principal of L. 60.

The defenders founded upon the two following pieces of written evidence, 1st, A letter of the hand writing of Donald Bain, in these terms: '*Glasgow, June 25th, 1766. Gentlemen, Please to employ any writer you please, and let him draw out a heritable bond of security on my subject, in any way you and he agrees, for the sum of Sixty pounds Sterling; and this shall be your security till that be done. (Signed) James Maxwell.*' Addressed to Messrs Claud and Walter Stewarts.

2dly, A declaration by Maxwell, of date January 31. 1767, bearing, in substance, that, considering, on the 24th of June last, he borrowed from Blackstock L. 60, for which Claud and Walter Stewarts were so kind as to agree to grant

their bill to said Blackstock, payable in seven months; that, accordingly, he received said L. 60 from Blackstock, on their accepting said bill to him for L. 61 : 15s., the L. 1 : 15s. being the interest from the date of the bill to the term of payment; and he, for their repayment, was immediately thereafter to have granted them an heritable security upon his tenement of houses therein described, in terms of his missive to them of the 25th day of said month; and at the same time, pledged his title deeds to the said lands, being his disposition and fine, in their custody, as a security to them until the heritable security should be executed; and which was granted by him to them on the 23th day of January current, for L. 18 Sterling, and said sum of L. 60 Sterling: But, because the bill was not due, nor in the custody of Stewarts at the time of executing the heritable security, it proceeds, by mistake, on the narrative, that he had accepted the bill to Blackstock with them, whereas the bill was drawn by Blackstock upon, and accepted by Stewarts only; and the sum in the bill is L. 61 : 15s. as including the seven months interest that fell due on the L. 60, from the date of the bill till the term of payment: Therefore, he thereby acknowledges and declares, that the L. 60 Sterling mentioned in the said heritable security, is the very sum which he received from Blackstock on the said 24th day of June last, and they gave their bill for it to him; and also is one of the sums he granted them the heritable security for, as contained in a bill drawn by the said Blackstock upon, and accepted by both them and him: And he thereby passes from, renounces, and discharges all objections, &c. And consents to the registration, &c.

And, farther, the defenders referred to the oaths of Bain and Blackstock, both as to the fact of Maxwell's having pledged the title deeds of his subjects in their hands, for the purpose of making out the heritable security in question, and also of their having been a previous communing and agreement between them, when the defenders accepted the bill to Blackstock, that Maxwell should grant them an heritable bond for their security. The Court having found, that they 'ought, before answer, to be examined upon these facts,'

Argued for the pursuers: 1st, There is no sufficient evidence of any anterior obligation to give the heritable security in question.

2dly, *Esto* there were evidence of an anterior obligation, it is still to be considered how far this is relevant to take the defenders out of the case of the act of Parliament, which it is clear they otherwise fall under. Upon this head, the construction of the act itself, and the particular circumstances of the present case, must be attended to.

The statute 1696, declares, 'All and whatsoever voluntary dispositions, assignments, or other deeds, which shall be found to be made and granted, directly or indirectly, by the aforesaid 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: LIKEAS, it is declared, that all dispositions, heritable bonds, or other heritable rights, whereon infestment may follow, granted by

No. 220. ' the foresaid bankrupts, shall only be reckoned, as to this case of bankrupts, to
' be of the date of the safine, lawfully taken thereon ; but prejudice to the va-
' lidity of the said heritable rights, as to all other effects as formerly.'

Two different things are here provided by the act. In the *first* place, that any disposition, or other deed, made by a debtor, in favour of his creditor, either for satisfaction or security, within sixty days of his bankruptcy, shall be void; *2dly*, That, even where an heritable security is granted sixty days before the bankruptcy; yet, if the infestment has been delayed till the bankruptcy, or within sixty days of it, the date of the infestment shall be the rule. *A fortiori*, this last must hold where no security has actually been granted, upon which infestment can be taken without the act of the bankrupt, but only an obligation to grant one. And, indeed, the executing an heritable security within the sixty days, though in implement of a former personal obligation, seems to fall under both the clauses of the act.

By the first clause, the bankrupt's hands are tied up from acting partially among his creditors. A period is fixed, after which no deed or security of any kind, granted by a person in bankrupt circumstances, to his creditors, can be of any avail.

The object of the second seems to have been, to prevent a creditor taking an heritable bond from keeping his precept of safine latent. A creditor keeping up such a security, without completing it by infestment, and thereby making it public, cannot be considered as altogether innocent of fraud, and of collusion with the bankrupt. While his debtor is contracting large personal debts, and enticing innocent people to their ruin, he looks on at his ease, with his heritable bond in his pocket; because, upon the eve of bankruptcy, and at a minute's warning, he can take infestment, and thereby deprive his fellow creditors of that very subject, upon the faith of which they lent their money. To prevent this, and such like frauds, the statute has declared, that even although the security shall have been already granted, in so far as depends upon the act and deed of the debtor; yet, if infestment is not taken, till within the sixty days, the deed shall only be reckoned of the date of the infestment.

Pleaded for the defenders: It is established, beyond all possibility of contradiction, that Maxwell applied to the defenders to interpose their credit for him to the extent of L. 60, which they refused, except upon condition that he would give them heritable security over his houses: That, to this Maxwell agreed, and gave them a written note, by which he impowered them to employ a writer to draw an heritable bond, declaring that note to be a security in the mean time; and, at the same time, impignorated the title-deeds of the houses in their hands: That, upon the faith of this, the defenders granted their bill to Blackstock, on the 25th of June, payable seven months thereafter: That, after granting the said bill, and before paying it, Maxwell granted the heritable bond of relief in question: That, thereafter, the defenders paid their bill. So standing the case, though Maxwell was rendered bankrupt, in terms of the act 1696, within sixty

days after granting the said bond, yet it is not liable to any challenge ; if it were, it would show that there was some very great defect in our bankrupt-laws, as there never was a fairer transaction ; there being nothing in the least fraudulent on the part of the defenders, the creditors, and nothing partial on the part of the debtor.

The intendment of both the statute 1621 and 1696, is one and the same : To prevent those who either were, or are presumed to have been conscious of their own insolvency, from doing any act of fraud to the prejudice of their creditors, either by disposing their subjects to conjunct or confident persons, or even third parties, without a just price, or for true, just, and necessary causes ; or by giving a preference to one creditor, by a voluntary deed, in prejudice of the legal diligence of another creditor : Or, in case of notour bankruptcy, as described by the act 1696, by granting voluntary dispositions, assignations, &c. in favour of their creditors, for their satisfaction or further security.

The present case does not fall under the act 1696 ; as it is plain, it had nothing else in view but to prevent bankrupts from granting new securities in favour of debts formerly contracted, for which securities had already been granted ; and for which the creditor was desirous to receive, and the bankrupt willing to give, further security. This is the expression of the statute itself ; and, therefore, that statute cannot, in sound sense, apply to a case where no former security had been granted, but where the same security was established, which had been covenanted at entering into the transaction, and upon the faith of which only the creditor gave his money.

It is clear from the proof and writings produced, that the creditor, in this case, would not give his money without heritable security ; and that it was upon the faith of such security that the creditor gave his money, or bill, which is the same thing ; and, accordingly, such security was given him directly ; for, the granting the written note, the pledging the title-deeds, and afterwards extending the heritable bond, are all but *unicum negotium*.

There is very good reason why a farther security, granted to an anterior creditor, who had a security before, should be voided ; while a security granted to a creditor who had none before, and who advances money upon the faith of the security which he is to get, should be sustained : For, in the first case, a bankrupt applies part of his funds, which should go among all his creditors, to one, without receiving any immediate value, and consequently the funds are diminished *quoad* the other creditors ; whereas, when he receives immediate value from a person, and gives him a security, the value that he got ought to be, and, very probably, is distributed among his creditors ; besides, if such securities were to be voided, no person would be in safety. It is clear, therefore, that, when a creditor advances his money upon the faith of a security, and then gets the security covenanted, that security must be valid, though it should be given some time after the advance of the money, and within sixty days of the notour bankruptcy.

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The note written by Bain, and the impignoration of the title-deeds, at any rate, afford good evidence that the defenders would not interpose without getting heritable security, and that the debtor agreed to give it them. But, laying these entirely out of the question, the heritable bond, and infestment thereon taken the same day, must stand good in so far as respects the L. 60. That heritable bond was not a further security granted for a former debt, but a new and single security, granted for an advance made in consideration, and upon the faith of such security.

As infestment was taken upon the heritable bond the same day it was granted, there can be no question upon the clause of the act 1696, requiring heritable bonds to be of the same date with the sasine taken thereon. But, even in questions upon that clause, the Court have often decided, that it does not extend to *nova debita*, and much less can the other clause be extended thereto. There was evidently a new contraction in this case by the defenders granting their bill, and afterwards paying it, upon the faith of the heritable security which was covenanted from the beginning; so that the case is the same as if one should grant bond as cautioner along with another, then get an heritable bond of relief, and afterwards pay the money. It is evident that this is a new contraction, and that nothing in the act 1696 strikes against it.

Replied: The argument used in the present case is, that the first part of the act applies only to securities given for anterior debts; and that the second part, though the words are general, ought to be restricted in the same manner; and ought not to extend to the case of heritable bonds, or other heritable securities, granted for *nova debita* contracted at the time of granting. But this doctrine seems to admit of a good deal of doubt; and, supposing it were well founded, it does by no means apply to the circumstances of the present case.

The second clause of the act makes no distinction with respect to the time at which the debt has been contracted, or the bond granted. A creditor keeping up his security without taking infestment, is considered as guilty of a fraud; and the law intended to force creditors to take infestment, that the circumstances of debtors might be thereby made known. Indeed, a creditor delaying to complete his heritable security by infestment within a reasonable time, may be considered as giving up the real right which it was in his power to have obtained, and relying solely on the personal credit of his debtor; as he leaves it in the power of the other creditors to step in, and obtain prior infestments, and does not show upon the record that he is any more than a mere personal creditor.

The doctrine now maintained has accordingly been confirmed by various decisions; 29th January and 12th December 1717, Grant *contra* Duncan, *infra b. t.*; 19th January 1731, Creditors of Merchiston *contra* Charteris, *infra b. t.*; and 5th November 1735, Trustees of Mathieson's Creditors *contra*

* Examine General List of Names.

Smith, *infra h. t.* In the case of Merchiston's Creditors, the interlocutor was extremely particular; for it not only determined the question then before the Court, but in general, 'that the clause in the act making the security to be considered as of the date of the infestment, was not introduced in favour of the creditor infest, to give him the privilege of a new debt then contracted, but was introduced altogether in favour of the co-creditors, and *in pœnam* of the creditor infest, who had kept up his precept of *saſine latent*.'

And, if such be the general rule of law, founded in the construction of the act 1696, and fixed by the decisions of the Court, even where an heritable bond has actually been granted of the date of the contraction, but the *saſine* not taken till within sixty days of the bankruptcy, *a fortiori* must the doctrine apply to cases such as the present, where the creditor relies upon a mere personal obligation to grant a bond till he shall find it convenient to insist for implement of this personal obligation upon the eve of bankruptcy. The creditor in a personal obligation can never be considered as more than a personal creditor, and he remains such till the heritable security is made out; so that, to all intents and purposes whatever, the heritable security is given in favour of a prior personal creditor.

The defenders, too, proceed all along upon a mistake with regard to the meaning of the word 'voluntary' in this act of Parliament. If the bankrupt did no more than comply with a decree or charge of harning against him, this perhaps might be a necessary deed; and it might be a question, whether this would fall within the terms of the act; but granting a security to his creditor in consequence of a prior concert or obligation, is not, in the meaning of this act of Parliament, a necessary deed. After bankruptcy, or within 60 days before it, the creditor, in order to obtain further security, can only call the law to his aid: He can have no assistance whatever from the bankrupt. If the bankrupt signs any deed, without being compelled by legal process, this is a voluntary deed, and gives no additional security to the creditor.

If he has already the deed of the bankrupt in his pocket, containing a precept for infestment, without any application to the bankrupt, or taking any new deed from him, he may no doubt take the infestment: But the second clause of the act 1696 will hinder it from being of any effect; for, although this cannot be called an act or deed of the bankrupt, yet the legislature thought it proper, by a fiction of law, to consider the bond or disposition itself, upon which the *saſine* is taken, to be of the same date with the *saſine*; and consequently, to be an act and deed of the bankrupt within the sixty days.

That the above is the meaning of the word 'voluntary' in the act 1696, appears from the decision, 4th February 1729 *Eccles contra Creditors of Merchiston*, No 197. p. 1128.; and from *Beg against Peat* in 1769, *Fac. Col.* No 95. p. 175. *voce* RANKING and SALE; and the same construction has, in practice, and in the opinion of our lawyers, been put upon the second part of the act 1621; *Bankton*, B. 1. Tit. 10. § 104. and *M'Kenzie's Commentary* upon that act.

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The case of the Creditors of Nisbet of Northfield against Cairns, in 1771, was decided upon circumstances which are altogether different from these which occur here.

The tendency of the defenders argument, that they relied on the heritable security from the beginning ; that they do not appear to have had any other security or obligation from Maxwell, is not very obvious. It is clear that they had no heritable security till seven months after the date of the contraction, and therefore they must, in the mean time, have trusted to his personal faith. If they say, that, in the interim, there was no written security, and that they relied upon his verbal obligation without any writing, the Court will consider in what respect this varies the argument. They will not dispute that they were creditors for relief against Maxwell, as far back as the 24th June, and that they did not get an heritable security from him till 13th January ; and it were strange to maintain, that the giving an heritable security to a prior creditor, who has no formal written obligation, but only a verbal one, is less an act of indulgence and partial favour, than where he has already a written obligation.

In fine, the particular circumstances of the case, in so far as regards the heritable security, and even according to the showing of the defenders, amount to this, that these gentleman interposed their credit for Maxwell, not for borrowed money, but in order to relieve a person who had already become cautioner for the money which Maxwell had borrowed ; that, though Maxwell was willing that they should have heritable security upon his subjects for their relief, yet it was, at the same time, communed upon and understood, that they were to delay this heritable security, and, perhaps, not to insist for it at all, in case they could otherwise operate their payment ; and, in the mean time, they were to rely upon Maxwell's personal credit ; that, accordingly, they did rely upon his personal faith for seven months, and desired no further security till Maxwell was on the eve of bankruptcy ; and, supposing there were the most complete evidence of prior communings or understandings about an heritable security, which the parties agreed to keep up, and not to execute till it became necessary, such communings rather tend to make the matter worse for the defenders ; as the plain effect of them, and of keeping up the security, was to deceive and mislead other creditors.

'THE LORDS repelled the reasons of reduction, affoizied the defenders, and decerned.' And afterwards refused a relaiming petition without answers.

Reporter, Kennet. Act. Hays Campbell & Cullen. Alt. M'Laurin. Clerk, Pringle.

Fol. Dic. v. 3. p. 60. Fac. Col. No 9. p. 14.