1794. *January* 21.

The TRUSTEE on the Sequeſtrated Eſtate of DAVID MARSHALL, *againſt* JAMES PROVAN and Company, and Others.

No 205.
A perſon purchaſed goods within ſixty days of the ſeller's bankruptcy. Afterwards the purchaſer procured bills granted by the ſeller to others, to be indorſed to himſelf, for the purpoſe of compenſating the price with them. Found to be a tranſaction, falling under the act 1696.

DAVID MARSHALL ſold Provan and Company goods to the amount of L. 253 : 6 : 9 Sterling, for which they agreed to grant him bills payable ſix months after date. Provan and Company *alleged* this happened on the 10th January 1792; while Marſhall *contended*, that it did not take place till the 24th of that month.

In the year 1791, Hamilton and Company had ſold Marſhall goods to a conſiderable amount, and in part payment had received two bills, accepted by Marſhall, amounting together to L. 237 : 13s.

On the 21ſt January 1792, Hamilton and Company indorſed theſe two bills to Provan and Company, who, in return, granted their own bill to Hamilton and Company for their amount.

David Marſhall having ſoon after demanded from Provan and Company bills, in terms of their agreement, for the price of the goods which he had ſold them, they pleaded compenſation to the extent of the bills which they had thus got indorſed to them, and offered him caſh for the balance.

Marſhall's eſtate was ſequeſtrated upon the 3d February 1792, and on the 20th he was rendered bankrupt, in terms of the act 1696.

The truſtee on his ſequeſtrated eſtate brought an action, in which he called both Provan and Company, and Hamilton and Company, concluding for payment of the price of the goods furniſhed by Marſhall to Provan and Company; and

Pleaded: It is admitted that Provan and Company got Marſhall's bills indorſed to them on the 21ſt of January. If, therefore, the ſale of the goods by Marſhall to them took place on the 24th of that month, (a fact of which proof is offered,) the tranſaction falls directly under the act 1696; the delivery of the goods being clearly an alienation by Marſhall, within ſixty days of his bankruptcy, in ſatisfaction of a prior debt.

But even if the ſale had been made on the 10th January, as the tranſaction between Hamilton and Company and Provan and Company gives an improper and dangerous preference to the former, over the other creditors of the bankrupt, it is void, both on the ſpirit of the act 1696, and at common law; 9th March 1781, Blaickie againſt Robertſon, No 12. p. 887.; Cauvin againſt Robertſon, 18th June 1783, Fac. Col. No 107. p. 170. *voce* COMPENSATION, RETENTION.

Anſwered: When Hamilton and Company ſold Marſhall's bills to Provan and Company, they had no apprehenſion of Marſhall's bankruptcy. Their having occaſion to remit money to Mancheſter, where they knew that a bill granted by Provan and Company would be more readily received than one granted by Marſhall, was their ſole motive in making the exchange which took place without

his knowledge. Although, therefore, the ſale by him to Provan and Company had not taken place before the 21ſt January, the date of the indorſation of the bills, the whole tranſaction would have been fair and valid, as the act 1696 relates ſolely to alienations, &c. by the bankrupt himſelf, and was not intended to ſtrike at tranſactions in which he had no concern, although they ſhould be attended with a conſequential benefit to ſome of the creditors. So far indeed from extending the ſtatute this length, the Court have refuſed to ſet aſide deeds even of the bankrupt himſelf, where they did not fall under the preciſe deſcription of '*alienations*;' February 1728, Creditors of Gratney, No 195. p. 1127.; 31ſt July 1724, Creditors of Watſon againſt Cramond, *infra h. t.* No 105.

But the averment of the defenders is, that the ſale by Marſhall to Provan and Company took place on the 10th January, when this Company were in no ſhape creditors to Marſhall. So that, in reality, the preſent queſtion has no connection with the act 1696; and, at common law, a fair tranſaction in the courſe of trade cannot be reduced, merely becauſe one of the parties has thereby eſcaped a loſs which the ſupervening bankruptcy of a third party would have otherways brought upon him.

THE LORD ORDINARY 'decerned conform to the concluſions of the libel.'

The Court refuſed a reclaiming petition. The defenders preſented a ſecond, which was appointed to be anſwered.

At adviſing the cauſe, one Judge thought that its merits depended entirely on the fact, whether the ſale by Marſhall to Provan and Company happened before or after the 21ſt January. If before the indorſation of the bills by Hamilton and Company to Provan and Company, (he obſerved) it was to be conſidered as a fair tranſaction; if after, although no fraud might be intended, it fell under the expreſs words of the act 1696. The queſtion therefore came ſimply to be *cui incumbit probatio*.

All the other Judges agreed with his Lordſhip, that if the ſale took place after the date of the indorſations, the tranſaction fell under the act 1696; but they differed from him in thinking it valid, if the ſale by Marſhall took place on the 10th January. The act 1696, (it was obſerved) being made to repreſs fraud, and as every poſſible device would be fallen upon to evade it, the moſt liberal interpretation ſhould be given to it. The preſumption of law ariſing from it, is, that a perſon foreſees his bankruptcy ſixty days before it occurs; and therefore all ſecurities granted by him for prior debts, within that period, are annulled. But if the tranſaction in queſtion were ſuſtained, a perſon, even within a few days of inſolvency, might defeat this ſalutary regulation, merely by informing a favourite creditor of his ſituation, and deſiring him to aſſign his debt to ſome friend, to whom he had ſold goods equal to its amount, for the price of which he would be entitled to plead compenſation upon the debt thus aſſigned. Although, therefore, in the preſent caſe, there was no evidence of the bankrupt's being privy to the tranſaction between the two defenders, yet it was too dangerous, in point of precedent, to be ſupported. Indeed, independent of the badneſs of its general ten-

No 105.

dency, it is clear, from the whole circumſtances attending this tranſaction, that the indorſation of the bills aroſe from an apprehenſion of Marſhall's bankruptcy; and on that account it was an improper accommodation by Provan and Company to Hamilton and Company; eſpecially as the former had previouſly entered into an agreement with Marſhall, to grant him their own bills for his goods, from which they were not entitled to depart.

The Court 'adhered.'

Lord Ordinary, *Henderland.* Act. *Cullen.* Alt. *Corbet.* Clerk, *Sinclair.*
Fol. Dic. v. 3. *p.* 56. *Fac. Col. No* 95. *p.* 212.

R. Davidson.

1794. *December* 12.

The TRUSTEE on the Eſtate of WALTER MONTEATH, *againſt* COLIN DOUGLAS and Others.

No 106.

An heritable bond of relief, granted by a principal debtor, and *bona fide* accepted of by the cautioners in a bond of corroboration of an old debt, was not found to fall under the act 1696; both bonds being executed *unico contextu;* although infeftment was not taken on the bond of relief, till within 60 days of the principal debtor's bankruptcy.

WALTER MONTEATH was nearly related to the late Ducheſs of Douglas, who, at different times, lent him above L. 12,000: For the greater part of this ſum, ſhe got heritable ſecurity over his eſtate of Kepp, the value of which, however, was not equal to the ſums ſhe had lent upon it.

The Ducheſs died in 1774, leaving a ſettlement veſting her whole funds in truſtees, who were directed, after paying her Grace's debts and legacies, to employ the reſidue of her fortune in the purchaſe of land, to be entailed in favour of her nephew Archibald Douglas and certain other ſubſtitutes. It was farther declared, That the truſtees ſhould hold the lands, in their own names, till the heir for the time ſhould arrive at the age of 22; and that after that event, they ſhould not be obliged to denude, till required by him.

In 1782, the Ducheſs's nephew had arrived at the age of 19, and the truſtees having conſulted counſel, how far they were bound to purchaſe lands with the truſt-funds, they were adviſed to do ſo.

The truſtees having accordingly ſet about recovering the truſt-funds, they applied to Mr Monteath for payment of what he owed, and threatened him with diligence. He, on the other hand, repeatedly begged delays, until a peace with America, where the greater part of his funds were locked up, and at the ſame time propoſed to ſell to the truſtees his eſtate of Kepp on reaſonable terms.

At a meeting of the truſtees in July 1783, Mr Monteath offered to find ſecurity to pay the debt at Martinmas 1784, in ſo far as it exceeded the value of his eſtate, upon the truſtees conſenting to ſuperſede perſonal diligence againſt him till that term.

This propoſal having been agreed to, Thomas Monteath, his brother and partner, granted the truſtees one bond of corroboration for L. 1250, and Colin, Robert, and Campbell Douglaſes, his brothers-in-law, 'for their further ſecurity,' granted them another for the like ſum. This laſt bond was ſigned by Colin and