[10*th April* 1835.]

The Reverend Doctor JOHN INGLIS and others, Trustees of the late Josiah Walker, Esq., Appellants.—*Dr. Lushington — A. Wood.*

THOMAS MANSFIELD, Esq., Trustee on the sequestrated Estate of James Stuart, Esq., late of Dunearn, Respondent.—*Sir John Campbell — Keay.*

Bankruptcy — Stat. 1696, *c.* 5.—54 *Geo.* 3. *c.* 137.—A party lent a sum of money on the security of a property which he was led to believe extended to ninety-five acres, but which, from the terms of the description, embraced only five acres; and after the borrower was bankrupt, and his estates had been sequestrated, and a trustee confirmed, and he had fled to another country, the lender obtained from him an heritable bond, embracing the lands originally intended to have been conveyed in security, on which infeftment was taken before the trustee was infeft: Held (affirming the judgment of the Court of Session) that the heritable bond so obtained was inept in a question with the trustee.

2d DIVISION.

Ld. Moncrieff.

JAMES STUART of Dunearn, W.S., was proprietor (besides other subjects) of nine different parcels of lands in the county of Fife. To three of these parcels he had completed a feudal title; viz. 1st, the lands of Nooklands, 2d, the lands of Torryhills, including those of Sisterlands, and 3d, the lands of Brewery of Newton, afterwards called Hillside. To the remaining six parcels his right was personal, no infeftment having been taken.

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All these lands (with the exception of Torryhills) are contiguous to those called Hillside, and they popularly went under the general name of Hillside. On the lands of Hillside proper, or Brewery of Newton, a mansion house was built, and the ground was laid out partly in gardens and partly in policies. They did not extend to above six acres, while those passing under the name of Hillside contained about ninety-five acres. Part of the lands called Sisterlands were included in the garden connected with the mansion house of Hillside.

All these properties had been lawfully acquired, and his right to them was not subject to any latent qualification.

In the month of November 1823 Mr. Josiah Walker, Professor of Humanity in the University of Glasgow, employed Messrs. Joseph Gordon and Alexander Stuart, Writers to the Signet in Edinburgh, to lend out for him on heritable security the sum of 6,000*l.*; and these gentlemen had been also employed to lend for other two clients certain sums amounting to about 4,500*l.* At this time Mr. Stuart of Dunearn (who was stated to be Mr. Gordon's most intimate friend) communicated to Mr. Gordon that he wished to borrow 10,000*l.* on the security of his estate of Hillside. It was stated by the appellants that Mr. Stuart represented this property as extending to ninety-five acres or thereby, and as comprehending the whole ground belonging to him which lay adjacent to his house of Hillside. This was not admitted by the respondent; but it was not disputed, that with a view to obtaining this loan Mr. Stuart transmitted to Mr. Gordon a valuation which had been made in the same month by Dr. Coventry, Professor of Agriculture in the University of Edinburgh, and who

was very generally employed to value lands. That document was in the following terms:—

" Contents and Estimated Value of the Lands, Planta-
" tions, &c. of Hillside, belonging to James Stuart,
" Esq., of Dunearn, and lying in the Parish of
" Aberdour, and Shire of Fife.

" I.—Domain lands, east of public road.—84 acres.

" 1. Arable lands, lawn, &c. 48 acres,			
" at 7*l.* 10*s.*, 360*l.*—at 28 years			
" purchase - - -	£10,080	0	0
" 2. Walled garden, 1 acre, at 15*l.*,			
" and 24 years purchase -	360	0	0
" 3. Plantations, 10 acres, per sum-			
" mary of estimate - -	2,119	10	0
	£12,559	10	0

" II. Lands, west of road, adapted for feuing.—
" 36 acres.

" 1. Southmost field, including 6 acres			
" of nursery, 15 acres, at 16*l.*,			
" say 13*l.* - - -	£195	0	0
" 2. Field north of last, $7\frac{3}{4}$ acres, at			
" 14*l.*, say 11*l.* per acre -	85	5	0
" 3. Field north of last, $8\frac{1}{4}$ acres, at			
" 14*l.*, say 11*l.* per acre -	90	15	0
" 4. Northmost field, 5 acres, at 12*l.*,			
" say 9*l.* - - -	45	0	0
	416	0	0
" Whereof 21 years purchase is	£8,736	0	0

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" Abstract.

" I. Domain lands, 59 acres, at -	£12,559	10	0
" II. West of road, 36 acres, at -	8,736	0	0
" Add, mansion, offices, lodge, and			
" old timber - -	1,200	0	0
" Ninety-five acres - -	22,495	10	0
" Deduct 28 years purchase of bur-			
" dens, per state - -	840	0	0
" Inde, estimated value -	£21,655	10	0

(Signed) " *A. Coventry.*"

" Edinburgh, 17th November 1823."

The appellants stated, that on the faith of this representation it was agreed to lend the money to Mr. Stuart, and on the 29th Messrs. Gordon and Stuart addressed the following letter to Mr. Stuart:—

" We return Dr. Coventry's letters, and valuation of " your Hillside property. We are prepared to lend " to you, in first security over this estate, (with the " exception of the 1,500*l.* you mentioned,) 6,000*l.* from " one friend of ours, and 4,300*l.*, in two sums of 3,000*l.* " and 1,300*l.*, from a family we act for, provided you " show, by searches, that your titles are unexceptionable, " and free from burdens, (with the exception specified,) " and that there shall be, besides the heritable security, " an assignment of the rents of your Cullelo property; " with this understanding, that the assignment of the " quarry rent is not to be intimated, unless from neces- " sity, through failure otherwise of punctual payment " of the interest. The rate of interest, though specified " in the bonds to be five per cent., shall be restricted to " four and a half, payable half-yearly in Edinburgh, " and the rate not to be varied on either side for two

" years. You will please send the titles, searches, &c. " on Monday, that the bonds may be prepared."

On the 1st of December Mr. Stuart returned this answer:—

" I am favoured with your letter of the 29th instant. " Your understanding of the terms of the loan is correct " in all particulars but one. I offered an assignation in " security of Mr. Davidson's rent of 360*l.*, or of the " quarry rent of 700*l.*, but not of both; and I men- " tioned to Mr. Gordon, that I preferred the former, " because I did not wish to intimate an assignation to " the tenant of the quarry. I have no doubt that this " explanation will be satisfactory to you. I annex copy " of the description of the lands, and shall immediately " get the searches completed, and the titles sent you. " In the meantime you may be preparing the deeds."

The description of the lands here alluded to was holograph of Mr. Stuart, and was in these serms:—" All " and whole the lands of Hillside, formerly called the " Brewery of Newton, with houses, buildings, yards, " orchards, greens, muirs, marshes, coals, coal-heughs, " annexes, connexes, parts, pendicles, and whole perti- " nents of the same whatsoever; together with the " teinds included in the said lands of Hillside, all lying " in the lordship of St. Colme, barony of Beith, and " sheriffdom of Fife."

On the 3d December Mr. Stuart again wrote the following letter, accompanied with the titles mentioned in it:—

" I now send you search of encumbrances over Hill- " side, with charter of resignation 1795, disposition " 1795, sasine 1795, and renunciation 1797. — There " was no infeftment in the lands from 1734, when " Alexander Stuart was infeft, until 1795."

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The titles so sent and referred to in the letter, embraced the three parcels of lands in which Mr. Stuart was feudally vested.

Three bonds were thereupon prepared by Messrs. Gordon and Stuart, one in favour of Mr. Walker for 6,000*l.*, and the others in favour of the two other clients. The description of the lands which had been communicated by Mr. Stuart was introduced into the drafts of those lands, which were thereupon transmitted to him for revisal; and on the 5th of December he sent them back accompanied by this letter. "I return the drafts "of the bonds all right. The assignation of rents is "mere surplusage; and I am only averse to it as being "contrary to practice, and as appearing to give a greater "security than it really does. I don't object to both "assignations if you intimate neither; but you must "be quite aware, that neither affords any real security "to the creditors, as they may be defeated by renun-"ciations, or by other ways," &c. The bonds were accordingly extended and executed by Mr. Stuart on the 7th, and on the 1st of January 1824 infeftment was taken on the lands of Hillside or Brewery of Newton, and the sasines were immediately recorded.

Interest was regularly paid by Mr. Stuart till the year 1828; and he did not borrow any additional money on any of the above parcels of lands. In that year he suddenly left Scotland in bankrupt circumstances; it was for some time unknown to what place he had gone. An application was made for sequestration of his estates, which was awarded on the 1st of September 1828, and the respondent was confirmed trustee upon his estate on the 6th of October of the same year. A decree of adjudication in his favour was at the

same time pronounced, which was recorded upon the 18th.

On examining the titles the respondent became satisfied that the security which had been granted did not extend over the whole ninety-five acres, but was confined to the lands of Hillside proper, which were worth about 1,000*l.*; and having intimated his intention to claim the other subjects as free from the burden for the general creditors, an application was made on behalf of the parties to whom the bonds had been granted to Mr. Stuart, then in America, to execute a supplementary deed. Accordingly, while at New York, he granted, on the 20th May 1829, a deed which was denominated a bond of corroboration, reciting in detail the communings for the loan, the transmission of Dr. Coventry's valuation, and the description, the correspondence, and the revisal of the bonds by him, after which the deed set forth, — " that although, from the correspondence and " agreement herein-before detailed, and the extent and " nature of the transaction, there can be no doubt that " the true intent and meaning of the covenants entered " into betwixt the parties who made the said loans " through their agents, Messrs. Gordon and Stuart, and " me was, that the security granted to them, and each " of them, should extend over the whole of my lands " and estate known by the name of Hillside, and to " which the valuation by Dr. Coventry related; and " that it was understood and agreed at the time, that " the description of lands engrossed in the bonds, and " transcribed from the titles exhibited, covered the whole " of those lands; yet, as it has been alleged by parties " having, or pretending to have, interest in my proper- " ties, that the description in the said bonds does not

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" comprehend the whole of the said lands and estate of " Hillside, as contained in Dr. Coventry's valuation, and " that the validity of the said securities is threatened to " be disputed by the said parties, it is therefore just " and reasonable that I should grant the cumulative and " corroborative disposition in security under written, as " well as similar deeds in favour of the other parties, " whose securities are threatened with challenge: there- " fore, wit ye me, the said James Stuart, without hurt " or prejudice to the personal obligation constituted by " my bond and disposition in security in favour of the " said Josiah Walker esquire, dated the 17th day of " December 1823, and the real burden created, or at " least understood to have been created and constituted " thereby, and by his seisin thereon, dated the 1st, and " recorded in the general register of seisins at Edin- " burgh the 6th days of January 1824, over the whole " of the said lands and estate of Hillside; but in confir- " mation of the said bond and disposition in security, " and infeftment thereon, and in further and more full " and perfect implement to him, the said Josiah Walker, " of the covenant and obligation entered into by me, " as the condition of the advance and payment acknow- " ledged by the said bond and disposition in security to " have been made to me by the said Josiah Walker, as " at the term of Martinmas 1823, to have sold, alienated, " and disponed, as I do hereby sell, alienate, and dis- " pone, to and in favour of the said Josiah Walker " esquire, his heirs or assignees, heritably, but redeem- " ably always, and under reversion, in manner after men- " tioned, all and whole my lands and estate of Hillside, " in the parish of Aberdour and sheriffdom of Fife, in " Scotland, extending to ninety-five acres of land or

" thereby." The separate parcels of lands were then minutely described, and a precept for infeftment granted. Sasine was taken and recorded on the 13th of July 1829.

The respondent as trustee had also required Mr. Stuart to execute a special disposition in terms of the bankrupt act in his favour, which Mr. Stuart accordingly did at New York on the 19th of June, and the respondent was infeft on the 12th of August 1829.

In the month of January thereafter, the respondent as trustee raised an action of reduction against Mr. Walker of the bond of corroboration and sasine, on the grounds,

" 1. That the foresaid disposition in security was impe-
" trated by the said defender from, and granted by the
" said James Stuart, for the farther security of the
" defenders, in preference and to the hurt and prejudice
" of the other creditors of the said James Stuart, and of
" the pursuer as trustee for their behoof, subsequent to
" the period when the said James Stuart had been ren-
" dered legally bankrupt in terms of the foresaid statute,
" 54 Geo. 3, c. 137, s. 1, by which it is enacted, that
" ' every person, whether he be out of Scotland or not,
" ' whose estate has been or shall be sequestrated under
" ' the authority of any of the acts before recited, or of
" ' the present act, shall, in like manner, be holden and
" ' deemed a notour bankrupt in all questions upon the
" ' act of 1696, from and after the date of the first de-
" ' liverance on the petition to the Court of Session for
" ' awarding the sequestration;' and the said disposition
" in security, and infeftment thereon, are reducible, as
" being and proceeding upon a fraudulent alienation in
" terms of the statutes 1621, c. 18, and 1696, c. 5; and,
" 2. That the foresaid disposition in security was impe-

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" trated by the defender from, and granted by the said " James Stuart, subsequent to the period when his estates " real and personal, and, inter alia, the foresaid lands " and others, were specially adjudged and declared to " belong to the pursuer as trustee foresaid, whereby the " said James Stuart was divested thereof, and, conse- " quently, the said disposition and infeftment thereon " are null, as being granted à non habente potestatem."

In defence Mr. Walker contended, 1. That he had a good title to exclude the respondent as the representative of Mr. Stuart, or of his personal creditors, in respect that the original infeftment must be held to embrace the whole lands which popularly passed under the name of Hillside; at all events, if Mr. Stuart did not thereby actually give such a security, he had been guilty of a fraud by inducing Mr. Walker to lend his money on the faith of a security extending over ninety-five acres; and the respondent, as the representative of general creditors, could not avail himself of that fraud; and, 2. That as Mr. Stuart was under an onerous agreement to grant a bond extending over the ninety-five acres entered into at a time when he was not bankrupt, the execution of the corroborative bond in implement of that agreement did not fall under the act 1696; nor did the decreet of adjudication prevent Mr. Stuart from granting such a deed, nor Mr. Walker from taking infeftment in the lands, seeing that at the time when he did so the trustee had not obtained infeftment.

The respondent, on the other hand, maintained, 1. That although a trustee for general creditors, or an adjudger might be affected by any fraud by means of which a bankrupt had acquired property, or by a qualification, (such as that of trust,) affecting his radical

right to it, yet the circumstance of a bankrupt obtaining a loan of money on a fraudulent representation could not prevent them from attaching the property to which he held a clear and undoubted right; and, 2. That although a creditor who had obtained a disposition on an heritable bond prior to sixty days preceding the bankruptcy might take infeftment, or otherwise formally complete the title either within the sixty days, or even posterior to the actual bankruptcy, yet the bankrupt could do no act and could execute no deed within that period to render the security effectual, and still less could he do so posterior to the sequestration which (whatever might be its effect in investing the trustee with the property,) had clearly the effect to divest the bankrupt, and to tie up his hands from granting any deed whatsoever.

Mr. Walker having died, his testamentary trustees were sisted in his place; and Lord Moncrieff appointed the question to be argued on cases. On advising them, his Lordship reported them to the Court, and issued this note of his opinion:—

" The summons in this case states two reasons of re-
" duction; but it comprehends three grounds of law;
" 1st, That the disposition and sasine called for consti-
" tute an undue preference, in violation of the statutes
" 1696, c. 5. and 54 Geo. 3, c. 137. 2d, That they
" amount to a fraudulent alienation, contrary to the act
" 1621, c. 18.; and 3d, That the disposition proceeded
" à non habente potestatem, in respect that it was
" granted after sequestration, and after the act con-
" firming the trustee.

" The facts are clear. The Lord Ordinary holds it
" to be proved, 1st, That there was a bonâ fide agree-

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" ment concluded between Mr. Stuart and Mr. Gordon, " as agent of Professor Walker, by which the sum of " 6,000*l.* was to be given in loan by the latter, along " with two other sums, to be lent by other parties " through Mr. Gordon, making in all 10,500*l.*, on the " express condition of obtaining an adequate and com- " plete heritable security; 2d, That that agreement was " specific, to the effect that the security should extend " over the whole lands comprehended in the report of " valuation by Dr. Coventry, produced. The Lord " Ordinary has no doubt that the proof of these facts " is sufficient; for he is of opinion that, in the absence " of the original letters of Mr. Gordon, the copies of " Mr. Gordon's letters, taken from his books, regularly " kept and sworn to, are admissible evidence against the " creditors, and are, with their counterparts in the " letters of Mr. Stuart, sufficient to establish the true " nature of the transaction. It is indeed impossible to " raise a doubt as to Mr. Gordon's intention; for, if " he did not believe that he was getting a security over " the whole lands in the valuation, he must be supposed " to have wilfully taken what he saw to be no security " at all, at the same time that he professed his determi- " nation not to lend except on complete and adequate " real securities. 3d, It is admitted on the record, that " the lands in the valuation are identically the same " lands which are comprehended in the deed under " reduction, with one unimportant exception. 4th, This " transaction was concluded, and the whole money bonâ " fide advanced in December 1823, and bonds were " then granted for carrying it into effect. The bank- " ruptcy was in 1828.

" The bond so granted to Professor Walker, in so

" far as it was insufficient for giving a security over the " whole lands, was so made, contrary to the agreement, " on the faith of which the money was advanced; and " upon the admitted facts it is clear that it was framed " in this defective manner by the fault of Mr. Stuart, " whether that fault be considered as proceeding from " fraud or from error. The Lord Ordinary sees no " evidence of wilful fraud, and cannot presume it; but, " taking it to have been by error, it was still by the " positive act of Mr. Stuart as the borrower, in misre- " presenting the titles, and thereby misleading the " party with whom he dealt. It is not the same case as " if he had simply sent the title deeds to Mr. Gordon " to prepare the bond. With the misrepresentation, " the error could not, or could not naturally, be disco- " vered from the title deeds; and the error was of so " gross a nature, that, in this question, the act which " produced it must be considered as culpa lata quæ " æquiparatur dolo.

" On the other hand, the deed under reduction was " not executed till after the sequestration and the " confirmation of the trustee.

" But the money having been advanced on the faith " of obtaining a security over the specific lands con- " tained in that deed, more than five years before the " bankruptcy, the Lord Ordinary has no doubt that, if " the same deed had been granted before the seques- " tration, but within sixty days preceding it, it must " have been considered, not as a security for a prior " debt, but as implement of the previous specific obli- " gation, and therefore within the exception of novum " debitum, and not liable to reduction on the act 1696.

" The cases of Cormack v. Gardner's Trustees, 8th July

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" 1829, and Cranston v. Bontine, 2d February 1830,
" seem to be conclusive of this point. It can make no
" difference whether the security was duly made at first,
" but not delivered till within the sixty days, or the
" security delivered at first was imperfectly executed,
" and was only made complete by another deed executed
" within the sixty days.

" The act 1621 evidently cannot be applied to the
" case.

" There is, however, great difficulty in the question
" upon the third ground of reduction, viz. that the deed
" was executed by the voluntary act of the bankrupt,
" after the sequestration and the confirmation of the
" trustee. When the point is stated in the abstract,
" there can be no doubt that no sequestrated bankrupt
" can effectually constitute a security over the estate by
" a voluntary deed. The estate becomes the property
" of the creditors, and there is an adjudication in the
" person of the trustee by the act of confirmation; and
" in this case the adjudication was special, the whole
" lands having been enumerated. But the present case
" is not resolved by this general point. For, 1. If the
" original contract be clear, and it be also clear that the
" first disposition was made imperfect by an error of
" Mr. Stuart, of a nature equivalent to fraud, the Court
" must determine whether it is competent to the cre-
" ditors or their trustee to avail themselves of such an
" error. Mr. Stuart held the estate subject to a specific
" obligation to make the security good over the whole
" lands in the valuation. If the estate passed from him
" to his creditors, it could only pass as it stood in his
" person with that obligation; and according to the
" judgment, and more particularly the opinions deli-

" vered in the case of Gordon v. Cheyne, February 5, " 1824, the creditors could only take the right of the " bankrupt tantum et tale as he held it. 2. The adju- " dication in the person of the trustee did not divest the " bankrupt feudally. An adjudication without charter " and sasine has not this effect; and certainly, assuming " the existing obligation for a specific security, an ad- " judication by the defender would have been compe- " tent after the trustee's confirmation; and, if first " completed, would have excluded him. The point of " difficulty is, that here the security was perfected by " the voluntary act of the bankrupt; and it has been " frequently decided that even diligence in itself com- " petent will be invalid to give a preference, if the " creditor has only been enabled to obtain it by the " collusive aid of the bankrupt. But, 3. If there was " a specific obligation to give the security, and if that " obligation was binding on the creditors, the question " is, Whether the pursuer has any legal interest to " reduce it as granted by the bankrupt, whether the " act of itself would in other circumstances have been " warranted or not? The deeds are valid in point of " form, Mr. Stuart not having been denuded; and if " the thing done was an act of justice which the credi- " tors might have been required to do, there can be no " interest to reduce it. Frustra petis, &c.

" Though the question is one of great difficulty, the " Lord Ordinary is inclined to think that this is the just " and the legal result. Mr. Walker never for one " moment agreed to follow the personal faith of " Mr. Stuart, or imagined that his money was lent " otherwise than on the faith of a complete security " over the specific lands agreed on. If the security

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" stands, he will get nothing more than that which he " had a right to believe was given at first, and which " the creditors cannot take from him, without founding " on the act of their constituent, by which he and his " agent were deceived.

" There is a separate point in the case, relative to " certain parts of the lands which were held by " Mr. Stuart by personal titles. With regard to these " it seems to be clear, that the trustee must be bound " by the latent equities, not limited to those which are " in the constitution of the title; and the Lord Ordi- " nary entertains no doubt that, if the security is other- " wise not reducible, the defenders had a right to com- " plete the title in the bankrupt. If the trustee had " done so, it would have accresced to Mr. Walker's " infeftment. He could only avoid this by making up " a different title, throwing the bankrupt out of the " progress. But a creditor holding a specific security " was entitled to put the matter right if he could.

" The result in the Lord Ordinary's opinion is, that " judgment for the defenders ought to follow from the " equity of the statutes and the general principles of law, " under the cases of Cormack, Bontine, Gordon, and " other similar cases.

" Certain lands of Torryhills, which are not in the " valuation, have been included by mistake in the last " disposition. As to them, the deeds must be reduced, " unless the defenders re-convey them at their own " expence." (Signed) " J. W. M."

On the question being argued before the Court, their Lordships ordered additional cases, which with the previous cases they appointed to be laid before the other judges for their opinions.

Lords Gillies, Mackenzie, Medwyn, and Corehouse.—

" It appears from the record, that, with one exception,
" there is no difference between the parties with regard
" to the facts of this case. It is admitted, that in 1823
" Mr. James Stuart, in negotiating a loan, offered, and
" that Messrs. Gordon and Stuart, on the part of their
" clients, agreed to accept, an heritable security over
" certain lands in the county of Fife, extending to
" ninety-five acres, and valued by Dr. Coventry at
" 21,655*l.* 10*s.* These lands generally passed by the
" name of Hillside; they were so called in Dr. Coven-
" try's valuation, and the fact is not denied; but that
" name properly applied to one small tenement, not
" amounting to ten acres, and not worth the tenth part
" of the sum at which the whole estate was valued.
" That the heritable bonds might be prepared by the
" agents for the lenders, Mr. Stuart sent them Dr. Co-
" ventry's valuation of the whole estate, a search of
" encumbrances, and such of the titles as were necessary
" to exhibit a valid progress. He afterwards sent a
" description of the lands, but it applied exclusively to
" Hillside proper, the separate tenement. In the bonds
" which were prepared by Messrs. Gordon and Stuart,
" and revised by Mr. James Stuart, that description
" was adopted, and the security, being in consequence
" limited to that tenement, was altogether inadequate.
" Five years afterwards Mr. Stuart having become
" bankrupt, and his estate being sequestrated, he was
" prevailed upon, by the agents for Walker, one of the
" lenders, to grant a bond of corroboration and a dis-
" position in security over all the tenements composing
" the estate of Hillside; and on these deeds Walker

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" took infeftment before the trustee under the seques-
" tration was infeft.

" In these circumstances, the present reduction has
" been raised by the trustee to set aside the deeds exe-
" cuted by Mr. Stuart after sequestration; and the only
" fact in dispute beween the parties is, Whether, in
" sending the erroneous description of the lands, and
" revising the deeds in which it was adopted, Stuart
" was guilty of an actual fraud; or whether his conduct
" proceeded only from inattention and negligence? We
" do not think that there is evidence of fraud. It is
" true, that a security which was granted by the late
" Dr. Stuart to his daughters for their provisions was
" prepared by their brother, Mr. Stuart, or in his
" writing office; and that it extended not only over
" Hillside proper, but the whole estate of Hillside, as
" well as other subjects belonging to Dr. Stuart; and it
" is presumable that Mr. Stuart must then have been
" aware of the distinction. But that happened seven
" years before the date of the bond to Walker, and in
" the interval the circumstance may easily have escaped
" his memory. It is still more material to observe,
" that an intentional omission of the lands could only
" have been made with the view of resorting to them
" afterwards as a fund of credit; but five years elapsed,
" during which he was in embarrassed circumstances,
" and often hard pressed for money; yet he never once
" availed himself of that resource, which, if he acted frau-
" dulently, it was the sole object of his fraud to obtain.
" It must be admitted, however, that his negligence was
" highly culpable, first in giving rise to the blunder, and
" afterwards in suffering it to pass uncorrected.

" The summons of reduction is laid, first, on the " statutes 1621 and 1696; and, secondly, on the ground " that the deeds challenged were executed after bank- " ruptcy and sequestration. It is clear that the statute " 1621 does not apply to the case; and accordingly, " that ground of reduction has been abandoned in the " pleadings.

" But if Walker, the creditor, stipulated in 1823 for " a security over the whole estate of Hillside, and ob- " tained a security over Hillside proper only, he " remained a creditor for the additional security down " to the date of Stuart's bankruptcy in 1828, being a " period of five years. If Stuart granted that security " after his bankruptcy, or within sixty days of that " event, by which Walker obtained a preference over " the other creditors, and particularly over one Brown, " who appears from the pleadings to have stood exactly " in the same predicament as Walker, the case seems " to fall directly both under the words and the spirit of " the statute 1696.

" As it was not the object of that statute to deprive " a person of the management of his affairs during the " period of the constructive bankruptcy, which it intro- " duced, it has been held not to operate against pay- " ments in cash,—against transactions in the ordinary " course of trade,—or in the case of what has been " called a novum debitum, that is, where there has " been a bonâ fide interchange of values, compre- " hending under that term securities granted for loans " at the date of the advance. The last of these ex- " ceptions, though proceeding on a simple and equitable " principle, has occasioned considerable difficulty in " practice. That difficulty arises from a separate pro-

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" vision in the statute, which, with a view to prevent the " fraudulent evasion of its enactments, by antedating " securities, declares that dispositions and heritable " bonds, or other heritable rights on which infeftment " may follow, shall be reckoned to be of the date of " the sasine which follows upon them. This provision, " if strictly applied, as it was in the case of Grant of " Bonhard, must have produced great hardship; for " although a person advanced money, and took an " heritable bond or disposition in security, years before " constructive bankruptcy commenced, yet, if he de- " layed to take infeftment, he was in a worse situation " than a creditor lending money, obtaining a security, " and taking infeftment simul et semel within the sixty " days. A contrary decision was, accordingly, given in " Chalmers v. the Creditors of Riccarton, and after- " wards in Burnet v. Johnston and Home. Therefore " it is now settled law, as Mr. Bell observes, that no " objection can be taken to an heritable security granted " at the date of the advance, though sasine shall not be " taken upon it till within the sixty days before bank- " ruptcy. But a farther relaxation has been given, the " extent of which does not yet seem to be determined. " When a loan is made and a security stipulated, an " interval frequently occurs between the advance of the " money and the execution of the heritable bond or " disposition by the debtor, which may be longer or " shorter according to the nature of the deed, the local " situation of the property, the state of the titles, and " many other circumstances. Now, it has been re- " peatedly decided that an interval of this nature does " not expose the deed to challenge, although the sasine " upon it is not taken till after the sixtieth day. In the

" case of the Bank of Scotland v. Stewart and Ross, an " interval of seven weeks was not held fatal. In a more " recent case of Cormack v. Gardner's Trustees, though " six months had intervened the deed was sustained; " but this decision is scarcely reconcileable with the " decision in the preceding case of the Trustees for " Brough's Creditors v. Duncan, &c. But it will be " particularly observed, that in these and several other " cases to the same effect, though there was an interval " between the loan and the granting of the disposition " or warrant of infeftment, that interval had elapsed " previous to the period of constructive bankruptcy; " and the debtor, while yet sui juris and before his " hands were tied up by the statute, had done all that " was incumbent upon him or that he could do towards " the completion of the security.

" But all these cases are perfectly consistent with the " doctrine, that if a loan is agreed upon, the money ad- " vanced, and a security stipulated, but that security " not executed by the debtor till after the sixtieth day, " any attempt on his part afterwards to remedy the de- " fect is unavailing. It is true, that in Houston and " Co. v. Stewart, an opposite view was taken by the " Court; but the decision was unanimously disapproved " of in the case of Brough's Creditors, which has just " been cited; and in Maclean v. Primrose, we are " told by Mr. Bell that Lord Meadowbank accom- " panied his judgment with a note, ' in which he con- " ' demned the decision in the case of Houston and Co., " ' as clearly contrary to principle, since an obligation " ' to grant a preference cannot constitute an actual " ' preference on an heritable subject in a question with " ' other creditors, and accordingly, it is one of those

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" ' decisions which is frequently quoted, and as often
" ' disregarded by the Court.' In Robertson Barclay v.
" Spottiswoode, which occurred some years after that
" of Houston and Co., an heritable bond had been
" granted within the sixtieth day by a husband to his
" wife, in terms of an obligation in his marriage articles;
" the bond was sustained by a narrow majority; but a
" reclaiming petition being presented, the case was com-
" promised, and Mr. Bell informs us, on grounds which
" he states, that if it had again come on, there is reason
" to believe the ultimate judgment would have been
" different. If Mansfield, Hunter, and Co. v. Cairns
" did not proceed on the specialty noticed by Lord
" Coalston in Hailes' report of the case, it falls under
" the stigma so often affixed to the judgment in Hous-
" ton and Co. The distinction therefore appears to be
" settled between cases in which the debtor has done his
" part before the period of constructive bankruptcy, and
" those in which he executes the deed subsequently to
" that time. On this point reference may be made to
" the trustee for Brough's Creditors v. Spankie, which
" is of the same date with that of the same party against
" Duncan, and also to Maclean v. Primrose, just cited.
" Mr. Bell seems to think, that in the Bank of Scotland
" v. Stewart the Court returned to the doctrine laid
" down in the case of Houston and Co., which had been
" so often and so solemnly condemned; but that opinion
" must have arisen from his overlooking the distinction
" now explained, for the deed executed by the bankrupt,
" though some time after the advance, was of a date, as
" already mentioned, long before the sixtieth day.

" We have been led to examine this point, because
" the defenders have attempted, from the mass of deci-

" sions relating to it, to extract the inference, that " wherever money has been advanced, and a security " stipulated, the case is to be considered as falling under " the exception of novum debitum, whatever length of " time may intervene between the advance and the " debtor's obligation, and although that obligation may " have been granted after constructive or even actual " bankruptcy,—an inference which we are clearly of " opinion those decisions do not warrant.

" But there is another and a different ground " on which, in their last argument, they rely with " greater confidence. It is said, that although a bonâ " fide purchaser is exposed to no objections but those " which constitute a radical defect in the title of the " seller, or in feudal property which appear on the face " of the records, a creditor-adjudger stands in a dif- " ferent situation, and takes the right adjudged, subject " to the conditions and under the equities, though " latent, by which it was qualified in the person of his " debtor; or, in technical phraseology, he takes it " tantum et tale as his debtor held it. That this was at " one time the doctrine of the law of Scotland, though " not to the extent to which it is now maintained by the " defenders, may be granted; and the case of Ireland, " which they cite, and others to the same effect, show " the opinions at one time entertained. But subse- " quently to that period the law has been settled other- " wise, by a numerous and consistent train of decisions, " which are not now to be called in question. Reference " may be made to the following cases:—The Creditors " of Douglas of Kelhead—the Creditors of Ross of " Kerse—Mitchell v. Ferguson—and more particularly " to Buchan v. Farquharson, in which a preceding

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" judgment in Smith v. Taylor was unanimously pro-
" nounced to be erroneous. Afterwards, when Smith
" and Taylor came again before the Court, although an
" attempt to open up the interlocutor which had become
" final was unsuccessful, the Court a second time unani-
" mously condemned the decision.

" The defenders have perplexed this point, by re-
" ferring to a class of cases, with which it is nowise
" connected. It is true that creditors attaching move-
" ables by diligence, are not in the same situation as
" bonâ fide purchasers. Nothing, except a labes realis,
" such as that which arises from theft or robbery, can
" be pleaded against the purchaser; while the arrester
" or poinder takes the subject under the conditions
" which affect the constitution of the real right in his
" deotor, but not under his personal engagements or
" liabilities on account of it. Thus, the exception of
" dolus dans causam contractui is pleadable against the
" arrester or poinder, while that of dolus incidens in
" contractum is not so. In illustration of this princi-
" ple various cases cited by Mr. Bell might be adduced;
" and, it may be added, that the distinction was received
" at a very early period into our law. In the case of
" Haitley, reported by Lord Stair, a person had sold
" goods and received payment of the price, though, in
" consequence of his fraud or fault, they were not deli-
" vered; but, in a competition, his creditor, who had
" attached them by poinding, was preferred to the seller.
" Even in the case of moveables, therefore, the creditor
" using diligence does not take them tantum et tale, as
" they stand in the debtor, that is, he is not responsible
" for the personal obligations of the debtor concerning
" them.

" Incorporeal, and other personal rights, which pass " by assignation, stood at one time in a different pre- " dicament. With regard to them, the maxim assigna- " tus utitur jure auctoris was carried farther with us than " in the civil law, from which it was borrowed. The " assignee, whether a purchaser or a creditor, was held " only procurator in rem suam, and, on that footing, " subject to every exception maintainable against his " cedent. But that rule, of which Dirleton doubted " and Stair disapproved, was greatly modified, if not " overturned, by the House of Lords in the case of " Redfearne, and the bonâ fide assignee of an incor- " poreal subject, for a price paid, placed in the same " situation as the purchaser of a moveable. This deci- " sion, however, did not touch the case of a creditor " adjudging an incorporeal right; and, therefore, in " Gordon v. Cheyne, the Court, with perfect consis- " tency, decided, that certain shares of the stock of a " shipping company, which a bankrupt held in trust, " were not carried by his sequestration, the trust, " though latent, affecting the constitution of his right. " It is in vain, therefore, for the defenders to argue, as " they have done, that the decision in Gordon v. Cheyne " revived the doctrine of tantum et tale, which was " exploded in Buchan and Farquharson. It decided, " that creditors adjudging an incorporeal right, were " not in the same predicament with bonâ fide pur- " chasers, but it did not deprive them of the privileges " they formerly enjoyed, and it had no concern with " heritable property at all.

" On these grounds we consider it clear that the " pursuer, as trustee for Stuart's creditors, took the " heritable estate in which the bankrupt was infeft,

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" subject to no limitation or burden which did not " appear on the face of the records; and his moveable " estate under such conditions only as qualified his real " right, but free from all his personal liabilities. If " Stuart, therefore, in terms of his agreement, was " bound to give Walker an heritable security over all " the lands of Hillside, as well as Hillside proper, and " nobody can doubt that he was so bound, that obliga- " tion, though effectual against himself and his repre- " sentatives, is not transmitted against his creditors.

" But it is said that in this cause a fraud intervened; " that Stuart obtained the loan by falsely representing " that the security covered the whole estate of Hillside, " and that his creditors cannot take benefit by that " fraud, on the same principle that they could not " retain goods purchased on a fraudulent pretence, or " paid for by a forged bill. We are of opinion, that " this plea admits of various answers. In the first place, " as formerly observed, we do not think that there is " evidence of fraud or wilful misrepresentation on the " part of Stuart; on the contrary, it is more probable " that the mistake originated from inattention. In the " next place, though the contract was rescinded, there " is no specific subject to vindicate, as in the case put " of goods sold on a false representation, and still ex- " tant. The claim of the borrower, therefore, must " resolve into a personal action of damages, which, on " the principle already explained, would not confer a " preference over the other personal creditors. The " case of the Duke of Norfolk and partners against the " trustee for the annuitants of the York Building Com- " pany illustrates this point. The company, under the " authority of an act of parliament, had granted a

" number of life annuities, and for the security of the " annuitants had disponed their estates to a trustee who " was infeft. The annuity bonds became the subject of " commerce, and, as we are told by Elchies, passed from " hand to hand like bank notes. Many of the holders, " particularly in England, inadvertently, or from igno- " rance, took renewals of their bonds, by which the " heritable security under the trust-deed was lost. It " cannot be doubted that the company, and their " Scottish advisers, were perfectly aware, in renewing " these bonds, that the holders were deceived, and their " own estate to that extent disencumbered. Accord- " ingly, on the ground that the ignorance of strangers " had been taken advantage of, the Court of Session, by " their first interlocutor, preferred the annuitants to the " Duke of Norfolk and others, who had adjudged the " estates of the company; but on a reclaiming petition, " the interlocutor was altered, and the adjudgers pre- " ferred, by a judgment afterwards affirmed in the " House of Lords.

" A few words are required on the recent case of " Cranstoun and Anderson v. Bontine. Graham of " Gartmore, who was debtor to his son Bontine in a " large sum of money, agreed in March 1826, to sell " his life-interest in that estate to Bontine, for a price " to be paid at Whitsunday following. At that term it " was arranged by a new agreement that Bontine, in- " stead of paying the price, should set it off against the " debt owing by his father. The conveyance was exe- " cuted in August, infeftment followed upon it, and in " September Graham was rendered bankrupt. In these " circumstances the Court of Session assoilzied Bontine " from a reduction, on the act 1696, at the instance of

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" a prior creditor. It will be remarked that the cir-
" cumstance of the price being compensated instead of
" being paid, on which the pursuers relied much, was
" quite immaterial; for although it might have been
" fatal to the transaction, if the new agreement had
" been made within the period of constructive bank-
" ruptcy, according to the decision in Crawford v.
" Stirling, (Nov. 1752,) it took place long previous to
" the sixtieth day, and before the operation of the statute
" had commenced. Farther, if this transaction had
" been followed by a conveyance also before the sixtieth
" day, though infeftment had been taken by Bontine
" after that time, still the transaction was secure, agree-
" ably to the cases of the Bank of Scotland v. Stewart,
" and of Cormack and others, already mentioned. But
" the important distinction between these cases and
" Bontine's already explained, (the conveyance by the
" bankrupt in the one being previous to the sixtieth
" day, while in Bontine's it was subsequent,) was not
" brought under the notice of the Court; and accord-
" ingly there is a reference in the opinions of the judges
" to both sets of cases, without distinguishing those by
" which the law has been recently, and it is thought
" correctly, settled, from those which preceded them,
" and which have been so often unanimously con-
" demned.

" This judgment was affirmed in the House of Lords,
" and the defenders rely on the opinion reported to have
" been given on the occasion by the learned Lord who
" presided. We doubt the accuracy of this report.
" His Lordship is made to say, that 'he could find no
" 'case which appeared to give much assistance in the
" 'decision of the one before the House; and that their

" ' Lordships were, for the first time, called upon to " ' put a construction on the statute 1696, in such a " ' case, and to lay down a general rule for the deter- " ' mination of cases of that class.' The rule then given " is, that a voluntary deed, in the sense of the statute " 1696, signifies a deed executed by a party of his own " mere motion, with a view to give a preference to a " creditor, and without any express obligation to do so. " As the deed in Bontine's case, therefore, was granted " in consequence of a previous obligation, his Lordship " held the statute not to apply.

" It may be true that the point had not previously " been considered in the House of Lords; but, as already " observed, it has been anxiously argued, and solemnly " and repeatedly decided in the Court of Session. The " case of Houston and Co. turned entirely upon that " point, and it was decided upon the principle laid " down by Lord Wynford. That judgment was unani- " mously condemned by the Court in Brough's creditors, " on the principle, ' that an obligation to grant a security " ' does not entitle the creditor to fulfil it after he falls " ' under the retrospect of the act 1696.' But it is " probable that it had been assumed, at the bar of the " House of Lords, that Mr. Bell was correct in holding " that the Court returned to the principle laid down in " Houston and Co., when they decided the case of the " Bank of Scotland v. Stewart, which certainly was not " the case.

" There is an authority which, though not mentioned " in Lord Wynford's opinion, may, perhaps, have had " influence with the House of Lords in inducing them " to adopt the construction given to the term ' voluntary' " in the statute 1696, and to which therefore it is

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" proper to advert. In the second branch of the " statute 1621 the same term occurs; and Sir George " Mackenzie, and after him Lord Bankton, have held " that a deed, though granted in implement of a pre- " vious obligation, is a voluntary deed, and reducible " under that branch of the statute. Mr. Bell, on this " subject, after citing Sir George Mackenzie, observes, " that his opinion does not appear to be law, and refers " to Kilkerran's report of the case of Grant of Tillifour, " where it is said that the Lords agreed that the words " 'necessary causes,' in the act 1621, are in practice " thus understood, that there be a previous obligation " to grant the deed; and though the words 'true, just, " and necessary causes' appear as they stand to be con- " junctive, they have always been disjunctive; so that " if either the deed be granted in consequence of a " previous obligation, or for a true and just cause, it is " not reducible. Now, as the statute 1696 is con- " fessedly a supplement or extension of the second " branch of the statute 1621, if the word 'voluntary' is " used in the sense here stated in the one, there is " ground to infer that it must be so construed in the " other also. But we are of opinion, that the learned " commentator is on this point inaccurate. Sir George " Mackenzie, in treating on the first branch of the " statute 1621, which relate to a competition between " a creditor and a gratuitous disponee, and in which " only the terms 'true, just, and necessary causes' " appear, plainly indicates his opinion, though he states " it in the form of a question, that a deed granted for " an anterior obligation is not reducible, and indeed the " act would be inconsistent if it were. But when he " comes to the second branch of the statute, which

" relates to a competition between a creditor who has
" done diligence with an onerous disponee who has not
" done diligence, he lays it down in the most explicit
" terms, that an anterior obligation will not save the
" deed. Now, it is plain, even from Kilkerran's report,
" that the Court in Tillifour's case were construing the
" first branch of that statute; and their opinion on the
" words 'true, just, and necessary causes' in that
" branch, instead of being opposed to that of Sir George
" Mackenzie, was the same as his. Indeed, so accurate
" a reporter as Lord Kilkerran could never have laid
" it down that the law had been always so considered,
" if so great an authority as Sir George Mackenzie
" had clearly held the reverse. But what puts the
" matter beyond question is, that Lord Elchies, in
" reporting the same case, expressly mentions that the
" discussion arose on the first branch of the act 1621,
" which the Lord President thought might have some
" weight in the question, though the rest of the judges
" thought otherwise. The argument, therefore, is re-
" torted with great force; for there is the uncontra-
" dicted authority of Sir George Mackenzie, that the
" term 'voluntary' in the second branch of the act
" 1621, does not signify deeds granted proprio motu
" only, but those also which are granted in implement
" of a previous obligation. Bankton lays down the
" same doctrine expressly, and Erskine by implication,
" and there is a decision to that effect, Peat v. Beg.
" If, therefore, the same construction of the term
" 'voluntary' be adopted in both statutes, the rule said
" to be laid down in Bontine's case cannot be maintained.

" II. Admitting that the statute 1696 does not
" apply, the deeds now in question are challenged, on

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" the separate ground that they were granted subse-
" quently not only to notour bankruptcy, but to seques-
" tration. On this point it is perhaps enough to refer
" to Mr. Bell's argument, which seems correct, that by
" the intendment of the statute, 54 Geo. 3, c. 137, no
" heritable security which is not completed before the
" first deliverance on the sequestration, can be com-
" pleted afterwards, even though the creditor held a
" previous warrant; for the retrospective effect given
" to the first deliverance, renders it a mid impediment
" to all such acts. But in this case there was no war-
" rant for infeftment of a date previous to the seques-
" tration. If the bankrupt, whose hands were tied up
" by the sequestration statute, interfered to grant such
" a deed, he did that which he not only had no power
" to do, but which, without the consent of his creditors,
" was an act of fraud in him to attempt. In Maclean
" against Primrose, where the creditor of a bankrupt
" brought an action of implement against him, to exe-
" cute a deed stipulated for before his bankruptcy, it is
" said that the judges seemed to be of opinion, that
" when the creditors of a bankrupt oppose an action
" such as this, the bankrupt cannot be compelled to
" grant a deed, which, if granted without compulsion,
" would convict him of fraud, and be reducible under
" the statute 1696. It is of no consequence that the
" bankrupt is not actually divested of his heritable
" estate, to which his titles are complete, until sasine
" is taken in the person of the trustee, because the
" contrary rule would be inconsistent with feudal prin-
" ciple and the faith of the records; and, accordingly,
" the trustee is empowered to complete the feudal title,
" in order to accomplish the divestiture. But these

" provisions do not derogate from the 38th section of " the act, which declares,—' that the whole estate and " ' effects of the bankrupt at the period of sequestration, " ' shall be a fund of division among those who were his " ' creditors prior to the date of the first deliverance, " ' regard being had to preferences obtained by secu- " ' rities or by diligence, before the said deliverance, and " ' not expressly set aside by this act, but to no other " ' claim of preference:' And farther, ' that all trans- " ' actions of the bankrupt subsequent to the said date, " ' from which any prejudice may accrue to the cre- " ' ditors shall be null and void.'

" If it could be maintained indeed, that even if " Stuart had not granted the deeds under reduction, the " pursuer would be bound to grant them on the prin- " ciple of tantum et tale, it might follow that the action " should be dismissed, on the strength of the maxim— " frustra petis quod mox es restituturus; but it has been " shown that that principle is inapplicable to the class " of cases to which the present belongs.

" In conclusion it may be observed, that if the " defences set up against either ground of reduction " were to be sustained, it would lead to consequences " incompatible with the plain and declared object of all " the bankrupt statutes. Whether the principle of " novum debitum or anterior obligation be resorted to, " it is not alleged, if the insolvent within the sixty days " fails to grant a stipulated security, that this will " entitle the creditor to the same preference he would " have held if it had been granted. The daily and " uniform practice of the country is opposed to any " such supposition; take, for example, a number of

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" recent cases where the debtor was expressly bound to " grant a security over a certain estate, but where it " was ineffectual, in consequence of a blunder in the " execution of the deeds. It follows, that if the debtor " lies under similar obligations to various individuals, a " very common circumstance and one which occurs in " the present case, he would have it in his power, " according to the defenders, to favour any one of them " to the prejudice of all the rest. Thus, Stuart had his " choice between Walker and Brown, and, as he has " preferred the former and postponed the latter, he " might if he had thought fit have done exactly the " reverse. This surely would be inconsistent with the " principle of fair and equal distribution, and it would " be fortified by no exception admitted to the operation " of the statute 1696.

" The result appears if possible, still more absurd, if " this power of preference is held to subsist, as the " defenders argue, not only during the sixty days, but " after the period of actual bankruptcy, and when the " estate has been placed in the hands of the Court by " the process of sequestration.

" On these ground, therefore, we are of opinion " that the deeds challenged in this case ought to be " reduced."

Lord Craigie.—" I see no evidence of fraud on the " part of the common debtor, in framing the security in " question. There is real evidence of the contrary ;— " 1st, because no after security was, de facto, given over " the same lands, and 2dly, because the value of the " lands, according to the report of a distinguished land " surveyor, although now from general causes consider-

" ably diminished, must still, it is thought, be sufficient " or nearly so to discharge the whole debt intended to " be secured on them.

" It cannot, however, be disputed, that either from " inattention, or want of ordinary skill, the security, as it " has been made out, is in a very imperfect state, great " part of the lands, said to be in the view of the parties, " not being specified in the disposition, nor in the infeft- " ment which followed. And one question will occur, " to whom this defect is to be imputed, whether to the " borrower, or to the agents for the lenders, which, in the " absence of the latter as parties cannot be determined at " this time. It is not easy however, to discover a principle " on which the loss should be thrown upon the general " body of creditors, to whom no blame is imputable.

" The question now is, Whether, supposing for a " moment that the defect in the security, as contemplated " at the date of the loan, was owing to the fraud or culpa- " ble negligence of the borrower, or of the agents for the " lender, or of the whole of these parties generally, the " corroborative conveyance and security, as it is called, " obtained after sequestration awarded against the bor- " rower, is to have any force or effect? At the consul- " tation, Lord Corehouse held, that it might fall under " the Act 1696; while Lord Gillies was of opinion, that " without an action of reduction, in terms of that statute, " it might be declared to be ipso jure ineffectual, upon the " ground specially brought forward in the summons, viz. " that it had been obtained à non habente potestatem; the " whole active powers of the borrower, unless in the cases " particularly provided for by the statute, having been " by the sequestration itself withdrawn from him. In " this way his Lordship thought that the deed was not

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" voidable merely, but absolutely and altogether " void: — and to this opinion I rather incline.

" But on a third, and separate ground, it is humbly " thought the supplementary security intended to be " granted by the second bond can be of no effect, being " not only not perfected before the sequestration, but " originating in a voluntary act of the common debtor, " when publicly insolvent, as well as divested of all " power over his estate and effects, in virtue of the " bankrupt statutes. Unless for this deed, the defenders " could not obtain a decree of adjudication in imple- " ment. The original bond per se, could not have " authorised it. In this respect, the case is similar to " that of M'Kellar v. M'Math, with this difference, that " in the former case the object of the bond was merely " to give facility to the diligence of one of the creditors; " whereas here the obvious and avowed purpose was to " create a preference, by affording means to attach the " sequestrated estate, by a mode of diligence to which " the other creditors could not resort. Without it, the " defenders' only course would have been by entering " a claim in the sequestration, which, so far as can be " discovered from the documents referred to, he could " only do with regard to the lands in question, as a " personal creditor.

" In this view, as well as in that suggested by Lord " Gillies, the principle of frustra petis, &c., appears in- " admissible to any extent. In the conclusion of the " summons referred to, the trustee is not in petitorio. " He demands nothing from the defenders, but merely in- " sists for a judgment declaring the bond to be void, as " ultra vires of the granter. If the bond is not effectual, " the summons and decree of adjudication in implement,

" with the infeftment following upon it, must, by neces-
" sary consequence, at the same time fall to the ground;
" while every plea or argument of the defenders, resting
" upon proceedings prior to bankruptcy, will remain
" entire. If, in the circumstances of the case, the de-
" fenders, at the date of the bankruptcy, had a just
" claim to be preferred to the personal creditors, or to
" the trustee, when enforcing their rights, they will
" have it still; and upon such a claim, the trustee will
" either give a judgment, or report the question, to the
" Court. In strict form, no other measure can be
" adopted.

" Yet there are strong reasons in expediency, why,
" at this conjuncture, and after the full argument and
" opinions already given, a determination on the whole
" cause should now be pronounced; and although, gene-
" rally, I concur in the able and elaborate opinion of
" Lord Corehouse, I cannot, upon a point of such vital
" importance to the law of Scotland, refrain from stating
" what has occurred to me.

" It is a rule established with us, beyond all memory,
" that there are no equities in competitions among
" creditors. This principle was adopted, and carried
" to its fullest extent, in the case of the Duke of Nor-
" folk in 1752, to which reference has been made. It
" has been held that vigilantibus non dormientibus jura
" subveniunt; and although no one ought to become
" locupletior alienâ jacturâ, yet in damno vitando, every
" one is entitled to avail himself of the blunders of those
" whose interests are opposed to his. However clear
" and honest the intentions of parties may have been,
" yet, if the writings used are liable to objection in point
" of form or solemnity, and still more, if, as in this

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" case, they are defective in the substantial parts, they " are in a competition held as inoperative and null. In " the case of a second security upon lands, even though " the prior security has been excepted in the clause of " warrandice, the apparently postponed creditor may, " on the bankruptcy of the common debtor, plead " any objection to the prior security that appears from " the face of the writings. So, after a competition has " begun, a party conscious of a defect in his own right " may, by any lawful means, but always without the aid " of the bankrupt, direct or indirect, correct the defect " pendente lite, so as to be preferred to his adversary; " although formerly in a better situation than himself.

" On looking into the books of authority and the deci- " sions of the Court, to be found under the titles of Com- " petition, Execution, and Writ, it will be seen that the " most minute and critical objections, in point of ex- " ternal formality, or arising from the want of proper " and technical words in the instrument, have been sus- " tained. In such circumstances, and notwithstanding " the most satisfactory evidence of intention to give a " right, the existence of another deed, followed with in- " feftment, before the former one has been completed, " must create an undoubted preference.

" These observations are not disputed in the general " case. It is the first regular infeftment in real estate,— " the first act of delivery in the transfer of moveables, " —and the assignation or conveyance first intimated, " in personal rights, that is preferred; although before " any of these forms have been gone through, an obli- " gation to dispone, or to make delivery, or to give a " valid assignation, can be shown. Particularly in re- " corded real rights, if appearing in the appropriate

" register, unless fraud can be proved, the entry in the " record is the only evidence that can be depended upon; " without this, a form calculated to give security to cre- " ditors and purchasers would become a snare to them.

" It is, indeed, in one particular case only, that an " attempt has been, of late, made to break through the " otherwise universal rule, and that is, in the case of " adjudications of lands; as to which it has been con- " tended, that if the debtor has previously and bonâ " fide engaged to make a conveyance of the subjects " adjudged, this should be held sufficient, without any " actual transference in the ordinary forms of law, to " warrant a judgment in favour of the party having " such imperfect right; and this, although the same " right had been in the most formal manner attached by " adjudication far beyond its value: and this prin- " ciple, if admitted at all, would be sufficient to set " aside a judicial sale under the bankrupt statutes, if " resting only on adjudications, or so far as adjudications " have been ranked on the price of the lands sold. The " decree of sale would not give an effectual title to the " lands, unless the infeftment upon it had been followed " with uninterrupted possession during the prescriptive " period of forty years.

" The recent decisions upon this subject have been " fully argued upon, and explained by Lord Corehouse; " but, at a more early period, there are authorities, it " is humbly thought, not less conclusive. Thus, in the " case of base rights prior to the establishment of the " registers for publication, a later conveyance or adju- " dication, if followed by possession, was preferred to " the former ones, although clearly importing an obli- " gation to make an effectual transmission of the right;

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" and so, in the case of personal rights of lands, he who " obtains the first infeftment will be preferred. In " these cases, although before possession has followed in " the one case, or infeftment in the other, the party so " situated may have become acquainted with the con- " veyance prior in date, still he will be preferred; and " it would be singular if the result were different. In " the case of a prior conveyance being followed by one " of a later date, and this again accompanied by an " adjudication of the same date, obtained by a separate " creditor, the second conveyance, if followed by the " first infeftment, would be preferred to the prior one; " while, according to the argument maintained for the " defenders, the first conveyance would be preferred to " the decree of adjudication, although entitled to rank " pari passu with the second conveyance.

" In the same manner an adjudger, who had gained " an easy victory over a creditor or purchaser, with a " blundered infeftment will, after all, be obliged to " yield to another creditor or purchaser, who, like the " defenders, has, as to nine tenths of the lands, no war- " rant at all.

" It is not easy to discover the grounds of such a " distinction as has been suggested. Our ancient " apprisings were truly judicial sales of lands, subject " to redemption within a certain period; and although " these were followed by adjudications, which, by " authority of special enactments, are to be ranked " pari passu, if within a year of the first effectual one, " and are in some other respects different from appris- " ings, the two rights are, in general, of the same " nature, and attended with the same effects; and " there is no authority, either expressed or implied, for

" deciding that a decree of adjudication, prior or of " equal date, should be postponed to an obligation to " convey, however correct in point of form, if not fol- " lowed with infeftment.

" But by the statute 54 Geo. 3. s. 29., and in the " circumstances here occurring, it is humbly thought, " that any difficulty that might formerly exist on this " point has been altogether removed. It will be " remembered that the awarding of a sequestration is " declared equivalent to an inhibition, and the general " adjudication which follows is held to operate equally " in favour of all the creditors, no other adjudications " for debt being permitted. At an after period of the " sequestration, with a view to give a feudal right to a " purchaser, the trustee is authorized and required to call " for a special conveyance of lands from the bankrupt, " and in default of this he is to deduce a special adjudi- " cation, mentioning the different lands, so far as known " to him; and this adjudication which is declared to " be of the 'nature of an adjudication in implement, " 'as well for payment, or security for debt, shall be " 'subject to no legal reversion.' In this manner, the " special adjudication is rendered equal to an expired " apprising or adjudication, or in other words, a right " of absolute property in the trustee, for the benefit of " the creditors, according to their rights and interests " at the time. The only diligence which can compete " with it would be an adjudication in implement, fol- " lowed with an infeftment prior to that of the trustee, " such as the defenders in this case attempted to " obtain, but, as it must now appear, to no effect; the " defenders producing no obligation to convey in refe-

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" rence to the lands in question, prior in date to the " sequestration itself.

" In the recent case of Bontine, which, in the plead- " ings, has been held of the same nature with the " preceding one of Cormack v. Gardner, although " altogether dissimilar, the warrant of infeftment in the " former case having been prior to bankruptcy, the " circumstances were extremely peculiar. The Lord " Ordinary had decided against the defender; but upon " a reclaiming note, a majority of the judges altered " that interlocutor. The judge dissenting was of " opinion that the right was liable to reduction, as " made out in defraud of the bankrupt statutes, and " also upon the common law, being in fact a fraudulent " conveyance made by a person publicly insolvent in " favour of his son, a conjunct and confident person, in " the most correct sense of the expression. To all this, " however, it was answered, that from the manner in " which the summons of reduction had been framed, " and resting wholly upon the bankrupt statutes, these " objections could not, in point of form, be listened to. " Instead of bringing a supplementary summons to " remedy the defect, an appeal was presented, and the " judgment affirmed; although within a few days of " the determination in the Court of Session, the " defender had applied to the Court for shortening the " induciæ of an adjudication brought by him against " his father, and the application was complied with, for " no less than 100,000*l*., reserving, however, as usual, " all objections contra executionem.—(See R. C. Bon- " tine v. Graham, 17th December, 1829.) Whether, " in virtue of this reservation, a transaction so ex-

" tremely improper may not still be set aside in the " ranking, is yet to be decided; but in all these cir- " cumstances, it humbly appears that the result cannot " be considered as a precedent in the present or in any " other case where the summons has been prepared in " proper form.

" It has been omitted, in reference to the case of " M'Math, to mention that of the Creditors of " Dunbar v. Sir James Grant, 18th June 1793, F. C., " where, in circumstances of peculiar hardship, it was " laid down by a great majority of the Court, ' That a " ' bankrupt ought to execute no deed by which the " ' situation of his creditors is affected, and that it " ' would be dangerous to support any deed of that " ' nature.'

" Professor (now Baron) Hume, in his lectures on " the title of adjudication, gives a statement of the " decisions upon the point now at issue. Referring to " the case of Duncan v. Wyllie, 7th December 1803, " he says, that the estate of a bankrupt being seques- " trated, the right of the trustee, as adjudger for the " creditors in general, was not affected by a latent and " private deed granted by the bankrupt. This judg- " ment, he observes, altered the interlocutor of the " Lord Ordinary, which proceeded upon the old rule, " and was meant to be established for the rule in all " such cases as should afterwards occur. He adds, " that even when the law was otherwise understood, if " a person who was infeft should dispone, and the " disponee should allow his right to remain personal, " without taking infeftment, and if the creditors of the " disponer should adjudge the subject, and be pre- " viously infeft, their right would not be liable to be

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" qualified by the personal right of the disponee. And " he refers to the case of Mitchell v. Ferguson, " 13th February 1781."

Lord Balgray.—" I concur in the opinion above " given by Lords Gillies and others, and agree in the " principles of law which are there detailed. At the " same time, it may be proper, on account of the " importance of the case, both to the parties and to " the law, to make a few observations:—

" I. Upon a most careful and attentive perusal of the " whole facts detailed in the record, it does not appear " that fraud can be laid to the charge of the common " debtor, neither can any fault be imputed to the lender " or his agents. It is perfectly clear to me, that a " proper and prescriptive progress of titles was sub- " mitted to consideration, sufficient to satisfy any con- " veyancer, and which could not be discovered as " defective, without a topographical examination which " never hitherto has been held as the duty of any pro- " fessional man. What therefore has taken place must " be viewed as having proceeded from inadvertency or " mistake. This, no doubt, creates an obligation against " the common debtor to apply the proper correction,— " but this extends no further than the parties imme- " diately concerned. Creditors certainly cannot benefit " themselves by fraud, but being certantes de damno " vitando they have been always considered to be enti- " tled to take advantage of errors and mistakes, to the " effect of obtaining a fair and equal distribution of their " debtor's effects.

" II. The case of R. C. Bontine v. Graham, 17th De- " cember 1829, is to be considered with some caution. " The circumstances of the case are correctly stated by

" Lord Craigie. The question was brought before the " Court in rather an imperfect shape and form. Per- " mission ought either to have been granted to amend " the summons, or the terms of the judgment should " have been framed so as to apply to the special circum- " stances of the case, and the way and manner in which " it was brought before the Court. Something of this " kind was suggested the day after the opinions were " delivered, but the judgment was signed, and the case " was immediately appealed.

" III. The present case stands in a very peculiar " situation. The act of the common debtor complained " of was subsequent to the sequestration, and so struck " at by the 38th section of the bankrupt statute, and " therefore, ante omnia, the bond of corroboration " should be set aside, and declared null and void.

" It will still remain competent to the creditor to " claim at common law, and to enforce against the " trustee and creditors, as the representatives of the " common debtor, any right to withdraw any part of " the estate from the common fund of division."

Lord Fullerton.—" However sensible of the impor- " tance of the consideration urged in the preceding " opinion of Lord Corehouse and others, in support of " the application of the act 1696 to the present case, I " am not prepared to assent to the conclusion that the " pursuer would, upon that ground of action, be enti- " tled to judgment in his favour.

" Considering the circumstances of this case; in par- " ticular, that the special security was not only stipulated " for, but that all parties seem to have acted under the " impression, that it was actually granted at the date of " the advance, I think it would be exceedingly difficult

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" to distinguish, upon any reasonable principle, between " the present and that numerous class of cases, respect- " ing nova debita, in which the Court have sustained " the securities. But I do not think it necessary to " enter into that enquiry here. The deeds under re- " duction were granted, not merely after or within " sixty days of bankruptcy, but after sequestration, and " after the statutory confirmation and adjudication in " favour of the trustee. Such being the case, and con- " curring as I do entirely in the preceding opinion, " both on the subject of the inefficacy of the alleged " personal obligation or constructive fraud in limiting " or in any way qualifying the right of the bankrupt to " the prejudice of his creditors, and on the effect of the " various provisions of the 54 Geo. 3. c. 137., I agree " in the general result, that the deeds challenged in this " case ought to be reduced."

Lords President and *Moncreiff*.—" The essential facts " of this case are sufficiently ascertained in the record. " But it is of importance to attend to the precise state " of them.

" That there was a definite agreement before " Mr. Walker advanced his money; that a specific " heritable security over all the particular lands com- " prehended in the valuation by Dr. Coventry, obtained " and exhibited for the purpose of this loan, should be " granted in due and sufficient form, unico contextu " with the payment to be made, is a fundamental and " indisputable fact in the case. Neither the lender nor " his agents ever, for one instant, consented to make " any loan on the personal credit of Mr. Stuart, or on " any thing less than a complete security, covering all " the lands in Dr. Coventry's valuation. They even

" insisted for additional security. We farther hold it " to be an equally certain fact, that Mr. Walker and " his agents did advance the money only in the assured " belief that they had obtained such a perfect security " by infeftment over the whole of those lands. In " what manner, and by what circumstances they were " led into this belief we think also sufficiently clear " upon the record. But in the first place, we can " entertain no doubt of the fact, that the agents who " negotiated the loan, and Mr. Walker himself, did " bonâ fide act and transact solely on the faith that such " a security was actually granted; and this circum- " stance appears to us to constitute a very strong pecu- " liarity in the case.

" It is next clear, that Mr. Stuart, instead of dis- " poning all the lands in the valuation in security of " the loan, extending to ninety-five acres, and valued at " 21,655*l.*, had disponed only a very small part of " them, consisting of about five acres, and only worth " about 1,000*l.*; the warrant for infeftment covered " nothing more.

" The cause of the security having been framed and " taken in this imperfect form, contrary to the faith of " the contract, and the firm belief of the lenders, is to " be found in the facts set forth in the record in arti- " cles 8 to 17 of the defender's statement. To the " order and result of those facts it is very necessary to " attend.

" After the agreement had been concluded, on the " basis of a security to be given over the lands in the " valuation, Mr. Stuart sent a description of the lands— " but at first, nothing more; promising at the same " time to send searches of encumbrances and the titles,

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" plainly with reference to that description, as compre-
" hending the whole lands. The description sent is in
" the 9th article of the statement; and, connecting it
" with the previous negotiation, it is evident, that when
" it stated, 'All and whole the lands of Hillside, for-
" 'merly called the Brewery of Newton, with houses,
" 'buildings, yards, orchards, greens, muirs, marshes,
" 'coals, coalheughs, annexis, connexis, parts, pendi-
" 'cles, and whole pertinents of the same whatsoever,
" 'together with the teinds included in the said lands
" 'of Hillside, all lying in the lordship of St. Colm,
" 'barony of Beith, and sheriffdom of Fife,' it was cal-
" culated, and must have been intended, to induce the
" belief, that all the lands in the valuation were com-
" prehended under the general name of 'the lands of
" 'Hillside,' with the amplifications annexed to it, and
" that they were all included in the same titles, to be
" sent with reference to it. The 10th Article shows the
" titles which were sent, viz. 'Charter of resignation
" '1795, sasine 1795, and renunciation 1797;' and the
" answer to that article bears: 'Admitted, that on the
" '3d December 1823, Mr. James Stuart sent to
" 'Messrs. Gordon and Stuart the title deeds of the
" 'lands referred to in the revised condescendence,
" '(article 2,) in which Mr. Stuart was infeft. It is
" 'denied that he sent the whole title deeds, or any of
" 'the titles to the other lands which were not included
" 'in the original bond.' The searches sent expressly
" related to the same description of the lands.

" The charter 1795 is in process. We have parti-
" cularly examined it. We find that it contains a
" precise description of the lands of Hillside, in the
" very words of the description previously sent by

" Mr. Stuart; it is in Latin of course, but being a ver-
" batim translation of the above words quoted, it is unne-
" cessary here to recite it. The charter does also contain
" other lands, viz. the lands of Nooklands, part of Tor-
" ryhills, a part of lands called Sisterlands, 'quæ est
" 'circiter decima tertia pars acræ, jamjam ablatam
" 'et inclusam intra hortum de Hillside'—the lands of
" Dunearn, the lands of Orrock, and the lands of
" Cullelo. Of these lands, it is clear that Dunearn,
" Orrock, and Cullelo are not at all involved in this
" question, being neither in the bond of corroboration,
" nor among the subjects valued. Torryhills has by
" mistake been put into the bond, but is admitted not
" to have been in the valuation. As to Nooklands and
" the fraction of an acre of Sisterlands, they are in the
" bond of corroboration, and from the mention of them
" in the second article of the condescendence, it is pre-
" sumed that they were included in the lands valued;
" though that valuation has simply reference to the
" estate of Hillside, and specifies no other lands by
" name. Nooklands had evidently no more apparent
" connection with Hillside than any of the other lands
" in the charter.

" With the description previously sent and with this
" charter and nothing else before them, Mr. Walker's
" agents made out the bond in the very words of that
" description, and in precise conformity to the same
" words in the charter.

" It thus appears, that while the description given,
" and precisely adopted in the bond made out, was ex-
" pressly represented as applying to all the lands which
" it was stipulated should be comprehended in the
" security, the titles sent to the defenders agents con-

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" tained a description which corresponded precisely " with that previously given, and no titles were sent, " from which it could be discovered that the main por- " tions of the lands relied on were not in fact included " in that description, but were held by separate titles. " The agents in consequence made out the deed in those " terms, and it was revised and executed by Mr. Stuart " in that form, and infeftment passed on it immediately ; " yet the fact now turns out to be that ninety acres of " the ninety-five in the valuation were held by entirely " separate titles, and were not included in the descrip- " tion.

" There is a statement in the record that Mr. Stuart " subsequently granted a security to a Mr. Brown, the " deed being written with his own hand, in which he " made use of the same description ; and it is also there " stated, that at a still later period Mr. Stuart granted " a security to his sister or brother, both over the lands " of Hillside, and by special description over the other " lands in Dr. Coventry's valuation : but it has been " explained that both these statements are inaccurate, " the bonds to Mr. Stuart's brother and sisters having " been executed in 1816, and that to Mr. Brown also " previous to 1823.

" Mr. Stuart's estate was sequestrated on the 1st " September 1828. After his sequestration, and when " he was in America, the defect in the security, as " covering only five acres instead of ninety-five, was " discovered ; and then he granted the bond of corro- " boration now under reduction, proceeding on a clear " narrative, that the money had been advanced on the " faith of a specific contract for a good security over the " whole lands in Dr. Coventry's valuation ; and on this

" deed infeftment passed before the trustee had obtained " infeftment in the lands.

" This appears to be the correct state of the facts, " and two questions of law arise—1. Whether the bond " of corroboration, &c. is reducible on the act 1696, as " a deed in security of a prior debt, executed after " bankruptcy or after the commencement of the sixty " days preceding the sequestration? and, 2. Whether, " supposing that it is not reducible on the act 1696, it " is invalid for want of power, or as a fraud at com- " mon law, as having been executed after the seques- " tration?

" 1. The first of these questions appears to us to be " one of very great importance; because, if the deed " had been executed before the bankruptcy, we are of " opinion that in the circumstances of the case it could " not be reduced, without entirely subverting the esta- " blished law, as we have understood it, and departing " from the principle of a very long series of adjudged " cases.

" The act 1696, c. 5, is a statute against the frauds " of persons becoming bankrupt; and in the part of it " here in question it has two provisions: 1. That any " dispositions, &c. after bankruptcy, or within sixty " days before it, 'in favour of his creditors, either for " 'his satisfaction or further security, in preference to " 'other creditors,' shall be void and null; and 2. " That as to this question, all dispositions of heritable " rights shall be reckoned as of the date of the sasine " taken.

" We are of opinion, that in interpreting a statute " such as this, expressly made for the prevention of " fraud, it could never be construed on doubtful

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" inferences, so as to become the instrument of fraud. " It soon became a question, on the clause last referred " to, whether, if an heritable security were bonâ fide " contracted by deed and conveyance before the com- " mencement of the sixty days preceding bankruptcy, " but no sasine taken till within that time, the security " was reducible under the act. In strictness there was " a great difficulty, insomuch that in several cases the " Court thought themselves bound to reduce; but " afterwards a more correct view was taken on the " principle and purpose of the statute, and those deci- " sions were entirely set aside in later cases: January " 29, 1751, Johnson v. Home and Burnet; November " 12, 1799, Mitchell v. Finlay. That very rigid con- " struction therefore being entirely exploded, and it " being ' settled that no objection can be taken on the " ' statute to an heritable security granted of the date of " ' the advance, though sasine on such security shall not " ' happen to be taken till within the sixty days before " ' bankruptcy,' neither those old decisions themselves " nor any principle involved in them can now be of " any authority.

" But the just rule of construction established by " the case of Johnson reached beyond the precise point " of the case itself. It might happen that there was a " clear specific contract for the advance of money, and " the granting instantly, as the condition of such ad- " vance, of a special security over a defined heritable " subject; and yet neither the conveyance nor the " infeftment might be made at the instant of the " advance made. Did that fall under the principle of " the act 1696? So far from its being a fraud to grant " the security subsequently, the fraud must lie in not

" granting it as soon as possible, or at any time when " demanded. But if the security was to be con- " sidered as of the date of the sasine, it could signify " nothing whether the deed of security giving warrant " for the sasine was before the commencement of the " sixty days or not, if the sasine itself was within that " period. The principle of the question never could " or did depend on this. The point held was, generally, " that the statute did not at all apply to nova debita, " which have been explained by the decisions to mean, " all cases in which the advance of money has been " made on a specific agreement for the particular secu- " rity which happens not to be made or completed till " within the sixty days. This may happen where the " whole transaction has been within the sixty days; " or it may happen where the transaction is earlier, and " the warrant for infeftment is also previously given " but no infeftment is taken till within the period; or " it may be where the transaction is concluded before, " but by breach of contract or accidental circumstances " the proper deed has not been executed till after the " commencement of the sixty days. Is this last case " in any degree more within the plain provision of the " statute than either of the other two? Is it the case of " fraud or fraudulent preference contemplated by the " statute? We think that it is not; and that the more " general rule, finally and fully adopted by the Court, " as we apprehend, embracing it, has been founded on " a correct and equitable view of the nature and " purposes of the statute.

" The first important case on the point is Mansfield, " Hunter, and Co. v. Cairns, February 25, 1771. In " that case both the bond and the infeftment were

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" within the sixty days of bankruptcy, but the contract " for the security, at lending the money, was clear. " The Faculty Report bears :—' It was observed on the " ' bench, that where money was advanced in conse- " ' quence of a communing, that an heritable security " ' should be granted, such bond was truly a novum " ' debitum, and did not fall under the statute.' In the " fuller report of the opinions by Lord Hailes, the " principle is distinctly brought out. Lord Pitfour " says, ' The act 1696 is salutary in itself; it would be " ' quite otherwise upon the interpretation of Mansfield " ' and Co. By that statute a retrospect was wisely, " ' though boldly, admitted. Where the law forbids " ' new security for an old debt, the creditor is not hurt; " ' he has the same security as at first. Money lent on " ' the faith of an heritable security is the same thing " ' as a sale. It is plain that here there was no purpose " ' of parting with the money upon the promise either " ' of the doer or of the debtor.' And President Dun- " das gives this strong opinion on it :—' If the act 1696 " ' could have the interpretation put upon it by Messrs. " ' Mansfield, I would certainly move for an application " ' to parliament for a repeal.' But the Court sus- " tained the security, Lord Monboddo only dissentient.

" The next case is that of Houston and Co. v. Stewart, " 20th February 1772. The decision in that case has " been said to be erroneous; but in so far as it is " material here, it only followed the previous case of " Mansfield and Co. The bond and the infeftment " were both within the sixty days; and the Court again " sustained the security. There was, indeed, ground " for doubt in the case; because there was no clear " proof of the fact that there was a stipulation for the

" special security, as part of the original contract, and " this depended at last on parole testimony, which, " however, was found competent. But otherwise, the " case is a clear and distinct precedent, the principle of " which is again given by Lord Coalston thus:—' There " ' is satisfying evidence that it was communed and " ' agreed on, that the creditor was to get heritable " ' security, and that the money was advanced on that " ' footing. Had the obligation to grant heritable " ' security been afterwards given, it would have made " ' a difference.' Lord Pitfour is still more precise:— " ' The act of parliament does not reach to this case. " ' The law meant to give a salutary remedy against " ' any partial deed in favour of any creditor; had it " ' meant to go farther, the retrospect would have been " ' intolerable. The law did not mean to interrupt the " ' course of common transactions. There was a novum " ' debitum here, no matter at what time contracted.' " The President:—' The obligation is to be considered " ' as an heritable bond of that date. The lateness of " ' the infeftment varies not the case.'

" Then came the case of Spottiswood v. Robertson " Barclay, November 19, 1783. That was the case of " an obligation in a marriage contract to secure a wife " heritably in a certain annuity, but not specifically. " Both the bond granted and the infeftment were within " the sixty days; yet the Court sustained the security. " There was a reclaiming petition not disposed of; and " it is said that the case was compromised. There " might be ground for doubt, in so far as the obligation " was not specific; but at any rate the judgment was " not altered; and in so far as principle was involved, " it only followed two previous decisions.

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" After these three consecutive decisions, the case of " Brough's Creditors v. Duncan, &c. occurred. In that " case the obligation of debt was contracted by the " cautioners on 23d March; an heritable bond of relief " was granted on the 18th May; infeftment was not " taken till November 20th; and it was agreed that " Brough should be held as legally bankrupt on the " 17th January. There was no proof, that in the " transaction on the 23d March it had been stipulated " that the specific security should be granted; and it " was only offered to be proved by the oath of the " bankrupt. But as the bond was executed on the " 18th May, six months before the commencement of " the sixty days, it is clear that according to every " opinion now entertained, if the stipulation for the " security had been held to have been pars contractus " from the first, the security ought to have been sus- " tained, and the decision against it would be wrong. " Though the old doubts, however, about the date of " the infeftment were revived, the ground of decision is " in the concluding observation on the bench: ' This " ' case, however, is attended with no difficulty what- " ' ever. 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 farther security falls under the act 1696.' We " conceive the view of the Court to have been, that " the granting of the security was not shown to " have been pars contractus on the 23d March; if " they had assumed that it was, the decision, besides " being contrary to three previous cases, would

" be erroneous according to every principle now " held.

" The case of Brough's Trustee against Spankie, &c., " decided on the same day with that of Duncan, was " not very different. There was, indeed, a holograph " letter by Brough; but it was objected that it could " not prove its own date; and no proof appears to have " been offered. The bond in that case was within the " sixty days.

" But whatever view may be taken of these two cases, " we find abundant authorities of a later date confirming " the principle of the previous decisions.

" The case of Mitchell v. Finlay bears on the point, " in so far as, under an obligation in a marriage con- " tract to infeft the wife in a special subject, the " husband two years after, and within sixty days of " bankruptcy, not merely gave infeftment to the wife, " but by voluntary act took infeftment himself, so as to " validate it. It was held, however, notwithstanding " the facility thus given by the bankrupt to a conjunct " and confident person, that the wife was entitled to " expede infeftment in the husband's person; and that " it should not be taken as his act.

" The case of More v. Allan, though it related to " personal rights, illustrates the principle. Bills were " accepted on the faith of a particular consignment; " the consignee refused to take it, and a new consign- " ment and new bills were then framed within sixty " days of bankruptcy. It was held that this security " could not be reduced; and Mr. Bell states the reason " thus:—' That wherever the bankrupt interfered only " ' to do that which both the parties understood had " ' been done at first, and upon the faith of which

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" ' understanding alone the money was advanced, the
" ' act was not objectionable, nor such as could entitle
" ' the creditors to separate the security from the
" ' advance;'—a principle which, if correct, is more
" applicable to the present case than to any other that
" ever occurred.

" In the case of Maclean v. Primrose there was an
" engagement to grant a security unico contextu with
" the advance. Maclean became bankrupt without
" granting it; and the Court (altering a bill-chamber
" judgment of Lord Meadowbank) gave decree to
" compel him to grant it. Mr. Bell says that they
" held, that if the creditors had opposed it, he could
" not have been compelled to do so; but that is a
" point which remained untried and undecided.

" The next case we observe is that of the Bank of
" Scotland v. Stewart, &c., which was decided by the
" Court unanimously in President Blair's time. The
" transaction was on the 6th May 1801, the heritable
" bond on the 29th June, the infeftment on the
" 27th October, and the bankruptcy on the 13th No-
" vember. But the Lord President takes it as admitted,
" ' That at the very commencement of the transaction,
" ' it was stipulated that Mr. Ross was to have this
" ' security, and that the title deeds were put into his
" ' hands, in order to get the disposition made out.' In
" all other respects, and particularly in the date of the
" bond being five months before the bankruptcy, it
" was identical with the case of Duncan and Jollie;
" but the judgment was the reverse; and unless,
" therefore, Duncan's case depended on that difference
" of fact or evidence, we must conclude that there was
" a difference of principle, and, at any rate, a plain

" adherence to the rule of the cases of Mansfield, " Houston, and Robertson Barclay. Neither do we " find in the report any thing from which we can infer, " that the decision at all turned on the circumstance " that the bond was executed before the commencement " of the sixty days; and Mr. Bell, far from supposing " that it did, not only holds that the Court disregarded " the decisions in the cases with Brough's Creditors, " and returned ' to the opinion which ruled Mansfield, " ' &c.,' but professing to state the law of the subject, " as settled at the date of his last edition, he announces " the result of all the cases on this point thus:—' 2. It " ' has also been held, that wherever there is stipulated " ' a specific security over a particular subject, in con- " ' sideration and on the faith of which an advance of " ' money or transfer of goods is made, the completion " ' of that security, although after an interval of time, " ' and after the term of constructive bankruptcy has " ' begun, is not within the intended meaning of the " ' statute.'

" To us it appears that, after all this, the point " might well be considered as settled. But Mr. Bell " still expresses doubts as to the principle founded on " the occasional dicta of Lord Braxfield, Lord Meadow- " bank, and, perhaps, other eminent lawyers, as to the " particular case of Houston, during the progress of " the question; and he says, that it may deserve recon- " sideration. We do not know what may be the limits " of the reconsideration of such questions; but, in the " present case, the question has been at least twice very " deliberately reconsidered, and the same rule has been " still farther confirmed.

" In the case of Cormack v. Anderson, &c. the

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" transaction was on the 13th of May 1822, and the
" stipulation for the security clear; the bond was
" executed on the 13th December 1822, but it re-
" mained in the hands of the granter till after seques-
" tration, and there was no evidence of delivery; the
" sequestration was on the 25th September 1827; and
" the infeftment on the bond on the 29th September.
" The Court took up the case, on the footing of there
" having been no delivery; but held that no delivery
" was necessary on the ground, which was thus stated
" by Lord Glenlee:—' It is said the bond was not
" ' delivered. That may be of consequence as to
" ' voluntary deeds, but this is not a deed of that kind,
" ' but one which, by action of exhibition and delivery,
" ' the bankrupt might have been compelled to deliver.'
" Can it be said that the bankrupt, in that case, was
" any more bound to deliver the bond within the sixty
" days, or after bankruptcy, than Mr. Stuart was
" bound, in this case, to grant the bond of corrobo-
" ration? In so far as the act 1696 is concerned, the
" cases appear to be precisely parallel. But, at all
" hazards, the case of Cormack is directly in the face
" of the case of Brough's Creditors v. Duncan, unless
" the latter depended on the want of evidence of the
" original contract; for in both the bond was executed
" long before the sixty days.

" The concluding case on the subject is Cranstoun v.
" Bontine. A transaction for the sale of Mr. Graham's
" liferent right was concluded on the 20th March 1826.
" No disposition was granted till the 5th of August 1826;
" infeftment followed on it on the 7th of August; but
" notour bankruptcy took place on the 6th September
" 1826. We see no specialties in the case, except

" what relate to the onerosity of the transaction itself;
" yet it is a case in which the disposition was within
" the sixty days; and, assuming the fact of a bonâ fide
" transaction and advance of money, such as exists in
" the present case, no decision could possibly be more
" directly in point. The disposition and infeftment
" were both found not reducible on the act 1696; and
" when we read the opinions of the judges, we cannot
" doubt for a moment that the law was held to be
" settled on the principle established by the long series
" of cases to which we have adverted in this opinion.
" Both Lord Balgray and Lord Gillies state the point
" roundly; the latter in particular, in these words:—
" 'But where an obligation to grant a conveyance was
" 'entered into previous to the sixty days, as in the
" 'present case, the conveyance following upon it,
" 'although within the statutory period, was effectual,
" 'being only in fulfilment of the pre-existing obli-
" 'gation;' and he goes on to distinguish this from the
" case of 'an agreement to secure a former debt.'
" That judgment stands affirmed by the House of
" Lords. It appears to us not to be very necessary to
" consider what might be the precise observations made
" in moving the affirmance. If it had been a judgment
" reversing the decision of this Court, or on a question
" new to the law, it might be right to weigh the
" reasons well; but this is only the concluding case of
" a long series, and the judgment is an adherence to
" that solemnly given by this Court on clear and
" distinct grounds. There are points still remaining in
" that cause; but on this question of the operation of
" the act 1696 the judgment is conclusive.

" On this deduction of authorities, we venture, with

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" all deference to other opinions, to think that there " never was any question of law more fully or delibe- " rately settled than this is. There are the three cases " of Mansfield, Houston, and Robertson Barclay before " 1793; and, independent of the cases of Mitchell, " More, and Maclean, there are since that time the " three cases of the Bank of Scotland, Cormack, and " Bontine, the last affirmed in the House of Lords. " In the three first cases, and in the last, the deed of " security was decidedly granted within the sixty days; " and substantially it was so in Cormack's case also. " Throughout all the cases we find no trace of any " distinction founded on the deed being before the sixty " days or not; and in the case supposed to be chiefly " adverse to the principle, that of Duncan, the bond " actually was six months before the sixty days, so that " in every view the decision in it was wrong.

" We look, then, at the present case; the contract, " and the bonâ fide advance of the money on the faith " of it, are beyond all doubt. If the case were made " identical as to the security with that of Duncan, by " supposing the bond of corroboration to have been " granted six months before the sixty days, it must, " according to every opinion which we have yet heard, " be sustained, contrary to that decision. But it is " identical in the material point with the three first " cases and the last, in so far as the act 1696 is " involved. We must, therefore, conclude that the act " 1696 does not apply to it, and that it cannot be held " to apply to it, without departing from the law as it has " been long and very carefully settled.

" II. But a second part of this case remains for con- " sideration. The bond of corroboration having been

" granted after sequestration, it is maintained that the " estate had passed by the adjudication to the trustee, " though he had not got a feudal title, and that the " bankrupt was disabled by the bankruptcy from doing " any voluntary act.

" Here the principle of the act 1696 must be laid " aside. That act applied equally to deeds after bank- " ruptcy, and within sixty days preceding it, plainly " supposing that a bankrupt might at common law " grant effectual deeds after notour bankruptcy. Now, " here he has granted a deed on which infeftment has " passed, which infeftment must be effectual unless the " trustee can reduce it. But it cannot now be said " that it is a deed in security of a prior debt; if it were, " it would be under the act 1696: it must therefore " bear another character.

" It is the case, then, of a deed granted for the pur- " pose of doing that which the defender's constituent " believed, and had a right to believe, was done at the " moment when he advanced his money in the year " 1823. It is in implement of a bonâ fide stipulation, " intrinsic of the contract, which the defender was " misled to believe was implemented at the first. It " was not so implemented, by the fault of the bank- " rupt, whereby Mr. Walker and his agents were " directly deceived.

" Here the question arises, whether it is to be held " that this was done by the fraud of the bankrupt, and " it is a very serious question. Mr. Stuart was bound " to know the titles by which he held the property " which he offered as a security; the more especially, " as he ventured to act as his own agent; but he " deliberately sends to the defenders' agents a special

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" description, expressly held out as the description of " all the lands, on the estimate of which the security " had been agreed to be taken, and then he sends a " charter, containing the same description verbatim, as " the guide to the agents in making out the bond. But " the terms of that title are such that no ordinary care " could have discovered that it did not comprehend the " whole lands, as composing the lands of Hillside. " The deed is made out and deliberately revised, and " afterwards signed by him, and he accepts of a loan of " 10,000*l.* on a security believed to comprehend lands " valued at 21,000*l.*, when, in fact, it comprehended " lands only worth about 1,000*l.* On the other hand " it appears that he had, a few years before, put his " name to deeds in favour of his brother and sisters, in " which the distinction of the titles was clearly marked.

" It would be with great reluctance that we should " draw the inference, that when all this took place " Mr. Stuart had it present to his mind, that the lands " were held by separate titles, and that he deliberately " intended to deceive Mr. Walker and his agents. " We know that there may be unaccountable forgetful- " ness, and great haste and rashness under difficulties; " but we apprehend that there is such a thing as fraud " in the eye of law, where not only a criminal pur- " pose could not be shown, but persons of fair and " liberal minds, from knowledge of the individual, may " be convinced that no such purpose could exist. That " Mr. Walker and his agents were, in point of fact, " deceived can admit of no doubt; that they were " naturally, if not necessarily, deceived by the course " which the negotiation took, and the positive acts " of the borrower, seems to us to be equally clear.

" We were at first under an impression that all the " title deeds, both of Hillside and of all the other lands, " had been sent to Mr. Gordon. But on an accurate " examination of the record, and of the charter therein " referred to, it is quite clear that it is not so, as al- " ready explained; and whether it was by design or " error on the part of Mr. Stuart that the proper titles " were not sent, it still operated as directly to deceive " Mr. Gordon as if it were proved to have been done " by positive intention.

" We are, therefore, constrained to come to the " conclusion, that without necessity of holding that " there was a directly fraudulent purpose, there were " acts sufficient to constitute as to this question a fraud " in the eye of law. Mr. Stuart's readiness to grant " the bond of corroboration may tend to impress the " belief that he had great regret for the unjust effect " which his inconsideration, at least, had produced; but " any agent who had done the same thing, however " pure he might feel himself from any purpose to mis- " lead, must have answered for it as for a legal fraud. In " one word, if this was merely an error, it was an error " of such a kind, that, in a question like this, it must " stand in the same place with a direct fraud.

" When the state of the security actually given was " discovered, no one can doubt that there was an obli- " gation on Mr. Stuart to do whatever he could to " correct it. If it had been discovered at an earlier " period, the defenders would certainly have had a good " action to compel him to execute an additional deed, " such as that which he did execute; and he could not " have resisted it, without rendering the case a very " clear one of positive fraud. Whatever view, therefore,

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" may be taken of the bond of corroboration, we have
" no idea that Mr. Stuart did any thing wrong in
" granting it; on the contrary, we think that he was
" bound to grant it, valeat quantum, and to do all that
" he could for the relief of the defenders. Whether
" he could do it effectually is a different question.

" A mistake sometimes enters into such discussions,
" as if it were impossible that the situation of a creditor
" could be at all altered or improved after sequestra-
" tion. But in various particulars the law is settled
" otherwise. A creditor by heritable bond, not infeft,
" is entitled to take his infeftment after sequestration;
" and if he obtains it before the trustee is infeft, his
" preference is secure. In Cormack's case the infeft-
" ment was not taken till after sequestration, and,
" what is more, it was done by the voluntary act of the
" bankrupt in delivering the deed; and until the last
" bankrupt act, which made the act of sequestration
" equivalent to an intimated assignation, the holder of
" an unintimated assignment could run a race with the
" trustee for the first intimation. Still farther, there is
" a series of cases establishing this point, that where the
" bankrupt granter of a disposition on which sasine may
" or may not have passed has not been himself infeft,
" and where the trustee holding the titles avoids in-
" fefting him, that he may not validate the security,
" though the trustee may try to get a title throwing the
" bankrupt out of the progress, the creditor is entitled
" to run the race with him, and if he gets adjudication
" and infeftment first he will be secure. This is clearly
" implied in the case of Mitchell v. Fergusson, 13th
" February 1781, though the trustee having the first
" infeftment was preferred. It is implied also in the

" case of Smith v. Taylor, 18th December 1795, even " holding that the decision was wrong, the trustee " having got the first infeftment; and it is implied in " the case of Buchan v. Farquharson, May 24, 1797. " The only doubt was, whether it was competent to the " trustee to exclude the creditor by getting the first " completed right.

" This may not resolve the present question; it only " goes thus far, that all things are not closed by the act " of sequestration, and that a preference not previously " established may be made out after it. We know that " it is a rule established on sound principle and abun- " dant authority, that, after bankruptcy, the bankrupt " cannot give aid to one creditor to complete a pre- " ference by diligence which he could not otherwise " have completed. But neither does this solve the " present question; there may be exceptions even to " that rule. But the present case appears to us to " stand on different grounds. The power of disponing " the lands remained in Mr. Stuart; even the trustee " took his posterior title from him by disposition. The " question therefore is, whether the bond of corro- " boration can be reduced, not as proceeding à non " habente potestatem, but as a fraud, in respect that " he was bound to dispone to the trustee. Was it " then a fraud in Mr. Stuart to dispone to the de- " fenders, in corroboration of his previous deed; and " can the creditors maintain this reduction on the " ground of such a fraud committed?

" On the best consideration that we can give to the " case, we think that it cannot be so treated. It is not " necessary to revert to a principle, at one time held in " the law, that all adjudgers must take the right of their

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" debtor, tantum et tale as it stood in his person. That " principle no doubt has been greatly modified; but it " has not yet been held, in any case that we are aware " of, that an adjudger is in all respects in the same " situation with an onerous purchaser. On the con- " trary there is an important distinction still firmly " established, viz. That wherever there is fraud, either " actual or legally constructive, though an onerous pur- " chaser would be safe, an adjudger cannot take benefit " by such fraud.

" This point of distinction is precisely explained by " Mr. Bell in a special section, as an existing principle " of the law; and he delivers the essential proposition " in these words:—' Against creditors fraud has been " ' thought entitled to full effect, where it is of that kind " ' which lawyers have distinguished as originating the " ' contract—dans causam contractui. In all such cases " ' creditors, in taking the benefit of the property, are " ' considered as adopting the fraud of the bankrupt, by " ' which he acquired the property;' — a principle " clearly comprehending the case of his keeping the " property free of a conveyance or security, which but " for the fraud would have affected it. Mr. Bell con- " firms the statement by many authorities, and particu- " larly by reference to the opinion of Lord Braxfield " in the case of Thomson v. Armstrong's Creditors, " November 16, 1786, which indeed, though its autho- " rity might be doubtful on any other ground, was " plainly a sound and right decision on this principle. " It was stated as the case of a conveyance to an agent " with powers to sell and to apply the proceeds for the " granter's behoof. The disponee made up a title by " charter and sasine, leaving out the qualification; he

" granted an heritable bond to one of his own creditors,
" and others of them adjudged. The Court held the
" statement to be an averment of intrinsic fraud, and
" found, ' that the allegation of fraud is not relevant
" ' against the heritable creditors, but found that it is
" ' competent against adjudgers.'

" But we apprehend that, in order to reach this
" point, it is not necessary that there should be a case
" established of criminal intention to commit a fraud.
" We do not see that that was required in the case of
" Thomson and Armstrong, or in any of the other
" cases. But the much later case of Gordon v. Cheyne,
" February 5, 1824, if it did not sanction the more
" general doctrine that creditors as adjudgers take the
" rights of the bankrupt tanta et talia, can stand on no
" other principle than that, without any positive inten-
" tion to commit a fraud, it would have been a fraud in
" the bankrupt or his creditors to take advantage of the
" form in which the right stood. Indeed the principle
" is expressly laid down in the interlocutor of the
" Court:—' In respect the petitioner, as trustee for
" ' general creditors, who are neither purchasers nor
" ' special assignees, adhere to the Lord Ordinary's
" ' interlocutor.'

" Many other authorities could be referred to on this
" point. It depends on a principle, which we imagine
" must be fundamental in all law, that justice shall be
" done between the parties in competition. Here the
" defenders and the other lenders gave their money on
" the faith of a specific security. Mr. Stuart either
" believed that he had given it, or there was an inten-
" tional fraud. There is no creditor who can say, that
" he contracted with Mr. Stuart on the faith of the

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" records, and that the lands were free; for there was " no attempt to make another security in a different " form; that would be a very different case: and the " plain question is, whether creditors who followed " solely the personal credit of Mr. Stuart are entitled " to take advantage of that which, whether intentional " or not, was a legal fraud, whereby his titles continued " disencumbered, so as to hold the money of the de- " fenders in the common stock, while they keep the " security on the faith of which it was given? We " humbly think that there is principle enough in the " law of Scotland to determine this in favour of the " defenders, and that we trench on no point, either of " the feudal or of the bankrupt law, in holding that the " deed, which was in itself validly executed by Mr. Stuart, " cannot be reduced by his creditors adjudgers to any " such effect.

" We must further observe, however, that the execu- " tion of the deed in question ought not to be consi- " dered as a voluntary act on the part of Mr. Stuart. " It was an act which he was bound to perform in " justice and honesty; and an act which he might have " been required by action to perform even after bank- " ruptcy. In the case of Mitchell, the husband, by vo- " luntary act, infeft both himself and his wife in imme- " diate contemplation of bankruptcy; Mr. Gardener " delivered his heritable bond and took infeftment for " the creditor after sequestration; yet it was held that " these were not voluntary acts, simply because they " could have been compelled by action; though the " necessity of such process might, by delay, have de- " feated the security, just as much as in the present " case; and in Maclean's case the Court actually gave

" decree against him after bankruptcy, to compel him " to execute a deed for effecting the security. No " creditor indeed opposed it, because the creditors knew " the fraud committed, and would not attempt to " avail themselves of it; and the Court must have been " convinced of it, riveted as it was by the very resist- " ance made by Maclean while no creditor interfered; " and, once more, observe the principle laid down in " the case of More v. Allan, that where the interference " of the bankrupt is only to do that which all parties " had understood to have been done at first, and on the " faith of which the money was advanced, the creditors " are not entitled ' to separate the security from the " ' advance.' We doubt whether this last peculiarity " in the present case has been sufficiently attended to. " It is not the case merely of a contract on the faith of " a security to be granted, where the security in the " knowledge of all parties has been delayed and not " executed. It is the case of a specific contract to all " appearance rigidly carried into effect, but where the " party has been deceived into the belief that he has " got his security complete, and, without any fault of " his own, by positive misrepresentation he has got only " a security of a twentieth part of its value.

" The question is, whether creditors can reduce the " deed of the bankrupt, made to give effect to the true " contract and the actual understanding, on the ground " that it was a fraud against them for him to grant it. " It was by a fraud (whether actual or constructive " signifies not), that the right was not made perfect at " first, and if the creditors were to succeed in reducing " the deed, they must take benefit by the fraud which " the bankrupt has endeavoured to correct. We are of

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" opinion that this they are not entitled to do; for we " can entertain no doubt that, taking the facts of the " case as importing a legal fraud, it was a fraud dans " causam contractui; inasmuch as Mr. Stuart, soliciting " the loan upon the tender of the special security of the " whole lands in Dr. Coventry's valuation, laid the basis " of the whole contract on the fulfilment of that tender: " without it there would have been no loan: there was " no loan except on the faith that the pledge had been " fulfilled.

" It is mentioned, that a security had been sometime " previous to 1823 given to a Mr. Brown, in the same " terms with that originally granted to Mr. Walker. " We apprehend, that this cannot at all enter into the " present question. It does not appear, under what " circumstances Mr. Brown may have contracted with " Mr. Stuart. The law, at any rate, must be applied " to the present case as it stands.

" On the whole, our opinion is, that the defences " ought to be sustained.

" There is a specialty in the case, however, which " ought not to be left out of sight. It appears from " the third article of the condescendence, that there " were six parcels of lands, in which Mr. Stuart was " not infeft, but which he held by personal right. But " whatever may be said with regard to lands possessed " by feudal title, we have always understood, that, in " personal rights, creditors must be affected by the " obligations of the bankrupt specially applicable to the " lands. In the case of Thomson and Armstrong's " Creditors, for instance, there would have been no " question at all if the bankrupt had not been infeft; " for the conveyance being substantially a trust, that

" quality would have affected all creditors; and num-
" berless other illustrations might be given. In the
" present case, the contract is so specific for a security
" over all these lands, that although, whether through
" fraud or error, it was not granted, it must be held,
" that the bankrupt, continuing to possess the lands by
" personal title, held them subject to a trust for the
" benefit of the defenders to the extent of their debt;
" and the creditors cannot take these lands without
" being subject to that trust obligation which was in
" Mr. Stuart's person. In every view, therefore, we
" are of opinion, that, even though the Court should
" not sustain the defence generally, the case of these
" lands, held by personal title, ought to be separately
" disposed of."

The cause was now put out for advising by the Second Division.

Lord Justice Clerk.—" Whatever opinion we may
" entertain, the question is already decided by a
" majority of the Court, and decree of reduction must
" be pronounced. While, however, that must be the
" result, as we have considered this case, and as it is
" one unquestionably of great importance, I conceive it
" to be our duty, in justice both to the case, to the
" law, and to the parties, to give our opinions upon the
" questions which are here raised.

" My opinion, I must say, coincides with that of the
" minority as to the main features of the case; and, I
" think, it will save a great deal of time in what I have
" to say, to state, that I take the assumption of facts, as
" contained, both in the note of Lord Moncreiff, and
" in the preamble to the opinion by his lordship and

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" the Lord President, as a correct statement of the facts " of the case.

" On looking at the record with all the attention I " can give it, I am decidedly of opinion, that it was " actum et tractatum between Mr. James Stuart and " the agent of Mr. Walker, that the former was to give, " and the latter to receive, a valid, effectual, and com- " plete heritable security, extending over every inch of " the lands contained in the report and valuation of " Dr. Coventry. I am most thoroughly convinced that " it never entered into the contemplation, either of the " borrower or of the lender, that the money was to be " advanced on any security, except that of the whole of " these ninety-five acres. I think that is luce clarius; " and, if this be the case, the question comes to be, how " is it that this bond of Professor Walker was limited " only to the lands of what is called Hillside proper, " and which, your lordships cannot overlook, consist of " only five acres out of these ninety-five acres in " Dr. Coventry's valuation, and over which the bond " under reduction extends?

" It is correctly stated by Lord Moncreiff, that only " certain titles were sent to the lender's agent, and that " the description of the lands corresponded generally " with the survey made by Dr. Coventry.

" The bond was accordingly made out precisely in " terms of the titles; but it turned out that no " materials were laid before the gentleman who pre- " pared it, from which a doubt could have been enter- " tained that the whole lands were not included under " that description. If the titles of the whole ninety-five " acres had been sent, and it had appeared that the

" man of business to whom they had been sent, having
" all the titles within his grasp, had made out a security,
" leaving out a parcel of the lands, that would have
" been a totally different question from the present.
" Mr. Stuart, or those in his right, might, in such a
" case, have been entitled to say, ' I told you to
" ' examine the titles, and make out a good security,
" ' and, if you have not done so, it is no fault of
" ' mine.'

" But it is clear that no materials were furnished to
" the agent by which this deed could have been
" rectified; and there was nothing to show that it was
" not completely effectual over the whole lands.
" Matters went on in this way for some time, but then
" the mistake was discovered, and that the security
" extended only to five acres in place of ninety-five, as
" contained in Dr. Coventry's valuation. This having
" been discovered, Mr. Stuart granted the new deed of
" corroboration, covering the whole ninety-five acres,
" which were originally understood to be comprehended
" under the security to the defenders. It is under
" these facts that the present action is brought for
" reduction of the deed granted by Mr. Stuart, after
" bankruptcy and sequestration, when he was out of
" the country, proceeding on the narrative of what was
" the intention of the parties in entering upon the
" transaction, extending that security over the whole
" lands, and making it effectual against them if he had
" the power so to do. Infeftment on this deed was
" taken by the defenders before the infeftment of the
" trustee; for although the latter had both the general
" adjudication and a special adjudication, yet he was
" not infeft till posterior to the infeftment of the

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" defenders. These are the circumstances upon which " we must proceed, and upon which our judgment " must be formed.

" Now, I must confess that it is impossible for me to " doubt, that if by what took place at the time of the " original transaction, in withholding from the agent " for the lender all the titles except those of Hillside " proper, it was intended by the granter to limit the " security to the five acres, it would have been the " grossest of all possible frauds, and one which could " not have stood a moment's discussion. There could " have been no doubt of that being about the most " palpable of all frauds, after what we have seen of the " real treaty between the parties, and, therefore, I " conceive it to be clear, that no fruits or benefits " could follow on it in favour of the party guilty of it, " or of any one deriving right from that party. But, " seeing that, notwithstanding the defect in the security, " (which I do not think ever was intended,) Mr. Stuart " never endeavoured to avail himself of this blunder; " and, when he, by his conduct, in fact, though pressed " by his difficulties, says to the defenders, when you " ask me to do what I intended to do from the " beginning, I do it readily, I think the idea of per- " sonal fraud is altogether out of the question. But " then, again, while I have no idea of such personal " fraud, I cannot doubt, that by withholding those " documents regarding the rest of the estate, the " neglect of which he was guilty is that which in law is " held to be culpa lata quæ æquiparatur dolo.

" Then the first question comes to be, Whether, " under these peculiar circumstances, this transaction " now sought to be reduced, which Mr. Stuart did enter

" into by this bond of corroboration, is one which can " be cut down or rendered ineffectual under the statute " 1696? Upon this matter, I am of opinion, after con- " sidering deliberately the opinions of the consulted " judges, and, particularly, after a careful perusal of the " decisions upon which these opinions are rested, that " the act 1696 does not apply to this case.

" It is admitted, on both sides, that the act 1621 is " inapplicable to the case. That is unequivocally ad- " mitted, and I am equally clear that the act 1696 does " not apply, and that there has been no violation of it.

" My opinion is formed both upon the statute and " upon the decisions referred to. If the case of Bontine, " where the deed granted was merely covenanted to be " granted, but was not actually granted till after the " notour bankruptcy of the grantee, does not fall under " the act, as the First Division and the House of Lords " have found, I cannot see, and I defy ingenuity to " show, that this case falls under the statute. That case " seems decisive on the point, that if a security or con- " veyance be covenanted for at the time, being before " the sixty days, the act 1696 does not cut it down, " though granted within that term. If, then, neither " the statute 1621 nor the statute 1696 apply, on " what other ground can these deeds be challenged or " set aside? And that brings us to the second question, " Whether, under the bankrupt statute, or at common " law, this is a security which is reducible, and from " which no fruits or any profit can flow to the party " in whose favour it is granted.

" Now, I beg to say, that notwithstanding all the " ability evinced in the opinions signed by the majority " of the consulted judges, I cannot get over the diffi-

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" culty, that where there is no interference with the " principle that regulates the security of the records, " we cannot and have no right to give our sanction to " a doctrine that would shake to their foundation the " rights of those who have transacted with an individual " bonâ fide. It is not compatible with my views of the " law regarding the security of the records, that either " under the bankrupt statute, or upon any principle of " common law, a personal creditor, who is not protected " by the records, can take advantage of the fraud or " culpa lata of the common debtor; and although it has " been said, that under the act of sequestration the " trustee (which means the creditors for whom he acts) " takes the estate free from those obstacles that would " oppose themselves in the person of the common debtor, " and that the principle of tantum et tale does not apply " to such a case, I must say, that that is not made out " to my satisfaction; and that it appears to me, from " the decisions, it can be shown, that when there is no " interference with the security of the records, and that " there was culpa lata, or gross fraud, the creditors are " not entitled to found upon it. If under the adjudica- " tion in favour of the trustee, a title is made up, and " infeftment previously taken upon it, that comes pre- " cisely within the right the party has to vindicate his " preference founded upon the records. But so long as " the right stands under an adjudication, not made " heritable, and not entering the records, I apprehend " that the trustee or creditors cannot take benefit from " the fraud of that party whose act is brought in ques- " tion. Wherever a party is secured by infeftment, " that will be effectual; but I do not think that, where " no infeftment has been completed, the adjudication

" can compete with the established right or the infeft-
" ment of another party.

" My Lords, in regard to what is stated, both in the
" cases for the parties, and in the opinions of some of
" the consulted judges, as to the effect of certain deci-
" sions which are said not to be authoritative, and to
" have been subsequently superseded, I apprehend that
" such observations must be taken with great qualifica-
" tion; and, particularly, in regard to the dictum in
" the report of the case of Ross of Kerse, as to the case
" of Thomson, it appears to me that it did not take into
" view the whole circumstances of Thomson's case.
" For, on looking into the case, and keeping in remem-
" brance the fact, that Lord Braxfield was on the bench
" when it was decided, it struck me as a remarkable
" circumstance, that if it had been supposed the Court
" meant to say that the law laid down in Thomson's
" case was fundamentally wrong, Lord Braxfield, who
" was in his vigour at the time, and who was present at
" that decision, should not have disapproved of it;—to
" me, my Lords, it is inconceivable that he would have
" stultified himself by saying the judgment in the case
" of Thomson was erroneous in point of law.

" I must say, therefore, as to these obiter dicta, which
" are founded on as setting aside the whole doctrine of
" tantum et tale, in reference to adjudications, that they
" rest on a very slender foundation.

" In the case of Mitchell, the Court gave effect to
" the plea of the adjudger infeft, and I think that was
" quite right.

" But I pray your Lordships to attend to that case
" of Thomson, where the Court found, as their judg-
" ment expressly bears, that while the allegation of fraud

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" was not relevant against heritable securities and infeft-
" ments, it was relevant as to the creditors adjudgers.
" If you look to the report of the case, and what is there
" stated, as observed on the bench, it is plain that the
" Court were not trying or deciding the question of all
" cases of adjudications, even when infeftment followed.
" So far from that, the judgment traces the distinction
" between those infeft on heritable securities and ad-
" judgers not infeft. And, accordingly, there occurs
" this passage in the opinion of the Court,—'The
" 'adjudging creditors stand, however, in a different
" 'predicament; for, as it had been found by decisions,
" 'which, for the stability of the law, ought not to be
" 'departed from, they must take the right of their
" 'debtor tantum et tale as it was in his person.'
" Nothing can be more explicit or decisive.

" We have been referred to an opinion, said to have
" been expressed in the case of Ross of Kerse, in these
" terms:—'And it was observed, that what had given
" 'occasion to so ample a discussion was an opinion
" 'expressed on the bench in the case Thomson against
" 'Douglas, Heron, and Company,' that 'adjudging
" 'creditors stand in a different predicament from
" 'disponees, as they must take the right of their debtor
" 'tantum et tale as it is in his person, (Fac. Coll.
" 'Nov. 15, 1786,) an opinion now stated to have been
" 'erroneous.'

" Now, I beg to say, that although this professes to
" state what passed on the bench in the case of Thomson,
" when Lord Braxfield was one of the judges, it does
" not state the distinction, as referred to in that former
" report between heritable creditors infeft and ad-
" judgers; and I must think that the remark in this

" case of Ross is in itself erroneous. The decision in " the case of Ross turned upon a totally different prin- " ciple, and did not interfere with that of Thomson. " In the same way, in the case of Wylie, it is said the " Court returned to the correct view, where it was " decided that a pactum de retrovendendo, contained " in a back-bond, was merely personal, and not effectual " against creditors.

" But we have a much later authority in the case of " Gordon v. Cheyne, decided in 1824, where it was " found, as stated in the rubric, that in a latent trust the " claim of the truster is preferable to that of the creditors " the trustee under a sequestration. This decision was " pronounced by the First Division in 1824. My " Lords, looking to the opinions in that case, and the " judgment, so far from thinking from what is there " stated, that the law in the case of Thomson was wrong, " I think it is conclusive of the contrary, the Court " having there used almost the very same words in their " judgment. And really, from that last judgment on " the point, I cannot find that there is any thing to " raise a doubt in regard to the general rules of law and " justice applicable to the present case; for I ask, on " what ground could that decision be right, if an adju- " dication, which has not been perfected by an infeft- " ment entered on the records, can put the trustee in a " better situation, or give him a better right than that of " the person from whom he has adjudged? As to the " views and dicta thrown out in these cases that I have " before referred to, I see some of them noticed by " Mr. Bell; but I must deny that there is any principle " in them to which I can assent.

" To maintain that, by a process of adjudication, you

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" are to place a party in a better situation than him " whose right is adjudged, is a proposition in which I " say there is no solidity whatever. It is contrary to " every idea of justice that I have been taught, and I " think it would be dangerous for your Lordships to " throw out even a doubt that would interfere with " this judgment in the case of Gordon. There the " Court were of opinion, ' that the principle of the " ' case of Redfearn applied exclusively to the case of " ' purchasers founding on an intimated assignation, and " ' could not be extended to a general body of creditors " ' under a sequestration, and that the authority of that " ' decision was not affected by the subsequent decision " ' in the case of Macombie. The general body of cre- " ' ditors could only take the rights tantum et tale as " ' they stood in the person of the bankrupt.' That " is the embodied opinion of the Court in that case, " and I hold it to settle the point.

" Is there any one of your lordships who can for a " moment entertain a doubt, that if Mr. Stuart had " continued solvent, and master of his own property, " and having full power over it—that he, on this defect " in the security being discovered, could not instantly " have been compelled to complete a sufficient one to " these defenders, in conformity with the admitted " covenant of parties? I apprehend that no one could " entertain for an instant a contrary opinion. It would " have been impossible to throw the burden upon the " agents of the borrower, or to say that they were to " suffer. He must have been bound himself to com- " plete that security, which he had covenanted and en- " gaged to give. But if that was the situation in which " the matter stood before his bankruptcy, are these

" parties, the pursuers, under the bankrupt statute,
" entitled to say, that while they take that which he had
" at the time, yet, having done nothing to perfect their
" right by infeftment, the bond of corroboration must be
" reduced, leaving the defenders the security over the
" five acres, while they, the creditors, take possession of
" the ninety acres? I cannot acquiesce in such a pro-
" position. If there had been other heritable creditors
" infeft in these ninety acres before the defenders, that
" would have been a different question, and a matter
" which we could not have touched. But that is not
" the case here; there are no persons saying that
" they have a right under infeftment to these ninety
" acres. We have merely the personal creditors, found-
" ing on the adjudication to the trustee not completed
" by infeftment, and I conceive that, upon every prin-
" ciple of common law as well as of equity, the securities
" in favour of the defenders are effectual.

" Your lordships in the additional cases have a deci-
" sion referred to, namely, that of Kelty. I looked to
" that case, of which I had full notes of what passed when
" it was before us; and I must say, that Mr. Jameson has
" given a most correct account of it. That decision, I
" apprehend, establishes this, that if there was nothing
" illegal in granting the deed of corroboration, which
" was merely for the purpose of perfecting the trans-
" action between Mr. Stuart and the late Mr. Walker,
" according as it had ab origine been covenanted, that
" deed is unchallengeable, and cannot be set aside.
" The case of Kelty is in this respect directly in point.

" There is nothing in the bankrupt act which pre-
" cludes a party, who has a warrant, from taking in-
" feftment upon that warrant, and making himself secure,

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" prior to the infeftment of the trustee; and there is
" nothing in the present case which I think ought to
" warrant the reduction of these securities. I am not,
" however, insensible of the difficulties that may ap-
" pear to arise from the Court being supposed to de-
" clare, that, notwithstanding a regular sequestration has
" been awarded, and an act of adjudication pronounced
" in favour of a trustee, a bankrupt is still left at liberty
" to go on granting securities in this way. That diffi-
" culty would have led, in my mind, to the propriety
" of carefully wording any judgment sustaining the
" security in question; for, if we merely repelled the
" reasons of reduction, it might have been said that we
" gave rise to a dangerous principle in favour of bank-
" rupts; and in order to avoid any such idea, I would
" have proposed an interlocutor proceeding on the
" grounds I have stated, being perfectly clear that this
" adjudging body of creditors, through their trustee, are
" not entitled to take these ninety acres, freed and re-
" lieved from the inherent obligation of making effectual
" the security that was settled ab origine, and that they
" are not entitled to say, we will hold these lands to the
" extent of ninety acres, but will not fulfil the original
" obligation upon which the security was granted. If,
" therefore, your lordships of this Division were in a
" capacity to pronounce a judgment, which we, however,
" are not, the opinion of the majority of the judges
" being against that view, I should have submitted to
" your lordships, that you should pronounce a judg-
" ment on the special grounds I have stated, finding, in
" fact, that as the pursuer, for behoof of the personal
" creditors of Mr. Stuart, is not, under the circum-
" stances of the case, entitled to reap any fruits from

" this action, it is unnecessary to decern in the conclu-
" sions of reduction. For I cannot consider it as con-
" sistent with the principles of eternal justice, that, in a
" case where no man can entertain a doubt of what was
" actum et tractatum, when the securities were stipu-
" lated for, and meant and believed to have been given,
" any person, coming in right of the borrower, can take
" advantage of his culpa lata."

Lord Glenlee. — " If we are to find that the act
" 1696 was to apply to a case like this, I think the
" decision would be one of the most dangerous that
" could be pronounced. I do not think that act ap-
" plies at all. The reason is stated very distinctly by
" Lord Moncreiff why that does not apply; and it does
" not seem to me to be so clearly noticed by the other
" judges who differ in opinion from him.

" The reason why the act does not apply to this case
" in my mind is, that it is not a case where the party
" lending the money knew that he had not got the
" security bargained for, and, knowing this, allowed it
" to lie over without getting it, on taking the means he
" might have taken to get it completed; for in such a
" case it would be difficult to say that he was more than
" a creditor who trusted to get a security. But here the
" creditor thought he had got that security all along,
" and it was thoroughly relied on both by the borrower
" and lender ab initio. Where a party knows he has
" not got the security agreed on, but trusts to the
" honour of the debtor to grant it, there may be a
" question how far, upon the debtor's bankruptcy, a
" deed having for its purpose to give that security,—the
" deed being granted after bankruptcy,—could compete

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" with the trustee's right under the sequestration; but " where the party never dreamt that he had not got " the security stipulated, and upon which he lent his " money, that is a case of a very different nature. " Mr. Bell has a distinct chapter in regard to the rights " of parties and deeds challengeable under the act " 1696, and he there points out the difference; and " states most distinctly the law to be, that where the " party understands that he had got the security at first, " but, in point of fact, had not got it, and the bankrupt " interfered only to do what both parties understood " had been done originally and upon the faith of which " the money was lent, the general body of creditors are " not entitled to take the benefit, and set aside the " security under the act: and he quotes an English " case, where a bill of exchange was delivered for a " valuable consideration, but the debtor forgot to indorse " it. It was there held that he might indorse it after " bankruptcy. In the same passage Mr. Bell goes on " to ask:—In Scotland, if the debtor had been applied " to to indorse such a bill, upon which he had thus " raised money, is there not reason to believe that the " case would have been held not to fall under the statute " 1696? I do not know whether this would be so, but " certainly the present is not a case where the creditor " can be told, you merely trusted to get a security, and " did not; and therefore I have no hesitation in saying, " that to me it appears that the statute 1696 has nothing " to do with the case at all.

" As to the statute 1621, it is admitted that the first " branch of it does not apply to this case; and, indeed, " there could be no doubt about that. As to the second

" branch, I think it has an application, but it would be " a good defence on that, if it could be made out that " the right was preferable, though not completed.

" But the creditors say that the right here was granted " after sequestration; still they must, nevertheless, " stand in the same situation in which they were before " it was granted. No doubt Mr. Stuart could do " nothing to better the right of the defenders; but if " they could in respect of their prior right have " opposed the trustee, had he been adjudging the lands, " then the trustee would have no interest to reduce the " bond of corroboration. Then on this, on the whole, " I agree with your lordship in the views you have " expressed. It appears to me that there is a mistake " on both sides, and particularly on the part of the " pursuer, as to the true nature of the doctrine of tan- " tum et tale. It is argued as if, in the case of " Thomson, it had been held that the general creditors " were in the situation of having incurred a passive " title, and that it could meet extrinsic claims; I am " persuaded that there was no idea of that in the minds " of the judges at the time. The principle seems to be " this, that where the objection attaches to and affects " the title of the bankrupt, where it actually corrupts " and taints his own title, although it is not to be " listened to in a question with a completed infeftment, " yet in regard to questions with the general creditors " taking the bankrupt's right as it stood in his person, " it may affect them, although the qualification does " not enter the record. In that view, I see nothing " against the doctrine.

" In the case of Ross of Kerse there was no alle- " gation of the title of the bankrupt (whose right was

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" adjudged) in itself being bad; but it was said, that " if he granted such and such a bond he would incur " an irritancy. The answer made was, that is not a " cause of absolute vitiosity in his title, it is merely a " cause for setting aside the right on separate and " extraneous grounds.

" In the same way, in the case Wylie v. Duncan, " there was no vitiosity alleged in the bankrupt's title. " The bankrupt held the right just as was intended, " and had merely given a personal back-bond, which " could not be good against creditors, although the " doctrine of tantum et tale were admitted. It is said " these are all departures from the doctrine laid down " in Thomson's case; but they are not so, unless that " case be misunderstood, so as to hold it laying down " that the personal creditors are liable to every claim " whatever against the bankrupt, which it never meant " to do; and I think the objection to the doctrine of " tantum et tale has been misapplied here by the " trustee. As to how far this case can be assimilated " to that of Thomson, it is a different question; the " character of the facts in Thomson's case seems to me " not to be very different from the present, the facts " of which are undeniable, although their character be " viewed differently by the different judges. Some of " them think that Mr. Stuart was only under an obli- " gation to grant the security; but that is not, in my " mind, the correct view. He had not only promised " to give, but actually represented himself as having " given, the security, and, by his own conduct, led " these creditors to believe that they had got right to " the whole ninety-five acres under their original bond. " That was the true state of the case; that, by his own

" act and deed, this limited and vitious title was given,
" but firmly relied on by the lenders, as having been
" effectual over the whole of the lands. I agree in
" the opinion, that, ab initio, there was no machinatio
" to deceive; but the question is, Whether, by his
" tortious act, he misrepresented what was done, and
" led the lender to believe he had got the security? As
" to this I have no doubt at all.

" Supposing, in Thomson's case, all had been
" adjudgers, I do not see it would have made any
" difference. The opinions there go merely on the
" fact of an omission of the trustee to insert the clause
" qualifying his right in the charter of resignation.
" Now, in that view, where is the great difference
" between that and the present? Why, really, I think,
" in principle at least, they seem very nearly connected.
" I doubt if there was held there to have been any
" machinatio to deceive ab initio, but it was considered
" enough to say that the title sought to be adjudged
" was tortiously held, and contrary to what the true
" state ought to have been.

" In regard to the act of sequestration, I am not
" aware that it is to be understood as giving any
" supereminent right to the trustee, to what would
" have arisen from an ordinary adjudication by cre-
" ditors. Then if there had been no sequestration at
" all here, but merely adjudgers, would the authority
" and principle of Thomson's case not apply? If an
" adjudication only had been raised, that moment the
" creditor in this bond would have become alarmed, and
" found out what had happened, — that they had not
" got the full security; they would have opposed the
" adjudication, and decree would only have been pro-

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" nounced, reserving objections contra executionem; " and then the creditor in the bond would have been " heard, and would have prevailed, although, if he had " taken no steps, and allowed the adjudgers to be infeft " before him, he would have been excluded. If infeft- " ment had followed in favour of the trustee here, the " case would have been altered. But when there is no " such infeftment, is this act of adjudication to run a " muck against all creditors? Is it reasonable to say, " that the act of sequestration is to take away what, but for the sequestration, these defenders would " have got?

" The 29th section of the statute bears in explicit " terms that the adjudication shall convey every right, " title, and interest, which was formerly in the bank- " rupt, to be now in the trustee; and at the close of the " section it is expressly declared, that if the bankrupt's " title happens to be entailed, or otherwise of a limited " nature, the conveyance to be executed by him, or the " decree of adjudication obtained by the trustee, shall " only be understood to carry that right and interest in " the estate which the bankrupt himself has, and no " farther. This is very like a reservation of all objec- " tions to an adjudication contra executionem, and, of " course, reserving the creditors' claims of preference. " I cannot conceive the statute to give a stronger effect. " In the case of Wauchope v. Duke of Roxburgh's " Trustees, certain lands were not specially included in " Duke John's trust deed, and Duke William took " them up. His creditors were leading adjudications, " when Wauchope raised an action claiming them as " Duke John's lands and objecting to the adjudications; " decree was given reserving all objections contra exe-

" cutionem. Afterwards Wauchope succeeded in his " claim. Now, suppose these facts to have occurred in " the case of a trader, would a sequestration have at " once extinguished Wauchope's interest, claiming as " Duke John's trustee? I rather think not. On the " whole matter I concur in the opinion just delivered, " that the reduction should be dismissed on the ground " that there is no sufficient interest in the trustee.

" I forgot to notice one point, viz. the difference be- " tween the lands in which Mr. Stuart was infeft and " those in which he was not infeft, in regard to which " last the objection founded on the doctrine of tantum " et tale applies very strongly."

Lord Cringletie.—" I confess that I agree with the " majority of the judges who have given us their opi- " nions. I cannot see how this act and deed of " Mr. Stuart can give the smallest preference to the " defenders. Whether they have any preference aliunde, " is another question. Suppose the trustee had got " himself infeft before the infeftment of these other " parties, he would have been successful beyond all " doubt; but if so, I do not see that what Mr. Stuart " did after his bankruptcy can have the least effect in " depriving the trustee of his preference. I think the " bankrupt act is express upon this point, and de- " clares, in totidem verbis, that a bankrupt cannot do a " single act after his bankruptcy to affect his general " creditors. His hands are tied up, and the estate is " carried to the trustee by the act of sequestration, be- " yond the control or power of the bankrupt. The " trustee here obtained a special adjudication, and he " was certainly entitled to go on and get himself infeft.

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" In a competition among creditors every one is entitled " to ameliorate his condition if he can, but this must " be done without any assistance from the bankrupt. " An adjudger is entitled to the benefit of litigiosity, " which inhibits the debtor from doing any deed to " prejudge the right of the adjudger to complete his " right, if he do so without such delay as the law con- " siders to place him in morâ. At common law, there- " fore, independent of the bankrupt statute, the pursuer " was entitled to infeft himself on his adjudication, and " could not be prevented nor prejudged by any volun- " tary act of Mr. Stuart. But how was he defeated? " Why, by these other parties proceeding contrary, as " I apprehend, to the common principles of litigiosity " and of law. From the moment the sequestration was " awarded, all Mr. Stuart's writings and title deeds fell " by law to be under the charge of the trustee, for " behoof of the creditors at large. But what takes place " here? Mr. Gordon, the agent for the defenders, ob- " tains wrongous access to them, passes an infeftment in " favour of Mr. Stuart, and prevails on him to grant " the deed under reduction. It is quite clear that if " there is any foundation for the claim of preference of " the defenders, such claim must rest on grounds quite " independent of the security given by Mr. Stuart after " bankruptcy, which must be set aside. It will be ob- " served that another creditor (a person of the name of " Brown) advanced to Mr. Stuart money on precisely " the same security with Walker, while he should have " got the same sort of security as was expected by " Walker. Now, would it not be highly absurd and " unjust, if Mr. Stuart could, by any deed after seques-

" tration, prefer the one of them to the other, when " both were in pari casu in lending their money and " stipulating for security?

" If there be any thing like a separate right in the " person of the defenders, what is to hinder them from " claiming under the sequestration? If they have such " right they will get the benefit of it there; but if they " have not, I have no notion that they can get it " through the deed of Mr. Stuart.

" I think there was considerable negligence on the " part of these creditors, the defenders; for, when they " saw that the description of the lands did not com- " prehend all that was contained in Dr. Coventry's " valuation, they should have asked the question at " Mr. Stuart, how this had happened? and if the ques- " tion had been asked, I suppose he would have " answered it at once. Then again, a search of en- " cumbrances was furnished which might have shown " them the mistake. We have not seen that search. " What does it contain? Is it limited to Hillside " proper, or what lands does it embrace? Stuart may " have been much to blame, but I think there was also " considerable remissness on the part of the lenders. " Supposing it was owing to negligence that the deeds " were not complete, what does negligence amount to " more than an obligation? I think that Stuart, after " the sequestration, was fettered and could not grant " such deeds.

" But what after all, even at the most, do the cir- " cumstances constitute more than obligation to grant " a deed? They go no farther. Now, suppose there had " been such an obligation five years ago by Mr. Stuart " —but he does not fulfil the obligation till within sixty

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" days of his bankruptcy—would that have done? I " think it would not. Upon the whole I agree with " the majority of the judges, that the deeds must be " reduced."

Lord Meadowbank. — " When the case originally " came before the Court, I entertained the same opi- " nion as Lord Cringletie; but now my opinion has " been changed, and I concur with that which has been " expressed by your lordship; and as I have nothing " to state which has not been noticed, I need not say " more."

Lord Justice Clerk.—" I think it would be better " that the other judges should be consulted in framing " the interlocutor to be pronounced."

The Court, on the 11th of July 1833, pronounced this interlocutor: — " The Lords, having resumed considera- " tion of the cause, with the opinions of the Lords of " the First Division, and permanent Lords Ordinary, " sustain the title of the pursuer to insist in this action: " Find, that the defenders have not produced a title " sufficient to exclude the action. Reduce, decern, and " declare, in terms of the libel: Find the defenders lia- " ble in expences."[1]

Mr. Walker's trustees appealed.

Appellants. — 1. The appellants assume what is already proved, or at least may be proved, as stated in the record:— " 1st, That there was a bonâ fide agreement " concluded between Mr. Stuart and Mr. Gordon, as " agent of Professor Walker, by which the sum of " 6,000*l.* was to be given in loan by the latter, along

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[1] 11 S., D., & B., 813.

" with two other sums to be lent by other parties, " through Mr. Gordon, making in all 10,500*l*., on the " express condition of obtaining an adequate and com- " plete heritable security; 2d, That that agreement was " specific, to the effect that the security should extend over " the whole lands comprehended in the reported valua- " tion by Dr. Coventry, produced." They also assume, that it is proved that they were induced, without any fault upon their part, by the misrepresentations of Mr. Stuart, to believe that the security actually given embraced the whole amount of security for which they had stipulated, and which Mr. Stuart had become bound to give; that is to say, the whole " lands, plantations, &c., of Hillside, " belonging to James Stuart, esq., of Dunearn," which are minutely specified under this title in Dr. Coventry's valuation, and which extend to about ninety-five acres; and, 3dly, They assume, that the imperfection of the description in the original security (if it shall be held to be so imperfect as not effectually to include within that security all the lands which were represented as being comprehended within this description) was occasioned either by the actual and intentional fraud of Mr. Stuart, or by that culpa lata quæ æquiparatur dolo. It does not appear to be of any importance whether there was intentional fraud, or merely the most gross and extreme degree of culpa lata. Now, although a purchaser of a proper feudal right is not liable to the fraud of the seller, yet such fraud is completely available against an adjudger.

Accordingly, the case of a bonâ fide purchaser, who makes his bargain and advances money solely upon the faith of the records, and who is entitled to trust to those records, has always been distinguished from the case of

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a personal creditor, who originally trusts merely to the personal security of the debtor, and not to the faith of the records, and who, when he comes to lead an adjudication, can by his diligence take no broader or better right than the debtor himself truly had, for he neither trusts nor is entitled to trust to these records. If that be the ground of distinction, it is manifest that it is totally immaterial whether the property attempted to be carried off by adjudication was originally the absolute property of the creditor, or was disponed to him by some third party, by a disposition ex facie absolute, although, truly, not intended to be so. In both cases the party appears the absolute proprietor upon the record. In both the question is, whether his right be not purely a limited right at the date of the adjudication, and if the limitation, although not appearing upon the record, affects an adjudger in the one case, so it must affect it in the other. This distinction is noticed by all the writers on the law of Scotland, and has been recognised by the decisions.[1]

In like manner, creditors are liable to extrinsic obligations, which limit or qualify the right of their debtor, although he should appear ex facie to be absolute proprietor. This was solemnly decided in the case of Gordon v. Cheyne.[2]

The authority of this decision is not denied: but it is said, in the first place, the rule is different in regard to heritable property; and, 2dly, That it does not overturn the authority of prior decisions, by which it is said to

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[1] 4 Stair, 40. 21; 1 Bankton, 10. 65; Stewart's Answer to Dirleton, voce Comprising; Ireland v. Neilson, 8 Feb. 1755; 5 Brown's Sup. 286; Gibb, 25 July 1766; Mor. 909; Hailes, 100.

[2] 5 Feb. 1824. 2 S. & D. 566, new edition; 675, old edition.

have been fixed, that creditors adjudging incorporeal rights do not take them tantum et tale, or subject to all the obligations of their debtor, the bankrupt. There appears to be neither principle nor authority for the first of these observations. It is clear that the only difference between incorporeal rights, passing by assignation, and heritable rights, requiring infeftment, so far as concerns the point in dispute, arises from a regard to the faith of the records, and, consequently, can have no application where the creditors do not ground their claim on a previous infeftment. But this not being the case in the present instance, the appellants cannot discover any answer to the opinion of the minority of the Court, that the case of Gordon and Cheyne is conclusive; nor do the prior decisions, and especially that of Buchan v. Farquharson[1], fix that creditors taking by adjudication do not adjudge an incorporeal right tantum et tale as it stood in the debtor. In that case, the judgment ultimately turned upon the priority of the completion of the right; there was a sequestration in competition with an assignation of a personal bond. At that time the sequestration had not the same effect that it has at present, as an intimation, and the assignation of the bond being intimated before the trustee completed his title, the question arose, whether the trustee was entitled to reduce the assignation? One defence was, that the creditors took the right subject to the obligation to assign, and that was sustained by one interlocutor of the Court. But afterwards it was doubted whether the doctrine of tantum et tale could be carried so far; and the Court

[1] 24 May 1797. Mor. 2905.

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ultimately decided, that there was nothing to prevent the creditor from completing his assignation, and that, if he did so before the trustee completed his title, he must prevail. The case, therefore, goes no farther than to recognise the distinction between that defect which touches the title itself, and a mere personal objection grounded on an extrinsic obligation, and not inferring either fraud or culpa lata in the bankrupt. For a bankrupt who has come under a personal obligation to convey a specific subject, and fails to complete the conveyance until he become bankrupt, is not guilty of fraud or culpa lata; and the creditors, in taking what they can by legal diligence, are not therefore under any necessity of supporting their case by taking advantage of such fraud or culpa. Accordingly, this distinction is admitted by the majority of the Court, between the case of Buchan and the case of Gordon.

But it is said, that even the case of fraud could not be available, and the case of the Duke of Norfolk and others against the Trustee for the annuitants of the York Buildings Company [1] is cited in support of this position. But the report of the decision is altogether silent as to this supposed ground; and the parties, whose bonds of annuity were set aside, never pretended that they had been deceived; or that their ignorance "had been taken "advantage of." All that appears in the first interlocutor as its ground is, that they, from not being acquainted with the laws of Scotland, had "erroneously "given up" the old bonds, and taken new bonds in their place. The case was not, in the pleadings, treated even

[1] 26th June 1752, Elchies, "Competition," No. 12. Mor. 7062.

by the defenders themselves as a case of deception, but only of great error on their part; and it was justly held by the Court, that mere error, without any fraud on the part of the bankrupt, ought not to have the effect of validating a bad security, in competition with a right which was unobjectionable.

But even if this case had supported the view which is taken of it, it never could control or weaken the authority of the great mass of decisions, both before and subsequent, in which it has been found that fraud is pleadable against creditors, and that where it is of that kind which amounts to a vitium reale, tainting the title itself, the creditors cannot take advantage of it.[1]

In particular, in the case of Thomson v. Douglas, Heron, and Co.[2] it was expressly found, that adjudging creditors, who had not completed their title by infeftment, could be met by an objection of fraud.

The subsequent case of Pearce v. Russell and others, in 1791, is no exception to the doctrine. The creditors there took, by the adjudication, a title in itself unqualified; their debtor had not even put himself under any obligation. It was a mere competition between them and the heirs of entail, who had failed to take any step whatever to make the entail effectual; and it is therefore impossible to hold that this case overrules the doctrine, involved in the case of Thomson, that a fraudulent or gross culpa on the part of the bankrupt cannot be taken advantage of by his creditors.

The case of Wylie v. Duncan, 8th December 1803, is equally inapplicable, for the same and even for stronger

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[1] See cases referred to, 2 Bell, 289, &c.—See also cases, Brown's Synopsis, voce Fraud, 765.

[2] 15th November 1786. Mor. 10,229.; Hailes, 1002.

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reasons. There a pactum de retrovendendo not appearing in the title, but contained in a separate missive, was found ineffectual against creditors infeft, as a mere personal obligation. There was no fraud, or even culpa, committed by the bankrupt; and before the question arose, or the holder of the personal obligation had taken any steps to make it effectual, he had not only allowed the estate to be adjudged to the trustee, but also the latter to complete his title by infeftment, and to enter into a contract of sale with a third party.

But at all events it is clear that the parcels of land, to which Mr. Stuart had merely a personal right, cannot be taken by the respondent otherwise than subject to the exemption pleadable against Mr. Stuart himself. The doctrine is well explained by Mr. Bell[1], who, after pointing out the effect of obligations where the debtor was infeft, observes:—"The rule respecting personal rights "to land is, that the conditions and qualities inherent "in the constitution of the right are effectual against "third parties, both purchasers and creditors, while the "right is not made real by infeftment. If, therefore, a "person hold a conveyance to land, qualified by a "limitation as of trust, or a condition as of pre-emption, "and on which no infeftment has taken place, his cre-"ditors must take the right as he has it." And he refers to various cases where this distinction has been enforced, adding, that "the real right is freed from "the condition, which becomes a personal obligation "merely, when sasine is taken." The cases of Burden v. Whiteford[2] and Ireland v. Neilson are direct authorities on this point; and they are confirmed by decision.

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[1] Vol. i. p. 283. [2] 4 June 1742. Elchies, "Fraud," No. 11.

In the case of Paul v. M'Leod[1] an entail not completed by infeftment was sustained against adjudging creditors, where the bankrupt was proved to be in the situation of a trustee, although he had purchased the lands in fee simple, and in his own name, under a decree of sale in favour of himself, his heirs and assignees. Here, therefore, he was only under a personal obligation to execute the entail; and although it was executed, it was never completed by infeftment; and, consequently, could not have been effectual against creditors, except upon the ground that the obligation of trust was pleadable against them. The Court, however, held that it was so pleadable; and " that he was to be considered as " a trustee in making the purchase; and, therefore, that " the entail was effectual against his onerous creditors."

The bond of corroboration does not fall either in principle or on authority under the act 1696, c. 5. The statute, after setting forth what shall be held to amount to evidence of bankruptcy, " declares 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 of before, in favours of his creditors, " either for his satisfaction or further security, in pre- " ference to other creditors, to be void and null."

Both the word and the spirit of the enactment manifestly apply to a preference given to one who previously had no right to it. It is for this reason that the statute strikes only against voluntary preferences, as opposed to those which the debtor had no right to withhold, as

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[1] 20 May 1828. 6 S. & D. 826.

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being part of the original agreement; and hence the opinion seems to be well founded, that even a delay to get the security ought not in such a case to bring it under the act. But it is an abuse, both of the words and the spirit of the statute, to cut down a security, in regard to which the personal obligation of the bankrupt was not trusted to for a single moment, and while the creditor, instead of being negligent, was only deceived. In such a case the Court has never hesitated in supporting the security; and, accordingly, it is justly observed by Mr. Bell, treating of this very case of delay in completing a security which was part of the original contract:—"In the first place, it seems to have been "held, that, wherever the bankrupt interfered only to "do that which both parties understood had been "done at first, and upon the faith of which under-"standing alone the money was advanced, the act "was not objectionable, nor such as could entitle "creditors to separate the security from the advance." And he refers to the case of More against Allan, 23d January 1800, the particulars of which, as set forth in the note, on the authority of the express terms of the judgment, fully support his view of the matter, as that which was unanimously adopted by the Court.

"But (he observes) another set of cases has created "more difficulty, where the parties were sensible that "the security was not at first completed, the advance "being made on the faith of the deed being afterwards "granted. In such a case it scarcely can be said that "the lender of the money is more than a personal "creditor merely." It is in this class of cases alone that there is any discrepancy in the decisions of the Court; and even here, the latter authorities are in

favour of the opinion, that it is no preference, under the statute, to give a creditor that for which he stipulated as a condition of the loan, because such a creditor is entitled to have his contract fulfilled, and is not in the same situation with the general creditors.

Referring to the decisions, it does not appear that even in the less favourable case of the failure to complete the security by reason of a delay, in some measure imputable to the creditor himself, there is the least countenance for the assumption, that the bankrupt cannot himself do any thing to aid the creditor, with that view, within the sixty days; nor does it appear that in any of the cases the mere length of the delay was considered of any farther importance than as a circumstance of evidence against the reality of the original transaction. In the case of Mansfield and Co. or Nesbitt v. Cairns, in 1771[1], the security was both granted and completed within the sixty days. The same was the case in Houston and Co. v. Stewarts, in 1772.[2] In the discussions on the bench, as reported by Lord Hailes, all the judges regarded the true criterion to be the original understanding, on which the money was advanced. In Robertson Barclay and others v. Spottiswood[3], in 1783, the bankrupt actually did not give the security till three weeks after notour bankruptcy, or after the lapse of the whole of the sixty days; and although great difference of opinion began now to prevail in regard to the whole of this class of questions, it does not appear, that any distinction was rested upon the mere fact, that the bankrupt's interference took place within the sixty

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[1] Brown's Supplement, vol. v. p. 386.
[2] Ibid. vol. i. p. 403.
[3] 19 Nov. 1783. Mor. 1177.

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days, or even upon the length of the delay, unless as creating doubt regarding the fact.

In the subsequent case of Brough v. Spankie and Jollie, the security and infeftment were granted and completed on the same day, and both within the sixty days. But as at this time the Court held that the decision in the case of Houston and Co. was erroneous, and that a creditor, who relies for any period of time whatever upon the personal obligation to get a security, cannot found upon that security, if even its completion by infeftment is delayed till within the sixty days, it is immaterial to examine the argument more closely, it being now fixed by repeated decisions that the objection cannot be carried so far. Only it may be observed, that the evidence of the original contract in this case appears, from the report, to have been assailed on a very serious ground, namely, that it rested entirely upon a holograph writing of the bankrupt, and "that a holo-" graph writing cannot prove its date in a question with " third parties, and that to pay any regard to it in the " present case would prove the source of endless fraud " and collusion."

In the next case of Maclean v. Primrose[1], the only point which came before the Court was, whether the debtor, who had come under an obligation to grant an heritable conveyance in return for an advance of money, could be compelled by law to grant the security, notwithstanding his having already become bankrupt? The sheriff found that this was no defence. The late Lord Meadowbank altered the sheriff's judgment, expressing a strong opinion against the authority of the cases sus-

[1] 16 Nov. 1799. Bell, vol. ii., note, p. 225.

taining such transactions; but the Court altered his lordship's interlocutor, and ordained the bankrupt to execute the conveyance.

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In the case of the Bank of Scotland v. Stewart and Ross[1], no argument rested upon the date of the conveyance, as contradistinguished from the date of the infeftment; on the contrary, the creditor who objected to the security, instead of taking up the distinction pointed out in the opinion of the majority of the Court in this case, insisted that the date of the security must be held to be that of the infeftment. Ever since this decision the Court has followed its authority; and, accordingly, Mr. Bell[2] has observed it to be the fair result of all the later decisions, "that wherever there is stipulated a specific "security over a particular subject, in consideration "and on the faith of which an advance of money or "transfer of goods is made, the completion of that "security, although after an interval of time, and after "the term of constructive bankruptcy has begun, is not "within the intent and meaning of the act." This has been fully confirmed by the cases of Cormack v. Gardner's Trustees[3], and the case of Bontine[4], which was affirmed by this house, and as observed by the minority of the Court, "there never was any question of law "more fully or deliberately settled than this is."

The majority of their lordships, indeed, have observed on the case of Cormack, that although there was an interval between the loan and the granting of the security, that interval had elapsed previous to the period of constructive bankruptcy, and "the debtor, while yet

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[1] 7 Feb. 1811. [2] Vol. ii. p. 226. [3] 8 July 1829. 7 S. & D., 868.
[4] 2 Feb. 1830. 8 S., D., & B., 425; 1 Wilson & Courtenay, p. 79, 6 July 1832.

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" sui juris, and before his hands were tied up by the " statute, had done all that was incumbent upon him, " or that he could do, towards the completion of the " security." But this observation, in regard to the bankrupt's hands being tied up by the statute, is the very point de quo quæritur; and it is incorrect, in point of fact, that in the case of Cormack the bankrupt had done all that he could before the sixty days, for he actually had not delivered the deed till after he was notour bankrupt, and even till after sequestration.

Referring again to the case of Bontine, it is admitted that the security not only followed at a considerable interval, but that it was actually granted within the sixty days; but it is observed that this fact, or rather the distinction founded upon it, " was not brought " under the notice of the Court." This observation is not well founded, for it has been justly remarked in the opinions of the minority, that it is expressly noticed in the deliberations on the bench, and even in the interlocutor of the Lord Ordinary.

It has farther been remarked, that there may have been a misapprehension in affirming the judgment in regard to the meaning of the term " voluntary " in the statute, which on various authorities, it is said, comprehends not only deeds granted ex proprio motu, but deeds which the debtor was previously under an obligation to grant. The appellants doubt whether there be any authority sufficient to make out this latter proposition. If the word voluntary does comprehend obligations forming part of the original contract, it has no intelligible meaning, and no security would be safe from the operation of the act 1696. Personal creditors who have done no diligence are protected by the act 1696, as

well as creditors who may have done diligence, and the only question under the statute is, whether the conveyance was made with the view of creating a preference? Hence it appears that the word voluntary can have no other meaning than that assumed in the decision of the case of Bontine; it is used in contradistinction to cases, where the debtor, instead of giving a preference to which he was not bound, is only fulfilling a special obligation, to which the law would compel him. This is accordingly the view taken by the best authorities[1], confirmed by most of the decisions, and expressly adopted in the case of Bontine; and it is quite a mistake to assume, as seems to be done in the opinion referred to, that this, if an error, originated in the House of Lords, for it is the express ground of the opinions of the judges in the Court below, as appears from both the reports of that case.

Neither is the bond struck at by the statute 54 Geo. III. c. 137. One great object of the law of sequestration was to combine in that process the whole equalizing diligences, which were previously competent for putting creditors pari passu, where no legal preferences had already been obtained, and to prevent the acquisition of new preferences within the period of constructive bankruptcy. For this purpose the first deliverance on the petition for sequestration has combined in it the effect of all the prohibitory diligence which it was previously competent to usé. It operates as an inhibition, and it therefore necessarily prevents the bankrupt from granting any deed, which, previous to the existence of the statute, he could not have granted effectually after inhibition had been used against him.

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[1] Bell, vol. ii. p. 202, and authorities there cited.

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But the statute nowhere declares that it shall be incompetent for the bankrupt to grant any deed which it would previously have been lawful and proper for him to grant, although inhibition, and every other sort of diligence, had been used against him short of a completed adjudication. The next question is, whether any of the enactments of the statute do by their own force, and without any further proceedings, so divest the bankrupt of his heritable estate, and so vest the trustee, as to render it feudally incompetent for the bankrupt to execute a deed, which was still competent to him, and which, indeed, it was his duty to grant, notwithstanding his bankruptcy, actual or constructive? The defenders submit that there is not.

There is a marked distinction in the statute betwixt the real and the personal estate. With regard to the personal estate, it is declared that the adjudication in favour of the trustee "shall operate as a complete "attachment and transfer of the moveable or personal "estate, for behoof of all the creditors at the date of "the first deliverance aforesaid, without the necessity "of intimation." But with regard to the heritable estate, there is no such divestiture of the bankrupt by the act of sequestration or investiture of the trustee. It is necessary, and it is carefully provided for in the statute, that the trustee should, in order to divest the bankrupt, make up a regular and complete title according to the forms of the law of Scotland. By the 29th section, it is provided, "That the Court shall, when "the trustee is confirmed, ordain the bankrupt to "execute and deliver, within a reasonable time to be "specified in the interlocutor, a disposition or other "proper deed or deeds of conveyance or assignment,

" making over to the said trustee or trustees in their " order his whole estate and effects, heritable and " moveable, real and personal, wherever situated, and " which shall specially describe and convey the pre- " mises, so far as they are known, or so far as the " trustee shall think it necessary, and be in such form " and style as may effectually vest the right in him, " with full powers of recovery and sale for behoof of " the creditors."

By rendering it imperative upon the bankrupt to grant a formal conveyance, the statute clearly contemplated that without such conveyance, or something equivalent, there should be no divestiture. Accordingly, the conveyance is to be " in such form and style as may " effectually vest the right in the trustee." It is here not merely implied, but expressly declared, that the trustee cannot be vested, nor, of course, the bankrupt divested, by the mere operation of the statute.

But it might happen that a conveyance could not be got from the bankrupt, and it was necessary to provide for that case. The statute therefore proceeds to enact, that whether such deeds be executed by the bankrupt or not, decree of adjudication shall be pronounced, " and " the Court shall, in the act or order above mentioned, " declare every right, title, or interest which was for- " merly in the bankrupt, to be now in the trustee, for " the purposes aforesaid; and particularly shall adjudge, " decern, and declare the whole lands, and other heri- " table estate belonging to the bankrupt, within the " jurisdiction of the Court, and which, as far as known " shall be specially enumerated and described, to pertain " and belong to the trustee or trustees in succession, " absolutely and irredeemably, to the end that the same

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" might be sold, levied, and recovered, and converted " into money for the payment of the creditors; which " adjudication being in the nature of an adjudication in " implement as well as for payment or security of debts, " shall be subject to no legal reversion." Hitherto the statute has provided merely for the conveyance from the bankrupt of the heritable estate vested in him, which may be either by his own deed or by special adjudication. But that does not complete the title of the trustee; the feudal right still remains with the bankrupt, and, in order to divest him, it is necessary that the feudal estate should be vested in the trustee. Accordingly, the next section of the statute has this enactment, " That upon the said disposition or decree of adjudica- " tion, the feudal titles requisite by the law of Scotland " shall and may be made up either in the person of the " trustee or in the person of the purchaser from him, " in virtue of such trustee's conveyance, agreeably to " the forms of the law of Scotland." To complete his title, therefore, it is imperative upon the trustee to adopt the forms of investiture in feudal subjects requisite by the law of Scotland; till he does so, the feudal estate remains with the bankrupt. The statute goes on to render it imperative upon the superior to enter the trustee,—to declare that, in the case of a succeeding trustee, he shall be vested either by disposition from the former trustee, or by adjudication; to declare, that if the trustee shall afterwards discover any other estate belonging to the bankrupt, he shall apply to the Court of Session for an adjudication of that estate: " And in " case the bankrupt's own title to any part of the estate, " heritable or moveable, real or personal, which be- " longed to him at that period, or to which he had then

" succeeded as apparent heir, nearest in kin, or other-
" wise, to any predecessor, have not been so completed
" as to vest the right properly in him, the trustee shall
" take the most safe and eligible method of completing
" the bankrupt's title, in such way and manner as the
" law requires, which title shall accresce to that already
" acquired by the trustee, in the same way as if it had
" been completed prior to the disposition by the bank-
" rupt, or adjudication against him."

The whole of these enactments demonstrate most clearly, that neither the sequestration, nor the general adjudication, nor the special adjudication are of any effect in divesting the bankrupt of the feudal right, and vesting the trustee. The bankrupt is divested only when the trustee has, by one or other of the modes pointed out by the statute, completed his title by infeftment.

But in the present case the respondent was not infeft till after the appellants had been feudally vested.

Respondent.—1. In arguing that creditors are affected by the fraud of the bankrupt, the defenders confound two cases which are in themselves essentially distinct. A bankrupt may, by fraudulent devices of various kinds, raise money, but unless the particular sums of money so raised can be identified (which, in the case of money, can very rarely happen,) the persons defrauded stand in the same situation with other personal creditors: or the bankrupt may acquire property by fraud, either land or moveables; and if that property be extant, as it is easily capable of identification, the person defrauded has an undoubted claim for restitution.

Supposing it to be true that Mr. Stuart did deceive

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the defenders, by making them believe that, under the name of Hillside, he was truly giving them security over various other lands not contained in the bond, and that, by this fraud, he contrived, in the year 1823, to raise a considerable sum of money, it cannot be maintainable that, in consequence of this fraud, Mr. Stuart's title to those lands, otherwise unexceptionable, is so tainted that his creditors cannot claim the property of them without subjecting themselves in reparation of that fraud.

It is quite clear that, if this be a case of fraud at all, it belongs to that class in which the bankrupt has contrived to raise money by fraudulent devices, and in which the creditors can in no degree be responsible, unless it can be shown that they are deriving benefit from the money so procured by the bankrupt.

This distinction is clearly marked by Lord Kilkerran in the case of Ireland. He says,—"If the original pur-"chase was fraudulent, as made when Cormack was in "the knowledge of Ireland's prior right, the bond taken "to be the foundation to effectuate that purchase was "no less so; and, according to the above principle, "that fraud must affect his creditors adjudgers:" and Mr. Bell [1] observes, that "while property obtained "by fraud is extant in the hands of the bankrupt, the "creditors who take that property, or who resist the "claim for restitution, are striving to gain by the pro-"prietor's loss; they participate in the fraud of their "debtor."

It is only in this view that the doctrine of tantum et tale applies. The extent of this rule, as finally settled by the decisions, seems to be this, that in the case of

[1] 1 Bell, 277.

real right, i. e. rights to which the debtor has completed a feudal title, any qualifications not appearing ex facie of those titles, but depending upon relative personal obligations, are ineffectual even against creditors adjudgers.[1] Farther, that in the case of personal rights to land, or jura incorporalia, where the title of the debtor is qualified by conditions inherent in the constitution of the right, a creditor adjudger can take the right only subject to those conditions, even although such conditions would be ineffectual against an onerous purchaser.

This distinction was sufficiently explained by the decision in the case of Gordon v. Cheyne. It was there determined, that certain shares of a trading company, which had stood for a course of years in the name of the bankrupt, but which ab initio had been held by him only in trust, did not belong to the general body of his creditors, but to the individual for whose behoof the trust was created. This decision did not pass unanimously, but it went no farther than this, that creditors adjudgers are liable to be affected by conditions or qualifications inherent in the constitution of their author's right, while that right remains personal.

But the case is very different where an individual has himself acquired right by an unqualified title, either to land or a jus incorporale, and, in the enjoyment of that unqualified right, has come under an obligation, express or implied, to convey that right to another. The creditor in such an obligation, if he have failed to demand implement from the bankrupt himself previous to his bankruptcy, is not entitled to demand implement from the

[1] Bell, vol. i. p. 283.

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creditors of the bankrupt, or to hold that the bankrupt's title is qualified by the extrinsic personal obligation which he had so undertaken.

Accordingly, in the case of Mitchell v. Ferguson[1], the disponee of a house not being infeft, the creditors of the disponer adjudged, and were infeft; and they were found preferable to a purchaser from the disponee.

It is true that in a subsequent case, Smith v. Taylor[2], some doubt was thrown upon the authority of the decision of the case of Mitchell, and the Court seemed to sanction the doctrine, that the general body of creditors could take the property of their debtor only tantum et tale as it stood in his person, and so must fulfil the obligation, even although only a personal obligation, which their debtor had incurred in relation to that subject. But, as Mr. Bell observes, "the erroneous opinion, "however, which this judgment tended to sanction, did "not long prevail;" and he refers, in support of this observation, to the case of Buchan v. Farquharson, 24th May 1797; and this is confirmed by the opinion of the judges in the case of Russell v. Ross's Creditors[3], and by the still more recent case of Wylie v. Duncan.[4]

On the above principles it is clear that no distinction applies to the property which was not feudalized in the person of Mr. Stuart.

2. The bond obtained by the appellants is struck at both by the act 1696, c. 5., and the 54 Geo. III. c. 137.

In regard to the act 1696, the leading distinction between the present case and any of those which have occurred, in which the statute has been found not to

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[1] 13 July 1781. Mor. 10,296. Hailes, 880. [2] 1 Bell, 288.
[3] 31 Jan. 1792. Bell's Cases, p. 177. [4] 3 Dec. 1803. Mor. 10,299.

apply, is, that no money was paid for the security in question, which was an original deed granted by the bankrupt. There is, therefore, no similarity between it and an heritable bond granted before the sixty days, on which sasine is taken by the creditor during the period of restrospective bankruptcy. There is another manifest distinction between such a case and the present. In the former nothing is done by the bankrupt; the sasine is taken by the creditor, without any act or deed by the bankrupt, and merely in order to complete the right which was obtained before bankruptcy. If therefore the present case is to be considered as involving the principles of a novum debitum, it is most analogous to those cases where money was advanced on the faith of heritable security, which was not granted previously to the bankruptcy of the debtor. It was at one time held to be law, that where the security, though stipulated for before, was not granted till after the sixty days, it was null under the statute; and upon this ground, that, till the security was granted, the creditor must have relied on the personal security of the debtor, and was therefore in no different situation from his other personal creditors; and upon this principle the cases of Brough v. Duncan and Jollie and Maclean v. Primrose were decided.

It is true that, in the case of Mansfield, Hunter, and Co.[1], it was decided, that where money was advanced in consequence of an agreement to grant an heritable security, such security, even although granted within sixty days of the debtor's bankruptcy, was not reducible in terms of the statute. A decision to the same effect was given in the case of Houston and Co.[2]; but in the

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[1] 15 February 1751.

[2] 20 February 1772.

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subsequent case of Spottiswood v. Robertson Barclay[1], doubts were expressed of the soundness of those two previous decisions. Judgment had been pronounced, sustaining an heritable bond of annuity granted by a husband within sixty days of his bankruptcy, in respect of a prior obligation to grant it, contained in his marriage articles; but, upon a reclaiming petition, the judges were much divided in opinion, and a hearing in presence was appointed for the purpose of reviewing and settling the question. With reference to that case, Mr. Bell observes:—"It never came again to trial, having "been compromised. But, if I can judge from the in- "cidental opinions which I have heard of two judges, "(in particular Lord Justice-Clerk Macqueen, who sat "upon the bench at that time, and Sir Ilay Campbell, "who was counsel in the cause,) there is much reason "to believe that the ultimate decision would have been "different from the first."

But in ten years thereafter the question was again raised and decided in the case of Brough v. Duncan, and Brough v. Spankie.[2] In both of these cases heritable security had been stipulated for from the first; but in neither had it been actually granted till within sixty days of bankruptcy. In both cases the Court held, that the lender of the money was a mere personal creditor, and that the securities were reducible.

In the subsequent case of Maclean v. Primrose the late Lord Meadowbank, in a note[3], condemned the decision in the case of Houston and Co. "as clearly contrary to "principle, since an obligation to grant a preference "cannot constitute an actual preference on an heritable

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[1] 19 November 1783. [2] 5 June 1793.

[3] 16 November 1799. 2 Bell, p. 225.

" subject in a question with other creditors; and, accord-
" ingly, it is one of those decisions which are frequently
" quoted, and as often disregarded by the Court."

The result then of these authorities seems to be this, that a security granted within the period of constructive bankruptcy, even although in implement of an obligation previously undertaken, is reducible under the statute; and farther, that after bankruptcy, or during the period of constructive bankruptcy, a debtor can do no act, even although in implement of a previous obligation, by which the situation of any one creditor can be improved at the expence of the rest.

The doctrine which was thus established was not in any degree shaken by the decision in the case of the Bank of Scotland v. Stuart. There the question was, with regard to the validity of a security, the sasine upon which had been taken within the period of constructive bankruptcy. Applying the statute strictly, as had been done in some of the earlier cases, the security must have been set aside in consequence of the date of the sasine; but the answer was, that the deed upon which the sasine proceeded had not been granted in satisfaction of a prior debt, but in consequence of an agreement entered into at the time when the money was advanced. That having been established to the satisfaction of the Court, the date of the sasine, which would have been conclusive against a transaction of a different character, was held to be immaterial.

The only case which can be supposed to give countenance to an opposite doctrine is that of Cranstoun and Anderson v. Bontine. But so far as that case is to be considered as a decision of the Court of Session, its authority is completely superseded by the detailed opinion

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which has been given in the present case, by the judges themselves who pronounced it. Lord Craigie, Lord Balgray, and Lord Gillies, who concurred in the judgment in the case of Bontine, have expressly stated, that the important distinction between it and the cases previously decided, (the conveyance by the bankrupt in the one being previous to the sixtieth day, while in Bontine's it was subsequent,) was not brought under the notice of the Court.

But even assuming that the case does not fall under the act 1696, c. 5, it clearly comes within the statute 54 Geo. 3.

By the act of sequestration, the whole estate and effects of the bankrupt are withdrawn from the possession and control of the bankrupt, and placed under the management of officers subject to the jurisdiction of the Court. Even before the election of a trustee, the creditors are appointed to choose an interim factor, and failing their doing so, the care and custody of the bankrupt's estate and effects devolve upon the sheriff-clerk.

By the 17th section of the statute it is enacted, "That the said factor or sheriff-clerk, chosen as interim "manager, shall be entitled to take possession of the "bankrupt's whole estate and effects, and of the bills, "notes, and whole other vouchers, title deeds, and "instructions of his estate, and also of his books and "papers; and the bankrupt shall, if required by him or "the creditors, grant powers of attorney, or other deeds "which may be deemed necessary or proper, for the "recovery of the estate and effects situated in foreign "parts, under the pain of fraudulent bankruptcy," &c.

After the election of the trustee, and after his nomination has been reported to the Court, and approved of,

the 29th section declares, that " the Court shall at the " same time ordain the bankrupt to execute and deliver, " within a certain reasonable time, to be specified in the " interlocutor, a disposition, or other proper deed or " deeds of conveyance or assignment, making over to " the said trustee or trustees, in their order, his whole " estate and effects, heritable and moveable, real and " personal, wherever situated, and which shall specially " describe and convey the premises, so far as they are " known, or so far as the trustees shall think necessary, " and be in such form and style as may effectually vest " the right in him, with full powers of recovery and " sale, for behoof of the creditors; and if the bankrupt " shall, without reasonable cause, neglect or refuse to " obey such order, the Court may punish him by im- " prisonment; and in all events, whether such deed or " deeds be executed or not, it is hereby declared and " enacted, that the said whole estate and effects of " whatever kind, and wherever situated, (in so far as " may be consistent with the laws of other countries, " when the effects are out of Scotland,) shall be deemed " and held to be vested in the said trustee or trustees " in succession, for behoof of the creditors; and the " Court shall, in the act or order above mentioned, " declare every right, title, and interest which was for- " merly in the bankrupt, to be now in the trustee, " for the purposes aforesaid; and particularly shall " adjudge, decern, and declare the whole lands, and " other heritable estate, belonging to the bankrupt, " within the jurisdiction of the Court, and which, as " far as known, shall be specially enumerated and " described, to pertain and belong to the trustee or " trustees, in succession, absolutely and irredeemably,

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" to the end that the same may be sold, levied, and " recovered, and converted into money, for payment of " the creditors; which adjudication, being in the " nature of an adjudication in implement, as well as " for payment of debts, shall be subject to no legal " reversion."

By the 22d section of the statute, the deliverance upon the petition for sequestration is directed to be recorded in the general register of inhibitions within fifteen days, " and the same shall, from the date of the " deliverance, be held equivalent to an inhibition." The nature and effects of the diligence of inhibition are well known. It gives to the personal creditor, at whose instance it is used, a right to reduce all conveyances of heritable property made by his debtor subsequent to the publication of the inhibition. Upon that ground alone the subsequent conveyance executed by Mr. Stuart, to the prejudice of the respondent, acting for behoof of the personal creditors, would be reducible.

It may be true that, in order to satisfy the rules of feudal conveyancing, something more is required to make the title of the trustee perfect. But that circumstance is of no importance, when the only question is with regard to the validity of a deed impetrated from the bankrupt, during the dependence of judicial proceedings, anxiously published to the world, and in contempt of an order of Court pronounced in the course of these proceedings.

But above all, and keeping in view that the appellants claim a preference solely in virtue of the supplementary deed executed by Mr. Stuart eight months after his estates were sequestrated, and after the Court had adjudged those same estates to belong to the respondent,

it cannot be denied that at the date of the sequestration the appellants were entitled to no preference at all; their preference was derived from the act of the bankrupt, many months after the date of the sequestration. But by the 38th section of the statute it is enacted, "that the whole estate and effects, of whatever kind, "belonging to the bankrupt at the period of the "sequestration, or the produce thereof, after paying all "charges, shall be a fund of division among those who "were his creditors prior to the date of the first "deliverance aforesaid, and none else, regard being had "to preferences obtained by securities, or by diligence "before the said deliverance, and not expressly set "aside by this act, but to no other claims of pre-"ference."

LORD BROUGHAM.—My Lords, I shall take time to consider this case, before I advise your Lordships to proceed to judgment. It involves questions of importance in point of law, but I do not feel pressed by any great difficulty as to which way it should be decided. I strongly incline to an affirmance of the judgment of the Court below. I think the case has been a good deal lengthened out by the very learned arguments which have been brought to bear upon it; but it is perhaps clearer than it has been considered. That is no reason, however, why I should without further consideration give my humble advice to your Lordships; or that, following up the opinion towards which I have a strong leaning, I should conclude that I have a better view of the subject than some who have dealt with it below.

I will state shortly the grounds on which I think it must be held that Mr. Stuart had not the power to do

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that which forms the subject matter of this reduction. My argument proceeds chiefly upon the view of the subject which arises on the bankrupt law, — I mean the act 54th Geo. III. cap. 137. As at present advised, my opinion is, that the 29th section divests the bankrupt, although it does not invest the trustee until his feudal title shall be made up. It would follow, if this is the correct view, that by force of the words of the section itself, declaring the right to be vested heritably, absolutely, and irredeemably in the trustee for the creditors, the bankrupt is prevented from dealing with the property in the intermediate space during which the trustee had not made up his titles; although the trustee would not be entitled to deal with the property, he being incapable of giving a feudal title until his investiture has been accomplished, as provided for under the subsequent section of the statute. Nothing can be more consistent with the principles of statute law, or less consistent with the principles of the common law, than that any fee should remain in pendente, or, as it is sometimes phrased, in nubibus; but that suspension may be well operated by the statute, to the effect of there being, for a certain period of time, no person in esse who can validly deal with the whole right to that property,— there being, however, during that interval, by the force of the statutory provision, possession by the law, with a view to subsequent operations. There are various instances of this in the bankrupt laws, which it is needless now to specify. A considerable difficulty will arise, if we are to determine this case upon the statute 1696. That was the only other argument, and was most largely dwelt upon by the counsel for the appellant, and ably commented upon by the learned judges in the Court

below, who agree with the appellant in the argument raised upon that statute, and the cases decided under it. The difficulty which I feel upon this branch of the case arises (as I have more than once thrown out in the course of argument) from the very imperfect knowledge we have of the way in which some of those cases were looked at. I observe that the case of Mansfield and Co. v. Cairns[1] and that of Houston v. Stewart[2] are reprobated in other cases. It cannot be doubted that the two cases of Brough v. Duncan[3] and Brough v. Spankie[4] really are not law, or contended that they are sufficient authority for the purpose of destroying the authority of Houston v. Stewart, and, by implication, of Mansfield v. Cairns. If it is said that the cases, quoad the cutting down securities granted by Brough to his creditors, in the one by a letter missive, and in the other by heritable bond, are bad law, but are good to the effect of destroying the authority of the two older cases, that appears to me a somewhat arbitrary mode of dealing with authorities. But we have a current of opinions of professional men upon the subject; and, above all, we have what with me is of the highest authority, and of the greatest weight, the very valuable opinion of the late Lord Meadowbank,—one of the best lawyers—one of the most acute men—a man of large general capacity, and of great experience, and with hardly any exception, certainly with very few exceptions, the most diligent and attentive judge one can remember in the practice of the Scotch law; his valuable notes from time to time affixed to cases having been very much the means of introducing

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[1] 15th Feb. 1771; Mor. No. 6. App. Bankrupt; Hailes, 403.
[2] 20th Feb. 1772; Mor. 1170; 1 Hailes, 468.
[3] 5th June, 1793; Mor. 1160. [4] 5th June 1793; Mor. 1179.

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that wholesome practice in Scotland. His Lordship, in Maclean v. Primrose [1], gives an opinion of the most unhesitating kind against the authority of Houston v. Stewart. He does not merely by implication put down that which has been distinguished from it, Mansfield v. Cairns; for I do not think we can discern any special circumstances to distinguish that case from the other. If it shall be found necessary to go into the question which the arguments have raised under the statute 1696, my opinion, as I have already stated, is not made up upon that. There is a circumstance which one cannot easily leave out of view, I mean the great hardship of Mr. Walker's case; and if I should ultimately be of opinion that we ought to affirm this decision, (as is very probable,) there is no doubt that, upon this ground of hardship, it should be without any costs; and it may farther be considered whether we can, consistently with the practice in former cases, affirm the decision of the Court below on the principal matter, without affirming that which saddled him with expences. This case is a most hard one; and not the less hard, in that there is no blame attachable to the party with whom he was dealing; I have no doubt that, in fact, there is no blame imputable to Mr. Stuart. If he had intended to deceive Mr. Walker—cui bono? The deed was to benefit nobody; for it was kept and hung over the estate: he did not deal with it. If the bankruptcy had intervened immediately, it might have been said, non constat that he did not intend to sell again, and to obtain more money; but, although the pressure of his difficulties was increasing rather than lessening, during five

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[1] 16th Nov. 1799; 2 Bell, 225, note 2.

long years, yet he never took one single step to do any thing inconsistent with the rights which he thought he had conveyed to Mr. Walker. My belief is, that it was an oversight to which the most experienced man of business, and skilful conveyancer as he was, may be liable; and that he would himself have been the first person to retrieve it, if he had been aware of it. This is perfectly reconcileable with the facts of the case, without imputing any blame to him. But Mr. Walker has been the sufferer, all the same as if there had been intentional neglect or omission, and his representatives are therefore much to be pitied. At the same time, the creditors, or the trustee for the creditors, are not bound to give up their rights. It becomes therefore highly desirable that, if possible, those representatives should not be required to pay the expences. What possible reason was there why they should not come into Court—why they should not defend this action? They had got an apparent title, and why should they not defend it? It appears to me rather extraordinary that the learned judges should not have thought of that when they came to consider the giving the costs below; for, according to their view, the question was a very nice one: they divided eight to five; and they considered it by no means a settled question. Some of them considered it as a question of the first impression, a case decided in this House by Lord Wynford leading them to view it in that light. It is not a case by any means for giving expences. The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone; but if you bring an appeal on the merits, and if it is not a colourable appeal, for the purpose merely of introducing the question of costs, the court of review

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may, in affirming the judgment, consider the question of costs awarded in the Court below. In the present case, no one can think here that bringing this appeal on the merits was colourable merely. I shall, therefore, if I recommend to your Lordships to affirm the judgment, certainly take that matter into consideration. I now move your Lordships that the further proceedings on this case be adjourned.

The case having stood over till this day,

LORD BROUGHAM:—My Lords, the facts of this case lie within a narrow compass, and are wholly undisputed. Mr. Stuart gave Professor Walker, in 1823, a security over a parcel of his real estate of Hillside in the county of Fife, and believed, as did the Professor and his conveyancers, that this security extended over the whole property of ninety-five acres of very valuable land. In this belief 6,000*l.* were advanced, and the lender was infefted in 1824. It was afterwards discovered that the title given extended over only five acres; and Mr. Stuart then gave additional security, conveying the whole, but this was after he had become bankrupt. A sequestration having been awarded in September 1828, and the respondent having been chosen and duly confirmed trustee for the creditors 6th of October of the same year, while the corroborative security was granted in May 1829. Between the respondent's confirmation as trustee and his making up his title as such, Professor Walker was infeft upon the second security; and this action was brought by the trustee to reduce that second security and all that followed upon it. The Court decreed for the reduction; and I am of opinion that the decree is well founded, and must be affirmed. There are two grounds on which it

rests: First, that the security granted was reducible under the act 1696, as granted within the period when all preferences of the bankrupt are reducible; and, secondly, that whether it is so reducible or not, yet being granted after the adjudication of bankruptcy and the confirmation of the trustee, it was granted à non habente potestatem, and is a nullity as against all men, especially as against the trustee, in whom the estates real and personal of the bankrupt were vested.

1. With respect to the first point, there is a conflict of authority, and though it becomes unnecessary to decide on which side the balance must be cast, as the second ground is sufficient for our purpose, yet the great importance of the question carries us into this discussion. That infeftment within the sixty days may be validly taken upon a conveyance granted prior to that period seems not be denied. It is agreed that a heritable right may be granted before the sixty days, and sasine may validly be taken upon it within that time, although nothing of the prior right can appear on the record: but the security itself having been here granted after the statutory period, and not merely the sasine had, we need not dwell longer upon that admission; and there is certainly no small discrepancy in the authorities upon this point. Previous to the case of Mansfield v. Cairns, 1771, the decisions were against the validity of a security so granted; but it was then held, that money having been advanced before the time, on an agreement to grant heritable security for the loan, such security might safely be granted within the sixty days; and the same doctrine was upheld in the subsequent case of Houston v. Stewart. As the provisions of the act 1696 strike at preferences, these decisions could only stand upon the

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ground that there was in such cases no preference. The act expressly names "all dispositions, assignations, and "other deeds granted in favour of his creditors, either "for his satisfaction or further security in preference to "a creditor's;" and I confess my own inability to discover how the party advancing the money for example, in Mansfield v. Cairns, which never had been paid, could be considered as other than a creditor of the bankrupt, merely because he advanced it upon an agreement; and how the heritable security, afterwards granted in performance of such an agreement, could be deemed any thing but a "further security." However, these two decisions plainly view the parties as standing in a different position, and the transaction as differing from that. Unable to perceive the grounds of the rule there laid down, and thinking those cases wrongly decided, I am not surprised to find them afterwards questioned by the Court. In Spottiswood v. Robertson Barclay, Nov. 19, 1783, the question was raised by an heritable security granted in pursuance of an obligation in a marriage settlement, and the security sustained. But Mr. Bell says, (Bankrupt Law, ii. 235,) that the Lord Justice-Clerk Braxfield and Lord President Campbell (two of the great authorities in the Scotch law) doubted the soundness of the first decision; when a reclaiming petition was presented and a hearing in presence ordered, which never took place, as the case was compromised; and Mr. Bell adds, that there is reason to believe that the first decision would have been reversed. Now, surely, if a bankrupt is not allowed validly to perform what he has bound himself to do by marriage contract, it is strong to say that he can validly implement any other onerous obligation within the statutory period. It is recorded of

Lord Monboddo, that he said, on the decision in Mansfield v. Cairns being pronounced, "there is no use in "studying law." In the subsequent case of Maclean v. Primrose, the late Lord Meadowbank, a very high authority, held Houston v. Stewart not to be law; and in one of the cases of Trustees of Brough v. Duncan, and Trustees of Brough v. Spankie, both decided 5th June 1793, the Court held the same opinion respecting that of Houston v. Stewart, regretting that the older one of Eccles v. Merchiston prior to 1751 had been departed from; and although they said nothing of the first of these cases, which made the deviation in Mansfield v. Cairns, it is plain that this cannot stand, if Houston v. Stewart be overruled. In the one of these cases of Trustees of Brough (the second) the Court held the statute to apply to securities given after the commencement of the sixty days, in implement of preceding obligations. There had been a letter missive, on the faith of which a bill had been accepted, and agreeing to give the acceptor heritable security over a particular property, as soon as the writings could be made out. The security was not granted till within sixty days of bankruptcy. This was held to be struck at by the act 1696, and it was in this case that the Court pronounced Houston v. Stewart to be wrong.

The other case appears to me to have been itself erroneously decided, at least if the decision is held to strike at an infeftment taken within the sixty days, on a security granted before, which was the case. It is barely possible to consider that the long time which had been suffered to elapse between the date of the conveyance and the completing of the security by infeftment, which was above three years and a half, may have been a sufficient ground for the decision, as evidencing a fraudulent

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and collusive transaction. Certain it is, that this case can stand on no other ground. But with the other case of the Trustees of Brough I have no quarrel at all; and thus the law would have stood clear, and ultimately consistent with the older and sounder doctrine of Eccles v. Merchiston, which had been temporarily departed from in Mansfield v. Cairns and Houston v. Stewart. But unfortunately there occurred a case in 1811, Bank of Scotland v. Stewart, in which the Court once more recurred to the exploded doctrine of these two ill-decided cases; and, excepting the fact of the title deeds of the borrower having actually been deposited before the statutory period for the purpose of making out the conveyance, I can find nothing to differ this from the cases of Eccles v. Merchiston and Brough v. Spankie, or to justify a recurrence to the contrary doctrine. Upon the whole, I am of opinion that the cases of Eccles v. Merchiston and Brough v. Spankie are rightly decided; that one of the Brough cases (Brough v. Duncan) is not to be supported; that Mansfield v. Cairns and Houston v. Stewart are not to be considered as law; and that though a party taking infeftment after the statutory period has begun, on a security fully given before, is safe, yet that a bankrupt giving security after the period, in virtue of an obligation previously given for a valuable consideration, whether of marriage, or loan, or purchase, is within the act 1696.

2. But the second point in the cause appears to me encumbered with no doubt; and it is, in my judgment, quite decisive in favour of the decree under appeal. Mr. Stuart was, at the time in question, under the operation of the bankrupt act — the act expressly framed for making the payment of debts more equal, and for

distributing all an insolvent person's estate, of whatever kind, equally among all his creditors. Now, although the retrospective operation given to the bankruptcy by the act 1696 may not extend to prevent a person not yet bankrupt from doing certain acts which he had previously actually bound himself to do, and which acts are not giving preferences to old creditors; and though certainly that retrospect is to be construed strictly, and not permitted to extend beyond what is fully expressed in the statutory words of nullity, yet it by no means follows that he is, after having been adjudged a bankrupt, empowered to do any act whatever, either original or supplementary; either acts which he lay under no previous obligation to do or acts to do which he had already bound himself. While he continues to have an independent and legal existence, he may be allowed to perform his obligations, although, within the period during which he is by the act disabled to give new securities he may be enabled validly, to do any act which falls not within the statutory description of preference to one creditor over the rest. But it by no means follows that, after his legal existence as owner of any property has altogether ceased, he shall have any power whatever, either to grant new securities for old debts, or to give one creditor any other preference over the rest, or to do any act affecting his property, even though that act should be of a kind which confessedly does not fall within the retrospective operation of the statute 1696; and indeed, without regard to the specific provisions either of that or of the later bankrupt acts, we may say generally that a more strange anomaly could not well be imagined, nor any position more entirely at variance with the whole policy

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of the bankrupt law, and indeed more repugnant to the notion of an adjudged bankrupt, than that he should retain the power of conveying his property after he had been so adjudged by sentence of the Court,—not ex parte as in England, where the adjudication takes place without his knowledge, but in foro contentioso, in a suit to which he was cited as a party. To support so singular a doctrine would require the plainest statutory enactments; and these are here all signally the other way. First, we may observe upon the nature of the process of sequestration itself. The action of declarator of bankruptcy given by the act 1696, and in lieu of which the sequestration given by 12 Geo. III. c. 72., extended to real estates by 23 Geo. III., was substituted, affected all the property of the bankrupt in the same manner in which the proceedings under the late acts do; for by that act 1696, upon a person being adjudged bankrupt in the declarator, his acts and deeds after his bankruptcy, as well as within sixty days before it, are declared void, if done in preference of one creditor over another. This, however, bringing the question back to that which was discussed under the first head, I need dwell no longer upon it, as in dealing with the present point I rely on the provisions of the later statutes. I may only observe, that the earlier statutes, 12 and 23 Geo. III., are not so express in their words, vesting the trustees, and consequently divesting the bankrupt, as the more recent ones; but they assume the nature and force of sequestration to be, as no doubt it is in itself, a judicial divestment, which makes the bankrupt's power of dealing with his property cease, unless in so far as he is to obey the orders of the Court, in making the conveyance to the

trustees. In particular, all these acts (old and new) contain a provision declaring all the bankrupt's property, real and personal, at the date of the sequestration, to be a fund for distribution among his creditors. This forms the 38th section of the present bankrupt act, and it is the 22d section of the 23d Geo. III. cap. 18., — the first act that applied sequestration to heritable estates: in truth the process of sequestration can mean nothing else. Let us now see what additions are made to these things by the law at present in force, to regulate the whole proceedings in bankruptcy — 54 Geo. III. cap. 137. The trustee in this case had been confirmed as such by a decree of the Court, and we are to see how the act treats the rights of a person so acknowledged, and how, by necessary consequence, it treats the bankrupt himself. The 29th section requires the Court to ordain (that is, to command by a judgment or order,) the bankrupt to make over, within a time to be specified, by disposition or other proper deed of conveyance, to the trustee, his whole estate, real and personal, specially describing the parcels in such conveyances; and the instrument is required to be in such form and style as may effectually vest the right in the trustee. Now, suppose it had stopped here, and the Court had made the order which it has made,—as much reliance is placed by the appellant, at least in the first branch of the argument, upon the analogies of our English law touching equitable estates, let us ask how our courts would consider any act done by a bankrupt, or by any other person, after an order had been made upon him to convey his estate to A. B. for whatever purpose? Why, it is clear that he never could validly affect that estate by any act whatever, except by the conveyance which he was

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directed to make. It would not follow that A. B. could, before the conveyance, deal with it; but, at all events, the bankrupt or other party ordered to convey never could deal with it effectually in any manner of way. But the statute proceeds to declare and enact, that in all circumstances, and whether such deed be executed or not, "the said whole estate and effects shall be deemed "and held to be vested in the said trustee for the cre-"ditors:" this is expressly declared and enacted, "it is "hereby declared and enacted." Is not this enough to divest the bankrupt? Is it not a statutory conveyance at all events out of him? Is there a better title to the substance of any right, whatever may be wanting to the forms of it, than an act of Parliament, providing expressly that such right is by force of the act in one party? But can a man's property be taken out of him more effectually than by a law of the country, providing that it is hereby vested in another? At any rate, can that man's hands be more effectually tied up than by such a statutory declaration and enactment? What stronger case would it have been, had the act expressly said (which would have been really superfluous) that the bankrupt should thereafter cease to do any act relating to his property so divested. But the act goes on, and in the plainest terms assumes his being divested by the statute, and by the order which the Court is required to make; for it directs the Court to declare, decree, and adjudge, in its order, that the whole estate, right, title, and interest, "which were formerly in the bankrupt, shall now "pertain and belong, absolutely and irredeemably, to the "trustee." This adjudication has in the present case been made, and, in my clear opinion, divests the bankrupt: although, until the trustee makes up his title, he cannot

convey by sale or encumbrance upon plain feudal principles, still it is enough to take the property out of the bankrupt. But I read the words of the act now for the further and important purpose of showing that the legislature so regarded the order of adjudication; for the act expressly speaks of "all the right, title, and in- "terest formerly in the bankrupt." Words cannot more clearly express that, after the adjudication, the estate is not in the bankrupt at all, and that all his power over it in any way, and to all intents and purposes, has ceased from and after that period. The authority of Mitchel v. Syme has been cited in further support of the decree, and it bears upon this branch of the argument. I think it is of use in that respect, for it held an infeftment of a real estate, subsequent to a disposition on which no infeftment had been taken, sufficient to cut down that disposition, and defeat a sasine subsequent. But I do not think the authority of that decision necessary to support the present. As for the argument raised upon the analogy of inhibition, and on section 22, which gives the recorded petition the force of a recorded inhibition, nothing can result from that. The object of the provision is to make the mere intimation of the petition of sequestration and the first deliverance upon it, if registered, have a certain effect, and it gives that proceeding only the effect of inhibition, — deeming this a sufficient protection against acts to be done while the petition is pending, and before adjudication. Nothing can be more rational than the supposition that the act intended to give the inchoate procedure,—the mere presenting and intimating a petition to sequestrate, —a less extensive nullifying effect than the final adju-

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dication itself. Nothing can be more consistent than that the sequestration itself, finally granted, should divest the bankrupt to all intents and purposes; while the commencement of a proceeding to obtain that sequestration should only have the more limited effect of a recorded inhibition. Much of the argument in this case seems to have been rested on the analogy of our equitable estates in England; but the Scotch law holds no resemblance now with the law of England in this particular, though both systems had one common original. Our equitable titles are peculiar to our jurisprudence. An agreement to convey an estate for a valuable consideration executed is with us, to all substantial purposes, a conveyance which vests the property in the purchaser, although, to obtain his full rights, he must resort to one court, and demean himself as a suitor according to one set of rules, and not another. Whatever is covenanted to be done is held in equity as done, so that a title by mere agreement is quite as paramount to any subsequent incumbrance, or other puisné title, as a legal conveyance. This is not the law of Scotland. Upon feudal principles, the party who first perfects his title by sasine (and since the act 1617, by registration also of his sasine,) is preferred to him, who, at a prior time, may have paid his money on an agreement or obligation. Land is only affected by the Scotch and the feudal law in a certain way. Any other mode of conveying it, or burthening it, is as inept and as inefficient as a sale or mortgage by parole would be with us. If, here, a man gave his money on a parole conveyance or mortgage, he would of course be cut out by one who the next month got a mortgage or conveyance, or even an equitable title, by a written

agreement, from the same proprietor to the same lands. This might be a hardship, and it is exactly the same kind of hardship which may happen in Scotland, and which has happened here, with this only difference, that in Scotland writing may be as inefficient to affect the land as parole is here. This consideration, too, is an answer to the argument, that the trustee takes the estate of the bankrupt tantum et tale. He does so; and the estate was not affected in the bankrupt's hands by the personal obligations, which were sufficiently valid and binding against the bankrupt. Between the bankrupt and the trustee there can be no privity such as to affect the latter with any personal obligation incurred by the former; and the land not being affected by such obligations, the trustee taking it tantum et tale takes it discharged of any real burthen. As to the English law, it may be further observed, that even we allow some further nicety, oftentimes working great injustice to creditors. He who, posterior tempore, obtains a legal title to an estate covered with real securities, will, by obtaining a prior equity, defeat one who lent his money on an equitable title only between the date of the two titles that now unite in the same person; so that one who has lent his money this year may be defeated, or, as it is very expressively termed, squeezed out by one who has only advanced money on the same estate a year after. The rigorous administration of the feudal principles in Scotland can work no greater hardship than this, and the consideration of such topics is only important in such a case as affecting the question of costs; I am of opinion, that none should be given either here or below; and with the exception, therefore, of the

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order of the Court of Session, as to expences, I now move your lordships to affirm the interlocutors complained of.

The House of Lords ordered and adjudged, "That the "interlocutor complained of in the appeal, (so far as the "same finds the defender liable in expences, and remits "the account thereof, when lodged, to the auditor to tax "and report,) be and the same is hereby reversed; and "it is further ordered, that the said interlocutor in all "other respects be, and the same is hereby affirmed.

A. M'CRAE—MONCRIEFF and WEBSTER,—Solicitors.