rupt, or within 60 days before. And the first and second clauses are connected together by the first clause; all the voluntary deeds of bankrupts there mentioned are declared void and null; but then, because voluntary deeds, whereupon infeftment might follow, might happen to be of an old date, which yet would be sufficient warrant for taking infeftment; therefore that law does provide, that all deeds, whereupon infeftment might follow, should, as to the point of bankrupt, be reckoned of the date of the infeftment, to this effect, that, if the infeftment was taken after the bankrupt was fled, or within 60 days before, the said infeftment might not be supported by the anterior warrants; but the same might fall in consequence with the sasine. In and by the whole tenor of that act, the bankruptcy is drawn back 60 days before the concurring qualifications thereby required; and that law presumes that the bankrupt was for 60 days *in meditatione fugæ*. And, as to any hazard of loss to creditors, or others who might contract *bona fide* in these 60 days, that inconveniency is well balanced by a greater advantage to creditors, in as far as otherwise the whole act might be eluded by bankrupts granting new original bonds within 60 days; and retiring the former securities, of which there could be no document or vestige of evidence to other creditors, to instruct the retiring of former securities. No 259.

It was also *argued*: That the precept of sasine is a further security for the debt, and that there is nothing in the former part of the act that does clearly make appear, that the design of it is only with relation to deeds done in favour of anterior creditors.

'The Lords found, That the bond in this declarator of bankrupt was to be 'reckoned as of the date of the sasine, and that the sasine being within 60 days 'of the debtor's becoming bankrupt, was null in competition with other creditors.' *

Fol. Dic. v. 1. *p.* 86. *Dalrymple, No* 178. *p.* 244.

1726. *January* 19.

Competition Margaret Chalmers, with the other Creditors of Riccarton.

Upon the 10th May 1700, Robert Craig of Riccarton granted bond for 3600 merks, to Jean Innes, relict of Robert Chalmers, in liferent, and to Margaret Chalmers, her daughter, in fee; and of the same date, for security and payment thereof, disponed to them an heritable bond for the sum of 5000 merks, granted to him by Gordon of Troquhain: Upon which bond, the disponees took infeftment the 12th June 1704, within sixty days of Riccarton's bankruptcy. No 260.

Found in opposition to No 259. *supra*, that the act of 1696 does not at all reach *nova debita*, securities for which are valid, although the sasine be taken within the 60 days.

Against this disposition it was *objected*, by the other creditors of Riccarton, That it was null upon the act 5th Parl. 1696, declaring "all voluntary dispositions, assignations, &c. granted by a bankrupt within 60 days of his bankruptcy, in favours of his creditor, for his satisfaction or further security, in prefer-

* It appears from No 260. that this interlocutor likewise contained these words, 'Without prejudice to the personal obligement in the bond.'

No 260. ‘ence of other creditors, to be void and null.’ Under which clauſe, it was *pleaded*, the diſpoſition in controverſy muſt be comprehended, becauſe ſaſine was taken upon it within that ſpace; and by the immediately following clauſe of the act, ‘all diſpoſitions, &c. as to this caſe of bankruptcy, are only reckoned to be ‘of the date of the ſaſine lawfully taken thereon.’

Answered for Margaret Chalmers, Let it be ſuppoſed, that her tranſaction with Riccarton had been actually made within ſixty days of his bankruptcy; nay, further, that ſhe had lent her money, and taken the ſecurity, even after actual bankruptcy; the tranſaction falls yet to be ſuſtained, becauſe the firſt mentioned clauſe annuls not diſpoſitions, &c. where money is inſtantly told down, but only where granted ‘in ſecurity or ſatisfaction of anterior debts, in prejudice of other ‘creditors.’ And the difference lies here, that by new contractions, the creditors ſuffer nothing, becauſe their debtor gets an equivalent in money for the obligation he ſubjects himſelf to, or the right he gives away; whereas, when one inſolvent applies any of his funds to the payment or ſatisfaction of a creditor, he detracts ſo much from his other creditors, to whom he was equally bound, and thereby ſo far virtually counteracts his engagements; ſo that applications of this ſort are truly invalid, through defect of power in the granter. And accordingly to this it has all along been determined, particularly No 192. p. 1120. Graham of Gorthie *contra* Campbell, where it was found, ‘That the indorſation of a bill, if for money ‘preſently advanced, fell not within this clauſe of the ſtatute.’ Alſo the Creditors of Orbiſton *contra* Hamilton of Dalziel, where the Lords found ‘the quali-‘fications alleged on the act 1696, not relevant to reduce a diſpoſition granted ‘by Orbiſton to Dalziel, except in ſo far as the ſame was made uſe of, in pay-‘ment or ſecurity of debts anterior to the diſpoſition,’ *vocè* RIGHT in SECURITY.

Replied for the creditors, If the words of the ſtatute favour this diſtinction, the ſpirit and deſign is entirely againſt it. The clauſe declaring ‘diſpoſitions, with ‘reſpect to bankruptcy, to be no better than if granted of the date of the ſaſine,’ if it has any meaning, muſt be deſigned to force creditors to take infeftment, that the circumſtances of debtors be thereby open, and people know with whom they contract: And truly that creditor cannot be conſidered as altogether innocent of fraud, who looks on, and ſees his debtor contracting a great bulk of perſonal debt, and enticing innocent people to their ruin; eaſy in the mean time, becauſe he can take infeftment at any moment, and thereby cut his fellow-creditors out of that ſubject, upon the faith of which they truſted their money. If this be the deſign of the clauſe, there is no room for diſtinguiſhing new contractions, from ſecurities granted for old ones; for *interest reipublicæ* that ſuch alſo be made public. And truly this diſtinction has no reaſonable foundation, unleſs where the deeds are executed after actual inſolvency; in which circumſtances, indeed, for the reaſons mentioned above, there is good ground for it: But let it be ſuppoſed, while a debtor is yet entire, two heritable bonds granted, the one a new debt, the other a corroboration of a former perſonal debt; for what imaginable reaſon ſhould it be, when the debtor many years afterwards becomes bankrupt, and

No 260.

both infeftments fall within the ſixty days, that the one is ſuſtained, and the other of no effect? It is evident the other creditors ſuffer no more by the one than the other; the one was no more negligent than the other, and their claims were equally onerous. And thus, in the caſe betwixt Duncan and Grant of Bonhard, No 259. p. 1228. the queſtion falling out anent an heritable bond granted for ready money, long before the bankruptcy, the LORDS found, 'That 'the bond was to be conſidered as of the date of the ſaſine; and found that the 'ſaſine being taken within the ſixty days, is void and null as to the point of 'bankrupt, without prejudice to the perſonal obligement in the bond.'

Margaret Chalmers *duplied*, If the deſign of the clauſe was, to oblige creditors immediately to take infeftment, it fell to be expreſſed in words like the following, 'That all infeftments taken within ſixty days of the bankruptcy ſhould be null, 'where there was any *mora* upon the creditor's part in taking infeftment;' whereas the words are of a quite different import; the infeftment is not made *per ſe* null, the diſpoſition or other warrant of the infeftment is only declared to be no better than of the date of the infeftment taken upon it: Suppoſing then that Margaret Chalmers's diſpoſition had been granted within the ſixty days, as a *novum debitum*, it falls ſtill to be ſuſtained by the other clauſe of the act, with the infeftment taken thereon.

'THE LORDS found the bond and aſſignation being granted at the ſame time, 'does not fall under the act of Parliament 1696.'

Fol. Dic. v. 1. p. 86. Rem. Dec. v. 1. No 69. p. 136.

1731. *June* 19.

The TRUSTEES for the Creditors of JOHN LOWIS of Merchiſton, *againſt* COLONEL FRANCIS CHARTERIS of Amisfield.

No 261.
A debtor granted an heritable bond, bearing to be for money inſtantly advanced. The creditor did not take infeftment till ſeveral years after the date of the bond, by which time, the debtor had become bankrupt. Although it was contended this was a

JOHN LOWIS, while apparent heir of the eſtate of Merchiſton, had had ſome tranſaction with Colonel Charteris of an extraordinary nature. Soon after ſucceeding to the eſtate, Mr Lowis became bankrupt, and executed a truſt-diſpoſition *omnium bonorum* in favour of Mr Archibald Murray, advocate, and others, for behoof of his creditors.

Colonel Charteris claimed as a creditor upon two heritable bonds, one for L. 3743: 4: 4 Sterling, the other for L. 1000. The firſt was dated in 1718, the other in 1721. No infeftment was taken on either till after Mr Lowis's bankruptcy in 1727.

The creditors purſued different actions againſt the Colonel relative to theſe claims. One on the ſtatute of 12th of Q. Anne, and other acts for preventing uſury; and one on the act of 1696, relative to bankruptcy.

It was *alleged* that the Colonel had never actually lent Mr Lowis one farthing. But that, about 1707 or 1708, Lowis had loſt at play, to a Count Nicola and an-