No 105.

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

The Court 'adhered.'

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

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1794. *December* 12.

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

No 106.

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

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

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

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

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

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

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

Campbell Douglas, 9th March 1784, and by Robert at London on the 20th of that month. No 206.

On the 26th March, Walter Monteath granted his brothers-in-law an heritable bond of relief over his dwelling-houſe in Glaſgow, the value of which was from L. 600 to L. 700 Sterling. This bond referred to the bond of corroboration, which it was declared had been granted on the faith of it.

On the 5th February 1785, Mr Monteath ſold his eſtate for L. 9723 : 17s. to the truſtees, who were infeft on the 24th March thereafter.

Infeftment was taken on the bond of relief, 17th October 1785, and the ſaſine afterwards recorded.

On the 7th December 1785, Mr Monteath was rendered bankrupt in terms of the act 1696. His eſtate was afterwards ſequeſtrated, and the truſtees for his creditors founding on that ſtatute, brought a reduction of the heritable bond of relief granted by him to the Meſſrs Douglas, the ſaſine on it not having been taken till within 60 days of his bankruptcy; and

Pleaded, 1ſt, The bond of relief was not a ſecurity for a *novum debitum*. The defenders had a perſonal claim for relief, independent of it, againſt Mr Monteath from the 20th March, the laſt date of the bond of corroboration; whereas, it was not ſigned till the 26th, ſo that it was granted in ſecurity of a debt which had ſubſiſted for at leaſt ſix days. Beſides, in queſtions on the act 1696, it is not the date of the bond, but of the ſaſine, which is regarded, ſo that in fact, the right now under reduction was granted in ſecurity of a debt which had exiſted nearly eighteen months. If perſons ſo nearly related to Mr Monteath as the defenders, had taken immediate infeftment on the houſe in which he lived, it would have excited the ſuſpicions of his creditors, he would inſtantly have been made bankrupt, and would thus have been prevented from proſecuting trade, and contracting further debts to their prejudice. Expediency, therefore, requires that the ſtatute ſhould reach this caſe. *See* alſo Dalrymple, p. 232. and 244. 29th January, and 12th December 1717, Grant againſt Duncan, (*infra, h. t.*); 19th January 1726, Chalmers againſt the Creditors of Riccartoun, (*infra, h. t.*)

But, *2dly*, The bond of relief was indirectly a ſecurity to the Ducheſs's truſtees for the old debt due to them, and ſo comes under the very words of the ſtatute. If it had not been for this debt, it never would have been neceſſary, and although it was directly granted to the defenders, the truſtees alone were benefited by it. If ſecurities like the preſent were ſupported, a perſon on the eve of bankruptcy, who wiſhed to give a preference to a favourite creditor, would find no difficulty in getting ſome perſon to be cautioner for him, as he could be ſecured from loſs by taking an heritable ſecurity in relief, and thus the object of the act 1696 would be entirely fruſtrated.

Answered, 1st, It may be true, that a claim of relief aroſe to the defenders on ſigning the bond of corroboration; but as it contained no obligation of relief, a ſeparate bond became neceſſary for that purpoſe, becauſe otherwiſe, the defenders, upon paying the debt, could not have rendered their claim effectual without

No 206. a proceſs at law. Both bonds, however, were executed, *unico contextu*; the bond of corroboration was ſigned by Robert Douglas at London on the 26th March, and ſuppoſing it to have been ſent off next day, it could not, according to the arrangement of the poſts at that time, have reached Glaſgow till the 26th, the date of the bond of relief; it is impoſſible therefore to conſider the bond of relief, otherwiſe than as a ſecurity inſtantly given for a *novum debitum*.

The attempt made by the purſuer to ſplit the bond into two parts, and to hold the infeftment afterwards taken on it as a ſecurity for the debt contracted by the perſonal obligation, is a refinement which has no foundation in the ſtatute, and has been long ago exploded; Kilkerran, *voce* BANKRUPT, p. 64.; 29th January 1751, Johnſton againſt Burnet and Home, No 200. p. 1134.

2*dly*, If there had been any thing fraudulent in the tranſaction; if the ſecurity had been granted to the defenders in truſt for the Ducheſs's truſtees, or as third parties interpoſed, in order to elude the ſtatute, as in the caſe, Blaickie againſt Robertſon, No 12. p. 887. it would then have been juſtly liable to reduction. But all parties in this caſe, were *in optima fide*. The truſtees made a demand on Mr Monteath, from a ſenſe of duty, that they might be enabled to lay out the money on land agreeably to the terms of the truſt, and to the opinion of counſel; and when ſecurity was offered for it, they accepted it, not ſo much from any apprehenſion of Mr Monteath's circumſtances, as that they might be ſecure of the money being paid at certain terms, ſo as to leave ſufficient time for realizing it before the truſt expired.

The motives of the defenders were equally pure. Their view was to ſerve Mr Monteath, not the truſtees; and although they ſtipulated a ſecurity over the houſe, it is clear they had no ſuſpicion of his failure, as it is ſcarce worth half the ſum they engaged for. The heritable bond did not afford even an indirect ſecurity to the truſtees. Its obligation was merely contingent. If the defenders had failed, without paying any part of the debt, the houſe would have remained unburdened to Mr Monteath and his creditors. Neither could the truſtees have prevented the defenders from renouncing this ſecurity at any time. Were it therefore in theſe circumſtances to be reduced, no man could with ſafety be cautioner for another.

The Lord Ordinary reported the cauſe on informations.

The Court, by a great majority, found, That 'the heritable ſecurity in queſtion 'fell under the act 1696.'

When the cauſe however came again before the Court, on a reclaiming petition and anſwers, in which the circumſtances attending the tranſaction were more fully brought out, it being thought to involve a new and important point, a hearing in preſence was ordered.

When it was afterwards adviſed, the Court were much divided in their ſentiments.

A majority were for ſuſtaining the ſecurity.

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The bond of relief, (it was obſerved), certainly does not come within the letter of the ſtatute, being a *novum debitum*, *quoad* the cautioners; and, in determining whether caſes of this ſort fall under its ſpirit, each muſt depend in a great meaſure on its own circumſtances. In the preſent caſe, no evaſion of the ſtatute was intended. At the time the two bonds were granted, neither the truſtees, nor the defenders, nor Mr Monteath's other creditors, had any ſuſpicion of his approaching bankruptcy. The truſtees accepted a perſonal bond of corroboration for a ſimilar ſum from his brother and partner. The defenders accepted a ſecurity not more than half ſufficient to relieve them; and ſo good was Mr Monteath's credit, that his other creditors did not proceed to diligence againſt him, although they ſaw his eſtate ſold, and infeftment publicly taken on it. If in ſuch circumſtances the bond of relief were reduced, no perſon could with ſafety become cautioner for a merchant, and many caſes might be figured where this would be attended with the greateſt hardſhip. For inſtance, bankers are not fond of ſecurity on land at any time, indeed till the preſent bankrupt act, it could not be given for future advances on a caſh-account, yet were the purſuer's doctrine well founded, even merchants poſſeſſed of land would find it difficult to get their friends to become perſonally bound with them, (eſpecially in times of general diſtruſt, when ſuch aid is moſt needed), as the validity of the heritable ſecurity which they could give in relief, would depend on their remaining ſolvent for ſixty days.

On the other hand, ſeveral of the Judges remained of opinion, that the interlocutor ſhould be adhered to. Nothing, it was obſerved, would tend ſo much to narrow the beneficial operation of the ſtatute, as to make every caſe of this ſort a queſtion of *bona* or *mala fides*. There are certain leading features in every tranſaction, by which it is eaſy to diſtinguiſh whether it falls within its ſpirit. Although, in this caſe, both the truſtees and the defenders are much above any ſuſpicion of planning a fraud, ſtill the effect of the tranſaction was to give a ſecurity for an anterior debt, and although the defenders were not fully ſecured by the bond of relief, yet it was the only ſecurity which Mr Monteath had to give.

The Court found 'That the heritable ſecurity in queſtion did not fall under 'the act 1696.'

A reclaiming petition was refuſed without anſwers.

Lord Ordinary, *Abercromby*. Act. *Solicitor-General Blair*, *Arch. Campbell*, *Moodie*.
Alt. *Lord Advocate Dundas*, *Rolland*, *Maconochie*, *Arch. Campbell*, junior. Clerk, *Menzies*.

Fol. Dic. v. 3. *p.* 56. *Fac. Col. No* 144. *p.* 328.

R. Davidson.