1717. *January* 29. PATRICK GRANT *against* ALEXANDER DUNCAN.

No 259.
An heritable bond was granted for ready money paid ſome time before bankruptcy, but upon which ſaſine was not taken till within the 60 days. The Lords found the bond was to be conſidered as of the date of the ſaſine, and therefore null as to the point of bankruptcy, but without prejudice to the perſonal obligation.

PATRICK GRANT, being a creditor to Alexander Hamilton, did raiſe a declarator of bankrupt againſt the ſaid Alexander, and Alexander Duncan, who had obtained an infeftment of annualrent in the bankrupt's lands, within 60 days before he fled; and after probation, the qualifications of the act of Parliament were found proven.

It was *alleged* for Alexander Duncan: The act of Parliament did not concern his caſe; becauſe the ground of his infeftment is not a bond granted in payment or ſatisfaction of any preceding debt, but is an heritable bond granted for money *bona fide* lent and paid down by the defender's father, when the common debtor was in ſufficient credit, though ſome time after he broke ſuddenly.

It was *answered* for the purſuer: The fact is as follows. The defender's heritable bond is upon the 21ſt of June 1709; the purſuer finding nothing on record againſt the common debtor, became creditor in the ſum of L. 422 the firſt of Auguſt thereafter, and infeftment followed upon the defender's debt the 13th of October; Hamilton broke in the month of November thereafter; and the purſuer did proſecute diligence upon his debt without delay: and, from that, 1*mo*, alleges, that the defender is in the caſe of the act of Parliament, in as far as his infeftment is taken within a month of the common debtor's flying: 2*do*, The infeftment is for further ſecurity of the perſonal obligement to pay, and ſo is in the preciſe words of the act, which provides, that all voluntary deeds by dyvors, at, or after their becoming bankrupt, or within the ſpace of 60 days before, in favour of any of their creditors, for ſatisfaction or further ſecurity in preference to other creditors, ſhall be void and null: 3*tio*, His caſe is in the meaning and reaſon of the law, which was to prevent the frauds of ſinking debtors, that it ſhould not be in their power to favour a creditor in *meditatione fugæ*; and that creditors keeping up their precepts of ſaſine, whereby others finding no real diligence might be induced to lend, ſhould be reckoned to have contracted with their debtors only at the dates of their ſaſines; and if the granting of original bonds would elude the act, there would be no difficulty to get friends to advance the money, and get new ſecurities, or creditors might retire their former ſecurities, and take new original bonds. And albeit the act does ſpecially provide againſt that practice, yet co-creditors would not know the fact of retiring former debts, nor have any mean of probation, but the parties oath, which proves oft-times dangerous; beſides ſuch original debts might be aſſigned to third parties ignorant of the facts, and thereby the act eluded.

It was *replied*: The act was not intended to be a ſnare to creditors laying down their money *bona fide*, who can never be preſumed to deal fraudulently; but was intended againſt creditors tranſacting former debts for new ſecurities, or accepting of corroborations; and the defender is neither in the words nor meaning of the act. The words of the act provide againſt payment or further ſecurity of creditors, that is to be underſtood anterior creditors; for an original bond is not

ſaid to be granted to a creditor, but he who lends the money becomes creditor by the bond. 2*do*, Though the ſaſine be taken within 60 days, in that caſe the act only provides that the bond ſhall be reckoned of the ſame date with the ſaſine; but ſtill it is an original bond for money truly paid *bona fide*. 3*tio*, Neither is it to be regarded, that the precept of ſaſine is for further ſecurity of the debt, becauſe the bond containing a perſonal obligement and precept of ſaſine, is a tranſaction for ſecurity of the money advanced; whereas a right for further ſecurity, in the meaning of the act, is a corroborative right of a former debt. 4*to*, The inconveniences inſiſted on are but imaginary; for this act provides more amply againſt the frauds of bankrupts, than the law of any other nation: and though it may be difficult to prove the fact of receiving bonds in ſatisfaction of former debts, in ſuch a caſe *non deficit jus, ſed probatio*; and the Lords, in ſeveral former caſes, have found, as the defender now pleads, that ſuch as acquire *bona fide* are ſecure, No 192. p. 1120. Campbell of Glenderowal againſt Graham of Gorthie, in the caſe of a bill of exchange, where the act was only found to take place, if the ſame was for ſecurity, and not for money received; and lately, in the caſe of the Creditors of Orbiſton, where the Lords ſuſtained a diſpoſition, in ſo far as it was not granted in ſatisfaction or ſecurity of former debts, *voce* RIGHT in SECURITY. No 259.

It was *duplied*: The preſent caſe differs greatly from thoſe formerly determined; for a bill of exchange may ſafely be negotiated and purchaſed *bona fide*; and a diſpoſition in like manner. But, in this caſe, there is a bond containing a perſonal obligement for payment of the money, and a precept of ſaſine for further ſecurity; and no ſaſine being taken, creditors intervened. The perſonal obligement is not quarrelled nor quarrellable as in the former caſes, upon which the defender might have done all diligence; but the effect of the act is only againſt the ſaſine in preference to other creditors.

'THE LORDS reduced the ſaſine.'

Dalrymple, No 168. *p.* 232.

*** Dalrymple mentions the ſame caſe again of this date:

1717. *December* 12.—PATRICK GRANT purſues a declarator of bankrupt againſt Alexander Hamilton, calling Alexander Duncan, who had obtained infeftment upon an heritable bond on the bankrupt's lands, within 60 days before he fled.

This cauſe being debated the 29th January 1717, the Lords did reduce Alexander Duncan's infeftment; he gave in a reclaiming bill in due time after the interlocutor, which having lyen over till this day, the ſame, with the anſwer, was adviſed; and the reaſoning upon the bill and anſwers was to the effect following:

For the petitioner, it was *alleged*, That he was not at all in the caſe of the 5th act, Parliament 1696, which annuls all deeds done by bankrupts in favour of their creditors, after they are become bankrupt, or within 60 days before; becauſe, admitting Hamilton the debtor was bankrupt, in the terms of the act of Parliament, and that his infeftment was within 60 days before he fled; yet his

No 259. bond was not granted in payment, or further ſecurity of any former debt, but was granted upon real advancing of the money; which was *bona fide* lent before his debtor fled, and when he was looked upon to be ſufficiently ſolvent.

It was *anſwered*, The act of Parliament does annul all deeds done by a bankrupt, after, at, or within 60 days before he does become bankrupt; the preciſe words are: 'Declares all and whatſoever voluntary diſpoſitions, aſſignations, or 'other deeds directly or indirectly, by the foreſaid bankrupt, in favours of any 'of his creditors, either for his ſatisfaction or further ſecurity in preference to 'other creditors, to be void and null.' So it is the defender's bond, and infeftment upon it, are granted to him, as a creditor, in preference to other creditors; and therefore void and null.

It was *replied*, The foreſaid clauſe of the act relates only to deeds of bankrupts, in favour of ſuch as were creditors anterior to theſe deeds; which that law annuls, in as far as it mentions deeds done for ſatisfaction of creditors, that is to ſay, ſuch as were formerly creditors, who obtain deeds or gratifications, for their payment and ſatisfaction; and the other members of deeds thereby annulled, are ſuch as are made for further ſecurity to creditors, that is, anterior creditors; whereas the defender became only a creditor by the deed quarrelled, which was obtained upon real payment of money at the time; and if the law were not ſo interpreted, it would prove a ſnare to many; for who can poſſibly know that the perſon with whom he tranſacts, may not prove bankrupt within 60 days; in which caſe, he ſhould loſe his debt; and the only clauſe in the act that concerns the defender's caſe, is a poſterior clauſe, providing, That all rights, whereupon infeftment may follow, granted by bankrupts, ſhall only be reckoned (as to the caſe of bankrupt), to be of the date of the ſaſine taken thereupon; and the defender's bond was indeed much more than 60 days before the granter fled; but the ſaſine was within the 60 days; and therefore the defender yields, that his bond ſhall be reckoned as if it had been of the date of the ſaſine; but then his debtor was a ſtanding man to whom he might have lawfully, and *bona fide* lent his money; and the occaſion of that clauſe was, that in former caſes of bankrupt, infeftments were taken upon bonds of an old date; whereby the bankrupt's eſtate in a great meaſure was exhauſted by debts, which had appeared in no record; and therefore, it was very well provided, that ſuch latent debts ſhould be reckoned of the date of the ſaſine; which ſaſine, being taken after a bankrupt was fled, will, by the common law, be null and ineffectual, when the bonds and warrant of them were conſtructed of the ſame date; but if ſaſine were taken within 60 days, when the debtor was ſtanding out, and when it was lawful to have contracted with him, the law provides nothing in prejudice of ſuch ſaſines further than that the warrants are reckoned of the ſame debt.

It was *duplied*, That the whole queſtion turns on this ſingle point, Whether the ſaid act annulling deeds of bankrupts, does only relate to ſuch deeds as are done in favour of anterior creditors; and the purſuer did contend that the deſign of the act was to annul all deeds of bankrupts, either after their becoming bank-

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.'