No 264.

THE LORDS found, That the diſpoſition to the ſuperior behoved to be held as of the date of the reſignation *ad remanentiam*. *See* No 6. p. 4.

Reporter, *Murkle.* Act. *H. Home.* Alt. *Lockhart.* Clerk, *Kirkpatrick.*
Fol. Dic. v. 3. *p.* 67. *D. Falconer, No* 91. *p.* 101.

1751. *January* 29. JOHNSTON *againſt* BURNET and HOME.

No 265.
A ſecurity for a *novum debitum* found not to fall under the clauſe of the act 1696, relative to the date of the ſaſine.

THOMSON had a credit from the Britiſh Linen Co. for which he and Home granted bond to the Company; and, of the ſame date, Thomſon and Burnet gave a bond of relief to Home, in which he diſponed to him certain ſubjects in ſecurity of his relief: on which Home took infeftment. A prior creditor of Burnet's purſued reduction of this heritable bond, on the ground, that, before Home's infeftment, Burnet had been rendered notour bankrupt in terms of the act 1696; and, by that ſtatute, the bond muſt be conſidered as of the date of the ſaſine. *Answered*, The clauſe in the ſtatute, declaring diſpoſitions by bankrupts to be held as of the dates of the ſaſines, concerns only ſecurities granted to prior creditors, but does not affect *nova debita*, ſuch as the preſent.——THE LORDS aſſoilzied from the reduction.

See The particulars of this caſe, No 200. p. 1130.

Fol. Dic. v. 3. *p.* 67.

1758. *December* 20.
Sir WILLIAM MAXWELL of Springkell, *againſt* BENJAMIN BELL.

No 266.
A perſon, at clearing accompts with his partner, diſponed to him an heritable debt in payment of the balance, by aſſigning the precept for infeftment. He became bankrupt before infeftment was taken; and a creditor had arreſted in the interim. In a competition, urged for the diſponee, that the ſtatute applies only to deeds

WILLIAM SCOTT and BENJAMIN BELL, carried on for many years, a trade of purchaſing cattle in Scotland, and ſelling them in England; which began in the year 1720.

In 1727, they acquired from John Somervel, *equally betwixt them*, an heritable debt on the eſtate of Crowdiknow, for L. 350, upon which Somervel had been infeft. The heritable bond and conveyance, in their favour, was produced in the ranking of Crowdiknow's creditors.

Upon the 8th of April 1745, a final clearance was made between them, by a ſtated account, in which the whole of this debt was ſtated to the debit of Bell; and after ſtating every other article, the balance came out due to Scot by Bell L. 454. A diſpoſition was the ſame day executed by Scot in favour of Bell, of Scot's ſhare of this debt, aſſigning him to Somervel's precept. Bell afterwards paid to Scot the balance due by the account.

In the year 1746, Bell put Scot's diſpoſition into the general regiſter.

In 1748, Scot became a bankrupt in terms of the act 1696.

In July 1749, Sir William Maxwell, as creditor to Scot, arreſted in the hands of Graham, purchaſer of Crowdiknow, in order to affect Scot's ſhare of the an-

No 266.
containing an immediate warrant to infeft; and that this was not granted for a prior debt, being a conſequence of an accounting between partners. The caſe was found not to fall under the act of 1696. The Court were chiefly moved by the circumſtance of the *copartnery*.

nualrents of this debt; and, in February 1750, obtained an adjudication againſt Scot, in order to attach the debt itſelf.

In July 1750, Bell took infeftment upon Somervel's precept, which, as to Scot's ſhare of the debt, proceeded upon the diſpoſition 1745.

Sir William Maxwell brought an action of furthcoming upon his arreſtment, in the courſe of which he alſo produced his adjudication.

Benjamin Bell appeared, and claimed to be preferred upon his diſpoſition from Scot, completed by infeftment in July 1750.

Pleaded for Sir William Maxwell: By the ſtatute 1696, all voluntary diſpoſitions by a bankrupt in favour of his creditor, within ſixty days before his bankruptcy, in preference to other creditors, are declared null. And it is further declared, 'That all diſpoſitions, heritable bonds, or other heritable rights, where-'upon infeftment may follow, granted by the foreſaid bankrupts, ſhall only be 'reckoned as to this caſe of bankrupt to be of the date of the ſaſine lawfully 'taken thereon.' The diſpoſition by Scot to Bell, muſt therefore be held as of the date of the infeftment taken in July 1750, which was two years after the bankruptcy.

2dly, Sir William is at any rate preferable, upon his arreſtment, to the annualrents of the debt preceding July 1749, when the arreſtment was uſed; becauſe the diſpoſition in favour of Bell was not completed by intimation or infeftment before that time.

Anſwered 1ſt, The act 1696 only applies to diſpoſitions or heritable bonds, which contain an immediate warrant for infeftment; whereas the diſpoſition by Scot to Bell conveyed only Somervel's precept, upon which the infeftment was afterwards taken. Beſides, the diſpoſition by Scot was not granted for ſecurity of a prior debt, but for money ſoon after advanced by Bell. At any rate, the act 1696 cannot apply to this caſe; for the heritable debt in queſtion was a copartnery-ſubject, and, at clearing the copartnery accounts, was conveyed to one of the partners, as a diſtribution of the company-effects; which could not be overturned by the ſubſequent bankruptcy of either.

2dly, If Bell has right to the heritable debt itſelf, he muſt alſo have right to the annualrents: The diſpoſition in his favour was ſufficient to diveſt Scot without intimation, and muſt carry the debt and all its advantages.

Replied: It is true, that it was found, in January 1734, Creditors of Scot of Blair *contra* Charteris, No 262. p. 1239. that the act 1696 did not apply to the caſe of diſpoſitions not containing ~~immediate warrant~~ for infeftment: That judgment, however, proceeded upon a principle of law, the contrary of which was afterwards eſtabliſhed. It was at that time held to be a principle of law, that ſuch diſpoſitions did completely denude the granter. This had been found, 20th November 1733, Sinclair againſt Sinclair, *voce* RIGHT IN SECURITY; but it was afterwards adjudged and eſtabliſhed, 22d June 1737, Bell of Blackwoodhouſe, Rem. Dec. v. 2. p. 15. *voce* COMPETITION, that a poſterior diſponee to ſuch kind of rights, completing his title by infeftment upon the precept aſſigned, was

No 266. preferable to a prior diſponee, as being the firſt who completely denuded the granter: And it muſt follow, of conſequence, that in this caſe Bell had not denuded Scot, or completed his right, till July 1750, after Scot's bankruptcy. Suppoſing the conveyance by Scot to Bell to have been granted for a ſum advanced, or ſoon after paid, this would not be a good defence againſt the reduction on the act 1696; as will appear by the deciſions collected on this ſubject; 29th January and 12th December 1717, Grant *contra* Duncan, No 259. p. 1228. And upon that point, after a contrary deciſion, 19th January 1726, Chalmers againſt Riccarton, No 260. p. 1231. there followed two other caſes in terms of the firſt deciſion; 19th June 1731, Creditors of Merchiſton, No 261. p. 1233.; 25th November 1735, Truſtees of Mathiſon's Creditors, No 263. p. 1240. In each of theſe three caſes, the diſtinction between *nova debita* and prior debts, was rejected. Neither is the pretext of a co-partnery a good defence; for in this caſe there appears to have been no permanent company between Scot and Bell, but a joint trade carried on from year to year, and the profit annually divided. At any rate, this heritable debt was no copartnery-ſubject, but diſponed to them by Somervel, not as partners, but equally betwixt them; and it was not conveyed by Scot to Bell as a diſtribution of the company-effects, but, in ſome meaſure, ſold to him for money he was afterwards to pay.

2*dly*, As to the annualrents, the diſpoſition in favour of Bell did not denude Scot till infeftment was taken; and therefore, till then, the diſpoſition only imported an aſſignation as to the annualrents, which was not completed by intimation till after the arreſtment; for the date of a diſpoſition not completed, can have no effect in a queſtion with third parties. In two ſimilar caſes, an arreſtment was preferred, as to the rents of lands, to a prior diſpoſition upon which infeftment was not taken till after the arreſtment; 22d November 1633, Warnock *contra* Anderſon, Durie, p. 693. *voce* COMPETITION; 24th June 1642, Lord Forreſter *contra* Caſtlelaw, Durie, p. 896. *voce* COMPETITION.

The Court ſeemed chiefly moved by the defence founded on the coparrtnery.

'THE LORDS found, That Benjamin Bell was preferable to Sir William Maxwell, as to the principal ſum and annualrents in queſtion.' *See* COMPETITION.

For Sir William Maxwell, *Johnstone, Ferguson.* Alt. *Montgomery.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 3. *p.* 67. *Fac. Col. No* 151. *p.* 268.

W. Johnston.

No 267. In this caſe ſaſine was taken more than 60 days before the bankruptcy, but the regiſ-

1782. *December* 13. DOUGLAS, HERON, and Company, *againſt* MAXWELL.

IN this caſe the general queſtion occurred, How far an infeftment granted by a perſon who was rendered bankrupt within ſixty days of the regiſtration was effectual?

The arguments were the ſame with thoſe formerly urged in ſimilar caſes.

THE LORD ORDINARY pronounced the following interlocutor: 'Having con-