1793. *June* 5.

The TRUSTEE for the Creditors of JOHN BROUGH, *againſt* GEORGE SPANKIE and JAMES JOLLIE.

No 222.
An heritable bond of relief, upon which an infeftment had not been taken till within ſixty days of bankruptcy, found to fall under the ſtatute 1696, altho' in implement of an obligation in writing, granted at the time the original debt was contracted.

In oppoſition to No 220. p. 1170.

IN this caſe, which has a ſtrict connection with No 216. p. 1160. George Spankie and James Jollie, on the 6th October 1787, accepted a bill along with John Brough, for L. 500 Sterling.

Of the ſame date, Mr Brough granted a holograph miſſive, which, after narrating, that they were only cautioners for him in this bill, concluded thus: 'And 'ſeeing I agreed to give you an heritable ſecurity in relief of the ſaid ſum, pre-'vious to your conſenting to join me in ſaid bill, I oblige myſelf to do ſo accord-'ingly, over my property in Regiſter Street, and that as ſoon as the proper 'writings can be made out.'

In terms of this miſſive, Mr Brough, on the 7th December following, granted Meſſrs Spankie and Jollie an heritable bond of relief, on which infeftment followed the ſame day.

Theſe gentlemen having agreed that Mr Brough ſhould be held as bankrupt on the 17th January 1788, for the reaſons mentioned in No 216. the truſtee for his creditors objected to their ſecurity, as being obtained within 60 days of this period, and ſo falling under the act 1696.

The counſel on both ſides referred to their papers in the caſe alluded to; and on the part of the defenders it was further urged, that the caſe, Houſton and Company againſt Stewart, No 220. p. 1170. was preciſely in point, it having been there found, that an heritable ſecurity, when granted in conſequence of an obligation contemporary with the original debt, was to be held in law as granted of the ſame date with it.

On the other hand, the objectors founded on the following additional authorities; Bankton, b. 1. tit. 10. § 104.; Eccles againſt the Creditors of Mackerſton, No 197. p. 1128.; and Beg againſt Peat, in 1769, Fac. Col. No. 95. p. 175. *voce* RANKING and SALE. They likewiſed contended, that a holograph 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.

The Lord Ordinary at firſt repelled the objection, but afterwards took it to report, on informations.

Obſerved on the Bench: The judgment in the caſe of Houſton and Company againſt Stewart is erroneous. Till the heritable bond was granted, Meſſrs Spankie and Jollie were mere perſonal creditors; and it is contrary to the principles of our law, as laid down both by Lord Bankton; and by M'Kenzie in his Commentary on the act 1621, that an obligation to grant an heritable ſecurity ſhould entitle the

No 222. bankrupt voluntarily to fulfil it, after he falls under the retroſpect of the act 1696.

The Court unanimouſly ſuſtained the objection.

Lord Ordinary, *Dreghorn.* Act. *Solicitor General, Patiſon.*
Alt. *Dean of Faculty, Cullen.* Clerk, *Mitchelſon.*

Fol. Dic v. 3. *p.* 61. *Fac. Col. No* 57. *p.* 126.

Davidſon.

SECT. VII.

Of Voluntary Deeds creating Preference.

1724. *July* 31.

The CREDITORS of MR DAVID WATSON, *againſt* ROBERT CRAMOND.

No 223.
A debtor granted an heritable bond of relief. The cautioner to whom it was given, was infeft more than 60 days before the debtor's bankruptcy; who had not been ſerved heir in the property when the infeftment was taken. He made up his titles while in the ſanctuary; the benefit of which was found to accreſce to cautioner.

MR WATSON having granted an heritable bond of relief to Mr Cramond, he was infeft thereon more than 60 days before Mr Watſon's bankruptcy.

Mr Watſon had not been ſerved heir in the lands upon which the infeftment of relief was granted; but he gave a procuratory for ſerving him within 60 days of the bankruptcy, and the infeftment upon that ſervice was after he had retired to the Abbey.

In a competition betwixt Mr Cramond and Watſon's Creditors, it was *objected* to Mr Cramond's preference in virtue of his infeftment, that the procuratory for the ſervice was after or within 60 days of the bankruptcy, and that being a voluntary deed by Watſon, the ſame was null by the act of Parliament 1696, being plainly intended to eſtabliſh a preference to Mr Cramond upon his infeftment of relief, which till then was inſufficient, Mr Watſon not being infeft nor ſerved heir to his predeceſſor, to whom he was to make up a title to the lands.

It was *anſwered* for Mr Cramond, That as his infeftment could not be reduced, being more than 60 days before the bankruptcy, ſo neither could the procuratory granted by Mr Watſon for ſerving him heir; becauſe it could not be conſidered as a deed by the bankrupt to one of his creditors in prejudice of the reſt, but it ſerved to make up the common debtor's title, which might be beneficial to all; and any advantage Mr Cramond had by it was a conſequence of the law, whereby it accreſced to his prior infeftment.

THE LORDS found, That Mr Watſon's poſterior infeftment did accreſce to Mr Cramond, and therefore repelled the nullity objected.

Act. *Hay & R. Craigie.* Alt. *Garden & W. Grant.* Clerk, *Murray.*

Fol. Dic. v. 3. *p.* 61. *Edgar, p.* 117.

*** *See* The caſe Creditors of Gratney, p. 1127. and *poſtea voce* COMPETITION.