1771. *February* 15.

MESSRS. MANSFIELD, HUNTER, and Company, and Others, creditors of John Nisbet of Northfield, *against* THOMAS CAIRNS.

No. 6.
Money having been advanced upon a communing and agreement, that an heritable bond should be granted, such security, though within sixty days of the granter's bankruptcy, not reduceable upon the act 1696. C. 5.

IN November 1769, Nisbet of Northfield applied for the loan of £1500, which belonged to Thomas Cairns. The person intrusted by Cairns to lend this money was William Kerr, who again employed William Hart, writer in Edinburgh, his ordinary agent. Cairns's money was remitted to the hands of Hart; and it was agreed that it should be lent to Nisbet upon an heritable security; but before the searches into the records and the other necessary measures could be accomplished, Hart had advanced to Nisbet £1000, upon his promissory note; and on that footing matters stood till the 19th of January 1770, when Nisbet granted to Cairns the heritable bond agreed on for £1500, upon which infeftment was taken the 20th February thereafter.

Upon the next day, the 21st February, Nisbet retired to the Sanctuary; and diligence having been used against him, he was rendered bankrupt. The pursuers, creditors of Nisbet, having brought a reduction of this heritable security against Cairns, founding upon the act 1696, C. 5. and concluding to have it set aside as a partial preference granted by the bankrupt in favour of Cairns, to the prejudice of his other creditors, within 60 days of his bankruptcy, the Lord Ordinary, on the 22d December 1770, pronounced an interlocutor assoilzieing from the reduction.

In a reclaiming petition, the pursuers pleaded:

Though the heritable bond bore the money to have been borrowed at Martinmas 1769, and stipulated interest from that date; yet as, from the account produced, it appeared that £311. 13*s*. 2*d*. had been advanced upon the 11th November, £500 upon the 30th, and £500 more upon the 12th December, these sums, amounting to £1311. 13*s*. 2*d*. being all previous to the actual granting of the bond, of course stood for several weeks upon Nisbet's personal credit alone. When, in these circumstances, Nisbet granted a farther security for that sum, not only within the retrospective period of the statute, but upon the very eve of bankruptcy, it fell under both the words and meaning of the enactment.

The statute was expressly directed against all deeds granted either for satisfaction or farther security; and as the money here was held upon personal security alone for several weeks, the heritable security afterward granted could not be considered as a security for a new contraction, but as a farther security in favour of an anterior creditor. It made no difference that an heritable security might have been communed upon and agreed to at the time the money was lent: If it was intended to conclude such a transaction free of challenge, it should have been done *simul et semel*, by delivering the money and receiving the heritable bond; but if, in fact, the borrower was entrusted with the money

No. 6. upon his personal security alone, no previous communing could authorise the debtor to grant such security when in a state of notour bankruptcy. Neither would it have altered the case, although, at the date of advancing the money, an express obligation in writing had been taken from Nisbet to grant an heritable bond; for if the implementing of that obligation had been delayed till the creditor was in a state of bankruptcy, it would have fallen under the statute. 4th Feb. 1729, Eccles *contra* Creditors of Merchiston, No. 197. p. 1128. The case here was stronger; as the obligation to grant the heritable bond stood upon nothing but verbal communings, proveable only bv Nisbet's oath, which, in a state of bankruptcy, was not admissible to the prejudice of his other creditors.

The defender's argument, that he was not creditor to Nisbet anterior to the date of the bond, the money which Nisbet had received being a loan made to him by Hart upon his own risk, was contradictory to what was elsewhere maintained, that the bond was nothing more than the security originally agreed on. It was farther disproved by the bond itself, which bore that Nisbet had become debtor to Cairns two months prior to the date of the security. It was also absurd to suppose that the statute could be evaded by changing the creditor; for whether the debt subsisted in the person of Hart for his own behoof or as a trustee for the defender, it certainly was a subsisting debt before the date of the bond; which must accordingly be held as an additional security for that debt, in which ever name it was taken.

Answered.—The present case was neither within the intendment nor the words of the statute. It appeared from the narrative, that the purport of the enactment was to remedy the abuse still arising from the frequency of *fraudful alienations* made by bankrupts in favour of their creditors; which was not surely the character of the present transaction. The words of the statute had as little application. These expressly related to the granting of *new* securities in favour of debts *formerly* contracted, and for which the creditor was desirous to receive, and the bankrupt willing to give, *farther* security. But they could not apply to a case where no former security had been granted, but where the same only was *established* which had been agreed on, and upon the faith of which alone the creditor had given his money.

When the entire transaction was duly considered, there was no foundation for the pursuers argument. The advances made, and circumstances that occurred betwixt the communing and granting the heritable bond, were merely preliminary to the final close of the business, whenever that should take place. The whole fell properly to be considered as *unicum negotium*; and supposing the money had been put into the hands of Nisbet by the defender, at the time Kerr intrusted it with Hart, still the actual advances, and the extending the security, ought not to be separated, so as, by a critical and judaical construction of the statute, to cut down the bond. The case of Eccles *contra* the Creditors of Mercheston did not apply. In that case there were not only two separate se-

curities, but two separate transactions; while, in the present, there was but one transaction, one debt, and one security. No. 6.

The pursuers' argument rested upon the supposition, that, previous to the date of the bond, the defender was merely a personal creditor of Nisbet's for this sum. But the reverse of this was the fact; for all the advances were made by Hart at his own risk, and upon a bill or note granted by Nisbet to him; and if Hart had failed previous to the granting of the heritable security, he, and not Nisbet, would have been held as the defender's debtor. No inference could be drawn from the narrative of the bond, which bore that the money had been borrowed as at Martinmas last. It was well known, that such narratives occurred every day in the course of business, always indeed when money was borrowed between terms; but it never was maintained that this mode of transacting made such debts, truly *nova debita*, to be regarded as securities only for prior debts. It was equally a mistake to say there was here an old debt and a new creditor; as in fact both the debt and the creditor were new upon the 19th of January when the bond was granted.

It was observed upon the Bench, That where money was advanced in consequence of a communing, that an heritable security should be granted, such bond was truly a *novum debitum*, and did not fall under the statute.

The Lords accordingly adhered.

Lord Ordinary, *Kennet*. For Mansfield, &c. *Macqueen*.
Clerk, *Kirkpatrick*. For Cairns *Sol. H. Dundas*.

R. H. *Fac. Coll. No. 77. p. 222.*

1771. *July* 16.

THOMAS MANSON, Writer in Edinburgh, *against* JOHN ANGUS, Merchant in Edinburgh.

No. 7.
Reduction upon the act 1696, c. 5. —Deposition of a bill of exchange, in security of a former debt, falls under the statute.

ANGUS had for several years been engaged in different transactions with Andrew Farquhar, in furnishing him with goods from his shop, and in discounting and giving him cash, on his own acceptances, for his bills. In the course of these, Farquhar had indorsed to Angus two bills, one for £110, accepted by Neil Campbell, and another for £50, accepted by John Austin. Payment of these having been demanded from the accepters without effect, Angus, upon the 5th January 1767, applied to Farquhar; who offered to indorse him a bill for £255, drawn by Thomas Johnston of Glasgow upon Johnston and Smith in Edinburgh. Farquhar and Angus went immediately to the house of Johnston and Smith, who demurred as to accepting or making payment of the bill unless they were allowed to retain a part of the contents on account of a debt due by Farquhar. This matter was not then settled; but