1790. *February* 19.

The TRUSTEE on the Sequeſtrated Eſtate of ANDREW SWINTON, *againſt* SIR WILLIAM FORBES, JAMES HUNTER, and COMPANY.

No 224.
A party was debtor to his bankers in various bills. He offered them, in ſecurity, a vendition to a ſhip, which they refuſed. He found a cautioner, who joined in a promiſſory note to them, to whom he gave the vendition. In three weeks after, he was notour bankrupt. The promiſſory note found not to fall under the act 1696.

SIR WILLIAM FORBES and COMPANY were creditors in ſeveral bills of exchange granted by Andrew Swinton. Theſe bills having been diſhonoured, letters of horning and caption were iſſued.

Being unable to pay the ſums due, Swinton applied to a gentleman of the moſt undoubted credit, who agreed to interpoſe his ſecurity, by indorſing to Sir William Forbes and Company a promiſſory note ſubſcribed by Swinton. On the ſame day, a vendition of a ſhip belonging to Swinton was executed in favour of the cautioner. Within three weeks after, Swinton was rendered bankrupt in terms of the act 1696.

Afterwards a ſequeſtration was awarded; and the truſtee having ſignified his intention to challenge the above-mentioned tranſaction, the cautioner preferred a bill of ſuſpenſion, in which he *contended*, That the efficacy of his obligation depending on that of the vendition, he could not be obliged to pay, until it was determined whether the transference in his favour was effectual or not.

This bill of ſuſpenſion was refuſed. An action was then brought by the truſtee on Swinton's ſequeſtrated eſtate, for ſetting aſide the promiſſory note granted by the bankrupt, and indorſed by the cautioner, and alſo the vendition of the ſhip, as falling under the ſtatute of 1696. A proof was offered, that before the interpoſition of the cautioner, Swinton had propoſed to execute the vendition in favour of Sir William Forbes and Company; and that the ſubſequent bargain had been completed with the knowledge of the agent employed by them in this buſineſs. The purſuers

Pleaded: The ſtatute of 1696 ſtrikes againſt all ſecurities, directly or indirectly, granted by a bankrupt in favour of a particular creditor to the prejudice of the reſt. It muſt therefore be fatal to the preference here obtained by Sir William Forbes and Company. It is not neceſſary, in ſuch a caſe, that the preferred creditor ſhould at the time be in the knowledge of the wrong which is intended; it is enough that the granting of the ſecurity by the bankrupt, was ſuch as is reprobated by the law. In the preſent inſtance, however, it is evident, that Sir William Forbes and Company, or, what is the ſame thing, the perſon employed by them, knew the whole circumſtances of the tranſaction. Such was the embarraſſed ſituation of the debtor, that no ſecurity immediately given by him could be of any uſe; and thus the interpoſition of the cautioner is to be conſidered merely as a cover, for obtaining, in an indirect manner, a right equally injurious to the creditors.

To tranſactions of this kind the Court has often refuſed its ſanction. Thus in a caſe, where, in order to give to an heritable ſecurity obtained by a favourite creditor the appearance of a new loan, it was contrived, that the creditor ſhould

No 224. advance the money to a truſtee, in whoſe name the infeftment ſhould be taken; the ſecurity was ſet aſide, in the ſame manner as if it had been immediately granted to the creditor himſelf. In a more recent inſtance, where a bankrupt, deſirous of relieving his cautioner, had obtained a farther loan from the creditor, upon giving an heritable ſecurity for the whole ſums due by him, the infeftment, ſo far as it tended to relieve the cautioner, was annulled. There, it was contended, that the cautioner was wholly ignorant of the circumſtances of the debtor; it even appeared, that he had afterward truſted him with much larger ſums on his perſonal ſecurity only; but this did not prevent the operation of the ſtatute, 9th March 1781, Blaickie *contra* Robertſon, No 12. p. 887.; Grant of Artamford *contra* the Creditors of Grant in 1789.*

Answered: For annulling a deed in conſequence of the ſtatute of 1696, it is not enough that one of the creditors has obtained ſome additional ſecurity within the 60 days immediately preceding public bankruptcy. It muſt alſo be ſhown, that by means of this ſecurity, thoſe funds which otherwiſe would have been divided among the creditors at large, have been appropriated to a favourite individual. Without this, the former have no intereſt to challenge the tranſaction, however beneficial it may have been to the latter.

This general rule was not broken through in the caſes referred to on the other ſide. In that of Blaickie *contra* Robertſon, the money for which the heritable ſecurity was granted had been advanced by the favourite creditor, and immediately returned to him, ſo that the wrong done to the other creditors was apparent. So too in the ſubſequent caſe, it was juſtly found to make no difference, whether the debtor, within the 60 days before his bankruptcy, had granted an heritable bond of relief to his cautioner, or to the creditor in whoſe favour the cautioner had interpoſed his ſecurity.

The preſent caſe is widely different. Unleſs it could be ſhown that the cautionary engagement, effected by the indorſation of the bankrupt's promiſſory note, and the vendition of the ſhip in favour of the cautioner, were the mutual cauſes of each other; it is evident that the former, by which the creditors of the bankrupt were no wiſe injured, may be ſuſtained, while the latter, if really fraudulent, may be ſet aſide.

It was ſeparately *contended* for the purſuers, That the mere granting of the promiſſory note was injurious to the creditors; Sir William Forbes and Company being thus enabled to rank more than once for the ſame debt. No attention, however, ſeems to have been paid to this argument.

The Lord Ordinary ſuſtained the reaſons of reduction: thus ſetting aſide the indorſation in favour of Sir William Forbes and Company, and the vendition obtained by the cautioner. And this judgment was acquieſced in by the cautioner, although he preferred a repreſentation to the Lord Ordinary, craving, that his claims of repetition againſt Sir William Forbes and Company might be reſerved.

* Not collected. *See* APPENDIX.

No 224.

After advising a reclaiming petition for Sir William Forbes and Company, with answers, the LORDS altered the judgment pronounced by the Lord-Ordinary; and found, That the granting of the promissory note by the bankrupt did not fall under the statute of 1696.

It seemed to be the opinion of the Court, that if there had been any concert between the parties, for the purpose of giving a preference to Sir William Forbes and Company, in consequence of the vendition granted to the person who had interposed as cautioner, the judgment of the Lord Ordinary might have been sustained; but no agreement of this kind appeared. And although Sir William Forbes and Company, or their agent, might have been informed of the bargain between the cautioner and the bankrupt, this did not derogate from the validity of the agreement between Sir William Forbes and Company and the cautioner.

A reclaiming petition was afterwards preferred for the trustee on Swinton's sequestrated estate, and refused without answers.

Lord Ordinary, *Monboddo.* Act. *Maconochie, Mat. Ross.* Alt. *Solicitor General.*
Clerk, *Home.*

Fol. Dic. v. 3. p. 62. Fac. Col. No 116. p. 220.

Graigie.

SECT. VIII.

Effect of Reduction on the act of 1696.

1696. *December* 16. CREDITORS of HUNTER, Competing.

No 225.
This act has no retrospect.

IT is held in the case from Fountainhall between these parties, of this date, No 124. p. 1023. that the word *declare* in the act of 1696 does not import a retrospect.

Fol. Dic. v. 1. p. 81.

1704. *December* 1. JAMES MAN *against* ALEXANDER REID and Others.

No 226.
A disposition by a bankrupt to a creditor being reduced on the act 1696, and that creditor have done no diligence, (as others had

JAMES MAN, as a creditor to Wales, arrests in the hands of Reid and others, and pursues a furthcoming, libelling the quantity and value of goods belonging to the common debtor intromitted with by the defenders. It was *alleged* for the defenders denying the libel, That any intromission they had was by virtue of a prior and preferable title. 'THE LORDS ordained the defender to depone, *ut constet de debito*; and sustained the defence, that the intromission was by virtue of a preferable title.