No 260.

both infeftments fall within the ſixty days, that the one is ſuſtained, and the other of no effect? It is evident the other creditors ſuffer no more by the one than the other; the one was no more negligent than the other, and their claims were equally onerous. And thus, in the caſe betwixt Duncan and Grant of Bonhard, No 259. p. 1228. the queſtion falling out anent an heritable bond granted for ready money, long before the bankruptcy, the LORDS found, 'That 'the bond was to be conſidered as of the date of the ſaſine; and found that the 'ſaſine being taken within the ſixty days, is void and null as to the point of 'bankrupt, without prejudice to the perſonal obligement in the bond.'

Margaret Chalmers *duplied*, If the deſign of the clauſe was, to oblige creditors immediately to take infeftment, it fell to be expreſſed in words like the following, 'That all infeftments taken within ſixty days of the bankruptcy ſhould be null, 'where there was any *mora* upon the creditor's part in taking infeftment;' whereas the words are of a quite different import; the infeftment is not made *per ſe* null, the diſpoſition or other warrant of the infeftment is only declared to be no better than of the date of the infeftment taken upon it: Suppoſing then that Margaret Chalmers's diſpoſition had been granted within the ſixty days, as a *novum debitum*, it falls ſtill to be ſuſtained by the other clauſe of the act, with the infeftment taken thereon.

'THE LORDS found the bond and aſſignation being granted at the ſame time, 'does not fall under the act of Parliament 1696.'

Fol. Dic. v. 1. p. 86. Rem. Dec. v. 1. No 69. p. 136.

1731. *June* 19.

The TRUSTEES for the Creditors of JOHN LOWIS of Merchiſton, *againſt* COLONEL FRANCIS CHARTERIS of Amisfield.

No 261.
A debtor granted an heritable bond, bearing to be for money inſtantly advanced. The creditor did not take infeftment till ſeveral years after the date of the bond, by which time, the debtor had become bankrupt. Although it was contended this was a

JOHN LOWIS, while apparent heir of the eſtate of Merchiſton, had had ſome tranſaction with Colonel Charteris of an extraordinary nature. Soon after ſucceeding to the eſtate, Mr Lowis became bankrupt, and executed a truſt-diſpoſition *omnium bonorum* in favour of Mr Archibald Murray, advocate, and others, for behoof of his creditors.

Colonel Charteris claimed as a creditor upon two heritable bonds, one for L. 3743: 4: 4 Sterling, the other for L. 1000. The firſt was dated in 1718, the other in 1721. No infeftment was taken on either till after Mr Lowis's bankruptcy in 1727.

The creditors purſued different actions againſt the Colonel relative to theſe claims. One on the ſtatute of 12th of Q. Anne, and other acts for preventing uſury; and one on the act of 1696, relative to bankruptcy.

It was *alleged* that the Colonel had never actually lent Mr Lowis one farthing. But that, about 1707 or 1708, Lowis had loſt at play, to a Count Nicola and an-

No 261.
novum debitum, not ſecurity for a prior debt, yet the act of 1696 was found to apply, and the ſecurity held to be of the date of the ſaſine, conſequently reducible.

other gambler, about L. 400, for which he had granted bills; of which L 190 had been conveyed to the Colonel; and that, from this ſmall beginning, by accumulating intereſt, premiums, forbearance-money, huſh money, &c.; for which new bonds were periodically taken, the ſum had at laſt ſwelled to the enormous amount claimed. During the courſe of theſe tranſactions, Mr Lowis had made payments in caſh to the Colonel, to a large amount.

In as far as the bonds bore to be in corroboration of former bonds, the Colonel claimed no preference; but each of them bore that beſides certain ſums had been *instantly advanced*. To this extent he claimed preference, and inſiſted, that the narratives of the bonds were *probatio probata* of the fact. While, on the other ſide, it was *contended*, that there were ſuch pregnant circumſtances of ſuſpicion attending the tranſactions, that the Colonel muſt enter into a full explanation. He was ordered to condeſcend. His condeſcendence was found not ſufficiently ſatisfactory. The creditors, on their part, ſtated circumſtances of ſuſpicion and fraud. The Court 'found the narratives of the bonds in queſtion did ſufficiently 'aſtruct their onerous cauſe.' The creditors appealed; and the Houſe of Lords adjudged that the bonds did *not* ſufficiently aſtruct their onerous cauſe, 'without ſome further proofs thereof from circumſtances or otherwiſe.' The cauſe accordingly returned to the Court of Seſſion, where the Colonel brought forward the circumſtances he founded on, which the creditors attempted to obviate. The Court of Seſſion found the bonds void and null. Colonel Charteris appealed. The Houſe of Lords varied the interlocutor ſo far as to find the bonds not null, but paid.

On the branch of the cauſe which depended on the act 1696, the Lord Newhall, Ordinary, had pronounced this interlocutor: 'Finds that the evidences ad-'duced by the Creditors againſt the Colonel, that the bond in 1718, in ſo far as 'concerns the ſum of L. 1707,' (ſaid to have been inſtantly advanced) 'were not 'ſufficient to document that the ſaid ſum was *ab ante* contracted before the date 'of the ſaid bond,' (repeated the ſame interlocutor as to the bond granted in 1721), 'but found that both the ſaid bonds, bearing date ſo many years before 'Merchiſton's bankruptcy, fell under the act of Parliament 1696, in regard the 'infeftments thereupon were not taken by the Colonel till within the 60 days of 'Merchiſton's becoming bankrupt, according to the diſpoſition of the ſaid act; 'and that the clauſe of the ſaid act, making the ſecurities to be conſidered as of 'the date of the infeftment, was noways introduced in favour of the creditor in-'feft, to give him the privilege of a new debt then contracted, of the date of the 'infeftment, but was introduced allenarly in favour of the co-creditors, and *in* '*pœnam* of the creditor infeft, who had kept up his precept of ſaſine latent; and 'therefore, that both the firſt bond as to its whole ſums, and the ſecond bond, fall 'under the act of Parliament 1696, and are reducible upon the ſaid act.'

Colonel Charteris, in a petition againſt this interlocutor, repeated the arguments which had been uſed in former caſes, particularly Chalmers againſt Creditors of Riccarton, No 260. p. 1231. in order to ſhow that *nova debita* do not fall under the act 1696.

The Creditors *answered*, That it may be a doubtful queſtion, and has been variouſly decided, whether *nova debita*, ſtrictly ſo called, fall under the act 1696 or not; but the preſent queſtion does not depend on that. No 261.

The Colonel alleges he lent his money in 1718 and 1721; and *then* received bonds. When the bankruptcy happened in 1727, and not till then, he took infeftment. The Lord Ordinary has found the bonds reducible: 1*ſt*, Becauſe the money was not borrowed at the time of the infeftment, which is the legal date of the ſecurity, but was borrowed long before: 2*dly*, Becauſe, in the conſtruction of law, and in the expreſs words of the act of Parliament, the date of the ſecurity is not the date of the bond, but the date of the ſaſine. Therefore the debts muſt be conſidered as contracted in 1718 and 1721; but, according to the appointment of the ſtatute, the heritable ſecurity is to be conſidered as granted in 1727, falling within the period of the bankruptcy. It follows that the bonds are reducible, in the ſame manner, as if either a different bond, or no bond at all, had been granted in 1718 and 1721; and the bonds in queſtion had not been granted till the date of infeftment in 1727: There can be no doubt, that ſecurity given in 1727, for a debt contracted in 1718, would be null, in the event of bankruptcy within 60 days.

The matter may be conſidered in another light. Since, by the act, the bonds are to be conſidered as dated in 1727, the caſe is the ſame as if a bond had been granted in 1727, bearing in its narrative, that it was for money lent in 1718 and 1721; and the infeftment taken in 1727. There can be no doubt this ſecurity would be void upon the ſtatute.

If this be not the meaning of the act of Parliament, it ſeems to have none; for the act does not allow the date of the bond, as actually written, to be conſidered, but *fictione juris* makes it the date of the ſaſine, and ſo only it muſt be conſidered. But the law does not ſay, that when the debt is contracted ſeveral years before, the money ſhall *fictione juris* be underſtood to have been lent at the date of the ſaſine, and thereby place it in the ſituation of a *novum debitum*. By no means. The time of the contraction muſt remain as it *de facto* happened; only the date of the ſaſine is to be reckoned the date of the ſecurity.

If an inhibition had been uſed againſt Lowis in 1722; theſe bonds would not have fallen under that inhibition, becauſe the debt was contracted before. But, in this queſtion of bankruptcy, the bonds are held as dated in 1727. So the point which the Lord Ordinary has determined is this; that the heritable bonds being, in law, granted in 1727, after the bankruptcy, for debts contracted in 1718 and 1721, the ſecurities are void by the ſtatute. Accordingly, it is explained by the words of the interlocutor, that the making the ſecurity to be conſidered as of the date of the infeftment, was not introduced in favour of the creditor infeft, to give him the privilege of a new debt, then contracted, of the date of the infeftment, but was introduced in favour of the co-creditors, and *in pœnam* of the creditor infeft, who had deceived others, by keeping his precept of ſaſine latent.

No 261.

The grand object of the act of Parliament is to prevent perſons, in colluſion with their debtor, from taking rights upon which infeftment may follow, and keeping them up latent till other perſons be induced to lend money, perhaps to the extent of the eſtate; and then, in colluſion ſtill with the debtor, ſtep forward and take infeftment, to the diſappointment of all others. If the act does not prevent this, it does little; for, otherwiſe, any one may lend a perſon money to the extent of his eſtate, take heritable ſecurity, keep it up till contractions of the like value be made, and then effectually take infeftment. It is preciſely to prevent this, that, at whatever time the contraction is made, the law makes the ſecurity of the date of the ſaſine; and preſumes a fraud from the keeping the precept latent. By this means creditors have an opportunity to bring their debtor under the ſtate of bankruptcy, when they ſee an infeftment taken. A creditor, therefore, who means to rely on his infeftment, is under the juſt neceſſity, either of completing it inſtantly, or loſing the benefit of it.

It follows, then, that as the words of the act muſt be taken as conſiſtent with themſelves, and as they are plainly conceived, ſo, if an heritable bond, in the caſe of bankruptcy, is to be held to be of the date of the ſaſine, Charteris' bonds are to be conſidered as dated in 1727, while he admits the debts were contracted long before; therefore the ſecurities are ſecurities for anterior debts.

The Lords adhered to the interlocutor of the Lord Ordinary, finding the bonds reducible upon the act 1696.

Colonel Charteris preſented a ſecond petition; upon adviſing which, with anſwers, their Lordſhips ſtill adhered.

This branch of the cauſe was not brought under appeal. By the fate of the bonds, on account of uſury and extinction by payment, above-mentioned, it became unneceſſary to reſiſt the deciſion, in ſo far as founded on the act 1696.

Lord Ordinary, *Newhall.* For the Creditors, *Arch. Murray, Ro. Dundas.* For Colonel Charteris, *Jas. Graham, Jo. Forbes, Dun. Forbes.*

In the Houſe of Lords, For the Creditors, *Ro. Dundas, J. Strange, A. Hume Campbell, Wm. Hamilton.* For Colonel Charteris, *Dun. Forbes, Wm. Murray,*

Fol. Dic. v. 1. p. 86. Seſſion Papers and Appealed Caſes in Advocates' Library.

*** This caſe is referred to in the Note under the report of No 214. p. 1158. Creditors of Stein *againſt* Newnham, Everet, and Co.

In that report it is mentioned, that the Lord Preſident had alluded to the judgment of the Houſe of Lords, in an Appeal which took place in 1734. No names of parties are mentioned in the report. The Editor examined the Appealed Caſes for that year, and found that of Merchiſton to be the only one which had any analogy to the caſe of Newnham, Everet, and Co.; but he has now, from the Honourable Judge mentioned, more accurate information on the ſubject of that caſe, than the report itſelf affords.

His Lordſhip's opinion was, That the evil meant to be remedied by the clauſe of the act of 1696, which relates to ſecurities for future debts, was the granting of

securities without value, actually existing at the time, but upon the expectation or chance of value to exist afterwards. This had sometimes been practised, and had always been liable to be used as a cover for fraud, by enabling the common debtor to deceive fair creditors, and collude with confidential friends; by excluding some, and assuming others, and so ranking and preferring them at pleasure. No 261.

The words of the statute are clear and explicit. There is no evidence that it was occasioned by the case of Langton, No 146. p. 1054. as has been supposed. In that case the debt was indefinite as well as future. However, the enactment is certainly not confined to that particular case. It is broad and general, and it marks the *futurity* as the prominent criterion.

The circumstance of a deed being indefinite as to the sum, is not at all mentioned in the act. Perhaps it was thought there was the less reason to provide a remedy for that case; as an uncertain and unknown incumbrance, could not be sustained even at common law, being inconsistent with feudal principles, and with the security of the records. This, however, was for some time a disputed point, as appears from a case in July 1730, CREDITORS of CALDERWOOD, observed by Lord Kames in his Dictionary, v. 2. p. 67. (*see* PERSONAL and REAL;) where his Lordship mentions, that it was debated, but not determined, whether clauses burdening the subject disponed with the granter's debts in general, without mentioning any particular debt, rendered these debts real or not. 'But, thereafter, 'it having been found, in an appeal to the House of Lords, that such general 'clauses create no real burden, THE LORDS, ever since, have been in use to de-'termine according to the judgment of the higher Court.' The cases here alluded to by Lord Kames, are discovered from b. 2. tit. 3. § 50. of Erskine, where the following passage appears: 'A clause, charging the lands contained in 'the grant with the disponer's debts in general terms, without mentioning the 'names of the creditors, was, by repealed decisions, in the cases of the Creditors of 'Lovat, Coxton, and Kersland, (*See* PERSONAL and REAL), adjudged to constitute 'a real burden on the lands disponed, in consequence of the right competent to 'all proprietors, of disposing of their property under such conditions and limita-'tions as they shall judge proper. But *two of those judgments* having been 'reversed in the House of Lords, the Court of Session, did, in July 1734, Credi-'tors of M'Lellan, (*See* PERSONAL and REAL), and by several later decisions, alter 'their former rule; upon this principle, that no perpetual unknown incumbrance 'ought to be created on land; because the purchaser cannot, by the strictest 'enquiry, know who the creditors in that burden are, so as, by a proper process, 'to force the production of their grounds of debt, in order to clear them off.'

The act 1696, then, was made not for cases of uncertainty, but for cases of futurity; and as to this last, it could make no difference with regard to the principle of the act, and the possible mischief meant to be provided against, whether the precise sum, which was to be the *ne plus ultra* of the contraction, was fixt or not. Suppose, for instance, a man has an estate worth L. 20,000, and this is the

No 261. extent of his whole fortune; although he ſpecify this ſum in a deed, there is as much room for abuſe, as if no ſum had been named. He might have named L. 100,000; but ought this to be conſidered in the light of a definite obligation?

It is not neceſſary to ſubſume fraud. The ſole queſtion under the act is, whether the ſecurity is for a debt already exiſting, or for a debt to be contracted. The caſe of Dempſter againſt Kinloch, (Rem. Dec. v. 2. p. 233. *voce* RIGHT in SECURITY), which has been mentioned, was attended with great difficulty, on account of the obligation which Dempſter had undertaken, to advance the balance at any term, upon requiſition of 40 days. Lord Elchies argued, with ſome force, that this was equal to an actual advance; but Lord Arniſton, and others of the Judges, obſerved, that the other party was not bound, therefore no debt was actually contracted. The preſent caſe is attended with much leſs difficulty. Neither party is bound. For a caſh credit may be withdrawn at any time.

In the caſe of Niblie, No 211. p. 1154. there was an abſolute conveyance; and it was thought the receiver could not be bound to denude, till completely indemnified. The caſe of Bank of England againſt Bank of Scotland, 1ſt March 1781, Fac. Col. No 41. p. 72. (*voce* RIGHT in SECURITY,) more applicable. The caſe of Pickering, No 212. p. 1155. is in point.

There is a peculiarity in the preſent caſe. The ſecurity to Newnham, Everet, and Co. is indiſputably indefinite. The original ſecurity by Robert Stein to James was indeed definite, it was for L. 12,000. But the eſtate veſted by that ſecurity in James, was by him conveyed indefinitely without any mention of the extent of the caſh credit.

It appears that in fact L. 16,000 has been advanced. Newnham, Everet, and Co. therefore, if the ſecurity be good, muſt rank for L. 16,000, to the effect of drawing in proportion to that ſum, and not in proportion to L. 12,000. This muſt form an inſuperable objection to the ſecurity.

The report, No 214. p. 1158. is likewiſe inaccurate with regard to the nature of a ſecurity for the faithful diſcharge of an office. Such a ſecurity would fall under the ſanction of the act 1696, as much as the ſecurity in queſtion. The caſe of real warrandice, is of a nature entirely different; it is a conditional ſale, and no money tranſaction.