

1768. *March 3.* JEAN SCOTT *against* WILLIAM ELLIOT.

BANKRUPT.

Evidence of Bankruptcy.—Act 1696.

[*Faculty Collection*, 306 ; *Dictionary*, 1108.]

PITFOUR. *9th January 1751, Johnston against Home of Manderstoun.* The law does not prevent a man from selling his lands or his moveables. I would put the judgment upon this, and so avoid giving any judgment upon the other point, though I think that the judgment of this Court, in the case of *Erskine of Kirbuddo*, was right, and that of the House of Peers wrong.

KENNET. If a creditor has an heritable bond, and delays executing the precept, the law holds the infertment, when taken, to be a partial preference.

AUCHINLECK. The Act of Parliament does not strike against an original contraction with a warrant for infertment.

PITFOUR. If the bond had been granted within sixty days of the bankruptcy, it would have been good. Can it be worse because dated two years before the bankruptcy?

COALSTON. The first question is doubtful, by reason of the decision of the House of Lords. As to the second, the Act of Parliament does not strike at *nova debita*; but my doubt is here: If one, in doubtful circumstances, grants a bond, and the creditor takes no infertment, till the debtor is just retiring to the Abbey, I have some doubt how far this is not reducible as fraudulent.

MONBODDO. The Act 1696 is a supplement to the Act 1621. The Act 1696 made any security to a former creditor to be reducible; but it does not extend to *nova debita*. As to the delay of taking infertment, that does not move me. The taking infertment at any time, does not vary the case. I cannot divide the date of the bond.

KAIMES. I will allow, that, if money is lent, and a long time intervenes before infertment, a proof of a fraudulent connivance might be admitted; but this does not apply to the present case.

“The Lord Hailes, Ordinary, found, That, although the principal debtor be proved to have been in the custody of a messenger, in virtue of letters of caption, *this*, joined with insolvency, is not sufficient to constitute him a bankrupt, in terms of the statute 1696.”

On the 3d March 1768, the Lords, in respect that the debts were *nova debita*, repelled the objection upon the Act 1696, and found it unnecessary to determine the point determined in the interlocutor.

*Act. A. Crosbie. Alt. A. Wight.*