1771. *February* 15. MESSRS MANSFIELD and COMPANY *against* THOMAS CAIRNS.

BANKRUPT.

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 reducible upon the Act 1696, c. 5.

[*Fac. Coll. V. 222*; *Dict. App. I.—Bankrupt, No.* 6.]

PITFOUR. The Act 1696 is salutary in itself: it would be quite otherwise upon the interpretation of Mansfield and Company. By that statute a retrospect was wisely, though boldly admitted. When the law forbids new security for an old debt, the creditor is not hurt: he has the same security as at first. Money lent on the faith of an heritable security is the same thing as a sale. It is plain that *here* there was no purpose of parting with the money upon the promise either of the doer or of the debtor. If a price is paid, and some days thereafter a disposition is granted, will this be said to be a new security? This question occurred in *January* 1751, *Johnson* against *Burnet*. Elchies and Arniston were both present, and gave that opinion which I give, though better expressed.

MONBODDO. Part of the heritable bond was for a *vetus debitum*, if the heritable bond had been granted for the L.300 due to Kerr. If Kerr had given up his personal bond, and taken heritable security, the case would have fallen within the statute. The same thing was done here, *per ambages*, as to the L.500 in the one, and in the other note it is the same thing as if Cairns had taken those promissory notes from Nisbet, instead of their being taken by Hart, Cairns's doer, from Nisbet. The bond is good *quoad* the remainder left in Hart's hands by Nisbet.

COALSTON. The pursuer of the reduction on the Act 1696 must prove, 1*st*, That a debt was created. 2*d*, That a security was granted. If Cairns had taken promissory notes from Nisbet, or if Hart had lent the money in Cairns's name, the case might have come within the Act of Parliament. Nisbet was not debtor to Cairns till the heritable bond was to be granted. It remained at the risk of Hart. If I advance money upon the honour of the debtor, and do not get heritable security for a day or two, will such security, when granted, fall within the prohibitions of the statute 1696?

KAIMES. The promise was, from the beginning, for heritable security. Money was advanced from time to time. Will this make the security become a *novum debitum*?

GARDENSTON. There is not one instance of a hundred, where the heritable bond is granted *simul et semel*, with the advance of the money. The same circumstances, as in this case, daily occur. When a man advances his money

within the *sixty* days, he cannot be in a better situation than other creditors. But that is not the case here. Heritable security was intended from the beginning.

PRESIDENT. If the Act 1696 could have the interpretation put upon it by Messrs Mansfield, I would certainly move for an application to Parliament for its repeal.

On the 15th February 1771, " The Lords assoilyied from the reasons of reduction ;" adhering to Lord Kennet's interlocutor.

Act. R. M'Queen. *Alt.* H. Dundas.

Diss. Monboddo.

1771. *February* 19. JAMES SCOTT *against* GEORGE STRAITONS.

TACK—

The termination or ish of which was indefinite, being granted to the tenant and his heirs, if effectual against singular successors? Effect of acquiescence in, and homologation of that right.

[*Faculty Collection, V.* 225 ; *Dictionary,* 15,200.]

PRESIDENT. The case of *Belladrum* is not to the purpose ; for in that case the tack had ish. Neither is the case of *Lord Hopeton and Wight* to the purpose ; for *there* the tacks were excepted from the sale, and in a manner homologated. The question is, whether the tack is good, which has not an ish? It is good against Sir Robert Grahame and his heirs, but the pursuer says that *he* is a singular successor. Answer : He has homologated the right by taking payment of rent, and even of vicarage, for near a century. I also think there is a good plea of prescription here. No infeftment was necessary in the case of patronages. Possession has been held sufficient to give a right, because infeftment does not commonly follow upon patronage. *Here* also is a subject upon which infeftment does not generally follow.

KAIMES. I doubt as to prescription, but I am clear as to homologation.

MONBODDO. I never heard of a right like this. I do not think it a tack at all ; there is not so much as a mutual contract ; for the tenant might renounce his possession at pleasure. It is, however, binding on the granter and his heirs, anomalous as it is. As to singular successors, the case is different. Records secure singular successors, except as to tacks, which are provided for by the statute 1449. Now this tack is not in the form of the tacks mentioned in the statute 1449 : it is not *for terms ;* it is but going one step further to make a tack good without any prestation of rent. I do not see any homologation. The receipts are cautiously worded, for *occupation of land.* Neither do I see how prescription can take place here. Patronages are not just in the case of the statute 1617, but approach near to it. The