1777. *August* 1. JAMES BELL *against* The MAGISTRATES of INVERKEITHING.

SUMMARY APPLICATION.

Whether a Summary Complaint be competent against the proceedings of a Town Council in their election of Councillors?

[*Fac. Coll. VII.* 407; *Dict., App. No. I; Summary Application, No.* 2.]

JUSTICE-CLERK. I doubt of the incompetency as found by the interlocutor: the words of the statute seem to be clear, and it would be of dangerous precedent to find otherwise: Magistrates then might allow proofs, and by that means go on to an election without any deacons who might be adverse to their views.

COVINGTON. I do not understand that the election of deacons, or such other matters, falls within the intention of the statute. Complaints must be served on Magistrates and Council, which implies that the complaints respect their actings.

BRAXFIELD. The question might have been tried both ways: the Magistrates have not received the deacon; *that* was wrong done at the election, or at a meeting previous to the election.

On the 1st August 1777, "The Lords found that the complaint was competent;" altering their interlocutor of the 14th June 1777, but on the merits "dismissed the complaint, and found expenses due."

Act. R. Blair. *Alt.* Ilay Campbell.

1777. *August* 5. KATHERINE KEIR, &c. *against* GEORGE WARDEN.

BANKRUPT.

Construction of the second branch of the Act 1696, c. 5.

[*Supplement, V.* 386.]

COVINGTON. The heritable bond has no connexion with cautionary obligation: it is altogether a *novum debitum*: it ought to be reduced,—the only consequences will be to bring in the parties *pari passu.*

BRAXFIELD. *Ex facie,* the bond does not fall under the enactment of the statute 1696. The transaction might have been so executed as to have given an absolute security to the creditor for the greater part of the debt. There has been great inaccuracy here, but I doubt whether there is enough to cut down the obligation. It was understood for many years, and even until 1734, that

general burdens were effectual. The Act 1696 seems, to a certain extent, to have altered what was then understood to be law. Suppose that the statute 1696 related to infeftments for specific sums; *Query*, May not this infeftment stand, where the intention of parties was honest, though the writings are inaccurately expressed?

PRESIDENT. I imagined that the Act 1696 was calculated for the very purpose of preventing such stipulations as the one in question. If the writer of the deeds has not obeyed the directions of the Act of Parliament, are we to supply his ignorance or folly?

MONBODDO. There is a distinction *here* between the two bonds. The bond for L.300 was granted when not a shilling had been advanced by the cautioner: the bond for L.73 was granted for a debt already contracted. The bond for L.300 falls under the statute 1696, as being a covert for fraud. The cautioner might have assigned the bond and infeftment for an onerous cause, and then the purchaser would have been safe, while Warden's right as a cautioner still subsisted. Even without this, Warden might have been ranked both for his bond and for his assignation from the master. The nature of the bond would only have been probable by Warden's oath, and, had he died, his heirs must have been ranked for both. In this view, the words of the statute ought to be liberally interpreted. It is impossible to say that the Act 1696 relates only to indefinite and not to definite sums. In the case of *Dempster*, the sum was definite: this case is infinitely stronger than that. Indeed, I should have inclined to the opinion of the single judge who was against the decision of *Dempster*. As to the bond for L.73, as that money was advanced by the cautioner, the bond may be supported although inaccurately expressed.

ALVA. As no prejudice has been done to the creditor, I think that the bonds may be supported.

JUSTICE-CLERK. The debt was not due by Law at the time that the first bond was granted, although the ground of debt was, that, in case Law did not pay the rent at the Whitsunday following, he was bound to relieve Warden. The argument for Warden goes this length,—that, wherever there is a *causa remotior obligationis*, it is sufficient to authorise an infeftment to the prejudice of other creditors. I cannot transmute the bond granted into another sort of security.

GARDENSTON. I pity the case of Warden, who appears to be a fair creditor and an honest man; but I cannot relieve him: it would destroy the statute 1696 if security for sums liquidated was held good.

On the 5th August 1777, "The Lords sustained the objection to the L.300, but repelled the objection to the L.73 bond."

Act. Ch. Hay. *Alt.* R. Blair. *Reporter*, Covington.

Diss. As to L.300 bond, Alva, Stonefield, Westhall, Braxfield.