1789. *November* 14. NEWNHAM, EVERETT *and* COMPANY, *against* DAVID STEWART.

BANKRUPT

Heritable security for a cash credit set aside.

[*Fac. Coll. X.* 159; *Dict.* 1158.]

JUSTICE-CLERK. From the first time that I ever considered the clause in question of the statute 1696, I could not see any occasion for that clause. The deeds there mentioned were already reducible at common law. Here the subject, granted in security, is defined, but the extent of the loan to be made is indefinite. The question as to that is not determined by the Ordinary.

ESKGROVE. I only regret that the Act 1696 does not go far enough.

GARDENSTON. Independent of the specialties, I think this security good; because the loan was stipulated for and contracted at the date. It is the same as if the banker had lent L12,000, and then that that sum had been deposited with him. I cannot go into the notion that the banker could have refused payment of any part of the deposit. [I can go into the notion that, on suspecting the sufficiency of the original creditor, he might refuse payment of a sixpence.] If the obligation had been cautionary, it is admitted that it would have been good. I think that the present obligation is merely cautionary.

ANKERVILLE. It occurs to me that the moment the heritable security was granted, Newnham and Co. were bound to answer the draughts to the extent of L12,000. The former decisions must have proceeded on specialties.

SWINTON. When the words of an Act of Parliament are clear, as I think they are in this case, it is not in the power of a judge to go against them.

DREGHORN. When I get a power to draw on a banker, I consider the money as actually advanced. The granting of a power to draw is an advance, yet it differs from an article advanced, for the obligation to pay is only good from the date.

JUSTICE-CLERK. A sufficient distinction is not made between the debt said to be contracted and the security granted for that debt. I do not see any advantage arising from cash credits upon heritable subjects. Bankers who give credits are very useful, and many of them are very liberal, but it is upon the notion of getting partial payments that they act. In cautionry there is always a bond of relief: this gives a *jus crediti*: In warrandice also there is a *jus crediti*, for the ground of eviction must be prior to the grant.

PRESIDENT. The argument from expediency does not move me, for I must go by the law; but I am of the opinion of the Lord Justice Clerk, that there is no expediency in the plea of Newnham and Co.

On the 14th November 1789, "The Lords found that the infeftment in security to Newnham and Co. cannot avail them for any sums paid, or obligations undertaken by them, posterior to the 4th February 1788;" adhering to the interlocutor of Lord Swinton.

Act. Allan M'Conochie. *Alt.* Ch. Hay. *Diss.* Gardenston, Ankerville.

Non liquet, Monboddo, Henderland.