1772. *February* 20. ALEXANDER HOUSTON and COMPANY *against* CLAUD and CHARLES STEWARTS.

## BANKRUPT.

An heritable security granted by a debtor, bankrupt in terms of the Act 1696, found not to fall under it, as being in consequence of an anterior obligation, coeval with the contraction of the debt.

[*Faculty Collection, VI.* 14; *Dictionary,* 1170.]

COALSTON. The Act 1696 does not strike against a disposition in consequence of antecedent obligations. *Here* there is strong evidence of an antecedent obligation. In support of this, I would allow a proof by witnesses who know the matter, and are not interested.

PITFOUR. I doubt much of the point of law, though it has been once determined, *Watson* against *Arbuthnot*, summer 1769. An antecedent obligation is good against inhibition, but not against bankruptcy. An actual formal security granted before bankruptcy is good for nothing, if security is not given till after bankruptcy. Shall we say that an obligation to dispone is of more weight than an actual disposition?

MONBODDO. I also doubt of the general point; but that is not argued in the petition and answers. I doubt how far the latter case can be authenticated against the creditor.

PRESIDENT. Witnesses are not offered to prove the obligation, but to prove facts whence an obligation may arise. Suppose the papers had been put into the hands of a writer, and he had died suddenly; in such case the proof would have been allowed. This shows that there is no general rule against allowing such proof.

PITFOUR. It is on account of the lubricity of the memory of witnesses that they are not receivable as to *words* spoken. But there is a great difference as to proving *facts* which are not liable to mistakes.

On the 24th January 1771, the Lords, before answer, remitted to the Ordinary to examine Baine and Blackstock as witnesses, and to proceed in the cause accordingly; altering Lord Kennet's interlocutor.

*Act.* R. Cullen. *Alt.* J. M'Laurin.

*February* 20.—COALSTON. There is satisfying evidence that it was communed and agreed on that the creditor was to get heritable security, and that the money was advanced upon that footing. Had the obligation to grant heritable security been afterwards given, it would have made a difference.

GARDENSTON. Although there was such a communing, yet there is no legal document of an obligation to be granted. Were this security effectual, the consequences would be dangerous. Even an express obligation to grant a security will not be sufficient: the heritable bond itself would not be sufficient. An heritable bond, without infeftment, is personal as to creditors: It is the seeing a burden upon record which alone puts them on their guard.

PITFOUR. The reasoning of Lord Gardenston is good, but applies not to this case. The Act of Parliament does not reach to this case. The law meant to give a salutary remedy against every partial deed in favour of any creditor. Had it meant to go farther, the retrospect would have been intolerable. The law did not mean to interrupt the course of common transactions. There was a *novum debitum* here, no matter at what time contracted. Were there here an *antiquum debitum* and a security, the case would be different. The case of *Kellar's Creditors* impinged a little upon these principles; but that is a single decision.

MONBODDO. The statute relates to anterior debts: But would the anterior creditor have had any preference had it not been for the heritable bond? The Act, at this rate, may be eluded.

AUCHINLECK. All depends upon the Act of Parliament. It provides, in plain words, that it shall not be in the power of the debtor to give a preference to any of his creditors within 60 days of the bankruptcy. A bill given, *simul et semel* agreed that heritable security should be granted. Here the difficulty: Could the person who got that obligation have had any preference without the heritable security? Were this preference sustained, it would be in the power of debtors to postpone and prefer creditors.

PRESIDENT. The obligation is to be considered as an heritable bond of that date. The lateness of the infeftment varies not the case.

KENNET. My former opinion in this cause proceeded upon the defect of evidence. In the case of *Cairns* I was clear, because the advancing the money and the heritable bond were *partes ejusdem negotii.* Here it is not just the same case,—for the money was advanced: But then it would not have been advanced, unless upon the stipulation of heritable security.

On the 20th February 1772, the Lords repelled the reasons of reduction.

11th March 1772, adhered.

*Act.* R. Cullen. *Alt.* J. M'Laurin.

*Reporter,* Kennet.

*Diss.* Gardenston, Auchinleck, Stonefield, Monboddo.