BRAXFIELD. The proprietor is not entitled to make the condition of the thirlage worse than it was before; but, when its condition is made better, the servient tenement cannot complain. Thirlage is generally called a servitude; but, in many particulars, it debords from a servitude: it falls with more propriety to be considered as a mutual contract. The favour originally was as much done to the sucken as to the proprietor. The thirle made no objection while the mill was building. The contract was implemented *bona fide* by the proprietor: and here an undue advantage is attempted to be taken by the person astricted.

COVINGTON. How can thirlage be a mutual contract? For the proprietor is not bound to keep up the mill.

PRESIDENT. He would be bound were the sucken to require it; which, however, is not likely to happen, as out-town multures are higher than in-town, and as there is no scarcity of mills.

On the 9th December 1780, "The Lords found Bisset liable in in-town multures;" adhering to the interlocutor of Lord Braxfield.

Act. A. Crosbie. *Alt.* ———.

Diss. Gardenston, Kennet, Westhall.

Non liquet, Ankerville, (who happened to be in circumstances similar to those of the proprietor of the mill.)

1780. *December* 12. BANK of ENGLAND *against* The BANK of SCOTLAND and OTHERS.

BANKRUPT—RIGHT IN SECURITY.

Act 1696, c. 5.

[*Faculty Collection, VIII.* 72; *Dictionary*, 14,121.]

MONBODDO. Upon reading the heritable bond, a doubt *occurred to me* that the heritable bond was not granted for a precise sum, but for a security as to bills discounted, or to be discounted to the amount of L.160,000. It *now* appears indeed, that, at the time of granting the bond, L.160,000 *was* advanced by the Bank of England; but *that* does not appear from the bond itself.

COVINGTON. The words of the Act 1696 relate to debts posterior to infeftments. The Bank of England cannot change its mode of proceeding: and if its security is not good, it will never interfere again to support Scots credit. The argument charges Mr Alexander with a direct fraud, in deluding the Bank of England by a security of no value. No one can suppose that Mr Alexander was to have repaid the sum of L.160,000 sterling in the space of two months. That the security was good for the original money advanced is clear, even from the words of the statute 1696. There is no *novum debitum* here; nor is there any collateral security in any other sense than as every heritable bond is a col-

lateral security; for such bond always begins with a personal obligation. The question is, Whether is the debt paid? I think not: the mere changing of the bills was not payment.

BRAXFIELD. On considering this security, according to a liberal interpretation of the Act 1696, it should appear that the security was good, as being contracted for debts prior to the sasine. Before the Act 1696, general burdens were understood to be valid, even against creditors and singular successors. The statute was calculated to prevent frauds, by circumscribing that practice; but, since that time, the law has undergone a considerable and proper alteration by the judgment in the case of the creditors of M'Lellan, which found that general burdens were not good. I have a great doubt how far security is good when granted for debts not above a certain extent: for ought that appears, the whole of the sum might have been advanced after the date of the heritable bond. If the nature of this security had been understood, the Bank of England would not have advanced the money; for their manner of dealing is not very consistent with feudal securities. Besides, I doubt whether new bills can be construed to be the same on which the security was granted.

ELLIOCK. The Act 1696 has nothing to do with this case,—for the money was advanced. It is said that the money was repaid: I deny that. The debt still subsists. An indefinite burden cannot be valid: but that is not the case here; the burden is defined.

GARDENSTON. The purpose of the Act 1696 was to prevent uncertain burdens; but there is no uncertainty here more than in every heritable bond. I see in the record a burden which cannot become greater than it is, although it may become less by intromissions of creditors; which appears not on any record. The whole debt was due at the date of the infeftment.

KAIMES. There is nothing in the question as to *general burdens;* for an *ultimatum* is named in the bond: neither is there any objection on the Act 1696; for the sum was really advanced. As to the objection of *novatio debiti,* there is a difficulty; for it is not the original document on which the claim is made,—it is a new obligation instead of the old one.

PRESIDENT. All equity is in a question with strangers: the L.160,000 was advanced long prior to the bond and infeftment. As to the *novatio debiti,* I must consider the nature of the transaction appearing *ex facie* of the bond, which required a renewal of the bills from time to time on money *already* advanced. There never was a new loan: had there been such, the infeftment would not have reached it.

On the 12th December 1780, "The Lords repelled the objection to the interest of the Bank of England."

Act. D. Rae. *Alt.* A. Wight.

Reporter, Justice-Clerk.

Diss. Monboddo, Braxfield. *Non liquet,* Kaimes.