

1789. November 14.

CREDITORS of JAMES STEIN, *against* NEWNHAM, EVERETT, and COMPANY.

No 214.

Decided in conformity with Pickering against Wright, &c. *supra*, p. 1155. Affirmed on appeal.

By disposition and assignation followed with infestment, Stein made over to Newnham, Everett, and Company, an heritable bond for L. 12,000, as 'a security for the reimbursement of such sums of money as should be drawn from them by orders, receipts, accepted bills, or promissory notes, for behoof of John Buchanan and Company,' (a partnership with which Stein had a concern), in consequence of a credit or cash-account which Newnham, Everett, and Company was to give to them.

Of this conveyance, as having been 'granted for security of debts to be contracted for the future,' the Creditors of Stein, who had become bankrupt, instituted a reduction on the statute of 1696.

On the part of the defenders, the topic sometimes resorted to, of a supposed analogy between the unquestionably valid infestments, for relief of cautionary engagements, for real warranty, or for guaranteeing the due discharge of offices of trust, and such securities as are granted for future debts, was insisted on; an analogy which, it was answered, fails in this, that in all the former instances, a debt is constituted, but in the last case there is nothing but an agreement to lend money, which forms no debt.

The late decision of Pickering *contra* Smith and others, was particularly appealed to, as being exactly in point for the pursuers; to which nothing new having occurred in the argument, it is sufficient to refer. See No 212. p. 1155.

The cause was reported by the Lord President, as probationer, who observed, That the extent of the cash-credit being indefinite, there was a separate ground for annulling the conveyance, agreeably to the judgement of the House of Lords in 1734*.

It was likewise *observed*, that expediency could hardly be urged in support of the right under reduction, as bank-transactions, being of a momentary nature, require all those expeditious methods of recovering money which personal securities admit, but which are inconsistent with the tedious process of ranking and sale, so often necessary before any benefit can be derived from heritable security.

THE LORD ORDINARY having 'found, That the infestment for security of Newnham and Company, could not avail them for any sums paid, or obligations undertaken by them, *posterior* to the date thereof,'

The Court adhered to that interlocutor; but remitted the cause to the Lord Ordinary to hear parties on the farther effect of the objection of an indefinite burden.

Lord Ordinary, Swinton.

A&C. Maconochie.

Alt. Hay.

Clerk, Colquhoun.

Fol. Dic. v. 3. p. 59. Fac. Col. No 88. p. 159.

Stewart.

* The case alluded to is, Creditors of Merchiston against Charteris, *infra* h. t.

* * * The case was appealed,

25th February 1791.—The House of Lords ORDERED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For Newnham, Everett, and Co. Appellants, *John Scott, W. Grant.*
For Stein's Trustee, Respondent, *T. Erskine, Alex. Wight, James Boswell.*

1791. March 2.

CREDITORS of JOHN BROUGH *against* the HEIRS of ROBERT SELBY.

SELBY was a joint obligant along with Brough in a bond granted to a banker for a credit in a cash account, to the extent of L. 500. Being, however, only a cautioner, Selby at the same time obtained from Brough a bond of relief in common form, and a *disposition in security*, of a tenement of land in Edinburgh, upon which disposition infestment immediately followed.

Brough became afterwards bankrupt, having previously operated on the cash-credit to the full amount, though at the date of the infestment, nothing had been drawn upon it.

Selby having paid the debt to the banker, his heirs after his death, in the competition of Brough's creditors, claimed a preference in virtue of the disposition in security. To this the other creditors *objected*, That at the date of the infestment no part of the debt having been contracted, the security was void as having reference to a future debt; and in support of this objection they

Pleaded: It is established by the decisions in the cases of *Pickering contra Smith and Others*, No 212. p. 1155., and of *Stein's Creditors contra Newnham and Others*, No 214. p. 1158. that heritable securities for money to be advanced after their date, in consequence of such a cash-credit as that in question, fall under the statute of 1696.

It is true, that here the dispoñee was not the principal creditor, but a cautioner or creditor for relief. The difference however is immaterial. The only essential circumstance is the debt being contracted prior or posterior to the security, on which surely it can make no variation, whether the claim under the security be made in the one character or in the other. If the contracting of the debt be subsequent to the infestment, the last will be equally unavailing to a creditor for relief as to a principal creditor. Nor is there any ambiguity as to the nature of the debt, for relief of which the cautioner becomes a creditor. For as upon the money being advanced, and not sooner, the principal debt arises to the principal creditor; so at the same instant, the accessory debt arises to the cautioner, as creditor for relief. Before the actual advance of the money, he is not more to be

No 215.

An heritable security in relief granted to a cautioner in a cash-credit, found effectual only as to money advanced prior to the infestment.

Heritable security, either to bankers for cash-accounts, or to the cautioners in bonds of credit, are now, by subsequent statute, legal.