No 214.

*** 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.

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 infeftment.

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

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 infeftment immediately followed.

Brough became afterwards bankrupt, having previouſly operated on the caſh-credit to the full amount, though at the date of the infeftment, 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 infeftment 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 diſponee 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 infeftment, 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. conſidered as ſuch, than the advancer of it was to be regarded as principal creditor; for it does not ſtamp either of them with the character, that they have come under obligations to do what is future, the one in advancing the money, the other in becoming ſurety for ſuch advance.

Answered: Such ſecurities for relief of cautioner in caſh-credits are in practice extremely common;* nor do they ſeem leſs agreeable to law that thoſe granted to cautioners for perſons obtaining offices of truſt, with reſpect to the validity of which however no doubt can be entertained. There is not an argument which can be urged for ſupporting an heritable ſecurity in either of the caſes, that does not apply with equal force to the other.

It has been ſaid, that before the money was actually advanced there was no exiſting debt, nor any room for a ſecurity in relief. But it is plain, that the cautioner had previouſly come under an effectual obligation to be reſponſible for the debtor's operations on the caſh-credit, while over theſe he poſſeſſed no means of controul; againſt which obligation, therefore, he was entitled to preſent relief, ſo that it cannot be regarded as a future debt.

The caſes of Pickering and of Newnham, as they related to ſecurities obtained by the creditor, afford not any precedent for the preſent, which reſpects a cautioner.

THE LORD ORDINARY pronounced this interlocutor: 'In reſpect that in the bond of relief John Brough, the principal debtor, is bound to relieve, free, and harmleſs keep, Robert Selby, the cautioner, from the payment of the contents of the bond of credit, and for that effect to deliver it up to him cancelled, or report a valid diſcharge thereof, duly regiſtered, againſt the term of Whitſunday then next; repels the objection.'

On adviſing, however, a relaiming petition, with the anſwers,

THE LORDS altered this interlocutor, and found, 'That the heirs of the deceaſed Robert Selby are only preferable, in virtue of his infeftment, for the ſums they can inſtruct to have been advanced at the date of the ſaid infeftment.'

Lord Ordinary, *Dreghorn.* For the Creditors, *Cullen.* Alt. *Abercromby.* Clerk, *Mitchelſon.*
Fol. Dic. v. 3. *p.* 59. *Fac. Col. No* 171. *p.* 351.

Stewart.

1793. *June* 5.

The TRUSTEES for the Creditors of JOHN BROUGH, *againſt* ALEXANDER DUNCAN and JAMES JOLLIE.

No 216. An heritable bond of relief granted to cautioners

On the 23d March 1784, John Brough obtained a caſh-credit for L. 500 from the Royal Bank, upon the ſecurity of a bond granted by himſelf, Alexander Duncan, and James Jollie; and on the 18th May thereafter, he granted to Meſſrs

* A variety of late inſtances were produced from the regiſter of ſaſines.