Mrs. Lowthian's representatives contended, that she was to be viewed in the right of a *bona fide* possessor, at least till she was cited in the action of reduction; and therefore, that she ought not to be liable in any interest till the date of citation, and afterward for interest only at the rate of 3 *per cent.* No. 2.

Mr. Lowthian's representatives, on the other hand, insisted, 1*st*, That the defenders should be accountable for the same interest, on the principal sums which Mrs. Lowthian had uplifted, as they bore when in the hands of her husband's debtors; 2*dly*, That the rents and interest levied by her, should be turned into a capital as at the first term after they respectively fell due, bearing interest at 5 *per cent.* from that period; 3*dly*, That from 10th June 1794, when the judgment of the Court of Session setting aside Mr. Lowthian's settlement was affirmed by the House of Lords, the whole sums, whether consisting of principal or interest then in Mrs. Lowthian's hands, should be converted into a capital bearing the legal interest, because at that date, the whole funds ought to have been delivered up by her to the proper owners.

In support of the two first of these propositions, the pursuers founded on the following authorities: Acts of Sederunt, 31st July 1690, and 18th February 1730; 1701, Creditors of Carden, No. 52. p. 515; Stair, B. I. Tit. 6. § 19.

The Lords found "the defenders liable to account to the pursuers for interest on principal sums from the time the same were uplifted by Mrs. Lowthian, at the rate of 5 *per cent.*; and found them also liable in interest, at the same rate, for the interests and rents uplifted by her, or which ought to have been recovered by her, and that from and after one year after the said rents and interests became due, or might have been recovered."

A reclaiming petition for Mrs. Lowthian's representatives was refused, (2d July 1801,) without answers.

Lord Ordinary, *Glenlee.* Act. *Monypenny.* Alt. *H. Erskine.* Clerk, *Menzies.*

R. D. *Fac. Coll. No. 236. p. 582.*

*** See APPENDIX, PART I. *voce* TERCE.

1801. *July* 7.

SIR FRANCIS FORD and GEORGE SMITH, Assignees of WALTER BOYD, *against* WILLIAM RIDDELL.

No. 3.
An infeftment in relief, entitles the cautioner to rank preferably, not only for the principal sum and interest paid

THE estate of Craigdarroch, belonging to Alexander Fergusson, having been brought to judicial sale in 1785, it was concerted among some of Mr Fergusson's friends, that a considerable portion of it should be purchased, for behoof of himself and his family.

William Riddell accordingly purchased lots amounting nearly to £15,000, in which, although he held them in trust for Mr. Fergusson's family, he was infeft on titles *ex facie* absolute.

No. 3. by him, but for interest on the whole sums paid, as a new capital.

In order to enable Mr. Riddell to pay the price, he resold some of the lots to advantage, and borrowed various sums on heritable security over what remained. Among others, he borrowed £6000 from the Duke of Queensberry, and £3000 from the Edinburgh Friendly Insurance Company, for which he granted heritable bonds in the usual form.

In 1791, Mr. Riddell executed a disposition in favour of Mrs. Deborah Cutler, Mr. Fergusson's wife, denuding in her favour of those parts of Craigdarroch which remained in his person. The disposition, however, was granted under the express burden of relieving him of the different sums which he had borrowed for paying the price, and, in particular, "of the payment of the fore-"said sum of £3000 Sterling to the Edinburgh Friendly Insurance Company, "and £6000 to his Grace the Duke of Queensberry, and of the interest due, "and to become due thereon, and penalties stipulated therefore, and of the bonds "and other securities granted for the said debts themselves, and all action and "execution competent thereon; and to procure forthwith the said bonds and "other securities themselves, to be delivered up to be cancelled, or at least a "discharge thereof, so far as the said William Riddell was personally liable."

These burdens were engrossed in the infeftment which followed on the disposition.

When Mr. Riddell granted this disposition to Mrs. Fergusson, he obtained from her, with consent of her husband, an assignation to the rents of the lands disponed, "for his further security of implement of the burdens and conditions "contained in the disposition."

After Mrs. Fergusson was thus vested in the estate, she borrowed different sums on heritable security. In particular, in 1792, she granted an heritable bond to Walter Boyd for £1200, which he had advanced to Mr. Fergusson. In this bond, Mrs. Fergusson excepted from the clause of warrandice, "the real "burdens created over the said lands and others above described by the said "disposition by the said William Riddell to me the said Deborah Cutler, *alias* "Fergusson, in so far as these real burdens are not already paid and extin-"guished."

Soon after this, Mrs. Fergusson executed an absolute disposition of the estate in favour of Mr. Fergusson, who died in the beginning of 1796.

During the interval between the date of Mr. Riddell's disposition to Mrs. Fergusson and Mr. Fergusson's death, the rents were levied by Mr. Fergusson; and he having often neglected to pay the interest on the sums which had been borrowed by Mr. Riddell, that gentleman was under the necessity of paying them out of his own pocket, except the interest due to the Duke of Queensberry, which his Grace allowed to lie over during Mr. Fergusson's life; but immediately on his death, the Duke signified to Mr. Riddell, that he must either immediately pay the principal sum contained in the bond, and whole bygone interest, or grant a bond of corroboration, with a cautioner, in which the interest should be accumulated into a principal sum.

No. 3.

Mr. Riddell finding it inconvenient to pay the money till the lands were sold for his relief, granted a bond of corroboration for the original £6000, and £1896. 19s. 8d. of bygone interest; which last sum was declared to bear interest from Lammas 1796.

Soon after Mr. Fergusson's death, his eldest son brought a ranking and sale of the lots vested in his father; and some of them having been sold in 1797, the Duke of Queensberry obtained an interim warrant for payment of £8000 out of the price; which sum was paid 6th December 1797, after which there was a balance due to his Grace of £315. 3s. 5d. carrying interest from that date.

In the draught of the order of ranking which followed the judicial sale, Mr. Riddell, in virtue of the real burden in his disposition to Mrs. Fergusson, was preferred for his relief of the balance due to the Duke of Queensberry, and for the sums of interest which he had paid to the Edinburgh Friendly Insurance Company, with interest thereon periodically from the dates at which it had been advanced.

To this order of ranking no objection was made in so far as the sums for which Mr. Riddell was preferred, consisted of principal sums due to the heritable creditors, or of simple interest thereon. But Sir Francis Ford and Mr. Smith, as the assignees of Mr. Boyd, who was a secondary heritable creditor, contended that Mr. Riddell was not entitled to rank either for the interest upon interest which he had become bound to pay to the Duke of Queensberry by the bond of corroboration, nor for interest upon the different payments of interest which Mr. Riddell had made to the Edinburgh Friendly Insurance Company; and

Pleaded: 1. Mr. Riddell may be regarded as virtually the cautioner of Mr. and Mrs. Fergusson, for the sums claimed by him as a preferable creditor. But as no judicial demand was ever made upon him by registration of the bonds or otherwise, for payment of the interest due to the heritable creditors, he has not even a personal claim against the principal debtors for interest upon the interest which he so advanced; Act of Sederunt, 21st December 1590; Ersk. B. III. Tit. 3. § 78.; 18th July 1668, Sir James Stewart, No. 63. p. 525.

2. But even if Mr. Riddell's claim were good against the principal debtors, it cannot be effectual in competition with a secondary heritable creditor. Mr. Riddell, by the terms of his disposition to Mrs. Fergusson, merely made his relief of the heritable debts of the Duke of Queensberry, and the Edinburgh Friendly Society, a real burden on the conveyance. By this step, therefore, he can never be placed in a better state than those heritable creditors themselves, who, even if they had led an adjudication, would not have acquired the preference for the accumulation of interest which is now sought by Mr. Riddell; 12th July 1769, Ranking of the Creditors of Auchinbreck, No. 34. p. 14131.

Besides, Mr. Riddell's claim resolves into a palpable infringement of the established rule, that no unknown or indefinite security can be created on heritable property.

No. 3.

Answered: 1. A cautioner who pays in consequence of a peremptory demand, whether judicial or extrajudicial, pays *necessarily*, and wherever he does so, he must be entitled to full relief, and of course to interest upon the sum which he has paid, without which he would not be indemnified; 24th January 1627, L. Wauchton against L. Innerweek, No. 57. p. 519. 16th January 1627, Cranston against L. Frendraught, No. 56. p. 519. Creditors of Crichen, No. 72. p. 532.

2. Mr. Riddell claims the preference, not in right of the Duke of Queensberry, or the Edinburgh Friendly Insurance Company. He claims it in virtue of his own infeftment in relief, with which the infeftment of Mrs. Fergusson was burdened. Had he remained undenuded in her favour, every claim of relief competent to him as trustee, and those in question among the rest, would have been completely secured. But he denuded only under the burden of these claims, so that they must be as effectually secured as if his trust infeftment had still remained, and accordingly they are expressly excepted in the clause of warrandice of the very heritable bond which is the title of the objectors to appear in the ranking.

Mr. Riddell's claim is as definite as any debt of relief can be, namely, for the principal sum and interest paid by him, with interest upon the whole sum paid as a new capital. Unless, therefore, this claim is good, it must be conceded, that (contrary to what has been uniformly understood) our law admits of no form by which an heritable creditor in relief can be protected from loss.

Replied: Mr Riddell had a complete security against loss in his own hands, had he chosen to avail himself of the assignation which he obtained from Mrs. Fergusson, and paid the interest as it fell due out of the rents.

The Lord Ordinary "sustained the objection to the accumulation of interest "upon the bond of corroboration to the Duke of Queensberry, and likewise to "Mr. Riddell's claim for interest upon interest paid by Mr. Riddell as a preferable creditor for the same."

On advising a reclaiming petition, and additional petition for Mr. Riddell, with answers, the Court, (27th February 1801), by a narrow majority, "adhered."

But afterwards, on advising a second reclaiming petition, with answers, the Court, by a considerable majority, and on the grounds above stated, altered the interlocutor, and repelled the objections to Mr. Riddell's claim.

Lord Ordinary, *Armadale.* For Sir F. Ford, *Hay, Jo. Clerk.*
Alt. *H. Erskine, M. Ross.* Clerk, *Home.*

R. D. *Fac. Coll. No. 145. p. 552.*

1802. *March 3.* CAMPBELL *against* The EARL of GALLOWAY.

No. 4.
In what circumstances a debtor is understood to be

IN the year 1744, the late Earl of Galloway purchased from Captain John Stewart of Drummorrell, the lands of Meikle Arrow, and received a disposition to them, which bore *in gremio* a discharge of the price. Soon after,