

S E C T. V.

Of Securities for Debts *to be* Contracted.

1715. January 19.

M'DOWAL of Freuch, and Captain ALEXANDER STEVENSON, *against* SIR JOHN RUTHERFORD and his LADY.

In a ranking of the Creditors of Hackburn, there being produced a disposition in favour of William Cairncrofs, (to which Sir John Rutherford has right by proffes) granted by Hackburn, of his lands, &c. under reversion, and for security not only of L. 2495 acknowledged due at granting, and which he obliges himself to pay betwixt and the 8th of June 1679, but of all other sums due by Hackburn to him, or which thereafter might be due and addebted to the said Cairncrofs, or whereunto he had right, or he or his heirs might thereafter have right by whatsoever manner of way; upon which he was infest 3d January 1675. There was also produced for Stevenson an heritable bond and infestment, dated 3d February 1679, and another heritable bond and infestment produced for Fullerton of Dreghorn, dated the same day with Cairncrofs's, viz. the 3d of January 1679; which infestment is confirmed in 1689, and is now in the person of M'Dowal of Freuch, who has also procured a charter of confirmation of the whole rights in his favour.

Stevenson, whose infestment was latest, insists in a poinding of the ground in June 1679, where Cairncrofs and Dreghorn compear, and plead preference upon their rights; and, during the dependence, Dreghorn procures his charter of confirmation. But Stevenson's right being made public by his citation against the tenants, and the dependence of the process before the confirmation, there is a decret in his favour extracted upon his preference.

Cairncrofs having thereafter by back-bond restricted his above sum to L. 1100, does, after the common debtor was *lapsus* and dead, purchase in certain personal bonds due to other creditors, and now in the ranking insists for preference even as to these also, and that by reason of the above clause of reversion.

It was *alleged* for the said other creditors, That their real rights having supervened before any acquisition of the personal rights, there was a *medium impedi-mentum*, which hindered the debts personal at that time to become real; especially considering that their sines were not only on record, but intimated, and Cairncrofs's right rendered litigious before his acquiring the personal debts.

Answered for Sir John Rutherford, That his claim is supported by law and form, and all analagous parallel instances; since there is nothing more usual, than for parties to give wadsets redeemable, for payment of a special sum, and of all other debts which should afterwards be owing before redemption. Nay, tis usual

No 210.

A disposition granted in security of debts due *and to be acquired*, found good *only* to the extent of debts in the disponent's person, at the time the infestments of other creditors were made public.

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for parties engaging for one another to take heritable bonds of relief, not only for all undertaken by them, but wherein they should afterwards engage ; which general clauses have always, before 1696, been found effectual. And there is no *medium impedimentum* here, since Sir John's right was originally exclusive of the competitors, who were certiorate by the records, that all sums to which Cairncrofs might have right, would certainly exclude them ; so that they cannot complain who contracted with a party so disabled, seeing *scire debebant conditionem ejus cum quo contraxerunt*.

Replied for the Creditors, *imo*, That Cairncrofs's right, was most suspicious and ensnaring, destructive to commerce, and tending to render our great securities by the registers altogether loose and uncertain ; for, by this clause the creditors do indeed see that their debtor owes a certain sum, whereof they take their hazard, knowing the estate will pay both that and theirs, for which they secure themselves by infestment, and render the same public ; but what other sums may be latent betwixt their debtor and other personal creditors, no real creditor can, or is obliged to know. *2do*, If such a clause be sustained, the debts which could never claim any preference, yea debts not *in rerum natura*, when other creditors rights were existing, would, by the mere accident, of another creditor having a right in security with so ample a clause, through the coming into that other creditor's person, be transubstantiate, and become real and preferable ; which is a manifest absurdity and injustice, tending to the overthrow of all our securities.

THE LORDS found Cairncrofs's right is not preferable for those debts, which were not in his person the time that the other creditors, Stevenson and Fullerton, their infestments were made public.

For Sir John Rutherford, *Sir Ja. Nasmyth*.Alt. *Graham*.Clerk, *Robertson*.*Bruce, No 30. p. 39.*

No 211.

A disposition *ex facie* absolute, with a back-bond bearing, that no price had been paid, but that the infestment was to subsist as security for debts due, and to be acquired by the disponent, sustained to the extent of debts contracted, whether before or after infestment.

1782. February 16. RIDDEL against CREDITORS of NIBLIE.

JAMIESON, upon the narrative of a price paid, disposed his lands of Langside to Niblie, *absolutely* and *irredeemably* ; and on this disposition infestment followed.

Of the same date with this disposition, a back-bond was granted by Niblie to Jamieson, declaring, that no price had been paid by him ; but that the infestment was meant to subsist as a security for certain debts of Jamieson, then in the person of Niblie, and for such other debts as Niblie should thereafter transact with Jamieson's creditors.

Both Jamieson and Niblie died soon after ; and their respective creditors having transferred their debts to trustees, Mr Reid, for the creditors of Jamieson, instituted an action for setting aside the infestment. It contained, among others, a conclusion for restricting the security thereby created, to the debts due to Niblie