It was ordered and adjudged that the interlocutor complained of be *reversed*. And it is further ordered that the interlocutors of Lord Justice Clerk, Ordinary there, of the 15th and 24th Dec. 1790, and 11th March 1791 be affirmed.

For Appellants, *Wm. Adam, John Clerk.*

For Respondents, *W. Grant, Wm. Tait.*

NOTE.—Unreported in Court of Session.

[M. 1158 et 1236.]

Messrs. NEWNHAM, EVERETT & Co., . . *Appellants;*

DAVID STUART, Esq., Trustee on James Stein's Estate, } *Respondents.*

House of Lords, 25th March 1791.*

House of Lords, 10th March, 1794.

HERITABLE SECURITY—ACT 1696, c. 5—INDEFINITE SECURITY.—In the *first* appeal in this cause: Held, that an heritable security, granted for future advances, was of no force for sums advanced subsequent to the date of the infeftment. This security for a cash credit, consisted of an assignation and conveyance to a former heritable security for the sum of £12,000, but the estate vested by that security was assigned indefinitely, without any mention being made of the extent of the cash credit, in security of which it was so conveyed: Held in the *second* appeal, that the security was of no force or effect even for the advances made before the infeftment, in consequence of its being a security for an indefinite amount.

James Stein stood infeft in an annualrent of £600, leviable out of the lands of Kincaple, and on that estate itself, for security of a principal sum of £12,000, due by virtue of an heritable bond, granted by Robert Stein of Kincaple.

James Stein being concerned in the firm of Buchanan and Co., merchants in Kincardine, applied to the appellants, bankers in London, for a credit to the extent of £12,000. This was agreed to, on condition of obtaining a conveyance of the Kincaple security, which was done accordingly. But, in the conveyance, there was no definite sum mentioned, for

Jan 7, 1788.

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* The first appeal in this cause, is reported here, along with the appeal which followed, after coming back from the House of Lords.

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which the security was so conveyed, but it stated that it had been agreed, on granting the same, that the company in which Mr. Stein was concerned, should have a credit, or account current, to be kept in the appellants' bank.

4th Feb. On this the appellants were infeft on 4th Feb. The appellants had advanced considerable sums before taking infeftment, and sometime thereafter a sum was drawn from this account amounting to £16,253.

Mr. James Stein became bankrupt, whereupon the respondent, his trustee, raised a reduction of the above security and infeftment, upon the ground, *inter alia*, That it was a security for debt *to be contracted*, which was struck at by the act of Parliament 1696, c. 5, and made it of no force for advances or debt contracted *after the date of the sasine*. In answer, it was admitted by the respondent, that the security must stand for such sums as were advanced *before* the

Jan. 24, 1789. *date* of the infeftment, but not for those sums advanced subsequent thereto. The Court of Session reduced the conveyance, in respect "that the infeftment for security of "Newnham and Co., cannot avail them for any sums paid, "or obligations undertaken by them posterior to the 4th "Feb. 1788, and appoints the defenders to give in a state "of all sums paid, or obligations undertaken by them, pre-"vious to the said date." On representation, the Lord Ordinary adhered, 16th June 1789; and, on reclaiming petition to the whole Lords, the Court adhered;* and on ap-

Nov. 14, 1789. peal to the House of Lords, their Lordships affirmed. (25*th March* 1791).

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* LORD PRESIDENT CAMPBELL said:—"The evil meant to be remedied by the clause of the act 1696, which relates to securities for future debts, was the granting of securities without value actually existing at the time, but upon the expectation or chance of value to exist afterwards. This had sometimes been practised, and had always been liable to be used as a cover for fraud, by enabling the common debtor to deceive fair creditors, and collude with confidential friends, by excluding some, and assuming others, and so ranking and preferring them at pleasure.

"The words of the statute are clear and explicit. There is no evidence that it was occasioned by the case of Langton, (No. 146, p. 1054, Dict.), as has been supposed. In that case, the debt was indefinite as well as future. However, the enactment is certainly not confined to that particular case. It is broad and general, and it marks the *futurity* as the prominent criterion.

"The circumstance of a deed being indefinite as to the sum, is

On the case coming back to the Court of Session, the respondent moved a new ground of objection to the deed, even as to those advances made *prior to the infeftment*, which was this, that the conveyance and assignation was

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not at all mentioned in the act. Perhaps it was thought there was the less reason to provide a remedy for that case, as an uncertain and unknown encumbrance could not be sustained even at common law, being inconsistent with feudal principles, and with the security of the records. This, however, was for sometime a disputed point, as appears from a case in July 1730. Creditors of Crawford, observed by Kaimes in his Dictionary, vol. 2, p. 67, (see Personal and Real), where his Lordship mentions that it was debated, but not determined, whether clauses burdening the subject disponed with the granter's debts in general, without mentioning any particular debt, rendered these debts real or not. "But thereafter, it having been " found, in appeal to the House of Lords, that such general clauses " create no real burden, the Lords ever since have been in use to " determine according to the judgment of the Higher Court." The cases here alluded to by Lord Kaimes, are discovered from b. ii. tit. 3, § 50 of Erskine, where the following passage appears:—" A " clause charging the lands contained in the grant, with the dis- " poner's debts, in general terms, without mentioning the names of " the creditors, was, by repeated decisions in the cases of the credi- " tors of Lovat, Coxton, and Kersland, (see Personal and Real), " adjudged to constitute a real burden on the lands disponed in con- " sequence of the right competent to all proprietors, of disposing of " their property under such condition and limitations as they shall " judge proper. But *two* of *those* judgments having been reversed " in the House of Lords, the Court of Session did, in July 1734, " Creditors of M'Lellan, (see Personal and Real), and by several " later decisions, alter their former rule, upon this principle, that no " perpetual unknown encumbrance ought to be created on land; " because, the purchaser cannot, by the strictest inquiry, know who " the creditors in that burden are, so as by a proper process to force " the production of their grounds of debt, in order to clear them off."

14 Nov. 1789.

1st Feb. 1793.

The Act 1696, then, was made not for cases of uncertainty, but for cases of futurity; and as to this last, it could make no difference with regard to the principle of the act, and the possible mischief meant to be provided against, whether the precise sum which was to be the *ne plus ultra* of the contraction, was fixed or not. Suppose, for instance, a man has an estate worth £20,000, and this is the extent of his whole fortune, although he specify this sum in a deed, there is as much room for abuse, as if no sum had been named. He might have named £100,000; but ought this to be considered in the light of a definite obligation?

" It is not necessary to subsume fraud. The sole question under

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inept, and good for no part of the sum, in respect that it was granted for an indefinite and uncertain sum. It was answered, that this was an assignation to a security in which the sum was definite, and not a security granted for an indefinite sum on a land estate.

Feb. 1, 1794. On report of the Lord Ordinary, the Court found, "The "conveyance granted by James Stein of the heritable bond "granted by Robert Stein to him over the lands of Kin- "caple was an indefinite security, and therefore cannot be "sustained so as to create a preference to Messrs. Newnham, "Everett, and Co., in a question with the other creditors of "James Stein, and therefore reduce, decern, and declare."*

Against this interlocutor an appeal was brought.

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the act is, Whether the security infer a debt already existing, or a debt to be contracted? The case of Dempster against Kinloch, (Rem. Dec., vol. 2, p. 233; *voce* Right in Security), which has been mentioned, was attended with great difficulty, on account of the obligation which Dempster had undertaken to advance the balance at any time, upon requisition of forty days. Lord Elchies argued with some force, that this was equal to an actual advance; but Lord Arniston and other judges observed, that the other party was not bound; therefore no debt was actually contracted. The present case is attended with much less difficulty. Neither party is bound. For a cash credit may be withdrawn at any time.

"In the case of Neblie, No. 211, p. 1154, there was an absolute conveyance, and it was thought the receiver could not be bound to denude, till completely indemnified. The case of Bank of England *v.* Bank of Scotland, 1st March, 1781, Fac. Coll., No. 41, p. 72, (*voce* Right in Security), was more applicable. The case of Pickering, No. 212, p. 1155, is in point.

"There is a peculiarity in the present case. The security to Newnham, Everett, and Co., is indisputably indefinite. The original security of Robert Stein to James, was indeed definite; it was for £12,000. But the estate vested by that security in James, was by him conveyed indefinitely, without any mention of the extent of the cash credit.

"It appears, in fact, £16,000 has been advanced. Newnham, Everett, and Co., therefore, if the security be good, must rank for £16,000, to the effect of drawing in proportion to that sum, and not in proportion to £12,000. This must form an insuperable objection to the security."

Interlocutor 1st February, 1794.

* Lord President Campbell.—"The sum is indefinite; see note on former case, 14th Nov. 1789. The argument in p. 18, &c.

Pleaded for the Appellants.—1. The act 1696, which has express relation to securities for indefinite sums, does not strike against such securities, in so far as granted for sums advanced before the date of infeftment; but as to "debts "to be contracted after the sasine or infeftment following "on the said disposition or right, without prejudice to "the said disposition or right as to other debts as ac- "cords." The plain inference and meaning of the latter clause is, that, as to debts contracted before the date of such sasine or infeftment, the security will be unquestionably and perfectly good; otherwise, the reason for fixing on the date of the sasine, and declaring all inept after it, but without prejudice to all contracted before it, would have no intelligible meaning whatever. 2. If good to this extent, it must be good in all events and circumstances, and whether the sum for which it was granted be definite or indefinite. But really and truly the objections to it as an indefinite security, does not apply, because the act as interpreted by the decisions of your Lordships, refers to indefinite securities, as *burdens* or *charges* on land; but this is not the case of a burden or charge on the property, when the possession is in one person, and the demand or alleged lien in another; but the present is a *total conveyance* of the property or subject intended to be the security, and a complete change of the possession, though under reversion. It therefore humbly appears, that though an indefinite burden cannot be created on landed estate, in form of an heritable bond, or the like, yet it does not follow that an heritable bond or security, with which an estate stands already burdened to a certain precise extent, may be conveyed and assigned in security of sums to be contracted to an indefinite extent.

Pleaded for the Respondent.—The difference between heritable and personal estate in the question at issue, is obvious, and founded on the soundest expediency and policy. The legislature, for the security of landed estates, on the one hand, and to prevent frauds on the public, on the other, has declared that no heritable securities for future debts should be effectual. This was done by the act 1696, which declares all such debts ineffectual after infeftment. The appointment

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very ingenious, (namely, that it was an assignation only to a security in which the sum was definite), but I doubt if it be solid."

Lord Justice Clerk.—"I cannot distinguish between a land estate and an heritable bond. Impignoration of moveables is different, for the moveables are in the creditor's possession."

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of the public registers would be no security if such infeftments were good, because it would be impossible to know the extent of such burdens from the records. The security here granted being therefore indefinite, can have no effect whatever as a preference. 2d. The distinction taken between burdening landed property, with an indefinite security, and conveying in security an heritable bond, which already burdens a land estate with a *definite* sum, is a mere piece of ingenious refinement. An heritable bond is heritable property, and, in the true sense of the term, an heritable subject; so that argument on this part of the case comes to nothing; and the appeal therefore falls to be dismissed.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *R. Blair, W. Grant.*
For Respondent, *Rob. Dundas, Jas. Boswell.*

[M. 2136.]

WM. KEITH, Accomptant in Edinburgh, Trustee on Sir Robert Maxwell's estate, } *Appellant;*
SIR WM. FORBES, Bart., JAS. HUNTER & Co. *Respondents.*

House of Lords, 11th June 1794.

RANKING—CAUTIONER—RELIEF—CORREI DEBENDI.—Three parties became bound, conjunctly and severally, in a personal bond for the sum of £10,000, borrowed for the use of one of them: the other two being mere sureties, and having bonds of relief granted. The principal became bankrupt, and nothing could be derived from his estate. One of the sureties also became insolvent, and the other being obliged to pay the whole debt. Held that the latter was entitled to rank on his co-surety's estate for the whole debt paid by him, to the effect of recovering the one half due by him. Reversed in the House of Lords, and held that he was only entitled to rank for the one half of the debt, each of them having been indebted as principal for a moiety thereof; and as surety for the other moiety.

Sir Robert Maxwell of Orchardtown, Bart., Patrick Heron of Heron, Esq., and Robert Maxwell of Cargen, Esq.,