

## SECT. IX.

## Indefinite Security.

1793. *Febroary 1.*The CREDITORS of JAMES STEIN *against* NEWNHAM, EVERETT and Company.

JAMES STEIN conveyed to Newnham, Everett and Company, an heritable bond for L. 12,000, secured by infestment, as a corroborative security for the sums which they should advance on a cash-account to Buchanan and Company, with whom Stein was connected in business.

The conveyance was silent as to the extent of the sum for which the bond was pledged.

Newnham, Everett and Company took infestment on this conveyance, and both before and after doing so, they made large advances to Buchanan and Company. In a reduction at the instance of Stein's Creditors, the Court, on the 14th November 1789, and afterwards the House of Lords, found, that the infestment could have no effect as to sums advanced posterior to its date.

A doubt having been started when the last interlocutor was pronounced, how far the conveyance was effectual at common law, even for sums advanced prior to the infestment, the creditors now shaped their objection accordingly, and

*Pleaded*; The proprietor of a moveable subject may lawfully impignorate it for a future as well as for a present debt, for a debt of indefinite as well as one of a definite extent, and the delivery of the subject completes the right of the creditor.

But as in heritable property actual delivery is impossible, if a private agreement between the parties were sufficient to constitute a burden on it, there would be no way by which a previous incumbrance could be discovered. To supply this defect, heritable bonds, and other rights in security were introduced, which are not effectual till an infestment taken on them has been recorded; and the records would but ill answer the purpose intended, if it were not essential to such rights, that they should express the name of the creditor, and the nature and extent of the debt. Hence, although this principle was little attended to in the older practice of the Court, it is now completely established, that no indefinite burden can exist upon land; 1734, Creditors of Maclellan, (See APPENDIX.); 20th June 1739, Creditors of Broughton against Gordon, No 70. p. 10246.; 21st February 1765, Stenhouse against Innes and Black, No 77. p. 10264. The conveyance in question, therefore, as being clearly of that description, must be reduced. See PERSONAL and REAL. Sect. 5.

*Answered*; There is a material distinction between the case where an indefinite burden is imposed on land, and to which all the cases quoted relate, and

No 32.

An indefinite security cannot be created on an heritable bond.

No 32.

the present, where it is to be imposed on an heritable bond already secured upon land. As the value of land is indefinite, the extent of the burden in the former cannot be discovered from the records. But the value of the bond is definite, and if conveyed without limitation, it must be presumed to be burdened to the utmost extent, in the same manner as if it had been so expressed in the conveyance. The records thus ascertain both the extent of the burden chargeable on the lands, and the amount of the debt for which the bond is impignorated.

The possession of an heritable as well as that of a personal bond, may be transferred to a creditor, and unless in so far as the holder is restrained by the act 1696, there seems no good reason why both may not be impignorated with the same freedom.

The Lord Ordinary reported the cause on informations.

*Observed on the Bench*; It has long been established, that no indefinite burden on land can be supported. There is no room for distinguishing between a landed estate and an heritable bond; both are held by feudal tenures, and the burdens on both ought to be public. Although the bond assigned is definite, the security created on it is indefinite.

THE LORDS pronounced the following interlocutor: "Find the conveyance granted by James Stein of the heritable bond granted by Robert to James Stein, over the lands of Kincaple, belonging to Robert, was an indefinite security, and therefore cannot be sustained, so as to create a preference to Messrs Newnham, Everett, and Company, in a question with the other creditors of James Stein; and therefore reduce, decern, and declare accordingly; repel the claim made by Messrs Newnham, Everett and Company for the expenses debursed by them in this cause previous to the agitating the point now under consideration, and find expenses due to neither party."\*

Lord Ordinary, *Swinton*.

Act. *Dean of Faculty, Maconachie*.

Alt. *Wight, Hay*.

Clerk, *Sir James Colquhoun*.

*D. D.*

*Fol. Dic. v. 4. p. 247. Fac. Col. No 22. p. 45.*

\* \* \* This case was appealed:

The House of Lords, 10th March 1794, ORDERED and ADJUDGED that the appeal be dismissed, and that the interlocutors complained of be affirmed.

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\* The defenders contended, That the pursuer's plea was incompetent, because the final interlocutor of the Court, authorising a partial reduction only in an action where a total was sought, implied that *quoad ultra* the defence was well founded, and, at any rate, that they must be entitled to the expense of the previous litigation. The Court were not moved by this objection. There is nothing, it was observed, to hinder a pursuer from insisting separately on different grounds of reduction.