

No 35.

The interlocutor of the Court in this case was precisely in terms of the above decision.

Lord Ordinary, *Justice-Clerk.* Act. *Abercromby.* Alt. *Rae, Law, W. Miller.*  
C. *Fol. Dic. v. 4. p. 243. Fac. Col. No 79. p. 135.*

\* \* \* See Observations on this case in the APPENDIX.

1782. June 24. Ranking of the CREDITORS of JARVIESTON.

No 36.

Right in security of the penalty in an heritable bond gives a preference for necessary expenses.

IN this ranking, several of the creditors by heritable bond were infeft, ' in security of their principal sums, annualrents, and penalties;' and by virtue thereof claimed to be ranked for their penalties, to the extent of the expenses actually incurred, in the same class in which they were ranked for their principal sums and annualrents.

The common agent in the ranking,

*Objected*; Were the strict words of the obligation the rule, this claim would be well founded. But that rule would not only justify a demand for the whole expenses, but also for the whole penalty, although no expenses had been incurred. Practice, however, has tempered the severity of this stipulation, by restricting the creditor's claim to the neat expenses. And on the like principles, in a question with posterior creditors, having lent their money on similar securities, a competitor cannot avail himself of the strict terms of his infeftment, to the effect of obtaining a preference for the whole expenses incurred.

The expenses of obtaining infeftment being disbursed at the same instant that the security is created, may be considered as a debt then actually existing.

But beyond that, an infeftment in security of the penalty is really a security for debts not then contracted, because, if the money be paid at the term, no penalty is due. It is likewise exceptionable, as creating an unknown and general burden on lands, because it cannot be known at any period what expenses have been laid out. On all these accounts no person has any difficulty in lending money upon an estate, although the penalties annexed to the debts heritably secured would fully exhaust the common fund, it being universally understood, that such security can go no farther than, at the utmost, the expense of infeftments, which is generally paid when the money is advanced, and, at any rate, is exceedingly trifling.

*Answered*; The conventional penalty in bonds for borrowed money, is an agreed modification of the damage the creditor may sustain by delay of payment; and the moment the debtor fails in payment, the penalty is due. From equitable motives indeed, the Court of Session has restricted penalties of this nature to the expenses laid out by the creditor; but to the penalty thus restricted, the creditor has the most undoubted claim; and if the same be se-

cured by an actual and express infestment, no reason can be given why the creditor should not enjoy the benefit of such security.

The objector has endeavoured to support his plea, by confounding the effects of the infestments now under consideration, with those attending rights of annualrent conceived in the ancient form. There a penalty was stipulated, and a clause intervened, declaring the lands redeemable, upon payment of the principal sums, annualrents, and penalties; and, by virtue of this clause, the debtor could not disburden his estate without satisfying the creditor for the expenses incurred in recovering his debt. But when an estate, so affected, was brought to a judicial sale, this clause was not attended with such complete effect. As the penalty was no where secured by infestment, it could not have a place in the ranking as an heritable debt; and the clause limiting the faculty of redemption, however effectual against the debtor himself, was of no avail against the purchaser; who by the statutes 1681 and 1695, could insist for an assignment of the real rights, upon payment of the price, or, in default of such assignment, could disburden the estate by consignation; Bankton, Book 3. Tit. 2. § 106. To those rights of annualrent, the practice founded on by the objector must be limited; 2d February 1739, Creditors of Menzies, (See APPENDIX.) In the case of an heritable bond, conceived in the terms of these under dispute, matters are totally in a different situation. Here the creditor is infest, expressly in security of his penalty, has a real right in the estate corresponding to it, and, in a ranking, is equally entitled to a preference upon it, to the effect of recovering the expenses incurred, as he is upon his principal sum and interests.

An infestment for expenses to be disbursed by no means secures any future debt, any more than an infestment for relief of a cautionary obligation. In both cases the debt exists at the time of granting the security. The disbursement of the money indeed is posterior, yet the necessity of disbursing is prior to the security; and whenever the one party comes under that necessity, he is creditor to the other for his indemnification. Nor can an infestment of this nature be viewed as an unknown burden. Its utmost extent is much more precisely defined by the records than the bygone annualrents, which are unquestionably really secured: And the hardship which may ensue to posterior creditors, falling on those who, from the records, might have known the amount of the debts affecting the estate, and provided against it, is no wise comparable to what the prior creditor must be exposed to if this plea should be sustained; as from thenceforward it will be impossible for the most skilful conveyancer to devise a mode by which a person, about to lend his money, can secure the expenses he may be exposed to in recovering his debt.

THE LORDS, chiefly moved by the practice alleged by the objector, at first dismissed this claim: But as, upon investigation into rankings, the practice appeared in no degree uniform, they altered that judgment, and found, " That

No 36. the petitioners (the heritable creditors) are preferable upon their heritable bonds to the extent of their necessary expenses, alongst with their principal sums and interests; and are entitled to be ranked for the said expense accordingly."

The expense laid out in recovering the contents of collateral security, not held to fall under the penalty in an heritable bond.

ONE of the creditors, mentioned in the preceding case, having advanced the sum of L. 600 Sterling, obtained an heritable security to that extent, and at the same time an assignation to the debts paid with the money advanced by him. One of the debts assigned, was a bill upon which arrestment had been used. In discussing this diligence, the creditor disbursed a sum nearly equal to the penalty secured by the heritable bond. The question occurred, Whether the expense thus laid out, not in following out the heritable security, but for making a collateral security effectual, could be imputed to the penalty in the heritable bond as a necessary expense.

*Pleaded* for the common agent; No person can charge an expense to the penalty in an heritable bond, which was not laid out in the character of real creditor, and in diligence affecting the estate. A contrary practice would be inconsistent with the nature of an heritable security; would encourage litigious creditors to load expenses upon their debtors; and would defeat the security of co-creditors, for money actually advanced before these expenses were disbursed.

*Answered*; According to the present form of an heritable bond, the personal obligation subsists in full force along with the heritable right, and the infestment is only accessory to the personal obligation. Whatever, therefore, can be demanded by virtue of the personal security, is effectual against the estate, in consequence of the heritable, the one being precisely commensurated with the other. Further, every expense, properly laid out in recovering payment of the debt, ought to be included in the penalty, because it constitutes a part of the damages sustained by the creditor from delay of payment after the stipulated term. And as the whole penalty is, in strict law, incurred whenever the term of payment is elapsed, and as it is only retrenched, upon equitable considerations, to the actual expense, it would be highly unjust not to support the creditors' claim to that extent; *Stair, Book 4. Tit. 3. § 2.*

THE LORDS found, " That the expense laid out in recovering the contents of a collateral security, could not be understood as a part of the penalty in the heritable bond."

Lord Ordinary, *Brazfield.* For the Common Agent, *Maclaurin, Henry Erskine.*

For the Heritable Creditors, *Cullen, Ross.*

Clerk, *Menzies.*

G.

*Fol. Dic. v. 4. p. 244. Fac. Col. No 48. p. 75.*