

at the date of the infestment, upon that part of the act 1696, c. 5. which annuls  
 ‘ infestments in relief or security of debts *to be contracted.*’

No 211.

THE LORDS, in respect this was not an infestment in relief or security, but an  
 absolute disposition to the property, sustained the same to the extent of the debts  
 due by Jamieson to Nible, at whatever time contracted.

Reporter, *Lord Justice Clerk.*      Act. *Ogilvie.*      Alt. *Nairne.*      Clerk, *Home.*  
*Craigie.*      Fol. *Dic. v. 3. p. 58.*      Fac. *Col. No 33. p. 54.*

1788. January 16.

GEORGE PICKERING *against* SMITH, WRIGHT, and GRAY.

JAMES KING granted to Smith, Wright, and Gray, bankers, an heritable bond  
 for L. 2500; on which infestment was taken. They, on the other hand, by a  
 separate deed, acknowledged, ‘ that they had not then paid the above sum; but  
 ‘ that the bond was intended as a security for such payments as they already had  
 ‘ made, or should *thereafter* make, during the currency of a cash-account which  
 ‘ they had opened in his favour.’

No 212.

An heritable  
 bond granted  
 in security of  
 sums to be  
 paid on a  
 cash-account,  
 found ineffec-  
 tual, except  
 as to pay-  
 ments made  
 prior to the  
 infestment.

King accordingly received from time to time considerable sums; but having  
 afterwards become bankrupt, and disposed his estate to Pickering, as trustee for  
 his creditors, the latter instituted an action for reducing this heritable security;  
 and

*Pleaded:* By the statute of 1696, cap. 5. it is enacted, for the prevention of  
 fraud, ‘ That any disposition, or other right that shall be granted for hereafter,  
 ‘ for relief or *security of debts to be contracted for the future,* shall be of no force  
 ‘ as to any such debts that shall be found to be contracted *after the sasine or in-*  
 ‘ *festment* following on such disposition or right.’ The security in question having  
 been evidently granted for a debt to be contracted ‘ for the future,’ if it ever  
 was to exist at all, comes directly under the words of the law: So that it is need-  
 less, while the expression is thus unequivocal and clear, to enquire, whether fu-  
 ture debts, altogether indefinite, may have been more especially the object of the  
 statute. Though in these the danger of fraud might be greater than in definite  
 debts, the language of the enactment proves, that it was apprehended to exist in  
 both. Accordingly, the Court having applied the statute to indefinite debts, in  
 the case of *McDowal contra Rutherford*, No 210. p. 1153. applied it equally to  
 such as were future, though definite, in that of *Kinloch contra Dempster*, 13th  
 June 1750, Rem. Dec. v. 2. p. 233. *voce* RIGHT in SECURITY.

*Answered:* Prior to the statute, it was usual to give infestments in security of  
 all debts to be contracted, and of all cautionary obligations to be incurred in fu-  
 ture. By means of these, not only personal but real creditors, whose rights were  
 posterior to those infestments, could be postponed at pleasure: A practice of a

No 212.

fraudulent tendency, and as such mentioned by Lord Stair, in a passage; (b. 2. tit. 3. § 27.) where the case of the Creditors of Langton \* is referred to as an example, and which is thought to have given occasion to the act of Parliament quoted. But the present security, on the contrary, was made for repayment of a specific debt, being the balance of a cash-account, not exceeding L. 2500; the onerous cause for granting which security existed from the time when the defenders agreed to pay so much money. If the records were inspected, the estate would appear burdened to that amount; but it is difficult to conceive how creditors could be thus ensnared, or how any loss could ever result from the discovery that in fact the burden was of no less extent.

*Replied*: The mere promise to advance money is of no significance, as it could not afford ground for an action of damages.

*Observed on the Bench*: So salutary an enactment ought not to be narrowed in its construction. Far from introducing any innovation, it does no more than confirm the doctrine of our feudal law. The loan of the money was essential to the constitution of the right in question. But it is absurd to conceive this right continually fluctuating between existence and non-existence, according as the money, during the currency of the cash account, should have been paid, repaid, and paid again; the creditor being of course the vassal one day, the next not so, the third a second time vassal, and so forth.

THE LORDS sustained the reasons of reduction of the heritable bond, so far as respected the sums advanced posterior to the date of the sasine thereon.

Reporter, *Lord Stonefield.*  
*Stewart.*

A&S. *Dean of Faculty.*

Alt. *Blair.*

Clerk, *Home.*

*Fol. Dic. v. 3. p. 59. Fac. Col. No 14. p. 25.*

1789. July 30.

CREDITORS OF SIR JAMES DUNBAR, *against* SIR GEORGE ABERCROMBY.

No 213.

An heritable security for sums posterior to its date, but prior to the delivery of it to the creditor, found valid.

IN autumn 1774, Sir Robert Abercromby, the predecessor of Sir George, having agreed to advance L. 5000, on 20th December ensuing, to Sir James Dunbar, upon a security over his estate; an heritable bond for that sum was executed in the month of October, and in November infestment followed. The bond and the instrument of sasine were deposited in the hands of a person who was the man of business of both the parties.

The money was advanced at different times until spring 1775, when the sum of L. 5000 having been completely paid, the heritable security was delivered up to Sir Robert Abercromby.

In a competition of Sir James Dunbar's creditors, it was *objected*, That as this money had not been all advanced prior to the date, either of the bond or of the infestment, they being so far a security for a future debt, fell under the sanction of the statute of 1696, cap. 5. And in support of the objection it was

\* See No 11. p. 33. and No 146. p. 1054. See also COMPETITION and BASE INFESTMENT.