

No 210.

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

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