

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.

Pleaded: The sum of money, in security of which the bond was granted and the infestment taken, not having been paid for several months posterior to the date of the latter, it was, in the terms of the statute, as much a future debt as if the payment had not been made for years after. In the case of Kinloch against Dempster, Rem. Dec. v. 2. p. 233. *voce* RIGHT IN SECURITY, a preference claimed under an infestment in security of L. 20,000, was restricted to L. 8000, that part of the money which only was paid prior to its date; and in the late case of Pickering *contra* Smith, No 212. p. 1155. an infestment, in security of money to be drawn in consequence of a cash-credit with a banker, was not sustained.

Answered: If securities for future debts had not been precluded, the enactment of the statute of 1696 respecting the *sixty days* prior to bankruptcy, must have become nugatory, as often as the precaution was taken of having such previous securities ready to supply the place of those prohibited. But as an artifice of this kind, the security in question could never be employed. None of the parties ever meant that it should be given or received for any future debt; and in fact it was not delivered sooner than the whole of the money was paid; it having been retained till then in the custody of the granter's agent, who happened, which is a circumstance of no moment, to be likewise the agent of the creditor. The delivery no doubt was posterior to the date of both the bond and the infestment; but this was equally necessary, and consistent with the regular practice of business. By that practice, which is essential to the absolute safety of the creditor, the debtor, before he receives his money, must have the bond executed, the infestment taken, and the latter likewise put on record; so that in such cases it is the date of the delivery of the security which is alone considered.

The decision in the case of Kinloch regarded a future and uncertain debt; the ground of that judgment, as stated by Lord Kilkerran, being, that neither the residue of the sum had been paid, nor the holder of the security laid under any such obligation to pay it, as could be the subject of diligence to the granter or his creditors; Kilkerran, *voce* PERSONAL AND REAL, p. 393.* The same observation is applicable to the case of Pickering *contra* Smith.

THE LORD ORDINARY sustained the objection.

But a reclaiming petition having been presented, and afterwards a hearing in presence appointed,

THE LORDS repelled the objection.

Lord Ordinary, Swinton. Act. *Wight, et alii.* Alt. *A. Abercromby, et alii.* Clerk, Gordon.
Fol. Dic. v. 3. p. 60. Fac. Col. No 86. p. 155.

Stewart.

* Under Lord Kames's report of the same case, *voce* RIGHT IN SECURITY.