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dual subject, insomuch that it is not in the power of the Court to adjudge one subject to one, and another subject to another. Suppose the heritage to consist of lands of different holdings of the same or of different superiors, each of the superiors must have each of the heirs his vassal, and that in the several holdings, who again must separate their interests by a brief of division, which is the *actio communi dividundo*; and this being the system of our law, one's intronitting with more than his share of one of the subjects can never extinguish his interest in the other.

Kilkerran, (PERSONAL AND REAL.) No 4. p. 384.

1750. February 17. and June.

DEMPSTER *against* DAME ELIZABETH NEVAY, Widow of SIR JAMES KINLOCH.

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Infestment for
a greater sum
than was ad-
vanced at the
date.

IN the ranking of the Creditors upon the forfeited estate of Sir James Kinloch of that ilk, the following question occurred :

The Lady Kinloch stood secured in a liferent out of the estate of Kinloch, by infestment, dated in December, 1742, registered in February 1743. George Dempster, merchant in Dundee, stood infest on an heritable bond, conceived in common form, for L. 20,000 Scots in the said estate, also in December 1742, and his sasine was registered January 1743, some weeks before the Lady's infestment was registered; but then he had at the date of his heritable bond advanced only L. 8735 Scots, which he of the same date acknowledged by a back-bond, whereby he became bound to pay and deliver to the said Sir James Kinloch at Whitsunday then next, or at any subsequent term of Whitsunday or Martinmas, the balance of L. 11,265, intimation being always made to him 40 days preceding the said term; and thereby it was further declared, that if the advance already made, and others thereafter to be required, should not extend to the foresaid sum of L. 20,000, in that event, the foresaid heritable bond, with what should follow thereon, should be restricted to what should be truly paid and advanced of the said L. 20,000 Scots money and no further. And by a writing on the back of the back-bond, of the 12th December 1743, Sir James acknowledged the obligation to have been implemented by payments at different times preceding that date of the said balance of L. 11,265.

The objection made for the Lady was, That George Dempster's infestment could give him no preference for the L. 11,265, as not advanced till after she was infest. By the common law before the 1696, it was lawful to grant an heritable security for debt contracted, or to be contracted, which became effectual from the date of the subsequent contraction; but still an intervening infestment to a third party was preferable to the security for the debt contracted after it: But by the act 1696, it is declared, That any disposition, or other right, granted for relief or security of debts to be contracted, shall be of no force as to debts contracted after the sasine, without prejudice to the validity thereof

as to other points, as accords, and both on the former law and on this statute, the objection was laid for the defender. No 104.

Answered for the pursuer, That he admitted the doctrines to be just both upon the former law, and upon the statute; but that neither did apply to the present case, because the whole L. 20,000 was truly in the sense of law advanced at the date of the bond. True, no more was paid in cash than the L. 8,735, but an obligation was given for the remainder, which was the same as if the money had been actually delivered in cash.

And accordingly the Lords, by their interlocutor 17th February, 'preferred George Dempster's claim to the claim of the Lady Kinloch.'

But upon advising a petition for the Lady, and answers for Dempster, they, upon the June 'preferred the Lady's infestment to Dempster's, so far as it was pleaded as a security for the sums advanced by him after her infestment.'

However, this judgment would have gone, it had been of little consequence as a precedent, as the question did not turn upon any point of law, but upon the construction of the obligation in the back-bond. For it was by all agreed, that taking it as an absolute obligation for the L. 11,265 not advanced, that could have been affected by a creditor of Sir James's, it would have been secured by the infestment, no less than if it had been advanced at the date of the bond, nothing being more ordinary than to make up a part of a sum by a bill or bond for a balance. But on the other hand, suppose it not to have been such an obligation as was affectable by a creditor, but an obligation pendent upon the will of Sir James, whether he would require the money or not, as at pronouncing the last interlocutor the majority of the Court understood it, there was as little doubt but that the last was the just judgment.

A particular objection was made to Dempster's preference as to the teinds, which, after the above judgment for the Lady's total preference, there was no occasion to determine. *Vide infra* of date June 1750, and between the same parties, *voce* SASINE.

Kilkerran, (PERSONAL AND REAL.) No 8. p. 393.

* * Lord Kames reports this case :

1750. June 15.

SIR JAMES KINLOCH having sold the land of Glenprosim, upon which his Lady was secured for her jointure, gave her a security upon the estate of Kinloch. The deed is in the 1730; she was infest December 1742; and her sasine recorded in February 1743.

Sir James having disposed his estate to his eldest son in the latter's contract of marriage, reserving a faculty to contract L. 20,000 Scots, found it necessary to have a ready fund to answer his demands, which his faculty could not procure him, as few people will lend money upon the faith of a faculty. Toward this end, he and his son concurred in an heritable bond to George Dempster for the sum of L. 20,000 Scots, dated in November 1742, upon which sasine

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was taken the 22d of December, and recorded the middle of January 1743, before recording the Lady Kinloch's sasine. But as no more than L. 8000 was advanced of ready money at the date of the heritable bond, Dempster gave Sir James a back-bond, acknowledging, that he had advanced no more but the said sum, and obliging himself to pay and deliver to the said Sir James and his son upon their joint order, or to Sir James upon his own order, at any term of Whitsunday or Martinmas upon a requisition of 40 days, all or any part of the foresaid ballance of L. 20,000; and it concludes with this clause: "But if the sum already advanced, and others hereafter to be required, shall not extend to the foresaid sum of L. 20,000 Scots, then, and in that event, the foresaid heritable bond, with what shall follow upon the same, shall be, and is hereby restricted to what shall be truly paid and advanced of the said L. 20,000." Dempster advanced the said balance in December 1743, by which the whole sum in the heritable bond was purified.

In a ranking of Sir James's creditors, the Lady claimed preference before Dempster, except as to L. 8000 advanced at the date of the heritable bond. It was premised for her, that if the heritable bond be taken by itself, which bears the actual loan of L. 20,000, no objection can lie against Mr Dempster's preference. But it appears from the back-bond of the same date, that part only was advanced, and that the remainder was to be advanced or not at Sir James's option. Lady Kinloch then is preferable before Dempster, except as to the money advanced at the date of the heritable bond, upon two grounds; *imo*, Infertment granted for security of money cannot, from the nature of the thing, be effectual beyond the money advanced; a sum cannot be secured unless there be an actual security, and as little can a security subsist without a debt of which it is a security; *ergo*, Dempster at the date of his infertment had a real security for L. 8000 only; and he was not entitled to draw one shilling more out of Sir James's estate; and as the Lady's infertment was recorded before any further advance, she must be preferable *secundo loco*.

For illustrating this point, a competition was supposed betwixt Dempster and the Lady, before any more money was advanced; Dempster would be ranked *primo loco* for his L. 8000, and the Lady *secundo loco*. Suppose the decree to be extracted, it will not be said that Sir James could overturn this decree by taking more money from Dempster; but is not the Lady's infertment equivalent to the supposed decree of preference; if Dempster could only take place of her for L. 8000 at the date of her infertment, no posterror deed of Sir James could deprive her of her place.

The Lady's second ground of preference is upon the following clause of the act 1696, declaring, "That any disposition, or other right granted for relief or security of debts to be contracted, shall be of no force as to debts contracted after the sasine, but prejudice to the validity of the disposition as to other points." And here the only question is, whether the whole L. 20,000 was contracted at the date of Dempster's infertment, or only L. 8000? It is true, Dempster stood bound to advance the whole if Sir James should require it.

But a promise to lend a horse for a certain use is not *commodatum*; neither is a promise to lend money, if it be demanded, a *mutuum*; there is no debt established by such a promise. What if the back-bond had run thus, that Sir James should accept of what Dempster should please to advance to the extent of L. 20,000; this would not have validated the infestment *a principio*, nor have made Sir James debtor to Dempster; and yet there is no difference; a debt cannot be contracted without the borrower's consent, more than without the lender's.

It may be added, that an obligation to lend money is of little significance to the obligee, as damages, in case of refusal, cannot be ascertained.

The Lady concluded with the following observation, that had Sir James intended to give Dempster an heritable bond, without any consideration or mutual cause, it might be good, if not challengeable upon the bankrupt acts; but the *species facti* is a security for debt, whereof part only was advanced; in such a case the security must be commensurate with the debt due. The case here is different from that where there is an obligation to relieve a man of debts contained in a list, and where the obligant gets an infestment for his security. In that case, the whole debt is contracted at once before infestment is taken; the person infest stands bound to relieve the granter of certain debts.

At advising, Elchies insisted, that George Dempster's back-bond made him debtor to Sir James Kinloch, that Sir James could assign the back-bond, and that the debts therein contained were arrestable by his creditors. Arniston and the other Judges were of opinion, that the back-bond did not constitute a debt, that no action of debt could lie upon the back-bond, but only an action to create a debt, or to lend money, and that, when Dempster advanced the money, it was not paying a debt due by him, but on the contrary, it was lending money, and creating a debt.

Accordingly it carried, Elchies only dissenting, that the Lady was preferable before Dempster, *quoad* the sums advanced after the date of her infestment, both by common law and by statute; by the common law, because a security cannot be without a subsisting debt which is secured; and by the statute, because there was no debt contracted at the date of Dempster's sasine, except the L. 8000.

Rem. Dec. v. 2. No 115. p. 233.

* * This case is also reported by D. Falconer :

1750. June 13.

SIR JAMES KINLOCH of that ilk, and Dame Elizabeth Nevay his wife, disposed their respective estates of Kinloch and Nevay, in the year 1730, to their son James Kinloch, in his contract of marriage, reserving to Sir James the life-rent of Kinloch, with a faculty of burdening the same with L. 20,000 Scots; and the estate of Nevay with 17,000 merks, reserving the annuity of 1000 merks thereon to the lady in case of her surviving her husband; and Sir James

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granted his Lady an annuity of 1000 merks out of the estate of Kinloch, in lieu of the like provision on another subject which she had renounced; whereon she was infeft in December 1742, and the sasine registred in February 1743.

Sir James and James Kinloch granted an heritable bond to George Dempster, merchant in Dundee, for L. 20,000 Scots, as borrowed at Martinmas 1742, payable at Whitsunday 1743, with annualrent at two terms in the year; on which he was infeft 22d December, subsequent to my Lady's infeftment; but his sasine recorded in January prior to her's.

George Dempster, 20th November 1742, granted a back-bond, declaring. That notwithstanding the bond granted to him, acknowledging the receipt of L. 20,000 at Martinmas last, yet he had only advanced L. 8735 of it; therefore, with and under the provisions and declarations after specified, binding and obliging him to pay to the said Sir James Kinloch, and James Kinloch Nevay, upon their joint orders or receipts, or to the said Sir James Kinloch, upon his own order alone, at Whitsunday next, or any subsequent term of Whitsunday or Martinmas thereafter, all or any part of the balance of L. 11,265, they always intimating any demand 40 days preceding the term of payment of the same; providing that Sir James Kinloch, and James Kinloch Nevay, should be bound and obliged to admit and sustain what orders and receipts should be granted either by them jointly, or Sir James himself alone; and after such payments should be made, as should, with the foresaid sum advanced at Martinmas last, extend to L. 20,000, then the back-bond should become void and null; but if the advance then made, and others to be required, should not extend to L. 20,000, then the heritable bond should be, and was thereby restricted, to what should be truly paid; and Sir James Kinloch and his son granted on the back-bond, 12th December 1742, receipt of the within sum and annualrents.

Sir James Kinloch Nevay succeeded to the estate on his father's death; and, engaging in the rebellion, was attainted; and claims were entered by Lady Kinloch for her annuity of 1000 merks, and George Dempster for L. 20,000, with an annualrent effeiring thereto, which were both sustained on the estate of Kinloch.

Lady Kinloch craved to be preferred to George Dempster, in so far as the money for which he was secured was not advanced by him before her infeftment, as he was then creditor only for what he had truly paid, and could not afterward become creditor for more, so as to claim a preference for it to her real right.

Answered; He was creditor at the date of his infeftment for L. 20,000, and the onerous cause he had given for it, was his obligation to pay up the money, which could have been made effectual against him.

THE LORDS, 17th February 1750, 'Preferred George Dempster's claim to the claim of the Lady Kinloch.'

Pleaded in a bill and answers, and on a hearing which was ordered on this question;

For the Lady, George Dempster did not grant any absolute security for the balance, which might have been transferred or affected by creditors, and therefore might, with more colour, have been called a value paid, so as to have made the counter-obligation a debt to him; but his obligation was conditional, to pay if demands were made upon him, which never might have been made; and in that case the heritable bond was restricted. His debt only arose on the existence of the condition; and before that, her infestment intervened, which could not be hurt by his after contraction. There were instances in law of rights, not valid from the beginning, which might afterwards be made good; as of a base infestment, which might be clothed with possession; but if a public infestment had been obtained prior to the possession, it would not be hurt. Thus far by common law: But by act 1696, for declaring notour bankrupts, it was statute, 'That any rights that should be granted for relief or security of debts to be contracted, should be of no force as to debts contracted after the sasine;' which was precisely the case of the debt competed on.

For George Dempster, The statute annuls securities for debts in general to be contracted; but, in many cases, the extent of a debt contracted may be uncertain; as in infestments for relief and of warrandice; and in some it is uncertain if any debt shall ever exist, as of a jointure to a wife. This case is not at all that of the act, where security is given for a precise sum, and that really due at the time. The bond granted to George Dempster is precisely such as his competitor supposes would make a good ground of a counter-obligation. It might have been transferred, and claimed against him; nor could he have retained any part thereof, on account of his claim against Sir James Kinloch. If he had died, his executor would have been debtor, and his heir creditor in the heritable bond. And though, if he had been pursued himself by Sir James, he might have defended himself; it could only have been by proponing compensation; which would not have been competent to him, if the term of payment of the heritable bond should be supposed suspended to a term later than when his bond was exigible. Many transactions have been conducted in this manner: The banks have lent money on heritable bonds, and have only paid part of the sum, and given obligation for the remainder at a term. And in one case the money was immediately put into the granter's cash account; so that the bond was to be a security for what he should draw out. And the Lords found, That a bond being renounced upon payment, but the renunciation not registred, revived on retiring it, 19th June 1745, Campbell *contra* Creditors of Auchinbreck, *voce* RIGHT IN SECURITY.

THE LORDS found George Dempster preferable for the sums paid by him prior to the Lady's infestment; and found, that she was preferable to him as to the remainder of his claim. See RIGHT IN SECURITY.

For Dempster, R. Dundas, R. Craigie, & Seryngeour. For the Lady, H. Home, T. Hay
and Hamilton-Gordon. Clerk, Forbes.