Answered; Nothing more is here required, than that the real right granted for the security of the childrens' provisions should have that effect, as far as the residue of the subject impignorated, or rather of its price, will extend. No doubt, until their father's death, they are not to receive payment, or, in other words, the intervening interests of the sum provided do not belong to them, and they claim them not. But is that a reason why the security given for the payment of the stock itself should be lost in whole or in part? Lyon *contra* Creditors of Easter Ogle, 24th January 1724, No 2. p. 233. Such, however, is the opposite argument. The balance of the price not being equal to one third of the childrens' debt, can never become effectual for their payment, if not by the progressive accumulation of the intermediate annualrents. Were this not to be permitted, how could it be said that the payment of their provisions had been secured to the extent of the impignorated subject? As to the assignation to mails and duties, the present claim is independent of that right. No 29.

THE LORD ORDINARY took this question to report.

The interlocutor of the Court was the following: "Upon the report of the Lord Probationer, now Lord Rockville, and having advised the memorials for the parties, the LORDS found, That the children of Hugh Maccornock are preferable to Archibald Malcolm upon the balance of the price *in medio*, and interest thereof due and to become due."

A petition for Malcolm, reclaiming against this judgement, was refused without answers.

Lord Ordinary, *Westhall*. For Malcolm, *Wight, Corbet*. Alt. *Dalzell*. Clerk, *Orme*.

S. *Fol. Dic. v. 4. p. 238. Fac. Col. No 167. p. 262.*

SECT. VII.

Right in security of Debts to be contracted.

1781, *March* 1.

The GOVERNOR and COMPANY of the Bank of Scotland, and OTHERS, *against* The GOVERNOR and COMPANY of the Bank of England.

No 30.
A bank had discounted bills to a merchant. They obtained an hesita-

THE Company of the Bank of England entered into the following agreement with Messrs Alexander, merchants in Edinburgh. On the one hand the former, who had previously discounted bills to a great amount, drawn by the latter, on two particular banking-houses in London, were still to continue to discount

No 30.
ble security to a specified extent, for these and for future bills to be discounted. The bills were all renewed periodically. The security was found to continue.

such bills to a farther extent, but "so as the same should not exceed, at any one time, together with the bills already discounted by them, as aforesaid, and then remaining in their hands, the sum of L. 160,000." And it is here to be remarked, that the rules of the Bank of England made it necessary to retire those bills every three months; which was done by substituting new ones, and having them in like manner discounted. On the other hand, Alexanders, by a personal obligation, bound themselves to convey to the Bank-company, for their security, certain West India estates, and likewise that of Cluny in Fife-shire; in implement of which, a disposition in security of the last-mentioned lands was executed in favour of certain trustees; and upon this conveyance, infeftment followed, after all the money had been paid by the Bank.

In the ranking of Alexanders' creditors, the Bank of England claimed a preference, by virtue of that right; to which the Bank of Scotland, and other creditors,

Objected, That the conveyance was inept and ineffectual; *1mo*, Because it tended to constitute a general and undefined burden only upon the lands; and, *2do*, As being contrary to act 1696, cap. 5th, a security for debts not already owing, but to be contracted in future.

In support of the *first* objection, it was *argued*; Since the decision of the House of Lords on this point in 1734*, it has ever been an established rule, that no indefinite or unknown incumbrance, no general burden, can be created on lands, so as to become a real lien upon them. Now, the security in question was not granted to guaranty any precise or specifical debt already contracted, but, on the contrary, merely to guard against the uncertain result of a general credit given by the Bank of England, which might produce a debt, either inconsiderably small, or so great as to be almost without bounds. For its *maximum* can hardly be considered as limited by a sum so disproportioned to the value of the estate, as is that of L. 160,000. Nor, at any future period, could its amount appear from the public records. Such a security is a novelty in our law, and, as a precedent, would be of dangerous consequence. Any circulation of bills, as well as the particular operation of discounting, might be protected by a cover of this kind; a powerful engine in the hands of a mercantile creditor. If, before the infeftment, he has really paid sums to the debtor, or discounted bills, to the extent mentioned in the security, he will have it in his power, at any subsequent period, to take in all such bills as he thinks proper to the same amount, and no inhibition, or other diligence, not even a posterior infeftment, can stand in his way. In this manner, a bankrupt acting in collusion with the creditor who holds such security, may give a preference to any debts they please, by having them indorsed or transferred to that creditor.

With respect to the *second* objection, it was *urged*; Though, prior to the security, the Bank had actually advanced the whole L. 160,000, by the discounting of the bills, yet the security was not granted on account of those specific

*** See No 261. p. 1236.

bills, but, as its tenor shows, for a progressive and continued series of discounting operations *per tractum futuri temporis*. The rules of the Bank did not even admit a permanent loan. No 30.

This, by the way, is a proceeding of an usurious tendency, a real security for which, the law will no more sustain, than it would an heritable bond obliging the debtor to pay forehand interest every three months. If it could at all be supported, it would only be after re-payment of all the extraordinary intetests, discounts, and sums given in name of commission. It is a proceeding, too, which renders creditors liable to be deceived; for, upon having shewn to them any prior set of bills to the amount of the L. 160,000, retired and cancelled, they might readily be induced to believe, that an end had been put to the security.

But that which proves the validity of the objection is, that it was the bills, and not the disposition in security, which really constituted the ground of debt. Without the bills, this disposition could have no effect. On account of them, to use the words of the agreement, it was granted "as a collateral security." Now, from every succession of new bills, there arises a *novatio debiti*; for, with respect to bills, the *nomen debitoris* is inseparable from the written voucher. Two bills drawn for the same sum would be considered as vouchers of different debts; and both would be effectual to indorsees. Thus they differ from bonds of corroboration; in which the renewal or multiplication of the instrument of debt affects not the *nomen debitoris*; nor is it inconsistent with the preceding security; whereas, if a second bill be granted on the same account with the first, this is immediately to be cancelled. For the second constitutes a new debt, which extinguishes the former, liberates indorsees, and every other person concerned in it, and puts an end to all the diligence that has been done upon it.

If the Bank of England had raised inhibition or adjudication on the first set of bills granted in 1744, now no longer existing, would these diligences have availed in the present ranking? If manifestly not, are bills, in 1775, to be considered as the same with those in 1744, in order to give effect to a voluntary security granted by a bankrupt?

Again, suppose inhibition against Alexanders prior to the last set of bills, would it not have struck against them, notwithstanding their supposed connection with preceding sets? Were it not to have that effect, banking companies might often put inhibitions at defiance.

Nor is it enough that those proceedings may have arisen from the original contract. The statutory regulations are not to be so dispensed with.

It is to be only further observed, that the argument now stated is perfectly conformable to the judgment of the Court, in the case of the annuitants of the York-Buildings Company, 14th February 1752, No 7. p. 7062.

Answered to the first objection; It is not, in any proper sense, a general burden, which is constituted by the real security in question; for, in the in-

No 30. feftment, its *maximum*, or utmost extent, is precisely and specifically ascertained. In no instance has the Court found the character of *generality* relative to the amount of debt, where such was the case. Creditors or purchasers are thus sufficiently informed to guard against the greatest possible hazard. Accordingly, it was never doubted, that a debt heritably secured would be effectual, though subject to a progressive diminution by payment; and yet, in that case, as well as in this, the records could only, with certainty, show the greatest possible amount of the debt, but by no means its actual extent, at any period. If, in the one instance, such information is sufficient, why is it not equally adequate in the other? Surely it can be of no consequence, whether the difference between the actual debt and the *maximum* is produced by a scale of increase or of decrease. The same obvious principle, indeed, which governs both cases, also regulates various others; those, for example, of real securities, for relief of cautionary engagements, or for the jointures of wives, and that of real warrandice; in all of which instances, though the utmost possible hazard can be easily known, yet its actual extent, whether even it should at all exist, may be altogether uncertain.

Nor does this doctrine lead, as the objectors argue, to any thing unjust, or inexpedient. The case put by them on this head, which, by the bye, is, in several obvious respects, more indefinite and general than the present, can surely never prove, that, in the free disposal of one's money or estate, if likewise lawful and void of fraud, there is either public inexpediency or injustice; nor without absurdity can an operation be considered as fraudulent, which, like that in question, is fairly and openly announced to the world, and certified by the records.

Answered to the second objection; Instances of infeftments sustained in security of conditional or future debts, have been, as referring to the former objection already given; and, with respect to the present one, they show, that the proper interpretation of the act 1696 is somewhat limited. But, in fact, the debt in question was truly constituted prior both to the disposition and to the infeftment. The source of this objection is the erroneous supposition, that the bills were inseparable from, or the essence of the *nomen debitoris*; whereas bills, in their own nature, are really nothing more than any other voucher, or evidence of an obligation. For the facility of negotiation, indeed, they are held, when in the possession of an onerous indorsee, as of unchallengeable veracity, and as such pass from hand to hand. In other words, it is thus presumed, that a bill expresses a true debt. But it would be most absurd to conceive, that, in consequenee of being so expressed, a true debt must actually arise; and yet, if this be not supposed, the voucher and *nomen debitoris* will be no longer considered as inseparable.

Now, it is next to be remarked, that, prior to the infeftment, the whole sum of L. 160,000 was paid, and that, ever since, it has remained due. The debt then constituted still continues. It is true, it subsisted, according to the pecu-

liar rules of the Bank, by repeated discounts, and renewal of bills. In this manner, however, nothing, it is evident, was changed, but the vouchers of the debt. Itself remained as much unextinguished as ever. The obligation was always the same; the evidence of it alone suffered any variation. Even though the whole sum had not been actually paid prior to the infeftment, that engagement which, by the original agreement, the Banking-company came under, would have formed such a debt as might have been secured; because, as at any time they could have been compelled to fulfil it, so they would have been equally entitled to the stipulated guarantee against that event. Accordidgly, it is common in practice to grant heritable securities for sums not yet actually paid. No 30.

One other illustration of this point shall be added. Instead of viewing the bills as evidences or vouchers of the debt previously constituted, they may perhaps be more properly considered as pledges or deposits, lodged with the creditors in additional security, like so many bags of money. In this respect, then, it is plain, that no change made upon the bills could, in the least degree, invalidate the debt itself. Nor does it seem much more difficult to perceive, that, as vouchers, they would have just as little effect. Hence the answer to the observations respecting various supposed cases of inhibitions is obviously this, that the bills not being the ground of debt, it is nothing, as to the present argument, that inhibitions founded on them would not avail.

THE LORDS " repelled the objections made to the real security on which the Bank of England claimed their preference in the ranking."

Lord Ordinary, *Justice-Clerk.* Act. *Rae & Lawo.* Alt. *Ilay Campbell.* Clerk, *Tait.*

S. *Fol. Dic. v.* 4. *p.* 239. *Fac. Col. No* 41. *p.* 72.

SECT. VIII.

Where the Creditor is empowered by the Debtor to sell his Land.

1790. *June* 11. ROBERT BROWN *against* ANDREW STORIE.

No 31.
An authority given to a creditor to sell the lands of his debtor, may be exercised without declarator, or other judicial proceedings.

STORIE disponed to a creditor of his certain lands which belonged to him, redeemable at Martinmas 1782, on payment of the sums then due.

After the elapsing of this period, the creditor was authorised, at any time before Martinmas 1784, upon six months notice, or after that term, without any previous intimation, to sell the lands by public roup, the time and place being advertised at stated intervals in the public newspapers.

It was declared, that this might be done without any judicial proceedings, the right of reversion formerly competent to the debtor being voided *ipso facto*; but the surplus of the price after payment of the sums due was to belong to him.