

No 28. said infeftment; find, That said heirs are not, in virtue thereof, entitled to any preference on the funds *in medio*."

Lord Ordinary, *Dreghorn*. For the Trustees, *Cullen*. Alt. *Baird*.
Clerk, *Pringle*.

R. D. *Fol. Dic. v. 4. p. 241. Fac. Col. No 145. p. 333.*

SECT. VI.

Right in security, how made effectual when the *pignus* is not equivalent to the debt.

1784. July 6. ARCHIBALD MALCOLM *against* ANNE MACCORNOCK and OTHERS.

No 29.

A creditor *in diem*, whose debt is secured on an heritable subject not equivalent to its amount, is entitled to supply the deficiency, by attaching the produce accruing prior to the term of payment.

HUGH MACCORNOCK granted, in favour of his daughter Anne, and of his other children, an heritable bond of provision for L. 600, payable at the time of his death, and containing an assignation to the mails and duties of the lands, which was to commence at that period.

He afterwards granted to Malcolm likewise, from whom he borrowed a sum of money, an heritable bond, with an assignment to the mails and duties in common form, and payable at an ensuing term.

Maccornock having become bankrupt, his lands were sold by judicial sale; but the price being chiefly applied for the payment of other debts preferable to these, there remained for payment of them both but the sum of L. 163.

Though the childrens provisions were preferable to Malcolm's claim, yet not being payable, till the death of their father, who was still alive, whilst Malcolm's debt was immediately exigible, a competition arose for the interest of the above balance, accruing during the father's lifetime.

Pleaded for Malcolm; The children of Maccornock have no right to receive one penny of the sums provided for them until their father's death, whereas the competitor's debt is already due. Their real security indeed is prior to his, but as it can have no effect beyond the obligation in their favour, so if at the time of payment it shall establish their preference, it will have had its full operation. Besides, it is to him, and not to them, that an assignation *de presenti* of the mails and duties of the lands impignorated was made. To those rents, therefore, during the lifetime of their father, if the subjects had not been judicially sold, he only would have had access; and his right to the intermediate interests of the price, which has become a *surrogatum* for the lands, must be equally exclusive.

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.

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*.
Clerk, *Orma*.

Alt. *Dalzell*.

S.

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

S E C T. 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.

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 29.

No 30.

A bank had discounted bills to a merchant. They obtained an hesita-