No 27. Whether, *post tantum temporis*, it was competent for the pursuers to insist on this ground of reduction, as there had been a process of ranking in dependence fifty years before, in which all the decrees of preference had been pronounced on the ground of the disposition 1688 being a valid deed? THE LORDS found, That the disposition granted by Sir Archibald Cockburn to his son, for security and relief of all engagements the son had come under for the father, and which especially declared, That all bonds wherein they stood jointly bound were proper debts of the father, which disposition was followed by infeftment, was a valid and legal security to the son on the estate disponed for his relief of all debts wherein he stood bound with his father preceding the date of the disposition, notwithstanding the particular debts were not specified; and that the son was thereupon preferable to all the creditors of the father, whose rights were not made real by infeftment before the date of the son's infeftment, and that to the extent of the said debts for which the infeftment for security and relief was granted; and in respect that the proper creditors of the father did not allege that the estate conveyed by the father to the son exceeded in value the debts for relief of which the son was infeft, found, That they could not draw any part of the price of that estate; and, lastly, found, That an inquiry into the situation of the circumstances of the father, at the date of the disposition made by him to his son in 1688, was not competent *post tantum temporis*.

Fol. Dic. v. 4. p. 241.

*** This case is No 49. p. 10220. *voce* PERSONAL AND REAL.

1794. *December* 12.

The TRUSTEES for the CREDITORS of JOHN BROUGH *against* The HEIRS of ROBERT SELBY.

No 28.

An heritable security in relief granted to a cautioner in a cash-account, found not to cover sums drawn out at the date of the infeftment, where, in consequence of future operations by the principal debtor, these sums were repaid, and another balance afterwards

ROBERT SELBY, on the 17th June 1783, became joint obligant with John Brough, in a cash-account with Sir William Forbes and Company, to the extent of L. 500 Sterling, to be kept in the name of Brough.

Selby being only cautioner for Brough, he, of the same date, got from him a bond of relief, containing a disposition in security of some heritable property, on which he was immediately infeft.

Previously to Brough's obtaining this cash-credit, he had an account-current with Sir William Forbes and Company, on which, at the date of the bond granted by Mr Selby and him, he owed a balance of L. 402: 16s. for which Mr Selby, by joining in the new security, became liable; but Brough having paid in various sums to his cash-account, between the 17th June 1783 and the 6th August following, this balance was wholly extinguished, and a small one created in his favour.

No 28.
created, which the cautioner paid, the principal debtor having become insolvent.

Brough became insolvent in 1788, and, at that time, in consequence of a variety of subsequent operations on his cash-account, there was a balance against him of L. 539 : 12 : 5.

Mr Selby having paid this sum, his heirs claimed to be preferred for it on the price of the subjects over which his security extended.

THE COURT, however, found, that " they were only preferable in virtue of Robert Selby's infeftment for the sums they could instruct to have been advanced at the date of the said infeftment *."

In consequence of this judgment, Mr Selby's Heirs limited their demand to the L. 402 : 16s. which had been advanced to Mr Brough before the 17th June 1783.

To their claim thus restricted, the Trustees for the Creditors

Objected, As the L. 402 : 16s. due by Brough at the date of Selby's infeftment, were afterwards wholly extinguished, the balance since paid by Selby was entirely a new debt, contracted after the date of his infeftment, and consequently not secured by it; 16th January 1788, Pickering against Smith, Wright, and Gray, No 212. p. 1155.; 14th November 1789, Stein against Newnham, Everett, and Company, No 214. p. 1158.

Answered, It is admitted, that Mr Selby's heritable security at its date, covered a debt of L. 412 : 16s. Now, an infeftment once legally constituted, cannot be extinguished or diminished by voluntary payments, far less by the daily fluctuation of a cash-account, or indeed in any way, unless by a renunciation duly recorded, or by sums recovered in virtue of legal execution; 16th February 1734, Earls of Loudon and Glasgow against Lord Ross, No 23. p. 14114.; 19th June 1745, Campbell against the Creditors of Auchinbreck, No 33. p. 14129.; 1st March 1781, Bank of Scotland against Bank of England, No 30. p. 14121.

Replied, It may be true, that a real security is not lessened in proportion as the debt is reduced by partial payments; but every partial payment, nevertheless *pro tanto* diminishes the debt, and when it is wholly paid, the security must necessarily be at an end, for a security cannot exist when the debt it was meant to secure is extinguished: *D. l.* 43. *De solut. et liberat.* (*lib.* 46. *t.* 3.) *l.* 129. *De regul. juris*; Bankton, B. 4. Tit. 45. § 182.

THE COURT, on the grounds stated for the objectors, pronounced the following interlocutor: " In respect it appears from the accounts of Sir William Forbes and Company, that the sum due to them by John Brough on his cash-account, antecedent to the date of the infeftment in security in favour of the late Robert Selby, was afterwards fully paid up and extinguished, and that the debt now claimed by Mr Selby's heirs was contracted posterior to the date of

* See 2d March 1791, Creditors of Brough against Heirs of Selby, No 215. p. 1159. *voce* BANKRUPT.

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 præsenti* 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.