1784. *July* 6. ARCHIBALD MALCOLM *against* ANN, &c. M'CORNOCKS.

RIGHT IN SECURITY.

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.

[*Fac. Coll. IX.* 262; *Dict.* 14,120.]

JUSTICE-CLERK. Malcolm's claim is to draw as a postponed creditor, in preference to prior creditors.

KENNET. Both debts are onerous. Had not the estate been sold, Malcolm would have been preferable on the maills and duties. The land being sold, the price comes in its place. The interest of the price would belong to the father and mother; and consequently Malcolm, the creditor, could affect it preferably to the children.

PRESIDENT. How can the interest be accumulated into a principal sum in the hands of a purchaser?

GARDENSTON. We ought to lose sight of *parties* and judge according to *law*. Before the land was sold, the children could have had no claim. How should they have any claim on the *surrogatum?* A debt not due cannot compete with one due.

BRAXFIELD. The difficulty here arises from the case being unusual. In the argument, the nature of the debt secured is blended with the nature of the security. The debt is not properly conditional; for it is to assignees, and the death of the children would not have extinguished the debt. The debt cannot be exacted before the term of payment; and the question is, What is to become of the intermediate annualrent? *Generally* a debt cannot be made effectual before the term of payment; but there is an exception when the debtor is *vergens ad inopiam*. A creditor may adjudge before the term of payment, that the profits of the estate may be set apart in security of his debt. Here the debtor who granted the heritable security was *vergens ad inopiam*. The children might have adjudged, and so secured the issues and profits. I think that the sale makes no difference. From the time that infeftment is taken, the lands are impignorated, and the issues and profits of the pledge must go the same way.

ESKGROVE. It was intended to secure L.600 on the esate. What could be the view of the parties at the date of the heritable bond? Supposing the father had become bankrupt, the creditor might have said, "I will not allow you to run away with the subject and leave me only a partial payment. Postponed creditors cannot come in to disappoint me. By the Roman law, a creditor had a *missio in possessionem* for his security. With us, it was found that an adjudication might pass on a debt not yet due; *Forbes*, 1711, *Law:* and then came the decision in the case of *Easter Ogle*. The children here are

ranked for payment of L600; that is, they are ranked on the whole subject until payment. But they will not be so, if they are not secured in the interest; for then they will not draw certainly more than L.160.

PRESIDENT. Malcolm lent his money on the faith of an estate; and he trusted to a personal right, which might have indemnified him before the children's right took place. If he once could have drawn, how can we, in the ranking, anticipate the right of the children? The judgment in the case of *Easter Ogle* was a strong step. How could the children, in the present state of their debt, apply for a sequestration?

On the 6th July 1784, "The Lords preferred the children."

For the children,—R. Dalzell. *Alt.* R. Corbet.

Reporter, Rockville.

Diss. Gardenston, Kennet, Stonefield, Hailes, Rockville, President.

1784. *July* 7. JAMES BRODIE of BRODIE *against* KEITH URQUHART of MELDRUM.

MEMBER OF PARLIAMENT.

A person, after voting for Preses and Clerk, went out of the Court-room to an antechamber, where he waited till he heard his name called, to give his vote for the Member being elected, and, instantly appearing, gave his vote. There being no opportunity previously to put the trust-oath, it was tendered to him immediately after giving his vote, when he refused it, as being out of time. The Freeholders having sustained the vote, the Lords found they had done wrong, and ordered the person's name to be expunged from the roll.

[*Folio Dictionary, III.* 421; *Dictionary*, 8779.]

In this case the Lords were unanimously of opinion, that wilfully to evade the taking of the oath of trust and possession, was equivalent to the refusing to take it; and therefore,—

On the 7th July 1784, "They sustained the complaint, and ordered the name of Mr Urquhart to be expunged from the roll, and found him liable in L.10 of expenses."

For the complainer,—Wm. Honeyman. *Alt.* A. Wight.
