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.

No 31.

In 1788, the creditor proceeded to dispose of the lands, in the form above described, to Robert Brown, who brought an action of multiple-poinding and a declarator, in order to try the efficacy of the sale. Storie being cited as a defender, objected to the proceedings, and

Pleaded; The only method by which a creditor can dispose of a land-estate belonging to his debtor, is that of a judicial sale under the statutes of 1681 and 1690, as enlarged by the act 23d Geo. III. cap. 18. Although it were to be agreed, that after a certain period he should have a power of selling, our law, justly jealous of the advantage which may thus be obtained over an indigent debtor, has required a previous action of declarator, for the purpose of trying the fairness of the transaction. This is agreeable to the Roman law with regard to the sale of goods impledged, the creditor, though authorised to sell, being obliged to have the sanction of the Prætor; Kames's Law Tracts, vol. 2. p. 71.; Voet. ad tit. Dig, de Pign. et Hypoth.; Id. ad tit. De Distract. Pign.; Heinec. Antiquit. Lib. 2. Tit. 1. § 2,; Ibid. Lib. 2. Tit. 17, 18, 19. § 11.; Vinn. ad Inst. Lib. 2. Tit. 8. § 1.

Answered; Every person having the administration of his own affairs, may either directly dispose of his lands, or authorise another in his name to take the measures which are necessary for that purpose. It is expedient that those who are so incumbered with debts as to be unable to pay what they owe, and whose property is at the same time too inconsiderable to bear the expense of a judicial sale, should be enabled to enter into agreements of this kind. Nor do the authorities quoted on the other side support a contrary doctrine. In the Roman law, a creditor in general could not, without the interposition of a judge, expose to sale those subjects which had been impignorated to him. But if a power of selling was given, it might have been exercised without any such interference. And although in all agreements of the nature of the *pactum legis commissoriæ*, it has been held, that the irritancy being truly penal, must be recognised in a declaratory action, an extension of the same rule to such a case as the present, would be equally inexpedient and unjust.

Though securities conceived in the form of the present one have been in use for many years, this is the first instance in which their validity was ever disputed; Voet. Lib. 20. Tit. 20. § 1.; Lib. 20. Tit. 1. § 22.; Perezius ad Tit. Cod. De Distract. Pign.; Bruneman. Comment. ad Lib. 4. De Pignorat. act.; Vinn. Lib 2. Tit. 8. § 1.; Stair, B. 1. Tit. 13. § 14.; Bankton, B. 1. Tit. 17. § 5.

The Lord Ordinary having taken the question to report on informations, the Court were unanimously of opinion, that the sale was liable to no exception.

"THE LORDS decerned in the action of declarator," &c.

Reporter, *Lord Henderland.* Act. *M. Ross, Honyman.* Alt. *W. Baillie.* Clerk, *Mitchelson.*

C. *Fol. Dic. v. 4. p. 239. Fac. Col. No 137. p. 272.*