No 6.

' of the Company's goods to my particular account.' By return to this letter, Davidsons tell Blyd, ' That at his desire they shall place the amount of the ' cargo to his particular account.' Upon the sight of this letter, Ranken, the other partner paid to Blyd his proportion of the price of the cargo; and Blyd soon thereafter becoming insolvent, an action was raised against Ranken for the whole price. His defence was, that Davidsons the pursuers had betaken themselves entirely to the faith of Blyd the other partner, by transferring the account of the Company to his particular account, whereby there was a novation of the debt that released him the defender; especially having upon the faith of the pursuer's letter paid his proportion to Blyd. THE LORDS sustained the defence, this weighing with them, that the transaction could have no other sensible meaning than to liberate Ranken, which was obtained by Blyd, in this view, to afford him credit against his partner.

Fol. Dic. v. 1. *p.* 479.

1752. *February* 14.

DUKE of NORFOLK and Partners *against* TRUSTEES for the Annuitants of the YORK BUILDINGS COMPANY.

No 7.

An infeftment was taken upon bonds for annuities, which infeftment referred to a list that contained the names of the creditors, and the amount of their annuities, but the endurance of each annuity was only qualified by the bonds. After this infeftment, the original bonds were cancelled, and new personal bonds granted for the same sums. Found that the infeftment could not compete with a posterior adjudication.

THE York buildings Company being authorised to contract debt by way of annuities for life, and having granted liferent annuities to the extent of L. 10,000 yearly, they disponed their estates in Scotland to certain trustees for behoof of the annuitants, and for their security and payment, upon which the trustees were regularly infeft. As these annuities were a subject for commerce, many of them past from hand to hand; and in several instances matters were so slovenly transacted, that in place of reserving the real security, the original bonds secured by infeftment were given up to the Company, and new personal bonds taken from the Company to the same extent.

The Duke of Norfolk and Partners being creditors to the Company in a great sum, proceeded to adjudication. This title was made the foundation of a reduction and improbation, in whibh the trustees for the annuitants were called, and the above fact being discovered by production of the annuity-bonds in the process, it was *objected* for the pursuer, That the old bonds being retired by the Company were extinguished; and suppose the new bonds to be *surrogatum*, that being personal bonds only, they cannot compete with the pursuer's infeftment. It was the opinion of the plurality of the LORDS when this matter came before the COURT, that the case was hard, persons purchasing annuities upon the faith that they had a real security, and losing their money by an error in the form of transaction, excusable in strangers who are not supposed to be acquainted with our law; and that it would be against the rules of equity for the Duke to take advantage of this blunder, whose debt was contracted before any of the original annuity-bonds were retired, and who therefore did not trust his

money upon the faith of a free fund; that it would be unjust to make any man suffer by the blunder of another, but not agreeable to equity that he should take any benefit by a blunder so innocent and so excusable. Upon this medium the following interlocutor carried by the plurality: 'Find, that by the laws 'of Scotland the creditors annuitants can have no real right in virtue of the 'trust-infeftment in the Company's lands and estates in Scotland, for payment 'or security of bonds granted by the Company after the date of the said in-'feftment. But in respect of the circumstances of this case, and that it ap-'pears that several of the said creditors, unacquainted with the laws of Scot-'land, have erroneously given up to the Company the old bonds, for security 'and payment of which the said trust-infeftment was granted, and which bonds 'had been duly assigned to them, and have in place thereof, taken new bonds 'for the same annuities, in the names of the said assignees, in belief that their 'real right and security in the said lands and estates in Scotland was not 'thereby hurt or impaired; and as the pursuer, whose debt was contracted be-'fore making the said exchanges, has suffered no prejudice thereby, so he 'ought to take no advantage by that error; therefore find, that the said an-'nuitants, who have delivered up old bonds of date prior to the date of the 'said infeftment, upon getting new bonds in their own name, ought to be pre-'ferred and ranked upon the Company's estates in Scotland, as if they were 'still possessed of the old bonds entire and uncancelled.' No 7.

This cause was again brought before the COURT upon petition and answers. I was in the minority against the above interlocutor; and that which weighed with me, and afterwards with the whole Judges, was what follows. Supposing an error, as in the interlocutor, here is a new principal of equity laid down, that wherever a man hurts himself by an error, no other man can take any benefit by it. Now, I cannot discover in the laws of any country, that equity has been carried so far. And it would make an innovation in law that has not been dreamed of. Let us put instances. One lends money to a person inhibited, who dies, and the inhibition is renewed against his heir, but by some error or mistake this second inhibition proves not formal. The heir gives a real security to the person who lent his money after the inhibition. According to the plan of the interlocutor, the creditor who has the real security cannot take the advantage of the inhibiter's error. A minor to whom several years annualrents were due upon an heritable bond secured by infeftment, discharged the bygone annualrents, and took a moveable bond in place of them. The debtor soon after becoming bankrupt, the minor brought a reduction of the transaction *intra annos utiles*, and the reduction was sustained, 29th January 1729, Moncrief *contra* Creditors of Mitchell of Balbeddie, *voce* MINOR. It was not dreamed that the creditor could be restored, had he been major, even against competing creditors who had lent their money before the transaction. Yet according to the present doctrine, a major ought to be restored; for nothing can be a stronger qualifica-

No 7. tion of an error than discharging the bygone annualrent, and in place thereof taking a moveable bond of corroboration.

'Find, that the annuitants who have delivered up the old bonds granted prior 'to the date of the disposition and infeftment, and have taken new bonds in 'the names of their assignees posterior to the said infeftment, have no real right 'upon the lands disponed to the trustees, and therefore can have no preference 'to the Duke of Norfolk and his partners.'

*** This interlocutor was affirmed upon an appeal to the HOUSE of PEERS. *Sel. Dec. No* 1. *p.* 1.

*** This case is reported in the Faculty Collection.

THE York Buildings Company purchased from the public many of the estates in England and Scotland forfeited upon account of the rebellion in the year 1715.

For the encouragement of that Compay, and other purchasers of these estates, and to enable them the better to pay the prices at which the estates had been sold, it was enacted by 6th Geo. I. cap. 24. 'That it should be lawful 'for such purchasers, to grant and settle rent-charges or annuities to the extent 'and yearly value of the estates;' and it was further enacted by 7th Geo. I. cap. 20. 'That it should be lawful for the Company to sell such annuities by 'way of lottery.'

Under the authority of these two acts of Parliament, three several lotteries were made; and among other conditions of these lotteries, the fortunate tickets entitled the respective proprietors to a liferent-annuity out of the Company's estates.

The lotteries being drawn, these fortunate tickets were, from time to time brought to the Company, and exchanged for bonds of annuity, obliging the Company to pay certain annuities to the respective proprietors of the tickets and their assigns, during the life of some person whose name was inserted in such bond; with this proviso annexed, That if the annuity should be in arrear, it should be lawful for the annuitant to enter upon the Company's estates, and distrain for payment.

The annuities having run in arrear, and the annuitants finding it impracticable to recover the arrears by distraining in terms of the bonds, the Company entered into an indenture with the annuitants; by which the company became bound to obtain infeftments on the several estates in Scotland; and being so infeft, to grant proper infeftments to Abraham Mure, and others, as trustees for themselves and the other annuitants, for security of the annuities due to the persons whose names and annuities were particularly contained in a schedule thereto annexed.

Soon thereafter the company were infeft, and they granted a disposition to to the trustees in terms of the indenture, and bearing relation to the schedule;

and, upon the precept of sasine contained in this disposition, the trustees were infeft in the year 1728. But it is to be observed, that neither the indenture, nor the schedule, nor the disposition, make any mention of the bonds above mentioned, which were exchanged for the tickets, nor of the names of the lives inserted in these bonds. No 7.

After these transactions, many of the annuitants disposed of their annuities; but being ignorant of the law of Scotland concerning the forms of transferring real rights, their method was, that the annuitant-seller assigned or delivered his bond to the purchaser; and the purchaser delivered up that bond, together with the assignation thereto (when he had been at the pains to take an assignation), to be cancelled; whereupon the Company granted a new bond to the purchaser. And it was further remarkable, that in many instances, instead of the name of the life in the original bond, the name of some other life was inserted in the new bond.

The Duke of Norfolk and his partners, creditors of the Company, having adjudged the Company's estates in Scotland, were thereon infeft. And it is to be observed, that the exchange of many of the old annuity-bonds for the new ones, in manner above mentioned, was made after the debt to the Duke was contracted, but of all of them before his infeftment was taken.

The Duke raised an action of reduction and improbation of all the rights granted to the said trustees.

Insisted for the Duke, That none of these new annuity-bonds, whether considered as independent of the old bonds, or as *surrogata* to them, can be entitled to the security of the trustees' infeftment.

1mo, As to the security independent of the old bonds; it is an undoubted maxim of our law, That a real lien can not be effectually established upon lands for a debt even existing at the time of the infeftment, if that debt is not certain, and discoverable either by the infeftment itself, or by some relative deed; far less can such a lien be established, where the debt does not exist at the time of the infeftment. To admit of the contrary, were to make it impossible for purchasers of lands to have security of their purchases, and so in effect were to put lands *extra commercium*. As therefore these new annuities not only did not appear from the indenture, disposition, or schedule, or from any relative bond existing at the time of the trustees' infeftment, but are of a date posterior to that infeftment, so they can have no benefit by it; especially as this infeftment does not bear to have been granted with any such intention, but only to secure annuities then existing, and particularly specified, as to the creditors' names and sums, in a schedule referred to in the disposition.

2do, If it be contended, that the new bonds are *surrogata*, and are therefore, in point of equity, entitled to the real security; it is first to be observed, that it is not yet proved by production of any of the original bonds or assignments thereto, that the new bonds had been actually taken in place of the old ones, and the old ones cancelled upon granting the new ones, in the belief that the

No 7. real security continued: Nevertheless, in the mean time taking the fact to be so, it is an undoubted maxim of the law of Scotland, that, for the subsistence of a real security, all the parts of which that security is composed must be kept subsisting: If infeftment is taken upon an heritable bond, that bond discharged or cancelled, the security is gone; the infeftment cannot subsist without its warrant. In like manner, when a security is so conceived, that the immediate warrant is not sufficient to make it complete; as for instance, where the disposition does not contain the names of the creditors, but refers to a schedule; and where that schedule does not fully discover the extent of the debts, by mentioning the names of the lives during which the debts (being annuities) are to subsist, but leaves that to be discovered from separate bonds; in that case, which is the very case here, the bonds, although not expressly referred to, make an essential part of the real right; and upon the cancelling or discharging any of these bonds, the real right is in so far extinguished; and any new bonds, granted for the like sum or annuity, are new rights. If the *bona fides* or *ignorantia juris* in a foreigner was to supersede the necessity of observing the feudal forms of conveying and constituting real rights, an absolute uncertainty would be introduced into our law as to such rights. The error of the annuitants might possibly afford them a good ground to be restored to their real rights against the debtor, but can never give them a right to enter into competition with third parties. Had there been sureties bound for the first annuities, or had the lands been sold, the cancelling the original bond would have set free the sureties, or made way for the purchaser's infeftment; and the granting new bonds for the same debts could neither have revived the obligation of the sureties nor the first infeftment. Upon this principle, it is not material whether the exchange of new for old bonds was made before or after the Duke's contraction, before or after his infeftment.

As to the case of those new bonds where the names of the lives are changed, they are so far in a worse condition than the others; that the alteration of the life, or endurance of the annuity, is a total alteration of the annuity.

Pleaded for the Trustees, That as to the supporting the annuities, independent of the old bonds, it is maintained, that, by the law of Scotland, infeftment may be given for debts not constituted by any bond or security. An infeftment may be granted to trustees for security of their expenses of management, although no separate bond is given; also for payment of certain debts or provisions to children, or donations contained in a list or schedule signed by the granter; and although such debts, provisions, or donations, may be reduced on implied fraud, yet are they not contrary to feudal principles. Neither does our law hinder real securities from being granted for future debts, as in the instance above mentioned, of the expenses to be incurred by trustees, or of a jointure to a wife in case she shall survive her husband. The act of Parliament 1696, Will. Parl. 1. sess. 6. cap. 5. supposes that dispositions may be granted for security of future debts; which dispositions, although declared null in the case mentioned

in that act, yet are not contrary to the principles of the feudal law. There was nothing therefore to hinder the infeftment from being taken even for annuities to be granted after its date. But the annuities here are not on so narrow a bottom; they are the very annuities subsisting at the date of the trustees' infeftment. The proprietors of the fortunate tickets were, under the authority of two acts of Parliament, entitled to a liferent annuity before granting any bonds, and without dependance upon them. The bonds were found ineffectual for establishing a real right upon the estates; an infeftment is therefore taken, not bearing relation to these bonds; for neither the indenture, schedule, nor disposition, make any mention of the date of these bonds; so that, by the form of the infeftment, the annuities would seem perpetual. Bonds were therefore no part of the real right; they contained only the limitation of its endurance; their chief use was to prove the names of the lives. If so, the cancelling of the bonds cannot be construed to be an extinction of a debt which was established without respect to any bond. No 7.

In the *next* place, These new bonds must, upon the strongest reasons of equity that can well be figured, be considered as *surrogata* to the old ones, and be entitled to the same security. In England, a *chose in action* (which comprehends bonds) cannot be properly assigned; and though, when a bond is assigned, the assign has an equitable right to the debt, yet he cannot sue otherwise than as an attorney for the assigner. For this reason it is there common for the assign to chuse rather to have a legal right of action by taking a new bond, than to rest upon the equitable right. Misled by this custom, the purchasers of the annuities, being foreigners, and ignorant of our law, made the exchange of the old for new bonds; and it is not to be supposed that either they or the company had the least suspicion, far less intention, that the security would be thereby extinguished. Further, the law of this country, with respect to foreigners, is *fact;* and *error facti nemini nocet.* Even *ignorantia juris in damnis amittendæ rei suæ non nocet.* All this argument is further supported by this consideration, that when the Duke's debt was contracted, the whole annuities appeared subsisting by the record: He can therefore plead no deception upon that head; and in fact, several of the exchanges were made after the contracting of his debt; so that as to them, he has suffered no real prejudice, and he ought to take no advantage of the error.

With regard to such of the new bonds, where the nominees or lives are changed, as no fraud was intended or used, and as one life is much the same as another, and in fact the new lives have failed in many instances where the old ones are still existing; these bonds are very much in the same situation as the others where the lives continue the same. At least, if equity is to be the rule, the annuity should in this case continue during the life of the first nominee: Or if even that is thought too much, during the joint life of the old and new nominee.

When this cause was heard on the 14th February 1752, the Court, very clear as to the law, but moved by the circumstances of the case, found to the follow-

No 7.

ing effect, viz. That, by the laws of Scotland, the annuitants could have no real right, in virtue of the trust-infeftment, for security of bonds granted after the date of that infeftment; but in respect of the circumstances of this case, and that it appeared that several of the said creditors, unacquainted with the laws of Scotland, had erroneously given up to the company the old bonds which had been duly assigned to them, and in place thereof taken new bonds for the same annuities in their own names, in the belief that their real right and security was not thereby impaired; and as the Duke, whose debt was contracted before making the said exchanges, had suffered no prejudice thereby, so he ought to take no advantage of the error; therefore that such annuitants ought to be preferred and ranked upon the company's estates in Scotland, as if they were still possessed of the old bonds entire and uncancelled; but that where the nominees or names of the lives in the old bonds were changed in the new bonds, the annuity could only subsist during the joint life of the new and old nominee.

Against that interlocutor the Duke reclaimed, and greatly insisted upon the danger of departing, in any case however favourable, from the known and established rules of our law. THE LORDS, upon hearing that petition, and answers thereto, altered, and found,

'That the annuitants, whose names are not mentioned in the schedule annexed to the disposition of the Trustees, or who have delivered up the old bonds granted prior to the date of the disposition and infeftment, and have taken new bonds, (although either in their own names, or in the names of their assignees,) posterior to the infeftment upon the disposition, have no real right upon the lands disponed to the Trustee, and in which they stood infeft; and therefore can have no preference to the Duke of Norfolk, upon the Company's estates in Scotland.'

Act. *James Ferguson, Henry Home.* Alt. *Robert Craigie, Alexander Lockhart.* Clerk, *Gilson.*
Fac. Col. No 16. *p.* 33.

*** This case, as mentioned in Lord Kames's report, was appealed:

THE HOUSE OF LORDS 'ORDERED and ADJUDGED that the appeal be dismissed; and that the interlocutor of the whole Lords of the 30th of June 1752, be affirmed.'

1756. *July* 27. ANDERSON of Linkwood *against* INNES of Dunkinty.

No 8.
A bond of corroboration to a son, of a debt due

JAMES FRASER granted to John Innes, younger of Dunkinty, a bond of corrobration for L. 500 Scots, of date 11th September 1733, in the following terms: 'Forasmuch as I was justly owing George Innes of Dunkinty by bond, the sum