

the Tower of Babylon, which being within year and day, were found to come in *pari passu*, and the matter remitted to an auditor, before whom it was *alleged*, for one of the apprisers, That the act betwixt debtor and creditor excepts annualrents constituted by infestment, which, and apprisings following thereupon, come not in *pari passu* with other apprisings; so that, as to the annualrents preceding the apprising, and which are constituted by an infestment of annualrent, they must be satisfied out of the mails and duties *primo loco*;—it was *answered*, That if the appriser had adhered to his infestment of annualrent, and apprised for the bygone, by a pointing of the ground, he would have been preferred; but now, having used requisition, and proceeded upon the personal obligation, for payment of annualrent, and apprised for the principal sum, and annualrent together, he cannot have that preference; for the requisition is a passing from the infestment of annualrent; and though he may pass from the requisition, and return to his annualrent, yet then he passes from the apprising for the principal sum; for he cannot pass from the requisition, in relation to the bygone annualrents, and adhere to it in relation to the principal sum, seeing one infestment is the security for both. It was *replied*, That he might restrict his apprising, and declare that he made use of the requisition, only in so far as concerned the principal sum, and annualrents, after the apprising.

Which the Lords sustained, and preferred him for the annualrents preceding the apprising.

Fol. Dic. v. 2. p. 355. Stair, v. 2. p. 33.

1779. February 5.

THOMAS DUNLOP and Others, *against* ALEXANDER SPIERS and Others.

DUNLOP and Ralston, merchants in Virginia, upon a settlement of accounts in September 1763 with James Dunlop, merchant in Glasgow, accepted bills to him at twelve months date, for the balance in his favour.

At this time, James Dunlop had a cash-credit with Dunlop, Houston, and Co. bankers in Glasgow, to the extent of L. 1500. In the bond of credit, his father, Dunlop of Garnkirk, and others, were jointly bound with him to the banking company. But the credit being entirely for the use of his son, he and his father granted a bond of relief to the other obligants.

Dunlop, junior, having drawn out the whole of his cash account, in order to replace the money, applied to the banking company to discount a bill for L. 1500, accepted by Dunlop and Ralston to him, at the time of the settlement above mentioned. The Company agreed, on condition that the bill should be indorsed by others, for their further security. This bill was accordingly indorsed by several of the cautioners in the bond of credit, upon which it was discounted by the Company, and the cash placed to the credit of Dunlop junior.

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Effect of partial payments before the term of payment, in case of bankruptcy.

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In November 1763, Dunlop, junior, having failed in his circumstances, disposed his whole effects to trustees, and, in a few days after, he was rendered bankrupt.

Remittances were afterwards made by Dunlop and Ralston, in part payment of their bill. These were received at different times; all of them after the bankruptcy and trust-right of James Dunlop, but previous to the term of payment of the bill, except one small payment, which was subsequent to it.

The bill, when it fell due, 22d September 1764, was protested by the Banking Company for non-payment, and diligence done upon it against the acceptors; but, as nothing could be recovered from the acceptors, the company came upon the indorsees. Dunlop, senior, being ultimately obliged to relieve them, his trustees paid up the bill, and took an assignation to the debt and diligence. They afterwards adjudged the estate of Dunlop, junior, upon the bill and assignation, and brought an action against his trustees for a dividend of his effects, corresponding to the whole sum of L. 1500. In objection to this claim,

Pleaded for the defenders, Where different persons are bound for the same debt, the creditor may attach the estate of each co-obligant, and may rank upon the estate of each for the whole debt. But if, before using diligence to affect the estates of the several co-obligants, he has either accepted a voluntary payment from one of the debtors, or received a dividend out of one of their estates, he can only claim from the other obligants the balance which remains. No diligence, by adjudication, arrestment, &c. could be led against their estates for any thing more. The partial payments, therefore, made by the acceptors in this case, having been all previous to any diligence done on the estate of Dunlop, junior, by the holders of the bill, these last can only rank for the residue, after deducting the payments.

The trust-disposition by Dunlop, junior, in favour of his creditors, was not equivalent to real diligence done on his estate. No *lien* was created over the subjects, or at least that part of them which consisted of moveables. These effects were vested in trustees, who had right to sell the whole, and uplift the price; and the creditors had only a personal right of action against these trustees to account.

But the partial payments must be deducted, even although this trust-disposition should be held as pledging the subject to the creditors of Dunlop, junior; for the indorsees were not, at that time, creditors to him. The trust-right was executed in November 1763, and the bill was not payable till September 1764. Before the term of payment, it depended altogether upon an uncertain event, whether the drawer was to become debtor to the holders of the bill, or not. If the bill had been paid by the acceptors at that term, no debt whatever would have existed against the drawer. As it was not paid, the indorsees became creditors to Dunlop, the drawer, but the debt only commenced at the date of the protest for not payment 25th February 1764. The whole partial payments had been made, (excepting the last) previous to this protest; consequently they

must be deducted in computing the debt due by Dunlop to the indorsees ; and the pledge, or security, supposed to be established by the trust-right, can extend to no more than the balance.

Answered for the pursuers, The holders of the bill, in the present case, as creditors of James Dunlop, had a security over his subjects by the trust-right in November 1763. This security extended to the whole bill, there being no part of it paid at that time. The partial payments afterwards made by the acceptors could not affect the right thus acquired over the subjects. It is an established point, that, where a creditor has different persons jointly bound for the same debt, after a lien is created in his favour over the estate of one obligant in security, a partial payment received from another, though in the end it will diminish the debt, does not affect or diminish the security.

A trust-right creates a real lien over the subjects of the debtor in favour of his creditors, equivalent to attachment by legal diligence. In one case, the security is voluntary, and in the other, it is obtained by an operation of the law ; but, in both, the effect is the same, giving every creditor a right to be ranked on the subjects for his whole debt at the time.

The holders of the bill were creditors to Dunlop in the whole amount of it, from an earlier period than the trust-right. When the drawer of a bill indorses it for value, he becomes, from that time, debtor to the indorsee. By receiving the indorsee's money, the drawer comes under an obligation that the bill shall be paid. The existence of this obligation depends on no event nor condition, but takes place from the beginning, and arises from the transaction. It is only the endurance of the obligation which depends on the event of the acceptor's paying, or not paying, the contents of the bill.

The nature of the transaction implies, that the indorsee must first demand his payment from the acceptor when the bill falls due. If the bill is not accepted, or not paid, the indorsee likewise, from the tacit engagement he is under to take care of the drawer's interest, is obliged to protest the bill, and give the drawer timely notice if it is dishonoured. But the obligation on the drawer is, notwithstanding, direct ; for the indorsee has immediate recourse against him, and is not obliged to discuss the acceptors by legal diligence, as in the case of subsidiary obligations. In the present case, it neither happened that the acceptors paid the bill, nor that the holders failed in any requisite incumbent on them ; consequently the original obligation on the drawer was never removed.

Allowing the obligation on the drawer to be only subsidiary ;—where a debtor is *vergens ad inopiam*, and still more, where he is bankrupt, adjudications, or other diligence, may proceed against him, for the purpose of security, upon debts *in diem*, and conditional debts, whether he is principal or cautioner. The indorsees of this bill, therefore, were entitled to secure themselves by diligence on the effects of Dunlop at the time he became bankrupt, November 1763. Consequently, from that period, they had a right to the benefit of the trust as much as any other of his creditors. It came in place of the security

No 20. which they would have otherwise obtained, from attaching his effects by legal diligence.

The judgment of the Court was, " Find, that the pursuers are only entitled to receive a share of the dividends of James Dunlop, junior, his effects, effeiring to the sum of L. 787 : 11 : 8 Sterling, being the balance resting on the L. 1500 bill, after deduction of the payments received before the term of payment of the bill, and of the protest thereof; and remit to the Lord Ordinary to hear parties procurators on the effect of the payments made after the term of payment of the bill, and the protest thereof, with power to his Lordship to do therein as he shall see just.'

Lord Ordinary, *Kennet.*
Clerk, *Robinson.*

Act. Sol. General.
J. Campbell, Rae.

Alt. Lord Advocate, *Wight.*
Blair, Craig.

Fol. Dic. v. 4. p. 244. Fac. Col. No 66. p. 124.

1780. February 24.

JOHN TAIT, and Others, *against* Sir JAMES COCKBURN, and Others.

No 21.

Whether a real security, as by adjudication, be diminished by a prior confirmation as executor-creditor?

CAPTAIN ADAM HAY having died leaving very considerable debts, Mr Tait, and certain other persons, expeded confirmations of his moveables as executors-creditors; and his apparent heir brought and obtained decret in a process of sale of his land-estate under the act of Parliament.

Afterwards, in framing the scheme of division of Captain Hay's funds, a doubt occurred, whether those creditors who had already attached the moveables by confirmation, were entitled to be ranked upon the price of the heritable estate according to their whole debts, or only for the balance that should remain after deduction of what was to be received from the executry. The point being debated in Court, it was

Pleaded for such creditors as had not confirmed; It is true, that when by adjudication a real *lien* is constituted upon an estate, such a *lien* will remain undiminished, notwithstanding partial payments, till the last farthing of the debt is paid. In that case, *unaquæque gleba servit*. Even securities affecting moveables, as arrestments, have a similar effect. But if the payments are prior to the adjudication, that diligence can surely comprehend nothing more than the balance then remaining; otherwise it would involve a *pluris petitio*, which would be fatal to the security.

Now though it be admitted, that the above-mentioned decret of sale gives to creditors a real security equal to adjudication, still it is to be observed, that the confirmation in question was prior to this decree; and being a mode by which moveables are actually appropriated, it must then *pro tanto* have operated an actual extinction of the debt. Confirmation is *aditio hereditatis in mo-*