

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, expedited 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-*

bilibus. But though that of an executor-creditor may be considered as a form of diligence; yet in this view likewise it must be allowed, like pointing, completely to transfer the property of the subjects confirmed, and to vest the creditor in them; who is only liable to render an account to the persons interested.

No 21.

Answered for the creditors who had expedited confirmation; The idea of confirmation being *aditio hereditatis in mobilibus*, corresponds not to the case of executors-creditors, whose confirmation gives no right to the succession of the deceased, and is merely a form of diligence established by law for the obtaining of payment. It is for this reason, that different creditors may confirm the same subject, whilst it is impossible that there can be two heirs of one succession, without being heirs-portioners; Lord Bankton, B. 3. Tit. 8. § 65. Nor, though such a confirmation tended as completely as pointing to transfer property, are the funds in this case really carried away. They still remain *in medio*; as they must do, until, after many calculations, and the ranking of all the various debts, it shall appear what shares of them should be allotted to particular creditors.

At first, the COURT found, "That the creditors who were confirmed executors were entitled to be ranked on the price of the heritable estate for their whole debts, without deduction of what they drew from the executry." But, on advising a reclaiming petition and answers,

"THE LORDS altered that interlocutor, and found, That the creditors who had attached the executry could only be ranked on the price of the heritable subjects for the remainder of their debts.

Reporter, Lord Justice Clerk.
Alt. Swinton, Ilay Campbell.

For creditors confirming, Elphinston.
Clerk, Tait

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Fol. Dic. v. 4. p. 244. Fac. Col. No 107. p. 201.

1790. November 16.

CREDITORS of JAMES STEIN *against* ASSIGNEES to the Estate of SANDEMAN and GRAHAM.

SANDEMAN and Graham, merchants in London, being the agents or correspondents of Stein, a distiller in this country, he was accustomed to consign to them large quantities of spirituous liquors destined for the London market. He likewise occasionally remitted bills to them. On the other hand, he frequently drew bills upon them, to an amount greatly exceeding the value of his consignments and remittances.

At a time when Sandeman and Graham had come under acceptances for Stein, to the extent of L. 58,000, but which were not yet payable; and when they had received bills for L. 39,000 as the price of his spirits, or that had been

No 22.

How far bills remitted and discounted prior to the bankruptcy of the remitter, though not payable till afterwards, are to be deemed collateral securities?