

1780. *February 1 and 24.* SIR JAMES COCKBURN and OTHERS *against* JOHN TAIT and OTHERS.

RIGHT IN SECURITY.

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

[*Fac. Coll. VIII. 201 ; Dict. 14,110.*]

PRESIDENT. The case of *Auchinleck* does not apply: the case of *Crichen* is nearer the present one; but that case was singular, and attended with many extraordinary circumstances. The rule *jura vigilantibus subveniunt* must be observed.

[Discovered that he was a party. Cause put off from 29th January.]

COVINGTON. What difference does it make that there are two separate estates instead of one? If there had been two heritable subjects, and part of the debt had been drawn out of the *one*, still the creditor would have been ranked on the *other* for the whole debt.

On the 1st February 1780, "The Lords preferred the creditors, who either confirmed as executor-creditors within the six months or cited the executor confirmed."

*Act. J. Swinton. Alt. A. Elphinston.*

*Reporter, Justice-Clerk.*

*February 24.*—BRAXFIELD. Confirmation is not equal to payment. Mr Tait has L.1200 in his hands: Has he not got payment for himself?—as, according to his own argument, he may retain. But the other creditors have touched nothing, and therefore they may still attach the price of the heritable subjects.

GARDENSTON. The question is, Whether Mr Tait is a creditor who has drawn, or who has only a claim to draw? The value of the goods was deposited in the hands of Mr Tait as *trustee*, not as *creditor*.

COVINGTON. Mr Tait confirmed the *ipsa corpora* for payment. This is a step of diligence which vests the subject in him.

JUSTICE-CLERK. I cannot distinguish between Mr Tait and the other creditors, for whom he is either actually trustee or held as trustee by the act of sederunt. There was nothing to have hindered the creditors who had attached the moveables to have divided the price, even before the price of the heritable subjects was divided. For conveniency, it happens that all is divided at one time: in that case it is certain that the creditors could only have drawn proportionally to their balance out of the heritable subjects.

BRAXFIELD. There is a difference between confirmation of *corpora* and *nomina*; for *nomina* is not money until payment, whereas estimated *corpora* is. I have doubt how far creditors, who have only right by citations, can be said

to have received payment ; for, if Mr Tait were to become bankrupt, the creditors for whom he appears would still have their full claim of debt.

COVINGTON. This is raising a question upon a *species facti* which does not exist.

On the 24th February 1780, “ The Lords found that Mr Tait, and the other creditors for whom he acts, can only be ranked upon the price of the heritable estate for the balance remaining due to them, after deducting what they have recovered out of the executry-funds ;” altering their interlocutor of \_\_\_\_\_.

*Act.* Ilay Campbell. *Alt.* A. Elphinston.  
*Reporter,* Justice-Clerk.  
*Diss.* Gardenston.

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1780. February 25. JOHN RAMSAY *against* JOHN GRIERSON.

#### ARRESTMENT.

The habile diligence for affecting the price of Heritable Subjects, in the hands of a Trustee for Creditors.

[*Faculty Collection, VIII. 203 ; Dictionary, 759.*]

COVINGTON. The first question *here* is, Whether there is a debt at all? I do not understand how an arrestment can be laid on a *conditional* debt, which may not become *pure* in twenty years. I always understood that in the law of Scotland a conditional debt is not the subject of arrestment. There may be a creditor where there is no debtor, as in an infestment of annualrent without a personal obligation to pay. Dickson ceased to be debtor in consequence of the discharge granted by his creditors : the only action, if any, must be against his trustee. The trustee is liable to account, but that obligation is not a subject of arrestment : the creditors may come at it another way, by compelling the trustee to dispoise the subject and divide the price.

KAIMES. *Here* a man dispoises his subjects, heritable and moveable, to a trustee, for his creditors' behoof. I cannot see how an arrestment by the creditors of the cedent can have any place. The purpose of an arrestment is to put the arrester in the room of the common debtor. The right of the common debtor is merely to account to the creditor : how can any diligence prevent the effect of the trust-right ?

BRAXFIELD. The subject of the hearing was, “ How far the arrestment affected the heritable estate ?” If the interest in question be *heritable*, it cannot be affected by arrestment ; if *moveable*, it can. The different creditors have not an heritable estate in the subject of the debtor, for then inhibition might be used against each of them, which would embarrass the trust-right and