

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

S.

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?

No. 22.

remitted by him, of which the times of payment were likewise not come, though all of them had already been discounted, and the proceeds applied for discharging debts due by Stein; he became bankrupt, as they also did. Beside the L. 39,000, they had paid L. 12,000 of other debts for him.

The assignees under the commission of bankrupt issued against Sandeman and Graham, claimed at first to be ranked on Stein's estate for L. 58,000 the amount of their acceptances for him; but as the holders of these bills, none of which had been paid, made the same claim, that of the assignees was soon given up.

They afterwards, however, framed another claim thus: They maintained, that the bills for L. 39,000 not having been payable at the time of the bankruptcy, were, although discounted, to be understood as unpaid, and as effects or securities then in their possession; of which they were entitled to avail themselves, under the statute of 1783, for obtaining payment of all the debts owing to Sandeman and Graham by Stein, and comprehending, beside L. 39,000 paid out of the discounted bills, the other sum of L. 12,000, and such farther sums as should be drawn out of the estate of Sandeman and Graham by the holders of the L. 58,000 bills.

Against this claim, the other creditors of Stein objected, and

Pleaded; The bills for L. 39,000, being, in the mercantile phrase, good bills, which could be discounted at any time, were equivalent to so much money *minus* the discount, and of course to be considered as truly payments made to Sandeman and Graham. The immediate employment of this money which took place, was the only way in which they could fulfil their duty to Stein their constituent. Yet the present claim implies an use of those remittances contrary to the sense of both the parties at the time, as well as to the duty of one of them. Nay, its very object is, to establish in Sandeman and Graham, against Stein's estate, a debt purchased with his own money.

If remittances of this kind were not to be regarded as payments, every banker who discounted a bill, beside having an action of recourse, would, with equal propriety, be deemed a *creditor hypothecarius* in respect to such bill, as a pledge of security for all the debts that the discounter might owe to him.

At any rate, those bills cannot be securities for relief of the L. 58,000 of acceptances by Sandeman and Graham. By the claimant's hypothesis, the L. 39,000 bills are part of the estate of Stein; but it is admitted, that for the L. 58,000 acceptances they cannot rank on that estate. Besides, it would be incongruous for a cautioner to withhold, for his own relief, any part of the debtor's funds, to the prejudice of the creditor.

The matter, indeed, would in this case become inextricable, by producing an indefinite series of rankings. On replacing out of the L. 39,000 bills the dividend of Sandeman and Graham's estate, drawn by the holders of the L. 58,000 acceptances, a new estate to that amount would be created, to undergo a similar distribution; in which these holders would again have a share, so as to oc-

casation another defalcation of the L. 39,000, and thus the same succession would go on *ad infinitum*.

Answered; Sandeman and Graham cannot be supposed to have received as cash all the bills remitted by Stein, which, in effect, would have been to become the guarantees for the acceptors. These bills were no more than securities in their hands; of which the claimants in their right are, by the statute of 1783, entitled to the same right that was sanctioned by the Court in the case of the Creditors of Fall*.

Nor could the discounting of the bills make any essential difference. On this occasion Sandeman and Graham were, truly and substantially, borrowing money from their bankers upon their own credit, aided by the deposit of Stein's bills, over which they had a right in security. The case was the same, as if, instead of remitting bills, he had assigned to them a bond, or impleged in their hands any moveable of value, and they, on borrowing money, had transferred to the lender, for his farther security, such bond or moveable; an operation surely that could not be considered as a payment by Stein, so as to diminish any balance due by him. On the contrary, this would still have remained unaltered, until actual payment of the bond, or sale of the moveable.

The L. 39,000 of remittances being then regarded, not as payments, but as effects of Stein's in the hands of Sandeman and Graham at the time of the bankruptcy, the proceeds are now to be applied for payment of every debt due by him to them; in which is plainly comprehended whatever dividend shall be drawn out of their estate, by the holders of the L. 58,000 bills.

Nor will any intricacy occur in this application; for if the dividends of these holders be deducted from the L. 39,000, and the remainder imputed towards payment of the cash advanced, (L. 51,000, or L. 39,000, and L. 12,000,) there will still remain such a balance as the corresponding dividends of Stein's other estate will be insufficient to extinguish; and, of consequence, the claimants must continue ranked for that full sum, as long as there are any dividends to be drawn.

Replied; The discounting has been spoken of, as in effect borrowing on the credit of Sandeman and Graham, so as to bring them under some obligation, or to expose them to some risk. But, in truth, they could only be bound, in any event, to pay back what they had thus received; in the same manner as if Stein had sent them a bag of money, that they afterwards delivered for value, which, on its being discovered that the coin was bad, they were obliged to restore.

In the case of Fall's Creditors, the bills were not delivered as cash, but merely as pledges, by which circumstance it is essentially discriminated from the present.

*-See Trustees of Fall's Creditors *contra* Sir W. Forbes and Company, *infra* h. t.

No 22.

And as to the double ranking, the difficulty is not solved; for it was not adverted to, that on the dividends being replaced out of the L. 39,000 bills, a new estate would be produced, and an endless series of rankings begun. For this reason probably it is, that no other instance can be produced of a claim of relief for dividends.

THE LORD ORDINARY pronounced this interlocutor: " Finds, That the assignees are not only entitled to be ranked for the sum of L. 39,000, and for L. 12,000, making up together the total balance due to them, and to draw a corresponding dividend accordingly, till by such dividend, and by the produce of the collateral securities in their hands, they shall be fully paid of the above-mentioned total balance; but also, that the said assignees are further entitled to be ranked, and to draw as aforesaid, ay and until they shall be fully paid and relieved of the amount of any dividend that has been or shall be recovered out of the estate of Sandeman and Graham, by the holders of their acceptances for the other sum of L. 58,000."

At first, upon advising a reclaiming petition and answers,

THE COURT adhered to the Lord Ordinary's interlocutor.

On advising, however, a second reclaiming petition and answers, the following judgment was pronounced:

" THE LORDS alter the interlocutor complained of, and find, That the assignees can only be ranked for L. 12,000:" To which judgment, by a very narrow majority, they adhered, after again advising the cause on a reclaiming petition and answers.

Lord Ordinary, *Justice-Clerk.* For the Assignees, *Solicitor-General.* Alt. *Macconochie.*
Clerk, *Home.*

S.

Fol. Dic. v. 4. p. 245. Fac. Col No. 146. p. 291.

S E C T. IV.

Real security remains till the last shilling be paid.

No 23.

1734. February 16. Earls of LOUDON and GLASGOW against Lord Ross.

AN adjudger upon a bankrupt estate having obtained payment of part of his accumulate sum out of the debtor's other effects, in a competition betwixt him and the other adjudgers, who were ranked *pari passu* with him upon the price of a remaining part of the estate, the question occurred, whether he was entitled to draw in proportion to his accumulate sum till he was fully paid up, or only in proportion to the sum that remained due? It was *contended* for him, That his