

representatives, the act of sederunt 1662, did not entitle Colonel M'Dowal to any preference, notwithstanding his having cited the intromitter with the defunct's effects within six months after his death.'

No 9.

And the like question having, about the same time, occurred in the ranking of the creditors of the deceast John Johnston in Dumfries, wherein Richard Dickerson pleaded preference to the other creditors, in respect of a citation given by him, within six months of the debtor's death, to the executor confirmed *qua* nearest of kin, the LORDS, upon the 21st July 1742, pronounced the like judgment: 'Finding him entitled to no preference, notwithstanding such citation, in respect none of the defunct's creditors had confirmed executors to him, or had used other complete diligence against his representatives.'

N. B. Where an executor *qua* nearest of kin is himself a creditor, as it has been found, that his confirmation *qua* nearest of kin gives him the same preference for the debts due to himself, as if he had confirmed executor-creditor; See Dec. 19. 1740. *voce* EXECUTOR, Lord Napier and Others *contra* Menzies and his Cautioners, No 31. p. 3849.; it would seem to follow, as a consequence of that judgment, that in such case, the citation to such executor *qua* nearest of kin, within the six months, would operate a preference *pari passu* with the said executor, to all other creditors doing diligence after the six months. See PAYMENT.

Fol. Dic. v. 3. p. 192. Kilkerran, (EXECUTOR-CREDITOR.) No 1. p. 176.

* * * This case is reported by Lord Kames, No 19. p. 3141.

1757. July 16.

MRS MARY STEWART and her Husband *against* ALEXANDER LORD LINDORES.

No 10.

In the year 1721, Alexander Stewart, son to Lady Lindores by her first husband, having right from his mother to a provision of 10,000 merks contained in her contract of marriage with David Lord Lindores her second husband, brought a process against Sir Alexander Anstruther, who succeeded to the estate of Lindores by a deed of settlement, for payment of this sum. Sir Alexander granted an heritable bond of corroboration; and having thereafter sold the estate to the present Lord Lindores, took the purchaser bound to relieve him of this among other debts.

An executor-creditor, like an executor-dative, being a trustee only, is not liable to the risk of goods perishing or falling in their appraised values, but is bound to dispose of them by auction, and to account for the price.

The Representatives of Alexander Stewart brought a process anno 1743 against the present Lord Lindores, founding upon the said clause of relief, and concluding, that he ought to pay this sum. The defence was, that the Lady Lindores being confirmed executrix to her husband David Lord Lindores, got his moveables appraised at very small values; that she sold these moveables at a higher value than they were appraised at; and that the pursuers in her right were accountable for the balance. The Lord Ordinary, before answer, directed a

No 10. proof of the value of the moveables confirmed; and having advised the proof, found, ' That there is no evidence of the extent of the alleged mal-appretiation, upon which any certain judgment can be formed; and found, that as no objection was made to the debt, till it was made in this process, more than 20 years after it was corroborated by Sir Alexander Anstruther, there lies no presumption against the pursuers, that any inventory or roup-roll of the effects confirmed has been suppressed in order to conceal the truth; and therefore repelled the defence.' But the Lords, upon a reclaiming petition and answers, found, ' That there is sufficient evidence brought, upon the part of the defender, that the value of the stock and crop was 7000 merks, and remitted to the Ordinary to proceed accordingly.'

The pursuers, in reclaiming, found it necessary to state the precise facts. David Lord Lindores having died in July 1719, his relict paid the funeral expenses, servants' fees, and several other pressing debts, obtained a decree *cognitionis causa* before the Commissary for L. 2899 : 17 : 8 Scots, upon which she confirmed her husband's stocking and growing corns, 9th September 1719. In this situation, nothing else could be done, but, from the different grains sown, to estimate what might be the produce, and what might be a reasonable price for that produce. It is the duty indeed of an executor, in this case, to bring the corns, after they are threshed out, into a regular account; but the executrix died in October 1719, before that could be done. At this period, there is no suspicion that any of the subjects confirmed were sold or disposed of: For as the Lady continued her husband's possession, to which she had right by her liferent-infeftment, the stocking was necessary for carrying on the management of the farm.

The corns and stocking, by this means, remained still *in hæreditate jacente* of Lord Lindores, and lay open to a new confirmation *ad non executam*: For as an executor is but a trustee, the confirmation transfers not the property to him, but only completes the power given him by the Commissaries to ingather the defunct's effects, convert them into money, and distribute the same among those having interest. Now, if the Lady Invernytie, who was his Lordship's next of kin, forbore to apply for a confirmation *ad non executam* for her own behoof, and for behoof of all concerned, the Lady Lindores's representatives were certainly not to blame for want of diligence, because her office died with herself. If they who had interest in his Lordship's executry were not pleased to interpose, the representatives of Lady Lindores could do no other than take possession of the confirmed goods, and dispose of the same for their own behoof. They, as representing Lady Lindores, had an obvious interest to act this part; because, in all events, the Lady became liable for the appraised sums, though every hoof should have perished; and therefore had a title to take possession of these goods to answer for the appraised values, if no other person was pleased to interpose.

This being the true state of the case, it is submitted, whether any action can ly against the representatives of the executrix for any benefit they may be sup-

posed to have made by this their intromission, at the instance of a creditor, or the next of kin, or any other person concerned in the executry. There appears to be no foundation for such an action, either at common law, or in equity. The remedy at common law is that suggested above, viz. a confirmation *ad non executam*, or of *male appretiated*; and if this remedy be neglected, why should another be created without necessity, especially where it, in a good measure, contradicts the principles of equity? That it does so, will appear from this single consideration, that though the goods should sell at an undervalue, or perish *casu fortuito*, the executor is notwithstanding liable for the appraised values, which is the legal charge against him; and therefore, to make him answerable for the profit he has by the effects confirmed, is making him run all the hazard, without the least prospect of advantage, contrary to the known maxim of equity, *cujus incommodum, ejus debet esse commodum*. At this rate, a confirmation *ad non executam*, or *male appretiated*, is a very foolish invention; better for the creditors, or others interested in the executry, to ly upon the catch till the goods be disposed of; if the market-price run high, they have all the benefit; and however low it may be, they are at no loss; the appraised values must, in that case, be the rule. But our forefathers judged more equitably; to prevent playing tricks by low apprisements, they invented the confirmation *ad male appretiated*, which is a most equitable remedy, by giving the principal executor the full value of the goods as stated in his own testament, and withal relieving him of all hazard and trouble. The principal executor can have no cause of complaint, and the executor *ad male appretiated*, who thus undertakes the burden of the management, has a chance of profit by disposing of them at higher values. A third party may no doubt come in, and bid upon him by a second confirmation *ad male appretiated*; but if the parties concerned forbear till all the effects be disposed of, it is then too late for the application; there can be no such thing as a confirmation *ad male appretiated* after the effects are sold and converted into money, more than for a confirmation *ad non executam*.

The sum is, that Lady Lindores herself, who was guilty of no negligence, could not be made liable to account for any greater sums, than those contained in her confirmed testament, seeing she died before having an opportunity of converting these effects into money. *2do*, When those concerned in the executry neither took out a confirmation *ad non executam*, nor *male appretiated*, but allowed the Lady's representatives to dispose of the goods, which they were entitled to do as being liable for the appraised values, there was no place thereafter for such confirmations; *3tio*, much less for an irregular application by a process that has no foundation at common law; and as little in equity, after neglecting the ordinary remedy. And *lastly*, If such a claim cannot be made by way of action, as little by way of exception, as in the present case.

'The petition for the pursuers was refused without answers.'

The Court thought it competent to claim the surplus value of the subjects confirmed by way of defence, though there be no confirmation *ad non executam*;

No 10. and they did not regard the distance of time, which must rest upon the following ground, that an executor-creditor, like an executor-dative, is a trustee only ; consequently, that he is not subjected to the risk of the goods perishing, or of their falling below the appraised values ; but that he is bound to dispose upon them by auction, and to account for the price, deducting only the debt due to himself ; and that his representatives are liable in the same manner.

Fol. Dic. v. 3. p. 192. Rem. Dec. v. 2. No 125. p. 263.

An executor creditor must do diligence ; *See* DILIGENCE.

Testament, within what district it must be confirmed ; *See* FORUM COMPETENS.

See Erskine against Aikenhead, No 75, p. 2842.

See APPENDIX.