

SECT. II.

Form of Confirmation.

1662. *January 18.* THOMAS FAIRHOLME *against* MARGARET BISSET.

No 5.

A general confirmation of goods in a shop, was preferred to a posterior one, which specified the different articles.

THOMAS FAIRHOLM, as executor-creditor, confirmed to Andrew Reid, pursues Margaret Bisset, his relict, to deliver the ware in his shop, contained in the pursuer's confirmation. The defender *alleged* absolutor, because she has confirmed the ware in the shop, specially and particularly for the use of the hail creditors; and the pursuer's confirmation is only general, not condescending upon the particular ware; and though the defender's confirmation be posterior, yet it is special, and hath attained possession before any pursuit, at the pursuer's instance, upon his prior confirmation; and confirmation does not establish property until possession or execution, but is only as a legal disposition incomplete, as gifts of escheat, where the first sentence or possession gives the first real right of property. The pursuer *answered*, That his confirmation is special enough, bearing the ware of the shop to be silks, stuffs, and others, worth 4000 merks; and the confirmation alone constitutes the property unto the executor, because he is *hæres mobilium*; and the property being before *in hæreditate jacente, ipso facto*, by the confirmation it is established in the executor. *2dly*, By the constant practice of this kingdom, there could be no second principal confirmation, but only *ad omitta*; and she could never confirm that which the first executor had confirmed. The defender *answered*, That, by act of sederunt of the Judges in the usurper's time, all executors confirming within six months after the defunct's death, were ordained to come in together; and, therefore, it was then the custom, that all confirmed principally the same things, seeing they could get no more than what was in their confirmation; and the defender's confirmation being at that time, must be sustained. The pursuer *answered*, That the defender cannot have the benefit of that act of sederunt, because she confirmed not within six months after the defunct's death. The defender *answered*, She confirmed within six months, or six or seven days more, which is an inconsiderable difference.

THE LORDS preferred the first executor to the goods in the shop.

Fol. Dic. v. 1. p. 272. Stair, v. 1. p. 82.

* * * Gilmour reports the same case :

No 5.

THOMAS FAIRHOLM, as executor-creditor to Andrew Reid, pursues Margaret Bisset, for certain merchant ware intromitted with by her, belonging to the defunct her husband. It was *excepted*, That she intromitted as executrix-creditrrix to her husband, the samem goods being in her possession the time of the confirmation ; and the pursuer having done no diligence therefore, before her confirmation, she ought to be preferred, seeing confirmation and possession complete a right in her person, without farther execution, which a naked confirmation doth not in the person of the pursuer. It was *answered*, That the first confirmation, in the person of the executor-creditor, gives such a right, that it excludes all second confirmations in the point of law, except *ad omissa et non executata*, where the principal executor is dead. And albeit the English Judges, in whose time both testaments were confirmed, did bring in *pari passu* all creditors who did confirm within half a year after the defunct's death, and that the pursuer's testament was within half a year ; yet this excipient, by her confirmation, cannot have that benefit, far less can she be preferred ; because she was not confirmed till after the half year was expired. It was *replied*, That she was confirmed within nine days after the half year, and her edict was served within the half year.

THE LORDS preferred the pursuer.

Gilmour, No 17. p. 14.

1693. December 8. KINFAUNS *against* Her HUSBAND'S CREDITORS.

IN the cause between the Lady Kinfauns and her husband's Creditors, competing with her upon confirmations, the LORDS preferred her, as she who was first confirmed executrix-creditrrix on her contract of marriage, (though none of them was within the six months of her husband's death, and so not in the terms of the act of sederunt), as to the office, and brought in Scott in Dundee *pari passu* with her *quoad* the common sums, which each of them had confirmed ; because he was confirmed that same day with her ; and in so far as each of them confirms separate or distinct sums, which the other does not, prefer them *respective* to these, and find a general confirmation of a sum due by such a debtor, though it do not particularly condescend on the individual sum, (which they may be ignorant of), is sufficient to carry the right, and make them preferable to Ramsay of Cairnton, who, *qua creditor*, had confirmed the special sum ; (but some months after the Lady and Scott's confirmations were expedie ;) and that his having obtained the first decret gave no preference here, seeing the debtor Northesk had advocated the other creditors actions, and had so far colluded with him as to let his decret pass ; but found the debtors, not being

No 6.

A confirmation of a debt due by a debtor named, though neither the sum nor the security were condescended on, was preferred to a posterior particular confirmation of the same debt.