

No 3.

As to the point of law ; *1mo*, Many preferable creditors reckoned themselves fully secured by their diligence, and have no benefit by the sale. *2do*, The same reason that would burden preferable creditors with the expense of roup and sale, would burden them also with Chamberlain fees, and all expenses of the management of the common subject of their payment. *3tio*, In voluntary dispositions for a price, to be applied for the behoof of the creditors, the expense of their disposition, and in clearing and managing the lands disposed, comes out of the first and readiest of the price ; and, in appraisings and adjudications, there are legal expenses and accumulations, which are made real preferable burdens ; and, because land is no divisible subject, sales are invented as legal adjudications to a buyer, and the price comes in place of the land to be divided amongst the creditors, in the same way that the land ought to be divided, if it were divisible. *4to*, The creditors being ranked, and the law having appointed the price to be paid, conform to the ranking, their decreets ought to suffer no diminution.

On the other hand, it was *argued*, That the opinion and apprehension of particular creditors, who desired not a sale, was not to be considered ; for, the law regarding the general utility of creditors, had introduced sales as a common advantage to all, that the creditors' claims might be reduced into money, which is truly an advantage, even to the preferable creditors, whose debts are mortified ; and, in recompense of that benefit, a small expense was not to be regarded. *2do*, In a doubtful case, the practice of the Lords for several years should make a rule. *3tio*, No question had ever occurred in relation to the sums advanced by factors towards sales ; and the foundation being once laid, that the preferable creditors were to be burdened, these sums could either be repaid to the factors, or added to the price, and then the total expenses deducted from the creditors proportionally. *4to*, The Lords had also come to a resolution, that nothing should be reckoned common expense, but the extract of the decret of ranking and process of sale.

' THE LORDS found, That the preferable creditors ought to be paid, conform to the decret of ranking, without any deduction of common expense ; and that the same ought to be taken out of the first and readiest of the price.'

Dalrymple, No 35. p. 43.

No 4.

1702. January 16.

RAMSAY against NAIRN.

EXECUTOR-CREDITOR counting with other creditors for his intromissions, the expenses of confirmation may be deduced by him out of the whole head, in terms of the act of sederunt, 28th February 1662.

Fol. Dic. v. 1. p. 286. Fountainhall.

* * * See This case No 15. p. 3139.