

No 27.

A decret of sale, at the instance of an apparent heir, within year and day of the first effectual adjudication, brings in the whole creditors, whether adjudgers or not, *pari passu*.

1748. January 29. IRVINE against MAXWELL of Springkell.

RICHARD BEMBLE-JOHNSTON, apparent heir of Colonel John Johnston of Netherwood, pursued a process of sale of his predecessor's estate, which was accordingly sold 21st July 1744. But Mr Francis Grant, merchant in Edinburgh, had obtained an adjudication 10th June of the same year, upon a decret of cognition, which interest came into the person of Sir William Maxwell of Springkell; and George Irvine, writer in Edinburgh, obtained an adjudication 23d February 1745, within year and day of the first.

A question arose, whether these adjudications ought to be ranked *pari passu*; or if the first had a preference, as the second was led posterior to the decret of sale, when there was no adjudgeable subject in the *hereditas jacens* of the common debtor, the estate being sold, and the price only affectable by arrestment.

On the other hand it was *pleaded*, That the adjudications within year and day of the first were to be ranked *pari passu* with it; and an apparent heir, by obtaining a decret of sale, could not take from his predecessor's creditors the benefit of leading them: That adjudications after the sale of a bankrupt estate, were not only competent, but necessary, if any of the creditors had not completed their diligence before; and there was no difference in the competence of them, betwixt the case of a sale pursued by a creditor, and by an apparent heir; in both which the price, as come in place of the land, fell to be affected by the diligence.

THE LORDS considered the decret of sale as an adjudication, for the benefit of the whole creditors, being obtained by the apparent heir, who was impowered by law to act as trustee for them and himself, and being within year and day of the first adjudication, that it ought to be beneficial to all, whether they had adjudged subsequent to it or not; they therefore found the whole creditors on the estate were to be ranked *pari passu*.

N. B. The apparent heir had raised a summons of sale, which he desisted from on account of an informality, and raised another; before the execution of which, Mr Grant, who had been called in the first, commenced his diligence; but this did not seem to influence the decision.

Reporter, Drummore.

For Irvine, A. Macdougall.

Clerk Hall.

D. Falconer, v. 1. No 233. p. 319.

* * * See this case as reported by Kilkerran, *voce* RANKING and SALE.