

sums, and annualrents, bygone and in time coming, during the not payment; and

No 47.

“ Found, That the defender, James Falconer of Monkton, as representing his father, ought to be charged with the principal sum in his father's bond, and the interest thereof; as also, That he should have credit for the sums paid to the creditors, of the dates when these payments were truly made: And therefore that the second scheme or calcul should be the rule of accounting betwixt the pursuer and defender.”

Act. *Montgomery, Lockhart.*Alt. *Brown, Ferguson.*Clerk, *Home.*

G. C.

Fac. Col. No 6. p. 8.

1767. July 31.

Colonel JOHN BLACKWOOD, and Others, *against* JOHN HAMILTON and Others.

RICHARD, Lord Maitland, granted an heritable bond over his lands of Dudhope to Mr Robert Miln of Barnton, by whom it was conveyed to Sir George Hamilton of Tullyallan. Sir George again conveyed it to Sir John Haliburton and others his creditors, who were infeft upon it in 1709. Sir George likewise conveyed it to Sir Archibald Flemyng of Farm, who was infeft 1706; but the sasine remained in the register-office many years unknown. Blackwood of Pittreavie being creditor to Sir Archibald Flemyng, *inter alia*, adjudged from him this heritable bond.

No 48.
When the division ought to take place in a judicial sale of a bankrupt's estate?

Lord Maitland having been debtor also to John Pate and William Paton, they severally adjudged the lands of Dudhope in 1690.

In 1735, a process of ranking and sale of Lord Maitland's estate was brought in name of Janet Hepburn, one of two heirs-portioners of John Pate; and, in 1741, a decree of ranking was pronounced, preferring the Representatives of the creditors-disponees of Sir George Hamilton, who were infeft in 1709 *primo loco* and Janet Hepburn and Thomas Paton, the Representative of William Paton the other adjudger, *secundo loco, et pari passu*; and finding, that as the sums due to the creditors-disponees of Sir George Hamilton would more than exhaust the sums in the heritable bond and infeftment, there was no place for ranking Mr Blackwood.

This decret was extracted, and the estate sold in 1744, at a price which fell short of the sums due upon the heritable bond.

Sir Archibald Flemyng's sasine having been afterward discovered, while great part of the price remained in the hands of the purchaser, Mr Blackwood brought a reduction of the ranking and sale, upon two grounds; *1mo*, That Janet Hepburn the nominal pursuer was dead before the commencement of that process; and therefore the whole proceedings were void; *2do*, That the

No 48.

disponees of Sir George Hamilton were preferred upon the supposition, that their infeftment in 1709 was the first; whereas it now appeared, that Sir Archibald Flemyng was infeft before; and, therefore, that Pittreavie ought at least to prevail in the reduction, so far as to obtain his proper place in the ranking.

THE LORDS sustained the reason of reduction, so far as to admit Mr Blackwood to his proper place in the ranking; but found that the process having been raised in the name of a person that was dead, did not affect the decree of sale.

A remit having been made to an accomptant to make out a scheme of division, a question occurred, whether the division ought to take place, as at Whitsunday 1744, the term of the purchaser's entry to the lands, or as at the time the account was made out? If the first, then the price was exhausted by the sums due upon the heritable bond, owing to the accumulation of a great number of past years interest. If the last, then, after payment of the principal sums and interests due upon the heritable bond, there remained about L. 20,000 Scots for the payment of the postponed creditors, the Representatives of Pate and Paton the adjudgers.

This question having been taken to report by the Lord Pitfour Ordinary, it was *pleaded* for the postponed creditors, That as, in general, it is equitable, that creditors should receive a rateable proportion of their debtor's effects, where these are insufficient for payment of his whole debts; so here the creditors under the heritable bond ought not to be allowed to sweep away the whole price by their accumulations, while the postponed creditors do not get payment of any part of their principal sums, unless there be some positive law, or fixed principle of law, to the contrary. It has indeed been customary, where the proceedings have been regular, to make the division take place at the term when the price becomes payable by the purchaser; but there does not appear any law for this; and therefore the rule ought not to be extended further than the practice has already gone, and especially to cases, where, as in the present, the whole proceedings have been irregular. The regulations 1695 require, that there should be an extracted decree of ranking before the sale; but here the proceedings having been null, there was strictly no decret of ranking. The ranking was not finally settled till the issue of Mr Blackwood's reduction. It seems therefore more agreeable to the spirit of these regulations, that no effect should be given to the sale; and, though the postponed creditors are willing that the sale may be good to the purchasers, yet they are entitled to plead, that it shall not have the effect to regulate the division of the price. Neither ought it to have any weight that the Court has found the irregularity of the proceedings did not affect the decree of sale; for these proceedings being, in strict law, undoubtedly null, this was only *ex nobili officio*, which neither is in practice, nor ought to be, exercised to the prejudice of third parties.

Answered for the creditors ranked upon the heritable bond: It is allowed to be the practice to make the division take place at the time the price becomes payable by the purchaser. It is a mistake that there is no law for this: It is founded in the clearest principles, and indeed in the nature of the thing. The scheme of division, at whatever time it is made, is no more than the application of the rules established by the decret of ranking. The purchaser immediately upon the sale becomes debtor to the creditors for their proportion of the price. The debts, therefore, are accumulated at that period, for this reason, that the annualrents of the price must belong to the same person who has a right to the price itself. It is upon this principle that a debt is accumulated by a decree of adjudication, the creditor thereby coming to have a right and interest in the subject adjudged to the amount of his debt. For the same reason, if a debt bearing interest be assigned in security of another not bearing interest, the last will bear interest against the cedent from the date of the assignation; 25th Jan. 1699, *Inglis contra M'Moran, voce RIGHT IN SECURITY*. In this view, it is of no consequence whether the ranking shall be supposed to have been before or after the sale; for, even on the last supposition, the scheme of division would, upon the above principle, be made out as at the date of the sale, and the debts accumulated from that period; as was found in the case of a judicial sale by an apparen their; *Drummond contra Angus, 1754. See APPENDIX.*

As to the argument from the supposed nullity of the decree of ranking, it is *answered*, That, whatever challenge might have lain against that decree, such challenge was not competent to the postponed creditors. The heritable bond was undoubtedly preferable; and, as that was more than sufficient to exhaust the price at the time of the decree, the postponed creditors had no interest; and therefore, by the regulations 1695, could not have been heard to challenge it. The after question with Pittreavie was only among the creditors of Sir George Hamilton claiming under the heritable bond, with which the postponed creditors of Lord Maitland had no concern. Those having interest in the heritable bond might, notwithstanding any dispute among themselves, have applied the whole price immediately, and then their could not have been place for the present question. In a word, the case falls to be viewed in the same light, as if, after the sale, the interest of any of the creditors had been affected by diligence in the hands of the purchaser, which it is clear could not have brought any advantage to the postponed creditors.

It might likewise be observed, that there is an inconsistency in the plea of the postponed creditors. At the same time that they allow the decree to be good to the effect of creating the fund, which is the subject of dispute, they maintain that it is null, in order to appropriate that fund to themselves.

THE LORDS found, that the creditors in the right of the heritable bond ought to be ranked in the scheme of division, *primo loco*, upon the price of the lands for the principal sum and annualrents thereof due at Whitsunday;

No 48. 1744. the term of the purchaser's entry, accumulated at that term into a principal sum.'

For the creditors in right of the heritable bond, *M^cQueen*
Alt Dav. Dalrymple, sen. et Advocatus.

A. R.

Fac. Col. No 68. p. 118.

SECT. XI.

The Sale must comprehend the Debtor's whole Estate.

1749. *January 11.* SIR HARRY MONRO *against* BAYNE.

No 49.

It was found, That a sale could not proceed on a summons not containing the debtor's whole lands, though these omitted were lands to which he had only succeeded, but was not entered.

Fol. Dic. v. 4. p. 211. Kilkerran, (RANKING and SALE.) No 6. p. 471.

* * * D. Falconer reports this case :

SIR HENRY MONRO of Foulis raised a process of sale of the estate of Kenneth Bain of Tulloch, omitting out of the summons a little piece of ground called Achnaclerach, to which the debtor had right as apparent heir to his brother, but was not infest in, it having been omitted out of Sir Henry's adjudication, but adjudged by other of the creditors, though when this question was determined, it was not cleared whether any of these adjudications proceeded on special charges, and consequently carried the lands.

Objected, That the sale could not proceed, as not comprehending the whole estate of the common debtor.

Answered, That it was not necessary a judicial sale should comprehend an estate to which an heir was not entered; but the LORDS had no regard to this. Then it was *pleaded,* The pursuers had adjudged and raised a sale of Achnaclerach, which they would bring in and conjoin with this process.

Objected, One sale cannot proceed on two summonses; and the defenders have executed a sale, which they will insist in, of the whole estate.

It was made a question on the Bench, whether this defect in the original summons could be supplied by an additional one to be conjoined; but it was observed, it could only be determined when the supplemental action was brought before the Court; as also, if the defenders should first bring in their