

1749. *June 29.* The CREDITORS of HAMILTON, Supplicants.

JOHN HAMILTON the apparent heir of his father, the deceased John Hamilton of Grange, pursued a sale of the estate of Grange upon the act 1695, which was brought the length of having day after day appointed for the sale by adjournment, nobody having appeared to offer. The Creditors, weary of the delay, applied to the Lords to lower the price, the height whereof they reckoned to be the cause why nobody offered.

This the LORDS refused to do upon the creditors' application, for that being a sale on the act 1695, it was thought the creditors could not take it up; and therefore the petition was let lie till the heir should declare himself.

Fol. Dic. v. 4. p. 208. Kilkerran, (RANKING and SALE.) No 8. p. 472.

No 16.

Whether the creditors may insist in a sale raised upon the act 1695, when the pursuer drops it?

1750. *January 6.*

MONTGOMERY and other ADJUDGERS of the Estate of MAXWELL of ARKLAND, Petitioners.

UPON the death of the pursuer of a sale, the other creditors applied to be allowed to take it up; which the LORDS granted, and "found no necessity to call the last pursuer's heir."

Some of the LORDS *urged*, That whereas by the fifth article of the act of sederunt 1711, it is enacted and declared, That in case of the death of the debtor or if any of the creditors, defenders, compearing and producing, shall happen to die, the process thereupon shall stop no longer than till their apparent heir be cited to compear upon a diligence, &c. so that if no person appear in the place of the common debtor, or creditor deceased, the LORDS declare they will proceed in the process where it last left, &c. as when parties alive do not compear; it is impossible to think the LORDS could mean, that in case of the pursuer's death, his heir should not have the same privilege of being called as any other creditor would have, though the clause is ill expressed.

Fol. Dic. v. 4. p. 208. Kilkerran, (RANKING and SALE.) No 10. p. 472.

*** D. Falconer's report of this case is No 118. p. 2240, *voce* CITATION.

No 17.

Whether after the death of the pursuer in a sale, the other creditors can take it up without calling the last pursuer's heir?

1750. *January 11.*

M'GILLIVRAY, Petitioner.

WHERE, in a ranking and sale, access could not be had to the rights of the lands, which lay in the repositories of the deceased common debtor in his house in Inverness-shire, the LORDS granted warrant for opening said repositories, &c.

No 18.

No 18. at the sight of the Sheriff-depute; and this they did without any further precaution, of intimating to his heir, &c.

Fol. Dic. v. 4. p. 208. Kilkerran, (RANKING and SALE.) No 11. p. 473.

1750. June 14.

NAIRN against His CREDITORS.

No 19.

Where a new proof is allowed of a subject, however small, there must be new letters of publication.

AFTER the ranking of the Creditors of John Nairn of Greenyards was finished, the sale advised, his lands of Greenyards and others appointed to be sold, and letters of publication executed, a petition was presented by the said John Nairn, setting forth, That there was a certain pendicle of land in the rental, to which one witness only had deponed, and that no value had been put thereon in the sale; and craving, that before the sale should proceed, a proof might still be allowed of the value thereof, and that the same, when proved, might be added to the valuation already put on the estate; and it appearing to be so in fact, the LORDS "allowed a new proof, and granted incident diligence."

But then the question was, Whether new letters of publication would be necessary? Where a price is upon application lowered, as is often done, no new publication is made; but this was thought to be a different case; and there is no arguing from the one case to the other, as the proved price must always be engrossed in the letters of publication.

And so much were the LORDS of this opinion, that a petition for John Nairn, the common debtor, craving that the proof already led by the one witness might be held as proof of the value, and that the roup might be allowed to proceed without new letters of publication, was refused, notwithstanding the whole creditors concurred in the request.

In a judicial sale, the Lords are the sellers, and are not to dispense with the forms of law, even at the desire of the creditors.

Fol. Dic. v. 4. p. 208. Kilkerran, (RANKING and SALE.) No 12. p. 473.

1751. February 1. CREDITORS of Mrs MARGARET BALFOUR, Petitioners.

No 20.

Where a part of the subject had been omitted to be brought into the sale till proof was led.

WHERE a coal, which the Lady had in lands whereof the surface belonged to another heritor, had been omitted to be brought into the summons of sale, which only carried lands with coal, coal-heughs, &c. in general, till after the proof in the sale was led, a new process of sale was raised, containing said coal; and the creditors applied by petition, craving that the same might be conjoined with the former action.

This the Lords complied with, though not without some scruple made, how the proof led before that new summons was raised could be repeated in it.

Fol. Dic. v. 4. p. 208. Kilkerran, (RANKING and SALE.) No 14. p. 474.