

warrant of the Court; but if he waves that right and voluntarily offer payment, the creditor who receives it applies it *bona fide* to the extinction of his debt, and owes no interest for it. THE LORDS sustained the plea of Captain Ker, and allowed his mode of accounting to be just. See APPENDIX.

Fol. Dic. v. 4. p. 212.

No 35.

1792. January 17.

CATHARINE BROWN, and Others, *against* The YORK BUILDINGS COMPANY.

IN 1777 an act of Parliament was passed, authorising the sale of the whole estates in Scotland then belonging to the York Buildings Company, to be made under the direction of the Court of Session, without waiting for the conclusion of the ranking. And under this authority those various estates were sold.

Certain creditors afterwards preferred petitions to the Court, praying, that they might be found 'entitled to state the accumulated sums in their adjudications, and interest thereon, as a principal again bearing interest from the terms when the prices of the estates became payable.' In support of this claim they

Pleaded; The statute 1681, c. 17, ordains, that the prices of the lands sold in consequence of that enactment, shall be distributed among the creditors according to their legal preferences, 'whether the said creditors have compeared or not;' and consequently the right to the price arises prior to the actual division. But if the prices themselves were distributed among the creditors, it must certainly follow, that the profits arising upon these prices should also fall to them. The prices, by the act of the law, are substituted to the creditors in lieu of their debts and diligence, and the interest of the prices must belong to those to whom the prices themselves belong. *Accessorium sequitur principale.*

By act 1690, c. 20. it is provided, that 'if no buyer be found at the rate determined by the Lords, it shall be leisome to the Lords to divide the lands and other rights among the creditors, according to their several rights and diligences.' Now it is obvious, that as this might take place long before the adjustment of the debts, the intermediate rents would belong to the creditors, though their right to possess must have been postponed till their claims were finally ascertained.

From the statute of 1695, c. 6. authorising purchasers to consign the price, and declaring that the consignment is to lie at interest for the greater benefit of the creditors; it is likewise evident, that, whether the creditors were already ranked at the time of the sales or not, the interest of the prices was to belong to them.

No 36.

Lands being sold judicially, the whole sums due to the creditors, interest as well as principal, are held as a capital at the period when the price begins to bear interest.

No 36.

Accordingly on searching the records it appears, that in every case which occurred between 1681, when the act passed, and 1695, the creditors in judicial sales were found entitled to interest upon their shares of the price, after it became payable, whether such shares corresponded to debts bearing interest or not.

The object of the act 1695, in ordaining the ranking to precede the sale, was to check the practice of purchasers buying up the bankrupt's debts, and by engaging in the litigation, wilfully protracting the process of ranking. And in all cases where, by any accident, litigation took place after the sale, particularly in consequence of the usage of reserving points of dispute for the division of the price, as soon as the share in the price to which each particular creditor had right was ascertained, he drew it, with the interest which arose upon it from the time when the price bore interest. 31st July 1767, Blackwood against Hamilton, *infra h. t.*

The regulation of 1695, however, did not affect judicial sales at the instance of heirs; the sale still continuing to precede the ranking, and the creditors drawing interest on the price from the period of the sale. Their right to do so was questioned only in the case of Invergordon in 1754, (*see APPENDIX.*); when it was recognised first by Lord Elchies Ordinary, and afterwards by the Court.

Nor is it disputed, that since the passing of the statute 1783, creditors, when ranked, have always drawn, in the division, the interest that arose upon their shares of the prices, in proportion to the amount of the debt, principal and interest, as it stood at the time of the sale.

It seems therefore to be established, both on the principles of law, and upon the invariable practice, that the creditors, in all ordinary judicial sales, whether at the instance of creditors, or of apparent heirs of deceased persons, are entitled to the interests accruing to the dividends that are found to have been due to them, as at the period of the sales.

With regard to the above mentioned statute of 1777, its object was not to make any innovation, except what was necessary for carrying on a business, which the subsisting laws had, from 40 years experience, proved unable to accomplish; and this was to make the sales precede the ranking, and to encourage creditors to come forward with their claims, by enabling the Court to issue warrants for payment, without waiting a final distribution. In all other respects the Court were expressly ordered to divide the prices in the same form and manner as practised in other sales of bankrupt-estates; and, in particular, they were to take the prices payable to the creditors, which appears to have been the invariable practice for 110 years past, originating in the special enactments of the statute 1681. It does not seem, therefore, that the profits arising upon the shares of the creditors can descend, in this case, according to a different rule from what has obtained in all other cases.

Answered; Neither adjudication nor voluntary infestment, nor process of ranking and sale, sequestration in this, decret of ranking, or the sale itself, could produce any innovation of the debt, or delegation of the purchaser in the room of the original debtor. The debt remains after the sale of the same that it was before it. Hence, prior to the division or payment of the price, a real creditor may still attach any personal estate of his debtor; and, on the other hand, were the debtor to offer payment of any debt, without accumulation at the date of the sale, it does not seem that the tender could be refused.

No just principle therefore appears, upon which an accumulation from the term at which the price bore interest could be founded, even where there had been a previous concluded ranking, although such a practice may have been introduced.

It was not, indeed, the notion of accumulation upon the debts, properly speaking, on which the practice proceeded; but that a proportion of the price did, at the time of the sale, or that from which it bore interest, come to belong respectively to the creditors. But this could not possibly be without an imputation of that proportion *in solutum* of the debt, and a consequent extinction of it; which extinction, however, was not supposed, nor did actually take place.

At the same time, though the practice were held to be right where the ranking preceded the sale, this concession could not affect the present argument; for which, it is sufficient to shew, that there can be no ground for accumulation when there has been previous ranking. Here there is no practice to combat; for, by the practice, no accumulation or division takes place till the ranking be concluded, as well as the lands sold. The ranking being previously concluded, as soon as the price exists, the right and interest of every creditor in it, and his share of it, are certain, nothing but calculation being wanted to make it liquid. But when there has been no ranking, it is impossible to know, at the time of the sale, who will have any right to the price, or to what amount.

That such accumulation has no foundation in justice, will appear on taking a view of the rights and interests of the debtor, of the creditor, and of other creditors, particularly postponed creditors.

Suppose a debtor's estate to exceed in value the amount of his debts, while a creditor has some doubtful claim not settled perhaps for 20 years after the sale, with what justice can the debtor's burden be increased by accumulating interest upon interest, when it was impossible for him to pay the debt till its justice and its extent were ascertained?

When the sale precedes the ranking, the debtor, in the mean time, remains subject to personal diligence at the instance of creditors; but this could not be, on the principle of accumulation, viz. that a proportion of the price is substituted for, and consequently extinguishes the debt. The same inconsistency appears, in regard to the creditor's right of attaching any separate property acquired by the debtor during the ranking.

No 36.

As to the creditor, again, if he obtains his accumulation on the footing of the same substitution, the consequence is, that he can get no more interest than accrues from his part of the price. But, suppose it to yield only 3 per cent. could he be compelled to take this instead of the legal rate of 5 per cent? If he could not, it is plain there has been no substitution of the price for the debt, the sole principle of accumulation.

Farther, the purchaser may become insolvent, and the subject may sink in value, or wholly perish. But it is clear the creditors do not run those hazards; which proves them not to have such a right to the price as to entitle them to the accumulation.

With regard to posterior creditors, suppose that a subject worth L. 1500 is sold in three lots, upon which three creditors are ranked; A, *primo loco*, whose whose debt at the time of the sale is L. 500; B, *secundo loco*, L. 500; C, *tertio loco*, L. 500; but during the ranking the purchaser of one of the lots fails, and its value is greatly diminished. In this case C. would be cut out. But, on the principle of substitution, and consequent appropriation, A. and B. would have run an equal hazard with C.

The practice has been appealed to on the other side. Even in the period between 1681 and 1695, it was not general in favour of accumulation, as appears from 7th January 1757, Middleton against Falconer, No 47. p. 13353. And as to the practice subsequent to 1695; accumulation could not have been made till after the ranking, as well as the sale.

Independent of all general argument, the claims of accumulation now made are excluded by the sales having proceeded on a special statute made *pendente lite*, authorising early sales, by way of privilege, for special purposes; but containing no warrant for any accumulation of debts earlier than it could have taken place if there had been no deviation from the ordinary course of law, by which there could have been no sale till the ranking was closed, and consequently no accumulation till then.

Observed on the Bench; The case of Invergordon is very much in point; for the Court does not seem to have gone upon the principle of a decree of sale at the instance of the apparent-heir being an adjudication to the effect of accumulating each creditor's debt, as it has truly no such effect; but upon the very principle which is pleaded here, of the price being held as a fund for payment of the creditors, and as belonging to them in the first place, together with the interest accruing thereon, till full satisfaction is made to them of their debts, leaving only the reversion, if any, to be taken by the heir; and further, that in accounting with the creditors, their debts must be taken as at the period when the fund was produced, whatever delays might happen in adjusting their amount, and finally closing the order of ranking and division. If no competition ensued among the creditors, and if the price were clearly sufficient to pay the whole, they would be entitled to immediate payment from the purchaser. In all events they are entitled to their dividends of the price, with the

interest thereon, so soon as their claims can be adjusted; nor is there any reason why the necessary delays, or perhaps the groundless disputes, raised up either by the purchaser, the common debtor, or postponed creditors, should have any effect to lessen their draught, more than to encrease it. In applying, therefore, such payment when received, the calculation of their debts must go back to the period when the fund was produced; and consequently must include the whole debt, principal and interest, as a capital at that period. It is in that sense, and to that effect alone, that the debt is accumulated; for to every other effect the debt remains in its former state. Were any later period to be adopted, such creditors as had a large proportion of their debts not bearing interest would be injured; the debtor would, in every case where the funds bore legal interest, be a gainer at the expense of his creditors; and even in some instances, an estate bankrupt at the time of the sale, might produce a reversion. It would become the interest of the postponed creditors, and common debtor, to protract the ranking and division by every means in their power. Had the sales of the York-Buildings Company estates been delayed till now, the creditors might, in the mean time, have accumulated their debts by adjudications, which would have had an equal or worse effect against the common debtor.

The following, after a hearing in presence, and advising memorials, was the judgment of the COURT: "Find, that the price of the estates, with the interest produced therefrom, is a divisible fund, to be applied to the payment of the creditors, as they have been, or shall be ranked; and that the account of their debts must be taken, and the application of their dividends made, as at the period when the price began to bear interest; the whole sums due to them, whether consisting of money bearing interest or not, being stated in said account as a capital at that period, according to the rules which have been usually observed in other judicial sales at the instance of creditors, and in sales at the instance of apparent heirs."

Upon advising a reclaiming petition for the York-Buildings Company, with answers, the COURT (17th January 1792) adhered.

For the York-Buildings Company, *Lord Advocate, J. Clerk, et alii.*

For the Creditors, *Solicitor General, Maconochie, et alii.*

S. *Fol. Dic. v. 4. p. 214. Fac. Col. No 3. (APPENDIX.) p. 11.*

1793. November 27.

JOHN MURRAY, and other preferable Creditors on the Estate of John Rae,
against DAVID BLAIR, and Others, his postponed Creditors.

THE heritable property of John Rae was sold by judicial sale to two purchasers.

No 37.

If in consequence of the bankruptcy of purchasers or