

S E C T. XII.

Who bears the Expense of a Ranking and Sale?—Election of the Common Agent.—Can the Common Agent be a Purchaser?—Expense of an interim Warrant.

1741. November 13.

Competition betwixt ANDREW DRUMMOND, &c. and Mrs HELEN CUNNINGHAM.

THE question betwixt these parties was, Whether the expenses of a process of sale, carried on by an apparent heir, fell on the heir or creditors?

For the Creditors it was *urged*, That as such process could be brought by the apparent heir without the consent of the creditors, and no compulsitor was competent to them to force the heir to bring such an action; they could not be burdened with the expense; and that it was not a sufficient foundation for the heir's claim of a proportion of the expenses, that possibly the creditors may reap benefit thereby, by receiving payment of their debts out of the price; for the rule of law is, that one who carries on an action for his own behoof will have no claim to a share of the expenses from a third party who may receive benefit from the event of the action. Neither is the rule in the case of bankrupts' estates, that every creditor bear a proportion of the expense according to what he shall draw, anywise similar; for in that case, every real creditor is entitled to commence an action of sale, and if the carrier on delay, any other real creditor may take it up, and the lands cannot be sold until the ranking be finished; so that, in effect, the carrier on of the process *gerit commune negotium*; but it is quite otherwise in a sale by an apparent heir; he alone can bring the action, and it will be no exception, though it could not be proved, that the defunct owed not a shilling; he can stop when he pleases, and no creditor can take it up, nor is there any compulsitor against him to proceed; it is not necessary that a ranking proceed, and possibly it may not be necessary after the sale; and therefore no argument can be drawn from the one case to the other.

For the apparent heir it was *observed*, That it would be unreasonable to make any distinction betwixt the two cases, where the estate was bankrupt, as the apparent heir acts in such a case for the common behoof of the creditors. They take the whole benefit, and therefore must bear the burden; if there were any difference to be made, it lies in favour of the apparent heir; for in every instance, where the estate is bankrupt, if the apparent heir is not a creditor himself to the defunct, he is solely acting for the benefit of the creditors; whereas, in a process of sale at the instance of a creditor, the pursuer is ma-

No 52.

An apparent heir does not bear the expense of a sale at his instance, where there is no reversion.

No 52. naging for his own interest, as well as that of the other creditors; and yet if the contrary were to hold, such apparent heir must pay the whole expense out of his own pocket; which were most glaring iniquity. Neither is it of importance, that an apparent heir may or may not bring such process, seeing it will not follow, that when he brings it for the common behoof of the creditors, he shall not be entitled to his own expense. It is not in the option of any real creditors, to intent a ranking and sale of a bankrupt estate at this day. But is that a reason for subjecting him to the expense? Agreeable to which it was determined, 3d February 1738, Creditors of Nicolson of Trabrown, see APPENDIX.

THE LORDS found, That the apparent heir, who draws no share of the price as such, is not to be burdened with the expenses of the sale and ranking; but that the same is to be paid by her, and the other creditors proportionally, effecting to the sums they shall draw of the price of the subjects sold.

Fol. Dic. v. 4. p. 216 C. Home, No 181. p. 302.

. Kilkerran's report of this case is No 8. p. 4029, *voce* EXPENSES.

1775. *January 25.*

JAMES INGLIS *against* WILLIAM JAMIESON, and Others, Creditors of
GEORGE HAMILTON.

No 53.

*Ratihabitio
æquiparitur
mandato, ap-
plicable to
the case of
an election
of a common
agent, in con-
sequence of
the act of
sederunt,
January 17.
1756.*

IN a competition for the office of common agent, in a process of ranking and sale of a bankrupt estate, the LORD ORDINARY pronounced the following interlocutor: "Having considered the debate, and, more particularly, that it is agreed there is but one creditor who voted for Mr Hay, and that, on the other hand, besides Mr Wilson himself, who is admitted to be a creditor, there are three creditors for whom Mr Wilson appears to be agent, having their interests in his hands, and in their names he voted for himself; finds, That, though there is no special power from these three to vote in the election, yet there is enough to cast the balance between the two unexceptionable votes, as it is not alleged any of the absent people are for Mr Hay; but appoints Mr Wilson, betwixt and the first sederunt day of January, to produce an approbation of his election by the absent creditors for whom he is agent."

Inglis reclaimed against this judgment; but the COURT adhered, moved chiefly by a circumstance stated in the answers, viz. That the respondents have, by writings under their hands, specially consented to and approved of Mr Wilson, as the common agent.

Act. Armstrong.

Alt. Morthland.

Fac. Col. No 153. p. 18.