

No 43.

Sir William Maxwell now in the right of the first adjudication reclaimed, and insisted that Irving and Rome's adjudications were ineffectual, as being led after the subject had been absolutely and irredeemably adjudged to the purchaser, and was no longer *in hereditate jacente* of the debtor.

On moving this bill, it was observed by one of the Lords, that there was this difference between the case of a sale on the act 1681, and that at the instance of an apparent heir, that in order to a sale on the act 1681, as there must be an adjudication or other real right to carry on the sale, so the creditors can draw nothing without an adjudication, and therefore creditors remaining personal after the sale must adjudge, in order to entitle them to what may remain for them of the price.

It is otherwise in the case of a sale at the instance of an apparent-heir, as no adjudication or other real right is there necessary to carry on the sale, so after the lands are sold no creditor need adjudge. As the sale is for the behoof of all the creditors, they are by the very sale, without other diligence, entitled to their share of the price; and therefore, it might be doubted, whether even the personal creditors were not entitled to the same preference with those that had adjudged after the sale.

Whereon, without any opinion offered upon the point argued in the bill, as the case was new, it was remitted to the Ordinary to hear parties on the whole case, even with respect to the creditors who had not adjudged after the sale.

The case being accordingly reported by the Ordinary, the Lords, January 29, 1748, "Found the whole creditors were to be ranked *pari passu*."

They considered the decree of sale as an adjudication for the benefit of the whole creditors, being obtained by the apparent heir, who was empowered by law to act as trustee for them and himself; and that being within year and day of the first adjudication, it ought to be beneficial to all the creditors whether they had adjudged or not.

*Fol. Dic. v. 4. p. 209. Kilkerran, (RANKING AND SALE.) No 4. p. 469.*

\*\*\* D. Falconer's report of this case is No 27. p. 5264. *vocce* HEIR.

APPARENT.

1751: November 27. GRAHAM against SMITH.

No 44.

WHERE a ranking and sale is pursued of an estate, on part of which one has a wadset, the wadstter may object to the sale of his wadset lands, which will be sustained, and all that can be sold will be the reversion; and the purchaser of the reversion cannot remove the wadsetter without using the order of redemption in terms of the wadset. But should the wadsetter appear, and without objecting to the sale, depone upon the verity of his debts, and crave and

obtain a preference for his wadset sum, in that case, the lands being sold, the purchaser may remove the wadsetter without using the order of redemption, which the wadstter dispenses with, by his betaking himself to a preference as creditor in the wadset money.

No 44.

*Fol. Dic. v. 4. p. 207. Kilkerran.*

\* \* \* This case is No 298. p. 12160. *voce* PROCESS.

## SECT. X.

Purchaser acquiring an interest not produced in the ranking.—Method of accounting for the price.—Division of the price.—At what time to be made ?

1739. *November 21.* CRAWFURD *against* HUNTER.

It has been adjudged, that though a decree of ranking be closed, yet when the scheme of division comes to be made out, an adjudger, for example, who had not appeared in the ranking, may appear and claim his share in the division, without being put to the necessity of reducing the ranking. But it was here found, that a purchaser, who, by decree of ranking, is decerned to pay to the creditors as they are, or shall be ranked, thereafter purchasing an adjudication which had not been produced in the ranking, could not be allowed, at making up the scheme of division, to found upon this adjudication for its share of the price, so as to hinder the creditors ranked from drawing their full share for which they were ranked; reserving to him his action of repetition as accords.

No 45.  
The purchaser acquiring an adjudication that had not been produced in the ranking, not allowed, at making up the scheme of division, to found upon it.

THE LORDS were not unanimous in this. Several of them thought, that as he might retrocess his constituent, who would be admitted, so might he be admitted to claim his share, at least to the extent of what he had paid for the debt, though not farther.

*Fol. Dic. v. 4. p. 211. Kilkerran, (RANKING AND SALE.) No 1. p. 468.*

1747. *June 30.*

THE TRUSTEES FOR MERCHISTON'S CREDITORS *against* MITCHELL of Pittedie.

CHARLES MITCHELL purchased at a judicial sale the lands of Pittedie, to be entered to at Whhitsunday 1726, and John Lowis of Merchiston being a considerable creditor thereon, he advanced to him several sums on his bills, con-

No 46.  
A person being debtor in a sum bearing interest, which he was not obliged