No 46.

1732, declared imputable to one another, the interest of the retained sum behoved annually to extinguish so much of the principal of the bills, and thus by a progressive account the extinction was made. They *pleaded*, That they might have insisted for the imputation from the time of the first year's interest falling due on the price at Whitsunday 1727, but they only demanded that the *calcul* should be made from the date of the interlocutor.

On the other hand, it was *contended*, That the application ought to be made when the interest arising on the retained price extinguished the bills and interest without any progression.

Two schemes were made by an accountant, agreeably to the demands of the several parties, and the LORD ORDINARY, 29th January, and 5th February, 1745, "Approved of the report of the accountant, as stated in the first page of the report," viz. that agreeable to the claim of the defenders.

On bill and answers, the LORDS adhered.

Act. *Murray*. Alt. *A. Hamilton*. Clerk, *Kirkpatrick*.

D. Falconer, v. 1. No 195. p. 260.

1756. *July 27.* Doctor MIDDLETON *against* FALCONER of MONKTOUN.

No 47.

The purchaser of a bankrupt estate, accounting for the price, can only have credit for the debts ranked when he paid the same.

THE estate of Monktoun being brought to a judicial sale, Patrick Falconer was preferred as the highest offerer; and, by the decreet of sale, the lands were declared to pertain to him, "upon payment of the price offered, viz. L. 44,000 Scots, and interest thereof from the term of Whitsunday 1695, to the creditors as they should thereafter be ranked," and a bond was granted in these terms with a cautioner.

By the regulations 1695, it is provided, that the ranking of the creditors shall be concluded before the estate be exposed to sale. But in this case, which was prior to the 1695, the ranking was not concluded till the 1699, and at that time a decreet of ranking was extracted in favour of the preferable creditors, whose debts at that period exhausted the price to a trifle. These debts were paid by Mr Falconer, the purchaser, as he found convenient, some of them not for several years after; and matters rested upon that footing without any ultimate clearance, the bond for the price remaining in the hands of the Court.

Patrick Middleton, one of the postponed adjudgers, brought a process against the present Monktoun, for payment of the balance that was supposed to be due upon the bond for the price. In bar of which, the defender *insisted*, That the bond was extinguished by payments made to the preferable creditors, as ranked by the decreet 1699. This matter resolving into a count and reckoning, was remitted to an accountant, who made a report stating the account in two different views. By the first, the debts were supposed to have been paid in the 1699, the date of the decreet of ranking; or which is equivalent, the defender

No 47. was allowed credit for them as then paid. In this view, the balance due by the defendant was no more but L.252 Scots. By the other, the account was stated progressively, charging the defender with the sum in his father's bond and interest from Whitsunday 1695, and giving him credit, on the other hand, for the sums paid to the creditors at the times when these payments were actually made. The balance, by this form of the account, did, in the 1711, when the last payment was made, come out to be L.2732 Scots. And, supposing the account in this form to be right, this balance, with the interest, was what the pursuer had to claim.

The cause of the great difference betwixt the balances in the two accounts was this: The capital of the price exceeded the capital of the debts; and though in the 1699 the debts, principal and interest, nearly equalled the price with the interest, yet as four years interest only was due upon the price, and a much greater sum of interest upon the debts, the difference turned greater annually, and, in the 1711, came to be the balance mentioned.

The question being, Which of the two views ought to be the rule of accounting? It was *pleaded* for the defender, That the decreet of ranking made an innovation on the bond for the price, by giving every creditor preferred a right to his proportion, as if a bond had been granted to him personally for that sum. According to this construction, the bond for the price is supposed to be retired, and bonds to the amount granted to the several creditors ranked. And this construction was endeavoured to be supported by the present practice, for of late years every scheme of division is made out in the foregoing manner, dividing the price as at the date of the sale.

It was *pleaded*, on the other hand, for the pursuer, That a decreet of ranking, whether before or after the sale, has not the effect of innovating the bond for the price, It remains as before, one debt, one debtor, and one creditor, though payment may be made to severals. It is the Court of Session which sells the bankrupt estate; it is the Court of Session which takes bond for the price, making it payable to the bankrupt's creditors. The Court is in the eye of law creditor, and it is the Court which, in effect, receives payment, when, by their direction, the sum is paid by the bankrupt's creditors; precisely as in a private debt, when the debtor pays to one or other having the creditor's order. For proof of this, let us suppose the purchaser and his cautioner to be *vergentes ad inopiam*, the bankrupt's creditors have not directly execution against them. The Court of Session must direct the execution; nor can it be otherwise; the bond for the price comes in place of the land; it is a subject *in medio* to be divided among the bankrupt's creditors by the direction of the Court, precisely as the land itself would have been had no purchaser been found. These creditors have an interest in the bond, being a subject that is to be divided amongst them; but they are not directly creditors in the bond, or any part of it, more than they were proprietors of the land, or any part of it. Thus, after a decreet of sale, and even after the ranking, the bond continues

jus unicum et individuum, and every farthing of principal and interest must be paid before the debtor is entitled to a discharge. Here the bond for the price was never innovated, it was never split into parts and divided among the creditors. All that was done by the decreet of ranking 1699, was to give authority to the creditors ranked to draw their payment out of the contents of the bond. As far as the debtor made payment of these contents, he must be exonered: The balance remains due, and must be accounted for. No 47.

The law is the same where the decreet of ranking, as at present, precedes the sale. The purchaser grants one bond for the price, which the bankrupt's creditors have an interest in, because it must be paid to them; but none of them are directly creditors in the bond, nor in any part of it. The dividing it among them is a future operation, which is performed by the decreet of division. By this decreet, indeed, there is an innovation; and the effect is the same as if the bond for the price were retired, and a new bond granted to each creditor ranked for his proportion of it. In this view of the case, which is the only just one, the late practice in decreets of division, dividing the price as at the date of the sale, is certainly wrong; and there is little doubt that it will be corrected whenever the matter is brought before the Court.

"THE LORDS approved of the second account; and found, that the defender, in accounting for the bond granted for the price of the land, can only have credit for the debts ranked when he actually paid the same."

Fol. Dec. v. 4. *p.* 212. *Sel. Dec. No* 114. *p.* 161.

*** This case is reported in Faculty Collection.

1757. *January 7th.*—IN the year 1695, James Falconer's father purchased the lands of Monkton, at a judicial sale carried on before the Court at the instance of the Creditors of Mr Alexander Hay, the former proprietor; and granted a bond for payment of the price, which he obliged himself to pay "to the Creditors of the said Mr Alexander Hay, having rights and diligences affecting the said lands, with annualrent from the term of Whitsunday 1695; and that at the first term of Whitsunday, Lammas, Martinmas, or Candlemas, after they should be ranked and preferred thereto by the Lords of Session, proportionally, according to their several sums, rights, and dilligences. conform to the decreet of preferrence and ranking to be obtained amongst the said creditors; with annualrent thereafter, yearly and termly, during the not-payment——The said creditors transmitting their rights and diligences affecting said lands and estate to him, with absolite warrandice, for the sums by them respectively received."

A DECREET of ranking was pronounced in July 1699, in which the preferable creditors were ranked in their order, to the extent of what was understood to exhaust the price, and interests of it at that time. It would seem, that the personal postponed creditors had so small expectations of getting any thing,

No 47. thar they did not claim to be ranked upon the superplus of the price which might remain after payment of the preferable debts, but allowed the decreet of ranking to be extracted; in consequence of which, the purchaser made payment to the whole creditors ranked at different periods, when they called for their money.

IN 1738, Dr Peter Middleton, having right by progress to a debt due to one of the postponed creditors, brought an action against James Falconer now of Monkton, for payment of the balance of the price which he alleged was still due upon his father's bond, at least of so much thereof as would satisfy and pay this debt. In bar of which it was pleaded for the defender, that the bond was extinguished by payments made to the preferable creditors, as ranked by the decreet 1699.

IT having been remitted to Andrew Chalmer the accountant to make out a scheme or calcul, from which it might appear, whether any part, or what part of the price remained in the defender's hands, he made his report, stating the account in two different views.

BY the first, the debts were supposed to have been paid at the date of the decreet of ranking 1699, or, which is equivalent, that the defender was to get credit for them as then paid; in which view, there came out a balance due at that period of L. 252 : 1 : 2 Scots; which, with the interest thereof from Whitsunday 1699, would have been the only fund for the pursuer's payment.

BUT by the second stating the account progressively, according to the common rules of accounting, that is to say, charging the defender with the sum in his father's bond, and interest thereof from Whitsunday 1695, and giving him credit for the sums paid to the creditors at the times when these payments were truly made, the balance in 1711, when the last payment was made, came out to be L. 2732 : 13 : 2 Scots, and, at the date of the account, amounted to L. 8940 : 15s. Scots.

THE reason of the disparity in the balances of the different accounts was that an arrear of interest had been due upon several of the debts, and the capital of the price bearing interest being greater than the capital of the debts, the balance in the purchaser's hands came of consequence to be increased proportionally to the length of time that payment to the creditors was postponed; and as some of the creditors did not receive their payment for several years after the sale, the purchaser had it thus in his power, from time to time, to convert the growing interest to a capital, bearing annualrent.

THE question in issue between the parties was, Whether the first or second calcul should be the rule of accounting.

Pleaded for the defender, The term of payment of the bond for the price was in this case superseded, till the first term after the decreet of ranking should be pronounced; because till then it could not be known who were the creditors entitled to receive the price: but, at that term, the purchaser was bound to pay the price, with the interest and penalty corresponding thereto, to

every creditor proportionally, effeiring to the sums for which they are severally preferred by the decreet of ranking, as much as if a new bond had been given to each creditor by the purchaser for that sum. The decreet of ranking imports an innovation or delegation in favour of every several creditor, of their shares of the purchaser's bond, in the same manner as if it had been granted to them severally, for the sums specified in the decreet; or as if the lands had been sold by the common debtor, and the purchaser's bond assigned to them to that extent. And therefore, although it should be admitted, that by the terms of the purchaser's bond, and the decreet of ranking, the creditors preferred were entitled to have had there bygone interests that were due at the first term after the decreet of ranking, accumulated into a principal, bearing interest, till they should receive payment from the purchaser; yet as these preferable creditors had not insisted upon this, no subsequent creditor can have any claim against the purchaser, upon pretence that a prior creditor may have accepted of a less sum than was truly due to him. The price is a debt due by the purchaser, not to the common debtor, nor to the creditors *in cumulo*, but to each creditor severally as ranked; and as no creditor can pretend to have any interest in the share of another, so neither can he reap any benefit from an abatement given to the purchaser of a part, either of the principle or interest, so as to claim more than the precise sum allotted to him by the decreet. As the preferable debts, therefore, which the defender's father was decerned to pay by the decreet of ranking, did exhaust the whole of the price, excepting only a balance of L. 252 Scots, as appears from the first calcul, that alone ought to be made the rule; and the defender is willing to account for that sum with annualrent *retro* since the year 1699. It cannot be pretended, that the postponed creditors, if they had appeared for their interests at the date of the decreet of ranking, could have claimed more than that sum; so that it must appear quite inconsistant to argue, that the pursuer's plea is better now than theirs would have been at that time. When the pursuer lays claim to more than that sum, he claims what might have belonged to other creditors, but what they themselves did not demand; and therefore what he can have no manner of right to.

No 47.

Answered for the pursuer, A sale of a debtor's estate, whether voluntary or legal, for payment of his creditors, cannot in any degree innovate or alter the state of the debts themselves, while they remain unpaid. In a judicial sale, such as the present, where the lands are purchased by a third party, for a price payable to the creditors, as they should thereafter be ranked, there is no principle in law from which to infer, that the debts are either innovated or extinguished, till actual payment is made. By such sale the creditors are not divested of their securities upon the lands sold; for although the lands are adjudged to belong to the purchaser, yet it is not simply, but conditionally, upon his making payment to the creditors of the price and interest. The creditors

No 47. still retain their original securities, as if no sale had been; insomuch that if the price of the estate could not be recovered from the purchaser, or his sureties, by reason of their bankruptcy, so as to make another sale necessary, in such second sale, the former creditors would not rank with the creditors of the first purchaser, but, by virtue of their original securities, would be paid out of the first and readiest of the price, as if no second bankruptcy or sale had been; which is a demonstration, that the sale of a bankrupt's estate makes no innovation of the debts or securities which the creditors had obtained.

The accumulation and division of the price, whether at the period of the sale, since the regulations 1695, or of the decreet of ranking in sales, prior to those regulations, was solely intended for the benefit of the creditors, without any view to the purchaser, who was not considered as having any interest how the sum by him due was divided amongst the creditors. He was debtor in a precise sum, and interest thereof from the term of payment in his bond. How that sum was divided among the creditors, was a matter he had no concern with, provided they demanded no more from him than the principal sum in his bond, and interest thereof, so long as any part thereof remained unpaid. And therefore, supposing that when the creditors came to be ranked among themselves, the preferable creditors might, in terms of the purchaser's bond above recited, have insisted to have had decreet for their original principal sums and bygone interest, and for the interest of these in time coming, as then accumulated; if they chose to wave that claim for accumulations, and were satisfied to take decreet in common form for their principal sum, and interest thereof, bygone and in time coming, there is no reason why the purchaser should thereafter be permitted to enlarge the claim of these creditors, to the prejudice of the other postponed creditors, or to assume to himself an advantage which the preferable creditors neither claimed nor took.

But, in fact, by the decreets of ranking the creditors are only ranked for the principal sums due to them, and annualrents, bygone and in time coming, during the not payment; whence it is plain, that every creditor's principal sum was intended to remain bearing interest from the date, without any accumulation, until payment should be made by the purchaser; and consequently, that the account ought to be stated in a progressive manner, according to the dates of the respective payments made to the creditors, conform to the second scheme or calcul in the accountant's report. And when the defender is found accountably, agreeably to that calcul, charging him with the sum in his father's bond, and interest from Whitsunday 1665, and giving him credit for the sums paid to the creditors, periodically as these payments were made, he cannot complain of the least hardship or injustice, nor will he thereby pay one farthing more than was truly due by his father's bond for the price.

The Court seemed to lay a good deal of weight upon the terms of the decreet of ranking, by which the creditors are only ranked for their principal

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.

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

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.

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 decreet 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