

1785. July 12. JAMES MASSEY *against* NATHANIEL SMITH and OTHERS.

LITIGIOUS.

The preference of adjudications led during a process of ranking and sale, at the suit of creditors, is not affected by that circumstance.

[*Fac. Coll. IX. 547; Dict. 8377.*]

BRAXFIELD. I am perfectly clear of the Ordinary's interlocutor, and on the grounds therein expressed. When any action of the nature of a *rei vindicatio* is commenced, the debtor cannot interfere so as to prefer one creditor to another; but this will not bar creditors from attending to their own security: as well might it be said, that one, having an heritable bond, might not, after a sale raised, take infestment.

ESK GROVE. I agree in substance with the interlocutor; but I think that its words are too wide: the case of *M'Connochie* is still stronger than this. A ranking and sale is for the common benefit; but it is no interdiction to prevent any creditor from securing himself.

SWINTON. When a subject is rendered litigious, no one creditor can take advantage of another. So it was determined in the case of an apparent heir; and I cannot distinguish that from the present case.

MONBODDO. In a proper sale, all creditors are understood to be pursuers; and every pursuer may render his right larger, or better, or more effectual.

BRAXFIELD. The case of a sale by an apparent heir does not apply: *that* is a form for the common benefit of the heir and the creditors. It is a process of adjudication for the benefit of all concerned. In such case a creditor *may* adjudge, but then he will not be the better for it. In such a sale, personal creditors *may* draw without adjudging: in a ranking and sale they cannot. Strange, that a creditor should not be at liberty to adjudge, while, without adjudging, he cannot draw.

JUSTICE-CLERK. All adjudications after year and day remain on the old footing: *prior tempore potior jure* then applies. I cannot understand how an action of sale can tie up the hands of creditors.

On the 12th July 1785, "The Lords found that all the creditors of the company, who have adjudged after year and day of the first effectual adjudication, whether before or after the commencement of the process of sale, fall to be ranked according to the dates of their respective adjudications, and ordained them to be ranked accordingly; and found that the maxim, *pendente lite nihil innovandum*, applies only to things done by the debtor or defender in the action, to make the right of the creditor or pursuer worse, but cannot hinder the creditor or pursuer to make his right better, even in competition with another creditor or pursuer; and that, in this case, one of the creditors, by raising a process of sale, cannot hinder the other creditors from using the diligence of the law to make their rights effectual;" adhering to the interlocutor of Lord Monboddo.

Act. A. Wight. *Alt.* A. Elphinston.