1785. *July* 12.

JAMES MASSEY and Others, *against* NATHANIEL SMITH and Others.

No 73.
The preference of adjudications led during a process of ranking and sale, at the suit of creditors, is not affected by that circumstance.

DURING the dependence of the process of ranking and sale instituted by the Creditors of the York-buildings Company, a great number of adjudications were deduced against the Company's estates; of which adjudications some were many years prior to others. In the course of the ranking, Massey and the rest of the later adjudgers objected to the preference claimed by Smith and other creditors from the priority of their adjudications, and

Pleaded; *Pendente lite nihil est innovandum*; a principle which precludes any preference from being created by diligence done while the action of ranking and sale is depending. In this process, though it be instituted in the name of an individual, the whole creditors are truly understood as reciprocally pursuers and defenders in actions of reduction of each others titles; according to which last, as they stood at the commencement of such competition, the respective interests of the creditors ought in justice to be determined. Such is the doctrine explicitly laid down by Mr Erskine, b. 2. tit. 12. § 65. The adjudications above-mentioned, therefore, of an earlier date, ought not to be preferred before those that were later, having been led equally with them *pendente processu*.

Answered; That the maxim which has been referred to is by no means applicable to measures pursued by competing creditors is evident from the anomalous consequences unavoidable on that supposition; of which the present case affords a striking example. For otherwise any adjudger, by merely bringing a process of ranking and sale, could effectually preclude the *pari passu* preference of all other creditors. The opinion of Mr Erskine seems to have been owing to his overlooking this distinction between actions of sale at the suit of creditors and such as are instituted by apparent heirs, that in the last mentioned process, the decreet of sale being obtained by the pursuer as trustee for the whole creditors indiscriminately, is considered as as an adjudication for their common benefit, Maxwell *contra* Irvine, No 27. p. 5264.; for which reason alone adjudication deduced by them, after the commencement of that process, must be unnecessary, and are justly deemed ineffectual.

THE LORD ORDINARY pronounced this interlocutor: "Finds, 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."

The COURT adhered to the above judgment.

Lord Ordinary, *Monboddo*. For Massey, *&c. Elphinston*. Alt. *Wight*.
Clerk, *Home*.

S. *Fol. Dic. v. 3. p. 392. Fac. Col. No 221. p. 347.*