1786. *April.* CUNISON *against* KER.

No 35.
Mode of imputing voluntary partial payments made by the purchaser to a creditor.

MR CUNISON purchased, at a judicial sale, the lands of Jerviston, and granted bond for the price, bearing interest from Martinmas 1773, the term of his entry. By the decree of ranking, Captain Ker stood ranked for L. 2170, with interest from that term, till payment. The ranking being protracted for several years by disputes among the creditors, Captain Ker, whose interest was undisputed, having occasion for money, Mr Cunison offered to make partial payments to him, from time to time, of such sums as he should require to account of his debt. Accordingly, between 1775 and 1782 four different payments were made, for which Captain Ker granted receipts to account; the last of which bore, that in case the sums already paid should exceed the dividend to which Captain Ker should have title by the scheme of division, he bound himself to repay the excess. In a final clearance between Captain Ker and Mr Cunison, a considerable difference arose as to the mode of imputing those payments. The former applied the payments to the extinction of the interest due on his debt at the respective periods of payment, and the excresce to the proportional reduction of the principal sum; carrying down the balance as a new capital, bearing interest until the next payment, and so forward; by which means a balance of about L. 40 appeared still due by the purchaser to Captain Ker. Mr Cunison, on the other hand, contended, That Captain Ker being entitled, by the decreet of ranking, to receive only L. 2170, with simple interest from Martinmas 1773, he, by this mode of accounting, would come to draw a great deal more than that sum; and he urged, that as he the purchaser was under no obligation to have made those partial payments, or to have paid any thing till the ranking was concluded, he was entitled to consider them as so many loans made by him to Captain Ker, on which interest was due; in this view, he brought out a balance of L. 167 due to him by Captain Ker, as exceeding the full payment of his debt, with interest, as in the decreet of ranking. *Argued* for Captain Ker, That when a bankrupt estate is sold, the price is due from the moment the purchaser is in possession of the lands. If the creditors are all agreed, they can demand their payment immediately; but as most commonly disputes occur, the purchaser is allowed to retain the price, bearing interest, in his hands, till those disputes are settled by a decreet of division. If however the purchaser is anxious to be relieved of his debt, he is entitled to consign the price, or he may, if he chuses, make voluntary payments to the creditors to account of their debts. The creditors receiving these payments appropriate them *bona fide*, because they get no more than what is their own. To consider such payments as loans is utterly absurd; for no man can lend what is not his own, and no man can owe what is his own. It is true that the purchaser might have retained this money till a decree of division was pronounced; nor could he have been forced to make payment, unless by an interim

No 35.

warrant of the Court; but if he waves that right and voluntarily offer payment, the creditor who receives it applies it *bona fide* to the extinction of his debt, and owes no interest for it. THE LORDS sustained the plea of Captain Ker, and allowed his mode of accounting to be just. See APPENDIX.

Fol. Dic. v. 4. p. 212.

1792. *January* 17.
CATHARINE BROWN, and Others, *against* The YORK BUILDINGS COMPANY.

No 36.
Lands being sold judicially, the whole sums due to the creditors, interest as well as principal, are held as a capital at the period when the price begins to bear interest.

IN 1777 an act of Parliament was passed, authorising the sale of the whole estates in Scotland then belonging to the York Buildings Company, to be made under the direction of the Court of Session, without waiting for the conclusion of the ranking. And under this authority those various estates were sold.

Certain creditors afterwards preferred petitions to the Court, praying, that they might be found 'entitled to state the accumulated sums in their adjudications, and interest thereon, as a principal again bearing interest from the terms when the prices of the estates became payable.' In support of this claim they

Pleaded; The statute 1681, c. 17, ordains, that the prices of the lands sold in consequence of that enactment, shall be distributed among the creditors according to their legal preferences, 'whether the said creditors have compeared or not:' and consequently the right to the price arises prior to the actual division. But if the prices themselves were distributed among the creditors, it must certainly follow, that the profits arising upon these prices should also fall to them. The prices, by the act of the law, are substituted to the creditors in lieu of their debts and diligence, and the interest of the prices must belong to those to whom the prices themselves belong. *Accessorium sequitur principale.*

By act 1690, c. 20. it is provided, that 'if no buyer be found at the rate determined by the Lords, it shall be leisome to the Lords to divide the lands and other rights among the creditors, according to their several rights and diligences.' Now it is obvious, that as this might take place long before the adjustment of the debts, the intermediate rents would belong to the creditors, though their right to possess must have been postponed till their claims were finally ascertained.

From the statute of 1695, c. 6. authorising purchasers to consign the price, and declaring that the consignation is to lie at interest for the greater benefit of the creditors; it is likewise evident, that, whether the creditors were already ranked at the time of the sales or not, the interest of the prices was to belong to them.