

interest thereon, so soon as their claims can be adjusted; nor is there any reason why the necessary delays, or perhaps the groundless disputes, raised up either by the purchaser, the common debtor, or postponed creditors, should have any effect to lessen their draught, more than to encrease it. In applying, therefore, such payment when received, the calculation of their debts must go back to the period when the fund was produced; and consequently must include the whole debt, principal and interest, as a capital at that period. It is in that sense, and to that effect alone, that the debt is accumulated; for to every other effect the debt remains in its former state. Were any later period to be adopted, such creditors as had a large proportion of their debts not bearing interest would be injured; the debtor would, in every case where the funds bore legal interest, be a gainer at the expense of his creditors; and even in some instances, an estate bankrupt at the time of the sale, might produce a reversion. It would become the interest of the postponed creditors, and common debtor, to protract the ranking and division by every means in their power. Had the sales of the York-Buildings Company estates been delayed till now, the creditors might, in the mean time, have accumulated their debts by adjudications, which would have had an equal or worse effect against the common debtor.

The following, after a hearing in presence, and advising memorials, was the judgment of the COURT: "Find, that the price of the estates, with the interest produced therefrom, is a divisible fund, to be applied to the payment of the creditors, as they have been, or shall be ranked; and that the account of their debts must be taken, and the application of their dividends made, as at the period when the price began to bear interest; the whole sums due to them, whether consisting of money bearing interest or not, being stated in said account as a capital at that period, according to the rules which have been usually observed in other judicial sales at the instance of creditors, and in sales at the instance of apparent heirs."

Upon advising a reclaiming petition for the York-Buildings Company, with answers, the COURT (17th January 1792) adhered.

For the York-Buildings Company, *Lord Advocate, J. Clerk, et alii.*

For the Creditors, *Solicitor General, Maconochie, et alii.*

S. *Fol. Dic. v. 4. p. 214. Fac. Col. No 3. (APPENDIX.) p. 11.*

1793. November 27.

JOHN MURRAY, and other preferable Creditors on the Estate of John Rae,
against DAVID BLAIR, and Others, his postponed Creditors.

THE heritable property of John Rae was sold by judicial sale to two purchasers.

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If in consequence of the bankruptcy of purchasers or

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otherwise, after the subjects are sold, and the scheme of division is made up, but before the price is divided, the fund of payment be diminished, the loss falls entirely upon the postponed creditors.

One of them and his cautioner afterward became bankrupt; and being unable to fulfil the terms of the purchase, the lands were again sold, but at a reduced price.

The judicial factor on the estate also died bankrupt, with a considerable balance in his hands.

Previously to these occurrences, a scheme of division had been made up, upon the supposition that the whole funds would be forthcoming.

When the defalcations were discovered, the postponed creditors contended, that in the division of the remainder, the deficiency should affect all the creditors proportionally, according to what they would have been entitled to draw by the original scheme. The preferable creditors, on the other hand, maintained, that they had still a right to full payment of their debts; and

Pleaded; By the act 1681, c. 17. judicial sales are only declared effectual on payment of the price, which is to be divided among the creditors, according to their preferences. Till the price is paid, the rights of the creditors continue a burden upon the estate; and if the purchaser become bankrupt, they remain a legal ground for bringing it again to sale. The creditors, therefore, who were preferable on the price at the first judicial sale, will also be preferable at the second; and if a smaller price is got, the loss must fall upon the postponed creditors.

Answered; If it could be precisely known previously to the judicial sale, what part of the price each creditor was to draw, the purchaser would immediately either pay to each creditor the specific sum he was entitled to, or grant him a bond for it. But as the sale must be over before each creditor's interest in the price can be ascertained, this plan cannot be followed. The purchaser, however, does what is equivalent. He grants a single bond, obliging himself to pay the price to the creditors respectively, as they shall be preferred by the decree of ranking. As soon therefore as each creditor's debt or dividend is ascertained, a proportional part of the bond becomes his absolute property; and if it should afterward be lost, it must perish *suo domino*. 17th November 1792, Brown against York-Buildings Company, *supra*.

Further, by 1690, c. 20. it is declared, that if there shall be no purchasers, the Court may divide the land among the creditors. Now, although the share of a preferable creditor were to be destroyed by an earthquake, he could not have recourse on the portions of the postponed creditors. And the same rule must hold where each creditor, in place of becoming proprietor of part of the estate, becomes proprietor of part of the price.

Replied; The bond granted by a purchaser, whether it is considered as an obligation in favour of the creditors *pro indiviso*, or as divided among them in certain proportions, is merely corroborative of the securities held by them before the sale.

The distribution of the land among the creditors is not similar to the present case, because that is equivalent to an actual payment and division of the price.

The Lord Ordinary reported the cause on informations.

Observed on Bench; The estate does not effectually belong to the purchaser till he pay the price. Till then the securities of the creditors remain entire, and of consequence the subject continues pledged to the preferable creditors, to the full amount of their debts. This is not inconsistent with what was found in the case of *Brown against the York-Buildings Company*.

THE COURT unanimously found, "That the creditors who stand preferably ranked upon the different funds, as established by the decree of ranking, are now entitled to draw their payment *in suo ordine* out of these funds; and that any loss which has arisen thereupon since the original sale of Mr Rae's estate in 1771, falls upon the postponed creditors."

Lord Ordinary, *Craig*.
Alt. *Hay*.

For the preferable Creditors, *Maconochie*.
Clerk, *Mitchelson*.

R. D.

Fol. Dic. v. 4. p. 214. Fac. Col. No 77. p. 170.

1795. February 4.

The TRUSTEE of DAVID DICKSON *against* The CREDITORS of JOHN RAE.

POINT I.

A PROCESS of ranking and sale having been brought by the Creditors of the late John Rae, a decree of ranking was extracted in 1770, and on 19th December of that year, the lands of Hurkledale, part of his estate, were sold to General Stewart Douglas, at the price of L. 6310, which he found caution to pay at Martinmas 1771, with interest from Martinmas 1770.

David Dickson stood ranked upon these lands for L. 1188:5s, as at Martinmas 1770, at which term it was agreed, that the principal and interest due to all the creditors should be accumulated into one sum, bearing simple interest.

In 1775, he applied for, and after a good deal of opposition, both from the other creditors and from General Douglas, obtained an interim warrant upon the latter, for payment of his debt, and by means of diligence used against the General, he received various partial payments.

In 1791, David Dickson assigned the balance remaining due to him, in trust to John Dickson, writer to the signet.

In 1789, the lands of Hurkledale were again sold by the creditors, for L. 6520, General Douglas having been unable to pay up the balance of the purchase-money, which at this time, after deducting the partial payments

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When a creditor on an estate brought to judicial sale, obtains partial payments to account of his debt, in virtue of an interim warrant on the purchaser, and afterward claims for the remainder of it upon the general fund under division, he is not entitled, in a question with the creditors, to impute the pay-