

dened by it; and nothing can abate legacies but the defunct's debts. It was *replied* for the defenders, That the executors could not know what would be free of the executry, till they had fully executed their office, the execution whereof is a debt burdening the executors, as a part of their office, and so must as well abate the legacies as the defunct's debts.

THE LORDS found, That when executors have but an office to the behoof of others, they are obliged to do diligence upon all probable interest of the executry, which cannot be loss to them, but must abate the legacies; but where the executors have the superplus of the executry above the legacies, whereby it is in their power to pursue any thing exceeding the legacies, or not, such pursuits are upon their own peril, and do not abate the legacies, and so found that these executors being the defunct's children, the tutors could not abate the legacies by expenses of process, for the superplus of the executry.

Stair, v. 2, p. 270.

No 1.

1674. November 20. SOMMERVELL against Sir WILLIAM SHARP.

SIR WILLIAM being donatar to a gift of bastardy, was pursued at the instance of Sommervell, as a creditor to the bastard, for payment of his debt, in so far as he had intromitted with the bastard's means. It was *alleged* for the donatar, That he ought to have allowance of what he had laid out for the gift by composition and passing the seals, and his true expense laid out in pursuing the debtors, and recovering sentence. It was *replied*, That in law, a bastard having no means, but *deductis debitis*, the donatar could take no gift to the prejudice of creditors; and, what he had bestowed upon the gift and other pursuits, it being *suo periculo*, it ought not to be allowed. THE LORDS did sustain the defence, and granted the allowance for these reasons, that the creditor could not pursue the debtors without a gift of the King, which he having neglected to crave, the donatar was in *bona fide* to seek the same, and what charges he had laid out in recovering of the debts being just and necessary, whereupon he was ordained to make faith, so that the creditor could have bestowed no less, he ought in law to be looked upon as *negotiorum gestor*, and what was profitably employed ought to be refunded.

Fol. Dic. v. 1. p. 286. Gosford, MS. No 710. p. 429.

No 2.
A donatar to a gift of bastardy being pursued by the bastard's creditors will get allowance of all expenses laid out for the gift, and in pursuing debtors.

1702. January 16. CREDITORS OF PITTENCRIEFF, Competing.

IN the roup of the lands of Yeaman of Pittencrieff, bought by Major Forbes, it fell to be debated among the Creditors, and particularly by Sir Thomas Moncrieff, one of the preferable ones, how the common expenses, such as the extract-

No 3.
The expenses of ranking and sale found to come off the whole head.

No 3.
tanquam præ-
cipuum, and
 that the pre-
 ferable credi-
 tors should
 suffer no de-
 falcation.

ing the decret of ranking, (for every one is to bear his own charge during the ranking in the competition), and the expenses of carrying on the sale, and bringing it to a roup, are to be paid and laid on, and if every one of the Creditors, who draw a part of the price, must bear a proportional part *pro rata* of that common expense, tending equally to the behoof of all the creditors, or if those who are unexceptionably preferable are to be free of bearing any part thereof. For it was *alleged* in their behalf, That they being secure for their penalty, as well as for their principal and annualrent, and if the debtor upon his right of reversion were redeeming from them, they were not bound to renounce and quit their rights, except their expenses were also paid and reimbursed; and no more can the purchaser at the roup compel them to denude of their rights, without also laying down their penalty, and they have it by virtue of their right; and that posterior creditors fall short, is through the defect, and posteriority, and weakness of their rights, which cannot be profitable to them, and prejudicial to those *qui sibi vigilarunt*. It was on the other side *contended*, That all who have benefit by the roup, and draw a share of the price, should bear also a share in the common expense; *ejus est incommodum cujus est commodum*; and whatever be the nature of your right, *non debes lucrari cum alterius jactura*; and, by the roup, you get up your sum, which otherwise lay dead and mortified on the land, and therefore you must, for this benefit, bear a proportional burden of bringing these lands to produce your payment by a roup. Yet the LORDS, by plurality, found (though the practice had been otherwise), that the preferable creditors should suffer no defalcation, and that the common expense behoved to come off the hail head and total price, *tanquam præcipuum*, and not *pro rata* of their debts; by which the posterior creditor's interests are much lessened and diminished.

Fol. Dic. v. 1. p. 286. Fountainball, v. 2. p. 139.

. Dalrymple reports the same case :

THE Creditors of Pittencrieff being ranked, and the lands sold by roup, to Lieutenant Colonel Forbes, in the application of the price, there falls in a question to be determined concerning the common expenses, viz. the expenses of extracting the decret of ranking, and the expenses of process and decret of sale, which are reckoned common expenses, as being profitable for the whole creditors, and decreets of ranking and sale being necessary writs to be delivered to the purchaser.

These expenses have been liquidated in former cases by the Lords, and proportioned and divided, so as every creditor that gets a part of the price has been burdened with a proportional share thereof, effecting to the share they received of the price; but, in this case, the preferable creditors declined to allow any abatement or defalcation of the sums to which they are preferred, upon

the account of these preferable expenses, and the purchaser not being safe to pay, until that payment be determined ;

THE LORDS did consider and reason upon the case more fully than the parties procurators at the bar, to the effect that there might be an uniform practice in time coming.

The precise question was, Whether these expenses should be charged upon every creditor receiving a share of the price, proportionally ; or if they should be paid by the purchaser out of the first and readiest of the price of the whole head, and the creditors to have their full sums according to their preferences, till the price be exhausted ? By which means these expenses would fall upon the last creditor, and possibly wholly exclude him.

It was *alleged* ; That, in former sales, the Lords had generally burdened every creditor preferred, with a proportional share, which had been done so frequently, that it was now looked upon as a constant fixed rule, which should not be altered upon the obstinacy of the Creditors of Pittencrieff.

On the other hand, it was *alleged* ; That the point had never been very fully considered nor determined by the Lords ; and, that the laws anent sale of bankrupt lands being late, and multitudes of questions falling in, many of them have been regulated by the consent and acquiescence of parties, which the Lords do easily authorise for the expediting of business ; and one practice hath become an example to another : But, before an uniform custom be formed, when parties apply for decisions in law, the Lords may, and ought to consider these cases more accurately, both with regard to what has been accustomed, and what is fit to be a rule in time coming ; and many questions have happened upon this subject, of late, which have delayed the conclusion of sales, and there is neither uniform practice, nor a foundation in law, to burden the preferable creditors.

Imo, As to the practice ; Bankrupt's estates being under sequestration, the Lords, of course, do authorise the Chamberlain to pay out some sums of money to the pursuer of a sale, for carrying on the process ; which sums are taken out of the first and readiest of the rents ; and, when the sales are finished, these sums are never repaid, either to the Chamberlain, or applied to the creditors ; so that, if the whole expenses of the roup should be taken off at the conclusion, the sums advanced by Chamberlains would be lost to the creditors, and come to the pursuer's pocket ; and, because these modifications fall generally short, if the superplus expense, more than is paid out by the factor by warrant, should be deducted off the preferable creditors, then a part of the common expense would fall to be taken off the whole head, and a part off the preferable creditors, which cannot be agreeable to law, all common expenses being to be deducted by one rule ; for, it is certain, that what is taken out of the first and readiest of the rents is equivalent, as to this point, as if taken out of the first and readiest of the price, the rents and price being to be applied in the same way.

No 3.

As to the point of law ; *1mo*, Many preferable creditors reckoned themselves fully secured by their diligence, and have no benefit by the sale. *2do*, The same reason that would burden preferable creditors with the expense of roup and sale, would burden them also with Chamberlain fees, and all expenses of the management of the common subject of their payment. *3tio*, In voluntary dispositions for a price, to be applied for the behoof of the creditors, the expense of their disposition, and in clearing and managing the lands disposed, comes out of the first and readiest of the price ; and, in appraisings and adjudications, there are legal expenses and accumulations, which are made real preferable burdens ; and, because land is no divisible subject, sales are invented as legal adjudications to a buyer, and the price comes in place of the land to be divided amongst the creditors, in the same way that the land ought to be divided, if it were divisible. *4to*, The creditors being ranked, and the law having appointed the price to be paid, conform to the ranking, their decreets ought to suffer no diminution.

On the other hand, it was *argued*, That the opinion and apprehension of particular creditors, who desired not a sale, was not to be considered ; for, the law regarding the general utility of creditors, had introduced sales as a common advantage to all, that the creditors' claims might be reduced into money, which is truly an advantage, even to the preferable creditors, whose debts are mortified ; and, in recompense of that benefit, a small expense was not to be regarded. *2do*, In a doubtful case, the practice of the Lords for several years should make a rule. *3tio*, No question had ever occurred in relation to the sums advanced by factors towards sales ; and the foundation being once laid, that the preferable creditors were to be burdened, these sums could either be repaid to the factors, or added to the price, and then the total expenses deducted from the creditors proportionally. *4to*, The Lords had also come to a resolution, that nothing should be reckoned common expense, but the extract of the decret of ranking and process of sale.

' THE LORDS found, That the preferable creditors ought to be paid, conform to the decret of ranking, without any deduction of common expense ; and that the same ought to be taken out of the first and readiest of the price.'

Dalrymple, No 35. p. 43.

No 4.

1702. January 16.

RAMSAY against NAIRN.

EXECUTOR-CREDITOR counting with other creditors for his intromissions, the expenses of confirmation may be deduced by him out of the whole head, in terms of the act of sederunt, 28th February 1662.

Fol. Dic. v. 1. p. 286. Fountainhall.

* * * See This case No 15. p. 3139.