

other of the interlocutors, and Lord Archibald also called them as parties to the discussing of his appeal.

The House of Peers reversed all the procedure, and remitted to the Lords of Session to re-hear the cause; and Lord Archibald gave in a petition, craving they might proceed, to which the Lady Rutherglen and Earl of March answered, That no procedure could be had against them till they were summoned.

THE LORDS found, That the Countess of Rutherglen and Earl of March, not being parties in the original cause, were not obliged to answer to any conclusion in the libel, except the articles in the said libel, upon which they brought an appeal against the petitioner, without the process were transferred, and they made parties thereto by a proper summons, although being made parties to the appeal brought by the petitioner, they appeared therein as respondents; but found the Countess of Rutherglen and Earl of March, by lodging an appeal against an interlocutor of the Court, did thereby make themselves parties, and that there was no necessity to summon them with regard to any article determined by that interlocutor.

Act. *Graham*, sen.

Alt. *R. Craigie*.

Clerk, *Forbes*.

Fol. Dic. v. 4. p. 147. D. Falconer, v. 1. p. 106.

1749. *January 4.*

BLACKWOOD *against* the other CREDITORS of the deceased Sir GEORGE HAMILTON of Tulliallan.

IN a reduction at the instance of Mr Robert Blackwood of Pittreavie, advocate, of the extracted decree of ranking of the creditors of Sir George Hamilton upon the estate of Dudhope, and of the sale following thereon, it was debated, how far, by the law and practice of Scotland, an extracted decree can be reduced *ob instrumentum noviter repertum*, and upon proper evidence of its being *noviter veniens ad notitiam*, but not determined.

But another point was determined, which had the same effect as to the pursuer. The title in the process of ranking was an adjudication at the instance of John Peat, who died without issue; whereby his adjudication fell to Janet and Margaret Hepburns, his two nieces, Janet the eldest married to Thomas Miller in Bothwell, and Margaret the youngest married to John Miller in Hamilton. Janet had died long before the commencement of the process of ranking, yet, by inattention in the agent, the process was raised, not in the name of Margaret, the living sister, but in the name of Janet, and Thomas Miller in Bothwell her husband.

And upon that ground, the LORDS at first, by their interlocutor, 1st July 1748, "found the whole proceedings void, in respect their was no pursuer;"

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returned to the Court, but it is otherwise if the other party appealed, though the heir answered.

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A summons of ranking and sale being raised in the name of a dead person, the Lords did not find the decree proceeding on it null, but opened it, so far as to allow one of the creditors to be heard on a new production.

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but upon advising bill and answers, " found the decree of ranking not void, but sustained the reason of reduction, that the process was raised in the name of Janet Hepburn, so far as to entitle Mr Blackwood to be heard to dispute upon his infetment, notwithstanding the extracted decree of ranking, and his compearing and competing therein ; but found, that the said reason of reduction does nowadays affect the decree of sale."

And this is agreeable to what the LORDS, sometime about the year 1720, found in Sir Andrew Myrton's case, who had purchased the estate of Gogar at a judicial sale, and which was sustained in favour of the purchaser, though access was allowed to the party objecting a nullity in the decree, and complaining of an injury done him in the ranking, to be yet heard.

The points that afterwards occurred in the reduction itself, *vide voce* BANKRUPT, and *voce* FRAUD.

Fol. Dic. v. 4. p. 147. Kilkerran, (PROCESS) No 9. p. 436.

* * * D. Falconer reports this case :

1749. *January 3.*—A PROCESS of ranking of the Creditors and sale of the estate of Dudhope, which had belonged to Richard Earl of Lauderdale, was raised and carried on in 1735 in name of Janet Hepburn, relict of Thomas Miller in Bothwell ; and the ranking being finished 12th July 1743, the estate was sold 21st December to George Dunbar, merchant in Edinburgh, in whose hand the price remained.

An heritable bond for L. 11,000 Scots, granted 1683 by the Earl when Lord Maitland to Miln of Barnton, was found preferable ; which had been disposed 1697 to Sir George Hamilton of Tulliallan, and by him disposed 1699 to certain of his creditors in security of their debts, and they thereon infest in 1709 ; but, in the mean time, Sir George had also disposed it 1702 to Sir Archibald Fleming of Farm, in security and for relief of certain debts for which Sir Archibald was bound with him ; and he was infest that same year, but the sasine was never taken out of the register.

Sir Robert Blackwood of Pitreavie had adjudged Fleming of Farm's estate ; on which interest Mr Robert Blackwood, his son and heir, appeared and competed in the ranking, but not having pleaded upon his author's infestment, the other creditors of Tulliallan were preferred on their infestment 1709.

Pitreavie getting notice of Farm's sasine, which he had been ignorant of, brought an action for rectification of the ranking, to which *res judicata* was objected ; and a reply was made, that the decret might be opened, propter instrumentum noviter repertum ; and besides that it was null, the action being raised and carried on in name of a woman who was dead before expeding the summons.

Pleaded for the defenders ; In processes of ranking, though one person be called pursuer, the whole parties are pursuers and defenders ; and if the pursuer

die or dispose of his interest, the action may be carried on by any of the rest ; but supposing this a nullity, the effect of it, by Article 18th of the Regulations 1695, can only be the opening the decret, to the effect of redressing the pursuer's prejudice thereby, the rest of the interlocutors standing good ; and it has been of no prejudice to him that the action was raised in the name of Janet Hepburn, whose interest in the event drew nothing, as, had it been raised in any other creditor's name, the same interlocutors would have been pronounced ; or if the objection had been made, a new ranking might have been raised, and brought to a conclusion before discovery of his infetment.

Pleaded for the pursuer ; No process can be carried on but by a real pursuer ; and therefore it has been appointed by act of sederunt 1711, § 4. that in rankings, on the death of a pursuer, or his not insisting, another creditor may, by warrant of the Lords, carry on the action, but it must be carried on by some person ; this therefore is no decret, it is null totally, and none of the interlocutors can be supported, in virtue of the regulation ; which does not apply to the case, though if it did, the nullity affects the whole interlocutors.

THE LORDS, 1st July 1748, " sustained the objection to the decret of ranking, that the process was carried on in the name of a dead person, and found the said decret void and null."

Pleaded further in a reclaiming bill ; The interlocutor pronounced will not only involve the creditors defenders in very great difficulties, for which they beg leave to reclaim against it, but will in its consequences weaken the security of decreets of sale. Rankings are to be finished and extracted before an estate can be sold ; and if this ranking can be reduced, the creditors are apprehensive of the subsisting of the sale of the estate, which was made to Mr Dunbar, as trustee for the whole creditors, to be by him disposed of to the best advantage, for all their benefits, as at the time no purchaser appeared ; and is since sold to a gentleman, who has paid part of the price, set and feued the lands, and regulated his affairs, on the supposition of being undoubted proprietor. Like objections may occur to many sales, as a creditor may have died, and his representative not have been called before procedure in the action ; so that no purchaser can look upon himself as safe, until he has secured his title by prescription, though hitherto decreets of sale have been looked upon as the best titles to purchase upon. This objection ought not to be sustained, as the whole creditors appeared upon the summons, and competed on their rights, and Mr Blackwood as well as the rest ; so that as any of them might have brought the rest into the field, none who appeared and competed, ought to be allowed to object to the process. The necessary title for pursuing this action is a real right in the estate, which a person who is excluded by preferable rights has not ; and yet if a creditor, who can possibly draw nothing, raise the action, the ranking may proceed thereon, because it is the action of all the creditors, and so it ought to be sustained in this case where they have

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competed ; and the interest on which the summons was raised, falls without the price.

There was a real pursuer, John Peat was an adjudger, and left his interest to Janet and Margaret Hepburns his nieces ; Janet died, but Margaret applied to a lawyer for his advice how to recover her debt, and he recommended her to a writer to the signet, who raised a summons for her, but by mistake gave her the name of Janet ; so that it is only a misnomer, which ought not now to be allowed to be objected to, for annulling the whole procedure.

Answered ; Here was no misnomer, but the summons raised in name of the dead sister, as appeared by her being designed from her husband's name and designation ; so that there was no summons, and the process could not be supported by the appearing and pleading of the parties, more than if they had come into court by a simple appointment amongst themselves ; the case is of no general consequence, being of a very particular kind, differing from that of a creditor's dying, pending process, where there was a foundation for the action ; and if any nullity supervened, the sanction of the regulation might apply.

N. B. A proof was brought, that Margaret Hepburn, relict of John Miller, did give authority for diligence to recover her debt ; whereupon the process was raised in name of Janet Hepburn, relict of Thomas Miller.

THE LORDS found, that the decret of ranking was not void and null ; but sustained the reason of reduction, of this process of ranking's being raised in the name of Janet Hepburn, so far as to entitle Mr Blackwood, the pursuer, to be heard to dispute upon his infetment, notwithstanding the extracted decret of ranking, and of his compearing and competing therein ; and found that the said reason of reduction, founded on the nullity of the name of the pursuer, did nowise affect the decret of sale.

Reporter, *Elchies.*Act. *Lockhart.*Alt. R. *Craigie & W. Grant.*Clerk, *Kirkpatrick.**D. Falconer, v. 2. No 25. p. 31.*

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1749. *July 26.*

M'AULAY, Petitioner.

It is usual where both diets of compearance in a summons of adjudication are run, but that by the usual forms of Court, the summons cannot be got enrolled in time to get decree within year and day of a former adjudication, to grant warrant to the keeper of the rolls, to enroll the summons forthwith at the head of the roll.

But an application for that purpose was in this case refused, where both diets of compearance were not run, that being thought to be too wide a step.

Kilkerran, (PROCESS.) No 11. p. 438.