RANKING AND SALE.

SECT. I.

In what Cases may a Legal Sale take place?

1733. *January* 24. RANKING of HALLGREEN.

No 1.

IN the sale of the estate of Hallgreen, compearance was made for Burnet of Monboddo, who had purchased a part of the debtor's lands long before the bankruptcy, and had applied the price to purge incumbrances, but had neglected an infeftment of annualrent preferable over the lands sold, as well as over those remaining with the common debtor. It was *pleaded* for him, That his lands ought to be struck out of the sale, seeing his case could not be reached by the act of Parliament, being neither debtor nor bankrupt. *Answered*, That *quoad* the annualrenter, the lands must be held as belonging to the bankrupt. *Replied*, The annualrenter may indeed follow forth his diligence by poinding the ground, which is all he is entitled to by the nature of his right. In this case, the annualrenter is in no worse situation than if his own debtor were not bankrupt; and there is no reason he ought to be in a better, which he would be, upon supposition he could sell his lands upon his debtor's bankruptcy; for no doubt he can bring them to a sale upon Monboddo's bankruptcy. THE LORDS found the lands purchased by Monboddo cannot be exposed to sale with the rest of Hallgreen's lands, but prejudice to the annualrenter to affect Monboddo's lands, as accords.—*See* APPENDIX.

Fol. Dic. v. 2. *p.* 310.

1769. *March* 7.

THOMAS PEAT *against* ELIZABETH BEG, Relict of JAMES JOHNSTON.

No 2.

After summons of ranking and sale, can a dispo-

JOHN CLYDE, mason in Douglas, in 1741, granted an heritable bond for 1200 merks, upon his lands of Crossburn, to George Forrest, and infeftment was taken.

No 2.
sition be granted by the bankrupt in implement of a minute prior to it?

These lands being sold by public roup, in 1754, William Howison, writer in Douglas, as principal, with John Young and William Lorimer, as cautioners, granted their joint bond for the price.

In 1757, John Clyde became notour bankrupt. Decree of adjudication of the lands of Crossburn, and others belonging to John Clyde, was obtained, for the accumulated sum of L. 144 Sterling, due upon the bond in 1762; and a summons of ranking and sale raised in 1764.

Upon the narrative of the roup of the lands of Crossburn, that William Howison had acted as trustee for Young and Lorimer, and that they had insisted in a process for implement in 1765, Clyde granted them a disposition of the lands, which, being infeft, they disponed to Elizabeth Beg, who, in like manner, took infeftment in 1767.

Thomas Peat succeeded to an heritable bond for L. 30, affecting the same lands of Crossburn in 1761, completed by infeftment, and on which adjudication had proceeded, in 1764. And having likewise obtained right to the sum contained in the former bond and adjudication, went on in the ranking and sale.

Elizabeth Beg brought a multiplepoinding in name of the tenants, which being remitted to the ranking, she insisted, that the lands of Crossburn, her absolute property, ought to be struck out of the sale, and the creditors ranked upon the price in her hands.

It was *pleaded* for her, That though, after a process of ranking and sale is commenced, it is not in the power of the debtor, by a voluntary deed, to withdraw any part of his estate from the diligence of his creditors, the rule does not apply here. For as, since the date of the roup 1754, the common debtor was under a specific obligation to dispone to the purchaser, the disposition 1765 was not a voluntary deed, but necessary, and such as he could have been compelled to grant.

A process of ranking and sale cannot have a stronger effect in this question, than an inhibition against the common debtor; yet an inhibition posterior to the roup 1754, would have afforded no objection against the disposition on which the petitioner founds her claim of having the lands of Crossburn struck out of the sale.

Nor is the disposition affected by Clyde's prior bankruptcy. The statutes 1621 and 1696 do not hinder a bankrupt, nor interpelled by prior diligence, from selling his subjects at an adequate price; and, if so, much less can they be interpreted to prevent him from implementing a sale formerly made, and granting a disposition in consequence of a prior obligation. Similar to this is the case of an apparent heir, who, after granting infeftments of annualrent, gave procuratory for serving himself heir, that his infeftment might accresce to the annualrent-rights. It was *objected* for posterior adjudgers, That the heir was bankrupt at the time; but the LORDS preferred the annualrenters; February 1728, Creditors Graitney competing, No 195. p. 1127.

No 2.

Answered for the pursuer; Even though the defender's authors had taken the proper steps for completing their right before the adjudications were led, the lands of Crossburn must still have been burdened with the bond for 1200 merks, upon which infeftment had followed, so far back as the 1754. But, as matters now stand, these lands cannot be struck out of the sale, because the process was commenced before the date of the disposition, and Clyde was bankrupt when he granted it.

A sale differs from an inhibition. The latter perhaps excludes only voluntary deeds; but, in the former, it is an established maxim, *pendente lite nihil innovandum*. No diligence begun, or even completed after its commencement, can have the effect to alter the preference of the creditors. Nor is the distinction of deeds necessary or voluntary founded on the bankrupt-acts. This is plain from the statute 1621, and Lord Bankton, in express terms, says, I. 10. 104. that 'it is extended to deeds that appear to be necessary,' which he exemplifies by a case similar to the present.

THE LORDS, moved principally by the latency of the roup, 'Refused to strike the lands out of the sale.'

Act. *Wight.* Alt. *Macqueen.*

G. F. *Fol. Dic. v. 4. p. 207. Fac. Col. No 95. p. 175.*

1780. *December* 23.

Messrs CUNNINGHAM, DOUGAL, and Company, *against* WILLIAM MARSHALL.

No 3.
Title to bring the action of ranking and sale.

MESSRS CUNNINGHAM, DOUGAL, and Company, being creditors to Mr Marshall, by an heritable bond and infeftment, brought a process of ranking and sale against Mr Marshall, which coming to be called before the Lord Ordinary in the Outer-house, the pursuers craved the common interloctor, allowing a proof of the libel, &c.

Objected for Mr Marshall; A ranking and sale is a process of a most serious nature, and of all others the most important to the defender. The direct tendency of the action is to strip him of his whole fortune, and declare him to all the world a notorous bankrupt; and this must be the consequence of pronouncing the interlocutor insisted for by the pursuers, by which a publication of the defender's bankruptcy must be made in the newspapers, and diligence granted for recovering the title-deeds of his estates. By the act 1681, cap. 17, no such action can proceed, unless the debtor's affairs be manifestly desperate, his estate affected by diligence, and the creditors in the actual possession of the same. But in this case, there is no bankruptcy, no diligence against the estate by adjudication, nor is any creditor in possession, and, therefore, no action of ranking and sale can proceed; as appears from the stile of the summons,