1760. *February* 20.

JOHN RUSSEL, Trustee for WILLIAM BELCHIER, *against* The PERSONAL CREDITORS of the Deceased JOHN HAMILTON of Grange.

No 9.
The creditors of an apparent heir, who has sold his predecessor's estate upon the act 1695, have no claim upon the price till all the predecessor's creditors are paid.

JOHN HAMILTON, heir apparent of the estate of Grange, did, upon the act of Parliament 1695, bring a process of sale of his predecessor's estate in July 1744. The act of roup was pronounced February 1748; and the land being exposed to sale July 1750, William Belchier merchant in London was preferred, as highest offerer, at the price of L. 62,200 Scots.

During the dependence of this sale, Belchier having advanced several considerable sums to Hamilton, knowing him to be heir apparent only, did, after purchasing the estate, convey his debts to a trustee, who having arrested in the hands of Mr Belchier as debtor in the price, produced his interest in the ranking of the creditors, and craved to be ranked upon his arrestment.

This point was considered independent of the arrestment; and it occurred, that when the predecessor's estate is sold by the heir apparent, the price comes in place of the land. The personal creditors of the ancestor can claim, because the land is sold for their behoof as well as for behoof of the real creditors. But the personal creditors of the heir apparent have no claim to the price, because the estate did not belong to their debtor. It is true, that a method is prescribed by law, empowering the creditors of an heir apparent to charge the debtor to enter heir, which will entitle them to adjudge the estate for their payment. But this method is impracticable after the estate is sold; for it would be absurd to charge the heir to enter to an estate which is no longer in *hæreditate jacente*. Nor can the creditors of the heir apparent avail themselves of the act 1695, supposing their debtor to have been three years in possession. For, in the *first* place, that act is not made for behoof of those who deal with the heir apparent *qua* such. And, in the *next* place, it gives not to the heir's creditors any claim to the land, making only a passive title against the next heir passing by.

THE COURT next took under consideration the arrestment, with respect to which there was no difficulty. The arrestment of the price in the purchaser's hand cannot, from the nature of it, be extended further than the interest that John Hamilton the common debtor has in the price. Now his interest is as heir apparent only, which is nothing but the surplus, after all his ancestor's creditors are paid. And therefore, this arrestment cannot be brought in competition with any of these creditors.

'The creditors of the ancestor were accordingly preferred.'

Sel. Dec. No 160. *p.* 220.

1773. *February* 25.

ADAM BELL, Trustee for the Creditors of JOHN MORTON, the Elder, *against* RICHARD LOTHIAN.

No 10.
The creditors of a person deceased,

JOHN MORTON, the elder, who was proprietor of the lands of Blackbriggs, died in May 1767. Within a year from his death, John, his son, being debtor

No 10.
are entitled to reduce deeds granted by his apparent heir, *intra annum deliberandi*, to their prejudice, on the second clause of the act 1661, c. 24. although these creditors should have used no diligence within the three years from his death.

to Lothian, granted to him a bond and disposition, under reversion, over Blackbriggs, for a certain sum, Lothian giving a relative missive, whereby he became bound to pay off a debt affecting the said lands, partly owing by Morton the elder.

An action was brought, at the instance of Bell, as trustee for James Kirkland and others, creditors of Morton the elder, concluding, that Lothian's right to the lands should be reduced, in so far as the pursuers are hurt thereby, founding on both clauses of the act 1661. c. 24. But the first branch was not thought applicable to the *species facti*; and the judgment went upon the second.

To the competence of the challenge on the second branch of the act, *objected* by the defender; The law gives no preference to the creditors of a defunct, in competition with the creditors of an apparent heir, as to the defunct's estate, unless they use diligence against it within the space of three years from his death. In default of which, the creditors of the apparent heir have an equal, and may acquire a preferable right to them, either by the diligence of the law, or the act of the heir; which, though done within the three years, and, of consequence, reducible, if the creditors of the defunct use diligence within that time, yet, if the three years are suffered to elapse, these diligences and securities will become valid and effectual.

Answered; The second clause of the act, by which the heir is prohibited to sell within the year, is pure and absolute, and the limitation applies only to the first clause of the act. This very question was determined, in the case Taylor *contra* Lord Braco, 26th November 1747, No 8. p. 3128. where the Court decerned in the reduction of the Noble Lord's right to an estate, solely upon the last clause of the act 1661; for it was not so much as alleged that any diligence was used within the three years.

'THE LORDS sustained the reasons of reduction of the bond and disposition, as being granted by Morton, the younger, *intra annum deliberandi*:' But, as the defender, if this point should be given against him, had prayed a reservation of all claims competent to him, against the estate of Morton, elder, by virtue of the debts due to him, and securities taken in consequence thereof, the Court remitted to the Ordinary to hear parties on that and some other points.

Act. *J. Boswell.* Alt. *Crosbie.* Clerk, *Tait.*

Fol. Dic. v. 3. *p.* 166. *Fac. Col. No* 63. *p.* 153.

1780. *June* 14. MAGISTRATES of AYR *against* QUINTIN MACADAM.

No 11.
Action for setting aside rights granted by an heir within the year after.

CAMPBELL was debtor to the burgh of Ayr. Within the year after his death, his heir made up titles, and sold lands which belonged to him. More than three years thereafter, but within forty years, the Magistrates of Ayr, for effectuating payment of the debt due to the burgh, brought a process against