1781. *August* 2. Ranking of the CREDITORS of CULT.

No 12.
The creditors of a defunct took renewed bills from his heir. They were, notwithstanding, found preferable to the heir's creditors.

MR WARDROBE of Cult died in 1775, possessed of an estate of about L. 300 Sterling of yearly rent. His debts, constituted chiefly by bill, for small sums, and due to country-people, amounted to L. 10,000, besides L. 1000 in name of provisions to his younger children.

His eldest son, Dr Wardrobe, who had resided for some time in the West Indies, and there purchased an estate, said to be very valuable, came home a few weeks before his death. Although, from the father's books, which were regugularly kept, the situation of his funds might have been known; and although the son himself was then insolvent for a large sum, he entered into possession of his father's estate, took up the bills granted by his father, and gave his own acceptances in their stead, to the extent of L. 7000.

In 1778, the creditors proceeded to diligence against the estate of Cult; among others, one Mr Ross from the West Indies adjudged for the sum of L. 15,000 due by the son. The younger children also led adjudications.

In the ranking of the creditors, those in the renewed bills craved to be preferred, in terms of the statute 1661, c. 24. as creditors of the father.

To this Mr Ross and the younger children *objected*, That, by the creditors having given up the father's bills, and accepted of others from the son, a *novatio debiti* took place, in consequence of which they ought only to be ranked *pari passu* with the son's creditors.

It was *observed* on the Bench, That the son's conduct had been very improper, and that no benefit could arise therefrom to his own creditors, or to his father's younger children.

THE LORDS waved determining the general point, and 'found, from the whole circumstances of this case, that the Creditors of William Wardrobe the father, though they gave up their former securities, and renewed the bills with the son, are entitled to the benefit of the act 1661, and to be ranked as the creditors of the father.'

Against this judgment the younger children *reclaimed*, when they endeavoured to remove the specialities alluded to in the interlocutor, and to distinguish their plea from that of Mr Ross, who was only a creditor to the son. But their petition was refused without answers.

For the Creditors in the renewed bills, *Honyman*. For Mr Ross, *Henry Erskine*.
For the Younger Children, *Dickson*.

Fol. Dic. v. 3. *p.* 167. *Fac. Col. No* 78. *p.* 134.

1783. *February* 15.

No 13.
A bond heritable, *destinatione*, was found to fall under the act 1661, c. 24.

ANNE MACKAY *against* The REPRESENTATIVES of COLONEL HUGH MACKAY.

ANNE MACKAY, the second wife of William Mackay, was, by their contract of marriage, entitled to certain provisions.

No 13.

Among other funds belonging to William Mackay, were two wadset rights, and a bond conceived 'in favour of him and his (former) wife, in conjunct fee and liferent, and of the heirs-male to be procreated betwixt them, in fee.'

Those wadsets William Mackay disponed to George, his eldest son, by the prior marriage, to whom, by the conception of the bond, that right likewise was to devolve.

Within a few months after the death of William Mackay, George disponed the wadset-rights and bond to his immediate younger brother, John.

Posterior to this conveyance, Anne Mackay sued these sons of her husband, as being his representatives, for payment of her provisions; and, on the dependence of the action, used inhibition against them both.

Afterwards, John conveyed to Colonel Hugh Mackay, a creditor of his, the wadset rights and bond in security of his debt.

A competition then ensued between Anne Mackay and certain persons representing Colonel Mackay, the event of which was chiefly to depend on the effects of the conveyance by George to John, and of the inhibition used by Anne Mackay against them.

Pleaded for Anne Mackay; As the wadsets and the bond, now the subjects of competition, are both heritable rights, the last, by virtue of its destination 'to heirs-male,' being not less so than the first, the debts of the ancestor are still preferable upon them to those of the heir, notwithstanding the conveyance by the latter within a few months of the death of the former. Both come equally within the sanction of the statute of 1661, cap. 24. which declares, that 'no right or disposition made by an apparent heir, so far as may prejudge his 'predecessor's creditors, shall be valid, unless it be made and granted a full 'year after the defunct's death.' As a creditor, therefore, of William Mackay, the father, the claims of Anne Mackay, respecting both rights alike, are to be preferred to those of any creditor of his sons. And her preference has likewise been secured by inhibition.

Answered; *Nomina debitorum* are not the subject of inhibition: Nor is the case altered from their becoming heritable *destinatione*. With respect to Mrs Mackay's preference, as a creditor of her husband, over the creditors of his heirs, the bond being a personal right, falls not under act 1661.

THE LORD ORDINARY reported the cause to the Court, who were clearly of opinion, that the statute 1661 applies to heritable subjects indiscriminately, whether they be such *destinatione*, or *sua natura*.

Some of the Judges denied the competency of inhibition to affect bonds heritable *destinatione* only. The majority, however, appeared to be of a different opinion; though it proved unnecessary to give a direct judgment on that point, the following being the interlocutor of the Court;

'THE LORDS, in respect the bond for 4000 merks, due by Lord Reay, was conveyed by George Mackay to his brother John, prior to the inhibition at the instance of Mrs Anne Mackay, repelled the grounds of preference pleaded by her upon that inhibition; but found, that as George Mackay disponed the said

bond to his brother John within five months of his father's death, the said disposition is not effectual against Anne Mackay, who was a creditor to the father, being contrary to the enactment of the second clause of the statute 1661.' No 13.

To that judgment, which was brought under review by mutual petitions and answers, the Court adhered; with this only variation, that as it had been omitted to mention, that Anne's Mackay's preference was effectual on the wadset, this omission was now supplied. *See* INHIBITION.

Reporter, *Lord Gardenstone.* For Mrs Anne Mackay, *Elphinston.* Alt. *Honyman.* Clerk, *Home.*

S. *Fol. Dic. v. 3. p.* 166. *Fac. Col. No* 93. *p.* 144.

SECT. II.

Decisions upon the act of Sederunt 1662 *.

1685. *March.* CAPTAIN M'KEITH *against* KENNEDY. No 14.

IN a special declarator at the instance of a donatar of escheat, compearance was made for an executor-creditor who had confirmed the subject, prior to the gift or general declarator; *alleged* for the donatar, that as the confirmation could not exclude another creditor doing diligence within six months after the rebel's decease, no more could it exclude the pursuer's declarator raised within the six months.——THE LORDS preferred the executor-creditor, in respect the act of sederunt only concerns creditors, and the donatar is in *causa pœnæ.*

Fol. Dic. v. 1. p. 206. *Harcarse, MS. No* 2.

*** *See* The particulars of this case *voce* COMPENSATION, No 67. p. 2616.

1708. *January* 2. RAMSAY *against* NAIRN.

No 15.
A testament being confirmed by the defunct's creditor, and the same subject being again confirmed by another creditor within the six months, the Lords found, that what-

WILLIAM NAIRN of Dunsinnan, being creditor to Young in Dunkeld, confirms himself executor-creditor to him, and thereby uplifts forty bolls of bear and malt he had lying in his barns. Mr David Ramsay being likewise a creditor, he confirms the same subject, with sundry other goods; and, being within the six months of the debtor's death, he pursues Dunsinnan to communicate to him a proportional part of what he had intermeddled with, in respect of the act of sederunt 1662, bringing in all creditors confirmed within six months of the defunct's decease *pari passu.* *Alleged*, Your confirmation is null, because there cannot be two principal testaments, and therefore, I being first confirmed, all

* The object of this act of sederunt is explained in No 19. p. 3141.