1776. *March 5.* JOHN BELCHIER, and JAMES WILLIAM BELCHIER, his Son, *against* CHARLTON PALMER and His ATTORNEY.

RANKING AND SALE.

A creditor having brought a process of ranking and sale of the estate of his deceased debtor, and the debtor's apparent heir having at the same time brought an action of sale under the Act 1695, and the two summonses having come into Court on the same day; *Found* that the latter had the preference, it being admitted that it was unnecessary to proceed with both.

THE pursuer John Belchier, Samuel Belchier, and William Belchier, were brothers, and all of the city of London. William, the youngest brother, having bought the estate of Grange in Scotland, he settled the same in favour of his wife in liferent and the heirs of his own body in fee; whom failing, to the pursuer, John Belchier, his eldest brother, in liferent, and to the other pursuer, James W. Belchier in fee.

William Belchier having died in embarrassed circumstances, the defender, and others of his creditors, used diligence against his estate. The defender raised an action of constitution against the pursuers, as heirs of provision to William Belchier, in which they gave in renunciations; upon which decreet was pronounced in favour of the defender, in common form. The defender also raised, and obtained decree in a process of adjudication, and then proceeded to bring a process of ranking and sale, on the Acts 1681 and 1690, in which the pursuers were called, as apparent heirs of provision.

On the other hand, the pursuers, in order to expedite the payment of the creditors, and at the same time to secure for themselves any reversion which might exist, brought an action of sale, on the Act 1695, as apparent heirs of William Belchier. The two summonses came into Court on the same day; and, as it was unnecessary that both should be proceeded in, the question occurred, Which ought to have the preference? Memorials having been ordered to the Court, it was

PLEADED by Mr Palmer, That James William Belchier having renounced to be heir to his uncle, he could not thereafter insist in an action of sale under the Act 1695. This is the first time that such a thing has been attempted. Renunciation divests an apparent heir of that character; and so it has been found in a question under the Act 1621, c. 7, that heirs who had renounced after majority were not entitled to redeem the adjudications of creditors affecting their predecessor's estate; *Macalla* against *Couston, 27th January* 1680, Ersk., 2. 12. 49. The modern device of an apparent heir indirectly redeeming such adjudications, by a conveyance to a trustee, merely proves that it is understood that an apparent heir, after renouncing, has no title in his own right to redeem the adjudications of creditors, being divested of the character of apparent heir. In this case there is no probability of any reversion to the heir; and, therefore, as he has no inducement to carry through the process, he will probably abandon it, or he may die; in either of which cases all the expenses will be lost; as the creditors cannot, in such an event, take up the process and bring it to a conclusion;—*Creditors of Hamilton, 29th June* 1749.

PLEADED by the Pursuers,—1*mo*, The process at the heirs' instance ought to be preferred; because, besides serving the same purpose as the action of sale at the instance of the creditors, it serves the further purpose of securing the payment of any reversion of the price to the heir. 2*do*, It is less expensive than the creditor's action. In the latter there must be a proof of bankruptcy, and the whole debts must be ranked before the sale can proceed; while in the former the estate may be instantly brought to sale without proof of the ancestor's bankruptcy, and without any previous ranking; and, in the event of the price being sufficient to pay the debts, without ranking at all. 3*tio*, As to the objection that, if the heir shall desert the action, the creditors cannot take it up—this, in the *first* place, proves too much; for, at this rate, if the heir's process had been even far advanced, it ought to be stopped as soon as any of the creditors choose to bring a ranking and sale, and thus the object of the Act 1695 be defeated. But, at any rate, the objection is unfounded. The pursuers deny that, if they should desert their action, it is incompetent for the creditors to take it up. It is the general rule, in all actions, that, if the pursuer deserts the cause, the defender may bring it to a conclusion; and, in processes of ranking and sale in particular, the pursuer is considered as a trustee for the whole defenders, any of whom may take it up if the pursuer die or desert the cause. So found in the case of *Arklaw*, *6th January* 1750. There can be no reason why this should not also obtain in the case of a sale by an apparent heir, the object of which is the same, in which the same parties appear. The case of *Hamilton*, cited by Mr Palmer, was no decision on the general point whether the creditors could insist in a process brought by the apparent heir. It was the case of a single bill given in by some of the creditors, which was not refused, but allowed to lie over *until the heir should declare himself*. It does not appear that the heir had abandoned the action. In point of fact, he did not abandon it, but afterwards followed it out, and sold the estate, which happens to be the very same estate now in question. But if the Court had been of the opinion suggested by Lord Kilkerran, it is evident they would have refused the petition as incompetent, and left the creditors to bring a process of sale at their own instance. In truth, therefore, what the Court did in the case of *Hamilton*, favours the pursuers' argument, as it rather intimates, that if the heir had continued obstinate, the Court would have granted the prayer of the petition, *which was allowed to lie over*. 4*to*, As to the idea that the heir's renunciation bars him from afterwards bringing a process of sale under the Act 1695; it is, in the first place, an absurd plea in the hands of the defender; because, if James William Belchier is not to be regarded as the apparent heir, the creditor's own process is inept, they themselves having called him and his father only as apparent heirs. But, moreover, the objection is unfounded. The object of a charge to enter, at the instance of a creditor against an apparent heir, is to force him to enter to his predecessor, that the creditor may sue him for his debt. By renouncing, the apparent heir refuses to enter for the said effect; but this goes no further than to leave the ancestor's estate open to the diligence of that particular creditor. The apparent heir does not thereby lose his character of heir. On the contrary, he may afterwards enter by service, notwithstanding his renunciation. Ersk., 2. 12. 49. and 3. 8. 57.

The following opinions were delivered :—

KAIMES. An apparent heir has no right to the estate till his predecessor's debts are paid. The creditors have an inherent right to the estate, and I would prefer them.

GARDENSTON. The Act of Parliament gives a right of selling to the apparent heir. He can have no interest to retard the sale, for his only hope is from the reversion of the price. It is plain that the renunciation of the apparent heir, a necessary measure, and always followed, cannot bar him.

KAIMES. An apparent heir, by delaying the steps of sale, may have an opportunity of picking up debts, and of procuring compositions.

MONBODDO. If the creditors see any tergiversation, they may take up the sale; so that the only objection which remains, is that of the heirs having renounced, which is nothing in the present case.

COVINGTON. I incline to the plea for the apparent heir. In that case the estate is sold before the ranking, which is a great advantage.

KAIMES. Gave up his opinion on the consideration mentioned by Lord Covington.

ELLIOCK. This is the first time that an apparent heir ever pretended to oppose a sale brought by the creditors of his ancestor. The statute in his favour does not repeal the statute 1681.

KENNET. There is nothing in the renunciation; for an apparent heir always renounces, in order to prevent the constituting of debts against himself. Every inconveniency dreaded may be avoided by the creditor's taking up the sale, in case the apparent heir protracts matters. The sale at his instance is more expeditious and cheaper than the other.

On the 5th March 1776, "The Lords preferred the sale at the instance of the apparent heir."

Act. J. Swinton. *Alt.* A. Elphinstone.

Reporter, Kennet.

1776. *March* 6. JOHN HENDERSON, Younger of Fordel, *against* CAPTAIN HUGH DALRYMPLE.

MEMBER OF PARLIAMENT—SASINE—WADSET.

1. What to be accounted such a wadset as to entitle to a vote for a Member of Parliament. *Sale sub pacto de retrovendendo.*
2. Found no objection to a sasine, that the person said to have appeared as attorney was, in the clause of delivery, by an obvious mistake, stated *to have given* sasine to the party said to have appeared as bailie, the characters being reversed.

[*Faculty Collection, VII. p.* 201 ; *Dict., App. I., Mem. of Par., No.* 2, *and Supp. V.* 586.]

N.B. In this celebrated cause I make no observations on the manner of