SECT. VI.

The possession of the disponee of an heir apparent accounted the possession of the disponer. Effect of a sale at the instance of an heir apparent, as to the creditors.

1758. *February* 10. WILLIAM YULE *against* ROBERT RITCHIE.

No 45. In a reduction of a disposition by an apparent heir not three years in possession, the possession of the disponee for three years was found equivalent.

MARGARET MILLER, while she was apparent heir, and before she had been three years in possession, disponed a tenement of land to Ritchie.

Ritchie entered to possession, and continued in it more than three years.

Yule, the heir of Margaret Miller, brought a reduction of this disposition, as granted by an apparent heir not three years in possession.

Ritchie's *defence* was, That his possession must be deemed the possession of Margaret Miller, the disponer, so as to make her, in the eye of law, to have been three years in possession.

Answered for Yule; The construction contended for by the defender, is contrary to the reason of introducing the exception from the common law. The exception was introduced merely in respect of the *bona fides* of those who had been tempted to contract with a person whom they saw three years in possession; and whom they therefore had reason to think was duly vested in the subject; but this will never apply to a person contracting with one not three years in possession, even though the contractor himself should remain twenty years in possession after that. His after possession will not give him that *bona fides* which he had not at first; and the rule of law takes place, *Quod initio vitiosum, tractu temporis convalescere non potest.*

In the *next* place, As the exception in question was introduced in the face of the common law, which allows no person not infeft to dispone, courts cannot, in a statute correctory of the common law, go beyond the letter of the statute. The statute requires a three years possession by the apparent heir; and a court cannot, in place thereof, substitute a three years possession by the disponee.

'THE LORDS assoilzied from the reduction.'

Act. *J. Dalrymple.* Alt. *Dav. Rae.*

J. D. *Fol. Dic. v.* 3. *p.* 259. *Fac. Col. No* 96. *p.* 172.

1791. *November* 15.
GEORGE HALDANE, and Others, *against* CHARLETON PALMER.

No 46. A decree of sale, at the suit of an ap-

IN the month of September 1775, a decree of adjudication was obtained by Charleton Palmer against the lands of Grange. And it afterwards became the first effectual one, by a charge against the superior of the lands.

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parent heir, is only held as an adjudication for the creditors of the ancestor, where it is within year and day of the first effectual adjudication.

Before this, however, and in the month of June 1775, a summons of sale was instituted by the apparent heir of the debtor; though the lands were not sold for many years after. In the mean while, several adjudications were led, and among others, one at the suit of Mr Haldane, in the year 1778.

In the ranking of the creditors, it was *contended* by Mr Haldane, and those creditors whose adjudications were not within year and day of the first effectual one, that the summons of sale, at the instance of the apparent heir, was to be considered as an adjudication for the whole creditors, and consequently that the whole were to be ranked *pari passu*. In support of this argument, Mr Haldane

Pleaded; The law considers an apparent heir bringing his ancestor's estate to a sale, as a trustee for the creditors of the ancestor. On this principle it was found, with regard to the lands in question now sold*, that the summons of sale, by the apparent heir, barred a similar action at the suit of the creditors. For the same reason, it should seem, that, pending the sale, the creditors were not obliged to use any diligence for attaching the lands; as was found 29th January 1748, Irvine against Maxwell, No 27. p. 5264.

In that case, indeed, the decree of sale was within year and day of the first effectual adjudication. But it would be unreasonable, if the interest of the creditors were to depend on an event not in their power, and so entirely arbitrary. As in a voluntary trust, no creditor, by separate measures, can secure a preference over the rest; so in those established by statute the same rule must hold, otherwise the regulation, instead of being beneficial to creditors, would prove a snare to those who relied on it.

Indeed, after a summons of sale, the matter becoming litigious, no step can be taken by one creditor to the exclusion of the rest, Erskine, b. 2. tit. 12. § 65.

Answered; Prior to the enactment of 1661, the creditor who obtained the first decree of adjudication, was entitled to an exclusive preference; and although the general rule was then departed from in favour of those creditors who led adjudications within year and day of the first effectual one, it remained, in other respects, unaltered.

Before the commencement of the summons of sale, therefore, the first effectual adjudger in this case had a *jus quæsitum*, which could not be taken away. Actions of sale, indeed, instituted by apparent heirs, as being attended with less expense, are preferred to those at the suit of creditors, but there is nothing to prevent an attachment of the lands within year and day of the first effectual adjudication in the same manner as before; and consequently, if any of the creditors omitted to do this, they have no right to complain, Bankton, B. 3. t. 2. § 8. par. 112.

In cases, it is true, where the decree of sale has taken place within year and day of the first effectual adjudication, it seems to have been justly determined, that the creditors should be admitted to a rateable distribution; otherwise, from the act of the heir, much injustice might ensue. But the principle of that

* 5th March 1776, Not yet collected. *See* Appendix.

decision is not applicable to the present case. The supposition, too, of any parallel between voluntary and legal trusts, is equally erroneous.

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Were an action of sale by an apparent heir supposed to be equivalent to an action of adjudication for the creditors at large, it must still be observed, that it is not the date of the summons in either case, but that of the decree, which regulates the preference. Besides, the cases are in no respect similar. An apparent heir bringing his ancestor's estate to sale, is so far held to be a trustee for the creditors, that every thing he does equally redounds to their advantage as to his own. But although, in this manner, the creditors reap the benefit of what the heir does, it does not follow that the heir, for their benefit, should be held to have done what he has omitted to do.

As to the maxim *pendente lite*, the effect of it is to prevent the granting of voluntary rights, and not to tie up the hands of competing creditors, 12th July 1785, Massie *contra* Smith, *voce* LITIGIOUS.

This question being reported on informations,

THE LORDS unanimously found, that, in the circumstances of this case, the creditors were preferable according to the diligences used by them respectively.

Lord Reporter, *Hailes*. For Palmer, *W. Craig*. Alt. *Abercromby*. Clerk, *Sinclair*.

C. *Fol. Dic. v.* 3. *p.* 259. *Fac. Col. No* 189. *p.* 394.

1796. *January* 29.

JAMES CHEAPE and JAMES LINDSAY *against* DONALD CAMPBELL and his Father's CREDITORS.

No 47.
The creditors of the ancestor are entitled to lead adjudications during the dependence of an action of sale, at the instance of the heir apparent, where there is no immediate prospect of the estate being sold, and where the interest of the debts is not regularly paid.

CAPTAIN DONALD CAMPBELL, as heir apparent to his father, brought a sale of the lands of Barbreck and others, in terms of the act 1695, c. 24.

During its dependence, James Cheape and James Lindsay, heritable creditors of his father, obtained decrees of constitution *cognitionis causa* against him, and in order to accumulate their debts, upon which no interest had been paid since Martinmas 1792, they raised adjudications, which the Lord Ordinary ordered to be intimated in common form.

Captain Campbell and the other creditors

Objected; Actions of sale at the instance of the heir apparent, are, in reality, brought for behoof of the creditors at large. The decree of sale has the same effect with a decree of adjudication at their instance, and on that account supersedes the necessity of adjudications by particular creditors, 10th June 1747, Maxwell, *voce* RANKING and SALE; act of sederunt, 11th July 1794. Although the pursuers should succeed in their attempt, it would not improve their security for the principal and interest due to them; and the expense arising from the number of adjudications which would necessarily be led, in order to come