1796. *May* 19.

The REPRESENTATIVES of JOHN DUNN *against* PETER JOHNSTON and Others.

No 42.

A DECREE of certification in a process of sale does not bar a creditor from obtaining a preference, upon an adjudication afterwards led, on grounds of debt produced before the decree was pronounced.

Fac. Col.

*** This case is No 43. p. 273. *voce* ADJUDICATION.

SECT. IX.

Difference between a Sale on the act 1681, and one at the instance of an Apparent Heir.—Sale of lands under Wadset.

1747. *June* 10. & 1748. *January* 29.

Sir WILLIAM MAXWELL *against* IRVING and ROME.

No 43.
A sale at the instance of an apparent heir, has the effect of an adjudication for behoof of the whole creditors.

LIEUTENANT-COLONEL JOHNSTON having died in the West Indies in the attack of Carthagena, in the year 1741, his land estate of Netherwood was brought to a sale at the instance of his apparent heir, and bought, at a public roup, before the Lords on the 21st June 1744. In the ranking upon the price, the following point was debated before the Ordinary.

Francis Grant, merchant in Edinburgh, from whom Sir William Maxwell of Springkell derives right, had obtained an adjudication on a decree *cognitionis causa* against the Colonel's heir before the sale, and while the estate was still *in hæreditate jacente* of the Colonel. After the sale, Rome and Irving, who had produced their interests in the ranking, took up the same from the process, and obtained also decrees of adjudication *cognitionis causa* in February 1745, within year and day of Francis Grant's adjudication. Others of the creditors allowed their interests to remain personal as they were, and did not pretend to compete with the adjudgers; but the adjudgers, after the sale, having insisted for a preference *pari passu* with the adjudger prior to the sale, the Lord Ordinary "Preferred them *pari passu*, as being within year and day of one another.

No 43. Sir William Maxwell now in the right of the first adjudication reclaimed, and insisted that Irving and Rome's adjudications were ineffectual, as being led after the subject had been absolutely and irredeemably adjudged to the purchaser, and was no longer *in hæreditate jacente* of the debtor.

On moving this bill, it was observed by one of the Lords, that there was this difference between the case of a sale on the act 1681, and that at the instance of an apparent heir, that in order to a sale on the act 1681, as there must be an adjudication or other real right to carry on the sale, so the creditors can draw nothing without an adjudication, and therefore creditors remaining personal after the sale must adjudge, in order to entitle them to what may remain for them of the price.

It is otherwise in the case of a sale at the instance of an apparent-heir, as no adjudication or other real right is there necessary to carry on the sale, so after the lands are sold no creditor need adjudge. As the sale is for the behoof of all the creditors, they are by the very sale, without other diligence, entitled to there share of the price; and therefore, it might be doubted, whether even the personal creditors were not entitled to the same preference with those that had adjudged after the sale.

Whereon, without any opinion offered upon the point argued in the bill, as the case was new, it was remitted to the Ordinary to hear parties on the whole case, even with respect to the creditors who had not adjudged after the sale.

The case being accordingly reported by the Ordinary, the LORDS, January 29, 1748, "Found the whole creditors were to be ranked *pari passu*."

They considered the decree of sale as an adjudication for the benefit of the whole creditors, being obtained by the apparent heir, who was empowered by law to act as trustee for them and himself; and that being within year and day of the first adjudication, it ought to be beneficial to all the creditors whether they had adjudged or not.

Fol. Dic. v. 4. *p.* 209. *Kilkerran,* (RANKING AND SALE.) *No* 4. *p.* 469.

*** D. Falconer's report of this case is No 27. p. 5264. *voce* HEIR-APPARENT.

1751. *November* 27. GRAHAM *against* SMITH.

No 44. WHERE a ranking and sale is pursued of an estate, on part of which one has a wadset, the wadstter may object to the sale of his wadset lands, which will be sustained, and all that can be sold will be the reversion; and the purchaser of the reversion cannot remove the wadsetter without using the order of redemption in terms of the wadset. But should the wadsetter appear, and, without objecting to the sale, depone upon the verity of his debts, and crave and