1741. *November* 13. DRUMMOND *against* Mrs HELEN CUNNINGHAME.

No 8.

A DECREE of sale being obtained at the instance of an apparent heir, who was herself also creditor, there being no reversion, it was found that the apparent heir, who, as such, drew no part of the price, was not to be burdened with the expenses of the ranking and sale, but that the same was to be proportioned among the several creditors, whereof she herself was one, in terms of the act of sederunt 1711.

The like was formerly found, *anno* 1738, between Nicolson, apparent heir of Trabrown, and his father's other creditors, No 7. p. 4028.

Fol. Dic. v. 3. *p.* 197. *Kilkerran*, (EXPENSES) *No* 2. *p.* 180.

*** *See* This case by C. Home, *voce* RANKING and SALE.

1761. *March* 6.

HUGH MACKAIL, Writer in Edinburgh, *against* ARCHIBALD BROWN of Greenbank.

No 9.
An apparent heir is entitled to bring his predecessor's estate to a sale, whether bankrupt or not, and the creditors must bear the expenses, unless there be a reversion.

ELIZABETH SHORT died in the right of one-third *pro indiviso* of certain houses and acres of land in and about the town of Stirling. These subjects being burdened with a considerable heritable debt in the person of Archibald Brown, Hugh Mackail, the son and apparent heir of Elizabeth Short, brought an action of sale upon the statute 1695. Mr Brown, the only creditor known of, appeared and *contended*, That the sale either ought not to proceed at all, or, if it should, that it ought to be at the expense of the pursuer, in case the price should fall short of the debt.

In support of this plea, he *insisted*, That there was the greatest reason to believe, that the price would not answer his own debt: That if the sale should proceed, and the expense be paid out of that price, he would be subjected to an additional loss: That, by the general principles of law and equity, creditors are entitled to make the most they can of their debtor's effects, in order to their own payment: That the act 1695 was not meant to injure the interests and just rights of creditors: That two privileges were by it bestowed upon apparent heirs; *one*, that they might bring their predecessor's estate to a sale; *another*, that, by entering heir upon an inventory, they might retain the estate to themselves, and be liable to the creditors only *secundum vires inventarii*: That both privileges have the same authority from the statute; but that it was established by the decisions of the Court, that the last could not be used to the prejudice of the creditor: That though an heir enter *cum beneficio*, the creditors are not obliged to suffer him to retain possession of the estate upon paying its proved value, but may, notwithstanding, bring it to a judicial sale as bankrupt; and

No 9. that no good reason can be assigned why the one privilege should be more available in competition with creditors than the other.

Answered for the pursuer; It cannot be known with certainty before the sale, whether an estate be bankrupt or not. In the present case there is reason to expect a reversion; but, supposing the estate to be certainly bankrupt, yet the heir is entitled to bring it to a sale, by the express words of the statute. The interpretation of the other part of the statute seems rather to support the pursuer's plea; for if, in the one case, the creditors may bring the estate to a sale, notwithstanding the entry upon inventory, to try if they can make more of it; so the apparent heir, for whose benefit this privilege of a judicial sale was introduced, ought not to be hindered from using it, in order to try whether he can make any thing of the estate, without being obliged previously to shew, that, in the event, this will certainly be the case. With regard to the expenses, it appears an established point, that they must be paid out of the estate or price, whether the process of sale be brought at the instance of creditors or apparent heirs. The action of sale was by this statute introduced in favour of apparent heirs; but, were the heir to run the hazard of bearing the expense himself, the intention of the law would be in a good measure defeated; for, as he could never be sure whether there might not be latent debts upon the estate, he would not chuse to expose himself to that hazard. All the writers upon the law agree in this interpretation of the statute, and the point has been expressly decided; Nicolson *contra* his Father's Creditors, No 7. p. 4028.

The Lords repelled the objection, and found that the expenses must come off the whole head.

Act. *Sir Adam Ferguson.* Alt. *Lockhart.* Clerk, *Gibson.*

A. W. *Fol. Dic. v. 3. p. 198.* *Fac. Col. No 31. p. 60.*

SECT. II.

Expenses of Exoneration;—of Multiplepoinding.

1687. *February.* Smith of Giblistoun *against* Creditors of Innergelly.

No 10. A factor, appointed by the Court of Session, is entitled to his

In an action of count and reckoning, at the instance of Robert Smith of Giblistoun, factor appointed for uplifting of the rents of the estate of Innergelly, against the Creditors of Innergelly, the Lords sustained that article of the factor's discharge of the victual sold to ——— Steedman, notwithstanding of the