Act. G. Buchan Hepburn. *Alt.* D. Dalrymple.
Diss. Kaimes, Alemore, Pitfour, Auchinleck.
Non liquet, Strichen.

Judgment had been given in this case, 3d August 1771. A reclaiming petition was presented: answers were made. The pursuer prayed for a hearing in presence: the hearing began 25th January 1771. On the 26th, Lord Hailes happened to look at the bill: he observed that it was pasted on the back, and that the two partial receipts were on the paper pasted on both, written with the same ink, and at the same time. He likewise observed, that there was an appearance of writing under the pasted paper. In presence of the Court the bill was separated from the pasted paper, and it then appeared that there was marked on the original bill a receipt previous to the term of payment of the promissory-note for £14 sterling, and another receipt for £8 sterling, being within 30 shillings of the sum originally due.

On the 26th January 1771, the Lords found "that this action was founded on a gross fraud, and assoilyied the defender; and remitted to Lord Auchinleck, Ordinary, to do therein as he should see cause."

Act. J. Grant, H. Dundas. *Alt.* A. Wight, D. Dalrymple.

1771. *February 5.* WILLIAM REID *against* STEPHEN RONALDSON.

ARRESTMENT—HEIR *CUM BENEFICIO.*

The estate of the debtor, a minor, having been sold *auctore prætore*, the arresters of the price in the hands of the purchasers preferred, upon their diligence, to the other creditors.

[*Faculty Collection, V.* 213; *Dictionary, App. I. Arrestment, II.*]

GARDENSTON. An heir, *cum beneficio*, is proprietor, and, in every respect, heir; only that he has certain personal privileges. When a sale is brought by an apparent heir, the case is different: there he is not proprietor, but trustee.

PITFOUR. We naturally have a prejudice in favour of the *pari passu* preference of creditors; but it cannot take place here. The only method which an heir *cum beneficio* can follow, if he means to bring in the creditors *pari passu*, is not to sell till they all agree in a *pari passu* preference. If he *does* sell, the price must be affectable by the creditors.

MONBODDO. I lay aside the circumstance that Reid was a minor: he is in the common case of an heir. An heir *cum beneficio* is still *heir*, though having privilege: if he sell the estate, the price is affectable by his creditors.

On the 5th February 1771, the Lords "found the arresting creditors preferable;" adhering to Lord Kennet's interlocutor.

For Reid,—R. M'Queen. *Alt.* G. Ogilvie.

1771. *February* 6; and 1772, *Dec.* 8. JOHN BOYD *against* JAMES STEELE.

SALE—IRRITANCY.

An alienation of land, qualified with a Back-bond, Whether to be held a fair sale, or right in security?

[*Faculty Collection, V.* 260; *Dictionary,* 7,221.]

PITFOUR. In the case of *Lord Balcarras* and *Scott of Scotstarvet*, the lands were found redeemable where the purchaser had no power to require his money, although it was pleaded that it was hard to keep him bound while the seller remained free. In that case also, 40 years were allowed for redemption; and yet the order of redemption was not used for many years after the lapse of that period. The present subject of controversy is not a sale, but a right in security. It is, indeed, declared that this shall be held as an absolute sale; but that is *protestatio contraria facto.* It is of no moment whether there is evidence of premonition or not; for there was no occasion for a premonition.

MONBODDO. If there were no circumstances in the case of *Balcarras* but those mentioned by Lord Pitfour, it proves too much, and therefore proves nothing. I think that *here* the reversion is barred both by the Roman law and ours. *Pacta legis commissoriæ* are unlawful *in pignoribus*; because an usurious stipulation for the pledge is generally more valuable than the sum advanced upon it. But *here* there is a sale, and probably for an adequate price. The premonition, supposing evidence of it, is nothing to the purpose; for redemption was the thing required.

COALSTON. Supposing the lands to have been sold for an adequate price, I have a doubt. The objection of *pactum legis commissoriæ* takes not place in sales. *Here* there was a sale. The provision as to paying annualrents, &c. in the event of a redemption, is no more than a paction *ut res sit inempta.* What strengthens my opinion is, that here there was no creditor who could demand his money.

KAIMES. I see the cloven foot: A severe creditor taking the advantage of a needy debtor. This is no more but a security, however expressed.

AUCHINLECK. We are always to consider *quid vere agitur*, not *quid simulate concipitur.* There was no occasion to give the creditor a power of demanding his money; for his interest must have prevented him from ever making the demand.