HEIR *CUM BENEFICIO.*

1699. *July* 31. JOHN DICK *against* Sir JOHN ERSKINE.

No 1.
The benefit of inventory found competent to every one who was in the state of apparency when the act was passed.

JOHN DICK, as a creditor to Sir Charles Erskine, pursues Sir John, as heir to his father, for payment.

The defender *alleged*; He was heir *cum beneficio inventarii*, conform to the 24th act, Parl. 1695.

It was *answered*; The act provides the benefit of inventory to heirs entering *inter annum deliberandi*; whereas the defender's father was dead several years before the act.

It was *replied*; The act bears, that for hereafter any apparent heir shall have access to enter by an inventory, allowing still to the apparent heir year and day to deliberate, in which time he may make his inventory; which year and day to deliberate must be understood year and day from the date of the act, where the heir's predecessor was dead before; because the privilege is given to every heir, and the year to deliberate is also competent to all, which falls in with the *annus deliberandi*, known in law, to such as should become apparent heirs thereafter; but, seeing the act was not limited to such as should become apparent heirs thereafter, and extended to all, the defender has the benefit of it.

THE LORDS found the defender had *beneficium inventarii*.

Fol. Dic. v. 1. *p* 361. *Dalrymple, No* 16. *p.* 19.

1704. *February* 1. BRUCE of Earlshall *against* The EARL of SOUTHESK.

No 2.
An heritor was succeeded by his eldest son, who survived him seven years, and died unentered. After the death of this appa-

ANDREW BRUCE of Earlshall died last vest and seised in these lands, about eight years ago, leaving Andrew Bruce his eldest son, and Mr Robert his second. Andrew having died in April 1703, unentered, Mr Robert raises brieves in January 1704, to serve himself heir to his father. Compearance is made for the Earl of Southesk and other creditors, to stop the service; and on application to the Lords, they name two of their number to be assessors to the macers; and

No 2.
rent heir, a younger brother having succeeded to the estate, offered to serve heir to his father *cum beneficio inventarii*. Found, that second or posterior apparent heirs have a year of deliberation, though the first had suffered it to expire without serving; and the service was therefore allowed to proceed.

on their report, a hearing in presence being allowed, it was *alleged* for Southesk, That Mr Robert cannot now seek the benefit of the act of Parliament 1695, by entering *cum beneficio inventarii*, because that act being an innovation of our old law, and by experience found hurtful to creditors, ought not to be extended; but so it is, that act allows them only to enter with that benefit within the year of deliberation for making up the inventory, and more than seven years are elapsed since Earlshall's death, who stood last infeft, and therefore he cannot enter to him by virtue of that act; neither is this any hardship, for if he will not represent his father, by entering simply to him conform to the old law, then he may abstain. *Answered* for Earlshall, That the *annus deliberandi* was introduced in favour of apparent heirs, and not to their prejudice; and though the year and day be long run out since his father's death, yet that was not his fault, seeing there was a *medium impedimentum* in the way, viz. his elder brother Andrew, who died but within these nine months; and if he made not use of the act of Parliament, that negligence cannot be imputed to Mr Robert, his younger brother, who, during his life, was not *valens agere*, and could not serve, and now within the *annus deliberandi* from his death he has taken out his brieves, and cannot be secluded; both the year of deliberation and the entering *cum beneficio inventarii* being borrowed by us from the Roman law, and there an apparent heir had thirty years *ad explorandas hæreditatis vires* before he was cut off by prescription, unless the creditors urged him by charging and doing diligence, *l.* 69. *D. de acquir. vel. omit.*; and in the succession to moveables, the nearest of kin may confirm themselves executors *quandocunque*, unless interpelled by creditors. And the reason of simple entering was from the feudal law, where the vassal could not burden the fee with debt without the superior's consent (as now it is in tailzied estates); but our customs having altered that, and subjected heritage to debt as well as moveables, it was most equitable the heir should have the benefit of an inventory, as well as an executor, and not be liable *ultra vires hæreditatis*; and lately, in the case of Sir John Erskine of Alva and his father's Creditors, No 1. p. 5329., the LORDS found the privilege of serving *cum beneficio inventarii* competent to him, although his father had died many years before the act of Parliament 1695, and consequently his *annus deliberandi* was long ago elapsed. *Replied* for Southesk and the creditors, That the *annus deliberandi* must run from the death of him who was last vest and seised, as appears by the 106th act 1540, seeing he is not serving heir to his brother, but to his father, who died many years ago; and if an apparent heir let a bond prescribe by not interrupting by the space of forty years, the second apparent heir cannot pretend he will yet interrupt, seeing he was *non valens agere* during his predecessor's life, and yet the negligence of the first will prejudge and cut off the apparent heir who is *in secundo gradu*; and if each apparent heir had a separate year of deliberation, this might confound and embarrass the diligence of creditors; for, suppose nine or ten brethren mutually succeeding one to another, if all of them claimed a year, when should creditors have access?

And Justinian seems to allow no more but one annual prescription to them all, in *l.* 19. *C. de jure deliber.*—THE LORDS, by plurality, found a second or posterior apparent heir had a year of deliberation, though the first had suffered it to expire without serving, and therefore allowed Earlshall's service to go on. No 2.

Fol. Dic. v. 1. *p.* 361. *Fountainhall, v.* 2. *p.* 217.

1708. *February* 11. MACKAY of Bighouse *against* SINCLAIR of Stempster.

No 3.
It was objected to a service *cum beneficio*, that although the inventory was made up within a year after the predecessor's death, the service was not expede till after the year. The objection was repelled. It was also objected, that though the inventory contained lands in one shire, it was made up before the Sheriff-clerk of another, and that it gave up a sum owing to the defunct only *in cumulo*, whereas the act requires that it should be full and particular as to the debts to which the heir is to succeed. The Lords sustained these objections, and found the heir liable in the debt due to the objecting creditor.

MACKAY of Bighouse pursues Sinclair of Stempster for payment of 4000 merks contained in his brother William's bond, to whom he is heir. *Alleged*, I am indeed his heir; but, conform to the late act of Parl. 1695, it is *cum beneficio inventarii*, and I am content to count conform thereto. *Answered*, You cannot have the benefit of the inventory, because your service as heir is without the year and day after your brother's death. *Answered*, All that the act requires is, that the inventory be made up within year and day, which was accordingly done.—THE LORDS repelled this objection. Then, 2*do*, it was *alleged*, The inventory is null, because it contains lands in Caithness, and yet it is made before the Sheriff-clerk of Mid-Lothian; whereas the act of Parliament precisely requires, that it be given into the clerk of the shire where the lands lie; and so he must be liable *in solidum* for the whole debt, as if there had been no inventory made, especially seeing it gives up *in cumulo* L 7400 owing to the defunct; whereas the law requires it should be full and particular as to the debts and sums whereto the heir is to succeed, without which special condescendence, it is easy for an heir to frustrate and elude the act of Parliament; for when he is pursued for intromitting with such a particular sum not given up in the inventory, he has a ready evasion, that it is included in the general sum given in upon inventory, and so could never be charged with omissions. *Answered* to the 1*st*, It is a new act, and errors in some punctilios at the first are venial, as was found in adjudging for the fifth part more, till it was prohibited by an act of sederunt; and that the being liable only to the value of the inventory is consonant to the Roman law, and founded on the same equity whereby executors with us had the same benefit; and Grotius thinks, the heir's obligation to his predecessor's creditors arises *ex quasi contractu*, from gratitude, and should not exceed the value of the subject he succeeds to; and *Voet. ad tit. Dig. de Jure Delib.* thinks small informalities should not forfeit the benefit of inventory, unless plain fraud appear, without which it were unjust to make him universally liable to all the defunct's creditors; and whereas he inserted some lands in Caithness therein, it was a pure mistake, for he might as well have put in the lands of Neufchatel in Switzerland; for he has no more right to the one than the other, they being evicted by the heir of conquest; and the inventory is fair and honest, if it mention the whole sums, for that comprehends all; and he