

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.

Fol: Dic. v. 1. p. 361. Fountainball, v. 2. p. 217.

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

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, *2do*, 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 *1st*, 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

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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 expedite 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.

No 3. defies them to condescend on any thing omitted beyond that extended sum.— THE LORDS thought this being a correctory law, and strictly to be interpreted, being much abused by sundry heirs, therefore sustained the objections against the inventory, and found him simply liable in the debt.

Fol. Dic. v. 1. p. 361. Fountainball, v. 2. p. 430.

* * * Forbes reports the same case :

IN the process at the instance of Æneas Mackay against James Sinclair of Stempster, for payment of 4000 merks resting to the pursuer by William Sinclair of Stempster, whom the defender represents as heir : The defender *alleged*, That he was served heir *cum beneficio inventarii*, and could only be liable *secundum vires*, according to the 24th act, Parl. 1695.

Replied for the pursuer ; The defender could not have the benefit of being only liable *secundum vires inventarii* ; because inventories were not made in the way and manner prescribed by the act of Parliament, in so far as, *imo*, They were only given in to the Sheriff-court of Edinburgh and recorded in the books thereof, albeit the defunct's heritage lies in Caithness, where, by the act of Parliament, the inventory should have been recorded. *2do*, The defender's inventory bears the sum of L. 7487 : 5s. to be due by the defunct by bonds, secluding executors, without condescending on the particular bonds and debts therein contained : Whereas the act of Parliament appoints the inventory to be full and particular as to all lands, houses, annualrents, or other heritable rights whatsoever, to which the apparent heir may, or pretends to succeed. For, when the extent of the defunct's debts is only mentioned in the inventory, the heir being charged as having intromitted with any particular debt, might, by pretending it was included in the total given up in the inventory, frustrate the design of the act of Parliament.

Duplied for the defender ; Any innocent error in making up the inventory cannot deprive him of the benefit thereof made in due time, seeing he cannot be charged as guilty of fraudulent omission or intromission, however the Lords may regulate the matter by an act of sederunt in time coming ; as was done in the case of adjudications irregularly led for a fifth part more, and other instances. *Vost comment. in Pandect. tit. de Jure Deliberandi*, N. 16. insinuates, that the benefit of inventory is lost only by the neglect to make inventory, and not by any informality in the upmaking thereof. As to the particular informalities condescended on by the pursuer, they are not of moment ; for, *imo*, An inventory is not annulled for not being made before the Sheriff, where the subject of it lies, when the subject of the inventory (as being conquest) could not fall to the defender who is heir of line, and never intromitted with it. Nor could inserting by mistake what belonged not to the heir serving, evacuate his benefit by the inventory formally completed as to other subjects ; more than if Poland

or Neufchattel had been insert in the inventory, seeing *utile per inutile non vitatur*. 2do, The words of the act, ' Full and particular as to all lands, houses, annualrents, ' &c. are to be taken *applicando singula singulis*, viz. full as to the extent, and particular as to the species or kinds, whether lands, houses, annualrents, &c. For as lands may go under a general designation, without mentioning every particular room, so heritable bonds are sufficiently demonstrated *relatione ad creditorem*, whereby any person having interest may have a sufficient view of the estate; and perhaps the heir knew not, at giving up of the inventory, who were debtors in the bonds.

THE LORDS refused to sustain the inventory founded on by the defender, to give him the benefit of being liable only *secundum vires*, in respect of the informalities thereof; and therefore found him liable simply as heir.

Forbes, p. 236.

1709. February 19.

AGNES CAMPBELL, Shopkeeper in Edinburgh against JAMES CAMPBELL of Burnbank.

In a cause at the instance of Agnes Campbell, against James Campbell of Burnbank, as served heir to Mungo Campbell his father, for payment of a debt due by him to the said Agnes Campbell,

Alleged for Burnbank; He ought to be assoilzied, because he is served *cum beneficio inventarii*, and the inventory exhausted by debts.

Answered; Burnbank cannot claim the *beneficium inventarii*, because inventories were not given up by him, in the terms of the act of Parliament, before the service.

Replied; *imo*, The service containing the special lands, to which the heir was served, is equivalent to an inventory. 2do, The act of Parliament requires no more than that inventories be given up within the *annus deliberandi*, before the heir intromit; as an executor decerned in moveables may safely confirm and give up inventory any time within the year. Inventories cannot always be given up at the time of the service, seeing, where lands lie in several shires, it is impossible that all the respective Sheriffs and Sheriff-clerks, who must subscribe the inventories, can be present at the service; and here inventories were made up, not only before the heir intromitted, or was cited by any creditor, but also before his service was completed by infestment. 3tio, By the civil law inventories may be made up after the service, *l. 26. C. de Jure Deliberandi*.

THE LORDS found Burnbank universally liable for the debt.

Fol. Dic. v. 1. p. 361. Forbes, p. 324.

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Beneficium inventarii not allowed to an heir who gave up inventories after the service, tho' within the *annus deliberandi*, and before he had any intromission, or was cited by any creditor, or infest on the service.