1711. *January* 11.

LORD and LADY ORMISTON *against* HAMILTON of Bangour.

No 5.
An heir served *cum beneficio*, may prevent an adjudication by assigning the inventory to the adjudging creditor, which he is obliged to accept of.

MY Lord and Lady Ormiston having obtained a decreet of constitution against Hamilton of Bangour, as heir to my Lord Whitlaw, his uncle, for L. 33,800 Scots, as a part of the L. 7000 Sterling bond given by Whitlaw to his Lady, they raise an adjudication of my Lord Whitlaw's heritable estate for that sum; and, in regard his heritage was not of that value, they offered to make it up out of the heir's own proper lands and estate; but the Lords finding he was minor, they would not allow his tutor to make any such offer that might tend to his minor's prejudice. The next allegeance was, he being served heir to his uncle *sub beneficio inventarii*, in terms of the 24th act 1695, where heirs are stated in the same privilege with executors, as the one can exoner themselves when pursued by assigning the inventory, even so may the other; and Bangour is willing to assign the subject contained in the inventory, by which the creditor had no prejudice; for, instead of an adjudication, which is a legal assignation, he gets a voluntary one, which is stronger; and the act expressly bears, that heirs shall have the privilege in the very same manner as use is in executry and moveables; and this exactly quadrates with the Roman law from whom we borrowed this. And Voet. *ad tit. de Jure Delib.* lays down this as a rule, 'Quod hæres creditoribus defuncti res ipsas hæreditarias possit pro debito in 'solutum dare, quoties numerata pæcunia in hæreditate non invenitur;' and it is a maxim in law, that 'quamdiu restat remedium ordinarium non est recurrendum ad extraordinarium,' so that the heir being willing to assign, no adjudication should pass to burden him with penalties, accumulations, and a fifth part more, to absorb and exhaust his paternal heritage. *Answered*, The act 1695, allowing heirs *beneficium inventarii* was a mighty alteration of our former law, whereby heirs served made themselves personally bound, whether the debt exceeded the heritage or not, because they had a year to deliberate on their hazard; but, for an alleviation, they are now by this act only liable to the extent of the heritage; and whatever good ends were designed by that act, yet experience has told us it has laid a foundation for heirs defrauding their predecessors' creditors; and so till it be rectified by the legislative power, it deserves no encouragement beyond its precise words and tenor. Now, though it equiparates the heir and executor thus far, that neither of them shall be liable *ultra vires*, yet it gives them no power to exoner themselves by assigning; and truly there is a great difference, for an executor is but *nomen officii* like an administrator and *curator bonis*, whereas an heir is *dominus et eadem cum defuncto persona;* likeas an executor finds caution, which the heir does not; and here bonds are offered where the debtors are insolvent; whereas, in adjudging lands, they must be purged of all incumbrances; and this being the first offer that has been made of assigning, to stop adjudging, is a novelty that may lead creditors into a laby-

rinth of trouble how to adjust the warrandice, and to appretiate the rights offered, which may be very little worth, and may occasion great wrangling and debate what shall be the form and stile of such assignations, which is yet unfixed and unknown.—THE LORDS, by plurality, found an heir served *cum beneficio* might offer an assignation to the inventory, as an executor may; and that the creditor is obliged to accept of it. But *quæritur*, if the subject assigned be incumbered by diligences, must not the debtor purge them ere the offer can be be received, in the terms of the 19th act 1672, introducing adjudications in place of apprisings? So this decision stopped the adjudication. No 5.

Fol. Dic. v. 1. *p.* 362. *Fountainhall, v.* 2. *p.* 624.

No 6.
An heir of line served *cum beneficio inventarii*, having no intromission with the defunct's estate but what was exhausted by payment of preferable debts, and being debarred from the rest by a competition for preference with the heir-male, was decerned to assign the inventory to the defunct's creditor, or to pay the debt due to him. See No 12. p. 5345.

1712. *November* 8.

JOHN VINT *against* The LORD and LADY HAWLEY and the EARL of DALHOUSIE.

IN the action at the instance of John Vint, as creditor to the deceased William Earl of Dalhousie, and William now Earl of Dalhousie, as representing the defunct; the pursuer insisted *primo loco* against the Lady as heir of line.

THE LORDS found, that the Lady being served heir *cum beneficio inventarii*, and having no intromission with the defunct's estate, but what was exhausted by payment of preferable debts, and being debarred from meddling with the rest of the estate, by a depending competition with the heir-male, she is not personally liable, if she assign the inventory to the pursuer; but decerned her either to assign or to pay the sum due to him. And accordingly a day was taken for her to produce a disposition.

Fol. Dic. v. 1. *p.* 362. *Forbes, p.* 629.

No 7.
A creditor of a defunct pursued his heir *cum beneficio* to assign the heritage in his inventory. Answered, he was obliged only to make the value furthcoming. Found that the heir must either pay or assign.

1724. *February* 5.

DOUGLAS of Cavers, and other Creditors of THOMAS PRINGLE, *against* WALTER PRINGLE, his brother.

THE defender was nominated and appointed sole executor and universal legatar in his brother's testament, and had served heir to him *cum beneficio inventarii.*

Cavers, and the other creditors of Thomas, upon his decease, obtained decreets of cognition before the Commissary of Peebles, and upon these they not only were decerned executors creditors to the defunct, made up inventories and confirmed the same, but they also pursued Walter for payment of their debts, as representing his brother *passive.*

The defender *pleaded* his service, as heir *cum beneficio*, in bar of this action, and the defence was sustained.