

1748. July 30.

RUTHERFORD.

It was found, upon a verbal report, that a sale might be pursued upon the act 1695, although the pursuer was served heir in general *cum beneficio*, he not being served in the lands. See No 23. *infra*.

*Fol. Dic. v. 3. p. 262. Kilkerran, (HEIR CUM BENEFICIO.) No 5. p. 240.*

No 21.

1749. July 12. SIR KENNETH M'KENZIE and his Factor, Petitioners.

No 22.

SIR KENNETH M'KENZIE of Grandvile, happening to be in Minorca when his brother Sir George M'Kenzie died without issue, as soon as he got notice of his brother's death, sent instructions to his friends in Scotland, to make up his titles in the proper manner, so as to save his person and proper effects from the defunct's debts. Accordingly inventories were sent him to be signed in order to his service as heir *cum beneficio*; but by certain disappointments, these inventories not being returned signed till the year was out, application was made in the name of Sir Kenneth and his factor for the authority of the Lords to the Sheriff to take in and record the inventories; which the Lords 'granted,' reserving to all parties having interest to object to the effect thereof as accords.

*Kilkerran, (HEIR CUM BENEFICIO.) No 6. p. 240.*

1751. February 27.

BLAIR, Petitioner.

PATRICK BLAIR, heir served *cum beneficio* to his brother Andrew Blair of Corbs, having pursued a sale as apparent heir, an act was pronounced by the Ordinary, before whom it came, in common form; and he now having applied by petition to the Lords, representing that the proof brought was not full, and craving a new diligence, a doubt was stirred on the Bench, How far it was competent for an heir served *cum beneficio* to pursue a sale as apparent heir; and precedents having been alleged for the pursuer, the case was deferred till this day, that the precedents might be condescended on.

Accordingly two precedents were found, one of the 14th July 1742, Robert M'Doual, second son to Ann Johnston of Kelton, and of John M'Doual of Logan her husband, against the Creditors of Robert Johnston of Kelton, (*See APPENDIX*), where, on the verbal report of the Lord Elchies, it was found, "That the said Robert M'Doual, disponee from his mother, who had been heir served *cum beneficio* to Robert Johnston of Kelton, her brother, was entitled to bring the subjects of the inventory to a sale on the act 1695;" which was a step further, as the pursuer was only assignee from his mother, the heir served. The other was likewise on the verbal report of the same Ordinary, no longer ago than on the 30th July 1748, (No 21. *supra*), when Andrew Ru-

No 23.

An heir *cum beneficio* may pursue a sale on the act 1695 as apparent heir.

No 23.

therford, merchant in London, as son and apparent heir of Robert Rutherford, brought a sale, as apparent heir to his father, of certain tenements in Edinburgh; and it being *objected* by the creditors, that the pursuer was heir served *cum beneficio*, and not apparent heir to his father, and so could not carry on the sale on the act 1695, the LORDS found, "That notwithstanding the pursuer was served heir in general *cum beneficio* to his father, yet it was competent to him to carry on the sale on the act of Parliament 1695."

The record of both which proceedings being produced in Court, the LORDS "Granted the diligence."

The greatest justice the heir can do to the creditors is to bring the estate to a judicial sale; and in Holland, where the entry of heirs *cum beneficio* is most frequent, the heir not only may, but must expose all the subjects of the inventory to public auction. Voet *ad Tit. De jure delib.* § 21.

*Fol. Dic. v. 3. p. 262. Kilkerran, (HEIR CUM BENEFICIO.) No 7. p. 241.*

No 24.

1752. July 21.

ROBERTSON, Petitioner.

ARTHUR ROBERTSON, apparent heir of William Robertson of Inches, represented to the Lords by petition, that he was resolved to deliberate, whether or not he would enter heir to his father, and craved that the Lords would ordain the Sheriff-depute of Inverness to inventory the writings, and transmit them to any of the Clerks of Session.

THE LORDS "refused this petition," as a novelty; every heir might ask the same thing, and every private party might ask the like, nor are the Clerks of Court bound to receive papers but in processes: Next, it would require an expense; and, Who was to pay it, if the petitioner should not enter?

*Fol. Dic. v. 3. p. 260. Kilkerran, (HEIR CUM BENEFICIO.) No 8. p. 242.*

1789. January 15.

JOHN SYME *against* DOUGLAS, HERON, and COMPANY.

No 25.

It is competent to prove resting owing by the oath of an heir served upon inventory.

GENERAL GORDON of Kingsgrange employed Mr John Syme, writer to the signet, as his agent. After the General's death, his heir made up titles *cum beneficio inventarii* to these lands, which were sold judicially.

In the ranking of the creditors, Mr Syme claimed a considerable sum for business done by him for General Gordon. As, however, before any demand was made, more than three years had elapsed from the date of the last article of his account, Mr Syme offered to prove, by the oath of the heir, that the whole was still *resting owing*.

Douglas, Heron, and Company, who were creditors to General Gordon, objected to this claim. And