

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

Pleaded ; An heir served *cum beneficio inventarii* is merely a trustee for the creditors of the ancestor, and so cannot be considered as the debtor, to whom, in virtue of the statute, 83d Parl. 1579, a judicial reference may be made. A contrary doctrine would be attended with very mischievous consequences, as it would thus be in the power of an heir, after possessing himself of the whole documents belonging to the ancestor, to rear up, in collusion with those who had been formerly creditors to him, many groundless claims.

Answered ; An heir served *cum beneficio*, although obliged, in accounting with the creditors of the ancestor, to conduct himself as a trustee, is truly proprietor of the ancestor's estate, in the same way as if he had made up titles without any limitation. In like manner, although he is not liable to the creditors of the ancestor beyond the value of the estate, he is still debtor to them ; and to his oath, therefore, a reference may be made in virtue of the statute of 1579. Where the claim, as in the present case, was unexpired at the ancestor's death, this is evidently just ; for the debt of the ancestor having been unpaid at his death, must be understood as still due, if not discharged by the heir.

THE LORDS were clearly of opinion, That so far as the claim had not undergone the statutory limitation at the decease of General Gordon, the allegation of resting owing might be proved by the oath of the heir, though served *cum beneficio inventarii*.

THE LORD ORDINARY had disallowed the claim.

But, after advising a reclaiming petition with answers, the COURT altered that judgment.

Lord Ordinary, *Anterville*. Act. *Dalzell*. Alt. *Blair*. Clerk, *Homa*.
C. *Fol. Dic. v. 3. p. 262. Fac. Col. No 55. p. 96.*

See CREDITORS OF A DEFUNCT.

See APPENDIX.