

No 7.

The pursuers afterwards *insisted*, That he should be ordained to assign the heritage contained in his inventories to them, effecting to their several debts.

To this the defender *objected*, That an heir *cum beneficio* was not obliged to assign the inventory, but only to make the value thereof furthcoming to the creditors, as was plain from the words of the act of Parliament 1695: And further, he *contended*, That whatever might be the fate of the general point, yet, in this case, he could not be obliged to assign to these pursuers, who were executors decerned and confirmed, and by the confirmation appeared to have subjects in their hands far exceeding the debts acclaimed by them.

It was *answered*, That the general point had been determined 8th November 1712, Vint against the Lady Hawley, No 6. p. 5335. where my Lady Hawley was expressly decerned either to assign or pay. And to the other part of the defence it was *answered*, That a creditor had power to affect all the subjects belonging to his debtor, for his security till payment: An arrestment could not hinder an adjudication, nor *e contra*, though the subjects differently attached should far exceed the debts upon which the diligences proceeded.

THE LORDS found, that Mr Pringle must either pay or assign.

Act. Ch. Areskine.

Alt. Wal. Pringle.

Clerk, Dalrymple.

Fol. Dic. v. 3. p. 261. Edgar. p. 22.

1724. July 4. MRS JANET SCOT *against* SIR ALEXANDER BURNET of Leys.

No 8.
Creditors of
an heir enter-
ed *cum beneficio*
inventarii,
are preferred
according to
their dil-
igence.

SIR ALEXANDER BURNET having entered heir *cum beneficio inventarii*, sold part of the inventoried estate to Mr Fergusson of Pitfour; in whose hands, as debtor for the price, an arrestment was laid by Mrs Janet Scot, one of the defunct Sir Thomas Burnet's creditors, and who had obtained a decret of constitution against the present Sir Alexander. She having thereupon insisted in a process of forthcoming, the defence offered for Sir Alexander Burnet was, 'That he being heir entered *cum beneficio inventarii*, was liable to the creditors 'in the value only of the inventory; and the inventory not being sufficient to 'answer all the defunct's debts, the arrester could only draw her share propor- 'tionally with the other creditors.'

In support of which it was *argued*, That the value of the respective debts must be calculated at the time of the heir's entering by inventory; if there be not sufficient fund for all, the several claims are so far *ipso jure* diminished, at least in so far as they relate to the heir, who by the law is protected from being further liable than to a limited extent; whence it was *urged*, that no diligence however in its nature preferable, could support a claim beyond that proportion of the inventory, which would fall to the user of the diligence, upon a just division amongst all the creditors. In consequence of this it was thought, that if an adjudication were leading against an heir who has entered *cum beneficio inventarii*, it would be competent to stop the adjudication, if the heir should offer

payment of the debt in proportion with the other creditors ; at least there behoved to be a reservation *contra executionem* in the decret of adjudication : And so *in executione, i. e.* in the division of the estate, the adjudger would only draw his share of the inventory, in proportion with the other creditors. *2do*, It was contended, That the arrestment in this case is not a habile diligence, more than in executry : The law is express, ‘ That the heir shall have access to enter to ‘ his predecessor *cum beneficio inventarii*, as use is in executry and moveables ;’ and it is certain, that no diligence by arrestment, whether of the subject of the testament, or of the executor’s proper effects, can any way afford a preference, or make that debt, which in prosecution against the executor, in concurrence with the other creditors, would have been but half or third, extend in the furthcoming to the whole debt. *3tio*, If creditors in this case were to be preferred according to diligence, it would give occasion to much fraud ; for the heir would have it in his power to prefer the creditors as he thought fit, by discovering the effects to some, and concealing them from others ; and by giving timely notice in order to use the first diligence, and a thousand artifices of that kind.

To the *first* it was answered, That the act of Parliament introducing the benefit of inventory in heritage, does not tie up the hands of creditors from doing diligence, more than where the heir enters without inventory : The act is likewise very far from diminishing the claims of the creditors *ipso jure* ; these stand equally good against the heir, as against the predecessor ; in proof of which, if neglecting or overlooking this privilege, the heir pay to any creditor his whole debt, though it may be far enough above the inventory, he will have no *condictio indebiti* ; which yet is always competent where one pays more than he owes. This act therefore does not affect or limit the rights of the creditors, but gives only a privilege or benefit to the heir, which, like other privileges, may be used or not at pleasure ; and it is only competent, after he has once made the value of the inventory furthcoming to the creditors, to protect him from being further liable : wherefore it is, that the defence should not be competent, as long as the heir has any share of the inventory still remaining with him, which he has not accounted for : And taking the matter in this view, it is evident that an heir *cum beneficio inventarii*, has no relevant defence against an adjudger, unless he can say, that the whole subject inventoried, or which is the same, its value is already applied to the payment of lawful creditors, who being before-hand with the adjudger in their diligence, have got payment, or at least established a *nexus realis* upon the subject, whereby the inventory is entirely exhausted. To apply which to the case in hand, since here is a part of the inventory not yet accounted for, *sciz.* the price of the land in Pitfour’s hand, in which Mrs Janet Scot, one of the creditors, has established to herself a preference by arrestment ; this part of the inventory must be made furthcoming to her, even suppose the question were with the other creditors, since she would have the first arrestment ; much more when the question is with the heir, who

No 8. has not the smallest title to make objections, as long as any share of the inventory remains unexhausted. To the *second, answered*, The defender will not profit himself by running a parallel betwixt an heir *cum beneficio*, and an executor; for it is certain, that in actions against the executor, one creditor may get the better of another, by the forwardness of his diligence: It is true that the executry cannot be arrested, but the reason of that is, because an executor is a common trustee for the benefit of all having claims upon the subject of executry, obliged to administer and do diligence for that end, but not personally liable to the creditors for their debts; whereas an heir *cum beneficio* is not a trustee, but a proper debtor, as much as where there is no inventory; with this only difference, that after he has made just count and reckoning to his predecessor's creditors, of all that belonged to his predecessor, the law *in favorem* has given him, as it were, a personal protection to be no further liable; but in the mean time, he is liable to all manner of execution, real and personal, horning, adjudication, arrestment, &c. which an executor is not, till he be personally decerned, as not being debtor but trustee: Indeed after he is personally decerned upon the only medium competent against an executor, *viz.* his intromissions with the executry, that decret may be put to execution in every shape against him and his goods; so that this argument is entirely inconclusive. *Answered to the third*, As to this matter, the creditors are in no worse situation with respect to the heir of their debtor, than they are with respect to the debtor himself; every man has it in his power more or less to favour particular creditors; and a creditor has no legal objection that he is not the favourite; Indeed, if he can allege fraud; if he can say, that by the collusion or deceit of the debtor, his co-creditor obtained the first diligence, this will be relevant; and this is all the safeguard any creditor can have from the nature of the thing, against the partial favour his debtor may bear to a co-creditor.

'THE LORDS found, that in this case the creditors are preferable, according to the diligence done on their respective debts.'

Fol. Dic. v. 1. p. 362. Rem. Dec. v. 1. No 49. p. 96.

* * Edgar reports the same case:

SIR THOMAS BURNET of Leys having contracted a great many debts, his son Sir Alexander, after his father's decease, entered into a transaction with most of the creditors, by which he obtained some easies of their claims; and thereafter he was served heir to his father *cum beneficio inventarii*, in terms of the act of Parliament 1695.

Mrs Scot, one of Sir Thomas's creditors, insisted in an action against Sir Alexander, and likewise used inhibition against him for his father's debt.

During the dependence of ths process, Sir Alexander sold a part of his father's estate, and Mrs Scot arrested the price of the lands sold, and pursued a forthcoming.

In this action it was *objected* by Sir Alexander, That he being heir *cum beneficio*, could only be liable to the extent of the heritage given up in inventory; and as it was certain, that if Sir Alexander had entered immediately upon his father's decease, without any previous transaction, the estate would not have paid four fifth parts of the whole debts, therefore the pursuer could not now draw more than she would have done at the time of Sir Thomas's death, had she then been in a competition with the other creditors.

In support of this defence, the following reasons were *insisted* upon, *imo*, That if creditors were to be preferred upon the subjects in an inventory according to their diligences, the heir *cum beneficio* would have it in his power to give any favourite creditor an opportunity of using his diligence exclusive of the rest, which would be a partial preference, and would disappoint the intention of the statute; and since the statute was designed for facilitating the transmission of the debtor's estate in favours of his creditors, it would be entirely disappointed, if an heir *cum beneficio* could make no payments, without calling the whole creditors in a multiplepointing, or in a process of ranking; that this statute was taken from the civil law, and therefore that law ought to be regarded in explaining any doubtful question. And by 22 l. *cod. de jure delib.* § 4, & 6, the heir might pay the creditors who came first, and such as afterwards applied could only have action for what they were entitled to from the nature of their debts, against the creditors who had got payment; which was a proof, that no creditor in the event could draw more than he could have done at the time of his debtor's death, or the entry of his heir. *2do*, By the statute, heirs *cum beneficio* are allowed to enter to their predecessors, as use is, in executry; in which, although the whole sum be libelled against an executor, yet a decret upon that libel is no more than a sentence of cognition, and no diligence upon it will entitle the creditor to more than his proportion of the subject of executry: And so it is in decreets against an heir *cum beneficio*, where a clause is always adjected, that the heir shall be liable *secundum vires*; which reserves the division, till such time as the heir brings the inventory into the field, and either agrees to make the distribution in money, or divides the subject by dispositions effeiring to the debts. *3tio*, An arrestment could not be a habile diligence to affect the price of the lands, and give the preference; because though the heir could sell, yet it would be absurd to say, that the sale should put it in the power of one creditor to carry off the price, to the disappointment of the rest; for suppose there were twenty adjudgers, all *pari passu*, and the lands were to be divided, they would get an equal share of them; must they not therefore get the same share of the price which came in place of these lands? They had all really affected the lands by their adjudications, and the purchaser was entitled to demand a conveyance of their rights in security of his purchase; but it would be unjust to oblige them to do this, unless they got their share of the price.

It was *answered* for Mrs Scot, That any debtor had an opportunity to point out to such of his creditors as he had a mind to favour, such subjects as they

No 8. might affect by diligence exclusive of others; but that never was found sufficient to overturn these diligences, neither could it be of such pernicious consequence to creditors, as it would be to indulge heirs *cum beneficio* to make up what schemes of debts they thought fit, and thereby exhaust the inventories, in prejudice of such creditors who had done farther diligence. The only privilege granted to heirs *cum beneficio* was, that they could be no farther liable than in the value of the inventory; notwithstanding whereof all manner of diligence is competent against them to the extent of the same, as much as against the debtor himself and his estate: Nor are all the particulars in the civil law adopted by our statute; before this statute creditors might do what diligence they pleased against the estate, which would have had its due effect, and neither the inventory nor sale could make any alteration in this respect; for the statute only secures the heir from being liable *ultra vires inventarii*.

It was further *pleaded*, That the parallel betwixt an heir *cum beneficio* and an executor did not hold in every respect: Executry cannot be arrested, because if it could, the executor would not be able to discharge his trust of gathering in the subjects, in order to make them furthcoming to the creditors; but this could not be the case with respect to heritage, because heritage is not considered as a perishable subject; neither can there any inconvenience arise from the creditors insisting for security or payment of their debts. In the case of executry, creditors are preferred according to their priority, excepting such who had used diligence within six months of their debtor's decease, who by special statute are brought in *pari passu*. And there is another very material difference betwixt an executor and an heir, that the executor is only trustee for the creditors, and not their proper debtor, and therefore no action is competent against him, but in consequence of his receiving the effects; whereas the heir is debtor to the creditors to the extent of the inventory, and the estate itself or its produce does consequently lie open to their diligence, so far as it will go; only when that is exhausted, neither the heir himself, nor any separate estate of his will be liable; and therefore every creditor is entitled to the proper effect of his diligence on the estate or its produce; but what that effect will be, must be determined according to the nature of that diligence compared with the diligence of the other competing creditors; and the heir can have no title to oppose this, it being *pariter* to him which of the creditors should be preferred, for he was only liable *secundum vires inventarii*.

THE LORDS found, that Sir Alexander Burnet could have no preference upon account of the debts for which he entered into contract with the creditors before his service *cum beneficio*; but that he must compete with the other creditors, according to the diligence done on their respective debts.

Reporter, Lord Polton. Act. Hay. Alt. Ja. Graham, sen. Clerk, Justice.

Edgar, p. 68.