

Answered; An adjudication of the faculty, and any settlements Mrs Crawford might make in the mean time, would be nugatory, if she should die before completing her titles by service, or by the mode now proposed, which cannot hurt Mr Coutts, as the estate will be adjudged *tantum et tale*, as it stands in her person. The case of Tyson is not collected, and seems to have passed of consent.

No 41.

Observed on the Bench; As Mrs Crawford is entitled to serve heir to her predecessor, the adjudication must be equally competent, and she ought to be at liberty to vest such a title in her person as may enable her to make a settlement.

THE LORDS, on advising minutes of debate, 'adjudged.'

Lord Reporter, *Swinton*.
Clerk, *Sinclair*.

For Mr Coutts, *Tait*.

Alt. *R. Craigie*.

D. D.

Fol. Dic. v. 3. p. 259. Fac. Col. No 71. p. 155.

SECT. V.

Privilege of selling the predecessor's estate by a public auction.

1733. February 28. BLAIR *against* STEWART.

THE privilege competent to apparent heirs by act 1695, to sell the predecessor's estate at a public roup, found competent, notwithstanding the pursuer had behaved as heir, and become thereby liable to all the debts of his predecessor. See APPENDIX.

No 42.

Fol. Dic. v. 1. p. 359.

1750. December 14. Sir JAMES HAMILTON Supplicant.

THE estate of Glenhove was sold judicially at the instance of the apparent heir, and purchased by Sir James Hamilton, who gave for it a sum exceeding the debts charged upon it; and having paid the creditors, and the residue of the price to the pursuer, applied for having his bond delivered up: Whereupon it was deliberated among the Lords, whether the heir ought to have taken the price without having made up a title, and what that title ought to have been.

No 43.

An apparent heir pursuing a sale of his predecessor's estate, needs not make up titles before he can receive the residue of the

No 43.
price, after
paying the
debt.

THE LORDS found the residue of the price, after paying the creditors, was rightly paid to the heir, and ordained the petitioner's bond to be delivered up.

Reporter, *Elchies.*

Clerk, *Pringle.*

Fol. Dic. v. 3. p. 259. D. Falconer, v. 1. No 172. p. 207.

1761. June 30. HEW M'KAILL *against* BROWN of Greenbank.

No 44.
The expense
of a sale by
an heir appa-
rent, upon
the act 1695,
must be paid
out of the
subject.

A SALE by an heir apparent upon the act 1695, was opposed by the only creditor who appeared, and whose debt amounted to a greater sum than could reasonably be expected for the subject. And for him it was *urged*, That if the pursuer, contrary to the interest of the creditor, was resolved to prosecute the sale, he should have no claim for the expense of the process, in case the price proved not sufficient to pay the debt. This point being reported to the Court, it was found, that the expense of the process must be paid out of the subject.

This judgment is not founded on the statute, which mentions nothing of expenses. Neither can the claim of expense be drawn as an inference from the statute; because the privilege is given to the heir apparent for his own sake, and not for the sake of the creditors. As little is the claim founded in equity; for the creditor here was not benefited, and *esto* he had been benefited, no man is bound to pay for a benefit he receives against his will.

Fol. Dic. v. 3. p. 259. Sel. Dec. No 182. p. 248.

* * * This case is reported in the Faculty Collection :

M'KAILL brought a process of sale of an estate belonging to his mother, as apparent heir. Brown, one of the creditors, opposed the sale, and *pleaded*, That the estate was totally bankrupt, and that, if the pursuer insisted in his process, it must be at his own expense.

Answered for M'Kail; That supposing the estate to be bankrupt, a sale at the instance of an apparent heir can be carried on more easily, and at less expense, than one at the instance of creditors: That the act 1695 is general, allowing apparent heirs to bring their predecessor's estates to sale, and by universal practice, they are always allowed their expenses out of the price.

THE LORDS repelled the objection; and found, that the expenses of the sale must be defrayed out of the subject.

For M'Kaill, *Geo. Wallace.*

Clerk, *Gibson.*

P. M.

Fac. Col. No 46. p. 99.