

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.*