

* n. 1. where an *Hor cum Beneficio* Inventory had sold part of the *Inventory* Estate; and a creditor of the predecessor had availed the price in the purchase; Had; In an Action of Forfeiting at the Instance of the Executor, It was pleaded for the Heir, that there not being sufficient Funds to answer all the predecessor's debts, the purchaser could only draw his share proportionably with the other creditors according to the value of the respective debts calculated at the time of the Heir's entering by Inventory, and the several claims are in so far as they are diminished, at least ^{in proportion as they are} the Heir, who by Law is protected from being further liable than to a limited extent, and no Debtor's bond or preferable, can support a claim beyond that proportion of the Inventory, which would fall to the share of the diligence, upon a just division among all the creditors, consequently an *Hor cum Beneficio* Inventory might stop an *Interdiction* credit against the Estate by offering payment of the debt in proportion with the other creditors; at least there is held to be a Reservation contra Executorem in the Decret of Jurisdiction, so as in Executions etc. In the division of the Estate amongst the creditors, the Heir could only draw his proportionable share of the Inventory. 2^o An *Interdiction* predecessor *Hor cum Beneficio* Inventory as it is in Execution and not in the Heir's hands, and no diligence by Arrestment, or other of the subject of the Testament or of the Executors proper efforts, in any way affect a creditor's force, or make that debt, which in a prosecution against the Executor in a competition with other creditors, would have been but a half or third, return in the forthcoming to the whole debt. 3^o If a creditor were in this case to be preferred according to diligence the Heir would have it in his power to prefer the creditor as he thought fit by discovering the effects to him, and concealing them from others and by giving timely notice, in order to use the first diligence, and many artifices of the like kind.

It was Answered for the Executor, 1^o The Law introducing the Benefit of Inventory in *Interdiction* has not up creditors from being diligences, more than when the Heir enters without Inventory. It is so far from diminishing their claims *ipso jure*, that they stand equally good against the Heir, as against the predecessor, since the Heir, if he neglects or overlooks this privilege pay to any creditor his whole debt, tho' it far exceeds the Inventory, will have no contradiction Indebiti, which is always competent to one paying more than he owes. The Benefit belonging to the Heir, which, as other privileges, may be used or not at pleasure is not competent so long as he hath any share of the Inventory unaccounted for remaining with him, but can only be after the Inventory is exhausted by payments made to creditors that he may be no further liable. So that he hath no Reservation against any creditor, unless he can say, that he hath already paid up the whole subject of the Inventory, to preferable creditors, or such as had at least established a *Nexus* Rights upon the subject. 2^o In Actions against an Executor one creditor may get the better by the forwardness of his diligence. It is true Executors cannot be arrested, because the Executor as a common Trustee is obliged to administer and do diligence for the benefit of all having claims upon the subject of Execution, and is not liable as debtor to any diligence, till he be personally decreed upon his having had Intromission with the Execution, in which case the Decret may be put to Execution in every shape against him and his goods, whereas an *Hor cum Beneficio* is not a Trustee, but a proper debtor liable to all manner of Execution Real and personal to the extent of the value of the Estate in the Inventory. 3^o Creditors are in no worse situation with respect to the Heir of the debtor, than they are with respect to the debtor himself; Every man having it in his power more or less to favour particular creditors: But if any creditor can say that his co-creditor by collusion with or deceit of the debtor, obtained the first diligence, that would be void and to hinder such a favourite creditor's preference, which is all the legal safeguard any creditor can have from the nature of the thing.

The Lords found that in this case the creditors are preferred according to the diligence done on their respective debts. 4 July 1724 Scot contra for Alexander Brunst of Coyos.