

1725. February 23.

AGNES and MARGARET CORSANS, and Mr PETER RAE, Husband to Agnes, for his Interest, against JAMES MAXWELL of Barncleugh, and ALEXANDER MACGOWAN, Writer in Dumfries.

THESE pursuers being served heirs *cum beneficio inventarii* to their great grandfather, grandfather, father and brother, all John Corsans of Meikleknock, insisted in a reduction against the defenders, of all rights granted to them by any of their predecessors, of or concerning the lands of Meikleknock.

The defenders produced a ratification, by John the pursuer's brother, of certain apprisings and other rights affecting these lands, together with a disposition by him to them of all right competent to him by or through the decease of any of his predecessors; and they contended, That the pursuers title to quarrel their rights was thereby excluded, in regard that they being served heirs to their brother John who had granted the writ, were obliged to warrant his deeds.

It was answered for the pursuers, That they were served heirs to John only *cum beneficio*, and therefore could plead against any right granted by him affecting the lands of Meikleknock, which belonged to their other predecessors, and to which their brother had no right, since he was neither served heir to any of them, nor had been three years in possession of the lands: That they were only liable for his debts and deeds to the extent of the inventory; and if the subjects given up in inventory should be found not to have belonged to him, then they were not liable for any deed of his with relation to that inventory.

Replied; That the pursuers, by serving heirs to John their brother, do, by the nature and genius of our law, represent him universally; and it is only by the act 1695 that there is this privilege given them, on account of their serving *cum beneficio inventarii*, that they shall not be liable to his creditors farther than the *vires inventarii*; but that privilege being correctory of the law, must be strictly interpreted: For which reason, however, the pursuers may protect themselves from being overwhelmed by their brother John's debts; yet since they do represent him, no reason can be assigned, why they may shake themselves loose of his deeds, not only to keep themselves *indemnes*, but likewise to quarrel rights which he, had he been alive, could not have challenged.

THE LORDS found, " That the disposition and ratification excluded the pursuers title as to the whole subjects contained in the ratification."

Upon advising a reclaiming petition with answers, 20th of January 1725, the LORDS found, " That though the pursuers' service *cum beneficio inventarii* to their predecessors, might defend them in any action on the passive titles, yet they were not thereby entitled to quarrel the ratification by their brother John, though he was neither served heir in general or special to any of his predecessors, nor three years in possession of any estate that might have belonged to any of them; and therefore adhered to their former interlocutor."

No 9.

An apparent heir granted to the creditors of his predecessor a ratification of apprisings at their instance, and disposition of the subjects appraised. Found that his heirs *cum beneficio*, could not insist in a reduction of these deeds upon the ground that the granter was neither served heir nor was three years in possession; but that reduction *ex capite fraudis* was competent to them.

No 9.

The pursuers reclaimed, and craved that the interlocutor last pronounced might be so explained as that it might not be understood to debar them from insisting upon any reasons of reduction competent to them against the deed granted by their brother John; particularly, *1mo*, That it was elicited by fraud; *2do*, That it was in prejudice of them as creditors to John, and of an inhibition used at their instance against him prior to the date of the deed produced; *3tio*, That they had a good and clear title to the estate in their persons, derived from their other predecessors, which was preferable to any right granted by John their brother, who died in a naked state of apparençy; so that any right derived from him to the estate of Meikleknock was reducible, as granted *a non habente potestatem*.

It was *answered*; That as to the two first reasons of reduction they were competent, being consistent with the pursuers service to the disponent, but that the third was over-ruled by the former interlocutors, whereby it had been found, that they could not quarrel John's deed of ratification.

THE LORDS adhered, reserving to compete upon any other right in the pursuers persons.

Act. *Ja. Boswell.*Alt. *Ch. Areskine.*Clerk, *Mackenzie.**Fol. Dic. v. 3. p. 261. Edgar, p. 179.*

No 10.

An heir entered *cum beneficio inventarii*, is obliged to communicate eases.

1725. December.

AIKENHEAD of Jaw *against* RUSSEL of Elrig.

THE present Thomas Russel of Elrig having served himself heir *cum beneficio inventarii* to his father, and given up inventories in proper form, entered into agreement with one Cowburgh, who was possessed of several adjudications upon the estate, above the value thereof; whereby Cowburgh accepted a part of the lands contained in the inventory in satisfaction of his debt, and discharged the remainder. Aikenhead of Jaw having right by purchase to a debt of 1000 merks, due by the deceased Russel of Elrig, insists against this Elrig, as heir served and retoured.

It was *alleged* for the defender, That he was heir *cum beneficio inventarii*, and that the inventory was exhausted, Cowburgh and his authors having adjudged for sums far exceeding the value. It was *answered* for the pursuer, That the adjudications were satisfied by the heir *cum beneficio*, out of the subject of the inventory, by payment of sums, or disposition of lands; which sums paid, or lands disposed, did not extend to the value of the inventory, and consequently could not exhaust it. The defender *replied*, That this was *jus tertii* to the pursuer, an heir *cum beneficio inventarii* not being obliged to communicate eases; and that it was sufficient to say, that Cowburgh's adjudications were exclusive of the pursuer's claim.