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 apparency; so that any right derived from him to the estate of Meikleknox 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 disponer, 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 disponed, 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.

No 10.

The question arising, If an heir *cum beneficio inventarii* is obliged to communicate eases? It was *pleaded* for the pursuer, That before the act 1696, cap. 11. diligences upon a predecessor's estate, acquired by the apparent heir, were redeemable by the creditors for the sums truly paid: But whatever reason there is with respect to apparent heirs, will equally obtain, that neither should heirs *cum beneficio inventarii* be allowed to clothe themselves with singular titles affecting their estate, to the exclusion of other creditors; and therefore it must be presumed, that as to this point the law has left heirs entering *cum beneficio inventarii*, upon the same footing they were before their entry. And truly were this otherwise, the act of Parliament, instead of being a new security to creditors, would afford an easier method for the heir to disappoint them than ever he had before: For heirs served *cum beneficio inventarii*, being best able to discover the condition of the debts, and the objections against them, would have the fairest opportunities to maintain vexatious suits against the creditors, and by purchasing in some preferable rights, to exclude all the rest. 2*do*, Heirs *cum beneficio* are in effect but *trustees*. What transactions they make, must accresce to the creditors, and disencumber the estate. This is clear from the words of the statute, ordaining, 'That the apparent 'heir shall have access to enter to his predecessor upon inventory, as use is in 'executries and moveables.' And it cannot be disputed, but an executor is a trustee, both for the inventory, and for the behoof of the creditors: And as such the LORDS have found, "That executors are bound to communicate eases to the other creditors, suppose such eases were given by the other creditors, out of respect and favour for the executor, 16th December 1710, Sir James Elphinston *contra* Anne Paton," No 17. p. 3853. And no imaginable reason can be assigned, if this is law in the case of executors, why it should not obtain in the case of heirs *cum beneficio*.

It was *answered* to the *first*, That no good argument can be drawn *ab incommodo*, to weaken the privilege given to apparent heirs by the statute, which ought to be interpreted benignly for them, and not so as to make the intention of the lawgivers wholly frustraneous; which would be, if heirs so entering were not capable of taking by the bounty of their father's creditors. Neither is the argument from the act 1661 of any force: For since it needed a special statute to oblige apparent heirs, getting eases, to communicate them, or (which is all one) that they should be redeemable upon payment of the sum transacted; why should that law be extended to give rule to a statute made thirty-four years after, when the statute itself is silent?

To the *second* it was *answered*, The case of executors does not apply. The pursuer wrests the words of the act, as in every respect an heir *cum beneficio* and an executor were similar; which is far from the truth. Where has the pursuer seen an heir served *cum beneficio*, finding caution? And is not the inventory in heritage to be given up in different records and different manner from that of moveables? As then in other things they differ, there is no reason

No 10. that, from the words above cited, they should be equiparate, in being obliged to communicate eases. The words are indeed only intended to bring a familiar example of the manner in which the service was to be perfected. As the pursuer's reasoning is not warranted from the words of the statute, neither is it from the analogy of the law. An heir and executor are perfectly distinct; an heir is by *succession*, not by *office*; an executor, by his very name, denotes an *office*, and the same as *administrator*. Should it then be granted, that an executor in every case were obliged to communicate eases, which is not proved by the decision, which was not in the case of an executor *qua* nearest of kin; it would be perverting the analogy of law, to draw an argument from an *office* to a right of *succession*, to make one a trustee who neither by name nor the nature of the thing, can be considered as such.

Beside the general point, the pursuer *urged* this argument, That the defender had not taken a conveyance of the adjudications, but only a discharge. Now, as he had not these adjudications in his person, he could claim nothing under them; and as heir *cum beneficio*, he could not dispute with any creditor, while any part of the inventory remained with him; at least not till he should show the value thereof exhausted by lawful debts.

In *answer* to this, it was *alleged* to be the same, whether an heir take an assignation or discharge. An assignation in the person of a debtor is virtually but a discharge, because *confusione tollitur obligatio*; so that the use of an assignation is not to make up a title, but the same with a discharge, viz. for a proof and evidence, the heir has discharged and satisfied so many of the debts for which there was credit upon him, to the value of the inventory; and if he can instruct so many debts are satisfied by him as exhaust the full value, whether the instruction be by his taking assignation or discharge, it makes no difference.

"THE LORDS found, That an heir *cum beneficio inventarii*, is obliged to communicate eases." (See the next case.)

Fol. Dic. v. 1. *p.* 363. *Rem. Dec. v.* 1. *No* 65. *p.* 125.

1727. *July* 6. AIKENHEAD *against* RUSSEL.

No 11.
An heir *cum beneficio* who had improved the estate, was made to account at the improved value.

AN heir entering *cum beneficio inventarii* to an estate over-burdened with debt, but having afterwards, by industry, considerably improved the same, disponed a part for payment of a preferable creditor, more than equivalent to the original value of the inventory. Being thereafter attacked by other creditors, the question arose, If he must be liable according to the present worth of the subject, or only for what it was at his entry? It was *pleaded* for the heir, That he was not trustee, but proprietor; that the creditors had no real interest in the subject of the inventory; that the inventory was only designed as a method to fix a certain value beyond which the heir should not be liable; and ac-