1736. *February* 17. ANNE MURRAY *against* CREDITORS of PILMURE.

No 15.
An heir *cum beneficio inventarii*, was found entitled to pay even real creditors the value of the estate, and resist a sale at their instance. But this was afterwards found erroneous, and it was fixt that he must submit to a sale of the estate, if the creditors chuse that method for their payment.

AN heir entering *cum beneficio inventarii*, brought an action for ascertaining the value of the land, concluding that the creditors, upon receiving that value, ought to disincumber the estate of their debts and diligences. On the other hand, the real creditors, who were infeft during the predecessor's life, insisted in a process of sale of the estate upon the statute 1681, cap. 17. These processes being conjoined, the defences made by the heir, were, 1*mo*, That, by the statute introducing the benefit of inventory, a privilege is given to the heir, to hold the estate upon payment of the value. The value comes in place of the estate; and when that value is made good to the creditors, they must disburden the estate of their whole debts, because they cannot have both the estate and the value. And to fortify this defence, it was urged, that upon an entry *cum beneficio*, the debts due by the defunct are *ipso jure* extinguished so far as they exceed the value; to which extent, and no further, the heir is liable. 2*do*, There is no foundation for a sale of the estate upon any of the acts of Parliament, seeing the heir, who is now proprietor, neither is nor can be bankrupt.

To the first, *answered*, The statute introducing the benefit of inventory, has only in view to protect the heir from an universal passive title, declaring that he shall not be personally liable beyond the value of the estate. From this indeed it follows, that if the creditors chuse to sue the heir for payment, they must accept the value, because the heir is no further liable personally; and if they receive the value, the estate must be disburdened of course. But if they forbear personal execution, the statute does not say nor insinuate, that the creditors are bound to accept this value. This is left to be determined by the common rules of law; and when that is the case, what room is there for maintaining, that a service with an inventory, can give the heir a more ample and unlimited right to the estate, than a service without an inventory? The infeftments granted to the creditors, were burdens upon the predecessor's estate; and the heir serving, with or without inventory, takes the subject *tantum et tale* as it was in the predecessor, burdened with the real debts. The debts once established upon the estate, must subsist until payment of the last shilling; unless the estate be brought to a public sale; which is the single case known in law, where a real creditor is bound to accept a proportion of the price. In short, the heir is put upon no better footing by the statute, than a debtor is, who has obtained from his creditors a discharge of personal execution, or than one is, who has a decree of *cessio bonorum*, or has the *beneficium competentiæ*. It is very true, the debts are restricted *quoad* the heir, he having, from the statute, a privilege of exception, to be free from personal execution upon paying the value; but this is perfectly consistent with his being *ipso jure* liable, which he is by representation: A personal exception against payment supposes the debts due; but to be free *ipso jure*, is saying, that there never was a debt, or that it is now

extinguished. The defender's doctrine would go hard with real creditors; if the debts, real as well as personal, be extinguished *ipso jure* so far as they exceed the value, the estate must always be sufficient to pay the remainder; which would be a monstrous injustice, by putting personal creditors upon an equal footing with those that are real. Besides, what becomes of the moveables upon this supposition? These must always be free to the next of kin, whatever become of the creditors. Nothing can be more absurd. No 15.

To the second, *answered*, 1*mo*, The heir who enters *cum beneficio* to an overburdened estate, is in the strictest sense of law bankrupt; for he is liable *ipso jure* to the whole debts, though he has a privilege to defend his person. 2*do*, *Esto* the heir were free *ipso jure*, that would not bar a sale. Let us suppose one purchases an estate, with a real incumbrance upon it, near the value; he is not personally liable to this incumbrance; and yet, if his proper debts exhaust the remainder, the real creditor may insist in a sale. Or suppose a man accepts a disposition with the burden of the granter's debts, which afterwards are found to exhaust the value; can it be doubted, that any of these creditors, after leading an adjudication, may proceed to a sale, though the debtor cannot be said to be bankrupt, when possibly he is not owing a shilling in the world? it is sufficient that the estate is bankrupt. And 3*tio*, Did there arise any doubt here upon the words of the bankrupt statutes, it would be a defect, which the Court of Session would supply from the spirit and meaning of these statutes. And indeed, why not a sale in this case, if it can be shown rather more necessary than in any other case that can be figured? Personal execution, which is a strong spur to the debtor, is wanting here; and there is the more necessity for other execution to supply that defect. And truly, it must appear exceedingly strange to suffer an estate to lie in *medio* for ever, leaving the creditors without hopes of payment, when the price might be sufficient to discharge the the whole debts, and possibly some reversion to the proprietor.

The Lords gave this question first for the creditors. But afterwards, upon a reclaiming petition and answers, it was found, upon the President's casting vote, 'That the creditors have no right to bring the estate to a sale; and that the heir is only liable to the creditors for the value of the estate as it shall be proved.'

Upon the authority of this case, several processes were brought at the instance of heirs served *cum beneficio*, and the Court beginning to demur upon the relevancy, the case was ordained to be pleaded in presence. And, upon 12th July 1738, 'They found the creditors have a right to bring the estate to a sale; and that they are not bound to accept the sum that the estate may be valued at upon proof.' The heirs of Sir Patrick Strachan of Glenkindy *contra* his Creditors, No 16. p. 5348.

Fol. Dic. v. 1. *p.* 363. *Rem. Dec. v.* 2. *No* 7. *p.* 13.