1742. *February 2.* COUTERALLERS *against* KILBUCKO.

[Elch., No. 4, *Heir cum Beneficio.*]

THE question here was, Whether an heir, entering *cum beneficio inventarii*, could quarrel the deeds of his predecessor when the inventary was exhausted? The *species facti* was this: The predecessor had disponed an estate, to which he was apparent heir, but had never made up titles, consequently the disposition proceeded *a non habente.* The heir, at the same time that he served *cum beneficio* to this predecessor, served likewise to a more remote predecessor, by which means he made up a title to this estate, which he now reclaims from the disponee, who makes this defence; that he cannot impugn the deeds of his predecessor. It was argued for the heir, that the main design of introducing the benefit of an inventary, both in our law and the Roman law, was to encourage heirs to enter, by securing their own estates, *ne quid ex sua substantia amittant.* For this reason it is, that, both by our own law and the Roman law, the heir, entering in that manner, kept up any debts due him by the predecessor, which were not extinguished *confusione* by the adition, but came in equally with the other debts; therefore, as the estate in question is the heir's estate, and never was the defunct's, if he is barred from reclaiming it, and obliged to warrant it to the disponee, he loses of his own proper substance, and is (contrary to the express words of the statute,) made liable to the debts and deeds of his predecessor *ultra vires inventarii.* *2do*, It is agreed* by all the doctors of the civil law, that, if the predecessor sold a thing which belonged to the heir, the heir entering *cum beneficio* could reclaim it, nor would the objection be competent against him, *Quem de evictione tenet actio, eum agentem multo magis repellet exceptio;* and this is the very same case, for it does not make any odds that the estate, at the time that it was disponed, did not belong to the heir, since it came to be his property afterwards.

To this it was answered,—*1mo*, That to be liable to the debts of the predecessor, and obliged not to quarrel his deeds, are two things extremely distinct: the law has only said, that an heir entering *cum beneficio* shall not be liable to the debts *ultra vires inventarii;* but, as to quarrelling the deeds of the predecessor, it has said nothing in that respect, therefore the common rules of law must take place, and an heir entering *cum beneficio* must be in the same case with other heirs. *2do*, As to what is said, that the estate never was the predecessor's, that may be true according to the rigour and subtlety of our law; but it is likewise true, that he had at least a title of possession; that, during his life, nobody else had a right to it; that he only wanted to have completed that right according to the forms required by our law; and that it was by and through his death that the heir ever came to have a title to it, though he connected his right with another: that estate, therefore, cannot be said altogether to be the heir's, which, by the common law, and by the principles of natural

* By the Roman law, an heir was only liable to warrant the defunct's deeds, *pro parte hæreditaria.* See *L.* 14, *Cod. de Rei Vind.*; *L.* 6, *Cod. de Hæred. ad. et Sand's Decis. Fris, L.* 4, *tit.* 9, Def. 4.

equity, though not by the subtlety of our law, belonged to the defunct. *3tio*, The example from the Roman law will not apply to this case, which never could have existed according to the principles of that law.

To this it was REPLIED,—That there does not appear to be any difference at all betwixt being liable to the debts, and obliged not to quarrel the deeds of the predecessor, since the obligation not to quarrel is founded upon the obligation to warrant, which is a debt as much as any other.

The Lords found, that the heir could not quarrel the disposition made by his predecessor. It carried narrowly. *Dissent. Elchies.*

November 17. This interlocutor was altered, by a great majority, against the President, Arniston, and Drummore.

In this case there were several other points determined worth noticing: *1mo*, That a person serving heir to a remoter predecessor was not liable to the gratuitous debts and deeds of the interjected predecessor, because the statute 1695 was intended for the relief and security of onerous creditors. This was before decided in the case of *Clydesdale* against *Dundonald*, 1726. *2do*, The Lords found that a service as heir-male, or heir of line, in general, does not carry a provision in a contract of marriage to the heirs of that marriage, but that the same devolves to the next heir of provision; because there may be heirs of a former marriage, so that the heirs of that marriage may be neither heirs-male nor heirs of line in general. This was determined the same way in a late case, *Edgar* against *Maxwell*, in which the Lords likewise found that an heir of provision, by a contract of marriage, who is thereby put under no limitations or restrictions, being at the same time heir to the estate by former settlements, may, if he pleases, neglect the provision in the contract, and make up his title to the estate directly upon the former settlement thereof, after which no substitute, by the provision in the contract, can, by taking up that title, impugn the deeds of that first heir, who made his election betwixt two titles that were equally competent and open to him, and, on pretence of the neglected title, disquiet his successors or disponees.

1742. *February* 9. ALEXANDER BLAIR *against* PRESBYTERY of KIRKCUDBRIGHT.

THE defunct James Blair of Senwick disponed and mortified to the Presbytery of Kirkcudbright, for the use of the poor of twenty-four parishes, 15,000 merks, to be raised and made effectual out of the readiest of his effects at his death; which sum he obliged himself, his heirs, executors, and assignees, to pay at the first term after his death, under a penalty, with interest during the not-payment; and, for further security, he assigns to the trustees all his debts due, or that shall be due to him at his decease, and particularly certain debts there mentioned, amounting to the sum of 20,000 merks. To these provisions is subjoined a clause, that if his means and estate, hereby disponed, shall fall short, or exceed the sum of 15,000 merks, in that case each of the parishes shall suffer a defalcation or addition proportionally; after this