1738. *July* 12. The HEIRS of STRACHAN *against* his CREDITORS.

No 16.
Creditors of a defunct can bring the estate to sale, and are not bound to accept of the value of it from the heir *cum beneficio.* See No 15. p. 5346.

IT had been once and again found, (No 15. p. 5346.) that where an heir was served *cum beneficio*, the creditors were not entitled to bring his predecessor's estate to a sale, and that the heir was only liable for the value of the estate, as it should be proved.

But the like question again occurring between the above parties, it was found that the creditors have right to bring the estate to a sale, and are not bound to accept of the value from the heir *cum beneficio ;* and that the same day the like judgment was given in another case, Crawford *contra* Young.

There is much to be said for either side of this question, but it is scarcely thought that the Court will now recede from this last judgment.

Fol. Dic. v. 1. *p.* 363. & 3. 261. *Kilkerran,* (HEIR CUM BENEFICIO.) *No* 1. *p.* 239.

1738. *November* 28.

LAWSON *against* UDNY, &c. Creditors of M'Dougal of Crichen.

No 17.

FOUND, that the priority of the citation given to, or even decree obtained against an heir served *cum beneficio inventarii*, gives no preference; but that the creditors must be ranked according to their diligence affecting the subject.

Kilkerran, (HEIR CUM BENEFICIO.) *No* 2. *p.* 239.

*** Lord Kames mentions this case thus:

AN heir *cum beneficio* having ascertained the value of the inventory by a process, the creditors of the defunct took decrees against him, one after another, in the following general terms, 'finding him liable to the extent of the value 'of the inventory, and decerning against him *secundum vires inventarii.*' And they being all called in a multiplepoinding, the LORDS found that the priority of citation or decree gives no preference, but the whole subject being in *medio*, the creditors must be ranked according to their diligences affecting the subject. In this case the Lords could not find otherwise, because there was no decree taken against the heir for a liquid sum, but only a decerniture to pay *secundum vires inventarii*, which was no better than a decree *cognitionis causa ;* but it would admit of a different consideration had decrees been taken against the heir, obliging him personally to pay the sums therein mentioned, upon the medium that he had in his hands of the value of the inventory sufficient to answer their claims. Such decrees, with regard to other creditors afterwards putting in their claim, would be equivalent to payment. The heir would be allowed to state these prior decrees as articles of exhaustion; for what in all events one must pay, may be held as payment with regard to third parties. See No 19. p. 3141.

Fol. Dic. v. 1. *p.* 362.