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.

*** This case is also reported by Clerk Home :

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ISAAC LAWSON, &c. being creditors, by personal bonds, to the deceased Crichen, intented a process upon the passive titles against his eldest son, heir served to him *cum beneficio*; the citations were dated in May and June 1735; and, in the December following, the defender was found liable to the extent of the value of the inventory, and decerned against *secundum vires inventarii*.

After this, in the years 1736 and 1737, Udney and others, also personal creditors of Crichen, insisted in the like actions against the heir, who, in order to ascertain the value of the subjects, &c. raised a declarator and multiplepoinding, in which the creditors were called to dispute their preference.

For Lawson, &c. it was *urged*, That they having cited and obtained decreet against the heir, before any step of diligence whatsoever was used by the other creditors, they ought to be preferred to them. In support whereof it was observed, That wherever creditors could not recover their whole payment, it was a rule in determining competitions amongst them, That *vigilantibus jura subveniunt*; and where they were in other respects in equal circumstances, the priority of diligence determined the question; the preference given to a first apprising, poinding, arrestment, confirmation by an executor-creditor, and first sasine, being all proofs of this proposition; and the statutory exceptions were a confirmation that such was the rule of the common law. 2*do*, Where the competition is upon a particular subject, and which is affectable by the creditor's diligence, there the preference must depend upon their diligence against the subject; seeing no personal diligence against the debtor can have any direct influence in the competition, for this obvious reason, that the debtor is universally liable to each of the creditors, and no personal diligence used against him can make him more liable than he was by the original constitution of the debt; consequently, such personal diligence cannot work any prejudice to the other creditors, who, without any, have the debtor bound to pay their whole debts; and therefore, in such a case, it is only such diligence as affects the debtor's estate, real or personal, and which is the subject of competition amongst the creditors, that can give a preference to one creditor before another. But, 3*tio*, Where the debtor's obligation is limited, where he is liable to the whole creditors to a certain extent, and, when he has paid that sum, he is free from his obligation to the other creditors; and where, upon paying a certain sum, he may liberate his estate, though of greater value; there the only diligence that can be used, is such as is personal against the debtor; consequently it must be the only rule of determining the preference. To apply this to the point in hand, an heir *cum beneficio* is not universally liable to his predecessor's creditors, he is only so to the extent of the inventory; and therefore there may be a competition upon his personal obligation. And, as he becomes free of this upon payment, and the diligence of creditors becomes thereby extinct, therefore

No 17. their preference must depend upon their diligence personally against the heir, seeing it is only upon his personal obligation to pay the value of the inventory that their competition and preference can be established. As this doctrine seems to be founded in the nature of the thing, so it is agreeable to the genius of the common law, which we have followed, in the statute 1695, allowing a service by inventory; the rule whereof is laid down in *l.* 22. § 4. *et seq. Cod. De jure delib.*; the words are, That heirs entering *cum beneficio, in tantum hæreditariis creditoribus tenentur, in quantum res substantiæ ad eos devolutæ valent, et iis satisfacient qui primi veniunt creditores; et, si nihil reliquum est, posteriores venientes repellantur*; from which, it is plain, the heir *cum beneficio* was bound to pay *primo venienti*, whereby he was free from the after creditors, who lost their debts, unless they had from the defunct a real right in his estate; the consequence of which was, not that they could bring a claim against the heir who had paid the value of the inventory, but that upon a real right they had action against the personal creditors who had received the value; but, if those that were negligent were but personal ones, there was no remedy, they neither had a claim against the heir, nor against the creditors who had been more timeous. In short, the subject of the competition can only be the heir's personal obligation for the value of the heritage; and, as the only diligence for affecting this must be personal against the heir, the first citations must be such diligence as ought to give them who used these a preference. Such appears also to be the law with respect to the preference of creditors, upon the value of a defunct's moveable estate confirmed by his executor; the simple citation of whom, within six months, gives a preference to all those who use no diligence in that time. But, supposing it were otherwise, and that the same rule held with respect to a citation given to an heir, yet here Lawson, &c. have gone somewhat further; they have also obtained decreets against the heir, whereby, as their sums do not exceed the value of the heritage, they have established their right upon his obligation for the value, and this before any action was brought against him by their competitors; therefore he ought to have paid their debts; and his neglecting to do so ought not to prejudge them; but the case should be considered as if they had actually received payment.

On the other hand, it was *argued* for Udney, &c. That, by the statute 1695, nothing more was introduced than a limitation of the several creditors of the defunct, to the extent of the value of the inventory, in a question with the heir so served, their claims not being thereby altered, but restricted; so that, if the subjects were exhausted by real debts affecting the estate in the person of the defunct, the personal creditors could get nothing; and, if they were all of that class, then their respective debts fell to be abated proportionally to the deficiency of the fund for their payment; consequently, decreet behoved to go against the heir for those restricted debts, whereupon all manner of diligence might issue against him, whether for affecting his person or estate, heritable or moveable, as well the subjects of the inventory, which absolutely belonged

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to the heir, as those that pertained to him in his own proper right. Indeed, if he omits to sist any of the personal creditors, they who first intent action may recover payment from him; in which case, those who supervene, will only have repetition from the other creditors proportionally, as these others, who have received more than a due share of their debts compared with the value of the estate; therefore all the creditors who are in the field may recover decreet for their whole sums, if the value of the inventory will answer, or proportionally to the extent of the same. Hence it would seem, that the first citations give no preference, and that decreets on the passive titles against the heir, can only entitle the obtainers to sue personal or real diligence against him, whereby they will be preferable upon the estate, according as they have affected the same, in like manner as if they were original creditors of the heir, which is exactly conform to the 22d law referred to, whereby, though the heir may safely pay to the first comer, whether creditor or legatee, they being always liable in repetition to the other creditors proportionally to their rights and preferences, yet it does not give the least hint that a citation at the instance of one creditor could give him any advantage over the rest who compeared with him in judgment while the subject is in the field. And it is a mistake to say, that the citation of an executor within six months is preferable to one thereafter, seeing it is only payment upon decreet that can avail for an exoneration to the executor, or exclude the creditors who supervene, as was lately determined in the question between James Graham and Mrs Murray, No 18. p. 3141. Neither ought the argument drawn from the brocard, *jura vigilantibus subveniunt*, to have any influence, seeing a vigilant creditor can have no more indulgence than the law allows him. One that throws his debtor into goal upon personal diligence, will not thereby have preference upon his estate; and much less then can a simple citation in a personal action have that effect. But there is one instance upon this head which defeats the very foundation of the plea of those diligent creditors; it is the provision in the statute 1661, cap. 24. that the creditors of a defunct shall be preferred to those of the heir, providing they use diligence for affecting the same within three years of the debtor's death, and which, by practice, is understood of complete diligence; a law which has received no variation from the act 1695; consequently it is absurd to argue, that a simple citation, in a personal action against the heir, shall affect or exhaust the heritage, in preference to others who have either not cited at all, or used posterior citations.

The Lords found, That the creditors of the deceased Patrick M'Dougal of Crichen have no preference on account of the priority of the citations, or of the priority of the decreets of constitution.

C. Home, No 104. *p.* 166.