No 8. 1740. *December* 19. LORD NAPIER *against* MENZIES.

ONE who is creditor to a defunct either originally or by assignation, or by having made payment on a discharge which entitled him to relief, afterwards confirming executor *qua* nearest of kin, has the same preference as if he had confirmed upon his debts as executor creditor, his confirmation being in the one case as in the other, considered as a proper diligence for his payment or relief; nor does it vary the case, in so far as concerns the cautioners in the confirmation, that the said executor is also heir; for although as heir he is universally liable, yet his cautioners in the testament are only bound for him as executor, for what remained unexhausted of the testament over his own debt.

Fol. Dic. v. 3. *p.* 192.

*** *See* this case, No 31. p. 3849.

No 9. An executor intromitted, but did not confirm till after six months. A creditor within the six months cited the intromitter. This creditor found entitled to no preference, none of the creditors of the defunct having been confirmed, or having used other complete diligence against his representatives, in terms of the act of sederunt 1662.

1742. *February* 19. M'DOWAL *against* The Other CREDITORS of M'DOWAL.

IT had grown into practice, in rankings upon executry, to give preference to a creditor, who, within six months of the defunct's death, had cited an intromitter, or an executor confirmed, without distinction whether the executor was confirmed *qua* creditor to the defunct, or *qua* nearest of kin, to the diligence of all other creditors used after the expiry of the six months. And in a multiplepoinding at the instance of Charles M'Dowal, now of Crichen, who immediately after his father's death, had intromitted with his moveables, but who within the year, though after the expiry of six months from his father's death, had confirmed himself executor nominated, and thereby purged the vitiosity, preference was, agreeably to said practice, *pleaded* for Colonel M'Dowal to all the other creditors, in respect he alone had, within six months of the defunct's death, cited Charles the son as intromitter with his father's effects.

But, upon considering the terms of the act of sederunt 1662, the said practice appeared to be erroneous; for it is only thereby provided, 'That where any 'creditors have done complete diligence, by obtaining themselves decerned and 'confirmed executors-creditors, or otherwise, any other creditors who shall, 'within six months of the debtor's death, use diligence, either by citation of 'such executor, or of an intromitter, or by obtaining themselves confirmed ex-'cutors-creditors, shall come in *pari passu* with those who had used the more 'timely diligence;' and, it appeared plain, that where no other creditor has done complete diligence, a citation to an intromitter falls not within the act: It was therefore found, 'That none of the creditors of the defunct being confirmed executors to him, nor having used other complete diligence against his

representatives, the act of sederunt 1662, did not entitle Colonel M'Dowal to any preference, notwithstanding his having cited the intromitter with the defunct's effects within six months after his death.' No 9.

And the like question having, about the same time, occurred in the ranking of the creditors of the deceast John Johnston in Dumfries, wherein Richard Dickerson pleaded preference to the other creditors, in respect of a citation given by him, within six months of the debtor's death, to the executor confirmed *qua* nearest of kin, the LORDS, upon the 21st July 1742, pronounced the like judgment: 'Finding him entitled to no preference, notwithstanding such citation, in respect none of the defunct's creditors had confirmed executors to him, or had used other complete diligence against his representatives.'

N. B. Where an executor *qua* nearest of kin is himself a creditor, as it has been found, that his confirmation *qua* nearest of kin gives him the same preference for the debts due to himself, as if he had confirmed executor-creditor; *See* Dec. 19. 1740. *voce* EXECUTOR, Lord Napier and Others *contra* Menzies and his Cautioners, No 31. p. 3849.; it would seem to follow, as a consequence of that judgment, that in such case, the citation to such executor *qua* nearest of kin, within the six months, would operate a preference *pari passu* with the said executor, to all other creditors doing diligence after the six months. *See* PAYMENT.

Fol. Dic. v. 3. *p.* 192. *Kilkerran*, (EXECUTOR-CREDITOR.) *No* 1. *p.* 176.

*** This case is reported by Lord Kames, No 19. p. 3141.

1757. *July* 16.

MRS MARY STEWART and her Husband *against* ALEXANDER Lord LINDORES. No 10.

An executor-creditor, like an executor-dative, being a trustee only, is not liable to the risk of goods perishing or falling in their apprised values, but is bound to dispose of them by auction, and to account for the price.

IN the year 1721, Alexander Stewart, son to Lady Lindores by her first husband, having right from his mother to a provision of 10,000 merks contained in her contract of marriage with David Lord Lindores her second husband, brought a process against Sir Alexander Anstruther, who succeeded to the estate of Lindores by a deed of settlement, for payment of this sum. Sir Alexander granted an heritable bond of corroborration; and having thereafter sold the estate to the present Lord Lindores, took the purchaser bound to relieve him of this among other debts.

The Representatives of Alexander Stewart brought a process anno 1743 against the present Lord Lindores, founding upon the said clause of relief, and concluding, that he ought to pay this sum. The defence was, that the Lady Lindores being confirmed executrix to her husband David Lord Lindores, got his moveables apprised at very small values; that she sold these moveables at a higher value than they were apprised at; and that the pursuers in her right were accountable for the balance. The Lord Ordinary, before answer, directed a