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