No 29. the inventory not intromitted with, or to shew diligence against the debtors, but only *cedere actionem* to another creditor or nearest of kin.

they may be satisfied of their own debt; as to any superplus of the inventory, they are only obliged *cedere actionem*, to the effect any other creditor, or nearest of kin, may pursue.—It was *replied*, That all executors, finding caution to make furthcoming the inventory, are alike obliged to account for the same, or to show diligence; and if it were not so, executors having the only title to pursue debtors, and so hindering all other creditors or nearest of kin to pursue, in law and reason they ought to do diligence against all debtors; and if they become insolvent *medio tempore*, it is just that they should be liable.——The Lords did sustain the defence, and found, That where there was no executor nominate or dative confirmed, that creditors were necessitated to confirm only *ad hunc effectum*, that they might have a legal title in their person to pursue for payment of their own debt, and that whensoever they were paid, any other creditor or nearest of kin might force them *cedere actionem*, which was an ordinary remedy in law against their further intromission; that therefore they should not be liable to do diligence as to the superplus of the inventory more than paid their own debt. And in this process there being produced contrary practics; one in anno 1667 against the executors-creditors, finding them liable to do diligence in a case Bisket against ——*, and Hog against Niven, *voce* Implied Discharge and Renunciation, where it was found, that executors having no benefit but *medium officium*, they were not obliged to pursue the debtors upon their own charges, but it was sufficient to assign; the Lords having reasoned long amongst themselves, and resolving to make this a practic in future, decerned *ut supra*.

Fol. Dic. v. 1. *p.* 240. *Gosford, MS. No* 381. *p.* 189.

No 30.

1673. *January* 21. Forbes *against* Forbes.

A man having left a legacy of 1000 merks out of the rents due by his tenants, the executor was found liable to have done diligence against the tenants within the year, when the hypothec remained upon the goods.

Fol. Dic. v. 1. *p.* 240. *Stair.*

*** *See* This case, No 14. p. 2263.

1675. *December* 14.

Cecil Thomson, and John Haliburton her Spouse, *against* Ogilvie, and John Watson her Spouse.

No 31. An executor obtaining payment, but doing no diligence,

The said Cecil, as executrix confirmed to Henry Thomson her brother, did pursue the said Grizel Ogilvie, as executrix to David Thomson her husband, for payment of the sum of L. 5000 left in legacy to the said Henry. It was

* Examine general List of Names.

alleged, That the defender, being only pursued as executrix, and having only done diligence against the debtors of the said Thomson who left the legacy, all she was bound in law to do, was to assign, or to do diligence, that the pursuers might recover payment. It was *replied*, That any diligence done against the debtors being only by obtaining decreet, and no execution used for many years after the decreet, the debtors were now insolvent, so that the pursuer was not obliged to take an assignation; but the defender is liable for suffering the debtors to become insolvent. It was *duplied*, That the executrix obtaining a decreet against debtors, constituting the debt against them, who, at that time, were repute to be solvent, the executrix was not obliged farther to execute the same; and they ought to be presumed to be now in no worse condition.—THE LORDS did find the executrix liable, notwithstanding she had obtained decreet, for not executing the same, unless she could prove, that, the time of the decreet, the debtors were bankrupts, and had no estate that could be recovered.

No 31. was found liable, unless he would prove the debtor was insolvent at the time of the decree.

Fol. Dic. v. 1. *p.* 240. *Gosford, MS. No* 817. *p.* 515.

1679. *February* 7. PEARSON *against* WRIGHT.

No 32.

IN the case of Pearson of Kippenross against one Wright, the LORDS found an executor-creditor liable to do diligence for recovering what he had confirmed, yea as exact as other executors, who are bound the length of a registrate horning. And this the Lords resolved to make a precedent for their constant decision in the like cases hereafter.

Fol. Dic. v. 1. *p.* 240. *Fountainhall, v.* 1. *p.* 41.

*** Stair reports the same case:

JAMES PEARSON of Kippenross, as assignee by James Buchanan to the sum of L. 300 due by James Sinclair, obtained decreet against James Wright as executor to Sinclair. Wright suspends, on this reason, that he is but executor-creditor, and therefore is only obliged to assign, but to do no diligence. It was *answered* for the pursuer, That though executors-creditors have not been holden to do the most exact diligence for recovering the defunct's debts, yet, in this testament, there being confirmed the defunct's moveable goods, which are perishable, and which are presumed to have been possessed by the executor, so that, without necessity of diligence, he must be liable for the superplus of the moveables more than pays himself;

Which the LORDS found relevant, unless the executor condescend and instruct how he was put from the possession of the moveables; for, if testaments do not instruct against executors confirming, that the goods in inventory were existent, upon which they make faith, the interest of creditors, wives, and bairns