

S E C T. IX.

Nimious Diligence.—Diligence of Liferenters.—Diligence of Indorsees.

No 74.

A man having suddenly perished at sea, and another, who was his creditor, getting himself within fourteen days confirmed executor-creditor, this was found nimious diligence, and the decree dative was reduced at the instance of the defunct's son, with concurrence of the other creditors; but the Lords declared, that they would have consideration as effiered of the defender's diligence, and what preference he should have thereby.

1631. *March 26.*

WINRAHAM *against* WILLIAMSON.

UMQUHILE Thomas Williamson dying by storm upon the sea, the ship and his whole goods having perished, immediately after the word thereof came to Scotland, Gilbert Williamson is confirmed executor to him, to be paid of his own debt, and thereby the said Thomas his other creditors being prejudged, if he should be paid totally of his debt. The son of the said umquhile Thomas, being his only bairn, pursues reduction of that decret-dative decerning him executor, because he, being nearest of kin, craved to be preferred; and the defender alleging, that his confirmation could not be reduced, except that the son would offer him payment of his debt, for the which only he was confirmed executor, which being done, he was content to renounce the office, or that it should be reduced.—THE LORDS found, that seeing the rest of the defunct's creditors assisted this pursuit of reduction, and that the defender had used *nimiam diligentiam*, by confirming himself executor within 14 days after the rumour of the death of the common debtor, and that the term of payment was not then come, the party having died, and perished with most of all his goods, by God's visitation by storm, and not by any fact or misgovernment of his own as a bankrupt, therefore that the defender's testament should be reduced, and ordained the defunct's son to be confirmed executor, to the effect he might be countable to the whole creditors proportionably for their debts, for which they ordained him to find sufficient caution; and in disputation amongst the creditors. THE LORDS declared, that they would have consideration as effiered of the defender's diligence, and what preference he should have thereby.

Act. *Mowat.*

Alt. *Burnet.*

Clerk, *Gibson.*

Fol. Dic, v. 1. p. 243. Durie, p. 586.

1666. *June 22.*

The LADY MILNTOWN *against* LAMINGTON.

No 75.

IN a pursuit at the instance of Lady Milntown, and her husband for his interest, which Lady was formerly married to young Lamington, for making up the deficiency of her conjunct fee lands ever since her entry thereto, the LORDS found that the Lady having possessed the conjunct fee lands divers years after her husband's decease, without making any legal intimation to old Lamington of the deficiency or inlake of the rent, the samen ought to assoilzie the defender from all by-runs preceding the date of the out-giving of the special charge;

and found, that Lamingtoun behoved to prove the conjunct fee lands to have been so much worth as the samen were given up for, the time of the marriage ; and found it sufficient for the defender Lamingtoun, in time coming, to offer sufficient tenants for taking of the land at the said rental, and for whom he should be cautioner, which was sufficient to assoilzie the defender in time coming, as was found in a former practique.

Fol. Dic. v. 1. p. 239. Newbyth, MS. p. 64.

No 75.

1724. June 20.

ELIZABETH MACLEOD and PATRICK DOUGLAS Her Husband *against* SIR WILLIAM GORDON of Invergordon and ALEXANDER GORDON of Ardoch.

No 76.

The indorser of a bill found to have lost recourse for not having followed out diligence, and not having intimated that he could not recover.

UPON the 26th of October 1704, a bill for 800 merks was drawn by John Gray of Newton, upon and accepted by Andrew Ross younger of Balblair, payable at Martinmas thereafter to Sir William Gordon, or order, for value of him; who indorsed it to his brother Alexander Gordon likewise for value, and he reindorsed it, without a date, to Alexander M'Leod and John Watson for value of them : The bill was protested the 11th December 1704, registrate the 12th, horning was raised the 13th, executed the 14th, and caption taken out the 5th January 1705, all in Ardoch's name, against Mr Ross the acceptor.

The pursuer and her husband having got right to the whole sum in the bill, insisted in an action of recourse against Sir William and Mr Gordon.

It was *pleaded* in defence, That supposing the indorsation by Ardoch to have been for value, yet no recourse was competent against him or Sir William, because the pursuer's authors ought to have proceeded to put the caption in execution, since they had accepted of an indorsation to a bill, after diligence had been raised and carried on so far by the indorser, and the rather that the acceptor lived in the town of Edinburgh with them, and was in publick office. *2do*, If they had done any further diligence, they ought to have advised the indorsers that they could not recover payment.

It was *answered*, *1mo*, That an indorsation of a bill for value, subjects the indorser to an action of recourse ; for, where it is otherwise intended, and the indorser resolves to be free, there is always adjected to the indorsation this quality, without recourse. *2do*, Since the bill was protested in Ardoch's name, it must rationally be presumed that the subsequent diligences were raised by Macleod and Watson after the indorsation to them, because it could not be supposed that these gentlemen, who were well known in business, would have paid value for a bill, after horning and caption were raised against the acceptor : And as to the notification of what they had done, they had made it in a more solemn manner than ordinary, for within ten months after the term of payment in the bill, a summons at their instance was executed against the defenders,