No 20. thereof; and, inſtead of the diſcharge, he took this blank aſſignation, filled up by him in Gloret's name. *2dly*, The charge, though in Gloret's name, is for Kinglaſſie's behoof; and if he were charging, his obligement to pay the debt would exclude him: And therefore muſt exclude the charger.—It was *answered*, That Gloret was in *bona fide* to take this aſſignation, knowing nothing of the back-bond; and that an obligement to ſatisfy the debt was not equivalent to a diſcharge: Neither is the having of the aſſignation, though blank, equivalent to an aſſignation, unleſs the name of Kinglaſſie had been filled up and intimate.

The Lords having taken Gloret's oath before anſwer, wherein he acknowledged that he got this aſſignation from Kinglaſſie, and paid no money for it; and that it was on theſe terms, Kinglaſſie being owing him a greater ſum, he was to allow what he got by this aſſignation, in part thereof, but deponed he knew not if it was blank when Kinglaſſie had it or not:

THE LORDS found, That the aſſignation being accepted by Gloret, in terms aforeſaid, that it was but a corroborative ſecurity; and ſo found the aſſignation for Kinglaſſie's behoof; and found the back-bond relevant to exclude him, and therefore preferred Monteith.

Stair, v. 1. *p.* 403.

1745. *June* 11.

STEWART of Kincarachy *againſt* MARY HAY and her HUSBAND.

No 21. Diligence being once begun in name of the cedent, cannot be carried on in name of the aſſignee. Neceſſary for the aſſignee to raiſe new diligence.

THOMAS BLAIR of Newton being creditor by bill, and decreet of the Sheriff thereon, to the Lord Ruthven, charged him with horning; and having died, Mary Hay, his relict and executrix, gave up this debt in inventory, as contained in the bill, decreet and precept, which were the warrants of the horning; and thereon ſhe, with concourſe of Charles Foggo her ſecond huſband, arreſted in the hands of my Lord's tenants, without raiſing any new diligence.

David Stewart of Kincarachy obtained an aſſignation to the rents, which he intimated after the arreſtment.

Pleaded in a competition for the aſſignee, that by conſtant practice, diligence raiſed in any perſon's name is never put in execution after his death; Meſſengers are only executors of diligences not judges of the tranſmiſſions of rights, and therefore the will of the letters is their rule.

In caſes of poinding, the law has of neceſſity allowed Meſſengers to be in ſome ſort judges; but this is not to be extended to executions of other kinds, where no ſuch law or practice has intervened; and hence it is, that meſſengers in a poinding may, upon payment, diſcharge the debt, but the executor of a horning cannot, being no judge, but tied up to the will of the letters.

It is admitted, that the effect of the diligence led by the defunct, belongs to the executor; and it is only contended that it cannot be put to further execution in his name, but he muſt raiſe new diligence.

Pleaded for the executor, the confirmed teſtament is a complete aſſignation in her favours, and as an aſſignee is procurator *in rem ſuam*, and can proſecute the cauſe either in his own or the cedent's name, it follows he can take it up in the ſame ſhape it was left by the cedent; nor will his death vary the caſe, ſince procuratories *in rem ſuam* may be executed after the death of the granter. No 21.

2*dly*, By the practice of the Commiſſary Court, diligences as well as debts are given up in inventory, and the preſent ſubject was given up as contained in the decreet and precept thereon; and though the horning be not mentioned, yet as the precept was its warrant, it is apprehended to have been ſufficiently conveyed.

3*dly*, Whatever defects the conveyance of the horning was ſubject to, were ſufficiently ſupplied by the judicial power of the meſſenger, who, on ſeeing the tranſlation of the right, might, as Sheriff in that part, proceed: For as by the civil law, upon a caſe being decided, the Magiſtrate was applied to, that he might name judges to put the ſentence in execution, which procedure was called the *actio rei judicatæ*, *Matheus de judiciis*, *diſp.* 12. § 11. & 12.: ſo in our law meſſengers are by the King's letters conſtituted judges for the execution of ſentences.

The Lords ordained the Writers to the Signet to report the practice in caſes of hornings, poindings, and arreſtments, whether ever uſed in the name of aſſignees or executors; on which they reported, that it was the conſtant practice in all theſe caſes to raiſe new diligence; whereupon, having heard the report made by the Keeper and whole body of the Writers to the Signet, with reſpect to the practice, they ſuſtained the objection to the arreſtment. (*See* Execution, Warrant of.)

Reporter, *Lord Drummore.* For the Arreſters, *Maitland.* Clerk, *Gibſon.* For the Aſſignee, *Craigie.*

Fol. Dic. v. 3. *p.* 46. *D. Falconer, v.* 1. *p.* 96.

See February 5. 1745, Elizabeth Ramſay againſt the Creditors of Clapperton.

D. Falconer, v 1. *p.* 62. *voce* Passive Title.

Whether Aſſignation not intimated denudes.

1614. *February* 11. Clerk *againſt* Napier.

No 22.
A donatar of eſcheat, found entitled to a ſubject, although previouſly aſſigned; but

In an action of ſpecial declarator, purſued by John Clerk, donatar to the eſtate of John Cuthbert, againſt William Napier of Wrights houſes; the Lords found, That a declarator made by John Cuthbert, before the rebellion, That the haill