

No 2.

Retention by the intromitter with a defunct's goods, of what was left in legacy to him, and of what was furnished by him to the defunct, in meat, drink, and other necessaries, a month or thereby before her decease, was found relevant against the executors pursuing for these goods.

1609. November 24. RUSSEL against ———.

EUPHAN RUSSEL in ———, executrix to umquhile ———, man and wife, thair pursewit ane ———, in ———, as intromitter with diverse the defunct's goods. It was *alleged*, That the defendar did na wrang for fifty merks, because the said sume was left to her in legacy be the defunct, being seik of the plague, and offerit to prove it be witnesses; whilk the LORDS fand relevant. It was farder *excepted*, That she had retention of an hundred pounds; because, the defunct being put out of the part, the defendar had furnisht her meat, drink, and necessars to herself and her family, extending to ane hundred pounds.—THE LORDS ordainit her to condescend upon the time of the furnishing, and she declaring that it was at the least be the space of ane moneth before the parties decease, the LORDS fand the exception relevant.

Fol. Dic. v. 1. p. 159. Haddington, MS. No 1654.

No 3.

A party being charged for a debt, and alleging in a suspension that he was cautioner in a testament, wherein the charger was executor, and was not yet relieved; the Lords ordained the charger to find caution for his relief, although no distress was qualified.

1632. November 7. GRANGER against LORD LOWDON.

GRANGER, relict of umquhile W. charged the Lord Lowdon for payment of 800 merks, addebted to her by his bond. He suspends, That umquhile Hew Lowdon, to whom he is successor, is cautioner for the charger, when she confirmed her husband's testament, that the sum of 800 merks, or thereby, should be made furthcoming to her husband's heir, and he could not pay her except she found caution to relieve him at the hands of the said heir. To which it was *replied*, That she was bound in the act of cautionry for her cautioner, and could not be farther obliged to find caution for his relief, seeing he was not distress. THE LORDS ordained her to find caution. It was thought hardly decerned.

Fol. Dic. v. 1. p. 159. Auchinleck, MS. p. 25.

No 4.

A creditor having proceeded to poind, *bona fide*, not knowing of his debtor's death; in a process for restitution at the instance of an executor-creditor, compensation or retention was sustained

1707. December 10. LEES against DINWIDDY.

LORD Minto reported Lees and Dinwiddy, merchants in Glasgow. Robert Dinwiddy being creditor to Ninian Glass by bond, he poinds a gabert-boat and some barrels belonging to him. James Lees being also a creditor to Glass, and confirming himself as executor to him, he pursues Dinwiddy for restitution of the poinded goods to him, as executor; because the poinding was unwarrantable, Glass having gone abroad, and was dead in Holland before that; and probation being led, it was found the poinding was after his death; and so the LORDS declared it null, though it could be no spuilzie, the poinder being in probable ignorance of his death. Then Dinwiddy finding that Janet Kelburn, the debtor's relict, was confirmed executor before James Lees, and she not called,