

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,

the relict, and he, repeated a reduction of his confirmation, that it was null, because there could not be two principal testaments to the same defunct, and on the same subject; but *ita est* she was confirmed before Lees, and all he could have done was to take a dative *ad omitta*.—THE LORDS found, though this practice was common in the inferior commissariots *ob commodum curiæ*, yet it was never done by the Commissaries of Edinburgh, and ought not to be allowed; and therefore annulled James Lee's confirmation, for not calling the principal executor thereto. The third point that occurred here was, Kelburn the relict pursued Dinwiddy before the Commissaries, for restoring the goods, as being in his hands now *sine causa*. *Alleged*, I must have compensation, because your husband, to whom you are executor, was my debtor in more, which I instantly instruct by his bond. *Answered*, You cannot exhaust the inventory of the testament, there being many other creditors besides you. The Commissaries sustained the compensation, and assoilzied Dinwiddy from her pursuit. This Lees quarrelled, on this ground, that the Commissaries had unjustly sustained the compensation, and she had, by collusion, suffered him to be assoilzied, to his prejudice, who had cited her before that absolvitor; for law has secured creditors of defuncts, that taking assignations to his debts, after his decease, shall not found a compensation against their executors farther than the debt was of its own nature privileged, or by diligence preferable; else this might lay down a ground for an unlawful gratification and preference of one creditor before another; and it was so decided, Thomas Crawford *contra* the Earl of Murray, *infra, b. t.* and the Children of Mouswal *contra* Laury, *infra, b. t.* *Answered*, The Commissaries did most justly; for there is a great difference betwixt a partial and a voluntary taking of an assignation, and being creditor *ab ante* and *proprio nomine*; and his citation is not to be regarded, the testament whereon it is founded being found null, it must fall in consequence. *Replied*, Though his confirmed testament was not sustained, for his omitting to call the principal executor, yet the citation on a null summons has been found good for an interruption. *Duplied*, It may indeed serve to interrupt prescription, which is odious, but not in a competition among creditors. *Triplied*, He has no interest to found on the wife's confirmation, seeing he derives no right from her. *Quadruplied*, It is very competent to me to allege upon my absolvitor, in respect of my compensation sustained.—THE LORDS found the allegiance competent to Dinwiddy, and that he behoved to have compensation upon Ninian Glass's bond to him, and so preferred him to Lees, and assoilzied him from Lees's reduction.

No 4.
to the poider
upon the debt
due to him by
the defunct,
which was
the founda-
tion of the
poiding.

Fol. Dic. v. 1. p. 159. Fountainball, v. 2. p. 402.

* * * See This case *voce* EXECUTOR.