

1626. July 7.

GUTHRIE *against* GUTHRIE.

IN a suspension betwixt Guthrie and Guthrie, where the executrix to a defunct being charged to pay the debt owing by her husband, contained in a sentence recovered thereon, and the executrix suspending, upon a reason that all the goods contained in the testament were exhausted; in the qualifying of which exoneration, an article being given in, desiring allowance of a year's mail for the dwelling-house of the defunct, the said defunct dying shortly after the term of Whitsunday, and the house-mail being desired to be allowed to the executrix, for the whole year after that Whitsunday, in respect of the alleged custom of taking of houses within Edinburgh for mail, which was alleged to be for a year, *viz.* from Whitsunday to the next Whitsunday; whereby the suspender alleged, that, albeit the defunct died shortly after that Whitsunday at which he entered to the said dwelling-house, yet the whole year's mail thereafter ought to be found his debt, and the same ought to be a necessary exoneration to the relict, *pro tanto*:—this reason was not found relevant, albeit it was given up and allowed by the commissaries in the testament, which was but a testament dative, seeing it was not tried, nor proven in any lawful judgment, that the defunct promised to pay the whole year's mail, and that he took the house from the owner for a year thereafter: without which had been proven, and that, seeing it was confessed that the relict remained all the year thereafter, and dwelt in the house,—the Lords found the whole year's mail could not be defalcate to the executrix as a debt of the defunct's, and therefore the Lords sustained that article of defalcation only for the half-year's mail, as a debt of the defunct's, to import exoneration, *viz.* from the Whitsunday before his decease unto the Martinmas thereafter, notwithstanding that the whole year's mail was given up as said is, as the defunct's debt in the said testament dative, which, not being the defunct's own deed, not being given up by himself, and no decret being given against his executrix at the owner's instance, trying and constituting the defunct debtor therefor, the exoneration was only sustained for the half-year.

*Act.* Heriot. *Alt.* ———. Hay, Clerk. *Vid.* 24th July 1623, Foulis.

Page 209.

1626. July 8.

SMITH *against* ———, Cautioner.

ONE called ———, who was acted cautioner in the convention of burghs, for one who was admitted their factor in the Low Countries, that he should do his duty faithfully to all the merchants who should employ him in their affairs in merchandise, according to the order observed in the like cases: this cautioner being pursued by a merchant called ——— Smith, for payment to him of the prices of certain wares sent by the said Smith to the said factor, to be sold to his use, and whereof he had made no satisfaction,—the Lords found that they would grant no process against the cautioner for the said factor, until the said factor had been discussed first, and that sentence were recovered against him, finding him debtor in a particular sum, and so that thereby he had failed against the obligation whereto he was bound when he was admitted factor, and