

No 46.

was lawful for her to do ; neither could the exception be sustained upon that disposition made to him for his relief, to give him power at his own hand, without authority of any Judge or Magistrate, to meddle with the same goods, specially seeing the same was made for his relief, and before his distress, he could never have intromitted ; likeas he was never distress, nor yet is distress therefor, nor able to show any distress, and of law *qui rem, quamvis suam, non jure occupat, punitur ut invasor, et cadit a jure, quod in re habet* ; and the pursuer having sundry gentlemens' sons in boarding, by this malicious meddling with her whole gear, and plenishing of her house, and leaving nothing therein for her use, they had deserted her, she having nothing left but the bare walls, which has redacted her to great misery ; which reply was rejected, and the exception sustained, albeit there was no distress alleged.

*Durie, p. 686. & 695.*

1636. *March 2.*LIBRACK *against* VAUS.

No 47.

A cautioner, distressed, granted a bond of corroboration, in which he found new caution for himself. The original debtor found bound to relieve this second cautioner.

DAVID VAUS, brother to the Laird of Blaws, as principal, and the Laird of Barnbarroch as cautioner for him, were obliged in a certain sum to David Aitkenhead, Provost of Edinburgh. The cautioner being put at by the creditor, gives a bond of corroboration to him, wherein Barnbarroch as principal, and his brother Lybrack was bound as cautioner for the same sum. Lybrack, after this, was forced to pay it ; whereupon he convened David Vaus (who was principal in the first bond) to relieve him of the said sum that he had paid for Barnbarroch, who was only obliged as cautioner for the said David Vaus, in respect that the said David was principal debtor, and so of all equity should relieve the pursuer. *Alleged*, The pursuer could have no action against the defender, because he had never employed him to be cautioner for him, but he should seek his relief off his brother Barnbarroch.—THE LORDS sustained the action as being very competent against the defender ; because, by his occasion, the pursuer had been distressed with payment foresaid. But declared that what this defender could allege against Barnbarroch, if he were seeking his relief off him, was receivable here against this pursuer Lybrack, in favours of this defender David Vaus.

*Spottiswood, p. 34.*

1665. *February 7.*KINCAID *against* LECKIE.

No 48.

Found in conformity with No 43. p. 2115.

IN an action pursued at the instance of ——— Kincaid against the Lairds of Leckie and Boquchan, it was found, that where, in a bond bearing annualrent, the principal debtor was only obliged to pay the annualrent (and not the cau-