

No 66. 1679. February 13. PATRICK CARSEWELL *against* SEMPLE of Foulwood.

COMPENSATION sustained against the executor-creditor, upon payment of a cautionry, though the distress was after the confirmation.

Fol. Dic. v. 1. p. 163. Fountainball, MS.

1685. March. CAPTAIN M'RIETH *against* KENNEDY of Munuishow.

No 67.

A tenant having paid up his rent to his master, for eight or ten years, and the minister's stipend standing out unpaid all that time, was found to have retention of a term's rent confirmed by the executor-creditor, after the proprietor's decease, until he should be relieved at the hands of the minister.

IN a special declarator at the instance of a donatar of escheat, comppearance was made for an executor-creditor, who had confirmed a year's rent prior to the gift, or general declarator.

Alleged for the donatar, That as the confirmations could not exclude another executor-creditor confirming within six months after the rebel's decease, no more could it exclude the pursuer's declarator raised within the six months.

THE LORDS preferred the executor-creditor, in respect the act of sederunt concerns only concurrence of confirmations, and the donatar is *in causa poenæ*. See ESCHEAT.

2do, It was *alleged* for the tenants, That they must have allowance against the executor-creditor of eight or ten years stipend to the minister, for which they are liable.

Answered, That minister's stipends are not *debitum fundi*; no, not for the current year; and the executor having confirmed but one year's rent, they ought at most to be liable but for a proportion of one year's stipend.

Replied, The tenants being liable to the minister for all the years of their intromission, and having paid the whole former rents to their master, who would have been obliged to relieve them if he were pursuing; consequently the executor, who is his representative, and not properly a singular successor, must allow them so much out of the year's rent confirmed, as will answer their relief at the hands of the minister.

THE LORDS allowed the retention for all bygone years stipends, till they be relieved of the same at the minister's hand.

Fol. Dic. v. 1. p. 163. Harcarse, (ESCHEAT.) No 435. p. 116.

1707. December 10. LEES *against* DINWOODIE.

No 68.

THE LORDS having reduced a posterior confirmation of a creditor, because the relict had already obtained herself confirmed; and she next pursuing the said creditor for restitution of some of the defunct's goods, which he had pointed by

virtue of his said title, which was found null ; yet the LORDS allowed him compensation upon the debt due to him by the defunct.

No 68.

Fol. Dic. v. 1. p. 162.

* * * See The particulars, No 4. p. 2546.

S E C T. VIII.

Effect Relative to Arresters.

1678. July 19. WARROCK M'LURE against BROWN.

THE LORDS, in a case between Warrock M'Lure and Brown, found an execution of arrestment, made by an officer of the town of Edinburgh, null, because it wanted witnesses ; albeit it was *alleged*, That the constant custom of the town of Edinburgh was to take them without witnesses or warrant from the Magistrates ; which the LORDS would not regard, as a mere *corruptela*. As for citations to processes, or in warnings to remove, it may be doubted if the Lords would also find them null if they want witnesses, since they get but two pence to execute them, and men will not be at the pains to seek witnesses to go along with them for so small a hire. See EXECUTION.

THE LORDS refused compensation, because the assignation to the debt was taken after the arrestment laid on in his hands, and so tended to gratify, &c. and prejudice creditors' lawful diligence.

Fol. Dic. v. 1. p. 163. Fountainball, v. 1. p. 10. & MS.

No 69.
The Lords refused compensation, because the proponent had taken assignation to the debt, after arrestment was laid on in his hands.

1679. December 24. CREDITORS of GORDON against CAPTAIN BINNY.

[ARRESTMENT being laid on affecting *bear* purchased by the arrestee and common debtor, retention was sustained against the arrester, until the arrestee should be relieved of the price of the common debtor's half.]

No 70.

THE LORDS allowed Binny retention of Gordon's half, ay till he were relieved of the price of it, notwithstanding the creditors of Gordon had arrested it.

Fol. Dic. v. 1. p. 163. Fountainball, MS.