

a year or more before the contract, and the Lords reponed also the sister to that discharge, given of her bairns part of gear contained in the contract done, in respect of the condition of the tocher, which was found null, as said is. See MINOR.

No 45.

Act. *Stuart et Dunlop.*Alt. *Nicolson et Cunninghame.*Clerk, *Scot.**Fol. Dic. v. 1. p. 127. Durie, p. 660.*

1633. July 19.

KIRKWOOD against FERGUSON.

MARGARET KIRKWOOD pursues Robert Ferguson for spuilzie of goods out of her house, committed in February; and the defender excepting upon a disposition preceding, made by the pursuer to him of these goods, for relief of his cautionry, wherein he was bound for the pursuer, in which disposition she gave him power to intromit with the goods at his own hands, and renounced all action of spuilzie, and all other action competent to her therefor; by virtue whereof he intromitted, and so alleged he ought to be free of spuilzie; the exception was repelled, and the action sustained; because the sum wherefore he was cautioner for the pursuer was not payable till Whitsunday, and the spuilzie was committed in February before that time, so that neither the term being come, nor he distrest any ways therefor by the creditor, that disposition could not sustain his intromission had at that time foresaid; but the LORDS reserved the modification to themselves after probation.

No 46.

A cautioner who had received from the principal debtor a right to intromit at his own hand for his relief, afterwards pursued for spuilzie, was assoilzied.

December 14.—ONE Kirkwood pursuing Ferguson in Galloway for spuilzie of her goods out of her house in Glasgow; the defender excepting that he was cautioner for the pursuer in a sum owing by her to her creditors, for his relief whereof the pursuer had disposed to him these goods; in which disposition she gave him power, for his relief, to intromit with these goods libelled at his own hand, without all danger of spuilzie, or any action to follow thereon against him, which she renounced; according whereto, fearing his relief to be uncertain, and seeing that the pursuer disposed some of the said goods, (whereby his relief might be frustrate,) he intromitted, and he was content being relieved to restore all again with which he intromitted; this exception was found relevant by the LORDS, to liberate the defender from all action of spuilzie, and to assoilzie him therefrom simpliciter, notwithstanding of the reply, that the pursuer offered to prove, that any alleged disposition that she had made of any of the goods, whereupon the defender excepted, was only of a brewing caldron which she had only set out to one for hyre, viz. of so much money to be weekly paid therefor, and upon bond to deliver the same again to the pursuer, after the time of hyring convened upon; by the which deed the excipient's case, and the disposition made to him, was no ways prejudged, and he could not allege, nor condescend upon any other of the goods libelled, to have been disposed by her, and this

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-