November 21.—In the action mentioned *supra*, No. 135, (the parties were one Corbet, compriser, and Anna Meinzies, Relict of Maxwell of Wraes,) there being *avisandum* to the Lords, anent the point there debated, viz. whether a woman should be excluded from the benefit of her liferent, because, by a clause in her contract of marriage, it was provided that she have no liferent till her tocher were paid; whose answer being reported this day, they found, notwithstanding of the said quality, the wife behoved to have her jointure; seeing *stante matrimonio* she could use no diligence for purifying the condition, and it was the husband's fault the tocher was not got in, for which the wife must not smart; unless they will say that he did diligence against the debtors to recover the tocher, but could not get it of them, or that *ex notorietate conditionis*, they were insolvent. *Favor matrimonii* is the cause of this. *Interest rei publicæ mulieres esse nuptas et sic dotatas; L. 2. de jure dotium.* Yet Gayl, *libro* 2, *observatione* 81, excludes the wife, unless she prove *dotem suam fuisse marito numeratam.*

Advocates' MS. No. 265, *folio* 114.

1671. *November* 14, and 21. COLLISONE *against* MEINZIES.

November 14.—This is a pursuit at the instance of an executor dative *ad non executa,* for payment of a sum owing to a defunct by ———.

It was ALLEGED,—No process at the pursuer's instance, because this sum to which he confirms himself executor creditor *ad non executa,* is not only confirmed in the principal testament, but it is also executed, in so far as the principal executor has recovered sentence against the debtor therefore.

REPLIED,—A sum cannot be estimated to be executed by a naked sentence recovered, unless he has also got payment, and discharged the same; for if it were executed by a sentence, then it should be *in bonis executoris;* if he died, it should be confirmed in his testament, and belong to his executors; if he went to the horn, that sum should also fall in his escheat, and belong to the fisk; with many other inconveniencies.

It was DUPLIED,—After sentence they are undoubtedly *in bonis executoris,* for this reason, he has all the acts of property and dominion that can be condescended on: he may uplift it, he may discharge it, and he may assign it; it will also fall under his escheat; in respect of all which there can be no place for a dative *ad non executa.* Neither is this a novelty, seeing the Lords have found the same frequently before, viz. betwixt Douny and Young, on the 10th of November, 1666; and lately, in 1670, in Mr. Arthur Gordon, Advocate, his cause against the Laird of Drum.

They were to have the Lords' answer on it.

Advocates' MS. No. 255, *folio* 112.

November 21.—The debate *supra,* at the 255th number, betwixt Collisone and Meinzies being reported this day, the Lords found the testament sufficiently executed by a sentence, and so there was no room for a dative *ad non executum.* It will also prove a great preparative for its falling under escheat, &c.

Advocates' MS. No. 266, *folio* 114.