

1561. *March 21.* The LAIRD OF ELPHINGSTOUN *against* The LORD GLAMIS.

No 6.

The executor may be called by the heir for his relief.

GIF the air of ony persoun that is deceist be callit for the deidis debtis aucht and be him the time of his deceis, he hes just actioun and titill to call the executouris that intromettit with the movabill gudis, to warrand and relieve him thairament, in sa far as thay ar responsal *de bonis defuncti*. And thairfoir, gif the air be persewit for the saidis debtis, he sould have ane day assignit to him to call the executouris for his relief.

*Balfour, (HEIR.) No 8. p. 220.*

1567. *June 5.* PRIOR OF PLUSCARDIN *against* The SHERIFF OF MURRAY.

No 7.

THE executouris may not be callit nor decernit to warrand ony heritabill infestment or dispositioun maid be the deid befor his deceis.

*Balfour, (HEIR.) No 12. p. 221.*

1630. *July 22.* L. CARNOUSIE *against* L. MELDRUM.

No 8.

Found, that the heir should have his relief from the executor, of all moveable bonds, and the executor should be relieved by the heir of all such as are heritable.

IN a pursuit made by the bairns of the L. Meldrum, executors confirmed to her, against the executors of her umquhile husband, and the intromitters with his goods and gear, for payment of that part of their mother's goods confirmed, which belonged to her, and consequently to them, as her executors, and wherein her husband would have been debtor to them, they being her bairns of an anterior marriage,—the LORDS found, that albeit there were executors confirmed to the umquhile husband, yet that thereby the pursuers were not excluded, but that they might also pursue the intromitters with the goods, to make their part thereof due to them in law furthcoming; for this is not, as when the creditor pursues a vicious intromitter to pay the debt, seeing here the intromitter is only pursued to make payment of the very particulars, wherewith he should have been proven to have intromitted; and which he had no reason nor right to retain; yet usually where executors are confirmed, no process is granted against intromitters, as is done 14th July 1626, and November 23. 1630, Gray *contra* Smith, *voce* LITIGIOUS—PASSIVE TITLE; and November 25. 1630, Miniman, *voce* PASSIVE TITLE. And even in a wife's testament confirmed, albeit her husband be living, defalcation ought to be of such particulars, which ought not to come in testament, viz. which of their own kind and nature are heirship; albeit the husband, to whom the goods confirmed belonged, cannot have an heir to claim the same, he being on life the time of the confirmation, and therefore that the wife's executors had no right to any particular of that kind.