

S E C T. III.

What understood Sufficient Discussion.

1610. *June 27.* SCROGIE *against* The CONSTABLE of DUNDEE.

No 44.

HE who has decret against an executor, discusses him sufficiently by horn-
ing, and needs no further diligence before he have recourse to the cautioner for
the confirmation of the testament.—THE LORDS will not grant an allowance
of large funeral expenses to the executor, if the defunct had not free gear more
than might pay his debts.

Fol. Dic. v. 1. p. 249. Haddington, MS. No 1924.

1623. *February 12.* ARNOT *against* ABERNETHY.

No 45.

IN an action pursued by John Arnot against Patrick Abernethy, the LORDS
found that the creditor of a defunct testator could have no action against him
who was cautioner for the confirmed executor, to make the testate goods furth-
coming, albeit the executor was put to the horn upon a decret obtained by
the creditor; unless the said creditor had shown where he had searched and
sought the goods of the executor to have poinded them, and his lands, to have
comprised them; and that decret and horning was no lawful discussion, albeit
the cautioner defender condescended not upon any particular lands or goods
pertaining to the defender, which I thought absurd.

Fol. Dic. v. 1. p. 249. Haddington, MS. No 2760.

A creditor
can have no
action against
a cautioner
in a confirm-
ed testament,
till he discuss
the execu-
tors, and it
is not suffi-
cient discus-
sion to put
them to the
horn. He
must also
poind, and
if there are
no moveables,
apprise.

* * Durie reports the same case :

JOHN ARNOT having recovered decret against the executors of umquhile
John Home, who was his debtor, and having denounced them to the horn,
thereafter pursues Patrick Abernethie, who was cautioner in the confirmed tes-
tament for the executors, to make the goods confirmed furthcoming; to hear
him decerned to make the said goods furthcoming, seeing he had discust the
executors, by putting them to the horn.—THE LORDS would not sustain the
process against the cautioner upon that ground, because the executors were
denounced rebels, seeing thereby they found the executors not sufficiently dis-
cuss; for the creditor ought to have sought the executors moveable goods, and
poinded them, if they had any; and if they had none, he ought to have com-