DEPOSITUM.

1593. *January* 25. BUCHANANE *against* BUCHANANE.

No 1.
A person was pursued for the delivery of a deposit. It was not sustained in defence, that he had delivered it to a third party for safety.

BUCHANANE ane of the dochteris and airs of umquhile M. Th. Buchanane, and Buchanane hir spouse, for his entres, persewit ane uther Buchanane to exhibit and delyver to hir his father's evidentis, whilk he had, or fraudfully had put away. It was *allegit* be the defender, That his houss being brunt be the hielandmen, he had delyverit the saids evidentis to James Carbraith of ——, to the effect they micht be the mare saiflie preservit; and sua thay beand out of his handis lang befoir the intenting of this caus, thir persewers could have na action, bot behovit to seik the evidentis fra the said Carbraith. It wes *ansrit*, That sieing this defender had grantit that he anes had the evidentis, he behovit to redelyver thame to thir persewars, wha had na action agains the said Carbraith, bot the said defendar micht persew him as he thocht expedient, alwayes thare action was verie competent agains this defendar, and na uther.——THE LORDS repellit the allegeance, and ordenit this same defendar to exhibit and deliver.

Fol. Dic. v. 1. *p.* 234. *Haddington, MS. v.* 1. *No* 320.

1665. *July.* DOUGLAS *against* BISHOP of CAITHNESS.

No 2.
A depositary found entitled to bring proof that the deposit had been lost without his fault.

THE Bishop of Caithness gives a ticket to the deceast Colonel Richard Douglas, bearing, that he granted the receipt of L. 40 Sterling from him in custody, which he obliged himself to deliver upon demand; which ticket being assigned to Mr Richard Douglas his nephew, he pursues for payment. It was *alleged*, That, in January 1648, the money being depositate in his hand for preservation *non tenetur reddere*, if it hath perished without the fault and fraud of the defender; but so it is, that, in *anno* 1648, he living in Durham, his house was then plundered upon the account of the engagement, and the money also; whereupon he is content to make faith. It was *answered*, That however the ticket

No 2. be conceived, as to the granting the receipt in custody, yet truly it was borrowed, and the defender became personally obliged to repay it; and it is known, that the army, for the engagement, marched not Durham way, but the west way in England; and it is unreasonable that the defender should offer to prove his defence by his own oath.

THE LORDS, before answer, ordained the Bishop to give his oath upon the way of consigning the money, or depositing it in his hands; and whether that individual money was plundered at that time.

Gilmour, No 158. *p.* 112.

1626. *March* 18. E. CASSILS *against* SIMPSON.

No 3. A nobleman left his Parliament robes with his tailor in a trunk. To render the tailor liable, it was found necessary to prove, that the key of the trunk had been given to him, and that he undertook the custody.

THE Earl of Cassils, as heir to the deceast Master of Cassils, his uncle, pursues George Simpson tailor in Edinburgh, for delivery to him, as heir to the said umquhile Earl, of his Parliament robe, which was within a trunk, and which trunk, having the said robe within the same, was put by the said umquhile Earl's servant, at his command, in the said George's dwelling-house, and was committed to the said George's custody and keeping. This summons was not found relevant, seeing it was not therein libelled, that the key of the trunk, where the said robe lay, was delivered to the defender, and that he took upon him the custody thereof, and to be answerable therefor; without the which had been specially libelled, the LORDS found, that the defender could not be convened, nor be found answerable therefor, albeit the summons bore, that the same was put in his house, and expressly was committed to his custody and keeping. For the LORDS found, that such persons, as was this defender, being common servants to noblemen, as this excipient, who was his tailor, ought not to be answerable for coffers and trunks, and boxes with writs, and such other wares, pertaining to noblemen, which their servants would set in within the dwelling-house of their merchants, or tailors, at the noblemens' coming, or being in Edinburgh; for they would take the same out, and put the same in again, at their own pleasure, as they had occasion to use the same, without the knowledge of the owner of the house, so that it were great iniquity to burden the master of the house with the same thereafter, except that it could be proven, and that it were libelled, that they had meddled with the same, and done any deed prejudicial to the owners therein.

Act. —— *et Nicolson.* Alt. *Mowat.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 234. *Durie, p.* 193.