

- No 21. * * A similar decision was pronounced, 17th June 1737, Scot of Ancrum against Douglas of Glenbervie.—See APPENDIX.—In this case it was yielded, that the defence could not stand upon the footing of compensation, because the defender's claim upon his curator's intromission was sopped by the decennial prescription.

1734. December 5. BRYMER against GRAHAM.

No 22.

A REAL creditor upon a bankrupt estate, who was also cautioner for the factor, having conveyed his debt to a creditor of his own for his security and payment; the question arose, If the assignee could draw this debt out of the bankrupt estate or price thereof, without being chargeable for the balance due by the factor, who was now become bankrupt, as well as his cautioner the cedent. In this case there could be no place for compensation; for, *esto* the balance due by the factor had been liquid, the cautioner was creditor upon the estate, but had no claim against the co-creditors, neither was he debtor to them for the factor's intromissions, but to the Court of Session; neither could payment or extinction be pleaded, because a factor has no power to apply his intromissions towards payment of his own debt, and far less has his cautioner power to apply the factor's intromissions; the LORDS therefore found, That the onerous assignee was not liable to account for the factor's intromissions, and repelled the objection pleaded against him upon that head.—In a former case, the LORDS had sustained the objection against the onerous assignee, 3d January 1730, Oliphant against Morisons.—See APPENDIX.

Fol. Dic. v. 2. p. 51.

1736. January 31. LEGATEES OF JOHN CALDWALL against THOMAS CALDWALL.

No 23.

THOUGH an executor may exhaust the testament by debts due to himself, without necessity of doing diligence, a legacy left to him is upon a different footing, which he is not allowed to take credit for, in exclusion of the other legatees; for seeing the legacies are all expressed in the testament, they must come in *pari passu*, and he is not allowed to pay *primo venienti*, as in the case of debts. Yet where a legacy of L. 20 was left to an executor to buy a suit of mournings, he was allowed to take credit for what part of the sum he had *de facto* employed that way, as being a sum to be laid out *ante omnia* by the express orders of the defunct.

Fol. Dic. v. 2. p. 50. G. Home.

* * This case is No 23. p. 8066. *voce* LEGACY.