

might be heard to propone and prove that reply, notwithstanding of his failing to prove her successor; for the LORDS found this a several member, which was now offered to be proved, from that member, whereby she was convened as successor; seeing, to prove her successor, the pursuer behoved to produce where she was infest, and this reply qualified her to behave herself as heir to him, whereby she could not renounce in prejudice of the charge given to her to enter heir; and the same was not alike, as if he had insisted thereby against her as successor; but the LORDS found them distinct members.

No 361.

Act. Hart.

Alt. Trotter.

Clerk, Hay.

*Fol. Dic. v. 2. p. 207. Durie, p. 582.*

1632. December 20.

KNOX against KNOX.

No 362.

JEAN KNOX having obtained sentence for payment of 1000 merks against her brother, as heir to his father, granter of the bond upon that sum to her; and having also obtained decret against a suspension and reduction intended by her said brother, for reducing of that sentence and bond; thereafter the charges for the said payment being *de novo* suspended, upon this reason, viz. because she was executrix nominate to her father, granter of the bond, and albeit she was not confirmed, yet she had intromitted with as many of the defunct's goods as would extend to that sum, and so she was paid in her own hand, and could not pursue the heir therefor, especially seeing the bond is a moveable bond, and not heritable, which ought to affect the executor, and who ought to relieve the heir thereof; the LORDS would not receive this reason being competent before the first sentence given against the suspender, then compearing, and then known to him, but omitted, and not proponed; and therefore found it not receivable now, especially seeing it was offered only to be proved by witnesses, that she had intromitted, and was not offered to be proved by writ or oath of party; therefore it was not received in this suspension against a written bond and sentence, being omitted of before *ut supra*.

Clerk, Scot.

*Fol. Dic. v. 2. p. 208. Durie, p. 661.*

1636. July 12.

BURREL against GILGOWER.

No 363.

ONE Burrel obtains decret of removing against Gilgower before the Bailies of Edinburgh, *in foro contradictorio*, which being desired to be suspended upon a reason founded upon a tack of the land controverted, and other opponing his decret given against him compearing; the LORDS found the letters orderly