No 40.

being within Scotland, but the proper law of the country itself; and therefore found that none of the defunct's bairns could pursue for their obligations, the same being heritable, but only the heir, and who should be retoured and served heir after the laws and custom of Scotland.

Item, There are some singular cases in our decisions, which only agree with the civil law, anent cautioners; whereas generally our practique disagrees therefrom; for where by the civil law cautioners could not be convened, while the principal were discust, by the consuetude of this kingdom, the creditor might, at his own option, pursue either the cautioner or principal at his pleasure, and may convene the cautioner, albeit he should never seek the principal; but their cases differ, and hold not with the general rule, viz. where one is cautioner for a tutor, in which case, the cautioner for a tutor cannot be convened, while the tutor himself be discust. *Secondly*, where any is cautioner for an executor at the time of the confirmation of a testament, to make the goods confirmed furthcoming, in which case the cautioner cannot be convened, while the executor be fully discust; which discussing of him must not only be personally, by denouncing of him rebel, but also by discussing of his moveables by poinding, and of his lands or heritable goods by comprisings; till all which be lawfully done, the cautioner cannot be convened. The like holds also in one who is cautioner for a factor to merchants, as was found 8th July 1626, Smith *contra* ——, (*See* Appendix to the Title FACTOR.) *Item*, In cautionry for making of arrested goods furthcoming, which are found when arrestments are loosed, *vide* 21st June 1626, L. Lochinvar, No 126. p. 788; 21st November 1627, Rollock *contra* Crosbies, No 6. p. 2074. And generally when a cautioner is for any *cui incumbit necessitas officii gerendi*. Sicklike a cautioner found in a suspension of a sentence for poinding of the ground, cannot be charged while the ground be first discust, as was done 18th February 1623, Drysdale *contra* Blaikburn, No 67. p. 2141.

Act. *Hope, Stuart & Baird.* Alt. *Nicolson & Ayton.* Clerk, *Gibson.*

Durie, p. 88.

1634. *July* 3. MELVIL *against* DRUMMOND,

No 41.
An heritable bond due in Scotland was found not legally conveyed by a testament according to the English form, tho' the testator resided in England, *animo remanendi.*

ESTHER TAILOR and George Melvil her second spouse, pursue Archibald Drummond, executor to umquhile —— Drummond her first husband, for payment to her of a sum of money, left in legacy to her by her husband, wherein the LORDS found, that albeit by the law of England, where the infeftment was made, which bore that legacy, the testator might leave legacies of heritable sums, and that the heir could not quarrel the same, but that such legacies are effectual; and albeit the heir was born in England, and so was alleged behoved

No 41. to be subject to the English laws, yet seeing the money left, was addebted in Scotland, and was a sum which could not be disponed upon by way of testament, and so came not under legacy, according to the Scottish laws, therefore that the relict had no action to pursue for the same, by the practique and laws of this realm; for *bona tam mobilia quam immobilia regulantur juxta leges regni & loci in quo bona ea jacent, & sita sunt;* for this legacy was *in corpore individuo*, of another nature than what was testable in Scotland, being of a particular heritable bond.

Act. *Stuart et Gray.* Alt. *Nicolson et Gilmour.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 320. *Durie, p.* 723.

1764. *January* 18. Mary Burgess *against* Eleanor Stantin.

No 42.
Heritage in Scotland cannot be affected by a testament *in liege poustie*, executed by a Scotsman abroad, according to the *lex loci.*

Robert Hepburn of Barefoot died infeft in some houses in Edinburgh, yielding about L. 50 Sterling of rent. He left a son, Archibald, and a daughter, Margaret, who married John Brown merchant in London, and had by him a daughter, who married Younger Burgess of the East-India house there; and of this marriage was procreated Mary Burgess the pursuer.

Archibald Hepburn, upon his father's death, entered to the possession of the houses, which he continued all his life, being much more than three years; but was never infeft.

Archibald, while a lieutenant in the Royal Scots regiment of foot, married Eleanor Stantin, by whom he had a son, James Stantin-Hepburn; and, in 1741, his regiment having been ordered upon the expedition against Carthagena, he executed, according to the law and forms of Ireland, a last will and testament, by which he bequeathed to his wife, the rents, issues, and profits of his houses in Edinburgh, during the minority of his son, and the half of them after his son's majority. The will likeways provided, that, if his son predeceased his wife, without lawful issue, she should have the whole during her life; and that, after her death, the subjects should revert to his nearest heirs at law.

Lieutenant Hepburn, a considerable time after executing this settlement, died abroad; upon which his relict entered to the possession of the subjects, and uplifted the rents by her factor, till she married Colonel John Eyre of Eyrecourt, an Irish gentleman of great fortune, who allowed James Stantin-Hepburn, his son-in-law, to draw them.

Upon the death of the said James, Mrs Eyre resumed the possession of the houses; but, Margaret Burgess having got herself cognosced heir *more burgi*, to her great-grandfather Robert Hepburn, the person last infeft in the houses, brought a process of mails and duties against the tenants.

Compearance was made for Mrs Eyre and her husband, who claimed a preference in virtue of Lieutenant Hepburn's testament, an extract of which, from the register of the prerogative-court of Ireland, was produced.