son,—That the decreet was unjustly given for the sum of £800, upon the oath of the executor, to his mother; because an executor's oath cannot constitute a debt to exhaust the testament in prejudice of the nearest of kin, or legacies contained in the testament:—

It was ANSWERED, That one of the legatees and nearest of kin being the executor's own daughter, the father's deposition is a sufficient probation of a debt; seeing, in law, it cannot be presumed that a father would depone in prejudice of his own child; which differs the case where an executor hath not that relation to the legators or nearest of kin: so that it was sufficient that the daughter did give her oath of credulity, if she had not reason to believe what her father deponed was true.

The Lords, finding that this case might be of great importance,—before answer ordained the daughter to be examined, if she was informed, or did know the verity of the debt; and, if she denied the same, they would then consider if her oath of credulity were sufficient against her.

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1673. *December* 18. MR JOHN GIBSON, Parson of OLD Hamstocks, *against* PATRICK HEPBURNE and OTHERS.

IN a pursuit, at the said Mr John's instance, as presented to the parsonage of Old Hamstocks, against the heritors of the parish, for reparation of his manse, conform to an account made after visitation, by ministers appointed by the bishop, extending to seven hundred pounds and odds:

It was ALLEGED by the heritors, that the pursuer, by his presentation, being parson, and having right to the whole teinds in the parish, which was a very considerable benefice, and exceeding the value of some bishoprics, could not crave the benefit of the Acts of Parliament anent reparation of manses, which was only competent to ministers who had modified stipends out of the tithes; whereas such parsons ought to be looked upon as titulars of great benefices, such as bishoprics or abbacies.

It was REPLIED, That, by all the several Acts of Parliament anent reparation of manses, all ministers serving the cure, without distinction, may have the benefit thereof; and parsonages and vicarages not being ecclesiastical dignities, which are accounted great benefices, they cannot be debarred upon that pretext.

The Lords did repel the defence, in respect of the reply; and found, that albeit patrons had no right to the tithes, but must present parsons and vicars to the whole benefice, yet that will not prejudge them of the benefit of the Act of Parliament, if either they want or have not sufficient manses.

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1673. *December* 19. JOHN M'LURG *against* GORDON of KIRKONAL.

JOHN M'Lurg, being assignee to a bond granted by Kirkonal's father and elder

brother, did pursue him, as representing his father, upon this passive title,—that he had intromitted with the maills and duties of the lands of Kirkonal, wherein he died infeft.

It was ALLEGED for the defender, That he bruiked his father's lands by an expired comprising, which he had acquired, during the lifetime of his elder brother; and so, not being apparent heir, by the late Act of Parliament his right could not be questioned, either to make him liable to his father's creditors, that they may redeem the same, by payment of such sums of money as he had truly given out when he acquired the right, or to infer a behaviour against him, albeit his comprising was extinct by intromission within the legal.

It was REPLIED, That the benefit of the Act of Parliament was competent to the pursuer, notwithstanding of the allegeance; because the defender's elder brother, being then out of the country, and dying shortly thereafter, unmarried, he was always looked upon as the apparent heir to his father; and, by the death of the elder brother before the father, he was his only apparent heir, and so his case did fall within the compass of the Act of Parliament: and if it were otherwise, all creditors might be frustrated of the benefit thereof, by acquiring rights in the name of a second brother, contrary to the express meaning of the said Act; as was lately decided in the case of the Laird of Posso, where his eldest son, acquiring right to a comprising during his father's lifetime, at which time he could not be reputed apparent heir, yet, in respect of the meaning of the Act of Parliament, and that if his father had been dead, he was the only person could represent him.

The Lords did decern in favours of the creditors. And to the second part it was REPLIED,—That the comprising, albeit extinct by intromission within the legal, yet it being a title to possess until that had been questioned by a declarator, it was sufficient to defend him against a behaviour as heir by intromission; which can never be interpreted but where an apparent heir cannot ascribe his intromission to any other right or title.

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1673. *December* 23. MR JAMES OGILVY of CLUNY *against* KINLOCH of BANDOCH.

BANDOCH, being charged at the instance of Cluny, as assignee to a minute, whereby Bandoch was obliged to infeft Cluny's author in a miln of Aberbrothic, did SUSPEND, upon this reason:—That he ought to have a year's duty, seeing it was not his fault that the charger's author was not infeft; *quo casu* undoubtedly Bandoch, as superior, was not obliged to receive a new vassal, either upon resignation or comprising.

It was ANSWERED, That the charger being only assigned to a personal right, and his author never infeft, there could be no year's duty craved, he having disponed the land to Cluny's author and his assignees; so that he gave him power to assign the right to any other, who, coming in his place, was not obliged to pay a year's duty.

The Lords did find, that there was no year's duty due to the superior, which can only be craved where there is *mutatio vassali*, and the superior charged up-