

satisfying prior debt; and the pursuers have libelled upon all the passive titles, and insisting thereupon; and, referring the verity of the provision made to the defender, to his own oath, which was already sustained; and whereupon he hath deponed and confessed the verity, he cannot now force the pursuer to discuss all the representatives, and after he hath failed in any success to return to this action: whereas he is now willing, upon payment, to assign the defender, that he may pursue or get relief of any of the representatives of his father.

The Lords, having considered this case and declarator, as not ordinary in practice; and resolving to make this a leading case, did sustain the declarator; unless the defender could condescend upon as much estate as this debt did amount to, which the pursuer might overtake by a legal title or diligence, or that he could condescend upon an heir, executor, or some other representative, who in law would be liable: being moved upon this reason, that, if it were otherwise found, it might occasion infinite pleas, and force a lawful creditor to more necessary charges than the debt might be worth.

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1676. July 6. The EXECUTORS of BISHOP WISHART, late Bishop of Edinburgh, *against* The Present BISHOP.

THERE being mutual declarators raised, the one at the instance of the executors of Captain Wishart, as executors to the late Bishop of Edinburgh, against the present bishop; to hear and see it found and declared, that the quots of testaments of all persons deceased within the diocese during his lifetime, for confirming whereof diligence was done by the procurator-fiscal; as likewise, that the quots of all testaments which fell during the annat, did belong to his executors; there being also a declarator, at the present bishop's instance, to hear and see it found that they did belong to him; whereupon there was an interlocutor upon the second of December 1674, finding that the quots of testaments, not confirmed during the incumbent's lifetime, did not belong to his executors, but to the succeeding bishop, in whose name they were confirmed; as likewise, the quots of the testament during the annat, after the decease of the prior bishop: notwithstanding, the executors did now again insist in the said declarator, upon this new ground, That albeit the testaments were not confirmed, yet if diligence was done during his lifetime, or during the annat, that the quots ought to belong to them who succeeded to the bishop deceased; and did insist at large,—

1st. Upon the ground formerly alleged, That the quots of the testaments were a part of the bishop's benefice; but did enlarge their dispute upon that ground, that the benefice of the bishopric of Edinburgh was singular, upon that account; that, without the quots of testaments, it was inconsiderable; it being a large diocese, and having no great rent belonging to the benefice.

2d. As all casualties of the benefice,—*viz.* liferent escheats, and non-entries, which fall during the incumbent's lifetime, belong to his executors, so the quots of testaments, being a casualty fallen, ought to belong to them; as is de-

cided, and is the undoubted law, in case of all superiors, during whose time these casualties do fall.

*3d.* To find the contrary were to make the bishops' right depend upon the diligence of their officers and procurator-fiscals, which were absurd; and as to the quots during the ann, no diligence could be done in their name, they being dead.

*4th.* By the Act of Parliament 1672, and by the king's letter to the Lords of Session, the quots of testaments during the ann are declared to belong to the executors of the deceased bishop; which is consonant to the 4th Act, Q. Mary, Parl. 4, appointing the annats of all benefices to belong to the executors of the incumbents: as likewise, he repeated the decreet of the Lords in favours of the executors of the Archbishop Fairfole, against the present Archbishop of Glasgow.

It was ANSWERED, for the Bishop of Edinburgh, who repeated his declarator, That, notwithstanding of these reasons, he ought to be preferred.

*1st.* Because the quots of testaments were already found, in this same process, not to be a part of the benefice, but to be a casualty belonging to their office and jurisdiction, and so could only belong to the bishop in whose name the testament was confirmed; which is conform to that principle of law, that *beneficium sequitur officium*.

*2d.* It is clear, by the first institution of commissariats, in Q. Mary's time, that the quots of testaments, and power of confirmation, did only belong to the commissaries; and the quots of testaments, until the restitution of bishops by King James, did belong to the Lords of Session; so that they were no part of the benefit of the bishopric, but distinct therefrom; belonging to an office and jurisdiction.

*3d.* The argument belonging to the casualties and non-entries, and escheats due to superiors, is retorted; for, albeit these casualties belong to the executors of the superiors, yet the composition or entry of the new vassal to lands in non-entry before his time, belong only to the subsequent superior, who enters him his vassal; because he only officiates and grants that deed.

*4th.* It being in the bishop's power to officiate, and to confirm, his procurator-fiscal after diligence, (in which case he would have right to the quots of testaments,) by securing the nearest of kin, and all having interest, which is the only reason and cause of that benefit,—it were against all reason, that neglecting, during his lifetime, to do the same upon a simple diligence, but the benefit should accresce to the succeeding bishop, who doth complete that right by confirmation, and interposing his authority: and, upon that ground, the quots of testaments during the ann can never be pretended to; seeing no citation can be in name of a defunct bishop, but only of the present incumbent.

The Lords, having considered their former interlocutor upon the second of December 1674, did adhere thereto; and of new did find, that the bishop's executors could have right to no quots, albeit diligence was done by a charge against the nearest of kin, without confirmation: and, upon that same reason, and during the ann, they could pretend to no quot, being chiefly moved upon these reasons:—That, by the institution of the commissariots, by the Act of Parliament, the quots of testaments were given to the Lords of Session, and were no part of the bishop's benefice. As likewise, that, by the 13th Act of the

3d session, 2d Parliament, K. Ch. II, the ann due to bishops or ministers is only declared to be the half year of the benefice or stipend, succeeding the incumbent bishop or minister's decease; making no mention at all of the quots of testaments, nor of any casualty belonging to them *ratione officii*; so that, the quots never being expressly annexed to their benefice, which were settled long before the commissariat courts, could not be reputed a part of the benefice thereof; but was only a consequent of their jurisdiction and power of confirmation, which were long thereafter given them in the act of restitution, by King James: and so they founded their office upon that principle, *quem sequitur officium eundem et beneficium*. And, as to the former decision betwixt the executors of the Archbishop of Glasgow and the present incumbent, they found that they only founded their sentence upon a private agreement and condescension of the archbishop.

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1676. July 12. HENRY GRAHAM *against* ALEXANDER SIMPSON.

THERE being a decret of suspension obtained, at Mr Andrew Oswald's instance, against William Graham of Hiltoun; in which suspension Alexander Simpson was cautioner for Hiltoun, and thereupon being denounced, and under caption, did make payment to the said Mr Andrew Oswald; and having gotten an assignation, caused comprise Hiltoun's estate for his relief. Henry Graham, having comprised the same lands from Robert Graham to whom William Graham of Hiltoun had disponded the said lands; but, after the said decret, there was a reduction raised of the decret at Graham's instance, upon these reasons;—That the decret was most unjustly taken out, the reasons of suspension being most relevant, *viz.* that the bond wherein Graham was bound with the Laird of Polmais, Cardin, and others, was for a public debt, due by the shire of Stirling, for their outreik of soldiers in the year 1640; and so the shires could only be burdened; and the subscribers of the bond were free by Act of Parliament. 2d. Mr Andrew's right to the bond was only as executor; whereas the bond was dated in the year 1640, before the Act of Parliament 1641; and, bearing annualrent, it belonged to the heir. 3d. Simpson needed not have paid Mr Andrew Oswald; because there was a new suspension obtained against him of that decret, and, at the passing of the bill, Simpson was desired to be cautioner; which was an intimation, and, he refusing, it was his own fault that he made payment.

It was ANSWERED for Simpson, That these reasons could not militate against him, whatsoever they might import against Mr Andrew Oswald; for he, being a cautioner for Graham of Hiltoun, against whom the decret was gotten, and being under horning and caption before he made payment, he ought, in justice and reason, to have his relief of the principal; and was not obliged to debate whether the decret was justly given or not: and, unless there had been a suspension raised of that decret, and intimated to him before payment, he was *in bona fide* to free himself from horning and prison, by obeying of the decret: and his refusing to be cautioner in a new suspension cannot prejudge him; he being un-