

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-

der horning and caption, and so not able to be cautioner, and in effect being the principal party.

The Lords did assoilyie from the reduction and suspension; and found, That a cautioner in a suspension being distressed, making payment, may seek his relief of the principal, notwithstanding that he might have just grounds to reduce the decret; he not being obliged to debate the same with the principal for whom he was distressed: As likewise, they found, That the desiring him to be cautioner in a new bill of suspension, which he refused, as being under caption and horning, could not prejudge him as being a sufficient intimation; and that it was necessary, for putting him *in mala fide*, that the principal should have obtained a new suspension both for himself and his cautioners, and had procured another to be cautioner in the new suspension, and, after passing thereof, should have intimated the same to Alexander Simpson before payment.

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1676. July 14. GAVIN HAMILTON of RAPLOCH, and JEAN LOCKHART, his Spouse, *against* JAMES BONNER.

IN an action at Raploch's instance, and his spouse, against James Bonner, as representing his brother, John Bonner, for payment of the sum of 4000 merks, upon this ground,—That John Bonner, the said Jean's first husband, having received in tocher an assignation to a bond of 6000 merks, granted to her by Allan Lockhart; by a special provision, he became obliged, that, failyieing of children of the marriage, that 4000 merks of the said portion should return to the said Jean Lockhart: which case having now existed by the death of the said John Bonner; his brother, as representing him, ought to be decerned to make payment.

It was ALLEGED for the defender, That he could not be liable for payment, but only for making a retrocession to the said Jean of the right assigned; seeing he did never receive payment from the said Allan Lockhart, notwithstanding that he did exact diligence against him in England; and the contract of marriage and provision bearing no obligation to make payment, but only a substitution failyieing of children of the marriage, there is no ground in law to make the husband's heirs liable; unless he had received payment, especially having done diligence.

It was REPLIED, That the defender ought to make payment notwithstanding; because, by the contract, the husband being expressly bound, in the case of no children, that sum should return to the wife, she was not concerned whether he got payment or not; or did diligence for recovery against the principal debtor; wherein she was not interested, the husband having taken his hazard of the tocher: and in contracts of marriage, which are most favourable as to all provisions made to the wife, who can only assign her portion to the husband, who only can do diligence, if he should be negligent, or the debt not prove good; then, contrary to the meaning of parties, and the favour which the law