It was ANSWERED, That the pursuer had no interest, she having a brother who did not concur in this pursuit; likeas the defender, when he procured his gift of tutory dative, having found sufficient caution, he could never be liable but to the furious person, if she shall recover; or to her heirs or executors, who shall have the best title, only.

It being farther ALLEGED, that this pursuer, by her contract of marriage, subscribed by her husband as taking burden for her, had discharged all benefit he could crave any manner of way by the decease of her said mother; and that in favours of her brother, who did not pursue.

The Lords, upon that last allegeance, did assoilyie the defender. But if the brother had pursued, or concurred in this action, it was not determined if a tutor dative to a furious person might be pursued for count and reckoning, and the modification of an aliment, which might have been the subject of debate; but it is thought they would have been liable in that same condition, as tutors to minors, but no otherways.

Page 432.

1674. *December 2.* CAPTAIN WISHART *against* The BISHOP of EDINBURGH.

CAPTAIN Wishart, as executor and nearest of kin to his father, the deceased Bishop of Edinburgh, did pursue the present bishop for the whole quots of testaments which fell during the deceased bishop's lifetime; as likewise during the ann after his father's death.

It was ALLEGED for the bishop, who had likewise intented a declarator, that no such quots could fall under executry, or within the ann :—that, as to these quots that fell during the bishop's lifetime, they could not fall to the executor, unless they had been confirmed, because they were only due to the bishop *ratione officii;* and the law did give the same, for that special reason, that he did administrate and interpose his authority for the preservation of the defunct's goods; which reason ceasing, and he being at no pains, nor did officiate, he could crave no benefit thereof; but the same ought to belong to the succeeding bishop, who did interpose his authority, and confirmed the quots of testaments, being of their own nature but casual, which might fall or not fall, were not of the nature of annualrents out of lands or teinds; and so could not be estimated to be a part of the rents and benefice.

It was REPLIED for the executor, That the quots of testaments being a part of the bishop's benefice, to which he was presented, did necessarily belong to him, as well as any other rents of his benefice; which falling due during his lifetime, he hath that same right thereto, as to the rents of any other part of the benefice; and he dying, not uplifting the same, it did fall under executry, as was decided lately in a case betwixt the executors of Fairfoull, Bishop of Glasgow, and the succeeding bishop: and the quots of testaments being due by the death of any person within the diocese, is no more a casualty, but in law is due to the Bishops, whether it be confirmed or not; he having no more right to any other part of the benefice than to these quots.

The Lords, by their interlocutor, did find, That the quots of testaments could be only due to the executors of the bishops, if they were actually confirmed during their lifetime,—having found that the late practique adduced was not a

decreet *in foro*, but upon the consent of parties. Thereafter the executors insisting for the quots of testaments during the ann; the Lords, upon the former reason, did find that the quots did not fall under the ann, but belonged to the Bishop who confirmed.

Page 434.

1674. *December* 2. BEATRIX CRAIG *against* EDGAR of WODDERLY.

EDGAR of Wodderly, being debtor to the said Beatrix in the sum of seven hundred merks by bond, she did assign the same to John Greenleys, her first husband, in her contract of marriage; who did make a retrocession thereof to the said Beatrix before his death; and she thereafter did of new assign the same to Mr John Lowthian, her second husband; to whom the said Beatrix being confirmed executor, and given up an inventory of that same debt, she did pursue Wodderly for payment.

It was ALLEGED, That she could have no right, as executrix to Mr John Lowthian; because the sum being formerly assigned to her first husband, any retrocession made by him not being intimated, it remained *in bonis defuncti;* and his executor can only have right to pursue.

It was REPLIED, 1*mo*. That the allegeance was *jus tertii* to the defender; and the pursuer was content to find caution to warrant:—2*do*. The debt being originally due to the pursuer; and albeit it was assigned, she being thereafter retrocessed, she had undoubted right thereto; and it could not be *in bonis defuncti*, after retrocession, but did belong to the pursuer, as executrix to her second husband.

The Lords did find, That an assignation made to a husband by a contract of marriage ought not to be intimated, otherwise he transferring the same, or making a retrocession, it did so denude him, that the debt assigned could not fall under his testament; and it was sufficient that the pursuer did offer to warrant against any distress, which could never happen at the instance of the executors of the first husband, who were obliged to warrant the retrocession; so that there could remain no difficulty but one being confirmed executor-creditor to the first husband; who thereupon might pretend that the defunct, being denuded by assignation, never intimated during lifetime, he confirming, ought to be preferred. But this was not the case, there being no executor-creditor; and, albeit there had been one confirmed, yet it is thought that the pursuer, as executrix to the second husband, who had right by translation, having first confirmed the sum, and done diligence, could have been preferred: but if the executor-creditor to the first husband had done diligence first, the difficulty would have been the greater, seeing it may be alleged, that an executor-creditor being confirmed, it is in effect a legal assignation to that debt of the defunct's; and, doing the first diligence, ought to be preferred to any prior assignee, who had never intimated the same.

Page 434.