

of influencing dying people, and abusing their trust, and deserved no encouragement. *2do.* The said Patrick, by a back-bond and declaration, the day subsequent to the testament, had acknowledged his getting an assignation to sundry debts from the said William, the testator, and obliged himself to be countable for the same, his expenses being allowed him, and a gratuity for his pains; which was a plain revocation of the testament; and his granting the back-bond was a passing from his being executor nominated therein.

To the *first* it was ANSWERED,—There was neither law nor custom declaring chirurgeons incapable of legacies in a testament; and testators are not to be restrained in the free disposal of their goods, flowing from the sense of gratitude, and good offices done him, especially where he has no children. To the *second*, The assignation seems not to have been to the whole, but only to some particular debts that required present diligence to be done for recovery thereof; neither was this incompatible with the testament, nor any derogation thereto, seeing he might be both executor and assignee under back-bond.

The Lords considered, if his declaration had made him only countable to the defunct himself, in his own lifetime, then it might very well consist with the testament; but it bearing to hold trust to him and his heirs, it resolved itself into a trust, and was incompatible. However, the Lords, having suspicion of the case, ordained the assignation to be produced; and, before answer, allowed either party to adduce what further adminicles or probation either of them had, to fortify or impugn the testament; and ordained the witnesses inserted to be examined for expiscating the true matter of fact.

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1698 and 1699. HIS MAJESTY'S ADVOCATE, and HENRY DOUGLAS, *against* The BISHOPS' VASSALS.

[See the first part of the Report of this Case, Dictionary, page 6666.]

1698. *December 28.*—MERSINGTON reported his Majesty's Advocate, and Henry Douglas, against several vassals and tacksmen to the late Bishops, (as mentioned 19th January 1698.) By the abolition of Episcopacy, the King became superior to their lands, and titular of the teinds belonging to them; and out of this fund he gives the late Secretary Johnston £4000 sterling, who, in the name of his Majesty, and Henry Douglas, his trustee, pursues the foresaid heritors and tacksmen; for whom it was ALLEGED, *1mo*, That so universal a reduction and improbation cannot be pursued without a special warrant from his Majesty; and his gifting a sum out of these casualties cannot support the action; for at this rate he may open all the charter-chests in Scotland, and propale their writs; which is of most dangerous consequence; and when the King's advocate attempted this in 1633, it created much trouble: and that private donatars should have the benefit of the King's causes has been refused; as to the *Earl of Southesk* against *Melgum and Others*, about Montreumont in 1680; and to the *Lord Stormont* against *his Feuars*, in 1696. *2do.* Seeing he pursues in right of the Bishops, he must instruct their right to the superiority or teinds acclaimed;

for, *jure communi*, the King is presumed superior, unless another be instructed ; and, by the Canon Law, *decimæ debentur parrocho* ; and therefore the Bishops' right thereto must be instructed. See Stair's Institutes, book 4. tit. 24. Of the Petitory Right of Teinds ; and 27th June 1665, *Ferguson against Stuart*.

ANSWERED to the *first*,—They need no special warrant from the King, because the King's Advocate is empowered to pursue this cause by a commission from the Lords of the Treasury ; which is equivalent to a mandate from the King. To the *second*,—The same action is competent to his Majesty that was to the Bishops ; but, *ita est*, if they had been pursuing, they needed not produce the rental-book of the bishopric, but only their patent, constituting them bishops of such a diocese.

The Lords repelled the defences, and sustained the process.

It was likewise debated, but not decided, If the King's right, by the abolition, extended not only to what belonged to the Bishops, but also to the lands and teinds of other dignified persons, as abbots, priors, chapters, deans, &c. or if the same belongs now to the patrons of the benefices, where they are not already erected, conform to the 26th Act of Parliament in 1693.

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1699. *January 31*.—In the action, mentioned 28th December 1698, Hary Douglass against the Bishops' Vassals and Tacksmen, debated in presence this day ; the Lords found the commission from the Exchequer to pursue this reduction, bearing only, To inquire into lands holden of archbishops and bishops,—this could not be a warrant to call for any who held of deans, chapters, or other inferior dignified persons : though it was contended, that Bishop was *nomen universale et collectivum*, that comprehended all the inferior degrees ; and they had all fallen to the King by the abolition of Prelacy ; and they are specially enumerated by the 29th Act Parliament 1690. But the Lords found an improbation no such favourable case as to extend the word Bishop beyond its precise literal signification. *2do*. The Lords found no process at the pursuer's instance until he produced the old rental-books of the bishopric, or some other document of their right or possession, to instruct, in some measure, that these lands or teinds belonged to that bishopric ; else they might trouble the whole heritors of the diocese, and cause them produce their evidents, on pretence that they held of them.

How cautious our predecessors have been in propaling men's evidents, that it needed an Act of Parliament to do it for the Highlands and Isles, may be seen from Act 262, 1597. By the feudal law, the superior had an action to force his vassal to produce his writs, called *Ostensio Monumentorum*, and by us the Showing of Holdings ; which went into desuetude when improbations were invented.

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*November 14*.—In the action mentioned *supra*, 31st January 1699, Hary Douglas against the Bishops' Vassals ; the pursuers procured a second explanatory gift from his Majesty, That he designed his gratuity to Mr Johnston, not only out of the feu-duties belonging to bishops, but likewise to the inferior beneficed clergy ; and the pursuer now insisting on this supplementary title, and craving the defenders may take a term in the reduction and improbation, they CONTENDED,—No law could oblige them to do the same ; because the pursuer's active title being found lame and defective, any new gift impetrated from his Majesty cannot be retroracted to support a process raised before the date there-

of, no more than an assignation posterior to a summons executed can be sustained as an active title therein; and whatever might be done where a single person is convened in a process, or where 'tis an ordinary action for payment, yet it were hard to dispense with so necessary a point of form in an improbation, where a whole country-side is convened.

ANSWERED,—This process is not only at Mr Johnston and his factor's instance, but also carried on in his Majesty's name; and it cannot be doubted but the King has as good right to the casualties due to deans and chapters as those of archbishops and bishops; and, therefore, there can be no need of raising a new process, seeing they are willing to give them as long terms as the Lords please for production; and, in many cases, titles have been allowed to be produced *cum processu*; and if improbation of the writs of a barony be pursued, I will be permitted to reply that such a room or parcel of land is part of that barony, and will get a term to prove it.

The Lords, after a debate in presence, sustained process on this second gift, without necessity of raising a new summons thereon; but allowed them a competent time to see it in the clerk's hands.

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1699. November 21. HUGH MAXWEL of DALSWINTON *against* MAXWELL of GARNSALLOCH and OTHERS.

ARBRUCHELL reported Mr Hugh Maxwel of Dalswinton's declarator against Maxwell of Garnsalloch, Kilbean, and other heritors of the parish of Kirkmahon, that the pursuer has right to a proportional part of the kirk, conform to his valuation and theirs; and that Garnsalloch demolish his new seat, erected only in 1607, and restrict it to the quantity and size of his old seat, &c.

ALLEGED,—That they had immemorially possessed their seats, and so prescribed a right to the same; and, for Garnsalloch's bringing out his seat, he had an ancient burial-place before it, and had only extended his seat upon his own ground so far as that went.

ANSWERED,—Church-seats are *inter res religiosas*, and so cannot prescribe, because not *in patrimonio et commercio*. *2do*. A burial-place does not obstruct hearing the minister; but to build a seat, with pillars and a cover, precludes all behind them in that gavel. *3tio*. It is offered to be proven, that, at the last reparation of the choir, it was agreed that Dalswinton should get a larger proportion for the accommodation of his tenants, because he contributed a third part of the expenses.

The Lords shunned to determine the first point, whether one might not prescribe the right of a seat as well as any other civil interest, and thought they might; as also considered that a church cannot be so exactly divided by arithmetical proportion, but sometimes one of a lesser interest might have a great share in the church, either because of his great quality, though his rent be small, or that he has many people living on his ground, or that another heritor, of more considerable rent than he, lives in another parish, and so is not so concerned: But the Lords fixed on the other two points; and found Garnsalloch must restrict his seat to what it was before the 1699; and, before answer, allowed the heritors and other witnesses present at the agreement made with the