1671. *December* 8. The ARCHBISHOP of ST. ANDROIS *against* PATRICK LINDSAY of Wormeston, his Commissary.

THIS was a pursuit against the Commissary for relieving the Bishop of L.303, as his proportion of the contribution-money due to the Commissaries of Edinburgh of all years since 1661, and in time coming.

ALLEGED, there can be no relief; because they have never been liable therein *de facto*, nor in law can be; neither by the decreet arbitral are they, but the Bishops themselves, burdened with that 900 merks of augmentation given to the Commissaries of Edinburgh, upon the account of the loss they sustained through the want of the great testaments; and as for the old duty which was 1200 merks paid to them, the subject matter of that was ever the quots, and when the quots were in Queen Mary's hands, and after given to the Lords of the Session, this 1200 merks was ever paid furth thereof. As for the act of Parliament 1609, and the injunctions following in 1610, and the late injunctions in 1666, ordaining the Commissaries to relieve their Bishops of the contribution-money, they can never bind this defender, because the injunctions 1610 did not keep within the bounds limited for them by the act of Parliament 1609, which was only to set down the manner of the Commissaries proceeding with the forms of process, and in so far as they deviated from that they are without a warrant. *2do*, The said injunctions 1610 were never *in viridi observantia quoad* this relief. *3tio*, The injunctions 1666 are, since the defender's gift *et jus quæsitum*, which cannot be burdened without his own consent. *4to*, The most that all these acts and injunctions can infer is allenarly that the Commissary relieve him of his proportion of the 900 merks of augmented money. But there is no ground for relief of the old duty, which was ever paid out of the quots, and so by the Bishops who received them.

See the answer to this in the informations; as also about the Bishop of Glasgow's decreet against his Commissary, and the act of Parliament procured by the Commissaries of Edinburgh for paying their fees out of the Bishops' rents.

After many hearings, the Lords, before answer, ordained the decreet-arbitral to be produced.

Then the matter was trysted. The Commissary was content to relieve the Bishop of the whole for the future, and the Bishop was to procure to him a general discharge of all bygones from the Commissaries of Edinburgh.

Advocates' MS. No. 287, *folio* 120.

1671. *December* 8. Mr. ARTHUR GORDON *against* the LAIRD of DRUM.

IN this action it came to be debated, whether or no an executor going to the horn after the recovery of sentence against the defunct his debtors, but not of payment, whereon his escheat is gifted, if the donatar will have right to the said sums contained in the sentence yea or no? It was CONTENDED he would, because by the sentence the dominion of the executry goods was established in the person of the executor, so that he dying after sentence, they neither at-

cresced to the co-executor, nor were there any place for a testament *ad non executum*, but the said goods fell under and behoved to be confirmed in the executor's testament *tanquam in ejus bonis ;* which the Lords have found already in this and in another like case betwixt *Meinzies* and *Collisone, quod vide supra, num.* 255. After sentence, the executor has all the acts of property imaginable ; he may uplift, assign, discharge, or dispose on them for payment of his own debt ; he is *hæres in mobilibus ;* by the sentence there is a judicial novation of the sums, by which they cease to be the means of the defunct, and become the proper goods of the executor, just as if he had taken a new security therefore in his own name. Thir goods must fall under the escheat of some, else rebellion should go unpunished *et rex careret injuriæ suæ solatio ;* not of the legatars or nearest of kin to whom the executor is accountable, because they have only a personal action for these goods, at least a tacit hypothec in them, and so *non sunt in eorum dominio ; ergo,* they must fall under the escheat of the executor. If executry goods, after sentence, were assigned, and not uplifted by the assignee, and he pass to the horn, they would fall under the assignee's escheat ; even so, under the executor's own escheat ; *tantum potest aliquis delinquendo quantum cedendo :* and so as the executor may transmit the goods by a voluntary assignation, so he may by an alienation *contra votum,* or by delinquency ; yea more will be conveyed by delinquency than by a voluntary deed. The full and absolute administration of the executry goods, especially after sentence, is so centred in the executor's person, that it is transmitted to his executor, and the legatars and nearest of kin have no other interest for their security but in the personal obligation of the executor and his cautioner. By all which it most evidently appears that the executor is *dominus bonorum mobilium.*—See Balmano's practiques *voce Rebels. January* 17, 1632, *Miller* and *Lindsey.*

To thir it was ANSWERED, that by the first original of executors, by the act of Parliament in 1617, by their finding caution to make the goods confirmed forthcoming to all parties having interest, viz. to creditors, legatars, and nearest of kin ; as also, by the whole nature of the office, it is more than evident that it is only *nudum ministerium seu fideicommissum* in the person of the executor ; and if he be *hæres* it is only *analogice et improprie, videlicet hæres fiduciarius et gravatus restitutione :* and Craig himself says, *a curatore bonis dato non multum differt;* and so he is *nullo modo dominus mobilium.* * Which also will more fully appear from thir instances : He can have no other right than what the defunct had at the time of his decease, at which time the defunct could dispone upon no part of his moveables, but only his own part ; and so the executor can be in better case than the defunct's self was. *Dominus bonorum* may assign his own goods without any onerous cause, he may gift them, and none can quarrel it ; but an executor cannot give away the executry goods without an onerous cause, or if he do, the legatees and others interested, either arresting or complaining of the fraud will ever be preferred to the executor's assignee. *Dominus bonorum* may swear upon any allegeance referred to his oath, and the same will prejudge ; but an allegeance cannot be referred to an executor's oath to bind any debt upon him in

* *Videatur omnino l.* 3. *p. ult. ; l.* 6. *p.* 3*tio ; l.* 17. *p.* 5*to. D. ad Senatus-consultum Trebellianum ; l.* 12. *D. de fideicommissariis libertatibus ; l.* 48. *p. ult. et l.* 49. *D. de jure fisci ; l.* 1. *C. Pœnis fiscalibus creditores præferri.* See the question here almost *in terminis* debated by Joannes Vandus, *libro Variarum Quæstionum* 2*do, cap.* 23. *Vide infra,* November 1667, *No.* 647, § 3.

prejudice of the nearest of kin and others interested; his discharging and assigning import no property; seeing these be acts which may be done by factors, tutors, or any administrator of other men's affairs. If a factor uplift a sum or recover sentence for it, yet it ceases not to be the constituent's, neither will they fall under the factor's escheat. If one were infeft for his own behoof, and the interest of several other persons *per expressum*, this trustee's rebellion or treason would not forfault the whole in prejudice of those to whom by the quality of the infeftment he is countable. So neither can the executor's rebellion prejudge those to whom by the express quality of the confirmation (which is his only title for intromission,) they must be made forthcoming. As for the axiom *tantum luendo quantum agendo*, it is only true where *delinquens est vere et proprie dominus*, which is not here. The finding of caution gives not the executor the right of dominion in the goods; 1*mo*, Because that is only an accessorian security, and the executor stands first and primarily liable. 2*do*, No stress can be laid on thir cautioners, since no care is had in receiving responsal persons;—a footman will be received for a very great inventory. And, by the common law, legatars had so great interest *in hæreditate defuncti*, that if they were *legatarii certæ speciei* they had *rei vindicationem*, which was only conceded *rerum dominis*; in other legacies *licet de manu hæredis capiebant*, yet they had not only their *actio personalis ex testamento, quasi tacite contractum fuisset cum hærede*, but also *actionem hypothecariam: Parag. 3. Institut. de Legatis.* Now *fideicommissa** (of the which kind the office of executry is,) being *per omnia* exæquat *cum legatis*, what actions were allowed to the legatars the same are consequentially due to him *cui ex fideicommisso hæreditas vel ulla ejus pars restitui debet*, and consequently to the nearest of kin and others against the executor. And where any thing was legat *veteribus formulis per vindicationem et per præceptionem, dabatur legatariis actio in rem.*

This point was reasoned from thir and many other excellent mids, whereof see some in the informations.

The Lords found no such dominion to be in the person of the executor, as, he being rebel, to make the executary goods fall under his escheat, except as to his own share, the third of the dead's part.

Vide infra, No. 377, December 1672, *Lord Lyon* against *Feuars of Balveny.*
Advocates' MS. No. 288, *folio* 121.

1671. *December* 8. The COUNTESS of BRAMFORD, LORD and LADY FORRESTER *against* The EARL of CALLENDER.

THE Earl of Bramford being forefaulted in 1645 for his loyalty to his Majesty, and having L.40,000 upon infeftment, out of my Lord Erroll's lands, the same was assigned by the then States to my Lord Callender, and he accordingly uplifted the same. This forefaulture, as horribly unjust, being *funditus* rescinded in 1661, *per modum justitiæ*, and the Earl and his heirs reponed against the same; as

* This was excellently well decided, though to the prejudice of the fisk, *contra quem qui in dubiis respondet, non erat; l.* 10. *D. de jure fisci;* and as Plinius says of Trajan *in Panegyrico* page 110, *Quæ præcipua tua gloria est, sæpe vincitur fiscus, cujus causa mala, &c.*