

1674. November 12.

The EXECUTORS of the late BISHOP of EDINBURGH *against* The present BISHOP.

The executors of the late Bishop of Edinburgh pursued the Commissaries and Procurator-fiscal and the now Bishop of Edinburgh for the quots of testaments, that were either confirmed or had fallen by the decease of defunct persons, and were confirmable before the late Bishop's death, and fell under his executry, and also for the quots of all testaments confirmed, or confirmable, for the half year after the said Bishop's decease, and falling under the ann.

The Lords found, That the quots of testaments that were not confirmed did neither fall under the Bishop's executry nor the ann; but only the quots of such testaments as were confirmed either during the Bishop's life-time or during the ann; upon these grounds, which were debated at the Bar, but more at length among the Lords themselves, viz. *1mo*, The quots of testaments do not belong to Bishops, as having a share and interest in the moveable estates of defunct persons after their decease; which are only divided betwixt their executors, and bairns, and relict; but the said quots are, in effect, sentence or confirmation-silver, which is given to the Bishops upon that account and consideration, that by their sentence or confirmation, (which is *instar sententiæ* being *actus voluntariæ jurisdictionis*), the defunct's estate is secured to be forthcoming to all persons concerned, both creditors, relict, bairns, and others; and therefore, until that be done, there is no quot nor confirmation-silver due; *2do*, The Lords of Session had, by act of Parliament, as a part of their salary, sentence-silver, viz. twelve pennies of the pound, until the same was taken from them by act of Parliament, their salary being enlarged, and settled upon them otherwise; and if, during the time the said Lords had their sentence-silver, any of them had deceased before sentence, though the process had been commenced and advanced beyond litiscontestation, it cannot be said, that the executors of a Lord deceasing before the sentence could claim any part of the sentence-money, where the sentence is pronounced after his decease; *3tio*, By the 28. act of his Majesty's Parl. 1661, the quots of testaments are discharged; and yet the Bishops being restored to the right of quots, the same will be due for any testament confirmed thereafter, notwithstanding of the said act of Parliament; whereas, if quots were due from the time they became confirmable, quots of testaments confirmed before the act restoring quots to the Bishops, could not be claimed, though confirmed since the Bishops were restored, as said is, to their quots, as being discharged by the said act of Parliament.

The Lords did also find, That the Bishop's relict and nearest of kin had right to an ann, even before the late act of Parl. (1672), (being the 13th act of the 3d Session of his Majesty's Second Parliament, concerning the ann due to the executors of Bishops and Ministers), in respect, by a letter of his Majesty's grandfather, *in anno* 1613, and act of the Bishops thereupon, an ann was found to be due to the nearest of kin of Bishops; but in regard, by the said letter and custom,

No. 29.

Found, that the quots of testaments, that were not confirmed, did neither fall under the Bishop's executry nor the annat, but only the quots of such testaments as were confirmed either during the Bishop's life, or during the annat.

No. 29.

before the said act of Parliament, the ann in relation to Bishops was, if the Bishop deceased before Michaelmas, after the month of . . . , his executors had the half of that year, as belonging to the Bishop incumbent *jure proprio*; and the half of the next year as ann; the half of the rent of his benefice for the half year preceding Michaelmas, the other half being due to him as incumbent, and fallen under his executry; whereas, by the late act, the said ann is so ordered, that the Bishop or Minister surviving Whitsunday, the half of that year does belong to him and his executors, upon account of his incumbency, and the other half for the ann; and the incumbent surviving Michaelmas, is to have the whole year as incumbent, and the half of the next year is to be ann: Therefore, the Lords found, That the late Bishop having deceased before the Michaelmas, and before the said late act of Parliament, the ann should be as it was formerly.

In the same process, it was debated among the Lords, more fully than at the Bar, Whether the quots of testaments should fall under the ann? And it was urged by some, that the quots of testaments are but casual obventions; and that they are due, as said is, upon the account foresaid, viz. that testaments are confirmed by the Bishop, or his officials, and *ratione operæ*, and as sentence-silver; so that they cannot be due but to the present incumbent, who does a duty; and that compositions for entering of vassals, and liferent escheats, and non-entries, and such life casualties, do not fall under the ann. Whereupon it was answered, That; by the King's letter, by the act of Parliament, and by the canon law, the half of the rent of the benefice, stipend, and living, fall under the ann; and the quots of testaments are a considerable part of the Bishops' rent, and especially in Edinburgh, and undoubtedly are a part of his living and benefice; and the rent of mills, which is casual, and depends where there is no astriction upon the arbitrary will of parties to come, or not to come, to the same, and is likewise due *ratione operæ*, doth fall under ann; as also the rent of fishings, and such like, which are casual; and there is a great difference betwixt quots, which are an ordinary yearly rent, and cannot fail so but there will be still testaments confirmed, and the casualties of superiority, as liferents, &c. which are so uncertain as that it cannot be said they are the Bishop's living; and the argument, that quots are due *ratione operæ*, and by reason of actual confirmation, which cannot be done by the executors or relict, is of no weight, seeing the other constant rent of stipends and benefices is due *ratione operæ*, and because the Bishop or Minister serveth, which is not prestable by executors or relicts.

The Lords, notwithstanding, inclined to find, That the quots do not fall under the ann; but, upon the motion of some of their number, that the interlocutor, being to be a preparative, should be further considered, they thought fit not to proceed to the voting.

Clerk, Gibson.

Reporter, Forret.

Dirleton, No. 194. p. 83.