

ing appointed another to be chosen by the College. And the master of the grammar school, Mr Robert Paterson, being presented to the said office by the College, pursued a declarator, to hear and see it found and declared, that he has right to the said office and salary.

It was ALLEGED for the Town of Aberdeen, That no title was produced for the pursuer but the extract of Dr Reid's testament, bearing the said mortification; which could not be respected, seeing the said extract is out of the books of the commissaries of Aberdeen; and his testament could not be confirmed but by the commissaries of Edinburgh, he having died out of the country: and therefore the said extract could not be considered but as a copy, and the principal ought to be produced. And it appears, that there was never any principal, bearing the masters of the College to have the election of the bibliothecare; seeing the Town of Aberdeen has been in use, since the mortification, to present to the said office. And, by a contract *in anno* 1632, betwixt the said Mr Dounie and the Town, he is presented to the said office by the town; to which Dr Dun, the principal of the College, was witness; and the executors nominated, likewise witnesses.

The Lords found, There was no necessity to produce the principal; the extract being a sufficient title. And as to the pretended nullity, it was not *juris*; seeing *non constat* that Dr Reid died out of the country: And, if there were any ground upon the pretence foresaid, it were only of a reduction.

It was found also, That, by the said testament, the nomination of the bibliothecare did belong to the College; and the possession of the town, without a right, cannot found a defence *in petitorio*: and the deed and contract with Dounie, and the subscription of the principal, and of the executors of Dr Reid, as witnesses, could not prejudice the College.

The Lords, having considered the tenor of the mortification, which gives power to the College to name, in case of refusal of Dounie, found, nevertheless, That the said interest, to name and choose a bibliothecare, was not temporary and *prima vice*; seeing wills of defuncts were to be interpreted benignly; especially in favours of colleges. And there can be no reason, why the defunct should have appointed the said election to be, in manner foresaid, for the first time, and not thereafter: and if the College had not the right foresaid, it should not belong to the Town, but the defunct's heir, who doth concur with the pursuit.

Newbyth, *Reporter*. Robert Hamilton, *Clerk*.

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1675. June 24. The COLLEGE of ABERDEEN against The TOWN of ABERDEEN.

IN the case abovementioned, of the College against the Town of Aberdeen, The Lords, having heard again a debate *in præsentia*, did adhere to what they had found formerly; and did declare *jus eligendi* of a bibliothecare to pertain to the College.

*Vide* June 17, 1675, *inter eosdem*.

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