

was granted after *res fuit litigiosa*, and during the dependence of the process betwixt Gight and Pittrichie ; there being a reduction raised of Pittrichie's decret, the event whereof is specially reserved in the disposition made to the Earl of Aboyne.

The Lords did reponne the Laird of Gight against the foresaid decret *in foro* ; he having purged himself, by oath, that he was not master of the writs now produced, when sentence was given, but had recovered them since by diligence, and dealing with Phedertie, and so was not *in mora* : and likewise they found, that he ought to be reponed against the Earl of Aboyne ; because *res fuit litigiosa* the time of his right, which was burdened with the event thereof : which sentence, as it was founded in justice and equity, so it was generally approven by all who were not interested ; seeing it restored Gight to a considerable estate and ancient family, which had been totally taken away upon a naked failie of non-performance of a security to tithes, the value whereof was most inconsiderable.

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1676. July 6. ALEXANDER and GEORGE ERSKINES *against* JOHN REYNOLDS, Bailie of Montrose.

THE deceased Alexander Reynolds, after his contract of marriage with Elizabeth Guthrie, did grant her a bond for payment of the sum of two thousand merks to her, or any she should nominate, at the first term after his or her decease ; which being assigned, with consent of her husband, after the marriage, to Mr James Rate, and transferred by him, in favours of Alexander Lessly, her son of a prior marriage,—after his death, Alexander and George Erskines, as executors, and having right to the bond, did pursue John Reynolds, as representing his father *nomimbus passivis*, to make payment of that debt ; and likewise did libel a declarator, that, after contracting of that debt, he being *locupletior factus* by his father, who did grant him an assignation to sums of money and other goods, extending to forty thousand pounds, which he had uplifted ; and did thereupon conclude that he should be liable for the debt : the pursuers, not being able to overtake the defender as heir, or upon any passive title, did insist upon the foresaid declarator, as being *locupletior factus*, by a provision after contracting of the debt.

It was ALLEGED, Absolvitor ; because any provision, made in favours of children, can never be a ground whereupon to pursue a declarator to make them liable for their father's debt, until first all the representatives of the father, such as heirs, executors, or vitious intromitters, be discussed ; whereas the pursuer's mother was known to be vitious intromissatrix with the father's goods ; and of purpose to gratify the pursuers, who were grand-children by a first marriage, did make them to pursue the defender, who was son to his father of a prior marriage, and so was most unfavourable : besides that, the libel upon such a passive title had no foundation, neither in our law nor practick.

It was REPLIED, That the declarator ought to be sustained notwithstanding ; because it is uncontroverted, that children's provisions are liable to creditors for

satisfying prior debt; and the pursuers have libelled upon all the passive titles, and insisting thereupon; and, referring the verity of the provision made to the defender, to his own oath, which was already sustained; and whereupon he hath deponed and confessed the verity, he cannot now force the pursuer to discuss all the representatives, and after he hath failed in any success to return to this action: whereas he is now willing, upon payment, to assign the defender, that he may pursue or get relief of any of the representatives of his father.

The Lords, having considered this case and declarator, as not ordinary in practice; and resolving to make this a leading case, did sustain the declarator; unless the defender could condescend upon as much estate as this debt did amount to, which the pursuer might overtake by a legal title or diligence, or that he could condescend upon an heir, executor, or some other representative, who in law would be liable: being moved upon this reason, that, if it were otherwise found, it might occasion infinite pleas, and force a lawful creditor to more necessary charges than the debt might be worth.

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1676. July 6. The EXECUTORS of BISHOP WISHART, late Bishop of Edinburgh, *against* The Present BISHOP.

THERE being mutual declarators raised, the one at the instance of the executors of Captain Wishart, as executors to the late Bishop of Edinburgh, against the present bishop; to hear and see it found and declared, that the quots of testaments of all persons deceased within the diocese during his lifetime, for confirming whereof diligence was done by the procurator-fiscal; as likewise, that the quots of all testaments which fell during the annat, did belong to his executors; there being also a declarator, at the present bishop's instance, to hear and see it found that they did belong to him; whereupon there was an interlocutor upon the second of December 1674, finding that the quots of testaments, not confirmed during the incumbent's lifetime, did not belong to his executors, but to the succeeding bishop, in whose name they were confirmed; as likewise, the quots of the testament during the annat, after the decease of the prior bishop: notwithstanding, the executors did now again insist in the said declarator, upon this new ground, That albeit the testaments were not confirmed, yet if diligence was done during his lifetime, or during the annat, that the quots ought to belong to them who succeeded to the bishop deceased; and did insist at large,—

1st. Upon the ground formerly alleged, That the quots of the testaments were a part of the bishop's benefice; but did enlarge their dispute upon that ground, that the benefice of the bishopric of Edinburgh was singular, upon that account; that, without the quots of testaments, it was inconsiderable; it being a large diocese, and having no great rent belonging to the benefice.

2d. As all casualties of the benefice,—*viz.* liferent escheats, and non-entries, which fall during the incumbent's lifetime, belong to his executors, so the quots of testaments, being a casualty fallen, ought to belong to them; as is de-