wife, obliging him to employ the sum of to the heirs of the marriage; which he craves to be fulfilled to him as heir of provision of the said marriage.

ALLEGED,—The obligement which is the ground of the pursuit is heritable, viz. to employ upon land or annualrent, and therefore is not prestable by the executor, but only by the heir, which the pursuer's self is; and so the obligation is confounded, he being both debtor and creditor to himself; and alleged the practique *Wilson*, where this was found.

ANSWERED,—That the same being only a destination, it noways made the obligement heritable.

My Lord Stair was content to give them the Lords' answer on the same. *Vide Dury*, 12 *March*, 1622, *Fairley*.

Act. Lockhart. *Alt.* Cunyghame.

Advocates' MS. No. 53, folio 78.

1670. *July* 2. DUMBAR *against* Mr. MURDOCH M'KEINZIE, Bishop of Murray.

THIS was a declarator at this Dumbar's instance against the Bishop and his son, Commissary of Murray, to hear and see it found and declared, that he has the sole and undoubted right of the Commissary clerkship of Murray in all time coming; and for bygones, craves repetition of the whole benefits and obventions of the said office, ever since his unjust and illegal deprivation by the Bishop. It being demanded by the Bishop, by what right or title he laid claim to that office, it was ANSWERED,—He had right from Mr. John Hay, who was established Commissary of Murray, by the King himself his gift under the great seal, in 1646, and ratified thereafter in Parliament; who by his said gift had power to elect and choose such clerks as he pleased himself; which clerks so chosen by him, were to bruik *ad vitam:* and, conform to this power, he nominated this pursuer clerk, who ever continued in the peaceable possession thereof till the act of restitution of Bishops in 1662; at which time the defender, most unorderly thrust him out, and placed in his own son, who has ay possessed sinsyne.

Then the Bishop ALLEGED,—That his right was null, and so could not be declared, because he was placed *a non habente potestatem* to place him: in so far as, *esto argumenti causa*, the gift granted to Commissary Hay had borne an express power to place a clerk, the same was only *stilus curiæ*, and could operate nothing in prejudice of the King, (who at that time, notwithstanding of the gift, might have disposed on the said clerkship to whom he pleased,) nor of the Bishops, who, by the act of restitution, were stated in his place: and they called to mind a practique in 1647, betwixt the Bishop of Galloway and ———, where the Bishop having empowered his Commissary to choose and admit procurators, it was found, by this power, he could not enter a procurator fiscal. But *2do*, The dispositive clause, in all writs, (whether they be charters, gifts, or other writs,) being that which regulates the whole tenor and

strain of the writ; where any thing is omitted out of the same, it is noways understood to be transmitted at all. *(Vide Cujacium, pagina* 150, *circa medium.)* But so it is here, there is no mention in the said clause of the gift of the Commissary clerkship, or of any power of establishing a clerk.

To thir two it was ANSWERED,—That it was sufficient the power was in any part of the gift. They were to have the Lords' answer on this.

Then ALLEGED,—*3tio, Absolvitor* from this pursuit, because it is offered to be proven, that the pursuer has homologated the right of the said office, inherent in the defender's person, and has past from any pretended right of his own; in so far as he, by a subscribed minute betwixt him and the Bishop, has acknowledged the Bishop to have a good right, and has renounced his own claim, and condescends to deliver up the registers and other writs concerning the office, providing the Bishop pay him by the space of three years, 300 merks yearly; which the Bishop is content to do. *Vide Dury,* 17th *February* 1624, *Thomson.*

To which it was ANSWERED,—That for the Bishop to found on that minute, is *propriam turpitudinem detegere;* because it is offered to be proven, that when the act of restitution of Bishops was making, the defender sent frequently for the pursuer, and showed him how the King and Parliament were about the restoring of Bishops, *in integrum,* to all their former privileges and concessions, and the cassing and annulling of all provisions to offices procured in the time of the troubles. *Item,* presently on the making of the act, he caused double the same; only he kept out the *salvo* that was made in favours of commissaries, their clerks, and others who were in possession of their offices; and so mutilated, did show it to the pursuer, and told him that was the act made: which false and disingenuous representation was the impulsive cause and inducement that moved the pursuer to enter in that contract with the Bishop; and he never discovered his error till the act was published, bearing *in gremio* a reserve *ut supra.*

It was REPLIED,—This was *ignorantia juris,* which excuses none, and can never liberate him of the minute, he being then *major, sciens, et prudens,* and a man that knew the law of the kingdom, at the least should have known the same.

The Lords FOUND the reason relevant to be proven, either by the Bishop's oath or the witnesses present at their communing.

Advocates' MS. No. 54, *folio* 78.

1670. *July* 2. THOMAS CRAWFURD *against* his TENANTS.

This was for mails and duties. Compeared one, who had comprised the same lands, and craved to be preferred, in respect he was in possession, in so far as he had obtained a decreet of removing against the tenant possessor thereof. The Lords FOUND this decreet of removing a sufficient qualification of possession; and would not suffer Thomas Crawfurd to reply that he behoved to be preferred to this compriser, because he had an inhibition against the common debtor, anterior to the compriser's very ground of his debt; only reserved to him reduction on his