

1674. *November 23.* JAMES HAMILTON *against* The EARL of KINGHORN.

JAMES Hamilton, as assignee, by Melgum, to two bonds of borrowed money due by the Earl of Kinghorn; who being charged, did SUSPEND, upon this reason:—That these bonds being granted to Melgum, as a part of the price of the lands of Hattoun, bought by the suspender from Melgum, who had granted a back-bond of that same date, bearing, that, if he should not be paid by the tenants, of the rents of the crop 1670 and 1671, that then he should be free of the said bonds *pro tanto*: Likeas he had recovered decret against the tenants for payment of these years' duties.

It was ANSWERED, That the letters ought to be found orderly proceeded, notwithstanding of that reason founded upon the back-bond; because the charger, having intimated the assignation by a charge of horning, the Earl, by his missive letter produced, did acknowledge that he was truly debtor; and that if, notwithstanding of Melgum's assurance by his missive letter, to free him of the charge at Hamilton's instance, he should not procure his liberation, in that case he should take care presently to make payment of the bygone annualrents; and, upon some reasonable delay, should likewise pay the principal sum; so that any decret recovered against the tenants, being long posterior to that missive letter, to which neither Melgum nor the charger was called, it could be no ground of suspension, it being only obtained of purpose to found this reason after several years, wherein he ought to have done diligence; and that by collusion also.

It was REPLIED for the defender, That the missive letter being only in these terms, That if he should be debtor to Melgum, he should make payment as said is, yet that did not preclude him from any legal defence founded upon the back-bond, which was prior to the charge.

The Lords, having considered Melgum's letter, with the Earl's subjoined thereto, did find, that they being posterior to the charger's assignation and intimation, could not prejudice the assignee; and that these words, if he should be debtor, relating only to Melgum's promise, and making no mention of the back-bond granted by Melgum, but, on the contrary, bearing that, in case Melgum should not prevail with the charger, he should be debtor to him both in principal and annualrents,—the charger was in the case of *delegatio*, where a creditor being appointed and delegated to pay, if he accept thereof, without making mention of any ground of law, such as compensation or otherwise, whereupon he might defend himself against the cedent, he can never thereafter defend against the assignee who hath intimated his right.

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1674. *November 25.* JANET INGLIS and ANDREW CHARTERS, her Husband, *against* JOHN M'MORRAN.

THE said Janet, and her husband, having intented action against Bailie Mac-Morran, as tutor dative to the said Janet's mother, for count and reckoning of his intromissions; and for modification of an aliment; and finding caution to make the rest forthcoming to the nearest of kin.