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 decreet 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 decreet 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 prejudge 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.

It was ANSWERED, That the pursuer had no interest, she having a brother who did not concur in this pursuit; likeas the defender, when he procured his gift of tutory dative, having found sufficient caution, he could never be liable but to the furious person, if she shall recover; or to her heirs or executors, who shall have the best title, only.

It being farther ALLEGED, that this pursuer, by her contract of marriage, subscribed by her husband as taking burden for her, had discharged all benefit he could crave any manner of way by the decease of her said mother; and that in favours of her brother, who did not pursue.

The Lords, upon that last allegeance, did assoilyie the defender. But if the brother had pursued, or concurred in this action, it was not determined if a tutor dative to a furious person might be pursued for count and reckoning, and the modification of an aliment, which might have been the subject of debate; but it is thought they would have been liable in that same condition, as tutors to minors, but no otherways.

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1674. *December* 2. CAPTAIN WISHART *against* The BISHOP of EDINBURGH.

CAPTAIN Wishart, as executor and nearest of kin to his father, the deceased Bishop of Edinburgh, did pursue the present bishop for the whole quots of testaments which fell during the deceased bishop's lifetime; as likewise during the ann after his father's death.

It was ALLEGED for the bishop, who had likewise intented a declarator, that no such quots could fall under executry, or within the ann:—that, as to these quots that fell during the bishop's lifetime, they could not fall to the executor, unless they had been confirmed, because they were only due to the bishop *ratione officii;* and the law did give the same, for that special reason, that he did administrate and interpose his authority for the preservation of the defunct's goods; which reason ceasing, and he being at no pains, nor did officiate, he could crave no benefit thereof; but the same ought to belong to the succeeding bishop, who did interpose his authority, and confirmed the quots of testaments, being of their own nature but casual, which might fall or not fall, were not of the nature of annualrents out of lands or teinds; and so could not be estimated to be a part of the rents and benefice.

It was REPLIED for the executor, That the quots of testaments being a part of the bishop's benefice, to which he was presented, did necessarily belong to him, as well as any other rents of his benefice; which falling due during his lifetime, he hath that same right thereto, as to the rents of any other part of the benefice; and he dying, not uplifting the same, it did fall under executry, as was decided lately in a case betwixt the executors of Fairfoull, Bishop of Glasgow, and the succeeding bishop: and the quots of testaments being due by the death of any person within the diocese, is no more a casualty, but in law is due to the Bishops, whether it be confirmed or not; he having no more right to any other part of the benefice than to these quots.

The Lords, by their interlocutor, did find, That the quots of testaments could be only due to the executors of the bishops, if they were actually confirmed during their lifetime,—having found that the late practique adduced was not a