

takes an assignation to a bond in corroboration of a debt owing him by the cedent, he will do well to advert what diligence he is tied to do.*

Before this decision many advocates were in a mistake as to the import of this absolute warrandice.

Peirston having lost the interlocutor, then offered him to prove it was communed and agreed to by this defender, that he should warrant the debt against all accidents that could befall it.

The Lords found this relevant to be proven *scripto vel juramento*; though it was alleged that he should not be heard to found on that now, because of his supine negligence in letting the debtor turn insolvent, and not putting him to it by the space of three years.

Advocates' MS. No. 270, folio 115.

1671. *November 28.* HAMILTON of KINKELL *against* AYTON of Kinnaldy.

ONE pursuing for implement of a contract to which he had right, it was ALLEGED, I cannot fulfil to you, because your author is denuded by an assignation in favours of ———, who has intimated the same to me, and has recovered sentence. The Lords *in præsentia* found (they say it was found so before,) it was *jus tertii* to the debtor; and therefore repelled his allegiance, except he could show an interest.

ALLEGED he had good enough interest,—lest he be made pay it twice. The Lords found he should suspend on double poinding.

ALLEGED, it were better to receive it here than needlessly to multiply processes and charges. Yet the Lords found in form it could not be received here, but only in a double poinding.

This pursuit was at the instance of Hamilton of Kinkell against Ayton of Kinnaldy, as heir to his father *et cæteris nominibus passivis*, to fulfil a contract whereby he was obliged to dispoise some lands to Kinkell's father, who assigned this contract to one Mr. Henry Danskein; who intimated his assignation, and pursued for transferring this contract against Kinnaldie *passive*, and obtained sentence. It was confessed by all, if Danskein had recovered sentence for implement it would have been a good defence against Kinkell's pursuit; but being only for transferring, it was not exclusive of the pursuer's right, unless Danskein's representatives did compear and propone on their right, and crave to be preferred; though it was alleged the transferring was equivalent to a decret for implement, and would receive the self same execution as if it were for implement.

Advocates' MS. No. 273, folio 116.

* The Lords were also moved with the authority of President Spotswood, who in his practiques is of this opinion. There were also French *plaidoiez* and *arrests* adduced for it by my Lord Newbayth. See Peleus his *Actions Forenses singulieres*, Lib. 5, Act. 15, pag. 259.