

1663. December 9. JAMES, ROBERT, and MARGARET MITCHELL, *against*
The COUNTESS of WINTON.

In anno 1660, Dame Elizabeth Maxwell, Lady Winton, as principal, and Lady Jean Seaton, her daughter, as cautioner, bind and oblige them to content and pay to Catharine Morton, indweller in Edinburgh, the sum of 500 merks. In 1662, the said Catharine assigns the said bond to James, Robert, and Margaret Mitchells, (married to John Hastie in Prestonpans;) L.200 she ordains to come in equally betwixt the two boys; and 200 merks she assigns to the said Margaret, in liferent, and to her bairns procreated betwixt her and John Hastie, in fee. Before intimation is made of this assignation, the cedent dies. Thereafter, the assignees above mentioned, they registrate the bond in the Sheriff-Court books of Hadinton; and, by a precept obtained thereon, charge the Countess of Winton to make payment of the said bond. This charge she suspends, *1mo*, Because all charges given by virtue of not intimated assignations, are ever suspendible before the Lords of Session: but such was this charge. *2do*, The said suspender were *in mala fide*, to pay the said sum to the chargers, by virtue of their not intimated assignation; seeing the executors of the cedent may pursue her for the same, as given up in the defunct's testament; till such time, therefore, that she did see an assignation granted by the cedent's executors, or nearest of kin, in favour of thir chargers, she could not be *in tuto* to make payment to them. *3tio*, The suspender might either have been *in mala fide*, if she had obeyed the said charge: seeing the King, or his donator, might have pursued for the same, as belonging to them by reason of bastardy; the said Margaret, cedent, being born and deceasing a bastard, without any lawful disposition, duly intimated, made thereof; or else might have run the hazard of double payment of the same sum, which, in law, she is not holden to do. *4to*, The suspender cannot answer the said Margaret Mitchell and her spouse; seeing, by verie-pretended obligation, it appears that 200 merks of the said sum is only assigned to them in liferent, and the fee thereof to their bairns; and, therefore, till such time caution be found her for making the said 200 merks forthcoming to the bairns, and for her exoneration of her payment thereof, and for warranting her at their hands for now and ever, she cannot be obliged in payment of the said sum to them. *5to*, For the three years' annualrent of the said principal sum, she produces five discharges; the last whereof discharges the very last term's annualrent.

The Lords, by their decret, assoilyie from all annualrents of the said principal, because of the said discharges produced; find the letters (notwithstanding of the reasons of suspension,) orderly proceeded; ordain them to be put to execution, ay and while the pursuer make payment [of the] principal sum; ordain, finally, the said Margaret Mitchell and her spouse to caution to relieve the Countess at their bairns' hands; which they accordingly do.

Suspender, Mr. Laurence Oliphant. *Alt.* James Chalmers.

Signet MS. No. 28, folio 9.