payable at a term, for an apprentice-fee, is for a just cause; and any person, for an onerous cause, (albeit he knew that to be the cause,) might lawfully take an assignation thereto; after which, the superveniency of the cedent's becoming bankrupt, ought not to prejudge the assignee. And, on the other part,—it being known to an assignee, that a bond for borrowed money, for performance of a deed which had *tractum futuri temporis*, it was sufficient to put the assignee *in mala fide* to distress the debtor, when that bond was granted *causa data causa non secuta*. Yet it seems, that, in point of law, the assignee could not be suspended upon that ground; seeing the money might have been uplifted and disposed of by the cedent before the outrunning of the apprenticeship; and, therefore, might have been assigned. But no interlocutor was given thereupon.

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1672. *November* 16. JAMES DAVIE *against* DAVID KENNOWAY.

DAVIE being charged upon his bond, for payment of debt due by James Cassils to Kennoway, in respect he had not imprisoned him in the tolbooth of Linlithgow, upon the 24th of February thereafter, conform to his bond for that effect, did SUSPEND, upon that reason,—That he had fulfilled the condition, by entering the said James Cassils, prisoner in the tolbooth, within two days thereafter.

It was ANSWERED, That the bond being peremptory as to that day, the failure could not be purged by any posterior performance.

The Lords did find, That the performance was sufficient to purge the failure; unless the charger would allege that he was prejudged and damnified, or that Cassils was in a worse condition the day of his imprisonment than he was the precise day contained in the bond; for the adjection of a special day in bonds, can only resolve in damage and interest, where the fact itself is truly done and performed.

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1672. *November* 16. DUNDAS and OTHERS *against* The MAGISTRATES of EDINBURGH.

THE Magistrates of Edinburgh, being pursued for payment of a debt due to Dundas, and some others of the creditors of Whythead of Park, upon that ground,—That Park, being imprisoned in the tolbooth of the Canongate, for civil debt, and arrested at the pursuer's instance; notwithstanding, he was suffered to escape, by the negligence of the jailer or insufficiency of the prison:—

It was ALLEGED, That the way of the escape being by a false key to the bell-house door, and carrying of a rope to the top of the bell-house, whereby the prisoner did come out at a window, the jailer nor magistrates could not be liable for the debt; because it was *casus improvisus*, and such as no prudent person could foresee, there never having escaped that way any prisoner in former times.

It was REPLIED, That it being confessed there were ropes carried into the tolbooth, by which the prisoner escaped, and that the window of the bell-house was open, out of which it was easy for any person to go down to the roofs of houses built underneath, against which the magistrates had provided since, by putting in of iron stauncheons in the windows: As likewise, that a woman being prisoner for a crime, did make her escape that way, albeit she was bruised in the attempt, because she did it without the help of any ropes; which occasion should have made the magistrates guard against all such attempts.

The Lords did ordain some of their number to visit the way of the escape.—Upon their report, did assoilyie the jailer, as not being intrusted with the key of the bell-house. As likewise, the magistrates, in respect there was never any attempt but that one wherein the prisoner suffered so much: Which, as to the magistrates, was hard, they being forewarned, and not having secured from any further attempt, as they have now done.

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1672. *November* 26. HENRY BARDINER of CULTMILN *against* WILLIAM COLZIAR of HALCROFT.

HENRY Bardiner having a feu of the Miln of Cults, with the astricted multures of all grindable corns, whereupon he was infeft, and confirmed by the superior, and did obtain decreet against Colziar; who did SUSPEND, upon this reason;—That he could not be liable for the multures of any bear not tholing fire and water, because he stood infeft in the lands of Halcroft, free of all restriction; which were feued long before any infeftment or confirmation granted to the charger, of all grindable corns; and had never been in use of paying any multures, but of oats and bear, which were ground for the suspender's use; but never for any bear sold to a merchant.

It was ANSWERED, That the charger standing infeft in the miln, with the astricted multures of all grindable corns; and being confirmed, and having acts of thirlage, and decreet conform, the suspender, by payment of multure for his oats, must be liable for all other grindable corns, seeing his possession of a part gives him right to the whole: as was found by a decision betwixt the Laird of Waughton and Foord, *in anno* 1635;—whereby it was expressly found, That *omnia grana crescentia*, being thirled, albeit the feuar of the miln had not been in possession of the multures of all corns growing by the space of 40 years; it being sufficient that, by virtue of the astriction, they had been in possession of a part.

The Lords, notwithstanding, did find the reason relevant to assoilyie from the multures of bear sold to merchants, or not tholing fire and water; in respect that the defender's authors were infeft by the Abbots of Culross, without any restriction to the miln of Cults, long before the Abbots' confirmation of the charter granted to the charger's authors, bearing all grindable corns:—and found, That the acts of thirlage or decreets could not infer payment of the multure for such bear as was sold, unless that either the heritor had consented thereto, or made payment of the multures of bear, in obedience of the said acts or