

1665. *February 15.* JAMES LAWSON *against* MARY LINDSAY, relict of James Cunynghame of Newhouses.

JAMES CUNYNGHAME of Newhouses, obliges him by bond in 1638, to pay to Alexander Job, his tenant, L.100. *Item*, in 1658, he grants bond to James Lawson in Templelands, for 200 merks. This James procures an assignation from the oys and executors of the said Alexander Job to the L.100 bond, and so pursues Mary Lindsay, relict of the said Ja. Cuningham, and executrix, confirmed to him, for payment-making to him of the said sums contained in the said two bonds.

It is ALLEGED for her, that no process can be sustained against her for the L.100 in Alexander Job's bond, because granted before the act of Parliament 1641; and, therefore, till an heir be served and retoured to him, the pursuer can have no interest thereto.

Whereto it was ANSWERED for the pursuer, that he insisted not *pro loco et tempore* for the said principal sum while the heir were served, but craved sentence for the annualrents thereof preceding Job's decease.

Whereunto it was REPLIED for the defender, that she must be assoilyied from the annual-rent, as also from the other bond, because offers to prove paid.

This the Lords found relevant, to be proven *scripto*: a day is assigned for that effect: her procurators failed, so that the term was circumduced against her, and she decerned her to pay the annualrents of the first bond, with the principal sum and annualrents owing of the other.

*Act.* Mr. Thomas Lermonth.

*Alt.* Mr. Jo. Cunynghame.

*Signet MS. No. 65, folio 61.*

1665. *February 15.* JAMES NASMYTH *against* GEORGE STEWART of Auldhame.

JAMES HOME of Bonprie being denounced to the horn in January 1662, his liferent estate fell; the gift whereof Mr. Ja. Nasmyth, writer in Edinburgh, procures on the 2d of July, 1662; gets it past the seals on the 3d day of July. Then intents a general declarator of his gift. Compears, Geo. Stewart of Auldhame, advocate, for his interest; craves to be admitted; and for instructing his interest produces a gift of the same escheat dated in March 1662, sealed the 14th July, 1662; *item*, an instrument under a notary's hand, bearing Nicoll Somervell, servitor to the said George, to have several times required the said signature from Mr. William Burnet, keeper of the register of signatures, but could not get the same, and therefore protested for cost, scaith, &c. he might sustain thereby; *item*, a summons of general declarator of his gift, at the said George his instance. Then alleged, that, since he had the like declarator with the pursuer, and had done the first diligence before him, he ought to be preferred, at the least he was content that a general declarator might pass for them both together of one date, seeing his composition was first paid: and craved that each party's defences might be reserved in the special declarator.

Whereunto it was REPLIED,—That albeit George Stewart's gift was prior in date to the pursuer's, yet the pursuer's was expedite before it; and the summons

raised, execute, and called before his; and, therefore, albeit posterior in date, seeing it was prior in diligence, the pursuer ought to have his gift first declared.

Upon which dispute the Lords preferred the pursuer. After pronouncing of which interlocutor, the cause being again called, George Stewart craved to be first declarator, notwithstanding thereof; in respect he had the first gift and first signature, and had done first diligence thereon; and any interruption made in passing through the seals, was not his default, but the treasurer's clerks, who kept up the same while the pursuer's gift passed. Whereunto the pursuer repeated his answer *ut supra*.

On this the Lords adhered to their former interlocutor. Then ALLEGED,—That no respect could be had to the pursuer's gift, because he offered him to prove, that the debt which was the ground of the horning was satisfied. *Item*, that the pursuer at the taking of the gift granted back-bond to the treasurer, declaring his gift to extend only for payment of the debt contained in the horning whereupon the gift proceeded.

REPLIED *nullo modo relevat* to say the debt was paid, unless ye say before denunciation and registration of the horning.

In respect of which reply; *item*, that the said George produced not the back-bond, nor no declaration relative thereto under the treasurer's hand, they repelled the allegiance; and preferred the pursuer; and declared his gift in *communi forma*.

*Act. Da. Dinmuire.*

*Signet MS. No. 70, folio 61.*

1665. *February 16.* PETER COUPER, Commissary at Inverness, *against*  
The MAGISTRATES OF INVERNESS.

PETER COUPER, Commissary at Inverness, comprises a tenement of land lying within the town of Banff, for a sum of money addebted to him by the heritor; then charges Sir Jo. Baird of Auchmedden, provost, with the bailies of the town, to infest him therein in free burgage. This charge they suspend, *1mo*, Because by an inveterate custom amongst them, whoever craves to be entered vassal of the said town must make himself burges, and pay the accustomed duties therefore, which this charger has not yet done. *2do, Esto*, There were no such law and practise amongst them as there is, yet the suspenders could never be forced to enter the charger till he had paid the yearly rent of the said lands comprised, and presented a formal charter to the suspenders for that effect, which is not done. *3tio*, They can give no obedience to this charge, till the charger become an actual resider of their burgh, and keep court and plaint, and pay common burdens as neighbours do.

To the first ANSWERED, *non relevat*, because beyond all controversy the suspenders are obliged to accept comprisers, albeit they be not burgeses. To the second answered, that the suspenders are obliged to accept comprisers without any composition to be paid for entry, seeing the lands are not holden of them as superiors, but of the king in free burgage, whose bailies the suspenders are; as was found in the decision of a former action, betwixt *Hay of* , and the *Burgh of Aberdeen*. To the third, it is not requisite a vassal compriser be a resider in