

the Lords, humbly craving they might be assoilyed and freed from the penalties and Sheriff fees. *1mo*, Because they craved compensation for 800 merks of penalties, contained in two bonds granted by Kilsith, which the pursuers, by satisfying them, had acquired right to. *2do*, Callendar, as being forfault by the usurper, might have taken the benefit of the act 1661, anent forfaulted persons their not paying of eight years annual-rent, the benefit of which act the Earl would not take; and therefore, &c. *Item*, offered, what expenses should be given in in account, to pay the same at the modification of the Lords. Upon which supplication the Lords ordained the defender to give in an account of his disbursements; who gave in the count following; for registration of two bonds, one of them registrate by way action, L.20; for raising of horning thereon, and getting them signet, L.5, 16s.; for using of requisition upon one of the said bonds, L.5, 16s.; for raising letters of apprising, signet to them, executions thereof, claim, acts of court, decret of apprising, instrument money, house dues, Sheriff fee, allowance of it, raising of letters to charge the superior thereon, &c. L.200; for writing a charter, L.8, 13s.; for taking seisine thereon, and its registration, L.30; for a disposition made by Andrew Ramsay to Kilsith, L.30; for an instrument of resignation *ad remanentiam* L.30; *summa totalis*, L.306, 16s.

Upon which account the Lords found the lands orderly redeemed, &c. the said L.306, 16s. being also paid with the rest; *item*, declared and ordained conform to the desire of the summons, unless in so far as the pursuer passed therefrom.

Act. Mr. Lawrence Oliphant. *Alt.* Mr. Jo. Cunynghame and William Braidie.
Signet MS. No. 78, folio 62.

1665. *February 17.* MARION BROWN, relict of Jo. Wauchop, and WAUCHOPS their Children, *against* JO. WAUCHOP of Gleghorne.

MARION BROWN, relict of Jo. Wauchop, and the children of the marriage betwixt them, charge Jo. Wauchop of Gleghorne, for payment making, (conform to his bond granted in 1664 to the said John,) of 400 merks. This charge he suspends on thir reasons; *1mo*, That formerly having made an offer of the said 400 merks, he found the chargers incapable to grant him sufficient and valid discharges therefore, in respect the chargers had denuded themselves of the said bond and sums of money therein contained, by assignation made in favour of Mr. Robert Clerk, writer in Edinburgh. Notwithstanding whereof, he only minding the chargers' good, granted them new bond for the 400 merks, and took her bond for delivering and obtaining to him of the former bond, given up to Mr. Clerk, with the assignation thereof, or at least his sufficient discharge thereof; nothing of which the chargers have yet done. Therefore, (lest he should be liable in double payment,) he craves the letters may be suspended ay and while the other bond be fulfilled. *Item*, because the said Mr. Robert Clerk is dead, he craves an extract of his testament; *item*, that the said sum may be confirmed and discharged by his lawful executors. *2do*, No execution can pass on the said bond, charged on at the children's instance; because, by the tenor of the bond, the same is only payable to them at their mother's decease; and though their mother were deceased, they ought to be authorized, being all minors, with tutors and curators, before he

could *tuto* pay them any sums of money. At the same time, Cleghorne charges the said Marion Brown, upon her bond, to deliver to him the said 400 merks bond, with the assignation thereto made in favour of Mr. Robert Clerk, &c.; *item*, to pay L.100 of penalty, contained in the bond, for her failyeing.

This charge she suspends on this reason, That the bond charged on is intrinsically and of the law null, being *ob causam datam, causa non secuta*; for when she granted the said bond, it was in expectation either of present payment to have been made to her of the said 400 merks, or of most sufficient security for payment thereof; but, to the contrary, he sent her a most insufficient bond, as appears by his suspending of it since: and, therefore, till such time that he grant her a better security, she cannot be holden to obtemper his charge. At the calling of thir two suspensions, there is produced by Marion Brown the first bond, with the assignation thereto, in favour of Mr. Robert Clerk, and Mr. Robert his discharge on the back thereof.

Upon the which production the Lords found the letters at her instance against Cleghorne orderly proceeded, ay and while he paid the said sum. Suspended them *quoad* L.40 of penalty. Suspended the letters raised by him against her; only ordained the clerk of the process to deliver up to him the foresaid first bond, with assignation and discharge, upon his receipt thereof, which should be to the clerk a sufficient warrant.

For *Cleghorne*, Geo. Stewart.

Alt. Mr. Thomas Lermonth.

Signet MS. No. 80, folio 63.

1665. *February* 18. DAVID HOME, and HARBERT GLEDSTANES *against* JAMES JOHNSTON and his SON.

MR. DAVID HOME, indweller in Edinburgh, as cedent, and Harbert Gledstanes, merchant there, as assignee, charge James Johnston, in the Westerlaw of Whitsome, and his son, for payment making to them of 515 merks, as the tack duty of the lands of Whitsome-hill, set to them for three years. *Item*, to pay sixteen cayne fous; *item*, to pay a boll to the hird; *item*, to leave the hay at their way-going, win, and standing in the rook, &c. conform to a tack granted by the said Mr. David, of the said lands in 1649.

This charge they suspend, *Imo*, Because general, noways condescending on the particular years that the said tack-duty is resting, but only general for three years; and, therefore, till such time the chargers condescend on the particular years, the suspenders can make no special obedience. *2do, Esto*, the particular years condescended on in the tack were also in the charge; yet the chargers can never distress the suspenders for the whole three years in the tack, but only for two of them, to wit, from Whitsunday 1649 to Whitsunday 1651, seeing the suspenders possessed the lands no longer. The English coming in 1650, and Dumbar being fought, the whole country of the Sheriffdom of Berwick was plundered, and, amongst others, the suspender lost his whole stock; whereon, in 1651, he renounced the said tack to Mr. David, then heritor of the lands; who accepted of the same, by labouring the said lands either by himself or by tenants; the verity whereof the suspenders refer to Mr. David his oath. And as for the two years they possessed,