

REPLIED for the suspender,—That the said answer ought to be repelled, because Mr. Alexander, in his discharge, offers to count. My Lord Cochran's procurator declares he refused to count. All which being considered by the Lords, they suspended *simpliciter* the letters for the whole sums charged for, except allenary the said L.440 given up in the declared charge, for which they find the letters orderly proceeded, and ordain them to have further execution, aye and while the same be paid.

*Susp.* Mr. William Maxwell. *Alt.* Mr. George Mackenzie, Lord Cochran, Sir Thomas Wallace.

*Signet MS. No. 36, folio 11.*

1663. *December 16.* HUGH WEIR *against* THOMAS GRAY.

In July, 1593, there is a contract of alienation made betwixt William Levinstone, of Jerreswood, as patron to the chaplainry of Lady Alverage, lying within the Kirk of the town of Lanerk, called St. Nicolas' Chapel, with consent of Jo. Levinstone, incumbent chaplain at the time; and Ja. Gray, notary, burghess of Lanerk; whereby the said William disposes the said chaplainry, with the houses and barn-yard adjacent thereto, as also the acre of land called the Lady acre, with half an acre called the Bonnet or Typsett, to the said Ja. to be holden of him as superior for payment of 40s. Scots money, in name of feu-farm, being the retoured duty thereof, yearly. Sir William Lockhart, of Carstares, he acquires the superiority of the said lands, and disposes it to Jo. Hushillwood, Bailie of Lanerk. Ja. Gray, the vassal, dies, *in anno* 1643; whereupon the tenement falls in non-entry in Hushillwood, as superior, his hands. He assigns it to one Hugh Weir, maltman there: who, as donator, and by virtue of the gift and disposition made to him, raises a summons of declarator against Mr. Thomas Gray, writer in Edinburgh, oy to the said Ja. Gray; to hear and see it found and declared by the Lords, that the said tenements in Lanerk have been in non-entry since 1643, and are, and will be still in all time coming, aye and while the lawful entry of an heir of perfect age: *Item*, to see it declared that the whole farms, mails, profits, and duties of the said lands, have appertained, for the whole space foresaid, to the said superior, John Hushillwood, and, consequently, to this pursuer as his donatar: *item*, that they will appertain to them in all time coming, aye and while the lawful entry, &c. with the relief of the same, when it shall happen; the retoured duty, owing for twenty years together, amounting to L.40: *Item*, the farms of the said lands being set at their true avail, will extend to L.48 yearly; as a testificate, declaration, or acknowledgment of the defenders, produced by the pursuer, bears: *item*, to hear it found and declared, that seeing this pursuer has good and undoubted right to call for the mails and duties of the said lands, for all the time they have been in non-entry; *item*, for the feu farm thereof; that messengers at arms be directed to poind, apprise, and distrenyie the readiest goods and gear that shall be found upon the ground of the said lands, for the said mails and duties owing; and failyieing of moveable goods and gear streinyable, to apprise the ground-right and

property thereof, to the said pursuer, as donatar, aye and while he be made completely paid.

The Lords, upon sight of the letters of gift and disposition, decerned conform to the desire of the summons; by reason, especially, that the defender, compearing by his procurator, consented thereto.

*Act.* Sir George Lochart. *Alt.* Mr. Jo. Harper.

*Signet MS. No. 37, folio 11.*

1663. *December 16.* JAMES HEWAT *against* JOHN HEPBURNE of Waughton.

JO. HEPBURNE of Waughton, *in anno* 1662, obtains a decret of removing, before the Earl of Hume, Sheriff of Berwick, against James Hewat, in AuldCambus, to flit and remove him and his from the four acres of lands, with one horse's grass, in the mains of AuldCambus; as also from the lands of Reidcleuches, parts and pertinents thereof, lying within the sheriffdom of Berwick. Upon this decret, he purchases the Sheriff's precept, charging him to remove within such a space, else to incur the hazard of horning and ejection. This precept he suspends; then raises reduction of the decret. The reasons he suspends upon, are, *1mo*, it is for null defence and not compearance, not being cited thereto; whereas, if he had been cited, he had compeared and alleged such relevant reasons as would have stopped the giving forth of the said decret, *in prima instantia*, which he now propones against it *in secunda*: as that he could noway be decerned to remove from the said lands, because he and his predecessors have bruiked the same past memory of man, by virtue of rights and tacks from the Earls of Home, Waughton his authors; and, particularly, that he possesses, by virtue of a tack granted him by James, Earl of Home, *in anno* 1640, during his lifetime; at least, for years yet to run and unexpired; long before the disposition or alienation of the said lands made to Waughton; and, therefore, till such time that the foresaid tack expire the suspender cannot be decerned to flit: *2do*, *Esto*, the said tack were not valid, (as it is most valid,) yet considering how he and his said predecessors have bruiked the said lands, by virtue of the said rights, they cannot be removed therefrom till such [time] as their rights be reduced; which is not, nor cannot be done. At the calling of this suspension to the preceding reasons, the suspender's procurator added [and] eiked the following:—*1mo*, The said decret is for null defence; for albeit therein, there is a procurator made compearing for the suspender, yet the truth is, he had no warrant from him to compear; whereas, it is notour that no procurator before an inferior judge should compear without a warrant in writ. *2do*, The said decret is given *a non habente potestatem*; one that could not be judge thereto, because in very truth, both judge and party in the cause, or at least, could either tyne or win therein: for, the Earl of Home (giver of this decret) having sold (disponed) the lands, from which the suspender is decerned to remove, to Waughton, with absolute warrandice from all tacks, &c. if the Earl had assoilyied the suspender from the action of removing pursued against him by Waughton, upon consideration of this tack, he did forsee that Waughton would have pursued him for war-