

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-

randice of the said disposition ; and so he might have tint thereby. And for this cause, *de facto*, did he repel that unanswerable exception, grounded on the tack, contrary to all law and reason, and contrary to the daily practise of the Lords in such cases. And as the said reason would have been a good cause of advocation, so also must it be of suspension ; and, therefore, the decret, as null in itself, must be turned in a libel. *3tio*, Albeit the said decret had been given by a competent and unconcerned judge, (as it was not,) yet it ought to be suspended, both upon iniquity, and as null in itself, and wanting lawful probation, in so far as the fore-said unanswerable defence was repelled : for although it was answered, that he and his predecessors had passed from this tack, by their payment of a greater tack-duty than was contained therein, which was no sufficient nor relevant reply to take away the said tack, but the most it would infer is, the heightening of the duty ; *2do*, This cannot be proponed against the suspender ; seeing his father died only in April last, and he was warned to flit at Pasche, so that the term of payment not being yet come, he has not paid any mails or duties ; and, therefore, the said decret is null, not proceeding on any probation. *4to*, It is to be remembered that the suspender has reduction of the said decret, upon reasons coincident with thir, depending.

To all which it was answered by Waughton's procurators, that the letters at his instance against the said Hewat ought to be found orderly proceeded, and he assoilyied from the said summons of reduction intended against him ; because the self same reasons insisted upon now, in the suspension and reduction, were all proponed before the obtaining of the said decret, and repelled.

All which allegeances being well and ripely considered by the Lords, they found that reason of suspension relevant, that there was a tack of the said lands standing in the person of the said Ja. Hewat, suspender, granted by the said Earl of Home to him, before any right made by the said Earl to Waughton, for years yet to run, unexpired ; and, therefore, assigned a day for proving the same. Which they failyieing to do, the term was circumduced against the defender ; and decret given forth, ordaining him to remove, otherwise the letters of horning to be put to farther execution against him. *Item*, assoilyie Waughton *simpliciter* from the action of reduction intended against him.

*Act.* Mr. Jo. Eleis. *Alt. charger*, Mr. David Dunmuire.

*Signet MS. No. 38, folio 12.*

1663. *December 16.* WILLIAM BAXTER and WILLIAM BLAIKWOOD *against* ANDREW LAMB of Southcarrie.

MR. ANDREW LAMB, Bishop of Galloway, at London, in November, 1623, borrows from William Kilmennie, merchant, residenter at London, 500 merks Scots ; and because it was by Patrick Baxter, merchant-burgess and bailie in Edinburgh, his order, he got it, he grants him his bond of the same. In 1646, Patrick Baxter dies, and his son, William Baxter, serves and retours himself heir to his father ; then charges Andrew Lamb of Southcarrie, oy and apparent heir to the said Andrew, Bishop of Galloway, granter of the bond, to enter heir to his fa-