

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

the burgh, in regard his lands must bear common burdens as other lands do within the burgh, whether he reside or no.

After which dispute, the Lords found the letters orderly proceeded, ay and while the suspenders entered the charger to the said tenement by infestment, &c.; the charger always paying to the suspenders the duty used and wont.

Suspender, Mr. Thomas Baird.

Alt. Sir Geo. M'Kenzie.

Signet MS. No. 76, folio 62.

1665. *February* 16. SIR MUNGO STIRLING of Glorat, and JAMES EARL of CALLENDAR *against* JAMES VISCOUNT of KILSITH.

SIR MUNGO STIRLING of Glorat, as principal, and Ja. Earl of Callendar, as cautioner, oblige them to pay to Sir William Livinstone of Kilsith, \$1,000 merks in 1645. Livinstone assigns this bond to Andrew Ramsay, his servitor, who thereupon comprises the lands of Glorat, lying within the Sheriffdom of Stirling, in 1655. Then by his retrocession, the said Andrew repones Kilsith in his former right and place. All this while, the annual-rents of the said principal sum comprised for are paid punctually. Then Glorat, intending an order of redemption, raises letters of premonition of James now Viscount of Kilsith, as heir served and retoured to his father, and his tutors and curators, for their interests, to compear, &c. and to accept and receive the sums of money contained in the process of apprising; and thereupon to acknowledge and grant the said lands to be lawfully and duly loosed, outquit, and redeemed. At the day the order being used, instruments of redemption are thereupon taken. Then Glorat and Callendar intent summons of declarator of redemption of the said lands; *item*, of the property of the same, charging them to compear, and to hear and see themselves decerned, to resign, renounce, and upgive the said lands, as lawfully redeemed; *item*, to make, subscribe, and deliver valid grants and renunciations of the redemption; *item*, to deliver up to the pursuers the process of apprising, with the grounds thereof; *item*, with all that has followed thereupon; *item*, to hear and see it found and declared, that the good and undoubted right and property of the said lands redeemed belongs to the pursuer allenary. At the calling of this action, the procurator for the pursuer declared that he passed *simpliciter* from that part of the summons whereby he craved decret of declarator of the property of the said lands; *item*, that he insisted only for declarator of redemption of the said lands; which decret he declared should be no acknowledgment, allowance, approbation, or strengthening of any of Stirling of Glorat his infestments or rights to the same lands; but that he and Kilsith should be in that very same state, case, and condition, as to their respective claims and interests in the said lands that they were at the leading of the said apprising, &c.

Whereunto it was ANSWERED for the defender, that the order of redemption cannot be sustained; neither can the lands be declared orderly redeemed, until first the pursuer consign and offer the principal sum and annual-rents contained in the bonds and apprising, but likewise the penalties, sheriff fees, and expenses debursed in leading the apprising, and in passing and expeding the infestment thereon; which they have not done. Whereupon the pursuers gave in a supplication to