

1670. *June 24.* ————— *contra* MACALLA.

THIS is a subsidiary action against the defender, as attester of a cautioner in a suspension, (in thir words “I attest his sufficiency for the sum charged for,”) to pay the sum contained therein; because the cautioner is already distressed by horning, denunciation, and caption, and yet they cannot recover the sum off him.

ALLEGED,—The attester of a cautioner must be in the same case with the clerk to the bills, who will never be liable if the cautioner attested was sufficient the time of the attestation; but so it is, this cautioner was such, in so far as he had sums of money and lands then, far above the worth of the sum charged for.

THIS WAS FOUND RELEVANT; and they ordained to condescend on what he then had.

Act. Norvell. *Alt.* Colvill and Spotswood.

Advocates' MS. No. 33, folio 76.

1670. *June 24.* CAMPBELL of Kepock *against* TILlichORLIE and OTHERS.

THERE was a pursuit for a boat-mail against certain feuars; which servitude was imposed of old by the Abbot of Coupar upon the proper lands of the abbacy; after which thirlage, they were feued out to sundry vassals.

ALLEGED,—Absolvitor from that mail, because they have prescribed their freedom, they being free thereof by the space of forty years.

ANSWERED,—Offers to prove, interrupted either by citation or possession within the forty years; as for the quantities, offers to prove they were used and wont to be paid by them and the other feuars of the abbacy.

ALLEGED farther,—The time of the imposing this servitude was before the lands were feued out, and when it was yet abbot's proper lands, at which time no servitude could be imposed, because *res sua nemini servit*. *Item*, the cause of it was that there being then no kirk at Cupar, the monks and tenants of the abbacy were forced to pass the water to the church of _____ which stood on the other side.

This was repelled, seeing as a man may thirl his tenents to his own mill, so he may thirl them to a boat built by himself, and for the commodity of the inhabitants of his own ground; and this thirlage will affect the ground and pass with it, though it go through the hands of 1000 singular successors, and is most ordinary.

Act. Dinmuire. *Alt.* Falconer.

The parties were Campbell of Kepock against Tillichorlie and others.

Next day it being called, it was ALLEGED for one of them, that they and their authors had their lands feued out to them for payment of such a feu-duty, without any mention of that servitude; and the same was imposed thereafter: which the abbot could not do, being then denuded, unless the heritor had consented.

This allegiance was found relevant.

Advocates' MS. No. 34, folio 76.