

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,

they were ever willing to have counted with the said Mr. David for them, but he declined; this they refer to his oath likewise. But, *3tio*, if he would come to count and reckoning with them, they offer to make appear, that he is more nor paid of the said two years duty; partly by money paid to the collectors and sub-collectors of the sheriffdom of Berwick for the time, for cess and other public burdens, which Mr. David was obliged to relieve the suspenders of, by the tack, at the least, to allow the same the forend of the said duty; and partly in repairing of the houses of the said lands, which he was likewise obliged to relieve him of; all which summed together makes L.818, whereof the suspenders have discharges and receipts to show. *4to*, Mr. David having charged them, they suspended. During the time the said suspension stood yet undiscussed, he assigns it to this man who now charges; *igitur*, no charge can be sustained at his instance till the first suspension be discussed. *5to*, For the cayne fowls, and other remaining heads of the tack, offers to prove them fulfilled by the charger's oath.

To the second reason above written, it was ANSWERED for the charger, that he insisted only for 1650 and 1651; and offered to prove, by the suspenders' oath, that he sustained no loss nor vastation for the said two years. The suspenders referred the same back again to his oath. Then, in fortification of the third reason, there are produced discharges for L.818, which is alleged will more nor pay the charger all he can acclaim for the duty of the said two years; at least, what they do not instruct by writ, they are content to refer the payment thereof to Mr. David his oath. He being examined upon this and the second article, he deponed *negativè*.

Whereupon the Lords suspended the letters *simpliciter* for the sums contained in the discharges; found them orderly proceeded as to the remaining sums charged for, amounting to L.191, *salvo justo calculo*, with 80 merks of expenses contained in the tack charged on.

*Suspender*, Mr. Alexander Spottiswood. *Alt.* Mr. Jo. Harper.

*Signet MS. No. 83, folio 63.*

1665. *February* 18. Sir GILBERT STUART of Polkaik *against* THOMAS ROBERTSON, alias MACCONDOCHIE.

THOMAS ROBERTSON, alias Maccondochie, in Dunkeld, is addebted to Thomas Young there in 250 merks. This bond Thomas assigns Sir Gilbert Stuart of Polkaik to; who charges thereon. Robertson suspends, *1mo*, Because he never had any dealing with Thomas Young, the cedent, though the bond bear borrowed money; offers to prove the bond to be false and feigned, as he has really intented summons of exhibition of the bond to that effect. *2do*, *Esto*, It were a true debt, he craves compensation of greater sums addebted by the cedent to him. At the calling of this suspension, there is proponed this eiked reason, that Polkaik's assignation was to his cedent's use and behoof; which being proven, they offered them to prove by the cedent's oath, that the bond charged on was consigned blank in William Rosse his hands, to have been filled up in the sum at the sight and de-