

lie, compears Mr. Jo. Harper: in the incident, the pursuers compear *ut supra*. *Alt.* Mrs. Robert Pitillo and Mr. John Eleis.

*Signet MS. No. 22, fol. 7.*

1663. *December 5.* JAMES HAMILTON *against* PATRICK CAMPBELL of Duntroon's TENANTS.

IN April 1657, Pat. Campbell, elder of Duntroon, as principal, and John Ca. fiar thereof, his son, as cautioner, bind them to content and pay to Robert Hamilton, burgess of Glasgow, the sum of L.160. This bond is registrate in the Sheriff-Court book of Inverarie in 1658; then he assigns it to James Hamilton, also burgess there, who immediately thereon raises letters of poinding and horning, containing arrestment, whereby he arrests in the said Duntroon's tenants' hands the farms and duties of their lands for the crop and year of God 1662; then pursues for making forthcoming, calling also Duntroon for his interest. For verifying the summons there is produced the registrate bond, the assignation thereto, the letters of poinding, horning, and arrestment, duly executed, raised thereon; and for the remanent points of the summons not verified nor instructed by the writs produced, refer them to the defenders, (in whose hands the victual is arrested) their oaths of verity. Whereupon their procurator takes a day to produce them for that effect, and protests for a qualified oath; the pursuer's procurator protests in the contrary. They not compearing at the day, the term is circumduced against them, and they ordained to make the said victual arrested forthcoming to the pursuer, in payment to him, as assignee, of the sums of money contained in the said bond.

*Act.* Mr. Robert Sinclair. *Alt.* Mr. George Mackenzie and William Braidie.

*Signet MS. No. 23, fol. 8.*

1663. *December 5.* ALEXANDER BALNAVES, Minister of Tippermuire, *against* GEORGE MURRAY of Tippermuire.

IN anno 1669, there is a contract of excambion past betwixt George Murray of Tibbermuire, and Mr. Alexander Balnaves minister there: whereby George binds and obliges him to possess the minister in the yearly duty and avail of eight acres of land; and the minister obliges him to procure from the presbytery of Perth a right or disposition of the old glebe of the parish of Tippermuire to the said George. *In anno* 1662, the minister registrates the contract, and summons Tippermuire to perform his part of the contract, and obtains decret against him; whereupon he raises letters of horning, charging him to obey the said decret, that ordaining him to pay to the charger the yearly duty of eight acres of land conform to that contract. Thir letters Tippermuire suspends on thir reasons: *1mo*, Because the foresaid charge is altogether general, only for two years duty of the said eight acres of land; neither condescending upon the species or kind of the said duty, whether victual or money, nor yet on the quota or quantity thereof, nor

yet for what years of God the same is due and payable ; so that the suspender cannot, nor knows not, what obedience to give thereto. *2do*, We have seen the pretended contract, ground of the said decret suspended, to be conditional, and to contain mutual obligements : but so it is, that the said minister never procured the said right conform to the tenor of the contract ; till which be done, the suspender can no ways be obliged to make payment to him of the said duty charged for, albeit its species and quantity were condescended on, as is not. *3tio*, Offers to prove that he left the said eight acres excambed free to the minister, for him to enter to the possession thereof ; so that, after the said contract, he meddled therewith neither by tilling or pasturing : but if the said minister suffered the same to lie lea and waste, *sibi imputet* ; that is *propria illius culpa* ; he cannot charge the pursuer with the duty thereof. Then summons him to compear and hear and see the said decret and all that has followed, or may follow thereupon, suspended *simpliciter*. Mr. Alexander getting a copy of this suspension, and seeing the main reason thereof to be the non-liquidation of the yearly duty or quantities thereof, he liquidates it most craftily himself, and summons him then before the Commissary of Dunkeld ; charging him to make payment to him of 313 merks, 4s. 4d. as if it had been contained in the decret obtained before the Lords ; and by that slight, (suppressing the cause or ground of the said pretended debt,) recovers decret against him : Tippermuire not thinking himself obliged to compear, because he had a suspension standing undiscussed of the very ground of this charge now to compear before the Commissary. Upon his decret he obtains a precept charging him to pay the sum contained in the decret, under the pain of rebellion and escheating, &c. This charge he again suspends, upon this reason, besides the others deduced in the first suspension ; that the ground of this decret being suspended, and yet standing undiscussed, it were absurd to suit any execution upon a commissary's decret or precept for the same debt ; they being also consequentially and dependantly suspended. At last, the suspensions being called, the minister's procurators are content that the reasons of both the suspensions be discussed *simul et semel*. And to them all, the charger oppones, *first*, his decret obtained *in foro contradictorio*. Then for that, that the suspender left the said eight acres of land, conform to their contract, free for the charger to enter thereto ; he offers him to prove that he was interrupted by the suspender himself, or his servants, by commission from him, in the peaceable possession of the same.

Which defence the Lords found relevant ; and so assigned him a day for proving the same : who, at the day, produced some witnesses ; who being on oath examined, their depositions were found unclear ; and, therefore, the Lords, before advising the cause, grant full power and commission to Mr. John Nairne, sheriff-depute of Perth, to try if there was any such interruption, yea or no ; and ordain the charger to report at such a day : which, the day being come, he failyied to do ; and, therefore, the Lords suspended the said letters, with all that has followed thereupon *simpliciter*.

*Act.* Mr. Thomas Murray. *Alt.* The Minister, Mr. Nathaniell Fyfe.

*Signet MS. 24, folio 8.*