

nouncing of this interlocutor, Mr. William Wallace did intimate this action to Mr. Alexander Seaton, advocate, as procurator for the said Laird of Balbithen, and protested that he might have recourse and relief against him. Whereupon the said Mr. Alexander craved sight of the process; or if that should be denied him, he protested that all his defences might be reserved as accorded, when any action for relief should be intended by the said defender.

To which it was ANSWERED for the pursuer, that he could not see the process, because neither was he called therein, neither had he any interest.

Which the Lords having considered, they refused a sight of the process to the said Balbithen's procurator, but reserved to them all his, &c. whereupon an act was extracted. In the mean time, the pursuers extract letters of diligence for summoning of witnesses to prove the points of the summons admitted to their probation, who compearing in presence of the Lords, by their depositions, proved the same sufficiently. Whereupon the Lords decerned and ordained the said defender to pay to the pursuer, as executrix foresaid, the sum of L.30 Sterling; assoilyie him from all by-run annualrents thereof; reserve to him his action of relief against Balbithen.

Act. Mr. David Falconer. *Alt.* Mr. William Wallace himself, and Mr. John Cunyghame. *Signet MS. No. 9, folio 41.*

1665. *January 21.* SIR GEORGE STIRLING of Keir *against* ROBERT, EARL of ROXBURGH.

ROBERT, Earl of Roxburgh, by his bond in 1623, obliges him to pay to Sir Thomas Nicolson of Carnock, advocate, 2000 merks. This bond Sir Thomas assigns to his daughter, Dame Anna Nicolson, then married to Sir George Stirling of Keir in 1642. In 1663, Sir George and his Lady obtain a decret *in foro contradictorio* for the said sum, against William, now Earl of Roxburgh, as heir, served and retoured to the said Robert, granter of the bond. Dame Anna, his lady, dies. Keir after her decease, charges the Earl of Roxburgh with horning upon the said decret. This charge Roxburgh suspends, *1mo*, Because the decret whereupon the said charge proceeds is obtained at his lady's instance, and his, *jure mariti* allenarly, for his interest; so that after her decease, he could not charge for the said sum in his own name, seeing his interest died with her. *2do*, The sums charged for belonged to the said Dame Anna the time of her decease, and so fall under her executory; so that the suspender cannot pay the same to any one save her executor, upon confirmation of the same, and upon a valid decret; and, therefore, the said letters were wrongously execute at the said laird of Keir's instance against the suspender. But *3tio*, The suspender has raised a summons of double poinding, mentioning that where he is troubled for payment-making of the said 2000 merks, by Keir, as having, or pretending to have right thereto, by virtue of a translation thereof by his lady, who was assigned thereto by her father Sir Thomas; *item*, By Sir Thomas Nicolson of Carnock, son to the said Sir Thomas; *item*, His mother and sisters, as executors, or nearest of kin to the said Sir Thomas, pretending right thereto, by virtue of a clause contained in Keir's contract of marriage with Dame Anna their sister, in their favours; he

summons all the saids parties to hear it declared that he is only liable in once and single payment, and that he is content to pay the same to any of the saids parties the Lords shall find has best right thereto; and so that he may be freed from all molestation at the hands of the others who shall be found to have no right thereto. This summons of double poinding being called, there is compearance only made for the Laird of Keir, for whom and his right, is produced the Earl of Roxburgh's bond, with Thomas his assignation of it on the back thereof, in favours of his daughter Dame Anna; then a decret obtained at the said Lady Keir and her husband's instance, against the Earl of Roxburgh, for payment-making, &c.; then his contract of marriage with the said Dame Anna, containing a translation of the said sum in favours of her husband. It is alleged by the Earl (who is pursuer) his procurators, that he could not be decerned to pay the said sum to the Laird of Keir, because he had no right thereto, in so far as in the contract of marriage, wherein his lady transfers to him the right of the said bond, it is expressly provided, that notwithstanding the said translation, if she should decease without heirs of her own body, the same should belong to her brother; but so it is that the said case has existed; *videlicet*, She has deceased without heirs of her body; and, therefore, the right of the said bond does not belong to the Laird of Keir, but to his lady's brothers and sisters, as executors to her in whose favours the provision foresaid is conceived.

To which it was ANSWERED for Keir, defender, *1mo*, That it was *jus tertii* to the pursuer; and so could give him no right to detain the money. *2do*, The heirs and executors of the Lady Keir are called in the multiplepoinding, and do not compear, neither produce any right; therefore Keir, compearing and producing a right, ought to be preferred. *3tio*, *Esto* they compeared and alleged upon the provision foresaid, contained in the contract of marriage, yet the same would be noways relevant, but Keir would be preferred notwithstanding thereof, because Sir Thomas Nicolson, when he assigned the said bond to his daughter, afterwards the Lady Keir, he provided that failing of her through decease, before her marriage, or within year and day after her marriage, without children, that it should accresce or pertain to his son, Sir Thomas: now she in her contract of marriage transferring the right of the said bond over upon the Laird of Keir, her spouse, reserving always to her brother (relative to the assignation thereof made to her by her father) the right of the said bond, in case of failyieing of heirs of her body, or in case of her decease within year and day after the marriage, without children; in which cases, and no otherways, it was provided the said translation in favours of Keir should be void and expire, and the bond should pertain to her brother; and that conform, in all points, to the assignation made by Sir Thomas to his daughter, and the substitution therein mentioned in favours of her brother, and no otherways. But so it is, it is evident by the said assignation made to the Lady Keir by her father, her brother was to have no right to the said bond, except she had died before her marriage, or had died within a year and day after her marriage, without children; but so it is, that none of the saids two cases existed, for she was married, and lived many years after her marriage; so that although by the contract of marriage, her brother's right to the said bond is reserved, in case failyie of heirs of her body, or in case of her decease without children, within year and day after the marriage; yet it seems certain, that the said first case of failyie of heirs of her body has been the mistake of the writer; otherways the second clause, of her deceasing within year and day without child-

ren, &c. would be superfluous, and altogether needless, as being largely included in the first case. And albeit, it may be objected, that *posteriora derogant prioribus*, and so that the clause of the translation should derogate to the clause in the assignation; yet that can have no weight here, seeing the translation expressly provides, that the right of the bond shall only come to her brother, conform to the meaning and tenor of the assignation made by her father to her, and no otherways; so that the conditions of the substitution in the assignation will be our only rule here, for interpreting the translation by; which if it has been otherways framed, the same must, beyond all doubt, have been the error and mistake of the writer allenary.

Which disputethe Lords having considered, they repelled the allegiance in respect of the answer made thereto; and therefore found the said first case in the reservation of the translation in favours of her brother, to have been the mistake of the writer; and that her brother's right must be understood to be only reserved in the terms and cases contained in the assignation made by Sir Thomas to his daughter. *Item*, Found that the saids cases of her brother's substitution had not existed; and therefore found the Laird of Keir to have only good and undoubted right to the saids bond and sums. And this the Lords decerned partly because of the writs above mentioned produced for the Laird of Keir; and partly because the executors and nearest of kin of the said Lady Keir, being oftentimes summoned, and not compearing to show their right; as also Ja. Chalmers as procurator for them having seen and returned the process, refused to answer therein. In respect of all which, the Lords found the letters raised at Keir's instance against the Earl of Roxburgh orderly proceeded; and therefore ordain Keir to be answered of the said sum, as partly found only to have best right thereto. *Item*, discharge the executors and parties from all troubling of the said Earl, as parties found to have no right for aught that is yet seen.

Suspender, Earl of Roxburgh, Sir Peter Wedderburn, Mr. Thomas Lermonth.
Alt. Mr. Jo. Cunninghame.

Signet MS. No. 17, folio 43.

1665. *January 21.* ALEXANDER ETTERS HANKS and JOHN ARCHBALD *against*
The EARL of HADDINGTON.

WILLIAM GRAY, by his bond in 1660, obliges him to pay to Alexander Ettershanks, cooper in Aberdeen, L.380. The same William, by another bond in 1654, obliges him to pay to John Archbald, burgess there, the sum of L.248. William deceases; bastard. The Earl of Haddington gets the gift of his bastardy, as before ye have seen in the decret, Gray *contra* the Earl of Haddington, 20th January, 1665. Him, therefore, thir two creditors pursue, as liable in payment of his debts; *item*, as come *in vice* and place of the said deceased William Gray, and so obliged to perform his deeds and obligements, sicklike and in the same manner as if he had been executor confirmed, or heir served and retoured to him. For instructing the summons there is produced the said two bonds, both of them allowed and recorded in the Exchequer.

It was ALLEGED for the defender,—*Imo*, No process, because all parties having interest are not called; *videlicet*, the principal Treasurer, and his deputes.