

1665. *January 21.* AGNES COLQUHONE *against* WILLIAM WALLACE.

GEORGE CHALMERS of Balbithen, by his bond, obliges him to pay to Ja. Philp, clerk to the Secret Council in King Charles the First his time, and in the bond designed servitor to the Earl of Stirling, the sum of L.30 Sterling. For another debt Balbithen is denounced, and lying year and day thereat his escheat falls, the gift whereof Doctor James Chalmers, physician ordinary to his Majesty, procures of the King. Ja. Philp, as clerk foresaid, making scruple to pass this gift, unless he were secured of payment of his L.30, Mr. William Wallace, advocate of Ileston, now one of the Sheriff-deputes of the sheriffdom of Edinburgh, by his obligation in January 1640, obliges him to cause move the said Doctor Chalmers either to pay the said L.30, or to grant security therefore; and that after the said Doctor should reap any benefit by the said letters of gift, or should obtain possession of the said lands of Balbithen, with the maills and duties thereof. This bond is registered in 1652; and assigned by the said Ja. Philp to Ja. Colquhone, merchant in Edinburgh. Ja. Colquhone dying, his daughter Agnes obtains herself decerned and confirmed executrix dative to her father; and then pursues Mr. William Wallace for payment making of the same to her, upon his bond; because, albeit the said Doctor Chalmers, (and now his son, as heir served and retoured to his father,) have so reaped benefit by the said letters of gift that they have ever been in possession by uplifting of the maills and duties since syne, yet that he has faillyied in moving him to pay the same. For verifying the summons there is produced Mr. William's obligation, with the assignation thereto; then the testament dative nominating the pursuer executrix to her father; then an extract of the said Ja. Chalmers of Balbithen, his retour, to his father the Doctor.

Against the summons it was ALLEGED for the defender, *1mo*, That there could be no process sustained till Balbithen his first bond granted to the said Ja. Philp (wheunto this bond pursued upon relates) be produced. *2do*, No process, because the condition of the said bond is not fulfilled, for Dr. Chalmers never did get any benefit by the foresaid gift, neither did enter to the possession of the lands of Balbithen by virtue thereof, but by another right.

To this it was REPLIED, to the first, that he was not obliged to produce the first bond; and that the bond produced was enough to instruct this pursuit. As to the second, the same ought to be repelled, because the conditions of the said bond being in *terminis alternativis*, to wit, how soon Dr. Chalmers, or his heirs, should reap benefit by the said gift, or obtain possession of the said lands of Balbithen, in that case the said L.30 Sterling was payable. Now, the pursuer subsumes, and offers to prove, that Dr. Chalmers' heirs are in possession of the said lands; and the pursuer is not concerned whether the said possession be by virtue of the said gift or not, seeing it was arbitrary to Dr. Chalmers, being once secured in the liferent escheat of his brother, to make use of the said gift, or of any other title; and his not making use thereof cannot prejudice the pursuer.

The Lords repelled the said allegiances, in respect of the summons and reply; and found the points of the said summons, viz. that the said Doctor and his heirs were and are in the possession of the said lands of Balbithen, by intromission with the maills and duties thereof, relevant; and admitted the same to the said pursuer his probation; and so assigned him a day for proving thereof; and for that effect ordained him to have letters for summoning witnesses, &c. Upon the pro-

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; assoilye 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 Nicolsons of Carnock, advocate, 2000 merks. This bond Sir Thomas assigns to his daughter, Dame Anna Nicolsons, 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 poiding, 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