

At the calling of this suspension, the suspenders, by their procurator, repeated their reasons above set down : whereto it was answered for the charger, that notwithstanding thereof, the letters ought to be found orderly proceeded, and that he opposed the decret.

All which being considered by the Lords, they found the letters orderly proceeded ; decerned them to be put to farther execution, ay and while the suspenders should remove to the effect the charger may enter, &c. ; and that conform to his infetment and seasing thereupon, precept of warning, decret, act of Parliament, and custom within burgh.

*Susp.* Mr. Nathaniel Fyfe. *Alt.* Mr. William Moor, Wm. Lauder.

*Signet MS. No. 2, folio 39.*

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1665. *January 20.* GILBERT GRAY *against* The EARL of HADDINTON, the KING'S ADVOCATE, TREASURER, &c.

WE saw before on the 21st of January, 1664, (*vide supra* page 368,) the Earl of Haddinton (as having got the gift of *ultimus hæres*, or of the bastardy of William Gray, once provost in Aberdein,) obtains decret of declarator of his gift against the relict and creditors of the said William Gray ; in which decret was reserved to the creditors, all their lawful defences upon their several rights, &c. Gilbert Gray, provost of Aberdein, finding that the said William was addebted to him in several considerable sums of money, amounting to some 3000 merks, as the bonds granted him therefore did bear ; *item*, that he was engaged in cautionry for the said deceased William, in divers considerable sums of money, amounting in all to 18,000 merks, for the payment whereof he was either actually distressed, or at least might be distressed ; and the said William being now dead, a bastard, having no lawful children of his own body, neither there being any of his deceased father's body, who in law might succeed or represent the said William Gray, Gilbert could neither obtain decreets for payment making to him of the foresaid sums addebted to him, nor for relief of his cautionaries against any person, as heir, or as lawfully charged to enter heir to the said deceased William, or otherways representing him, whereby adjudications, apprisings, or other legal diligences may be deduced, obtained, or used in the ordinary way, against the estate and means of debtors who are deceased, and who have heirs to represent them : therefore, he raises a summons against the Earl of Haddinton, as donatar, the King's Advocate, for the King's interest, Earl of Rothes treasurer, Lord Bellenden, treasurer-depute, and all others having interest to hear it, (*in subsidium* of other remedies) in all law, equity, and reason, found and declared that the whole goods and gear, both heritable and moveable, of the said William Gray, are and should be liable to him, for his relief and payment of the debts and cautionaries above written, for which he stands engaged, and is distressed ; *item*, that the foresaid debts being verified and declared, the said decret of declarator may be equivalent to a decret *cognitionis causa*, so that he may use adjudication of the said estate upon it, in the same manner as if the said William Gray had deceased, leaving apparent heirs behind him, which, having been charged by the pursuer to enter heirs, upon their renunciation were decerned *cognitionis causa*. For instructing this summons, the whole bonds, as-

signations, and translations above written were produced. Compearance is only made for the Earl of Haddinton, for whom it is alleged, *1mo*, That no process can be sustained, at the instance of the said pursuer, against him for the sum of 2040 merks, contained in two of the said bonds; because no translations of them in favour of this pursuer are produced. *2do*, Albeit the said translations were produced, yet the said defender ought to be assoilyied from the same, because the king and his donatar are not obliged to pay debt. *3tio*, Albeit they were obliged, (as they are not,) yet the Earl of Haddinton cannot be holden to make any translation of the said defunct's goods or estate, in favours of the pursuer; because he has granted a back-bond to the Exchequer, whereby he obliges himself to be ruled by them, in reference to the satisfaction to be made to the defunct's creditors; and, therefore, the defunct's creditors should make their addresses to the Exchequer, and get their bonds allowed there. *4to*, Albeit the said bonds are allowed there, yet the Earl of Haddinton nor his estate could not be liable in payment of the said William Gray his debts; but all that can be craved of him is that the Earl grant a right to so much of the defunct's estate as may correspond to his just debt, instructed to be truly resting by him.

Whereunto it was REPLIED for the pursuer, That the first allegiance ought to be repelled, because, *1mo*, They concurred for the assignees; *item*, offered to produce translations before extracting their decret. *2do*, The pursuer is distressed as cautioner, and produces decreets passed against him. To the second, ANSWER,—That the Earl's gift is a gift of bastardy, and not of forfaulture and rebellion, and, therefore, in all equity, must be obliged to pay the defunct's just and lawful debts as if he represented him either as heir or executor. To the third, ANSWERS,—It ought to be repelled, because, *1mo*, It concerns not the defunct's creditors that the Earl has granted the said back-bond, neither are they obliged therein. *2do*, When the Earl, as donatar foresaid, shall be called to an account in the Exchequer, it will most justly exoner him to produce decreets legally done, decerning him to pay such sums of money to such of the defunct's creditors. But, *3tio*, *ex suprabundanti* oppones the bonds produced, marked, and allowed by the clerk to the Exchequer, and recorded in their books. As to the fourth allegiance, are content that the said Earl of Haddinton, and his estate, be free of the said debts, and restricts to the said William his estate; except in so far as the Earl of Haddinton has already intromitted therewith, for which he ought to be liable.

In respect of which answers, the Lords repelled the foresaid allegiances, and, therefore, found and declared the estate of the said William Gray, both personal and real, to be liable to the said pursuer, as his lawful creditor and distressed cautioner for him, in satisfaction to him of the sums of money above written. *Item*, that this declarator shall be equivalent, &c. *Item*, find the Earl of Haddinton as donatar liable for payment of the same, conform to his intromission with the defunct's estate and no farther; and for that effect decern and ordain him to denude himself by assignation or disposition of so much of the said William his estate, in favours of the pursuer, as will pay the sums aforesaid.

*Act.* Pat. Fraser. *Alt.* James Chalmers.

*Signet MS. No. 5, folio 40.*