

1670. *June 29.* RANKINE *against* ANDREW BURRELL.

IN a reduction, at the instance of Rankine, as creditor to Walter Leishman, of a transaction and discharge granted to Burrell, upon the Act of Parliament 1621, as being done *in fraudem*, in respect the debt was clear and liquid, extending to 4000 merks, whereas he had only received payment of 2800, and discharged the whole debt.

It was ANSWERED for the defender, That the transaction being *supra re litigiosa*, and a point in law, which was debateable, *viz.* That Burrell, by contract of marriage, was obliged to employ 4000 merks, paid him in tocher, to himself and her in liferent, and the longest liver of them two, and to their heirs to be procreated of the marriage; which failing, to his wife, her nearest and lawful heirs: Of which marriage, there being two children, who survived their mother and thereafter died, the said Walter Leishman being served heir to his sister, the mother of the children, and thereby having right by the tailie in the contract of marriage,—it was questionable in law, if the mother, dying before the children of the marriage, the said Walter, who was the mother's brother, behoved to be served heir to them; and if they, being the only persons who had right by the death of the mother, their father was their nearest heir, and not their uncle on the mother's side. Which case being dubious, and to take away all charges of process, an abatement of 1200 merks of 4000 could not be reduced upon the Act of Parliament 1621.

The Lords, notwithstanding, did sustain the reason of reduction, upon that ground, That the wife's uncle was unquestionably heir to her, who was fiar by the provision of the bond, and so had right to that obligation, and might have forced the father to make payment; and therefore reduced the said transaction.

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1670. *July 7.* BORTHWICK of HALHERIOT *against* LORD BORTHWICK.

THE Lord Borthwick, having disposed the lands of Halheriot, heritably and irredeemably, to the said William Borthwick, with an obligation to assign and dispone all right of teinds which he or his predecessors had;—it was questioned, If the obligation as to the teinds, being so conceived, should be extended to bygones, seeing the said William had a tack of his teinds, for a wadset both of stock and teinds, from the Lord Borthwick and his mother, who was liferenter.

It was ALLEGED for the Lord Borthwick, That, by the disposition, he was only obliged, *per verba de futuro*, to dispone the lands and teinds, and that the entry to both was to be at Whitsunday thereafter; and so did not include bygones.

It was ANSWERED for the said William, That he, having possessed both stock and teinds for several years, whereof there was no reservation as to bygones, the disposition ought to be interpreted to extend thereto, seeing it did bear all right that he or his predecessors had thereto.

The Lords, before answer, ordained the writer and witnesses, and the com-muners, to be examined.

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