

1627. *January 19.* The EARL of BUCKCLEUGH *against* ROBERT BURNET and OTHERS.

THE Earl of Buckcleugh having intented a double poiding against Mr Robert Burnet on the one part, claiming right as heir served to his own daughter begotten by him upon his wife, one of the seven daughters of William Mauld, which daughter was served one of the heirs to the said William Mauld, as representing her mother, and one of the said seven daughters; and therefore he, as her heir, who was one of the heirs of her said good-sir, claiming the seventh part of a sum adebted to the said William Mauld by the said Earl of Buckcleugh, on the one part;—and against the rest of the six daughters of the said William Mauld on the other part; who claimed the right of the said whole sum to pertain to them, seeing the right of the said whole sum was not only established by an heritable contract betwixt the said William Mauld and the said Earl of Buckcleugh, but also infestment of an heritable annual-rent was granted therefor, out of the Earl's lands, to him in his lifetime; so that the right of that contract, and sums therein contained, being perfected by an heritable real right, and by sasine, the right thereof and of the said sums could pertain to none but to these who might be heirs to the said William Mauld, and was infest in this annual-rent as heir to him who died infest; and seeing neither Mr Robert Burnet's wife, who was one of the seven daughters of the said William Mauld, was infest in her lifetime, nor her daughter was ever infest as heir to her good-sir as representing her mother, but only served as one of his heirs by a general service, whereupon she was never infest in her part of this annual-rent controverted,—therefore they contended that her service, so far as might concern this sum libelled, being extinct by her decease, it could not be acclaimed by her father as served general heir to his daughter, who neither was infest, nor could be infest therein, seeing the contract provided the same to the heirs of William Mauld, and he could never be that person who might be heir to him, but the same behoved to pertain only to the six daughters surviving, who were heirs *in solidum* to the whole, the other seventh and all descended of her body dying not infest:—The Lords found, that, seeing the daughter of the seventh sister begotten by Mr Robert Burnet, was served one of the heirs of William Mauld, and that she, as one of the said heirs, had obtained the contract foresaid, made betwixt the Earl of Buckcleugh and her good-sir, registrat at her instance against the Earl; and in respect that Mr Robert Burnet was served heir to his daughter, albeit by a general service only, and that he had obtained the said contract registrat at his daughter's instance as said is, transferred in him as heir to her; albeit his daughter died not seised, yet that the right of the said sums, contained in the said contract, both principal and byruns, pertained to the said Mr Robert Burnet; and that the same did not so belong to the other six sisters, as that it could not be sought but by them who was infest;—and therefore in respect of the said Mr Robert Burnet's retour as heir to his daughter, and of his decret of transferring, and of his daughter's retour and decret of registration,—which retours and decreets, the Lords found, could not evanish and become extinct,—they decerned the said Mr Robert to be answered and obeyed, and discharged the other six sisters, as having no right to the said seventh part; and found that the renunciation to be given by the said Mr Robert to the Earl of

Buckcleugh should be a sufficient security to exoner and warrant him of the payment thereof.

*Act.* Scot. Burnet, *per se*, and Stuart. *Alt.* Lermonth; Aiton and Oliphant, *per se.* Scot, *Clerk.*

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1627. *January 19.* The MARQUESS of HAMILTON *against* CALDER.

IN an action of non-entry betwixt the Marquess of Hamilton *against* Calder, the Lords found, that the extent of the land ought to be valued according to the quantity and extent whereto it was valued by a contract made by the defender and his mother, wherein the land was designed to be so many pound lands, and according to a decret, recovered at this same defender's instance, for delivery of the evidents of the same lands, wherein it was called also a land of the same extent. Which designations the Lords found sufficient against the subscriber of the said contract, and obtainer of the said sentence, to bind him to that extent; albeit he alleged that that designation could not bind him thereto, seeing, in these writs, *non agebatur* to what avail the lands should be extended; but that was the adjection of the writer, whose designation could not make the land more than indeed it was, and could not work against the verity: likeas he produced a service done since, wherein the sworn assizers had extended the same to a far less avail, which ought to have greater faith than a superfluous designation idly adjected in any writ. Which allegiance was repelled, and the extent was ruled according to the said contract subscribed by the party, and decret recovered by himself; seeing the said service was not retoured, nor passed the chancellary, but was upon a reason stayed, that it should not be exped.

*Act.* Stuart. *Alt.* Nicolson. Gibson, *Clerk.* *Vid.* 24th January 1627, L. Glenkindie.

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1627. *January 20.* The DUKE of LENNOX *against* ALEXANDER WEEMS.

IN a suspension, betwixt Alexander Weems and D. of Lennox, for suspending of the charges whereby the Duke was charged to pay a pension granted to the said Alexander by umquhile Lodovick Duke of Lennox and Richmond; the decret for letters conform to that pension being quarrelled, because the Duke of Lennox was not summoned thereto;—the Lords found no necessity to summon the giver of the pension to the action of letters conform thereupon, seeing he was the pensioner's author, and he needed not to summon his own author. This decision may appear to be hard; for, upon a decret for letters conform, the chamberlains and others, intromitters with the duties of that lordship or lands where-out-of the pension is craved to be paid, are charged to make payment to the pursuer, who of reason ought not to be charged therefor, except their master and lord, to whom these duties should be paid by them, were called thereto; for no reason can draw their duties from them by any process