

1670. *June* —. MR WALTER BRUCE, Minister, *against* MENZIES of ROTMELL.

ALEXANDER Menzies of Rotmell being obliged, by contract of marriage, to pay the sum of 2500 merks, in name of tocher, with his daughter, to the said Mr Walter; long thereafter he did provide the fee of his estate to his eldest son Robert, by his contract of marriage; at which time the said Robert gave bond, wherein he was obliged, that, in case his father should be distressed for any debt prior to his contract, in that case he should become cautioner for him to the creditor; or otherwise, if they should borrow money for payment of the debt, that he should be obliged as cautioner for the same: upon which bond, Mr Walter having pursued Robert for payment of his tocher;—

It was ALLEGED, That, by the conception of the bond, he was only to grant new security, as cautioner for his father; which never having been done in his father's time, who should have been principal, and of whom he might have gotten relief, the bond, whereupon the libel was founded, was not obligatory.

The Lords, notwithstanding, did sustain the pursuit upon the bond; especially it being instructed, by letters of horning produced, that the father was distressed in his own lifetime; which was sufficient to make the son liable according to the tenor of the bond: Seeing, if the son had been pursued during the lifetime of the father, he would have been necessitated to grant bond as cautioner; albeit the father had refused to grant a new bond; and the death of the father could not alter the case.

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1670. *June 15.* WALTER STEWART *against* ROBERT GRAHAM.

In a reduction of a disposition of the lands of Hiltoun, pursued at Walter Stewart's instance, as creditor to William Graham, as being assignee to a bond of 1000 merks, long before the disposition, upon this reason,—That the disposition was made *in fraudem creditorum*, and fell within the Act of Parliament 1621, as being *inter conjunctas personas*; the lands being disposed by a contract of marriage, bearing for love and favour, and that the defender had married William Graham's wife's niece:

It was ANSWERED for the defender, That the right of the lands, being made in contemplation of marriage, and that, by the contract, he had obliged himself for a provision to the children, and a competent provision to his wife, could not fall within the Act of Parliament.

The Lords, having considered the contract of marriage, whereby the defender was only obliged to employ 5000 merks, which he declared he was then worth in goods and merchandise, did incline to find the reason of the reduction relevant, in so far as the fee of the lands did exceed a competent tocher, which might be answerable to his provision.

But it being further ALLEGED by the defender, That the fee was burdened with the liferent of William Graham and his wife, and that the lands were affected with prior comprisings, which he was forced to redeem. To which it was REPLIED for the pursuer, That, beside the fee of the lands, the de-

fender was assignee to £20,000 worth of bonds, by which he had redeemed all former apprisings; as likewise, that the defender's right was affected with a reservation of a power to the disponent to burden with 5000 merks, whereof the bond pursued on was declared to be a part.

The Lords, before answer, did ordain both parties to be heard upon these grounds.

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1670. June 17. BYRES *against* BAILIES of HAMILTON.

BYRES, and some other creditors of George Lyles, having gotten a disposition of the whole merchant ware in Lyles' shop, and of the plenishing of his house, which they caused intimate publicly, at the market-cross, to the bailies, who, notwithstanding thereof, did shut up the doors, by putting on a plate of iron, and thereby debarring the said creditors from entering to the possession till other creditors got entry to the house, and took away the goods: There was a pursuit intended against the bailies for damage and interest.

It was ALLEGED by the defenders, That what was done by them was lawful, and *ratione officii*; in respect Lyles, the common debtor, was bankrupt, and had fled in the night-time out of his house, when he made that disposition.

The Lords, notwithstanding, did sustain the summons, unless the defenders could allege, that what they had done was upon the complaint of several creditors, or others concerned; and that they had preserved the goods to be forthcoming to any should have the best right.

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1670. June 22. BELSHISH *against* PORTERFIELD.

IN a declarator, pursued at Toft's instance against Sir Laurence Scot and Mr Alexander Spoteswood, advocate; the Laird of Crawfordland having right to a bond, wherein the Laird of Wedderburn was principal, and Tofts cautioner, he caused lead a comprising against Wedderburn, which did expire *in anno* 1664; as likewise did adjudge Tofts the cautioner's whole estate; but, before the expiring of the legal thereof, he did enter into a transaction with the pursuer, Tofts, who should have satisfied the debts, and thereby freed his own estate of the adjudication, and made use of the expired comprising against Wedderburn only, for his relief. Notwithstanding whereof, Mr Alexander Spoteswood, being employed for the pursuer, did induce Sir Laurence Scot to purchase the said right from Crawfordland, both to the comprising and adjudication, which was likewise expired; and therefore craved, in respect that the said Mr Alexander had prevaricated, that the right purchased in the name of Sir Laurence Scot might be declared not to affect the pursuer's lands. The second ground was, that Sir Laurence's right was purchased in the name of Sir Laurence only, for the sums advanced by him, to have been satisfied by the Laird of Wedderburn, or by the said Mr Alexander, for his behoof: which Wedderburn being the heir