

reason; especially seeing there were three or four other witnesses who concurred with them in the same things, and against whom there was no such objection. So, on the whole matter, the Lords adhered to the decret, and refused to loose it.

*Vol. I. Page 626.*

1694. *July 4.* The Two DAUGHTERS of CROOKSTON *against* JOHN BORTHWICK, their Brother.

THE CAUSE of the two daughters of Crookston, against John Borthwick, their brother, for payment of 12,000 merks, contained in their mother's contract of marriage, was reported. ALLEGED,—All these provisions to daughters of a marriage are only in case there be no sons, and the estate tailyed to an extraneous heir; so that the daughters, as heirs of line, are debarred; then portions are especially provided to them; but *ita est* there is an heir-male of the marriage here, and the clause is conceived by mere mistake; for never was it dreamed that daughters should have 12,000 merks off their own brother, by a contract, unless there were a bond of provision. ANSWERED,—The clause is most express; and, whatever is the usual style, yet paction may derogate therefrom; *et in claris non est locus conjecturis*: and, in regard of this provision, the father had disposed all his moveable estate by his daughters; so, if they got not this, they would be absolutely frustrated, and get nothing. The Lords found the clause so express that they decerned conform; though it was both unusual and exorbitant, yet it was not unlawful.

*Vol. I. Page 626.*

1694. *June 22 & 29; and July 4.* The EARL of TWEEDDALE, Chancellor, *against* The EARL of LAUDERDALE.

*June 22.*—WHITELAW reported the reduction, raised by the Earl of Tweeddale, Chancellor, against Richard Earl of Lauderdale, of a decret obtained by the Duke of Lauderdale against him for the teinds of Pinkie. See Stair, *22d January* 1678. His reason of reduction was, That he succumbed then; because, having founded upon two tacks of these teinds, the one from Abbot Pitcairn to M'Gill of Rankieler, the second from Queen Anne;—the Lords had repelled both the defences founded upon these rights:—the *first*, Because, though Rankieler's tack was produced, yet his assignation of the same to the Earl of Dumfermline, Tweeddale's author, was not produced; and so it was *super jure tertii*: and the *second*, Because Queen Anne, being but a liferentrix, her tack had ceased with herself. And now, as the Earl of Tweeddale had recovered Rankieler's assignation to Dumfermline of that tack, and producing it, he ought to be reponed,—it being but of the nature of a certification in a single reduction, which is always taken away by production; especially seeing he was ready to give his oath that he had it not then, but has recovered it since out of Dumfermline's charter-chest. ANSWERED,—The decret *in foro* cannot be opened, that being no nullity; and it was the Earl of Tweeddale's own fault that he did not seek an incident diligence for recovery of the assignation as well as the tack; seeing they