

dained Weir, the defender, to depone whether he did not advise Simpson to state the wines to the Duke's account, and to pursue ; and what documents and evidences he has to clear that the wines came to the Duke's cellars.

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1696. *January 28.* ELIZABETH VICAR *against* The EARL of SOUTHESK.

THE Earl of Southesk being pursued by Elizabeth Vicar, as representing her husband, for £144 sterling contained in an English bond, and a decret of the Lords obtained thereon, whereby the Lords had found, that the single being £72 sterling, it might run up till it had equalled the principal sum, and so made £144 sterling ; but the Earl now representing, in a suspension and reduction, that the penal sum in the bond was allenary £100 sterling, so the annualrent could never be allowed, by the analogy of law, to swell above that sum :

The Lords looked upon it as a pure error *in calculo*, and therefore restricted it to the £100 sterling, which they found by paction stopped the *cursus usurarum*, and that it could not exceed that sum ; and assoilyied from the remanent £44 sterling as a mistake.---See *22d January 1679, Sir Alexander Fraser against Burnet.*

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1696. *January 31.* JAMES HALIBURTON of FODDERANCE *against* PETER WEDDERBURN of GOSFUIRD.

RANKEILOR reported James Haliburton of Fodderance, against Peter Wedderburn of Gosfuird, for relieving him of the sum of 2000 merks, wherein he was cautioner for Pitcurr, from whom Gosfuird had taken a security for 10,000 merks, which he was to pay to the Lady Balgillo, David Yeaman, and the relict of one Yorkston ; and, if he paid more than the said 10,000 merks to them, then they were obliged to assign him to their debts ; *ita est*, the second sum named was the bond wherein Fodderance was bound as cautioner.

ANSWERED,—He was only liable to pay out 10,000 merks, which he had done by satisfying the first and third debt ; and the clause, “ if he paid more,” was wholly in his own option, and noways obligatory. And, though Yeaman's debt was named *secundo loco*, yet that did [not] import any preference given it before the third, which he had paid ; seeing the bond did not oblige him to pay them in the order as they were named ; for then it would have borne the adjection of these words, in the first, second, and third place ; and *Bartolus, ad tit. De Vulgari et Pupillari Substitutione*, says, *Ordo intellectus et mentis contrahentium magis attenditur in dubiis quam ordo scripturæ.*

REPLIED,—Such clauses are not adjected to operate nothing ; and the least they can signify is, that he could not give a total preference to the last in exclusion of the second, but behoved to take them in at least equally and *pro rata*.

But the Lords, conjoining the two together, *viz.* the obligation providing for his security, in case he paid out more than the 10,000 merks, and the order they were ranked in, found Gosfuird bound to relieve him of the whole debt and cautionry in Yeaman's bond.

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1696. *January 31.* JEAN WALLACE, Lady Hackburn, *against* TURNERS, her  
TENANTS.

RANKEILOR reported Jean Wallace, Lady Hackburn, against Turners, her tenants, whom she had charged for not residing in her land, conform to an express obligation in their tacks. Their reason of suspension was, That they were under tack of a far more considerable room, taken by them from an adjacent heritor; and he was content to put his son in her land, and subset it.

The Lords considered the obligation was specific, and that they ought not to have the privilege of subtenants and assignees; and that the master had a prejudice by their not dwelling, both in not upholding the houses so well, and the want of the fuilyie, &c.: Therefore they decerned him to dwell there for the future; and, as to bygones, *quia loco facti impræstabilis succedit damnum et interesse*, ordained them to give in a condescence of the damage and loss through his not residing since the date of his entry and tack.

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1696. *January 31.* JOHN JOHNSTON and JAMES GORDON *against* CHARLES DIRRY.

Mr John Johnston and James Gordon, merchants in Aberdeen, against Charles Dirry, merchant in Edinburgh, for the price of a parcel of cork they had sold him.

ALLEGED,—It was arrested by the Dean of Guild of Edinburgh with sundry other goods; because, having brought our ship to the port of Leith, we had broke bulk before we had made offer to the town; contrary to one of their acts.

ANSWERED,—They had loosed the arrestment within a few days after, and had offered it to him; and he, having bought some raisins from them as well as the cork, he took away the raisins, notwithstanding of the arrestment he now pretends, but refused the cork; because he found he would gain by the first, but not by the second: Likeas, there was a symbolical delivery of the cork, by weighing it in the public weigh-house of Leith.

The Lords observing there was an appearance of a trick here, and that nothing was more destructive of commerce than *calliditas et fallacia*, they allowed the pursuers to prove, though both raisins and cork were affected by the arrestment, yet he took away the raisins after the same, and refused the cork, to make him liable in the price of both.

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