

1696. *January 28.* WILLIAM WELSH of SCAR *against* SIR ALEXANDER ARESKINE of CAMBO, Lord Lyon.

HALCRAIG reported William Welsh of Scar against Sir Alexander Areskine of Cambo, Lord Lyon, for repetition of a competition of 1900 merks, which the pursuer's father paid to the defender's father for procuring a gift of his father's forfeiture, for being at Pentland Hills' rebellion. The defence was, Neither the pursuer nor the defender are in the terms of the Act of Parliament rescinding fines and forfeitures; for it is only in favours of forfeited persons, (which you are not,) and against donatars, which the defender's father was not; and though the Act allows repetition from donatars and others, yet the word *others* imports only such as derive right from donatars.

The Lords thought an heir served might have the benefit of that restitution, as well as the forfeited person himself; but found the Lyon having only acted as a friend at the interposition and desire of the rebel's son, and not being donatar, he fell not within the terms of the said Act of Parliament; unless it could be proven, that my Lord Lyon was putting in to get the gift of the forfeiture to himself, and that his son, to prevent it, and get it in his own name, came and offered him the said composition: But if he was only applied to as a friend, to do the son a favour, there was neither law nor reason to extend this strict and exorbitant Act to that case. There was another reason suggested, that this was paid for procuring the gift of forfeiture, (which was never obtained;) and so it was *causa data et non secuta*, and ought to be repaid; this was not determined, but remitted to the Ordinary to hear them further anent it.

*Vol. I. Page 705.*

---

1696. *January 28.* ALEXANDER SIMPSON *against* JAMES WEIR.

CROCERIG reported Alexander Simpson, late bailie of Edinburgh, against James Weir of Kirkfield, for the price of some butts of wine and sack sold to the late Duke of Queensberry, but bargained for by the said James Weir, then his servant. Simpson had, by a process, endeavoured to fix them on the Duke; but he deponing that he knew not that these wines came to his use, and offering inspection of his books between his servants and him, Simpson raised a pursuit against Weir; that he might not lose his money betwixt them both.

ALLEGED,—The very receipts and accounts produced under Mr Simpson's own hand acknowledged they were furnished to the Duke; and, it being but a *nudum ministerium* on his part, they could never be fixed on him; and the Lords had found, 1st November 1665, *Howison against Cockburn*, that a servant taking off ware from a merchant, in the name of his master, could not be made liable for the price.

ANSWERED,---The count was so stated to Queensberry, and I pursued him at your express desire; and I being *in damno vitando*, you (who knew best how to instruct that the wines came to the Duke's use,) ought to have looked to your own security and relief.

The Lords thought the case very hard; and therefore, before answer, or-

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.

*Vol. I. Page 705.*

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 allenarly £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.*

*Vol. I. Page 706.*

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 intellectús 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*.