

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 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.*

*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*.