ALLEGED for Sir William, 1*mo*,—That, after the date of that ticket, Sir William granted to my Lord Halcraig two bonds, one for 10,000 merks, and another for 2000 merks; and it may be rationally presumed, that the lesser sum in this ticket has been cast in and included into one of these two bonds.

ANSWERED,—That posterior bonds are not interpreted in law to include former obligations, unless it be specially expressed or demonstrated that the posterior include the former: for how many different instructions of debt are produced, so many separate debts are existent: As has been oft decided, as Durie observes, *20th February* 1639, *Lord Cardross* against *the Earl of Mar*, where both securities were found to subsist together, unless the second had bore to be in satisfaction of the first.

2do, ALLEGED for Sir William,---That Halcraig, by a missive letter posterior to the said ticket, acknowledged he had received from him all money he had lying by him of his; which plainly comprehends this ticket, seeing it was by a precept on Gavin Plumber, which is equivalent to lying money.

ANSWERED,---The discharge in that missive can never extend to this ticket, but only to what money Halcraig had in specie lying beside Sir William, by way of custody and *depositum;* for these contracts are *toto cœlo* different from each other; the ticket is *mutuum*, where the dominion of the money passes from the lender to the borrower, (contrary to Salmasius his opinion,) and the *periculum est debitoris*, if it perish: But, where I lay a bag of money beside a friend, that is only *depositi vel custodiæ causa*, and the property still remains with me; and if, *casu fortuito* by fire or otherwise, it be lost, it perishes to me. And therefore this letter can never comprehend the ticket, or import a discharge thereof.

3tio, Sir William founded on another letter of Halcraig's, desiring him to borrow 2000 merks for him; which no man of sound judgment would have done, when the person he employs to borrow it was owing him the like sum; for then he would have urged him for the payment.

ANSWERED,---This letter bears its dittay in its bosom; for it bears, I will have use for your money at Martinmas, and take it altogether; and therefore borrow this 2000 merks for me in the mean time.

The Lords thought there was very great presumptions of this ticket being paid, or included in these posterior countings; yet, seeing it was not retired, (as it ought to have been,) and that a discharge of lying money can, in no grammar, extend to a bond of borrowed money; therefore they repelled all the three defences, in respect of the answers, and found the L.1500 in the ticket still due.

Vol. II. Page 509.

1709. *July* 6. SARAH SINCLAIR *against* MARGARET COCKBURN.

MRS Margaret Cockburn, sister to Clarkinton, being married to Gideon Murray; by the contract there are 6000 merks of tocher provided, whereof 2000 merks were simply payable to the husband, and the remanent 4000 merks provided in fee to the children; but with this quality, That the husband and wife might uplift it in case of necessity, providing they got the consent of the friends therein named. Gideon's affairs miscarrying, he went abroad, as a soldier, to Portugal;

and the friends consented to the uplifting of 1000 merks of the 4000: and his wife, getting the annualrent of the 3000 merks paid her, she farther contracts for diet, clothes, and other necessaries, about 500 merks from Mrs Sarah Sinclair, and grants bond for the same; who arrests the like sum in Clarkington's hands, and pursues a forthcoming against him.

ALLEGED,—The bond is granted by one *vestita viro*, and so is null. ANSWERED, 1*mo*,—He is dead. 2*do*, I have a factory empowering me to intromit. REPLIED,—*Vita præsumitur*, unless death be proven. 2*do*, He could not give a factory for uplifting that which he could not uplift himself.

ALLEGED, 2*do*, for Clarkington,—That, by the express conception of the clause in the contract of marriage, it was burdened with the consent of some particular friends therein named, who refused their assent; 1*mo*, Because it may prejudge her children; 2*do*, In case of no bairns, 2000 merks of it is to return to the granter; and to allow its exhausting this way evacuates that clause. ANSWERED,—The requiring the consent of friends, was to prevent unnecessary squandering and dilapidating the money; but absolute necessity has no law; and there can be nothing more necessary than to furnish her the means of life; for the annualrent of 3000 merks can never maintain a gentleman: and if the friends be obstinate in denying their consent, then it devolves *in arbitrium boni viri*, and the Lords of Session come in the friends' place, to consider the equity of the demand, and to supply their default.

The Lords found the narrative of the bond bearing to be for aliment, with a special account of furnishing, signed also by the debtor, were not probative, being only her assertion; but that the absolute necessity behoved to be *aliunde* instructed by witnesses; especially seeing it was informed that she had taken on for aliment from others, as well as from Mrs Sinclair; by which exorbitancy, in a short time, the whole stock of the 3000 merks might come to be exhausted, after which she would have no fund for her maintenance. Which consideration moved the Lords to look the more narrowly to the necessity and rationality of the furnishing. *Vol. II. Page* 510.

1707 *and* 1709. JEAN SEATON and SIR ALEXANDER WEDDERBURN of BLACKNESS *against* LORD PITMEDDEN.

1707. *December* 4.—MRS Jean Seaton, daughter to Lord Pitmedden, and Sir Alexander Wedderburn of Blackness, who married his eldest daughter, raise a process against my Lord, founded on the contract of marriage passed betwixt him and Dame Margaret Lawder, daughter to Mr William Lawder, one of the clerks of the Session; ALLEGING, That he is bound to make an equal distribution and division of the considerable means and estate he got by the said Mr William; and, on this depending process, having raised inhibition against my Lord, he applied to have it stopped till the ground of it were tried and cognosced, it being an extraordinary thing for children to crave inhibition against their parents, unless, *causa cognita*, the reasons were found very good. On the other hand, it was contended, he acted partially amongst his children, and diminished their portion, to make his representation great, by his eldest son and heir.

It was reasoned on the other side, That none could be so fit a judge of the