

already, or may be, tailyied to the heirs-male ; in which case, if there be only daughters procreated, they will be excluded from the succession ; therefore, he obliges himself to pay to the said daughters the sum of 18,000 merks at their age of fourteen, with annualrent thereafter, and which sum they shall accept in full satisfaction, and shall be obliged to renounce and denude in favours of the heir of tailyie. Saintford dying, and leaving only one daughter of this marriage, and she being married to Captain Patrick Gordon of Myreton, he finding that the lands held ward, and were recognosced, he procures a gift of recognition ; and, pursuing a declarator, and for maills and duties, he insisted, *primo loco*, to affect and burden the lands with the £1000 sterling provided to the daughters of that arriage, the case having existed that there were no sons.

ALLEGED for the other Creditors,—That the case wherein the £1000 sterling was provided to the heirs female of that marriage had never existed ; seeing, by the narrative of that clause, it was only to be due to the daughters in case they were debarred from the succession by a tailyie of the said barony, made or to be made ; but, *ita est*, it is not pretended that the said condition was ever purified, or that ever the estate was tailyied to heirs-male ; in which event only they were to have right to the said L.1000 sterling. And so the daughter, being heir of line, has right to the estate of Saintford ; and, if it were not exhausted with debt, might enter, there being no tailyie to debar her : and, if she find that succession not only unprofitable but dangerous, yet she may not repudiate it, and retain a faculty of electing the L.1000 sterling provision, to which she can never recur, it being extinct by his not making a tailyie.

ANSWERED for the Daughter,—That the narrative and supposition of a tailyie is fully cleared by the subsequent clauses, making the L.1000 sterling payable at a precise determinate time, with annualrent thereafter, and execution to pass against the father for implementing the same ; which is impossible if it had been conditional. And the daughter has her election to betake herself to the estate, or to the foresaid provision ; as was found, *26th July 1677, Stevenson against Stevenson.*

REPLIED,—It is against the conception of the clause, the meaning of parties, and the analogy of law, to make the daughters creditors in that sum, unless a tailyie were produced to debar them from the estate ; and so it was decided, in a parallel case observed by Dirleton, *20th June 1672, Gray against Forbes.*

The Lords, by a plurality of seven against six, found the daughter was not a creditor in that L.1000 sterling obligation, which was only conditional, in case she had been debarred by a tailyie ; and therefore preferred the other creditors to her, unless she can prove there was a tailyie. *Vol. II. Page 508.*

1709. *June 30.* SIR JAMES HAMILTON'S CHILDREN *against* SIR WILLIAM MENZIES.

THE Children of Sir James Hamilton, Lord Halcraig, as executors to him, pursue Sir William Menzies, their uncle, for intromission with sundry of their father's debts, and particularly for payment of L.1500 Scots contained in a ticket granted by him to Lord Halcraig in April 1698.

ALLEGED for Sir William, *1mo*,—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 cælo* 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.

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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;

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