Replied for Sir Andrew,—That he cannot plead the benefit of his minority, seeing he does not represent his father, but, being charged, has renounced to be heir to him; and, upon an adjudication so led, he bruiks the lands, and so he must be reputed as a stranger; and it should be the adjudger's minority, and not his. And, as to the interruption by the liferent, he was still *valens agere*, seeing a fiar may pursue a declarator of right, though he be not actually in possession.

The Lords repelled Sir Andrew's defences; and declared in favours of the pursuer, conform to his decreet-arbitral. *Vol. II. Page* 100.

1700. *July* 3. Maxwell of Friercarse *against* Maxwell of Garnsalloch and Maxwell of Cowhill.

Maxwell of Friercarse pursues Maxwells of Garnsalloch and Cowhill, and others, for count and reckoning of his estate during his minority, they or their father having accepted to be his curators; and, for proving thereof, produces a precept for choosing his curators in 1672, with an execution thereon against his nearest of kin, and a minute bearing his nomination and election of them to be his curators, and their acceptance, and making faith and subscription.

Alleged,—The paper is not obligatory nor complete, unless the pursuer instruct there was a judicial act of curatory passed thereon, or that they acted and intromitted; seeing all his charge is made up of a vast sum of pretended omissions now after twenty-seven years.

Answered,—Their acceptance is proven by their subscription under their own hand; and *non refert* whether they entered to the administration or not, or extracted an act, that being their own fault in neglecting their duty.

The Lords thought the case new, and ordained it to be argued in their own presence. *Vol. II. Page* 101.

1700. *July* 6. Thomas Barclay of Hilton *against* Agnes Bervy and Doctor Hamilton.

Arniston reported Thomas Barclay of Hilton against Agnes Bervy, relict of Provost Boswal in Kirkaldie, and Doctor Hamilton. Barclay charges her on a bond for 1000 merks. She suspends on this reason, That it was the result of a transaction; for he having married her eldest daughter, and portions being settled on the younger by their father when on death-bed, this bond was given for a ratification, by the said Barclay and his wife, of these provisions; but Barclay having got a sight of the ratification, he lacerated and tore the same; and there was a decreet of Privy-Council against him, decerning him to renew it.

Answered, 1*mo*. It is denied it was for the ratification; 2*do*. *Esto* it were, this is not a clear compensation, seeing the bond is for a liquid sum, and the fact decerned for is illiquid; 3*tio*. The decreet of Privy-Council stands suspended.

The Lords found, by a discharge produced, That the bond and ratification were the mutual causes one of the other; but Barclay's wife being now dead, it was *factum impræstabile* to renew the ratification, and therefore *loco rei succedit*

dammum et interesse. And that not being presently liquidated, seeing Barclay's son was yet minor, and could not ratify in his mother's stead, and the provisions were not quarrelled *ex capite lecti*; therefore they allowed Barclay to uplift the principal; for the reason did not stop the payment of the annualrents; he finding sufficient caution to refund, if his son did not ratify, or quarrelled these bonds of provision, at his majority.

2do. Compensation was craved on a decreet they had against Barclay, for £300, as some years' aliment of his children, and £30 for burying one of them.

Answered,—The bairns were her own grand-children, and so must be *ex pietate avita;* and as to the funeral, no particular account of articles given in.

The Lords would not sustain that ground of the *pietas materna;* but found, —seeing their father was in life, and no paction or agreement was pretended to be made with him,—that no aliment could be acclaimed: But all were clear, that, from the date of the instrument by which he required them back, he was free; and the plurality assoilyied him from the aliment on the ground aforesaid. *Vid.* Stair, *21st July* 1695, *Ludquharne* against *Geicht;* and *supra*, 13*th June* 1700, *M'Lean* against *Ogilvie*: And found not the grand-mother obliged to funerate the child that died with her, and that the article was moderate; and therefore sustained the compensation *quoad* the £30.

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1700. *July* 9. John Corse *against* Janet Anderson.

In advising a process, pursued by John Corse in Paisly, against Janet Anderson, relict of John Reid, the Lords discovered, from the probation, that Corse had vitiated a bond granted to him by Reid, and turned the word "myself" to "himself," whereby he had got payment of 1100 merks.

The Lords decerned him to repay that, as *indebite solutum*; and instantly granted a warrant to one of their macers to apprehend the said Corse, and bring him in prisoner to the tolbooth of Edinburgh, that the Lords might punish him for his forgery; and, in regard the witnesses touched one Fork, as somewhat accessory, they gave likewise warrant to put him under caution to appear, under the penalty of 1000 merks, otherwise to imprison him. This was done both secretly and quickly, that no advertisement might prevent their macer; and to discourage falsehood, which is increasing exceedingly. *Vol. II. Page* 102.

1700. *July* 10. William Hay *against* James Balfour.

William Hay, Collector of the shire of Aberdeen, having bought the lands of Balbithan, from James Balfour, merchant in Edinburgh, for 40,000 merks; and there being 5000 merks of the price yet resting, he suspends the charge on this reason, That the lands being sold to him on the faith of a subscribed rental, he finds, upon trial, that it falls short 250 merks *per annum*, and therefore he must have retention *pro tanto*.

Answered—Indeed the disposition does relate to a rental; but it is only in