1679. *February* 11. ARTHUR FORBES *against* The MASTER of SALTON.

ARTHUR Forbes his cause (*vide Dec.* 1672, *No.* 377 ; *vol. II. p.* 689,) against the Master of Salton was decided; and the Lords found the right standing in late Sir Charles Erskine, Lord Lyon, his person, was but a trust to Salton's behoof. But his oath taken by Newbyth bore, that it was to his own behoof: which seems to interfere. *Vol. I. Page* 41.

1679. *February* 11. BRUCE of BROOMHALL *against* the CREDITORS of MORRISON of DARSIE.

The competition of Bruce of Broomhall and the Creditors of Morrison of Darsie was decided. *Vol. I. Page* 41.

1679. *February* 18. SIR ROBERT SINCLAIR *against* HOME of WEDDERBURN.

SIR Robert Sinclair's cause with Home of Wedderburn was this day determined against him, and his comprising of the teinds reduced *funditus,* because the decreet, whereupon it proceeded, was extracted before the writs produced for Wedderburn were advised. Sir Robert said, In Sir John Gilmor's time he would not have lost the interlocutor; and he hoped to see such another president ere he died. *Vol. I. Page* 42.

1677, 1678, 1679. SIR ALEXANDER FALCONER of GLENFARQUHAR *against* SIBBALD of KAIR.

1677. *July* 24. SIBBALD of Kair raises a declarator against Sir Alexander Falconer of Glenfarquhar, to hear and see it found and declared, that the gift of his ward and marriage was taken by Gideon and Harry Guthries, his tutors and overseers, and was transacted by them with Sir C. Erskin, Lord Lyon, and consequently must be presumed to be done to his own behoof,—see Dury, 18*th July* 1635, *Edmiston;* and thereafter that they gave up the assignation they had gotten to it, and the Lyon gave a new assignation in favours of Glenfarquhar; with many other circumstances of the fraud and false conveyance, which see in the informations beside me; and therefore a bill was given in to the Lords, craving that my Lord Lyon might be examined *ex officio nobili,* whether there was not a prior assignation to the Guthries; and if it was not in trust to the minor's behoof; and was not retired and given back to the Lyon, and he thereon gave this second and new assignation to Glenfarquhar, or old Sir David Falconer, &c. anent their knowledge of it.

The Lords refused the desire of this bill, in regard Glenfarquhar being a sin-

gular successor and assignee, his right could not be taken away by depositions of witnesses or by his cedent's oath; unless it were proven to be to his cedent's behoof, or without onerous causes: and writ could only be taken away by writ. And therefore refused to examine the Lyon *ex officio*, unless we could say that we had rendered it litigious against the Lyon, by executing a summons before the date of this assignation to Glenfarquhar, for declaring that the gift was already assigned to the Guthries, for the pupil's own behoof. After which citation they found the Lyon could do nothing in prejudice of that intimated action *lite pendente*. But we were not able to subsume on any such declarator executed against the Lyon before his assignation to Glenfarquhar.

This was very hard and strict usage, considering the pregnant concurring qualifications of trinqueting and base indirect dealing. And the Lords, on less motives, have been oft induced to examine witnesses *ex officio nobili;* but they keep this *officium* of theirs as a screen to palliate their arbitrariness, to grant it or not as they favour. See Dury and Hadington, 1*st March* 1623, *Williamson* and *Law*.

This same session, in the end of it, the Lords refused to grant commission for examining Doctor Frazer, who had assigned a bond of Sir James Hamilton's father to Burnet of Leyes; though Sir James produced sundry little schedules, under the Doctor's hand, insinuating all the money contained in that bond was not then advanced to Sir James his father. Yet, in this other process, anent the modification of the avail of the marriage, we obtained, for the vassal defender, a joint probation of the rent of the lands and the value of his estate, beside the burdens condescended on. Whereas, in strict law and form, the donatar to the ward ought to have the sole probation of the rents of the land.

Advocates' MS. No. 615, *folio* 295.

1678. *February* 26.—This day the declarator pursued by Falconer of Glenfarquhar against Sibbald of Kair, anent the avail of his marriage, (*de quo vide supra*, No. 615,) was advised by the Lords; as also our declarator of trust against Glenfarquhar, whose oath, they found, did not prove any prior assignation: and having considered the probation led upon the rent of the lands of Kair, belonging to the minor, and any other estate he had belonging to him, which was in all betwixt sixteen and seventeen chalders of victual; as also the burdens and incumbrances affecting the same or the minor, whether personal or real, which were betwixt 7000 or 8000 merks, and more; they modified 3000 merks for the avail of his marriage, payable presently or next term, he being past fourteen.

This modification was very reasonable and low. *Vide supra, folio* 151 *et seq. Mr George Gibsone* against *Janet Ramsay*. Newton removed during the advising. In regard the donatar is liable in an aliment to the minor, by act in 1491, we thereon craved compensation *pro tanto:* but the Lords would not receive it here, but ordained us to pursue and liquidate it by way of action. *Quæritur* if Glenfarquhar will be liable for the year's aliment preceding the years of his assignation to the donatry from the Lyon.

Advocates' MS. No. 729, *folio* 320.

1679. *February* 19.—Sir Alexander Falconer of Glenfarquhar his declarator against Sibbald of Kair was called, wherein he craved to be free of the aliment, as donatar to his ward and marriage:—1*mo*, Because the mother had alimented

him already; *2do*, She had intromitted with as much of the rents of Kair as would compense it; *3tio*, Before 1676, he could not be liable, that being the date of his assignation to the gift of the ward from the deceased Sir Charles Erskine, Lord Lyon, but only for the years since; *4to*, For years posterior he cannot be decerned in any aliment, because he is willing to entertain the minor at his own house, and he will take his custody.

ANSWERED,—The entertainment which a superior and his donatar owe to the ward-vassal is more than a mere aliment; for the 25th Act Parliament 1491 requires he be brought up according to his quality and the condition of the fee; so that it is both more liberal and large than a mere *victus et amictus*. The mother's entertainment can never be supposed to have been a donation *ex pietate materna;* because, besides that she had little or no jointure to do it on, she advanced it *intuitu* of repetition, knowing that her son had right to an aliment from the donatar to his ward; and it is ridiculous to think that she minded to compliment the donatar. And though the wardator be already alimented for all the years past, yet that can be no discharge to the donatar of it, unless he can say he was alimented by him. And though his mother's intromitting with as much of the rents as will pay it, is not relevant against him, yet, *1mo*, Her said intromission is denied; *2do*, She did it by virtue of a right, *viz.* a decreet-arbitral, wherein Glenfarquhar himself is one of the judges; *3tio*, The time of the said pretended intromission, she was clothed with a husband, *viz.* Robert Arbuthnot; and so she cannot be liable, unless they prove that she represents him by some passive title. As to the 3d, This pursuer must be liable for years preceding his assignation, because the minor's aliment is *debitum fundi, et transit ad singulares successores*; and his author's gift is expressly burdened and clogged with it; and so Glenfarquhar, seeing it *in græmio juris*, could not be ignorant of it. To the 4th, The donatar, by our law, hath not the custody of the minor's person; and the donatar's offer to entertain him with himself does not liberate, especially where the minor is sixteen years of age, and at the College. What! would Glenfarquhar teach him to keep his sheep? See Stair, *tit.* 14, Anent the Keeping of the Person of the Minor.

See 26th February 1678, where the marriage is modified and decerned. But being charged for payment, we contended it was not payable till the entry of the heir, which is his age of twenty-one years complete; for, though *cessit dies obligationis, tamen nondum venit dies, nequit exigi*; for wherewith shall he pay the avail of his marriage when he is not in possession? And therefore I find Balfour, *tit. Marriage of Heirs, C.* 76, telling us, that the Lords decided the single avail of the marriage not to be due till the entry of the heir: as also, that there can be no non-entry craved, so long as lands are in ward, but that ward stops it. See Stair, *tit.* 14, and Craigie, in his Collection of *Pract. v. Maritatio et v. Non-entry.* As to alimenting, *quo animo* it is done,—see *L.* 34 *D. de Negot. Gest.* 1*st February* 1672, *Guthrie;* and 3*d January* 1679, *Deas.* And I hear lately, that in *Mr John Ellis's* case against the *Countess of Dirleton* and *Mr Dalmahoy*, the Lords found, where one conjunct person had alimented another, without paction or agreement, (where the persons were of that age as were capable to make it,) they could not thereafter pursue for repetition of that aliment given.

This debate being reported to the Lords, they sustained the pursuit against the defender, for bygone years only since the defender's right of assignation from the late Lord Lyon, reserving action to the pursuer against the for-

mer donatars for three years preceding; and sustain the defence, that, as to the years since the expiring of pupillarity, the pursuer was alimented freely by the mother, without any paction. And, as to the years during the pupillarity, find the defence relevant, that the mother intromitted with as much of the rents of the ward-lands as the aliment would extend to; and sustain an aliment to the pursuer in time coming, according to his age and condition; and remit to the Ordinary to consider the pursuer's condition, and to modify the aliment accordingly.

On a second report, the 25th of February, the Lords adhered to their former interlocutor, and find the donatar not liable for alimenting, after the expiring of the pupillarity, in case the minor was alimented freely by the mother, without any paction: and find thir defences relevant *separatim, viz.* that the aliment was discharged, or that the mother or father-in-law intromitted with as much as will satisfy the aliment; or that there was a debt due to the minor, out of which he might have been alimented *aliunde*. And,—before answer to the other allegeance, that the estate was burdened with a liferent and wadset, upon a right from the grandfather, whom the minor represents, which exhausted the whole rent of the lands,—ordain the intromission of the liferenter and wadsetter to be proven.

Then, on the 27th February, upon a bill given in by Sibbald of Kair, the Lords adhered to their former interlocutor, and remitted to Forret to consider the condescendence of the rent of the lands, and the burdens affecting them, to hear the parties' procurators thereon, and to modify the aliment as he shall find just: which he modified to L.100 Scots yearly, during the pupillarity before fourteen, and L.200 after that, conditionally that the foresaid points were proven.

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1679. *February* 22. ROBERT M'GILL of FINGASK *against* HOME of WEDDERBURN.

MR Robert M'Gill of Fingask obtaining a decreet against Home of Wedderburn, for payment of a debt contained in his father and goodsire's bond, he suspends, and offers to prove paid, and craves an incident; and when we are circumducing the term, he produces some discharges of the bygone annualrents, amounting only to a small sum. We, not being willing to delay ourselves, offer immediately to allow them, and deduce. This was refused; because, in form, wherever there is a production made of writs for proving, there must be an *avisandum* made with the cause to the Inner-House, and they must be there advised; and one will not get a decreet though he offer instantly to allow all they seek; which seems strange: and yet it is affirmed it was so decided by the Lords in the case of *Kinfauns* and one *Couper*, lately. *Vol. I. Page* 44.

ANENT APPARENT HEIRS.

THEY affirm that an apparent heir may neither pursue a reduction *ex capite lecti*, (yet his creditors may do it, to remove impediments out of their way,) nor yet an improbation.

It was queried, if an apparent heir shall get a comprising gifted to him, if that