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

right be redeemable from him by the defunct's creditors within ten years after his acquisition of it, by 62d Act Parliament 1661; for that act seems only to allow the redeeming of such rights as he shall acquire with money; for it speaks of repaying him the sums for which he bought and purchased it; and the case of donation, (as being infrequent in this uncharitable age,) seems not to be provided for, but to be a *casus non cogitatus*, wherein the statute is out, and which was not thought on; and so *casus omissus habetur pro expresse et de industria omisso*; and *statuta*, being *strictissimi juris*, cannot be extended *de casu in casum*. Some think the act, though it ought, yet in strictness it will not reach this case. See some questions at the end of February 1680, and Stair, *tit.* 24; where an heir getting a comprising *gratis* must be paid the whole sums.

A mother giving her daughter a tocher, and taking from her a discharge of all she can ask or crave, by her father or goodsire's decease, as heir to them, (there being only daughters,) or any other manner of way; *quær.* if the accepting of this tocher, and renouncing the succession in manner foresaid, will be a *gestio pro hærede*, and infer a passive title, yea or not. Some affirm it will, because she gets money to do it. But this were exceeding hard. How far an apparent heir, renouncing to be heir for money, is liable, see Stair, *tit.* 29.

What if an apparent heir renounce the reversion of the apprising, or his right of the lands apprised, and get a sum of money for it. The Lords have taken a very rational and just way in this; for, if the legal of the apprising was not expired, or if there was any right to the lands standing in the apparent heir's person, and he quit that for money, then it is a behaviour; but if the legal be expired, and he gets it merely for his kindness and good will, that binds no representation on him. See Dury, *27th January* 1636, *Straiton*; *10th February* 1642, *Johnston*. *Vol. I. Page* 44.

Anent Equality of Punishments.

Doctor Jermyn, in his Commentary on the Proverbs, c. 16, v. 11, cites to this purpose an apposite saying of St Chrysostom on the 95th Psalm:—*Cum punit Deus trutinat ultionem, ut congruens sit delictis.* And the English *Magna Charta, anno* 9 *Henr.* III. *c.* 14,—"No man should be amerced but after the quantity of his offence." And Draco's laws, to this hour, stand condemned for making one punishment for all faults; though the Stoics made all errors equal. *Vol. I. Page* 45.

1679. *February* 28. Anent Recognition.

Robert Graham, Provost of Dumfries, a man in great reputation for wealth as a drover, being broken, this day his escheat is gifted to the Earl of Dundonald, the President, Craigie, &c. *primo loco*, for payment of their debts. They also got the gift of the recognition of his lands, which he had made to recognosce, by taking a base infeftment after he was bankrupt; which will occasion a pretty debate in the declarator of recognition, whether or no such a fraudulent deed can make the lands recognize, so as to prejudge his creditors; and if this will