No 334. charged Alexander Blair, the pursuer's cedent, to furnish them, seeing they were not exorbitant, nor furnished *aliunde*; and notwithstanding of the quality adjected by the Lady to her oath, that Alexander Blair promised to take back the silver-lace; seeing it was yet in her hands for these several years; and they held one of his sons as confessed, because he would not depone but with this quality, that it was gifted to him, which is not presumeable, his part of the account being L. 137 Scots; the pursuer, before extract, proving that the prices contained in the account are the ordinary prices that such goods were sold for at the time; which the pursuer having done, and the depositions being advised, the Lords decerned.

Fol. Dic. v. 2. p. 239. Fountainhall, v. 1. p. 333, & 349.

1686. *January.*

Major Buntein and Drummelzier *against* Murray of Stenhope.

No 335. A gift of marriage for the behoof of the vassal himself being decerned to be communicated to the sub-vassal, upon his paying a proportion of the composition, and the expenses laid out in procuring the same; the Lords found the composition and expenses relevant to be proved by the pursuer's oath, without necessity of any other instruction.

Fol. Dic. v. 2. p. 239. Harcarse.

*** This case is No 16. p. 7763, *voce* Jus Superveniens.

*** See the like, March 1684, Bruce against Fraser, No 82. p. 9226, *voce* Mutual Contract.

1698. *January* 14. Hopkirk *against* Mary Deas.

No 336. Furnishing to a minor *in familia paterna* of clothes and other necessaries, found not to fall by the triennial prescription, the account being attested by the minor within the three years.

Crocerig reported Hopkirk merchant in Edinburgh, against Mary Deas, and Mr Alexander Wedderburn her husband, and Mr James Deas of Coldingknows, Advocate, her father, for payment of the sum of L. 241 Scots, as an account of clothes and others furnished to her, and which she had subscribed. The defence for her husband was, I cannot be liable, because he furnished to her before her marriage, when she was minor, and a daughter *in familia*, and had no separate estate of her own; and so her father must only be convened for that; for either the furnishing was necessary, or superfluous; if necessary, it a proper debt, burdening the father; if exorbitant and superfluous, the merchant *sibe imputet quod credidat minori*, and she has *debito tempore* revoked. *Answered*, This being a moveable debt due by the wife prior to her marriage, the husband by the communion of goods, becomes liable for the debt. The Lords found, if she had been *sui juris et materfamilias* the time of on-taking of this account, and that she wanted a father, that then it would have affected herself, and consequently her husband *jure mariti*; but being *in*

familia with her father, neither she nor her husband could be made liable for the same. Then the pursuer *insisted* against her father, *super hoc medio*, That he was bound to furnish his daughter. *Alleged* for Coldingknows, Merchants ought not to furnish children *in familia* with goods, without the parents' special warrant and order to that effect, otherwise, by their insnaring collusion bairns may be enticed to take off clothes and other furnishing, to the ruin or detriment of their parents: And Durie observes, 27th November 1624, in the case of a Baxter in Leith *contra* Mackison, (*See* APPENDIX.) that an account of bread furnished to his daughter for the use of his family, did not oblige, unless they proved his warrant, else children and servants might take on accounts at their pleasure; and the like was found 21st June 1634, Sir James Hamilton *contra* Certain Furnishers, No 211. p. 6003.—*Answered*, It were very rude if merchants should question Gentlemen's children their warrant for off-taking of goods in their shops, and should be put to ask, 1*mo*, Are you majors or minors? 2*do*, Have you commission from your parents for what you seek? But the rule to be followed in this case is, if the goods and ware which were bought be not superfluous or extravagant, but such as are necessary and suitable for persons of their quality to wear. See 22d February 1623, Lamb *contra* Tweedy, *voce* RECOMPENCE.—THE LORDS found the merchant behoved to prove the things were necessary and suitable to one of her rank and station, and no ways exorbitant; in which case, they found there was no need of the father's special warrant for the furnishing the same. Then *alleged*, That still he could not be liable, because he offered to prove, that at or about the time this account was furnished, he had taken off clothes and apparel sufficient for her degree. *Answered*, The merchant knew nothing of that, and was not prohibited to furnish, and so cannot be a loser; and he saw his daughter wearing the clothes, which was a ratihabition; for *qui scit et non prohibet, is mandat ubi prohibere potuit, et non fecit.* THE LORDS found it relevant to assoilzie the father from this pursuit, that he proved he furnished his daughter sufficiently *aliunde*, by paying accounts for her elsewhere to merchants, for clothes, near the time of contracting this debt. But it being *objected*, That two articles of this account were made up of a watch and some borrowed money; the LORDS found these not necessary nor suitable, and rejected them, unless the merchant would prove the watch yet extant, or that they were *in rem minoris versa*. Thereafter it was *contended* for the father, That this merchant account was prescribed by act of Parliament, not being pursued for within the three years. *Answered*, The account was subscribed, which hindered the prescription. *Replied*, It was null, being signed by a minor without the consent of her father, who is her administrator in law; and was so found, Durie, 22d March 1634, Rhynd, No 57. p. 8942.—(*See* No 59. p. 2730.)—*Duplied*, A writ null as to some effects, yet used to be sustained to import an interruption. THE LORDS found her subscription to the account was sufficient interruption to the prescription. As there is a hardship on merchants to refuse children *in familia* goods they call for, espe-

No 336.

No 336. cially when they are 18 or 20, as she was; so on the other hand, they may vent their trinkets and superfluous ware on children, when too ready to comply with their vanity and prodigality, and get their accounts subscribed or a bond for the price, and let it lie over for some years, and then pursue the father, when his mean of probation may have perished, that his sons or daughters, minors *in familia* at the time, were sufficiently furnished in apparel when they took off this account, and so for not proving that he shall be liable.—See Recompence.

Fol. Dic. v. 2. p. 239. Fountainhall, v. 1. p. 813.

1707. *July* 16.

Daughters of William Waddel *against* William Wadderstoun of Haugh.

No 337.
A bond granted, payable to two co-tutors *nominatim*, for the use and behoof of their pupils, in contemplation of a disposition granted by these tutors, of some moveables belonging to their pupils, being assigned to them after their majority, it was found that the debtor could not prove payment by the oath of the surviving tutor, one of the cedents, the other being dead, and both *officio functi*.

William Wadderstoun of Haugh having granted a bond for 1030 merks, payable to Thomas Waddel and James Wadderstoun, uncles and tutors to the three daughters of umquhile William Waddel in Gilmertoun, for the use and behoof of the said pupils; and William Wadderstoun being charged to make payment of the bond at the instance of the said three daughters and their husbands, as assignees constituted after their majority by their two tutors; he suspended upon this reason, that he offered to prove by the oath of James Wadderstoun, one of the said tutors yet alive, that the sums in the said bond were satisfied and paid to him and the co-tutor, except the odd thirty merks.

Answered for the chargers, That, however, during the tutory any charge at their tutors' instance might have been taken off by their oaths; now the office being expired, the tutors who are *functi* cannot depone to the prejudice of their former pupils, to whom they granted *virtute officii* the assignation charged on; more than if after count and reckoning a tutor found liable in a balance, having granted in payment thereof an assignation to any effects due to himself, it could be pretended that his oath could prejudice the assignee; 2*do*, One of the tutors who were conjunct in the administration being now dead, the other's oath can no more be taken than he could act by himself; and both being co-creditors in the bond, as one of them could not charge without the other's concourse, neither can one discharge without the other; nor could this tutor's oath afford recourse against the representatives of the other tutor. And here the surviving tutor and the suspender are brothers-in-law, who may collude to the charger's prejudice.

Replied for the suspender, The manner of probation by the tutor's oath is in this case most competent; because the bond charged on was granted to the tutors *nominatim*, in contemplation of a disposition granted by them to the suspender, of some moveables belonging to their pupils. And as the suspender could have been charged for payment at the tutors' instance, it is competent to him to instruct any reason of suspension by the tutor's oath. And the oath