damnum 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.

2*do.* 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, 21*st 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

the clause of warrandice that the tacks were not for elusory duties, so that the rental was not the rule of the sale; and James Balfour had but a little before succeeded to them by his uncle's death, and knew not the rent; but the buyer had more opportunity to be acquainted with it, being Collector of the cess within that shire.

REPLIED,---The rental could not be for regulating the tenants' tacks; for there were lands inserted in the rental that were under no tack.

The Lords, before answer, allowed the witnesses and communers at the disposition to be examined, what was the meaning of parties in signing a rental; as also to prove the value and yearly rent, how far it fell short of that subscribed rental; reserving, to the conclusion of the cause, if James Balfour's heirs shall be liable to make up the deficiency and inleak, in case any be proven.

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1700. *July* 11. MARY WRIGHT *against* The EARL of MAR, and ROBERT ALLAN and FERGUSON.

MARY Wright, relict of James Bruce, merchant in Alloway, pursues the Earl of Mar, Robert Allan, and Ferguson, his coal-grieves, on this ground, That her husband, (to whom she is executor confirmed,) lent, to the deceased John Keiry of Gogar, £3000; and he, as standing infeft in the Lordship of Mar, and manager of the coal, did allocate and sell to him 1000 chalders of coals, for his payment, and did ware and employ the £3000 on the refection and maintenance of the coal-works and new sinks; and that the Earl and his factors had intromitted with these coals, and uplifted their price, and so ought to be liable.

ALLEGED, *Absolvitor*,---Because they no way represent the deceased John Keiry by any passive title; and he had no other right to the coals but only for behoof of the creditors of Mar; and there was no hypothecation, nor *nexus realis* on the coals, so as to hinder them from selling and disposing on them. It is true, if a *corpus* or *quantitas* had been assigned, or so many chalders presently lying on the coal-hill, or some other place, impignorated, there might have been something pled; but here it is only 1000 chalders of coals indefinitely and in general, without any special designation; which can give no hypothecation, seeing our law has not adopted that tacit hypothec, owned by the Roman lawyers, of the ware for the price, or houses and salt works for the expenses of reparation, unless in bottomry upon ships. And its being *in rem versum* gives no real right, no more than, if he had bought lands, or a parcel of wines or other goods, with the borrowed money, could he have pled an interest in the lands or goods bought with his money;—14*th June* 1676, *Cushney* against *Christie*.

The Lords found the pursuer had only action against John Keiry's representatives; and that neither the hypothecation, or *in rem versum*, affected the coals in this case; and therefore assoilyied the defenders.

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