alive; which he refused, as an instrument against him proves: and, *esto* his brother had been dead, yet he could not summarily charge without a service or confirmation to complete his right.

REPLIED,---Where a substitution runs in thir terms,---that the sum is made payable to one and his heirs; which failyieing, to such another *nominatim*, that person cannot have access till first there be a cognition that the heirs of the institute's body have failed; but if it run to Titius, and failyieing of him by decease to Sempronius, in that case our law neither requires service nor confirmation; but the substitute may call for the money without any other solemnity, save to prove that the first person is dead, if it be denied. See Stair, 14*th January* 1663, *Beg* against *Nicolson;* and 3*d July* 1666, *Fleming*.

The Lords were clear there was no need of serving or confirming in this case; but some inclined to see what documents he had to lead him to the belief that his brother was dead; others thought he was *in culpa*, seeing the money was offered him on his warranding against his brother, which he refused; therefore, without any farther trial, they found his detaining Bishopton unwarrantable, but reduced the bailie's modification of the expense as too high, from £246 to 100 merks, and assoilyied from the rest; as also suspended as to the fine adjudged to the procurator-fiscal, as exorbitant and oppressive. *Vol. II. Page 32.*

1699. *January* 6. ADAM CARLYLE of BRIDEKIRK *against* CARLYLE of LIMEKILNS.

HALCRAIG reported Adam Carlyle of Bridekirk against Carlyle of Limekilns, being a reduction of a decreet-arbitral pronounced in 1682, by which he was most enormly lesed; the controversy being anent some bygone feu and non-entry duties, which Limekilns owed to Bridekirk, his superior, for which they decerned him not only to give up some debts and bonds Bridekirk's father owed him, but also to thirle his lands to his mill.

ANSWERED,---There was no iniquity, 1*mo*. Because he not only got a discharge of the bygone casualties of the superiority, but was also to get his entry and charter; and as to these debts, Bridekirk not representing the granter of the bonds, he could never be made liable. 2*do*. They can never quarrel this decreet-arbitral, because homologated by charging me with horning to implement; and so he cannot both *approbare et reprobare*.

REPLIED,---You having declined to implement your part of the said decreet, I must be free, and may now reduce it. 2*do*. Performance upon your part is become both imprestable and impossible, because of incumbrances upon your estate by adjudication and otherwise. 3*tio*. It would be now liable for these debts discharged, on the 24th Act of Parliament 1695, for obviating the fraud of apparent heirs.

The Lords thought he having made use of the decreet by charging on it, he can neither repudiate nor reduce it; but, if the other had also reclaimed, then, *mutuo consensu*, they might recede from it, seeing *unumquodque eodem modo tollitur quo colligatur*; but that it was now turned *factum impræstabile* was not a reason of reducing it on iniquity, but a ground to annul it, unless the creditors-adjudgers from him would concur and offer to implement their debtor's part, by receiving him vassal, and giving him a charter; which probably they

would do, to get the benefit of the astriction, by sustaining and fulfilling the decreet-arbitral. *Vol. II. Page 32.*

1699. *January* 6. MARION MAXWEL, Lady Rosyth, *against* DRUMMOND of INVERMAY.

I REPORTED Dame Marion Maxwel, Lady Rosyth, against Drummond of Invermay, for an aliment of twenty chalders of victual, conform to the provision of her contract of marriage, during the dependance of the process anent the extent of her jointure-lands.

The Lords found Invermay could not be personally liable for the same, unless he had intromitted; but granted warrant to the lady to uplift the rents from the tenants of these roums wherein she stood infeft, not exceeding twenty chalders of victual, during the dependance of the other process.

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1699. *January* 10. SARAH JOHNSTON *against* The EARL of ANNANDALE.

SARAH Johnston, having right to 2500 merks of a wadset granted by the Earl of Annandale's father to Lockerby, pursues a transferring of the said contract against this Earl *passivè*, as representing the granter; and it being called summarily, it was OBJECTED,—It must abide the course of the roll. ANSWERED,—By an Act of Sederunt in July 1688, transferrings are exemed from the roll. REPLIED,—These are transferrings of depending processes, but not of registrate writs, as this is. DUPLIED,—The Act makes no distinction; *et ubi lex non distinguit, nec nos.*

The Lords considered such transferrings, or registration, were now little in observance; therefore ordered trial to be taken what has been the custom when such actions were insisted in,—whether they went to a roll; the ordinary process now in such cases being a summons on the passive titles.

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1699. *January* 10. LADY SEMPLE *against* COLONEL CUNINGHAM.

THE Lady Semple pursued reduction and improbation of a mutual tailyie, by way of indentures, past betwixt the deceased Brigadier Richard Cunningham, her last husband, and Colonel Cuningham, his brother; in which action, she not insisting when it was called, protestation was granted for not insisting. Thereafter a bill was given in for the lady, craving it might be stopped, and she allowed to insist. Which being ordered to be seen by the Colonel, he was content to stop his protestation, but craved a commission to London and Dublin to examine witnesses on his brother's subscription. For preventing whereof the