But the gentlemen answer, that Lords at the beginning having been only Barons, and in regard of the considerable interest they had in their respective shires, being commissionate from the small barons and freeholders to represent them in Parliament, they, because of that credit, got first the denomination of Lords, without any patent or creation; and, upon the matter, were nothing but Barons: and so what is due to them is also due to the other, they originally not differing from the rest by any essential or superior step of dignity. So Craig, pages 78 and 79.—REPLIED, whatever was their rise, the other Barons have clearly acknowledged a distinction now; in so far as they have renounced their privilege of coming to Parliaments by the 113 act in 1587; and the distinction being made, and their privileges renounced, by the small Barons in the Parliament 1427. DUPLIED, that act is introduced in their favours, and nowise debars them; but allenarly dispenses with their absence, and the penalty they incurred thereby, &c. The Gentlemen found on the *Interdictum uti possidetis:* the Lyon says, it is but *vetustas erroris*, and an usurpation.

The complainers are the Lairds of Dundas, Halton, Polmais, &c.

Advocates' MS. No. 393, *folio*, 216.

1673. *June.* JAMES RAE *against* ALEXANDER GLASSE of Sauchy.

IN the same month of June, there was an action of count and reckoning pursued by James Rae against Alexander Glasse of Sauchy; wherein Sauchy having produced a bond for 7000 merks, granted by the same James to Marion Rae his niece, now spouse to Sauchy, and to which he had right *jure mariti;*—Against which it was alleged, that the said bond could found no debt against him, because it bears this express quality,—"providing always the said Marion marry with my consent," and which he never gave:—

ANSWERED, the condition and quality was sufficiently purified and fulfilled; in so far as he was present at the marriage, and is a subscribing witness in the contract of marriage, and staid fourteen years in their house after the same.

REPLIED, where a consent is positively and expressly required to the constitution of an obligation, it must be specially adhibited, and must not be inferred upon presumptions, as that of being present, or a witness; that he never gave his consent to it, and, if he had, they would have taken him subscribing as consenter in the contract; that he never trysted nor communed, but was only witness therein *tanquam quilibet e populo.*

DUPLIED, that his simple presence (though he had not subscribed, as he has done) was sufficient in this case to import a consent, and it is enough he declared no dissent nor dissatisfaction; nor had he any reason, the parties being equal, and without any disparage, and with whom he staid after. And, which is sufficient in the marriage of children, that the father dis-assent not. *L.* 7, 12, *et* 13, *D. de Sponsalibus.—L.* T. C. *De filiis-familias, et quemadmodum pro his pater teneatur, lib.* 10.

The Lords found the quality satisfied by his presence and subscribing *witness,* and that the same was equivalent to a solemn and formal consent. Which seems agreeable to that practique marked by Dury at the 26th of July, 1631, Bishop of

the Isles *contra* Shaw; but there is a contrary decision observed by him at the 19th and 28th of July, 1625, Walwood *contra* Tailzeor; and Mascardus, there cited. It might have been likewise urged for Sauchy, that all these clauses which restrict the liberty of marriage are reprobated in law. Which see debated *supra*, No. 306. [20th January, 1672.] See also No. 365, [10th July, 1672;] and the Informations of the cause beside me.

Advocates' MS. No. 394, *folio* 217.

1673. *June.* JOHN BEATON, Minister of Ayton, *against* HIS PARISHIONERS.

IN the action pursued before the Commissioners for Plantation of Kirks, by Mr John Beaton, minister at Ayton, *against* his parishioners, for making up that proportion of his stipend which was evicted from him by Mr Thomas Ramsay, minister at Mordington, out of the lands of Lammerton; there being a great quantity of free teinds in the said parish of Ayton, and the heritors disputing amongst themselves who should bear the burden: the Lords inclined to find, and that upon most just grounds, wherever an augmentation is granted to a minister, such heritors as have the right of other men's teinds shall be *primo loco* liable before any who have acquired the right of their own teinds shall be burdened therewith. And which interlocutor was upon the occasion of the deceased Lord Renton, who had many teinds besides his own; and which, being an odious purchase, deserves no favour in law.

Advocates' MS. No. 395, *folio* 217.

1673. *June.* ——— *against* ———

ONE having charged for a tocher upon a contract of marriage, the same was suspended, upon this ground; that, by the same contract, the husband was bound to employ a certain sum, upon sufficient security, to himself and his wife, in liferent and conjunct fee, and to the bairns of the marriage in fee; and which is not yet done; and till that obligement and condition of lying so much foregainst it be fulfilled, the tocher cannot be paid; at least, they must be fulfilled *simul et semel.* Pitmedden says, that the Lords suspended the letters aye and while the charger fulfilled his part, as in correspective obligations, and employed the sum conditioned by him conform to the obligement of the said contract. *Vide* a like case *supra* at No. 321, [Laird of Balnamoon *against* Macintosh, 9th Feb. 1672.] Yet this may prove very hard to exact of merchants, to cause them to give out their stock (with which it is far more their interest to trade,) upon annualrent, so destined and clogged.

Advocates' MS. No. 396, *folio* 217.