alrent and penalty of his father's bond were added to the principal sum, and made to bear annualrent thereafter :

It was ANSWERED, That the adding of the bygone annualrents to the principal sum, was most just, seeing they were then all due ; and if a minor might have borrowed money to pay the same, upon a bond bearing annualrent, so it was as lawful to add the same to the principal sum, and take bond for altogether bearing annualrent. And as to the penalty, seeing the expense of recovering a decreet did amount to as much, it was just, likewise, to add the same to the principal sum and annualrents.

The Lords did find the answer to the first reason relevant, and assoilyied from the reduction, in so far as the annualrent was made principal, bearing annualrent, and that it did not fall within minority and lesion : but, as to the second, in making the penalty a principal sum, they did ordain the charger to give in a particular account of his necessary expenses, and declared, that if they found reason, they would modify the same, and reduce *pro tanto*.

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1674. *January* 14. MARGARET JOHNSTON *against* ROBERT STEWART.

MARGARET Johnston, as executrix to her father, who was minister at Orphar, did pursue the said Robert for the vicarage of the lands, lying within the parish of Orphar, in Orkney, extending to two hundred merks yearly, for the space of seven years, during her father's service ; he being presented to the vicarage of the parish ; and thereupon had obtained decreet and letters conform.

It was ALLEGED for him, That the presentation, and letters conform, could give him no title to the vicarage, unless it were instructed that it was a distinct benefice belonging to the patron, or that they could prove that the pursuer's father, or other incumbents before him, had *decennalis et triennalis possessio* of the vicarage teinds of the parish ; which they were content to find relevant.

It was REPLIED, That the minister's presentation being from the presbytery, who then were in use to present in place of a laick patron, having obtained letters conform, gave him a sufficient title ; unless the defender would allege that they had right themselves to the teinds, or have been in possession by virtue of a tack, or other rights, flowing from those who had right to the vicarage : and if none can allege upon any right, all vicarages belong to the kirk *jure ecclesiastico*.

The Lords did repel the defence, and sustained the minister's title, as being founded *in jure*, against the defender, who had no right, nor could allege that he was troubled at the instance of any other person who pretended right to the vicarage ; and found, that vicarages as well as parsonages did, *in jure*, belong to the church, and those who are presented thereto, unless the patron or others can allege upon a valid right settled in their person. *Page* 394.

1674. *January* 14. The EARL of DUNFERMLINE *against* The EARL of CALLENDER.

IN a pursuit at Dunfermline's instance, as assignee constituted by his father,

who had right from his mother by her contract of marriage, whereby she was provided, by the Earl of Callender, to the half of the whole lands or monies that he should conquest during the marriage; as likewise in and to a renunciation made and subscribed before the marriage, by the Earl, of all his *jus mariti*, or right, that he could pretend to her liferent lands, and conjunct-fee, of the estate of Dunfermline, with an obligement never to meddle or intromit with the same, but with the lady's special consent and warrant; whereupon they did conclude, a right to the half of the conquest, and to the maills and duties thereof, since the lady's decease; As likewise of the whole maills and duties of the conjunct-fee lands of Dunfermline, during the marriage:

It was ALLEGED against the first member, craving the declarator of property of the half of the conquest,—That the contract of marriage, whereupon it was founded, did not bear the same; in so far as, by the said minute of contract, she was only provided to the liferent of the said conquest lands, not making mention of any right of the fee and property, but only giving her right to dispose of the half thereof, in case of no children; which being subjoined to her liferent of the lands of Levingston, they being both *unius et ejusdem contextus*, can bear no other sense; but as she is provided by the liferent both of Levingston and the lands of the conquest; so, in case of no children, she should have liberty to dispose of the half of the said liferent lands.

It was REPLIED, That that clause of the contract of marriage was opponed, bearing, not only her right of liferent of the lands of Levingston, but in like manner of the whole conquest lands, with full power, in case of no issue by children, to dispose of the equal half thereof: which words can only be applicable to the half of the right of property of conquest, and not to the liferent; seeing a full power to dispose of any thing at pleasure necessarily imports a right of property: and if it were interpreted that they should relate to the liferent only, it would import an absolute contradiction against common sense; for albeit there were children of the marriage, she was provided to the whole liferent; and yet, if there were no children, she is provided but to the half.

The Lords did find, that the words and meaning of that clause were only applicable to the property, and not to the liferent, as being inconsistent therewith; and that the liferent of the whole conquest, with a power to dispose of the half thereof, were most inconsistent, and in reason could only relate to the property.

It was ALLEGED against the second member, founded upon renunciation of his *jus maritale*, as to all the lady's liferent of the estate of Dunfermline, That no respect could be had to the said renunciation, because it was all holograph; and albeit it did bear a date before the marriage, yet it was truly written and subscribed in the year 1652, when Callender's estate was sequestrated by the English usurpers, of purpose that his lady might get off the sequestration: whereupon the Earl is content to make faith, that that was the true date thereof, and was only made and delivered to the said Countess for the cause foresaid.

It was REPLIED, That the renunciation was opponed, bearing date before the marriage, and albeit it was holograph, the date could never have been quarrelled by himself: for if that were sustained, then all subscribers of holograph writs, by their own assertion or oath, might make the writ elusory, contrary to all principles of law.

The Lords did repel the allegeance, and found that a holograph writ, being delivered to another party, who had thereby *jus acquisitum*, the verity of the

date could not be improven or questioned by the writer himself, that not being *habilis modus probandi.*

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February 3, 1674.

THIS cause being again called in the Inner House, and the pursuers insisting upon the minute of the contract of marriage, that it might be declared that the half of the whole conquest, made by the Earl of Callender during the marriage, did belong to the Earl of Dunfermline, as having right by assignation from his father, as said is; as likewise, that it might be declared that he had right to the whole maills and duties of the Lady Dunfermline's conjunct-fee lands, during her lifetime, which were uplifted by the Earl of Callender, by virtue of the foresaid renunciation of his *jus mariti:*

It was ALLEGED for the defender, No process; because, upon report of the Lord of the Outer House, it being declared that the Lords would heart he same *in præsentia,* it ought to be inrolled, and called according to its date, conform to the Act of regulation of process, ratified in Parliament.

It was REPLIED, The defender's procurators having judicially declared, that if they could get a delay from disputing these points until a certain day, which was granted them, not only on their first desire, but likewise to another diet, which was also granted, they did condescend *peremptorie* to debate the said cause without farther delay; and so could not now return to a dilatory defence.

It was DUPLIED, That the condescendence of one advocate could not prejudge the rest, nor the party, to propone that same defence, founded upon an express Act of Parliament.

The Lords did repel the defence, and declared, that they would advise the cause upon the report made by the Lord in the Outer House. Whereupon the Lord Almond, in name of the Earl of Callender, did give in an appeal, judicially under his hand, from the Lords of Session to the King and Parliament, upon that ground,—that his defence founded upon the Act of Parliament ratifying the act of regulation of the session, ordaining process brought in to the Inner House upon report to be inrolled and called according to the date of the inrolment, was unjustly repelled. And thereafter it being intimated to them to give in their informations, the said Lord Almond did renew his appeal, and took instruments thereupon judicially in the clerk's hands. Whereupon the Lords, having seriously considered what was fit for them to do in that case, they unanimously agree to proceed and advise in that cause, notwithstanding of the appeal, upon these reasons:—That, by the 63d Act of Parliament, 14th K. J. II. it was ordained, That all causes pertaining to the Lords of Session, shall be utterly decided by them, but any remeid of appellation to the king or parliament: as likewise, by the Act of Parliament of K. Ja. V. after the institution of the College of Justice, the Lords of Session are declared to have as full power as the Lords of Session had in former times; by which they are secured from appeals, as said is. And if this be not sustained, then their power and jurisdiction would be interrupted by all parties who were dissatisfied with any of their interlocutors, by giving in of appeals to the King and Parliament; and Parliaments not sitting but upon particular occasions, the lieges would be altogether frustrated of their legal procedures, and of justice done them, without all remedy. Whereup-

on the Lords did, by a letter subscribed by them all, represent to the king's majesty, the great injury done to them by the said appeal, and the breach of their privileges; against which they did implore his majesty's authority for redress.

Upon the 10th of February thereafter, the Lords having advised the report as to the right of conquest, and the renunciation of the *jus mariti*; the information given for the pursuer did bear, as to the *first*, concerning the conquest founded upon that clause of the contract, in case there be no children procreated of the marriage, it might be understood in these terms,—failyieing of children after the dissolution of the marriage, and not in case of the existing of children, and thereafter dying before the parents; seeing, in reason, it cannot be supposed that the Lady, having the conjunct fee of 22,000 merks yearly, and the Earl of Callender at that time a gentleman of no great fortune, in contemplation of the great benefit he was to make of her conjunct-fee, out of which the conquest was to be made, he thought it just, failyieing of heirs of the marriage, after dissolution thereof, that the equal half should belong to the Lady and her heirs. And, as to the *second* point, concerning the renunciation of his *jus mariti*, declaring it unlawful to uplift any of the rents of the conjunct-fee lands, without her consent, it was urged upon these grounds, That it ought to be sustained; because, before marriage, it is lawful to the parties to agree as to all interest or benefit that any of them are to have during the marriage; and the same doth not fall to be considered, in law, as *donationes inter virum et uxorem*, which are revocable upon a public reason, *ne mutuo amore se spolient*; and where both husband and wife, having competent estates, which are liable *ad sustinenda onera matrimonii*, by these donations the whole burden should be upon one of them; whereas, before marriage, both of them are *sui juris*, and have *plenam disponendi facultatem*, being *major, sciens et prudens*.

These reasons being considered by the Lords, without any answer from the Earl of Callender, who had appealed, they found it was their duty, not only to answer the grounds of law, but to offer reasons that occurred to them for deciding in this cause, as if the defender's advocates had pleaded the same; seeing the decreet is to be given *parte comparente*, and in that case the Lords are warranted by the common law.

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1674. *January* 17. DOCTOR HAY *against* ANDREW ALEXANDER and OTHERS.

IN a pursuit for maills and duties, at the instance of Doctor Hay, as being infeft in the lands of Artrochie, upon a comprising against Cone, an heritor thereof; compearance was made for Andrew Alexander, who ALLEGED, That he ought to be preferred; because he had a right from one Neilson, who had a right to the said lands, from the common debtor, prior to the pursuer's.

It was REPLIED, That the said Neilson's right, being apprised at the instance of George Stewart long before any right made to Alexander, the Doctor had reduced George Stewart's right, who was preferable to Alexander; and therefore, upon that principle of law, *si vinco vincentem te vinco*, the Doctor ought to be preferred to Alexander.

It was DUPLIED, That the reduction cannot militate against Alexander, be-