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-

cause he was neither called nor compearing, and it was *res inter alios acta ;* so the pursuer, having declared that right null, could not make use thereof as a standing valid right, wherein he could pretend no interest.

It was TRIPLIED, That George Stewart, whose right was reduced, having fully denuded Neilson by a comprising long prior to Alexander's right flowing from Neilson, Doctor Hay, notwithstanding he had reduced the same, for not production of the bonds whereupon George Stewart had comprised, yet he might make use thereof against Alexander, who was not pursuer in that reduction.

The Lords did repel the allegeance and duply, in respect of the reply and triply ; and found, That if Neilson was totally denuded by George Stewart, by an expired comprising before the right made to Alexander, that Doctor Hay ought to be preferred, Alexander's right being *a non habente potestatem ;* but if his right was before the expiring of the legal reversion, that he ought to be preferred to the Doctor, as deriving right from Neilson, who had a prior right from the common debtor. Which was most just : but the great point thereby in debate was not decided, but passed over without decision, *viz.* that the Doctor, who had declared George Stewart's right void and null, could never found upon the same, as a standing right, against a third party, who was neither called nor compearing ; which is against common reason and law ; and, as that maxim holds, *quod approbo non reprobo,* so, *a contrario, qui reprobat approbare non potest.* And not being so found was very hard.

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1674. *January* 22. HALBERT LAUDER *against* WILLIAM ALISON.

IN a suspension, raised at William Alison's instance, who was charged at the instance of the said Halbert, for payment of the sum of £1000 of tocher, contained in his contract of marriage with the said William's daughter, upon this reason,—That the letters ought to be suspended as to 500 merks ; because, by the contract, he was only obliged to pay 1000 merks in real money or bonds, and for making up of the £1000 he was obliged to deliver merchant-ware for 500 merks ; which he had really done, by delivering as many merchant goods to the charger, upon inventory, after the marriage :

It was ANSWERED, That the reason was noways relevant ; because the merchant goods were in possession of the daughter long before the marriage, who, for several years, was in use of buying and selling in the shop as her own goods, and never counted for the profit thereof to her father.

It was REPLIED, That the daughter, being *in familia paterna,* and having no means of her own, any goods in her possession must be presumed to be the father's ; and his payment of the maill of the merchant shop to the heritor thereof, and delivering the goods after marriage upon inventory, must be interpreted a fulfilling of the contract of marriage, as to that obligement of delivering of 500 merks of merchant ware.

The Lords did sustain the reason of the suspension, notwithstanding of the answer, unless the charger would offer to prove that the suspender's daughter had means belonging to herself, whereby she might buy merchant-ware, and trade therewith by succession, or legacy, or any other right flowing from any