1661, or offering caution during the not requisition; if he, in such a case, ought not to be liable in the requisition; not indeed to infer a universal passive title, but, seeing he seeks benefit of the superintromissions, that at least he may state himself as their formal debtor. It is a certain truth, that an extraneous compriser could not be forced to these terms; but the case of an apparent heir buying in such apprisings is not so favourable. *Vide* this decided *22d March* 1683. *Vol. I. Page* 181.

1683. *March 22.*—In the Earl of Marishall's cause against his wadsetters, (28th March 1682;) the Lords, *in præsentia*, found, that whatever apparent heir, as creditor, or singular successor, took the benefit of the 62d Act of Parl. 1661, anent restricting wadsetters to their annualrent, and imputing the superplus *in sortem*, should *ipso facto* make himself liable in the requisition, so as to become personally bound for what should be found resting them, on a count and reckoning, both principal and annualrents.

Which was looked upon as a most just decision. *Vol. I. Page 229.*

1674, 1676, 1682, *and* 1683. The Earl of Dunfermeling *against* The Earl of Calendar.

1674. *February* .—By a minute of a contract-matrimonial passed betwixt the Earl of Calendar and the Lady Dumferling, grand-mother to the present Earl, amongst other clauses he is obliged, in case there be no heirs procreated of the marriage, to dispose upon the half of the conquest by the advice of the Countess. The words are, The half of the conquest shall be disposed upon as she shall think fit. Dumfermeling, as heir to his grandmother, pursues Calendar to dispone the equal half of such lands and sums he condescended on in his summons, *super hoc medio*, that they were conquest *stante matrimonio*, and there was no issue extant of the marriage. Alleged for Calendar, that this clause related only to the liferent of that half of the conquest, and not to the fee of it. *Secundo*, That the provision was only conditional, in case of no heirs or issue of the marriage; but so it is, there was a child of the marriage betwixt them: and, albeit the child predeceased the dissolution of the marriage, yet the naked existence of the child purified the condition of the clause.

Answered for Dumfermeling the pursuer, to the *1st*,—That the clause behoved to relate to the fee and property, because, by an anterior clause, the liferent of all other conquest already, or to be conquest, is provided to her. So this must superadd and operate more; which can be nothing else but the heritable right.* To the *2d*, Nothing can purify that condition but a child procreated, surviving, and actually existing, heir of the marriage; which was not here. See Dury, *27th January* 1630, *Trumbull* against *Colsuresby*, and the marginal citations there, from *Joannes a Sande, Gudelinus, Matthæus de Afflictis, Hippolitus de Marsiliis, Cardin, Mantica, Bartolus, Suinbourne*, and the laws there quoted. See *22d February* 1656, *Lady Langton* against *Rollo; vide infra*, No.

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* See *Vulteius de Feudis, lib.* 1. *cap.* 7. No. 68, 69, *et seq. page* 152, *et seq. Vide infra,* [No. 478, *Catharine Mitchell,* 17*th June* 1676;] *Item,* No. 27*th June* 1676, thir same parties.

555, § 6. For the 1*st* point, see the elegant Joannes Vandus, *lib.* 1*mo*, *Quæstionum Juris, cap. tertio*, where he thinks this formula of a husband's writing and nominating *uxorem suam dominam omnium suorum bonorum* imports not the property and dominion thereof to be acquired to the wife, but must be interpreted *commode et sano sensu de usufructu* for the reasons there drawn *ab impropriatione verborum deflectendorum ad mentem loquentium, cui omnino inservire debent.*

There was also a third point debated; for Dumfermeling craved sundry rents of her jointure lands, which Calendar had uplifted *contra fidem tabularum nuptialium*, by which he obliged himself not to intromit with her jointure.

ANSWERED for Calander,—This being a renunciation of his *jus mariti*, before the marriage; yet, by the subsequent solemnization of it, the benefit of that renunciation did return and accresce to himself again *jure mariti.*—See a large and clear observe anent thir renunciations, in another manuscript beside me; where it is shown from this, and the Lady Innerteill and Colinton's case, that thir renunciations stand good against the husbands, though they will not exclude his creditors.

This debate being reported, by the Ordinary who heard it, to the haill Lords, they found the aforesaid clause related to the fee of the half of the conquest. As to the *second*, before answer, they ordained witnesses to be adduced for proving if there was a child born at all, and how long he lived: and forbore the advising of the third point, anent the recurring of the renunciation to the *jus mariti*; because the reporter informed them that Calendar the defender's advocates desired to be heard upon it *in præsentia.* Which the Lords agreed to; and calling in the parties and advocates, first the defender's procurators craved eight days' delay, and that being past, then other eight days; after which, instead of debating *peremptorie in causa*, they proponed a dilator, upon the article of the regulation appointing where the Lords were to hear causes in their own presence, which were brought from the Outer-House, they behoved to be enrolled in the roll of the Inner-House and called only in their tour.

The Lords demurred much upon this punctilio of form, knowing many were lying at the watch: at last they repel it. And yet they needed not have been so shy, having rejected the same individual allegeance, in June 1673, in *Sir Andrew Ramsaye's case* against *Francis Kinloch:* see it marked at large *supra*, No. 400.

At the pronouncing of this interlocutor began much mischief, and a train of animosity and alienation in the Session, that we can most justly term this a fatal cause, and wish the scandal had never been borne; for the Lord Almond presented an appeal to the Lords, bearing that he appealed from their unjust interlocutor to the King and Parliament. At this the Lords startle, and they fright the King with the dangerous consequences of it as a factious draught. He writes down a letter commanding inquiry to be made into the advisers of that dangerous appeal. Sir G. Lockhart, Sir Jo. Cunyghame, Sir G. Mackeinzie, Mr Wm. Weir, being Calander's counsel-at-law, are called; and they refuse to give any answer as to their accession, but maintain that an appeal, having the effect of a protestation for remeid of law, was a competent and allowed remedy against sentences of the Session. *Hinc illæ lachrymæ*; for, in the

Summer Session, 1674, a peremptory letter from his Majesty commanded these advocates to disown appeals; which they refusing, were, on the 24th of June 1674, deprived of their offices, and near 50 more advocates, from resentment of the injury done to their employment, did desert their employment, and were thereupon also debarred. See the large history and account of all them traverses, in another manuscript, *paginis* 90, 91, *et duodecim paginis sequentibus.* See also this matter of fact more fully narrated in the President or Cragie's answer they made to the address presented by the outed advocates to the Secret Council, on the 28th of January 1675.

As for the event of the law part of this fatal debate between Dumfermeling and Calandar, see *infra*, [27th June] 1676, No. 480; at which time it got a definitive stroke, where, amongst sundry other grounds urged beside the three above mentioned one, there was one very pretty defence proponed for Calander, that them words,—With power to the Countess to dispose upon the half of the conquest, as she should think fit,—was a mere personal faculty committed to herself, and whereof she never having exerted the *exercitium*, it expired and died with herself, and transmitted not to her heirs; she not having used it in her lifetime was a sufficient tacit declaration of his intention it should remain and abide with the family of Calandar. See the answers to it there, where the Lords found it was not a mere personal right and faculty, but a transmissible fee and dominion, stated and rooted in her person; though law says, *traditionibus et usucapionibus non nudis pactis transferuntur rerum dominia*, especially with us in heritage, *L.* 20 *C. de Pactis.*

Before I leave this subject, I will descant a very little upon the case of appeals. By the Roman law *non licebat appellare ab interlocutoria*, because the judge might correct and alter that at his pleasure, and there was so no notable *gravamen.* But appellations were only *a sententiis definitivis*, which their judges might not revoke, because *functi officio.* See this in Joan. Bellonus his 2d Book *Antinomiarum juris civilis et canonici*, cap. I. page 79. With us, conform to the equity of the canon law, the Lords of Session, nor no other Judges, are tied with the foresaid nicety; but they may, at any time before extracting, change and reform their sentences whether interlocutory or definitive; and appellation may be interjected from either: but with us, appellation (when used against decreets of Session,) has only *effectum devolutivum*, and not *suspensivum* to stop process or sist execution, (which is the nature of a proper appeal:) See this distinction in Bachovius, *in notis ad Vesembecium et Trentlerum, ad tit. D. de Appellationibus*, and in Perezius, *commentario ad dictum titulum Codice.* And these appeals in effect are no more, and should rather be called a protestation for remeid of law, as Balfour, in his *Practiques, tit.* Of the Session, folio 61, cap.—, speaks;* and the Act of Sederunt in November 1567, condemning murmuration of the advocates or parties against the interlocutors of the Session; and is designed for a declaration to take off acquiescence, and that they do not rest satisfied with the sentence; but will mean themselves to the superior Judge, the King and Parliament, to have it amended and reversed: though some are of opinion that such a protestation *inest de natura rei;* and, whether express-

* It is leasum to appeal from the Council to the Parliament, says Balfour in his Practiques, tit. Of the Institution of the College of Justice, cap. 16.

ed or not, the Parliament's superiority is sufficiently salved, so as they may proceed to the reconsidering of it: which see fully canvassed and debated in other papers *alibi.*

In the common law, *a Præfectis Prætorio non licebat appellare; vide tit. C. de Præfectis Prætorio, ibique Perezium;* with whose power the Lords of Session, as Supreme Ordinary Judges in civil matters, seems to bear an analogy and resemblance, and they seem to have much the same authority and jurisdiction; and as the Roman emperors could invest that magistracy with such an ample power, why may not our predecessors have done the same to the noble judicatory of the Session; and which the King and Parliament have truly and *de facto* conferred on the Session, as wisely finding no less power to be necessary for lodging the subjects' property in security; and which they have done by the 63d Act in 1457, ordaining all causes cognoscible by the Lords of Session shall be utterly decided and determined by them, but any remeid of appellation to the King or Parliament. See the many laws and others cited in the margin there.

It seems incompatible to have two supreme sovereign unaccountable and unappealable courts and judicatories, conversant about one subject matter in one kingdom. In England there is an orderly subordination, by which you may appeal from one court to another aye till you come to the Parliament; and this order nature has taught all the world over. In France there is a resort from all their parliaments, præsidials, seneschaussees, and other courts, to the Parliament of Paris, whose decisions are called *arresta,* because there must be a stop, *et non datur ultra*; and yet even iniquity may be complained of against their decreets, only they are Judges to it themselves; as I have shown at length *alibi,* out of Mornacius, *in Observationibus ad L 2, parag. 24, D. de Origine Juris.* See the manner of their appellations *in forme d'enqueste civile,* or *proposition d'erreur,* clearly explained by Ægidius Bardin, in his *Methodus Juris Civilis,* pages 149, 150, *et seq.* See the compend of it in papers beside me, he being more nervous and pertinent in this part than any where else in all his book. In the foresaid compend of it, see also pretty reflections on the legislative, judicative, and executive power, and an application of them to the affair of appellations.

In Frizeland they allow, against the decreets of their Supreme Senate, two remedies; one *per reauditionem,* the second *per revisionem*; but both are before themselves. See this largely discoursed in Joannes Bouritius, his honest tractate *de Officio Advocati,* cap. 32, 33, and 34, and my compend of it; where he shows, that, in the province of Holland, and elsewhere, they have proper suspensive appellations. Of ecclesiastic appellations, see Mr Luke Ogle's discourse, *apud* me; and Mr Fox his History of the Martyrs, in his giving account of Becket, Archbishop of Canterbury.

And really it seems morally impossible that, when one is wronged by the Lords of Session, there should be no remeid. It is absolutely fit they have some countermand and check to curb them from turning arbitrary; and appellations devolutive, as we have explained them, are the just and adequate remedy of this evil; and the individual one given in by Almont was just and rational in itself: and no lawyer dare affirm but the Session is subordinate and accountable to the Parliament, who considers that the impugning and diminishing the authority, jurisdiction, and power of the Parliament over all, is guilty of high

treason, by the 130th Act in 1584. And whereas, it is pretended that the King has signified his pleasure by a letter; it may be replied, that such, being impetrated *per subreptionem et obreptionem, partibus non auditis,* is but *rescriptum vel pragmatica sanctio, contra jus vel utilitatem publicam*; which *ab omnibus judicibus refutari jubemus,* says the Emperor, *in L. C. Si cont. jus vel utilitatem publ.*, and our Acts of Parliament; Act 47 in 1587, Act 68 in 1587.

Yet, on the other hand, it may be thought that the Lords of Session can determine a cause as well as any Provost from a burgh, or gentleman from a shire may do, though even you take the Parliament in the whole aggregate and collective body. Ærodius, in his learned Pandects *Decretorum, seu Rerum Judicatarum, libro* 4, *tit* 4, *De Injuriis, No.* 22, *edit. anni* 1573, can tell us, *Judici postquam pronuntiavit judicii iniquitatem non licet objicere, imo gratias agere oportet.*

As to the other part of the controversy wherein the Lords urged the advocates to depone anent the advice they had given their client, my Lord Almont, and their accession to his appeal; this seemed illegal: 1*mo*, Because that were to force men to depone *super inquirendis;* prohibited as tyrannical by the 13th Act in 1585, and by Acts of General Assembly. 2*do*, This were contrary to our allegeance and duty; which is to conceal, and not propale our clients' secrets. 3*tio, Consilii non fraudulenti nulla est obligatio, L.* 47 *D. de Regulis Juris.* 4*to*, If the advice be quarrellable, then they cannot be forced to depone; because their oath may infer a guilt or crime against them: *nemo tenetur se accusare, propriamque prodere vel revelare turpitudinem.* All civil nations hold that to be a sacred seal that lies upon advocates, not to prevaricate, else the lieges shall never be secure of a sixpence. And that the owning and acknowledging accession may import some guilt, (though none can tell the name of it,) appears from his Majesty's letter terming the appellation illegal, and to touch his honour. And whereas, the Lords of Session offer to declare it shall import no crime; this cannot be rested on: 1*mo*, Because the Lords of Session have no jurisdiction to remit crimes, or declare that a criminal confession shall not operate or militate against the confessor: the Justiciary would not regard this security given. 2*do*, *Esto* they could give it to procurators and members of their own court, yet *indulgentia quos liberat notat, nec infamiam criminis tollit, sed pœnæ gratiam tantummodo facit, L.* 3 *C. de Generali Abolitione.* Who are conscious of no guilt will take no indulgence or remission.

Neither can this case be drawn in with any ingenuity under the compass of the Act 2d in 1670, for that allows only examination *super inquirendis*, for discovery of conventicles, &c.; far less can our oath of allegeance and obedience to the Lords, given at our admission as advocates, be large enough to palliate such an arbitrary stretch as this; for that must be understood *secundum terminos habiles juris;* and we must at least be granted to be rational men, and not to be bound to a blind canonic and implicit obedience. See Dury, 14*th Nov.* 1628, *Betsone* and *the Laird of Grange;* Annæus Robertus, *Rerum judicatarum libro* 2, *cap.* 19; Josephus Mascardus, *de Probationibus, vol.* 1*mo, conclusione* 66, *item conclusione* 1239; *Lex ult. C. de Testibus;* M'Keinzie's Observations on the Act of Parliament 1621, against bankrupts, where he debates the question, if an advocate can be forced to depone anent

advice given to his client; it is page 189, *usque ad finem libri*; he leaves it problematick, yet inclines to the negative. See him also in his book of pleadings, in that criminal one for Charles Robertsone, if one be obliged to depone, where it may reflect upon himself; it is page 207, *et seq.* See the same case marked by me, *supra*, in thir Observes and Collections, at the 9th of March 1671, No. 162. See also the 25th February 1671, it is No. 157; and Hippolitus de Marsiliis, *singulari* 424, there stated; and where it is compared by me to a priest's confession: and yet I find that Sir Robert Sinclar was made to depone in Towy Barclaye's case anent falsehood.

I remember I heard Mr David Dinmuire tell that, in a case wherein he was concerned as advocate,* the Lords, in the Winter Session 1675, found that an advocate was not obliged to detect, by deponing as a witness, what was revealed to him by his client at the consultation and advising of his case. But what an advocate hears otherwise, he may be forced to declare the same upon oath; seeing, there, he is to be reputed *tanquam quilibet ex populo*, and not in the capacity of, and under the reduplication *qua*, an advocate; and it may fall out to be in matters extrinsic from the process. But this seems as ambiguous as the devil's oracles at Delphos.

I put the case: An advocate sees a paper of his client's only for the sake of one clause in it, and yet he reads it all over, by which he comes to know defects, weaknesses, or intrigues in his client's rights that were not particularly revealed to him nor committed to him *sub sigillo confessionis*, as Aspilcueta, Doctor Navarrus, in his *Manuale Confessariorum*, and the other casuists, term it. *Quid Juris?* under which of the two members of the foresaid definition would that case fall? *Esto, argumenti causa*, in a debate anent an intimation, or the incurring of a clause irritant, a whole writ were read in order only to one clause in it. The Lords found a man was only obliged to know it as to that clause, and not *pro reliquo*; Hadington, 29th Nov. 1622, *Murray* against *Durhame* and *Others*. See it also in Dury, *eodem die*.

But, to sum up this excursion, I having written such infinite numbers of observations upon the debate agitated between the bench and bar, anent the lawfulness of appeals from the Session to the King and Parliament, I shall spare all superfluous repetition here, and only refer to these remarks. See therefore a large discourse arguing the subordination and inferiority of the Session to the Parliament, and the justness and necessity of appeals, and answering nine several objections against them. See the public address was given in by the outed advocates to the Secret Council on the 28th of January 1675, containing a justification of the grounds of their secession, and exceptions against the king's letter discharging protestations for remeid of law. See the President's answer to it. See the criminal indictment and libel exhibited against us for subscribing that address. See the published answers were made to that libel; *item*, some private animadversions I made upon it, containing much variety and freedom. See Mr Dinmuir's observations upon appeals. See all the letters from the King or my Lord Lauderdale to the Lords of Session, or of the Session to them, upon this matter,

* It was in a proving of the tenor, wherein the Lords ordained him to depone if ever he saw that writ shown to him, at a consultation or otherwise, whereof the tenor was craved to be proven, but did not oblige him to tell what was in it.

apud me, and in my abridgment of the Books of Sederunt. See the history of the affair of the lawyers from its original animosities, *viz.* the regulations, till November 1676. See also all the acts, authors, and papers I have cited in the short hint I made here at appeals; on which, as I could not dwell, because of the plentiful comments I had made on it already, so it had been uncivil to have wholly past it over here *sicco pede*, this being the natural seat of that famed question that inflamed the country into violent factions. See, anent the grievance of the ignorance and corruption of the Lords of Session, in many papers, and particularly in the Transactions of the Parliament 1673, page 68 *et seq.*, where it is *ad nauseam* discoursed of, and many other papers beside me. *Vide practicam sequentem; item*, a discourse of the nature of the Lords of Session's jurisdiction; *item*, of the arbitrary power of the Secret Council. *Vide* an instance of an erroneous decreet, No. 479, [June 1676;] *infra*, 517, *in fine* § 11, [December 1676, *The Calmer.*] *Advocates' MS. No.* 445, *folio* 232.

1676. *June* 27.—In the fatal and scandalous action Earl of Dumfermeling against the Earl of Calendar, mentioned *supra*, *numero* 445, [February 1674;] (which was resumed at this time;) it was ALLEGED for the defender,—1*mo*, That, the old Earl of Calander (who was the principal party convened in the summons,) being dead, no process could be sustained against this Earl till the same were transferred.

The Lords found no necessity of transferring, because he was convened *pro interesse* in the first summons; which was sufficient.

2*do*, ALLEGED,—That the clause of the minute of contract-matrimonial was conditional, and never purified.

The Lords found the Lady had right to the half of the fee of the conquest, in respect the child deceased long before the dissolution of the marriage; and because Calender had no visible way to conqueish, but by his Lady's great liferent, which was equivalent to his present estate; yet, so that all debts during the marriage burdened equally both halves; but found what was purchased in place of that which was the husband's before the marriage, was not to be reputed conquest. *Advocates' MS. No.* 480, *folio* 248.

Infra, No. 492, § 3, [July 1676;) about the declinator was in this cause against Newton; *infra*, No. 494, [Historical Volume,—thir same parties.]

1682. *March* 25.—The Earl of Dumfermline's cause with the Earl of Callander advised. The Lords found the value of the conquest to be proven;—and decerned Callander to restore the half of it, conform to the minute of contract, to Dumfermline, with the bygone maills and duties since the acquisition: which will do more than exhaust the other half.

But there can be no conquest esteemed *nisi prius deducto ære alieno;* and Callander's procurators at last gave in a condescendance of considerable debts, and offered to instruct them; all which behoved to defalk from the conquest. *Vide infra*, 11*th May* 1682. *Vol. I. Page* 181.

1683. *March* 22.—The case between Dumfermline and Callender is debated, anent the debts which Callender gave in, to diminish and abate the conquest proven, (*vide* 25th March 1682;) and Glorat's debt was refused to be allowed, because they wanted the bond; though they produced a comprising led on it, with a renunciation thereof: which the Lords would not sustain as a sufficient probation; but adhered to their former interlocutor.

This was thought very hard. *Vol. I. Page* 229.

1683. *March* 23. EDWARD FOUNTAIN *against* ANABLE and MARGARET LAUDER.

EDWARD Fountain against Anable and Margaret Lauders, reported by Castlehill. The Lords turned the bailies of Edinburgh their decreet into a libel, in respect, upon the production of the tack, it was expired, and they had used a warning against him, and so taken off his tacit relocation; and yet the bailies had decerned him to be repossessed. *Vol. I. Page* 229.

1681 *and* 1683. THOMAS RAMSAY and JAMES AITKENHEAD *against* HELEN RAMSAY and BROWN.

1681. *December* 23.—MR Thomas Ramsay, minister at Mordington, offering a cautioner in the loosing an arrestment laid on by Helen Ramsay, his sister, and James Aikenhead, apothecary, her husband, on a depending process; and the cautioner being refused by Sir William Bruce, clerk to the bills; and Mr Thomas offering *cautionem juratoriam*, that he could not find a better, the Lords absolutely refused to allow it in this case, though they admitted it in passing of suspensions. See Stair, 16*th July* 1661, *College of St Andrew's*. *Vol. I. Page* 167.

See the intermediate parts of the report of this case, Dictionary, page 4234.

1683. *March* 28.—In Helen Ramsay's case against Brown, (mentioned 20th Dec. 1682;) she offering to prove, by his oath, that he promised that his wife's tocher of 1000 merks should come back to her friends, if she had no children; and he having deponed *negative*, she, upon a bill, got an order to reëxamine him, he always not altering the deposition to his own advantage. Which is a caveat may be used and adjected in such like cases of reëxaminations. *Vol. I. Page* 230.

1683. GEORGE SETON of BARNS *against* The LADY BEARFORD, &c.

February 7.—SIR Arthur Forbes, Viscount Granard, Lady Margaret Hay, and the Lady Bearford, gave in a bill against George Seton of Barns, complaining he had vitiated a principal agreement, or decreet-arbitral, passed betwixt his father and him in 1658, by making *eighteen* hundred *sixteen* hundred, and *his* estate *this* estate, and adding the word *rents*, which corrupted the sense.

ANSWERED,—They were not vitiations, but amendments, inserted in it at the very beginning by the arbiters.

The Lords, having considered the bill and answers, recommend to my Lord Register and Redfoord to hear the parties anent the vitiation of the said decreet-arbitral, and upon the haill points controverted; and, for that effect, grant warrant to the Commissary-clerk of Edinburgh to exhibit and produce the principal decreet-arbitral in question; and to the Clerks of Session, and