1664. *June* 18. LORD LIE *against* WILLIAM VEITCH.

IN this case found that the testator's creditors are preferable in law to the creditors of the executor; even though William, who was creditor to the executor, had arrested the sum long before my Lord Lie, who was a creditor to the defunct; in respect the debt was not established in the executor's person by a decreet, and so was not execute. *Advocates' MS. folio* 52.

1664. *July* 1. TURNBULL *against* MINTO.

TURNBULL being his father's third son consents to a disposition made by his mother of a tenement of land belonging to her as heretrix to Minto: which tenement was resigned by the mother before this right in favours of her husband and his heirs. And this Turnbull craving reduction of the foresaid right, by his mother, to Minto, as heir to his father, as done by his mother, after she was denuded;

ANSWERED,—*Esto*, she had been denuded, yet this pursuer consenting to the right, any supervenient right that came in his person prejudges not him, and gives him no interest to quarrel the right to which he is consenting, since in law *jus superveniens venditori accrescit emptori.*

REPLY,—He having no right then standing in his person, and having two brothers living, who would ever exclude him and succeed first, he could not transact or transmit any right but what he had, since *nemo potest plus juris in alium transferre quam ipse habet*; especially considering there was no preceding onerous cause of the said consent: for which Craig was adduced, *Lib. 2. Dieg. ult. de conjunctis investituris.* Alleged farther, that his consent in law infers no warrandice, yet it prejudges the consenter, so that he can never evite that right to which he consented. Alleged the right made by the wife must be said to be done in contemplation of a contract of marriage, otherways it would be found to be *donatio inter virum et uxorem*, and so revocable, and revoked by this posterior right made by the wife who was heretrix; now, if a woman may revoke a right as a man may do, is doubted in law. This was debated, but not decided, and was to be heard *in præsentia.*

Act. Dinmuire. *Alt.* Birnie.

Advocates' MS. folio 52.

1664. *July* 20. PATRICK OLIPHANT *against* SIR JO. FLETCHER, the KING'S ADVOCATE.

SIR JO. FLETCHER, his Majesty's advocate, being accused by Mr. Patrick Oliphant, by permission from his Majesty, before the Secret Council, upon misdemeanours and deeds of prevarication committed by him the time of the late Parliament: which was an extraordinary case, founded upon no law written nor consuetude:

and this process had its foundation in the civil law, *T. D. De prævaricatoribus :* where, amongst other pretty debates, this was one, if an advocate, or any other, might be accused of prevarication, *sine quærela partis læsæ*, and that this was rather an inquisition after crimes not known than an accusation, which is not allowed in law against any without some party were lesed. Clarus, *parag. ult. Quæst.* 3. distinguishes betwixt an accusation and an inquisition, and asserts that they cannot stand together ; *item*, that there is *inquisitio delicti et delinquentis ;* inquisitions after delicts are not allowed, *sine quærela partis ;* inquisitions after delinquents are not sustained but where the delict is constant. So Clarus, *Quest.* 4. *Lib.* 5. *Pract. Crim.* Then there is no inquisition after delinquents, but only *in delictis facti permanentis*, as homicide : but *in delictis facti transeuntis*, as is prevarication, there ought to be no inquisition *sine quærela partis læsæ.* It was subsumed, that this kind of process of prevarication against the Advocate, could not be pursued by Mr. Patrick, unless some party wronged by the Advocate were complaining, and concurring with him in the pursuit ; otherwise it should be *inquisitio judicis in delictis facti transeuntis sine quærela partis*, which is allowed by no lawyer. The greatest part of the deeds of prevarication ran upon his taking from pannels accused by himself for treason, *pendente lite.* Against thir particulars, alleged, The simple taking was no crime, unless it were libelled *intuitu* of the process, and to desert the diet ; and though the diet did desert after his taking, yet it could not be presumed to have been done *ut a lite discederet*, unless it were proven ; for it was affirmed, that an advocate might take from a defender (whom he is pursuing,) to be for him in other causes, so as he be faithful to the pursuer in that one particular cause.

ALLEGED farther,—*Quidam actus sunt simpliciter mali, et ex nulla circumstantia boni*, as adultery : *alii simpliciter mali, sed ex circumstantia aliqua boni*, as homicide upon self-defence. *Quidam* ἀδιαφοροι, *sed ex circumstantiis boni vel mali*, as *donatio facta a reo advocato partis adversæ.*

This was a most malicious pursuit, and came never to a decision.

Advocates' MS. folio 53.