ALLEGED,—The same did not fall, seeing by the law the marriage only falls when the apparent heir was unmarried the time of the vassal's decease.

REPLY,—Though it be true that the feudal law is such, yet both in law, reason, and practique, (Skene, *in notis Latinis ad cap.* 91 *Quoniam attachiamenti,)* where the vassal *dolose* precipitates his apparent heir's marriage, when he is on death-bed, his dole cannot prejudge the superior, since there ought to be the greatest faith and honesty betwixt vassal and superior imaginable; and therefore the precipitation makes it as if it had not been done, being done fraudulently as said is. *Vide February* 1676, *No.* 471, *parag.* 7. There were no practiques produced for the case, only one in Skene's time, and another in Balfour's time; and Craig (tit. 52, cap. 15, page 301, *in initio)* was alleged for it. However, the Lords found the reply and libel relevant.

The Laird of Ruthven's case differed something from this; for though young Ruthven was married that same day his father died, yet there was a previous treaty and articles agreed upon when the old Laird was in perfect health; and the suddenty of his sickness occasioned the precipitation of the marriage, though agreed and resolved on before. This was not decided. But these cases were never drawn in question before this time, and precipitations of this kind were ordinary to shun the falling of the marriage; and it is very like the Lords would not have sustained it, if there had not been produced former decisions of the case.

And since all thir, there is another case emergent, not unlike, which is:—Jo. Kinlock dispones the lands of Jourdie to his son David, who is not married, and resigns in the superior's hands, and on the morrow after he dies; but was not infeft. For since the law is, that the marriage of the apparent heir is only due, and if the heir be infeft before the vassal's decease, it saves the marriage; the question will be, if the precipitation of an infeftment proceeding on the vassal's resignation when he was *moribundus*, will undergo that same fate before the Lords as the precipitation of the marriage. But this case is not tabled yet.

Advocates' MS. folio 57.

1667. *January* 31. LYELL *against* ——.

SOME Merchants in Dundee, having sold to Spruce, Englishman, 60 tons of wine, for which he paid L.30 Sterling, in part of payment, and took their receipt relative to the bargain. They draw bills of exchange on him for L.120 Sterling, but without relation to the bargain. Spruce, before payment of the rest of the price, absents himself, and assigns the bill of exchange as if it had been a bill of credit; and the drawers being convened for payment, ALLEGED the cedent was debtor *ab ante* to the drawers for the price of wines; which was found relevant: so that the question was, how this debt should be proven against Spruce; for the merchants neglected to take writ of him, and the bills had no relation to the bargain.

ALLEGED,—That it being betwixt merchant and merchant, *lege mercatoria* it must be proven by witnesses. On the other hand CONTENDED, it being a bargain of importance of L.1000 Sterling, the same, of the law, cannot be proven

but *scripto vel juramento.* If Spruce had been present, they would have referred the truth of the bargain to his oath; or if they had had only to do with Spruce, they would have gotten him holden as confessed; but the bills being assigned for a cause onerous, the assignee would not suffer the cedent to depone to his prejudice.

This case seemed to be very singular. The Lords were convinced there was a clear cheat in the thing, on Spruce's part, whereof Lyell was not free; and they knew not how to help the merchants and to preserve the law, whereby it is provided that nothing above L.100 Scots can be proven by witnesses. And yet seeing there was a double produced in process, attested by two notaries, of the receipt of L.30 relative to the bargain, the principal being in Spruce's own hands; therefore the Lords ordained him to be cited to produce the principal, with certification that if he did not, they would hold that double produced as relevant to infer the bargain above written: which wants not its own difficulties.

Act. Dinmuire. *Alt.* Wallace. *Advocates' MS. folio* 57.

1667. *June* 10. CAPTAIN JOHNSTON *against* JAMES CUNYGHAME.

THERE is a bond granted by James Cunyghame to Captain Johnston and Janet Cunyghame his wife, for the sum of ———, &c. payable to them, their heirs, executors, and assignees, bearing annualrent to the term and thereafter. After the wife's decease, Johnston charging the debtor, he suspends; at the discussing, compearance is made by Janet Cunyghame's executors, who claimed the half of the sum charged for, because, by the conception of the bond, the sum being payable to their heirs jointly, the same ought to divide; specially the sum being moveable, whereas in heritage it is otherwise, and belongs to the man, as *dignior persona;* for which there was adduced a practique *in anno* 1623, betwixt *Dougall and Hendersone.* The Lords found the sum wholly to belong to the man, and no part of it to the wife's executors.

Act. Cunyghame and Dinmuire. *Alt.* Brown. *Advocates' MS. folio* 58.

1667. *June* 20. NIMMO *against* THOMAS MURRAY and his CURATORS.

ONE Nimmo having lent to Thomas Murray and his curators 1000 merks, which bond was subscribed by the minor and his curators; Nimmo charging them to pay, he suspends on this reason, that the bond cannot tie him by a payment, because he being minor, he must prove that it was in *rem ejus versum,* otherwise the granting of the bond by him and his curators is null, as granted by him in his minority to his lesion.

ANSWER,—The bond was good, because minors, with consent of their curators, subscribing bonds, they are effectual in law; and that it was not proper for the