in an action to make forthcoming. But that is absolutely necessary in a forthcoming, yet I think it not so here.

Advocates' MS. No. 356, *folio* 146.

1672. *July* 2. Anent PROCURATORIES of RESIGNATION.

Quæritur, A father, by contract of marriage, dispones lands to his son, and the heirs of his body, and grants a procuratory of resignation, for infefting his son and the heirs therein: the son dies, and never any resignation made: he leaves a child behind him, which child is served heir to his father: the question is whether (the goodsire, granter of the procuratory of resignation, being still on life,) resignation may not be summarily made in favours of that child, as well as if by name and sirname he had been mentioned in the procuratory; seeing by an inquest of sworn men, he is cognosced and declared to be the son and heir of that man to whom and whose heirs the procuratory was granted.

Sir George Lockhart and sundry were of opinion, there needed no action, but that the service was equivalent to an assignation to the procuratory, in which case resignation might be made summarily.

Advocates' MS. No. 357, *folio* 146.

1672. *July* 5. JACOB JAMART *against* HARRY JOSSIE.

Jacob Jamart pursuing Harry Jossie, for sundry sums he had paid for him as cautioner: It was alleged for the defender, that by the police and practique of Bordeaux, * the major part of one's creditors (which goes either by the sums or the number,) having accepted a cession from their debtor of all his goods, they give him a supercedere and *rescriptum moratorium;* and what they do in this sort binds all the rest, and they are obliged to stand to it, and the goods are divided amongst them all *pro rata;* that conform to this police, he had made a cession; and therefore craved, that according to the custom of Bordeaux, Jamart might make a proportional part of whatever he shall recover by virtue of this sentence furthcoming to his other creditors in Bordeaux, and that the Lords would divide it amongst them. The Lords would not regard the customs of another kingdom, nor decide conform thereto, (seeing they in the same manner rejected ours, and by acts of parliament we are ordained expressly to be governed by the king's laws, and not by the statutes and customs of any other realm;) and thought the desire of the defender was as unreasonable as if one should say, if a Frenchman had got a bond of a Scotsman, past twenty-one years, but within twenty-five, and did pur-

* And this was also the common law, *l.* 7. *in fine, l.* 8. 9. and 10. *D. de Pactis. Vide Schotanum, ad d. T. de Pactis,* who shows the customs of Germany and Holland have receded from this now. *Vide omnino l. ultimam C. Qui bonis cedere possunt. Contrarium definivit Senatus Burdegalensis ejus quod hic allegatur; ut videre licet apud Autumnum, in Censura sua Gallica ad l.* 8. *D. de Pactis.*

sue for the sum here in Scotland, the debtor had a good defence in alleging that the bond must be regulated by the law of France; that though he was major the time he granted it by our law, yet he was minor by the French law, (which following the footsteps of the civil law, holds a man for minor till he pass twenty-five;) and therefore he had revoked the same: would not all judge this absurd? and yet it is all one with what the defender alleges, only they left the defender's other creditors free to pursue Jamart, upon his return, according to their police in Bordeaux, and to evict their shares from him, conform to their law there; of which they could take no notice, the defender being a Scotsman, the subject of the debate being here also, and the same being pursued before a Scots judicatory.

Then the defender pressed, that Jamart might at least find caution, that what he should obtain of him here shall be furthcoming to all having interest, as shall be decerned by the consul and jurats of Bordeaux.

This was repelled, because the putting him to find such a caution were alike as to deny him justice, seeing none would bind for him, a stranger, in such a considerable sum. *2do,* He had land and vineyards there, so that none could doubt his responsality. *Possessores immobilium non tenentur satisdare; l.* 15 *D. Qui satisdare cogantur.* The Lords refused to put him to find caution.

Advocates' MS. No. 358, folio 146.

1672. *July* 5. The EARL of CALENDAR *against* The TOWN of STIRLING.

THE Earl of Calendar, as heritable Sheriff of Stirlingshire, pursues the Town of Stirling for making payment to him of those customs, commonly called the Sheriff-gloves, as also of a stag every day of the fair, conform to his possession, at least the use and wont of his authors, the Earls of Mar. ALLEGED,—That no right was produced to prove the Earl was Sheriff, or had right to the particulars acclaimed. ANSWERED, They had produced his infeftment of the Sheriffship, which, though it was general and bore not the particulars he sought, yet he offered him to prove those were immemorial casualties of that office.

ALLEGED,—His infeftment is null, proceeding upon a gift or signature of his Majesty's, the time of his captivity in the Isle of Wight, all which are since revoked and declared void. ANSWERED,—Whatever defect he had that way, the same is purged, being ratified in Parliament in 1662. REPLIED, *Quod non est, id nequit ratificari.*

Farther ALLEGED,—That Stirling is sheriff within itself, and so never owned the sheriff of the shire. ANSWERED, The two sheriffships are compatible; the sheriff of the shire is the far older of the two, and was in possession of the emoluments accruing to his office, and now acclaimed, before Stirling were made sheriffs within themselves: that the gift given to the town was *salvo jure antiquiore.*

ALLEGED,—That these thirty years bypast, the sheriff of the shire has used no deeds of possession of what he now seeks; that the town all that time has been free and in possession of their own privilege of sheriffship; and, therefore, the action being possessory, the defenders are to be maintained in their possession