

No 26. a promise ; afterwards he ever still more and more abhorred her, and never used her company ; meantime she brings forth another child, long after the ticket ; so that, granting he had truly made a promise as the ticket bears, she has forfeited the benefit thereof, by her after whoredom, which would be a lawful ground of a divorce, if they were lawfully married, and far more ought it to be a ground to impede the solemnization of a marriage, or adherence. It was *answered*, That *copula*, and the ticket under his hand, bearing the promise, made a *validum et ratum matrimonium*, and any child got thereafter, the law presumes to be in the marriage, *filius enim est quem nuptiæ demonstrant*, unless the pursuer can offer to prove her an adulteress with another ; in which case he may pursue a divorce, and so it was found by the Commissaries. *Replied*, That though the ticket did bear a promise and *copula*, yet the marriage was not *legitime* solemnized, nor did there any cohabitation follow ; and therefore she afterwards playing the whore, and bringing forth a child, unless it could be made appear that he did cohabit, or any otherwise converse with her, (so that it might be at least probable that he had dealing with her), that presumption of the law in this case cannot have place.

THE LORDS, before answer, ordained the defender to condescend, whether or not she can make it appear, that ever she conversed with the pursuer after the subscribing of the ticket, or was in his company, and when, and where.

*Gilmour, No 137. p. 99.*

No 27. 1674. July 23. EARL OF KINGHORN *against* HAY.

THE Earl of Kinghorn having apprised Dronlaw's lands, obtained decret of mails and duties. Dronlaw raised suspension on this reason, That by transaction and agreement betwixt the Earl and him, the Earl had bought his lands at seventeen years purchase, and was to be satisfied of the apprising by a part of the price. It was *answered*, That there being nothing reduced in writ, *est locus poenitentiae*, and the Earl doth resile. It was *replied*, That such verbal agreements may be resiled from *ubi res est integra* ; but here it is not ; for it being a part of the bargain, that Mr Robert should purchase the right of his superiority, that the Earl might hold the lands of the King, he had done it, and paid 6000 merks therefor ; likeas the Earl was infest upon his superior's resignation. It was *duplicated*, That the Earl offered to repone and to make new resignation.

THE LORDS found, That the matter was not intire, and that the Earl could not resile.

*Fol. Dic. v. 1. p. 562. Stair, v. 2. p. 281.*