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# PRACTICE

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# CRIMINAL LAW OF SCOTLAND.

(Six)  
BY ARCHIBALD ALISON,

ADVOCATE.

WILLIAM BLACKWOOD, EDINBURGH; AND  
T. CADELL, STRAND, LONDON.

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## PREFACE.

I HAVE now the satisfaction of laying before the Public the Second and concluding Part of my undertaking, which embraces all that is treated of in the last Volume of Mr Hume's Commentaries, with the great additions made to those branches of the Criminal Law, by the numerous statutes which have been passed, and the extended practice which has taken place since the first publication of that valuable Work.

Many subjects there discussed at length, have, from the change of the times, now in a great degree gone into desuetude; while other branches have swelled out, from the multiplication of decisions, to a very considerable extent. It will be found, accordingly, that nearly one half of the present Volume is occupied with the subjects of Indictment and Parole Proof; the two branches of Criminal Law which are most frequently the subject of practice. But notwithstanding this great increase of these subjects, I hope that the other Chapters contain every thing that is of utility in business, in the present state of our Criminal Jurisprudence.

In the compilation of this Work, I have to express my



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## INTRODUCTION.

THE Criminal Institutions of Scotland are founded on the following principles :—

1. That as the protection of individuals from injury is one of the main objects of civil government, any person against whom a crime has been committed, is entitled to expect that the punishment of his aggressor shall be taken up by the public authorities, and conducted at the public expense.

2. That as the prosecution of crimes is a matter of public interest, on the one hand, and, on the other, immediately affects the liberties, and may ultimately endanger the lives of the accused persons, the privilege of conducting the prosecution may more safely be intrusted to a public and responsible officer, than left to the passions, interests, or resentment of the injured parties, or their legal advisers.

3. That as the commitment of accused persons for trial, is a step of the utmost moment to all concerned, the grounds of commitment should immediately be submitted to responsible persons, qualified to judge of the evidence adduced ; and if it does not afford a reasonable prospect of a conviction, the accused should forthwith be set at liberty.

4. That if the public authorities decline to prosecute at the public expense, an opportunity should still be afforded to the injured party, of himself conducting the prosecution on his own responsibility.

Proceeding on these principles, the prosecution for crimes, as founded on the immemorial usage of Scotland, and fixed by the statute of Anne, has been as follows :

The Lord Advocate is the public prosecutor for crimes over all Scotland.

To enable him to discharge the duties of so important and laborious an office, he has the power of naming deputies to act in his absence in his name. These are the Solicitor-General and three Advocates-Depute, to which a fourth has now been added for the Winter Circuit at Glasgow. For their proceedings the Lord Advocate is responsible, and by his advice they are in all cases of difficulty regulated. These officers may prosecute in any court in the kingdom. They are not responsible for expenses, as they act in the name, and on the behalf, of the Crown, which, by the law of Scotland, neither pays nor claims expenses in any criminal case whatsoever.

The Court before whom these public officers generally prosecute, is the High Court of Justiciary, whose powers extend over the whole kingdom, and whose circuits travel twice a-year through its most populous counties.

Besides the Court of Justiciary, there is established in each county, the Sheriff Court, and in each considerable town, a Burgh Court. These courts take cognizance of such crimes as may be punished by fine or a moderate imprisonment. But their powers do not extend to transportation, which belongs exclusively to the Court of Justiciary.

The Justices of the Peace also take cognizance of the smaller crimes, and possess the same power for repressing offences with those of England, with this difference, that they have not the statutory power of transportation which they enjoy.

In each county and borough a public officer is appointed, whose duty it is to receive all complaints from individuals who have been injured in their persons or

estates within the limits of his jurisdiction. If the case appears of such a description, as may be competently tried by the county or borough court, he prosecutes the accused immediately before that court. The prosecution, in such a case, is generally concluded within a few days or weeks after the commitment has taken place. The prosecutor in these courts is called the Procurator-fiscal; but as the same high trust is not reposed in him, which is vested in the Lord Advocate and his deputies, he is liable both in damages and expenses, in case of improper or groundless prosecution, and examples are numerous of his being subjected in both by a higher tribunal.

The cases, in these inferior courts, are always decided by a jury, except in those cases of petty offences against the public peace, which in England, as well as in this country, are prosecuted in a more expeditious method under the name of Summary Convictions.

The Justices of Peace, in each district, have also a Procurator-fiscal, who prosecutes before them, under the like responsibility for damages and expenses, in cases fit for their decision.

The proceedings of these inferior magistrates, except in trifling Police cases, and all the evidence taken before them, are reduced to writing, in order that they may be subject to the review of the High Court of Justiciary; and the moment a sentence is pronounced, it may be subjected to the review of the High Court of Justiciary, by a process called a Bill of Suspension and Liberation. For the decision of these questions the High Court always sits, without the intervention of any vacation.—The only periods in the year when these cases cannot be instantly taken up, are during three weeks in spring or autumn, when the whole Judges are necessarily absent on the Circuit. In the event of the sentence of the inferior Court being deemed improper, the High Court of Justiciary grant warrant to have the accused instantly set at liberty;



and if the prosecution appears to have been improper, the prosecutor is forthwith subjected in expenses, and the damages may be recovered after being assessed in the civil court. No inferior Judge can authorize the infliction of any corporal pain whatsoever, nor go beyond imprisonment, excepting the Sheriff; and his powers in this respect are never exercised.—This part of the jurisdiction of the Court of Justiciary is in constant operation, and its effect in preventing lengthened imprisonment, or undue punishment, is most salutary.

In the event again of a crime occurring in any county or borough of Scotland, which is of a more serious complexion, such as murder, robbery, rape, fire-raising, house-breaking, aggravated theft, &c., the proceedings are as follows :—

Information is immediately lodged, by the injured party, with the Procurator-fiscal of the borough, county, or district, where he resides. Upon this, an information or complaint is made out, which must be in writing, and signed by the party making the application, by the express direction of the Act 1701. Without such signature, the magistrate can in no case commit a prisoner; and the person signing the application becomes responsible for the whole damages and expenses consequent on the imprisonment, if it shall turn out to have been groundless or malicious. The magistrate is himself liable in these penalties if he commits without that signature, or without any feasible grounds with it.

The committal, in the first instance, is for farther examination, in order to give the injured party an opportunity of collecting his evidence. It has not been decided for what period the incarceration under this warrant may legally continue.—In general, it does not last more than a few days; and it has been decided that a confinement of 17 days under such a warrant was illegal, in the cir-

cumstances of the case then at issue, and subjected the parties occasioning it to damages and expenses.<sup>1</sup>

This commitment for farther examination is a great advantage to the accused in Scotland.—“ It is not,” says Lord Chancellor Eldon, “ a proceeding against the party, but a proceeding for his benefit, with a view to protect him from a commitment for trial, if, during a reasonable time for examination, it can be found that there ought to be no commitment for custody, in order to trial.—Such a commitment must be for farther examination during a reasonable time, and bail cannot be required of him till it is concluded, because it is not determined whether he will ever have a trial to stand.”<sup>2</sup>

When the evidence is brought together, it is reduced to writing, with the view of being immediately submitted to the Crown counsel, and, if necessary, of serving for their brief at the trial. The duty of doing this devolves upon the Procurator-fiscal, who conducts the examination, and the Sheriff, Magistrate, or Justice before whom it is taken ; and for its accuracy they are responsible.

The investigation, or *precognition*, as it is called, being concluded, the Sheriff or Magistrate has in the first instance, instantly to make up his mind, whether there are sufficient grounds for committing the accused to stand trial.—If he is of opinion that there are such grounds, he grants warrant accordingly ; being subject to damages and expenses, if he does so without sufficient reason.

The moment the warrant for commitment to stand trial is granted, the accused may apply for bail. The Magistrate who signs the warrant for committal, has immediately to consider whether the crime with which the prisoner stands charged, is, or is not, a capital offence. In the latter case bail must be taken, in the former it

<sup>1</sup> Taylor v. Arbuckle, Dow, iii, 175.—<sup>2</sup> Ibid. iii. 184.

must be refused.—In either case, the Magistrate is responsible for the exercise of a fair discretion, and by special statute he must, within 24 hours, both determine upon theailable nature of the offence, and fix the amount of the bail which is to be required.<sup>1</sup>

The maximum of the bail is fixed by the act 1701, and a subsequent act of Parliament, at L.600 sterling for a landed proprietor ; L.300 for a gentleman, or household-er ; and L.60 for a private person. In practice, bail is almost always taken of a much smaller amount, being usually fixed at 300 merks, or about L.15 sterling, for a common person, or L.50 for one in better circumstances.<sup>2</sup>

The accused person being committed to stand trial, the precognition whether he takes any steps to force on his trial or not, is immediately transmitted to the Crown counsel in Edinburgh, in order that they may determine whether or not the accused should be brought to trial. Immediately upon its being received, it is laid before the Advocate-depute for the Circuit where the crime has arisen, who, if the case is clear, decides himself upon the propriety of a prosecution, or if it is attended with difficulty, or is of much importance, takes the opinion of the senior law officers of the Crown. In either case, the decision is made with all possible expedition ; and unless the case is attended with very great difficulty, or farther evidence is required, an order, directing the accused to be detained in prison for indictment, or to be forthwith set at liberty, is returned within a few days after it has been transmitted to Edinburgh.

There are now transmitted between 800 and 1000 cases for the opinion of the Crown officers every year. The experience which they soon acquire in judging of the propriety of prosecution, by considering so great a number of precognitions, operates most beneficially in practice, by lead-

<sup>1</sup> Hume, ii. 93.—<sup>2</sup> 39 Geo. III. c. 49.



ing to the *immediate* discharge of several hundred persons annually from prison, who otherwise would be compelled to await their trial at the ensuing Circuit.

If the accused person is ordered by the Crown Counsel to be discharged, he is set at liberty, in so far as the commitment at the instance of the Crown is concerned. But the injured party has still his remedy if he thinks that the case should still be prosecuted, by undertaking the prosecution at his own instance, with concurrence of the Lord Advocate, as it is technically called. This concurrence the Lord-Advocate may be compelled by the Court of Justiciary to grant, and in practice it never is refused. But the prosecution is entirely under the control of the private party, who is liable in damages and expenses, if there be no reasonable ground for his proceedings.<sup>1</sup>

In this particular the laws of England and Scotland rest on precisely the same foundation; the want of probable cause being there held to be a sufficient ground for subjecting a prosecutor in damages.<sup>2</sup>

If the Crown Counsel conceive that there is a sufficient ground for a prosecution, but the case appears to be one which would terminate in a fine, or moderate imprisonment, the practice is to remit it to the inferior Judge, before whom the proceedings originated, for trial. Upon this it is immediately tried before the Sheriff or magistrates, and thus the hardship is avoided of detaining the accused in prison, if he is unable to find bail, till the next Circuit; a punishment which would in many cases exceed that which should follow upon a conviction for his offence, and in all would be attended with the most injurious effects upon his character and morals.

But if the crime appear to be more serious, and the evidence complete, the Crown Counsel direct the accused

<sup>1</sup> Hume, ii. 123.—<sup>2</sup> See Lord Eldon; Taylor v. Arbuckle, Dow, iii. 180.

to be detained in prison for indictment.—And generally the same Counsel who gives this direction, is obliged to prepare the indictment, and himself attend and conduct the trial.—Thus the opinion of the Counsel upon the important question of bringing the person committed to trial, is formed under every possible safeguard of its accuracy; being grounded on the minute and anxious investigation of the evidence which the preparation of the indictment requires, and under the serious responsibility of being himself obliged to stand up, in the face of a jury and of the country, and justify the prosecution which he is known to have directed. There is here no division of responsibility, nor any subterfuge by which the odium of an improper prosecution may be avoided. If such a proceeding occurs, the public officer must be at his post, to vindicate what he has done.

The Crown Counsel are paid by fixed salaries, and have no interest whatever in increasing the number of prosecutions. By so doing they augment their own trouble, without adding any thing to their emolument.

If they decline to prosecute when there is good evidence, their professional character suffers an irreparable injury, by the successful prosecution of the offence, at the instance of the injured party. To decline to prosecute in such a case, would be to proclaim their own imbecility in despairing of evidence, which one of their brethren, with inferior advantages, has brought to a successful issue.

The Advocates-depute are, in general, men about thirty years of age; the immense increase of criminal business, compared with the small amount of their salaries, rendering it impossible to find senior practitioners of any eminence, who will undertake the office. It has not been found, however, that this department of the public business has been either negligently or unsuccessfully conducted; and the greatest lawyers whom Scotland has ever pro-



duced, President Blair, Sir Ilay Campbell, and Lord Braxfield, as well as the persons who now hold the highest situations on the Bench and at the Bar, the Lord President, the Lord Justice-Clerk, Lord Corehouse, Lord Meadowbank, and many others, have been trained in this school.

To say that these circumstances ensure propriety of judgment in every case which is submitted to the consideration of the law officers of the Crown, would be to say more than can be expected of any human institution. But the result, which shall be immediately given, proves, that they have done as much as has ever yet been effected by human wisdom, to attain that object.

When the case is to be prosecuted by the Crown, the proceedings are prepared and the trial is conducted at Edinburgh, if the case occurs in the High Court, under the immediate direction of the Lord Advocate. If it belongs to the Circuit, the indictment is prepared by the Advocate-depute, to whom the conducting of the trial is to be intrusted. In this indictment the same minute and scrupulous accuracy is required, which is exacted in an English prosecution; and many particulars must be added for the information of the prisoner, which are not essential in their practice. In particular, not only the specific offence itself charged, but the mode in which it was committed, must be set forth with scrupulous accuracy; the place where the crime was committed, must be correctly described by its name, parish, and county; all articles to be used in evidence, must be minutely and accurately described, and submitted to the inspection of the prisoner, previous to his trial; and a list of witnesses must be annexed to the indictment, containing an accurate description of every witness, by his name, profession, place of residence, parish, and county. The smallest error in any of these particulars, excludes the prosecutor from the benefit of that article, or witness at the trial.

A copy of the indictment, containing these particulars, must be delivered to the prisoner, at least fifteen free days before his trial, by an officer who serves it upon him, with the list of witnesses and of the assize who are to be adduced against him. If there is a variation, other than an unimportant clerical error, between the copy delivered to the pannel, and the record copy of the indictment and list of witnesses, it casts the indictment.

Before the pannel can be called on to plead to the indictment, the prosecutor must produce written evidence of its delivery, with the list of witnesses and assize, to the prisoner, by a written statement signed by the messenger and witnesses, or "execution," as it is technically called, setting forth the delivery of those important documents. This writ must be scrupulously accurate, and the least error in it enables the prisoner to postpone his trial, and exposes the officer to the risk of censure or deprivation of office.

If the witness, upon being called into Court, declares that his name, surname, profession, place of residence, parish or county, vary in the slightest degree from the description contained in the indictment, it excludes his testimony on that trial.

The witnesses are not examined as in England, in presence of each other. The moment the trial commences, they are enclosed by themselves in a separate apartment. It is sufficient to cast a witness, if he has heard any part of the evidence given by any other witness, or has had any communication with the prosecutor subsequent to his citation. The necessity of separate examinations, often prolongs trials, and imposes additional trouble on the Court and prosecutor. But it obviously prevents the latter witnesses from making their story tally with that told by the former, and is conducive to the prisoner's benefit.

Prisoners in Scotland have a very great advantage which

they do not enjoy in England, in consequence of the rule invariably followed in this country, of compelling the prosecutor to close his evidence before the proof in exculpation begins. In this way, the accused person has the benefit of knowing the nature of the prosecutor's evidence, while the prosecutor is almost always in the dark as to the line of defence which he is to adopt, and has no opportunity of bringing farther testimony to disprove or outweigh the statement of his witnesses. There is indeed a regulation, that where any special defence, such as *alibi* or provocation, is to be set up, it must be stated in written defences lodged before the trial begins; but this regulation is seldom enforced in practice, and even when it is followed, the information conveyed in that paper, which hardly ever consists of more than a few lines, is so extremely scanty, as to afford little assistance to the prosecutor in the direction of his evidence. Whereas in England, not only is it in the power of a prosecutor to bring witnesses to rebut or disprove the defence maintained by the pannel, but the Judge, in the course of his charge to the jury, may examine a witness who has sat in Court during the whole trial, and who, of course, must be aware of the effect which his testimony must have upon the case, in order to clear up any disputed or controverted matter. It is well known to all persons acquainted with the Scotch Criminal practice, that if a similar indulgence were allowed to the prosecutor in this country, it would lead to the conviction of many prisoners who now escape under a verdict of Not Proven.

The assize in Scotland consists of forty-five persons, summoned regularly by rotation, by the Sheriffs of the counties. The jury is selected from this list by ballot, each prisoner having a peremptory challenge to the extent of five, and of any number if he can show cause for their rejection.

Prisoners in Scotland are invariably furnished with



counsel. If they are too poor to fee them themselves, they are assigned them by the Court, and this duty the barristers are not permitted to decline. If no barristers are present, the Sheriffs of the counties, who must be there, are named by the Court to undertake that office. For many years, the most distinguished writer of the present age,<sup>1</sup> was regularly nominated to that duty, at the Jedburgh Circuit; and the talents which have riveted the admiration of both hemispheres, were often gratuitously and successfully exerted, in defending the humblest and most destitute of the Scottish prisoners.

It is seldom, however, that this duty is devolved upon the Sheriffs of the counties. The great competition at the bar, induces numbers of young men to travel the Circuit, at a very heavy loss to themselves, for the purpose of acquiring information and distinction. If the inexperience of some of these gentlemen renders them hardly equal to the task of addressing a jury upon a difficult case of circumstantial evidence, they make ample amends by the accuracy with which they scrutinize the writs or "executions" which must be lodged with the keeper of the record, previous to the trial, and the ingenuity with which they get up technical objections to the numerous forms, which, for the protection of the prisoner, are established by the Scottish criminal practice. It is well known to all persons acquainted with that practice, that a great proportion, probably more than a half, of the acquittals in our Courts, originate in these technical niceties, which are unknown in the English practice; or, if there established, can little avail the prisoner, in consequence of the want of Counsel assigned to him, and with which the Judge who tries the case can never be acquainted.

Often, however, Counsel of the first eminence gratui-

<sup>1</sup> Sir Walter Scott.

tously undertake the cases of the poorest prisoners. It is no unusual thing to see the same Counsel who are retained in the cases of the first Peers of the realm on one day, engaged the next in the defence of the poorest and most destitute criminals.

It is a rule of Scottish evidence, that the prisoner can be convicted only on the testimony of two witnesses, or of one witness, supported by such a chain of circumstantial evidence, as obviously is equal in amount to the evidence of another. Of course, if the evidence is purely circumstantial, a much clearer chain of circumstances is required to convict, than is considered essential on the other side of the Tweed.

This benefit, which the English law has reserved as a special favour for cases of high treason, is established in Scotland, in the trial of the most inconsiderable offences. It is invariably observed as a rule, both by the Judges and the Jury; and of the few cases of pannels who are acquitted from a defect of the evidence, the greater number escape after their guilt has been established by one witness, by the impossibility of adducing a second, or supporting his testimony by any corroborating circumstances. The justice or expedience of this rule may perhaps be doubted, especially in cases such as robbery, when an injury is generally committed on one individual, precisely because he is alone. As the rule stands, however, it is obviously an advantage to the prisoner.

The evidence being concluded on both sides, the Jury are addressed by the Counsel on both sides, the pannel being in every case entitled to the last word. The prosecutor in Scotland never has the reply, but whether in arguing legal points to the Judge, or matters of evidence to the Jury, he is obliged to allow his opponent to be last heard in defence. When the great abilities which are often displayed on the prisoner's side in our Courts are considered, this privilege is often of infinite advantage to



his cause ; and examples constantly occur, of its producing such embarrassment in the minds of the Jury, as leads to a verdict of Not Proven.

If the Jury cannot agree on their verdict before the Court adjourns, their verdict, which in other cases is oral, must be reduced into writing. This written verdict is received sealed by the Court, and no explanation or amendment can be admitted after it is opened. If it does not tally in every respect with the indictments with which the prisoner is charged, the whole proceedings are null, and he is entitled to his acquittal ; and so frequently does this occur in practice, that a written verdict is considered by the bar as affording no inconsiderable chance of a technical error, and consequent escape of the pannel.

Whether the verdict of the Jury be in this form, which implies, that they attach heavy suspicion to the accused, or Not Guilty, which implies, that the prosecutor has failed in his case, the benefit is the same to the prisoner. He is for ever freed from any farther proceedings in regard to the matter laid before the Jury. By no alteration in the mode or name of charging the offence, can he be again subjected, as in England, to imprisonment or trial. If the facts charged be the same, any subsequent proceedings will be instantly quashed, by whatever name they may be called.

Previous to moving for sentence, the prosecutor has the privilege of "restricting the libel," as it is technically called, to a punishment short of death, or entering a writing upon the record which disables the Judge from pronouncing a capital sentence. This important privilege, which from time immemorial has been established in our practice, is not confined to the King's Advocate or his Deputes. It extends also to private prosecutors when they prosecute in their own name, with his concurrence. It is founded upon the following consideration :—

Although the law of Scotland is greatly more lenient

than that of England, and recognises hardly 50 capital offences, instead of the extensive list to be found in the pages of its statute-book, yet even this inconsiderable number is found, in practice, to bring many more prisoners within the forfeit of death, than the humanity of modern times will permit to be carried into execution. There are many crimes besides, which, when they occur in an aggravated form, such as robbery and house-breaking, require the infliction of that dreadful penalty, while the numerous lighter degrees of the same offence may suitably be visited by a slighter punishment. As the law cannot take cognizance of these distinctions, but must prescribe one unvarying rule for all such cases, it is absolutely necessary in every country that some dispensing power should exist, at the moment of the trial, to mitigate the severity of the strict letter of the law. In England, this dispensing power has always been, in reality, vested in the Judges on the Circuit, who, by leaving a small number only of the prisoners sentenced to death for execution, substantially, from the earliest times, exercised that power which is now openly displayed, by recording, instead of pronouncing the sentence. In Scotland, it is thought, that this necessary and important power is more fitly intrusted to the public prosecutor, whose knowledge of the case is more minute and circumstantial than that of the Judge who presides at the trial,—who is acquainted with the comparative atrocity of all the cases which have occurred from the same district,—with whose duties, as acting for the Crown, the power seems to be more consonant,—who holds a situation more amenable to the bar of public opinion, and against whom censure or complaint may more fearlessly be directed.

This power is obviously one which can be exercised only for the benefit of the prisoner. It comes into operation only when his life is forfeited to the laws of his

country. It may be abused on the side of mercy, but it cannot become the instrument of oppression.

Many cases of great importance, however, occur in practice, in which, though there may be reason to hope that the life of the prisoner will ultimately be saved, the prosecutor feels, that it is beyond the proper sphere of his duty to undertake the responsibility of restricting the libel, or in which he conceives that the act of mercy will come more appropriately from the throne. In that, as in all other cases, the royal mercy is still open to the unfortunate criminal; and in such a case, the presiding Judge never fails to transmit such an account of the trial as ensures a transportation pardon to the pannel.

From the extent to which this power of restricting the libel is carried in practice, sentence of death is seldom pronounced in this country without its being carried into execution. The effect of such a sentence, accordingly, upon the audience and the criminals in Scotland, is greater than those accustomed to the practice of any other country could conceive. Nevertheless, there are not above eight or nine persons executed annually in the whole kingdom.

By the 1 Will. IV. c. 37, it is enacted, that no capital sentence shall be carried into execution in less than fifteen days from its date, if to the south of the Forth, or twenty days, if to the north of that river. Nor is this humane provision to be overlooked in estimating the spirit of our criminal law. By the benevolent exertions of the ministers of religion, a salutary change is almost invariably effected in his mind during that melancholy interval. And instances frequently occur, in which the prisoner, from the opportunity thus afforded him of collecting evidence to support his petition for the royal mercy, is saved from an ignominious death under circumstances, when, but for the intervention of that period, he would have had no chance of obtaining a mitigation of his sentence.



Such is a short outline of the form of criminal proceeding in this country. The means afforded to prisoners of forcing on their trial, and putting a period to their confinement, are as follows:—

Every prisoner, when committed to jail, is expressly ordered by the act 1701, to be furnished with a copy of the warrant for his incarceration, and the petition on which it was granted. These documents make him acquainted with the person at whose instance he has been apprehended, and the grounds of the charge which is preferred against him. They afford him also the means of making the requisite application to his friends, in order to establish his innocence before the magistrate, and induce him not to commit him for trial.

If committed for trial, and if he is desirous of forcing on his trial, the prisoner has, by the same statute, the power of taking out letters of intimation against the person on whose application he was incarcerated, and the Lord Advocate. The purport of these letters is to require these officers to bring the prisoner to trial within the time fixed by the act 1701, the *habeas corpus* act of Scotland, under the certification, that if that be not done, he shall be set at liberty. This law proceeding costs about two guineas; but it is seldom exacted from the poorer prisoners.

Upon these letters being executed against the Lord Advocate, he is obliged to execute an indictment against the prisoner within sixty days from the date of the service, and to bring the trial to a conclusion within forty days thereafter. Of course, this often renders it necessary to bring up prisoners, and all the witnesses for their trial, from the most distant quarters to Edinburgh, in the interval between one circuit and the other; a necessity which often imposes a very heavy expense upon the country. If the indictment be not served at the expiration of the sixty days, or the trial not concluded at the expi-

ration of the 100, the prisoner must instantly be set at liberty. The penalties of keeping him in prison after the expiration of either of these periods, are fixed by the statute at certain sums for each day of the confinement, and a large sum in name of damages, and these sums cannot be modified by any power whatsoever.<sup>1</sup> Any magistrate competent to take cognizance of the crime for which the prisoner is committed, is entitled and bound to grant warrant for his liberation, if the prisoner is detained within his bounds. The magistrate or jailer who fail to give instant obedience to the provisions of the act, become themselves liable in all the penalties of the act.

Having obtained his liberation under these provisions of the act, the prisoner can no longer be apprehended by a warrant granted by any magistrate whatsoever. He can only be of new incarcerated upon Criminal Letters, issuing from the High Court of Justiciary, and specially delivered to himself. These criminal letters contain a full indictment, with the list of jury and witnesses, and the statute is express, that unless these criminal letters are brought to trial within forty days after the apprehension of the pannel, he shall be set at liberty, and be *for ever free* from all prosecution for the offence at the instance of the King's Advocate, or any other party.

If the prisoner has not availed himself of the provisions of the act of Parliament, the Lord Advocate, or his Deputes, may, when the trial comes on, *move* te Court to desert the diet *pro loco et tempore*, as it is called; that is, to postpone the trial to a subsequent period. Upon cause shown, as the absence of a material witness, the Court will grant him this indulgence, and recommit the prisoner; in like manner, as on a similar application from the pannel, they will postpone his trial, in order to give him time to bring forward his witnesses. The Court,

<sup>1</sup> Hume, ii. 13.



however, judge of the grounds of all such motions with a jealous eye, especially if coming from the public prosecutor; and if they observe the slightest disposition to make an oppressive use of this privilege, they will compel him to go on with the trial at the period fixed, and, in default of his doing so, desert the diet *simpliciter* against the pannel, or, in other words, abandon the prosecution, and ordain him to be set at liberty.<sup>1</sup> This has been repeatedly done in times much less scrupulous than the present, particularly in the case of George Young, Oct. 9, 1679, Fount. I. 60; Williamson, I. 43, *Ibid*.

The Lord Advocate and his Deputes are not themselves liable in damages and expenses, like the Procurators-fiscal in the different counties,<sup>2</sup> unless a case of corrupt or malicious prosecution could be substantiated against them, in which case they would unquestionably be responsible for such acts of oppression. But, as no commitment can in any case be granted without a signed information, the party who signs that information becomes liable for the damages of imprisonment, if it was groundless or malicious. The Lord Advocate may be compelled to disclose the name of his informer, in order that damages may be recovered from him; and this right has been repeatedly enforced.<sup>3</sup> By the act 1579, c. 78, it is specially declared, that in those cases where the Lord Advocate alone pursues, the penalties, when found due, shall be paid by his informer.

As little can that officer imprison any person of his own discretion, or detain him in prison till he obtain his liberation under the act 1701. He has no power as Lord Advocate, to imprison any person whatever. He can only present a petition to a magistrate, praying for a warrant of commitment; a power which he shares with every individual, in England as well as Scotland, who

<sup>1</sup> Hume, ii. 265, N.—<sup>2</sup> Hume, ii. 132.—<sup>3</sup> Case of Stephens, 1727; Haggart, 1738; Hume, ii. 132, 133.

has sustained an injury. The committal, in the first instance, can only be for farther examination; and if the prisoner is confined under that warrant more than a reasonable time, which hardly ever extends beyond eight or ten days, the magistrate and private informer are liable in damages.<sup>1</sup> The magistrate can alone thereafter grant warrant to detain the prisoner for trial; and if he does so, without good and sufficient reason appearing on the face of the precognition, he acts at his highest peril, and will be subjected in damages by the injured party, whether the application for imprisonment comes from the private party, the Procurator-fiscal, or the Lord Advocate.<sup>2</sup>

It has been decided also, that a prosecution cannot be suspended over the head of a pannel for an indefinite time; and it is a mistake to imagine that the act 1701 affords no means of forcing on a trial except to those who are actually in prison. If he has once been committed to stand trial, he becomes entitled to the whole benefit of the act of Parliament; and of this he cannot be deprived, either by finding bail, or by the prosecutor consenting to his liberation.

Such is a short outline of the Law and Practice of Scotland in Criminal Cases; in the anxious provisions of which, made for the thorough investigation of the case by different impartial law authorities before the accused is committed for trial,—in the numerous advantages afforded to him at the trial,—and the peremptory means which he enjoys of forcing the prosecutor to bring his case to a conclusion,—the greatest possible security to the liberty of the subject is provided. A great part of the most important of these regulations, viz. that relating to the commitment of persons for trial, and the consideration of their cases by the Crown Counsel, is not only part of the ancient law of Scotland from a remote

<sup>1</sup> Arbuckle v. Taylor, Dow, iii. 175.—<sup>2</sup> Hume, ii. 84.

period, but was minutely considered and approved of by the English ministry under the administration of Lord Godolphin, and at a time when the principles of civil liberty, established at the Revolution, were thoroughly understood, and acted upon by the government.

The English practice in criminal matters is in many respects different from the Scotch. We find no fault with any part of that practice, and make no attempt to recommend any part of our institutions for their imitation. The principle, that each nation is the best judge of the legal establishments which are adapted to its own circumstances, is too obvious to permit any such attempt. But when the institutions of England are not only theoretically proposed for our admiration, but frequently suggested for practical imitation in this country, we should seriously consider the comparative merits of the system we are invited to adopt, and that which we are urged to abandon.

Excepting in some particular classes of state or political offences, the English law recognises no public prosecutor, who is bound, as a matter of duty, to take up the injuries done to the subjects of the realm. The wrongs of each individual are left to his own prosecution.

As this necessity of prosecuting at their own expense must often become extremely burdensome to individuals, and might lead to a neglect of public justice, persons giving information to a magistrate, which leads to the apprehension of a criminal, are bound over to prosecute at the next Courts of Oyer and Terminer under a heavy penalty. In addition to this, as the prosecution must be carried on at the expense of the injured party, the legislature has found it necessary to interpose, in a variety of instances, to offer certain rewards to those who obtain convictions. Persons apprehending a highwayman, and prosecuting him to conviction, are entitled to L.40 from



the county,<sup>1</sup> and L.10 from the hundred, where the offence was committed ;<sup>2</sup> those who apprehend and convict an offender against the coin receive L.40 ;<sup>3</sup> those who apprehend a housebreaker are entitled to L.40 ;<sup>4</sup> a like reward is bestowed upon those obtaining the conviction of any person accused of taking a reward for the concealment or facilitating of stolen property ;<sup>5</sup> those who procure a conviction of a sheep-stealer are entitled to a reward of L.10 ;<sup>6</sup> those who apprehend a convicted felon, returned from transportation, are entitled to L.20 ;<sup>7</sup> and any person prosecuting to conviction any housebreaker, horse-stealer, or thief to the value of 5s. from a house or shop, is entitled to an exemption from all parish offices or burdens,—an exemption frequently of more value than L.40 sterling.<sup>8</sup>

Thus, the motives which impel an individual, who has sustained an injury in England, to prosecute, are, to satisfy the indignation which he feels against his aggressor ; to escape from the penalty which he will incur by failing to prosecute, and to obtain the reward and indemnification to which, upon a successful prosecution, he is entitled.

The individual concerned, having resolved to prosecute, the depositions of the witnesses are taken before a Justice of Peace, who, if he thinks the case deserving of trial, grants warrant to commit the prisoner to stand trial. The magistrate by whom this important step is taken, is a gentleman who generally resides in the vicinity, who is not professionally required to be possessed of any habits of business, or to be acquainted with legal proceedings, although, without doubt, many most honourable exceptions to this defect are to be found among the English magistracy.

<sup>1</sup> 4 and 5 Will. and Mary, c. 8.—<sup>2</sup> 8 Geo. II. c. 28.—<sup>3</sup> 6 and 7 Will. III. c. 17 ; 15 Geo. II. c. 28.—<sup>4</sup> 5 Anne, c. 31.—<sup>5</sup> 6 Geo. I. c. 23.—<sup>6</sup> 15 Geo. II. c. 34.—<sup>7</sup> 8 Geo. III. c. 15.—<sup>8</sup> 10 and 11 Will. III. c. 23 ; Blackst. iv. 294.



The prisoner, when once committed, must lie in prison, if the offence is not bailable, or if he cannot find bail till the next Quarter Sessions or Assizes, if the offence was committed out of London, or the next term, if it was committed within it. This incarceration is not, as in Scotland, immediately subjected to the consideration and review of a superior officer. The only public body which has the power of liberating the prisoner, is the Grand Jury, and it does not meet till the next Assizes. In this way he must often lie nearly six months in jail, before he has any legal means of obtaining a trial or liberation, or even having his case considered by any competent or impartial judges.

When the Grand Jury meet, the indictment is preferred against the prisoner, and evidence laid before them in support of the charge. This Grand Jury is composed of gentlemen of the most consideration and wealth in the county where the offence was committed. If twelve of them find a true bill, the prisoner takes his trial before the Petit Jury, provided the witnesses for the prosecution are then ready. If they are not, he must remain in jail till the next term or circuit. If they throw out the bill, he is set at liberty. But a fresh charge may thereafter be preferred against him, before a second Grand Jury.<sup>1</sup> Nor does there seem to be any limit to the renewal of such prosecutions.

If the accused is charged with felony, he is not allowed to have the benefit of counsel at his trial, except in regard to points of law arising at the moment.<sup>2</sup> On the other hand, the counsel for the prosecution are allowed to enforce the case, by addressing the jury in the commencement of the evidence, and exerting all their ingenuity in examining the witnesses.<sup>3</sup>

The prisoner, except in cases of treason, is not entitled

<sup>1</sup> Blackstone, iv. 305.—<sup>2</sup> Ibid. 335.—<sup>3</sup> Ibid. 354.

to have a copy of his indictment, with the list of witnesses and assize, served upon him previous to trial; "That being," says Sir Michael Foster, "a mischievous invention, calculated to defeat the ends of justice." All the numerous opportunities of escape, which the narrow inspection of these important documents afford to the prisoner or his counsel, are unknown to the English practice.

He is entitled to a peremptory challenge of thirty-five jurymen. But he may be legally convicted on the evidence of a single witness, except in cases of treason,<sup>1</sup> and this witness may be the person entitled to the statutory reward on conviction.—Phillips, i. 127; Leach, 157.

Upon a conviction of the prisoner, or even after his acquittal, if there was a reasonable ground of prosecution, the prosecutor is entitled to be repaid his expenses by the county.<sup>2</sup> This, of course, gives him a decided interest to prosecute the case to an issue, in order to obtain that indemnification, and must tinge his testimony in many cases. The sum, however, thus awarded to him, seldom amounts to nearly his actual charges; and it is the knowledge of this which renders it necessary to bind the injured party over to prosecute, and in so many cases leads to the neglect or abandonment even of serious injuries.

It is the principle of the English law, that the Judge is the counsel for the prisoner. "This means nothing more, however," says Blackstone, "than that he shall see that the proceedings against him are legal and strictly regular."<sup>3</sup> Of course, he cannot consult with him about the means of his defence, nor minutely examine the documents to be produced against him, nor counsel him in regard to the evidence which he should adduce; nor, in addressing the Jury, is he bound to urge those consider-

Blackstone, iv. 336.—<sup>2</sup> Ibid. 362.—<sup>3</sup> Ibid. 354; Coke, iii. Inst. 137.

ations in his behalf, which may fitly be brought forward with effect by a barrister.<sup>1</sup>

The *Habeas Corpus* is the well-known protection of the people of England against arbitrary imprisonment. But the security which it affords, is, in many particulars, inferior to that which the Scotch enjoy under the act 1701. The provision, in regard to persons committed for treason or felony, is, "That every person committed for treason or felony shall, if he requires it, the first week of the next term, or the first day of the next session of Oyer and Terminer, be indicted in that term or session, or else admitted to bail, unless the King's witnesses cannot be produced at that term; and if acquitted, or if not indicted and tried at the second term or session, he shall be discharged from his imprisonment, for such reputed offence."<sup>2</sup> Admirable as the provisions of this act of Parliament are, they yet fall short of that which the act 1701 have afforded to the people of this realm. The English statute only requires the prisoner to be tried at the first assizes, or admitted to bail, or if the witnesses for the prosecution are not then in attendance, to be tried at the next assizes. In this way, the period of imprisonment in any case may be six months, or, when the witnesses are not ready, twelve months from the date of the commitment; whereas, by no possible contrivance, can a Scotch prisoner be detained in prison above 140 days, or four months and twenty days, being little more than one-third of the period to which the English confinement may extend. And in practice such a length of confinement in Scotland rarely occurs, when the prisoner runs his letters. The effect of a liberation from this confinement is, in Scotland, an absolute exemption from all trial or prosecution, at the instance of any party whatsoever; whereas, in England, it only enables the prisoner to

<sup>1</sup> Blackstone, iv. 355, note.—<sup>2</sup> Ibid. iii. 136.



insist that he shall be admitted to bail, by which means the prosecution is still suspended over his head.<sup>1</sup>

Justices of Peace, at their Quarter Sessions, may try inconsiderable offences, and their power extends to transportation. There is no form known by which such sentences can be brought, as in Scotland, under the review of a higher or more experienced tribunal.

In Scotland, the same mode of prosecution which is granted to any subject of the realm upon an injury done to himself, is the only one which is open to the Sovereign for the prosecution of ordinary crimes, or of offences, such as libel or sedition, which more nearly affect his interest, or may be supposed, in a peculiar manner, to provoke a stretch of royal authority. No distinction, in this respect, is recognised between state offences and those which affect the interest of individuals. In England, on the other hand, in those cases in which the King is more immediately concerned, or which have a tendency to disturb the public peace, an information *ex officio* is filed by the Attorney-General, which goes at once to a Petit Jury, without the intervention of a Grand Jury at all. Upon these *ex officio* informations, which proceed at the instance of the Attorney-General, there is no restraint whatsoever;<sup>2</sup> and though no prisoner can be prosecuted for treason or felony, in this summary mode, yet the punishment which the Judges may inflict for a misdemeanour, reaches to the longest term of imprisonment known in the English law; and an imprisonment for three or five years, is unquestionably as heavy a punishment as transportation.

Of the different effects of the two systems in actual practice the following tables exhibit a fair specimen:—

<sup>1</sup> Blackstone, iii. 136.—<sup>2</sup> Ibid. iv. 311.



It appears from the returns laid before the House of Commons, that during seven years immediately preceding 1823, the number of committals, as compared with the convictions over all England, stood as follows.

## ENGLAND.

	1817.	1818.	1819.	1820.	1821.	1822.	1823.	Total.
Committed, . . .	13,932	13,567	14,254	13,710	13,115	12,241	12,263	93,082
Convicted, . . .	9056	8958	9510	9318	8788	8209	8204	62,043
Acquitted, . . .	2678	2622	2635	2511	2501	2348	2480	17,775
No Bills found, .	2198	1978	2109	1881	1826	1684	1579	13,264
Sentenced to death,	1302	1254	1314	1326	1134	1016	968	8224
Executed, . . .	115	97	108	107	114	95	55	691

Average of Commitments for 7 years, ending 1823,	. . .	13,240
of Convictions, . . . . .	. . . . .	8,863
of Acquittals, . . . . .	. . . . .	2,539
of persons liberated by grand jury,	. . . . .	1,898
of persons sentenced to death,	. . . . .	1,175
of persons executed, . . . . .	. . . . .	98

That is, the number of convictions is about two-thirds of the committals; the remaining third being either liberated by the grand jury, or acquitted on the trial; and the number acquitted by the Grand or Petit Jury is about half the number ultimately convicted.

In Scotland there have been no returns hitherto published of the number of committals, in order to compare them with the convictions; but the numbers brought to trial in the Court of Justiciary and Circuit Courts for the three years ending 1823, have stood as follows:—

## SCOTLAND.

	1821.	1822.	1823.	Total.
Tried, . . . . .	270	282	269	821
Convicted and outlawed, . . .	250	239	228	717
Acquitted, . . . . .	20	43	41	104
Sentenced to death, . . . . .	12	9	28	49
Executed, . . . . .	9	6	13	28

Average of persons tried annually for 3 years, ending 1823,	. . . . .	273
Of these were convicted, . . . . .	. . . . .	239
acquitted, . . . . .	. . . . .	35
sentenced to death, . . . . .	. . . . .	16
executed, . . . . .	. . . . .	9

That is, the acquittals are to the convictions in Scotland as 35 to 239, or as 1 to 7 nearly. Whereas, in England, the acquittals by the Grand or Petit Juries are to the convictions as 4437 is to 8863, or as 1 to 2 nearly. This difference is rendered more remarkable, if it is recollected, that in England all persons who do not appear are convicted of the crime with which they are charged, whereas in Scotland they are outlawed only.

But this superiority in the number of convictions compared to the acquittals, is but a small part of the benefit which arises from the Scotch system. In order to explain the other advantages, and show the way in which the criminal justice of the country is actually administered, we shall subjoin the number of cases transmitted for the opinion of Crown counsel, and their result, during the three years ending December 1823.<sup>1</sup>

This table displays, in the most striking manner, the beneficial effect of the consideration of cases by the Crown Counsel, an institution which forms so leading a feature in the criminal jurisprudence of this country.

Out of 589 cases annually transmitted for the consideration of the public prosecutors, only twenty-five terminate in all the accused being acquitted; that is, the cases in which persons, who must all be considered as innocent, have suffered lengthened imprisonment, is only one-

<sup>1</sup> Cases transmitted for opinion of Crown Counsel . . . . .

Cases in which the accused, after being committed, are ordered to be liberated immediately from defect of evidence, . . . . .

Remitted to inferior Judge, and tried immediately before him, . . . . .

Indicted in Court of Justiciary, or Circuits, . . . . .

Cases where all the accused are ultimately acquitted, . . . . .

1821.	1822.	1823.	Total.
646	601	521	1768
109	140	136	385
145	132	136	413
273	202	173	648
32	23	21	76

Average of cases annually transmitted to Edinburgh, . . . . . 589

Liberated immediately from defect of evidence, . . . . . 128

Remitted immediately for trial before inferior Judge, . . . . . 137

Indicted in Court of Justiciary or Circuits . . . . . 216

Where all the prisoners were ultimately acquitted, . . . . . 25

twenty-third of the total number detained in jail for trial by the Crown Counsel. Whereas, under the English system, the acquittals by the Grand and Petit Juries amount to one-third of the committals; that is, one-third of the persons committed have unjustly suffered imprisonment previous to their case being considered by the Grand or Petit Jury.

Of these 589 cases, 128 are immediately abandoned by the Crown Counsel, in consequence of the evidence being considered insufficient to obtain a conviction. The accused are forthwith set at liberty; and their whole imprisonment seldom exceeds a few days or weeks, while the evidence in their case is preparing or under consideration. Whereas, under the English system of Grand Juries, the accused, in all these cases, would suffer imprisonment from the day of their being committed to stand trial till the Grand Jury met, a period which generally amounts to several months.

Out of the same 589, no less than 137 are annually remitted to the Sheriffs, before whom they are immediately tried. These cases arise out of inferior delinquencies, in which the hardship of detaining the accused in prison till the first Term, or Circuit, is manifest. They are tried in general several months before the time when they could be taken up by the Court of Justiciary; and not unfrequently the period of their imprisonment expires before their more guilty brethren can possibly be brought to trial before a superior tribunal.

The number of cases now transmitted for consideration is from 900 to 1000, annually; but the proportion of convictions and acquittals is believed to be much the same as that above specified, although the author, from not being in office, cannot give the details.

In order to give an accurate conception of the practical benefit which this mode of administering criminal justice affords to accused persons in Scotland, there is subjoined a

statement of the proceedings on one of the last Western Circuits<sup>1</sup> from the Crown Office:—

To ensure the rapid and regular consideration of cases by all concerned in their preparation, and prevent neglect or undue delay in any quarter, from the committing magistrate to the Crown Counsel, all the Procurators-fiscal are obliged to fill up for every case a schedule in the form given below,<sup>2</sup> with the dates of the several steps

<sup>1</sup> Committed for trial, but liberated by Crown Counsel, in May, 1826,	8
in June,	. . 11
in July,	. . 11
in August,	. 19
—	
Liberated during four months,	. . 49
Committed, but remitted for immediate trial before the Sheriff,	
in May,	. . 3
in June,	. . 6
in July,	. . 9
in August,	. 5
—	
Remitted for immediate trial before the Sheriff in four months,	23
Prisoners indicted for Circuit,	115
Tried and convicted,	84
Acquitted,	7
Outlawed for non-appearance,	24
—	

115

Thus out of 115 indicted for trial at the Glasgow Circuit, only seven were acquitted; the whole remainder being either convicted or outlawed.

<sup>2</sup> SCHEDULE TO BE FILLED UP AT REPORTING PRECOGNITIONS TO THE CROWN AGENT.

Name of Accused.	Date when first committed to prison.	Place where Accused committed, and by what Magistrate.	Crime.	Date of Warrants of Commitment for farther Examination.	Dates of Declarations of Accused.	Date of Warrant of Commitment until liberated in due course of law.	Whether Prisoner in Jail or liberated on bail.	Date of the last step taken in the Precognition.	Date of forwarding Precognition to the Crown Agent.
John Thomson.	Feb. 1, 1833.	Edin. by Sheriff-Substitute.	Theft.	Feb. 1.	Feb. 2 and 3.	Feb. 4.	In Jail.	Feb. 9.	Feb. 10.



of procedure which have occurred, and transmit it so filled up to the Crown agent.

It is the duty of the Crown counsel, as soon as he receives the precognition, to glance over this schedule, in order to see whether any undue delay has taken place in the detention of the prisoner, or the preparation of the case. If he sees any, he is required to request an explanation from the Procurator-fiscal, and if that is not satisfactory, to submit the matter to the Lord Advocate. But the great regularity and correctness of these gentlemen seldom render this necessary.

To ensure regularity and despatch in the Crown counsel themselves, they are required, as soon as they receive a case, to enter it in a book furnished to them for that purpose, and fill up the entries,\* which show at once the time that it has lain in their hands, and the various steps which they have taken in regard to it. By combining the schedule in the precognition with the entries in their books, the progress of every case from first to last is at once exhibited; and if any delay or neglect in its consideration has taken place, authentic written evidence exists to fix it upon the party in fault. The knowledge of the existence of this clear and indisputable means of proving any neglect, has in general, as might have been anticipated, a very great effect in preventing its occurrence.

For these admirable regulations, so well calculated to ensure regularity in the dispatch of criminal business, and in an especial manner provide against the undue detention of prisoners in jail without consideration being

* Day when received from Crown Agent.	Name of Party accused.	Crime.	Jurisdiction.	Opinion on advising.	How disposed of.	Remarks.
Feb. 10.	John Johnston.	Murder.	Shire Lanark.	To be indicted.	Sent to Crown Agent with indictment, Feb. 13.	Tried and executed.

had of their situation in those ordinary cases where such abuses were most likely to occur, from no political party being interested in their exposure, the country is indebted to Sir William Rae, a public officer now in retirement, of whose services it may with truth be said, and can now be said without the motive being suspected, that he has done more to ameliorate the statutes, and improve the practical administration of the Scotch criminal law, without introducing the slightest dangerous innovation, than any legislator, during the same period, who has preceded him, in the annals of his country.

## CHAPTER I.

### THE JURISDICTION OF THE JUSTICIARY COURT.

THE history of the Criminal Jurisdiction of our Courts, and the successive changes they have undergone from the earliest times, is elaborately given in the learned work of Baron Hume.<sup>1</sup> Without recapitulating the historical deductions there given, it is sufficient to mention the Courts which are at present in operation, with the boundaries of their respective jurisdiction.

1. The Court of Justiciary is the Supreme Criminal Tribunal over all Scotland, and its jurisdiction in criminal matters is both universal in point of extent, and supreme in point of degree.

The Court of Justiciary, established in 1672, and enlarged as to its powers and jurisdictions by subsequent acts of Parliament, is the Supreme Criminal Court in Scotland; and is competent to the trial of every offence within the realm of the highest or lowest degree.<sup>2</sup> How mean soever the injury, still if it amount to a crime, and be cognizable to the effect of awarding punishment for correction or example, the accusation may be competently laid before the Lords of Justiciary.<sup>3</sup> There is no peremptory rule here, as in civil matters, for confining the trial of the less important laws in the first instances to the inferior courts; and the accused has no reason to complain if he is tried before the highest and purest judicature of the kingdom, instead of some inferior and less enlightened judge. The Books of Adjournal, accordingly, are full in early times of the most trifling cases of theft, assault and riot, which were tried without objection before the Justiciary Court; and although such instances have become almost unknown in later periods, from the immense increase of

<sup>1</sup> Vol. ii. c. 1. p. 1—31.—<sup>2</sup> Hume, ii. 31.—<sup>3</sup> Ibid.

crime, and the augmented skill of the inferior judges, yet this change of practice has not arisen from any change of law or custom as to the *competence* of such trials, but a sense of the *expediency* in the general case of not consuming the time of that Supreme Court with trifling or inconsiderable offences. Whenever a case occurs, accordingly, of an offence, though meriting only a slight punishment, being unlikely to receive a fair trial in an inferior judicatory from excited local feeling, or vehement popular prejudice; or whenever a new or unusual offence has been committed, where an inferior judge might be at a loss what punishment to inflict, or which involves a novel and important point of law, the Court are in use to try questions of the smallest criminal delinquency. Witness the case of the Croy Rioters, June 8, 1823,<sup>1</sup> which was postponed from the Inverness Circuit, where it originally came on, in consequence of a peremptory challenge of so great a number of jurymen by the prisoners, as did not leave the requisite number for an assize, and was subsequently tried in the Supreme Court, although the offence was so trifling that the punishment inflicted on most of the pannels was only two months' imprisonment; and the case of Peter Porteous, March 14, 1832, where the pannel, charged with writing an insolent and threatening letter to the Sheriff of Clackmannan, in relation to a depending precognition, was tried in the Supreme Court, and sentenced to a month's imprisonment, in consideration of the novelty of the charge, and its importance in point of legal precedent.<sup>2</sup>

2. It is competent to bring before the Justiciary Court a libel, concluding not only for the pains of law, but for damages to the suffering party, if it arises out of an act of criminal delinquency; but not one containing the patrimonial conclusions only, although arising from a criminal act.

All criminal actions subject the offending party to a twofold obligation; that of expiating, by a punishment inflicted by the criminal tribunals, the outrage done to the offended law, and that of repairing the damage thereby sustained by the suffering party. The proper forums for the enforcing of these different obligations,

<sup>1</sup> Justice-Clerk's MS.—<sup>2</sup> Ibid.



are the criminal and civil courts of the country; but in some cases, these different branches of jurisdiction are, to a certain extent, blended together, and one trial made to answer both the ends of criminal justice and civil reparation. It is accordingly competent to bring before the Justiciary Court a libel, which embraces both the public and private interest in its conclusions; that is, which concludes for fine, imprisonment, or other punishment, *nomine pænæ*, and for damages and solatium also to the party injured.<sup>1</sup> Nay, if such a libel has been brought, it enables the party to prosecute the civil conclusions to an issue, although from a pardon, previous trial, or the like, a bar is put in the way of entertaining the criminal conclusions.<sup>2</sup> But it is not competent to bring before the Supreme Court a libel which concludes for the private and pecuniary interest of the party *only*, though arising directly out of a criminal delinquence; for although the criminal court, when once thrown open to admit a proper criminal suit, may entertain its civil conclusions after the proper subject of their investigation has been departed from, or avoided by some extraneous proceeding, they will not so far deviate from the proper object of their institution, as to entertain a process founded on whatever ground, entertaining only civil conclusions.<sup>3</sup> Accordingly, when a complaint was brought by an accused party against several printers, concluding for damages on account of an alleged libellous account which they had published of certain proceedings in his case, it was held, that however much the Supreme Criminal Court might be bound to superintend the account of its proceedings, any claim for reparation to the private party on account of such proceedings, is cognizable only in the civil courts.<sup>4</sup>

3. The Court of Justiciary is not competent to try any crimes against the Mutiny Act, or of a military nature; nor any offences of sailors against the regulations or discipline of the royal navy, nor of ecclesiastics against the rules and discipline of their body, either in the first instance, or by review.

How ample soever may be the jurisdiction of the Court of

<sup>1</sup> Hume, ii. 32.—<sup>2</sup> Home v. Adamson and Ogilvy, Aug. 15, 1732. Hume, ii. 32, 33.—<sup>3</sup> Hume, ii. 33.—<sup>4</sup> Case of A. Ritchie, June 29, 1789, unreported.

Justiciary, it does not extend to those peculiar offences which are not directed against the general law of the land, or the principles of universal morality, but the rules or discipline of particular professions, for whose regulation a peculiar code has been framed. Upon this principle it cannot take cognizance, either directly or by review, of those peculiar offences which can be committed by the members of our ecclesiastical or military state, and are violations of the special discipline and polity, or rules of government, under which the persons engaged in those professions live, and for which they are liable to be tried in the courts of their own order, and according to the lawful course of enquiry there.<sup>1</sup> On this principle the Lords of Justiciary are not competent to try a soldier for desertion, or any other offence against the Mutiny Act, or the Articles of War; or a sailor in the royal navy, for any offence against the Articles of War; or a clergyman for any deviation, however glaring or blamable soever, from the faith, worship, or discipline established in the church.<sup>2</sup>

But this is to be understood only of such offences as are against the peculiar and separate code of these different professions, and can be committed only by persons, who, by being subject to its rules, are amenable to its punishments. It does not extend to such transgressions as are *mala in se*, crimes in themselves contrary to the laws of God and good government, though committed in the course, or under the colour, of professional duty. On this principle the Books of Adjournal are full, not only of trials of soldiers or sailors for such offences as theft, robbery, murder, or the like, which have been committed by them as individuals, and without reference to the peculiar code which they are bound to obey in their professional capacity; but of those more delicate cases, where the offence was committed in the course of professional duty, and the prisoner's defence consisted in the obligations imposed by that duty.<sup>3</sup> Thus there can be no doubt that a military officer might be brought to trial in the Justiciary Court on a charge of murder, committed by excessive and undue severity in awarding a military punishment, and in the course of that trial its Judges may unavoidably be compelled to take cognizance of the regulations established on that subject in the Articles of War, or the practice of Courts Martial; and of this a melancholy but just example occurred in the trial and condemnation of

<sup>1</sup> Hume, ii. 34.—<sup>2</sup> *Ibid.*—<sup>3</sup> See c. 1. sect. 1. § 14. vol. i. p. 39—46.

Governor Wall, in 1807, for a murder committed many years before, in flogging a soldier in one of the West India Islands. Accordingly, on 13th July 1814, Thomas Whyte, a midshipman, was tried in the Justiciary Court for a murder committed on a sailor under his command, who was alleged to have been guilty of disobedience to orders on the *Peir of Leith*, within the territory of the Judge Admiral. But they would not be competent to try a soldier for desertion or mutiny, or running away from an enemy, any more than a clergyman for heresy, or breach of ecclesiastical discipline.

4. Formerly the Lord High Admiral was the sole judge, in the first instance, for offences of a proper maritime character committed within the floodmark of the sea; but by a recent special statute, the Court of Justiciary have a cumulative jurisdiction in all such cases; and since the abolition of that high Court, they are the only Court now possessing such jurisdiction, both in the Scottish or the high seas, on board a Scottish vessel.

By the well-known statute 1681, c. 16, it was provided, "That the said High Admiral is his Majesty's Lieutenant and Justice-General upon the seas, and in all ports, harbours, or creeks of the same, and upon fresh waters, or navigable rivers below the first bridges, or within the floodmarks." And he was declared to have "the sole privilege and jurisdiction in all maritime and sea-faring causes, foreign and domestic, whether civil or criminal whatsoever, within this realm, and over all persons as they are concerned in the same;" and it was forbidden to "all other judges to meddle with the decision of any of the said causes in the first instance."<sup>1</sup> Under this statute, it was nevertheless held, in conformity with the general principle of law on such subjects, that the true criterion of the exclusive jurisdiction of the Lord High Admiral was to be found, not in the circumstance of the bounds or territory where the thing complained of happened, but in the nature of that thing as an offence against the laws of navigation or sea-faring business, and whereof the trial requires an intimate acquaintance with maritime custom and jurisprudence.<sup>2</sup> On this principle, while it was held on the one hand that murder, rape, theft, as-

<sup>1</sup> 4 1681, c. 16.—<sup>2</sup> 5 Hume, ii. 31.



sault, or the like, though committed on the high seas, or within high water mark, might competently be tried in the Court of Justiciary,<sup>1</sup> it was equally well established on the other, that any offence against the rules of navigation or maritime customs,<sup>2</sup> or any ordinary offence even, committed at sea, whereof the cognizance required a more than ordinary acquaintance with seafaring usages or expressions,<sup>3</sup> could only be entertained in the Admiralty Court. The Admiral too had acquired in criminal, equally as civil matters, a jurisdiction beyond what was conferred upon him by special statute, by custom and usage; and on this footing tried, without challenge, ordinary causes, such as rape, murder, and assault, committed within his bounds.<sup>4</sup>

But the law on this head has now undergone a great alteration from Sir William Rae's act, 9 Geo. IV. c. 29, § 16, which declares, "That the cumulative jurisdiction of the High Court of Justiciary with that of the High Court of Admiralty, shall extend to *all crimes and offences whatsoever* now competent to be tried in the said Court of Admiralty." Under this clause, any offence, how clearly maritime soever, both from its character and the place where it was committed, may be made the subject of trial in the Justiciary Court; and, accordingly, in the case of William Buchan and Alexander M'Intyre, Dec. 14, 1829,<sup>5</sup> being the last steam-boat case, the trial took place in the Justiciary Court, though the offence was entirely against the rules of navigation.

By a still later statute, the 11 Geo. IV. and 1 Gul. IV. c. 99, the High Court of Admiralty is totally abolished. All cases of a maritime nature, therefore, of such magnitude as to be fit for the cognizance of a supreme tribunal, must now be brought before the Justiciary Court. With respect to inferior maritime crimes, by this statute their cognizance is transferred to the Sheriffs of the several counties. The provisions of the act are these:—

By § 21, it is provided, "Whereas all maritime causes may now be brought by review before the Court of Session, and

<sup>1</sup> James Johnston and others, Feb. 3, 1756; Mungo Campbell's case, M'Laren, No. 84; Thomas Whyte, July 13, 1814; John Hog, Jan. 8, 1812; Hume, ii. 36; M'Laurin, No. 59, Jan. 11, 1821; Hume, ii. 35.—<sup>2</sup> Russell, M'Arthur, and M'Larty, May 26, 1823.—<sup>3</sup> See the doubts of the Court in the case of Robert Murray, March 20, 1826; Hume, ii. 35.—<sup>4</sup> William Thomson, Sept. 10, 1734; M'Adam and Long, Sept. 1573; Wilson Potts, Dec. 10, 1781; Hume, ii. 36, 37.—<sup>5</sup> Unreported; see vol. i. 141.



whereas the Court of Justiciary holds a cumulative jurisdiction with the High Court of Admiralty, as to all crimes competent to be tried by the High Court of Admiralty; and whereas it has become unnecessary and inexpedient to maintain any separate Court for maritime or admiralty causes, be it therefore enacted, that the High Court of Admiralty be abolished."

By § 22, it is enacted, "That the Sheriffs of Scotland and their substitutes shall, within their respective sheriffdoms, including the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds, in or adjoining such sheriffdom, hold and exercise such original jurisdiction in all maritime causes and proceedings civil and criminal, including such as may apply to persons residing furth of Scotland, of the same nature as that heretofore held and exercised by the High Court of Admiralty." It is farther provided, "That the sentences, interlocutors, and decrees pronounced by Sheriffs in maritime causes shall be subject to review by the Courts of Session and Justiciary respectively, in the same way and manner in which sentences, interlocutors, and decrees of Sheriffs in similar causes not maritime are subject to review at present, and not otherwise: provided always, that it shall not be competent for the Sheriff to try any causes committed on the seas of a nature which it would not be competent for that judge to try, if the crime had been committed on land."

By § 24, "Where counties are separated from each other by a river, or by a frith or estuary, the Sheriffs of the counties adjoining the sides thereof shall have a cumulative jurisdiction over the whole intervening space so occupied by water."

The Court of Justiciary have jurisdiction to try all crimes committed on board of British ships in the high seas, if the vessel belongs to a Scottish port. So it was found in the case of Thomas Steel, December 18, 1820, where the libel charged the crime as committed off the island of St Thomas, *in the tropic of Cancer*. Mr Jeffrey and Mr Menzies at first thought of pleading the objection, that this crime was only cognizable in the Court of Admiralty in England; but on consideration they abandoned the idea, and the Court unanimously sustained their jurisdiction.<sup>1</sup> The same point was held quite clear in the subsequent case of Robert Murray, March 15, 1826, where the murder was committed on board a vessel bound from Port-Glasgow to Pictou, in the middle

<sup>1</sup> Justice-Clerk's Notes.

of the Atlantic, although the jurisdiction was deemed doubtful from the *nature of the crime*, which was a maritime offence, and was thought more fit for the Admiralty Court, its abolition not having then taken place.

5. Where, by express appointment of the legislature, a particular Court is appointed for the trial of special offences, that is, of course, a competent forum for such crimes; but the original and inherent jurisdiction of the High Court of Justiciary over all offences, gives them a cumulative jurisdiction in such cases, unless it is expressly taken away either by direct words or unavoidable inference.

The Court of Justiciary has a general and inherent jurisdiction in all crimes; and, therefore, it requires either an express enactment, or the expression of an obvious intention on the part of the legislature, to deprive them of their power to take cognizance of any particular offence. If, therefore, in regard to any crime which is already known to the law, and is within the province or general jurisdiction of the Court of Justiciary, additional statutory provisions should be made, in which Inferior Courts are invested with the power of proceeding against such offenders, without any mention of that Supreme Court; the effect of these enactments is only to give these inferior tribunals a cumulative jurisdiction with the Supreme Court, without taking away the jurisdiction of the latter.<sup>1</sup> Where certain colliers, accordingly, were indicted for a combination before the High Court, and it was objected in bar of trial that the Court had no jurisdiction in respect of the 39th and 48th Geo. III. c. 106, which authorized justices to convict such offenders in a summary manner on the oath of one witness, and imprison them for three months, without any mention of the Justiciary Court, the Court were unanimously of opinion, that it was unnecessary to determine the question whether this statute extended to Scotland, as, whether it did or not, the inherent jurisdiction of the Supreme Court was not impaired for the trial of such offences.<sup>2</sup> Upon the same principle, although the 6th Geo. IV. c. 129, which repeals the Combination Laws, pointed out a new and peculiar jurisdiction for the trial of such assaults for the purposes of combination, in a summary mode before the Justices of Peace,

<sup>1</sup> Hume, ii. 37.—<sup>2</sup> Falhouse, Wilson, and Charles Banks, May 20, 1818; Hume, ii. 37.

and authorized them to inflict three months' imprisonment upon a conviction of offenders, after that summary fashion, on the oath of one witness,—yet this was held in no ways to infringe upon the inherent jurisdiction of the Court of Justiciary in such cases, which empowers them to entertain an indictment for assault, aggravated by being committed for the purposes of combination, laid upon the basis, and according to the provisions of the old common law; and, accordingly, in various cases since the statute, such charges have been sustained, and led to very serious punishments, particularly in that of James Steel, Glasgow, April 1826, where twelve months' imprisonment was the sentence; and James Frew and others, Glasgow, April 1828, where seven years' transportation was awarded.<sup>1</sup>

So strongly is this principle founded in our practice, that even in cases where statutes have specially enjoined a particular Court to proceed in the trial of offenders of a particular class, the new jurisdiction thus acquired has only been exercised in concurrence with the Lords of Justiciary. Thus, though the statute 1581, c. 118, regulating the pains of deforcement, recommends to the Lords of Session, and them only, to proceed summarily and diligently in the trial of all such offences, and refers to the “saidis Lords” as Judges in that matter; yet they have never exercised this jurisdiction but cumulatively with the Lords of Justiciary, before whom all prosecutions in such cases are now conducted:<sup>2</sup> and although the statute 1584, c. 132, states the crimes of blasphemy, fornication, &c. to which it relates, as the subject of trial, “be the ordinar Bishop of the diocese, or utheris, the King's Commissioners, to be constitute in ecclesiastical causes,” yet the Court of Justiciary never lost its hold in such cases, and an objection to their jurisdiction taken on that ground was in one instance repelled.<sup>3</sup>

6. Where new offences are created by special statute, the presumption is, that the Court of Justiciary are competent to take cognizance of them, and nothing but clear and indisputable expressions will limit the right of judging of them to any other Court.

It frequently happens that statutes create new offences in rela-

<sup>1</sup> Unreported; see vol. i. 192, 193.—<sup>2</sup> Hume, ii. 38.—<sup>3</sup> Sands, Baikie, and others, Aug. 1, 1712; Hume, ii. 38.



tion to matters of revenue, or the like : and prescribes a certain form of procedure, or points out certain courts for their trial. In such cases the same principle obtains, and it is not presumed, except on clear and unambiguous expressions, that the jurisdiction of the Supreme Court was meant to be excluded. On the contrary, any ambiguous clause or phrase will rather be construed in favour of this high tribunal, which, *de jure*, and without the aid of statute, has a natural and inherent jurisdiction to try offences of every sort as soon as statute, or custom, or the increasing depravity of the age, has given them birth.<sup>1</sup> Accordingly, where certain pannels were indicted in the Court of Justiciary, on the 6th Geo. I. c. 21, a revenue statute, and it was objected to the jurisdiction of the Court, that it was declared, “ that the several offences in this act shall, and may be heard, tried, and determined by bill, plaint, or information, in any of his Majesty’s Courts of Record, at Westminster, or in the Court of *Exchequer*, in Scotland, respectively,” it was held that these words only invested the Barons with a cumulative jurisdiction with the Justiciary Court,<sup>2</sup> without excluding the latter tribunal. In like manner, where an indictment was laid on the 8th Geo. I. c. 18, and the declaration was founded on the clause of the statute, which declares, “ that the several penalties and forfeitures in this act mentioned, shall be prosecuted and determined by bill, plaint, or information, in any of his Majesty’s Courts of Record at Westminster, or in the Court of *Exchequer* at Edinburgh, except where it is in this act otherwise directed;” the objection that the Court of Justiciary had no jurisdiction was nevertheless repelled, and the pannels were convicted.<sup>3</sup>

In like manner, it is declared by a clause in several turnpike acts, that if any one pass the gate without paying toll, or shall assault the toll-keeper, or demolish the gate, it shall be competent for a Justice of the Peace, in a summary manner, and on the evidence of one witness, to convict the offender. Now, a clause of this description, prescribing a certain course for the speedy coercion and punishment of offences of a certain description, can never be held to deprive the Supreme Court of its cognizance of such charges, when a case justifying a libel of a more serious description shall be laid before them. From the moment that

<sup>1</sup> Hume, ii. 38.—<sup>2</sup> Thomas Anderson and others, Nov. 8. 1725.—<sup>3</sup> Hog and Bryson, June 29, 1730 ; Chalmers and Yorkston, Aug. 1, 1751 ; Hume, ii. 39.



such a building was allowed to be raised, and such a revenue collected, they are part of the lawful property of the public; and all the instruments employed in levying this revenue, are thenceforth under the safeguard of the common law of the land, and the ordinary courts of justice, in aid of, and not to exclude or restrain which, such provisions as these are held to have been introduced into the statute.<sup>1</sup> So it was found in just such a case arising out of a clause in the turnpike acts for the county of Berwick, which declared, that “if any person shall break down or otherwise damage or destroy any arches or bridges, or turnpike-gates, chains, or bars, &c., every person so offending, and lawfully convicted thereof, on the testimony of one or more credible witness or witnesses, or other competent proof, before any one or more of the Justices of Peace for the county of Berwick,” the offenders shall be fined in a sum not exceeding L.5, nor under 40s. sterling. Lord Justice-Clerk Braxfield repelled the declination, and the pannels were convicted.<sup>2</sup> The law of England is founded on the same principles: “it being held as a clear and established principle of law,” says Lord Kenyon, “that where a statute creates a new offence, by prohibiting and making unlawful any thing which was lawful before, and appoints a specific remedy against such new offence, by a particular sanction and particular mode of proceeding, that particular mode of proceeding, and no other, must be pursued; but where the offence was antecedently punishable by a common law proceeding, and the statute prescribes a particular remedy by a summary proceeding, either method may be pursued.”<sup>3</sup>

It need hardly be observed, that where penal statutes are passed creating new offences, without specifying where they are to be tried, a jurisdiction immediately vests in the Court of Justiciary to try such offences; and that though a statute introduces some new sort of revenue, or establishes an additional class of officers, and does not appoint any penalty for those who shall assault or resist them, or defraud that particular branch of the revenue, still the Court of Justiciary has ample power to guard it or protect those officers, and punish at common law those who shall transgress against either. So it has been found in regard to an assault on officers of the revenue, in a particular

<sup>1</sup> Hume, ii. 39.—<sup>2</sup> Robert Vert and others, Sept. 21, 1792.—<sup>3</sup> Case of Harris, 1790; Leach, ii. 551, 4th ed.

department created by statute, though laid on the common law alone in several cases :<sup>1</sup> and in regard to frauds on the revenue at common law, though not laid on, or authorized by any statute, in a great variety of others ;<sup>2</sup> and the law as above stated, on both points, is now matter of daily practice.

7. The jurisdiction of the Court of Justiciary is universal as to the persons subjected to it, whether native or foreigner, and whatever may be their profession or avocation, if the offence be one against the public laws of the realm, and not against the regulations of a particular order.

The jurisdiction of the Court of Justiciary is not less extensive with respect to the persons, than the crimes amenable to it. In the first place, it is subject to no limitation from regard to the country or nativity of the offender : whether he be an alien or natural born subject, still if he has committed a crime in this country, he is amenable to its laws. Accordingly, an African had sentence of death for theft and housebreaking ;<sup>3</sup> an Italian of transportation for culpable homicide ;<sup>4</sup> and a Frenchman of death for piracy and murder.<sup>5</sup>

In like manner, all persons, of whatever profession or state in society, are liable to the jurisdiction of this Court for ordinary offences which they commit *tanquam quilibet*, and not against the rules or regulations of the peculiar body or class to which they belong.<sup>6</sup> Though therefore a member of the clerical or military body is only amenable to the Ecclesiastical or Martial Courts for trespasses against the discipline or regulations of those bodies, yet for all offences against his neighbour, or any breach of public police or economy, he must answer in the ordinary courts of justice.<sup>7</sup> Nay, it shall not, as already observed, exclude the cognizance of the ordinary courts of justice, although the offence is one intimately connected with professional duty, and in the cognizance of which its rules are necessarily involved : as if a soldier is charged with homicide committed on duty, or a sailor with culpable

<sup>1</sup> Caithness and Bisset, Dec. 1, 1788 ; Barnet and Brown, Jan. 10, 1820. Unreported.

<sup>2</sup> Brown and M'Nab, March 18, 1793 ; Peter Hughan, Dec. 17, 1810.—<sup>3</sup> William Hendry, Nov. 28, 1797 ; Hume, ii. 41.—<sup>4</sup> Gaspar Reysano, Dec. 19, 1721.—<sup>5</sup> Heaman Gautier, Nov. 26, 1821. *Ante*, i. 639.—<sup>6</sup> Hume, ii. 41.—<sup>7</sup> Mackenzie's Observations on Statutes, 249. Hume, ii. 41.

homicide occasioned by negligent steering. Accordingly, in the cases of Dreghorn, February 1807; Maxwell, June 1807; Inglis, August 1810, and many others, the Court proceeded to the trial of soldiers without objection, although the homicide was committed in the course of military duty, and the defence resolved in a great measure into the plea that it was justifiable under the rules of military discipline.<sup>1</sup>

In like manner, although the clergy are only liable to punishment for heresy, or breach of ecclesiastical discipline in the Ecclesiastical Courts; yet for all other offences, *Utitur jure communi*, and he is amenable to the ordinary law, and the established Courts for its administration.<sup>2</sup> “Though the preaching the word,” says Mackenzie, “is declared to be part of the ecclesiastical jurisdiction, yet that relates only to the matters of faith to be preached, as to which ministers are to be judged by clerical judicatures; but if they preach what encroaches on the secular power, they are to be judged by the King, and those deriving power from him, conform to the 8th James V. c. 129.”<sup>3</sup> If, therefore, a clergyman shall mount the pulpit as a stage from which to scatter sedition or treason among the people, or shall pervert his holy office to the circulating of slander or calumny against individuals, he falls under the secular arm for the coercion of such offences.<sup>4</sup> Numerous cases have accordingly occurred, when publicly praying for the Pretender, or drinking his health by the name of King James, were the subject of trial and punishment in the Justiciary Court.<sup>5</sup>

On the same principle a clergyman is answerable as an ordinary individual, if, while transgressing a rule of ecclesiastical discipline, he is at the same time committing any civil offence, as by celebrating a clandestine marriage, granting a false certificate of banns, committing sabbath-breaking, habitual drunkenness, intruding into churches, failure to pray for the King, or the like. Many instances of prosecution for such offences are to be found in the books; now, from the change of the times, in a great measure fallen into oblivion.<sup>6</sup>

#### 8. For treason, petty treason, or any other *felony*, the

<sup>1</sup> Hume, ii. 41, 42. *Ante*, i. 44, 45, and ii. 4.—<sup>2</sup> *Ibid.* ii. 42.—<sup>3</sup> Mackenzie's *Obs.* on Acts, p. 208.—<sup>4</sup> Hume, ii. 42.—<sup>5</sup> Gideon Guthrie, July 18, 1715. Thomas Baikie, Aug. 1, 1712; Hume, ii. 42.—<sup>6</sup> Hume, ii. 43-45.



Peers of Scotland can only be tried by a Court of their own order, assembled by the Lord High Steward of Great Britain; but in regard to assault and inferior crimes, they are subject to the jurisdiction of the ordinary courts of justice.

By the Treaty of Union, it is declared, "That the foresaid sixteen Peers of Scotland, mentioned in the last preceding article, to sit in the House of Lords of the Parliament of Great Britain, shall have all privileges of Parliament which the Peers of England now have, and which they or any Peers of Great Britain shall have after the Union, and particularly the right of sitting upon the trial of peers;" and that "all Peers of Scotland shall be tried as Peers of Great Britain, and shall enjoy all privilege as peers, as fully as the Peers of England do now, or as they or any other Peers of Great Britain may hereafter enjoy the same, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and particularly the right of sitting upon the trial of peers."<sup>1</sup> The result of this provision is, that for high treason, petty treason, misprision of treason, as also for murder, or any other *felony*, the Peers of Scotland are subject only to the judgment of their own order, assembled in the court of the Lord High Steward of Great Britain; towards a trial before which tribunal a true bill must be found by the 6th Anne, c. 23, by a jury of twelve men, who may be commoners, before a special commission which shall be issued for that purpose.<sup>2</sup>

This matter is now fully and precisely regulated by the 6th Geo. IV. c. 66, which bears in its preamble to have been passed to clear up the doubts which had been entertained in regard to the true import of that clause of the 6th Anne, c. 23, § 12, which allows a commission to issue for the trial of crimes committed by Peers in Scotland.

It enacts, that the crimes "on account of which such a commission may issue, are all treasons, misprisions of treasons, murders, and other crimes which infer a capital punishment by the law of Scotland; and all *felonies* and other crimes, for which, if committed in England, a peer of the United Kingdom would be

<sup>1</sup> Articles of Union, Art. 23.—<sup>2</sup> Blackst. b. iv. c. 19; 2 Hume, ii. 46.



tried by his peers; and it shall not be lawful for the Court of Justiciary, or any other court in Scotland, to take cognizance of any of the aforesaid crimes.”<sup>1</sup> The indictments to be presented to “the good and lawful men,” under the commission described in the said act of Anne, shall “in all respects be such as is competent in the Court of Justiciary, excepting only, that no notice shall be taken therein of the Court before which the peer accused is to be tried.”<sup>2</sup> “When such indictment shall have been found, a copy of it, with a list annexed of all the witnesses against the peer accused, shall be delivered to him in presence of two credible witnesses, fifteen days at least before the commencement of his trial; and all writings and articles libelled on, shall in due time be lodged in the office of the clerk of Parliament, that he may there see the same.”<sup>3</sup> “When such indictment shall have been found, then, on the application of the prosecutor, or the peer accused, the keeper of the Great Seal of the United Kingdom, shall award his Majesty’s writ of *certiorari* under the Great Seal, directed to the justices acting under the commission aforesaid, commanding them to certify such indictment into the High Court of Parliament, or Court of the Lord High Steward.”<sup>4</sup> “The relevancy of the indictment, the evidence in support of it, and the proof in exculpation of the accused, together with the punishment to be awarded, and the power of the prosecutor to restrict the pains of law, and every other point involving matter of law, shall be judged of in the High Court of Parliament, and in the Court of the Lord High Steward, according to the law of Scotland; and the same forms of proceeding, as far as may be, shall be observed on occasion of such trials as are established by the law and practice of Scotland, and are observed in the trial of indictments before the High Court of Justiciary.”<sup>5</sup> “The President of the Court of Session, the Lord Justice-Clerk, and any other judges of the Court of Session in Scotland, shall, when summoned by his Majesty, attend on occasion of the trial of any such indictment before the High Court of Parliament, or Court of the Lord High Steward, and such judges shall be received and placed in the said Courts respectively with the judge in England, after a particular manner specified in the statute.”<sup>6</sup>—“If the indictment is found not relevant, or is otherwise dismissed in the High Court of Parliament, or of the Lord High Steward, those

<sup>1</sup> § 1.—<sup>2</sup> § 2.—<sup>3</sup> § 3.—<sup>4</sup> § 4.—<sup>5</sup> § 5.—<sup>6</sup> § 6.

courts may, on application by the prosecutor, grant warrant to commit the accused peer to prison, till liberated in due course of law ; or if they see cause, they may admit him to bail to answer to any indictment for the same crime within six months thereafter, and under such penalty as they shall think proper : But he shall be entitled to his liberation from prison without bail, if an indictment shall not be found against and served on him for such crime, within the space of thirty days from the date of the warrant of commitment.”<sup>1</sup>

The process for forcing on the trial of such peer is equally clearly and minutely regulated. It is provided, “ That when any peer charged with a crime shall be committed to prison in Scotland, till liberated in due course of law, he may apply to the Sheriff of the county in which he is imprisoned, or to the Lords of Justiciary, to be admitted to bail ; and the said Sheriff, or any one of the said Lords, shall cognosce whether the crime is capital or not, and shall modify the bail in terms of the act 1701, c. 6, and 39th Geo. III. c. 49 ; and the bail-bond to be granted by such peer shall be, that he will appear and answer to any indictment that shall be exhibited against him for the crime in question, in any competent Court, including the Court of Parliament, and the Court of the Lord High Steward ; and that within twelve months, if before either of those Courts, and six months if before any Court in Scotland.”<sup>2</sup> “ When a peer charged with any crime cognizable only in the Court of Parliament, or of the Lord High Steward, shall be detained in jail because the crime is notailable, or because he is unable or unwilling to find bail, he may apply for letters of intimation, in terms of the act 1701, requiring the Lord Advocate, or Procurator-Fiscal, or party concerned, to fix a diet for his trial within sixty days ; and the issuing of a commission in terms of the said act, 6th Anne, shall be held equivalent to the fixing of a diet for trial, in terms of the act 1701. If no such commission shall have issued before the expiry of the sixty days, such peer shall be immediately liberated ; and he shall not be afterwards apprehended on account of the said crime, unless an indictment shall have been previously found against him, under a commission issued in terms of the said act of Anne.”<sup>3</sup> “ A peer charged with any crime cognizable only in the Court of Parliament, or of the Lord High Steward, shall not be entitled

<sup>1</sup> § 7.—<sup>2</sup> § 8 —<sup>3</sup> § 9.

to any of the other privileges provided in the act 1701, "in so far as regards the liberation of such peer from prison, or his right to force on a trial, or have the same prosecuted to a final sentence."<sup>1</sup> The provisions of this act "apply to all peeresses in their own rights, to all wives of peers, and all widows of peers not married to commoners, who shall commit crimes in Scotland."<sup>2</sup> And with respect to the Grand Jury, it is declared that the bill must be presented to and found by "good and lawful men," under the commission described in the said act of Queen Anne.<sup>3</sup>

These privileges extend to all the individuals of the Scottish peerage, equally as the sixteen who represent that order in the House of Peers; and even to those members of the peerage, such as females, minors, or papists, who labour under a personal incapacity for that situation.<sup>4</sup> On the other hand, for all offences of a lower degree, the Scottish peers, like the English or Irish, are answerable in the ordinary courts of justice;<sup>5</sup> and they are also liable to attachment for such contempts as are of a high degree.<sup>6</sup> Many cases accordingly have occurred, in which peers for crimes inferior to felony have been outlawed, or convicted in the Justiciary Court, particularly those of the Earl of Rosebery<sup>7</sup> outlawed there, on a libel for deforcement, and the Earl of Morton,<sup>8</sup> who was tried on the same libel, with other persons of inferior rank, on a libel for assault, oppression, and wrongous imprisonment. More lately, the same point underwent some discussion in the case of the Earl of Mar, Perth, autumn 1830, and High Court, Dec. 18, 1831. The indictment there charged the pannel with assault, by pointing a gun loaded with small shot at an individual, and discharging it "nearly in his direction." This was charged as being done "violently, wickedly, and *feloniously*," in the usual style of indictments for assault. It was objected at the Perth circuit, that the word "*feloniously*" rendered the charge a felony, and as such that it could not be tried in the Justiciary Court. Lords Moncreiff and Medwyn certified the point from the Perth circuit, and to avoid the difficulty the old libel was abandoned, and a new one served on the prisoner, the same in every respect as the former, with this difference, that the word

<sup>1</sup> § 10.—<sup>2</sup> § 11.—<sup>3</sup> *Ibid.*—<sup>4</sup> Blackst. b. iv. c. 10, No. 2.—<sup>5</sup> Hawk. b. ii. c. 44, No. 13, 15, 16.—<sup>6</sup> Hume, ii. 47.—<sup>7</sup> Dec. 27, 1725.—<sup>8</sup> March 4, 1740; Hume, ii. 48.



“feloniously” was omitted. On this libel he was tried without objection in the Justiciary Court, convicted and sentenced to two months’ imprisonment, and to keep the peace to the extent of £5000, a sentence which was *in termine* carried into effect.<sup>1</sup>

These statutes declare the privileges to extend to “all *felonies* and other crimes, for which, if committed in England, a Peer of the United Kingdom would be tried by his Peers.”<sup>2</sup> We are thus referred to the law of England to define the line: and it is there held that the proper definition of *felony*, is an offence which occasions a total forfeiture of land or goods, or both, at the common law, and to which a capital or other punishment *may* be superadded according to the degree of guilt.<sup>3</sup> A capital punishment does not form a necessary part of a felony, though the idea of it is so connected with that extreme penalty, that it can hardly be separated from it, and to this usage the interpretation of law has long conformed. Therefore, if a statute makes any new offence a felony, the law implies that it shall be punished with death, as well as forfeiture, unless excluded by benefit of clergy.<sup>4</sup> And with regard to felonies created by statute, it is held not only that those crimes which are made felonies in express words, but also those where the punishment is extended to life or limb, become felonies thereby, though the word “felony” be omitted.<sup>5</sup> And wherever a statute declares that the offender shall, under the particular circumstances there described, be deemed to have *feloniously* committed the act, it makes the offence a felony, and draws after it all the ordinary consequences attending that high species of offence.<sup>6</sup> It does not appear, however, that the mere insertion of the word “feloniously” in an indictment, is sufficient to stamp the offence with the character of felony, or let in the privilege of Parliament to a peer in pleading to it; unless the offence charged is such an one, as when connected with that epithet, amounts to a felony.

A peer, if cited by the Crown as a witness in the Justiciary Court, is placed in a peculiar situation if he be a *socius criminis*. For the ordinary obligation of a *socius* to speak out when cited for the Crown, arises from the protection which the Court will afford to the witness, if he is himself charged with the offence:

<sup>1</sup> Justice Clerk’s MS.—<sup>2</sup> 6th Geo. IV. c. 66.—<sup>3</sup> Hawkins, i. c. 25. § 1. Blackst. iv. 95; Russell, ii. 42.—<sup>4</sup> Blackst. iv. 98; Russell, ii. 42.—<sup>5</sup> Hale, 703. Hawkins, i. c. 40. § 2.—<sup>6</sup> Russell, ii. 42.



but this cannot be done even by the Justiciary Court in the case of a peer who is examined as a *socius criminis* in a murder or other felony, because the future prosecution of the peer, if it take place at all, must be conducted in the Court of the Lord High Steward, over which they have no control, either directly or by review. This point occurred in the case of James Stewart of Dunearn, 10th June 1822, charged with the murder of Sir Alexander Boswell in a duel, where Lord Rosslyn, who had been his second, was examined as a witness. The Lord Justice Clerk, before he commenced his deposition, addressed him thus: "Your lordship is called on in this question only as a witness; and although ordinary witnesses are bound to answer the questions put to them, they are under the protection of the Court, and thus secured from being subject to be tried from any facts as to which they may have given evidence: yet as your lordship in a case of this description is not subject to the jurisdiction of this Court, you will judge what course you should follow." Lord Rosslyn replied, "that he did not see any distinction that could be taken between a peer and any other person: the protection of the law being granted to peers equally with other witnesses," and then answered the whole questions put to him.<sup>1</sup> Should such a case as this again occur, it seems relieved of all difficulty by the subsequent act, 6th Geo. IV. c. 66, which has been passed in relation to the trial of peers before the Court of the Lord High Steward. For that statute having declared, "that the evidence in support of the indictments, the proof in exculpation, and *every other point involving matter of law*, shall be judged of in the High Court of Parliament, or in the Court of the Lord High Steward, according to the law of Scotland;"<sup>2</sup> and the law of Scotland having extended the privilege of protection to all witnesses who are *socii*, that are cited for the Crown, it is clear that the same protection must be afforded to a peer against any future prosecution in the Courts to which he is amenable, as could be afforded by the Court of Justiciary: and therefore his obligation to speak out, when cited in the latter Court in matters which may criminate himself, rests on the same footing as that of ordinary witnesses.

## 9. Members of the House of Commons during the

<sup>1</sup> Justice Clerk's MS. June 10, 1822, James Stewart.—<sup>2</sup> Sect. 5.

sitting of Parliament are not liable to be arrested for any inferior offences on any warrant but that of their own house; but this does not apply to arrests for treason, felony, or breach of the peace, whether actually committed or constructive.

The privilege of peers is perpetual, and belongs to individuals of that high order, though not actually members of the legislature; but those of the members of the Lower House extend only to the members during the sitting of Parliament.<sup>1</sup> Formerly the members of the Scottish Parliament enjoyed an absolute freedom from arrest on any account whatsoever on any warrant but their own;<sup>2</sup> but at the Union this ample privilege came to be confined to the privilege enjoyed by the English Members, which does not apply to arrest for treason, felony, or breach of the peace, or even that inferior degree of breach of the peace which is implied in *all crimes*, that of being *contra pacem Domini Regis*.<sup>3</sup>

10. The Lords of Justiciary have an exclusive jurisdiction in the four pleas of the Crown, in falsehood and forgery, when remitted from the Court of Session, in all statutory offences where transportation may be awarded, and in all cases where a new crime is created under a capital sanction.

From the earliest times the Court of Justiciary have been the sole judges competent in the four pleas of the Crown, as they are called, that is to say, in murder, robbery, rape, and fire-raising, which have always, both on account of their importance and the serious punishment with which they are followed, been reserved for that high tribunal.<sup>4</sup> Whenever also the Court of Session remits cases of forgery to another tribunal, it is always to the Justiciary Court, and not to any inferior judge, that this is done; and in all aggravated cases of forgery, this Court seems the proper tribunal,<sup>4</sup> although there seems no authority, but rather the reverse, for holding that the Sheriff is not competent himself to try those smaller cases of forgery, or uttering, where imprison-

<sup>1</sup> Hume, ii. 48.—<sup>2</sup> 1701. c. 6. Blackst. i. 166. Hume, ii. 48.—<sup>3</sup> Hume, ii. 59.  
—<sup>4</sup> *Ibid.*

ment is the only punishment either concluded for in the libel, or suitable to the case.

It is a general rule also, that wherever a statute prescribes transportation as the punishment for any offence, this in effect confines the cognizance of it upon a libel, concluding for the full statutory pains to the Justiciary Court,<sup>1</sup> as being the only Court competent to inflict that punishment.<sup>2</sup> This principle was applied by the Court in the case of John Russell, March 17, 1827, to the recent act against night-poaching. The first statute introducing that offence, 57th Geo. III. c. 90, prescribed transportation or imprisonment; and as the Sheriff was not competent to inflict the heavier pain, the Court held, on an advocacy from the Sheriff of Linlithgow, who had declined his jurisdiction on that ground, that his judgment was well founded.<sup>3</sup> In this case the libel had concluded for the full pains of the statute, so that the decision fixes nothing as to the case of a statutory offence, authorizing transportation where the inferior pains of fine or imprisonment are alone concluded for, as to which there seems no objection on principle to the competency of the Sheriff, in all cases where his jurisdiction is not excluded by statute or inveterate usage. This difficulty is avoided in the present act, 9th Geo. IV. c. 69, which in all the cases excepting those where transportation may be awarded, declares the Sheriff or Justices competent in Scotland; but adds, "that in all cases of a third offence, or in other cases in Scotland where a sentence of transportation *may* be pronounced, the offender shall be tried before the High Court, or Circuit-Court of Justiciary."<sup>4</sup> Under these words, though the point is not altogether excluded, (inasmuch as on a libel concluding only for fine or imprisonment even for a transportable instance of the offence, transportation *may not* be inflicted,) the probability rather is, that the Court would hold their jurisdiction exclusive in all cases, where, from the nature of the charge, without regard to the conclusions of the libel, the punishment of transportation is competent.

Besides statutes of the foregoing description, there are several which have introduced new sorts of crimes into the law, or have assigned a higher rank, and more severe chastisements,

<sup>1</sup> Hume, ii. 58.—<sup>2</sup> Duncan Kennedy, March 16, 1767; Maclaurin, No. 77.—<sup>3</sup> *Ante*, 551, vol. i.—<sup>4</sup> 9th Geo. IV. c. 69. § 11.



to offences formerly known, and yet are silent as to the Court, where this new and more rigorous code is to be applied. In all such cases, the Court of Justiciary is the tribunal which, *in dubio*, is held as invested with these superior powers; as it is presumed that the legislature did not intend to commit the trial of this great interest to any Court, but that of the highest skill and consideration.<sup>1</sup> This at least is the rule in all cases where the additional sanction is of a capital nature. According to this rule, the Justiciary are the sole Court competent to the trial of any of the felonies created by the Riot Act, 1st Geo. I. c. 5; the crime of enlisting soldiers to serve in a foreign state, contrary to the 9th Geo. II. c. 30; the invading of a privy counsellor for the discharge of his duty to his Majesty, on the act 1660, c. 4; the crime of incest, on the act 1567, c. 14, or the cursing and beating of parents, if laid on the old act 1661, c. 20.<sup>2</sup>

11. The jurisdiction of the Justiciary is also privative in offences properly directed against the state, or the administration of justice, or the execution of their duty by its own officers.

From the nature of treason, as being an offence of the very highest kind levelled against the King, and drawing after it the severest penalties, its trial is competent alone in the Justiciary Court.<sup>3</sup> Whether sedition stands in the same situation, is more doubtful, though the Justiciary has been the Court usually selected for such prosecutions, and the nature of the offence, as directed against the government itself, and not any local or inferior authority or judicature, seems to point to the Supreme Court as the only competent tribunal. On the same principle, the Justiciary Court is alone competent to the trial of all prosecutions of inferior judges or officers, as justices, sheriffs, or magistrates of burghs, for neglect of duty, or corruption in the discharge of their several offices, as these judges are not answerable one to another, and the Supreme Court has a general superintendence over the whole.<sup>4</sup> But there seems no doubt that an officer of any of these subordinate Courts, as a constable, sheriff officer, and burgh officer, are liable to be tried in the Courts to

<sup>1</sup> Hume, ii. 58.—<sup>2</sup> Ibid, ii. 59.—<sup>3</sup> Ibid, ii. 58.—<sup>4</sup> Ibid, ii. 58.



which they severally belong, for malversation in the discharge of the inferior duties which it has intrusted to their care. Prosecutions for deforcement of the King's messengers are competent only in the Supreme Court; and, therefore, where the objection is wished to be avoided, the libel should be laid for assault only, aggravated by being committed on an officer in the discharge of his official duties; but deforcement of the officers of Inferior Courts may be prosecuted in, and more properly belong to, the tribunal to which they severally belong.<sup>1</sup>

12. The Court of Justiciary is privative, by the force of special statute, in various other cases, either by having expressly received the cognizance of certain crimes, or become invested with the same power by unavoidable implication.

Various statutes, which however the change of manners have for the most part consigned to oblivion, have conferred the cognizance of particular offences on the Justiciary Court. Among this number must be reckoned sorning, if prosecuted capitally, which is not now likely, on the act 1455, c. 45; notour adultery, if laid on the statute 1581, c. 105; blasphemy, according to the act 1661, c. 21; denying any of the persons of the Trinity, on the 1695, c. 11; usury, on the 1597, c. 251; clandestine marriage, if the celebrator is to be banished Scotland, or corporal pains inflicted, on the acts 1661, c. 34, or 1698, c. 6. But these statutes have so much fallen into oblivion, from the change of manners since the period of their enactment, that a farther enumeration would be superfluous.<sup>2</sup>

13. The Court of Justiciary has the exclusive power of providing a remedy for all extraordinary or unforeseen occurrences in the course of criminal business, whether before themselves, or any inferior Court.

Akin to the well-known *nobile officium* of the Court of Session, is a similar power enjoyed by the Justiciary Court, of providing a remedy for any extraordinary or unforeseen occurrence in the

<sup>1</sup> Hume, ii. 58.—<sup>2</sup> Ibid, ii. 58.

course of criminal business in any part of the country.<sup>1</sup> This is an unusual remedy, not to be called into operation when any of the Ordinary Courts are adequate to the matter; but still abundantly established wherever no other means of extricating it appears. Thus, on the application of the Lord Advocate, they have repeatedly appointed a Sheriff-depute *pro tempore*, to execute the Porteous Rolls, where no appointment has flowed in time from the proper quarter.<sup>2</sup> On the same principle, they assign an aliment to prisoners on criminal warrants, and modify or control the decisions of inferior judges in that particular; assign particular places, as the Castle of Edinburgh, for the confinement of prisoners in peculiar circumstances, or when contamination or intimidation is in a particular manner apprehended;<sup>3</sup> liberate prisoners whose lives are in danger from confinement; make provision for the support of witnesses who come from a distance, if the Sheriff has not attended to his duty in that particular, as was done in regard to witnesses who had come from Ireland to a late trial at Glasgow, by summarily censuring or altering the arrangements of the Sheriff, to whom the matter properly belongs;<sup>4</sup> give protection to witnesses who require it; grant warrant for the incarceration of witnesses suspected of a design to abscond, or prevaricate, on cause shown by affidavit, or other legal evidence, that they are likely to abscond, or be tampered with; and warrant the edictal citation of those wandering or desperate characters for whom no regular domicile can be assigned, or to whose haunts no access can be obtained.<sup>5</sup>

To this head must be ascribed the power conferred by a recent statute upon the Court to provide extraordinary places for the trial of crimes in particular sheriffdoms.

By 11 Geo. IV. and 1 Gul. IV. c. 37. § 12, it is provided, that "where from the extent of any borough or town, situated at a distance from the head borough of a shire, or from any other cause, it shall be expedient that trials of persons accused of crimes committed in such burgh, or town, or places adjacent thereto, should be there tried, instead of being tried at the said head

<sup>1</sup> Hume, ii. 59.—<sup>2</sup> Nov. 21, 1711, James Wallace to Sheriffdom of Nithsdale. Rose, March 29, 1732, to Sheriffdom of Ross. Alexander Baillie, March 27, 1733, to Sheriffdom of Inverness; and Sinclair of Ulbster, Feb. 23, 1737, to Sheriffdom of Caithness; Hume, ii. 59.—<sup>3</sup> As in M<sup>c</sup>Kinlay's case, July 19, 1817, in regard to the witness Robert Campbell.—<sup>4</sup> Craig and Brown, autumn 1829, Glasgow.—<sup>5</sup> Hume, ii. 59. 60.

burgh : It shall be lawful for the High Court of Justiciary at Edinburgh, on the application of his Majesty's advocate, to give all such directions in that behalf, as the said Court shall think fit ; and the sheriff of the county within which such burgh or town is situated, shall give obedience to all directions so given." In short, the principle is, that wherever the interposition of some authority is necessary to the administration of justice, and there exists no other judicature by whom it can competently be exercised, or which has been in use to exercise it, the Court of Justiciary is empowered and bound to exert its powers, on the application of a proper party, for the furtherance of justice.

14. The Court of Justiciary also have the power of reviewing the sentences of all inferior Courts in Scotland ; and the method of review is either by advocatation, suspension, or appeal.

Besides its ample original jurisdiction, the Justiciary Court possesses also an universal power of *review* of all sentences, save only those of itself or its own members,<sup>1</sup> and of the Court of Session in its criminal capacity. It may well be termed universal, because it was held to apply even to the sentences of the Lord High Admiral, notwithstanding the ample exclusive charter bestowed on him by the act 1681, "in all maritime and seafaring causes, civil or criminal, whatsoever within this realm." These words, how broad soever, were construed to mean only that he was the sole judge competent in the first instance, but not to take away the inherent power of review which belongs to the Justiciary Court, as the highest criminal tribunal in the kingdom ; and accordingly numerous cases have occurred of their having reviewed the sentences of that supreme Court.<sup>2</sup> To the sentences of all inferior judges, it was at all times understood to apply without exception ; but the Court of Session, in their criminal capacity, now in a great measure fallen into disuse, have always been held equally supreme as the Justiciary Court, and therefore no appeal is competent from their decisions in criminal matters to those of the latter tribunal, though such an appeal

<sup>1</sup> Hume, ii. 508, 509.—<sup>2</sup> M'Adam and Long, July 15, 1784 ; Ezekiel M'Haffie, Nov. 26, 1827.



seems competent from the Court of Session even in such matters to the House of Lords.<sup>1</sup>

This review of the sentences of sheriffs, magistrates, justices, and all inferior judges, is either by advocacy, by suspension, or by appeal.

15. The process of *Advocation*, as at present in use, is the remedy by which judgments or sentences of inferior Criminal Courts, which have not yet been carried into execution, are brought under the review of the Supreme Court, and one judge is competent to pass the bill ; but a quorum can alone competently refuse it.

The process of advocacy is obviously properly applicable to those cases where an order or proceeding has taken place in the course of a trial or criminal process in an inferior court, by which the pannel conceives himself aggrieved, but which is not terminated by a final sentence ; and to such cases it should in strictness be applied. Of this description was the case of William Hare, Feb. 2d, 1829, who complained by bill of advocacy to the Justiciary Court, of the commencement of a precognition against him, and the arrest of his person on a charge, at the instance of the private party, in circumstances where he maintained that the right of prosecution had been lost in consequence of his having been adduced as a witness at the instance of the Crown in a previous trial, on an indictment which charged the pannel with the identical murder, with two others, for which he was now arraigned.<sup>2</sup> But for a long period this process has been applied indiscriminately to all cases from inferior criminal tribunals, without regard to the point, whether it was at the close or during the course of the proceedings that this remedy has been sought.<sup>3</sup> Formerly advocations were not competent from the High Court of Admiralty by the special injunction of the act 1681, c. 16 ; but, since the abolition of that court, they are applicable to every inferior court whatsoever.

In modern practice, the process following on an advocacy has been materially shortened from what it was in former days.

<sup>1</sup> James Carse, Aug. 10, 1784 ; Act of Sederunt ; Hume, ii. 509.—<sup>2</sup> Syme's Case, 373.—<sup>3</sup> Hume, ii. 510.



Instead of the bill being passed and the letters expedé, as in the civil process, the discussion takes place on the bill itself, which, if not *instanter* refused, is either followed by answers and replies, followed by a debate at the bar, or by a debate on the bill and answers only, or even on the bill alone, according as the case may more or less urgently seem to require dispatch.<sup>1</sup> Which-ever form is adopted, the presence of the pannels is not requisite at any stage of the proceedings in the Supreme Court, until the bill is passed; although they sometimes are so chiefly with a view to instruct their counsel at the debate.<sup>2</sup>

One judge is competent to pass a bill of advocacy;<sup>3</sup> but a quorum or three is necessary to refuse it.<sup>4</sup> The reason of the distinction is obvious; if the bill is passed, it only opens the doors of the Justiciary Court to discussion, and if it is afterwards refused, it can only be by a quorum of that Court; if it is refused, the party is left without any redress, and therefore this final disposal of the case should not take place but by the same authority.

Instead of passing the bill, the Court may remit the process to the inferior judge, with instructions how to proceed; and this, as an expeditious and satisfactory mode of procedure, has been frequently adopted.<sup>5</sup> Instances, also, have been not unusual of passing the bill, to the effect of trying the cause at the next circuit for the district where it arose.<sup>6</sup>

After the bill is passed, the condition of things is thus far altered, that the presence of both prosecutor and pannel becomes indispensable, as in any other law of criminal prosecution; they have therefore to find caution *de novo*; the prosecutor, if he be a private party, to insist, and the pannel, if not in custody, for his appearance; and no farther steps are legal, but in presence of both parties.<sup>7</sup>

16. The process of suspension applies after the conclusion of a trial in the Inferior Court to prevent, or terminate execution of the sentence; and it is competent wholly in absence of the parties.

<sup>1</sup> Hume, ii. 511.—<sup>2</sup> Nov. 12, 1722, Regality of Tarbolton, Royston MS. 220; Hume, ii. 511.—<sup>3</sup> Wingate, Nov. 25, 1734; Royston, 218; Hume, ii. 512.—<sup>4</sup> Geo. Steedman, Feb. 7, 1810; Hume, ii. 512.—<sup>5</sup> Fraser, April 4, 1729; Brownhill, March 1722; Hume, ii. 512.—<sup>6</sup> W. Macrae, July 3, 1711; A. M'Pherson, Aug. 1, 1711; Hume, ii. 512.—<sup>7</sup> Hume, ii. 512.

Suspension and liberation is the proper remedy, when a trial has been concluded and sentence pronounced; and its object is to have the sentence overturned, and the complainer set at liberty. In this process of review, equally as in that of advocacy, the Court is to be applied to by bill, which it is competent for one of the Court to pass, not only to the effect of granting a *sist*, but of opening the doors of the Justiciary Court.<sup>1</sup> But a refusal of the bill, as it is a final disposal of the case, can here, equally as in advocacy, only be competently done by a quorum of their Lordships.

In a suspension, the question sometimes arises, what powers have the Justiciary Court to set aside a sentence which proceeds on the verdict of an assize? Upon this point there is room for a distinction. If the verdict is challenged on the ground that it is contrary to evidence, certainly this is a ground to which the Court can pay no sort of regard. It is the province of the jury, and their *exclusive* province in criminal matters, to weigh and determine upon the evidence submitted to their consideration; and no process is here recognised similar to that for setting aside a verdict as contrary to evidence in the civil Courts.<sup>2</sup> But, on the other hand, it is the province of the Court to decide whether the evidence laid before them was legal and competent; and therefore, if the suspension be founded on any objection to either a witness received, a question put, or a document admitted, the Court will proceed to enquire into the correctness of that legal decision.<sup>3</sup>

But here the question occurs, what is to be the effect of this investigation? Is the verdict to be altogether set aside, if any error how trifling soever has been committed by the judge, or any piece of evidence how slight soever erroneously admitted or rejected? or have the Court the power of looking into the proceedings, and considering what weight the objectionable matter had in the scale, and suspending or not, according as it appears likely or unlikely to have influenced the decision of the jury? Upon this point the practice of the Court is to hold, that they cannot determine what share any article of evidence, how inconsiderable soever, may have had upon the minds of the jury; and, therefore, that if any error in point of law has been committed by the judge, either in receiving or rejecting evidence, they have

<sup>1</sup> Hume, ii. 514.—<sup>2</sup> Ibid.—<sup>3</sup> Ibid.

no alternative but to quash the verdict. No stronger example of this can be figured than occurred in the case of George Ferguson, James Lindsay, and others, June 28, 1829, where a sentence of the Sheriff of Perth with a jury was brought under review, upon the ground that he had refused to allow one of the witnesses, adduced for the prosecution in a case of riot, to be cross-examined as to whether he had ever been engaged in lifting dead bodies. The Court held that the question should have been admitted, the witness having been previously informed that he might decline answering it; but they expressed a strong inclination to support the conviction, which it was not likely could have been materially altered even if the question had been put. But upon its being brought under their consideration that this was the verdict of a jury, and that it was impossible to say what effect the admission of the question might have had on their decision, they unanimously, though with expressions of regret, suspended the sentence.<sup>1</sup>

It is deserving of consideration, however, how far it is imperative on the Court to follow out this rule in all cases, how great soever the disproportion may be between the weight of the erroneous matter submitted or withheld, and the sum-total of the evidence which led to the conviction. One thing seems perfectly clear, that where the pannel has been convicted on several charges, any alteration of the judgment of the inferior judge, on a point of law affecting one of the charges, is no good ground for setting aside the decision *in toto*; but that the Court are bound to consider what the sentence should be, supposing the conviction on that charge struck out of the record. In doing so, they are not interfering with the province of the jury, but only modifying the sentence of the judge according to the diminished amount of crime of which the pannel is now held to have been convicted; and even in cases where the conviction is of a single charge only, it seems extremely doubtful whether, upon any erroneous decision on a matter of evidence however slight, they are, in every case, bound to overturn the whole sentence. For what if the pannel was proved guilty by the concurring testimony of four eye-witnesses, and the erroneous decision was pronounced in regard to a fifth who was examined unnecessarily, or on an immaterial point of the cause, or in regard to the declaration of the accused, in which nothing of

<sup>1</sup> Unreported.



the least consequence was divulged? In such cases, are the Court forced by any unbending rule to shut their eyes to the weight of evidence which exists independent of the tainted matter, merely because it was a jury and not a judge to whom it was submitted, when ample means of ascertaining what the whole evidence was exist in the notes of the judge who presided at the trial, and of which he is bound by the late act to furnish them, if required, with an authenticated copy? In considering the weight of the proof after the objectionable matter is withdrawn, or after the suspender has received the full benefit of the evidence objected to, whatever it may be, and supposing it as favourable as possible to the pannel, the Court are not setting up their own judgment on a matter of proof against that of the assize, they are only considering the effect on the verdict of the alteration upon the evidence which their legal decision has effected, and applying the principles of that verdict to the altered state of the materials on which it is now based. These, however, are mere speculations, on which no reliance should be placed, unless they are supported by a decision of the Supreme Court.

In reviewing the sentences of inferior judges, pronounced without the intervention of a jury, the Court are always in use to consider the weight of the objectionable matter, and not to suspend the sentence on an erroneous legal decision, unless it is in such a material part of the proof as really affects the conviction. If, therefore, enough remains to support the conviction *aliunde*, the alteration of the judgment on one point will not set aside the sentence as to the remainder.

All objections that appear on the face of the record, as against the relevancy of the indictment, the application of the verdict to it, the interlocutor of relevancy, or which arise from the irregular proceedings of the assize itself, are as much under the control of the Court as the deliverances of the judge on matters of evidence.<sup>1</sup> The assize have no greater privilege to commit error in point of law, in any thing which falls within their province, than the judge; it is in determining on the evidence only that their judgment cannot be overturned. Numerous cases, accordingly, are to be found, in which, on such errors committed by the assize, and proved by production of the record, the Court have inter-

<sup>1</sup> Hume, ii. 515.



ferred without hesitation to set aside the proceedings. To give but one instance of so necessary a rule, in the case of Sanderson, July 1730, the verdict and sentence were set aside, because the assize had irregularly held intercourse with others after inclosure.<sup>1</sup>

On the same principle, if any error has been committed by the judge, either by sustaining an objectionable indictment, or making up an irregular record, the Court will, without hesitation, quash the proceedings, and suspend the sentence, although the verdict of a jury has supervened upon these informal proceedings. In the case of the Comet steam-boat, accordingly, the verdict was set aside in respect of an irregularity in making up the record; the prosecutor in the Admiralty Court having, where there was a double charge, one of culpable homicide, and another of reckless steering, and so killing the persons on board the vessel, deleted part of the indictment, and left the major of the first charge, and the minor of the second, alone standing, and coupled together; a proceeding which, although they cohered sufficiently, was considered as unprecedented and inadmissible.<sup>2</sup>

It is no objection to the review of a sentence by suspension, that it has already in part been put into execution; the prisoner has a right to have the sentence, in so far as it is erroneous, set aside, if any part of his punishment still remains to be undergone.<sup>3</sup> The pannel must remain in jail during the discussion of the bill of suspension, if his sentence is of imprisonment, because the conviction and sentence constitute a case, *prima facie*, against him, which can be taken off only by their being set aside, in whole or in part, by the Supreme Court; and he is not, during that interval, entitled as a matter of right to bail, though that is sometimes agreed to *ex gratia* by the prosecutor, where there seems a reasonable prospect of the suspension being successful.<sup>4</sup> If the sentence be one of death, scourging, the pillory, or corporal pains, which will soon be carried into execution, and render the suspension thereafter useless, it is competent for the Court, and one of their number in this matter possesses the power of doing so, to grant a sist of execution in the meantime, and grant warrant for the transmission of the original proceedings.<sup>5</sup> If the presence of the pannel becomes necessary by the farther discus-

<sup>1</sup> M'Laurin, No. 46; Hume, ii. 515.—<sup>2</sup> Comet case, Dec. 24, 1825, unreported.—

<sup>3</sup> Hume, ii. 515.—<sup>4</sup> Ibid.—<sup>5</sup> Ibid.

sion of the case, after the bill has been passed, he is then transmitted to the jail of Edinburgh, and thence brought up to the Supreme Court at any future diet by their warrant.<sup>1</sup> It is competent for the Court to amend, vary, or alter, the sentence in any way they think fit, as well as set it aside altogether; an instance of which occurred in the last suspension from the Admiralty Court, that of Ezekiel M'Haffie, who had been laid under caution by the Judge-Admiral not to navigate again in a reckless or careless manner, in addition to six months' imprisonment, for culpable homicide committed on board a steam-boat; an addition which the Justiciary Court deemed improper, and struck out, while they affirmed the remainder of the sentence.<sup>2</sup>

17. By special statute, it is competent to bring the sentence of any inferior Judge, not inferring Death or Demembration, by appeal before the next Circuit Court for that district.

By the Jurisdiction Act<sup>3</sup> it is enacted, "That it shall and may be lawful for any party or parties, conceiving himself or themselves aggrieved by any interlocutor, decree, sentence, or judgment of the sheriff or steward's court of any county, shire, or stewartry, or of the courts of any royal borough, or borough of regality or barony, or of any court of any baron, or other heritor having such jurisdiction, as is not hereby abrogated or taken away, where such interlocutor, decree, sentence, or judgment, shall be concerning matters criminal, of whatever nature or extent the same may be, except all cases which infer the loss of life or demembration, or in matters civil, where the subject-matter of the suit did not exceed in value the sum of L.12 sterling, to complain and seek relief against the same by appeal to the next Circuit Court, of the circuit wherein such county, shire, or stewartry, royal borough, or borough of regality or barony, or such barony or estate shall lie, so as no such appeal be competent before a final decree, sentence, or judgment pronounced; and such appeal it shall be lawful for the party conceiving himself aggrieved to take in open Court, at the time of pronouncing such decree, judgment, or sentence, or at any time thereafter, within ten days, by lodging the same in the hands of the clerk

<sup>1</sup> Hume, ii. 515.—<sup>2</sup> Nov. 26, 1827, unreported.—<sup>3</sup> 20 Geo. iii. c. 43, § 34.

of Court, and serving the adverse party with a duplicate thereof personally, or at his dwelling-house, or his procurator or agent in the cause, and serving in like manner the inferior judge himself, in case the appeal shall contain any conclusion against him by way of censure or reparation of damages, for alleged wilful injustice, oppression, or other malversation; and such service shall be held sufficient summons to oblige the adverse party to attend and answer at the next Circuit Court, which shall be held fifteen days at least after such service; and thereupon the judge or judges at such Circuit Court shall and may proceed to cognosce, hear, and determine any such appeal or complaint, by the like rules of law and justice as the Court of Session, or Court of Justiciary respectively, may now cognosce and determine in suspensions of the interlocutors, decree, sentences, or judgments of such inferior Courts; but the said Circuit Court shall proceed therein in a summary way, and in case they shall find the reasons of any such appeal not to be relevant or not instructed, or shall determine against the party so complaining or appealing, the said judge or judges shall condemn the appellant or complainer in such costs as the Court shall think proper to be paid to the other party, not exceeding the real costs *bona fide* expended by such party; and the decree, sentence, or judgment of such civil Court, in any of the cases aforesaid, shall be final.

36. " Provided always, that wherever such appeal shall be brought, such complainer, at the time he enters his appeal as aforesaid, shall lodge in the hands of the clerk of Court, from which the appeal is taken, a bond, with a sufficient cautioner, for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall in that Court be awarded; and the clerk of Court shall be answerable for the sufficiency of such cautioner.

37. " Provided always, that in case such Circuit Court shall, in cognoscing or proceeding upon such appeal, find any such difficulty to arise, that by means thereof such Circuit Courts cannot proceed to the determination of the same, consistently with justice and the nature of the case, in any such case, and not otherwise, it shall and may be lawful to and for such Circuit Court to certify such appeal, together with the reasons of such difficulty, and the proceedings thereupon had before such Circuit Court, to the Court of Session, or Court of Justiciary respectively, which



Courts are hereby respectively authorized and required to proceed in and determine the same.”

Under this statute, it has been decided, that it is competent for a party, against whom decree has been given for damages and imprisonment, to complain by bill of advocation to the Supreme Court, though he had previously, by a minute on record, declared his resolution to enter an appeal to the next Circuit Court, and had entered a bond of caution in terms of the statute, upon the ground that the steps adopted had not been sufficient to entitle him to be heard in the Circuit Court, and consequently that there was no legal appeal, and that even if there had, as there was no judgment of the Circuit Court, he had still a right to be heard.<sup>1</sup> The right of complaint is open alike to either party, and therefore it becomes of importance to enquire what means exist, if the prosecutor appeals, of compelling the pannel to appear and abide by the sentence. Where a sentence of imprisonment for a month had passed, and the prosecutor appealed, upon the ground that he was entitled to damages and expenses, in addition to that pain, the Court granted warrant to detain the man in jail till he should find caution *judicio sisti* after the conclusion of the month, under a penalty of L.50.

When an appeal is taken from any sentence, awarding imprisonment, caution must be lodged at the time of entering it that the prisoner will return to jail and pay the costs, in the event of the appeal being dismissed; and this being a pretty severe burden, renders this mode of bringing cases under review of comparatively rare occurrence. It is competent, however, in this way to suspend the operation of a sentence of an inferior judge, though pronounced with assistance of a jury, upon such grounds as are by law competent to open up a sentence, where the verdict of an assize has intervened.

<sup>1</sup> Shaw, No. 61, p. 70; John Drew v. Thomas Wort.



## CHAPTER II.

### OF THE JURISDICTION OF THE SHERIFF, COURT OF SESSION, AND INFERIOR COURTS.

BESIDES the Court of Justiciary, the Court of Session and various subordinate judges have jurisdiction in Scotland. The most important of these is the *Sheriff*, an officer of great antiquity and experienced utility, and whose duties, both in civil and criminal matters, are daily becoming of more importance.

1. The Sheriff has a concurrent jurisdiction with the Justiciary Court in all offences committed within his bounds, which are not peculiarly reserved, either by statute or inveterate usage, for the Supreme Criminal Tribunal.

The Sheriff is the ancient conservator of the King's peace within his bounds, and, as such, is entitled to take cognizance of all crimes committed within his bounds, which have not been appropriated by statute or custom to some higher tribunal.<sup>1</sup> On this principle, he has the cognizance of all offences committed against the King's peace, such as assault, mobbing, bearing unlawful weapons, hamesucken, sending an incendiary letter, violent threatening, theft, reset, and all ordinary offences of that description.<sup>2</sup> On the same principle he is competent to the trial of falsehood and forgery, to the effect of inflicting an arbitrary pain;<sup>3</sup> usury, so far as relates to the treble penalties; falsehood, fraud, and wilful imposition; fraud, breach of trust, or embezzlement; perjury, and subornation of perjury; breaking prison, deforcing his own officers, or those of other inferior judges within his bounds, though not deforcing the officers of the Supreme

<sup>1</sup> Hume, ii. 60, Mack. xii. 1.—<sup>2</sup> Hume, ii. 61.—<sup>3</sup> *Ibid.*

Courts; bigamy, clandestine marriage, on a libel concluding for the pecuniary penalties; the malversations or wilful neglect of duty by officers in his own courts; sedition; intrusion into churches; bribery, where it forms an article of criminal dittay.<sup>1</sup> Trials of prisoners for uttering forged notes, have of late years been very frequent before the Sheriff in all the larger counties during the last twenty years; and instances have also not been unfrequent where they have entertained libels for forgery itself, in those subordinate cases where an arbitrary pain only is concluded for, or appears suitable to the offence.<sup>2</sup> On the same principle he is intrusted with the execution of the laws against profanity, lewdness, and excessive drinking; against Egyptians and sorners, vagabonds and sturdy beggars; keepers of loose or disorderly houses; destroyers of trees, breakers of yards, cunning-haires, or dovecots; the users of false weights, forestallers, and regraters, so far as any subsisting statute subjects them to punishment.<sup>3</sup> In short, as the judge-ordinary of the bounds, he is *prima facie* to be held as invested with a jurisdiction in all offences, whether at common law, or against particular statutes, unless in so far as his inherent power of enforcing the law has been abrogated by custom, restrained by statute, or virtually taken away by the statutory imposition of a punishment which he is not competent to inflict.

2. But he is not competent to pronounce a sentence of transportation, and therefore where a statute creates an offence, and declares that in certain cases transportation may be inflicted, the Sheriff becomes incompetent to entertain it, at least where that heavier punishment is competent, and the pains of law generally are concluded for in the libel.

The Sheriff cannot pronounce a sentence of transportation, although he can in some cases one of death, because he is not competent to carry the former into execution, while he can the latter. What is to be said then as to those statutory offences which prescribe transportation for the more aggravated cases,

<sup>1</sup> Hume, ii. 61.—<sup>2</sup> George and John Robertson, Perth, autumn 1827. See vol. i. 425.—<sup>3</sup> Hume, ii. 60, 61.

such as night poaching, persons convicted of which may in several cases be subjected to seven or fourteen years' transportation? Is the Sheriff competent to the trial of all such cases, to the effect of inflicting such a sentence as he can legally pronounce; or is he excluded in those cases only where the pains may be extended to that degree; or is he incompetent in every case whatever to the trial of such statutory offence? This point occurred in the case of John Russell, March 17, 1827. The *species facti* there was, that the pannel was charged before the Sheriff of Linlithgow, with an infringement of the Night Poaching Act, 57 Geo. III. c. 90, in a libel concluding generally for the pains of law. It was objected before the Sheriff, that the act authorized the infliction of seven years' transportation, or such inferior punishment as may by law be inflicted on persons convicted of a misdemeanour; and that it directed that "in Scotland such person or persons shall be dealt with, as any person or person *charged with a transportable offence* may be dealt with according to the law and practice of Scotland;" and therefore that the offence could be tried only by a court competent to pronounce sentence of transportation. The Sheriff sustained this plea; and the Court, upon advising a bill of advocation, affirmed the judgment, proceeding upon the principle that as the libel concluded for the pains of law generally, and there was no restriction of these pains on record, the Sheriff, being incompetent to the infliction of the severer punishment, could not entertain the case at all.<sup>1</sup> This decision, therefore, left it still open, whether the Sheriff could entertain such a case, if the pains of law were specially limited to fine or imprisonment; and the difficulty is avoided altogether by a clause in the existing acts, declaring that the Sheriff shall have a cumulative jurisdiction with the justices in the simple offence; and in cases of a third offence, or "where sentence of transportation may be pronounced, the offender shall be tried before the High Court, or Circuit Court of Justiciary."<sup>2</sup>

Were the point not set at rest by this decision, and the subsequent enactment founded on it, it may be doubted whether this decision is altogether agreeable to the principles of law, and whether the opinion of Lord Mackenzie there expressed is not the better one, viz., that the pains concluded for in the libel, are

<sup>1</sup> Justice-Clerk's MS. Hume, ii. 60.—<sup>2</sup> 9 Geo. IV. c. 69, § 10. 11.

the pains which *the Sheriff can competently inflict*; and that because he is not competent to inflict the higher pains applicable to the more aggravated cases under the act, is no reason why he should not entertain the lighter cases where fines or imprisonment would be the suitable penalty, or even the more serious cases, to the effect of inflicting such a punishment as are within his power. It is difficult to see any good answer to the argument that the Sheriff is avowedly competent to try numerous crimes, for which, in their worst forms, transportation is the suitable punishment, as for instance, theft, assault, fraud, swindling, perjury, and many others; and that if the objection that he is incompetent to pronounce a sentence of transportation is sufficient to exclude him from the cognizance of all such offences, nine-tenths of his criminal jurisdiction would at once be swept away. Nor do the words of the statute make any difference; for it merely says, that the persons so charged shall be dealt with as persons "charged with a transportable offence may be dealt with according to the law and practice of Scotland;" and it is impossible to deny that persons charged with transportable offences may be tried before the Sheriff, and are so every day. And of the justice of these observations, the case of Russell itself affords a striking example; for, after the advocacy was discussed, he was tried in the Justiciary Court, and received *two months'* imprisonment, a sentence which it was certainly not *ultra vires* of the Sheriff to have pronounced.

3. The Sheriff, by immemorial custom, is not competent to try persons accused of murder, robbery, rape, or fire-raising, but he may entertain cases of theft of whatever amount.

These crimes, styled the pleas of the Crown, have been, from the earliest times, on account of their importance and difficulty, reserved for the Justiciary Courts. There were certain exceptions to this rule in the case of a murderer taken red-hand, or if the trial was brought on within forty days of the fact charged;<sup>1</sup> but this vestige of barbarity has long since ceased to be put in practice in any part of the country.<sup>2</sup> It seems always to have been understood, that in robbery, or the taking of property by

<sup>1</sup> Mackenzie, ii. 12. § 3.—<sup>2</sup> Hume, ii. 63.



violence,<sup>1</sup> rape, and fire-raising, the jurisdiction of the Justiciary Court is exclusive of every other jurisdiction. In the case of theft it was formerly the law, that the Sheriff was only competent to try the offence if he was taken *in the fang*, as it was called, or had the character of a *fur famosus*; but all these distinctions have long ago vanished, and the power of this officer to try all cases of theft, of whatever amount, and though committed under the aggravation of housebreaking, habit and repute, previous convictions, or opening lockfast places, fully established.<sup>2</sup> So firmly is the Sheriff's jurisdiction in this particular established, that not only has a declinature on that ground been expressly overruled,<sup>3</sup> but, in several instances, sentence of death has been pronounced by that judge, and relief by suspension refused in the Supreme Court.<sup>4</sup> It is probable, however, that though the legality of such a sentence is unquestionable, no Sheriff in Scotland will hereafter pronounce one; there being an obvious propriety in reserving trials, likely to terminate in so serious a result, for the supreme criminal tribunal of the country.

4. The form of process before the Sheriff is different, according as the trial is to be with or without an assize: in the former case, the trial is to be on an *induciæ* of fifteen days, and according to the forms observed in the Justiciary Court in the latter on an *induciæ* of six only, and in a summary form.

The form of process before the Sheriff-Court, which was formerly subject to much uncertainty, is now established on the best footing by more than one statute, and an act of adjournal passed for the regulation of that special matter.

By 6 Geo. IV. c. 23, § 1, 2, 3, 4, the Court of Justiciary is authorized and required "to take into consideration the course of proceeding in criminal causes before the Sheriffs' or Stewards' Courts in Scotland, and to regulate the same by one or more acts of adjournal to be passed by them, from time to time, as they shall see cause." In virtue of the powers thus conferred, the Court of Justiciary, on 17th March 1827, passed an act of adjournal, which establishes regulations to be observed by the Sheriff Courts

<sup>1</sup> Hume, ii. 64.—<sup>2</sup> Ibid. ii. 66.—<sup>3</sup> James Banks and James Sutherland, Dec. 12, 1735; Hume, *ibid.*—<sup>4</sup> Robert Lyle, Nov. 1753, by Sheriff of Renfrew; and Low, Jan. 28, 1785, from Sheriff of Forfar; Hume, ii. 66.

and Borough Courts in criminal cases. These regulations are so admirable, and of such vast importance in the practice of inferior criminal courts, whether Sheriff, Steward, or Borough, that no apology is here necessary for their insertion.

1. "The libel shall be drawn as nearly as possible in the form of criminal letters. It shall give notice of the articles, if any, to be produced in evidence, shall contain a warrant for citing witnesses, and shall be signed by the clerk of court. The diet of compearance shall be filled up before the libel shall be issued by the clerk, and on no account shall any libel be issued by the clerk with the diet of compearance blank. A list of the names and designations of the witnesses, signed by the prosecutor or the clerk of court, must be annexed to the libel.

2. "If the trial is to be by jury, the libel shall contain a warrant for citing assizers, and may conclude generally for the pains of law. A list of the assize shall be signed by the Sheriff or Magistrate, and shall be annexed to the libel and list of witnesses: and the accused shall be cited to underlie the law, at the diet of compearance specified in the libel, on *induciæ* of not less than fifteen free days, *i. e.* exclusive of the day of citation and the day of compearance." A citation, therefore, to stand trial on a Monday, must be served on the pannel on the Saturday *preceding* that day fortnight.

3. "If the trial is to be without a jury, the libel shall conclude for fine, imprisonment, and banishment, or any of them, or other pains of law competent to be inflicted by the Sheriff or Magistrate without a jury; and the *induciæ* shall not be less than six free days.

4. "The officer shall deliver to the party accused, if he find him personally, a full and accurate double of the libel to the will; and a list of the witnesses, and also a list of the assize, when the trial is to be by jury.

5. "If the officer do not find the party accused, he shall leave the double of the libel, and a list of the witnesses, and of the assize, if any, in the party's dwelling-house with one of his family; and if entrance into the dwelling-house be not obtained, the officer shall affix the double of the libel, and a list of the witnesses and of the assize, if any, to the most patent door of the dwelling-house: and in either of these cases, open proclamation must also thereafter be made at the market-cross of the head-

borough of the county; and another double of the libel, and a list of the witnesses and of the assize, must be there affixed.

6. "The list of witnesses and assize served on the party accused, shall not be on a paper apart, but shall be annexed to the double of the libel. It is not necessary that a copy of the signature of the prosecutor or his procurator should be annexed to the list of witnesses so served on the accused, or that a copy of the signature of the Sheriff or Magistrate should be annexed to the list of assize so served.

7. "The double of the libel, and the list of witnesses and list of assize served on the accused, may be written bookwise, and shall be subscribed on each page by the officer executing the same: and shall have a short copy of charge and citation subjoined thereto. This copy of charge and citation shall contain the names and designations of the witnesses present at executing.

8. "The written execution returned by the officer shall be subscribed by him, and by the witnesses specially designed, in whose presence the citation is given. It shall set forth whether the double of the libel, and the lists of witnesses and assize, and short copy of charge and citation subjoined thereto, were served on the accused personally, or left at his dwelling-place with one of his family, which dwelling-place must be particularly designated in the execution, or whether he was otherwise cited; and if he was otherwise cited, the execution shall set forth the manner of citation. The execution shall also state, that the double of the libel, and the lists of witnesses and assize served, were subscribed on each page by the officer.

9. "The original libel, list of witnesses, and list of assizers; the executions against the accused, and against the witnesses and assizers, and also the articles to be produced by the prosecutor in the course of the trial, shall be lodged in the hands of the clerk of court not later than the day before the trial.

10. "If at any diet the accused appear, but the prosecutor fail to insist, the Sheriff or Magistrate may declare the diet to be deserted; and if the circumstances of the case require it, may award expenses to the accused, which may be thereafter recovered by all manner of legal diligence. If the prosecutor's absence be necessary, and the necessity be proved to the satisfaction of the Sheriff or Magistrate, he may excuse the same, and continue the diet to a future time.

"11. When bail has not been found, if the party accused shall



fail to appear at any diet, the Sheriff or Magistrate may grant warrant for apprehending and imprisoning him until he shall find sufficient bail to attend the whole diets of court.

12. " When bail has been found, if the party accused shall fail to appear, the bail-bond may be declared to be forfeited ; and the Sheriff or Magistrate may grant warrant for apprehending the accused, and committing him to jail, till liberated in due course of law.

13. " The party accused, if he demand it, shall receive from the clerk letters of exculpation, containing a warrant for citing witnesses, agreeably to a list signed by the accused or his procurator.

14. " All articles to be founded on by the accused in the course of his trial ; a written statement of the defence, and a list subscribed by the accused or his procurator, of the witnesses to be adduced on the part of the accused, shall be lodged in the hands of the clerk of court, not later than the day before the diet of compareance : and the accused shall not be allowed at the trial to produce any articles which have not been so lodged, or to prove any special defence which has not been stated in writing, and lodged as herein provided, or to examine any witnesses not insert either in a list lodged as herein provided, or in the list of witnesses for the prosecution, unless by special permission of the Court, asked and obtained on cause shown previous to the commencement of the trial.

15. " In trials by jury, the forms of the Court of Justiciary shall be observed, except that the evidence shall be taken down in writing, unless otherwise provided by the legislature. All objections stated in the course of the proceedings, with the answers thereto, shall be entered on the record, if required by the party against whom the judgment on the objection has been pronounced ; or if the objection shall appear to the Sheriff or Magistrate to be of importance, and such as ought to be put on record, though required by neither party.

16. " In trials without a jury, the whole proceedings are to take place, and the evidence shall be led, in presence of the parties and of the judge who is to decide the cause, and the diet shall not be adjourned without reason stated in the record.

17. " In all criminal trials, if the accused has any objection to the principal libel or list of witnesses, or to the double of the libel, or to the list of witnesses served, or to the manner in which



the witnesses are designed, either in the principal libel or the list served, or to the execution of the libel, or to the execution against witnesses, or any objection founded on discrepancy between the double of the libel, or the list of witnesses served, and the record, he shall be bound to state the same, before the interlocutor of relevancy is pronounced, otherwise the objection cannot afterwards be received.

18. "If the accused shall be found guilty, the Sheriff or Magistrate shall, on the motion of the prosecutor, pronounce judgment.

19. "Where a fine has been imposed, or expenses awarded, the Sheriff or Magistrate may grant warrant to imprison the party convicted, till the fine or expenses shall be paid.

20. "In pronouncing and executing sentences importing corporal pains, the Sheriff or Magistrate must attend to the provisions of the 11 Geo. I. c. 26. § 10, and the 3 Geo. II. c. 32. § 2."

These excellent regulations not only amount to a code of laws for the government of all Sheriff and Borough Courts, but they contain a summary of the law on these matters as now settled in the practice of the Court of Justiciary; the rules of that Supreme Tribunal having been adopted with very little variation by its Judges in framing the rules of procedure for inferior jurisdiction: In some particulars, however, these regulations have been superseded or varied by subsequent acts of Parliament, applicable generally to all Criminal Courts in Scotland. These acts will be fully commented on in the sequel; but before dismissing the forms of process before the Sheriff and Borough Courts, the following observations seem indispensable.

1. As to the execution of the libel, it is enacted by Sir William Rae's act 9 Geo. IV. c. 29, that "instead of a short copy of citation being left with a person accused, every copy of a criminal libel served on such person, shall have marked upon it a notice, to be subscribed by the officer of the law who serves the same, and by *one person*, who shall witness such service in the form contained in the Schedule A. annexed to this act: which form of notice shall be observed in *all criminal libels* in Scotland; and it shall not be necessary for such officer to subscribe *any other part* of such copy of a libel."<sup>1</sup>

<sup>1</sup> § 6.

2. It shall be no objection to such service, or to the citation of any juror or witness, that the officer who discharged the duty was not at the time possessed of the warrant of citation; "and it is hereby provided, that the execution of citation of all criminal libel shall be in the form contained in Schedule B. annexed to this act: which execution it shall not be necessary to produce, unless sentence of fugitation, or forfeiture of a bond of caution granted for appearance to stand trial, is moved for; but without prejudice to such exhibition being made to disprove objections to service when stated to the Court: and it shall be no objection to the admissibility of the officer or witness who served such libel to give evidence respecting such service, that their names are not included in the list of witnesses served on the accused."<sup>1</sup> \*

3. "Copies of all criminal libels served on persons accused, and all notices of compearance or attendance, whether left with parties accused, or jurors, or witnesses, and all executions of citation, may be either printed, or in writing, or partly both."<sup>2</sup>

4. "When the charge of art and part is set forth in the outset of a criminal libel, it shall not be necessary to repeat that

<sup>1</sup> § 7.

\* The schedules A and B, showing the form of the short copy of citation, and of the execution which the messenger is to return, showing the service of the indictment, are in these terms:—

Schedule A.

Form of Notice.

A. B., Take notice that you will have to compear before the High Court of Justiciary, (or other Court to be specified,) to answer to the criminal libel against you, to which this notice is attached, on the            day of            at            o'clock.

This notice served on the            day of            by me,

C. D., Macer.

E. F. witness.

(Or other officer of the law.)

Schedule B.

Execution of Citation.

A copy of a criminal libel containing a charge of theft, (or whatever the crime may be,) consisting of            pages, and having annexed to it a list of witnesses, (and of Assize, when the trial is by jury,) was, on the            day of            , served by me upon J. K , by delivering to him personally, (or, as the case may be,) on which copy was marked a notice of compearance, on the            day of            .

A. B., Macer,

E. F. witness.

(Or other officer of the law.)

<sup>2</sup> § 8.

charge in the latter part thereof, according to the form usually observed in the 'at least' clause; and that it shall be competent altogether to omit the said clause; any law or practice to the contrary notwithstanding."<sup>1</sup>

5. "It shall not be competent, in any criminal cause or prosecution whatsoever, for any prosecutor, or person accused, to state any objection to any juror, or to any witness, on the ground of such juror or witness appearing without citation, or without having been duly cited to attend."<sup>2</sup>

6. "If, owing to any error in the name or designation of a witness, as given in the list served along with the criminal libel, a person accused can make it appear that he has been unable to find out such witness, or that he has been misled or deceived in his enquiries concerning such witness, the same shall be stated to the Court, before the jury is sworn, and the Court shall thereupon give such remedy as may be just, and no objection of that description shall afterwards be received."<sup>3</sup>

7. "When a person accused, on being brought to the bar, shall say, that he means to plead Not Guilty, and does not desire that the criminal libel exhibited against him should be read over, it shall not be necessary to read over such libel before proceeding to the trial of such person."<sup>4</sup>

8. "After an interlocutor of relevancy shall have been pronounced, when a person indicted before any criminal Court shall plead Guilty to the crime, or crimes, of which he is accused, it shall no longer be necessary to name a jury for the purpose of deciding on the guilt of such person; but the Court, before whom such accused person shall be tried, shall, upon such confession being made, have power forthwith to pronounce the sentence of the law, in the same manner as if a verdict of Guilty had been returned; provided always that such plea of Guilty shall be made in open Court, and shall then and there be subscribed by the pannel, or by the pannel's procurator, and shall be authenticated by the signature of the judge."<sup>5</sup>

9. "Verdicts in writing shall be discontinued in all cases where the verdict is returned before the Court adjourns."<sup>6</sup>

10. It is lawful for the Sheriffs "to proceed in, try, and determine all causes and prosecutions for crimes before them, where the trial is by jury, by verdict of such jury, upon examining and

<sup>1</sup> § 9.—<sup>2</sup> § 10.—<sup>3</sup> § 11.—<sup>4</sup> § 12.—<sup>5</sup> § 14.—<sup>6</sup> § 15.



hearing the evidence of the witness, or witnesses, in any such cause or prosecution, *viva voce*, without reducing into writing the testimony of any such witness, or witnesses, in the same manner, and according to the same rules, as are observed in trials before the Court of Justiciary; and it is hereby provided, that the judge trying such causes, or prosecutions, shall preserve and duly authenticate the notes of the evidence taken by him in such trial, and shall exhibit the same, or a certified copy thereof, in case the same should be called for by the Court of Justiciary.”<sup>1</sup>

11. “ In trials of crimes before the Sheriff, or other inferior Court in Scotland, without a jury, no part of the proceedings which is not in use to be taken down in writing, in trials by jury, shall be so taken down, excepting only the depositions of witnesses.”<sup>2</sup>

12. “ All warrants of imprisonment for payment of penalty, or for finding of caution, shall specify a period, at the expiry of which the person sentenced shall have been discharged, notwithstanding such penalty shall not have been paid, or caution found.”<sup>3</sup>

These regulations, amended and altered in some particulars as they are by this subsequent act, form a complete code for the regulation of the Sheriff and Borough Courts, in the higher and more important departments of their criminal business; that is, for all cases whatever of their trial by jury, and for all without a jury, in which a higher penalty than that authorized by the summary form of process is concluded for. For the decision upon the various points of practice arising out of these important regulations, reference must be made to the chapters on indictment and pleading in the Supreme Court, where an ample commentary on them will be found. Generally speaking, the points there decided are applicable to proceedings before the Sheriff or Borough Courts, unless in matters relating to the forms and proceedings which exclusively belong to the Justiciary Court.

5. Where the prosecutor in the Sheriff or Police Courts shall conclude for a fine not exceeding ten pounds and expenses, or imprisonment not exceeding sixty days, the trial may proceed in a summary form,

<sup>1</sup> § 17.—<sup>2</sup> § 18.—<sup>3</sup> § 21.



without the pleadings or evidence being reduced to writing.

It is enacted by the same statute, 9 Geo. IV. c. 29, "That in the prosecution of criminal offences before Sheriffs of counties in Scotland, where the prosecutor shall, in his libel, conclude for a fine not exceeding ten pounds, together with expenses, or for imprisonment in jail or bridewell, not exceeding sixty days, accompanied, when necessary, with caution for good behaviour, or to keep the peace for a period not exceeding six months, and under a penalty not exceeding twenty pounds, it shall and may be lawful to proceed to try such offences in the easiest and most expeditious manner, without the pleadings or evidence being reduced to writing, provided always that a record shall be preserved of the charge, and of the judgment, including the names of the witnesses examined on oath, unless when the accused pleads guilty, which shall be made to appear; and the said record shall also set forth, if the prosecutor or accused party desire it, any offer of proof made by either of the parties, and refused to be admitted: and likewise, if so desired, any objection to the admissibility of evidence sustained or repelled by the Court; which record shall be in the form contained in the schedule C, annexed to this act.<sup>1</sup>

"The Sheriff so trying any such offence, shall preserve a note of the evidence taken by him on such trial, and shall exhibit the same, or a certified copy thereof, in case the same should be called for by the Court of Justiciary."<sup>2</sup>

By a subsequent act, 11 Geo. IV. and 1 Will. IV. c. 37, sec. 4, it is enacted, in relation to these summary prosecutions, "That on the prosecution of criminal offences before sheriffs of counties, according to the summary form provided by the said last recited act, (9 Geo. IV. c. 29,) the person accused, when first brought before the Sheriff, shall be entitled to require a copy of the libel against him, and to require that his trial shall be adjourned for a space not less than forty-eight hours after such copy of the libel shall be served upon him; and such requisition shall thereupon be complied with, provided that the same shall be made before the examination of any witness upon the trial shall have commenced; and no such requisition shall be compe-

<sup>1</sup> § 19.—<sup>2</sup> § 20.

tent where a copy of the libel shall have been served upon the person accused, at least forty-eight hours before such trial.

“ No adjournment of any such trial shall take place, when the person accused pleads Not Guilty, or at any other stage of the trial, except when required by the person accused, as herein before provided, unless the Sheriff shall see cause to authorize such an adjournment; and it is provided, that when the declaration of the accused, or other evidence different from parole testimony, shall be adduced on such trial, the production thereof in evidence shall be marked in the record of the trial.”<sup>1</sup>

Under these enactments, it is competent to proceed against a prisoner in this summary form, without any citation at all, by merely putting the libel into his hands when he is brought into Court; provided always, that, if he requires it, the diet shall be adjourned for at least forty-eight hours, to give him time to prepare for his defence; and that if it is intended to proceed against him, at all events, at that diet, he shall have received a copy of the libel at least forty-eight hours before. The safer and more regular course, therefore, in all cases where the trial is meant to be insisted in at first calling, is to give such previous citation, and thereby preclude such demand for delay. The statute *infers* that the declaration of the accused, and other evidence besides parole testimony, may be received; and the only regulation is, that, in such a case, it shall be marked in the record of the trial. It is not therefore necessary to give notice of the production of such documents, or of any other articles of evidence, or to serve the accused with a list of witnesses. The form of procedure prescribed in the act, is decisive upon this point. For the statute says, that a “ record shall be preserved of the *charge* and judgment, including the names of the witnesses *examined on oath*,” which record shall be in the form contained in the schedule C, annexed to this act; and in schedule C is to be found no trace either of lists of witnesses, or notice of production of documents, or articles of evidence.\*

<sup>1</sup> § 5.

\* Schedule C, prescribing the charge and form of process in these summary cases, is in these terms:—

C.

1. Libel.

Unto the Sheriff of the county of

These regulations seem to include all the directions requisite for conducting criminal trials of every description before the Sheriff or Borough Courts. All these trials may be classed under one of three heads. 1. They are either trials by the Sheriff

the complaint of the Procurator-Fiscal of Court, (or other party, with his concurrence,)

Humbly sheweth,

That I. K. has been guilty of the crime of theft, (or otherwise,) actor, or art and part; In so far as on the \_\_\_\_\_ day of \_\_\_\_\_, or about that time, he did (here state the particulars of the offence, specifying particularly the place where the crime was committed). May it therefore please your lordship to grant warrant to apprehend the said \_\_\_\_\_, and to bring him before you, (or to cite him to appear before you,) to answer to this libel; and thereafter to (here specify the punishment concluded for) according to justice.

#### Second. Deliverance on the Libel.

At

18

The Sheriff having considered the libel, grants warrant to officers of Court to apprehend the above designed I. K., and to bring him (or to cite him to appear) to answer the same, and also to cite witnesses for both parties.

(When stolen goods, or the like, are to be searched for, this will be included in the libel or warrant.)

#### Third. Procedure.

At \_\_\_\_\_ 18 . Compeared the said I. K., and the libel being read over to him, he answers that

I. K.

C. D.

If the accused plead Not Guilty, or the case be not concluded at the first diet.

The Sheriff adjourns the diet to \_\_\_\_\_, at \_\_\_\_\_, and, in the meantime, grants warrant to incarcerate the said I. K. in the tolbooth of \_\_\_\_\_, to be detained till that time, or until he finds caution to appear at all future diets of Court, under a penalty of \_\_\_\_\_

C. D.

At \_\_\_\_\_ 18 . Compeared the said I. K. The \_\_\_\_\_, witnesses, after named, were examined upon oath, in support of the libel, *videlicet*,

G. H.

L. M.

And the witnesses after named were examined on oath, in exculpation, *videlicet*,

N. O.

P. Q.

#### Fourth. Sentence.

The Sheriff finds \_\_\_\_\_; and therefore (here add the terms of sentence.)

C. D.

and a jury, in which case, the forms adopted in the Court of Justiciary are to be observed, and the evidence taken down in the Sheriff's notes; or, 2. Trials before the Sheriff or Bailies, without a jury, upon a citation of six free days, in which case the pains of law competent to be inflicted by the Sheriff, without a jury, may be concluded for, and the procedure is to take place in presence of the parties, and the evidence to be taken down in writing. Or, 3. Trials under the summary form authorized by the late act, in which case a fine of L.10, or imprisonment of sixty days, only can be concluded for, and the record is to be made up without the written evidence being taken down, but with a record only of the offer of proof on either side, which has been rejected.

6. It is indispensable in all Courts whatever that the witnesses be put on oath; and if the record bear evidence, or necessarily imply that one or more of them have been admitted without being sworn, the whole proceedings will be set aside in the Supreme Court.

The Police Bills for all the great towns, such as Edinburgh, Glasgow, Aberdeen, &c., contain a power for the Magistrates, sitting in the Police Court, to proceed after a summary fashion, extremely similar to the summary form of procedure prescribed for the Sheriff Courts, without taking down the evidence in writing, where the pains concluded for are only a fine of L.10, or imprisonment for sixty days, and caution to keep the peace to the amount of L.20. In all these Courts, however, and generally in all Courts exercising criminal jurisdiction, whether high or low, it is a sacred rule that the witnesses are to be sworn; and if the record prove, or necessarily infer, that this has not been done with every one of them, the Justiciary Court will at once, upon a suspension, quash the proceedings; and it is held *probatio probata* of this neglect having occurred, if the record bear that some of the witnesses were "sworn and examined," and others "examined" only.<sup>1</sup> It is considered good evidence also of such a fatal omission, if the record does not bear that the witnesses were put on oath, where that is either usually done in cases where that has taken place, or it is directed to be done by the regulations

<sup>1</sup> Thomas Purves, May 16, 1825; Shaw, No. 134.



under which the Court acts.<sup>1</sup> In the case of 'Thomas Connor, January 23, 1826, an objection was stated to the previous convictions libelled on, upon the ground that the witnesses had not been sworn. The record merely stated, that the witnesses were "examined," without any thing farther, so that taken *per se*, it was not decisive one way or other. The Court expressed great doubts whether they could admit parole evidence; but a majority, consisting of the Lord Justice-Clerk, Lords Gillies and M'Kenzie, ultimately held it incompetent, and repelled the objection. And if the record bear, "Having considered the libel, and *taken evidence*," which is often the case, that is justly held as affording a presumption that the evidence taken was taken on oath, that being the species of proof to which the word "evidence" properly applies.<sup>2</sup>

But what shall be said of another point, which is not unlikely to occur? Suppose that it is alleged in a suspension, that the pannel made an offer of proof, but that it was either *neglected* or refused to be taken down, or that the judge refused to take down any objections to the admissibility of evidence on either side, which was indispensable to a right decision of the case? In such a case, there seems room for a distinction. If the suspender allege that competent proof was tendered and rejected, but admit that he omitted to require the judge to take it down, and that accordingly neither his notes nor the record afford any evidence of the fact, this is no ground for an alteration of the sentence; for he has not brought himself within the form prescribed by the statute, and nothing exists to shake the presumption in favour of the record, which is a fundamental point in criminal jurisprudence. So it was lately held by the whole Court, in a suspension of a sentence of Lanarkshire in just such a case.<sup>3</sup> But, on the other hand, if it be alleged that an offer of proof was made, or an objection stated, and that the evidence was admitted in the first case, or the objection repelled in the other, and that the judge *refused* to make an entry thereof, either in the record or his notes, there seems as little room for doubt that the allegation is relevant, and may be competently proved by pa-

<sup>1</sup> Allan Grant, March 5, 1827; Syme, 144; Ann Dykes, Nov. 9, 1827; Syme, 263.—<sup>2</sup> Held settled in M'Queen and Robson, June 4, 1832, unreported. <sup>3</sup> John Russell, June 8, 1829. Unreported.

role proof. In admitting such a proof, the Court do not overturn a record by parole evidence, they merely entertain a complaint *that no record was made up*, and the positive directions of the statute refused to be obeyed in a particular case. A decision, proceeding somewhat on this principle, was pronounced in the case of *Gillespie v. Mills*, Feb. 23, 1831. The allegation in the suspension there was, that the suspender had been incarcerated without having been brought before any magistrate, and of course without any trial or investigation into the charge against him, merely by filling up a blank warrant of imprisonment with his name. This allegation the Court most justly found relevant, and admitted to proof by commission, proceeding on the principle that such a charge must somehow or other be investigated, and that here there was no violation of the rule that a record cannot be contradicted by parole evidence, because there was no record in the proper sense of the word at all. It turned out that the allegation was totally false, and the suspension was refused, with expenses.<sup>1</sup> Unless, however, in the case where a positive offer is made to prove that such an offer of proof or objection was refused to be put on record, though required by the party, it seems much the safer course to adhere to the important rule, that the record is alone to be looked to; the more especially when it is considered how easy it is to make bold allegations, and offer to support them by parole proof in such cases, with no idea of ever proceeding to proof at all, but merely of forcing the opposite party, by the dread of litigating with an insolvent opponent, into a compromise or abandonment of the sentence.

7. It is indispensable that the accused be present at every stage of the process; and if any material step be taken in his absence, it will vitiate the whole proceedings.

It is expressly enjoined by the Act of Adjournal for the Regulation of the Sheriff and Borough Courts already noticed, that in trials by jury the forms of the Justiciary Court shall be observed, and in trials without jury, "the evidence shall be led, and *whole proceedings* take place, in presence of the parties, and

<sup>1</sup> Justice Clerk's MS.

of the judge who is to decide the cause." Under this just and necessary rule, it is of course indispensable that the pannel, in every case, however trifling the punishment, or summary the procedure, be present in the whole proceedings; but it is worthy of observation, that anterior to this enactment, it was part of our common law that the party must be present at the leading of evidence and pronouncing of sentence, and that if this be not the case, the sentence is void.<sup>1</sup> So strongly were the Courts impressed with the necessity of enforcing this rule, that they in every case, where this was omitted, since the ruling decision in the case of Macalister, in 1812, have found the private party, or the Procurator-Fiscal, liable in expenses. And in the case of William Ferguson, 6th August, 1815, the Court, in respect the pannels were absent at the deposition of the principal witness, and when judgment was pronounced against them, suspended the sentence, and found the prosecutor liable in expenses.<sup>2</sup> But it has been held by the Supreme Court that these rules, as to the presence of the pannel at the proceedings, &c., do not apply to a complaint at the instance of a private party, with concurrence of the Procurator-Fiscal, against a party accused of breach of the Game Laws, on the principle that it is not for the interest of either of the parties that the strict rules of criminal procedure should be applied to such cases.<sup>3</sup>

8. In the selection of the form of process to be adopted in regard to any particular crime, it does not appear to be safe to try any case in an inferior Court without a jury, where the charge is of such a kind as to warrant, if proved, six months' imprisonment, and caution to the amount of L.50.

It often is a matter of the very highest importance, to know whether a particular offence should be prosecuted in the inferior Court, with or without the assistance of a jury, the more especially as the Court, in cases where they think that it has been improperly omitted, are in use not only to suspend the sentence simpliciter, but find the prosecutor liable in expenses. It is

<sup>1</sup> June 22, 1812; Macalister and others, June 17, 1816; James M'Hendry, John Erskine, Dec. 14, 1818; Hume, ii. 68.—<sup>2</sup> Unreported. Record.—<sup>3</sup> Sloan v. Earl of Cassilis, Nov. 1823.



highly desirable, therefore, that the Court should lay down some general rule, by which it may at all times be at once known whether a case should be tried with or without a jury. In laying down such a rule, the best test would seem to be the nature of the punishment concluded for in the libel, because that is the conclusion at which the prosecutor, to whom the whole circumstances are known, has arrived concerning it; and if he deem a heavier punishment than that fixed by a certain rule as competent to be inflicted without a jury, called for in the circumstances of the case, he has it in his power to adopt the other and more solemn form of procedure. But however that may be, certain it is that the Court have always eluded the laying down any such general rule, and confined their judgment to the special cases brought before them, and uniformly pointed to the principle of judging of this question by the *nature of the charge*, rather than the conclusions of the libel. It is extremely difficult, therefore, to say what the law is on this point; but as it is a matter on which both the public prosecutors and magistrates throughout the country are daily called on to decide, and the penalty on the former is so severe if they decide erroneously, I have deemed it indispensable to hazard some such rule as is above laid down, subjoining the authorities on which it is founded for its correction or illustration.

The principle, as laid down by Baron Hume, is, that an inferior judge, whether Sheriff, Justice of the Peace, or Magistrate of a borough, may try without a jury, on a libel concluding for fine and damages, or imprisonment only, or banishment forth of the borough or county.<sup>1</sup> This principle was abundantly confirmed in former times, by several decisions of the Supreme Court. Thus, a bill of suspension was refused, where a pannel was convicted, without a jury, of stealing grain from a barn, entered by means of false keys;<sup>2</sup> and in another case, where a party, convicted of insulting a provost, and resisting his officers, had been sentenced to pay a fine of L.5, to be imprisoned a month, and banished the burgh for three years.<sup>3</sup> It was expressly found in a case of embezzlement by a steward of his master's farm, and where imprisonment, pillory, and banishment for life from the county

<sup>1</sup> Hume, ii. 147.—<sup>2</sup> John Falconer, March 21, 1757.—<sup>3</sup> Alex. Flight, March 13, 1767.



was the sentence, "that such a charge was competent to be tried by the Justices of Peace, without a jury."<sup>1</sup> A libel before the Steward of Kirkcudbright, for assault and battery, which concluded for imprisonment, fine, and damages, originally with a jury, was remitted to the inferior judge, with instructions to proceed "*without a jury.*"<sup>2</sup> A suspension of a sentence of the Sheriff of Ayr, of imprisonment for fourteen days, and to pay a fine of L.50, to be levied by imprisonment, on a charge of sundry attempts at subornation, founded on the right of trial by jury, was refused, after advising a full written debate.<sup>3</sup> And at a very recent period, a sentence of the Sheriff of Edinburgh, awarding three months' confinement in Bridewell, in pursuance of a conviction for theft, without a jury, was confirmed, and the advocator found liable in expenses.<sup>4</sup>

Clear as these precedents are on one side of the question, their authority has been weakened, if not overturned, by a still later course of decisions, in which the opposite principle has prevailed, and which are now understood as forming the fixed law on the subject. The first of these cases was that of Michael M'William, Dec. 14, 1818. This man had been sentenced by the Sheriff of Edinburgh to nine months hard labour in Bridewell, and five years banishment from the county, on a conviction, without a jury, of two acts of theft, one of a cotton handkerchief, and one of a silver watch; both stolen from dwelling-houses, under former conviction for the like crimes. In a suspension the Court, "in respect of the *nature of the crime charged* against the complainer, find that the Sheriff, notwithstanding the usage alleged to have taken place, ought to have proceeded with the assistance of a jury, and therefore suspend the sentence."<sup>5</sup> In the next case, the matter underwent a still more deliberate discussion, and a judgment equally decisive was pronounced. A woman was there prosecuted at the instance of the Procurator-Fiscal of Perthshire, on a libel concluding to have her punished "by fine, imprisonment, and banishment from the county, all or any of the said punishments." The fact charged was, that she had within a close adjoining one of the streets of Perth, picked a gentleman's pocket of L.14. The trial was without a jury, and, on advising a bill of

<sup>1</sup> Archibald Tait, Feb. 15, 1776.—<sup>2</sup> Craig and Clarke, March 15, 1788.—<sup>3</sup> Robert and David Cochrane, March 14, 1803.—<sup>4</sup> George Stedman, June 20, 1810.—<sup>5</sup> Hume, ii. 148.

suspension, the Court, "in respect of the nature of the *crime charged* against the complainer, find that the Sheriff ought to have proceeded in this case with the assistance of a jury, and therefore suspend the letters *simpliciter*."<sup>1</sup> The Court there laid down the principle, that the proper criterion to go by in this matter is the nature of the *crime charged*, not the conclusion of the libel. This want of a jury was one of the reasons of suspension, in the case of William Martin, Nov. 7, 1827, charged with an assault upon a woman, and wounding her in the throat with a knife, which was followed with a month's imprisonment, and caution to keep the peace for three years; but the decision of the Court suspending the sentence, was not founded upon that alone, but upon the omission to grant any warrant against witnesses till after the first day of compearance on the libel.<sup>2</sup> At Inverness, Sept. 20, 1827, in the case of Edward Robertson, Lord Alloway suspended the sentence, which was one month's imprisonment, following on a charge of having obtained money by a swindling game, and an assault committed to the effusion of blood, on a magistrate acting in the execution of his duty when apprehending him. The Sheriff had pronounced so lenient a sentence, upon the ground that there was no evidence that the pannel knew the person assaulted was a magistrate; but Lord Alloway held that the nature of the charge was the thing to be looked to, not the limitation of that charge arising from the proof which was disclosed.<sup>3</sup> Lastly, in the case of John Blackwood, Dec. 17, 1827, which was a suspension of a judgment of the Sheriff of Edinburgh, who had sentenced a man to six months' hard labour in Bridewell, for stealing £12 and a pocket-book from a shop, on the ground of the want of a jury, the Court suspended the sentence *simpliciter*, and found the prosecutor liable in expenses.<sup>4</sup>

It is evident from these precedents, that it is a matter of no small difficulty to say what cases should be tried with a jury, and in what that solemnity may with safety be dispensed with. The principle on which the Court proceed, however, is to judge by the charge contained, not the punishment concluded for in the libel. And in applying this principle to practice, perhaps the nearest approach to a fixed rule on the subject is that contained in the text. Certainly all cases of theft, with the aggravation of

<sup>1</sup> Unreported; Hume, ii. 148.—<sup>2</sup> Unreported.—<sup>3</sup> Hume, ii. 149.—<sup>4</sup> Unreported.

housebreaking, or opening lockfast places, or of being habit and repute a thief, or previously convicted, if more than once, of theft, seem to require a jury. The same may be said of simple theft, if to the amount of £10 or upwards, or to the extent even of a few pounds only, if from the person, and by a practised thief. Assaults in the general case, are in a peculiar manner the fit object of summary convictions; but the case seems to be different, if the injury has been to the fracture of bones, or danger of life, or attended with mutilation or irreparable injury to the person. Swindling also in trifling instances, or for inconsiderable sums, may be safely tried without a jury; but one should be summoned if either repeated instances have occurred in the same individual, however small the sum taken in each, or if a sum above £10 has been taken on one occasion, or more than one previous conviction exists. In short, the principle of law is, that all the graver and more serious offences, though punishable by imprisonment only, should be tried by a jury; and it is the safe side to err on, as the law stands, to summon a jury in a case where it is unnecessary, rather than to omit it where it is thought requisite; for no sentence can be set aside, where a jury has needlessly intervened, but it may where it has been improperly omitted.

But while this is the law, to which every judge and practitioner is bound to pay particular attention, while it remains unaltered, it deserves consideration, whether the rule of requiring a jury has not been pushed sufficiently far in our practice, and whether there is really any practical advantage to the prisoner in the great majority of cases of the *minora delicta*, in subjecting him to this public method of trial. The superior severity of punishment following on jury trial is obvious. It confers frequently legal infamy, which a summary conviction does not; it renders the crime of the pannel known to the whole assize, and too often makes retreat from the paths of error impossible, by the publicity which it gives to his delinquence, and it leads to much longer and more grievous imprisonment, both because the citation is longer, and jury trials are taken up by the Sheriffs at stated periods, like quarter sessions, instead of being disposed of *de die in diem* by the Sheriff-substitute on the spot, as they successively arise. Jury trial is of inestimable importance in all political cases, and all cases whatever where a grave sentence, decisive of the prisoner's fate, as that of death or transportation, is to be pronounced; but in smaller cases, where imprisonment only, or fine, is to be the



result, and abridgement of previous confinement, coupled with the means of retreat from crime, are the greatest benefits to the prisoner, it may well admit of doubt, whether a privilege introduced for his benefit does not too often practically become an aggravation of his sufferings.

Should the law on this point become at any future time the subject of legislative enactment, it seems highly desirable, on the one hand, that it should be fixed by some definite line, what cases must be tried by jury, and what not; and, on the other, that no suspension of a sentence on the ground of the want of a jury should be allowed, except where it appears by minutes on record that the pannel, before the interlocutor of relevancy was pronounced before the inferior judge, had made that demand. And it is equally material, that in trifling cases, where a few months' imprisonment is likely to be the punishment, the prisoner should not be subjected to the lengthened confinement and legal infamy which follows this more solemn species of trial. In considering this subject, it is of importance to determine whether the punishment concluded for, or the nature of the charge, should be the test: The former appears at first to be the more certain and satisfactory one to assume; but it is liable to this inconvenience, that it leads to the compounding of crimes, and the prosecution of offences, for the sake of convenience, before a tribunal where an inadequate punishment only can be pronounced; an evil of which the police courts of the country afford ample experience.

9. Inferior Borough Courts have still the power, without a jury, of inflicting corporal pains, in so far as relates to broils, assaults, or proper police offences; but Sheriffs, or Justices of Peace, cannot exercise that power after a summary fashion, at least in the more grave and serious transgressions.

The experienced necessity of a police of great towns, and the extraordinary vigilance and sharp coercion requisite to restrain the growing depravity of their lower class of citizens, have long ago introduced the principle, that Magistrates of boroughs may without a jury inflict corporal pains, in proper police transactions, such as broils, assaults, or outrages in the streets, keeping of disorderly houses, or other the like offences against the peace and



good order of the borough.<sup>1</sup> This was ascertained by an enquiry of the Court into the usage of all the royal boroughs, and expressly sanctioned by their solemn decision.<sup>2</sup> A sentence of the Magistrates of Edinburgh was in the succeeding year confirmed, who had adjudged a woman, keeper of a brothel, who harboured juvenile thieves and prostitutes, to be confined in the House of Correction, privately scourged, and drummed out of the borough.<sup>3</sup> The like judgment was given, without taking an answer, in the case of the suspension of a sentence of the Magistrates of Edinburgh, who had sentenced two prisoners to be scourged through the borough.<sup>4</sup> And in the case of John Johnstone, Feb. 23, 1789, the Court refused to listen to any argument on the general point, "how far *corporal pains* could in any case be inflicted without proceeding by calling a jury;" though they suspended the sentence in the special case before them, upon the ground of its having been fit for that mode of trial.<sup>5</sup>

Although, however, this usage has, from the necessity of the case, thus been admitted in regard to Magistrates of boroughs, it does not appear that it ever obtained in the Sheriff Courts, nor even in the Borough Courts, except in regard to the *minora delicta*, which are properly the subject of police. There are, indeed, some earlier instances where such corporal pains inflicted by justices, were sustained by the supreme Court;<sup>6</sup> but the matter was settled in the negative in the noted case of Leonardo Piscatore, 1770, who was accused before the Sheriff of Mid-Lothian, without a jury, of firing and wounding with a pistol, on a libel which concluded not only for damages, but corporal punishment, by whipping, pillory, imprisonment, or otherwise. He advocated on the ground, that in such a case he was entitled to a jury; and the Court remitted to the Sheriff, with instructions to summon an assize, although the prosecutor, in his answer to the bill, had limited his conclusions to the damages only.<sup>7</sup> In two subsequent cases, in both of which the charge before the Sheriff of Mid-Lothian contained different acts of assaulting, wounding, and maiming, and subsequent thefts from the persons assaulted, and concluded for punishment by whipping, pillory, banishment,

<sup>1</sup> Hume, ii. 149.—<sup>2</sup> Young and Wemyss, March 19, 1783; Hume, *ibid.* App. to Fac. Coll. p. 7.—<sup>3</sup> Jean More, Jan. 17, 1784.—<sup>4</sup> Thomas Elliot and James Alexander, March 10, 1788.—<sup>5</sup> Hume, ii. 150.—<sup>6</sup> Robert Dow, July 13, 1739; Hume, ii. 150.—<sup>7</sup> Maclaurin, No. 100.

or otherwise, the Court found, on separate advocations, that they should have been tried by jury.<sup>1</sup> So also in the case of John Johnstone, Feb. 23, 1789, though the Court, as already noticed, refused to hear an argument on the general point, as to the incompetence of inflicting corporal pains in any case but on the verdict of a jury, they, in the special circumstances of that case, which was an aggravated assault on a passenger in the street, suspended the sentence, in respect a jury had not been summoned. In a subsequent case, where a pannel had been sentenced by the Sheriff of Clackmannan, without a jury, to stand in the pillory, and be drummed through the streets of Alloa, and banished the county for three years, under certification of whipping in case of return, though the Court suspended the sentence on a separate ground, they expressed strong doubts of the power of the justices to inflict the sentence of pillory without a jury.<sup>2</sup> Where the Justices of Peace for Argyleshire had sentenced a man summarily to stand in the jugs for prevarication, the Court suspended the sentence simpliciter.<sup>3</sup> And in a case where the Sheriff of Glasgow had sentenced a man for stealing lead from the roof of a house, to the pillory for half an hour, twelve months' imprisonment, and banishment from the borough, under pain of imprisonment to the extent of two years, in case of return, the Court in a suspension, where the want of a jury was mainly ruled on, suspended the sentence quoad the pillory, and reduced its amount in other particulars.<sup>4</sup>

Upon the whole, though no judgment has yet been pronounced, in which it has been found incompetent for an inferior judge to pronounce sentence awarding corporal pains at all without a jury; yet the leaning of the Court has been constantly becoming stronger of late years, to check the infliction of such a punishment on any other foundation than the verdict of an assize. The thing itself also has gone out of use, by the change of manners, and probably there is no inferior judge who would now take upon himself such a responsibility, even in borough cases, unless the verdict of a jury has intervened. And there appear many reasons, amply sufficient to vindicate such a change, in the altered temper, and increased humanity of the times, and the experienced in-

<sup>1</sup> Wm. Brown, March 19, 1783; Hume, ii. 150; Wm. Ballantine, eod. die.—<sup>2</sup> Janet Clerk, May 22, 1800.—<sup>3</sup> Lachlan Graham, May 17, 1800.—<sup>4</sup> John Tweedale, June 13, 1803.

efficacy of corporal pains, except in case of juvenile offenders, to answer the ends of punishment.

It is a just rule also with the Justiciary Court to discourage the imposition of long imprisonments by the Sheriff without a jury. Upon this ground, in a late case, where the Sheriff of Mid-Lothian had sentenced a woman convicted of attempt at wilful fire-raising before himself, without an assize, to *two years'* imprisonment, the Court, on a suspension, reduced the punishment to one year, upon the ground, that so long an imprisonment should not have been inflicted by the Sheriff without a jury.<sup>1</sup>

10. In many of the greater boroughs the Magistrates have a right of sheriffship, which gives them the same jurisdiction within their bounds which the Sheriff has in the county.

The magistrates of all boroughs have an inherent power, as conservators of the king's peace within their bounds, to repress by suitable punishments the inferior transgressions against the quiet police, or good order of the town. But besides this, to some of the greater boroughs, such as Edinburgh, Glasgow, and Aberdeen, a right of sheriffship is attached, under which the Magistrates of the borough enjoy the like jurisdiction within the royalty, as the Sheriff does over the county in its landward parts.<sup>2</sup> Instances accordingly have not been wanting of late years of trials by jury taking place before the Magistrates of Edinburgh, though from the obvious inadequacy in general of such functionaries, how respectable soever in their proper province to addressing a jury on criminal matters, such trials usually take place before the Sheriff of the county.

11. By a recent statute, the period which must elapse before any capital punishment can be carried into effect, is fixed at not less than fifteen, nor more than twenty-one days after pronouncing sentence, if to the south of the Forth, and not less than twenty, nor more than twenty-seven, if to the north of that river; but inferior corporal pains may be ordered to be inflicted in the first situation

<sup>1</sup> Robina Spence, Feb. 24, 1824, ante, vol. i. 443.—<sup>2</sup> Hume, ii. 70.



after the expiration of eight, in the second of twelve days after pronouncing sentence.

By the 11 Geo. IV. and 1 William IV. c. 37, it is enacted, "That from and after the first day of August next, after the passing of this act, every sentence of any criminal court, imposing a *capital* punishment, if pronounced in Edinburgh, or in any other part of Scotland, to the southward of the Firth or River of Forth, shall specify a day for having the same put in execution, not being less than fifteen days, or more than twenty-one days after the date of such sentence; and if pronounced in any place to the northward of the said Firth or River of Forth, the day to be so specified, shall be not less than twenty days, or more than twenty-seven days, after the date of such sentence."

By the previous act, 11 Geo. I. c. 16, it is enacted, "That from and after the 1st June, 1725, no sentence or judgment of any civil magistrate, or court of judicature, importing a capital, or *any corporal* punishment, if pronounced in Edinburgh, or any other part of Scotland, to the south of the Firth or River of Forth, shall be put to execution within less than thirty days after the date of such sentence; and if pronounced any where to the northward of the said river or Firth of Forth, shall be put to execution within less than forty days after the date of such sentence; provided, nevertheless, that nothing herein contained shall hinder or disable the Courts of Judicature, or any other civil magistrate within Scotland, to commit to jail and detain in custody, in order to trial, or in order to the execution of sentence, as they by law might have done before the making of this act."

It is only "so much of the said recited act (11 Geo. I. c. 26) as prohibits the sentence of the Courts of Judicature importing a *capital* punishment from being put to execution within the periods therein specified," which is repealed "by the 11 Geo. IV. and 1 William IV. c. 37," and consequently the provisions of the prior act remain in full force as to all *corporal* punishments *not capital*. But by the 3 Geo. II. c. 32, § 2, it is enacted, "That from and after the 24th June 1730, it shall and may be lawful to and for all the said Magistrates and Courts of Judicature, to put in execution any judgment or sentence, importing any corporal punishment less than death or dismembering, if given or pronounced in any part of Scotland to the southward of the Firth or River of Forth, after elapsing of eight days, and if given or



pronounced in any other place to the northward of the said Firth or River of Forth, after the elapsing of twelve days, from and after the date of such judgment or sentence respectively, provided always that it shall and may be lawful to and for the Judges of the Court of Justiciary, or any of them, who are hereby severally authorized and required, upon application made, and a reasonable cause shown to him or them, by any person or persons who shall find themselves aggrieved by any such sentence or judgment, pronounced by any Court of Regality, or other inferior civil magistrate or Court of Judicature, to stay all execution of such judgment or sentence for the space of thirty days, to the end that such application may be made for redress as is agreeable to the laws of that part of Great Britain called Scotland."

Inferior judges are expressly required by the late Act of Adjournal, to attend to the provisions of these acts in pronouncing capital or corporal punishments, and the subsequent act of William IV. is of course universally obligatory. Under the present law, therefore, the periods within which capital or corporal punishments may be carried into execution, stand thus:—

1. *Capital* punishment to the south of Forth, must be fixed between fifteen and twenty-one days from the date of the sentence; to the north of that river, from twenty to twenty-seven.

2. *Corporal* punishment, of any sort less than life or dismemberation, may be directed to be carried into execution eight days after the date of the sentence, if to the south of the Forth, twelve if to the north of that river.

3. Any single Judge of the Justiciary Court may, on an application from a person sentenced to corporal pains within the short period last specified, grant a respite for thirty days, to afford time for an application to the Royal mercy.

12. Banishment from Scotland, or from any borough or district of Scotland, can now be competently pronounced only in cases where that penalty is imposed by special Act of Parliament.

By 11 Geo. IV. and 1 William IV. c. 37, § 10, it is enacted, "That it shall not be competent for any Judge or Magistrate to pronounce upon any person whatsoever convicted of any crime, a sentence banishing such person forth of Scotland only, or forth

of any borough, or district, or county of Scotland, save and except in those cases where, by any act or acts of the Parliament of Scotland, now in force, the punishment of banishment forth of Scotland, is enacted and specially provided for any specific offence." Under this enactment it is still lawful to pronounce the sentence of banishment from Scotland, in cases such as celebrating clandestine marriages, where that punishment is specially provided by Act of Parliament for that offence; but is no longer lawful to pronounce such sentence, or of banishment from any borough or shire in crimes at common law, or where that pain is not specially enjoined for the offence. The practical effect of this enactment evidently will be to cause this peculiar species of punishment suited to the infancy of legislation, and which merely relieves one part of the country at the expense of another, to go out of use altogether.

13. The Court of Session, in virtue of special statute, are competent to the trial of several crimes, and of all criminal facts, so far as necessary to judge of civil or patrimonial conclusions; but in such cases, the verdict of the one Court is no evidence in the other.

By various statutes the Lords of Session are invested with a criminal jurisdiction in regard to particular offences, which are in an especial manner connected with their own department of business. Thus they are competent to the trial of deforcement and breach of arrestment,<sup>1</sup> of contravention of lawburrows,<sup>2</sup> of perjury and subornation, when emerging in business before themselves;<sup>3</sup> of fraudulent bankruptcy,<sup>4</sup> wrongous imprisonment, usury, and clandestine marriage, to the effect of inflicting the pecuniary transgressions.<sup>5</sup> By ancient custom also, they are competent to the trial of falsehood and forgery, both when brought before them in the form of improbation, and by petition and complaint, or of any inferior species of falsehood when committed in the course of proceedings before themselves, or of those inferior officers of the law who are subject to their immediate superintendence and control.<sup>6</sup>

The criminal jurisdiction of the Civil Court, however, though

<sup>1</sup> 1581, c. 118.—<sup>2</sup> 1581, c. 117.—<sup>3</sup> 1555, c. 47.—<sup>4</sup> 1696, c. 5.—<sup>5</sup> 1701, c. 6; 1597, c. 251; 1661, c. 34.—<sup>6</sup> Hume, ii. 71.

frequently put in force in former times, is now more the subject of curiosity than use, as the forms of its proceedings are inconsistent with the proper investigation of delinquencies, and it is now usual, accordingly, where any delinquency emerges before themselves, to remit the case to his Majesty's advocate for investigation and trial before the Justiciary Court.

It is of more importance to observe, that the Court of Session is, *ex virtute officii*, competent to the investigation of all criminal acts, how high or atrocious soever, where they emerge or are necessary to the decision of questions of assythment, damages, or civil interest brought before them.<sup>1</sup> Thus, though not authorized by any remit from a criminal judge, they may decree assythment to the kinsman of one who has been murdered.<sup>2</sup> In like manner, the injured husband may receive damages from the seducer of his wife, or one assaulted may raise an action of reparation and damages; too many of which, proceeding often on the most frivolous grounds, have been brought, since the introduction of jury trial, in the Jury Court. So also, if a verdict has been returned against any one, convicting him of theft, wilful fire-raising, defrauding insurance offices, or the like, and he escape with his life by a pardon, restriction of the libel, or the like, still he is liable in the Civil Court for restitution of the value of the goods stolen, or the damage occasioned by the crime.<sup>3</sup>

Farther still, though no criminal process at all have been raised, either from the Lord Advocate declining to prosecute, or any other cause, still the injured party may himself bring a civil action for reparation of the wrong occasioned, and in the course of that action the whole criminal acts may be tried before them just as before the Criminal Court. A noted instance of this occurred in the case of *Moffat v. Miller*, November 11, 1819. This man had been apprehended some years before, on a charge of having broken into the Paisley Union Bank, and stolen bank-notes to the amount of £20,000. When apprehended, bills to the value of £1000 were found on his person, which the Bank arrested in the hands of the town-clerk of Edinburgh, with whom they were officially deposited, upon the ground that they had been purchased with part of the stolen property. *Moffat* afterwards was liberated, as the Lord Advocate declined to prosecute, and he some

<sup>1</sup> Hume, ii. 71.—<sup>2</sup> Campbell of Kilberry; M'Laurin, No. 98; Abernethy of May; *Ibid.* No. 99.—<sup>3</sup> Buchanan v. Bontein, Nov. 27, 1739; *Kilk. Res Judicata*, No. 2.



years after claimed the bills in a multiplepounding brought in name of the town-clerk, and thus the Bank were compelled to prove the theft, to resist restitution of the claimed money. A remit was made to the Jury Court to investigate the fact, and a trial ensued, in the course of which the crime was completely brought home to him, and verdict passed in favour of the Bank. Subsequently he was arrested on a criminal charge for the same offence, convicted on January 12, 1820, and sentenced to death, though he died in prison before it was carried into execution.<sup>1</sup> Of course, the Court are equally competent to investigate all such criminal acts when they are not the grounds of a libel, but brought forward incidentally as a defence against a demand made by others. Of such a kind was the case of *Moffat v. Miller*, already noticed; and another instance occurred in the case of *Ker v. Sun Fire-Office*, Feb. 1, 1797, where, on an action against underwriters for the value of a house which had been consumed, the allegation that it had been wilfully set on fire to defraud them, was made the subject of investigation in the Civil Court.<sup>2</sup>

Where the accused has already been tried in the Criminal Court, the whole evidence must be a second time laid before the jury in the Civil Tribunal. Baron Hume, indeed, lays it down, that "if the pannel has been convicted thus far, regard shall probably be had to the evidence taken in his trial, that the Civil Court will not require to have the whole proof taken a second time, but will hold it for lawful evidence, unless good objections to the witnesses are now shown, as if it had been given before themselves."<sup>3</sup> But this opinion is more applicable to the old form of process, both before the Courts of Justiciary and Session, than their present method of proceeding, which, being with the assistance of a jury, and without the evidence being taken down in writing in both cases, leaves no record of the evidence in either but the judges' notes, which there is no authority for submitting to a subsequent assize. Accordingly, in the late case of *John and James Wilson*, which was an action brought for a malicious prosecution on account of a horse alleged to have been maliciously slaughtered, the Court assoilzied the defender, on a proof taken in the Civil Tribunal, though the pursuer had been acquitted under the directions of the Circuit Court at Ayr, in spring 1827, when tried on the criminal charge.<sup>4</sup>

<sup>1</sup> Murray's Rep. i. p. 272.—<sup>2</sup> Fac. Col. Hume, ii. 71.—<sup>3</sup> Ibid. 72.—<sup>4</sup> Shaw and Dunlop, ix. p. 327. Feb. 1830.

It has long been settled, that in judging of the civil interest, the Court of Session are entitled entirely to disregard a verdict of acquittal obtained in the Justiciary Court.<sup>1</sup> So it was held in a case where the jury in the Criminal Court had acquitted the pannel of an attempt to bribe the Solicitor of Excise; but the Civil Court, as in a case of *turpis causa*, refused action to the alleged briber and his creditors, when suing for restitution of the money.<sup>2</sup> In like manner, in an action brought for recovery of the insured value of a house which had been consumed by fire, the Lords of Session assoilzied the defenders, upon the ground that there was sufficient evidence of the house having been wilfully burned, though on a trial of the alleged offender before the Court of Justiciary, an acquittal had been obtained.<sup>3</sup> The same point was held as perfectly fixed in a subsequent case, where certain cabinet-makers in Glasgow, having been convicted before the Magistrates of that city of an assault, for the purpose of combination, and subsequently obtained relief by bill of suspension, in consequence of some flagrant irregularities in the procedure in the inferior court, the Court held, in a subsequent action of damages against the private party, grounded on the injury sustained in these proceedings, that the decision in the Criminal Court was to be entirely disregarded, excepting as an authority in point of law, on the formal errors there given effect to; and the claim for damages disposed of on its own merits, as it might appear to the Court from the facts disclosed before themselves, coupled with that previous decision.<sup>4</sup>

14. The Court of Session have a power of reviewing the sentences of inferior Courts in certain police cases, where the proceedings are rather of a civil than criminal nature; but wherever the suit is at the instance of the public accuser, and properly of a criminal character, or though at the private instance with his concurrence, if a fine *in vindictam publicam* be concluded for, and the proceedings be of a criminal character, the Justiciary Court is the proper place to apply for review.

From a very remote period, the Court of Session have been

<sup>1</sup> Hume, ii. 72.—<sup>2</sup> Stein v. Bonar, Dec. 4, 1789, Fac. Col.—<sup>3</sup> Trustees of J. Kerr, v. Sun Fire-Office, Feb. 1, 1797, Fac. Col.—<sup>4</sup> Ronald and Others v. Robertson, Reid, and Brother, June 1820, unreported.

in use to review the sentences of inferior courts in certain criminal cases of a police nature, and that not only where the process was at the instance of a private party for reparation, but of the procurator-fiscal for example.<sup>1</sup> And this applied not only to sentences awarding pecuniary pains, but to those even of imprisonment or banishment for a borough or county, or for caution to keep the peace, if pronounced on a summary trial without a jury, and for such disorders as fall properly under the notion of breaches of police. Accordingly, many cases formerly occurred, in which not only were suspensions entertained of sentences of Magistrates of boroughs banishing persons from their bounds for keeping disorderly houses,<sup>2</sup> but even in cases such as stealing poultry, where a fine of £10, caution for good behaviour, and imprisonment for six months, had been inflicted.<sup>3</sup>

But these decisions, though pronounced at no very distant period, have lost nearly all their weight in consequence of the practice of later times, when more correct ideas have come to prevail as to the great lines of distinction between civil and criminal practice. Mr Hume observed this tendency of our practice, and mentioned it with commendation;<sup>4</sup> and since his commentaries were published, the train of decisions has been so uniform the other way, as nearly to have swept this anomalous jurisdiction of the Court of Session from our practice. In the first of these cases, where the sentence complained of was that of pilory and imprisonment pronounced by a Sheriff against a porter accused of embezzlement, the Court of Session unanimously refused the bill as incompetent.<sup>5</sup> This was followed shortly after, in a case where a month's imprisonment only, and a fine of £30, had been inflicted by the Sheriff, on a libel at the instance of the procurator-fiscal, only for subornation of perjury, and three similar bills were on the same day refused on the same ground of incompetency.<sup>6</sup> Again, in the case of *John Cumming v. William Johnston*, June 29, 1810, the Court refused as incompetent, in pursuance of the opinion of President Blair, a suspension of a decree of the Sheriff of Renfrew, forfeiting the bail-bond lodged for a party who had been prosecuted in that Court at the instance of a private party, in a libel concluding for fine and damages on

<sup>1</sup> Hume, ii. 72.—<sup>2</sup> James M'Arthur and Jean Stevenson, Dec. 16, 1775, Fac. Col. Margaret Burns, Dec. 12, 1789; Hume, ii. 72.—<sup>3</sup> David Wilkie, July 10, 1798.—

<sup>4</sup> Hume, ii. 74.—<sup>5</sup> Walker and Rodger, Jan. 17, 1809, Fac. Col.—<sup>6</sup> Fiscal of Ayrshire v. Guthrie and Finlay, May 15, 1810; Hume, ii. 73.



account of an assault. "The forfeiture of this bond," said that great judge, "arises out of proceedings in a criminal case, and must be judged by the principles of criminal law, of which a civil court is not competent to judge." This obtained also, although the bond had not been forfeited at calling the criminal process, but upon a petition offered to the Sheriff three days after, and served on the cautioner.<sup>1</sup> The same course was adopted in the Court of Session, in the case even of a sentence of a fine only, if awarded in a prosecution at the instance only of the fiscal, for the public interest, and not in relation to any police transgression. So it was found in the suspension of a decree of the Justices of Lanarkshire, who had inflicted a fine of £100 on a person charged with fraud and imposition in relation to webs given out to be wove, on a libel at the instance of the fiscal alone, concluding for a fine to be levied by imprisonment, and other punishment in person and property.<sup>2</sup> On the same principle, a bill of suspension of a sentence in the police court of 60 days' imprisonment, awarded against a boy on a charge of stealing a shovel from a scavenger, was refused as incompetent.<sup>3</sup> In like manner, where a party had been apprehended on suspicion of being concerned in a theft from a bank, and large parcels of bank-notes had been seized on his person, which were made the subject of a precognition, but the prisoner had run his letters without any libel being raised against him, and he had applied to the Sheriff for restitution of the notes, and the application was opposed by the bank, on the ground of proceedings against the thieves in London and elsewhere, and the Sheriff had ordered the bank to say when these proceedings were likely to terminate, an advocacy of this interlocutor was held to be incompetent in the Court of Session, as it related to a *subsisting* criminal process.<sup>4</sup> It would have been otherwise if the precognition had been terminated, or unduly delayed, as then the civil interest alone would have remained. Lastly, where a libel was raised by a private party, with concurrence of the procurator-fiscal, against a pannel for poisoning a dog, concluding for £20 to the fiscal, with warrant of imprisonment till paid, thirty guineas as the value of the dog, and one hundred guineas as a solatium to the private party, and the

<sup>1</sup> Unreported; Hume, ii. 73.—<sup>2</sup> Fiscal of Lanarkshire v. Watson and Ramsay, June 5, 1812, Fac. Col.—<sup>3</sup> John Porteous, Feb. 21, 1818; Hume, ii. 73.—<sup>4</sup> Unreported; Hume, ii. 73.

proceedings had been after the form of criminal courts, the Court, on advising memorials, in respect of the form of the libel, and the character of the proceedings, dismissed as incompetent an advocacy complaining of a judgment assoilzieing the defenders.<sup>1</sup>

Upon the whole, therefore, the rule seems to be now settled, that where the public prosecutor is the accuser, or even where the private party insists with his concurrence, but the proceedings have been of a criminal character, and a fine or other punishment *in vindictam publicam* is concluded for, the proper court of review is the Justiciary Court.

## CHAPTER III.

### ON THE SOURCES OF CRIMINAL JURISDICTION.

IN the books of the foreign commentators, an ample commentary is to be found on the sources of criminal jurisdiction; or the circumstances which authorize a criminal tribunal to take cognizance of, and pronounce sentence on, an offender brought before them. These are the *forum delicti*, or the circumstance of the crime having been committed within the Judge's territory: the *forum apprehensionis*, or that of his having been apprehended there: the *forum originis*, or that of his having been born there; and the *forum domicilii*, or that of his having been domiciled there. How far these principles are received in the Scottish practice, will best appear from the following observations:—

1. The *forum originis* is so far received in our practice, that any person, born in the British dominions, is guilty of high treason, if he is found in arms against the state, though in the service of another power: but except to that effect, it does not, *per se*, confer criminal jurisdiction.

If a person is born in Scotland, though of foreign parents, he owes this country a debt of gratitude, for protection during the long and helpless period of infancy, which is justly held sufficient to debar him, at any period of his life, from bearing arms

<sup>1</sup> James Roger v. Robert and Alexander Gray, Nov. 1820. Fac. Col.

against the country of his nativity. No matter how short may have been the period of his residence in infancy in this country, or how long and close his connexion with a foreign state since that time, still he is held in strict law to be under such obligations to it on the footing of nativity, that he cannot shake himself loose of them at any subsequent period of life.<sup>1</sup> Thus, in 1665, Colonel John Kirkpatrick, and eleven others, soldiers of fortune, who continued to bear arms against this country, notwithstanding its rupture with the United States, in whose service they were, were outlawed for treason;<sup>2</sup> and, a century after, Angus M'Donald had sentence of death, as a traitor, for acting under a French commission, in 1745, though he had been carried abroad in his infancy, and had always resided in that country, to which all his possessions and property attached him as a native.<sup>3</sup> But though such is the strict and necessary rule of law, the humanity of the Crown will doubtless interpose its pardon, in all those cases where the legal traitor is only constructively connected with this country, and has not incurred, morally speaking, the guilt of treason, by violating a real allegiance, and forgetting the experienced obligation of actual protection during a considerable part of life. Traitors, such as Wolfe Tone, in the Irish rebellion, who, on account of real or supposed grievances, join in manhood the ranks of its enemies, and are found combating to subvert its government, have not only no legal or moral excuse, but they are the worst species of traitors, as uniting foreign aggression with domestic insurrection, and seeking, instead of the numerous means of redress which the constitution has thrown open, that aid from foreign powers, which experience had proved is always more likely to aggravate than remedy any domestic evils.

If a native of Scotland go abroad, but return, commit a crime here, and again escape out of the realm, the circumstance of his birth shall thus far have weight against him, that he may be outlawed for the offence:<sup>4</sup> though a foreigner, in similar circumstances, could not be subjected to that penalty.<sup>5</sup> But farther than this, our practice does not warrant us in asserting that the *forum originis* would, in our practice, be carried. There is no authority for affirming that it would be sufficient to entitle our

<sup>1</sup> Hume, i. 50.—<sup>2</sup> Ibid. Dec. 27, 1665.—<sup>3</sup> Foster's Reports, Dec. 10, 1747.—<sup>4</sup> Robert Creswell, Feb. 10, 1766.—<sup>5</sup> Hume, ii. 50.



courts to try a native Scotsman for a crime committed abroad even on another Scotsman, even if he should afterwards return to this country.<sup>1</sup> A case of this description once occurred, with this difference only, that the deceased, as well as the survivor, was settled in a foreign country : but in the end, in pursuance of an act of Privy Council, proceeding on the ground, “in respect that the said slaughter was committed *out of our dominions*,” the justices deserted the diet.<sup>2</sup> The case, however, would be much more delicate, and possibly might be otherwise decided, if such a crime were to be committed by one Scotsman on another, though both resident at the time abroad, if they were in circumstances of close and immediate connexion with this country, as if both were in the service of a foreign ambassador abroad, or soldiers in a British regiment abroad, or members of a Scots factory in a foreign country.<sup>3</sup> On this point, however, there is no decided case to direct our judgment.

If a Scotsman commits a crime abroad, and flies here for refuge, he is not liable to be apprehended and carried back to the state whose laws he has violated, by reason of his inherent right to the protection of our laws, which he has done nothing within this realm to forfeit.<sup>4</sup> If, indeed, he had been apprehended abroad, we would certainly not have interfered with the right, which they, like every other state, possessed, of punishing all persons, of whatever origin, who have committed crimes within their bounds : but if he returns here, he falls under protection of our ordinary laws, intended to secure the liberty of the subject, the most important of which declares, “that no person shall be transported forth of this realm, except with his own consent given before a judge, or by a legal *sentence*,” a term which is not applicable to any preparatory order or warrant with a view to his trial elsewhere.<sup>5</sup> There is an exception, however, to this rule, in regard to the apprehension of Scotsmen accused of crimes in England and Ireland, which will be hereafter considered.

2. The *forum domicilii* is not admitted in our practice, to the effect of authorizing the trial here of a person who has committed a crime abroad : although, by special statute, the aid of our magistrates is required to assist in

<sup>1</sup> Hume, ii. 50.—<sup>2</sup> Captain H. Bruce, March 29, 1622. Hume, *Ibid.*—<sup>3</sup> Hume ii. 52.  
—<sup>4</sup> *Ibid.* ii. 52.—<sup>5</sup> 1701, c. 6. Hume, ii. 52.

the apprehension of any person charged with committing an offence in any part of his Majesty's dominions.

A person domiciliated here, whether a Scotsman or a foreigner, for any crime he may have committed abroad, is not liable to be tried before our courts.<sup>1</sup> They are not instituted to administer justice over the whole world, but in our own country, or a particular district of it only; and, therefore, if the crime charged has been committed beyond those limits, they are neither called upon nor entitled to step forward for its correction.

With respect, however, to the *apprehension* of persons charged with committing crimes in England or Ireland, or any other part of the British dominions, we have a variety of statutory enactments, calculated to ensure their arrest and detention, in order to their transmission to the place where the crime was committed, which will be fully commented on in speaking of arrest and precognition.<sup>2</sup> In all these cases, however, the offender, when taken, must be transmitted for trial to the country where the crime was committed—and our courts, however authorized to investigate their charge in precognition, cannot proceed to its final disposal. The case of theft, where the stolen goods are brought from abroad into this country, is no exception to these principles, for, by so bringing the stolen goods within the jurisdiction of our courts, a *crimen continuum* is committed, which makes the offenders amenable to their coercion, on the principle of the *forum delicti*. Accordingly, in a case where a man had been committed to the jail of Kirkcudbright, on the warrant of a Scotch Justice, on a petition from the procurator-fiscal of that shire, on the charge of a forgery committed in England against the Bank of England; and the petition whereon he was committed, prayed, “to detain him until he shall be removed to London, upon a legal warrant, there to be tried for the crime alleged against him, or until he shall be liberated in due course of law;” the Court, under the direction of Lord Justice-Clerk Hope, gave an immediate order for his liberation; “in respect the procurator-fiscal for the county of Dumfries has *no interest* to prosecute for a crime alleged to have been committed in England.”<sup>3</sup> Afterwards, he raised an action before the Court of Session, for the

<sup>1</sup> Hume, ii. 52.—<sup>2</sup> 1612, c. 2; 13 Geo. III. c. 31; 54 Geo. III. c. 186; 45 Geo. III. c. 92. *Infra*, c. iv.—<sup>3</sup> John Rae Mure, Oct. 1809. Hume, ii. 53.

penalties of the act 1701, and succeeded: the Judges concurring in the opinion, that the only competent course of proceeding for a Scotch magistrate, in such a case, would have been to have indorsed an English warrant, in terms of the statutes, and on that warrant apprehended the prisoner, and transmitted him for trial in that country.<sup>1</sup> Upon the same principle, where a prisoner was charged with uttering forged bank-notes, partly in this country, and partly in England; and though the charge of uttering in England was given up by the Lord Advocate, in the debate on the relevancy, but no proper restriction of the libel to the Scotch charge was put on record, and the jury found the pannel guilty generally, the objection in arrest of judgment was sustained, that it was uncertain whether the pannel was not convicted of the English charge, and, therefore, that no sentence could pass on the verdict.<sup>2</sup>

3. If a crime, however, be committed, partly in this country, and partly in England, the pannel may be tried for that part committed here; and in the proof of that libel, evidence may incidentally be led of the previous part of the criminal proceeding which occurred in that country.

If a crime be committed partly in England or Ireland, and partly in this country, as by throwing off forged notes at Belfast, and circulating them here; or composing and printing a libel in England, and circulating it here, no one can doubt that he may be tried in this country for the Scotch part of the offence. Numerous instances, accordingly, have occurred, where in such cases the trial for the uttering the forged instrument has taken place in our courts, though they were fabricated in England or Ireland; in particular, *Herries*, April 1770, where the notes were thrown off in London, and *Macaffie*, Nov. 1782.<sup>3</sup> Indeed, in almost all the cases which have been tried in Glasgow of late years, for uttering forged notes, the actual forgery was committed in the north of Ireland, and the notes were brought over for circulation in this country. The same principle applies to one who writes an incendiary letter in England, and sends it down, whether

<sup>1</sup> Fac. Col. 10th July 1811. *J. Rae Mure v. P. F. of Kirkcudbright*.—<sup>2</sup> *George Elliot*, 18th July 1800, and 9th Feb. 1801; *Hume*, ii. 53.—<sup>3</sup> Unreported.



by post or otherwise, to this country. He stands in the same situation with one, who, standing on the English side of the border, discharges a gun at a man on the Scotch side; and no reasonable doubt can be entertained of the competence of trying him in this country, where his crime has taken its destined effect. Such a case, accordingly, has lately occurred. A person wrote two letters, the one dated Dublin, containing threatening expressions, the other Newcastle-upon-Tyne, containing a challenge, and transmitted them both to a gentleman in Edinburgh. A petition was presented to the Court of Justiciary, at the instance of the Lord Advocate, setting forth these facts, and praying for a warrant to commit to prison till caution was found to keep the peace; and the court, without hesitation, granted the warrant prayed for.<sup>1</sup> This precedent is of the more authority, because the Court, on the day on which they granted the warrant, and immediately before subscribing it, had had their attention specially drawn to the nature of the crime charged, and the objection to their jurisdiction over it, in a previous suspension and liberation, at the instance of the same party, where they liberated him from a former warrant, granted in relation to the same charge, but on an irregular application.<sup>2</sup>

By Mr Peel's act, 9 Geo. IV. c. 31, sect. 8, it is provided, "That when any person being feloniously stricken, poisoned, or otherwise hurt *upon the sea, or at any place out of England*, shall die of such stroke, poisoning, or hurt in England; or being feloniously stricken, poisoned, or otherwise hurt at any place *in England*, shall die of such stroke, poisoning, or hurt, upon the sea, or at any place out of England: Every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, enquired of, tried, determined, and punished in the country or place in England, in which such death-stroke, poisoning, or hurt shall happen, in the same manner, in all respects, as if that offence had been wholly committed in that county or place."<sup>3</sup>

The same statute contains a provision for the trial in England, under a special commission of oyer and terminer, of any of his Majesty's subjects who shall be "charged in England with any murder or manslaughter, or with being accessory before the fact

<sup>1</sup> William Taylor, 4th March 1818; Hume, ii. 54.—<sup>2</sup> *Infra*, c. iv.—<sup>3</sup> § 8.

to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land, out of the United Kingdom, whether within the king's dominions or without."<sup>1</sup> And it declares, "that if any person, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have take place in England or elsewhere, this shall be felony:" and "any such offence may be dealt with, tried, determined, and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county."<sup>2</sup>

This act does not extend to Scotland; but it would appear that the principle of our common law reaches all cases, without any special enactment, of a *crimen continuum*, or where a crime consists in different acts, of which part are committed, and receive their full accomplishment in this country. It is stated, accordingly, by Baron Hume, that in the case of a forcible abduction and marriage by a Scots offender, if the woman, after being seized in England, is brought to this country, even after her marriage, and continues his confinement of her person there, he becomes amenable to our courts for that his *continuation* of the illegal conduct within their jurisdiction. But if the crime, in so far as the criminal was concerned, has received its full accomplishment in a foreign country, and the victim of the violence comes here—as, if a man is wounded in England, and comes to Scotland, where he languishes and dies—there seems no principle on which, if the offender also comes here, he can be competently tried by our courts: for the criminal act has not received its full accomplishment, nor was it continued here: its *effect* alone remained when the sufferer entered the jurisdiction of our courts; and it is not the place where the consequences of criminal acts were developed, but those where they were committed or contrived, that forms the proper quarter for their trial and punishment.

It is evident, that in the trial of such continuous crimes as may be competently enquired into in our courts, it may often become necessary to enter into the proof of the original hatching or commencement of the crime, by acts committed in a foreign country. Such proof is clearly competent, and is always admitted when such cases occur in our courts: not that these acts, com-

<sup>1</sup> § 7.—<sup>2</sup> § 22.

mitted *extra territorium*, can competently be made the subject of trial or punishment here, but that they are necessary to elucidate or prove that part of the case that does fall under our jurisdiction, in the same way as the proof of a criminal act committed in Scotland may be carried into any country to which the criminal may have fled, or where he may have transported his ill-gotten gains.

4. The *forum deprehensionis* is not admitted in this country, except in cases of a *crimen continuum*, or where, by special statute, the cognizance of crimes committed *extra territorium* has been conferred upon our Judges.

Akin to the *forum domicilii* is the *forum deprehensionis*, or the jurisdiction founded on the actual apprehension of the offender. Now, here there seems to be no room for doubt, that a foreigner, who seeks refuge in Scotland from pursuit for a crime committed abroad, is not liable to molestation, except by the force of special statute in this country. He has violated no law of this state; his crime was of no evil example against its people, and there seems no sound principle on which he can be subjected to the jurisdiction of its courts.<sup>1</sup> Nay, there seems good ground for doubt whether the same would not hold in regard to a fugitive stranger; and whether our magistrates would interpose their authority to apprehend such a one, charged with a foreign crime, to the effect of having him conveyed abroad to be tried in the country where the crime was committed.<sup>2</sup> Accordingly, where a warrant had originally been granted in England, by an English justice, on the oath and information of a Scotsman, directed against a domiciled Scotsman, not said at the date of the warrant to have been in England, proceeding on a charge of forgery, alleged to have been executed at Hawick, in Scotland, and not followed by any uttering or proceeding in England; and where the warrant so obtained was brought by the obtainer thereof into Scotland, and indorsed by a justice of peace for Selkirkshire, and on that warrant the prisoner was committed to jail at Selkirk, till liberated in due course of law, it was held by the court, that damages were due, and £300 was awarded against the party, and *subsidiarie* against the Scotch justice also. It was held, that the

<sup>1</sup> Hume, ii. 56.—<sup>2</sup> Ibid.



proceedings in Scotland were exceptionable; and on general principles that the original warrant was utterly wrong, as relative to a crime committed solely in Scotland, and for which no English court could hold trial, instead of a warrant having been originally obtained in the county where the crime was committed, and brought for indorsation to the English justice, within whose jurisdiction the offender may be suspected to have been.<sup>1</sup>

It has been decided, however, that where a person had stole horses in England, escaped with them across the border, and been taken with them in his possession in the county of Selkirk, he might be competently tried for the crime in the Court of Justiciary.<sup>2</sup> In this, however, there is truly no departure from principle; for theft is an exception from the general rule, being a *crimen continuum*, so as to be continued in Scotland, by the act there committed of the thief arriving with the stolen goods, and travelling onwards, with a view to the disposal of the spoil.<sup>3</sup> Sir George Mackenzie accordingly declares, that “not only where the crime itself was fully committed, may it be tried, but where *any part* of it was committed; and, therefore, a thief may be judged, not only where he first broke the house, but by the judge of that place where he was taken with the thing stolen:” and he adds, “with us, wherever a thief is taken with a fang, he may be hanged; nor is that judge obliged to send him back, except either in the case of prevention or replegiation.”<sup>4</sup> The principle, accordingly, of theft being a *furtum continuum*, and, as such, founding a jurisdiction in the courts of the territory into which the stolen goods are brought, is perfectly established in our practice, and is in an especial manner exemplified every day in the trial of offenders who have brought stolen goods from one shire or the jurisdiction of one circuit into another.<sup>5</sup>

But it is much more doubtful whether it is competent to try, within the district into which the goods have been brought, the aggravation of *housebreaking*, committed in another county or jurisdiction. This point occurred at Stirling, 26th September 1818, in the case of Charles Tawse, who was charged with theft, by housebreaking, committed in the county of Renfrew, and continuing the theft into the county of Stirling, and brought to trial at the latter town. The Advocate-depute, to avoid the

<sup>1</sup> Knox v. Aitken and Anderson, 18th Dec 1813; Hume, ii. 56.—<sup>2</sup> Joseph Taylor, March 1767. Maclaurin, No. 76.—<sup>3</sup> Hume, ii. 54.—<sup>4</sup> M'Kenzie, ii. tit. 2. p. 179.—<sup>5</sup> Walter Tyrie, Perth, Spring, 1826. Alexander Lees, Jedburgh, Spring, 1821.

objection, restricted the libel to the simple theft, on which the prisoner was convicted, and had sentence of imprisonment for twelve months.<sup>1</sup> This was confirmed by Lord Justice-Clerk Boyle, in another case, where the pannel was charged with stealing a horse, by breaking into a stable in the neighbourhood of Haddington, and carrying it into the county of Roxburgh, where he sold it at Kelso, and was brought to trial at the Jedburgh Circuit. His Lordship held it extremely doubtful, whether the housebreaking could be proved, as it was beyond the jurisdiction of the Circuit, and exemplified the point by a murder committed in one jurisdiction, and followed by robbery, and the carrying the robbed goods into another, in which case there could be no doubt that the murder could not be charged in the new jurisdiction, nor referred to in proof, except as proving or illustrating the robbery, which constituted the sole *crimen continuum*.<sup>2</sup> The same principle was laid down by the same learned judge, at Stirling, in a case where the theft of some grain was charged as having been committed, by housebreaking, in the county of Dunbarton, and the theft was continued into the county of Stirling, by the goods having been brought there; and in pursuance of a recommendation from the Bench, the charge of housebreaking was withdrawn, and the prisoner was convicted and punished of the simple theft.<sup>3</sup> This principle seems obviously applicable, either to the aggravation of housebreaking, or opening lockfast places, which, of course, cannot be committed, except in one particular place, if that aggravation is charged in a court whose jurisdiction does not reach that place; but it does not apply to an aggravation, such as habit and repute, or previously convicted, which is personal to the offender, *inhæret ossibus*, and which, of course, he brings with him into the new jurisdiction into which the theft is continued.

5. By special statute, the trial of a thief, or resetter, is competent in any part of the United Kingdom, for goods brought and received there, stolen in any other part.

The principle of theft being a *crimen continuum* has been adopted by the legislature, and applied to all cases of theft of

<sup>1</sup> Charles Tawse, Stirling, Sept. 1818; Hume, ii. 55.—<sup>2</sup> Alexander Lees, Jedburgh, Spring 1821. Unreported.—<sup>3</sup> Stirling, Autumn, 1823. Unreported.

goods in England, subsequently brought into Scotland, or *vice versa*, and to reset, in similar circumstances, by the 13 Geo. III. c. 31. For all other crimes, the course which this statute prescribes is the conveyance of the offender apprehended on the indorsed warrant to the *locus delicti*, there to be dealt with according to the law of that country. But in the case of *theft* and reset, this statute prescribes a totally different course. It declares, "that if any person or persons, having stolen, or otherwise feloniously taken, money, cattle, goods, or other effects, in either part of the United Kingdom, shall afterwards have the same money, cattle, goods, or other effects, or any part thereof, in his, her, or their possession, or their possession or custody, in the other part of the United Kingdom, it shall and may be lawful to indict and punish such person or persons for theft, or larceny, in that part of the United Kingdom where he, she, or they, shall so have such money, cattle, goods, or other effects, in his, her, or their possession or custody, as if the said money, cattle, goods, or other effects, had been stolen in that part of the United Kingdom."

And in regard to reset, the same act provides, "that if any person or persons, in either part of the United Kingdom, shall hereafter receive, or have any money, cattle, goods, or other effects stolen, or otherwise feloniously taken, in the other part of the United Kingdom, knowing the same to be stolen, or otherwise feloniously taken, every such person or persons shall be liable to be tried and punished for such offence, in that part of the United Kingdom where he, she, or they shall so receive, or have the said money, cattle, goods, or other effects, in the same manner, to all intents and purposes, as if the said money, cattle, goods, or other effects, had been originally stolen, or otherwise feloniously taken, in that part of the United Kingdom."<sup>1</sup>

These enactments are repeated, and seem to be extended to Ireland, by the 44 Geo. III. c. 92. § 7, which proceeds on the narrative, "that doubts may be entertained, whether they could be indicted and tried in that part of the United Kingdom where such offenders *have* the said money, cattle, goods, or other effects, in their possession or custody, as the original offence was not committed in such part of the said United Kingdom."

Under the words "stolen, or otherwise *feloniously* taken,"

<sup>1</sup> § 5.



which occur in these statutes, in the clauses applicable both to theft and reset, there can be no doubt that the trial of persons for bringing *robbed* goods from the one country into the other, or resetting such robbed goods here taken in England or Ireland, is competent, as they are in the strictest sense of the words "feloniously taken." But a doubt may be entertained how far the same rule applies to those who have obtained goods by fraud or swindling; felony, according to the English law, signifying "an offence which occasions a total forfeiture of lands or goods, or both at the common law, and to which capital or other punishment *may* be superadded, according to the degree of the guilt."<sup>1</sup> But in Scotland, goods obtained by fraud or swindling, are in the strictest sense said to be feloniously taken; and such is the established style of indictments in regard to them: and, therefore, there seems good reason for holding that our courts would, under these statutes, be entitled to entertain an indictment, charging a pannel, under these acts, with bringing into Scotland goods obtained in such felonious ways in England, though, without doubt, the special crime of reset can apply only to goods acquired by theft or robbery.

6. The principal ground of criminal jurisdiction is the *forum delicti*, under which head our Courts are entitled to try and punish every person, of whatever country, who commits an offence within their bounds.

The chief source of criminal jurisdiction unquestionably is the *forum delicti*, or the right which every court possessing such powers has to try and punish every person, without exception, who commits a crime within their bounds. This power is universally recognised by the laws of all civilized countries; since every foreigner who comes to a state, and, *pro tempore*, obtains the benefit of the protection of its laws, is bound, in return, to yield obedience to them. There never has been any dispute, accordingly, that every person, of whatever country, who commits a crime within the bounds of Scotland, is liable to be tried before any court which possesses criminal jurisdiction over the place where it was committed; and numerous instances have occurred of foreigners of every sort, Jews, Frenchmen, Africans, having

<sup>1</sup> Blackst. iv. 95. 1 Hawk. c. 25. § 1.

been brought to trial, without objection, both in our supreme and inferior courts.<sup>1</sup>

To establish jurisdiction, however, in this way, over a foreigner who is only transiently here, it is indispensable that he be actually apprehended, and either in jail, or under bail to stand trial. If this has been done, he is amenable to the jurisdiction of our courts, because he is subject to their power: but if this is not the case, and he has escaped abroad, no sentence of fugitation can regularly pass against him; or if, *per incuriam*, such a proceeding should take place, it will not be followed by any confiscation of the property he may have in Scotland, or may afterwards acquire there.<sup>2</sup> But if he should return to this country, he may be apprehended on the old charge, imprisoned, or laid under bail; and in such a case, if he should again escape, fugitation, with all its legal effects, may be pronounced against him.

7. Though the preceding principles apply in an equal manner to the Court of Justiciary, yet inferior courts are bound to observe the same rules, in their intercourse with each other; and, instead of trying cases which have occurred beyond their jurisdiction, to transmit the offenders, under an indorsed warrant, for trial in the jurisdiction where the deed was done.

Our ancient statutes, which prescribe the duty of sheriffs, lords of regality, and other inferior magistrates, in bringing murderers and other great offenders to justice, uniformly direct that they transmit the prisoner from the sheriffdom where he was taken to that where the deed was done, there to have the law administered to him.<sup>3</sup> The proper course of proceeding is to apprehend the prisoner, on a warrant granted by a judge having jurisdiction over the place where the crime was committed, and get it indorsed by the magistrate within whose bounds he is to be apprehended; and when taken, have him transmitted for trial, after the precognition is finished in the place where he was seized, in the jurisdiction where he committed the crime. In a case where the offences complained of, accordingly, were certain misdemeanours against the game laws, for which the Justices for *Lanarkshire*, on the complaint of their procurator-fiscal, had visited the pannel with

<sup>1</sup> Hume, ii. 57.—<sup>2</sup> Ibid. ii. 57.—<sup>3</sup> 1426, c. 89; 1491, c. 28.

a penalty of £20, forfeiture of the dogs and guns, and to have the offender sent abroad as a soldier, though the offences charged in the libel were committed in *Dunbartonshire*; the Court suspended the sentence *simpliciter*.<sup>1</sup> The like judgment has since been given in a similar case, where the prosecution was at a private instance, with concurrence of the procurator-fiscal. A complaint was there laid on the statute 1621, c. 31, against an unqualified person for having killed game on the complainer's land in *Stirlingshire*: but it was brought with concurrence of the procurator-fiscal for Dunbartonshire, before the Justices of *that* shire within which the pannel resided. The Justices found the complaint incompetent, "in respect that the offences complained of are stated to have been committed in *Stirlingshire*;" and the Court refused a bill of advocation, complaining of that judgment.<sup>2</sup>

## CHAPTER IV.

### OF PROSECUTORS AND THEIR TITLE.

ON the important subject of the prosecution of crimes, the Scottish practice has departed widely, and for very sufficient reasons, from the law both of Rome and of the neighbouring kingdom.

By the Roman law, every citizen, as a member of the sovereignty, was invited to prosecute for any offence which might be considered as injurious to the public.<sup>3</sup> In the English law, as it is well known, the private party injured, is, in general, the only prosecutor, and he is bound over to insist in the suit, by the magistrate who committed the criminal for the offence. The Scotch law stands on a totally different foundation. With us, the right to prosecute crimes is confined to the party injured, or the Lord Advocate, who insists, as the public guardian of the realm, in the name of his Majesty, for the interest which he has in the tranquillity and welfare of his subjects.<sup>4</sup> And experience has abundantly proved the wisdom of this system, which in practice generally vests the right of prosecution in a public officer of professional character and public responsibility, instead of a mul-

<sup>1</sup> *Andv. Clephane*, 7th Feb. 1810; *Hume*, ii. 57.—<sup>2</sup> *John Buchanan v. Walter Weir*, 28th May 1818; *Hume*, ii. 57.—<sup>3</sup> *Hume*, ii. 118.—<sup>4</sup> *Ibid. Burnet*, 295.



titude of private individuals, whose prosecutions, sometimes begun in anger, are frequently abandoned from inconstancy, caprice, or the load of the expenses attending criminal proceedings. By this method, the cognizance of offences is immediately brought under the consideration of persons of tried experience and legal habits; the individual is relieved from the expense and vexation attending a prosecution; and offenders are not detained in jail, unless there exists such evidence against them, as, in the opinion of those well qualified to form a correct judgment on the subject, affords a reasonable chance of conviction.

Though almost all prosecutions are now, practically speaking, conducted by the public prosecutor, yet the earliest form of proceeding was here, as in England, that at the instance of the injured party. As this is now, however, a form of proceeding rarely adopted, and hardly ever but in those cases where the Lord Advocate has previously declined to take up the case for the public interest, the precedence, both in point of importance and priority, belongs to public prosecutions.

1. The Lord Advocate is entitled to prosecute for all crimes committed within Scotland, of whatever magnitude, and before whatever court.

It is not precisely ascertained, and is now a matter rather of curiosity than use, at what period the office of Lord Advocate was first introduced into Scotland. Certain it is, however, that it was raised to its present high rank before the end of the 16th century: for by the act 1587, c. 77, it is declared, "that the Thesaurer and Advocate pursue slaughters, and other crimes, although the parties be silent, or wald otherways privily agree."<sup>1</sup> The coupling of the Advocate and Treasurer, in this important duty, points, as well as many other early documents, to the origin of the interference of his Majesty in private crimes, viz. the interest which the crown had in the escheat or pecuniary penalties consequent upon conviction.<sup>2</sup> But, in regard to *public* crimes, such as treason, sedition, and many others, which, without being immediately injurious to individuals, threaten the frame and fabric of society, there can be no doubt that, from the very earliest times, the powers of a public accuser were recognised.<sup>3</sup>

<sup>1</sup> Hume, ii. 130.—<sup>2</sup> Burnet, 307; Hume, ii. 130, 131.—<sup>3</sup> Ibid.

The course of proceeding in the fifteenth and sixteenth century, appears to have been this:—After information, taken in the several counties, under the brief of dittay, to be afterwards explained, the Justice-Clerk, at the command of the Justice-General, made up what was called the “Porteous Roll” for each county; that is, a roll of the names of the several delinquents committed for trial, with the indictment prepared against each: and the same officer issued the necessary precept for the trial of these charges; and gave his orders to the crowners, or coroners, an officer long since fallen into disuse, to arrest the delinquents, and lay them under bail to answer to the charges. Thus, the preparation of the indictment, and all the steps preparatory to trial, were committed to the Justice-Clerk: and the peculiar province of the Lord Advocate began when the trial in court commenced.<sup>1</sup>

But whatever may have been the origin of these high powers in the Lord Advocate, certain it is, that he is now invested with them in the fullest and most unlimited extent—so that his title to prosecute crimes is now universal; embracing not only public crimes of every description, such as treason, sedition, riot, smuggling, incest, or the like, but also, those of a private nature, which more immediately affect the welfare of individuals, such as rape, robbery, murder, assault, theft, and others.<sup>2</sup> In all these cases, his title to prosecute is altogether independent of the private party injured, and he cannot be debarred from insisting by any collusion, compounding, or remission of the offences, by those who immediately suffered under them.<sup>3</sup> By declining to give information of the commission of crimes, indeed, the private party may often succeed in preventing a prosecution, by keeping the public prosecutor in entire ignorance of its occurrence; but if once it has been taken up by the public authorities, the private party has no power whatever over it; and he may be compelled to appear and give evidence, however unwillingly, against the person who is accused of the transgression.<sup>4</sup> In short, the theory or legal fiction is, that by the commission of every crime, however inconsiderable, within Scotland, the Lord Advocate acquires a *jus quæsitum*, in prosecuting it for his Majesty’s interest, as the supreme guardian of the realm, in the chastisement of offences: the reason of expedience which supports this fiction is, that there-

<sup>1</sup> Hume, ii. 131.—<sup>2</sup> Hume, ii. 133.—<sup>3</sup> Burnet, 308, 309; Hume, ii. 132 —

<sup>4</sup> Hume, ii. 133.

by we have acquired our admirable system of prosecution, extending over the whole country, and practically found to be more beneficial than any other which the wit of man has ever devised for the suppression of crime.

The Lord Advocate is entitled to prosecute in any court, whether supreme or inferior, within the realm. In the sheriff and borough courts, indeed, the right of prosecution is usually bestowed on a procurator-fiscal appointed by the Judge, who acts as public prosecutor in all offences which he is competent to pursue: but his powers are noways prejudicial to those of the Lord Advocate, if he should think fit to insist in person, or by his deputes, before such a tribunal.

2. The Lord Advocate may delegate his powers to any number of deputes, who are invested with all the powers of that high officer.

Like other officers whose agency may be required in many places at the same time, or whose duties are so multifarious as to be beyond the powers of a single individual, the Lord Advocate possesses the power of naming deputes or substitutes, by whom his power may be carried into effect at the same time in various parts of the kingdom.<sup>1</sup> These deputes possess the same powers as the principal officer himself, and they enjoy the same immunities and protection: but their proceedings are considered as those of the Lord Advocate himself: in other words, he enjoys no greater protection for their proceedings than he does for his own.

These depute-advocates were for long the Solicitor-General and three others, which last went alternately the North, West, and South Circuits. Lately a fourth has been added, who takes the Winter Circuit at Glasgow, rendered necessary by the vast increase of business in that populous city. Their powers are co-extensive, and extend over all Scotland, so that any one may exchange with another any part of his official duty. Besides these deputes, there are a number of other gentlemen also named in the Lord Advocate's commission, in order to sign official papers, and go through other matters of mere routine, when none of the regular deputes are at hand.

It sometimes happens, however, that an advocate-depute must

<sup>1</sup> Hume, ii. 132.



be named *pro tempore*, in consequence of illness or accident having happened to the regular one, in going a circuit, when there is not time for the Lord Advocate to name another before the business commences. In such a case the Court nominate another advocate to discharge the duties of public prosecutor, and administer to him the oath *de fidei administratione*. Accordingly, on the 16th September 1769, Cosmo Gordon, advocate-depute, having been prevented from attending by his father's death, the record bears, "it being the province of the Judge to name another advocate-depute instead of the said Mr Cosmo Gordon, without which the Court cannot proceed to business, he therefore appoints Mr Robert Cullen, advocate, to act as advocate-depute for the remainder of the North Circuit, and he accordingly gave his oath *de fidei*."<sup>1</sup> In like manner, Alexander M'Conochie, advocate-depute, having been prevented from attending at Ayr, Spring 1805, "Lord Cullen nominates William Campbell, Esq., advocate, to be depute to his Majesty's advocate, on the circuit at this place."<sup>2</sup> The same has been frequently done in later times, particularly Inverary, Spring 1819, when Mr John Lockhart was appointed by Lord Succoth, in room of John Hope, Esq., advocate-depute; and Inverness, Autumn 1820, when William Menzies, Esq. was appointed in room of the same advocate-depute, who had been prevented from attending that circuit.

3. The Lord Advocate cannot be compelled to give his instance, or to pursue in his own name for the public interest.

If the public mode of prosecution was the only one which the law recognised, the Scottish practice might justly be charged with injustice, in having not compelled the Lord Advocate to prosecute when the private party complained of an injury. But there is no hardship in the case as it at present stands, inasmuch as though the Lord Advocate cannot be constrained in any way to give his instance, that is, to prosecute in the name of the King and at the public expense, yet there still remains open to the injured party, if he shall feel aggrieved, the method of private prosecution, with his concurrence, which, as will be immediately shown, he may be, in general, compelled to afford. Nothing

<sup>1</sup> Hume, ii. 132.—<sup>2</sup> *Ibid.*

could be more unjust or inexpedient than to compel the public prosecutor, as a matter of course, to take up every criminal charge which prejudice or passion chose to prefer, or a more thorough departure from the principle of the institution, one main object of which is to submit prosecutions to impartial and skilled investigation, and bring to trial only those persons against whom there are pregnant grounds of suspicion. And the result has completely proved the justice of these principles; for while, on the one hand, such has become the public confidence in the decision of the Lord Advocate and his deutes, on the grounds of prosecutions, that private prosecutions have almost gone into disuse;<sup>1</sup> on the other, the proportion of convictions to indictments in the Scotch Supreme Criminal Courts is much greater than obtains in any part of England, and nearly triple of what is exhibited by the average of their criminal proceedings.<sup>2</sup>

It is settled law, accordingly, that the Lord Advocate cannot be compelled to give his instance in any case, whether singly or in conjunction with the private prosecutor.<sup>3</sup> If, therefore, that officer be wanting in the due discharge of the duties of his station, the proper channel of redress is by application to the King in Council, who will not fail to make due enquiry into the alleged grounds of complaint.<sup>4</sup>

4. The Lord Advocate is so completely master of his libel that he may pass from any charge at pleasure, or restrict the libel to an arbitrary punishment at any time before moving for sentence.

The high confidence reposed, though not, as the result proves, without sufficient reason, in the Lord Advocate, appears strongly in the uncontrolled power which he possesses, not only of passing from any separate charge at any time before moving for sentence, but of departing from any aggravation, or any number of aggravations, by which the punishment of these charges, if proved, would be enhanced, or of restricting the libel where the punishment by law is capital to a pain short of death.<sup>5</sup> Thus, if an

<sup>1</sup> During eight years that the author was Advocate-depute, not one private prosecution was brought to trial in the Justiciary or Circuit Courts.—<sup>2</sup> In Scotland the average of convictions to acquittals is as six to one; in England as two to one.—<sup>3</sup> *Gordon v. King's Advocate*, June 21, 1766; *M'Laurin*, No. 74.—<sup>4</sup> *Hume*, ii. 134. *Burnet*, 309.—<sup>5</sup> *Hume*, ii. 134. *Burnet*, 311.

indictment contain a charge of robbery and of theft, aggravated by housebreaking, by being habit and repute a thief, and previously convicted of theft, the public prosecutor may restrict the libel quoad the robbery, depart from the aggravation of habit and repute, and previous conviction, and restrict the libel as to the theft and housebreaking. This is matter of daily practice, and though at first sight it may seem to savour of arbitrary power, yet it has been found to be eminently productive of public advantage, and, in particular, to be extremely favourable to the humane dispensation of the law. For the public prosecutor having no power to *increase* the legal punishment, but only to *mitigate* its pains, this dispensing power can only be exercised on the side of mercy; and experience has proved, that this power of mitigation cannot be better exercised than by a public officer whose professional character depends on the discharge of his duties; upon whom the odium of withholding it improperly, singly and exclusively rests; and whose place in society both compels him to hear any complaints made against the exercise of his powers, and to become acquainted with the public feeling in regard to the degree of punishment which is adequate to different offences. Certainly the ultimate power of mitigating sentences, and of saving human life where it has been forfeited to the offended laws, cannot be better intrusted than to the Crown and its responsible advisers: but the subordinate and intermediate duty of mitigating the sentence which is to be pronounced, by softening the features of the charge of which the jury is to convict the prisoner, seems to be more fitly vested in the public prosecutor, whose responsibility is not divided, and who is directly in contact with the public, who are to judge of his conduct, than in the Supreme Judges, whose more elevated situation makes them less acquainted with the public feeling as to the discharge of their duty, and who cannot possess the same minute acquaintance with each case which comes before them as the prosecutor, who has investigated it from the beginning, and on whose responsibility it has been brought forward.

The power of the Lord Advocate to pass from any charge in his libel, or any aggravation of a charge, has been long established, and is *tritissimi juris*. But the establishment of the *period* down to which he may exercise this power of restriction or departure, is of more recent occurrence. In the case of Carsewell, 9th June 1791, it was settled that this may be done after



the verdict has been returned by the Jury.<sup>1</sup> This power has since that time been repeatedly exercised at that late stage, and is now a matter of settled practice.<sup>2</sup> And there is no objection on principle to an exercise of this mitigating power at that late period, for the instance of the prosecutor subsists until he has finally put the case out of his hands, by moving for sentence on the verdict. As he may decline to move for sentence even after conviction, so he may move for it subject to such mitigation as he deems it just to introduce. In a late case, the prosecutor, after verdict returned, declined to move for sentence, and the pannel was dismissed from the bar;<sup>3</sup> and in two other cases, the prosecutor restricted the libel, with the approbation of the Court, several days after the verdict had been returned, the diet having in the mean time been adjourned, and other cases disposed of.<sup>4</sup>

In certain cases, and to a limited extent, the public prosecutor has the power of striking out of his libel unnecessary or superfluous expressions, without departing from any charge. The nature of the power thus enjoyed, and the necessary restrictions under which it is laid to prevent it from becoming an instrument of injustice, will be more properly considered when treating of the subject of Pleading and Making up the Record.<sup>5</sup>

5. Though the prosecutor, by restricting the libel, or departing from charges or aggravations, may materially affect the fate of the prisoner, yet he is not entitled, in moving for sentence, to suggest any punishment for the offence of which the prisoner is convicted, which it lies with the Court to inflict.

The power of the prosecutor is merely over his own libel, or restraining the pains of law for which his indictment concludes. If, therefore, he shall have moved for sentence, he is entirely *functus officio*; the Court thereafter have the matter exclusively vested in their hands, and any application for an alteration on the punishment they have inflicted must be made either to the royal mercy, or, if the sentence is one of an inferior court, by bill of suspension to the Justiciary Court.<sup>6</sup> In the case of

<sup>1</sup> Hume, ii. 134. Burnet, 311.—<sup>2</sup> John Lyle, July 16, 1812; Fraser and Mossman, Feb. 23, 1811.—<sup>3</sup> Case of James Watson, Inverness, May 1826.—<sup>4</sup> Case of James Drolin, Glasgow, Spring 1828; and of John Gall, Aberdeen, Sept. 1827.—<sup>5</sup> Vide *Infra*, chap. 7.—<sup>6</sup> Burnet, 310.

Hughan, accordingly, 24th August 1810, where the prisoner was indicted at common law for *uttering* a revenue stamp, and on the 38 Geo. III. c. 89, for *forging* it, and where the prosecutor, by a minute on record, had restricted the libel to the *statutory* punishment, the Jury having found the libel proven as to the uttering, but not proven as to the forgery, the Court, on a motion in arrest of judgment, held that no sentence could follow. The error lay in the form of the restriction, which should have been generally of the pains of law, instead of limiting them to the punishment specified in the statute, which, as it applied only to the forgery, of which the prisoner was not convicted, necessarily proved fatal to the whole case.<sup>1</sup>

6. The public prosecutor possesses the power of consenting to a petition for banishment, or any subordinate penalty given in by the party accused; and a sentence following on such petition, with the certification which it contains, is as valid and effectual as if pronounced on the verdict of a Jury.

The public prosecutor has, from the earliest period of our practice, exercised the power of consenting to a petition given in by a party committed for trial, praying to be banished from the jurisdiction over which the powers of that prosecutor extend. This power extends to all prosecutors, both the Lord Advocate and the Fiscals of inferior jurisdictions; the banishment to which the former can consent being of course that from all Scotland, and the latter from the jurisdiction of his own court only.<sup>2</sup> This power was formerly most liberally exercised; the great object in remote times having been to get quit of the criminals even by their banishment into England; while more recently nothing has been found adequate for the increasing depravity of the age, but transportation to distant colonies. The petition, in general, prays for the infliction of a particular sentence, in which case the prosecutor consents generally to the prayer of the petition;<sup>3</sup> but if it does not, there can be no doubt that it is competent for the prosecutor to qualify his consent, by specifying the punishment which is to be inflicted. In such a case it is held that the petitioner, by persevering in his application after the qualified con-

<sup>1</sup> Burnet, 310.—<sup>2</sup> Burnet, 312.—<sup>3</sup> Hume, ii. 134.

sent adhibited, has tacitly consented to the pains specified in the prosecutor's minute, and judgment passes accordingly.<sup>1</sup> The whole matter is of the nature of a judicial contract between the accused and the prosecutor, to which the Court are no otherways a party, but as pronouncing and recording the sentence which is agreed upon between them.<sup>2</sup>

There is this restriction, however, upon this power, that it cannot be competently exercised except in those cases where the prisoner is legally committed for trial, and has been served with an indictment to stand trial for the offence; these being held the essential preliminaries towards any party entering into a judicial contract which is to abridge his personal freedom, or expose him to the certification contained in the sentence in the event of its being infringed.<sup>3</sup> In the case accordingly of Grizel Baird and Jean Brown, January 3, 1815, where it appeared that the prisoners had been sentenced to twelve months' hard labour in the bridewell of Edinburgh, in virtue of a sentence of certification pronounced by the Sheriff of the county, the Court suspended the sentence, in respect it appeared that it had been pronounced on the prisoners' own application, when they were merely committed for farther examination, and had neither been committed for trial nor served with any indictment.<sup>4</sup>

7. The Lord Advocate is not obliged to find caution, or take the oath of calumny, nor is he liable in expenses or penalties as a private prosecutor; but an inferior public prosecutor may be subjected in expenses, where his conduct is either grossly irregular or oppressive.

The high confidence reposed in the Lord Advocate appears in this, that neither he nor his deutes can be called on to give an oath of calumny, or that he believes the prosecution to be well founded, nor to find caution to insist, nor subjected in expenses or penalties, in the event of the pannel being acquitted by the jury.<sup>5</sup> From the multitude of cases which they are compelled to prosecute, amounting generally to above a thousand a-year, there would be no bounds to the responsibility which an opposite rule would impose, and the law has affixed penalties of a different and

<sup>1</sup> See Mitchell, Dec. 20, 1765; Short, March 18, 1766; Davie, Dec. 1, 1766; Spence, July 25, 1766; Leith and Wilmer, Dec. 17, 1785, all in Burnet, 312, and Hume, ii. 134.—<sup>2</sup> Hume, *ib.*—<sup>3</sup> *Ibid.*—<sup>4</sup> *Ibid.*—<sup>5</sup> Hume, ii. 134. Burnet, 313.



far more serious character to a wilful deviation from his high official duties.

But this absolute exemption from penalties and expenses belongs only to the Lord Advocate and his deputed, and is not to be extended in the same unqualified manner to inferior prosecutors or procurators-fiscal, who are selected in general from a subordinate class of men, and are not to be presumed in every case to be either so thoroughly exempt from improper motives, or so completely under the observation of the King in Council, as those high functionaries whose appointment flows directly from the Crown itself. Instances, accordingly, have frequently occurred, in which procurators-fiscal have been found liable in expenses, where the proceedings were either grossly irregular, or savoured at all of official oppression.<sup>1</sup> Witness, among numerous other examples that may be given, the case of *A. Clephane v. Procurator-fiscal of Lanarkshire*, 7th Feb. 1810; *Guthrie v. Fiscal of Ayrshire*, 20th June, 1810; *Macalister and Malcolm v. Fiscal of Lanarkshire*, 22d June, 1812; and *John Coats v. Fiscal of Lanarkshire*, 22d May, 1814. It is unnecessary to specify farther examples of a practice perfectly familiar to the Court.

But while this is true on the one hand, it is not less material to observe on the other, that the presumption of law is, that the procurator-fiscal has acted from conscientious motives, and that any irregularity which has occurred in the proceedings, is the result of oversight, or such error as even the most vigilant attention has not been able to avoid.<sup>2</sup> This presumption, it lies upon the suspender to elide, by making out so strong a case of irregularity, or exhibiting such grounds to suspect oppression, as turn the balance of justice the other way. Repeatedly, accordingly, while the Court have suspended the sentence, they have refused to find the procurator-fiscal liable in expenses. This is more particularly the case, either where the facts disclosed in the proof are such as to render the party suspending the sentence unworthy of such an advantage,<sup>3</sup> or where the irregularity complained of has been of such a kind as, although deserving of correction, was not such as to put the procurator-fiscal clearly in error in pursuing it.<sup>4</sup> Indeed it is deserving of serious consideration, whether the subjection of public officers doing their duty to the best of their ability, to expenses in the event of the reversal of the sentence,

<sup>1</sup> *Hume*, ii. 135.—<sup>2</sup> *Ibid.*—<sup>3</sup> *John Ronald and Others v. Fiscal of Lanarkshire*, Nov. 4, 1817.—<sup>4</sup> *Grace Sharp v. Procurator-fiscal of Perthshire*, March 1826.

has not been carried somewhat too far by our supreme judges. Nothing can be more just than that this effect should follow, wherever there is the least appearance of oppression, iniquity, or vindictive proceedings, or where substantial injustice has been experienced by the prisoner complaining of the sentence; but where the ground of suspension is, as is generally the case, a mere technical error, altogether foreign to the real merits of the case, and unattended by the least hardship to the prisoner, it seems an extremely hard case to subject the public prosecutor in expenses, merely because he has not adopted the improved style of conducting his case, which the more extended practice and greater advantages of the Supreme Court have enabled them to attain. Such a finding is usually followed by an action of damages, in which the pursuer, being generally insolvent, succeeds by the threat of a Jury trial, with a party who is totally unable to refund expenses in the event of failure, in forcing him into the payment of a large sum of money, often without a shadow of justice, very little of which finds its way into the pockets of the aggrieved party, as it is almost wholly intercepted by his agent, who has conducted these proceedings, as a profitable speculation for himself. Every person practically acquainted with these matters, must recollect many cases in which this has occurred; and in which the finding of expenses against a public officer has been made the commencement of a series of proceedings which have terminated in most severe and unmerited consequences.

8. Though the Lord Advocate cannot be subjected in penalties or expenses, he may be compelled by the Court, if they shall see cause, to give up his informer, who will be liable in both, if sufficient ground shall be made out to show that the information was malicious and without probable cause.

Formerly, it appears to have been held, that where the Lord Advocate alone pursued, he could not be compelled to name his informer;<sup>1</sup> but this is now altered, and in the case of *Stephen v. King's Advocate*, June 8, 1727, it was decided by the Court of Session that his Lordship might be compelled to do so.<sup>2</sup> There appears, however, to be no instance on record in which the Court

<sup>1</sup> M'Kenzie, Observations on Act 1425, c. 50.—<sup>2</sup> Hume, ii. 136. Burnet, 313.

of Justiciary have interfered to compel the Lord Advocate to name his informer ; but, on the contrary, Lords Kilkerran and Strichen, at Inverness, Sept. 1754, refused to make an order on the Lord Advocate to name his informer, by finding “ it improper for them to interfere in this matter, but prejudice to the petitioner to age thereanent as accords.”<sup>1</sup> It rather appears that this refusal must have proceeded on the ground of the Justiciary Court not being the proper *forum* for such an application, than on that of the powers of the Judges on the Circuit being adequate to such a stretch ; there being no doubt that those powers within the jurisdiction of the Court are as extensive as those of the Supreme Criminal Tribunal.

In inferior courts, there can be no doubt that the procurator-fiscal, if he has pursued in his own name without the concurrence of the private party, may be compelled to name the person whose information led to the criminal proceedings ; and this is done every day.

It is provided by the act 1579, c. 78, that where his Majesty's Advocate pursues alone, the penalties shall be paid by the informer. These penalties have now, from the change in the value of money, come to be almost elusory ; but the case is very different with the actions of damages which may follow such disclosures, and which are often attended with the most serious consequences. The rule in regard to these actions is, that the Lord Advocate will not consent, and cannot be compelled to give up the *precognition*, which is kept in the Crown office, and of which no private party, in any subsequent process, is entitled to demand exhibition or inspection ;<sup>2</sup> but that the declarations of the accused may be recovered and founded on in subsequent civil proceedings.<sup>3</sup> This distinction is founded on justice and principle, for the declarations of the accused are judicial acts, and concern himself alone ; but the declarations of third parties are the private papers of the Crown, like the memorials of a litigant for his counsel, and are extracted from the witnesses without any oath by legal compulsion, with a view to a particular criminal proceeding, and it would therefore be highly unjust to make them evidence either against the party accused or themselves. The warrants of commitment, however, by the Sheriff, may be obtained either by a

<sup>1</sup> Burnet, 314.—<sup>2</sup> Sir John Majoribanks' case, April 1823 ; Murray's Reports, i. 232 ; Parker v. Imperial Fire-Office, Nov. 29, 1809.—<sup>3</sup> Alison's Cessio, Dec. 3, 1814. Fac. Col. ; Parker v. Imperial Fire-Office, Nov. 29, 1809.



diligence or citing the custodier as a haver to prove the fact of the incarceration—but of course they can be founded on to no other effect, and certainly not as affording any presumption of guilt.

Questions of importance frequently arise as to the liability of a party to damages, on account of the information which he has given to the public prosecutor, which has led to unsuccessful or abortive criminal proceedings. Upon this subject the rule is, that an action cannot be maintained for a malicious prosecution, unless the information was both malicious and without probable cause. “Admitting the information,” says Lord Eldon, “to have been malicious, yet if there was probable cause for it the verdict cannot be for the plaintiff; and admitting it was without probable cause, if it was not malicious the verdict cannot be for the plaintiff; the want of probable cause, however, being considered as evidence of the malice; but still it is but evidence which may be overturned by the jury being of opinion, upon the whole, that there was not malice. The law, therefore, protects the prosecutor, unless you can say that he acted maliciously, and that there was not probable cause for his proceeding.”<sup>1</sup>

9. The instance of the Lord Advocate does not fall by his death, or removal from office, but his successor may take up and insist in his indictments without any change in their form.

It is not a particular person, as Lord Advocate, that is entitled to prosecute, but the public officer bearing that character. If, therefore, one Lord Advocate is removed either by death or promotion, his successor takes up the case as a matter of course. So the Court held in the case of Richard Wyndham, Dec. 3, 1804, on occasion of the promotion of Lord Advocate Hope to the appointment of Lord Justice-Clerk; the new Lord Advocate, after an argument on the objection, was permitted to proceed with the indictment raised by his predecessor, and this has ever since been held to settle the point.<sup>2</sup>

10. The public, equally as the private prosecutor, may insist against an accused party at any time within twenty

<sup>1</sup> Arbuckle v. Taylor, July 10, 1815. Dow, iii. 181.—<sup>2</sup> Burnet, 314.

years from the date of the offence ; but the lapse of that period is an absolute bar to any farther proceedings.

In former times, instances were not uncommon of persons being indicted at the distance of twenty-five or twenty-six years after commission of the offence.<sup>1</sup> But in the case of Callum M'Gregor, August 1773, it was solemnly decided, after great consideration, that the lapse of twenty years is a complete bar to any ulterior criminal proceedings.<sup>2</sup> This, however, it would rather appear, holds only where the accused has not been outlawed for the offence ; for the interlocutor in that case dismissing the pannel bore expressly, " in respect it does not appear that any sentence of fugitation passed against him."<sup>3</sup> Instances have been frequent of trials at the distance of thirteen and fourteen years after the acts charged against the pannel occurred. Thus, William Scott had sentence of death on 21st Dec. 1638, for the murder of his wife, committed in 1623, fifteen years before ; Paul Clerk had the like sentence, Dec. 2, 1669, for the murder of his brother in 1656, thirteen years before. In later times, Richard Hamilton was convicted, July 1807, of culpable homicide, done ten years before ;<sup>4</sup> and Durrand, Henderson, and Jamieson, were put on their trial at Inverness, Sept. 1830, for a murder committed in 1825.<sup>5</sup> In general, however, the lapse of any considerable time presents such insurmountable difficulties in the way of a prosecution, that it is only where a flagrant case occurs, or an extraordinary chain of evidence has come to light, that the prosecutor will be inclined to resort to his undoubted privilege of bringing the accused to trial at any time within the criminal prescription.

11. The power of the Lord Advocate to restrict the libel, is not to be affected by mere implication ; and, therefore, he still enjoys that power, though the pain of death be provided by statute for any particular offence, unless his inherent power of mitigation be expressly taken away.

Without doubt, if a statute affixing the pains of death to any crime, expressly declares that the Lord Advocate is to possess no

<sup>1</sup> George Turnbull, Aug. 23, 1603 ; Hume, ii. 136.—<sup>2</sup> M'Lautin, No. 90 ; Hume, ii. 136, 137.—<sup>3</sup> Hume, ii. 157.—<sup>4</sup> Hume, ii. 136.—<sup>5</sup> Unreported.

power of restricting the pains of law, this enactment, how severe soever, must form the law for that particular case. But nothing short of such an express declaration will have the effect of restraining the power of mitigation, essentially inherent in his office; and, in particular, a statutory declaration that a particular offence is to be punished with death, is held still to leave him the power of restricting the libel, if he shall see cause. It has long been settled, accordingly, in regard to that class of statutes, unhappily too numerous, which provide the pain of death for offences against British Acts of Parliament, that they still leave the law subject to the power of restriction by the Lord Advocate; and it is daily exercised, accordingly, in such cases, without doubt or hesitation. To fortify, however, the principle of our common law in this interesting particular, it is expressly provided by the 6th Geo. IV. c. 126, which first affixed the pains of death for attempts to murder, "that nothing contained in this, or *any other statute*, enacting a capital punishment, shall be held to affect the power of the prosecutor to restrict the pains of law." This statute is now repealed; but a similar clause is to be found in the subsisting act, 10th Geo. IV. c. 38.

12. The public prosecutor possesses the power of moving the Court to desert the diet *pro loco et tempore*, or abandon the libel brought against the pannel, and moving for his recommitment on a fresh warrant; but though this request is usually complied with, yet it lies with the Court, if sufficient cause is not shown, or they suspect that an improper or vexatious use is about to be made of the motion, to refuse it, and insist upon the trial proceeding, or that libel being abandoned.

The details of the desertion of diet, and the rights of the parties in regard to it, belong to another part of the subject.<sup>1</sup> But it is necessary to observe, in describing the powers of the prosecutor, whether public or private, that he possesses the right of moving the Court to desert the diet *pro loco et tempore*: the effect of which is, that the libel falls, but the prisoner is recommitted, at the instance of the prosecutor, to await a new libel, raised in a different or more unexceptionable form.<sup>2</sup> As this power, however,

<sup>1</sup> *Infra*, chap. xi.—<sup>2</sup> Hume, ii. 276; Burnet, 310.



of bringing a libel, and abandoning it when called, may be made the means, if oppressively used, of extreme injustice, it is settled that the Court are not bound, as a matter of course, to agree to the motion, but may competently call on the prosecutor to show cause why it should be granted.<sup>1</sup> The Court, however, cannot compel the prosecutor to state the grounds on which his application is rested, if he chooses to withhold them,<sup>2</sup> the remedy lies in declining, unless cause is shown to desert the diet *pro loco et tempore*; and if the prosecutor will neither go on, nor assign a reason for delay, desert the diet *simpliciter*.<sup>3</sup> It is so seldom, however, that the slightest suspicion exists of any improper intention on the part of the Lord Advocate, in making this application, that it is usually granted as a matter of course; and hence the expression has become general in ordinary language, of the *prosecutor* deserting the diet *pro loco et tempore*; an expression which, though in general truly descriptive of what practically happens, is nevertheless not well founded, either in the form of the proceeding, which invariably is a motion on his part, and a deliverance by the Court, nor in the powers which he and the judge respectively possess. Such a power of deserting the diet accordingly, without the interposition and authority of the Court, was expressly disclaimed by the Solicitor-General, in a minute on record, in the case of Archibald, March 1, 1768,<sup>4</sup> and since that time, as indeed before it, no attempt has been made to claim it for the office of Lord Advocate.

13. The private party injured by an offence may also prosecute in his own name, with concurrence of the public prosecutor; but this right is limited to those who truly have suffered from the delinquency which has been committed, or have a substantial and peculiar interest in the issue of the trial.

The original form of prosecution in Scotland, and which still subsists in full vigour, though not frequently put into practice, from the universality of public prosecutions, was in the name, and at the instance of the private party injured, who prosecuted, not merely for redress and reparation to himself as an individual,

<sup>1</sup> Hume, ii. 276.—<sup>2</sup> Case of M'Phie, Sept. 19, 1763, Inverness; Burnet, 310; Hume, ii. 276.—<sup>3</sup> Ibid. ii. 276.—<sup>4</sup> Ibid. ii. 276.

but for punishment on behalf of the public.<sup>1</sup> This form of prosecution, therefore, is for the full pains of law, for which the Lord Advocate could conclude, as well as for the damages, *solatium*, and expenses, which more nearly concern the patrimonial interest of the private sufferer.<sup>2</sup> Thus, in a case of homicide, a libel at the instance of the wife or the kinsmen of the deceased, is as good towards inflicting the highest punishment of the law on the body of the culprit, if he be convicted of murder, as, if it turn out culpable homicide, it is to recover the assythment, or pecuniary consideration due to the kindred. This *title* arises to the private party, though the concourse originally afforded by the public prosecutor, which is essential to the process, should be withdrawn at the diet of compearance.<sup>3</sup>

To support his instance or title to carry on such a process, the private party must be able to show some substantial and peculiar interest in the issue of the trial, an interest arising from what he, beyond all others, has suffered on the occasion libelled, and at which he is entitled to feel more than ordinary indignation.<sup>4</sup> Such is the general rule; but in the application of it to practical purposes, many nice and important questions arise.

1. The title of the individual complainer must not be a feeble and remote concern in the issue of the trial, or one of a general nature, or felt in common with a whole neighbourhood or class of society.<sup>5</sup> It does not belong, therefore, to every minister of the Church of Scotland, though certainly interested in preserving the purity of their order, to prosecute for the celebration of clandestine marriage, or intrusion into kirks by unqualified or deposed persons: and though the keeping of an irregular house for thieves and prostitutes, is a general nuisance to the whole neighbourhood, yet none but the procurator-fiscal, and those in the close vicinity, and personally injured by the nuisance complained of, are entitled to prosecute.<sup>6</sup> Or if a court of justice be interrupted by a mob, or a riot ensues upon the settlement of a minister, whereby the ordination is hindered, and the parish scandalized and deprived for a season of its ordinary religious worship—still this interest, though by no means evanescent, is not so considerable as to permit every litigant in the one case, or every heritor of the parish, or member of the congregation, in the

<sup>1</sup> Burnet, 297; Hume, ii. 118.—<sup>2</sup> Hume, ii. 118; Burnet, *ibid.*—<sup>3</sup> Col. Charteris' Case, April 4, 1723; Hume, ii. 119; Burnet 297.—<sup>4</sup> Burnet, 302; Hume, ii. 119.—<sup>5</sup> Burnet, 302; Hume, ii. 119.—<sup>6</sup> Hume, *ibid.*

other, to stand forth as the avenger of the public wrongs.<sup>1</sup> It has been decided, accordingly, that in such a case the patron of the parish has a sufficient title to prosecute, but not so the heritors or parishioners.<sup>2</sup> In like manner, when an account of a judicial proceeding of the Court, published in the newspaper, was complained of by an individual, as not only injurious to himself, but derogatory to the dignity of the Court, their Lordships dismissed the complaint, upon this, amongst other grounds, that no private party has a right to complain of an offence as derogatory to the dignity of the Court, the vindication of whose authority belongs to themselves and the public prosecutor alone.<sup>3</sup> On the same principle it has been held, that the clerk to the trustees on a turnpike road, was not a competent prosecutor, nor would his constituents have been so, for an assault upon the person of a carter employed by them, though done specifically with the view of obstructing him in that employment.<sup>4</sup>

2. The right of private prosecution fails in the case of a judicial trustee on a bankrupt estate, because the law does not view him as invested with that peculiar and personal interest in the wrong done to the estate under his management which is necessary to support a *criminal suit*, how adequate soever it may be to invest him with a complete title to pursue *ad civilem effectum*. So the Court found in the case of a trustee who prosecuted for the forgery of an indorsation on a bill, whence arose a claim of relief against the bankrupt estate;<sup>5</sup> and the Court of Session proceeded on the same grounds in regard to the title of such a trustee to prosecute the debtor for the pains of fraudulent bankruptcy, though it was argued that this offence was in an especial manner committed against the trustee, as legally charged with the recovery and distribution of the effects;<sup>6</sup> and in the case of a complaint for perjury, at the instance of a banking company, a similar judgment was given.<sup>7</sup> It would appear, therefore, that the proper parties to prosecute in such cases are the creditors themselves, as being directly lesed and injured by the crime committed against the funds of their payment. But in what way they are to act up to all the obligations of law on private prose-

<sup>1</sup> Hume, ii. 120.—<sup>2</sup> Gillin, Gray, and others, July 5, 1751; Hume, ii. 120.—<sup>3</sup> Burnet, 302; Case of A. Ritchie, June 29, 1798.—<sup>4</sup> Wingate v. Brown, Feb. 17, 1809; Fac. Col. and Hume, ii. 120.—<sup>5</sup> Andw. Belch, Jan. 3, 1806; Burnet 303; Hume, ii. 119; Burnet, App. No. 14.—<sup>6</sup> Jas. Aitken and Adam Rennie, Dec. 11, 1810; Fac. Col.—<sup>7</sup> Renfrewshire Banking Company v. M'Kellar, May 18, 1816; Hume, ii. 119.



cutors, in particular, appearing personally in Court during the trial, has not yet been settled, and it may be anticipated, will offer very serious difficulties, if ever such a case should occur. The title of the trustee, however, appears unexceptionable in all offences, as theft, swindling, breach of trust, or the like, which are directed against the *possession* of the estate under his management, as such offences implicate him directly, by interfering with his custody, and possibly subjecting him to claims of reparation or damages, at the instance of his constituents.<sup>1</sup> It has been decided that the agent of a game association may prosecute, as a common informer, on the footing of his interest in the penalties;<sup>2</sup> and by Mr Home Drummond's act, 7 and 8 Geo. IV. c. 20., it is provided, "that it shall and may be lawful for the trustee appointed for the management of any sequestrated estate in Scotland, or any creditor whose claim has been received, and has been duly ranked upon any such sequestrated estate, in the sederunt-book kept by the trustee, with concurrence of his Majesty's advocate, to prosecute such offence before the High Court, or Circuit Court of Justiciary."

It is settled, that the title of a freeholder on the roll, equally as that of a candidate, is available to sustain a prosecution for perjury in taking the oath of trust and possession.<sup>3</sup> But this proceeds, not on the principle, that one freeholder may prosecute for an injury not done to himself, but that every freeholder is *himself injured* by such an usurpation of the office of freeholder, as charges the roll with a person not legally entitled to a place on it, and diminishes his individual importance, by the admission of an unqualified person to a participation of his privileges.

As the title of a private party is thus subject to so many restrictions, it follows that the indictment must set forth in a clear and distinct manner the interests of the private party, in order that the Court may judge whether it is of such a kind as to authorize their putting the accused on his trial: and that where this is not done, the indictment should not be found relevant. In the case of Thomas Somerville, accordingly, Jan. 25, 1813, when the libel had omitted to set forth sufficiently the nature of the private party's interest to prosecute, the Court ordered informations on the relevancy; and the private parties wisely drop-

<sup>1</sup> Burnet, App. No. 14.—<sup>2</sup> Gray, Jan. 26, 1816.—<sup>3</sup> James Fife, Dec. 5, 1796; Hume, ii. 120.

ped that defective libel, and raised a new one, in which their interest as having been obliged to pay the bill, which had been forged, was duly set forth.<sup>1</sup>

14. But if the private prosecutor himself have sustained an injury, his title to prosecute is clear and indubitable, for the smallest as well as the greatest injuries.

Under the modifications already mentioned, the title of a private complainant reaches crimes of every sort, whether affecting his person, property, or peace of mind.<sup>2</sup> Whether it be the injury of bodily pains, battery, or mutilation; or insult, and fear of mischief, as attempts to ravish or murder,<sup>3</sup> or a challenge to fight,<sup>4</sup> or a threatening letter; or a putting in danger, by conspiring to fix a false criminal charge;<sup>5</sup> or the loss of liberty, as by wrongous imprisonment, or illegal detention; or the violation of natural affection, as by raising a dead body of a near relative from the grave;<sup>6</sup> or patrimonial loss inflicted or intended, as by theft, forgery, deforcement, perjury, subornation, in a civil process;<sup>7</sup> or loss or disappointment of any other sort, as in the case of bribery in opposition to one's interest as candidate at an election: all these are such wrongs as bestow a title on the sufferer to accuse and bring to justice the author of the injury.<sup>8</sup> And in all these cases the title becomes good, though the criminal act complained of has been *an attempt* only: provided it has been an attempt which has proceeded so far, *si devenit ad actum maleficium proximum*, as of itself, on the ordinary principles of law, constitutes an indictable offence. On this account, Baron Hume justly censures the judgment in the case of Sir William Jardine, July 10, 1797, which found the private party had no title to prosecute one article of charge which charged the pannel with an attempt to suborn, in respect the attempt is not alleged to have succeeded.<sup>9</sup> In three prior cases, the title of the private party to prosecute for this sort of injury, passed unquestioned both at the Bar and on the Bench.<sup>10</sup> And in the estimation of law, if the

<sup>1</sup> Hume, ii. 119.—<sup>2</sup> Burnet, 299; Hume, ii. 121.—<sup>3</sup> Walter Buchanan, Jan. 15, 1728.—<sup>4</sup> Bassil Eids v. M'Caul, April 5, 1714.—<sup>5</sup> Houston v. Walkinshaw, Aug. 8, 1704.—<sup>6</sup> Arch. Begg, Jan. 14, 1803; Hume, ii. 121; John Samuel, July 12, 1742.  
<sup>7</sup> Isackson and Others, Aug. 10, 1710.—<sup>8</sup> Hume, ii. 121; Burnet, 299.—<sup>9</sup> Hume, ii. 122.—<sup>10</sup> Charles Hay, July 31, 1710; M'Donald of Barrisdale, Feb. 2, 1736; and Hogg and Soutar, July 14, 1738; Hume, ii. 122.

jury have been personal, it is of no moment how trifling it may have been. Where it was urged accordingly, that the firing of a pistol at a person, and putting him in fear of his life, but without hitting or injuring him, was too inconsiderable an injury to sustain a title at the instance of the private prosecutor,<sup>1</sup> the Court at once repelled the objection.

15. The near kinsmen of the injured party have a right to prosecute for such injuries to their deceased relative, as by their atrocious character, or serious consequences, may be supposed to inspire them with warm and excusable feelings of resentment.

The true foundation of the right of a private party to prosecute, is to be found in the feelings of resentment which follow the reception of an injury, which are implanted by nature, and universally felt. As the law which prohibits private feuds cannot extinguish these feelings, it deems it safer to turn them into the regulated channel of legal prosecutions. Upon this account, and because the deceased sufferer cannot himself prosecute, the near kinsmen are allowed to prosecute in cases of murder, rape, or attempt to commit these crimes.<sup>2</sup> In the case of rape, a right to prosecute was sustained at the instance of the woman's father, though it was objected that she was of perfect age, and did not join in the complaint;<sup>3</sup> and a stepfather has been permitted to insist in his own name, and for the woman and her mother.<sup>4</sup> Independent of the common law, there is on this matter of rape, the express enactment of the act 1612, c. 4, which declares, that "if the woman's parents, or nearest of kinsfolk, or his Majesty's Advocate, be able to verify to determination of the assize, that the fact was at first violably and forcibly done against the parties' will, and without their consent; the subsequent consent or declaration of the party shall not excuse the offenders from his Majesty's arbitral punishment." These words evidently imply that the woman's nearest of kin are competent to prosecute for this offence; and, accordingly, in the case of Col. Charteris, Nov. 12, 1723, the title at the instance of the injured husband, was sustained after the Lord Advocate had withdrawn his concurrence.<sup>5</sup>

<sup>1</sup> Jas. Justice and David Horne, July 1744; Hume, ii. 122.—<sup>2</sup> Hume, ii. 123; Burnet, 299.—<sup>3</sup> Cheyne and Bowman, July 6, 1602.—<sup>4</sup> Patrick Carnegie, June 20, 1681; Hume, ii. 123.—<sup>5</sup> Ibid.



On the same principle, a tutor may prosecute for a rape, attempt to ravish, or forcible abduction of his ward;<sup>1</sup> and a similar title was sustained in an uncle and tutor nominate pursuing for the abduction of a male ward, though it was objected that he was past fourteen, and did not concur in the prosecution.<sup>2</sup>

2. Though the law recognises an interest arising from wrongs done to our *relation or kindred*, yet they must be *personal* wrongs, and of a high and aggravated kind, such as excite strong feelings of anguish and resentment in the minds of the kindred of the sufferer.<sup>3</sup> In so far, indeed, as the heir or executor of the injured party have a patrimonial interest on such an occasion, as for improbation of a forged writing, damages, or restitution of stolen goods, certainly his title must be sustained in the civil court; but a libel, concluding for corporal pains only, or fine, or escheat of goods, on account of an ordinary assault, would certainly not be competent to the next of kin, or heirs of the injured party.<sup>4</sup> It is otherwise, however, where the injury done was very atrocious; and, accordingly, where a man had been unlawfully seized, detained, and imprisoned in a ruinous castle in the Highlands, the Court repelled the objection, that the prosecution was instituted not by the suffering party, but his son.<sup>5</sup>

With regard to the kinsmen who may pursue, Mackenzie lays it down that it cannot go beyond those degrees wherein marriage is forbidden; but that it will, in the atrocious personal crimes, go that length is certain.<sup>6</sup> In the case of Gillespie, Dec. 27, 1694, the prosecutor was cousin-german; and there seems to be no limit to the relations, however remote, provided they truly are the next of kin.<sup>7</sup> The nearest of kin does not exclude the more remote; and all may prosecute jointly.<sup>8</sup> The nearer, by declining to prosecute, does not exclude the remoter, if they choose to take up the case; and the more distant kinsmen may prosecute for the assythment, in cases of murder, if they can show that the next of kin have been required to concur, and have declined.<sup>9</sup>

This high privilege belongs only to legitimate relations. It has been expressly found, even in a case of rape and murder, that there is no title in the person of a bastard cousin-german,<sup>10</sup>

<sup>1</sup> Hume, ii. 123.—<sup>2</sup> Ibid.—<sup>3</sup> Burnet, 303; Hume, ii. 123.—<sup>4</sup> Hume, ii. 123.—

<sup>5</sup> McLean of Lochbuy, Aug. 17, 1759; Hume ii. 123.—<sup>6</sup> Hume, ii. 124. Sir Godfrey McCulloch, Feb. 8, 1697.—<sup>7</sup> Hume, ii. 124.—<sup>8</sup> Carnegie of Fintraves, Aug. 1728; Hume, ii. 124.—<sup>9</sup> Balfour, 517.—<sup>10</sup> Thomas Weir and James McNaught, June 27, 1621.

and there seems no principle on which even the nearest illegitimate relations can be admitted to this, any more than any of the other privileges of the genuine blood.<sup>1</sup>

If the relationship is objected to, it lies on the prosecutor to establish it; which if he fails to do, his process must be dismissed.<sup>2</sup>

16. If the private prosecutor has been outlawed, and is still unreponed, he cannot insist in a criminal process.

How near soever the relationship of the prosecutor may be, nay, though he should be himself the injured party, he cannot be heard to seek redress in a court of law, if he has himself been thrown out of the pale of the law by a sentence of fugitation.<sup>3</sup> Unless he has been reponed he cannot be permitted even to defend himself against any prosecution that may have been raised against him, and much less to institute criminal proceedings against others. This disability, however, does not follow a sentence of excommunication by the church for any offence how heinous soever, nor a sentence of infamy by a court of justice; but only a regular sentence of fugitation pronounced by a competent court, and standing unrecalled.

17. Not only private individuals, but mercantile companies and corporate bodies, may prosecute at their own instance, provided their rights as such have been infringed or invaded; and the prosecution contains the names of individual prosecutors, and members of or for behoof of the firm.

Wrongs may be committed not only on individuals, but on mercantile, banking, and insurance companies, magistrates of boroughs, presbyteries, or the like, in their joint or corporate capacity. Unless they were permitted to prosecute in their corporate capacity, for offences committed against them in their corporate character, no private prosecution could be maintained in such cases, and the proceedings of the public prosecutor there relieved of that salutary check which the power of private prosecution imposes. It is settled law, therefore, that communities,

<sup>1</sup> Hume, ii. 125.—<sup>2</sup> Ibid.—<sup>3</sup> Patrick Dunbar, June 22, 1599. Hume, ii. 125.

or corporate bodies, may prosecute for injuries done to them *qua* such.<sup>1</sup> Accordingly prosecutions have been sustained at the instance of the Governor and Company of the Bank of Scotland for forgery;<sup>2</sup> of the British Linen for forgery;<sup>3</sup> of the Directors of the York Buildings Company and their factor, for falsifying writings, and fraud;<sup>4</sup> of the Managers of the Sun Fire-Office against persons accused of fire-raising to defraud insurers.<sup>5</sup> And till a very recent period all the prosecutions for offences against the Bank of England were conducted by the Governor and Company of that establishment, with the concurrence merely of the public prosecutor. But in all these cases the names of *individual managers* or members of the firm are necessary to sustain the instance, for it has been held that a banking company cannot prosecute by the social firm, without the names of some individuals at least for behoof of the firm.<sup>6</sup>

Our practice also exhibits various instances of prosecutions by magistrates of boroughs, for offences committed against them in their corporate capacity. Witness, among other instances, that of the provost and magistrates of Aberdeen v. Irvine of Hillon, for breaking prison, and the provost of Linlithgow v. Hunter and others, December 20, 1725, for assaulting a chief magistrate and privy conventions within burgh, in hinderance of the common law; and the provost and bailies of Irvine v. Craufurd, March 14, 1757, for an unlawful conspiracy to defeat the freedom of election, by carrying off one of the trades' counsellors. The title of the complainers was here objected to, on the ground that their election as magistrates had been set aside as illegal by the Court of Session; but the Court sustained the answer, that no sufficient evidence of this was produced, and that if there had, "it was competent to the pursuers, *or any inhabitants* of the borough, to raise a prosecution for the offences charged."<sup>7</sup>

Numerous instances also occur in which the right of presbyteries, or the procurator of the church in their name, has been sustained in prosecutions for offences against the church, or molesting her judicatories.<sup>8</sup> In the case of Cleghorn v. Duguid, November 1713, it was objected to the title that the moderator

<sup>1</sup> Burnet, 300.—<sup>2</sup> Treasurer of Bank of Scotland v. Young, Nov. 1750.—<sup>3</sup> Bailly, Feb. 1765.—<sup>4</sup> Mathie, March 10, 1727.—<sup>5</sup> Case of Muir and Cant, Dec. 5, 1773.—

<sup>6</sup> Hume, ii. 119; Renfrew Banking Company v. M<sup>c</sup>Kellar, May 18, 1816.—<sup>7</sup> Burnet, 300.—<sup>8</sup> Sands v. Moodie, July 1712; Cleghorn v. Duguid, Nov. 1713; Burnet, 301; Black and Others, Patrons of St Machar v. Campbell, July 1714; Burnet, *ibid*.



and private complainers had produced no sufficient authority from the presbytery to show that they actually concurred; but the Court found, "that the moderator and the other two ministers, pursuers, with the procurator for the church, insisting for themselves, and in name of the presbytery, are legally entitled to prosecute."<sup>1</sup>

It need hardly be added, as a consequence of the same principle, that freeholders and electors have a sufficient title to prosecute for perjury, in taking the trust oath against the interest of the true electors in effecting the return.<sup>2</sup> Here there is a combination of two titles, either of which seems sufficient, *per se*, to sustain the title; that of the individual complainers in their private capacity, and lesed in their private estate by the perjury complained of, and that of the same complainers in their corporate capacity, and as vested with a certain public privilege, which they are bound to defend and preserve from invasion as a public duty.

18. The private prosecutor is vested with the same right of restricting the libel, or departing from aggravation, which belongs to the Lord Advocate, provided he obtains the concurrence of that officer to such mitigation of the legal pains.

The law has specified the punishment which constitutes the maximum of pain which can be inflicted for every offence. But it holds that the private, equally with the public complainer may, with the concurrence of the Lord Advocate, interpose to arrest the severity of its enactment, on the principle, that if the private party injured is content with an inferior pain, it may safely be presumed that the public indignation will be sufficiently satisfied with the mitigated punishment.<sup>3</sup> In the case, accordingly, of *Glen v. Hunter*, December 20, 1725, this right was exercised by the private party, the public prosecutor at the same time restricting the libel on the same grounds; and in that of *Begg*, January 14, 1803, the private prosecutor consented to a prayer for banishment, not generally, but under a condition, and sentence was pronounced in terms of the consent thus qualified.<sup>4</sup> There does not appear, however, to be any ground for holding

<sup>1</sup> Burnet, 301.—<sup>2</sup> *Penrose Cumming v. Leslie*, Nov. 1785; *Idem v. Lawson*, June 1785; *Duff v. Fife*, March 1, 1796; Burnet, 301.—<sup>3</sup> Burnet, 301.—<sup>4</sup> *Ibid.*

that the private party can *alone* interpose without the concurrence of the public prosecutor, and such a power in such hands might lead to dangerous or disgraceful compounding of public justice.<sup>1</sup> But if the complainer do not thus interpose, the prosecution of the private party reaches the full pains of law; as well those public penalties which follow a prosecution at the instance of the public prosecutor, as those private ones of *solatium*, damages, and expenses, which go to repair the private wrong which he has sustained in his person or patrimonial interest.<sup>2</sup>

19. An injured party may either prosecute himself, with concurrence of the public prosecutor, or lay the case before that officer, with a view to its being taken up by him at the public instance; but if he adopts the latter course, although he may prosecute himself if the public prosecutor declines, yet if a public prosecution is raised, he has made his election to abide by the issue of it, such as it may happen to be, and cannot be permitted to proceed afterwards at his own instance against real or supposed delinquents whom the public prosecutor has admitted as evidence for the Crown in the original prosecution.

Private parties injured by offences have no reason to complain of the situation in which they are placed by the law of Scotland. If they choose to insist in their own name they may do so, and thus acquire, jointly with the Lord Advocate, the entire control of the prosecution, with all the powers which attach to it. If, however, instead of this, they lay the matter before the public prosecutor, and take advantage of the prosecution at the instance of the Crown, they are not entitled afterwards to complain of the selection of pannels which the Lord Advocate has made, or insist in their own name against those whom he has admitted as witnesses for the public interest. To allow this would be to permit a private party first to precognosce witnesses upon oath, on occasion of the trial of one of the guilty parties, and afterwards insist against the witnesses who had divulged their own criminality, under the compulsion of a criminal trial, and the impression of security arising from being called as a witness for the Crown. This rule, which is founded

<sup>1</sup> See Justice-Clerk's speech in *Hare v. Wilson*; *Syme*, 393.—<sup>2</sup> *Burnet*, 302.

in the highest equity, was lately exemplified in the case of William Hare, February 2, 1829. The *species facti* there was, that this man was admitted as a witness for the Crown in the case of Burke and M'Dougall, December 24, 1828, who were charged with three separate murders, and, among the rest, with the murder of a poor vagrant, well known in Edinburgh under the name of *Daft Jamie*. Burke was tried only for one of the murders, and convicted of it, and in the course of the proof of that charge he admitted his accession to that murder, but declined to answer on a cross-examination whether he had been guilty of any others. Burke stated in his dying declaration that Hare and he jointly murdered *Daft Jamie*; and it soon transpired from various sources that he had undoubtedly been implicated in that foul transaction. Upon this the public indignation was strongly excited against this atrocious criminal, and, by the aid of a subscription, a prosecution was instituted in the name of the relations of *Daft Jamie* against Hare, concluding for the pains of law and assythment for the murder of that man. A precognition was begun, and Hare arrested, and laid in jail by a warrant of the Sheriff of Edinburgh, when the proceedings were stopped by a bill of suspension and interdict, at the instance of Hare, which concluded to have him liberated and the proceedings quashed, on the ground that having been adduced as a witness for the Crown in the prosecution of Burke and M'Dougall, he could not be again tried at the instance of the private party. The Lord Advocate stated, by a minute on record, that he would not give his concurrence to such a prosecution, upon the ground that he was bound to refuse it in justice and honour, after having examined Hare as a witness for the crown in the former trial. The question was fully and ably argued, both by verbal debate and written pleadings, and the Court, by a majority of three to two, "in respect that the complainer William Hare cannot be criminally tried for the crime charged in the warrant of commitment; therefore suspend the said warrant, ordain the said William Hare to be set at liberty, and discharge all further proceedings in the precognition complained of.<sup>1</sup> This judgment proceeded on the grounds that the Lord Advocate was here clearly debarred from insisting by the judicial compact implied, in calling him as a witness in the previous trial, which contained the charge now made the subject

<sup>1</sup> Syme, 373, 396.



of prosecution, even although no examination on the circumstances of that charge had actually taken place; and that this being the case, the private party was also bound by the tacit acquiescence in these proceedings, which was necessarily implied by his putting the matter into the hands of the Lord Advocate, instead of following out from the beginning his right of private prosecution.

20. The prosecution at the private instance requires the concurrence of the Lord Advocate, and cannot be insisted in without it; but his Lordship is not the uncontrolled judge of giving or refusing his concurrence, but may be compelled to state his grounds for withholding his concurrence to the Supreme Court, who will judge of their sufficiency.

The prosecution at the private instance is attended with this peculiarity, that it requires the concurrence of the Lord Advocate, and receives it by the subscription of that officer, or some one authorized for him, at the bill or petition for the criminal letters.<sup>1</sup> This practice is grounded on two considerations: 1. The interest which this officer has in the fines or escheat consequent on a conviction for various offences; 2. The far more material interest arising from his interest in the administration of justice, and the necessity, by the interposition of this high officer, of guarding against collusion, fraud, or corruption, in the management of private prosecutions.<sup>2</sup> This concurrence is therefore required to every libel in a Criminal Court, whether it conclude for the full pains of law, or mainly, or even entirely, for pecuniary compensation to the injured party; for the Scottish law recognises no infliction of punishment, whether in the form of damages or otherwise, in the Criminal Court, but either in a libel at the public instance or at the private, under his superintendence and concurrence. So far is this carried, that even in an action of reduction improbation, which is intended only to regulate the civil rights of parties, though by fiction laid on criminal grounds, the concurrence of the Lord Advocate is, by immemorial practice, indispensably requisite.<sup>3</sup> Several cases have accordingly occurred, in which, for want of the concurrence of the Lord Advocate, criminal

<sup>1</sup> Hume, ii. 125. Burnet, 306.—<sup>2</sup> Ibid. Hume, ii. 126.—<sup>3</sup> Ibid.

processes have been dismissed, particularly *Syme v. Steel*, Aug. 10, 1765, and *Darby v. Love*, Feb. 10, 1796, both prosecutions for fraudulent bankruptcy, at the instance of a trustee for creditors, which, independent of being objectionable on the footing of the title of the *trustee*, were also defective from want of the proper concurrence.<sup>1</sup>

But the Lord Advocate has not the interest of the individual absolutely in his hands, nor can he merely at pleasure deprive a party injured by an offence of his inherent right of prosecution.<sup>2</sup> Not that it is to be supposed that he can be compelled to grant his concurrence in all cases, how absurd and untenable soever the grounds of prosecution may be, as if his concurrence should be asked to a prosecution for witchcraft, which has ceased to be a point of dittay—or of treason, for which no private party can prosecute—or of murder, at the instance of one who is not a kinsman of the deceased.<sup>3</sup> The rule therefore is, that he may refuse his concurrence in the first instance, if he shall see cause; but then the aggrieved party may apply to the Court, who will compel him to adhibit his concurrence, if there is not reasonable ground to the contrary.<sup>4</sup> In exercising this important though delicate duty, of compelling the public concurrence, the Court are entitled only to look to the case as it *prima facie* appears before them; and unless the proceeding to which the concurrence is claimed is clearly and indisputably illegal, they will constrain him to grant it, leaving all objections to the title of the pursuer, the relevancy of the libel, the sufficiency of the proof or the like, to be discussed in ordinary form, after the libel shall have come into Court or to be discussed in ordinary form before the assize.<sup>5</sup> In 1633, accordingly, the Court of Session ordained the Lord Advocate to adhibit his concurrence to certain proceedings of reduction in the Court of Session, qualifying their order by the declaration, “that his Majesty’s Advocate is nowise thereby debarred from appearing for his Majesty’s particular right and interest to oppose and defend the said pursuits.”<sup>6</sup>

As the concurrence of the Lord Advocate to such prosecutions is a mere form to open the door of the Criminal Court to the private party, and give the former a sort of control over, and cognizance of the proceedings, it is settled, that in the case of mutual

<sup>1</sup> Burnet, 306.—<sup>2</sup> Hume, ii. 126.—<sup>3</sup> *Ibid.* Burnet, 306, 307.—<sup>4</sup> Hume, ii. 126, 127. M<sup>l</sup>Laurin, 298.—<sup>5</sup> *Ibid.*—<sup>6</sup> *Ibid.*

libels by parties against each other, he may, and must, under the qualifications above stated, grant his concurrence to both parties;<sup>1</sup> and it is competent for him to appear for the defender in either.

21. The private prosecutor, before he is allowed to proceed, is bound to find caution to insist; he is liable in certain penalties, if the prosecution prove to have been malicious; he must take, if required, the oath of calumny; and he may be subjected in costs, if the Court see cause.

It is obviously necessary to lay the private prosecutor under very different restrictions from the public accuser. Such is the force of private interest, both in blinding the understanding and exciting the passions, that if private persons, who either have been, or conceive themselves to have been injured, were allowed to prosecute without any restriction or responsibility, trials or commitments would become the means of wreaking individual vengeance, and the tribunals of public justice be converted into the instruments of private malignity. For these reasons, which daily experience in the neighbouring country proves to be well founded, it is settled in our law, that the private prosecutor must submit to a very serious responsibility before he undertakes a prosecution.

By several old acts<sup>2</sup> the individual complainer must find caution, under certain penalties, at raising his criminal letters, (the only form of prosecution competent to the private party,) to report them duly executed, and insist in the prosecution. By the two former acts the unjust or calumnious prosecutor is liable in certain sums of money, now become elusory from the change of the times, for which the Justice shall give immediate decree, in the event of an acquittal, to be recovered by summary imprisonment of the prosecutor's person.<sup>3</sup> By a later act, 1587, c. 88, these penalties are declared to be exclusive of the charges of the pannel's defence, which the Court are directed to modify to the accused, "quhair parties are maliciouslie charged to underlie the law." Under these words it is justly settled, that, in considering a motion for expenses, the Court are entitled to look to the whole circumstances of the case, and not the mere fact of a verdict of

<sup>1</sup> Stirling, July 4, 1748; Hume, ii. 127.—<sup>2</sup> 1535, c. 35; 1579, c. 78; 1593, c. 170.—<sup>3</sup> Hume, ii. 127. Burnet, 305.



acquittal of the charge, and either to give full expenses, or modify them, or refuse them altogether, as the justice of the case shall seem to require.<sup>1</sup> Accordingly the Court have more than once awarded full expenses to one of the pannels in a case, and refused them to the other.<sup>2</sup> In a late case,<sup>3</sup> the private prosecutor was found liable in full expenses, as well as the statutory penalties, in consequence of having not insisted in his criminal letters; and in another they were modified to ten guineas.<sup>4</sup> Full expenses were awarded against the private prosecutor, on a verdict of not guilty in favour of the accused, in the case of M<sup>c</sup>Intosh v. Cameron, Inverness, Spring 1832.

Farther, the Court are empowered, if they see cause, to go a still greater length against the unjust and calumnious accuser, by awarding a certain sum *de plano* on the acquittal of the pannel in name of *solatium*, and as a reparation for his damage and distress.<sup>5</sup> There is this obvious advantage of proceeding in this course, that there is a greater likelihood of the money thus awarded really reaching the pocket of the injured party, and not being intercepted, as is too often the case with damages awarded in the Jury Court, by a huge account by the agent over and above his modified expenses; while the prosecutor has the immense advantage of escaping the heavy costs of a new and vexatious proceeding in the Civil Court. Accordingly, in one case, instead of the statutory sum of L.10 Scots, L.40 Scots was awarded to one pannel, and L.30 to another.<sup>6</sup> In every point of view this seems a desirable course, both because the circumstances of the case are then fresh in the recollection of the Court, because a subsequent action of damages by a pursuer, probably insolvent, is avoided, and the wasting of the substance of both parties in ruinous proceedings before the Jury Court prevented.

22. The private prosecutor may be compelled to take the oath of calumny, either *in limine*, or on any other stage before the jury is sworn; and if he decline to swear, the diet will be deserted simpliciter.

As a farther security against malicious prosecution, it is com-

<sup>1</sup> Burnet, 306. Hume, ii. 127.—<sup>2</sup> M<sup>c</sup>Culloch and Macandlish, July, 1744; Hume, ii. 127. Fullerton, Aug. 15, 1768; Liddell and Lewes, June 20, 1769; *ib.*—<sup>3</sup> Murray Borthwick v. Alexander, June 17, 1822.—<sup>4</sup> John Hunter, Dumfries, April 1825, unreported.—<sup>5</sup> Hume, ii. 128.—<sup>6</sup> Oswald and Brown, Aug. 5, 1712; Hume, ii. 128.

petent for the pannel to insist that the prosecutor shall give his oath of calumny before proceeding farther ; or, in other words, swear that he believes that the facts stated in the libel are true.<sup>1</sup> This may be, and usually is, demanded *in limine* of the process ; but it may also competently be put at any subsequent stage, before the jury is sworn, when they become so completely charged with the case that it is no longer competent. It has been accordingly put and taken, after the interlocutor of relevancy has been pronounced.<sup>2</sup>

The prosecutor must swear, not merely that he has just grounds and reasons to insist, but that the facts charged in the libel are, so far as he knows, true.<sup>3</sup> This is the important thing which it is the object of the oath of calumny to elicit, and not a mere vague opinion that the prosecution is well founded, which may cover only some absurd idea in point of morality or law.<sup>4</sup> In the case, accordingly, of John Lawson, Feb. 10, 1785, where this matter underwent some discussion, though the Court pronounced only a general order, the oath taken was, "that the prosecutor *believes* that the facts charged in his libel are true, and that he has good reason to insist in this prosecution."<sup>5</sup>

If the prosecutor decline to swear, the Court will, *de plano*, desert the diet, upon the ground that a prosecution, to the grounds of which the prosecutor will not emit such an oath, is not fit to be submitted to a jury.<sup>6</sup> And the effect of such a desertion is equivalent to a desertion *simpliciter*, or a complete bar to any farther prosecution, at the instance of a party who has shown such reluctance to depone to its verity.<sup>7</sup>

But what if the private party hath lodged a disclamation of the process, or written expression of a resolution to abandon it ? It will depend on the terms of the disclamation, whether it applies to that process only, or is general, and debars the party from insisting anew in any other libel.<sup>8</sup> In the case of Farquhar v. Graham, Feb. 9, 1621,<sup>9</sup> the disclamation was held to apply to the right of prosecution generally, and to debar the raising of new letters on that matter in time to come : but in a later case, the disclamation was held to apply to that particular process only, from the peculiar terms in which it was conceived.<sup>10</sup> The disposition of law,

<sup>1</sup> Hume, ii. 128 ; Thomas Hamilton, Glasgow, April 1814.—<sup>2</sup> Robert Craufurd and Others, March 14, 1757 ; Hume, ii. 129.—<sup>3</sup> Huene, ii. 129.—<sup>4</sup> Ibid.—<sup>5</sup> Ibid.—<sup>6</sup> Hume, ii. 129.—<sup>7</sup> Ibid.—<sup>8</sup> Burnet, 306.—<sup>9</sup> Hume, ii. 129. The like in Pat. Gordon, Nov. 20, 1706.—<sup>10</sup> Rule and Gilkie, June 23, 1777.

however, is to construe all such disclamations as general of the right of prosecution; and unquestionably it would require very peculiar circumstances to let in a prosecution in a new form, on a second occasion, which, on the first, had been deliberately disclaimed or abandoned.

## CHAPTER V.

### OF ARREST AND PRECOGNITION.

THE first step in the punishment of offences obviously is, to arrest the criminal, in order to detain him in prison, or lay him under bail to stand his trial. The power of arrest, therefore, and the parties by whom it may be exercised, form the first subject in the consideration of the steps necessary to bring a guilty party to justice.

1. If a Sheriff, Justice of the Peace, or other magistrate, sees a felony, riot, or breach of the peace committed in his presence, within his jurisdiction; or if he receive information of it, in such circumstances that the criminal might escape if a written warrant is waited for, he may summarily order the arrest of the criminal, without any written warrant.

Though, without doubt, so important a step as arresting a person, even to undergo an examination, should not in the general case be taken without the formality of a written warrant, yet there are some cases in which, for obvious reasons, this must be dispensed with. A sheriff, or magistrate, sees a felony or riot committed under his very eye, and the criminal running off as hard as he can drive; certainly it is not to be imagined that he is obliged to call for pen, ink, and paper, write out a written warrant, and put it into the hands of a constable, or sheriff-officer, before he can order the arrest of the criminal. In such a case, the necessity of the case makes the law; and as the magistrate may arrest the offender thus caught *in flagrante delicto*, if he



can reach him himself, so he may verbally direct any of the bystanders to do the same.<sup>1</sup>

Farther, the same holds though the deed have not been actually committed under the eye of the magistrate, if an immediate complaint has been made to him of a murder, robbery, or the like violent crime, by those who have certain knowledge of the fact, and of the person of the offence, and of the person of the criminal; if the case is so urgent, that the individual thus positively charged might escape through the delay in making out a written warrant.<sup>2</sup> So it was found in a case where the order to arrest was given by a privy counsellor, verbally, to apprehend a man charged with the murder of a person, which had taken place in the presence of the provost and the privy counsellor, but which the Court held equally relevant to assoltie the pannels, whether they acted on the order of the one or the other.<sup>3</sup>

2. In similar cases, where dispatch is indispensable, a constable, sheriff, or borough officer, or other officer of the law, may apprehend a person whom he has seen, or whom others from whom he got the information have seen, committing a felony, without any written warrant; and in atrocious crimes may, without any warrant for that purpose, proceed to break open doors.

The same sense of necessity which has led to the authorizing a magistrate to apprehend, or cause to be apprehended, a criminal charged with a felony, who might escape if a written warrant were applied for, has led to the extension of the same power to a constable, sheriff, or borough officer, or other officer of the law acting within his jurisdiction, if he in like manner sees or has information of a felony committed, in such circumstances, that, without such an instantaneous stretch of authority, there would be a reasonable danger of the criminal escaping.<sup>4</sup> This rule is part of our common law; but, besides that, it is supported by the instructions to constables, in the act 1617, c. 8.<sup>5</sup> In this attempt, which often may be attended with considerable difficulty, or even danger, the constable or law-officer may command the assistance

<sup>1</sup> Hume, ii. 75.—<sup>2</sup> Ibid.—<sup>3</sup> Gillespie and Others, Dec. 30, 1694; Hume, ii. 75.—<sup>4</sup> Kilk. 304; Meldrum v. Brown, Dec. 23, 1746; Hume, ii. 76.—<sup>5</sup> 1617, c. 8. No. 6, 8.

of the neighbourhood.<sup>1</sup> In all these cases, however, the right of the officer is to *apprehend* only, and does not extend to committing to prison. It is the duty of the officer, therefore, in such cases, to bring the supposed delinquent before the nearest magistrate, in order that he may be deliberately examined, the declarations in regard to him taken, and disposed of according to law.

As to the power of breaking open doors in pursuit of a criminal on such occasions, it is undoubted, that in cases of murder, robbery, housebreaking, rape, fire-raising, treason, or the like, which by their violence threaten the peace of society, he may break open doors where the fugitive has taken refuge, or he has received reasonable information he has taken refuge, without any warrant at all.<sup>2</sup> But this does not hold with persons charged with a breach of the peace, unless he actually hears a tumult or affray going on, when it becomes his duty to break in to *prevent* a breach of the peace. It is declared by special statute, that a constable, on information of any theft, hereschip, or depredation, is to levy a *posse* of the neighbours, to pursue the offenders, and he is declared inculpable if slaughter or mutilation ensue in recovery of the goods.<sup>3</sup> The enactment in regard to levying the *posse*, is less applicable to the present than it was to former times; but the statute implies, that if arrest would be legal without a warrant in such cases with the aid of a *posse*, of course it must be equally legal if it can be accomplished without such external aid. Several statutes also have made it lawful for all the lieges to pursue and take rebels for capital crimes, and to destroy by fire and sword all houses where they enter or are harboured;<sup>4</sup> and although these powers, frequently exercised under the terrible letters of fire and sword in former times, have now fallen into comparative disuse, they are strongly indicative of the powers inherent by the Scotch law in all persons, for the apprehension of great and notorious offenders. But in all these cases, if the constable proceed to break open doors, he must first demand and be refused admission, and notify his mission; and this holds equally whether he is or is not the bearer of a written warrant.<sup>5</sup>

By special statute also, a constable is authorized, in common with other officers of the law, to apprehend Egyptians, vagabonds, sturdy beggars, night-walkers, and, in general, all idle and dis-

<sup>1</sup> Hume, ii. 76.—<sup>2</sup> Ibid.—<sup>3</sup> 1662, c. 6.—<sup>4</sup> 1528, c. 8; 1567, c. 33; 1661, c. 22.  
—<sup>5</sup> Hume, ii. 76.

orderly persons, having no lawful means of subsistence; a class of both sexes, who unfortunately are daily becoming more numerous in every part of the kingdom.<sup>1</sup>

3. The same power of arrest belongs to private individuals, without any warrant or magisterial authority, if actually present at the commission of a felony.

By the first principles implied in, or at the foundation of, the social union, individuals who are themselves present at the commission of a flagrant offence, as murder, robbery, or housebreaking, are entitled to interfere for the arrest of the offenders, without either the warrant of a magistrate, or the presence of a constable.<sup>2</sup> This was strongly laid down both by Lord Chief-Justice Mansfield in 1780, on occasion of Lord George Gordon's Riots, and by Lord Chief-Justice Tindal, in December 1831, on occasion of the Bristol Rioters; and it is so obviously founded both in reason and necessity, that it must obviously obtain in the law of every civilized state. As this, however, is a very delicate matter, introduced, contrary to the general policy of the law, from considerations of necessity and expedience, it must be exercised with due regard to the rights of the lieges; and therefore as little violence must be committed as is consistent with the apprehension of the offenders; and when taken, the criminals are to be merely taken forthwith before the nearest magistrate for examination,<sup>3</sup> by whose warrant alone the committal is to take place.

It does not however appear, that the same would hold with persons who have merely *received information*, how credible or pointed soever, in regard to the commission of a felony, which they have not actually witnessed.<sup>4</sup> At the same time there is one situation in which there seems no doubt that such a step might be taken by a private individual, and that is where the *person himself*, upon whom the outrage has been committed, interferes to secure the apprehension of the offender. Certainly if a person returns to his house and finds it pillaged, or on fire, or his child murdered, and he is informed by the bystanders, or others, that they have seen the criminal stealing out of the premises, or running away, with the blood on his clothes, it is competent for him, or any member of his family, to pursue the sus-

<sup>1</sup> 1617, c. 8, No. 4 and 5.—<sup>2</sup> Hume, ii. 76.—<sup>3</sup> *Ibid.*—<sup>4</sup> *Ibid.*



pected person and apprehend him, without any other warrant than the perpetration of the felony by the criminal; and in such pursuit, any of the neighbours may join the principal sufferer by the violence.

But such power is not competent to individuals who have neither witnessed the crime, nor seen the criminal, nor suffered from the injury in regard to a mere breach of the peace; nor can it be affirmed, that in the pursuit of any criminal, how great soever, is it lawful for private persons, even those injured, to break open doors. The proper course in such a case is to surround the house, and prevent the criminal's escape; but delay the breaking in till they have either obtained the authority and presence of a constable or law-officer, or the written warrant of a magistrate.

4. Every magistrate may grant warrant to arrest to the officers of the law within his jurisdiction, even for an offence which he is not competent to try or punish.

The object of arrest being merely to secure the person of the supposed delinquent, with a view to his examination or detention previous to trial, it follows that any magistrate having jurisdiction may arrest and commit without any regard to his competence to take cognizance ultimately by trial of the offence. Thus a Sheriff may apprehend for treason; a Provost or Bailie for any of the pleas of the Crown; and a Justice of the Peace for forgery, or any other offence which he is notoriously incompetent to try.<sup>1</sup> This arises from the nature of the commission of such magistrates, which is for the preservation of the peace within their respective bounds; a duty towards the due performance of which the apprehension and committal of offenders is indispensable. Nay, it would rather appear that a baron bailie has the power of granting warrant to apprehend a criminal within his bounds, to the effect at least of carrying the offender before the nearest Justice within the bailie's own bounds, or of custody in the jail of the barony in the meantime, till the higher magistrate shall be informed of the charge; the clause in the Jurisdiction Act<sup>2</sup> on this subject applying to proper jurisdiction for trial and sentence.<sup>3</sup> Accordingly, in the case of Thomas Hay, Feb. 2, 1824, where it was objected to a declaration taken by a baron

<sup>1</sup> Hume, ii. 77.—<sup>2</sup> Geo. II. c. 43.—<sup>3</sup> Hume, ii. 77,

bailie of Leith, that his name was not in the Commission of Peace, the Court repelled the objection; a decision which implies that he had, *qua* baron bailie, sufficient jurisdiction to arrest and take precognition.

5. A warrant to arrest is good without either the informer's oath or a written petition or signed information; but it is competent to insist for any of these safeguards if the Judge sees cause.

A warrant to *arrest* is a very different thing, and governed by very different rules, from a warrant to *commit*, which must in every case proceed on a signed information.<sup>1</sup> But a warrant to apprehend merely, is good without either the oath of the applicant, or his examination by the magistrate, or even a written petition in support of the application.<sup>2</sup> In short, it is looked upon as a proceeding which takes place frequently on the spur of the moment, under circumstances of the greatest urgency, and where the only indispensable requisites are a distinct statement, whether written or parole, of the offence charged of the person of the criminal, and of the giver of the information.<sup>3</sup>

Although, however, it is not indispensably necessary that a warrant to arrest should have been preceded by the formalities of a written petition, an oath, or judicial declaration, and it cannot be objected to any such warrant, that it was not preceded by them; yet these are proper and praiseworthy securities, which it is always competent for the magistrate to insist for, and some of which, at least, a judicious judge will never fail to exact, if he sees the least reason to suspect that the warrant is applied for from hasty or improper motives. In particular, the formality of a written petition, specifying the crime by place, date, and name of injured party, so far as then ascertained, naming the criminal, and praying for warrant to arrest and cite witnesses for a precognition, should never be dispensed with, where circumstances admit of its being presented. Indeed, such a proceeding seems indispensably necessary towards the making out of a correct warrant, even for the apprehension of the criminal. In like manner the judge may insist before he grants warrant, even to apprehend for the judicial examination, or deposition of the in-

<sup>1</sup> Hume, ii. 77 and 84.—<sup>2</sup> Ibid. ii. 77.—<sup>3</sup> Ibid.

former ; and though this last safeguard is only adopted where suspicious circumstances have emerged. Yet it is always competent for the judge to insist for it where he has any cause to apprehend precipitate or improper proceedings.

6. It is indispensable towards a warrant to apprehend, that it be dated and signed, and as clearly as possible express the person meant to be arrested ; and although the crime charged is, where practicable, a proper addition, it is not indispensably necessary.

The object of the warrant to arrest being not the committal of the prisoner, but merely to bring him before the magistrate for examination, the great thing to be attended to is, that the person meant to be seized is distinguished in it so clearly as to occasion no mistakes.<sup>1</sup> This rule, however, is to be understood in a reasonable and practicable sense. Certainly it is not to be expected that a correct designation by name, trade, and place of residence, is to be given in regard to a person who has just committed an offence, and is probably totally unknown, both to the person who has suffered by his crime, and the magistrate who is called upon to grant warrant for his apprehension. All that is required, therefore, is, that the warrant shall contain all the specification in regard to the name and designation of the supposed offender which the parties possess at the time, and which affords all the security that the state of affairs will permit against one party being mistaken for another. And in the execution of such warrants, it will not escape observation, that if an innocent person is by mistake arrested instead of the guilty one, he can in general have no difficulty in pointing out the mistake, and substantiating it to the magistrate before whom he is brought, and that he suffers no great inconvenience from the error in the meantime ; whereas, if resistance to a warrant to arrest is to be held as authorized merely by the want of a full specification of the person intended, or an error in it, the most ruinous consequences to the administration of justice may ensue.

It is not to be imagined from this, however, that a warrant is good which orders the officer to apprehend *all* persons suspected of the matters therein set forth, without any description at all of

<sup>1</sup> Hume, ii. 78.



the individuals upon whom suspicion has truly lighted.<sup>1</sup> The person praying for the warrant, must have some clue whereby to distinguish the person suspected from all others; and this clue, how slight soever, should appear in the instrument. It may not be possible to ascertain his name; but the description, such as it is, which has prompted the informer to pray for his arrest, should appear in the instrument by which it is to be effected.

The warrant must be dated and signed by the magistrate; but no part of it but the signature requires to be in his handwriting.<sup>2</sup> If it be from a Justice of Peace, it should bear his style and quality, and the county where it is given, by the addition of the letters J. P. and the county to his signature. But though these are proper solemnities, there is no authority which holds that such a warrant is void, by reason of any omission, excepting that of the magistrate's subscription.<sup>3</sup>

The warrant may authorize the officer to bring the supposed delinquent before either the magistrate himself, or any other competent magistrate for the bounds. It may be addressed to an individual macer, officer, or constable, or generally to the proper officers of the magistrate who gives it.<sup>4</sup> Nay, there is no objection to the name of a private individual being inserted in lieu of, or failing, one of the ordinary functionaries of the law, who thereby becomes an officer in that part, clothed with the powers of such a character, and subject to the responsibility which attaches to it.<sup>5</sup>

The description of the crime charged, briefly but intelligibly, is an usual part of every warrant even to arrest, and should never be omitted where it can be given.<sup>6</sup> But there seems to be no sufficient authority for holding that the party shall be entitled to resist, or to claim damages for the execution of a more general warrant, such as authorizes his apprehension to answer all such matters as shall be laid to his charge.<sup>7</sup> And certainly, if one specific crime be specified, which of itself supports the warrant, there is nothing irregular in a general addition of other charges, which often are unknown when the warrant is originally applied for, and only come to light in the course of subsequent investigations.

## 7. In the execution of his warrant, the officer must not

<sup>1</sup> Hume, ii. 78.—<sup>2</sup> Ibid.—<sup>3</sup> Ibid.—<sup>4</sup> Ibid.—<sup>5</sup> Ibid.—<sup>6</sup> Ibid.—<sup>7</sup> Ibid.

go beyond the bounds where his commission extends ; he must acquaint the party with the substance of the warrant, and he must not break open doors until he has notified the errand to those within, and been refused admittance.

The warrant of a judge, of course, is of no legal effect beyond his jurisdiction ; and, therefore, unless indorsed or supported by the authority of some judge in the territory into which the criminal has withdrawn, it cannot legally be executed there.<sup>1</sup> If, therefore, he has escaped out of the jurisdiction within which the warrant runs, it must be indorsed by a magistrate within the new jurisdiction, before it can be legally put in force there. When this is done, however, it may be executed either by the original officer who brought it, or one who belongs to the jurisdiction where it has been indorsed.<sup>2</sup>

In all cases of arrest, it is the duty of the officer, when proceeding to arrest, briefly to acquaint the party with the substance of his warrant. Farther, if the warrant is in the hands of a private party, or of an officer acting beyond his usual bounds, and where his official character is known, he is obliged to show it on demand, though certainly not to part with it to any one for perusal or inspection.<sup>3</sup> Nay, even if the officer is a known officer, acting within his ordinary bounds, he seems bound to comply with such a demand, unless made in such circumstances as appear to endanger the document, or appearing to have arisen from a desire to snatch it out of his hand, or get it destroyed.<sup>4</sup>

With regard to breaking open doors, it seems to be a general rule, that this violence is not to be resorted to by the bearer of a criminal warrant, unless he has first notified his errand to those within the house, and been refused admittance.<sup>5</sup> If this be done, however, it is quite certain that he is entitled to force open doors, in order to apprehend the suspected person, and that equally whether he is in his own house or in that of another, and whether he is known for certain to be the guilty person, or only suspected as such.<sup>6</sup> Most certainly he is not obliged to take the word of those within the house that the criminal is not there ; but is not only entitled, but bound, to make a thorough search himself ; and

<sup>1</sup> Hume, ii. 78.—<sup>2</sup> Ibid. ii. 77.—<sup>3</sup> David and Charles Edmonston, Aug. 7, 1695 ; and John and George Sinclair, Nov. 20, 1699.—<sup>4</sup> Hume, ii. 80.—<sup>5</sup> Ibid.—<sup>6</sup> Ibid.

for that purpose, not only to force open the outer door, but any inner doors or lids of places where the prisoner is suspected of being lurking. If any bloodshed occur in the sober and temperate endeavour on the officer's part to discharge this duty, he shall be acquitted of the consequences; and if death ensue to him or his assistant, from resistance to such a duty so set about, it will amount to nothing short of murder. The principle of the law is, that every person is bound to throw open his doors, and make patent all the secret parts of his dwelling or premises, in order to facilitate so important an object as the arrest of a criminal; and, therefore, any resistance to an officer, who legally and temperately discharges that duty, implicates the resisters in direct disobedience to the law, and in the general case in the pains of deforcement; and if these precautions be duly observed, the officer is not answerable for the consequences, although the suspected person truly neither is, nor ever has been, within the premises; or though, if there, he is entirely innocent of the charge, or the felony or crime in question never has been committed.<sup>1</sup>

8. If the warrant is to be executed *extra territorium*, it must be indorsed by some judge having jurisdiction in the territory where it is to be enforced; and no farther formality is now necessary in the case of warrants signed in Ireland or England, and executed in this country.

If the suspected party has fled beyond the territory where the warrant runs, it must be indorsed by a Magistrate or Justice of Peace in the new territory. This is granted as a matter of course, if the warrant be that of a Scotch Magistrate, upon production merely of the former warrant, fortified, if necessary, by the oath of the bearer as to its authenticity, which, however, is not a necessary solemnity, and without any enquiry as to the grounds on which it was granted;<sup>2</sup> and, by inveterate usage, a Sheriff may indorse a Justice's warrant, or *vice versa*.

Several statutes have been passed to regulate and facilitate the indorsement of criminal warrants executed in one part of the United Kingdom in another.

By 13 Geo. III. c. 31, it is enacted, "That from and after the passing of this act, if any person or persons against

<sup>1</sup> Hume, ii. 80.—<sup>2</sup> Ibid. ii. 78.



whom a warrant shall be issued by any Justice or Justices of Peace, of any county, riding, division, &c. within that part of the United Kingdom called England, for any crime or offence against the laws of that part of the United Kingdom, shall escape, go into, and reside, or be, in any place of that part of the United Kingdom called Scotland, it shall and may be lawful for the Sheriff or Steward-depute or substitute, or any Justice of Peace of the county, or place where such person or persons shall escape, go into, reside, or be, to indorse his name on the said warrant; which warrant, so indorsed, shall be a sufficient authority to the person or persons bringing such warrant, and to all persons to whom such warrant was originally directed; and also to all sheriff's officers, steward officers, constables, and other peace-officers of the county or place where such warrant shall be so indorsed, to execute the said warrant in the county or place where such warrant shall be so indorsed, by apprehending the person or persons against whom such warrant is granted, and to convey him, her, or them, into the county, riding, division, &c. of that part of Great Britain called England, being adjacent to that part of Great Britain called Scotland, in which the crime was committed, and before one of the Justices of Peace of such county, riding, &c. to be there dealt with according to law; or in case the crime was committed in a county not adjacent to that part of Great Britain called Scotland, then, in every such case, to convey him, her, or them, into any county of that part of Great Britain called England, next adjacent to Scotland, and before one of the Justices of Peace of such county, which Justice is hereby authorized and required to proceed against such person or persons, as if the said person or persons had been apprehended in the said county."<sup>1</sup> There is a similar provision, *mutatis mutandis*, for the apprehension of persons in England guilty of crimes in Scotland, and their transmission to that country. The expense of removing such persons is to be defrayed by the treasurer of the county in England, or the Sheriff-depute or substitute in Scotland, upon the amount being ascertained by oath before two of the Justices of such county, and allowed and signed by them.<sup>2</sup>

It is further enacted by the same act, "That from and after the passing of this act, if any person or persons having stolen, or

<sup>1</sup> § 1.—<sup>2</sup> § 2.

otherwise feloniously taken money, cattle, goods, or other effects, in either part of the United Kingdom, shall afterwards have the same money, cattle, goods, or other effects, or any part thereof, in his, her, or their possession or custody, in such other part of the United Kingdom, it shall and may be lawful to indict, try, and punish such person or persons, for theft or larceny, in that part of the United Kingdom where he, she, or they shall so have such money, cattle, goods, or other effects, in his, her, or their possession or custody, as if the said money, cattle, goods, or other effects, had been stolen in that part of the United Kingdom.

“ And that if any person or persons in either part of the United Kingdom shall hereafter receive, or have any money, cattle, goods, or other effects stolen, or otherwise feloniously taken, in the other part of the United Kingdom, knowing the same to be stolen, or otherwise feloniously taken, every such person or persons shall be liable to be tried and punished for such offence in that part of the United Kingdom where he, she, or they shall so receive or have the said money, cattle, goods, or other effects, in the same manner, to all intents and purposes, as if the said money, cattle, goods, or other effects had been originally stolen, or otherwise feloniously taken, in that part of the United Kingdom.”

The benefit of this statute was much restricted by a succeeding act, 45 Geo. III. c. 92, c. 5, and c. 6, which declared it unlawful to proceed to enforce or act upon any such warrant, until proof of its authenticity *upon oath* to the Court, Justice, or Judge, applied to; and it was declared to apply only to such warrants as have issued, “ if in England or Ireland, upon some indictment found, or information filed, or if in Scotland, upon some libel or criminal letters, raised and passed under the signet of the Court of Justiciary, against the person or persons named in such warrant, or unless the same shall appear to have issued in respect of some *capital* felony mentioned in such warrant.”

It was therefore enacted by 54 Geo. III. c. 186, that all warrants issued in England, Scotland, or Ireland respectively, shall be capable of being indorsed, executed, and enforced in any part of the United Kingdom, in like manner as is provided by 13 Geo. III. c. 31, in regard to warrants granted in England or Scotland respectively. The words are, that so much of the 45 Geo. III. c. 92, “ As enacts that it shall not be lawful for any

judge or justice to indorsẽ any warrant, unless the same shall appear to have issued, if in England or Ireland, upon some indictment found, or information filed; or if in Scotland, upon some libel or criminal letters raised and passed under the signet of the Court of Justiciary, against the person or persons named in such warrant, or unless the same shall appear to have issued in respect of some capital crime or felony, mentioned in such warrant; and that in all cases in which any warrant or certificate shall be required to be acted upon in any part of the United Kingdom, other than that in which the same was originally issued, it shall not be lawful for any Court, or any Judge, or Justice, to proceed to enforce or act upon the same until it shall be proved upon oath to such Court, Judge, or Justice, that the seal and signature upon the same are the seal and signature respectively of the Court, Judge, or Justice, whose seal or signature the same respectively purport to be, shall be, and the same *are hereby repealed.*”

2. And, “That all warrants issued in England, Scotland, or Ireland respectively, may and shall be indorsed and executed, and enforced and acted upon in any part of the United Kingdom, in such and the like manner as is directed by the said first recited act of the 13 Geo. III. c. 31, in relation to warrants issued or granted in England and Scotland respectively, as fully and effectually, to all intents and purposes, as if all the provisions of the said acts were in this act severally repealed and re-enacted.”

3. “And that it shall and may be lawful for any Judge of any of His Majesty’s Courts of Record in Westminster, of the Courts of Session in the County Palatine of Chester, or of any of the Courts of Great Sessions in Wales, or for any Judge in any of His Majesty’s Courts of Record in Dublin, to indorse any letters of *second diligence* issued in Scotland, for compelling the attendance of any witness or witnesses resident in England, Wales, or Ireland, upon any criminal trial in Scotland; and such letters shall upon such indorsement have the like force and effect as the same would have in Scotland, and shall entitle the bearer thereof to apprehend the witness or witnesses mentioned therein, and convey such witness or witnesses to Scotland, for the purpose of the trial or trials in respect of which such letters shall have been issued, without *any tender* of expense or expenses to such witness or witnesses;” and this is contained in the 45 Geo. III. c. 92, notwithstanding.



The statute, 13 Geo. III. c. 31, is thus referred to as the rule. But that statute is limited, both by its preamble and enacting clauses, to warrants issued on account of *criminal acts*, for which the malefactor is meant to be brought to *trial*. It does not apply, therefore, to a warrant, even though proceeding on a criminal act, if the object of the apprehension is not to bring the offender to *trial*, but to lay him under bail to keep the peace, or in any other way restrain his freedom, or prevent the execution of his malicious designs. Where the offender, accordingly, had been transmitted from Newcastle to Scotland, in pursuance of a warrant of one of the Lords of Justiciary, indorsed by an English Justice of Peace, and it appeared that the petition on which the warrant was granted, related to a threatening letter, dated Dublin, and a challenge dated Newcastle, addressed to a person in Scotland, and prayed to have the offender laid under bail to keep the peace; and warrant was granted in terms of that prayer, but no farther, it was held that the warrant not being with a view to custody in order to *trial*, did not warrant the apprehension of the offender in England, even though backed by an English Justice for the county where it was executed.<sup>1</sup> It was held in a late case, which related to a deforcement of officers acting on an English warrant, against a person in Coldstream, which was indorsed by a Scotch Sheriff-substitute without any oath, that the 54 Geo. III. c. 186, applies to all warrants, and directs them to be indorsed in the manner prescribed by the 13 Geo. III. c. 31, for criminal warrants; and that, as the emitting of an oath is no part of the provisions of that statute, the warrant in question was good, in respect of the indorsation, without that formality.<sup>2</sup>

9. Having apprehended the prisoner, it is the duty of the officer to take him with all convenient speed before a magistrate, to be by him dealt with according to law.

Having taken the person of the prisoner, the officer shall not in any case commit him to jail of his own authority, a power which would be liable to the most flagrant abuses, but carry him as quickly as he can before a magistrate, who is charged with the farther disposal of his person. To accomplish this object the officer may, if the matter cannot otherwise be arranged, detain him in a house

<sup>1</sup> William Taylor, March 4, 1818.—<sup>2</sup> Peter Nisbet, Dec. 27, 1831, Justice-Clerk's MS.

for the night, if, owing to the distance from the magistrate, or the lateness of the hour, he cannot be brought before him on the day of his apprehension.<sup>1</sup> Having him once before him, it is the duty of the magistrate to take the judicial declaration of the accused, and commence a precognition in order to determine whether there are sufficient grounds for committing for farther examination, or for trial.<sup>2</sup> In some cases it is competent for the magistrate to grant to commit *de plano* in his warrant to apprehend, even before a precognition is taken, if there appears sufficient evidence, from the notoriety or urgency of the case, as from his having broke from jail, where he had been formerly committed to stand trial, to warrant that extraordinary stretch. And the Court of Justiciary are always in use to grant warrant to apprehend and commit at one and the same time; their duty not being to take precognitions, or consider the grounds of committal. These cases, however, are exceptions from the general rule, which unquestionably is, that an investigation into the merits of the case, to a certain extent at least, should precede every committal for any time, however short; and in the case of the Lords of Justiciary, proceeds from the confidence reposed in the Lord Advocate and his deputes, at whose instance all such applications to them are made.<sup>3</sup> If, therefore, an ordinary judge, having local jurisdiction, and whose duty it is to take a precognition before he sends any one to jail brought before him, shall grant, on suspicion, warrant to commit without any investigation at all, he in the general case acts illegally, and the Court will give redress upon the facts being substantiated: so it was held in a recent case, where it was alleged that the prisoner had been committed without having been brought before any magistrate, or any precognition at all being taken, by merely subscribing a blank warrant. The Court held such allegations relevant to warrant a liberation, and a proof was allowed by parole evidence; but upon advising the proof, it appeared that the allegations were totally false, and the bill of suspension was in consequence refused, and the suspender found liable in expenses.<sup>4</sup>

10. The first duty of the magistrate, before whom the prisoner is brought, is to take a declaration from him, in

<sup>1</sup> Hume, ii. 80.—<sup>2</sup> Ibid.—<sup>3</sup> Ibid.—<sup>4</sup> Gillespie v. Mills and Others, Feb. 23, 1831; Justice-Clerk's MS.

conducting which he must observe the usual rules on the subject.

The Scotch law, differing in this particular from the English, allows and enjoins a declaration to be taken from a prisoner as soon as he is brought before the magistrate; and that for the double purpose of giving him an opportunity of clearing himself in so far as he can by his own allegations, and explaining any circumstances which may appear suspicious in his conduct, and of affording evidence on which the magistrate can with safety proceed in making up his mind whether or not to commit for trial. And experience has abundantly proved the wisdom of this provision; for a declaration hardly ever fails to be as great an assistance to an innocent man in clearing him from an unjust imputation, as it is a disadvantage to a guilty one in endeavouring to screen himself from punishment. The Roman maxim, *magna est veritas et prævalebit*, is nowhere more strictly applicable than in this case: truth in the end is generally triumphant, and from nothing more than its own candid statement; while guilt is caught in its toils, and very frequently brought to light from the efforts made by false statements to escape the merited punishment.

This is not the proper place to give a detailed account of the law regarding declarations, which will afterwards be the subject of an ample commentary. But an outline of the leading duties of the magistrate in such a case properly belongs to this chapter.

1. It is the duty of the magistrate, in conducting the examination in the outset, to see that the prisoner is in a sane and sober state of mind. This must be proved or admitted before the declaration is read to the Jury; and if there be any doubt on this head, the Court will direct it to be laid aside.

2. It is also his duty to inform the prisoner that he is at liberty to confess or not as he pleases; that no punishment will attend his declining to speak, but the fact of his having done so be merely set down in the declaration; and that in all probability the declaration, whatever it may be, that he may emit, will be used in evidence against him.<sup>1</sup>

3. No threats or inducements to confess, of any sort, should be held out to overcome the reluctance of the prisoner to make

<sup>1</sup> Hume, ii. 80, 81.



a judicial declaration: that is, such a declaration as is to be used in evidence against him.<sup>1</sup> It is quite a different matter to endeavour to get from him a confession as a King's evidence, which it may often be his best policy to make. In all cases where this is attempted, he should be informed that what he is to say cannot be used in evidence against him, and is to be subject of consideration for the Crown Counsel, with a view to taking or rejecting him as a witness.

4. The prisoner in a judicial declaration should never on any account be put on oath; and it should be borne in mind by the magistrate examiner, that if he puts any person on oath, it is at least extremely doubtful whether he can afterwards be brought to trial. It is the more necessary to attend to this where there are several accused persons, among whom it is doubtful who should be brought to trial, and who taken as witnesses, because it sometimes happens that inexperienced magistrates, by putting a witness on oath when examined in precognition, prevent him from being afterwards brought to trial, though he may be the fittest person to answer for the offence.

5. There is no incompetence in taking a judicial declaration from a person with a view to his trial, who has previously been examined as in a precognition; but in all such cases, no reference should be made in the judicial declaration to the previous examination in precognition, but the story commenced *ab ovo*, as if no such examination had previously been taken. And the prisoner should be informed, that, if he pleases, his first declaration will be cancelled before he commences that which is to be used against himself. By no doqueting or reference can a declaration in precognition be made a competent part of a judicial one.

6. The prisoner's declaration must be taken down at large in writing, read over to him before it is signed, and either signed by the prisoner himself, or by the magistrate in his presence, if he either cannot or will not adhibit his subscription. In the latter case, the declaration should bear the reason why the magistrate's signature alone appears instead of that of the party who has emitted the declaration.

7. The declaration must be taken in presence of the magistrate, and of two other witnesses, who are to subscribe with him the doquet or attestation at its close, setting forth that it was

<sup>1</sup> Hume, ii. 80, 81.

freely and voluntarily emitted, in the sound and sober sense of the declarant. But the doquet does not prove itself; and if not admitted, the declaration must be proved by two witnesses present at its emission, who must also declare that it was emitted by the declarant in his sound and sober senses, and freely and voluntarily; a necessity which clearly points to the propriety of the witnesses to it being present at the time, and so able both safely to swear to these facts, and stand the cross-examination to which they are very frequently subjected.

8. Where any articles are exhibited to the prisoner and referred to in his declaration, they should be labelled at the time, as referred to in that declaration, in order that no dispute may take place in future as to their being the identical articles then exhibited and spoken to by him. This labelling should take place in his presence, and the label be signed by him or the witnesses to his declaration; and in the declaration itself they should be mentioned as now labelled as relative hereto.

9. When a second or any future declaration is taken from a prisoner, the first or previous ones should be read over to him before he commences the new one, and it should be mentioned whether he adheres thereto *in toto*, or wishes to vary it in any particular; and if he is brought up to be examined at his own request, this should be set forth immediately after the narrative of the previous ones having been read over to him, as the reason why the additional one was taken.

10. It frequently happens that a prisoner is sent up to the Sheriff-substitute, or one of the higher legal authorities, with a small precognition commenced in the country, probably by some remote or inexperienced Justice of Peace, containing, among the declarations of the witnesses, a short declaration by the prisoner himself, which is very apt to be overlooked by all concerned, as being quite different in appearance from what such instruments usually are, and totally deficient in the proper solemnities. It is not safe, however, to pass such a declaration over in silence, because that is extremely apt to give rise to the objection, that the prisoner has emitted a declaration which is not libelled on; that it in consequence cannot be used against him, and therefore that no other can be brought forward. The only way to guard against such an occurrence, is to read over the original and imperfect declaration to the prisoner when he emits the next one, to ask him whether it was freely and voluntarily emitted, and if

he wishes to correct it in any particulars, and if so, in what ; and to get that imperfect instrument signed by him, or the Judge examiner and witnesses in his presence, as relative to the second declaration. This precaution will, in the general case, cure the defects of the original instrument ; and if it does not, it will, at all events, enable the prosecutor, by libelling on it, and tendering it at the trial, to throw upon the prisoner the burden of objecting to its regularity ; in which case, though he may succeed in casting that defective document, he will not succeed in getting quit of the other and regular instruments which have followed, and which the prosecutor has showed no inclination to suppress, but, on the contrary, put at the prisoner's disposal, if it can be of any service to him.

11. If the prisoner, during any of his examinations, evinces any symptoms of insanity, either real or apparently assumed, it is proper to state the fact in the doquet on the declaration, in order that the attention of the counsel on both sides may be drawn to so important a matter ; and the Judge examiner should exert more than ordinary vigilance, both in order to ascertain how the fact really stands, and to be able to give that full and articulate deposition on the subject which will probably be required of him at the trial.

These are the rules which a skilful and experienced Judge will always attend to in conducting that delicate and important part of his duty which consists in taking a judicial declaration. Many of them are indispensable towards the validity of a declaration as an article of evidence at all against the prisoner ; others, though proper steps, are not held to be of such vital importance, that the omission of them can be peremptorily pleaded against the declaration as a ground why it must be cast at the trial. The full discussion of this important subject belongs to a subsequent chapter.<sup>1</sup>

11. The next step in the magistrate's duty is to commence a precognition, with a view to determine whether there are grounds for committing the prisoner, and if it cannot be brought at one sitting to such a state of forwardness as to determine that matter, he may be committed in the meantime for farther examination.

<sup>1</sup> *Infra*, on Proof by Declaration.



If there do not appear grounds for instantly liberating or committing the prisoner, which is not usually the case, the next step of the magistrate's duty is to commence a precognition by taking the declarations of all the persons, and collecting all the articles of evidence which are calculated to throw light upon his case.<sup>1</sup> This precognition may take a considerable time; in intricate cases it may extend to weeks, and is seldom concluded before the expiry of a few days. The law in regard to the situation of the prisoner, when imprisoned under a warrant of commitment for farther examination, forms an important subject of enquiry.

12. A prisoner committed under a warrant for farther examination, is entitled to have that temporary state of confinement brought to a conclusion within a reasonable time, as applied to the circumstances and nature of the case; but he is not entitled, as a matter of right, to bail, nor does his incarceration fall under the act 1701.

The warrant for farther examination, is not only absolutely indispensable to the discharge of criminal justice, but it is the greatest possible security against unjust detention to the innocent prisoner; because it gives time for the consideration of his case, and the adducing of exculpatory evidence on his part, and prevents, in many cases, the granting a warrant for imprisonment till liberated in due course of law, which, if once granted, leads to his detention till trial, a period frequently of many months. Nothing could be more unfavourable, therefore, to the liberty of the subject than to subject this warrant to the unbending rules of the act 1701, or to affix any period within which it must be terminated, for that would in many cases lead to a lengthened imprisonment, in circumstances where, but for it, a few days' detention only would be incurred.<sup>2</sup> It is settled, accordingly, that the privilege of bail cannot be demanded as a matter of right (though it may be conceded *ex gratia*, in the case of trifling offences), by a prisoner under detention, on a warrant for farther examination, and that the act 1701 does not apply to such a case, the provisions of that act applying only to a "custody in order to trial," and not that temporary detention, while as yet it is undetermined whether there shall be any custody in

<sup>1</sup> Hume, i. 81; Hutchison, i. 462.—<sup>2</sup> Per Lord Eldon, in *Taylor v. Arbuckle*; Dow, iii. 183, 184.

order to trial or not.<sup>1</sup> “The strong inclination of my opinion,” says Lord Chancellor Eldon, “is, that a warrant for farther examination is not a warrant in respect of which the terms of the statute apply.”<sup>2</sup> It may be added, that the only bail which the act 1701 authorizes, is that for appearance on a libel to stand trial for the crime; there is no allusion to bail being required to appear and submit to examination or detention as in a precognition.<sup>3</sup>

At the same time, it is not to be imagined that a prisoner under a warrant for farther examination is entirely at the mercy of the committing magistrate, who may keep him in jail as long as he pleases under such a warrant. On the contrary, he is entitled to have his examination concluded within a reasonable time; such a time as in the circumstances of the case, and as applied to its nature, indicates a disposition to bring that preliminary state of confinement to an end as speedily as may be, with a due regard to public justice on the one hand, and private freedom on the other.<sup>4</sup> “What shall be deemed a reasonable time,” says Lord Eldon, “may be difficult to say, whether one, two, three, four, or five days; for what may be a reasonable time in one case, may be an unreasonable time in another; but the magistrate is bound to terminate his commitment for farther examination, within a reasonable time; and an action may be maintained against a magistrate for committing for farther examination, if his view and purpose in so doing were to put the party under the same hardship and oppression, as would belong to a commitment for custody in order to trial.”<sup>5</sup>

It is evident, from these authorities, that the warrant for commitment should be distinct and clear: it should be either a commitment for farther examination, or a commitment till liberated in due course of law; but not a commitment “for farther examination, or till liberated in due course of law.” It was an ambiguity of this description which, both in the cases of *Andrews and Murdoch*,<sup>6</sup> and *Taylor v. Arbuckle*,<sup>7</sup> above-mentioned, landed the magistrate in a most distressing and costly action of damages: because it was impossible under it to say

<sup>1</sup> *Fife and McLaren v. Ogilvie*, July 29, 1762; *Andrew v. Murdoch*, June 20, 1806; *Dow*, ii. 405-6; *Arbuckle v. Taylor*, June 1810, in *House of Lords*, June 29, 1814; *Dow*, iii. 183; *Burnet*, 350; *Hume*, ii. 81, 185.—<sup>2</sup> *Dow*, iii. 186.—<sup>3</sup> *Hume* ii. 81.—

<sup>4</sup> *Per Lord Chancellor Eldon, Arbuckle v. Taylor*; *Dow*, iii. 184; *Hume*, ii. 81, 82.—

<sup>5</sup> *Ibid.* iii. 184.—<sup>6</sup> *Dow*, ii. 404, 405.—<sup>7</sup> *Ibid.* iii. 184-6.

whether the common law, or the provisions of the act 1701, were to apply; and in this ambiguity ample room was afforded for an action of that description. Farther, when the prisoner is committed for farther examination, all the subsequent deliverances and proceedings should keep that situation in view, and none of them bear reference to a commitment for trial: and, in like manner, when committed for trial, none of the proceedings or deliverances suitable to a warrant for farther examination, should be made.<sup>1</sup> In particular, it is an extremely unsafe proceeding which frequently occurs of committing for farther examination, and then transmitting the case to the Crown Counsel at Edinburgh, either for an opinion as to whether it is bailable, or on the grounds of the prosecution; because the magistrate continues liable to the rule of law, that that preliminary custody must be terminated in a reasonable time; and if that reasonable time has elapsed before the case is returned, which is extremely apt to happen, where the offence occurs in a distant part of the country, or from accidents in its consideration at Edinburgh, the magistrate committer is answerable for the consequences. In this, in short, as in most other instances, it will be generally found, that an attempt to elude responsibility, or get quit of a difficulty, by throwing it upon a superior functionary, leads to dangers greater than those sought to be avoided; and that a conscientious and fearless discharge of duty, after making every endeavour to arrive at a right conclusion as to the law, by the magistrate himself, is not only the most honourable, but the most prudent course that can be adopted.

13. The Judge-examinator may grant warrant for citing witnesses for the precognition, and, if necessary, put them on oath, in order to elicit the truth, provided this last is not done to the party accused, or any other intended to be brought to trial, or to any one to whose testimony there would be a legal objection.

The course for compelling the attendance of witnesses, is by a warrant of citation, which is usually prayed for in the petition for arrest, but may be competently applied for at any subsequent stage of the proceedings. In case of their refusal or contuma-

<sup>1</sup> See *Andrews v. Murdoch*; Dow, ii. 404-5, where a strange blunder of this sort occurred.



cious declining to appear, letters of second diligence may be issued to warrant their apprehension, in order to ensure their attendance.<sup>1</sup> When brought before the Judge, in like manner, they may be coerced with imprisonment, if they either refuse to answer at all, or answer in a manner plainly evasive or elusory.<sup>2</sup>

It is competent, also, for the Judge, and the practice is daily becoming more frequent, from the increasing depravity of the lower orders, to put the witnesses on oath, in order the more effectually, by its terrors, to extract the truth from them.<sup>3</sup> In doing so, however, the Judge should keep in view, that a person who has been put on oath, in regard to any crime, cannot be himself tried for its commission, upon the ground that, *Nemo tenetur jurare in suam turpitudinem*; and, consequently, that if the Crown, or those acting for the public interest, have put any party on oath, it must be held that they have passed from all intention of putting him on his trial, and that the oath was taken on that implied condition. If, therefore, there is any dubiety as to which of the persons in custody is to be selected for trial, which is very frequently the case in offences committed by large gangs of criminals, none of them should be put on oath, except such as are certainly not the intended objects of punishment.

In discharging this delicate duty of compelling witnesses to appear and depone in a precognition, and of putting them on oath, or committing them to prison if they refuse to take the oath, or to answer questions, it is the duty of the Judge, as nearly as possible, to walk by the rules of evidence which will ultimately be followed at the trial. There seems, therefore, no authority which can justify a magistrate in tendering an oath to a wife against her husband, or against any party with whom he is implicated in one common offence, or to a husband against a wife in similar circumstances, or to an adult child who refuses to depone against its parent, or to any child under the age when it can be legally sworn, or in compelling a child under that age to declare against its parent. As such proceedings would be illegal if attempted in open Court, and when the accused is on his trial, so they seem to be equally exceptionable in the secret, but

<sup>1</sup> Hume, ii. 82; Hutchison, i. 463.—<sup>2</sup> Hume, ii. 83.—<sup>3</sup> Hume, ii. 82; Hutchison, i. 463-4.

equally regular and important investigations which precede that event; not to mention the prejudice which would accrue to the accused, if information were thus to be extracted from his nearest and dearest relations, which could not be brought against him directly from them when on trial for the crime; and the opinion of the prosecutors in determining on the case, were to be liable to the bias unavoidably incurred by reading important depositions which cannot ultimately be brought against him. No steps of coercion, therefore, should be adopted against witnesses in a precognition, except such persons, and in relation to such questions, as are competent to be examined or put at the trial. It is quite a different matter examining such witnesses, where they come forward voluntarily, or, though cited, state no objection to emitting their declaration. There seems no impropriety in such a case, in taking down every thing which they are willing to say in answer to the questions put; and it often tends greatly to the benefit of the prisoner to have examined in precognition such witnesses, though they would be incompetent at the trial, because they explain matters highly suspicious in appearance, which, but for their statements, might lead to an indictment being raised against him.

14. The precognition being entirely an *ex parte* proceeding on the part of the prosecutor, the prisoner is not entitled to have a copy of the proceedings, nor to be present himself, or have any one attend on his part to put questions, nor to cite witnesses in exculpation; but it is the duty of the Judge to attend to his suggestions in that particular, and cite and examine any persons whom he may deem material to substantiate his innocence.

The peculiar and delicate situation of witnesses, at the commencement of a precognition, and the great facility of corrupting or diverting the sources of evidence at the commencement of the investigation, has, from the earliest times, given rise to the rule, that the precognition is strictly an *ex parte* proceeding, at which neither the accused nor his friends or legal advisers can claim to be present, nor to put questions on his behalf, nor to claim a copy of, or even see, the declarations of the witnesses.<sup>1</sup> It is the prin-

<sup>1</sup> Hume, ii. 82; Hutchison, i. 464.

ciple of our law, that the evidence in criminal cases is in a great degree made up of a comparison between the statements of the witnesses, and the admissions which the accused has emitted in his declaration ; that this comparison, while it often tends to make out the criminality of the guilty, is in general favourable to the interest of the innocent prisoner, by the coincidence which it establishes between what he has said, and the declarations to him unknown of the persons examined against him ; that this benefit could not accrue to the innocent, nor this additional evidence be obtained against the guilty prisoner, if either were present at the declarations of the witnesses, because this would give the one the means of machination, and making up a declaration consistent with what they had said, and deprive the other of the observation that it was impossible : and therefore, that the strict seclusion of the prisoner in the interval between arrest and commitment to stand trial, and the *ex parte* nature of all proceedings in precognition, is essential to the great objects of criminal jurisprudence, the conviction of the guilty and the speedy liberation of the innocent prisoner. For these reasons, which experience has proved to be entirely well founded, it is one of the directions given by the Court on 4th March 1709, for taking of precognitions, “ that none be present with the clerk at the examination of the persons cited by the Sheriff to give up dittay.”<sup>1</sup>

But while, for these reasons, it seems indispensable for the interests both of public justice and private freedom, that the prisoner should have no means of knowing what is going forward in precognition, it is not to be imagined, that it is the intention of the law that he should be prevented from bringing forward such genuine and unexceptionable evidence as may, by establishing his innocence, both save him from the disgrace and mischief of a lengthened confinement, and the public from the burden of maintaining a person perhaps for months in jail, who is ultimately to be acquitted. Although, therefore, our practice does not recognise any absolute right in the prisoner at this period to cite witnesses and lead a precognition, or get a diligence to recover writings in his own behalf,<sup>2</sup> yet it recommends to the judicious and upright magistrate to attend to the prisoner’s suggestions in this particular, and cite and examine, of his own authority, such witnesses as he shall specify as material to his defence ;<sup>3</sup> and at such examination there seems to be no objection to, but on the

<sup>1</sup> Hume, ii. 82.—<sup>2</sup> Hume, ii. 82; Hutchison, i. 464; Tait.—<sup>3</sup> *Ibid.*



contrary a great propriety in, the prisoner being present and suggesting questions to the magistrate. By so doing, there is no danger of his being enabled either to make up a story himself, or put one into the mouths of his witnesses, which are the great objects to be avoided in taking a precognition; while, at the same time, he has the means of at once clearing himself, and inducing the magistrate examiner, or the Crown counsel who consider the case, to order his liberation, if either his innocence is apparent, or the means of convicting him appear to be deficient.

15. It is proper, so far as possible, that the witnesses should be examined apart from each other; but it is no objection to a witness at the trial, that he has heard the declarations of others before the committing magistrate.

The same reasons which have introduced the practice of examining the witnesses at the trial, apart from each other, point to the propriety of a similar course in taking the preliminary investigations. All the witnesses therefore are examined separately, and only introduced to each other, or the prisoner, when it is necessary for the purposes of identification.<sup>1</sup> It is a very different question, whether the fact of one witness being present when another was examined, affords an objection to his admissibility as a witness at the trial. This is often necessary and unavoidable, particularly in regard to police-officers employed in the enquiries necessary towards getting up the precognition; and in regard to all, it is evident that no care on the magistrate's part can prevent their talking the matter over in private with each other, and so arriving at a complete knowledge of what they can respectively say on the subject. Accordingly, although it was at one period settled, that it was a sufficient objection against a witness that he had been present when others were precognosed,<sup>2</sup> yet this was soon so far relaxed, that it was held not to apply to the magistrate examiner,<sup>3</sup> who of course hears them all, nor to the declaration witnesses;<sup>4</sup> and at length it was settled, by a deliberate judgment of the whole Court, in conformity with the opinion of Baron Hume,<sup>5</sup> that it is no sufficient objection to a witness that

<sup>1</sup> Hume, ii. 82; Hutchison, i. 464; Tait.—<sup>2</sup> Brown and Murray, July 13, 1791; Hume ii. 379.—<sup>3</sup> John Ker, Jan. 13, 1792; *Ibid.*—<sup>4</sup> Hume, ii. 380; Hutchison, i. 464.—<sup>5</sup> Hume, ii. 380.

he was present where others were precognosed, where the witness's attendance had been natural, and had not proceeded from any improper motive;<sup>1</sup> and this is now considered as a point of settled practice.<sup>2</sup> Although, however, the objection of having heard the witnesses examined in precognition has now almost disappeared from our practice, yet it is not the less the duty of the magistrate to attend to the rule of keeping them separate, both as a measure in itself of even-handed justice, and as tending to remove an objection to *credibility*, which may often be stated with serious effect.

16. The precognition should always be reduced to writing, and signed by the witnesses, according to their usual mode of spelling; their designation, by trade, place of residence, parish, and county, inserted at the commencement of their declaration, with their age, and any peculiar circumstances attending them.

The precognition serves the double and equally important purpose of furnishing the magistrate, committee, and Crown counsel, with the means of considering whether there are grounds for proceeding against the accused, or detaining him in custody, and of furnishing to the prosecutors, if an indictment is to be raised, the means of drawing a correct libel. For this last purpose, it is indispensable that the designation of all the individuals examined in the precognition should be correctly given, both the christian and surname, with the age, trade, and residence of the witness, by name of place, parish, and county. Without the most scrupulous attention to accuracy in these details, it is impossible that the libel can be correctly drawn, or the list of witnesses properly made out; and an inaccuracy in any material particular will prove fatal to the case, or cast the witness in whose designation it occurs, which may frequently be attended with the same effect. For this purpose, in addition to the name of the witness, as given by himself at the commencement of his declaration, the precaution should always be taken, of making him sign at full length, either at the foot of every page, or, at all events, at the close of his declaration; and wherever he has the least doubt as to the parish in which his residence is situated, the

<sup>1</sup> Wm. M'Leod, Dec. 14, 1801; Hume, ii. 380.—<sup>2</sup> Shaw's Cases, No. 126; Geo. Bigrie, Jan. 8, 1820; Shaw, No. 5.

name of the next adjoining parish should be added, in order that he may be described in the list of witnesser as residing in one or other of them.

The same scrupulous attention should be paid by the magistrate to the *description of the crime*, as contained in the witnesses' declarations. The *locus delicti* must be accurately specified by name, owner, parish, and county, and the mode in which it was perpetrated, made out so far as possible from their declarations. For example, if the crime to be investigated is a theft by house-breaking, it is necessary, in the first place, to specify the name of the house, that of its owner, with his christian name and profession, and the parish and county in which it is situated. In the next place, the mode in which the entry was effected must be elicited, as by forcing open the kitchen window, &c.; and in order to exclude the possibility of any other mode of entrance, the shutting of the windows and locking of the doors the preceding night, proved by the persons who performed these acts. Lastly, the goods abstracted from the house, or from their place of deposit in the house, must be accurately given, distinguishing such taken from open places from those obtained, if any, by forcing open lockfast repositories, and in this last case, the mode in which that violence was effected; and the secure state of the lock previously, must be established by those who can speak personally to the fact.

To ensure a correct description of the stolen articles, a complete list or inventory should be made out, specifying each article, with the person to whom it belongs. This list should be signed by the witnesses who identify the articles, and authenticated by the magistrate; and this frequently saves a great deal of time at the trial; because this inventory is copied over and annexed to the libel as the list of stolen articles; and the persons who speak to the theft, instead of going over every article, merely identify their signature at the bottom of the inventory they have signed, and which is libelled on and lodged with the clerk, as a production which enables them to say that all the articles contained in that inventory were abstracted from them.

17. The whole articles intended to be used in evidence, whether stolen or not, should be marked at the time by the witnesses who are to refer to them at the trial, kept apart by themselves in custody of some official person;



and a complete inventory transmitted with the precognition of all these articles accurately described.

It is of the very highest importance, both to the success and expedition of a criminal trial, that the witnesses should be able to speak at once, and without hesitation, to the articles produced in evidence against the accused, which they have formerly identified when examined in precognition. There is no method of securing this which can be relied on, but making them sign labels, affixed in their presence to these articles, so that when they see their signature again, they can at once say that that is the article which they formerly saw and examined. This is in general more effectually done by their signature on a label affixed in their presence to the article, than by marking their initials or name on any part of it, because it frequently happens, that at the trial they cannot recollect where they marked it, and they consume valuable time, exhaust necessary patience, and confuse themselves in looking for it; whereas the sealed label is at once seen, and consequently they can speedily identify their signature, and thereby feel assured that that is the article to which their declaration, whatever it may be, bears reference.

Where a forged note is to be brought home to the pannel, every person, without exception, into whose hands it has got between its being uttered by him, and marked or labelled in the precognition, must be cited and shown the note, in order either to identify it, or declare that the note which they received into, is the same with that which they passed out of, their hands: a statement which is sufficient to keep up the chain of identity where it is clearly identified *in limine* as having come from the prisoner, and passed on in like manner by witnesses who can say the same to the official persons who mark it in precognition. And it should be a general rule, in regard to all notes suspected as forged, that they should be marked by initials on the back as soon as ever they come into the hands of official persons, and labelled as soon as ever an opportunity occurs.

In like manner, where goods suspected to be stolen, or any other articles intended to be used in evidence against the prisoner, are brought into the magistrate's office, he should pay particular attention to the early securing the means of identification at every subsequent stage of the proceedings. Towards this object, it is by no means sufficient that the witnesses, at the time they

see the articles in precognition, clearly recognise or identify them, for this very often happens, when they are totally unable to say any thing about them, when shown the same articles at a subsequent period, possibly with a great variety of other articles, in open court, during a hurried trial. To secure the fleeting but important testimony of such witnesses, therefore, as well as to guard against the possibility of mistakes in so important a particular as the identification of articles, care should be taken, as early as possible in the precognition, to label them in the presence of the witnesses who are afterwards to identify them, and make them sign the label themselves. This should in an especial manner be done by the police-officers who have seized stolen goods, forged notes, bloody garments, concealed weapons, or the like, as soon as ever they bring these articles into the office; and if they have passed before this was done, through intermediate hands, these persons also should, as soon as possible, be made to identify them, and sign the labels. By taking these precautions, the double object is accomplished, of enabling the witnesses at any subsequent period to distinguish these articles from any other, and of enabling the counsel who draws the indictment, to determine who must be included in the list of witnesses, and called at the trial, to speak to these articles, by merely looking at the names on the labels.

Having got all the articles intended to be used in evidence labelled, and the labels signed by the witnesses who are to speak to them at the trial, the next duty of the magistrate is to place them in a safe place of custody, under the charge of some official person, who should be included in the list, if he is not, which is often the case, one of the declaration witnesses, in order to be able to speak, if required, at the trial, to their having been kept in safe custody during the interval between the labelling and the trial, and also to give any explanations in regard to them, which may be deemed necessary in the course of the trial.

18. For the recovery of stolen articles, or articles deemed necessary towards completing a precognition, it is competent for the magistrate to grant a search warrant; and it is not indispensable that an oath should be emitted before granting it, but it is competent to demand it by a common petition, though it should always proceed on a signed application.

The great interest which the public have in the detection and punishment of crimes, has led to several relaxations of the ordinary rights and safeguards of individuals in the prosecution of these important objects. One of the most important of these is, the granting of *search warrants*, a matter of the highest importance, and of every day's occurrence in practice, but concerning which little information is hitherto to be found in our books.

By the English law, it is indispensable that a search warrant should be preceded by an oath, setting forth a reasonable cause to suspect that stolen goods are in the house or place specified in the warrant; and upon this oath being made, a Justice of Peace or Magistrate may grant such warrant.<sup>1</sup> But in Scotland it never has been customary to exact such oath, as an indispensable step towards the issuing of such warrant, nor does the law require it;<sup>2</sup> but by the usual course, the application for warrant to apprehend the prisoner, and cite witnesses for a precognition, contains also a prayer to search for stolen goods, which is granted as a matter of course, by the general deliverance, "*grants warrant as craved.*" This course has not been found in practice to lead to any irregularities, as in ninety-nine cases out of the hundred, the warrant is applied for by the procurator-fiscal for the public interest, which is generally a sufficient safeguard against an improper use being made of the power thus conferred. But it is always competent for the magistrate to insist that the oath of the applicant shall be taken, and his causes of suspicion against the places specified; and this security should never be omitted where there appears any ground to suspect an improper or oppressive intention. In all cases the warrant should be granted only on a signed application, and it should always be minutely looked into, where it appears without the instance of the procurator-fiscal.<sup>3</sup>

The search warrant must be dated and signed and subscribed by the magistrate, and it should bear his designation, and that of the county for which he acts, and the cause for which it is granted; but the signature only is required to be in his handwriting.<sup>4</sup>

The search warrant must be special as to the goods intended to be searched for, or at least the felony which it is intended to elucidate, and bring to punishment by the warrant craved for; but it does not appear to be indispensable that it should set forth

<sup>1</sup> Hale, ii. 113, 114; 7 and 8 Geo. IV. c. 29, § 63.—<sup>2</sup> Hume, ii. 77, 80; Hutcheson, ii. 453.—<sup>3</sup> Hutcheson, ii. 453.—<sup>4</sup> Hume, ii. 78; Hutcheson, i. 453.



the particular house meant to be searched for these goods, any more than the particular place where the criminal is suspected to be concealed. It seems in short to be a sufficient authority to search for the goods specified, taken on the felonious occasion charged, everywhere, in the same manner as it is sufficient warrant to search for the individual suspected wherever he is to be found. It is to be observed, at the same time, that Mr Hume speaks ambiguously of such a general warrant, by not specifying whether the illegality to which he alludes consists in the warrant not specifying the *goods* or the *houses* meant to be searched; and that in the English law, a general warrant to search in all suspected houses for stolen goods, is held to be illegal on the very face of it.<sup>1</sup> The English law, at the same time, is much more scrupulous in this matter of warrants than our practice.<sup>2</sup> Beyond all question, a warrant is illegal which should authorize officers to search everywhere for stolen goods generally, without specifying either the goods sought for, or the houses suspected. If the former is not known and specified, the latter must be enumerated by place and name.

In executing search warrants, the officer has the same powers, and is bound to observe the same precautions, as in executing a warrant for the arrest of an individual. He is entitled, therefore, to break open doors, without any special authority to that effect, if his search cannot otherwise be accomplished, taking care always to notify his errand in the first instance, and demand admittance before he proceeds to use any violence.<sup>3</sup> And in the execution of this delicate duty, it seems to be a salutary precaution which is recommended in the English law, viz. that the search warrant, especially where doors are to be broken open, should be executed as much as possible *in the daytime*, the night being a season of alarm and trepidation, when murder and resistance are likely to ensue from the attempt to enforce such warrants.<sup>4</sup> However, this is only a measure of precaution, and it cannot be affirmed that it is illegal or irregular to execute such a warrant at night, which very often is the only season when it is likely to meet with success; but only that in general it is advisable, where it can be done without detriment to justice, to select the day season.<sup>5</sup>

<sup>1</sup> 2 Hawk. 82, 84; Hale, 150; Burn, art. Search Warrant.—<sup>2</sup> Hume, ii. 78.—<sup>3</sup> Hume, ii. 80.—<sup>4</sup> 2 Hales, 151; Burn, *voce* Search Warrant.—<sup>5</sup> Burn, *ibid*.

If stolen goods are discovered, it is the duty of the magistrate, after they are properly identified, to return them to the owners, unless they are laid aside for the purpose of evidence at the trial; in which case they should be carefully preserved in the meantime, and returned to the proprietor after that object has been accomplished.<sup>1</sup> The same holds with any other articles taken from the owners, for the purpose of evidence in criminal proceedings, all of which, when that purpose is served, should be returned to the proprietors.

19. The duty of conducting precognitions has now devolved entirely on Sheriffs, Magistrates of Boroughs, and Justices of Peace, by whom it is exclusively conducted till the case is transmitted for consideration by the Crown Counsel.

Formerly, precognitions were not unfrequently taken before the Supreme Judges themselves, who were afterwards to conduct the trial: but this practice, evidently objectionable, has now for a long time been abandoned; and all precognitions are taken, either before the Sheriffs, or Sheriff-substitutes, or the Magistrates, or Justices of Peace, in the different counties. When taken before the Justices, it is usual to have the proceedings sent up to the Sheriff of the county to be completed; a precaution generally very necessary, from the inaccurate way in which, from want of practice, they are generally taken in those remote parts of the country where crime has not made any considerable progress.

In conducting the precognition, the magistrate is bound to the same degree of diligence laid down as applicable to the warrant for farther examination, viz. to conclude the investigation in a reasonable time; and if the imprisonment be prolonged in an unreasonable manner, or from oppressive motives, there is no doubt he may be exposed to an action of damages. In general, the sooner that the prisoner can be either liberated, or committed till liberated in due course of law, the better for all concerned: for the prisoner, because his case is immediately upon that submitted to the consideration of the Crown Counsel, by whose order, if there is not evidence to warrant a prosecution, he will

<sup>1</sup> Hutcheson, i. 456.

be straightway liberated : for the magistrate, because the critical period of conducting the precognition is terminated, and he is answerable for no farther delays which occur in the detention or bringing to trial of the prisoner. The rapidity and regularity with which precognitions are concluded, is now greatly increased by a recent regulation for the engrossing in the proper schedules of the dates of all the steps which have occurred in them, for the purpose of being checked by the Crown Counsel ; a regulation, the particulars of which will be more particularly detailed in a subsequent chapter ; and which this country owes, with many other great improvements in its criminal practice, to Sir William Rae.

20. The responsibility of Judges and Justices of Peace in all these proceedings is now limited by special statute, and they can be subjected in damages only where they are proved to have acted maliciously and without probable cause.

By 9 Geo. IV. c. 29, it is enacted, “ That the provisions of an act made in the 43 Geo. III. c. 141, entitled an act to render Justices of the Peace more safe in the execution of their duty, shall extend to all inferior Judges and Magistrates in Scotland, in regard to any *sentence* pronounced, or proceeding had in any *criminal trial*.”

And by 11 Geo. IV., and 1 Gul. I. c. 37, it is enacted, “ That the said recited Act, passed in the 9 Geo. IV., in so far as it provides for rendering all inferior Judges and Magistrates more safe in the execution of their duty, shall extend to all acts done by any such Judge or Magistrate in apprehending any party, or in regard to any criminal cause or *proceeding*, or to any prosecution for a pecuniary penalty.”

The 43 Geo. III. c. 141, to which both these acts thus refer, declares, “ That in all actions whatsoever which shall at any time, after the passing of this act, be brought against any Justice or Justices of Peace in the United Kingdom of Great Britain and Ireland, for, or on account of, any conviction by him or them, had or made under or by virtue of any Act or Acts of Parliament in force in the said United Kingdom, or for or by reason of any act, matter, or thing whatsoever done, or commanded to be done, by such Justice or Justices, for the levying of any



penalty, *apprehending any party, or for or about the carrying of any such conviction into effect*, in case such conviction shall have been quashed, the plaintiff or plaintiffs in such action or actions, besides the value and amount of the penalty, or penalties, which may have been levied upon the said plaintiff or plaintiffs, in case any levy thereof shall have been made, shall not be entitled to recover any more or greater damages than the sum of twopence, nor any costs of suit whatsoever, unless it shall be expressly alleged in the declaration in the action, wherein the recovery shall be had, and which shall be in an action upon the case only, that such acts were done maliciously, and without any reasonable and probable cause. And such plaintiff shall not be entitled to recover against such Justice any penalty which shall have been levied, nor any damages or costs whatsoever, in case such Justice shall prove at the trial that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence."

This statute, extended as it now is to "all inferior Magistrates and Judges in Scotland, in regard to any sentence pronounced, or *proceeding had*, in any *criminal trial*," and to "all acts done in *apprehending any party*, or in regard to *any criminal cause or proceeding*, or to any prosecution for a pecuniary penalty," seems to apply to almost every act which can be committed by a Judge in the discharge of his criminal duties. In all such cases it is indispensable to allege and prove that the act complained of was done maliciously, and without reasonable and probable cause. This is only an extension to such cases of the rule of the common law, in regard to actions of damages for malicious prosecutions, as laid down by Lord Chancellor Eldon in the case of *Arbuckle v. Taylor*;<sup>1</sup> and certainly it is no wider extension than was loudly called for from the necessity under which such public officers lie of discharging their duty in these matters, and the great peril of the vexatious prosecutions to which they were previously exposed, got up with no view of obtaining damages for the party complaining of an injury, but of extracting, by the terror of litigating with an insolvent pursuer, a large sum in name of damages or expenses for the benefit of his agent. The defence

<sup>1</sup> Dow.

founded on this statute 43 Geo. III. c. 141, was sustained in the case of *Gibson v. Murdoch and Eaton*, June 18, 1817, which was an action of damages brought against the Procurator-fiscal and Sheriff-substitute of Ayrshire, at common law, and on the act 1701, for wrongous imprisonment, against which, so far as it concluded against the Sheriff-substitute, the defence founded on this statute was sustained by the Court. They held that there was in that particular instance no case for the pursuer on the act 1701, so that the decision did not affect the application of the statute to an action of damages founded on that act; but if its provisions have been violated, and are alleged to have been so ‘maliciously, and without probable cause,’ there can be no doubt that the action is competent, but that without that addition it is not.

## CHAPTER V.

### OF COMMITMENT AND BAIL.

THE next and most important part of the magistrate’s duty is to consider whether there are sufficient grounds *to commit for trial*, or till liberated in due course of law, in the technical phraseology of the law; and in the event of his doing so, to consider and determine on the prisoner’s application for bail. In this matter reference is to be had chiefly to the Habeas Corpus Act of Scotland, the act 1701, c. 6, a statute which provides a more effectual remedy against undue imprisonment, than is afforded by that justly celebrated part of English jurisprudence.

1. The first requisite of the statute, for custody in order to trial, is, that it must proceed on a written and signed warrant, specifying the prisoner either by name and designation, or reference to the annexed petition, which prayed for his imprisonment.

The words of the statute are, “That no person shall hereafter be imprisoned for custody, in order to trial for any crime or offence, without a warrant in writ, expressing the particular cause for which he is imprisoned, and of which warrant the messenger, or executor thereof before imprisonment, or the keeper of the

prison receiving the same, is hereby ordained to give a just double immediately under his hand to the prisoner himself, for the end after specified: declaring, that all warrants for imprisonment on the account aforesaid, either proceeding upon informations not subscribed, or not expressing the particular cause, shall be void and null, and the judge and officiar of the law, and all others whatsoever subscribing the same, and the executor or keeper of the prison, who shall receive and detain the person, so wrongously ordered to be imprisoned, or refusing a double, as said is, shall be liable in the punishment of wrongous imprisonment, hereafter expressed." These enactments necessarily imply, that the warrant to be legal must be subscribed, and must sufficiently specify and distinguish the prisoner, which is to be done of course by name and trade, or designation. Indeed, the necessity of a warrant being signed is a matter of common law, and runs through all its departments, civil and criminal; and accordingly damages have been awarded in the Court of Session, on account of a temporary detention in a tavern, on a *meditatione fugæ* warrant which was unsigned.<sup>1</sup>

The statute contains the following exception, "Without prejudice also to inferior Magistrates, Judges, or Justices of Peace, and constables, to take security of persons for their good behaviour, and keeping of the peace, as they have been in use formerly to do, or to imprison in order to trial, for indignities done to the saids inferior Magistrates, Judges, or Justices of Peace, or to imprison parties disobedient and contumacious to church censures, vagabonds, and masterful beggars, or to imprison for riots, bloods, and batteries, or persons found acting in tumults, or for drunkenness, sabbath-breaking, and swearing, uncleanness, pickery, and thieving; for which causes, or any of them, it shall be lawful to proceed as formerly, the persons imprisoned having always relief by offering bail, and demanding a trial as above." The last words of the enactment prove, that the intention of this clause was not to withdraw prisoners committed for such police offences from the whole benefit of the statute, and expose them without remedy to any length of imprisonment; but only to deprive them of the benefit of those objections, often critical and punctilious, to the form of the warrant of commitment, which it extends to those confined for more serious charges, and where

<sup>1</sup> Anderson v. Smith, Nov. 26, 1814; Hume, ii. 84.



more deliberation and accuracy may justly be required from the magistrate, in the form of the instrument. Accordingly, where it was made an article of charge against a bailie of a borough, that he had imprisoned the prosecutor without an information or order in writing, the Court dismissed the charge as irrelevant, because it appeared from the libel itself, that the bailie had been called from his bed at midnight to settle an affray in which the prosecutor had been engaged, and that he only ordered him to jail till next day, on his refusal to find caution.<sup>1</sup> The true meaning of this exception is to withdraw from the statute, so far as it regulates committals, all those committals for riots, breaches of the peace, police offences, and the like, where, from the pressure of similar business, and the inconsiderable nature of the offence, the exactness required in more serious cases cannot be expected; leaving them to be regulated by the common law.

2. The next requisite is, that there must be a specification of the cause of committal in the warrant, of which an exact copy be delivered to the prisoner at the time of his committal for trial.

The warrant must express the particular crime or crimes for which the prisoner is committed, and that with such a specification of time and place, as shall distinguish that offence from all others of a similar description. It is not sufficient therefore to say, that the prisoner stands committed for the crime of theft, murder, robbery, contravening such a statute or the like; the warrant must go a step farther, and set forth the time and place of the offence, as the murder of such a man in such a place, the theft of such goods from such a house, the contravening of such statutes by the particular acts done in breach of it.<sup>2</sup> Where the petition to whom the warrant referred accordingly thus set forth, that "the prisoner had been concerned in the commission of a *forgery in England*," this was justly held not to amount to a compliance with the statute.<sup>3</sup> But it is by no means necessary that the offence shall be set forth with the precision, and in the technical language, justly required in a criminal libel; this is impracticable in that stage of the proceedings, nor can it be ex-

<sup>1</sup> Swinton v. Abercrombie, March 8, 1722; Hume, ii. 84.—<sup>2</sup> Ibid, 85.—<sup>3</sup> Rae Mure v. Sharpe and Others, July 10, 1812, Fac. Coll.

pected from the class of men to whom the drawing of such warrants must frequently be intrusted. It is sufficient, therefore, if the circumstances of the crime are set forth with such reasonable precision as the circumstances will allow, and in such a manner as to give a general conception of the particular crime which is the subject of charge.<sup>1</sup>

In practice, the usual and the best way for all concerned in which this is managed, is by subjoining the warrant to the petition on which the precognition has proceeded, or which has been made out at its close, and stating that the prisoner above designed is committed for the crime above set forth. In this way the prisoner not only acquires a knowledge of the prosecutor on whose application he stands committed, but also gets a more minute account of the crime, and its concomitant circumstances, than he could possibly do from a description of the crime engrossed on or abridged in the warrant.<sup>2</sup> But though this seems a reasonable and advantageous course, which should never be omitted where the petition contains a tolerable description of the crime in question, yet it is neither enjoined by the statute, nor required by inveterate custom, and its omission cannot therefore be founded on, as sufficient either to annul the warrant at common law, or implicate the magistrate in the statutory penalties, if an adequate description of the crime be contained in the body of the warrant.

In whichever way the warrant is made out, the prisoner, on his commitment, must receive a full copy of it under the hand of the officer committing, or the keeper of the prison; and if this be omitted or refused, these parties become liable in the pains of wrongous imprisonment. The double should be made out at the time the warrant is written, and delivered to the officer, to be compared and signed by him; and if the warrant refers to the petition, a full copy of that petition, with the deliverances on it, should be also added, under the like pain; for, in that case, the description of the crime is imperfect without the petition or information to which it bears reference.

3. It is indispensable to a legal warrant of commitment for trial, that it proceed on a signed information.

The only other thing which the act requires in the warrant of

<sup>1</sup> Hume, ii. 85.—<sup>2</sup> *Ibid.*

commitment is, that it proceeds on a signed information ; a provision of essential importance, as it fixes the person by whose application the proceedings have taken place, and prevents all arbitrary imprisonment, at the mere pleasure or suspicion of the magistrate. Although, therefore, it cannot be affirmed that a magistrate cannot of his own motion, and without any complainer appearing before him, commit for farther examination, and conduct a precognition, (although it is customary even in that preliminary stage to have some complaint, either from the procurator-fiscal, or some private party) ; yet when matters have advanced to this last stage, and the warrant is made out, which confines the prisoner till liberated in due course of law, it is essential, both on the words of the statute, and the reason of the thing, that he be provided with the authority of a definite and written accusation, whereon to justify this strong and prejudicial step against him. This application is usually made in a petition by the procurator-fiscal, or private party, or both, which prays for the commitment of the person or persons named, at his suit or instance, as guilty, or on probable grounds presumed to be guilty, of the crime laid to his charge.<sup>1</sup>

But it is not indispensable that the signed information should be in this regular form. An affidavit, signed declaration, or signed letter of the party injured, equally comes under the statutory description of a signed information, and equally answers the purpose which it had in view.<sup>2</sup> Where the procurator-fiscal applies, his petition protects the magistrate from the charge of having committed without a signed information ; but in any action of damages which may be brought against him, or him jointly with the informer, or petitioner, for rash, malicious, or partial proceedings, he must defend himself on the facts disclosed in the precognition.<sup>3</sup>

In such a case, it becomes a matter of the very highest importance, to know in what way the magistrate is to defend himself against such accusations. And here a difficulty, fraught with the most important consequences occurs, which must have frequently been experienced by every person in business.

The law on this subject recognises a distinction founded on decided cases. In the case of *Harper v. Robinsons and Forbes*, January 8, 1821, an action was brought for damages for a com-

<sup>1</sup> Hume, ii. 85.—<sup>2</sup> Ibid. 86.—<sup>3</sup> Ibid.



bination, for causing the pursuer to be apprehended and tried for reset of theft. The defence for Forbes, the local magistrate, was, that he acted in the discharge of a public and official duty. In the course of the trial, it was proposed to read to a witness adduced, the declaration emitted by him in precognition before the inferior magistrate. It was laid down by the Lord Chief Commissioner, with the concurrence of the Court (Gillies and Pitmilley), that it "is incompetent to read the declaration, to show that the facts are different from what are therein stated; but it is competent to show that he was imposed upon in signing it."<sup>1</sup>

In the subsequent case of *Craig v. Sir J. Marjoribanks*, March 13, 1823, which was an action of damages on account of defamation committed by the alleged unfair and irregular taking of a precognition by the defender, and its transmission to the Lord Advocate, the Court, Lords Chief Commissioner, Gillies, and Pitmilley, refused to grant a diligence for production of the precognition, at the pursuer's instance, and held that it is incompetent to ask a witness, by parole proof, whether the precognition contained a fair statement of his evidence.<sup>2</sup> This last point was evidently right decided; because, if it is incompetent to get at the contents of a precognition in a regular—it is much more so to do so in an irregular—way, and by inferior evidence. But this decision is understood as having settled the law on the general question, as to the competence of obtaining a diligence against the Crown, to force production of a precognition in the custody of its officers; and accordingly it is a general rule, that the Court never will grant a diligence against the Crown for that purpose.

If production of a precognition may sometimes be indispensable to protect an upright magistrate from an unjust and vindictive action of damages, it may as often be required to expose the injustice dealt out to a prisoner, who has been rashly or wantonly committed. This point is likely soon to receive an authoritative decision from all the judges, in the case of *Bogue v. Magistrates of Rothsay*, June 15, 1832. The pursuer here brought an action against the magistrates of that borough and their procurator-fiscal, for damages, on account of an alleged illegal commitment, for which they granted warrant against him, and offered to prove, by production of the precognition, that it was groundless and malicious. The defenders also defended

<sup>1</sup> Murray, ii. 393, 394.—<sup>2</sup> Ibid. iii. 342—347.

themselves on the same precognition, and maintained that it would demonstrate probable cause for all their proceedings. Lord Corehouse reported the cause to the Court, as to whether a diligence should be granted for recovery of the precognition, which never had been reported to the Crown counsel, and therefore the case was free from the difficulty arising from the privilege which the Crown has been held entitled to in this particular. Lord President and Lord Gillies inclined towards granting the diligence, and Lords Balgray and Craigie for refusing it; and the opinion of all the judges was most properly ordered to be taken on a point of so much importance.<sup>1</sup>

But it is well worthy of consideration, whether the law on this point, so far as hitherto settled, is founded on just principles.

It is a general rule, as the law now stands, that the Crown never gives up its precognition; and consequently where application is made to its officers to deliver up a precognition, in order to show on what grounds a committal was granted, and so defend the magistrate against an action of damages founded on it, they always refuse to comply. The result is, that the magistrate is left to defend himself against such an action without the *only evidence* on which the case can be correctly decided, viz. the written declarations which were under consideration at the time of granting the warrant of commitment complained of. In this extremity he has no alternative but to found upon the declarations of the accused, which may be recovered under a diligence, and the depositions which he can adduce at the trial from the persons examined in the precognition. But these depositions are not calculated to do justice either to the pursuer or defender in such an action; for on the one hand, at the distance of many years, they may, and in all probability have forgot many circumstances of the case, and omit many things on which the case, as it appeared in precognition, mainly depended; they may be dead, out of the country, or no longer to be found, so that it is impossible to supply their evidence; and on the other hand it does by no means follow, because material facts against the pursuer are stated on oath in the Jury Court, that they were formerly under consideration of the Judge who committed on the precognition. In this way it may happen on the one hand, that a commitment altogether unjustifiable may be vindicated by parole testimony

<sup>1</sup> Shaw and Dunlop.

being elicited at the trial, which was not adduced in the precognition; and on the other, that one perfectly justifiable may be made the ground of decree for heavy damages, merely because the evidence existing in the precognition, and which formed the ground of the magistrate's decision, has been forgotten or lost in the period which has elapsed, before the action of damages comes on. And all this would be done when decisive evidence of what they truly *did say*, exists in an authenticated written form, taken at the moment it was emitted.

Nor is such a result less at variance with the rule of law, that the best evidence is in every instance to be laid before the jury of which the case will admit. For the magistrate having determined on a certain written precognition, the best evidence of what it contains is by the exhibition of itself, and not by the secondary evidence of the oaths of witnesses as to what they actually saw, or said, when examined, which may be and often is completely at variance with what they formerly said in precognition. In admitting the precognition as the best evidence of what *they said* when thus examined, no violence is done to the rule of law, that a declaration is never to be received where an oath can be tendered; for the question is not what is true, or what was done on the occasions to which the precognition refers, as to which what they say on oath is the only competent evidence, but what *did they say* when examined before the magistrate, as to which the written instrument thus made up is as much superior to any thing to which they can subsequently depone, as exhibition of a written document is to any parole proof of its contents. The only way, therefore, in which the principles of law can be observed, or justice be done to the parties, is to have the rule established, that when a magistrate is convened in an action of damages, on account of an alleged unfounded commitment, the Crown should be ordained to surrender the precognition in which he has so material an interest, as containing the grounds of his vindication; and the opinions of the Judge and Jury taken on the facts disclosed in that document. It may be added that, in this way, these actions which are frequently raised, with the most oppressive views, by an insolvent pursuer, in the hope of extorting a compromise out of a magistrate, from the terror of the expense of a Jury trial with such an opponent, would be brought to a far narrower and less perilous issue, and the chance of iniquitous success, from the material circumstances being forgot by the wit-



nesses, be materially lessened. If the witnesses in precognition have declared any thing which is false, that may be a perfectly good reason why *they* should be subjected to the consequences, but it is none at all why the magistrate, who could only proceed on their information, should suffer the consequences of their misconduct.

4. The usual form of commitment is, till liberated in due course of law ; and it should be dated, the quality of the magistrate added, with the name of the jail and of the officer who is to execute it ; but none of these particulars are essential, nor can their want be pleaded, under the statute.

The usual and best mode of committing for trial is, to commit “ till liberated in due course of law ;” and it is customary, and certainly proper, to add the date, the magistrate’s designation, and the name of the officer who is to execute the warrant, with that of the jail which is to receive the prisoner. But though these particulars are certainly proper to be added, and will never be omitted by a correct magistrate, it cannot be affirmed, on any authority, that they are an indispensable part of a warrant, or that the prisoner is entitled to his liberation, or damages, if they are omitted.<sup>1</sup> Certainly, as they form no part of the directions in the statute, its authority cannot be appealed to as vitiating a warrant in which they are omitted, and there seems no authority at common law for such a decision.<sup>2</sup>

The case is widely different with any omission in the three great statutory requisites. If they are omitted, the Court will at once give relief by suspension and liberation from this illegal state of confinement ; and so they have repeatedly done in such cases.<sup>3</sup> The form of application, in such a case, is by bill of suspension and liberation, which is intimated to the party concerned in the commitment ; and if he cannot justify the proceeding, or correct the error, as by serving a new and sufficient warrant, or obtaining a signed information, the party will be ordained to be set at liberty.<sup>4</sup> Even where this is prevented by the error having been discovered, the foundation of an action of damages for the

<sup>1</sup> Hume, ii. 86.—<sup>2</sup> Ibid.—<sup>3</sup> Francis O’Niel, June 20, 1716 ; John Calder, Nov. 20, 1716.—<sup>4</sup> Hume, ii. 87.

statutory penalties may be laid, by the previous illegal detention which that must be held to have been which took place, with so great an omission as the want of one of the statutory requisites.

5. In case of imminent or actual invasion, rebellion, or insurrection, any one suspected of accession to such attempts may be committed, by any five of the Privy Council, without regard to these provisions of the statute ; but his right to force on his trial, or obtain his liberation, remains unchanged.

As the due observance of the whole statutory requisites for commitments might be difficult or impossible in the confusion consequent on foreign invasion, or domestic insurrection, it is wisely provided in the statute, " That in the case of imminent or actual invasion, rebellion, or insurrection, commitments may proceed, by order of the Privy Council, or any five of their number, upon suspicion of accession thereto, without being liable to any penalty for the said commitment, the person imprisoned having always his relief for trial or liberation as aforesaid." The effect of this clause, of course, is to withdraw such *commitments* altogether from the statute, leaving the prisoner to obtain his *liberation* or trial as in ordinary cases under the statute.

In all other cases, detention on a warrant which is defective in any of these particulars, subjects the judge committer, the officer executor, and the keeper of the prison, in the pains of wrongous imprisonment.

It is also provided, " That no Member of Parliament attending shall be imprisoned or confined upon any account whatever, during a Session of Parliament, without a warrant of Parliament, reserving to the High Constable and Marischal their privileges and jurisdiction in the time of Parliament, as formerly ; and also providing, that if any Member commit a capital crime, or there be a manifest breach of the peace, any magistrate may attach for securing of the person or the peace, and deliver the person to the custody of the High Constable, in order to the Parliament's cognition, the next sederunt."

6. Every crime is, by the Act 1701, bailable, except such as are capital by law.

The matter of *bail* is one of the most important in the personal liberty of the subject, and therefore it is fortunate that the act 1701 has placed it on the clearest and most indisputable footing. It enacts, " That all crimes not inferring capital punishment shall be bailable, and, for clearing and establishing the method of finding bail in such cases, either before or after imprisonment, statutes and ordains, That it shall be lawful for the prisoner, or person ordered to be imprisoned, to apply to the committer, or Commissioners of Justiciary, or other Judge competent for cognition of the crime, and offer to find sufficient caution that he the said prisoner, or person ordered to be imprisoned, shall appear and answer to any libel that shall be offered against him, for the crime or offence wherewith he is charged, or at any time within the space of six months; and that under such a penalty as the said committer, or the Lords of Justiciary, or other Judge competent, shall modify and appoint; and that upon the said application the said committer, or Lords of Justiciary, or other Judge competent, shall first cognosce whether the crime be capital or not, in order to the finding bail allenary; and if found bailable, then he or they shall be obliged to modify the sum for which bail is to be found within twenty-four hours after the said petition is presented to him or them respectively; the sum for which bail is to be found, not exceeding 6000 merks for a nobleman, 3000 for a landed gentleman, 1000 for any other gentleman or burgess, and 300 merks for any inferior person, under the pain of wrongous imprisonment. And upon the parties finding sufficient bail under the penalty modified at the sight of the said Judge or Judicatory respective, and delivering or offering the same to the clerk, and instruments taken upon the delivery or offer of sufficient caution, the said committer or Judicatory competent shall order his liberation, or discharge his imprisonment, if not incarcerate under the penalty of wrongous imprisonment: As likewise that sufficient bail, under the penalty modified, being offered to the judge or magistrate to whom the execution of the warrant is directed, the said judge or magistrate shall be obliged, and is hereby appointed and ordained, to accept of the said bail, and set the prisoner at liberty, under the like penalty of wrongous imprisonment."<sup>1</sup>

In order, therefore, to determine the important matter, whether

<sup>1</sup> 1701, c. 6.



any particular crime is bailable, the magistrate or judge to whom application has been made, has only to ascertain whether the crime, for which the prisoner stands committed, is or is not capital.<sup>1</sup> In judging of this matter, the judge is bound to look exclusively to the strict letter of the law, without any regard to the modification which it may have received in practice, by restricting the libel, departing from capital conclusions, waving aggravations or the like, for whatever time these humane proceedings may have gone on; for the object of such restrictions is only to save the offender's life, or modify the punishment which he is to undergo, but by no means to depart from that salutary security for his *appearance*, which arises from detaining him in jail till the trial.<sup>2</sup> Thus, in the numerous cases of deforcements of the officers of the revenue, which are capital by statute, though hardly ever prosecuted to that extent in practice; in assaults with loaded fire-arms, or sharp instruments, under the late statute; in thefts by one habit and repute, or repeatedly convicted—or of articles of considerable value, as above L.100—or of any thing, however small, viz. housebreaking, or of a horse, or ox, or more than one sheep, in all cases of robbery or stouthrief, how small soever the value of the article taken; in all cases of forging notes, or uttering forged notes, or forging bills or instruments for payment of money, bail must unquestionably be refused, though it frequently happens in the course of practice that the punishment of the offender is not capital.<sup>3</sup>

Farther, the charge against the prisoner must be taken as it stands on the face of the warrant of commitment, or of the petition to which it refers; but, at the same time, if the petition, in its detail of facts, should state a crime under one denomination, when truly it falls under another and inferior one—as if it should charge a prisoner with housebreaking, and support that by setting forth that he entered the house by an open window on the ground-floor, or by lifting the latch of the door which was unlocked, or the like—certainly in such a case it is not to be imagined that the magistrate is to be deprived of his power of judging of the illegality of what is thus set forth on the face of the application to him, or reduced to the necessity of interponing his authority in favour of a proceeding manifestly unwarrantable.<sup>4</sup>

<sup>1</sup> Hume, ii. 88; Burnet, 335.—<sup>2</sup> Hume, ii. 89; Burnet, *ibid.* 336.—<sup>3</sup> Hume, ii. 89; Burnet, *ibid.* and 337.—<sup>4</sup> Burnet, 336.

And it is in this sense that we are to understand the words of the statute, which direct the magistrate “to cognosce whether the crime be capital or not,” words evidently implying that he is not merely to look to the *nomen juris* affixed to the crime, but also to the *species facti*, set forth to show that that peculiar crime has been committed.<sup>1</sup> If, therefore, on considering the precognition, the magistrate committer should be of opinion that the crime truly committed does not amount to the capital crime charged against the prisoner, it is his duty to find the crime bailable.<sup>2</sup>

But if the application is made to a *different* judge from the one who has considered the precognition, it does not appear that he can call for that paper, in order to examine into the *truth* of the charge, or the grounds on which it is stated at the capital denomination contained in the warrant.<sup>3</sup> This delicate power of applying for the *precognition* has hitherto been confined to the Supreme Court, who, on a strong case stated to them, certainly will call for that and all the other grounds of the warrant, and judge for themselves whether they warrant the deliverance which the inferior magistrate has pronounced upon them.<sup>4</sup>

The privilege of bail extends to all crimes not capital, whatever the form of commitment may have been, so as it is a “custody in order to trial,” and not *in pœnam*. Accordingly, it applies to a commitment, *ex officio judicis*, on a suspicion of perjury, subornation, or falsehood, whether emerging in the course of a criminal or civil procedure.<sup>5</sup>

If the point is not yet determined whether the crime is bailable or not, as if a wound is inflicted which may prove fatal, but has not yet done so, it is the duty of the judge to refuse bail till the injured party is declared out of danger by the medical attendants from the effects of the wound.<sup>6</sup> This was accordingly done in the case of Robert Corse, July 24, 1741, and 5th December, 1801, Andrew Robertson, and is now matter of daily practice.

7. The Supreme Court have the power of granting bail even in capital cases, where they see cause to abate the strictness of the law in that particular, but they alone possess this power.

<sup>1</sup> Burnet, 336.—<sup>2</sup> Ibid. Hume, ii. 90.—<sup>3</sup> Burnet, 336-7.—<sup>4</sup> James Grim, Nov. 8, 1740; Hume, ii. 90; Burnet, 336.—<sup>5</sup> Ker v. Fulton, 22d Nov. 1744; Kilk. p. 316; Hume, ii. 89; Burnet, 336.—<sup>6</sup> Hume ii. 90.

The great object of the statute was to save the subject from prolonged or arbitrary imprisonment. It rendered it imperative, therefore, on the judge to modify bail in cases not capital, under the pains of wrongful imprisonment; but it did not declare it imperative on them to refuse bail in cases which are capital; and, in these circumstances, the Court have rightly held that they are not precluded from exercising a general superintending power of inferior magistrates in this particular, and of awarding bail even in capital cases, where it appears essential to justice that this power should be exercised.<sup>1</sup> In truth, such a dispensing power is essential to prevent gross injustice in particular cases, for else it might be in the power of the kindred of a deceased party, or of a rash or vindictive procurator-fiscal, by stating a case of homicide as murder, to keep the accused in confinement for a long period, though the case was ever so clear in his favour, and such as on the trial must instantly terminate in his favour. Several cases, accordingly, have occurred, in which the Court have exercised this equitable power of interposition.

Thus, where it appeared, on a perusal of the precognition, that the homicide committed by a prisoner confined on a charge of murder, had been in repelling a violent and unjustifiable attack on the Excise Office, the prisoner was released by the Supreme Court on bail; the bail, however, being modified at L.100 Sterling.<sup>2</sup> The like was done in favour of the prisoner, charged with murder, on a perusal of the precognition, where it appeared that the accused, who was Sheriff of the county, had, on occasion of a violent tumult in a borough within his jurisdiction, after making proclamation in terms of the riot act, given orders to fire, in consequence of which one of the rioters was killed.<sup>3</sup> So also where the precognition showed that the deceased had been killed in an attack on the Excise Office, where the prisoner was on guard; and it appeared that the deceased had died rather *ex malo regimine*, than from the effects of the wound; and where no warrant had been sought for six months after the death of the party killed, and, when obtained, it was not used for some weeks more, and then the accused voluntarily gave himself up, bail was granted,<sup>4</sup> but the penalty in the bond was made 200 merks. In like manner, where it appeared that the prisoner was imprisoned on a

<sup>1</sup> Hume, ii. 90; Burnet, 334.—<sup>2</sup> John Fulton, June 20, 1740; Hume, ii. 90.

—<sup>3</sup> See Robert Monro, Nov. 8, 1740; Ibid.—<sup>4</sup> Nov. 23, 1746, Timothy Henry; Hume, *ibid.*



charge of murder, and it appeared from the petition with which he supported his application for bail, that he was employed as a constable's assistant, to apprehend a housebreaker, who, on being found, made a violent resistance, and laid hold of the prisoner's musket, and so was killed, either accidentally, or at all events justifiably, the Court admitted the petitioner to bail.<sup>1</sup> The same was done where the Lord Advocate had declined to prosecute; the Court deeming the prosecution, which was one for murder, groundless, admitted the petitioner to bail.<sup>2</sup> Lastly, in the case of John Symmons, 30th August 1810, who was charged with murder, the prisoner applied for bail, and with it lodged the precognition. The Justice-Clerk at first refused the application in respect chiefly of what was admitted in the prisoner's application; but a second petition having been presented, setting forth that the prisoner's life was in imminent danger from confinement; and this having been corroborated by the report of two eminent medical men, to whom the Court remitted to report on his state, they granted warrant for his liberation, upon condition that he should be removed to a lodging in the borough, chosen by the magistrates, and there remain under custody of a messenger, or other sure guard, appointed by the magistrate, on his own charges, under a penalty of £500, for which he was ordained to find caution to the magistrate's satisfaction; reserving to the procurator-fiscal to apply again for his incarceration, if he recovered.<sup>3</sup> This case is valuable, as pointing out the course to be pursued in cases of serious danger to a prisoner from confinement, although the circumstances of the case, as shown in the precognition, did not warrant admission to bail; and, as such, it is applicable to every prisoner on a capital charge, who is in such circumstances of extreme danger, and is able to find the security, and undertake the expense necessary to ensure his appearance at the trial.

8. By special statute, if a Revenue officer be in custody for murder, which he has committed, by persons armed, when searching for, or attempting to seize prohibited goods, he shall be admitted to bail.

The legislature, justly apprehending that many homicides

<sup>1</sup> John Collic, April 27, 1747.—<sup>2</sup> George Smith and Others, Nov. 2, 1776.—

<sup>3</sup> Burnet, 334, 335; Hume, ii. 91.

would ensue in the course of the necessary and unavoidable efforts of the officers of the revenue to discharge their duty against the smugglers, and other unruly characters, with whom they must frequently come in collision, has provided, by the 9th Geo. II. c. 35, that all officers of the revenue, and their assistants, who are opposed in the execution of their duty, by persons armed, openly protecting prohibited goods, and beat, maimed, or wounded by such persons, may oppose force to force, and endeavour by the same methods that are violently used against them, and by which their lives are endangered, to defend themselves, and execute the duty of their said office ;” and if they wound or kill any of the said persons, and are sued and prosecuted for the same, the magistrate before whom they are brought, is enjoined and required to admit them to bail, any law or usage to the contrary notwithstanding.

This act being intended for the protection of officers necessarily engaged in perilous duties, should receive a liberal interpretation, so that if he is opposed and resisted by an armed force, and placed in such circumstances as compel him to oppose force to force, though he may have been rather too precipitate in the use of his arms, he is still entitled to its benefit.<sup>1</sup> Such unfavourable circumstances may justly expose him to a higher punishment, if found guilty ; but they are not sufficient to deprive him of the benefit of bail.<sup>2</sup> It is not to be imagined, however, that the Judge is deprived of all discretion in this matter, or that he must straightway admit a revenue officer to bail in respect of the statute. On the contrary, he is bound to investigate the charge, and see whether or not the prisoner’s conduct was of that kind which the statute enjoins : and unless it was, he is bound to act in regard to the case as at common law. For this purpose, the prisoner must in the meantime remain in jail, that it may be seen whether the slaughter was of the kind which falls under the indentment of the statute.<sup>3</sup>

It has been held in England, that where a smuggler was assembled with others who were armed and was active, it was not necessary that such individual should be armed.<sup>4</sup> And it has been found that either a stick or a great stone come under the

<sup>1</sup> Burnet, 337.—<sup>2</sup> Ibid.—<sup>3</sup> Hume, ii. 92.—<sup>4</sup> Franklin’s Case, Leach, 255 ; Russell, i. 124.

description of an offensive weapon, if used as such, and so as to produce blows and bruises.<sup>1</sup>

9. The bail which may be exacted, is now fixed by later statutes at £1200 for a nobleman, £600 for a landed proprietor, £300 for any other gentleman, burgess, or householder, and £60 for any inferior person.

The act 1701 fixed the bail from the different persons whom it specified at sums which, by the change in the value of money, have become elusory; power was therefore given to double them, by 11 Geo. I. c. 25; and latterly, by the 39 Geo. III. c. 49, they were fixed at the sums above specified, which appear amply sufficient to secure the attendance of the persons committed. At one time it was competent, by 39 Geo. III. c. 39, to extend the bail even beyond these specified sums, in cases of sedition, to any sum that might be deemed sufficient to secure the appearance of the accused; but this is now repealed, as savouring too much of arbitrary power.<sup>2</sup>

The term "householder," does not occur in the act 1701; but it is held to include that class of persons, now much more numerous than formerly, who were neither gentlemen, burgesses, nor inferior persons, but often of as great importance as any of the three.<sup>3</sup> It would rather appear that the deliverance of the Judge modifying bail to a specific sum, is not subject to any review at the instance of the prosecutors;<sup>4</sup> at least, where it had been modified, caution found, and the prisoner in jail, though warrant of liberation had been extracted, the application to have it raised was found incompetent.<sup>5</sup>

The magistrates have, of course, the power of modifying bail to a smaller amount than what is specified in the statute, the maximum only being fixed by its enactments. In practice, the bail exacted from persons in the rank of labourers or mechanics, is usually 300 merks, and from others in the same proportion: but where there seems reason to suspect an evasion from justice, it is made as high as the circumstances of the accused will admit, and not unfrequently as high as the statutory limit.

10. It is competent for the Lord Advocate, in cases

<sup>1</sup> East, i. 421; Russell, i. 124.—<sup>2</sup> 6 Geo. IV. c. 47, § 5.—<sup>3</sup> Burnet, 345; Hume, ii. 92.—<sup>4</sup> Hume, ii. 92.—<sup>5</sup> Fiscal of Glasgow, July 29, 1801; Hume, ii. 92.



clearly capital, to consent to bail, if he shall see fit ; but in such a case the bail may be fixed at any amount which he pleases.

In cases where, by law, the prisoner is not entitled to bail, he may still receive that benefit, upon an application to the Lord Advocate, without going through the forms, or incurring the expense of a petition to the Justiciary Court, and this consent is very frequently given by that officer, or his deputed. The cases in which they exercise this dispensing power, are those in which it appears probable, from the whole complexion of the case, that it will not terminate in a capital sentence, either by the charge of murder being restricted to one of culpable homicide, or terminating in an entire acquittal, or where, from the nature of the case, or the character of the accused, or his state of health, it seems consonant to justice that this indulgence should be granted. It is no reason, however, for granting this consent, that the libel will probably be restricted, and no capital sentence pronounced : for that takes place in nineteen cases out of twenty of those where law has affixed the penalty of death to the offence ; and it is a matter of the highest importance, to secure the presence of the depraved characters who commit such offences, with a view to their transportation. The cases for which it seems peculiarly fitted, are those more melancholy ones in which a respectable man has got himself involved in an affray, or has been so unfortunate as to commit homicide ; and there is no reason to believe that he will appear at the trial, and every likelihood that he will be either acquitted or convicted of culpable homicide only. But in such case, the bail may be made as high as the Lord Advocate or his deputed think fit ; and in modifying it, they should have in view the circumstances of the party, the probability of his coming forward, independent of the compulsion of bail, and the equity of his claim for a relaxation of the rigour of the law.

11. The application for bail must be in writing : it may be made equally before or after imprisonment, if the warrant of commitment has been granted ; and it must be made to a Judge competent to try for the offence.

The statute having expressly declared, that the person “ or-

dered to be imprisoned" may apply for the benefit of bail, it follows, that this privilege is competent equally to a prisoner against whom a warrant of incarceration has been granted, though not imprisoned, as to one actually within the precincts of the jail.<sup>1</sup> It is settled, both on the words of the statute and the reason of the thing, that the application for bail must be in writing, and that a verbal application is no sufficient ground for an action of damages in case of refusal.<sup>2</sup>

Nothing can be clearer, than that so solemn an application, and one in which the date as well as nature of what is set forth is of such importance, both to the prisoner who makes, and the magistrates who dispose of it, should be in a written form. The petition ought to be signed, and dated, and marked by the clerk of Court, with the day and hour of presentment, as the twenty-four hours, within which the judge must modify bail, runs from its presentment.<sup>3</sup> It should be accompanied also with a copy of the warrant of commitment, and this seems indispensable, if the application is made to one who is not the magistrate committer; but though not so accompanied, if he is otherwise fully aware of the nature of the charge, he may competently pronounce a deliverance on the petition.<sup>4</sup>

But what if a positive allegation be made in any subsequent proceedings, that the date of the petition was erroneous, or that a wrong date of presentment has, either designedly or fortuitously, been made by the clerk to whom it was presented? This point occurred in the case of *Andrews v. Murdoch*, already so often mentioned. It there was alleged, that the petition for bail was presented on the 2d July, but that the date marked on it was the 9th, on which day the deliverance of the magistrate was pronounced. The Court here seem to have held, that the date of the petition being presented could be proved only by the date written on itself;<sup>5</sup> but in the House of Lords, it was justly held by Lord Chancellor Eldon, that it was impossible to maintain that such a marking was conclusive, and that parole evidence was competent to contradict the record, and establish the true date.<sup>6</sup> Of course, the presumption *in dubio* is, that the date marked on the petition is the true one, and it will require a pregnant and conclusive proof to outweigh the record in this particular.

<sup>1</sup> Hume, ii. 93.—<sup>2</sup> *Andrews v. Murdoch*, June 9, 1814; Dow, ii. 419; *Arbuckle v. Taylor*, July 10, 1815; Dow, iii. 173; Hume, ii. 94; Burnet, 341.—<sup>3</sup> Burnet, 341; Hume, ii. 94.—<sup>4</sup> Hume, ii. 94.—<sup>5</sup> Burnet, 341.—<sup>6</sup> Dow, ii. 419.

The petition for bail must be presented either to the magistrate committer, or some other judge who is "competent for cognition of the crime." Under these words, a Lord of Justiciary may admit to bail a prisoner confined on a Sheriff's warrant, or a Sheriff a prisoner confined on that of a Justice of Peace for his county, or even a prisoner confined on a Justiciary warrant, provided it was for an offence of which he could take cognizance.<sup>1</sup> Accordingly, where a Justice of Peace had admitted a prisoner to bail, in a case which, though clearlyailable, he was not competent to try, the Court reversed his deliverance, and themselves admitted the prisoner to that benefit.<sup>2</sup> It does not appear that it is competent for a judge to modify bail, unless he can take cognition, not only of the class of offences, but of the individual offence for which the prisoner stands committed, or has him brought within his jurisdiction; that is to say, he must be competent to try the offence, and have jurisdiction over the prisoner, or at least have the prisoner within his jurisdiction at the time the application is made. It would be incompetent therefore for a Sheriff of Mid-Lothian to entertain a petition for bail from a prisoner in Linlithgow or Lanark jails, unless he is transmitted to their sheriffdom; for they have no jurisdiction over the prisoner unless that is the case, and their warrant of liberation would be utterly nugatory, in regard to a case where both the offence was committed, and the prisoner is situated, beyond their bounds.

Where the petition for bail is presented to the Lords of Justiciary, they are in use, if it has not been previously done, to remit to the Judge Ordinary of the bounds to take a precognition, and proceed with the case as he shall see cause.<sup>3</sup> And where such a petition was presented to that Court by a prisoner confined on a charge of forgery, on a warrant from the Lords of Session, the Court of Justiciary refused the petition, reserving to the prisoner to apply to the Lords of Session.<sup>4</sup>

12. In the case of a peer charged with a crime, and committed till liberated in due course of law, he may apply for bail to the Sheriff of the county where he is imprisoned, or the Lords of Justiciary; and the bail exacted of him may be to stand trial within twelve months if be-

<sup>1</sup> Hume, ii. 95.—<sup>2</sup> Matthew Finlayson, Jan. 17, 1811; Hume, ii. 95.—<sup>3</sup> Lauchlan M'Intosh, July 12, 1751; Hume, ii. 95.—<sup>4</sup> Mary Ogilvie, Aug. 1, 1758.



fore Parliament or the Lord High Steward, and six months if before any Court in Scotland.

For the special case of a peer charged with a crime, and “committed to prison in Scotland till liberated in due course of law,” provision is made by the 6th Geo. IV. c. 66, § 8. This statute enacts, in regard to such peer, that it shall be competent for him to apply to the Lords of Justiciary, or the Sheriff within whose county he is incarcerated, and that it shall be competent for any one of the said Lords, and to the Sheriff, to cognosce whether the crime charged against such peer be capital or not, and to modify the bail in terms of the act 1701, and the act 39 Geo. III. The caution to be found by such peer is for answering to “any indictment which shall be exhibited against him for the crime in question in any Court competent to try the said crime, including therein the High Court of Parliament, and the Court of the Lord High Steward, and this at any time within twelve months if before the High Court of Parliament or the Court of the Lord High Steward, and six months if before any Court in Scotland.”<sup>1</sup>

13. The deliverance of the judge, to whom the petition for bail is presented one way or the other, must be given within twenty-four hours; and he runs the risk of an action of damages, if on any ground he delays the deliverance beyond that period.

The statute declares, “That upon the said application, the said committee, or Lords of Justiciary, or other judge competent, shall first cognosce whether the crime beailable or not, in order to the finding bail allenarly; and if foundailable, then he or they shall be obliged to modify the sum for which the bail is to be found, within twenty-four hours after the said petition is presented to him or them respectively,” under the pains of wrongful imprisonment. Under these words it has been held, and indeed the words would admit of no other construction, that the bail must be modified within twenty-four hours of the date of presentment, if the crime beailable.<sup>2</sup> But if the crime is *not*ailable, there is no injunction that the deliverance *refusing* bail

<sup>1</sup> 6 Geo. IV. c. 66, § 8.—<sup>2</sup> Burnet, 342; Hume, ii. 95.

should be written out within that period; and, consequently, there is no liability for the statutory penalties if it be delayed for a longer period, as indeed the prisoner suffers no injury by such a delay.<sup>1</sup>

By the phrase "presentment," is here to be understood the transmission of the petition to the Magistrate himself, not the bare lodging of the paper with the clerk of Court, who may be, and sometimes is, at such a distance from the judge, that more than twenty-four hours must elapse before the application can possibly reach him; as, for example, if an application for bail is lodged at the Justiciary Office at Edinburgh, when all the judges are absent on the circuit,<sup>2</sup> yet in such a case, the clerk of Court will be answerable at common law, but not on the statute, for want of any proper and reasonable diligence in communicating it to the judges if the prisoner's confinement shall thereby be unduly prolonged.<sup>3</sup>

The injunction of the statute being express that the bail, if modified at all, is to be modified within twenty-four hours, it is obviously an unsafe practice which is sometimes adopted, of ordering the petition to be intimated to the person who appears to be concerned in the commitment; for unless the answers are lodged and the case disposed of within that short time, which can rarely be expected, there seems no ground on which, if it is elapsed without bail being modified, in a case where the prisoner was entitled to it, the claim for the statutory penalties can be resisted.<sup>4</sup> An instance of the danger of such a proceeding occurred in the case of *Andrews v. Murdoch*, already mentioned, where the committing magistrate, a country Justice, sent to Edinburgh to take the opinion of the Crown counsel as to whether the bail should, in terms of the 39th Geo. III., be extended beyond the amount authorized by the act 1701. The Court here seem to have held, that the subsequent act, by having given a power of raising bail, which could not in some cases be exercised within the specified period, virtually suspended that part of the statute. But Lord Eldon, in the House of Peers, justly observed that this position was untenable; and that so important a provision as that in regard to the time in which bail should be modified, could never be held to be abandoned or modified by implication, and accordingly he remitted the cause for farther enquiry as to the

<sup>1</sup> Burnet, 343; Hume, ii. 97.—<sup>2</sup> Hume, ii. 95.—<sup>3</sup> *Ibid.*—<sup>4</sup> *Ibid.* 96.

true date of the presentment for bail.<sup>1</sup> This affords another instance of the truth of an observation already made, that in such cases, by much the safest course for the magistrate is to exert his own judgment on the subject, and not, in the attempt to avoid the responsibility of decision, incur the more serious responsibility of delay.

If the crime, however, be clearly *ex facie* capital, the petition may be competently intimated to the prosecutor, with a view to ascertain whether he will consent to bail; as from delay beyond the twenty-four hours in such a case, the prisoner can suffer no injury, and may reap great benefit. This was accordingly done in the case of Short, Nov. 18, 1765.<sup>2</sup>

14. The caution which must be proffered, is to appear and answer to any libel with which the prisoner may be charged at any time within six months.

The *terminus a quo*, or date from which the period must be computed, is the date of the bail-bond. Six months from that period has usually been found in practice a sufficient time for bringing forward the charge, and in no instance has it extended at common law to a longer term.<sup>3</sup> The obligation of the cautioner is only applicable to that commitment referred to in his petition, and does not hinder his being kept in jail, on other and separate detainers.<sup>4</sup> Should the period of six months expire without any libel being served, the party may be again apprehended, and laid under bail for the same length of time; but, unless on the strongest case of unavoidable delay in bringing forward the trial, it should not be renewed a third time.<sup>5</sup> And even for a first renewal of the bond, the prosecutor must apply to the Court before whom he is brought, who may or may not accede to the request, as they shall see cause.<sup>6</sup>

If the bail be in the ordinary terms, “of answering to any libel for the crime,” without the addition of the words, “and at all diets of Court following thereon,” the condition of the bond is purified, and the cautioner is free, if the prisoner makes his appearance, and offers to stand trial.<sup>7</sup> If the trial be then delayed, on the motion either of the prosecutor or pannel, he must be

<sup>1</sup> Dow, ii. 93.—<sup>2</sup> Burnet, 343.—<sup>3</sup> Ibid. 340; Hume, ii. 94.—<sup>4</sup> Ibid.—<sup>5</sup> Burnet, 340.—<sup>6</sup> Hume, ii. 94.—<sup>7</sup> Ibid.



committed anew, on the warrant of the Court before which he is brought, and a fresh application for bail presented, and bail-bond made out.<sup>1</sup> But if the original bond bind the cautioner to present the accused not only at the first diet, but all subsequent diets, it applies, by its conception, to all adjournments of the diet at any subsequent period, as long as the original libel served within the six months is kept afloat. But if *that libel* falls, the bond will not apply to any subsequent libel served beyond that period.

But what if the prisoner does appear at the diet fixed within the period of the bail-bond, but the prosecutor moves the Court to desert the diet *pro loco et tempore*, and to have the prisoner recommitted on a new warrant? Is he entitled then to perpetuate against him for an indefinite period the burden of finding bail, or of undergoing imprisonment? For this case the act 1701 has made no provision; its object being almost exclusively the prevention of undue imprisonment, and the securing the benefit of bail to prisoners.<sup>2</sup> But the prisoner is still under the protection of the common law; the prosecutor can only obtain a desertion of the diet, and recommitment of the prisoner, on an express motion for that purpose made in open Court; and if reasonable cause be shown to the contrary, or the least disposition to oppress the accused appear, it will be refused, and the prosecutor be compelled to proceed with the trial, or see the diet deserted *simpli-citer*, by authority of the Court.<sup>3</sup>

15. The privilege of bail ceases as a matter of right, as soon as the prisoner is remitted to an assize; and he can only receive that indulgence thereafter, upon the consent of the prosecutor, and under such a penalty as the Court shall appoint beyond the statutory sum.

The privilege of bail ceases, when the assize are charged with the prisoner's case, for this reason, that, being actually in presence of the jury, and his fate ready to be determined in a few hours, it is unnecessary for his relief, and inconsistent with justice, that he should obtain the benefit of bail, and thereby acquire the right, by simply withdrawing and forfeiting its penalty, to nullify all the subsequent proceedings, and render it impossible to pronounce any sentence upon him, none of which steps can be

<sup>1</sup> Hume, ii. 94.—<sup>2</sup> Burnet, 340, 341.—<sup>3</sup> Ibid.; Hume, ii. 276, 277.

legally taken, but in presence of the accused. The act, in short, of remitting to the assize, implies a judicial contract, by virtue of which, on the one hand, the prosecutor is bound to stand or fall by the libel then in the hands of the jury, whatever it may happen to be, and on the other, the prisoner renounces his benefit of bail, and engages to be personally present to legalize the proceedings in the trial, and receive sentence in the event of conviction. Where an application for bail accordingly was made after the enclosing of the assize, the Court refused to grant it;<sup>1</sup> and where bail was applied for in another case, after verdict returned, in consequence of a certification to the whole Court for judgment on an objection, the Court admitted it, only in pursuance of the prosecutor's consent, and upon the penalty being fixed at £300 sterling, which was much beyond the statutory sum for persons in the prisoner's condition.<sup>2</sup>

It has not yet been determined whether the privilege of being admitted to bail ceases as soon as the trial has commenced, but there seems the strongest reason to hold, that if it be not delayed on the motion of the prosecutor, the prisoner should, after the diet has been called, lose as a matter of right this privilege. If the contrary rule were adopted, it would always be in the power of the prisoner, after an interlocutor of relevancy was pronounced, to defeat justice by offering bail, and withdrawing even in cases worthy of transportation for life. This was accordingly done in just such a case as that of Cameron, Jan. 15, 1798. The true principle seems to be, that bail can be demanded under the statute only in cases of custody in order to trial; and, therefore, that both on its words, and the reason of the thing, this preparatory state of confinement, with all its privileges, ceases when the trial has commenced, which must be held to have been the case from the moment the prisoner answered to the indictment.<sup>3</sup>

16. The penalties specified in the statute, are not incurred if the magistrate, within the twenty-four hours, pronounce a deliverance on the petition for bail, though it be erroneous; but it is liable to review in the Supreme Criminal Court, and in case of gross error, the magistrate is liable in damages at common law.

<sup>1</sup> Waddell, Glasgow, Autumn 1808.—<sup>2</sup> Bell and Others, Glasgow, Spring 1800, and High Court, May 22, 1800; Hume, ii. 94.—<sup>3</sup> Burnet, 339.

The object of the statute was to compel the instant attention of the magistrate to the application to bail; and, if he neglected that plain and obvious duty, to subject him in heavy penalties, but by no means to render him liable to the same penalties if he merely formed a wrong judgment on the merits of the application. The one is a neglect of duty, for which an apology can hardly ever be found; the other an error of judgment, to which the most conscientious men are subject. The statute has not said, accordingly, that the penalties are incurred if the magistrate pronounce an erroneous decision on the application, but only that he shall be liable to them if he let the period elapse without pronouncing a deliverance at all. The prisoner, in such a case, has his remedy, by an advocacy of the judgment to the Supreme Court;<sup>1</sup> a remedy which appears to be open to both parties in all deliverances on this matter of bail, excepting, perhaps, the case of an attempt to obtain a review at the prosecutor's instance of a modification of the *amount* of bail, on the ground that the prisoner's condition was higher than the magistrate has fixed it to be, where the review of the Supreme Court has been held to be excluded if the caution has been found, and the warrant of liberation extracted, although the prisoner is still in custody.<sup>2</sup>

But though the statutory penalties are inapplicable to such a case, it is not to be imagined that the magistrate is entirely at liberty, without any personal responsibility, to pronounce any deliverance he pleases on so important an application. On the contrary, he is here, as elsewhere, in the discharge of his important duties, under the cognizance and control of the ordinary principles of jurisprudence; and if in an action at common law, of damages for illegal and oppressive conduct in refusing bail, it shall be made to appear that he has acted either corruptly or from inexcusable ignorance, as in holding a trifling assault, unattended with danger to life, or a common pickery, a capital offence, he shall answer for such nefarious and unpardonable conduct to the sufferer by his illegal proceedings.<sup>3</sup>

17. Provision is made by special statute for the taking of bail under warrants indorsed between Scotland and any other parts of the United Kingdom.

<sup>1</sup> Hume, ii. 97.—<sup>2</sup> Fiscal of Glasgow, July 28, 1801; Hume, ii. 92.—<sup>3</sup> Ibid. 97.



The 45 Geo. III. c. 92, has made provision for the taking of bail, under warrants indorsed between England and Scotland, or Great Britain and Ireland. This statute, after reciting the 13 Geo. III. c. 31, and 44 Geo. III. c. 92, which regulate the indorsation of criminal warrants between Scotland and England, or Ireland respectively,<sup>1</sup> enacts, " In case any person or persons shall be apprehended in one of the said parts of the United Kingdom, for an offence which was committed, or charged to have been committed, in either of the other parts of the same, under any warrant indorsed in such manner as is in that respect provided, by virtue of either of the said recited acts, such person or persons shall and may be taken before the Justice or Judge who indorsed the said warrant, or before some other Justice or Justices of the county, stewardry, city, liberty, town, or place where the same was indorsed; and in case the offence be bailable in law, and such offender or offenders shall be willing and ready to give bail for his or their appearance, according to the exigence of the said warrant, such Judge or Justice or Justices, by whom such warrant was indorsed, or before whom any such offender or offenders shall be brought, shall and may proceed with such offender or offenders, and take bail for him, her, or them, according to the exigence of the said warrant, in the same manner as the Judge or Justice or Justices who originally issued the same, should or might have done; and such Judge or Justice or Justices so taking bail as aforesaid, shall take the recognisance or bail-bond of the said offender or offenders, and of his, her, or their bail, in duplicate, and shall deliver one of such duplicates to the constable or other officer or officers, or person or persons, so apprehending such offender or offenders as aforesaid, who are hereby required to receive the same, and to deliver, or cause to be delivered, such recognisance or bail-bond to the clerk of the Crown, or clerk of the peace, or proper officer for receiving the same, belonging to the Court in which, by such recognisance or bail-bond, such offender or offenders shall be bound to appear, and such recognisance or bail-bond shall be as good and effectual in law, to all intents and purposes, and of the same force and validity, as if the same had been entered into, taken, or acknowledged, before a Judge or Justice or Justices of the Peace of the county, stewardry, city, town, liberty, or place where the offence

<sup>1</sup> Ante, vol. ii. 126, 127.

was committed.”<sup>1</sup> The other duplicate is to be transmitted to the Court of Exchequer for that part of the united kingdom where the bail is taken; and a certificate of the forfeiture of the bond, under the seal of the Court where the forfeiture is declared, shall be a sufficient warrant for levying the bail-bond. But if the offence is not bailable, the prisoner is to be remanded into custody, to be dealt with according to law.

By § 2, “In case any person suing out such warrant shall show, by affidavit or otherwise, to the satisfaction of the Judge or Justice granting the same, that it may be necessary to execute such warrant in a part of the United Kingdom different from that in which such warrant is issued, and it shall appear also to the Judge granting such warrant, that it is granted for an offence for which it would not be lawful for any Judge or Justice before whom such offender or offenders might be brought by reason of the indorsement of such warrant, as directed by the said recited act, to admit such offender or offenders to bail, such Judge or Justice granting such warrant, shall upon the face of such warrant write the words ‘not bailable;’ and in all cases in which such words shall not have been so written, it shall and may be lawful for the Judge or Justice or Justices, before whom any offender or offenders may be brought under such warrant so indorsed, to admit such offender or offenders to bail.”<sup>2</sup> It is very material to attend to the writing of these words “not bailable” on the face of the warrant; for if that precaution be neglected, the Judge in England or Ireland, before whom he may be brought, is under these words bound to admit the prisoner to bail, even for an offence clearly capital. So it was determined by the Court of King’s Bench, Dublin, in the case of *J. Gibbons*, Spring 1828. The prisoner had been there apprehended on a warrant of the Lord Justice-Clerk, backed by an Irish Justice, on a capital charge of sinking ships to defraud insurers; but as the words “not bailable” were not written by his Lordship on the warrant, the Court there rightly determined that the prisoner was entitled to bail, though they fixed it at £1000 sterling, the result of which was, that he ultimately escaped.

18. The duty of the magistrate is to determine whether the crime is bailable, and fix the amount of bail merely; it belongs to the clerk to determine, in the first instance,

<sup>1</sup> 45 Geo. III. c. 92, § 1.—<sup>2</sup> § 2.

the sufficiency of the cautioner; but his determination in that respect is liable to be reviewed by the magistrate, and both by that of the Supreme Court.

The clerk is the party to whom, in all cases of caution, the bond is to be proffered, and it is part of his official duty to make enquiries and satisfy himself as to the sufficiency of the cautioner.<sup>1</sup> No specific time is fixed within which the clerk must conclude his enquiries, nor indeed could it be so fixed with any regard to justice to either party, because the sufficiency of the cautioner is not, like the nature of the charge, a point to be ascertained by reference to authorities, but a matter concerning which enquiries among different persons are necessary, which it may often be impossible to conclude within a determinate time.<sup>2</sup> All that can be said, therefore, on this point is, that the enquiries must be concluded, and the sufficiency of the cautioner determined, within a reasonable time, in the circumstances of the particular case which has occurred.<sup>3</sup> If the clerk refuse a person whom the party deems sufficient, the proper remedy is to take notarial instruments thereupon, and make application to the Judge, in terms of the statute, for immediate liberation, and he is then obliged to satisfy himself of the sufficiency of the bondsman;<sup>4</sup> on sufficient caution being found, the Judge is bound immediately to order the prisoner to be liberated.<sup>5</sup> There seems no room for doubt, that his decision on this point, like every other, where statute or custom has not taken away that remedy, is open to review at the instance of either party in the Supreme Court.

19. Where a party has forfeited his bail-bond, by failing to appear and stand trial, he loses the privilege of being thereafter admitted to the benefit of bail.

If a party is duly cited to appear, and he abscond, he is not again entitled, as a matter of right, to demand to be admitted to bail. He has already been in custody, in order to trial; he has reaped the benefit of the act 1701 in this particular, and he cannot demand a second time to obtain the indulgence which it holds out in the ordinary case of detention prior to that event. His subsequent detention has a mixture of two characters in it. He

<sup>1</sup> Burnet, 343; Hume, ii. 96.—<sup>2</sup> Burnet, 343; Hume, ii. 96.—<sup>3</sup> Burnet, 344.—<sup>4</sup> Ibid.—<sup>5</sup> Ibid.



is not only imprisoned in order to trial, but he is imprisoned in a certain degree, *in modum pœnæ*, for having failed to answer to the laws, when duly cited; and he has forfeited the peculiar privilege by which the severity of an imprisonment, solely of the first kind, is softened, by having incurred the penalty of the second.<sup>1</sup> Such, accordingly, was the opinion of the Court in pronouncing sentence of fugitation in the case of Cameron, Jan. 17, 1798, although the point could only there be incidentally spoken to.<sup>2</sup>

20. The Court of Justiciary have a controlling and supreme authority in all matters touching the jails for criminals; they are the authority by which a new jail is declared sufficient, and a legal place of custody in criminal matters, any old or inadequate jail condemned, and any neglect of their duty by the legal custodiers of such jails punished and enforced.

In virtue of their general superintendence over the criminal police of the kingdom, and as the Supreme Court of Review and Redress in criminal matters, the Justiciary Court have a sort of *nobile officium in criminalibus*. This appears in the general control which they exercise, and the vigilant and most necessary superintendence which they exert over the condition of jails, and the conduct of those intrusted with their management, in all parts of the kingdom.

The course of proceeding, where the authority of the Court is required for declaring a new prison erected in any county or borough a legal jail, has been to present a petition to the Court of Justiciary, accompanied by a plan of the edifice, and the reports of scientific or skilled persons, praying to have it declared a legal place of confinement. Upon this the Court remit to one or more of their number to report upon the state of the edifice; and if their report is favourable, they declare the jail a lawful jail, or they may grant power to any of their number to make that declaration. This course was adopted on March 17, 1804, and March 12, 1805, on the application of the Magistrates of Glasgow, to have the new bridewell there declared a lawful place of confinement for criminals, to relieve the old jail when full; on July 23, 1813, when the Court remitted to the Judges on the Western

<sup>1</sup> Burnet, 351.—<sup>2</sup> Ibid.

Circuit to report on the New Jail and Court-House at Glasgow, and declare these buildings a lawful jail if they shall see cause ; on March 13, 1812, on the petition of the Magistrates of Edinburgh to have the lock-up-house there declared part of the tolbooth of that city ; on May 28, 1817, in regard to the jail of Leith ; on June 5, 1820, in regard to the bridewell and workhouse for the Calton of Glasgow ; on June 15, 1820, on an application from the Magistrates of Inverary to have the criminals confined in the debtors' jail at Inverary ; and on Nov. 26, 1820, as to the bridewell of Paisley.<sup>1</sup>

Farther, if a jail appears to be insecure, or unfit for its purpose, either on account of insecurity, defective accommodation, unhealthiness, or the like, it is the province and duty of the Supreme Court, on the application either of the Magistrates, the Lord Advocate, or any one interested in the matter, to investigate the situation of the edifice, and compel those legally burdened with its maintenance to implement their obligation, by putting it in a proper state of repair. This superintending power has been exercised on several occasions. Thus, on May 19, 1823, a petition was presented to the Justiciary Court, at the instance of two persons of the name of Macfarlane, setting forth that they were confined in the jail of Dumbarton on criminal warrants, and that the building was in such a crazy and insecure state that it was unfit for the habitation of any human being, their lives were endangered from its tumbling down. The Court remitted to the Lord Advocate to take a precognition on the subject, as to how far the magistrates had implemented a prior order of Court to provide a temporary place of confinement for criminals ; and as it appeared that this order had not been complied with, the magistrates were on June 15, 1824, ordered to appear at the bar, and admonished by the Lord Justice-Clerk, " to be more attentive to the orders of the Court in time to come," and at the same time, the Court declared, that till a proper place of confinement was procured, all prisoners on criminal warrants within the county of Dumbarton, should be transmitted to the Glasgow jail, to be there maintained at the expense of the county of Dumbarton.<sup>2</sup> For the like reason of the insufficiency of the jail, all the prisoners in Leith jail on criminal warrants were, on Nov. 15, 1824, ordered to be confined in the jail of Edinburgh. And at Inverness,

<sup>1</sup> Hume, ii. 96.—<sup>2</sup> Ibid.

Autumn 1830, on a petition from the Lord Advocate setting forth the insecure and unwholesome state of the jail of Dingwall, supported by a report by professional persons, one by the Sheriff-substitute and the Advocate-depute, all of whom had inspected the building, the Court granted warrant for all prisoners confined, or ordered to be confined, on criminal warrants within that jail, to be transmitted to the jail at Tain, there to be maintained at the expense of the party bound to aliment them in the jail of Dingwall, and interdicted the keeper of that jail to receive any criminals within that building, until the farther orders of the Court.<sup>1</sup>

## CHAPTER VI.

### OF LIBERATION ON THE ACT 1701.

THE ancient law of Scotland was miserably defective in regulations to force on the trial of a prisoner, and instances were frequent of applications to the Court, setting forth that the petitioner had lain ten or fifteen months in jail, without their trial having been brought forward. In such cases the Court were in use to order the prosecutor to fix a day for the trial, under certification, that if it elapsed without that being done, they would grant warrant for his liberation.<sup>2</sup> But this was obviously a partial and insufficient remedy, and accordingly the grievance of long imprisonment was one of the evils set forth in the most prominent manner in the claim of right. In the act 1701, following on the Revolution, especial care was taken to insert such provisions as might secure this important part of the rights of the subject from those abuses to which, under despotic power, they are commonly exposed. The provisions of this statute have frequently been complained of, as complicated and obscure; but this remark has originated only with those by whom they were not properly understood; and, when minutely attended to, they will be found to constitute a body of law for the protection of the liberty of the subject, probably superior to that existing in any other code of jurisprudence, and certainly much more complete than that which the English have obtained from the Habeas Corpus Act.

<sup>1</sup> Unreported.—<sup>2</sup> Burnet, 351; Hume, ii. 98.



1. Every prisoner committed, and in prison for trial, has a right to apply to any Judge competent to try the offence for which he is incarcerated, for letters of intimation, which must be issued by such Judge within twenty-four hours, addressed to the public or private prosecutor, or both concerned in the warrant of commitment, ordaining him to fix a diet for the trial within sixty days of such intimation; and if that period elapses without the diet being so fixed, the prisoner is entitled to his instant liberation.

The provision of the statute on this subject is in these terms: "And his Majesty, with advice and consent aforesaid, farther statutes and ordains, that upon application of any prisoner in custody in order for trial, whether for capital or bailable crimes, to any of the Lords of Justiciary, or other judge or judicatory competent for judging the crime or offence for which he is imprisoned, and the said prisoner his producing the said double of the warrant of his imprisonment under the keeper's hand; the said judge or judicatory competent, under the pain of wrongous imprisonment, are hereby ordained, within twenty-four hours after the said application and petition is presented to him or them, to give out letters or precepts direct to messengers for intimating to his Majesty's Advocate or Procurator-Fiscal, and the party appearing by the warrant to be concerned, if any be within the kingdom, to fix a diet for the trial within sixty days after the intimation; certifying his Majesty's Advocate or Procurator-Fiscal, and the said party concerned, that if they failzie, the prisoner shall be discharged, and set at liberty without delay; for doing whereof, the said judge or judicatory competent, are hereby expressly warranted, and strictly required and ordained to do the same, under the penalty foresaid, unless the delay be upon the prisoner's petition or desire."<sup>1</sup>

1. The first circumstance worthy of notice in these important words, is, that the prisoner entitled to their benefit, is he who is in "custody, *in order to trial*, whether for capital or *bailable crimes*." No one, therefore, is entitled to sue out this process, but one who is committed for trial;<sup>2</sup> but, on the other hand, every pri-

<sup>1</sup> 1701, c. 6.—<sup>2</sup> Burnet, 354, Andrews v. Murdoch; Dow, ii. 417; Hume, ii. 104.

soner is entitled to its benefit who is so imprisoned, whether for a capital or bailable offence. The right arises the moment that the prisoner is imprisoned on such warrant; but in cases of treason there is this exception, "That in case of imprisonment for treason, the prisoner shall not have access to apply for prefixing of a diet for process for forty days after his imprisonment, which are hereby allowed for preparing of the process, after elapsing of which time, the Lords of his Majesty's Privy Council, or Lords of Justiciary, or any of them, are hereby required, upon the application of the prisoner, to issue forth precepts as in other cases."

2. The act declares that the prisoner must be "*in custody* in order to trial." It is not said in *prison*, in order for trial; but still these words imply that the petitioner is in some state of duress or confinement, and not at large under a pecuniary penalty merely to appear and stand trial. These considerations, joined to the purpose of the act, which was to prevent wrongous *imprisonment*, seem decisive against the extension of the act to persons on bail; and this is the opinion accordingly delivered by a respectable authority.<sup>1</sup> Singular as it may appear, this point, important as it is, did not receive an authoritative decision till very lately. It occurred incidentally in the case of James Dundas, April 1712. The *species facti* there was, that this prisoner, who was on bail, accused of leasing-making, had his diet called on 7th January 1712, and the diet was thereafter continued on his caution being ordered to be renewed to the 3d February. On that day he declined to renew his caution, and went to prison, but was liberated in a few days afterwards. Meanwhile, when at large on bail, he obtained from the Court, on 22d January, a warrant for intimation against the Lord Advocate, and on the 18th February, the diet was called, and farther delay craved, and he was ordered to renew his caution. On the 25th February, the case was called, and continued till the 8th April, when the prosecutor being unable to proceed with the trial, from the absence of witnesses who could not be present within the statutory period, abandoned the charge, and the pannel was dismissed. This, therefore, could not be considered as an authority on the point, because it was only a proceeding on the part of the prosecutor; but such as it was, it favoured the opinion that the act did

<sup>1</sup> Burnet 353.

apply to persons though out on bail.<sup>1</sup> But strong doubts still continued to be entertained, whether such an interpretation was consistent either with the words of the statute, or its obvious intention. At length the point was decided in the case of Macdonald and Young, June 18, 1832. It there appeared that an indictment was served against the pannel on 21st June 1831, citing him to appear on 12th July, and an indictment of relevancy was then pronounced, after which, as the prosecutor did not proceed with the trial, he was ordained to find new bail. He did not do so, but went to prison, and on the day following, the 13th, he took out and executed letters of intimation. He remained in jail till the 19th, when he was allowed to go out without bail, purposely to avoid the application of the statute. The diet was afterwards called and continued by successive adjournments till the 8th November, when it was again called, and the prisoner objected that he could not now be tried, as the statutory period had elapsed. In this case, therefore, the prisoner was in prison, with a current indictment executed against him when he took out his letters, and the question was, whether he could be deprived of the benefit accruing to him under the statute from that circumstance, by the prosecutor opening the prison door and letting him walk out. The Court held<sup>2</sup> unanimously, that when letters of intimation are taken out by a prisoner who has had an indictment executed against him, the diet of which is still current, the act 1701 applies to that indictment; and that unless *either* the trial is concluded on that indictment, within forty days after the first diet to which he is called to appear, or a new indictment is executed against him within sixty days after such intimation, he is entitled to the benefit of the act; and by a great majority, Lord Medwyn alone dissenting, that when the intimation is made by a person in prison, he cannot lose the protection accruing to him under the statute by being liberated. Lord Moncreiff even inclined to go the length of holding that the statute applied to a person out on bail *ab initio*, upon the ground that he is still under a *legal bond* to appear, and therefore may in some degree be considered as "*in custody* in order to trial;" but the other Judges did not deem it necessary to enter on that question, which was not requisite for the decision of the case before them.

3. The application must be made "to a judge or other judi-

<sup>1</sup> Justice-Clerk's MS. — <sup>2</sup> Ibid.



catory competent for judging the crime or offence for which he is imprisoned. This provision is analogous to that which directs the application for bail in like manner to be made to a judge competent to take cognition of the crime; and it is justly held to render an application to a judge who could not try the prisoner for the offence with which he is charged, a mere nullity.<sup>1</sup> So that one who lies committed for an assault on the warrant of a Justice of Peace or Borough Magistrate, may nevertheless apply to the Sheriff of that shire for intimation, because he has a concurrent jurisdiction with these inferior judicatories in the cases which they may try.<sup>2</sup> For the same reason, the application is competent to the Court of Justiciary from a prisoner confined on the warrant of any inferior judge in Scotland, because their jurisdiction is universal in extent, as well as supreme in degree. But if the application is made to a judge who is not competent to try the offence, either by reason of defect of power, or want of jurisdiction, it is null; and accordingly where a prisoner was committed on a charge of robbery perpetrated in the county of *Kinross*, and application was made to the Sheriff of *Perth*, this was held irregular and null, in respect both that the Sheriff was incompetent to try for robbery, and that no offence committed in *Kinross* could be tried in *Perthshire*.<sup>3</sup>

4. The application must be in writing; and it must be accompanied by a double of the warrant of imprisonment, under the jailer's hand, to verify the fact of the incarceration.<sup>4</sup> The hour at which it is lodged should be authenticated by the proper marking, under the hand of the clerk of Court, at the time when it is presented; and the judge, in like manner, should mark the hour when it is laid before him, either in his own hand, or in that of his clerk, under his eye.<sup>5</sup> The twenty-four hours run against the judge from the time when he receives it: but the clerk is bound to do reasonable diligence in laying the application before the judge, in like manner as in an application for bail.<sup>6</sup>

5. The precepts which the judge is to issue, are "for intimating to his Majesty's Advocate, or Procurator-fiscal, and to the party appearing by the warrant to be concerned, if any be within the kingdom, to fix a diet."<sup>7</sup> Where the warrant of commitment has been obtained from the Court of Justiciary, and on

<sup>1</sup> Burnet, 355; Hume, ii. 104.—<sup>2</sup> Ibid.—<sup>3</sup> Robert Spital, Nov. 27, 1809; Burnet, 355; Hume, ii. 100.—<sup>4</sup> Hume, ii. 104; Burnet, 355.—<sup>5</sup> Ibid.—<sup>6</sup> Ante, p. 172.—

<sup>7</sup> Burnet, 355.

the application of the Lord Advocate, the warrant for intimation must be obtained from the same high authority, and intimated to his Lordship, or one of his deputies,<sup>1</sup>—or it will be held null.<sup>2</sup> But if the commitment has been obtained, even from the Justiciary Court, by the private party, it rather appears that the intimation may be sufficiently made on the Sheriff's precepts, and to the Procurator-fiscal for the shire, provided, of course, the offence be one which the Sheriff can competently try.<sup>3</sup>

6. The intimation is not required by the statute to be to the Fiscal *and* the Lord Advocate, but the Fiscal *or* the Lord Advocate, alternatively, according as the circumstances of the case may require.<sup>4</sup> In any case, therefore, of commitment at the Fiscal's instance, for a crime cognisable by the Sheriff, and where intimation has been thus made to that officer, and the party concerned, it is good against the Lord Advocate; that high officer being represented, *quoad hoc*, by that inferior functionary. If, therefore, such prisoner has been liberated at the end of sixty days, in consequence of no diet having been fixed for his trial, and the Lord Advocate chooses to serve him with criminal letters, those criminal letters must be subject to the same restrictions as if the first intimation had taken place on a Justiciary precept to himself.<sup>5</sup>

7. By the express words of the statute, intimation must be made not only to the Procurator-fiscal, or Lord Advocate, but the private party also, where he appears by the warrant of commitment to be concerned, if any such be within the kingdom; and, accordingly, where no such intimation was made to the party appearing by the warrant of commitment to be concerned, the Court refused to set the party imprisoned at liberty.<sup>6</sup> But this is only necessary where the interest of the private party appears, *ex facie*, of the warrant of commitment, not where he has merely given information, and the application for commitment has been solely at the instance of the public prosecutor.

2. If sixty days be allowed to elapse without a libel being served on the prisoner, he is entitled to instant liberation; and in computing the time, the day of inti-

<sup>1</sup> Hume, ii. 105; Burnet, 355.—<sup>2</sup> Geo. Rankine, Glasgow, April 1800; Burnet, 355.

—<sup>3</sup> Hume, ii. 105.—<sup>4</sup> Burnet, 355; Hume, ii. 105.—<sup>5</sup> Hume, ii. 105, 106.—<sup>6</sup> Hume, ii. 106; Burnet, 356; John Cameron, July 15, 1713.

mation is considered as a *punctum temporis*, so that the sixty days runs from its termination.

If no libel at all be served on the pannel within sixty days, the statute has clearly set forth the consequences, viz. "that the prisoner shall be discharged and set at liberty without delay." A written application must, however, be made to the judge, who is bound instantly to issue precepts to the proper officers to set the prisoner at liberty, under the pains of wrongous imprisonment.<sup>1</sup> To verify the fact, the letters of intimation, with the execution against the proper parties, must accompany the petition.<sup>2</sup>

In computing the sixty days, it is held, in conformity with the rule in cases of death-bed and retrospective bankruptcy, that the day on which intimation is made is to be held as a *punctum temporis*, as the point or term from and after which the sixty days are to be counted.<sup>3</sup> Indeed, on principle no other decision could be given; for the statute allows the prosecutor "sixty days *after* the intimation," and therefore he is within the law if he serve the libel at any hour of the sixtieth day: not to mention that computation by hours is both perplexing and unnecessary in a matter of this description. In Campbell's case, July 13, 1822, the prisoner claiming liberation offered to prove that the indictment was not served on him till between nine and ten on the evening of the 26th June, while his letters of intimation were executed on the 27th April, between three and four; so that counting by hours the sixty days had elapsed; but the Court, after great consideration, held the indictment served within the requisite time.<sup>4</sup>

A vehement debate was maintained in former times, whether it was necessary that the *diet itself* should be fixed within the sixty days, or whether it was sufficient, if the *libel was executed* within that period, though the day of compareance was as much later as the legal induciæ of fifteen days would permit. It is, however, now completely fixed, that it is sufficient if the libel is executed within the sixty days, although the day of compareance is beyond that period.<sup>5</sup> But it is indispensable that the libel be served on the prisoner within the statutory period: it

<sup>1</sup> Hume, ii. 100.—<sup>2</sup> Ibid.—<sup>3</sup> M'Intosh, Perth, May 1800; Hume, ii. 107; John and Alex. Campbell, July 13, 1822; Shaw, 66; Hume, ii. 100; Burnet, 362.—<sup>4</sup> Shaw, No. 66.—<sup>5</sup> Hume, ii. 107; Burnet, 361.



will not do merely to have taken the preliminary steps for effecting that object within that period; and therefore a deliverance on a bill for criminal letters, which fixes the diet for trial, is not enough, if not followed by actual serving of the criminal letters themselves on the prisoner.<sup>1</sup>

It is provided, however, that the liberation shall be forthwith granted, "unless the delay be upon the prisoner's own petition or desire." This is a most just and necessary qualification, as else the statute might prejudice the prisoner himself in the most essential particular, by depriving him of the time requisite to bring forward his evidence, or make out legal points material to his defence. But no continuation of diet, certification, or other prolongation of the process by authority of the Court, any more than that which takes place at the desire of the prosecutor, can stop the currency of the statutory period.<sup>2</sup>

3. If a diet be fixed for the trial of the prisoner, by serving an indictment on him within the sixty days, the prosecutor must bring that indictment to a conclusion within the forty days immediately following, or the prisoner is entitled to his liberation.

The next point to attend to, is the course which the statute compels the prosecutor to adopt, if he is desirous to avoid the liberation of the prisoner. The clause on this subject is as follows:—"And the diet of the trial being prefixed, the magistrates of the place, or keeper of the prison, shall then be obliged to deliver the prisoner to a sufficient guard, to be provided by the Judge, his Majesty's Advocate, or Procurator-fiscal, that the prisoner may be sisted before the Judge competent; and his Majesty's Advocate, or Procurator-fiscal, shall insist in the libel, and the Judge put *the same* to a trial; and the same shall be determined by a final sentence, within forty days if before the Lords of Justiciary, and thirty days if before any other Judge. And if his Majesty, or Procurator-fiscal, do not insist on the trial at the day appointed, and prosecute the same to the conclusion as aforesaid, his Majesty, with advice aforesaid, statutes and ordains that the diet shall then be *simpliciter* deserted, and the prisoner immediately liberated from his imprisonment for that crime or

<sup>1</sup> Burnet, 362.—<sup>2</sup> Burnet, 363.

offence; and if no process be raised and executed within the time allowed, or in case of not insisting at the diet, and bringing the process to a conclusion within the foresaid space, it shall be lawful to the prisoner to apply to the Justice-General, Justice-Clerk, or any of the Lords of Justiciary or Judges competent, *respective*; and upon his application and instructions that the limited time by law for insisting in or concluding the process is elapsed, and instruments taken thereupon, the said Justice-General, Justice-Clerk, Lords of Justiciary, and Judge competent, shall be obliged, within twenty-four hours, to issue out letters or precepts direct to messengers for charging the Magistrates, or keepers of the prison wherein the prisoner is detained, for setting him at liberty, under the pains of wrongous imprisonment."

There is an ambiguity in these expressions as to the commencement of the period from which the forty days is to be computed. Is it to be reckoned from the day of serving the libel, so as to compel the prosecutor to bring the process to a conclusion within 40 days more, or 100 days in all; or may the forty days be unconnected with the sixty, so as to permit him to fix a diet much beyond that period, and force him to conclude it only within forty days of that distant diet? After some discrepancy of opinion, it has at length become fixed law, in conformity both to the obvious intention of the statute, and the justice of the case, that the forty days must begin to run from the day of serving the libel, so as to prevent the prosecutor in any case from prolonging his process beyond 100 days in all.<sup>1</sup> This appears to have been held as settled law, ever since the noted case of M'Ewen and Butcher, August 1776. The *species facti* there was, that, on 1st February 1786, these persons had made intimation, in terms of the statute, to the Procurator-fiscal for the county of Fife. On the 30th of March, just as the days were about to expire, they were served with a libel, calling them to stand trial at Perth on 25th May, fifty-five days after the expiry of the sixty. At the calling, it was pleaded in bar of trial, that the forty days must begin to run immediately after the sixty; and that, as more than that period had elapsed, the trial could not proceed. The Judges on the Circuit certified the case for the consideration of the whole Court; informations were ordered, and an enquiry into the practice directed, when the Lord Advo-

<sup>1</sup> Hume, ii. 108; Burnet, 504.

cate consented to the dismissal of the prisoners ; which was done, under a reservation of his Lordship's right again to insist on such a plea if he saw cause. From these proceedings, it is evident he was not sanguine of success ; and from that period, the uniform practice has been to construe the forty days as necessarily following the execution of the libel.<sup>1</sup>

If the prosecutor chooses to serve his libel much within the sixty, he has only forty days to conclude his process from the date of such execution. He might, if he chose, have served it on the fifty-ninth day ; if, instead of this, he has selected an earlier period, he has made his election, and must abide by the consequences.<sup>2</sup> Baron Hume has given his opinion, that in *that* particular case the forty days must be held to run, not from the date of the execution of the libel, but of the diet of compearance ;<sup>3</sup> but he has quoted no authority in support of his opinion ; and the reason he assigns, viz., that the statute has only directed the prosecutor to "insist in the libel," and bring it to a conclusion within forty days, and that he cannot insist in the libel till the day of compearance, however weighty in itself, and entitled to regard, as supported by such an authority, is equally applicable to the case where the libel was served on the last of the sixty days, where, nevertheless, its force has been for above fifty years been disregarded.

The libel served on the prisoner must be brought to a final sentence within the statutory period. No second indictment can be served after intimation under the act, and the prosecutor's only remaining chance is the last criminal letters.<sup>4</sup>

4. In counting the forty days, the period of delay granted at the desire, or for the accommodation, of the pannel, must be deducted.

In counting the forty days, from whatever date, deduction must be made of those periods of delay granted at the desire of the pannel ;<sup>5</sup> for though the statute has not made this the subject of express enactment, as it has in regard to the first sixty days, yet the Court have justly held that the same principle applies to both, and that they are bound at common law to make the deduction where the prisoner applies for delay.<sup>6</sup> In the case of Robert

<sup>1</sup> Burnet, 365 ; Hume, *ibid.*—<sup>2</sup> Hume, ii. 109.—<sup>3</sup> *Ibid.*, Note.—<sup>4</sup> James Millar, June 16, 1715 ; Hume, ii. 103.—<sup>5</sup> Hume, ii. 109.—<sup>6</sup> Burnet, 365 ; Crawford, Dec. 23, 1717 ; Bell, June 16, 1735.



Thomson, June 1739, it was debated, but not decided, whether the forty days must be forty free days, exclusive of the day on which the trial begins.<sup>1</sup> But the opinion of Baron Hume seems well entitled to regard, that there is an obvious distinction between this case and that of the commencement of the sixty days; that the first day of trial is not a separate step or event, *a terminus a quo*, from which the period of the trial may begin to run, but rather a portion of the trial itself, and the day itself a natural part of the period limited by the statute for bringing the trial to a close.<sup>2</sup> The analogy of the case of James Anderson, Nov. 17, 1823, where it was found that if the forty days allowed for bringing a prisoner to trial, who is apprehended on criminal letters after liberation on the act 1701, have elapsed without final sentence being pronounced, he is entitled to an absolute discharge, is in favour of this construction.<sup>3</sup>

5. If the trial be not concluded within the forty days, the diet shall be *simpliciter* deserted, and the prisoner immediately liberated from his imprisonment for that crime or offence.

The effect of the expiry of the forty days, without the trial being concluded, is different, according to the different stages at which the proceedings have arrived before the expiry of that period. If, before the expiry of the forty days, the indictment against the prisoner has not even been called in Court, he is entitled to have the diet deserted *simpliciter* by the express words of the statute, and he cannot be again charged with the offence, but by an apprehension on criminal letters, after the form and under the restrictions which it has prescribed, and which will be immediately explained.<sup>4</sup> If it has been called in Court, and remitted to an assize, and a verdict of not guilty, or not proven, pronounced by them, that amounts to a total liberation from the charge, because no man can thole an assize twice for the same offence.<sup>5</sup> Nay, if the prosecutor has postponed the trial to so late a period that the verdict is not returned, and sentence pronounced, until after the expiry of the forty days, he cannot, by this remissness on his part, purchase a dispensation from that

<sup>1</sup> M<sup>c</sup>Laurin, No. 45.—<sup>2</sup> Hume, ii. 110.—<sup>3</sup> *Infra*, p. 204.—<sup>4</sup> Burnet, 367, 374; Hume, ii. 111.—<sup>5</sup> Hume, *ibid*; Burnet, 368, 374.

rule of law, so that the result must equally be an entire liberation from the offence.<sup>1</sup>

But between these extremes questions of great difficulty occur. For what if the libel be deserted after it has been called, in consequence of the absence of a witness, or other insurmountable obstacle to the conclusion of the trial? In such a case it is fixed that the desertion of the diet is not equivalent to a total discharge of prosecution for the crime, but that the party, though entitled to instant liberation, may still be apprehended on new criminal letters.<sup>2</sup> In the first case that occurred on this subject, where the point was brought to a solemn decision, the prisoner had run his letters, and on the fifty-eighth day after intimation he was served with an indictment, which was continued from time to time till the 27th October, being the last of the forty days succeeding the sixty. On that day the trial was adjourned owing to the absence of a material witness, and thus the libel fell. On the 27th October he was served with new and complete criminal letters, on which he was recommitted; and on the objection that he could not be tried on these letters being stated, it was unanimously repelled.<sup>3</sup> This has since been confirmed by a later judgment, that in the case of Thomas Fleming, May 18, 1818. The objection was there repeated, that a prisoner liberated in consequence of the first forty days having elapsed, could not again be charged with the offence; but though the judgment of the Court was prevented by the expiration of the second forty days allowed for concluding the criminal letters, without the trial being brought on, they unanimously held that the objection was ill founded, and put on record an entry that "they were unanimously of opinion, that there was no foundation for the objections stated in bar of trial."<sup>4</sup> Indeed the statute itself has clearly pointed to the same decision; because, in regard to the case of the first forty days elapsing without the trial being concluded, it has merely declared, that "the diet shall then be simpliciter deserted, and the prisoner immediately liberated from his imprisonment for that crime or offence;" whereas, for the case of the second forty days allowed for concluding the criminal letters, it has declared, "Wherein if the King's Advocate failzie, the diet is to be deserted simpliciter, and the prisoner ordered to be set at

<sup>1</sup> Hume, ii. 111; Burnet, 368, 374.—<sup>2</sup> Hume, ii. 114.—<sup>3</sup> Wilde's case, Nov. 21, 1808; Burnet, 375; Hume, ii. 113.—<sup>4</sup> Hume, ii. 114, note.

liberty from the said imprisonment ;” and “ the diet being there-upon deserted, the party imprisoned a second time, as aforesaid, to be *for ever free from all question or process for the foresaid crime or offence ;*” words which point as clearly as can be to a distinction between the effects of the desertion of the diet in the two cases, and prove that in the second case only was it intended that the prisoner enjoy an absolute exemption from the offence.<sup>1</sup>

But what shall be said if the prosecutor has diligently and timefully insisted in his libel, and got it remitted to an assize in good time, but is prevented *casu fortuito* from bringing it to an issue, as by the illness or death of the Judge, juryman, or prosecutor, which necessarily suspends the proceedings? Is the statute to be so rigorously applied, as to hold that this accident is to entitle the prisoner to an entire liberation from all question concerning the offence in future, or may the prosecutor bring a new libel and prosecute it to a successful issue, provided it can be brought to a close before the expiration of the first forty days? This point has not yet received a decision; but as the Court, in the case of Mary Elder or Smith, Feb. 19, 1827, held, that where a juryman was taken ill, and the trial broken off in consequence, the trial might still proceed, at a new diet, with the same libel and list of witnesses, and a new Jury balloted from the old list of assize, and from the opinion of Baron Hume on the subject, it is more than probable that the determination of the Court will be, when the case arises, that the libel may still be prosecuted to an issue, and the pannel convicted, provided this can be accomplished within the forty days.<sup>2</sup> If this cannot be done, it is quite clear that *that libel* has completely fallen, and that the prisoner is entitled to his instant liberation; but, on the other hand, there seems as little reason for doubt that the prisoner may still be imprisoned and tried on new criminal letters; for the only objection to such a proceeding is, that of not tholing an assize twice, which the Court, in Mrs Smith’s case, justly held not applicable to such abrupt and accidental interruptions of an inchoated trial before the assize.

The case is widely different if the indictment, after having been remitted to an assize during the currency of the first forty days, comes to an abrupt termination in consequence of some error of the prosecutor in drawing his libel, or conducting his

<sup>1</sup> Burnet, 375.—<sup>2</sup> Hume, ii. 111.



case. This point occurred, and was debated, but not decided, in the case of John Hannay, Nov. 4, 1806. The libel had there described the person killed as the daughter of "John Robson, *wright*, at Wetcroft, near Lochrutton Gate," whereas it came out in evidence that he was a *tailor* at that place. The prosecutor, in consequence, abandoned the case, and the Jury assoilzied him from the charge as laid in *that* libel. This was done during the currency of the first forty days. The prosecutor then raised a new libel, in the form of criminal letters, in which he charged him with the murder of the true person, giving the father's designation correctly, and insisted on his right to prosecute for this new offence, which he maintained had never yet come under the cognizance of the Court. It was objected, 1. That the prisoner could not thole an assize twice; and, 2. That the trial could not proceed in respect of his case having been "put to a trial," and determined by "a final sentence," in terms of the provision of the act 1701. The Court waved the second point, in consequence of their deeming the first objection good at common law, but it was spoken to by several of the Judges, who differed in opinion. Lord Justice-Clerk Hope, however, made some able remarks, tending to show that the objection on the act 1701 was good, and in that opinion he is supported by the great authority of Baron Hume;<sup>1</sup> but a majority of the Court inclined the other way.<sup>2</sup>

In considering this matter, every thing, it is obvious, depends upon the question, whether or not the second indictment preferred against the prisoner for the real offence, is to be regarded as for the *same crime* as the first and erroneous charge on which he was acquitted. If it is, the maxim of not tholing an assize twice, of course, becomes applicable, and as a necessary consequence, the act 1701 puts a stop to all farther proceedings. For in *that* view the observations of Lord Justice-Clerk Hope are perfectly just, that "the trial had been brought to a final sentence, applicable to the warrant of commitment, and the statute bore no provision for new criminal letters in such an event. In no point of view could that verdict and sentence be considered as a void or erroneous proceeding. The charge was, no doubt, as relative to its true object, a blundered charge; but still it was a regular and logical charge, and apt for the trial of its own con-

<sup>1</sup> Hume, ii 112; Burnet, 369 —<sup>2</sup> Burnet, 369.

tents; and the trial which took place on it was in all respects a regular and lawful process, in which acquittal ensued, only in consequence of the want of evidence applicable to the case libelled."<sup>1</sup> But these observations are no answer to another view, which seems, with great deference to such high authority, to be the true one, viz. that the charge on the new criminal letters is an entirely *new* charge, commencing for the first time when those letters were served on the prisoner, and as completely distinct from the former charge contained in the prior commitment, and forming the subject for the former libel, as any offence committed in another county, or by another individual. No one can assert, that because a prisoner has run his letters, and been assoilzied for the murder of *one* individual there, he is not liable to be prosecuted for the murder of *another* individual, in the form of criminal letters, or any other way. Now, the prior judgment of the Court, in Hannay's case, demonstrates that the two crimes were considered as distinct, because they held the daughter of John Robson, *Wright* at Wetcroft, near Lochrutton Gate, to be a different person from the daughter of John Robson, *Tailor* at the same place, and in respect there was no evidence of the murder of the former of these parties, who was the person laid in the indictment, they directed an acquittal. That judgment was perfectly correct: but it is difficult to see how the inference is to be avoided, that such a result necessarily left the prosecutor at liberty to prefer a new indictment against the prisoner for the real crime; in the prosecution of which, he was as little liable to be met by the plea of *res judicata*, or any objection founded on the act 1701, as he would be in the trial of the same prisoner for the offence committed in a different time and place. If this view be correct, which, however, it is to be observed, is directly in the face of the judgment of the Court in the Lochrutton case, the act 1701 really had nothing to do with the matter; and the proceeding would have been equally competent, if an indictment had been executed against the prisoner the day after his acquittal for the new and separate offence, then for the first time laid to his charge.

6. The provisions of the act apply to a libel raised against the prisoner, previous to his executing his letters

<sup>1</sup> Hume, ii. 112.

of intimation ; but in that case, the prosecutor has his option, either to proceed with the current libel, which he must in that case conclude within forty days after the diet to which it stands current, or serve a new libel within the sixty days, and bring it to a conclusion within forty more.

From the whole tenor, as well as the express words of the act 1701, it is clear that it was intended to apply to indictments or criminal letters, executed *subsequent* to the letters of intimation being executed against the prosecutor. If, therefore, a prisoner, with a current indictment running against him, execute letters of intimation, the prosecutor may, if he chooses, execute a new indictment against him, within sixty days of such intimation, instead of going on with the current indictment ; but, if he chooses to go on with the former, he must conclude the trial within the forty days after the first diet to which it calls him to appear. This point occurred in the case of John or Alexander Campbell, 8th June 1822. The *species facti* there was, that this prisoner, who was imprisoned on a charge of falsehood and fraud, applied for letters of intimation *after* the diet of the libel against him had been called at the Circuit, on 8th April 1822, and certified to the High Court on 20th May following. On April 27th, he executed letters of intimation against the Lord Advocate ; and on 8th June presented a petition, in which he prayed for liberation, on the ground that forty days had elapsed from the time of serving his letters of intimation. The Court, after hearing parties, refused the petition as incompetent ;<sup>1</sup> proceeding on the ground, that the prosecutor is not tied down by the executing the letters against him, to proceed with the current indictment, but may raise a new one, provided it is done within the sixty days allowed by the statute. But if the prosecutor makes his election to proceed with the current libel, he must bring it to a conclusion within the forty days of the date of the first diet of compearance after the intimation ; and if he fail in so doing, on executing a new libel within sixty days of the intimation, he is entitled to plead the statute in bar of trial.<sup>2</sup>

7. If no libel be executed within the sixty days, or,

<sup>1</sup> Shaw, No. 62 ; Hume, ii. 110 ; Justice-Clerk's MS.—<sup>2</sup> M'Donald and Young, June 18, 1832 ; Justice-Clerk's MS. Supra, p. 185.



if raised, if it be not concluded within the next forty, the prisoner may apply for letters of liberation to the Court of Justiciary, or Judge competent; and they must, within twenty-four hours, issue letters or precepts addressed to messengers, charging the magistrates or keeper of the jail to set him at liberty, under the pains of wrongous imprisonment.

The prisoner, under the statute, may apply not only to the Judge before whom he is to be tried, but to any Judge competent to the cognition of the crime; so that a Sheriff, if competent to the cognition of the crime, that is, if he has jurisdiction and powers sufficient, may issue his precepts for setting at liberty a person committed on a Justiciary warrant.<sup>1</sup> But this, of course, must be on the understanding that the judge to whom application is made, is competent to try the individual offence with which the prisoner is charged, and not the class of offences to which it belongs;<sup>2</sup> and, therefore, a Sheriff of Perthshire could not competently issue precepts for the liberation of a prisoner committed, though to his jail, for a crime committed in Fife and Kinrossshire.

There is an express clause declaring that the liberation of the prisoner is "without prejudice to the keeper of the prison, as to his dues, in all cases of liberation as formerly, before the making of this act." Under this clause, he is entitled to detain the prisoner till the sums thus legally due are satisfied.

The act provides "that the prisoner shall *instruct*, to the satisfaction of the Judge, and by instruments taken thereupon," that the time limited by law, for insisting in, and concluding the process has elapsed. This provision was absolutely necessary, to prevent the presenting of false petitions to Judges unacquainted with the circumstances of the case, on which, if unaccompanied by evidence, the most atrocious offenders might escape.<sup>3</sup> To entitle a party to prevail in an action of damages against the Judge for not liberating the petitioner, in terms of the act, he must make out clearly,

1. The date of the application, by day and hour, which should be established by the marking on the petition by the Judge, or his clerk; though, if it be alleged that the marking is false, or the clerk refused to make it, parole proof of the time of presenting

<sup>1</sup> Burnet, 370.—<sup>2</sup> Robert Spittal, Nov. 27, 1809; Hume, ii. 100.—<sup>3</sup> Burnet, 370.

the petition would seem to be competent.<sup>1</sup> 2. Instruments should be taken on the lapse of the time for raising or insisting in, or concluding the process, which instruments should be intimated to the Judge alleged to be in fault. 3. The failure on the part of the prosecutor, in one or other of these particulars, should be set forth. It will afford a good defence, if he or his agent have consented to a delay on the Judge's part, in pronouncing a deliverance on the petition. Where there was sufficient evidence, accordingly, that the delay had been consented to by the petitioner's agent, and some doubt as to the evidence of the day on which the petition was presented, the Court assoilzied from the action for damages.<sup>2</sup>

8. If the prisoner has obtained his release in consequence either of failure to serve a libel in sixty days after intimation, or to conclude the trial in forty days thereafter, he may again be apprehended and brought to trial for the same offence, but it must be on criminal letters issuing from the Supreme Court, and the trial on them must be concluded within forty days of their being executed against him; and if this is not done, he is entitled to a complete and final discharge for the offence.

The prisoner's release obtained in the manner already set forth, does not afford a complete bar to all farther prosecution; it merely subjects the prosecutor to the necessity of conducting the last prosecution afforded him in a peculiar manner, and bringing it to a conclusion in a limited time; and if that last chance is thrown away, the prisoner is entitled to a complete discharge. The words of the act are, "And the prisoner being liberated in manner foresaid, it shall not be lawful to put or detain him in prison for the same crime, under the penalty of wrongous imprisonment, in case his former liberation be known to the committer before the warrant is granted; or, in case he be detained after his former imprisonment is sufficiently instructed to the keeper of the prison, who, upon production of the former warrant of his liberation from his imprisonment for the said crime, shall be obliged to set the

<sup>1</sup> Andrew v. Murdoch, June 9, 1814; Dow, ii. 419.—<sup>2</sup> Burnet, 371.

prisoner forthwith at liberty, unless there be new *criminal letters* raised before the *Commissioners of Justiciary*, and *duly execute* against the said prisoner, in which case it is hereby declared lawful to imprison him of new, though the said letters be raised for the same crime for which he was formerly incarcerated, and it shall be lawful to apprehend *and secure him at the time of executing* the said letters, or at any time thereafter before trial, and to detain him till his trial, or that he be set at liberty in due course of law. And his Majesty, with advice and consent aforesaid, ordains his Majesty's Advocate to insist in the *said libel*, and prosecute *the same* to a final sentence, within forty days after the said prisoner is of new *incarcerate thereupon*, unless the delay be upon the application, or at the desire of the prisoner. Wherein, if the King's Advocate failzie, the diet is to be deserted *simpliciter*, and the prisoner ordained to be set at liberty from the said imprisonment. And the process not being duly prosecute as aforesaid, and the diet thereupon deserted, his Majesty, with advice and consent aforesaid, declares the said party imprisoned *a second time* as aforesaid, to be for ever free from all questions or process for the foresaid crime or offence." Many things are to be observed in this enactment.

1. In the first place the statute has expressly declared that the prisoner must be *apprehended* on "*new criminal letters* raised before the *Commissioners of Justiciary*." The only lawful warrant, therefore, on which the prisoner can be arrested, if at large, or detained in jail, if his liberation from running his letters has not yet arrived, is on *new criminal letters*, issuing from the Court of Justiciary, after the date of his former intimation. Unless the officer is in possession of such letters his arrest is illegal; and on this account it is usually the practice, where a prisoner, who has run his letters, is brought to trial, whom it is desirable to prevent escaping, to have criminal letters ready to execute against him at the bar, in the event of the former trial being unavoidably postponed till the last of the forty days, or else the prisoner may insist upon walking away the moment the former instance falls, and he may probably be beyond the reach of justice before the criminal letters can be made out and issued, signed, and sealed, from the Justiciary or Circuit Court. The Court, however, in such cases, have sometimes granted warrant for the interim custody of the prisoner, to give the prosecutor time to prepare his



criminal letters ; but it is not safe to trust to this being always done.<sup>1</sup>

2. The prisoner must be not only apprehended, but brought to trial on *criminal letters*. It is not, therefore, competent to bring him to trial after he has obtained his liberation under the act on a *new indictment*, even although that species of libel differs only in form from an indictment at the instance of his Majesty's Advocate.<sup>2</sup> The late act<sup>3</sup> abolishing criminal letters in the ordinary business of the Justiciary, has made no difference in this particular ; it has repealed or superseded none of the provisions of the act 1701 ; and the last libel on which the prisoner can be tried must still be the criminal letters which it enjoins.

3. The criminal letters must call the prisoner to stand trial before the Court of Justiciary, or the Circuit Court, and that equally, whether the prior libel was raised in the Supreme or any inferior Court.<sup>4</sup>

4. The prosecutor must prosecute the *same* letters to an issue, as those on which the prisoner was apprehended ; no change of one set of letters for another can be permitted, nor any alteration in any material article of the original letters issued from the Justiciary Court.<sup>5</sup> This follows from the emphatic words of the statute, that he must prosecute the " same libel " to a final sentence within forty days. Where a prisoner, accordingly, had been liberated on the act 1701, and the libel executed against her thereafter, was not brought to a conclusion within the forty days, but a new libel served instead, the Court sustained the objection that the trial could proceed only on the first libel.<sup>6</sup> In these cases, indeed, the question occurred in regard to the *indictment* following on the first intimation, where the same rule of the necessity of following that indictment, or of taking to the last criminal letters, obtains ;<sup>7</sup> but in several subsequent cases the same principle has been applied to the last criminal letters. Thus, John Gall was to stand trial for housebreaking on Jan. 27, 1742, having previously run his letters, and been discharged on expiration of the sixty days. He was then served with criminal letters and recommitted ; but the prosecutor deserted the diet of that libel, and betook himself to another, when he pleaded that he was

<sup>1</sup> Burnet, 377.—<sup>2</sup> Napier Jackson, Glasgow, Sept. 1793, and John M'Innes, Perth, Aug. 1801 ; Hume, ii. 102 ; and Burnet, 373, 379.—<sup>3</sup> 9 Geo. IV. c. 29.—<sup>4</sup> Hume, ii. 102 ; Burnet, 377.—<sup>5</sup> Hume, ii. 102 ; Burnet, 378.—<sup>6</sup> Janet Philp, June 16, 1715 ; Hume, ii. 103 ; James Miller, eod. die.—<sup>7</sup> Burnet, 378.

now entitled to an absolute discharge for the offence, and the Lord Advocate consented to desert the diet *simpliciter*.<sup>1</sup> The precedents were noways affected by the judgment in Welsh's case, Nov. 21, 1808, for, although the prisoner in that case, who had been liberated on the act 1701, was served with *two* sets of criminal letters, the second on the day after the first, yet the first was considered as utterly null, and not existing, from having wanted the will which is the sole warrant for its execution against the prisoner; and therefore the Court viewed the case as if *one* set of criminal letters only had been executed, and decided only that such letters were competent after the prisoner had been liberated on the act 1701.<sup>2</sup> At length the point received a solemn and authoritative decision. The prisoner had made intimation to the Lord Advocate, and on Dec. 23, 1816, being the fifty-ninth day after intimation, he was served with an indictment, calling him to stand trial on Jan. 27, 1817. The prosecutor, however, did not insist in that indictment, but on 1st Feb., being the thirty-ninth day after service thereof, served him with criminal letters, citing him to stand trial on 24th Feb. The pannel all the while remained in jail; and in the close of all, the pannel was served with *second* criminal letters, calling him to stand trial on the 10th March. The Court, in these circumstances, sustained the objection, that instead of prosecuting *the same* criminal letters to a conclusion within forty days after service, the prosecutor had served *new* criminal letters, calling him to stand trial beyond that period, dismissed the pannel from the bar, and declared him to be free from all question for the crime specified in these criminal letters in all time to come.<sup>3</sup>

It seems to follow, as a necessary consequence from this principle, that the criminal letters executed on the prisoner must be taken with all their imperfections on their head; and that no alteration on them can be admitted after they have issued from the signet, at least in any material parts. If there are any errors in these letters they are the prosecutor's last chance, and by no subsequent operation, after they have issued from the signet, can they be competently amended. This point was debated, but not decided, though not in relation to the act 1701, in the case of the Croy Rioters, July 4, 1823;<sup>4</sup> where such an objection was stated to the fugitation of some of the pannels, on the ground that some

<sup>1</sup> Hume, ii. 103.—<sup>2</sup> Hume, ii. 114.—<sup>3</sup> William Clark, March 10, 1817; Hume, ii. 114.—<sup>4</sup> Unreported.

alterations, *in substantialibus*, had been made in the criminal letters after they left the Justiciary office, and, therefore, that they were not duly cited. The inclination of the Court rather seemed to be, that no alteration of criminal letters after they have left the Justiciary office, in any material part, can be admitted; and that if they are erased or altered when sent to the country, it is doubtful whether they can be held as the criminal letters of the Court, such as the statute has enjoined to be executed. Minutes of debate were ordered, but a sufficient number of pannels having been convicted, to whom the objection did not apply, nothing farther was done in the case.

5. The forty days run, not from the date of the execution of the criminal letters, but from the time that he is “of new *incarcerate* upon.” If, therefore, the prisoner is not incarcerated at all, but merely served with criminal letters, and left at large, it is extremely doubtful whether the limitation, as to time, takes place.<sup>1</sup> In the case of John M<sup>c</sup>Innes, accordingly, July 12, 1803, the prisoner had been confined only sixty-seven days in all, had been indicted the second and third times without being recommitted, and had been served with two successive criminal libels when still at large on bail; and the objection which was stated and prevailed, was not that the forty days had expired after the letters had been executed upon him, but that he had not been regularly cited.<sup>2</sup> And in the case of William Ridley, Jan. 17, 1811, it was found, on an application for a discharge in these circumstances, “in respect that the petitioner has been *admitted to bail*, that the provisions of the act 1701 do not apply to this case, and, therefore, refuse the desire of the petition.”<sup>3</sup> If, however, the prisoner has *once been incarcerated* upon the criminal letters, there seems no doubt that the forty days begin to run from that date, and that neither by consenting to his enlargement or bail, nor opening the jail doors and letting him walk out, can the prosecutor obtain a dispensation from the positive enactment of the statute, which declares that the criminal letters must be prosecuted to a final sentence within that period.

6. As the process must be concluded within forty days of the incarceration on criminal letters, it is the same thing whether the failure to accomplish that object has arisen from his own fault or neglect, or some supervening accident over which he has no con-

<sup>1</sup> Hume, ii. 104.—<sup>2</sup> *Ibid.*—<sup>3</sup> *Ibid.*



trol; as the illness of a witness, or the certification of a legal point for the determination of the whole Court. Where a prisoner, accordingly, who had run his letters, and been brought to trial, and convicted on the last criminal letters, had his case certified for the determination of the High Court as to the punishment to be inflicted, in consequence of which the forty days expired before the sentence was pronounced, the Court sustained the objection that the prisoner was now entitled to be for ever discharged of the crime, and that no sentence could follow on the verdict, although the prosecutor agreed that he had complied with the statute when he had obtained a verdict, and moved for sentence in the time allowed by law, in respect that he had not, in terms of the statute, "prosecuted the same to a final sentence" within that period.<sup>1</sup>

7. In this part of the act there is the same exception as in the prior one, "unless the delay be upon the application or at the desire of the prisoner." It is proper, however, that this application on his part should appear on record, as it is doubtful whether any other than written evidence of such a petition could be received.<sup>2</sup>

The consequence of a liberation from the last process founded on the criminal letters, is an entire absolvitor from the crime in all time to come; and the Court are in use to insist in their deliverance, assoilziing the prisoner, the words of the statute declaring the prisoner to be "for ever free from all question or process for the foresaid crime or offence."<sup>3</sup>

9. The act does not apply to trials for forgery, or fraudulent bankruptcy, before the Court of Session; but it does to all trials for those, as well as any other offence, before the Justiciary Court.

Though the statute has made no exception, it has been held not to apply to trials for forgery before the Court of Session.<sup>4</sup> The same principle has been held to apply to trials for fraudulent bankruptcy before the Court of Session;<sup>5</sup> and this may now be regarded as settled law, because the Court of Session, in the

<sup>1</sup> Anderson's case, Nov. 17, 1823; Hume, ii. 101.—<sup>2</sup> Burnet, 378.—<sup>3</sup> Ibid. 380.—

<sup>4</sup> Hume, ii. 110; Burnet, 381; Bankton, i. 2. 61; Starke v. Burnet, July 29, 1748; Kilk. Rennie, Feb. 24, 1737.—<sup>5</sup> Duncan v. Lord Advocate, Jan. 21, 1823, Fac. Col.; Hume, ii. 116.

case of Duncan last mentioned, expressly found, "that the provisions of the act 1701 do not apply to cases of fraudulent bankruptcy, which are cognizable only in the Court of Session;" and the House of Peers, in affirming that judgment, did not sustain the argument pleaded for the appellant, that the provisions of the act 1701 *do* extend to criminal prosecutions in the Court of Session, but simply "ordered and adjudged that the interlocutors complained of be affirmed, without reference to the special finding in the last interlocutor, as to which the Lords, in the whole circumstances of the case, do not think it necessary to come to any determination." The ground of this affirmance was, that the letters of intimation having been obtained from the Court of *Justiciary*, could not apply to, in their second stage, or have any effect on, the proceedings in the Court of Session.<sup>1</sup> The judgment of the House of Lords, therefore, leaves untouched the decision of the Court of Session, which must be considered, till set aside by the same high authority, as forming the law of the case; and if any thing rather supports it, as if the express finding that the act 1701 does not apply to proceedings in the Court had been contrary to law, there can be little doubt that that supreme tribunal would have taken that opportunity of correcting it. The same principle has been held to apply to a case of blended forgery and subornation tried in the Court of Session.<sup>2</sup>

But this exception, which must be admitted to be contrary to the spirit and intention of the act, which unquestionably was to provide a remedy for lengthened and oppressive imprisonment in *all* cases, is now practically removed by the late act<sup>3</sup> rendering it competent to prosecute cases of fraudulent bankruptcy before the Court of Justiciary, and the total disuse of all criminal prosecutions, both for that offence and forgery or subornation, before the supreme civil tribunal. The cognizance of these, as of all other crimes, has thus been restored to the Court to which they properly belong, and the whole proceedings before which are subject to the control of this excellent statute.

10. Any Judge competent to the trial of the offence, may issue an order for liberation under the act, though

<sup>1</sup> Shaw and Wilson, i. p. 608.—<sup>2</sup> Ker v. Orr and Fulton, Nov. 22, 1744; Kilk. 316; Elchies, No. 8.—<sup>3</sup> 7 and 8 Geo. IV. c. 20.

the warrant of commitment is from an higher Judicatory, provided the precept for intimation has been issued by him.

Under the words of the act already quoted, which describe the course of application for a discharge from jail, this relief may be sought not only from the Supreme Court, but from any Judge competent to the trial of the offence; that is, having sufficient jurisdiction to try the offence, take cognizance of the crime, and liberate the prisoner. A Sheriff, therefore, may sometimes be called to give an order for the trial of a prisoner whose trial has been proceeding before the Court of Justiciary, provided that the letters of intimation have issued under his own precept; as often happens with prisoners, originally committed by that inferior judge, who are afterwards remitted for trial to the Justiciary Court.<sup>1</sup> But this course is competent only where the precept has issued from the inferior court, for if the intimation has been made to the Lord Advocate, and under a precept issuing from the Justiciary Court, the subsequent application for liberation must be made to the same high authority from which the proceedings originated; the whole being regarded as *one* process, though divided into two branches.<sup>2</sup> This view is confirmed by the decision of the House of Peers in the case of *Duncan v. Lord Advocate*, June 28, 1825, already mentioned;<sup>3</sup> it having been, therefore, found that letters of intimation, at first obtained from the Court of Justiciary, could not in their second stage be followed out in the Court of Session.

Of course, under none of these provisions can the prisoner obtain his release from any other than the individual crime specified in the warrant of commitment.<sup>4</sup> For any other and separate detainers, he must seek relief in like manner in the course pointed out in the statute. This might have been held at common law, but in addition it is declared, "That the liberation provided by this present act, is only to be understood from imprisonment for the causes foresaid, and without prejudice of all personal diligence or imprisonment for the payment of debts, or upon sentence, or for any other causes than those above expressed." And it is also declared, "And his Majesty, with consent aforesaid, extends this act for preventing of wrongous imprison-

<sup>1</sup> Hume, ii. 115.—<sup>2</sup> *Ibid.*—<sup>3</sup> Shaw and Wilson, vol. i. p. 608.—<sup>4</sup> Hume, ii. 115.



ment to the case of all confinements, not either consented to by the party, or inflicted by trial after sentence;" a provision which, how broad soever, must be taken in connexion with, and as limited by, the previous clause, withdrawing imprisonments for debt from its operation.

11. The magistrate refusing, or unduly delaying to grant, the precept or order required of him, and the jailer, or other person, failing to pay the due obedience to it, shall be liable in the penalties of wrongous imprisonment specified in the statute.

For the purpose of enforcing obedience to the injunctions which it contains, and impressing their importance upon Judges and others intrusted with the custody of prisoners of all descriptions, the act declares all persons failing to yield obedience to it to be liable to the penalties of wrongous imprisonment. These penalties are declared to be, "£6000 for a nobleman, £4000 for a landed gentleman, £2000 for every other gentleman and bur-gess, and £400 for every other person; and if any persons be detained after elapsing of the respective days, in manner above prescribed, for obtaining his liberty, the Judges, Magistrates, or others, wrongously detaining, shall be liable in the pains following, viz.—£100 a-day for a nobleman, £66, 13s. 4d. for a landed gentleman, £33, 6s. 8d. for other gentlemen and bur-gesses, and £6, 13s. 4d. for other persons; and farder, shall lose their offices, and be incapable of public trust, by and attour the pains above specified, and the penalty to belong to the party imprisoned, and process to be competent for the same before the Lords of his Majesty's Privy Council, or the Lords of Council and Session, to be discussed summarily without abiding the course of the roll; and it is hereby declared, that the above penalties shall not be modified by any power or authority whatsoever."

The parties under this clause, who are liable in the penalties, are, 1. The magistrate who signs a warrant of imprisonment without a signed information, or which does not specify the particular cause of commitment *in gremio* of itself, or in the relative petition, and the officer executing such warrant, or the keeper of the prison, who shall receive or detain the prisoner, so irregularly committed, or who shall refuse to give the double of the

warrant. 2. The magistrate who does not modify bail within twenty-four hours after the application, regularly supported, is laid before him, if the offence is bailable; or does not grant warrant of liberation if the bail is found, or refuse to accept sufficient bail when offered. 3. The magistrate who does not, within twenty-four hours after the application, properly supported, is laid before him, issue precepts of intimation to the prosecutor to force on the trial. 4. The magistrate who does not, after sufficient evidence has been laid before him, showing that the time limited by law for insisting in and concluding the process is elapsed, issue within twenty-four hours precepts of liberation; and, 5. The magistrate who, after such liberation, knowing thereof, or with evidence of it laid before him, grants a new warrant of commitment except upon new criminal letters raised and executed against the party.<sup>1</sup> In prosecutions under this act, real damage need not be alleged or proved; the statute has specified in what the injury of the pursuer consists, and at what sum it is to be valued.<sup>2</sup> The severe clause as to the party offending being incapable of holding office, is justly held as limited to cases of gross and wilful wrong, not inattention or an excusable error of judgment.<sup>3</sup>

12. The statute declares, "That action and process for wrongous imprisonment shall prescribe, if not pursued within three years after the last day of the wrongous imprisonment; and process being once raised, the same shall prescribe, if not insisted in yearly thereafter."

As actions for the penalties consequent on wrongous imprisonment are very serious, and not liable to be modified by any authority, the statute has wisely subjected them to a prescription of an unusually short duration. Where an action was brought, accordingly, at common law, and on the statute, concluding for damages and the statutory penalties, and the pursuer, after a remit from the House of Peers, allowed three years to pass without petitioning to apply the remit, the Court sustained the defence of prescription both against the statutory and common law conclusions.<sup>4</sup> Effect was given to this statutory limitation

<sup>1</sup> Burnet, 382.—<sup>2</sup> Ibid. 383.—<sup>3</sup> Hume, ii. 116.—<sup>4</sup> *Arbuckle v. Taylor*, Dec. 1820, Fac. Col. ; Hume, ii. 116.

in a case where the imprisonment complained of consisted in a confinement in the Tower of Askegill, the property of Sir James Dunbar, though it is doubtful how far the statute applies to such cases of irregular confinement by ordinary individuals; and whether the relief to be sought in such cases is not entirely founded on the common law.<sup>1</sup> It has been held, that where the error of the magistrate consisted, not in the want of a signed information, or of the specification of the offence in the warrant or relative petition, but in sustaining an absurd or incredible story as ground for commitment, the statute does not apply, and that for such a case the proper remedy is an action of damages at common law.<sup>2</sup> It is incompetent for one who has brought an action at common law for damages on account of wrongous imprisonment, to raise another action grounded on the same facts, and concluding for the penalties contained in the act 1701.<sup>3</sup>

13. The statute forbids all close confinement for more than eight days, and all transportation furth of the kingdom, except under the warrant of a lawful sentence, or with the consent of the person himself, given before a Judge.

The clause on the subject is in these terms:—"And farther discharges all closs imprisonment for more beyond the space of eight days from the commitment, under the pains of wrongous imprisonment, above set down: as also, that no person be transported forth of the kingdom, except with his own consent before a judge, or by legal sentence: certifying judges, magistrates, and all others, who shall give orders otherwise for the said transportation, as likewise, all such who shall transport any person, without a lawful warrant from a judge or magistrate, that he shall be liable to the foresaid pains of wrongous imprisonment, as also, of being deprived and declared incapable of public trust." By close confinement, here mentioned, is to be understood solitary and inaccessible confinement;<sup>4</sup> and, therefore, it is worthy of consideration, whether it is safe to prolong the solitary confinement, in which prisoners are usually kept in the interval between their being committed for farther examination, and committed till

<sup>1</sup> Sir James Dunbar, August 11, 1714; Hume, ii. 116; Burnet, 385: Sir Alexander Anstruther, April 1720; Hume, *ibid.*—<sup>2</sup> Burnet, 384.—<sup>3</sup> *Murdoch v. Eaton*, June 8, 1817. *Fac. Col.*—<sup>4</sup> Hume, ii. 117.



liberated in due course of law, beyond that period. Indeed, in the general case, it is not expedient to continue the confinement on this hazardous warrant for a longer time than eight days, and it will require special circumstances to render any longer continuance not a matter of risk at common law.

In the case of imminent danger to the life of any prisoner, the Supreme Court have the power of ordering his removal to any suitable place, there to be detained under the guard of the legal custodiers of the jail, and under such conditions as to the charge of his maintenance, as they may see cause to impose. This power is of ancient standing; and, accordingly, it was exercised on 12th February 1677, in the case of William Kennedy, confined on a charge of murder, who, on the proper evidence that his life was in danger from confinement in jail, granted warrant for his liberation, on finding caution to the extent of 1000 merks, to remain in a certain house within the city, confined to his chamber.<sup>1</sup> The same was done in a subsequent instance, in the case of Lieutenant John Symonds, 24th August 1810, who was confined on a charge of murder, who was liberated on a certificate of medical men, on his finding caution to remove to a lodging within borough, chosen by the magistrates, and remain there on his own charges, under the guard of a messenger, all under a penalty of £500, reserving to the procurator-fiscal to apply for his reincarceration upon his life being out of danger.<sup>2</sup> A similar indulgence has frequently been granted in later times; but always under the provision, that danger to the life of the prisoner has been satisfactorily established by respectable medical certificates, and that sufficient caution to remain, under a sure guard in the place assigned, has been found by the prisoner. Should a similar application be made by a prisoner in such destitute circumstances as to be unable to find bail, there seems little doubt that the Court would pronounce a similar order, if the circumstances of the borough are such as to afford the requisite accommodation, combined with security against the prisoner's escape.

<sup>1</sup> Hume, ii. 117—<sup>2</sup> Ibid. ii. 91.

## CHAPTER VII.

## OF LIBEL ON INDICTMENT.

THERE is no subject of criminal law in which accuracy is more indispensably required than in drawing the libel, because every word of it is fraught with meaning, and a variation, however slight, from what comes out in the proof, often proves fatal to the most important prosecution. Minute attention, therefore, is necessary to all the details of this branch of practice; and the most scrupulous care and anxiety on the part of all those intrusted with the duty of preparing the indictments is indispensable, notwithstanding which, errors will sometimes occur, of such a kind as to prove extremely prejudicial to the fair administration of justice.

1. Libels are of two kinds; either indictments or criminal letters, which, though different in form, are the same in substance; but the latter form is now generally disused in the Supreme Court, excepting in the case of persons who are apprehended a second time after having run their criminal letters; but it is universal in the Sheriff or other inferior Courts.

The libel is the written instrument which is delivered to the pannel, containing the particulars of the charge with which he is accused. It is of two kinds; indictment and criminal letters.

In an indictment the prosecutor calls upon the pannel at once by name, introduces himself in his character of accuser, and proceeds straightway to describe the crime with which he is charged.<sup>1</sup> Every page of it is signed by the prosecutor; in the Supreme Court, by the Lord Advocate, or one of his deputed, if the prosecution is at the public instance. It does not pass under the seal of the Court, nor receive in any way the mark of their sanction or authority: for although a diet is subsequently named, and

<sup>1</sup> Hume, ii. 153.

authority given to cite the witnesses and assizers, yet this is on a separate petition, which the prosecutor presents for that purpose.<sup>1</sup> The deliverance of one of the Judges on this petition, authorizes the preparation of letters of diligence, which pass under the signet of the Court, and contain a warrant for the citation of such witnesses as are contained in a list given in along with the indictment, and signed by the prosecutor. The letters of diligence also contain a warrant to cite the assize, as contained in a separate list, which was formerly signed by *three* of the Court; but this is now altered to *one*, by a recent statute, which declares, “that the warrants for summoning jurors, shall only require the signature of one of the Judges of Justiciary; and it shall not be necessary to annex a copy of the signature of such Judge to the list of assize served on the accused.”<sup>2</sup>

The following is the form of an indictment:—

“ WILLIAM CAIRNS, *alias* GEORGE DOUGLAS, present prisoner in the tolbooth of Haddington, you are indicted and accused at the instance of Sir William Rae of St Catharines, Bart. his Majesty’s Advocate, for his Majesty’s interest: THAT ALBEIT, by the laws of this and of every other well governed realm, THEFT, more especially when committed by means of HOUSEBREAKING, and by opening lockfast places, is a crime of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said William Cairns, *alias* George Douglas, are guilty of the said crime, aggravated as aforesaid, actor, or art and part; IN SO FAR AS, on the 6th day of June 1830, or on one or other of the days of that month, or of May immediately preceding, you the said William Cairns, *alias* George Douglas, did wickedly and feloniously break into and enter the house situated at Broxburn, in the parish of Dunbar, and shire of Haddington, then or lately in the occupation of David Dickson, then or lately labourer and keeper of a grocery shop there, by breaking one of the panes of the under sash of a window of a room of said house, and then removing the fastening of said window, or in some other way to the Prosecutor unknown; and having thus obtained entrance into said room, you did then and there wickedly and feloniously steal, and theftuously away take, a gardener’s knife, two six-penny loaves, and a flowered silk handkerchief of a yellowish or reddish colour, all the property or in the lawful possession

<sup>1</sup> Hume, ii. 153.—<sup>2</sup> 6 Geo. IV. c. 22, § 115.



of the said David Dickson: And you the said William Cairns, *alias* George Douglas, did also, time above libelled, wickedly and feloniously open a lockfast drawer of a chest of drawers, or of a press then standing in said room, by forcing it open by means of the said knife, or in some other way to the Prosecutor unknown, and you did then wickedly and feloniously steal, and theftuously away take from said drawer, eight shillings or thereby in copper money, all the property or in the lawful possession of the said David Dickson: And you the said William Cairns, *alias* George Douglas, having been apprehended and taken before Robert Riddell, Esquire, sheriff-substitute of the shire of Haddington, you did, in his presence, at Haddington, on the 7th day of June 1830, emit and subscribe a declaration: Which declaration, as also the foresaid stolen articles, or part thereof, as also a wooden box, being all to be used in evidence against you the said William Cairns, *alias* George Douglas, at your trial, will, for that purpose, be in due time lodged in the hands of the clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same: ALL WHICH, or part thereof, being found proven by the verdict of an Assize, or admitted by the judicial confession of you the said William Cairns, *alias* George Douglas, before the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, you the said William Cairns, *alias* George Douglas, OUGHT to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

“ A. WOOD, *A. D.*

“ LIST OF WITNESSES.

- “ 1. Robert Riddell, Esquire, sheriff-substitute of the shire of Haddington.
- “ 2. William Watson, now or lately apprentice to Henry Marshall Davidson, now or lately sheriff-clerk of the shire of Haddington.
- “ 3. John Lloyd, now or lately superintendent of police for the shire of Haddington.
- “ 4. Duncan M'Donald, now or lately sheriff-officer in Dunbar, in the shire of Haddington.
- “ 5. David Dickson, now or lately labourer and keeper of a grocery-shop at Broxburn, in the parish of Dunbar, and shire aforesaid.

- “ 6. Isobel Purves or Dickson, wife of the foresaid David Dickson.
- “ 7. Peter Comb, now or lately ploughman at Markle, in the parish of Prestonkirk or Prestonhaugh, and shire of Haddington.
- “ 8. John Brown, now or lately burgh-officer in Dunbar aforesaid.

“ A. Wood, A. D.”

2. The style of criminal letters, again, is in the form of a summons. They run in the Supreme Court in the name of his Majesty, and in any inferior court in that of the Judge who is to try the case, and contain a will or authority for citation, as in civil cases.

They commence with a salutation in the name of the authority by whom they are issued, to macers and other officers of the law, and then enter into the particulars of the charge in exactly the same way as an indictment, with this difference, that they narrate the crime in the third person instead of the first, in which the charge is contained in an indictment. They finish with the *will*, which, in the Supreme Court, is his Majesty's, in an inferior, the Judge's, command to the officers of the law, for summoning the party accused to come and find caution for his appearance to underly the law, on a day therein named; for summoning the witnesses and assizers, both as contained in lists, duly signed by the prosecutor, and separate from the criminal letters. These criminal letters, when in the Supreme Court, pass under the signet of the Court of Justiciary; for which purpose the prosecutor presents a petition or bill, containing the whole of the intended charge, and praying for criminal letters in the premises, as accords of law. This bill, in the Supreme Court, is signed by the Lord Advocate, or one of his deputies, and the private party, if the prosecution is at the instance of such, and one of the Judges gives a deliverance, granting the prayer of the petition, in these terms, and specifying the day of trial, “ *Fiat ut petitur*, to the 13th day of March next to come;” the effect of which is to authorize the prosecutor to raise criminal letters, and have them passed by the signet of the Court, engrossing the charge contained in the petition; and thus the authority of his

Majesty, as the fountain of justice, is at once given to the whole process.<sup>1</sup>

The following is the form of criminal letters :—

“ GEORGE, &c.—WHEREAS it is humbly meant and complained to us by our right trusty SIR WILLIAM RAE of St Catharines, Baronet, our advocate, for our interest, upon WILLIAM BURNS and JAMES HARTLEY, present prisoners in the tolbooth of Glasgow, and JAMES M'KIRDY, now or lately glass-maker in Dumbarton : THAT ALBEIT, by the laws of this and of every other well governed realm, MURDER, as also the violently ASSAULTING, BEATING, and WOUNDING any of the lieges, more especially when committed to the great effusion of blood and imminent danger of life, are crimes of an heinous nature, and severely punishable : YET TRUE IT IS AND OF VERITY, that the said William Burns, James Hartley, and James M'Kirdy, are, all and each, or one or more of them, guilty of the said crime of murder, or of the said crime of assault, aggravated as aforesaid, actors or actor, or art and part ; IN SO FAR AS, upon the 23d day of April 1824, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, the said William Burns, James Hartley, and James M'Kirdy, did all and each, or one or more of them, upon the high-road between the toll-house of Dalreoch and Renton, and at or near to Dalreoch Quarries, in the parish of Cardross, and county of Dumbarton, violently, wickedly, and feloniously attack and assault the deceased Alexander Macfarlane, then residing at Millburn, in the parish of Bonhill, and county of Dumbarton ; and they did, all and each, or one or more of them, then and there, with a stone or other lethal weapon to the prosecutor unknown, strike the said Alexander Macfarlane a violent blow or blows upon the head, which knocked him down to the ground, and which cut and wounded him on the head ; and they did, while he lay upon the ground, roll him into a deep ditch at the road side ; and they did, all and each, or one or more of them, jump upon the body of the said Alexander Macfarlane, and did strike, beat, and kick him, whilst he lay in the ditch ; in consequence of the said wound on the head, and the maltreatment above libelled, or of part thereof, the said Alexander Macfarlane died upon the 29th day of April immediately following, and was thereby murdered by the said William Burns,

<sup>1</sup> Hume, ii. 155.



James Hartley, and James M'Kirdy, or by one or more of them: OR OTHERWISE, time and place above libelled, the said William Burns, James Hartley, and James M'Kirdy, did, all and each, or one or more of them, violently, wickedly, and feloniously attack and assault the said Alexander Macfarlane, and did, then and there, with a stone or other lethal weapon to the prosecutor unknown, strike the said Alexander Macfarlane a violent blow or blows upon the head, which knocked him down to the ground, and cut and wounded him on the head; and they did roll him into a ditch, strike, beat, kick, and jump upon the person of the said Alexander Macfarlane, whilst he lay in the said ditch, as above described; by all which the said Alexander Macfarlane was cut and wounded to the great effusion of his blood, and imminent danger of his life: And the said William Burns having been apprehended and taken before Humphrey Walter Campbell, Esq. sheriff-substitute of the county of Dumbarton, did, in his presence, at Dumbarton, upon the 28th day of April 1824, emit and subscribe a declaration: And the said James Hartley having been apprehended and taken before the said sheriff-substitute, did, in his presence, at Dumbarton, upon the 27th day of April and 4th day of May 1824 respectively, emit and subscribe a declaration: And the said James M'Kirdy, being conscious of his guilt in the haill premises, did abscond and flee from justice: All of which declarations, being to be used in evidence against each of the said William Burns and James Hartley respectively by whom the same were emitted; as also a surgical report, commencing 'Alexander M'Farlane came to my house,' and signed 'John Cullen, surgeon;' as also a plan, entitled 'Plan of part of the turnpike road between Dumbarton and Renton,' being all to be produced in evidence against all and each of the said William Burns, James Hartley, and James M'Kirdy, at their trial, will be lodged in due time in the hands of the Clerk of the Circuit Court of Justiciary, before which they are to be tried, that they may have an opportunity of seeing the same. ALL WHICH, or part thereof, being found proven by the verdict of an Assize, before our Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, in a Circuit Court of Justiciary to be holden by them, or by any one or more of their number, within the Criminal Court-house of Glasgow, upon the 27th day of September, in this present year 1824, the said William Burns, James Hartley, and James M'Kirdy, OUGHT to be punished with

the pains of law, to deter others from committing the like crimes in all time coming.

“OUR WILL IS HEREOFRE, &c.

“*Dated and signeted 3d September 1824.*

“JA. ANDERSON.”

The privilege of appearing by indictment belongs to the Lord Advocate alone; any inferior functionary, as a procurator-fiscal, must pursue in the form of criminal letters. But if the indictment is raised in the name and at the *instance* of the Lord Advocate, the injured party, if he prosecutes jointly with him, may sign after his lordship or his deputed.<sup>1</sup> But if the prosecution is at the instance of the private party, with *concourse* only of his lordship, which is generally the case with private prosecutions, the libel must be in the form of criminal letters; and that is the form universally adopted now in such cases.

The body of criminal letters are signed by the Clerk of Court, but the list of witnesses are signed by the prosecutor or prosecutors. But what is to be said as to inventories subjoined to the indictment or criminal letters? Should they be signed by the prosecutor or by the Clerk of Court? Being in truth part of the libel, referred to in it, and drawn out in that separate and compendious form, they must be signed by the same party who signs the body of the libel; by the prosecutor, if it is in the form of an indictment; by the Clerk of Court, if in the form of criminal letters. The objection, accordingly, was sustained to criminal letters, that the inventory subjoined to it was signed, not by the Clerk of Court, but by the public prosecutor.<sup>2</sup>

The style of criminal letters calls offenders to come and find caution to underlie the law; but it is now always used as a writ, summoning the accused to appear and stand trial on the day therein named, although he is in custody, and no finding of caution whatever is intended.<sup>3</sup> It was formerly much used in the Supreme Court, the practice being that all libels which were drawn after the 22d February and 22d July, for the spring and autumn circuit respectively, were in the form of criminal letters, these being the periods when the Porteous Roll, which contained the file of indictments for each county, was closed for the ap-

<sup>1</sup> Geo. Storrie, Jan. 1785; Hume, ii. 155.—<sup>2</sup> James Reid and Margaret Sheriff; May 29, 1826. Shaw, No. 151.—<sup>3</sup> Hume, ii. 155.

proaching assizes. But this is now altered by a late statute, which enacts "that so much of an act, passed in the 8th year of the reign of her late Majesty Queen Anne, chapter 16, as relates to the presentment of crimes to be tried in the Circuit Courts, and the transmission of the same, with writs and evidence, to the Lord Justice-Clerk and his deputies, shall be, and the same is hereby repealed; and it is hereby provided, that hereafter all crimes may be tried before any Circuit Court of Justiciary, by indictment, in the same manner as before the High Court of Justiciary at Edinburgh."<sup>1</sup> The practical effect of this enactment has been, that criminal letters are, in a great degree, disused in the Supreme Court, except in the case of private prosecutions, which still must be drawn in that form, and libels, on which persons who have run their letters and been liberated under the act 1701, in which it is also required; the imperative words of that act, that no one liberated under its provisions, after having run his letters, shall be apprehended a second time, except under criminal letters issuing from the High Court of Justiciary, standing still unrepealed.<sup>2</sup>

With regard to Inferior Courts, it is provided by the Act of Adjournal, which prescribes the form of proceeding before them, that "the libel shall be drawn as nearly as possible in the form of criminal letters; it shall give notice of the articles, if any, to be produced in evidence, shall contain a warrant for citing witnesses, and shall be signed by the Clerk of Court. The diet of compareance shall be filled up before the libel shall be issued by the Clerk, and on no account shall any libel be issued by the Clerk with the diet of compareance blank. A list of the names and designations of the witnesses, signed by the prosecutor or the Clerk of Court, must be annexed to the libel. If the trial is to be by jury, the libel shall contain a warrant for citing assizers, and may conclude generally for the pains of law. A list of the assize shall be signed by the Sheriff or magistrate, and shall be annexed to the libel and list of witnesses, and the accused shall be cited to compare to underlie the law, at the diet of compareance specified in the libel, on induciæ of not less than fifteen free days, *i. e.* exclusive of the day of citation and the day of compareance. If the trial is to be without jury, the libel shall conclude for fine, imprisonment, and banishment, or any of them, or other pains of law, competent to be inflicted by the Sheriff or

<sup>1</sup> 9 Geo. IV. c. 29, § 5.—<sup>2</sup> 1701, c. 6.



magistrate without a jury, and the *induciæ* shall not be less than six free days.<sup>1</sup>”

Although, however, the form of criminal letters differs in so many particulars from that of indictments, yet the substance of both is precisely the same; in so much that it is a mere mechanical operation of a clerk turning the first person into the third, and introducing a slight variation in the words of style at the beginning and end, to transform the one into the other. Accordingly, so completely are they viewed as different species merely of one genus, to which the generic word “indictment” is applicable, that in a case where the accused was tried on criminal letters, and the jury in their verdict, which was written under the old form, began with the words, “Having considered the criminal *indictment* at the instance of, &c. find the pannel guilty,” it was unanimously held by the Supreme Court, upon a certification from the Perth Circuit, that the objection moved in arrest of judgment, upon the ground of the verdict being inapplicable to the libel, was ill founded.<sup>2</sup>

3. A criminal libel, in whatever form, is drawn in the form of a syllogism; in which the major states the appellation of the crime charged, either by its *nomen juris*, if it have such, or a general description of its nature; the minor avers the pannel’s guilt of the crime or crimes libelled, and sets forth the facts and circumstances which bring it home to him; and the conclusion infers, that on a conviction of a whole or part of these crimes, he should be punished with the pains of law.

The above contains a general view of the structure of an indictment, which is drawn in this form, not from any rigid and unbending adherence to antiquated or scholastic forms, but from sound and sufficient reasons, applicable to all times and places. Punishments are annexed by the law, not to particular trains of conduct, so much as to the commission of particular *offences*. It is indispensable, therefore, towards the justice of a criminal prosecution, that it should be distinctly set forth by the prosecutor, under what denomination he conceives the offence with which

<sup>1</sup> Act of Adjournal, March 17, 1827, c. 1.—<sup>2</sup> William Campbell, Nov. 17, 1823; Shaw, No. III.

the pannel is charged should be classed, because that turns the attention of the Judge and Jury to the offence which is to be the subject of their consideration, and the question, whether the deeds of the pannel really amount to it or not. Towards the elucidation of this last point, it is equally necessary that the minor should contain a full and minute account of the facts charged against the pannel, not only in order to make him acquainted with the full particulars of the accusation which is to form the subject of his trial, and so enable him to prepare for his defence; but also in order to put the Court in a condition to determine whether the facts specified really amount to the crime set forth in the outset, or only to a minor and less aggravated offence. The conclusion for the pains of law is equally necessary, in order to form the proper object of the prosecution, and authorize the Judge, if a conviction is obtained, to pronounce them against the pannel.<sup>1</sup>

It follows from this, that any error or omission which vitiates the regular form of the syllogism, and breaks the coherence and dependence of its several parts upon each other, is a sufficient objection to the libel, and that even although the error is in an immaterial part, or in those words of style which have been consecrated by the custom and observance of past times. The principle is here applicable, "*Multorum quæ a majoribus nostris instituta ratio reddi non potest;*" and any deviation from established custom, is not permitted in so serious an instrument; for this reason, of itself decisive, if no other existed, that the reason for their institution is not perceived till dear-bought experience has proved the danger of departing from them; and that if inaccuracy or slovenliness are once permitted in the immaterial part of the libel, they will certainly not be long of making their appearance in those parts which are of most importance. It is only, in short, by incessant care and attention on the part of all who are intrusted with the preparation of criminal libels, and the thorough conviction that any error will lead to the dismissal of the charge, that the accuracy and precision so necessary in these important writs, fraught with such important consequences to the lives and liberties of the lieges, can be preserved. Accordingly, in a case where it was objected to an indictment that the words of style "are crimes of an heinous nature, and severely punishable," were omitted, the Advocate-depute deserted the diet.<sup>2</sup>

<sup>1</sup> Hume, ii. 155.—<sup>2</sup> Thomas Methven v. Wallace, Perth, Sept. 1815. Record.

And on the same principle, the omission of the words “are guilty of the said crime, actor, or art and part, in so far as,” &c. was held fatal.<sup>1</sup>

It follows from the same principles, that in that part of the libel which affirms the pannel’s guilt of the crimes set forth in the major proposition, it is indispensable that the utmost accuracy should be observed; because it is the words there used which fix the crime with which he is charged on him; and where there are several pannels and different crimes narrated in one major, it should be specifically and distinctly set forth whether it is with the whole, or with a certain proportion of these crimes that each pannel is charged, and the degree of criminality charged against each accurately set forth.

These are the general principles of indictment; but the specialties applicable to each part of the instrument require a minute examination.

4. An indictment commences with the name and designation of the pannel; and it is indispensable not only that they be correct, but sufficiently explicit to distinguish the pannel from any other person of the same name, in the same situation.

Whether the libel be in the form of an indictment or criminal letters, the first important part of it is the name and designation of the pannel; and here the rule is not only that they must be correct, but that they must be sufficient to distinguish him from every other person of the same name, who resides, or is placed in the same situation. On this principle, all material variations in the name or designation of the pannel, as, if he be called John instead of James, or weaver instead of shoemaker, or residing in Leith instead of Edinburgh, or in Castlehill instead of Canongate, are good objections to the libel.<sup>2</sup> So also, any variation, even in single letters, which go to change the name of the person, as Blain instead of Blair, Law instead of Low, Dawson instead of Lawson, or the like, are a sufficient objection to the libel.<sup>3</sup> Thus, the name of the pannel being Cain, and he being indicted under the name of *Kane*, the objection was held good, although his name was spelt in that way in his declaration before the magi-

<sup>1</sup> Elizabeth Buchanan, Sept. 21, 1821. Record.—<sup>2</sup> Hume, ii. 158.—<sup>3</sup> Ibid.



strate; that declaration not having been signed by him, nor he having in any way led to the belief that that was the proper mode of spelling it.<sup>1</sup> On the same principle, the variation *Breck* for *Brock*, was found fatal in the description of the person wounded, which is governed by exactly the same principles.<sup>2</sup> The variation, Adam from *Adams*, was held sufficient to authorize a proof in another case: but it failed on the evidence, and the objection was repelled.<sup>3</sup> And Alison Duncan being indicted under the name of Elizabeth, or Ally Duncan, was found to have a good objection to trial on that indictment.<sup>4</sup> On this principle the objection was repelled, that *Elizabeth* Robertson was indicted under the name of *Elspeth* Robertson, these two being held to be in reality the same name;<sup>5</sup> and the objection that *Cawfield* was written *Cqfield*, underwent the same fate.<sup>6</sup>

But, on the other hand, the principle of *idem sonans* is not less applicable to the case of the designation of a pannel than that of a witness; and, therefore, if the sound is the same, and the mode of spelling only different, the objection is justly held as too trivial to merit any consideration. Upon this principle, the names Dalrymple and Darymple; Johnston and Johnstone; Clerk and Clark; Robinson, Robison, and Robertson; Davidson and Davison; Rae, Reay, and Ray; Stuart, Stewart, and Steuart, are justly held to be the same, and therefore no objection founded on such different modes of spelling the same word is sustained.<sup>7</sup> But the case is different where, though the sound is the same, the mode of spelling is so distinct as to make the words substantially different also; as Cay, instead of Kay or Keay: Alison, instead of Ellison; Kane instead of Cain,<sup>8</sup> or the like. In such cases, the mere fact that two different names are pronounced the same way, is not held a sufficient reason why the one should be confounded with the other.

Not only so, but where an *alias* is introduced, however unnecessarily, it has been held necessary that it should be correct. Thus John Murray, who was indicted under the name of John Murray, alias *Health Jock*, having objected that the alias should have been *Hill Jock*, and that he was never known by the nickname of *Health Jock*, the prosecutor, perhaps rather hastily,

<sup>1</sup> William Kane, Sept. 24, 1823; Shaw, No. 105.—<sup>2</sup> James Gilchrist, Spring 1808; Hume, ii. 158.—<sup>3</sup> Alexander Adam, Perth, April 1825. Shaw's Cases.—<sup>4</sup> October 11, 1797, Alison Duncan.—<sup>5</sup> Elspeth Robertson, Nov. 15, 1728.—<sup>6</sup> John Cook, Dumfries, Sept. 15, 1801.—<sup>7</sup> Hume, ii. 158.—<sup>8</sup> William Kane, Sept. 24, 1823; Shaw, No. 105.

deserted the diet;<sup>1</sup> and James Wight having objected that his name is that only, whereas he is designed in the libel James Bryce, alias James Wight, and that he never was known by the name of *Bryce*, the libel was dropped.<sup>2</sup> But where the *alias* is only intended to cover, or meet a different mode of spelling the same name, as John *Braid*, alias John *Baird*, the objection that the pannel's true name was Braid, and that he never bore the name of Baird, was repelled.<sup>3</sup> And though any number of *alias's* are given, if the pannel pleads to the libel without any objection, it is no objection in any subsequent stage that none of the *alias's* are proved to have been affixed to his name.<sup>4</sup> Donald and Daniel have been found to be the same name, and that the one may be transmuted into the other without objection.<sup>5</sup>

Farther, it is not sufficient that the pannel be correctly named; it is farther necessary that he be designed in such a manner as to distinguish him from any other person of the same name in the same situation, and to let him know distinctly that he is the person meant in the libel, and that he must prepare for his defence accordingly. If, therefore, he is out on bail, and there are other persons of the same name residing in the same town, street, or village, which frequently happens, especially in Highland districts; or if he is in jail, and there is another person of the same name in the same place of confinement, it is a good objection that such is the fact, and that the man at the bar was in a state of uncertainty as to which of the two the libel was really meant to apply. Although, therefore, it is in general sufficient to describe a person in confinement as present prisoner in such a jail, yet, if there are two persons of the same name and surname in that jail at the time, the objection is good, that he is uncertain whether the libel applies to him.<sup>6</sup> To avoid this objection, it is usual to describe every prisoner not only as present prisoner in such a jail, but farther, by his trade, or late place of residence, as contained in his declaration; because the chances are extremely small, that two persons of the same name, and residing, or prisoners in the same jail, should be under indictment at the same time.

As the profession and place of residence of the pannel require

<sup>1</sup> John Murray, Perth, April 1824.—<sup>2</sup> James Wight, March 6, 1819; Hume, ii. 157.—<sup>3</sup> John Braid, Feb. 24, 1823; Hume, ii. 157.—<sup>4</sup> John Braid, ut supra.—<sup>5</sup> Donald M'Kenzie, Dec. 3, 1822. Unreported.—<sup>6</sup> John Robertson, Glasgow, April 1824; Shaw, No. 124; John Carruthers, Sept. 1827, Dumfries; Shaw, No. 180.

to be added, in order to distinguish him from any other person of the same name, it follows that if any material error occurs in these particulars it will form a good objection. Thus, William Affleck, designed present prisoner in the tolbooth of Ayr, having objected that he never had been prisoner there except for half an hour, this objection was sustained.<sup>1</sup> So also William Brown, designed as dwelling at a certain place "in the parish of Ballantrae, and county of Ayr," stated an objection, which was sustained, that he dwelt "in the parish of Inch, and county of Wigton."<sup>2</sup> In like manner the objection was sustained for John Cantley, that he is described in the libel as servant to John Don, late Sheriff-depute of Stirlingshire, whereas he is truly wright in Stirling.<sup>3</sup> In some cases, it is no easy matter with those prisoners who have not been in custody, or emitted a declaration, to get at their proper designation; but notwithstanding that, it is necessary in all such cases to give the pannel such a designation as shall leave him in no uncertainty as to whether he is the person meant in the charge.

The difficulty is avoided in all those cases where the pannel is actually in custody at the time of serving the indictment, because he is at once styled by his name and trade, adding, present prisoner in the jail of his confinement, as, "A. B. weaver, present prisoner in the Tolbooth of Glasgow;" and this is in all cases held to be a sufficient designation, unless there is another person of the same name and trade in the same jail at the same time.<sup>4</sup> The Lock-up-house at Edinburgh is part of the Edinburgh jail, so that the designation, "present prisoner in the jail of Edinburgh," applies to a pannel, though he is prisoner in the Lock-up-house at the time; and the same holds with the Glasgow Bridewell, which is held part of the jail of that city. So strongly is this rule fixed in our practice, that even in a case where the pannel was described by his residence *incorrectly*, but by his name correctly, and it was added, "present prisoner in the Tolbooth of Edinburgh," the objection to the designation was repelled, upon the ground that *utile per inutile haud vitatur*, and that the designation as prisoner in the jail was sufficient to fix his identity.<sup>5</sup>

Where the pannel is not in custody, at the time of serving the

<sup>1</sup> William Affleck, Ayr, April 14, 1823; Shaw, No. 108.—<sup>2</sup> William Brown, Ayr, April 14, 1823; Shaw, No. 109.—<sup>3</sup> John Watson, James Cantley and Others, Jan. 27, 1735; Hume, ii. 158.—<sup>4</sup> Hume, ii. 159, 160.—<sup>5</sup> Andrew Fithie and Others, July 1746; Hume, ii. 161.



indictment, the designation must be so far correct as to leave no uncertainty as to the person intended. Where, therefore, there were three persons of the same name, to any of whom the designation given would apply, this was held to produce such an uncertainty as gave rise to a good objection.<sup>1</sup> But where the description is sufficient by place of residence and trade, it is of no moment although the description in other respects is insufficient, as if the parents or other relations of the witness are not given; for it is enough if one sufficient designation is given, without adding a second.<sup>2</sup> A married woman, however, ought to be designed by her husband's name in addition to hers, or by her husband's name alone, which is her real designation; and where this was omitted the Advocate-depute deserted the diet.<sup>3</sup>

4. It is a good reply to any objection founded on the designation of the pannel, if he is described as he has described himself in his declaration or bail-bond, how erroneous soever that description may be.

It is justly held as a fixed principle, that when the designation of the pannel is the same as he has given himself, all is done that is required; for he cannot complain of any error if he has been the cause of its introduction, nor allege that he is uncertain whether he was intended, when the very description which he himself has given of himself is adopted.<sup>4</sup> This rule is now in universal observance, and whenever, in answer to an objection to the pannel's designation, it appears that he is described as he described himself in his declaration, the objection founded on his description is repelled. And this of getting a fixed rule to go by in designing pannels, is one of the many important purposes in criminal practice which are attained by that instrument.

Farther, it is also a good reply to such an objection, if the pannel is described according to the name which he assumed at the time of his apprehension, or by which he was then generally known, although it is not engrossed in a regular declaration, or he has never signed such a writing if it was once taken.<sup>5</sup> For if, on such occasions, he has assumed a false name or designation, certainly he shall not profit by such a piece of intentional deceit,

<sup>1</sup> John Fraser, Nov. 14, 1744; Hume, ii. 160.—<sup>2</sup> William Fraser, Nov. 23, 1744; *Ibid.*—<sup>3</sup> Helen Wood and James Fergusson, Perth, April 1825; unreported.—<sup>4</sup> John Young, Nov. 27, 1797; Hume, ii. 161; Angus M'Lellan and Donald Gillies, April 1828, Inverness; unreported.—<sup>5</sup> Hume, ii. 161.

or refuse to answer under the name and designation which he himself has assumed.<sup>1</sup> So it was held in a case where the pannel was indicted under the name which she had assumed when apprehended, which was proved by the persons who seized her,<sup>2</sup> though it was totally different from her real one. The like judgment was given in another case, where the prisoner was indicted under the name of Robert Robertson, or Wilson. But says this man, my name is neither Robertson nor Wilson, but *Edward Wallace*. To this, however, it was held a good reply, that for some time formerly he had gone by the name of Robertson; that during the last three months, when in jail, he passed under that of Wilson; and in particular, that he had addressed a petition under that name to the magistrates of the borough where he was confined. In these circumstances his plea was clearly entitled to no sort of attention, and accordingly it was at once overruled.<sup>3</sup> In like manner where Alex. Sharp was described in the libel Alex. Sharp *alter*, adding his trade as a collier, and place of residence; and he objected that *alter* was no name or designation of his, and that if he had any other appellation, it was *Redhead*; it was held a good reply, that he had assumed this nickname when he found bail, whether in joke or deceit it mattered not.<sup>4</sup> A pannel, therefore, must plead, if he took the name under which he is indicted, either at finding bail or emitting his declaration, although he neither signed the bail-bond nor the declaration, from inability to write.<sup>5</sup>

In repelling an objection of this description, it is competent to examine witnesses who are not in the list, if they can speak to the designation assumed by the pannel, at or about the time of his apprehension; but in general the declaration witnesses will be sufficient for this purpose.

Where a person is known by many different names, which is very frequently the case, especially with professional thieves, it is usual to insert, as the leading title, the name he assumed when he emitted his declaration, or was apprehended on that charge, adding such other appellations as he has assumed at different times.<sup>6</sup> But it is not an objection, if many such *alias's* exist, that they are not all added, or if added, that they are not proved, provided the name assumed at emitting the declaration is inserted.

<sup>1</sup> Hume, ii. 161.—<sup>2</sup> Agnes Brown, Aug. 6, 1714.—<sup>3</sup> Robert Robertson or Wilson, Aug. 6, 1713; Hume, *ib.*—<sup>4</sup> Alexander Sharp, March 18, 1766; Hume, ii. 162.—

<sup>5</sup> Daniel Grant, Peter Crosbie, and Others, Oct. 6, 1820, Glasgow; unreported.—

<sup>6</sup> Hume, ii. 162.

5. A minor or pupil may be called to stand trial without any notice of his guardians, or a married woman without that of her husband.

In civil cases a pupil or minor cannot be duly brought into Court without the concurrence of his guardians, nor a married woman without that of her husband; because the questions involved in such discussions are of so intricate a kind as to require the aid of these legal custodiers of the estate; and being of a patrimonial nature, they directly affect the property to the care of which they are appointed. But in criminal cases the rule obtains *culpa tenet suos auctores*; and a delinquent of whatever age, is left to extricate himself as he best can from the consequences of his own transgressions.<sup>1</sup> This point was settled long ago in the case of a married woman;<sup>2</sup> and the frequent trial of pupils of early years and juvenile offenders, in modern practice, renders the practice as to them a matter unhappily of too great notoriety.

6. The party at whose instance the prosecution proceeds, must be specified in the indictment, as also the concurrence, if there is any; and if the party who gives his instance withdraws, the prosecution falls.

It is obviously indispensable both that the party at whose instance a prosecution is raised, and also the concurrence of his Majesty's Advocate, where it is also given, should be explicitly set forth.<sup>3</sup> Of course, if there is any material inaccuracy or omission in setting forth the instance, either in the pannel's copy or in the record, it affords a good objection. Where, therefore, it was objected against a libel, that in the copy served on the pannel the Lord Advocate's surname was omitted, the instance bearing to be that of "Alexander of Meadowbank," instead of "Alexander Maconochie of Meadowbank," the objection was held to be so formidable, that Lord Reston certified it to the High Court from the Inverness Circuit, and the libel was no farther insisted in.<sup>4</sup>

If the libel is at the instance of the public prosecutor, it of course falls if his instance is withdrawn, or he does not appear in Court to support it. If it is at the instance of A B, with

<sup>1</sup> Hume, ii. 162.—<sup>2</sup> Mary de Peys, Sept. 4, 1570; Lady Drew, Nov. 22, 1774; Hume, ii. 162, 163.—<sup>3</sup> Hume, ii. 163, 164.—<sup>4</sup> Hugh Anderson, Sept. 29, 1817; Hume, ii. 164.



concourse of the Lord Advocate, A B is the real prosecutor ; and if his instance is withdrawn, the process falls. But if the instance is in name of A B, with that concurrence, and also of the Lord Advocate himself, this is the suit of both parties jointly, and either may insist in the conclusions.

7. The major proposition contains the crimes with which the pannels or any of them are charged ; and under the general title of the laws of the realm there is included only the common law and those statutes which, by their antiquity and frequent usage, have become, as it were, part of the customary law, but not those which are of recent introduction, and have aggravated the pains of the common law.

The major proposition sets out with the words, “ That albeit by the laws of this and of every other well governed realm, theft, especially when accomplished by means of housebreaking, is a crime of an heinous nature, and severely punishable.” In cases of murder, it is usual to add the words, “ albeit by the laws of God and of this and every other well governed realm, murder is a crime,” &c. This general reference to the laws of the realm is held to imply the whole common law, and such statutes as, by their antiquity and universal usage, have passed, as it were, into the known and customary law of the realm. For example, under a libel, in these general terms, for the crime of perjury, bigamy, wilful fire-raising, deforcement, or the like, the prosecutor would be permitted to refer to the different old statutes, which at different periods have assigned the pains of those offences, or fixed the mode of their prosecution, and insist to have those pains applied.<sup>1</sup>

But here the privilege of including statutes under the general designation of the laws of the realm ceases. Certainly in those cases, now unfortunately too numerous, in which a statute has passed in modern times, either creating or defining any new offence, or augmenting the punishment of any one already known to the law, or giving extraordinary privileges to the prosecutor in conducting the proof, it is indispensable, if the pains of the statute are to be concluded for, or the facilities of proof which it

<sup>1</sup> Hume, ii. 166, 167.

introduces taken advantage of, not only must the statute be specially referred to, but the enacting words founded on accurately quoted.<sup>1</sup> In such cases, accordingly, it is customary, after founding on the common law, to quote such parts of the statute as are intended to be made use of; and this can never be safely dispensed with in the case of any statute, at least since the union of the kingdoms.

In quoting a statute, it has been held by the Court that not merely the words applicable to the individual case, but the whole clauses where they occur, should be quoted; and accordingly, in a case on the act against cutting and maiming, where many different modes of committing violence are specified, as by cutting, stabbing, discharging loaded fire-arms, throwing sulphuric acid, administering poison, attempting to drown, &c., it was laid down that the whole clause should be quoted, although only one of the methods of inflicting an injury there specified was applicable to the *species facti* set forth in the minor proposition.<sup>2</sup> This rule is *in viride observantia*, in regard to the numerous British statutes against forgery, post-office, custom-house, or excise offences, where there is generally only a few words, sometimes only a single one, which covers the case in hand; but yet the whole clause in which it occurs, sometimes extending over a whole page, is inserted at length. It is, however, to be understood in a reasonable sense only. It is intended only to guard against garbled or imperfect extracts from statutes being founded on, by which the real meaning of them may be disguised or misunderstood; and therefore, if the whole clause applicable is quoted to its close, with the pains of law annexed, it is unnecessary to go farther, and indulge in additional extracts.

Where a statute is libelled on, the *ipsissima verba* applicable to the case should, as far as possible, be copied into the minor, where the fact with which the pannel is charged is set forth.<sup>3</sup> If there is a minor applicable to the statutory and another to the common law charge, which is competent, and sometimes done for distinctness sake, the minor intended to meet the statutory charge should contain the statutory words, and the common law words be left for the common law charge. Where there is only one minor for both, which is usually done in all those cases, such as the cutting and maiming act, where the statute does not create a

<sup>1</sup> Hume, ii. 167.—<sup>2</sup> Hardie's case, Jan. 15, 1831.—<sup>3</sup> So held in John Bell, Feb. 10, 1817; *Pet. totam curiam*.

new offence, but only enhances the punishment beyond what the common law would authorize, care should be taken to interweave with the established words of style applicable to the common law charge, those new and peculiar ones which are to be found in relation to that subject in the statute.

It is competent for the public prosecutor, at calling of the cause, or at any stage of the trial before the jury are enclosed to return their verdict, to depart either from the common law or the statutory charge, or to restrict the libel to an arbitrary punishment, without departing altogether from either the one or the other;<sup>1</sup> or he may restrict the libel to an arbitrary punishment, so far as laid on the statute; or, leaving the statute to its full operation, he may restrict the pains of the common law.<sup>2</sup> This latter course is more unusual than the former, because the common law is generally less severe than the statutory; but it is equally competent, and should equally be adopted, where this is not the case, and the object is to save the offender's life.

8. Crimes possessing a *nomen juris*, as theft, murder, robbery, stouthrief, forgery, or the like, are libelled on under that denomination; but it is competent where a new offence, or one not properly included under any known appellation occurs, to describe it generally in the major; and if it amounts to an act plainly criminal, such a mode of libelling will be sustained by the Court.

Where a crime clearly comes under the description of any crime known in the law, the proper course certainly is, both for the sake of brevity and distinctness, to libel in the major on that specific offence. But it is by no means to be understood that this is the only competent method of drawing the major proposition. On the contrary, it is a legal, and frequently an advisable course, wherever there is any doubt as to the crime coming under any *vox signata*, to libel on the criminal act by a description of it at large; and if this description plainly sets forth a criminal act, it will be at once sustained by the Court.<sup>3</sup> And even in regard to those offences which have received a known legal appellation, it is not unusual, and is frequently fair, both to the interests of

<sup>1</sup> Francis Brown, June 13, 1791; Hume, ii. 168.—<sup>2</sup> Thomas Anderson and Others, Nov. 8, 1725; Robert Ferguson, Oct. 11, 1809; Hume, ii. 168.—<sup>3</sup> Hume, ii. 169.



justice and of the prisoner, that it should be libelled on, not only under the general appellation, but such a special one as indicates the particular *species* of the *genus* which is to be the subject of discussion. Thus it is usual to libel on "theft, especially sheep-stealing," or "theft, especially cattle-stealing or horse-stealing," or "theft, especially plagium or man-stealing." In like manner, in cases of fraud and swindling, or fraud and embezzlement, it is usual to set forth, not only the generic appellation, but the particular variety which is meant to be charged; as "falsehood, fraud, and wilful imposition, more particularly the fraudulently and feloniously obtaining the money or goods of others by cozenage or false pretences;" or "fraud and embezzlement, and more particularly the wickedly and feloniously defrauding any master or employer by the clerk or other person employed by him in conducting his business;" or "fraud and breach of trust, more especially the wickedly and feloniously embezzling and appropriating to one's own use and purposes the money or goods of others with which he had been intrusted, or which had come into his possession in the course of his business." In these and similar cases, although the want of the specification cannot be pleaded as an objection to the indictment, if the *nomen juris* set forth in the major truly covers the offence set forth in the minor, yet it is the usual, and certainly the more correct and equitable course, to follow up the general description by such a specification of the species of the offence which has here occurred, as both makes the prisoner acquainted with the real nature of the charge which is to be brought against him, and enables the Judge to determine, in considering the relevancy, whether the facts set forth really amount to the species of crime stated in the major proposition. This is more particularly proper in those crimes, such as fraud, swindling, breach of trust, embezzlement, culpable homicide, or the like, the varieties of which are so infinite, not only in the amount of the property abstracted or unlawfully obtained, or injury done, but in the means by which the offence was committed, and the degree of depravity which its perpetration implies, as to render the general description no index whatever to the real nature of the offence which is to be the subject of investigation.

It is usual, and has now become almost a set form of style, to employ a different phraseology in the major proposition, according as the peculiar offence specified is intended to be set forth as

an *aggravated kind* of the general kind, or merely as a branch of it, requiring a particular description. The word "especially" is employed to denote an aggravated species of the offence; the words "more particularly," usually precede such an enumeration of particulars as is intended to convey a more definite idea of the offence than the general description itself can afford, without any aggravation of its character. Thus "theft, more especially horse-stealing or cattle-stealing;" "assault, especially when committed by a husband on his own wife;" or "on a man in his own house," or the like, are intended to designate an aggravated species of the offence, and warrant, if followed by a conviction, a heavier punishment. On the other hand, the phrase "more particularly," is used where, without any aggravation, a minute description of an offence is intended to be conveyed, as "fraud and breach of trust, more particularly the defrauding any merchant or banker by the clerk or other person employed by him in the management of his business;" or "culpable homicide, more particularly the culpably, negligently, and recklessly running down and drowning any person sailing in a small boat, by neglect and unskillfulness in the steering of any steam-vessel;" or "falsehood, fraud, and wilful imposition, more particularly the fraudulently and feloniously obtaining the goods or money of others by cozenage and false pretences." In such cases, the specification which follows is an exemplification, not an aggravation, of the offence, and no heavier punishment should follow a conviction than if the general offence only were set forth. Still, though this is the usual and correct course which should be observed by all persons in drawing indictments, it cannot be affirmed that it has yet become so completely and invariably the course of style, as that any Judge would be justified in throwing out an aggravation, otherwise correctly libelled, merely because it was preceded by the words "more particularly" in the major; or in holding that a specification, not amounting to an aggravation, was ill laid, merely because it was ushered in by the words "more especially." It need hardly be observed, that in all cases, and however laid, it is rather the duty of the Judge to judge of the aggravation by its real nature, than by the words by which it is commenced, and not to throw out what legally amounts to an aggravation, because it is introduced by an incorrect phrase, nor to sustain that as an aggravation, though correctly laid, if it is not recognised as such by authority or practice.

9. Where different acts of an offence are charged in one libel, some of a more aggravated kind than others, it is not necessary to specify the whole degrees as different crimes in the major proposition; but it is sufficient if the crime, with all the aggravations intended to be proved, is once set forth—leaving the application of the different degrees of the offence to the subsumption of the minor.

It frequently happens that the same offence is intended to be charged under many different degrees of aggravation, against the same or different pannels; and the question arises—Is it necessary that the whole degrees of the offence should be specified as separate crimes standing *per se*? or is it sufficient if the substantive crime, with all its aggravations as meant to be proved, is once for all set forth? For example, one act of simple theft is contained in the libel; one of theft, aggravated by housebreaking; and another of theft, aggravated by housebreaking, and by having been committed by an habitual thief. In such a case it has been at length settled, though after a good deal of hesitation, that it is not necessary to say theft, as also theft, especially when committed by housebreaking; as also theft, especially when committed by housebreaking and by a person who is habit and repute a thief; but that it is sufficient to libel at once and for all the cases, “Theft, especially when committed by housebreaking, and by a person who is habit and repute a thief;” leaving the specification of the different acts, with their respective aggravations, to be made in that part of the indictment which follows, and charges the offences individually against each pannel.<sup>1</sup> This was first decided in a Circuit case, but it has been since repeatedly confirmed by opinions delivered *obiter*, indeed, but decidedly, by the Supreme Court; and as it is founded both on expedience and principle, there can be no doubt that it will be adhered to as a precedent in future. It is founded on expedience, because it is a matter of importance to reduce the necessary clauses in indictments to the narrowest compass which is consistent with the specification which justice requires, to avoid the chance of error in the superfluous additions; on principle,

<sup>1</sup> Andrew Berkley, Perth, April 1825; unreported.—<sup>2</sup> James Innes and Others, March 16, 1826; unreported on this point.



because the offence charged is radically the same against all, or as applicable to all cases, though under different degrees of atrocity; and therefore, by drawing the libel in this compendious form, there is still to be found in the major proposition a statement of every offence set forth in the minor, which is all that the law requires. It follows from this, that if the crimes with which the pannel or pannels are charged, are not merely aggravated cases of the same offence, but different or inconsistent offences, as theft, robbery, stouthrief, assault, or the like, they must all be separately set forth in the major proposition.

It has been held, that under a simple charge of theft, it is competent for the Court not only to hear proved, but to take into consideration, in awarding punishment, the mode in which it is perpetrated, if done otherwise than by housebreaking; that the only aggravations of that offence which must be stated in the major, are those of housebreaking, habit and repute, or previous conviction; that the aggravation of opening lockfast places, or of the value of the property stole amounting to a *furtum grave*, need not be set forth, but may be competently proved in the course of the evidence, provided they were duly set forth in the course of the minor proposition; and that, if so established, they may constrain the Court to pronounce a capital sentence in a case evidently of that serious character, though the major contained nothing but a charge of simple theft, or the capital aggravation of housebreaking had been departed from.<sup>1</sup> This decision, of course, forms the law of the case; but, nevertheless, it seems more in spirit with the established principle of our practice, that the major and minor propositions should accurately correspond, to insert the aggravation of lockfast places in the major, and where it is meant to be followed up in the minor; and such has been the usual practice in this particular since that time. It is not the practice to say any thing about theft as amounting to a *furtum grave* in the major proposition; and numerous cases have occurred, where the theft of property to the amount of £10,000 or £15,000, and therefore clearly capital, has been held to be correctly laid under the general name of theft, without any addition.<sup>2</sup>

<sup>1</sup> James Joss, May 21, 1821, High Court; Shaw, No. 20; and Justice-Clerk's MS.; Hume ii. 170.—<sup>2</sup> As in James Murray, Feb. 19, 1825, High Court, for the robbery of L.8000 from the Stirling Bank; and James Moffat, June 12, 1820, for the theft of L.20,000 from the Paisley Union Bank.

10. It is competent to charge the same act under several different and inconsistent denominations, provided that there is a minor applicable to each major, which may cohere when the alternative and inconsistent charge is abandoned.

It frequently happens that the prosecutor is uncertain under what denomination to libel a crime, or whether it will on the proof amount to one or another offence; as theft, or breach of trust, theft or robbery, reset or theft, stouthrief or robbery, or the like. In such cases the ends of justice require, and practice has abundantly established, that it should be competent to libel the offence alternately under one or other of these denominations, to meet whichever turn the proof should take.<sup>1</sup> It is not the prosecutor's meaning, in such a case, to involve the pannel as guilty by one act of all those inconsistent offences, but alternatively as guilty of one or more of them, as the fact shall turn out upon the trial. This mode of libelling, which has long been established, and is matter of daily practice, should be adopted in all those cases where there appears to be any doubt either on the facts, as they are likely to appear in evidence, or on the law, as dubious and undecided, whether the criminal act really amounts to one or another offence; as where a snatch or jostling took place, and a watch was abstracted; or money was appropriated to his own use by a clerk intrusted with the management of the concern stolen from; or goods were found in the prisoner's custody at such a distance of time from the original depredation, or under such circumstances, as renders it doubtful whether he has really been the original thief or a resetter only. In such cases, by stating the offence in the major, as theft, as also robbery, in the first case; theft, as also breach of trust, in the second; and theft, as also reset of theft, in the third; the difficulty is avoided, and the pannel is convicted, under the direction of the Bench, of either of the two crimes, which, on a combined view of the law and the fact, he appears really to have committed.<sup>2</sup> The objection that a man could not be charged at once with the inconsistent crimes of theft and reset, was accordingly repelled, after full argument by the Supreme Court.<sup>3</sup> And this precaution should never be neglected where there appears any doubt as to

<sup>1</sup> Hume, ii. 169.—<sup>2</sup> Ibid. ii. 170.—<sup>3</sup> Macdonald and Jamieson, Aug. 9, 1770.

the precise nature of the crime which the prisoner has committed; for the distinction between different crimes is often exceedingly thin and unsubstantial, and it is no easy matter *a priori* to determine on which side of the line the weight of the evidence will incline. A signal instance of this occurred lately in a case where the libel was laid for robbery only, and the evidence established that the spoliation was accomplished without violence, and so the Jury found the pannel guilty of theft; upon which the Court found that no sentence could pass upon the verdict.<sup>1</sup>

11. A crime may be charged under many aggravations, or at once under its highest denomination, and it is competent in such a case for the prosecutor to abandon the greater charge, and insist in the lesser, or for the jury to find the latter proven, and not the former.

In cases which admit of a great number of aggravations, as theft, which may be aggravated by housebreaking, by opening lockfast places, by being committed by a person habit and repute a thief, and previously convicted of theft; or assault, which may be committed to the effusion of blood, fracture of bone, mutilation of the person, or danger of life; it is usual and expedient to lay the crime in the major proposition, under the heaviest aggravation which is likely to be established in the proof; and upon such indictment, it is not necessary to have more than one minor, or narrative, setting forth the facts which have actually occurred; and it is competent either for the prosecutor to depart from, or the jury to find not proven, any one of the aggravations which they think proper.<sup>2</sup> Thus, where a house has been broken into, and goods stolen by an habitual thief, it is competent, and the uniform practice, to indict him under the major proposition of "Theft, especially when committed by means of housebreaking, and by a person who is habit and repute a thief." In such a case, one minor suffices for the whole complex crime which has been committed; and by simply departing from one or more of the aggravations, the prosecutor may limit the charge accordingly; or by negating one or more of them on the proof, the jury may in like manner restrict the libel to

<sup>1</sup> Peter Wallace, May 21, 1821; Shaw, No. 30.—<sup>2</sup> Hume, ii. 170.



the facts which have really been established in evidence before them.

A charge of murder is held to include under it one of culpable homicide; so that, under a charge of that serious description, it is competent for the jury to find the prisoner guilty of culpable homicide, though the punishment should amount only to a week's imprisonment. Of course, it is unnecessary in a case of homicide to libel alternatively on murder and culpable homicide; but if there is any chance of the case amounting to the former crime, it should be laid solely for it; if it can in any view only amount to the latter, it is unfair to run the chance of exciting a prejudice against the prisoner, by charging him with a heavier offence than under the circumstances can be substantiated.

12. It is competent for the prosecutor to state a charge against the pannel, under the mildest epithet which the circumstances will admit; and it is no objection to the proceeding that the offence might have been charged under a heavier denomination, provided the facts set forth in the minor are not inconsistent with the major as it stands.

In the case of those crimes which have sundry different appellations, drawing after them different legal consequences in the way of punishment, it is in the power of the prosecutor to charge them either under their highest or any inferior denomination which they may bear. Thus, the invading and beating another in his house, may be charged either under the name of hame-sucken, which is in general a capital offence, or assault, especially when committed on any man in his own house, which can be followed only by arbitrary pains.<sup>1</sup> So far was this formerly carried, that in Mackenzie's time it was permitted to a prosecutor to pass from a libel which charged, under the old law, murder under trust, or theft in a landed man as treason, and restrict it to a charge of murder, or theft, aggravated by the condition of the culprit.<sup>2</sup> On the same principle it is competent to charge treasonable acts as sedition, and so bring them under our common law, and ordinary forms of criminal proceeding; for although it

<sup>1</sup> Hume, ii. 176.—<sup>2</sup> Mackenzie, ii. 21, No. 3.

is a rule of the English law that the felony merges in the treason, and it may be necessary to adhere to that rule, in proceedings under the treason law; yet fortunately no such principle is recognised in our practice, and in proceedings for sedition the Scottish practice is alone to be regarded.<sup>1</sup>

13. It is competent to combine several criminal acts into one libel, though ever so heterogeneous in their own nature, provided they have been committed by the same pannel or pannels; but in such a case it is in the power of the Court, on special cause shown, to direct the trial of one charge to proceed before the others are taken up.

From the earliest period, it has been a rule of our practice that different acts, not only of the same species of offence, may be charged against a pannel in one libel, but of different offences committed at different times, and on different individuals.<sup>2</sup> Thus, the noted Major Weir was tried on one libel for incest with his sister, adultery with several other women, and bestiality.<sup>3</sup> The objection of *cumulatio criminis* was repelled in a case where the crimes charged were incest and adultery, followed by the poisoning of the husband.<sup>4</sup> And in the noted instance of Elliot Nicolson and Maxwell, an adulterous intercourse, followed by forgery, conspiracy, and an attempt to poison, were tried in one and the same libel.<sup>5</sup>

In these instances the different crimes in a certain degree cohered together, and were part of one nefarious proceeding. But the same rule is followed even in cases where the crimes charged have no sort of connexion with each other, as a theft from one person, a forgery from another, and a murder of a third.<sup>6</sup> Thus, an act of murder and fire-raising committed at the same time, an assault committed on a person of whose evidence the pannel was afraid, and an attempt to suborn, were tried at the same time in one libel.<sup>7</sup> Treason, cursing of parents, and parricide, were sustained in the same libel in one case;<sup>8</sup> murder, forgery, assault, several acts of robbery and oppression, committed on different per-

<sup>1</sup> This was laid down in M'Kinlay's case, July 1817.—<sup>2</sup> Hume, ii. 171, 172.—<sup>3</sup> Major Weir, April 9, 1670.—<sup>4</sup> Nairn and Ogilvie, Aug. 5, 1765; Hume, *ibid.*—<sup>5</sup> Elliot Nicolson and Maxwell, San. 1694.—<sup>6</sup> Hume, ii. 172.—<sup>7</sup> Robert Stewart and Others, July 1713.—<sup>8</sup> Philip Standfield, Feb. 6, 1688.

sions, and at different times, in another.<sup>1</sup> In later times, the same practice has, from the vast increase of crimes, become unhappily too frequent. In a recent case at Aberdeen, one pannel was sent to an assize charged with no less than nine acts of housebreaking, committed through a course of years, and of five of them he was actually convicted;<sup>2</sup> and in another, an indictment containing twelve capital charges of forgery were sent to the assize, of nine of which the prisoner was found guilty.<sup>3</sup> Two murders were charged and served against a prisoner at Jedburgh in 1823,<sup>4</sup> and at Edinburgh in 1820;<sup>5</sup> and in the noted case of Burke and M'Dougal, Dec. 24, 1828, it was unanimously held by the Court, after a full argument and the most strenuous opposition from Dean of Faculty Moncreiff, that it was competent to charge a pannel in one indictment with three separate murders, committed in different places, and at the interval of months from each other.<sup>6</sup>

But while this is well established on the one hand, it is not to be imagined on the other, that either the prosecutor is obliged to proceed with all the charges at one time, or the Court to admit such an accumulation of charges to proof at one time and with one assize, where such a proceeding is likely to be attended with real and serious injustice to the pannel. On the contrary, the prosecutor may proceed with what number he pleases, adjourning the consideration of the others to another opportunity; and in like manner, the Court, if they see cause from the excited state of public feeling, or the prejudice likely to be excited against the pannel from such an accumulation of charges, to apprehend injustice to him from the trial of all the charges at once, may direct the prosecutor to proceed to trial, in the first instance, with one. Of the exercise of this power there are many old instances on record;<sup>7</sup> and the Court, in a recent case, where the pannel was charged with three murders, which had vehemently excited the public mind, and there was reason to apprehend that he would be prejudiced by having them all tried at one time, and by one assize, separated the trials, and directed the Lord Advocate to proceed in the first instance with the proof of one of them.<sup>8</sup> As this, how-

<sup>1</sup> James and Patrick Faa, Dec. 2, 1696; Hume, *ibid.*—<sup>2</sup> Charles Bowman, Aberdeen, April 1826, *Ante*, i. 314.—<sup>3</sup> Malcolm Gillespie, Aberdeen, Autumn 1827.—<sup>4</sup> Robert Scott, Jedburgh, Autumn 1823.—<sup>5</sup> Robert Surrage and Others, Sept. 7, 1820; Shaw, No. 15.—<sup>6</sup> Burke and M'Dougall, Dec. 24, 1828; Syme, 350.—<sup>7</sup> David Young, July 24, 1738; Walter Buchanan, Dec. 18, 1727; Hume, ii. 174.—<sup>8</sup> Burke's case, Dec. 24, 1828; Syme, 350, 352.



ever, is a step which obviously goes to delay and impede the administration of justice, and may sometimes considerably abridge the proof of the prosecutor, by obliging him to bring forward separately the proof of charges which depend upon each other, it will not be taken but on due cause shown to the Court, and in circumstances where real prejudice is on reasonable grounds to be apprehended to the pannel from its not being adopted.

14. It is not competent for several different prosecutors complaining of separate injuries, to combine their instance into one libel ; but in a prosecution at the instance of the Lord Advocate, the private parties injured may either unite their separate instances or concur with that of his Lordship.

It is an established rule of law, indispensable to prevent individuals from being oppressed by the combined strength of many different prosecutors, each complaining of a separate offence, that no accumulation of *prosecutors* shall be permitted ; but that each must raise his own libel, and stand or fall by the merits of his own prosecution.<sup>1</sup> But the case is different where the prosecution is at the instance of the Lord Advocate, and the private parties merely appear as joint prosecutors with him, or as lending their concurrence to a proceeding in which he is the substantial pursuer. Such proceeding is competent,<sup>2</sup> because no injury is there inflicted on the pannel, and he is in a more favourable situation than he would have been, had the Lord Advocate prosecuted all the charges, as he might have done, in his own name alone, and called the other prosecutors as witnesses to support them before the assize.

15. But it is competent to accumulate many different pannels into one libel, if they have all concurred in bringing about the same criminal acts ; but in such a case, it is in the power of the Court, upon special cause shown, to separate the trials and send them to the assize in the first instance by themselves, who are represented as material witnesses in behalf of the others.

<sup>1</sup> Hume, ii. 174, 175.—<sup>2</sup> Clergymen of Orkney, Aug. 1, 1712 ; Walter Buchanan, Dec. 18, 1727 ; Jean Dougal and Others, Jan. 15, 1728 ; Hume, ii. 174.

Although the accumulation of prosecutors is in the general case not legal, it is otherwise with the including of a number of pannels in one libel, which is in every case competent when they are charged as accessory either directly or indirectly to the same criminal acts.<sup>1</sup> This is matter of daily practice, and it obviously is indispensable in every code of criminal jurisprudence, because, as many different individuals often combine to commit one criminal act, justice requires that they should jointly be responsible for the deeds which they have jointly chosen to perpetrate.<sup>2</sup> In such a case they are all liable, *singuli in solidum*, for the full legal penalties; and cannot be heard to plead that the libel should be apportioned out among the different pannels in proportion to their separate shares in the transgression. Law holds them all jointly responsible for the acts which they have jointly committed; leaving it to the Court, when sentence is pronounced, to apportion the punishment according to what may appear to be the merits of each individual case.

In this way, however, great hardship may sometimes be experienced by the prisoners. For what if some of the persons included in the libel are the witnesses who could bear the most decisive evidence in their behalf, and they have been put there by a designing prosecutor purposely to deprive them of the benefit of their testimony? Such an attempt, though unknown under the public prosecutions of Scotland, is familiar to the more polluted channels of its Civil Jury proceedings, and might very possibly recur in our Criminal Court, either in arbitrary times, or if private prosecutions should again come into general use. For such a case there is an effectual remedy provided in the power vested in the Judges, upon a motion made by the prisoners and cause shown, of separating the trials, and sending those to the Assize in the first instance, who are deemed essential by the other prisoners to their defence.<sup>3</sup> Upon a motion made in such circumstances by the prisoner's counsel in a recent case, the Lord Advocate, to avoid the delay of going twice over the evidence, at once deserted the diet against the prisoner, whose evidence was deemed material, and he was dismissed from the bar, and gave evidence in favour

<sup>1</sup> Hume, ii. 173.—<sup>2</sup> Hume, ii. 175.—<sup>3</sup> Fife, M'Nab, and Stedman, June 30, 1691; M'Nicol, M'Culloch, and Others, July 1744; Stirling, Scott, and Others, July 22, 1744; Hume, ii. 175, 176.

of his former associates.<sup>1</sup> And in another instance, on a similar motion, the Court separated the trials.<sup>2</sup>

It is only, however, in the event of the pannel, whose evidence is desired, being either acquitted, or dismissed from the bar, that they can be admitted to give evidence in favour of their associates. Certainly, if they are convicted of any offence inferring infamy, they cannot be permitted to give testimony in favour of any others charged in the same libel with a similar offence; and even in the case of one convicted of assault, riot, or any minor offence, not followed by such a stigma, it is difficult to see on what principle he can, after having been proved to have himself been concerned in the crime, be adduced as a witness to screen others from the punishment due to their share in the delinquence.

It is not to be supposed, however, that the Court have no discretionary power in this matter; or that they are obliged, in every case, upon the mere allegation of one of several pannels that he requires the evidence of one of his associates, straightway to separate the trials. Such a power of compelling a separation would be liable to evident abuse, not only as affording a most dangerous facility to pannels to get up stories supported by each other for their defence, but as often interfering seriously with the chain of evidence by which the conviction of either is to be obtained. On this point, therefore, it is fixed that the Court are invested with a discretionary power, and that they should not comply with the request, unless they are satisfied that it is made in good faith, and that its refusal would really prejudice the pannels in their defence. In many cases, accordingly, when the Court were not satisfied with the grounds stated for the motion in support of the separation, they have refused to accede to it.<sup>3</sup> This took place particularly in a recent case at Glasgow, where the matter underwent a very full discussion. It was there moved by the prisoner's counsel, that the trial of one specified by name should first proceed, in respect he was the only person present, except the police-officers, at the commencement of the affray, and that therefore there was a *penuria testium*. This was strongly opposed by the public prosecutor, upon the ground that though it was competent for the Court to separate the trials, yet this was a power

<sup>1</sup> Robert Surrage and Others, Sept. 7, 1820; Shaw, No. 15.—<sup>2</sup> Thomas Kettle, James Barnet, and Others, June 13, 1731; Justice-Clerk's MS.—<sup>3</sup> James Justice and David Howe, July 30, 1744; Margaret and Agnes Adam, June 24, 1774; Hume, ii. 176.



which should not be exercised except on strong grounds, because it enabled the counsel for two of the pannels to precognosce on oath the witnesses for the other prisoner, contrary to the usual practice, and that no sufficient grounds had been stated for it in that case. Lord Justice-Clerk Boyle and Reston, "having considered the whole circumstances of the case, find no sufficient grounds stated for making the separation asked."<sup>1</sup>

16. It is not competent to compel different pannels, charged with separate and unconnected crimes, to stand trial together; and if such an accumulation be attempted, the Court will either throw out the libel as irrelevant, or grant a separation of the trials.

There is a third, and a still more exceptionable form of *cumulative actionum*, that where *several persons* are charged in the same libel with *separate and unconnected* crimes. There is an obvious impropriety in thus blending together different persons and crimes not united together by any common bond, not only from the confusion and perplexity which may naturally be expected at the trial, but from the prejudice which an innocent or less guilty pannel may receive from being tried at the same time with one whose case is clear, or criminality of the most atrocious degree. For these reasons, our practice does not in the ordinary case allow the prosecutor a free range in this particular; and therefore it is certainly not competent to charge in the same libel, John with a murder, James with a theft, and George with a forgery, all unconnected with each other.<sup>2</sup> Several instances, indeed, occurred in former times, of separate processes being thus huddled together into one indictment:<sup>3</sup> but they are now regarded as bad precedents, since more correct ideas have become prevalent, from the improved jurisprudence of modern times. In a late case, accordingly, at Aberdeen, where two women were charged with separate acts of uttering forged notes, unconnected with each other, though committed at the same time and place, in the same libel, the Lord Justice-Clerk Boyle at once separated the trials, and expressed an opinion that such a mode of classing together unconnected crimes should not again be attempted.<sup>4</sup>

<sup>1</sup> Robert Young, Andrew Home, William M'Kain, Glasgow, Sept. 1816; Justice-Clerk's MS. and Record.—<sup>2</sup> Hume, ii. 176, 177.—<sup>3</sup> Which see in Hume, ii. 177, 178.—<sup>4</sup> Helen Hughes and Mary Flyd, Aberdeen, Sept. 1824; Justice Clerk's MS.

This rule, however, is to be understood in a reasonable, and is not to be construed in a peremptory sense. It is still competent, and constantly done, to charge together in one libel unconnected offences, if both pannels are connected in one of them; and this is matter of daily practice. Thus, if John and James are together implicated in one theft, by housebreaking and theft, and James has been guilty of a separate offence by himself, it is clearly competent to include both in one libel, the first charge of which relates to both pannels, the second only to the latter. Thus, where two persons were tried for a robbery, executed by the one, and planned by the other, the former was tried in the same libel for another crime, executed by him alone, in a different part of the county.<sup>1</sup> The objection of *cumulatio actionum*, was repelled in a case where three persons were indicted for one act of shopbreaking, in which all three were concerned; and for another, in which two of them only were engaged, both shops being situated in the same town, and the pannels connected with each other.<sup>2</sup> In like manner, where two pannels were charged, one with housebreaking in Edinburgh, and another act of the same crime at Nidpath Castle, in the county of Peebles, and the other with resetting the goods stolen in Edinburgh alone, the objection of *cumulatio actionum* was repelled.<sup>3</sup> The like objection was repelled, where three prisoners were indicted for various acts of theft, and three others with resetting the goods stolen on three different occasions.<sup>4</sup> Indeed, in the case of thieves and resetters, it is the constant practice to try them altogether, at one and the same time, and in one and the same libel; a proceeding of which none of them can complain, when their proceedings are so intimately connected, and they were willing to combine so closely together, for the purposes of depredation. Thus, it appears that the objection of *cumulatio actionum* is only sustained where different pannels, unconnected with each other by any one link, are massed together, and that in such a case it is insurmountable; but that it does not hold where the separate acts of the pannels are parts of the same criminal delinquency, pursued through its different stages, or where the different culprits are so far blended as to be exposed to any one charge in common.

It is also competent for the Court, where the objection of

<sup>1</sup> Anderson and Marshall, Nov. 25, 1728; Hume, ii. 178.—<sup>2</sup> Clark, Calder, and Donaldson, May 6, 1780.—<sup>3</sup> Archibald Stewart and Charles Gordon, Feb. 14, 1785; Hume *ibid.*—<sup>4</sup> William Campbell and Others, April 22, 1822: unreported.

*cumulatio actionum* is stated, to pronounce a general interlocutor of relevancy upon the whole charges standing together, and separate the trials one from another, by taking them up on different days, and with different juries, balloted from the same Assize. This was done by the Court in several cases;<sup>1</sup> and it is attended with the advantage of bringing the matter for consideration in complicated cases, more distinctly under the notice of the jury, and relieving the pannels from any prejudice which they could possibly derive from being tried together.

17. The minor proposition of the libel sets out with an affirmation that the pannel, or each of them, is guilty of all or some of the crimes described in the major;— and in that part of the libel great care is necessary, to make the charge against each correspond correctly with the major applicable to his case.

The minor proposition commences with these words—“ Yet true it is and of verity, that you the said A. B. are guilty of the said crime, actor, or art and part.” Simple as these words appear, there is no part of a libel in which more nicety is sometimes required, or in which an error is attended with more fatal consequences.

When the major contains one crime merely, as theft or murder, and there is only one pannel charged in the libel, all that is necessary is to affirm that he is guilty of the crime, actor, or art and part. But these words are indispensable; and, accordingly, when the words “ are guilty of the said crime, actor, or art and part,” were omitted by mistake, the blunder was held to be fatal to the indictment.<sup>2</sup> The omission of the words “ are crimes of an heinous nature, and severely punishable,” was considered equally fatal in another instance, though these were mere words of style at the close of the major proposition.<sup>3</sup>

But when the major contains different crimes, or different degrees of the same crime, and there are different pannels who stand in different degrees of delinquency, it is necessary that the minor in this clause should specify accurately the degree of

<sup>1</sup> Elliot, Nicolson, and Maxwell, Jan. 1694; Margaret and David Myles, Nov. 17, 1702; Thos. Mowbray and Others, March 13, 1717; Hume, ii. 179.—<sup>2</sup> Elizabeth Buchanan, Sept. 21, 1821, Perth, Record; Justice-Clerk's MS.—<sup>3</sup> Methven and Others, Perth, Sept. 30, 1815, Record.



delinquency with which each is charged. Thus, suppose there are three pannels, one of whom has been guilty of stouthrief, while, in common with the two others, he has been guilty of theft, by housebreaking, and that one of these two be habit and repute, and has been previously convicted of theft, while the other has been convicted merely, the major must run thus:—  
 “Albeit, by the laws of this and of every other well-governed realm, theft, especially when committed by means of housebreaking, and by a person who is habit and repute a thief, and has been previously convicted of theft, as also stouthrief, are crimes of an heinous nature, and severely punishable; yet true it is, and of verity, that you the said A. B. are guilty of the said crime of theft, aggravated as aforesaid, and of the said crime of stouthrief, actor, or art and part; and you the said C. D. are guilty of the said crime of theft, aggravated by housebreaking, and by being habit and repute a thief, and having been previously convicted of theft, actor, or art and part; and you the said E. F. are guilty of the said crime of theft, aggravated by housebreaking, and by having been previously convicted of theft, actor, or art and part.”  
 This phraseology may appear at first sight to savour of tautology; but it will be found upon examination to be all strictly necessary, and indispensable to distinguish the separate degrees of delinquency charged against each individual. And great accuracy is required in these particulars, because it is part of the libel which contains the prosecutor’s affirmation as to the pannel’s guilt; and he cannot advance or prove beyond what he has there affirmed, so that any inaccuracy there is generally fatal to the indictment.

For the same reason, where more crimes than one are stated in the major proposition, it must not only be affirmed that they are *crimes* of an heinous nature, and severely punishable; but farther, the minor must state that each pannel, if he is meant to be charged with more crimes than one, is guilty of the said *crimes*, actor, or art and part: because, if more crimes than one are set forth in the major, and the pannel is accused merely of being guilty of the said *crime*, there is an uncertainty of which he is meant to be affirmed to have been guilty, which shall prove fatal to the indictment. An instance of this occurred in the Comet case, and in the end proved fatal to the prosecution. The crimes charged in the major were there culpable homicide, as also reckless steering and running down any boat or vessel: but the minor, instead of affirming that the pannels were guilty of the said

*crimes*, affirmed that they were guilty of the said *crime*. It was strongly objected that there was here an uncertainty which crime was meant to be charged; and, to avoid the difficulty, the prosecutor took the major proposition of culpable homicide, and the minor, of the reckless steering, which was more correctly drawn than that which charged the former crime, and on this patched record obtained a conviction in the Admiralty Court; but the error was held irremediable by the Justiciary Court, and the transposition inadmissible, and the sentence was in consequence suspended simpliciter.<sup>1</sup>

It follows from this, that where there are several pannels, and more than one crime, or more than one degree of crime in the major, it is necessary not merely to say that each is guilty of the said crimes, or of one or other of them, but to go a step farther, and specify which of the crimes each has been guilty of, without confounding him with the other. When once the principle is admitted, that the affirmation in this part of the libel forms the measure and the limit of what can be proved against each pannel, this follows as a matter of course. Thus, where a libel was laid at common law, and on a statute, and the minor merely set forth that the pannel was guilty of the said *crime*, it was held that the common law charge alone could be proved, and that the statutory one must be abandoned.<sup>2</sup>

But the rule is different where the statutory enactment does not create a new offence unknown to the common law, but merely augments the punishment of what was already regarded as a criminal delinquency. Of this kind is the recent act rendering cutting and maiming capital. That statute does not create a new offence, it only augments the punishment which may follow its conviction. In such a case, though the libel is laid at common law for assault, and cutting and stabbing, and on the statute there is truly only one offence, the statute merely rendering capital what was before punishable only with arbitrary pains; and, therefore, the libel is correctly drawn, if it affirms that the pannel is guilty "of the said *crime*," or "of one or more of the said crimes," without any aggravation.<sup>3</sup> This is the usual style which has been adopted, where the act merely enhances the punishment of the common law; though in many cases the practice has been

<sup>1</sup> M'Innes and M'Bride, Dec. 22, 1825; Ante, i. 124.—<sup>2</sup> James Rollo, Sept. 1818, Perth; unreported; Justice-Clerk's MS.—<sup>3</sup> James Gowans, March 4, 1825; unreported.

to say, "are guilty of the said crime of assault, aggravated, and with intent as aforesaid, and of the said crime specified in the said statute." This form is, without doubt, also relevant; and it should be followed in all those cases under the statute where there is the least doubt of the crime coming under the common law, as pointing the gun, and drawing the trigger, without discharging the piece, although, under the latest authorities, that would at common law amount to an assault.<sup>1</sup>

Where a crime is stated in the major with one or more aggravations, it is indispensable that it should be affirmed in the minor that he is guilty "of the said crime, aggravated as aforesaid," or aggravated in the way set forth in the major, and intended to reach his case; as, "aggravated by housebreaking, and by being habit and repute a thief," or, "aggravated by being committed to the effusion of blood and danger of life;" because it is this part of the indictment which contains the affirmation of the pannel's criminality, and limits what can be proved against him. Where there are more than one pannel, and different aggravations apply to each, the latter mode must be adopted. In a case where the pannels were charged with stouthrief, as also theft by housebreaking, and being habit and repute thieves, but the prosecutor had stated in the minor merely that "you are guilty of the said crimes," instead of saying, "the said crime of stouthrief, and the said crime of theft, aggravated as aforesaid;" he was obliged to pass from the whole aggravation libelled before the pannels pleaded to the indictment; and but for the circumstance that the stouthrief was proved, on which they were capitally convicted, this would have enabled three of the greatest criminals who ever appeared at the bar in this country to have escaped with a few months' imprisonment.<sup>2</sup>

It frequently happens that a certain *intent* is charged, which forms the material part of the crime, as assault, with intent to ravish; assault, with intent to murder, or to maim, disfigure, or disable, or the like. In such cases the intent may be charged in one of two ways. It may either be laid as a substantive part of the crime itself, as "assault, with intent to ravish," or as an aggravation of it merely as "assault, *especially* when committed with intent to ravish." The latter is in general the preferable

<sup>1</sup> Ante, i. 175.—<sup>2</sup> Donaldson, Buchanan, and Forbes Duncan, Aberdeen, April 1823, Record.



method; because, under an indictment in the first form, if the intent is not proved, the whole libel falls to the ground; whereas, if it is laid in the other form, the pannel may be convicted of the simple assault, although the aggravation of the intent is found not proven. According as the one or the other form is adopted, there must be a difference in the affirmation of guilt at the commencement of the minor. If the intent is laid as a substantive part of the crime, it is sufficient to say that the pannel is guilty "of the said crime;" because there is only one crime, without any aggravation, set forth in the major. But if it is laid as an aggravation, then the minor must affirm that "you the said A. B. are guilty of the same crime, aggravated, and with intent as aforesaid;" and unless this is done, the intent which forms the essential part of the crime cannot be proved. An error of this description lately proved fatal to one charge in an indictment in a very important case, that of Stuart, June 15, 1829. The pannel was there accused of murder and theft at common law, and also "the wickedly and feloniously administering any quantity of laudanum, or other narcotic and deleterious substance, to any of the lieges, to the grievous injury of the person, with intent to murder, or to produce stupefaction, and thereafter to steal," &c. The minor charged the pannel with "the said crimes of murder and theft, as also of the said crime of feloniously administering laudanum, or other narcotic and deleterious substances, *aggravated with intent as aforesaid.*" It was objected, that the intent to murder was stated as a substantive part of the crime in the major proposition, and as an aggravation only in the minor, and therefore that the two did not cohere. The objection was very critical, and much less substantial than in the opposite case of the crime being stated with an aggravation in the major, and without it in the minor; because there could be no question that the intent stated in the major was in substance an aggravation, and was so stated in the major, though without the word "especially," which is its usual precedent, having been added; but notwithstanding this, the Court found the charge in the indictment, where this error occurred, irrelevant.<sup>1</sup> A decision, proceeding on the same principle, was pronounced shortly before by the High Court, in another case in relation to the citation of the pannel. Two men were there charged with robbery, or

<sup>1</sup> Shaw, No. 195.

with assault *aggravated* by the intent to rob. Their citation called upon them to stand trial for "robbery, or assault, with intent to rob, in manner mentioned in the said indictment." It was objected, that the intent to rob was stated as an aggravation only in the indictment, but as a substantive crime in the citation, and therefore that the one was inapplicable to the other. The Court refused to listen to the answer, that the addition "in manner mentioned in the said indictment," in effect rendered the specification in the citation the same as in the libel, and, holding the distinction between intent as a substantive part of the crime, and as an aggravation, to be thoroughly established, sustained the objection, how thin and critical soever, as a sufficient bar to the pannel's pleading to that part of the charge.<sup>1</sup>

It is no less necessary to attend to the introduction of the minor, if an alternative charge is preferred in the libel, and different crimes are set forth in the major of only one of which it is possible that the pannel can have been guilty. In such a case the minor must charge him alternatively with the one or the other crime; and if it affirms in general that he is guilty of the said crimes, without specifying one or other of them, the indictment is plainly objectionable. Thus, if theft, as also robbery, rape, as also assault, especially when committed with intent to ravish, are stated in the major, and it is intended to charge the pannel with *one or other* of these crimes, not *both*, on different occasions, it is necessary to charge him with being guilty of the "said crime of robbery, or the said crime of theft," in the first case, and "of the said crime of rape, or of the said crime of assault, aggravated, and with intent as aforesaid, in the second." Many cases have occurred in which an error of this description has been held fatal to an indictment.

18. It is indispensable that the pannel be charged with being guilty of the crime for which he is indicted, "actor, or art and part."

It only remains to add, that the words "are guilty of the said crime, actor, or art and part," seem to be not merely an usual, but a necessary and indispensable addition to this part of the charge. For the statute 1592, c. 153, has declared, "That in all time

<sup>1</sup> Alexander Wright and William Moffat, Feb. 26, 1827; Syme, 136.

coming all criminal libels shall containe that persones complained on or airt and part of the crimes libelled, quhilk shall be relevant to accuse them thereof; swa that no exception or objection take awaie that part of the libel in time cumming." "Under the broad and positive injunction of this law," says Mr Hume, "a general charge of art and part became an ordinary, or rather *a necessary* and unexceptionable member of *all* criminal libels, without exception even of those where, according to the story told in the libel, there may seem to be no room, strictly speaking, for a charge of accession."<sup>1</sup> The late statute, which abolished the At least clause, declares, "That when the charge of art and part is set forth in the outset of a criminal libel, it shall not be necessary to repeat that charge in the latter part thereof, according to the form usually observed in the clause usually commencing with the words At least; and that it shall be competent altogether to omit the said clause, any law or practice to the contrary notwithstanding."<sup>2</sup> Under these authorities it seems indispensable that the clause of art and part should appear in this part of the libel; it is not sufficient to say, that it may be omitted at the prosecutor's pleasure, and that if not inserted, he merely loses the benefit of proving accession; for where the old statute expressly enjoins that this clause shall form a part of *all* criminal libels, and the recent one merely declares, that when set forth in the outset of the libel it may be dispensed with at its close, and in consequence of this permission, the At least clause has gone out of practice; the inference seems unavoidable, that if this clause is altogether omitted, the libel is drawn in the face of the statute, and can receive the sanction of no criminal Court whatsoever. It has been found, accordingly, that when the words "are guilty of the said crime, actor, or art and part," were omitted, the libel was irrelevant.<sup>3</sup>

19. The minor proposition must in general specify the time when the offence was committed, as nearly as it can be ascertained; a latitude of three months being allowed to the prosecutor, within which he may prove the facts charged, if so stated in the libel.

The *subsumption* of the minor proposition of the libel, as it is

<sup>1</sup> Hume, ii. 230.—<sup>2</sup> 9 Geo. IV. c. 29, § 9.—<sup>3</sup> Elizabeth Buchanan, Perth, Autumn 1821; unreported.



called, or the narrative of the facts with which the pannel's guilt is inferred, begins in general with these words, " In so far as on the 15th day of July 1830, or on one or other of the days of that month, or of June immediately preceding, or of July immediately following, you, the said A B, did," &c., and then follows the description of the place where the crime was committed. In this particular of the time, a greater latitude is allowed to the prosecutor than in any other part of the libel; for he must be quite specific in general, both as to the place where it was committed, and the mode of its perpetration; and no alternative of another place can in the general case be admitted; whereas he may prove the crime on any one of these months specified in the libel.<sup>1</sup> The reason of the difference is founded in the experienced difference of the memory of witnesses in relation to *time*, and any other particular involved in the commission of a crime. They are in general extremely distinct as to the place where it was committed, and the circumstances and mode of its perpetration; and they can speak to these particulars with sufficient precision even after the lapse of years; but, as to time, they become after a short time beyond measure confused and contradictory, to an extent which would be *a priori* incredible to one not practically acquainted with these matters. They are frequently, after a few months, unable to say whether an event took place in summer or winter, seed-time or harvest, though they are quite distinct as to the place and circumstances of its commission. A signal proof of this occurred lately at Inverness, in a case where the pannels were charged in 1830 with a murder committed in 1825. The witnesses were all extremely distinct as to the facts of the murder, and the appearances exhibited by the dead body; but there was an irreconcilable difference between them as to the year when it occurred. Twenty or thirty, many of them assigning apparently valid causes of knowledge, fixed it in 1825; as many, with as good reasons for remembering the time, in 1826; and when at length an entry in the books of the vessel, on board of which the deceased was a seaman, fixed the time in 1825, a similar diversity arose as to the time when the principal witness, a servant-maid of the pannel's, was in his service, and that in the end involved the evidence in such contradictions as proved fatal to the prosecution.<sup>2</sup>

<sup>1</sup> Hume, ii. 220, 221.—<sup>2</sup> Durrand, Henderson, and Jamieson, Inverness, Sept. 1830; ante, l. 85.

The latitude of three months has now for a very long time been fixed as that within which the prosecutor may prove his libel; and to secure against the chance of error, one month is usually selected immediately before, and one immediately after that in which the crime is supposed to have been committed.<sup>1</sup> It need hardly be observed, that except in some special cases, which will be immediately noticed, there is no greater latitude allowed to the prosecutor, and most certainly that a libel which does not specify any <sup>time</sup> time at all is clearly bad.<sup>2</sup> And in truth, even in cases where this latitude is taken, the pannel suffers no sort of injustice thereby; for the day on which the act is supposed to have been committed, is always specified, and if the defence resolves itself into an *alibi*, so as to make time a matter of importance, it is incumbent on the prosecutor to fix down the crime on the very day libelled, and even at the hour specified by his witnesses; and if he is proved to have been elsewhere at that day and hour, so as to render the commission of the crime impossible, he will obtain an acquittal.<sup>3</sup> But of the intention to rest the case on *alibi*, or a dispute as to time, due notice must be given to the prosecutor in special defences; and in ordinary cases, if this is not done, and the prisoner has thereby intimated that his defence does not rest on any thing regarding time, the offence may be proved not merely on the day libelled, but at any time within the three months. In a late case, where the defence was *alibi*, which was stated in the special defences, the prosecutor, before the proof began, moved that the pannel should be obliged to state where he was on the day libelled, but this the Court refused, as the prosecutor had not set forth the special day of the theft. After the proof for the prosecution was concluded, the pannel moved that the prosecutor should now fix on the day of the theft, but this the Court also refused.<sup>4</sup>

20. In special cases, where the precise time when the crime was committed cannot be ascertained, and in some cases of theft, reset, and forgery, it is competent to take a much wider latitude, and to charge the offence as ha-

<sup>1</sup> Hume, ii. 221.—<sup>2</sup> John Love and Others, May 4, 1687; Hume, ii. 220; Shaw, No. 30; and Robert Wylie, Glasgow, April 1820, where a libel for reset was found not relevant, no time being specified either of the first reset, or the finding in possession of the stolen goods.—<sup>3</sup> Hume, ii. 221.—<sup>4</sup> Charles Small, Sept. 29, 1831; Jedburgh, Justice-Clerk's MS.

ving been committed within the narrowest limits which the circumstances of the case will admit.

There are many crimes which, from their very nature, cannot be fixed down to any particular time. Put the case, that things are stolen from a house at a time when all the family are from home, and that it is discovered, for the first time, when they return, perhaps after the lapse of months or even years after their departure. In such a case no other mode of libelling can, by possibility, be adopted, but that of laying it at same time to the prosecutor unknown in the interval, between the time the family left the house and their return to it;<sup>1</sup> and this form, accordingly, is constantly adopted, and admitted by the Court in such cases.<sup>2</sup> Thus the theft of hides was sustained as a charge against a tanner's servant, though the only specification of the time was in November or December 1785, or January 1786.<sup>3</sup> The like course was adopted where the time specified was somewhere in three months in regard to the theft of potatoes growing in the fields.<sup>4</sup> A charge of theft committed somewhere between the 2d January and the 10th April, was held good in a very recent case.<sup>5</sup> The like, where the time set forth was on various occasions in July 1824.<sup>6</sup> A latitude of five months was taken and sustained in another case.<sup>7</sup> And where the pannel had been in the master's service, from whom the theft was charged as committed, the indictment was sustained as relevant, though it specified the time no other way than during five months of that occupation.<sup>8</sup> A latitude of five months was taken and held competent in a charge of stealing from a shop and cellar, by a person in the service of the owner.<sup>9</sup> But in all these cases, as there is a greater latitude than usual assumed, it is incumbent on the prosecutor to state on the face of his libel such circumstances as warrant this deviation from the usual practice, as that the theft was committed from an unoccupied house, or by a clerk or servant when in the employment of his master; and unless this is done, it is doubtful whether a charge in such terms would be sustained. In a late instance the time in a case of sheep-steal-

<sup>1</sup> Hume, ii. 221.—<sup>2</sup> Wylie, Dunsmore, and Others, Glasgow, Autumn 1823; unreported.—<sup>3</sup> James Lillie, July 10, 1786; Hume, ii. 222.—<sup>4</sup> Andrew Young, Dec. 26, 1800, *ibid.*—<sup>5</sup> Margaret Robertson, July 15, 1826.—<sup>6</sup> Isaac Simpkins, Nov. 10, 1824.—<sup>7</sup> James Ross, Dec. 23, 1818.—<sup>8</sup> Rebecca Connell, June 6, 1824.—<sup>9</sup> Hugh Stenhouse, Jan. 10, 1822; unreported; Justice-Clerk's MS.



ing was laid thus :—“ On the 7th September 1819, or on one or other of the days of that month, or of the months intervening between the month of June 1819, when the sheep on the farm were shorn and counted over, and the 1st November 1819, when the sheep on the said farm and grazings were again counted.” This was held relevant ; the Justice-Clerk declaring, that if the Court were to hold otherwise, it would frequently amount to declaring impunity to that species of crime.<sup>1</sup>

In like manner in regard to reset. There are several reasons which render it indispensable that a greater latitude in point of time should be admitted here than in ordinary cases, because the precise period when the crime was committed cannot be known, and the only points which the prosecutor can distinctly fix, are that of the theft where it is known, and that of finding the goods in the pannel’s possession.<sup>2</sup> A latitude of five months was accordingly admitted in the cases of Johnston and Wylie, Glasgow, September 1823 ; and in a still later instance, the objection that a latitude of *five years* was taken for the time of the reset, was repelled, in respect the prosecutor had given all the information which he himself possessed, and that a more minute specification was impossible.<sup>3</sup> The crime was charged as committed in July 1818, and the reset as then “ or at some other time to the prosecutor unknown,” which left it open to 1823, when she was apprehended.

On the same principle in cases of forgery. It is frequently impossible to fix the place where, or the time when, the fabrication of the forged instrument was effected, which is usually known only to the pannel himself ; and the only matter which is usually known to the prosecutor is the time and place of the uttering. This last matter must be specifically libelled as to time ; but in the former it is indispensable, and has become matter of established practice, that a much wider range should be allowed to the prosecutor. Thus, the range of all the months from January to August 1730 was assumed, without challenge, in an old case ;<sup>4</sup> in another, the range of the years 1781 and 1782 is taken for the fabrication ;<sup>5</sup> and in a third, while the time of the fabricating the plates is not at all mentioned, the whole years 1777 and 1778 are assumed as the time within which the impressions were thrown off.<sup>6</sup> More lately, the forgery was charged as having been com-

<sup>1</sup> Alexander Reid ; Perth, Spring 1820 ; Justice-Clerk’s MS.—<sup>2</sup> Hume, ii. 221.

—<sup>3</sup> Margaret Boug, Jan. 19, 1824 ; Justice-Clerk’s MS.—<sup>4</sup> Campbell’s Case, March 26, 1731.—<sup>5</sup> John Macaffa, Nov. 1782.—<sup>6</sup> David Reid, Aug. 12, 1780.

mitted in the year 1811, and the year 1816, and in the months of January, February, and March 1817, which was admitted without objection.<sup>1</sup> It has become usual lately to libel the time as nearly as it can be fixed, or within the limits which can be assigned for it, and to add, or “at some other time to the prosecutor unknown;” and this style has been sustained in several cases which met with the greatest consideration.<sup>2</sup>

In crimes, also, which are committed through a long course of time, and whose atrocity depends in some degree on their long continuance, as incest, adultery, lewd and indecent practices with female pupils, or the like, a latitude still greater has, from the earliest time, been admitted in our practice.<sup>3</sup> In several older cases of this description, the crime was described in the libel generally, as having been committed through several years;<sup>4</sup> amounting in some instances to no less than five years. More lately, in a case of lewd and indecent practices by a schoolmaster with his pupils, the time was laid generally, as in the years from May 1757 to April 1758; and this was sustained, and sent to an assize:<sup>5</sup> and in another instance, where the latitude was strongly objected to, the acts of incest libelled on were charged as having been committed from January to June 1765; but the Court sustained the indictment, with no other restrictions in point of time.<sup>6</sup> In the case of John Bell, 2d December 1777, which was also one of a schoolmaster charged with lewd and indecent practices with his female pupils, the libel included a range of six years, which was strongly and justly objected to; but the Court “repelled the objection taken to the latitude of the libel, so far as it charges the several acts, from which the crime is inferred to have been committed, through the period of six years; but found that the prosecutor ought to specify, so far as his information goes, the particular times and years *when*, or *within which*, the several criminal acts were done and committed, and desert the diet of the present libel *pro loco et tempore*.<sup>7</sup> In general, however, it is true of all those cases where an extraordinary latitude in point of time is allowed, that the law allows it unwillingly, and from necessity only; and therefore, that it will not sustain such a latitude where, by due diligence, a more accurate and specific detail could have been given, or where there is nothing appears, either from what

<sup>1</sup> William M'Kay and James M'Neil, April 2, 1817; unreported.—<sup>2</sup> Malcolm Gillespie, Aberdeen, Sept. 1827.—<sup>3</sup> Hume, ii. 222, 223.—<sup>4</sup> Major Weir, April 9, 1670; Margaret Haitly, Jan. 12, 1674; James Mitchell, March 1, 1675; David Hog, July 8, 1700.—<sup>5</sup> Forbes's Case, July 24, 1758.—<sup>6</sup> Nairn and Ogilvie, Aug. 5, 1765; Hume, ii. 223.—<sup>7</sup> John Bell, Dec. 2, 1777; Hume, ii. 224.

is set forth on the face of the libel, or from the nature of the facts charged, to warrant such a departure from the ordinary rule.<sup>1</sup>

In cases where the criminal act charged is libelled as having taken place at the distance of many years from that of the service of the indictment, it has been held, in several older cases, that a much greater latitude in point of time may be allowed: an indulgence which was justly admitted, from the experienced difficulty of getting witnesses to speak with precision to time after the lapse of such a period.<sup>2</sup> Thus, Finlay M'Gibbon was sent to trial in 1669, on a libel which charged a murder as committed somewhere in 1664, 1665, or 1666.<sup>2</sup> William Bruce, in 1670, was tried for three murders done in 1642, 1643, or 1644:<sup>4</sup> and Ludovick More, in 1725, for an act of robbery charged as committed in 1711 or 1712:<sup>5</sup> and Charles Cunningham, tried in March 1783, is sent to an assize on a libel charging the crime as committed in 1780.<sup>6</sup> Still, even in these circumstances, if the pannel resort to the plea of *alibi*, or make out that time is material for his defence, the prosecutor will be compelled to fix the time more nearly; and if he cannot do so, owing to the lapse of time, that is a disadvantage inherent in his situation, which cannot relieve him from the necessity of obviating the prisoner's defence.<sup>7</sup>

21. The libel must be quite specific in the general case, as to the place where the crime was committed—which must be specified by name, parish, and county, or in some equivalent way, so as to leave no uncertainty in this particular; and if the place specified turn out on the proof not to be the one where the offence was committed, the pannel must be acquitted.

There is no part of an indictment where precision is more required than in describing the *locus delicti*; because any inaccuracy, how trivial soever, is there generally fatal to the charge. The reason of this excessive strictness is twofold. In the first place, the interest of public justice requires that there should be no dubiety or hesitation as to the place where the crime charged is stated to have been committed, both to distinguish that parti-

<sup>1</sup> Hume, ii. 224.—<sup>2</sup> Ibid. ii. 223.—<sup>3</sup> Finlay M'Gibbon, Dec. 2, 1669.—<sup>4</sup> William Bruce, April 15, 1670.—<sup>5</sup> Ludovick More, Jan. 29, 1726.—<sup>6</sup> Charles Cunningham, March 1783.—<sup>7</sup> Hume, ii. 224.



cular transgression from any other, and to afford the pannel, if he is really not guilty, the means of establishing, by proof of *alibi*, his innocence of the charge. In the next place, the prosecutor has positively affirmed in his libel, that the pannel was guilty on the particular spot libelled, and the jury are only charged with the enquiry, whether the crime there libelled as having been committed was brought about by him. If, therefore, it comes out on the proof, that a crime was really committed by the prisoner in the manner set forth in the indictment, but that it was perpetrated in a different place, or in a different street or parish, then the crime *charged* is not proved, and the pannel, on the jury's oath, must be found not guilty of the charge preferred before them. This principle will be found to justify all the strictness in this particular for which our practice is distinguished, and which occasionally has in so signal a manner defeated the ends of justice. The remedy for it is to be found in the adoption of another principle which has not been established hitherto in our practice, but for which abundant foundation exists both in reason and justice, viz. that though acquitted of the crime charged in that *locus*, he should still be amenable to trial and punishment for the real offence committed in another place, and against which the proceedings in the first trial should be held no bar whatever, on the very ground on which the first acquittal is founded. But this is a mere speculation, unsupported hitherto by any authority, and to which no weight should be attached till it is so confirmed.

The manner in which the *locus* is in general described is in these words:—"You the said A. B. did, within the house then or lately occupied by John Johnston, saddler, situated at Colinton, in the parish of Colinton and county of Edinburgh," or "on the High Street of Edinburgh." The name of the place where the offence was committed is *inter essentialia* of the description, and it is usual to add, for the greater distinctness, the name of the owner of the house, field, &c., where it occurred, especially if it be situated in a street or village, where no other means of designating it can be given. But it is not necessary to give the name of any person whatever, if the place be sufficiently designated without it; as if it occurred on the street of a town, the quay of a harbour, the main-road through a village, &c. But if this be not the case, it is hardly possible to designate the place sufficiently, but by the name either of a house, if it has a known appellation,

as Dalkeith House, Hamilton Palace, Dunkeld House, Taymouth Castle, or the like, or by the name of the owner as well as that of the house, if it is not a well known mansion. Where the crime is committed, which is often the case, on a particular road, the course is to describe the place to which the road leads, and the distance of the *locus delicti*, as nearly as it can be gathered, from some known village, place, or house on it. If it is on a field, the name of the farm, of which it is a part, is described, with its tenant, and that of the field, if it has any; if not, by its local situation as nearly as can be done, with the addition, in either case, of the parish and county.<sup>1</sup>

The rule in general is, that an indictment shall not be good if it is not explicit in this article, but either only hints at the *locus*, or leaves it to be inferred from other parts of the story, or does not at all describe it, or does so in so loose and inaccurate a way as may be conceived to lay the pannel under any disadvantage in conducting his defence.<sup>2</sup> Numerous decisions have established this principle in almost every branch of that part of the libel. Thus, in the noted case of Fountainbridge, the libel described the *locus* thus:—"Having gone to that public highway which leads by Fountainbridge, westward from the City of Edinburgh, and having there met with George Williamson, messenger in Edinburgh, and William Wallace, stabler there, on horseback, on their way to the said City of Edinburgh, a little to the westward of the said village of Fountainbridge, the said David Dalgleish did seize the bridle of the horse on which the said George Williamson was riding," &c. This was held by the Court to be an insufficient description, in respect neither parish nor county were added, and that the distance westward from Fountainbridge was not given.<sup>3</sup> It seems sufficiently clear, however, that this description was sufficient; the line of road being given, the village of Fountainbridge, a known place on that road, as the *terminus a quo*, and the distance specified as a short distance to the westward of that village. It has been unanimously agreed upon the Bench,

<sup>1</sup> The following are examples of the mode of libelling in these cases:—On the "high-road leading from Edinburgh to Haddington, and on or near that part of the said high-road, which is a quarter of a mile or thereby to the south-east of Tranent, in the parish of Tranent, and county of East Lothian." And, "on a field of the farm of Colinton Mains, called the Low Park, then or lately occupied by William Laing, farmer there, situated in the parish of Colinton and county of Edinburgh.—<sup>2</sup> Hume, ii. 209.—<sup>3</sup> David Dalgleish, March 13, 1789; Hume, ii. 209.

accordingly, in several late cases, that the case of Fountainbridge was judged with excessive strictness, and that the parish need not be added, if the place is sufficiently fixed otherwise.<sup>1</sup> This was confirmed by the late Lord Meadowbank and Lord Justice-Clerk Boyle in a subsequent case, where these learned Judges agreed that a libel would be sufficient which bore as a locus, "the wheat-field near the Ward Mill, at the Townhead of Arbroath, in the county of Forfar," without any mention of the parish.<sup>2</sup>

On these principles, it has become usual of late years to drop the description of the parish altogether in those great towns where the boundaries of the parishes are seldom generally known, and places are always designated by the names of streets or quarters of the city, and not by these ecclesiastical divisions. Thus it has been held, that the *locus* of a theft from a shop was sufficiently described, when it was set forth as "the shop then or lately occupied by William Falconer, spirit-dealer, situated in the High Street of Edinburgh," without the addition of either the parish or county.<sup>3</sup> So also the *locus* was held good described as "within the shop situated in Canongate of Edinburgh, then or lately occupied," &c., though it was argued, that it was not said whether by the word "Canongate," the parish of Canongate or the burgh of Canongate was intended; the Court holding that it meant the latter.<sup>4</sup> In like manner, a robbery was held to be sufficiently libelled as to place, where it described the crime as committed "in the Gallowgate of Glasgow," although it was argued that that street was a mile long, and larger than many small burghs.<sup>5</sup> Nay, so far is this principle carried, that it has been found, that even where a street in a city is described as situated in a wrong parish, it is no objection, if the situation of the street in other respects is correctly given.<sup>6</sup> The reverse of this obtains in landward parishes; and the reason of the distinction is, that in towns, parishes are arbitrarily divided according to the convenience of the Magistrates, or Collectors of Rates, and do not form the index by which houses or streets are distinguished from each other; whereas in country parishes their boundaries are fixed, and form the usual addition to the description of the situation of every place whatever. Even an error in the name of a

<sup>1</sup> Particularly in *Peter Gordon*, Nov. 16, 1812; Justice-Clerk's MS., and *Hume*, ii. 210.—<sup>2</sup> *Peter Gordon*, Nov. 16, 1812; *Ibid.*—<sup>3</sup> *Sinclair and Nicolson*, May 29, 1827; Justice-Clerk's MS.—<sup>4</sup> *William M'Laren*, Jan. 26, 1826; *Ibid.*—<sup>5</sup> *William Sinclair and Others*, Glasgow, Spring 1825.—<sup>6</sup> *John Auld and Others*, July 18, 1826; unreported.



street will not in every case prove fatal to the prosecution, if the street in which the crime is proved to have been committed lies in the same line with, and may be held a continuation, though sometimes named differently from the one libelled. Thus, in a case at Glasgow of robbery, which was charged as committed in *Shaw Street* of Greenock, while the proof established that it was committed in *Low Street* of Greenock, and no evidence was led on the prosecutor's part to prove that they were the same, it was objected to the jury, that the accused must be acquitted, on the ground that the robbery proved was not the robbery libelled; but this was overruled by Lord Justice-Clerk Boyle, and the accused convicted and transported, upon the ground that the evidence established that the two streets were in one line, and sometimes called by the same name; and that no cross-examination of the witnesses for the Crown had taken place to put the prosecutor on his guard as to the discrepancy relied on in defence.<sup>1</sup>

22. The parish need not be added in rural, nor the street in town districts, but if either are given they must be correct.

The rule in country places is, that the parish need not be added, if the place can be sufficiently marked, which is not usually the case without it; but that, if it is added, it must be proved, and any error in that particular will be fatal to the charge.<sup>2</sup> A different decision was indeed once given in the case of *Torrieburn*, where the *locus* laid was "a little room at the end of a hay-loft, contiguous to the dwelling-house of the late Lord Colville, within the parish of *Torrieburn* and county of *Perth*." It came out in the course of the trial that *Torrieburn* was in *Fifeshire*, though in the immediate vicinity of the two counties, and upon this it was objected that an acquittal must follow. But the Court sustained the answer, that the meaning was obvious, and the addition of the county, though unnecessary, could not vitiate the libel, as the pannel had not pointed out any other *Torrieburn* than that at which Lord Colville resided.<sup>3</sup> But this decision, pronounced in the infancy of our jurisprudence in this particular, may now be fairly set down as erroneous; not only from the able and decisive reasoning of Baron Hume on the subject,<sup>4</sup> but from the opinion

<sup>1</sup> Peter Rice, Glasgow, Autumn 1823; unreported.—<sup>2</sup> Hume, ii. 208.—<sup>3</sup> Elspeth Robertson, Nov. 7, 1728; Hume, ii. 208.—<sup>4</sup> Hume, ii. 208.

expressed by the Court in a subsequent case which received the most deliberate judgment. It there appeared that the libel described the offence as committed “near the Ward Mill, at the Townhead of Arbroath, in the parish of Arbroath and shire of Forfar, and in a field of wheat belonging to Lewis Evans, tacksman of the said mill.” The jury found the pannels guilty art and part of the crimes libelled, but that the same were *not* committed in the *parish* of Arbroath. In fact, it had been proved in evidence, that they were committed in the adjoining parish of St Vigean’s. The case was certified from the Perth circuit; and the Court were of opinion, that when the libel specifies a parish, even, as in this instance, unnecessarily, it must do so correctly; that the verdict here contradicted the charge, and destroyed the individuality of the crime, as it found it was committed in a different parish from that libelled, and therefore that no sentence could follow on the verdict.<sup>1</sup>

This decision has ever since been held to have formed the law on the subject. Accordingly, in a subsequent case, where the libel stated the crime as having been committed at a certain place in the parish of *Peterculter*, and it turned out on the proof that it was in the parish of Banchory Devenick, the advocate-depute at once gave up the case.<sup>2</sup> The same course was adopted, with the approbation of the Court, in a subsequent case, where the act of murder libelled was charged as committed at Dalkeith, in a different parish and county from that which came out in the proof, though in the immediate vicinity of it, the Court holding that where a parish is added, however unnecessarily, it must be correct; and that although the description of the *locus* was sufficient without the parish and county, yet, as they were in the libel with which the jury was charged, they could return no other verdict but that of not guilty of the crime before them.<sup>3</sup>

The same principle has been applied to the analogous cases of the libel, describing the *locus* as in a particular close, or street, or square, and it turning out on the proof, that truly the crime was committed in a different close, or street, or square. Thus, where the *locus* of a murder, by poisoning, was laid in a close in Saltmarket Street of Glasgow, and it appeared that

<sup>1</sup> Peter Gordon, Perth, Sept. 28, 1812; Hume, ii. 208.—<sup>2</sup> Robert Fleming, Aberdeen, September 1821; unreported.—<sup>3</sup> Thomas M’Pherson, Inverness, Spring 1824; per Lord Pitmilley.

the fatal deed was done on the pavement of the broad street called the Saltmarket itself, the prosecutor, by the directions of the Bench, gave up the case.<sup>1</sup> The same was done under the direction of Lord Moncreiff, in a case where the theft was charged as committed “in Bridgegate Street of Glasgow, and at or near that part of the said street, which is situated near Goose-dub Street,” and it turned out that it was committed *in* Goose-dub Street, *near* Bridgegate Street.<sup>2</sup> So also, where an act of robbery and murder was described as having been committed “on the High Street of Edinburgh, near the head of the Fleshmarket Close,” and the proof established that it took place within the close, and at the entrance of a common stair there, the Lord Advocate abandoned the charge: though it may be doubted whether so slight a discrepancy should on principle be held fatal to a libel.<sup>3</sup> On the same principle, an indictment was abandoned by the prosecutor, with the approbation of Lord Mackenzie, which charged various acts of rioting as committed “on the High Street of Brechin, and in the vicinity of the Swan Inn, then or lately in the occupation of John Ross, vintner, situated in High Street aforesaid,” as it appeared from the proof, that the Swan Inn was situated, not in High Street, but in the Mealmarket of Brechin.<sup>4</sup> So strict a rule, however, has not been always applied by the Court in later instances. Thus, where the prosecutor had somewhat unnecessarily described a robbery as having been “committed on the *footpath* of the road leading from Shawfield Toll to Little Govan, in the parish of Govan,” &c., and it turned out in evidence, that though the assault was commenced on the footpath, yet it was continued on the road, and that it was on the road that the robbery took place, the objection was overruled by Lord Justice-Clerk Boyle, upon the ground that the assault was truly commenced on the footpath, and that, being done with intent to rob, the crime commenced there.<sup>5</sup> In like manner, in another case in Glasgow, where the robbery was described as having been committed “on the High Street of Glasgow,” and it turned out on the proof, that though the hustling of the person robbed began on the High Street, yet the final robbery took place in a close at right angles from that street, and about twenty yards down, the objection was overruled by Lords

<sup>1</sup> Barbara Wilson, Sept. 1827, Glasgow.—<sup>2</sup> Logue’s Case, Glasgow, Jan. 1831.—

<sup>3</sup> Skelton, March 3, 1812; Hume, ii. 210.—<sup>4</sup> Fawns, Young, and Others, Perth, Sept. 10, 1830.—<sup>5</sup> Edward McCaffie and Others, Glasgow, Autumn 1823; unreported on this point.



Justice-Clerk Boyle and Moncreiff, partly on the ground that the assault was commenced on the High Street, and partly that the closes in the High Street of that city pass in common parlance under the name of the street itself.<sup>1</sup>

23. The *locus* must be described in such a way as to distinguish it accurately, without reference to any other part of the indictment; and unless this is done, it will be rejected as insufficient.

It is not sufficient that the description of the *locus* be accurate, so far as it goes; it must also be full and explicit, containing such an enumeration of particulars, as completely distinguishes the place in question from all others in the neighbourhood. If, therefore, any important particular be omitted, even manifestly *per incuriam*, the description will be held insufficient, and the indictment irrelevant. On this principle, where the indictment specified that the murder in question happened in the pannel's dwelling-house, but it was not said in the description of the *locus* where that dwelling-house was, and the indictment only described the pannel as "late ale-seller in Dundee," it was held by Lord Justice-Clerk Boyle, that the description was insufficient, although the pannel could be at no loss to know where his dwelling-house was.<sup>2</sup> In like manner, where six acts of uttering forged notes were charged, all in the city of Edinburgh; and the sixth was set forth as having taken place "in the immediate vicinity of the shop in South St Andrew Street, occupied by John Laing, saddler," without adding *Edinburgh*, the Court found this charge irrelevantly laid.<sup>3</sup> So also, when several charges in an indictment were laid with the *locus* in "the Bridge Vennel of Wigton," or in gardens behind certain houses in "Wigton," the Court, upon a certification from the South Circuit, found that these charges were irrelevantly drawn, in respect that the word Wigton was equivocal, and might either mean the town of Wigton in Scotland, or the county of that name there, or the town of Wigtown, in Cumberland.<sup>4</sup> On the same principle, where an indictment charged an act of theft, by housebreaking, as committed "in the house then or lately occupied by Mrs Russell, residing in Salisbury Street, in or near

<sup>1</sup> Edward Bruce and Others, Glasgow, Spring 1828; unreported.—<sup>2</sup> Angus Cameron, May 6, 1811; Hume, ii. 210.—<sup>3</sup> Thomas Pearson, March 15, 1821; Shaw, No. 18.—<sup>4</sup> James Bodan, May 15, 1823; Shaw, No. 92.

Edinburgh," the very critical objection was sustained for the pannel, that it did not say where the house was *situated* that was broken into, and that although Mrs Russell was described as *residing* in Salisbury Street, in or near Edinburgh, yet it was not said that the house broken into was that in which she resided, and that it might have been occupied by her for other purposes besides a dwelling-house.<sup>1</sup> It may reasonably be doubted, however, whether this last case was not adjudged with excessive strictness, the fair presumption being, where a dwelling-house is described as occupied by a particular person, residing in such a street, that she resides in the house so situated and occupied. In like manner, in a case where the *locus* of the exposure of a child was laid "within a field or park called Bannaty Mill Park, on the farm of Bannaty Mill there, and now or lately occupied by George Swan, farmer in Strathmiglo, in the parish of Strathmiglo, and county of Fife," the objection was sustained by Lords Pitmilley and Hermand, that it was not said where the farm of Bannaty Mill was *situated*; but only that it was occupied by George Swan in Strathmiglo, in the parish of Strathmiglo; whereas Swan might reside at Strathmiglo, and occupy a farm in a different parish and county. This case is said by Baron Hume to involve an *apparent* ambiguity only; and, in truth, the words "parish of Strathmiglo, and county of Fife," are more naturally to be construed in the description of the *locus* as connected with the situation of the *field libelled*, than of the *occupier* of that field; and if that view be adopted, there was no defect whatever in the description.<sup>2</sup> But whatever view may be entertained of this subject, it is quite clear that the word "situated" should never be omitted in the description of a *locus*, and the style should be "the house then or lately occupied by John Thomson, *situated* in Candlemaker Row, in or near Edinburgh," which effectually removes all ambiguity between the words intended to apply to the *locus*, and those meant to describe the residence of its owner.

Where a man has a shop as well as a house, and the shop is to be described as the *locus* of certain criminal acts, *its situation* must be described as well as that of the house where the owner dwells. An error of this description proved fatal to an indictment which recently came under consideration at Glasgow. Various acts of riot were there charged, some committed in the neigh-

<sup>1</sup> Daniel Brown, John Kerr, and Others, Dec. 19, 1825; Justice-Clerk's MS.—

<sup>2</sup> John Buchanan, April 20, 1824; Shaw, No. 122.

bourhood of the house of John Toshock, others in the neighbourhood of his *shop*; so far as the house was concerned, the description was held sufficient, but as there neither was a *locus* given for the shop, nor was it said that it adjoined the house, the charges in that vicinity were judged irrelevant.<sup>1</sup> Where a theft was charged as committed “from a hedge at the end of a house then occupied by George Hare, labourer, at Dalhousie Mains, in the parish of Cockpen, and county of Edinburgh,” the objection was sustained that the place described was not where the house of Hare was situated, but where he worked; Dalhousie Mains being the farm on which he was employed; and this decision seems founded on strict legal principle.<sup>2</sup>

These decisions will probably be deemed by every rational person to have carried the strict rule of law, at least as far as reason can approve, or principle has required. On the other hand a variety of decisions have been pronounced by the Court, tending to establish that the rule is to be understood in a reasonable and not a captious and judaical sense; and that if such a description is given as truly distinguishes the place from any other, and can leave no ambiguity as to the place intended, nothing more can be required.<sup>3</sup> On this principle it has for some time been held, that it is sufficient if the place in a town is described by the street, followed by “in or near” the city of which it forms a part, without specifying either the parish, or whether it is within the royalty, or forms one of the contiguous suburbs, as the Pleasance, Canongate, or Portsburgh of Edinburgh; or the Gorbals, Hutchison Town, or Anderston of Glasgow. This style has been constantly adopted for five years, and is uniformly sustained by the Court; though the objections to it, being deemed untenable, were immediately overruled, and are not reported. On the same principle, the *locus* of a theft was held to be sufficiently laid by the High Court, which described it as committed “within or near an entry or common passage leading from, and situated in or adjoining to, West Nicolson Street, in or near Edinburgh,” without specifying the name of the entrance, as that was a small street, having few such leading from it.<sup>4</sup> So, also, a theft described as committed “within the house then or lately possessed by David Hay, innkeeper, on the Old Bridge of

<sup>1</sup> Cunningham, Carmichael, and Others, Sept. 16, 1816; Justice-Clerk's MS.—

<sup>2</sup> John Nisbet, July 17, 1820; Justice-Clerk's MS.—<sup>3</sup> Hume, ii. 211.—<sup>4</sup> William Drygin, Dec. 1, 1828; unreported.



Ayr," was held sufficient.<sup>1</sup> Wherever, too, there is any doubt as to whether a place is situated in one of two parishes, it is competent, and indeed unavoidable, to libel it as in one or other of these parishes ;<sup>2</sup> and an objection of this sort was repelled by the Lord Justice-Clerk Boyle, at Aberdeen, in a case where the uttering of some forged notes was laid at a particular place "in the parish of Banchory Devenick, or adjoining parish of Peterculter, and county of Aberdeen."<sup>3</sup>

24. In cases of sheep-stealing, reset of theft, pocket-picking, forgery, theft from goods in a state of transitus, or other crimes of a peculiarly occult nature, a much wider latitude is indulged to the prosecutor, and the description is sufficient if it gives all the specification of which the circumstances will admit, and which is within his power.

The strict rules in regard to the description of the *locus delicti* cannot be applied to many offences, by reason of the extensive bounds over which the subjects stole were accustomed to range, the secret manner in which the crime is committed, and the impossibility of the prosecutor obtaining accurate information as to the places where the early stages of the crime were committed. Thus, in cases of sheep-stealing or cattle-stealing, it frequently happens that prior to the theft the sheep or oxen were ranging over a hill farm or mountain pasture, and the depredation is only discovered at the distance of days or weeks after the animals have been carried off. To require that the prosecutor in such case is to libel and prove the particular part of the range from which the theft was committed, would just be to proclaim impunity to offences of this description, though they are among the most dangerous and easily committed which exist. In such cases, therefore, our practice permits the prosecutor to describe the *locus* in such a manner as to embrace the range within which the animals were moving when the theft was committed; and is satisfied if he gives the pannel all the information on the subject in his power, and does not withhold what he either possesses, or by a reasonable degree of activity might have discovered. Thus, where a libel bore that the sheep were carried off "from a field on the farm of Mount Pleasant, in the

<sup>1</sup> Dempster and M'Pherson, Ayr, May 1, 1822; unreported.—<sup>2</sup> Tough and Fortay, Feb. 22, 1806; Hume, ii. 214; Robert Stedman, Feb. 11, 1782; *ibid.*—<sup>3</sup> Charles O'Neil, Aberdeen, Autumn 1824.

parish of," &c., and it was objected that the "farm" was too wide a range, and that the prosecutor was bound to specify the name of the particular field, at least in an enclosed farm, where the crime was committed, the objection was unanimously overruled by the whole Court, upon the ground that the changes of sheep from one field to another are so frequent, that it would be unreasonable to require specification of any particular field, and it is sufficient if that of the whole farm on which they graze is given.<sup>1</sup> On the same principle, where the *locus* laid was "from the sheep-walk lying along the sea-shore, between the river of Lernvey and the point of Grimshader, in the parish of Lochs or of Stornaway, island of Lewis and County of Ross;" and it was objected that the description was not sufficient, especially as the name of the farm was not given; the objection was repelled by the Lord Justice-Clerk Boyle and Lord Pitmilly, upon the ground, that in that remote situation the sheep may have strayed from their own farm before they were stolen, or the limits of the farm may not have been accurately known.<sup>2</sup> On the same principle an indictment was sustained as relevant by Lord Mackenzie, which charged the theft of the sheep as having been committed from "the pasture occupied by David Clark, junior, situated on the brae or hill of Fordyce, in the parish of Fordyce, and county of Banff."<sup>3</sup>

It is sufficient, also, if the libel bear "that the pannel did *within* a park situated, &c., wickedly and feloniously steal and theftuously away take," without adding that they were stolen *from the park*.<sup>4</sup> This was decided upon an objection, and after the point was fully argued, upon the ground, that to complete the *asportatio* of sheep it is not necessary that they should have been carried out of the enclosure in which they were grazing; but it is sufficient, if it be alleged and proved, that acts amounting to theft were committed within those limits, as by seizing and putting them on the shoulders of the thief, slaughtering them, putting them on a horse's back, &c., although they have not been removed from the field.

It is not to be imagined, however, from this, that the prosecutor is subject to no restriction in the libelling of the *locus* in cases of sheep and cattle stealing. On the contrary, he is bound to

<sup>1</sup> Edgar and Young, Feb. 3, 1828; Justice-Clerk's MS.—<sup>2</sup> Philip M'Leod, May 3, 1824, Inverness; unreported.—<sup>3</sup> Wm. M'Kenzie, Aberdeen, Autumn 1830; unreported.

—<sup>4</sup> Clarkson and Macdonald, May 8, 1829; Justice-Clerk's MS.

give such a description as at least fixes down the place within a particular farm in an enclosed country, or a known sheep-walk, or hill range, in a mountainous or open region. Thus, where the *locus* of the theft of the sheep was given no otherways but as taken “from a park or field situated on the east side of the road leading from West George Street of Glasgow, to Black Quarry, within the royalty of Glasgow,” the indictment was justly found irrelevant, upon the ground that neither the name of the field, nor of the farm, nor its occupier, was given.<sup>1</sup> In short, the exception from the general rule is admitted with reluctance, and on the ground of necessity alone, by the law; and, therefore, where a more specific description could with a moderate degree of diligence have been given than the indictment exhibits, and limits more precise afforded than it contains, the objection will be sustained. The fair rule seems to be, that the farm must be described by its name and occupier, where the theft was committed from an enclosed farm; and that where it was from a mountain range or hill pasture, such limits must be specified as the prosecutor has it in his power to give.

In like manner, in cases of reset of theft, there are obvious reasons why this crime cannot be libelled with the same accuracy as to place as an ordinary crime, because it is committed in general with such attention to concealment and privacy, as renders it impossible to know in what particular place the possession of the thief ceased, and that of the resetter commenced. All that the prosecutor can in general do in such a case, is to specify the place from which the goods were taken, and those where they were found in the custody of the resetter; the intermediate places of their deposit being known only to himself or his associates, whose information very frequently can either not be obtained, or if obtained cannot be relied on. It has accordingly been found on objection, that it is relevant to charge reset in these terms,—from a house “in Market Lane, or Market Street of Glasgow, or at some other place to the prosecutor unknown.”<sup>2</sup> It has become usual, since this decision, to describe the *locus* in cases of theft by the place where the stolen goods were discovered in the resetter’s possession, with the addition, “or in some other place within certain limits to the prosecutor unknown,” as, “within the house then or lately occupied by you, situated in Old Wynd of Glasgow, or

<sup>1</sup> Per Lord Pitmilley, Glasgow, Sept. 1822; unreported.—<sup>2</sup> Campbell, Kerr, and Welsh, Glasgow, April 22, 1822; Shaw, No. 75.



in some other place within the city or suburbs of Glasgow to the prosecutor unknown, wickedly and feloniously reset and receive,"<sup>1</sup> &c. The addition of *some* limits seems requisite, and none seems so proper, where the crime was committed, as it usually is, in a town, as the city or suburbs within which they were discovered in the pannel's possession.

Some *locus*, however, must be assigned in cases of reset; and, therefore, where the libel charged the crime as committed in these terms, "or otherwise, time aforesaid, you did wickedly and feloniously reset and receive a ewe, stolen as above libelled, knowing the same to have been stolen," it was properly held that the indictment was irrelevant, and the diet was in consequence deserted.<sup>2</sup> The proper course to follow in all cases where the *locus* is doubtful, is to specify some place, the most likely that can be given to have been the real *locus*, and to add, in some other place in the city and suburbs, or parish where the goods were found, to the prosecutor unknown; a mode of libelling which satisfies the rules of law, and lets in a proof of such other place within those limits as may accidentally come to light in the course of the trial.

On the same principle, in cases of pocket-picking, or theft from a carriage, or cart, or vessel, during the course of its conveyance from one place to another, some extension of the ordinary rule seems indispensable, because the prosecutor cannot in the general case know in what particular place the goods were taken, from the pocket in the first case, or abstracted from the coach, waggon, or packet in the second. In such cases, accordingly, it is justly held sufficient if the *locus* be laid within those limits, how wide soever, which can alone be assigned to the crime in question. On this principle, it has been held, that where a man had had his pocket picked somewhere in Perth, but he could not tell where, it was relevant to charge the crime in these terms, "Upon one or other of the streets of the borough of Perth, or in some other place within the said borough to the prosecutor unknown." This latitude was strongly objected to, but the indictment sustained, in respect of the peculiarity of pocket-picking, which is an occult crime committed in general without the knowledge of the person on whom the depredation was committed.<sup>3</sup> For the same reason it was found relevant to

<sup>1</sup> As in Pauley, White, and Others, Glasgow, Autumn 1823; unreported.—<sup>2</sup> Priest, Brown, and Others, April 15, 1819; record.—<sup>3</sup> Peter M'Gown and Henry Cavan, Jan. 3, 1822; record.

charge, that an article was stolen “from the boot of the Waterloo coach, in the course of the journey of the said coach from Glasgow to Edinburgh, or while the luggage of the said coach was discharged at the Star Inn, Prince’s Street, Edinburgh.”<sup>1</sup> So also an indictment was sustained as relevant which charged a theft as committed “from the Waterloo steam-boat, being at that time on its voyage between Glasgow and Campbelton.”<sup>2</sup> And a theft was found relevantly charged which specified the theft as committed “from a carrier’s cart, upon the high-road leading from Paisley to Kilmarnock, and on that part of the said high-road which is between Waterland Toll, in the parish of Dunlop and county of Ayr, and Dunlop village in that parish, or on some part to the prosecutor unknown of the aforesaid road.”<sup>3</sup> In all these cases the latitude is admitted contrary to the ordinary rules of law, from the necessity of the case, and the impossibility of giving a more specific description of the place where the crime was committed, from the prosecutor not knowing more than that it occurred in such limits.

The same considerations point to the necessity of a similar latitude in cases of forgery; the crime of all others which is committed with the greatest precautions to ensure secrecy, and which comes to cognizance only at its latest stage, after a long process, and the assistance probably of many different hands in many different places, has been required to effect its completion. For these reasons, by the consent of all lawyers,<sup>4</sup> the prosecutor is indulged with a great latitude in this particular, in so far at least as the description of the place where the actual forgery was committed is concerned; for, in the subsequent matter of *uttering*, which is an overt act which comes directly to the prosecutor’s knowledge, the same minute specification is justly required which takes place in ordinary crimes.<sup>5</sup> But in the previous and occult matter of forgery, it has always been the practice to libel either at large in a certain district, or with a specification of a particular place, and an alternative of some other place to the prosecutor unknown. Thus, in *Herries’ case*, the fabrication is laid as having taken place “in the city of London;”<sup>6</sup> and in *Macaffie’s case*, “at

<sup>1</sup> Michael M’Callum, July 2, 1821; unreported.—<sup>2</sup> Donald M’Kinnon, April 1823; unreported.—<sup>3</sup> Robert Baird, April 10, 1824, Ayr; Justice-Clerk’s MS.—<sup>4</sup> Hume, ii. 214. In *falsi accusatione locum exprimi necesse non est; quo nempe in loco instrumentum falsum conscriptum sit; sed sufficit re ipsa demonstrare falsum commissum esse. Voet de Accusationibus.*—<sup>5</sup> Hume, ii. 216.—<sup>6</sup> *Herries’ case*, April 24, 1770.

Dublin, in the kingdom of Ireland, where he was then residing.”<sup>1</sup> In another case the forgery was libelled “in the town of Falkirk and county of Stirling, or in a certain other place or places to the prosecutor unknown.”<sup>2</sup> The same style has continued to these times. Thus, in 1792, Brown and M’Nab were tried on a libel, which charged the forgery as committed “in the city of Edinburgh, or at Monkton aforesaid, or in some other place to the prosecutor unknown.”<sup>3</sup> In 1801, M’Neil and O’Neil on a libel, which charged the forgery as committed “in the city of Glasgow and county of Lanark, and at the town or borough of Ayr in the county of Ayr, or at some other place to the prosecutor unknown;”<sup>4</sup> and Malcolm Gillespie in 1827 on a libel, which charged all the acts of forgery as committed “at Crombie Cottage, in the parish of Skene and county of Aberdeen, or in some other place within the county of Aberdeen to the prosecutor unknown.”<sup>5</sup>

For the same reason, an indictment for writing and sending an incendiary letter, need not specify the place of writing, which is rarely known, but is deemed sufficient if it set forth the place of delivery and mode of conveyance.<sup>6</sup> In several cases, accordingly, of indictments for such an offence, no notice at all was taken of the place where the letters were written, but only of the place of uttering through the post-offices of Peterhead and Linlithgow;<sup>7</sup> while in others the place of writing is specified as “within the town of Kilmarnock in the county of Ayr, or in some other place within the said county.”<sup>8</sup>

To this class of cases must also be added that of piracy, or other crimes at sea, on account of the great difficulty of obtaining accurate intelligence in cases of that sort.<sup>9</sup> Accordingly, in a late case a charge of assault and murder was sustained, which specified the *locus* of the two, as “on the deck of the ship Harmony of Greenock, when the said ship was at sea, and in a boat then alongside of the said ship Harmony, which was then alongside of the said ship Harmony off the Island of St Thomas, within the tropic of Cancer.”<sup>10</sup>

It is only, however, in cases of this description, where the crime is in its nature committed in occult or remote situations, that this mode of libelling is admitted. No such latitude is

<sup>1</sup> Macaffie’s case, Nov. 26, 1782.—<sup>2</sup> John Brown, March 9, 1781.—<sup>3</sup> M’Nab and Brown, Dec. 24, 1792; Hume, ii. 215.—<sup>4</sup> John M’Neil and Michael O’Neil, March 19, 1801.—<sup>5</sup> Malcolm Gillespie, Aberdeen, Autumn 1827.—<sup>6</sup> Hume, ii. 217.—<sup>7</sup> John Fraser, March 19, 1759; John Edwards, March 18, 1761.—<sup>8</sup> Thomas Rennie, Feb. 8, 1781.—<sup>9</sup> Hume, ii. 317.—<sup>10</sup> Thomas Steel, Dec. 18, 1820.



admitted in other cases, or when the reasons on which the exception is founded do not exist. Thus, it has been held, that it is indispensable in a charge of bigamy, that the *locus* of the first as well as the second marriage should be given.<sup>1</sup> For the same reason, in an ordinary case of theft, the description of the place as “in *the vicinity*” of a house particularly described, was held as too vague; it should have been in the *immediate vicinity*, or described by the proximity to some other place, or by some other name.<sup>2</sup> And in a case of murder, where the crime was described as having been committed “on a field on the farm of Lochend, then and now or lately occupied by Thomas Oliver, in the parish of South Leith and county of Edinburgh, or *in some other place to the prosecutor unknown*,” the Court held this addition as too general, and the Lord Advocate consented to its being struck out of the record.<sup>3</sup> But this decision is not to be taken as fixing that in all cases of murder no latitude at all can be admitted. The error lay in not specifying *some limit*, as the parish of South Leith, the county of Mid-Lothian, or the like, to limit the sweeping part of the charge. And even cases may be figured where as great a latitude as was here thought objectionable would be admitted. Put the case, for example, that a body is floated down a river evidently murdered, and that there is decisive evidence to fix it on the pannel, but none to specify the place where it was committed; or that a dead body bearing the mark of recent murder is brought to a surgeon for sale, under circumstances which bring home the crime to an individual, but leave the place of its perpetration uncertain, without doubt a libel would be sustained as relevant in such cases which specified all that the prosecutor knew, and describes the circumstances, which renders any farther specification impossible.

Where a horse has been hired by a person who thereafter disposes of it, and he is indicted for theft, the proper *locus* is the stable-yard where the delivery of the animal took place, in all cases where the hiring is charged as having been done with intent to appropriate in breach of the bargain.<sup>4</sup> In a libel under the night poaching act, where the minor bore that the pannel entered a plantation, and “was found at night between the hours of ten and twelve, armed with a gun, in the act of *coming out of the said*

<sup>1</sup> John Braid, February 23, 1823; Justice Clerk's MS.—<sup>2</sup> William Darling, March 15, 1830; unreported.—<sup>3</sup> Charles and Margaret M'Mahon, Dec. 10, 1827; Syme's Cases.—<sup>4</sup> John Smith or Loyd, Jan. 8, 1829; unreported.

plantation, carrying with you the game you had there destroyed," the Court held the libel relevant, though it did not set forth that the pannel was found *in* the wood; the statute<sup>1</sup> only requiring that the persons should have entered the wood with the intent to destroy game, armed, and been apprehended within the prescribed hours, but not that they should be seized within its bounds.

25. In crimes which consist in a great variety of acts done at different times and places, and bear a *tractus temporis*, it is competent to lay the libel at large within a certain space or district of country.

There is another class of cases in which, for similar reasons, an unusual degree of latitude is allowed in describing the place where the crime was committed. This is in those offences which do not consist of a single act, but employ a tract of time, and have a series of proceedings, from the whole of which taken together the offence is inferred, so that the guilt cannot properly be said to be contracted at any one place, but more at large within a certain space or district. Thus, the crime of seducing British artificers to go abroad, or procuring British subjects to enlist in the service of a foreign power, is in general completed at many different times and places, and by many different acts, from none of which, taken singly, is the crime to be completely inferred. This point was argued at large in a case of enlisting soldiers, where it was objected, that in none of the charges was the *locus* more minutely specified than in a certain shire, or with an alternative of two shires, or in a large district of country; but the libel was sustained as relevant.<sup>2</sup> It would not be safe, however, to rely on this precedent, in cases at this time, where the acts, however numerous, can be more particularly specified by time and place. In cases too of notour adultery, where this is to be inferred from the open cohabitation of parties at bed and board, the libel has frequently been laid at large in several houses in a particular city, as Edinburgh or Leith,<sup>3</sup> &c. The same principle was held to rule cases of treason as long as it was regulated by the Scotch law; and is extended by Baron Hume to all those cases where the libel is founded on a charge of repeated

<sup>1</sup> 57 Geo. III. c. 90.—<sup>2</sup> Robert Cameron, Jan. 21, 1743; Hume, ii. 217.—<sup>3</sup> Margaret Haitly, Jan. 12, 1674; Nicolson and Maxwell, Jan. 16, 1694; Hume, ii. 218.

guilt, and a continued course of offending.<sup>1</sup> In all such cases, however, it is advisable, in addition to the general charge, to insert as many particular instances as can be specified by time and place, a mode of libelling which has become very usual in late years, and is more suitable to the precision of modern practice than the latitude of older times. It is to be observed, too, that in many of these cases, though a libel is allowed to be brought into Court in these general terms, yet if a proof of alibi is brought, the prosecutor must be much more specific in his proof, as to the place of the commission of the crime; and if this is not done, it will be the duty of the jury to presume, *in dubio*, that the acts charged are to be judged of as in those places to which the panel's proof applies.<sup>2</sup>

26. In the description of the offence the prosecutor must specify the mode in which it was committed, so as to enable the Judge to determine whether it amounts to the crime set forth in the major proposition.

It is absolutely indispensable to the formation of a right judgment on the *relevancy* of a charge; that is, on the question whether the facts which are to be laid in evidence before the jury amount to the crimes stated in the major proposition, and to which the pains of law are to be attached by the conclusion, that it should be specifically stated what these facts really are. It will not do for the prosecutor in this vital matter to wrap himself up in obscurity, and get a libel laid before the jury without the judgment of the Court being previously passed on the legal import of what it contains, on the chance, possibly, that from their inexperienced hands he may obtain a more favourable judgment than from the precision and legal accuracy of the Bench. Add to which, that both judge and counsel are better prepared to discuss the legal merits of any point of law which the case may involve in the outset of the proceedings, when nothing is as yet disclosed in evidence, and the leaning of practice, as well as the presumption of law, is against the prosecutor, than in an ulterior stage, when the attention of both is probably exhausted by the fatigues of the trial, and the feelings may possibly be excited by the facts which have come out in evidence against the prisoner.

<sup>1</sup> Hume, ii. 218.—<sup>2</sup> Hume, ii. 220.



For these reasons, it has long been the settled rule of our practice, that the minor is irrelevant if it does not contain such an enumeration of particulars as shall warrant the affirmation of the pannel's guilt of the crime stated in the major proposition.<sup>1</sup>

Nay, farther, the minor must state such specific facts, must so completely develop the *modus operandi* which the prisoner has adopted, as shall enable the Court *ab ante* to determine on the legal import of what is to be laid before the jury, and leave them nothing to do but consider whether these facts are established in evidence before them.<sup>2</sup> If, therefore, the major charge the crime of robbery, but the minor detail no acts of violence against the person robbed, or no threats to subdue and overawe his will; or the major charge theft by housebreaking, but the minor bear no specification of the effraction of any part of the building, or of any thing done to overcome its legal strength, certainly in both these cases it shall straightway be dismissed as an irrelevant charge of that specific crime.<sup>3</sup> On this principle it has been determined, that in a libel for perjury, where the tenor of the oath was set forth, and also it was affirmed that it was contrary to truth, but the prosecutor had omitted to add that it was emitted by the pannel, knowing it to be false, the charge is irrelevant.<sup>4</sup> So also, in an indictment for theft, by housebreaking, where it was charged in the minor, "You, the said Daniel Mackenzie, did wickedly and feloniously break into and enter the house in Prince's Street," &c. and it was not added *how* this was done, as by forcing open the door, lifting the sash of the window, or the like, the aggravation of housebreaking was found to be irrelevantly laid.<sup>5</sup> A similar decision was pronounced by Lord Justice-Clerk Boyle, in a case on the Circuit, where a similar defect in libelling the *modus operandi* in housebreaking had occurred.<sup>6</sup> On the same ground, in a charge of obtaining goods on false pretences, where the libel had neglected to mention the false pretences used to get possession of the goods, but merely affirmed in general, that they were obtained on false pretences, the charge was held irrelevant, and the Advocate-Depute withdrew it.<sup>7</sup> In like manner, where the libel, in addition to certain false pretences specially libelled, set forth "other false pre-

<sup>1</sup> Hume, ii. 181, 182.—<sup>2</sup> Hume, *ibid.*—<sup>3</sup> Hume, ii. 181.—<sup>4</sup> Halliday's Case, Mac-laurin, No. 75.—<sup>5</sup> Daniel Mackenzie, June 28, 1824; Hume, ii. 182.—<sup>6</sup> Michl. Hart, Perth, Spring 1820; Justice-Clerk's MS.—<sup>7</sup> Alex. Clark and Jas. Fairley, Perth, April 1823.

tences," the Court held this addition inadmissible, and struck it out of the indictment.<sup>1</sup> On the same principle, in a case of subornation of perjury, where the charge was, "You, the said Robert Smellie, did wickedly and feloniously solicit, entice, and fraudulently induce and suborn you the said Matthew Steele, wilfully, deliberately, and fraudulently to commit the crime of perjury, by falsely swearing, contrary to the fact, that," &c. the objection was held good, that the means used by Smellie to induce Steele to commit this nefarious act, were not set forth.<sup>2</sup> The law is settled in the same way in England; it being held to be necessary, in an indictment for obtaining money on false pretences, to specify what these false pretences were.<sup>3</sup>

In the special case of the crime of seducing sailors to desert from his Majesty's service, it has been found, both in the Scotch<sup>4</sup> and English law,<sup>5</sup> that it is sufficient if the libel charges the pannels with having, "contrary to the allegiance they owe to us, and their duty to their country, entice, persuade, and actually procure the said John Watson, &c., to desert from our service, and absent themselves without leave from our said gun-vessel for several months." It does not appear on what grounds this exception to the general rule is admitted in this particular case. It probably was on the ground, that it is of no importance in that offence what the nature of the inducements were which were set forth; the essence of the crime consisting in the inducing sailors *any how* to desert the service; whereas, in other cases of inducing others to commit a crime, the seductions applied are *inter essentialia* of the charge. But it is not advisable to rely on these precedents, as establishing any distinction between the case of seducing soldiers or sailors to leave the service, and any other case of a similar offence.

The same principle has been uniformly applied to other cases. Thus, where the major proposition charged "the wickedly and feloniously using, uttering, and vending any false or counterfeited money, knowing the same to be false and counterfeited;" and the minor merely set forth sundry acts of disposal of false coin by the pannel, at an under value, to two persons, who bought

<sup>1</sup> John or Alexander Campbell, July 15, 1822; Hume, ii. 182 — <sup>2</sup> Robt. Smellie, Feb. 10, 1823; Justice-Clerk's MS. and Hume ii. 182. — <sup>3</sup> Thos. Mason's Case, 1788; Leach, i. 487. — <sup>4</sup> Wilson and Hopner, July 13, 1799; Hume, ii. 191. — <sup>5</sup> Richd. Fuller, Leach, ii. 790. And the like in an indictment for a conspiracy to hinder a man from working at his trade. Eccles and Others, Leach. i. 274.

and took them *as false*, it was held that the indictment was irrelevant, in respect that the major imported that the coins were uttered *as genuine*, whereas the minor bore that the coins were uttered to an associate at an *under value*.<sup>1</sup> As the libel in that case, however, did not bear in the major that the coins were vended as genuine, which is the usual style in such cases, it may be doubted whether an excessive strictness was not applied to its decision. On the same principle, in a case where the libel bore a charge of attempting to steal, by entering into a shop, with other offences, that particular charge was found irrelevantly laid, upon the ground that the libel "did not state any circumstances wherein the attempt to steal consisted."<sup>2</sup> Upon the same ground, in a case of forgery and uttering, where the document forged was not set forth in one of the charges, as having been uttered "*as genuine*," the Court sustained the objection to that part of the libel, upon the ground, that as the major charged the uttering a forged document as genuine, the minor was irrelevant, unless it repeated the same allegation.<sup>3</sup> But it is sufficient, in a case of embezzlement and fraudulent appropriation, to state that the pannel embezzled the funds or goods, and appropriated them to his own uses and purposes, without adding how this was done; that being no more necessary in such a case, than it is to say how stolen goods were disposed of by the thief.<sup>4</sup> And in a charge of robbery and assault, it is held that the violence libelled in the outset, rides over, and applies to the whole, although it is applied only to the assault, and not repeated in the charge of robbery; the two acts being part of the same transaction, and the same acts of violence having been committed in the perpetration of both.<sup>5</sup> In a charge of theft, by opening lockfast places, it is not necessary to set forth in the major that the opening had been feloniously done;<sup>6</sup> and it is not usual to state it in this manner in that part of the libel; but it seems proper to state it in the minor, when the mode of carrying the act into execution is described.

\* Where a crime, too, is stated under aggravated circumstances, it is indispensable that the minor should distinctly set forth the cir-

<sup>1</sup> John Macfarlane, July 16, 1810; Hume, ii. 181.—<sup>2</sup> Macqueen and Baillie, Jan. 25, 1810; Ibid.—<sup>3</sup> Alex. Baillie, March 14, 1825; Justice-Clerk's MS.—<sup>4</sup> Per Lord Pitmilley in Peter Tyrie, Perth, April 1826; and Lord Meadowbank, in Henry Powrie, Stirling, Sept. 1825; unreported.—<sup>5</sup> John Calderwood, John Farquharson, and Stewart MacLachlan, Jan. 8, 1822; unreported.—<sup>6</sup> Archd. Scott, Dec. 14, 1818; unreported.



cumstances, to enable the Court to determine whether the aggravation is well-founded in law. Thus, where the charge was a combination among workmen to raise their wages, at a time when that was a point of dittay, and also a combination to *control* their masters, the objection was sustained to the latter part of the charge, that neither was the control set forth in the major charged as *unlawful*, nor did the minor specify any facts from which such unlawful control could be inferred.<sup>1</sup> In like manner, in the case of Gavin Simpson, the pannel was indicted for way-laying, beating, and wounding, aggravated as follows:—"Especially when committed to promote the purposes of a conspiracy, or illegal combination of operative manufacturers, to subvert the lawful authority of their masters and employers, and usurp to themselves the direction and control of their work, by attacking and intimidating, and thus compelling all who continue, or are willing, peaceably to serve and obey their said masters, either to leave their service, or to enter into the said conspiracy or illegal combination." It was objected to the libel, in so far as this combination was concerned, that it only stated that the pannel was a member of such an association among cotton-spinners, and was on that account dismissed from his employer's service; and that he thereafter assaulted a party of boys and girls who continued in Mr Houldsworth's cotton-mill, after he had dismissed several members of that combination; and that these acts were not charged as having been done with *the intent* set forth in the major proposition, or in furtherance of that design. The Court pronounced this interlocutor:—"In respect that the minor proposition does not charge that the assault was committed in pursuance and furtherance of the alleged illegal combination, or that any circumstances are libelled as necessarily importing that purpose in the pannel at the time of the assault, find that the circumstance of aggravation charged in the major proposition, is not relevantly charged in the minor."<sup>2</sup> A similar objection was sustained in MacKinlay's case, who was charged, *inter alia*, on the statute, with administering unlawful oaths, or *causing* unlawful oaths to be administered, whether the pannel was present at the administration or not. So far as regarded the actual administration, the libel was sufficiently specific; but as to the *causing* the oath to be administered to any one in his absence, there was no

<sup>1</sup> Alex. Marshall and Others, Dec. 16, 1799; Hume, ii. 182.—<sup>2</sup> Gavin Simpson, Feb. 23, 1811: Record.

statement of either time, place, or *modus operandi*; and therefore the Court justly found that part of the libel irrelevantly laid."<sup>1</sup>

In like manner, in a case where a libel, founded on one of the revenue laws, which made it a capital offence to pass from the coast, with uncustomed goods, to the number of five persons, and resist any officer who attempts to make a seizure of such goods; and the minor only related that the officers were endeavouring to seize certain goods in the pannel's possession, "as being prohibited and uncustomed goods;" the objection, how critical soever, was sustained, that the libel did not allege that the goods the officer was to seize *were* uncustomed, but only that they were to be seized *as* such.<sup>2</sup> So also, where a libel charged an act of forgery and uttering, and in the minor it was charged that the uttering took place by the pannel, "or some person to the prosecutor unknown," this was sustained as relevant: but as it came out on the proof, that the instrument was uttered by one of the witnesses, who was known to the prosecutor, this was held fatal to the charge.<sup>3</sup> The essence of hamesucken consists in the entering a person's house, with the design to assault him, and thereafter committing the assault; and, therefore, in a case where a libel of this description did not bear that the pannel sought the dwelling-house with intent to assault, the indictment was found irrelevant.<sup>4</sup> In the case of officers of the revenue, it is sufficient, by special statute, if they announce their character, without producing any warrant under which they act;<sup>5</sup> and, therefore, it is enough to libel in such a case, that the officers announced that they were officers of the revenue, or that they were known to the pannels as such.<sup>6</sup> But if the deforcement be that of an ordinary officer, it is indispensable that the minor should state, that the pannel knew that the person deforced was an officer of the law; and where this was wanting, the libel was found by Lord Gillies to be irrelevant.<sup>7</sup>

The word "murder," or "murdered," is held to be a *vox signata*, meaning the felonious and inexcusable putting another to death;<sup>8</sup> and, therefore, where the libel charged murder, and it was objected

<sup>1</sup> Andrew M'Kinlay, July 19, 1817; Hume, ii. 183.—<sup>2</sup> Chalmers, Yorkston, and Others, August 1, 1751; Hume, ii. 184.—<sup>3</sup> Robt. Gillies, May 23, 1831; Justice-Clerk's MS.—<sup>4</sup> William Den, Aberdeen, April 1827; unreported.—<sup>5</sup> 6 Geo. IV. c. 108, § 105.—<sup>6</sup> Malcolm M'Gregor and Jas. Stewart, Stirling, Sept. 1826; unreported.—<sup>7</sup> John Mathieson and Others, Inverness, April 1828; unreported.—<sup>8</sup> Hume, ii. 184.

that in a particular part of the charge, it was not alleged that the acts of violence charged were done *feloniously*, and that a felonious intention was not to be presumed, the answer was sustained by the Court, that this was unnecessary, in respect it was alleged that by these acts the deceased was murdered, which necessarily implied such an intent.<sup>1</sup> However, it is usual to commence the narrative of all assaults, whether they end in death or not, with the words violently, wickedly, and feloniously; and, therefore, these words should always be added to a charge of murder. The words of style used in a case of culpable homicide, arising from negligence, as riding over a child, &c., are “culpably, negligently, and recklessly:” where the death has not arisen from negligence, but blamable violence, though not amounting to murder, the words to be used are “violently, wickedly, and recklessly.” In cases of reset of theft, it is indispensable that the goods shall be charged as having been received, “knowing the same to have been stolen;” in uttering forged notes, or instruments, that the instrument was uttered “as genuine, knowing the same to have been false and forged, as said is.” In rape, it must be set forth that the act was done upon the woman forcibly, and “notwithstanding the utmost resistance in her power;” in assaults with intent to ravish, that the violence was done with that intent. But it is not necessary to set forth that the assault was *forcibly* done, where it was committed on a girl under the age of puberty, that being in the eye of law a forcible attempt.<sup>2</sup> In cases of theft, it is usual to say that the goods were “wickedly and feloniously stolen, and theftuously carried away;” but although the addition of the word feloniously is usual, it is not indispensable, the words you did “steal, and theftuously carry away,” being freely held to amount to all that is necessary in that charge.

It is not necessary, however, that the libel should repeat in the minor proposition the exact words in every case of the major. It is sufficient if words are used in many cases which amount in legal signification to the same meaning with those used in that part of the indictment. In a case of murder, for example, the charge is good if it mention the felonious assault, the wounds inflicted, and the death of the sufferer in consequence, though the usual words, “by all which the said A. B. was murdered by you the said

<sup>1</sup> Duncan Clark, Perth, Sept. 1826; unreported—<sup>2</sup> Per Lord Moncrieff, M'Arthur's Case, Glasgow, Jan. 1831.



C. D.," are omitted.<sup>1</sup> In cases of rape, in like manner, the charge is every day sent to the assize, although it is not said in the minor proposition that the woman was *ravished*, but only that the pannel "had carnal knowledge of her forcibly and against her will, notwithstanding the utmost resistance in her power."<sup>2</sup> So also a charge of deforcement would be held good, if the fact of the officer having been knowingly and wilfully deforced is distinctly set forth, though the minor is not concluded with the usual words of style, "by all which, the said A. B., being an officer of the law, acting in the execution of his duty, was obstructed and deforced, as said is." Still, however, though our judges do not go so strictly to work as to require the *ipsa verba* of the major proposition to be repeated in the minor, provided that other equivalent expressions are used, still it is advisable, as much as is usual or customary, to follow that course; and in cases where a statute is libelled on, it is indispensable that the words designating the crime should as far as possible be repeated in the minor proposition.<sup>3</sup>

27. If the libel contain a charge of the same kind, but of an higher denomination than that which appears in the course of the proof, it is competent to insist still on the inferior charge.

It frequently happens that the crime charged in the major proposition is of the same kind, but a higher denomination than that which comes out in the course of the trial. Thus, murder may be charged, while the facts proved amount only to culpable homicide; hamesucken, when they amount only to assault or the like. In such a case it has long been settled, that a charge of murder involves one of culpable homicide, and that on an indictment charging the greater crime the pannel may be convicted of the lesser, and this is matter of every day's practice.<sup>4</sup> At one period also it seems to have been held, that on a libel charging a particular crime, a conviction could be obtained on an inferior charge, as on a libel charging the invading, beating, and bruising persons in authority and magistrates, a conviction for an ordinary assault was competent.<sup>5</sup> But these precedents are not to be

<sup>1</sup> Hume, ii. 184.—<sup>2</sup> Wallace and Ferris, Feb. 23, 1747.—<sup>3</sup> John Bell, Feb. 10, 1817; unreported.—<sup>4</sup> Hume, ii. 184—186.—<sup>5</sup> Robert Carnegie, Nov. 11, 1672; Hume, ii. 185.

relied on in modern practice, and, as the law now stands, the point is to be resolved by a distinction. If the libel charges the higher offence as an aggravation of the lower, then, though the aggravation is not proved, still the simple offence may be the subject of trial and punishment. But if the aggravated crime is laid as a *substantive charge*, then the whole must be proved, or the pannel will be entitled to an acquittal. Thus, if assault with intent to rob or to ravish are charged, these respective intents must be proved, or the libel will fall, and no conviction on the simple assault can be obtained; but if it be laid as assault, *especially* when committed with intent to rob or to ravish, then a conviction on the simple assault may be obtained without the aggravation. Murder and culpable homicide are the only cases in which, on a charge of the higher offence as a substantive charge, a conviction of the lesser can be obtained.

28. It is not enough that the libel gives a sufficient description of the mode in which the crime was perpetrated; it is also indispensable, in the general case, that it shall give such a specification of the person injured, as may enable the pannel to discover with ease who is intended, and to distinguish him from any other.

A clear specification of the party injured is evidently indispensable in a criminal process, both in order to let the pannel know who he is charged with having assailed, and at whom he is to apply for information, and to limit the prosecutor in his proof to the specific act or acts on which the indictment is founded. It is accordingly a fixed rule of our practice, that an indictment in the general case is not good, unless it gives such a description of the person injured as shall clearly distinguish him from any other individual.<sup>1</sup> If all cases, therefore, the name and designation of the injured party must be set forth, and the rules by which this matter is regulated are even more rigid than in the analogous case of the designation of witnesses. The usual and certainly the best course is to give the name of the party, his trade, and residence, by name of place, parish, and county, thus, "John Thomson, farmer, then or lately residing at Libberton-Mains, in the parish of Libberton, and county of Edinburgh." Children living

<sup>1</sup> Hume, ii. 197.

with their father or mother, are designed as residing with them, adding their name, trade, and place of residence; and married women by their maiden name, with the name and designation of their husbands. Clerks in banks or public offices, and persons holding public situations, as clergymen of parishes, professors in universities, magistrates, judges, &c., are held to be sufficiently and properly designed when they are mentioned by their names, and the office which they hold, and where they may be heard of and enquired after, as “ James Johnston, then or lately clerk in the employment of Sir William Forbes and Co. bankers, Edinburgh;” or “ Adam Duff, then or lately Sheriff of the county of Edinburgh;” or “ Dr Thomas Charles Hope, then or lately Professor of Chemistry in the University of Edinburgh.” The principle on which this apparent latitude in regard to such public characters, or persons in the employment of such public companies or offices, is founded is, that it is much more easy to get at a person so described, and there is much less chance of ambiguity in regard to the person truly intended, than when they are described merely by their name and place of residence; and, therefore, the ends of the specification are more completely answered in the one way than the other. Generally speaking, the principles which regulate the designation of witnesses, on which an ample commentary will hereafter be given, are applicable to the case of the designation of the injured party, with this difference, that by reason of the vital importance of accuracy in this particular in the body of the libel, an error is regarded with a more jealous eye than when it appears in the lists of witnesses.

It follows from this principle, that any *substantial* variation of the libel from the real name of the person injured, will be fatal to the charge; because it strikes at the whole proceedings, by establishing that the person injured was a different person from that set forth in the libel, with the injury on whom, and on whom *alone*, the jury are charged. This principle is undoubtedly well founded in law; but it frequently has led to a most injurious defeat of the ends of justice in particular cases. Following out the rule thus for the wisest purposes introduced, our Judges have frequently felt themselves compelled to acquit prisoners charged with the most atrocious crimes, on account of an error in the designation, so trivial that no uncertainty could possibly exist as to the person really intended. Thus, in the noted case of Hannay, the *species facti* was, that the pannel was charged with the murder of



“ Marion Robson, daughter of the deceased John Robson, late *wright* in Westcroft of Lochrutton, in the parish of Lochrutton, and stewardry of Kirkeudbright, and of Janet M'Niven, his wife, presently residing at Lochrutton Gate, in the parish and stewardry aforesaid.” It turned out on the evidence, that John Robson, the father, was not a *wright* but a *tailor*, and had never worked as a *wright*, and that another John Robson lived at Lochrutton Gate, who was a weaver. Upon this discovery, the Solicitor-General (John Clerk, Esq.) gave up the case. Mr Hume, however, has stated, that it is “ not quite clear that the error here was fatal to the charge, like one in the name of the person killed ; and as to this the Court gave no judgment or opinion.”<sup>1</sup>

A similar proceeding took place at Aberdeen, in September 1817, in a case where the person assaulted was named *Tocher*, but he was styled *Tochie* in the indictment: the prosecutor having discovered the error in time, deserted the diet.<sup>2</sup> But the matter since that time has been made the subject of deliberate judgment, both of the Circuit and Supreme Courts. Thus it appeared, in a case at Inverness, that the libel charged the pannel with the murder of “ Alexander Davidson, sawyer at Dartulich, in the parish of *Edin Kellie*, and shire of *Elgin*,” whereas the proof established, that the person murdered was “ Alexander Davidson, sawyer at Dartulich, in the parish of *Ardclach*, and shire of *Elgin*.” Upon this, Lord Pitmilley held, after a debate, that the pannel must be acquitted of the charge, and he was assolizied accordingly.<sup>3</sup> Again, in a late instance at Aberdeen, the principle was carried a very great length. John Murray was there charged with rape committed on Christian Urquhart, “ daughter of, and *then* and now, or lately, residing with Alexander Urquhart, labourer at Knockie, in the parish of Turiff, and county of Aberdeen.” She was designed in the same manner in the list of witnesses ; but when tendered for examination, she swore that *at the time* of the rape she was residing with a farmer of the name of Milne, but that she left that place about ten days after, and had ever since resided with her father, the person designed in the libel and list. Upon this being established, Lords Pitmilley and Alloway held that the pannel must be acquitted ; that there was a positive allegation, that at the time of the assault the girl resided with Milne ; and as that was not the

<sup>1</sup> John Hannay, July 28, 1806 ; Hume, ii. 197.—<sup>2</sup> Grant and Dacus, Sept. 1817, Aberdeen ; Justice-Clerk's MS.—<sup>3</sup> Thos. M'Pherson, May 3, 1824 ; Hume, *ibid*.

case, there was no alternative but to assoilzie the pannel from the charge.<sup>1</sup> Upon this case Baron Hume has observed—"The inaccuracy here was even less than in the case of Hannay, for the girl's designation was right in the principal and permanent circumstance of parentage, and inaccurate in a transient and temporary circumstance only, which was not indispensable to be set forth."<sup>2</sup>

More lately still, the same principles have been applied in a case which came under the consideration of the whole Court. John Ferguson was charged with the murder of a child, the "daughter of Elspeth *Marion* Buchanan." The mother was designed by that name in the list of witnesses, and sworn under that designation without objection. But she stated upon an examination *in initialibus*, and it was proved by the parish register, that she was not named *Marion*, nor had been christened as such, but had been called Meney after the surname of her grandmother. She declared that she had been usually called Meney, but in one service, where she lived for six months, had been called *Marion*, to distinguish her from another person who lived in the same service. When examined before the Sheriff, she stated her name was Meney. Upon this evidence the Lord Justice-Clerk, Lords Gillies and Medwyn, held the objection good; Lord Meadowbank strenuously and ably supported an opposite opinion. The pannel was of course acquitted.<sup>3</sup>

Upon a review of these different judgments, though they cannot all be considered as of equal authority, yet it is impossible to dispute that the principles on which they are founded, are, on the whole, strictly agreeable to law and justice. The rule that the pannel must be convicted of the crime libelled, and that the jury must enquire into his guilt of *that individual offence*, and of no analogous crime which should have been libelled, or may have been intended, is founded not only on the dictates of reason, but the principles of justice. Still it may admit of reasonable doubt, whether, in two of the instances, the Court did not carry this just and equitable principle to an undue length. There is a material difference between such an error in the description of the injured person as affects his *identity*, and such an one as touches merely an adventitious quality which may be erroneously set forth, although the identity remains unaffected. When the Court there-

<sup>1</sup> John Murray, Aberdeen, April 1826; Shaw, No. 148.—<sup>2</sup> Hume, ii. 198.—<sup>3</sup> John Ferguson, May 16, 1831; Justice-Clerk's notes, and Shaw, No. 212.

fore held, in Murray's case, that an error in the residence of the injured party at the *time of the assault* was a fatal blunder, although the designation in every other particular was correct, they gave to an adventitious quality, not necessary to be set forth, the weight and the importance of one on which the identity depended. In like manner, when Mr Clerk abandoned the prosecution in the case of Hannay, in respect of an error in the description of the *trade* of the father of the murdered person, he gave an effect to an error in the designation of the father, which would have been more reasonable if applied to the injured party herself. It may be considered, therefore, as the true principle, that those errors only are to be held as fatal to a charge, which affect the identity of the crime; as a mistake in the name of the injured party himself, or his trade or residence, or the place where the crime was committed; but that those subordinate errors which relate to the trade or residence of their parents, or any adventitious quality not essential to the designation of the principal party injured, should not have this effect. No hesitation need be felt in making these observations on the case of Murray, at least, since the learned Judges who pronounced it had afterwards the candour to admit to the author that they were satisfied it had been adjudged with excessive strictness.

But it deserves the serious consideration of those intrusted with the administration and improvement of the law, whether there is not an obvious remedy for the defeat of justice which the discovery of such errors in the *corpus delicti* occasions, in sustaining the competency of a second prosecution for the new offence, which it has appeared in the course of the proceedings was really committed. That the pannel is not in such a case tried twice for the same offence is obvious, from the circumstance that the new charge was held on the former trial to be essentially different from the old one, and in consequence of that discrepancy the former acquittal took place. It does not follow, because a prisoner has been acquitted of one crime, that therefore he cannot be tried for *another* crime committed on a different person, or at a different place. Nor is there any insurmountable difficulty in the consideration that here the two trials are substantially for the same offence; for that difficulty has been got over in many cases, particularly in those where the former trial was, no matter at how late a stage, cut short by the illness or death of a juryman; and the fact of an absolvitor having taken place on the former charge, should be no bar to the indictment for a new and different crime



when it is preferred. The acquittal of a great culprit, not on the merits or from defective evidence, but from such an inaccuracy in the legal instruments on which he is tried, always produces the worst possible effect, and tends more than any other circumstance to diffuse the general opinion, that criminal law is a mere lottery, and that escape is generally obtained, not from established innocence, or defective evidence, but the astuteness of lawyers or the negligence of scribes. While these observations are naturally suggested by the importance of this subject, it is to be observed that they have received no sort of countenance from the decisions of the Court; but that, on the contrary, on a second libel being brought against John Hannay, charging him with the real offence, it was decided by the Court that the proceeding was incompetent.<sup>1</sup>

But while this decision unquestionably forms the law as to this point, while it remains unaltered by the same high authority or legislative interference, it is worthy of remark that our practice in this particular seems to be more scrupulous than that of the neighbouring kingdom. The defence of *autrefois acquit*, is in the general case, indeed, a good defence in England against any second trial;<sup>2</sup> but this obtains only where the first indictment was valid.<sup>3</sup> Where this was not the case, a second trial is competent on the same *species facti*, notwithstanding a former acquittal. Thus, a man was found liable to a second trial for forging a certain bill, though he had been tried and convicted for the offence on a former occasion, which verdict had been set aside on the ground of an error in the description of the bill.<sup>4</sup> So, also, where certain prisoners were tried and acquitted on a charge of breaking into a house and stealing goods, it having been proved that no goods at all were stolen, it was found competent by all the Judges to try them next day on a new indictment, which charged them with breaking into the same house with intent to steal.<sup>5</sup> The competence of a second trial, on a more correct indictment, is taken for granted in their practice.<sup>6</sup> And where a charge of murder was preferred by forcing a person "to take, drink, and swallow down poison, that is, oil of vitriol," and he was acquitted of that charge, and afterwards tried and convicted on a charge of forcing him "to take oil of vitriol," it was held by eleven of the twelve Judges, that the second trial on the new

<sup>1</sup> Hume, ii. 466; John Hannay, Nov. 4, 1806.—<sup>2</sup> 2 Hale, 246; Rex v. Holcroft, 4. Co. 46.—<sup>3</sup> 1 Chitty, 452; and Rex v. Clark, 1 Russel, 472.—<sup>4</sup> Reading's case, Leach, ii. 590.—<sup>5</sup> Vandercomb and Abbot, Leach, ii. 711.—<sup>6</sup> Cook's case, Leach, i. 105.

indictment was competent, though, on the special ground that the second indictment implied that oil of vitriol was a poison, a pardon was recommended.<sup>1</sup> It is evident, therefore, that the plea of *autrefois acquit* is not an insuperable bar in England to a new trial on a more correct indictment; and although it is no doubt true that the objections to relevancy, as Baron Hume<sup>2</sup> has observed, are in the general case argued by their practice on a reserved case after the first trial is over, yet still these cases demonstrate that they do not regard the mere fact of the prisoner having undergone a first trial, or, as we would say, tholed an assize, an insurmountable bar in every case to a second prosecution.

29. In cases where the name of the injured party cannot be ascertained, or where there is an uncertainty as to what it really is; or where a course of violent acts on a great number of the lieges is charged, the specification of the individual may be dispensed with.

Cases sometimes occur, where the name of the individual who is injured, cannot, by any exertion on the prosecutor's part, be ascertained. Put the case that a corpse is found mangled and disfigured with wounds, so that the person killed could not be recognised, or that it is brought packed up in a box to an anatomist, under circumstances which leave no doubt of the crime, though the individual cannot be discovered; in these and similar cases the necessity of the situation makes the law, and a libel will be sustained, though laid at large, for the murder of some person unknown.<sup>3</sup> In a case, accordingly, where the name of the deceased was not distinctly known, the libel was sustained which called him "David Galt, or of some other name to the prosecutor unknown."<sup>4</sup> In cases of piracy, too, it is often impossible to specify either the property of the ships plundered, or the names of the persons slain, in the course of the expedition; and, therefore, an indictment for that crime has been sustained as relevant where the libel was silent, not only as to the name of the captured vessel, but her owners, port, and country, and an objection taken on that ground was overruled.<sup>5</sup> For a similar reason it is competent

<sup>1</sup> Rex v. Clark, 1 Russell, 472, 473.—<sup>2</sup> Hume, ii. 467.—<sup>3</sup> Hume, ii. 198.—<sup>4</sup> Neil M'Gaughan and Robert Brown, Sept. 14, 1819; unreported.—<sup>5</sup> Green and Others, March 1705; Arnot, 251.

to found a charge on a theft of goods whose owner is unknown, if taken from the lawful custody of some known person; but in such a case the libel must state that it is unknown to whom the goods belong.<sup>1</sup>

But it is not merely in these situations, where the specification is plainly impossible, that an indictment in such general terms will be sustained by the Court. In former times, the same rule obtained in those cases, then unhappily too numerous, in which the prosecutor charged a course of violent offences, over a tract of country, against persons who made a sort of trade of plunder.<sup>2</sup> And in a great variety of cases it has been found competent, on objection, to charge the murder or robbery of A. B., or some other person, to the prosecutor unknown.<sup>3</sup> And in the late case of *Burke and M'Dougal*, one of the charges was for the murder of "Margery, or Mary M'Gonegal, or Duffie, or Campbell, or Docherty, then residing in the house of Roderick Stuart, labourer, in Pleasance of Edinburgh;" an enumeration which almost amounted to no specification at all.<sup>4</sup> In such cases where the name is uncertain, some one, the most likely to have been the real one, should be given, accompanied with the alternative, "or some other name to the prosecutor unknown."

30. A libel for theft or swindling must specify the individual from whose custody the articles are taken; but though the name of the owner is usually added when it is known, it is not an indispensable part of the charge.

The material point in a libel for theft, swindling, or embezzlement, is the possession from which the goods were taken, whether that was on the part of the real owner, or of some intermediate or temporary person for him.<sup>5</sup> Which matter being duly set forth, with the time, place, and manner of taking, the particular act is then described by its natural and overt characters, and cannot be confounded with the depredation of any other goods. Libels, accordingly, have always been sustained which described stolen goods as in the possession of the person from whom they were taken, though the person to whom they belonged

<sup>1</sup> Daniel M'Kenzie, April 1818, Perth, Hermand and Gillies.—<sup>2</sup> M'Gibbon's case, Dec. 18, 1676; Hume, ii. 198.—<sup>3</sup> James Cranston, Sept. 10, 1723; Robert Robertson, Aug. 6, 1743; John Irvine, Sept. 24, 1744; Alexander Barclay, July 31, 1758; Hume, ii. 199.—<sup>4</sup> Syme, 346.—<sup>5</sup> Hume, ii. 200.



was either not specified or unknown. Thus, stolen goods are frequently described without objection, as the property of the said A. B., or of some other person to the prosecutor unknown.<sup>1</sup> Libels, in like manner, are frequently sustained, which charge goods taken from a certain house, as the property of the said Alex. M'Dougal, or some others of his family;<sup>2</sup> and this style is very frequently adopted, where it is uncertain to which member of a family certain stolen goods belong. And it is sufficient to affirm, in a theft from a carrier or the post-office, that the goods or money were taken from the carrier or post-boy, in the course of their conveyance from a person named in one place, to another named in another.<sup>3</sup> This is now the established practice in such cases; the libel specifies that a certain sum was on a particular day enclosed in a letter by A., and put into the post-office at B., addressed to C. at D., and that it was stolen at some particular place specified, or some place to the prosecutor unknown, in the course of its transmission from the one to the other.<sup>4</sup> These observations are equally applicable to the description of the possession and ownership of the goods in the case of robbery or theft; and, accordingly, not only have many libels been sustained which described only the persons who had the robbed goods in their possession,<sup>5</sup> but the objection has been expressly repelled, that in such cases the owner of the goods was not specified.<sup>6</sup> In the case of goods belonging to the Crown, and in the hands of public officers, they should be charged as the property of his Majesty, and as in the lawful possession of the person from whom the depredation was committed.<sup>7</sup> So strongly has this principle taken root in our practice, that by the established style of indictments in all cases of theft, robbery, swindling, breach of trust, and reset, the goods feloniously taken are described "as the property, or *in the lawful possession* of A. B.," and under the latter part of this alternative it is sufficient if the goods are proved to have been in the possession of A. B., either without proving at all to whom they belong, or though it appear from the proof that they belong to some other person. It has also

<sup>1</sup> Macdonald and Jamieson, Aug. 9, 1770; Daniel M'Kenzie, Perth, April 1818.

—<sup>2</sup> James Johnston, Feb. 7, 1787.—<sup>3</sup> Daniel M'Kay, July 6, 1781; Hume, ii. 201.

—<sup>4</sup> James Macintosh, July 17, 1826; William Oliver, Oct. 31, 1809; Ante, i. 348, 353.—<sup>5</sup> Wilson, Hall, and Robertson, March 2, 1736; David Coulton, Dec. 8, 1738.

—<sup>6</sup> Alexander Barclay, July 31, 1758; Hume, ii. 202.—<sup>7</sup> Carruthers' case, Nov. 1, 1731.

been held on an objection, that when goods are stolen from a police-office, it is sufficient to describe them as "in the lawful custody and possession of one or more of the police-officers, at the said police-office."<sup>1</sup> And a charge of theft is sustained, though the article be only accidentally or unintentionally in the hands of the possessors; as a stray sheep, which has come upon a man's ground without his knowledge. It is held in his lawful possession.<sup>2</sup>

Care must be taken, however, in describing the ownership of stolen goods, either to be accurate, or to put in such an alternative as may cover any error; and where this is not done, and a discrepancy between the allegation in the libel and the proof emerges, a fatal objection will arise. Thus, where the stolen goods were described in the libel as the property of John Anderson, and it came out in the proof that they were the property of John Anderson and Company, the objection was deemed so serious that it led to a compromise of the case by a restriction of the libel on the part of the public prosecutor.<sup>3</sup> On the same principle, where a parcel was charged as stolen from a carrier's cart, addressed to "*James Budge, merchant in Anstruther,*" and it turned out on the proof that it was addressed to *John Budge, merchant there*, the objection was deemed insurmountable, and the pannel was acquitted.<sup>4</sup> A similar case occurred at Ayr, where the goods were charged in the libel "as the property of *David Woodburn, tenant of Whiterigs;*" and it came out on the proof that they belonged to *Hugh Thomson, residing there, his overseer*. The case was in consequence abandoned.<sup>5</sup> To avoid such a result, it is usual, in cases of goods stolen from a firm, to describe the goods in this manner, "the property, or in the lawful possession of the said Company of A. and B., or of the said A. or the said B., the individual partners thereof." In a case where property was stolen from a broker's shop, and it was charged as the property of "*James Neilson, broker, and overseer of scavengers,*" it appeared on the proof, that his wife's name, *Euphemia Phemister*, was above the door, and that he never dealt in the shop, being engaged in his other occupation. The

<sup>1</sup> John Lawson, Jan. 9, 1822.—<sup>2</sup> Colin M'Intyre, Inverary, Autumn 1820; Justice-Clerk's MS.—<sup>3</sup> Fraser and Mossman, August 29, 1810; Hume, ii. 201.—<sup>4</sup> Robert Wright, alias John Handy, Dec. 26, 1808; Hume, ii. 201.—<sup>5</sup> John Kelly, Ayr, Spring 1821; unreported.

objection was repelled, on the ground that they had not separate stocks, but shared the profits between them.<sup>1</sup>

31. In the description of the stolen goods, it is sufficient if the prosecutor gives reasonable information without descending to any punctilious accuracy.

In the description of stolen property, it is justly held by our practice, that the same minute accuracy is not absolutely required as in the description of the *locus delicti*, or the person injured. There is a material difference in point of reason and justice between the one and the other. The essence of the crime, and the material features by which its nature is to be made known to the prisoner, depend on the time and place of its commission, and the name of the person injured; the description of what is taken is in general a subordinate matter, not forming a vital part of the charge. It is to be recollected, too, that by the very act of the depredation the prisoner frequently renders it impossible to give a minute description of the goods abstracted, and it would be the height of injustice that he should profit by the perfect manner in which his crime has been completed. On these grounds a more general description is sustained as sufficient in this matter than in the other parts of the libel. Without referring to the older cases, where a very great latitude in this respect was permitted,<sup>2</sup> it is sufficient to observe, that from the earliest to the present times, it has uniformly been held sufficient to describe the total sum, and the species of money generally, without specifying how much was taken in bank-notes, how much in gold, and how much in silver. Thus, a libel was sustained which charged the prisoner with having robbed Christopher Hog of a cloakbag, "in which were three hundred and twenty-four pounds, four shillings, in gold, money, and bank-notes."<sup>3</sup> The same style was adopted and found relevant in a later case, where the goods stolen were described as "a sum of money in specie, and in the notes of different banks, or banking companies, amounting to £423, 7s. 6d., or thereby, all belonging to the Dundee Banking Company."<sup>4</sup> In the case of Moffat, who was defended by Messrs M<sup>c</sup>Neil and

<sup>1</sup> Margaret Fleming, March 20, 1826; unreported.—<sup>2</sup> Hume, ii. 202, 203.—<sup>3</sup> Christopher Hog, Nov. 7, 1720; Hume, ii. 203.—<sup>4</sup> Bruce, Falconer, and Dick, Nov. 28, 1788; Hume, *ibid.*



Menzies, the ablest criminal lawyers at the bar, the charge was, that the pannel had stolen “£20,000, or thereby, in bank or bankers’ notes, of various denominations, the property, or in the lawful possession, of the said Paisley Union Banking Company;” and this latitude passed without objection, though on other points the case was most strenuously defended.<sup>1</sup> Hugh Ross was charged with the theft of “a large quantity of bank or bankers’ notes, partly of the British Linen Company, partly of Hunters and Company, bankers, Ayr, and partly of other banks or banking companies, to the prosecutor unknown, of various denominations, to the prosecutor unknown, to the amount of £1682 sterling, or thereby, the property, or in the lawful possession of the Paisley Banking Company.”<sup>2</sup> And in Murray’s case, who was defended by Messrs Jeffrey, Cockburn, and Murray, the indictment charged the theft of “one paper parcel containing bank-notes specified, as in inventory, to the amount of £2434, 17s.,” and also “a paper parcel containing a large number of bank or bankers’ notes, of different denominations, being partly notes of the Bank of Scotland, partly of the Banking Company carrying on business at Edinburgh, under the firm of Sir William Forbes, James Hunter, and Co., and partly of other banks or banking companies, to the prosecutor unknown, amounting in value to the sum of £2254, 10s. sterling, or thereby, the property, or in the lawful possession of the Leith Bank or Banking Company.”<sup>3</sup> It is unnecessary, after these examples, to multiply instances of a style which is now matter of daily practice.

There is this peculiarity, however, which requires particular attention in regard to money, that the expression “*bank-notes*” is held to mean the notes of the Bank of England, or of the Scotch chartered banks only; while the expression “*bankers’ notes*,” is held, besides these, to include also the notes of *private* banks or banking companies.<sup>4</sup> To avoid this objection, it is the constant practice, where bank-notes are libelled on, to style them “bank or bankers’ notes;” and these words reach every description of bank-notes, whether issued by chartered or private banks.

Frequent mention is made in indictments of the theft or robbery of watches, and questions may arise as to how far it is neces-

<sup>1</sup> James M’Coul, June 12, 1820.—<sup>2</sup> Hugh Ross, Ayr, Autumn 1812.—<sup>3</sup> Robert Murstey, Feb. 16, 1825; unreported.—<sup>4</sup> Smith and Brodie, August 1788; Hume, ii. 390.

sary to give a specification of the stolen article in this particular case. On this head the rule is, that it is not necessary to give any farther description of the watch than that it is a gold, a silver, or a metal one; but that if the name and number are given, they must be correct, or the pannel is entitled to an acquittal.<sup>1</sup> Nay, in some of the older cases, no description of the watch at all is given;<sup>2</sup> but this is not the practice at this time, and it is doubtful if it would now be held sufficient. The usual practice is, that when the watch is recovered, and is lying before the prosecutor when he draws the libel, the maker's name and number are given, adding the words "or of a similar name and number," these last words being intended to cover any slight deviation in the spelling, &c. of the words, or in a single figure of the number, which has obviously arisen from mistake, and can lead to no doubt as to the stolen article intended to be described; but that where the watch is not recovered, it is described only by its composition, as a gold watch, a silver watch, a metal watch, or the like, and libels in both forms are daily sustained as relevant by the Court.

In the description of horses or cattle, the practice formerly was to describe them quite at large, without any specification whatever of the colour, age, or distinguishing marks.<sup>3</sup> And it is laid down by Baron Hume, "that a libel is good for stealing sheep, horses, or cattle, if it mention the kinds, time, place, and possessor, and the number of head of each, though it say nothing of the age, size, or other natural marks of the animals."<sup>4</sup> In the case of sheep, this mode of libelling is still *in viridi observantia*; nor indeed is it easy to see in what way, to those unskilled in the slight distinction between those animals, any more specific description can be given. But in the case of horses and cattle, it has become usual of late years to specify some marks by which the animals meant may be distinguished, as "a black ox between seven and eight years old, high-horned, and rolled in the hind-foot;"<sup>5</sup> or "a blackish-brown mare;"<sup>6</sup> or "a three-year-old horned stot of a black and white colour, having bucket horns; a three-year-old horned stot of a black colour; a two-year-old hummel quey of a reddish colour, being all the property," &c.;<sup>7</sup> or "a branded horned stot of three years and a half old, or thereby, and

<sup>1</sup> Hume, ii. 204.—<sup>2</sup> Steedman, Feb. 11, 1782; Gavin Lawrie, March 18, 1783.—

<sup>3</sup> Hume, ii. 202; Donald Bain, Dec. 17, 1722; William Philip, Feb. 22, 1772; Alexander Gray, Aug. 1, 1774.—<sup>4</sup> Hume, *ibid.*—<sup>5</sup> George M'Donald, Feb. 16, 1767.—

<sup>6</sup> Philip's case, Feb. 22, 1772.—<sup>7</sup> John Gall, Aberdeen, Autumn 1827.

a branded hummel stot of the same age.”<sup>1</sup> In cases of horse-stealing the same rule is followed; they are in general thus described, “a light grey or cream-coloured mare;”<sup>2</sup> or a “grey mare and a horse of a dapple brown colour.”<sup>3</sup> It seems proper always to adopt this course where the colour or other marks are known, and where this is not the case, to say “the colour of the said animal being to the prosecutor unknown,” which will of course form a sufficient excuse for its want. But it cannot be affirmed that this practice has grown up into a settled usage, or that a judge would be justified in throwing out a libel in horse or cattle stealing, upon the ground that the age or colour of the animal is not given, nor is it affirmed that they were unknown to the prosecutor.

In the description of the theft of other articles, and more especially where they are of such a kind as are taken away in gross or large quantities, as groceries, haberdashery, napery, woollen cloths, or the like, it has always been the inclination of our practice, proceeding on very sufficient reasons, to sustain a description of the stolen goods very much at large; more especially if some are specified by distinguishing marks, and the others are mentioned in the general way. Thus, a libel was sustained on objection, which charged the theft of “several pieces or quantities of different kinds of wares or goods, such as linens, calicoes, cottons, dimities, woollen cloths, druggets, shalloons, cotton, velvets, and plushes, and other sorts of merchandise.” The objection of the want of specification was repelled, upon the ground that the articles meant to be used in evidence were described by their proper marks, and that as to the rest the general description was sufficient.<sup>4</sup> The libel against Randal Courtney bore only that he carried off “large sums of gold and silver money, and several shirts belonging to the said George Keith, and table-cloths, table-napkins, and other articles.” This was sustained after a debate on its sufficiency.<sup>5</sup> In more modern times, the usual practice is to libel specifically on such articles by their quality, colour, and measure, as can be so detailed, and, in regard to the rest, to give such a general description as can be furnished; adding, if the description is obviously defective, “the particular description being to the prosecutor unknown.”

<sup>1</sup> Andrew Howie, Sept. 1827, Aberdeen.—<sup>2</sup> Charles Fraser, Inverness, Autumn 1828.—<sup>3</sup> John Tweeddale, Glasgow, Winter 1828.—<sup>4</sup> M'Donald and Jamieson, August 1770; Hume, ii. 204.—<sup>5</sup> Randal Courtney, August 4, 1743; *ibid*.



If, however, a particular description is given, however unnecessarily, the prosecutor must prove the articles to be of the description specified, or he will lose that part of his libel. Thus, in a case where the libel specified several articles of *wearing apparel*, and, *inter alia*, two towels, these were held *pro non scriptis*, as not being properly wearing apparel.<sup>1</sup> On the same principle, when two sets, one of thieves and another of reseters, were tried on the same libel, and the thieves were charged with the theft of "three dozen of gold rings and several pairs of gold ear-rings," and the reseters with the reset of these articles, the objection was sustained for one of the latter parties, that he was charged with resetting a gold amethyst ring, and a pair of gold pearl ear-rings, which had not been *specified* in the preceding list as stolen by the thieves. The truth is, that as both the amethyst ring and pearl ear-rings were *gold*, they had been included under the general description of gold rings and ear-rings; and therefore there is reason to think that this case, which occurred during the hurry of a most laborious circuit, was adjudged with undue strictness, inasmuch as the articles libelled on as resetted, *were* previously libelled on as stolen, with this difference only, that a *more minute* description was given of them in the part of the libel which charged the reset, than in that which set forth the previous theft, a circumstance of which surely the resetter could not with any good reason complain.<sup>2</sup> The true principle appears to be, that if a generic term is used, which *includes* several species, it is not a valid objection if one of those species, technically speaking, bears a different appellation from the whole genus; and of this an apt illustration lately occurred at Glasgow. An article was there specified in a libel under the name of *cambric*, and it was objected, when produced, that it was truly *cambric muslin*, which was the fact; but Lord Pitmilley repelled the objection, upon the ground that the term *cambric* was the generic term, applied to both kinds of stuffs, though they were made of different materials.<sup>3</sup>

32. The libel must specify the way and manner in which the criminal act was committed; in assaults and

<sup>1</sup> John Wilson, Stirling, Sept. 1816, unreported.—<sup>2</sup> White, Paisley, and Others, Autumn 1823; Glasgow, Shaw, No. 106.—<sup>3</sup> M'Kechnie and M'Cormack, Glasgow, Sept. 1817; Hume, ii. 205.

homicides, by setting forth the nature of the wounds, and the manner of their infliction; in housebreaking, or other offences, by describing how the criminal act was accomplished.

“It is a sacred rule of law,” said Lord Alemore, “that the facts must be laid with precision in a criminal charge. It is not allowable to charge that you killed such a man by stabbing or poisoning. Here the mode of corruption is not specified, and yet there are so many modes of expression in soliciting, which are not criminal, that no proof should be allowed upon a general charge; and the prosecutors are the less excusable for not having stated the modes of corruption, as they might have found them out on a precognition.” This, accordingly, was one of the grounds on which the Court dismissed the libel, as too vague in a case of bribery, not only as to time and place, but the *mode and circumstances* of the criminal act.<sup>1</sup> On the same ground, a libel was dismissed as irrelevant, which charged the pannel with swearing falsely, that his vote “was not nominal or fictitious, nor created for the purpose of enabling him to vote for a member to serve in Parliament,” without any specification of the facts or circumstances which might either show what meaning he himself attached to the phrase, “nominal and fictitious,” or from which the Judge might discover whether he were correct in his notions on the subject.<sup>2</sup> But in a case of challenging to fight, where it was objected that the libel did not bear a challenge to fight a duel, or single combat, or to fight with mortal weapons, the Court sustained the answer, that from the detail of facts and circumstances given, it was clear that a challenge of the latter description was intended.<sup>3</sup>

In like manner, in a charge of murder, certainly a libel shall not be good which shall charge the crime thus: “In so far as, upon the 10th day of April 1832, you did kill and murder C. D. merchant in Edinburgh, upon the High Street of Edinburgh.” The prosecutor must go a step farther, and describe those acts, as by stabbing, poisoning, shooting, strangling, or the like, by which the fatal act was carried into effect.<sup>4</sup> Thus, where the indictment,

<sup>1</sup> M'Intosh's case; M'Laurin, No. 79, p. 463.—<sup>2</sup> Lawson of Westertown, June 27, 1785; Hume, ii. 191.—<sup>3</sup> Jas. M'Caul, April 5, 1714; Hume, *ibid.*—<sup>4</sup> Hume, ii. 190.

*inter alia*, charged the pannel with having “ *invaded* Barbara Mowat, and predoniously and oppressively extorted from her the sum of £10, or some such sum, to redeem her husband from captivity,” the Court found that that article of the libel which charges the pannel with invading Barbara Mowat, cannot be sustained, because of the *uncertain manner* in which it is libelled.<sup>1</sup> To the same purpose was the judgment in a case of bribery at an election. The libel there charged the prisoner with having “ on one or other of the days of August, September, or October 1768, by himself, or by others employed by him, by gifts, rewards, or promises, agreements or securities for gifts or rewards, corrupt, or attempt to corrupt, or by corruption procure, or attempt to procure, David Ritchie, &c. members of the said burgh of Cupar, to give their votes for certain persons, and not to give their votes for certain other persons, at the last annual election of magistrates and counsellors.” Now, this the Court justly found irrelevant, “ as too vague and uncertain as to the *place, mode, and circumstances* of the crime libelled.”<sup>2</sup> The prosecutor should, instead of, or in addition to, this general and sweeping charge, have specified particular instances in which the corrupt considerations were applied to the electors, setting forth when and where this was done, what line of conduct was required of them, and what considerations, as by delivery of money, granting of a bill, promise of a reward, or the like, were applied to sway their political conduct.

In this particular, however, our practice is content with a reasonable description of the mode in which the criminal act was done, and does not require that punctilious accuracy or minute description of the instrument, and mode of inflicting the injury, which is usually given in the English practice. In a case of murder, for example, it is not necessary to specify the precise place of the wound, its depth and width, or the nature and value of the weapon by which the injury was inflicted, as is usual in the English practice. It is sufficient if the wound is described in a more general way, as having been inflicted “ on the sides and belly with a knife, or other sharp and cutting instrument,” or with a bayonet, or some other offensive and mortal weapon;<sup>3</sup> or “ with a hammer, or some other lethal and ponderous instru-

<sup>1</sup> Earl of Morton v. Sir James Stewart, March 3, 1740.—<sup>2</sup> George Dempster, August 1, 1788.—<sup>3</sup> William Davidson, July 1726.



ment;" or by a shot from a loaded gun, or other offensive fire-arm; or by the administration of sulphuric acid, arsenic, or some other deleterious and corrosive substance; specifying of course the place where the injury took effect, as on the head, breast, sides, or back. Innumerable instances prove this to be the established style of such indictments, both in ancient and modern times. Thus a libel was sustained which charged the killing the deceased, "by strangling her with a neckcloth or handkerchief, or something else pulled strait about her neck, or by squeezing her throat with your hands;"<sup>1</sup> and another, which charged the murder of a child, "by squeezing its neck with your hands, or otherwise putting its head under water, or by some other means to the prosecutor unknown;"<sup>2</sup> a third, for the murder of a child, "by pouring a quantity of what is commonly called oil of vitriol, or some other substance of a poisonous nature, to the prosecutor unknown, over its throat," and on this libel sentence of death followed;<sup>3</sup> and a fourth, for murdering the pannel's wife, by "strangulation, or other means to the prosecutor unknown."<sup>4</sup> In recent times, the same style has been adopted. Mary Elder, or Smith, was indicted, without objection, for murder, on a libel which set forth, that she did "administer to Margaret Warden, servant to the said David Smith, a quantity of arsenic, or other poisonous drug, which she had mixed up with water, or some other substance, and did then and there induce her, the said Margaret Warden, to swallow, by falsely representing that the mixture was innocent, or by some other false representation to the prosecutor unknown."<sup>5</sup> Burke was convicted and executed on a libel which charged him with having "feloniously laid his body, or part thereof, over or upon the face of Margaret M'Gonegal, &c., when she was lying on the ground, and did, by pressure thereof, and by covering her mouth and face with his body or person, and by grasping her by the throat, and keeping her mouth and nostrils shut with the hands, and thereby, or in some other way, prevented her from breathing, suffocate and strangle her."<sup>6</sup> Robert Emond was hanged on a libel which charged him thus—"You did violently, wickedly, and feloniously attack and assault the said Catherine Franks, and did, with a table-knife, hatchet, or other sharp and lethal instrument

<sup>1</sup> John Hannay, July 28, 1806.—<sup>2</sup> Taylor and Smith, Feb. 2, 1807.—<sup>3</sup> Barbara Malcolm, Jan. 5, 1808.—<sup>4</sup> James Gilchrist, June 14, 1808.—<sup>5</sup> Mary Elder or Smith, Feb. 5, 1827; Syme, 71.—<sup>6</sup> Burke and M'Dougal, Dec. 24, 1828; Syme, 346.

to the prosecutor unknown, inflict on her a severe wound across the throat, and ten or thereby wounds on the head and face, by which her skull was fractured in several different places, and she immediately died of the injuries thus received, and was thereby murdered by you the said Robert Emond.”<sup>1</sup> These are sufficient examples of a style which is now matter of daily practice.

It is enough if the manner of the death was proved to agree in substance with the violence there set forth, although in some slight particular there should be a difference. In this respect, we agree with the rules of the English practice, which is much more scrupulous in these particulars than ours has ever been. “And if the *manner and substance* of the death proved at the trial agree in substance with the means charged in the indictment, it will be sufficient; as where the indictment is for killing with a dagger, and the evidence proves killing with a staff; or if the indictment is for killing with one kind of poison, and the evidence proves the killing with another, such evidence maintains the indictment, because the proof of the instrument is not absolutely necessary to the proof of the fact itself; but if the charge is for poisoning, and the death is proved to have been by striking or starving, &c., this evidence would not support the indictment, as the species of death in the one case is totally different from the other.”<sup>2</sup> If these principles obtain in the English practice, where a minute specification of the instrument and manner of the death is usually given, much more must they obtain in our courts, where such accuracy has never been considered necessary, and a much greater degree of latitude in describing the mode in which the injury was inflicted has always been permitted.

It is competent to add to a charge of murder a charge of previous malice, in these terms: “And you the said A. B. did previously evince deadly malice against the said C. D., especially at Aberdeen aforesaid, for twelve months or thereby preceding her said decease.”<sup>3</sup> It is proper to limit the period to which the charge is meant to apply, in some such way as this, as it is doubtful whether, on such a charge without any restriction, a proof would be admitted without any restriction.

In cases of housebreaking, although it seems to have been otherwise in our older practice,<sup>4</sup> it is now fixed, that a libel is

<sup>1</sup> Robert Emond, Feb. 8, 1830; unreported.—<sup>2</sup> Phillips, i. 204, 5th edit.—<sup>3</sup> Case of Joseph Rae, July 22, 1817; ante, i. 12.—<sup>4</sup> Randal Courtney, Aug. 4, 1743; Hume, ii. 196.

not good which does not specify the mode of entry, as by forcing open the front door, breaking open a window, cutting through the partition from an adjoining house, coming down the chimney, &c. To this it is usual to add, "or by some other means to the prosecutor unknown." The legal effect of this addition, however, is not to enable the prosecutor to prove any other mode of housebreaking, how dissimilar soever from that charged, but merely to cover any variation in inconsiderable particulars, which does not vary the essentials of the charge. Thus this clause will cover a variation as to the mode of forcing entry into a house, as by breaking open a window instead of raising the sash, or by unlocking the front door instead of wrenching the door from its hinges; but it will not cover a total variation from the *modus operandi* specified in the libel, as by entering at the window instead of the door, or coming down the chimney instead of breaking an aperture in the wall.<sup>1</sup>

33. But in cases where, from the nature of the crime charged, a minute description of the *modus operandi* is impossible, it will be sufficient if the prosecutor gives all the information on the subject which he himself possesses, or by a reasonable degree of activity might have acquired.

Cases frequently occur, especially in charges of murder, where it is impossible to give that specification of the mode in which the injury was inflicted, which is justly deemed necessary in ordinary cases. Thus, in cases of child-murder, it frequently happens that the infant's life is extinguished with such facility as to leave no traces of the manner in which the inhuman act was accomplished; or in cases of murder by smothering or drowning, the traces of violence, if any, may have totally disappeared before the corpse becomes the subject of judicial investigation. In such cases, therefore, or where the body, from the length of time which has elapsed before it is discovered, is in such a state of decay as to have obliterated all marks of external action, it is competent to libel in general upon such a mode of accomplishing the act as appears most probable, accompanied by a general charge that the deed was done in that way, or in some other way to the prosecutor unknown. Thus various libels for child-mur-

<sup>1</sup> Per Lord Justice-Clerk Boyle, in *John Wales*, Glasgow, Spring 1828; unreported.



der were sustained as relevant in former times, which merely assert that "violent hands were laid upon the infant," without specifying how. Thus Helen Girdwood was indicted—"And the child being alive, she most cruellie and unnaturallie murdered the same, and buried it in the red land, where the swine having digged up the same, the bloodie marks and signes of her cruel hands were found upon the said infant."<sup>1</sup> And Jean Cowan was charged thus—"And then and there she did cruelly murder and kill her own innocent child, by laying violent hands upon it."<sup>2</sup> These examples are not given for the general imitation of prosecutors in later times, since more correct ideas have been established as to the precision requisite in libelling, but only as proofs of the modification of the ordinary rule, which from the earliest times has been admitted in this particular offence.

Cases may often occur, in like manner, where it is impossible to discover in what way the death has been inflicted, and nevertheless it is indispensable to the ends of justice that the libel should be sustained. The body, before it is found, may be so far decayed that it is impossible to discover any thing as to the appearances it exhibited during life; or the deceased may have been secretly murdered in his own house, which was afterwards rifled and set on fire, so that the body, with all the contents of the dwelling, was consumed.<sup>3</sup> Such a case actually occurred; and the libel, in so far as it charged the murder, was sent to an assize in these terms:—"All access to the room having been cut off as said is, they wickedly executed their barbarous purpose, and cruelly murdered the person of the said Lord Banff in cold blood, by stabbing, strangling, or in some other wicked and cruel manner depriving him of life; and thereafter broke open chests, cabinets, and other lockfast places, where his papers and other things of value were kept, pillaged, rifled, and away took what they pleased, as appeared by the order the house was found in when the neighbours and servants came to quench the burning."<sup>4</sup> On the same principle, an indictment was recently sustained, which charged the murder of a Jew, who was discovered in a field near Leith, many months after his death, in a state of extreme decay, in these terms:—"And having overpowered the said Alexander Phillips, you did strangle him by squeezeing his throat, or by some other means to the prosecutor unknown, wickedly and

<sup>1</sup> Helen Girdwood, Nov. 17, 1681.—<sup>2</sup> Jean Cowan, Nov. 18, 1734.—<sup>3</sup> Hume, ii. 193.—<sup>4</sup> Robert Stewart and Others, Aug. 3, 1713; Hume ii. 193.

feloniously put him to death.”<sup>1</sup> This principle is so obviously founded in reason, and the necessity of the case, that it must be of permanent application in all cases where, on the showing of the libel, the circumstances were such as to render a more minute description of the *modus operandi* impossible. It applies not only to murder, but to all other crimes where the same reason applies, and therefore, without doubt, would be held to rule the case of thieves breaking into a warehouse or shop, pillaging it of its contents, and setting fire to the premises, so as to consume all traces of their diabolical proceedings—a proceeding which has occurred of late years in Scotland, though unfortunately without the offenders having been brought to justice. It was applied in a case where a man was murdered on a mountain in winter, and his body was long after discovered among the snow, by sustaining an indictment in these terms:—“ You beat and bruised him on the cheek-blade, head, breast, and back, and *used him in so cruel and barbarous a manner* that thereof he instantly died, and was inhumanly murdered by you.”<sup>2</sup> This was obviously as minute a specification as could possibly have been given in the circumstances described.

34. If the libel be alternative in the major proposition, it must also be alternative in the minor; and if it be copulative in the major, it must be copulative in the minor; and regularly to each major there should be a separate and distinct minor.

Great care is requisite in making the major and minor proposition correspond; and where this is not done, a fatal objection will arise to the structure of the indictment. Thus, if the major charge the pannel with two separate crimes, one in addition to the other, there must be two separate minors, one applicable to each charge; but if the major charge one offence *alternatively* with the other, the one minor must be alternative with the other. It will not do to connect an alternative major with a copulative minor, nor a copulative major with an alternative minor; and if this is done, the libel is objectionable. An instance of this lately occurred at Glasgow, where two pannels were charged with theft

<sup>1</sup> Charles and Margaret M'Mahon, Dec. 10, 1827; Syme, 281.—<sup>2</sup> William Mackintosh and Others, Dec. 1, 1729; Hume, ii. 194.

by housebreaking, and three others with resetting the stolen goods. The crimes charged in the major of course were theft by housebreaking, and reset. But in the minor, after the charge of theft by housebreaking, which applied to the two former, there followed these words, "or otherwise," and then followed the charge of reset against the resetters. Now this was obviously incorrect; for theft and reset, the one *in addition* to the other, were charged in the major, while theft and reset, the *one or the other*, were charged in the minor. The objection was deemed insurmountable, and the advocate-depute in consequence deserted the diet. Thereafter a new indictment was preferred against the pannels, in which the charge of reset began with the word "farther," and on this libel they were all convicted.<sup>1</sup> The proper words to commence an alternative charge are, "or otherwise,"<sup>+</sup> those fit for a copulative or additional one, "farther," or "likeas," or "as also," and this style should always be observed where a case of either of these descriptions occurs for prosecution.

The only way to draw a libel correctly, and to preserve a proper harmony between the major and minor propositions, is to give a separate minor for each major. This is *indispensable* in all cases where the charge in the major is either different against different pannels, or alternative against the same ones. It is not indispensable, however, that this should be done in cases where separate crimes are charged copulatively against the pannel, as theft and assault, robbery and assault, fraud and swindling, or the like; but, on the contrary, it is sufficient if in the course of the one minor, a distinct narrative to support each major is to be found. Many indictments are daily drawn in both styles; but where the transaction is complicated, or the one charge is widely different from the other, and not parts of one complex transaction, it is advisable to introduce a separate minor for each.

35. After the conclusion of the description of the criminal acts comes the aggravation, if any there be, arising from the character of the pannel, as that he is habit and repute a thief, or has been previously convicted of the offence with which he is again charged.

At the close of the narrative of the criminal acts with which

<sup>1</sup> Wylie, Johnston, Ferguson, and Others, Glasgow, April 1823; unreported.



he is charged, comes the description of the aggravation arising from his character, so far as that can be competently stated as an aggravation in a criminal court. It is usually done in these terms:—"And you the said A. B. are habit and repute a thief, and have been previously convicted of theft, conform to the convictions hereafter libelled on;" or, "and you the said A. B. have been previously convicted of theft, conform to the convictions hereafter libelled on." This matter requires no illustration, farther than to observe, that none of these aggravations can be proved unless they have been thus specifically libelled on; that the aggravation of habit and repute applies to theft, and theft only; and that every offence, of whatever kind, may be competently charged as aggravated by a previous conviction for that same delinquence.<sup>1</sup>

36. To this follows, in the order of the libel, an account of the declarations of the accused, which are to be used in evidence against him, and all the documents, papers, and articles of evidence which are to be applied to that purpose.

The usual style in which this part of the libel is drawn out is as follows:—"And you the said A. B. having been apprehended and brought before C. D., one of his Majesty's Justices of Peace for the county of Perth, did in his presence, at Dunkeld, on the 2d and 6th days of April 1832, emit and subscribe two several declarations: which declarations being to be used in evidence against you at your trial; as also a gun, as also a coat, as also, &c. will for that purpose be in due time lodged in the hands of the Clerk of the Circuit Court, before which you are to be tried, that you may have an opportunity of seeing the same." The many niceties attending this part of the subject, the rules in regard to the taking and libelling on the declarations of witnesses, and the description and lodging of articles of evidence against the prisoner, will be considered under the head of Proof by Declaration, and Written Proof, to which these subjects rather belong.

37. The old At least clause is now abolished by act of

<sup>1</sup> George Buckley, July 12, 1822; Shaw, No. 73; Houston, Cathie, and Mary Bentley, Jan. 9, 1822; Hume, i. 94; ante, i. 301 and 297.

Parliament ; and all that remains of the libel, is the conclusion for the pains of law.

Next after the description of the articles to be lodged in evidence, there followed till within these few years the "At least" clause, which was conceived in these terms:—"At least, time and place aforesaid, the said murder was committed, and you the said A. B. are guilty thereof, actor, or art and part." The intention of this was to allow the prosecutor to prove accession, and a *species facti*, somewhat, though not essentially, different from the minor proposition set forth in the libel. But as it came to be held in process of time, that nothing could be proved under this clause but what was set forth in the body of the libel ; and as the accession of the pannel to these offences was sufficiently alleged in the outset of the libel, where it is affirmed that "You the said A. B. are guilty of the said crime, actor, or art and part," it had long been found that this part of the indictment was a mere superfluity, instrumental only in suggesting frivolous objections, wholly foreign to the merits of the case, to the prisoner's counsel ; and therefore it was abolished by Sir W. Rae's act, which declares, "that where a charge of art and part is set forth in the outset of a criminal libel, it shall not be necessary to repeat that charge in the latter part thereof, according to the form in the clause commencing with the words 'At least,' and that it shall be competent altogether to omit the said clause, any law or practice to the contrary notwithstanding."<sup>1</sup> Since this enactment, this clause has gone entirely out of use.

The matter of art and part, therefore, now rests on the clause in the commencement of the libel ; and all that it seems necessary to state on that subject is, that it embraces all those relative and less immediate degrees of guilt, the *ope et concilio* of the Roman law, whereby one is involved, who is concerned in occasioning, preparing, or facilitating the criminal deed, or approving of, or ratifying it after it is done.<sup>2</sup> It includes, also, all interference and assistance, *in ipso actu*, at the very time of perpetration, whereby the person thus concerned is not an accessory, but a principal offender. "By art," says Mackenzie, "is meant, that the crime was contrived by their art or skill, *eorum arte* : by part is meant, that they were sharers in the crime committed ; when it was

<sup>1</sup> 9 Geo. IV. c. 29, § 9.—<sup>2</sup> Hume, ii. 225.

committed, *et quorum pars magna fui.*"<sup>1</sup> Though couched in the quaint but expressive language of former times, this is, perhaps, as comprehensive a definition of the charge of art and part as could be given; and it has long been settled, that on a conviction as "art and part" of any offence, the highest pains of law may be awarded.<sup>2</sup> This is now matter of daily practice, alike in the highest as the lowest crimes. The details of the degree of accession, which implicate a pannel as art and part of every different offence, form a most important department of criminal law, on which an ample commentary has already been given.<sup>3</sup>

It has been held that where all were engaged in one felonious enterprise, though only one committed the act of murder, this rendered them all art and part in that crime, if done in pursuance of the common design;<sup>4</sup> and that a previous mandate and direction to steal, accompanied by subsequent possession of the booty, inferred the guilt of theft.<sup>5</sup>

If John and James are indicted for murder, as actors, or art and part, and it is stated that John stabbed the deceased with a sword, while James held his hands, and the proof show that it was James who stabbed the deceased with a sword, while John held his hands, still the indictment shall be good to convict both John and James; because, still the bottom and substance of the accusation, by stabbing with a sword, is true, and both pannels are guilty thereof, actors, or art and part.<sup>6</sup> The same rule is observed in the English law. If the indictment, says Philip, charge that A. gave the mortal blow, and that B. and C. were present, aiding and abetting; but on the evidence it appears that B. struck, and that A. and C. were present, aiding, &c., this is *not a material variation*; for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three held the weapon, and altogether struck the deceased. The identity of the person who gave the fatal stroke, says Foster, is but a circumstance, and in this case a very immaterial one. The stroke of one is in the consideration of law the stroke of all; they are all principals in the deed.<sup>7</sup> It is not necessary to set forth the special circumstances of the accession, and that is never done; it

<sup>1</sup> Mackenzie, i. 3. 5.—<sup>2</sup> Walter Johnston, Aug. 1771; Maclaurin, No. 87; and Hume, ii. 225.—<sup>3</sup> See Vol. i. chap. 1, on Homicide, &c.—<sup>4</sup> Macdonald and Others, March 13, 1812; Robert Hamilton and Others, July 19, 1826.—<sup>5</sup> Macdonald and Wilson, June 15, 1818.—<sup>6</sup> Taylor and Shaw, Leach, i. 175; and Hume, ii. 236.—<sup>7</sup> Phil. i. 204.



is sufficient if, by competent evidence, they are implicated in the substance of the charge set forth in the minor proposition.<sup>1</sup>

38. The libel closes with the conclusion, that the pannel should, upon being found guilty of the crimes stated in the libel, or part thereof, by the verdict of an assize, be punished with the pains of law.

The conclusion of the libel is in these terms,—“ All which, or part thereof, being found proven by the verdict of an assize before the Lord Justice-Clerk and Lords Commissioners, in a Court-house to be held at Edinburgh on the 15th day of November next ensuing, you the said A. B. should be punished with the pains of law, to deter others from committing the like crimes in all time coming.” For indictments on the Circuit, the style is slightly varied, thus, “ in a Circuit Court of Justiciary, to be holden by them, or any one or more of their number, within the Criminal Court-house, in the borough of Glasgow, in the month of September, in this present year 1832, you the said A. B. ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.” The style of indictments, since the year 1720, has been generally for the pains of law, without specifying what those pains are; a practice much more convenient than the older custom of concluding specially for particular pains, as it leaves every thing open for the consideration of the Judge, on considering the verdict of the assize.<sup>2</sup>

The meaning of the words “ all which, or *part thereof*,” is not, as the words might seem to indicate, that the pannel shall be convicted on legal proof of part only of the libel, as the housebreaking without the theft, or the strokes without the murder, (unless the libel is alternately laid so as to include these subordinate charges,) but that upon proof of part of the *separate charges* contained in the libel, he may be convicted, although the whole are not established. Thus, if murder and theft be separately libelled, it is competent for the jury, to find the theft proven and not the murder, or *vice versa*; or if assault and robbery are libelled, it is competent to find the first proven, and the second not proven; or if theft, aggravated by opening lockfast places, and by house-breaking, and by a person who is habit and repute a thief, be

<sup>1</sup> Baillie and Watson, Aug. 7, 1715; Hume, ii. 237.—<sup>2</sup> Hume, ii. 241.

charged, the jury may find the simple theft alone established, or the theft with the addition of opening lockfast places, or with the farther addition of housebreaking, if they have any doubt as to all the aggravations charged being fully established in evidence before them.<sup>1</sup>

## CHAPTER VIII.

### OF THE EXECUTION OF THE LIBEL.

THERE is no department of criminal business in which the interests of justice were formerly more liable to be defeated by trivial and immaterial inaccuracies than that which regarded the execution of the libel. The foundations of our old law on the subject, were the act of Mary 1555, c. 33, that of James VI. 1587, c. 86, and that of Charles II. 1672, c. 16. The substance of these enactments was, that the prisoner should be served, either personally, or at his dwelling-place, with a copy of the libel, whether it be criminal letters or indictments, to which is subjoined a copy of citation, under the hand of the officer, wherein he charges the pannel to appear at such a time and place, and before such a court, to underlie the law, for the crime set forth in his dittay.<sup>2</sup> In addition to the copy of the libel, the statute of Charles II. orders that the pannel shall be at the same time served with a list of the witnesses who are served upon him.<sup>3</sup> Nothing could be more fair and reasonable than these enactments; but upon this admirable basis there came to be reared up in process of time, through the acuteness of lawyers, and the steady application of the principle of strict interpretation of criminal writs by judges, a system of law so complicated, and involved in such niceties, as too often proved a complete bar to the administration of justice.

The errors founded on, were either in the diligence on which the pannel was cited, or the short copy of citation annexed by the messenger who executed the citation to the copy of the libel served on the pannel, or the execution returned by him, setting forth what he had done. It was held, that all these writs must

<sup>1</sup> Hume, ii. 241.—<sup>2</sup> 1555, c. 33.—<sup>3</sup> 1672, c. 16.

correspond with the charge contained in the principal indictment, and with each other; so that any variation in the minutest particular in the one from the other, or from the principal charge, was fatal, although the copy of the libel, and the "list of witnesses and assize served on the pannel," were in every respect correct. Of the length to which this strictness was carried, and the subtle objections which it in consequence produced, no better example can be given than lately occurred in a case where the Court sustained this objection to a citation, that the pannels were called in the short copy of citation to "underlie the law for the crime of robbery, or assault, with *intent to rob*;" while the libel charged them with robbery, "*especially* when committed with *intent to rob*;" the *intent to rob* being stated as a substantive part of the charge in the citation, and as an aggravation in the indictment.<sup>1</sup> So also, the Court refused to fugitate a pannel, charged in the libel with *several sorts* of crime, in respect the short copy of citation subjoined to his copy of the indictment, called upon him only to answer to the *crime* charged in the indictment;<sup>2</sup> and the same objection was repeatedly sustained, as a bar to the pannel's pleading to the indictment.<sup>3</sup> In like manner, the objection was sustained to a short copy of citation, that the date of the letters of diligence on which it was founded was left blank in the month and year;<sup>4</sup> and to a statutory charge in a libel, that this charge was not referred to in the precept, execution, and copy of citation.<sup>5</sup> Objections of this sort were the more distressing, that they occurred in a part of the criminal process, which, although it was merely formal, and did not in general touch the justice of the case, yet required a great degree of critical accuracy, and was executed, not by men of skill and experience, from whom it could reasonably be expected, but messengers and sheriff-officers, often in remote parts of the country, in whom it could not always be found. For these evils, however, a remedy has now been provided by Sir W. Rae's act, which has greatly simplified our former law in this particular, and provided one uniform style, little liable to error, for the execution of all criminal libels in Scotland.

<sup>1</sup> Alex. Wright and William Moffat, Feb. 26, 1827; Syme, 136.—<sup>2</sup> Grant and M Kerran, July 16, 1827; Syme, 245.—<sup>3</sup> Alex. Jamieson, Glasgow, Spring 1828.—<sup>4</sup> James Allison, July 13, 1825; Shaw, No. 137.—<sup>5</sup> John Stewart, July 14, 1827; Syme, 236.



1. The first requisite of the statute is, that there shall be served on the pannel a full and correct copy of the libel, with the list of witnesses to be adduced against him, and the assize who are to be summoned to his trial.

The act of Mary 1555, c. 33, enacts, "That any person summoned to compear before the Justice, his deputes, or others, Judges within the realm, havand power of Justiciarie in criminal causes, the copie of the saidis letters or precept whereby he is summoned, sall be delivered to him, gif he can be personalie apprehended; and failzieing thereof, sall be delivered to his wife or servands, or affixed upon the zet of his dwelling-place, if ony he has, and thereafter, open proclamation being maid at the head burgh of the shire, ane uther copy to be affixed at the market cross." The act 1672, c. 16, farther prescribes, "That when any criminal libel or summons of exculpation are given and execute against any party, that at the same time lists of the witnesses to be adduced for proving of the said libel and summons, and of the persons who are to pass upon the inquest, be also given to them, to the effect the party may know what to object against the said witnesses and assizes, and may take forth diligence for summonding of witnesses for proving of their objections, why any contained in the said lists should not be admitted to be a witness or upon the assize."

Under these excellent enactments it has for a century and a half been held as a fixed principle, that the pannel must be served with a full copy of the libel, and lists, and not a mere abridgement of their contents.<sup>1</sup> And in one particular the practice of later times has gone a step beyond the enactment of the act of Mary. In the case of a number of pannels, who are all called in one libel, it is declared by the act to be sufficient if service is made on two of the pannels, and in their name on the rest. But it has long been usual, and has now by inveterate usage become indispensable, to serve a copy on each of the pannels, how numerous soever they may be.<sup>2</sup> By a full copy, however, in the case of criminal letters, is to be understood a copy of the body only of the libel, exclusive of the will, which is a pure matter of form, except that it bears the day of compearance, which

<sup>1</sup> Hume, ii. 243.—<sup>2</sup> Ibid. ii. 245.

is communicated in the short copy of citation.<sup>1</sup> In the case of an indictment, the copy embraces the whole instrument down to its close.

2. The copy served on the pannel must not only be a complete copy, but it must be accurate in every material article of the charge, and if a variation occur in any such particular, the pannel will not be permitted to plead to the charge, but the libel be dismissed.

In ordering service of a full copy of the libel, our practice intends not only that the copy shall not want any entire member or article of the charge, but that it shall not vary from the record in any material circumstance or expression.<sup>2</sup> There is a material difference in point of justice and principle, between any errors occurring in the copy of the libel served on the prisoner, and a similar error in the execution of citation returned by the messenger, the short copy of the citation served on the prisoner, or the diligence from the Court by which these proceedings were authorized. These writs are mere matter of form; except the day and place of trial, they embrace nothing in the least important to the prisoner, and if they are correct he is noways injured by any other errors they contain: but the libel is a totally different matter; every part of it is fraught with important consequences to his life, property, and freedom; and a change in a word, sometimes in a letter, may alter his fate in the most essential particulars. It is therefore indispensable, that the copy served on the prisoner shall not vary from the record in any material circumstance, and if it does, that it shall be dismissed as irrelevant. For how is he to conduct his defence where such an ambiguity occurs? Is he to trust to the copy served on him, or the record, as the true charge he has to answer? And where is the authority for the part of the copy served on him different from the original, when it is not to be found in the record subscribed by the public prosecutor, or the clerk of Court, who alone are authorized to authenticate these important instruments?

In this, as in most other particulars, however, our practice is regulated by rational views, and does not require that punctilious accuracy in the copy served on the pannel, which in practice,

<sup>1</sup> Captain Charteris' case, Aug. 4, 1707; Hume, ii. 245. — <sup>2</sup> Hume, *ibid.*

even with the utmost attention to correctness, is frequently found to be unattainable. The essence of the regulation is, that the pannel shall be informed of the nature and circumstances of the charge, and of the evidence also, so far as they can let him into it, which is to be adduced against him;<sup>1</sup> and, therefore, it shall be a good objection, if a discrepancy occurs of such a kind as can lead him into any mistake concerning the charge, or any *possible* disadvantage in conducting his defence.<sup>2</sup>

Numerous decisions have fixed both the species of error which shall be held as fatal to the whole charge, and those which have the effect of casting only a particular branch or part of it. Thus, if the error occur in the name of the pannel, or his trade or designation, or in the description of the crime with which he is charged, or in the time, place, or circumstances attending the criminal act, or the person or persons injured thereby, or in the statute on which the libel is founded, without doubt the mistake must be fatal to that charge, whatever it is. Thus it was long ago held, that where the pannels were described in the copy served on them, as residing in *Kincardine*, while in the record they were designed as residing in *Bachilton*, the objection was held fatal;<sup>3</sup> because, if the error was in the copies, the men were entitled to plead that these copies were not meant for them; if in the record, that it was directed against different persons.<sup>3</sup> On the same principle it has been found, that where the name of the person assaulted was written *James Tocher* in the record, and *James Tochie* in the pannel's copy, the error was fatal.<sup>4</sup> So also where the pannel's copy omitted the *surname* of the Lord Advocate, by styling him "Alexander of Meadowbank," the objection was certified, and no farther proceedings occurred in the case.<sup>5</sup> But where the omission was merely of the word *Saint* in "Sir William Rae of *St Catherine's*," the objection was repelled, as it could lay the pannel under no possible disadvantage in conducting his defence.<sup>6</sup> On the same principle, where the principal copy of the libel bore the words "*conceive* deadly malice," which was unintelligible, and the copy bore correctly, "*evince* deadly malice;" the charges in which this error occurred were abandoned.<sup>7</sup> And where the name of the person murdered was

<sup>1</sup> Hume, ii. 245.—<sup>2</sup> Ibid.—<sup>3</sup> Thomson, Young, and Peacock, May 25, 1720.—<sup>4</sup> William Grant and James Daun, Aberdeen, Sept. 1817; Justice-Clerk's MS.—<sup>5</sup> Hugh Anderson, Sept. 29, 1817; Hume, ii. 246.—<sup>6</sup> Hume, ii. 246.—<sup>7</sup> William Alexander and Janet Blackwood, Jan. 27, 1827; Syme, pp. 65, 66.



written *Breck*, instead of Brock, the objection had the effect of casting the libel.<sup>1</sup> The variation of Geo. III. instead of Geo. IV. in criminal letters, was found to be fatal.<sup>2</sup> And the omission of the word “to,” in a statutory charge, which was necessary to make it intelligible, has been held to be fatal.<sup>3</sup> And the same effect was given to the omission of the word “by,” in that part of criminal letters which bears “shown to us *by*.”<sup>4</sup>

But there are many other errors which have the effect not of casting the whole libel, but that particular part of it where the error occurs. Thus, if the libel contains several charges, and there is a mistake in the major of one of them, or its corresponding minor, though that will have the effect of casting the charge in which that irregularity occurs, it will not injure the remainder of the libel. Or if there be an error in the name of one pannel, or in the charge applicable to him alone, it will not vitiate the libel as to the others.<sup>5</sup> So also if there be an error in the description of a particular article of evidence libelled on, as by specifying the declaration by a wrong date, or as taken before a wrong magistrate, or the like, the effect of that mistake is only to disable the prosecutor for making use in evidence of the article so erroneously described, but not to injure the remainder of the libel.<sup>6</sup>

Even in a material part of the charge, and one which affects the whole indictment, a mere clerical error, which makes no difference in substantials, and can lay the pannel under no possible disadvantage in conducting his defence, will sometimes not be permitted to cast the libel. Thus, though no part of the pannel’s copy is more material than his name, it has been found that the variation “Affect” from “Affleck,” in the commencement of the service copy of the libel, is no objection where the spelling of the word was correct in the other parts.<sup>7</sup> In like manner, where the error in the pannel’s copy was mere surplusage, as where the instance was set forth thus, “his Majesty’s Advocate, for *his Majesty’s Advocate*, for his Majesty’s interest,” the objection was repelled.<sup>8</sup> The principle on which the former decision was founded was, that the names were the same, and that the rule of *idem sonans* applied; and even if that had not been the case, the

<sup>1</sup> James Gilchrist, Glasgow, Spring, 1808; Hume, ii. 25.—<sup>2</sup> Niel Ferguson, March 13, 1820.—<sup>3</sup> David M’Kay and Others, Inverness, April 1827.—<sup>4</sup> William Christison, Ayr, May 4, 1821; Justice-Clerk’s MS.—<sup>5</sup> Hume, ii. 246, 247.—<sup>6</sup> *Ibid.* ii. 247.—<sup>7</sup> George Affleck and Others, Jan. 14, 1822; Justice-Clerk’s MS.—<sup>8</sup> R. Lauchlan, Ayr, Autumn 1821.

correct spelling of the name in the subsequent parts of the indictment could leave the prisoner in no doubt as to his being the person intended. The rule is the same in the English practice. Thus, where in an indictment for perjury the libel set forth, that "the prisoner *undertood* and believed," instead of *understood* and believed, Lord Mansfield held that the variation was not material, because it did not change the word so as to make it another word, and this seems to be the true principle on the subject.<sup>1</sup> The same decision was given, on the same principle, where the indictment set forth, that a promissory-note charged as forged, bore the word "received" instead of "reicevd," which appeared on the instrument itself.<sup>2</sup>

3. The list of witnesses and assize must be correctly copied over in the pannel's copy, with the designation as contained in the record, and they must be all followed by the short copy of citation.

For ensuring the important object of a correct service on the pannel of the list of witnesses and assize who are to appear at a prisoner's trial, the Court have from time to time passed several acts of adjournal.<sup>3</sup> But they are all now repealed; and the law on the subject embodied in the act of adjournal, 9th July 1821, which has effected an important improvement in our law in this particular. This act repeals the acts of adjournal 26th July 1675, 12th July 1803, and 27th March 1818, and enacts, "That all parties accused shall be served with full copies of their indictment or criminal letters to the will, of the list of witnesses' names and designations to be adduced against them, and of the list of the assizers' names and designations who are to pass upon their assize, with a short copy of charge subjoined *thereto*; that the aforesaid full doubles and copy of charge shall be subscribed by the officer executing the same on each page, and the execution returned by him shall bear that they were so subscribed, and declares that it shall be no objection to such doubles that they are written bookwise. And the said Lords do farther direct that the Sheriffs and Sheriff-clerks of the different counties respectively, shall take especial care that the doubles of all criminal libels, lists of witnesses, and lists of assizers to be served on parties accused,

<sup>1</sup> Rex v. Bach, Leach, i. No. 71.—<sup>2</sup> Thomas Hart, *ibid.* i. case 78.—<sup>3</sup> Acts of Adjournal, July 26, 1675; July 12, 1803; March 27, 1818.

be accurately compared with the record in all respects, and written out in a clear legible hand before delivery to the officer for execution; and shall farther direct the said officer to subscribe each page of the said doubles, and to certify the same in the return of the execution of citation, in terms of this act, for the exact performance of which duty the Sheriffs and Sheriff-clerks are by law responsible.”<sup>1</sup> This act is altered by the 9th Geo. IV. c. 29, to be immediately noticed, so far as concerns the signature of the messenger at the foot of each page, or the attestation by him that they were so subscribed, which is declared to be no longer necessary, provided that he subscribe the short copy of citation at the close of the whole writs.

It was formerly necessary, by the act of adjournal, July 1803, that the messenger should not only sign each page of the copy of the libel, but also specify, in his short copy of citation annexed to the libel, the number of pages so signed; and the omission of this mention in the short copy of citation was more than once held fatal.<sup>2</sup> The act of adjournal 1821, however, repeated this act of 1803, without re-enacting any thing as to the messenger specifying in his short copy of citation the number of pages so signed; and therefore it has been repeatedly found since that time, that no such mention of the number of pages is required either in the short copy<sup>3</sup> or execution of citation.<sup>4</sup> And it was found in another case, that where the pannel’s copy bore, “what is contained on this and the preceding pages, is a true copy of the list of assize,” but the record bore, “what is contained on this and the *two* preceding pages,” &c, the objection was bad, in respect both that the variation was not material, and that the necessity of enumerating the pages in the short copy of citation is taken away by the act of adjournal 1821.

This matter, however, is now put on a different footing, in consequence of the act 9 Geo. IV. c. 29. That act has given a form for all citations and executions of citations in Scotland, and they of course form the law on the subject. The short copy of citation given below,<sup>5</sup> contains *no mention* of the number of pages;

<sup>1</sup> Act of adjournal, July 9, 1821.—<sup>2</sup> Robert Boyack, Perth, May 2, 1809; Hume, ii. 248.—<sup>3</sup> Mackenzie’s case, June 28, 1824; David Johnstone, Inverness, Sept. 1827; Donald Ross, Sept. 17, 1827, Inverness.—<sup>4</sup> Margaret Lyon, Glasgow, April 1821.—<sup>5</sup> Take notice that you will have to compare before the High Court of Justiciary (or other court) to answer to the criminal libel against you, to which this notice is attached, on the day of            at            of the clock. This notice served on the            day of            by me, C. D. macer, or other officer of the law.            E. F. witness.



and the statute expressly declares that it shall not be necessary for the messenger to sign any other part of the libel. But the *execution* of citation which the messenger is to return is differently worded, for it requires the messenger expressly to set forth, that "a copy of a criminal libel, containing a charge of theft, &c., consisting of            pages, and having annexed to it a list of witnesses of assize," was served on the prisoner. Under this schedule, therefore, it is indispensable that the *execution* returned by the messenger shall contain a statement of the number of pages of which the libel he served consisted; and, therefore, if the *execution* be produced, and it appears that this has been omitted, it will prove a good objection to the fugitation. It has been found accordingly under this statute, that where the *execution* of citation set forth that the messenger had executed a libel consisting of twenty pages, and from the service copy produced it appeared that there were twenty-two pages, no fugitation could pass on that libel.<sup>1</sup>

4. The libel, and lists of witnesses and assize, must be authenticated by the proper signatures, and the copy served on the pannel must bear that the original was so signed, and contain a correct copy of his signature.

By immemorial custom, the record copy of the libel, and lists both of witnesses and assize, must be authenticated in a particular manner. The libel, if it be in the form of an indictment, must be subscribed by the prosecutor, whether public or private, and this signature must be adhibited, not only at the close but to every page.<sup>2</sup> If it is in the form of criminal letters it is signed by the clerk of Court, and he in like manner must sign every page as well as the end. In either case, the inventory, if any, subjoined to the libel, must be signed by the same party who signs the libel itself; that is, by the prosecutor, if it is in the form of an indictment, and by the clerk of Court, if it is in the form of criminal letters; because these inventories, which are always referred to in the libel, are, in truth, part of the libel itself, placed at the end *brevitatis causa*, for the sake of dispatch at the trial, and consequently they must be authenticated by the same formalities as the body of the libel. The objection, there-

<sup>1</sup> Wright and Dick, July 18, 1832; Justice-Clerk's MS.—<sup>2</sup> Hume, ii. 249.

fore, was sustained to criminal letters, that the inventories of stolen goods referred to in the indictment were signed, not by the clerk of Court who signed the letters themselves, but the public prosecutor who subscribed the list of witnesses.<sup>1</sup>

But with respect to the list of *witnesses* the case is different. By immemorial custom, they are signed by the prosecutor both in the list annexed to indictments and criminal letters. This arises from the style of the warrant for citation annexed to these letters, which is not to cite such witnesses as shall be contained in a list to be subscribed by the clerk of Court, but “such witnesses who best know the verity of the prisoners, as shall be contained in a list subscribed by the *said complainer* ;” or, if the prosecution is at the joint instance of the Lord Advocate and the private party, “in a list subscribed by the *said complainers*, or either of them.”<sup>2</sup> It is necessary that this subscription be adhibited by the prosecutor himself, and not by a clerk or agent for him ; an observation which applies to all these signatures, whether authenticating libels, lists of witnesses, or assize.<sup>3</sup>

With regard again to the assize, the old practice, founded on the regulations 1672, was, that the list was signed by a quorum of the Court of Justiciary, after being made up by the clerk of that Court. But this is now altered by the 6 Geo. IV. c. 22, § 15, which enacts “that the warrant for summoning jurors shall only require the signature of *one* of the said Judges, and it shall not be necessary to annex a copy of the signature of such Judge to the list of assize served on the accused.” This statute was passed in consequence of frivolous objections having been sustained to the copy served on the pannel of the signature of the Judges to the list of assize, as W. Fergusson, instead of G. Fergusson, D. Bayle, instead of D. Boyle, and the like, which had led to the escape of prisoners charged with the most atrocious crimes ;<sup>4</sup> an evasion of justice from which we are now happily delivered by this statute, introduced, with so many others for the improvement of our criminal practice, by Sir William Rae.

The signature of the prosecutor, however, to every page of the libel, as well as at its close, and to the list of witnesses and inventories annexed to the indictment, and of the clerk of Court to every page of the criminal letters, with the inventories annexed to

<sup>1</sup> Reid and Sheriff, Nov. 16, 1826 ; Shaw, No. 151.—<sup>2</sup> Hume, ii. 249.—<sup>3</sup> Smith and Others, Jan. 26, 1778 ; Hume, ii. 249.—<sup>4</sup> Janet Ramage, Dec. 28, 1825 ; William Sutherland, March 15, 1825 ; Hume, ii. 247.

them, and at their respective ends, and of the prosecutor to the list of witnesses following the criminal letters, is still required, and the signature of the Judge is necessary to the list of assize, though it need not be transcribed in the pannel's copy. All the other signatures which authenticate these important writs must be transcribed in their proper places in the pannel's copy; and, therefore, it will not only form a good objection if any of these necessary signatures are omitted in the pannel's copy, but even if they are incorrectly copied over. On this ground it has been found that it is a good objection, if the pannel's copy of criminal letters do not bear to be signed by the clerk of the Court from which they issued.<sup>1</sup> So, also, where the copy of the list of witnesses served on the pannel does not bear that the principal was subscribed by the prosecutor, the objection has been repeatedly held fatal.<sup>2</sup> And any mistake of one prosecutor for another, or of a material letter of his name, will have the same effect. Thus, where the pannel's copy of the list of witnesses bore to be signed by "H. Home Drummond, A.D.," whereas the principal was signed "by John Hope, A.D.," the variation was held to be insurmountable.<sup>3</sup> And where the pannel's copy bore to be signed by A. Dundas, A.D., instead of R. Dundas, A.D., the objection was sustained.<sup>4</sup> The principle on which these decisions are founded, is, that the pannel is entitled to rely on his copy as being in all respects the same as the record; and to believe that the original was either a surreptitious instrument, or not duly authenticated, if it either wants the signature of the prosecutor, or bears the signature of one who does not enjoy that character.

5. Every criminal libel, executed in every part of Scotland, shall have marked on it by the officer who executes it, a notice of the day of trial, in the form prescribed by the statute; and no other part of the libel need be subscribed by him, except that notice.

It is enacted, by the 9th Geo. IV. c. 29, "That instead of a

<sup>1</sup> John Connor, Glasgow, Sept. 1821; Shaw, No. 48: John Thomson and Others, Stirling, April 21, 1823; Shaw, No. 101.—<sup>2</sup> John Kipack, Aberdeen, Sept. 1823; unreported: Highat, Ayr, Sept. 1815; Ann Somerville, June 4, 1821; John Gray, Aberdeen, Autumn 1823; David Gall, Perth, May 9, 1820; Shaw, No. 30.—<sup>3</sup> William Shepperd, Perth, Sept. 6, 1820; Shaw, No. 31.—<sup>4</sup> Alexander Glasgow, April 13, 1829; Shaw, No. 181.



short copy of citation being left with a person accused, every copy of a criminal libel served on such person, shall have marked upon it a notice to be subscribed by the officer of the law who subscribes the same, and by one person who shall witness such service, in the form contained in the schedule annexed to this act, and therein designated by the letter A, which form of notice shall be observed in the service of all criminal libels in Scotland; and it shall not be necessary for such officer to subscribe any other part of such copy of a libel."<sup>1</sup> The form to be observed in such cases, has been given above, and is applicable to every libel of every description.<sup>2</sup> It is farther enacted by the same statute, "That copies of criminal libels served on persons accused, and all notices of compearance or attendance, whether left with persons accused, or jurors, or witnesses, and all executions of citations, may be either printed, or in writing, or partly both."<sup>3</sup> Under this statute, it has been decided unanimously by the Supreme Court, that it is not necessary that the notice of appearance by the messenger should be written on the *libel* itself; but that it is properly adhibited at the close of the list of witnesses and assize: the word *libel* being held to mean the whole writs, libel, and lists which the old statutory law requires to be served on the prisoners.<sup>4</sup> It has also been held, that the messenger's copy of citation should be annexed to the close of the list of assize, and not of the libel or list of witnesses, the lists being considered as part of the criminal libel; and that the officer should sign that notice, and no other part of the writs.<sup>5</sup> In a case, accordingly, where it was objected that the signature of the messenger was only adhibited to this notice, at the close of the list of assize which followed the list of witnesses, and not at the foot of each page of the lists, according to the former practice, the objection was repelled, upon the ground that the object of the statute was, to make one signature of the officer suffice for the whole libel; and that this word Libel meant libel and lists.<sup>6</sup> But if any part of the statutory requisites prescribed in the 9th Geo. IV. c. 29, or the relative schedule, are wanting, it will be a good objection, for the object of that statute was to simplify the formalities of citation, which experience had proved to be too complicated, and not dispense with them altogether.

<sup>1</sup> 9 Geo. IV. c. 29. § 6.—<sup>2</sup> Ante, p. 44.—<sup>3</sup> No. 8.—<sup>4</sup> David Gibb, Nov. 17, 1828; Shaw, No. 161.—<sup>5</sup> J. Robertson, Nov. 17, 1828, advocated from Linlithgowshire.—

<sup>6</sup> William Watson, April 21, 1829, Aberdeen; Shaw, No. 191.

6. Every objection founded on an omission in the pannel's copy of what is contained in the record, or upon a discrepancy between the one and the other, must be pleaded before the assize is sworn, or it cannot afterwards be received.

Formerly the administration of justice was frequently defeated by objections stated by pannels to witnesses, or articles of evidence meant to be used against them, upon the ground, that the copy of the libel served on them, either made no mention of them, or varied in the description from what was contained in the record; and there was much room for subtle discussion as to the class of objections which required to be stated before the assize was sworn, and what might be competently reserved till after that had been done; and, of course, any considerable error generally proved fatal to the charge.<sup>1</sup> At length, the escape of flagrant offenders on such niceties became so frequent, as loudly called for legislative interference, and this was provided, first by act of adjournal, and then by act of parliament.

The act of adjournal already mentioned, July 9, 1821, enacts, "That all objections founded upon the alleged omission in the said doubles of any part of the record, or upon any discrepancy between the said doubles and the record, must be proposed *before the jury is sworn*, with certification that no such objection shall thereafter be entertained." Of course, if a witness, or an article of evidence, as a declaration, is correctly described in the record, but erroneously in the pannel's copy, and he allows the jury to be sworn without stating the objection, he must be held to have departed from it, and to have made his election to have the trial regulated by the correct record instead of his incorrect copy. This was exemplified at Aberdeen, soon after the passing of the act, in a case where, after the jury was sworn without objection, it was objected to the production of a declaration against the prisoner, that the date in the pannel's copy was incorrectly libelled on; but to this it was sustained as a sufficient answer, that the date was correctly given in the record, and that the objection founded on the error in his copy could not be received after the jury was sworn.<sup>2</sup>

<sup>1</sup> See Hume, ii. 250, 251.—<sup>2</sup> Per Justice-Clerk, Ellen Hughes, Aberdeen, Autumn 1824.

By the act 9 Geo. IV. c. 29, § 11, it is enacted, "That if owing to any error in the name or designation of a witness, as given in the list served along with the criminal libel, a person accused can make it appear, that he has been unable to find out such witness, or that he has been misled or deceived in his enquiries concerning such witness, *the same shall be stated to the Court before the jury is sworn*, and the Court shall thereupon give such remedy as may be just; and no objection of *that description* shall thereafter be received." This regulation applies equally to the case of such an error happening in the pannel's copy of the list, from its *varying* from the record, and to the case of its occurring in the principal list itself,<sup>1</sup> and being from it transferred to the pannel's copy. In either case, the objection must be stated before the jury is sworn, with this difference only, that in the former case, as it is an objection to the service copy served on the pannel, the proper season for stating it is *in limine* before he answers to the indictment; in the latter it may competently be stated, after pleading, before the assize is sworn.<sup>3</sup>

It is evident, on a combined view of the enactments of the act of adjournal and act of parliament, that *all objections* founded upon any difference between the record and the pannel's copy, or any omission in the latter of what is contained in the former, must be stated before the jury is sworn; and that if reserved till a later period they cannot be received. Nor will it vary the case, although the objection is brought forward in a different form, as by stating to a witness, not that there is a variation between the record and the pannel's copy in his designation, but that the man now adduced is not the man contained in his list, and whom he was entitled to expect to see adduced against him. Still, if he is the man designed in the *record*, (for without doubt *that* must be established,) the objection in effect resolves into a variation between the pannel's copy and the record, and as such cannot competently be brought forward after the jury is sworn.

But what if the pannel's copy be the correct designation, but the record is wrong? In that case also the objection must be stated before the jury is sworn, though, without doubt, if so stated, it will cast the witness. The reason is, that the error here lies in the record; that by the late act,<sup>3</sup> the witness may appear without citation, and that, if any thing is meant to be

<sup>1</sup> Hume, ii. 252, note.—<sup>2</sup> Ibid.—<sup>3</sup> 9 Geo. IV. c. 29.



founded on the difference between the copy and the record, the season prescribed for it is before the assize is set. If the pannel's copy and the record agree, but both are wrong, this of course is a good objection to the witness, but it must be stated before the jury is sworn.

If any objection is meant to be founded upon the want of a *sufficient* designation of a witness, as that he could not be found, or the like, this also must be stated, by the express terms of the statute, before the jury are impannelled. This part of the subject will receive an ample commentary in a future part of the subject.<sup>1</sup>

The object of these different enactments, which have made a great difference in the common law in this particular, was not to deprive the pannel of the benefit arising from a discrepancy between the record and the copy he has received, but to prevent its having the effect of preventing the course of justice, by procuring for him an acquittal from the jury, in the face perhaps of the clearest evidence. That he should have the benefit of having the faulty part expunged from the record, which is to be used against him, is quite clear; but it is carrying this advantage an extravagant length to make it the means, as was formerly too often the case, of procuring for him a complete absolvitor from the crime. As the law at present stands, the ends of justice are equitably combined with the interests of the pannel in this particular, and it affords a proof how little these objections really, in general, involved the justice of the case, that since the recent enactments as to the time of their being stated, they have, in a great measure, gone into disuse.

7. The citation of the pannel, as well as his indictment, may be either written or printed, or partly both, provided the signature of the messenger and witness be in writing.

By 9 Geo. IV. c. 29, it was enacted, "That copies of criminal libels served on persons accused, and all notices of comparance or attendance, whether left with *parties accused*, or jurors, or witnesses, and all executions of citation, may be either in printing or writing, or partly both."<sup>2</sup> Under these words, the

<sup>1</sup> *Infra*, designation of witnesses.—<sup>2</sup> § 8.

only part of these instruments which it seems absolutely necessary should still be in writing, is the signature of the messenger who executes it, and of the witness who accompanies him. Certainly there is no authority for holding that in this important particular the pannel can competently be deprived of the security arising from the signature of the persons who execute the libel against him; and in general the crime also, with the day and place of compearance, is filled up in writing, but this is not necessary. It has become very usual of late years to execute printed copies of criminal libels on prisoners, a practice which is attended with this advantage, that it renders the writ much more intelligible to them and their advisers than when it is in manuscript. It would be a still farther improvement, where this is meant to be done, if the *record itself* were printed from a manuscript prepared at the Crown-office, which would insure its identity with the copy served on the pannel; but neither authority nor practice have yet sanctioned this alteration.

It is no objection that there is an erasure, even in so material a part of a record as the date of the pannel's trial. This was decided by the High Court, in the case of criminal letters, calling the pannel to stand trial on the sixth May next, and where the word *sixth* was written on an erasure, in respect the *will* was correct, and that the pannel's copy corresponded to the date of the criminal letters as altered.<sup>1</sup> And it is as little an objection to a citation that the date is written on an erasure, in the pannel's copy, if it corresponds with the record and the diligence.<sup>2</sup> This proceeds on the same principle with that already stated, as established in regard to erasures, even in the most important parts of the libel, viz. that it is indispensable that such alterations should sometimes take place, from the frequent alterations of residence which take place between precognition and trial. But, undoubtedly, all alterations and erasures are unseemly, and should as much as possible be avoided by careful officers.

8. The citation of the accused must proceed upon a regular diligence issuing from the Court before which the trial is to take place, and that diligence must apply

<sup>1</sup> Malcolm M'Lean, May 11, 1829; unreported.—<sup>2</sup> M'Kenzie, Dec. 3, 1821; unreported.

to the crime contained in the libel; but the messenger need not have it on him when he executes the service.

The alterations introduced by the recent statutes all relate to the short copy of citation served on the pannel, and the execution to be returned by the messenger. The *diligence*, therefore, or warrant from the judge, which authorizes the citation of the pannel, is still regulated by the niceties of the old law.

There is one provision, however, on this subject, which is of much importance. It is provided by the same act, "That it shall be no objection to such service (*i. e.* service of the libel on the pannel,) or to the citation of any juror or witness, that the officer who discharged the duty was not at the time possessed of the warrant of citation."<sup>1</sup> It is farther provided, "That it shall not be necessary to produce the execution, unless sentence of fugitation, or of forfeiture of a bond of caution shall be moved for, but without prejudice to such execution being produced, to disprove objections to service when stated to the Court." Under these enactments, it is not necessary, and therefore it is not advisable, to produce the execution, unless forfeiture of a bond of caution, or outlawry, is to be moved for. Should the pannel deny that he has received a copy of the libel, it may be produced to disprove the assertion; and it is a necessary production in the cases above mentioned. But there seems no authority for dispensing with production of the *diligence*, to instruct the authority for the citation of the *pannel*. All these writs, therefore, should always be drawn out with the same care as formerly, and the niceties of the law regarding them, though now of not nearly such frequent occurrence as formerly, still require explanation.

The principle of law on the subject is, that the diligence must be dated, and apply to the crime stated in the libel, and the pannel, and specify correctly both the day and place of compearance, and the Court before which the trial is to take place. It is a good objection, therefore, to a citation, if the date of the letters of diligence is blank, either in the diligence or copy of citation.<sup>2</sup> On the same principle, where a pannel was charged with hame-sucken, assault, and attempt to murder, under the cutting and maiming act, and it appeared that the *attempt* to murder was left out in the diligence and citation, it was held that that charge

<sup>1</sup> Geo. IV. c. 29. § 7.—<sup>2</sup> James Anderson, July 13, 1825; Shaw, No. 135.



could not be insisted in, and it was accordingly abandoned by the public prosecutor.<sup>1</sup> But if a crime be specified in a diligence thus—"Theft, aggravated in manner mentioned in the indictment raised thereanent," it applies sufficiently to an indictment charging theft, especially when committed by housebreaking, and by a person habit and repute a thief," for the reference in the diligence to the indictment lets in all the aggravations there set forth.<sup>2</sup> And it is no objection to a citation, that after the indictment was completed, and the warrant annexed to the Porteous roll, a line was erased, and another one added, and an indictment conform to the one so altered served on the pannel; for the warrant is held to be thus for the first time subjoined to the roll of indictments when the service copy is made.<sup>3</sup> But though that holds in the case of *indictments*, which are a flexible instrument, under the prosecutor's control, till finally fixed down by the service copy being made out for the pannel, it is doubtful whether the same rule applies to criminal letters, which issue under the seal of the Court, and admit of no alteration by any subsequent or inferior authority. In a case, accordingly, where it was objected to the citation of a pannel, who was called to appear on criminal letters, that her designation was filled up in the country *after* the letters had issued from the Justiciary Office, and consequently that there was no warrant for her citation, minutes of debate were ordered by the Court, and the case was no farther proceeded in by the Crown.<sup>4</sup>

9. The person who executes the diligence, must be an officer of the law, authorized to officiate on such an occasion: but he may be either a macer, messenger-at-arms, or sheriff-officer; and he need not be possessed of the warrant at the time of the service.

Whether the libel is in the form of indictment or criminal letters, it may equally be executed by messengers-at-arms, who are the ordinary executors of the King's letters, or macers of the Court of Justiciary, or by sheriff-officers.<sup>5</sup> These last are authorized, under the general authority of the warrant issuing from the Justiciary Court, which is addressed to "messengers,

<sup>1</sup> John Stewart, July 14, 1827; Syme, 236.—<sup>2</sup> Innes, March 15, 1826; Shaw, 151.—<sup>3</sup> Clark, May 15, 1826; Shaw, No. 155.—<sup>4</sup> Hugh McDonald and Others, June 9, 1823; unreported.—<sup>5</sup> Hume, ii. 242.

sheriffs, or other officers whatsoever.”<sup>1</sup> It is, accordingly, no objection that the citation is executed by a sheriff-officer, though the only warrant was a Justiciary diligence, in aid of which no sheriff’s precept had been issued; for the Justiciary warrant runs over the whole kingdom, and is addressed to all officers of the law whatsoever.<sup>2</sup> The objection, also, has been repelled, that a citation bears to have proceeded, not on a Justiciary warrant, but the Sheriff’s precept following thereon.<sup>3</sup> But although this latitude is allowed in the case of Justiciary warrants, yet, of course, the warrant of a sheriff cannot go beyond his jurisdiction; and therefore no citation can be legal in any county which does not either proceed on the warrant of the Judge Ordinary of the bounds, or of the Justiciary Court, who have a general jurisdiction over the whole kingdom.

Of whichever description, however, the officer be, he must be duly vested with his alleged office, and have right to use it at the time of the execution. A citation, therefore, given by a mere private individual, or an officer of law, while labouring under suspension, is null.<sup>4</sup>

But the officer need not be possessed of the warrant, that is, he need not have it on his person when he executes the warrant against the pannel.<sup>5</sup> This change on our old law was introduced in consequence of the vast increase of criminal cases, which rendered it impossible that a warrant which, according to the practice of that period, was subjoined to the Porteous Roll, could be at the same time in the hands of all the different messengers to whom the duty of executing citations under it was intrusted.

10. If the pannel can be found personally, the citation must be delivered to him, and any other mode of citation can only be resorted to where that cannot be done.

The most secure and satisfactory mode of citation is by delivering the service copy of the libel to the pannel personally apprehended, and any other and less certain mode of proceeding is sanctioned from necessity if the pannel cannot be found.<sup>6</sup> It has accordingly been found, that an error in an original personal citation cannot be supplied by subsequently giving the pannel

<sup>1</sup> Hume, ii. 242.—<sup>2</sup> M’Kenzie, Sept. 1813, Inverness; Walter Craufurd, Sept. 31, 1822; Shaw, No. 80.—<sup>3</sup> Philip M’Leod, May 3, 1824, Inverness.—<sup>4</sup> Hume, ii. 242.—<sup>5</sup> Geo. IV. c. 29, § 7.—<sup>6</sup> Hume, ii. 252.

a correct citation at his dwelling-place; for it is the express direction of the act, that the citation at the dwelling-place is only to take place "failzieing" the execution against the person, and therefore it is not to be resorted to if the other is practicable.<sup>1</sup>

11. If the accused cannot be found personally, the libel must be left at his house or lodging, with his wife, servant, or some one of his family, and this must be followed by proclamation and execution at the Market-Cross of the head borough where he resides.

If the accused cannot be personally found, the injunction of the act of Mary is in these terms:—"And failzieing thereof (*i. e.* personal apprehension), the copie of the saidis letter or precept sall be delivered to his wife or servands, or affixed upon the zet of his dwelling-place, gif he ony has, and thereafter open proclamation being maid at the head burgh of the shire, ane uther copy to be affixed upon the Mercat-Croce."<sup>2</sup> The copy thus ordered to be delivered for the pannel must be left at his *dwelling-house*, and not at any place of business, or of occasional residence.<sup>3</sup> Accordingly, where an execution bore that a cadet in a regiment of horse was cited by leaving the copy, by order of the colonel of the regiment, with a corporal at the place where the troop was quartered for the time, instead of the quarters where he was billeted, this was held a bad citation.<sup>4</sup> So also, where the citation was left at the house of Culcainn, the dwelling-place of the pannel's captain, which was neither the dwelling-house of the pannel nor his father.<sup>5</sup> On the same principle, the objection to an execution was sustained, that although it bore that the copy was left for the pannel with his wife, there was no mention of where this was done.<sup>6</sup> The same rule is *in viridi observantiâ* in modern times. Thus, where a citation was left for two pannels with a lodging-house-keeper, but it turned out that though they had, seven weeks before, lodged there, they had since had a house of their own, the objection was sustained.<sup>7</sup>

The execution must not only set forth that the citation was delivered at the pannel's *dwelling-house*, but it must set forth

<sup>1</sup> Margaret Buxton, Jan. 8, 1677; Hume, ii. 252.—<sup>2</sup> 1555, c. 33.—<sup>3</sup> Hume, ii. 253.—<sup>4</sup> Alexander Hay, Jan. 5, 1736; Hume, ii. 253.—<sup>5</sup> Monro and Others, Feb. 23, 1741; *ibid*—<sup>6</sup> Walter Buchanan, June 30, 1727; *ibid*.—<sup>7</sup> Thomas King and Alexander Hood, May 30, 1825; Shaw, No. 135.



where it is by name, parish, and county, or street and borough,<sup>1</sup> and this seems not less indispensable since 9 Geo. IV. than before it. This is necessary, because else the officer may have left the citation at the place where he conceived was his dwelling-place, though in truth it had no pretensions to that character.<sup>2</sup> And if a defective execution has been lodged in the clerk's hands at the diet mentioned in the letters, it is not competent thereafter to amend it and lodge a fresh execution, stating the fact correctly, even though the diet had not been called on the day to which the letters run, but adjourned only in absence of the pannel, with the whole other diets of Court.<sup>3</sup>

But what shall be held a man's domicile in this question? Upon this important point the rule is, that he is domiciled where he has resided forty days immediately preceding the service of the citation upon him. And although the pannel has left the place of his former domicile before the service of the citation, yet if this has taken place within forty days of the citation, he is held to be still rightly cited at that old domicile, upon the principle that the old domicile continues till the new one is acquired.<sup>4</sup>

12. If the accused has fixed a domicile for himself in his bail-bond service of the libel, there is good service though he actually resides in a different place.

It is the usual practice where a prisoner is liberated on bail, to get him to fix a domicile for himself, or to specify some place where he will be ready to receive and answer to any charge which may be executed against him; and this place is held his domicile *pro hac vice*. In such a case, therefore, he cannot be permitted to plead that he was cited not at his actual dwelling-place, but the place which he has then selected, for that would be to allow him to run counter to the judicial contract made with the prosecutor.<sup>5</sup> Nor will it alter the case, although the pannel be an Englishman, who has fixed a domicile in a Scotch town, for a crime committed in Scotland, and in addition to a copy at the conventional domicile, has had a copy sent to him at his

<sup>1</sup> Hume, ii. 253.—<sup>2</sup> Ibid.; Thomas Fraser, Nov. 23, 1744; Thomson and Robertson, April 1827; unreported.—<sup>3</sup> R. Young and J. Morrison, June 3, 1822; Shaw, No. 59.

—<sup>4</sup> John Farquharson and John Calderwood, Perth, Spring 1823, per Lords Justice-Clerk and Pitmilley; Thomas Kinloch, April 1822, Perth, per Lord Meadowbank.—

<sup>5</sup> William Ward, April 24, 1821; Shaw, No. 51.

place of residence in England, where he could not be regularly cited; for such a proceeding is *ex mera gratia*, and is an advantage to the pannel, and certainly cannot vitiate the regular citation left for him at the place which he himself had selected for that purpose.<sup>1</sup> Where it appeared that a pannel had paid for and lived in lodgings for forty-two days, and had left them, evidently with a view to prevent the service of an indictment, but left his sister there, and was held still liable for the rent by the landlord, and gone to England, where he had been for three days before the citation took place; service, by leaving a copy at the former lodgings, was sustained,<sup>2</sup> as the proceeding was an obvious attempt to defeat the course of justice.<sup>3</sup> In another case against the same party, it appeared that the pannel was designed in an indictment as “now, or lately, woollen-draper, and now, or lately, residing with Catherine Young, in North St Andrew Street, Edinburgh,” and the citation was left there; it was objected, when fugitation was moved for, that the citation was not left at his true dwelling-place, as he had left his sister’s on the 21st December, five months ago, and had since resided in different places, and at the date of citation was dwelling with one Gun at Seafeld, and that when the citation was left by the macer at Catherine Young’s, he was informed that Young did not reside there. But to this it was sustained as a sufficient answer, that he had found bail when apprehended on a new warrant in February last, and that in the bail-bond he had given his designation in the terms and at the place where the citation was now left; that his change of residence was obviously to prevent any new domicile from being fixed for him; and that when the macer left the service copy for him, his sister, who was also his cautioner, refused to tell where he was.<sup>4</sup> The true conclusion to be drawn from these cases is, that where a pannel has once been domiciled in a place, and since that time constantly shifted his residence to avoid a domicile being fixed upon him, service in the last place of his fixed residence is good service, if he retains any connexion with it, as by a member of his family still continuing there.

It is a very common practice among the poor people when they go out of their houses for the day to their work, to leave the

<sup>1</sup> William Ward, April 24, 1821; Shaw, No. 51.—<sup>2</sup> Young and M'Donald, July 12, 1831.—<sup>3</sup> Young and M'Donald, July 12, 1831.—<sup>4</sup> Robert Young, May 30, 1831; Shaw, No. 214.

key with a neighbour, or to leave a neighbour in the house to look after the premises. In such a case, it has been more than once decided, that the neighbour is to be held as the servant of the owner of the house *pro hęc vice* as occupying the premises, and, therefore, that it is good service of citation if the notice is left with such neighbour; and though this was determined in regard to the citation of a witness, the same principle would probably be extended to the analogous case of the citation of the pannel.<sup>1</sup> It is to be observed, however, that the act of Mary applies only to the citation of the pannel, and that the Court have uniformly and rightly held that no analogy is to be drawn from the citation of a pannel to that of a witness, so that this authority can be applied only if the neighbour who has the key truly occupies the house for the time, and therefore comes under the description of a temporary servant.

13. If access cannot be obtained to the pannel's house, he must affix copies of the libel and lists to the chief door of the house.

The act of Mary having prescribed the mode of citation, if access to the house cannot be obtained, viz. by affixing a copy "on the zet of his dwelling-place," this injunction must be precisely observed, in preference even to any other which may seem better calculated to ensure its reaching the pannel.<sup>2</sup> Delivery, therefore, to his wife or servants, even though found in the neighbourhood of the dwelling, is not good service; the proper course (though not necessary) in such a case is, to tell them that the copies were affixed to the door of the dwelling.<sup>3</sup> In all cases of citation at the dwelling-house, it is material that the execution should state specifically how the copies were left, as by leaving with the wife, with the servants, or the like, in order that the Court may determine as to the legality of the proceeding which has been adopted. In a case, accordingly, where the execution did not set forth the *modus operandi*, but merely that copies were left at their dwelling-places, without adding whom they were

<sup>1</sup> Clementina Stewart, Aberdeen, April, 1826, Pitmilly and Alloway; Shaw, No. 165, p. 198; Margaret Boug, Jan. 1824; Allan Grant and Others, March 5, 1827; George and Robert Wilson, December 18, 1826.—<sup>2</sup> Hume, ii. 254.—<sup>3</sup> Hume, ii. 254. Thomas Fraser, November 23, 1744.



given to there, or whether they were affixed at the door, the Court refused to fugitate the pannels.<sup>1</sup>

14. In all cases where the pannel is not personally apprehended, the pannel, in addition to having a copy left at his dwelling-house, or with his servants, must be cited edictally at the market-cross of the head borough of the shire where he resides.

The act of Mary has made one provision more for the case of all citations that are not given to the pannel personally, viz. that he must be edictally cited; that is, open proclamation must be made at the head borough of the shire where the pannel dwells, and a copy of the libel and lists affixed there, so as he, or some one interested in his affairs, may hear or see them.<sup>2</sup> If this is omitted in any case where the pannel is not personally cited, the citation is bad; and it will not supply the defect although it be proved ever so clearly, that the copy left at the pannel's house came to his knowledge, or reached his hands; for statutory solemnities cannot be supplied by equipollents.<sup>3</sup> On the same principle, the citation is bad if the edictal citation took place at the head borough of a different county from that where the pannel dwelt; and therefore, in a case where the pannels were described in the libel as residing in the counties of Argyle and Inverness, and the edictal citation took place at the market-cross of Perth, the objection was held fatal.<sup>4</sup>

It is expressly enjoined by the act of Mary, that the pannel is to be sought for *first* at his dwelling-place, and the edictal citation had recourse to "thereafter," in default of his being personally apprehended. It is, therefore, an absurd and illegal course to execute the libel first at the market-cross, and then at the dwelling-house; and citations of that kind have been repeatedly found to be null by the Justiciary Court.<sup>5</sup>

Copies of the libel and lists must be affixed to the market-cross, as well as the dwelling-house.<sup>6</sup> This is obvious both on the words of the statute and the reason of the thing, and there-

<sup>1</sup> See Robert Monro and Others, Feb. 23, 1741.—<sup>2</sup> Hume, ii. 255.—<sup>3</sup> Ibid.—<sup>4</sup> Archibald M'Inlester, Dec. 13, 1736.—<sup>5</sup> John M'Innes, Perth, Spring, 1822; George Brown and Others, Glasgow, October, 1820; Shaw, No. 42; Alexander Fraser, Inverness, April 15, 1819.—<sup>6</sup> Hume, ii. 256.

fore an old decision, which found that it is not necessary that the copies should be affixed at the latter place and not the former, is justly censured both by Royston<sup>1</sup> and Baron Hume.<sup>2</sup>

A subsequent statute has prescribed the *time* of the day at which this important matter of an edictal citation must be executed. The act 1587, c. 86, orders, with respect to “all criminal letters and utheris whatsoever, that imports tinsel of life and moveable gudes,” that they shall be executed “betwixt aught in the morning and twelve at noon, summer and winter, in open time of day, in presence of famous witnesses specially designed.” This matter of the famous witnesses specially designed, is now repealed by the 9th Geo. IV. c. 29, which declares *one* witness sufficient, and dispenses altogether with his designation. And although the injunction in regard to the time of the edictal citation is still in force, yet it has not become customary or usual for the messenger to set forth in his execution the time of his edictal citation, nor even that it was done between eight and twelve. This is presumed in favour of the messenger, leaving it to the pannel, if the fact be otherwise, to propose and prove his objection;<sup>3</sup> and it has been held on two different occasions, that it is no objection to an execution that the time when the edictal citation took place is not set forth.<sup>4</sup> These regulations regarding the time of edictal citations, have no application to personal citations, which may be executed at any time of the day or night.<sup>5</sup>

15. All citations for trial by jury must now be on fifteen days, whether in the supreme and inferior courts; and for summary trials without a jury, six days is the proper period.

For above a century and a half, the uniform practice of the Court of Justiciary has been to give all pannels cited to appear before them, fifteen free days to prepare for their defence; an indulgence which, in the English law, is confined to those who are indicted for high treason. The same period must, by the recent regulations for Sheriff and Borough Courts, be granted in

<sup>1</sup> Royston, 237.—<sup>2</sup> Hume, ii. 256.—<sup>3</sup> Hume, ii. 256.—<sup>4</sup> Thomas Fraser and Others, Nov. 23, 1744; Andrew Thomson, Jan, 23, 1769, *ibid.*—<sup>5</sup> Robert M'Gregor, Aug. 6, 1753, *ibid.*

all trials by jury by inferior judges; while six days is the *induciae* assigned for trials without jury by the same tribunals.<sup>1</sup> In police cases, it is usual to give a citation on forty-eight hours only, but that is in virtue of the special statutes, on which an ample commentary has already been given.<sup>2</sup>

16. If no domicile can be found for a person, and he cannot be apprehended personally, he may, by special authority of the Court, be cited edictally at the head borough of the shire where he last chiefly resorted.

It is obviously necessary to have some means for the citation of those persons who have no settled abode in any one quarter, but are continually moving about, from place to place, either in the pursuit of business, amusement, or mendicity, as pedlars, travelling merchants, vagrants, beggars, or the like. If the prosecutor were to wait till such persons had resided forty days in one place, it is probable they never would be cited at all. Some provision is also required for the citation of those lawless and desperate characters, not so common now as formerly, to whose haunts no safe access can be obtained. In such cases, on a bill presented to the Lords of Justiciary, setting forth the fact, and supported by such evidence as makes out a *prima facie* case of vagrancy or resistance, the Court will grant warrant for the citation of the pannels at the head boroughs of the shires where they principally haunted, without any citation at all, either personally, or at their dwelling-place. This was done in several old cases:<sup>3</sup> and though the practice had in some degree fallen into disuse, owing to the change of times, and the more settled habits of the people in the Highland districts, yet it is still a legal and competent proceeding, and has not only been recommended from the Bench, but actually adopted in several late instances. In the cases of the Croy rioters, where an objection was stated to the citation of some of the pannels, and it was stated by the prosecutor, that they were of such roving habits that no fixed domicile could be got for them, it was observed by the Court, that for such a case the remedy of an edictal citation was expressly pro-

<sup>1</sup> Regulations, March 1827; Ante, p. 40, 45.—<sup>2</sup> Ante, p. 47, et seq.—<sup>3</sup> Macniel of Bara, March 8, 1679; Donald Macondach, Feb. 15, 1692; Monro and Others, Feb. 23, 1741; Hume, ii. 258.



vided by the law.<sup>1</sup> Since that time the remedy of an edictal citation has been frequently applied by the Court, upon a petition, accompanied with affidavits from messengers, macers, or officers of the law, setting forth the state of vagrancy which rendered that extraordinary remedy necessary. This was done, in particular, upon the fugitation of Thomas King and Alexander Hood, who escaped fugitation on a prior occasion, by shifting their domicile, and stating the objection, but were at length defeated by this method.<sup>2</sup>

17. Those who are abroad from the realm, must be cited by open proclamation at the Market-Cross of Edinburgh, and Pier and Shore of Leith, upon the long induc-tion of sixty days.

From the earliest times, our law has been familiar with a practice in a great degree peculiar to itself, viz. that of citing persons abroad, whether for civil actions, or criminal delinquencies, by calling them at the Market-Cross of Edinburgh, and Pier and Shore of Leith. Special authority for this must be asked in the bill for the criminal letters, and the manner of the execution is by open proclamation, and leaving copies at the Market-Cross of Edinburgh, and Pier and Shore of Leith, which is held to be of itself sufficient notice to the party, who is allowed sixty days to prepare his defence.<sup>3</sup> It has been expressly found, that this mode of citation applies to criminal, as well as civil cases; and that where there is any doubt as to whether the accused is within Scotland or not, it is competent to cite him, both at his last domicile there, and the head borough of the county in which it is situated, and also at the Market-Cross of Edinburgh, and Pier and Shore of Leith, as forth of the kingdom.<sup>4</sup> The course of citation taken in that case, is obviously a safe and advisable course, wherever there is any doubt as to whether the accused is within or without the kingdom, taking care, of course, not to call the case till the sixty days from the execution of the citation at the Market-Cross of Edinburgh.<sup>5</sup>

If one has been cited edictally only at Market-Cross, and Pier and Shore, there can be no doubt that he is ill cited, if he be

<sup>1</sup> Macdonald and Others, June 9, 1823.—<sup>2</sup> Thomas King and Alex. Hood, June 28, 1825.—<sup>3</sup> Hume, ii. 259.—<sup>4</sup> Robt. Creswell, Feb. 10, 1766; *ibid.*—<sup>5</sup> *Ibid.*

actually in Scotland at the time, even though he has but recently returned there;<sup>1</sup> for being within the realm, he is entitled to insist that he shall be sought after, in the mode prescribed for persons in that situation. But what if he be out of Scotland at the time of his citation left at his dwelling-house, but has not been out for a sufficient time to have lost his domicile in this country? Suppose, for example, that he resides on the Border, and has left Scotland the day before, to avoid the citation, and return the day after? Is he entitled to insist that he shall be called at Market-Cross, and Pier and Shore, as forth of the kingdom, and would such a citation be good in such circumstances? Upon this point the rule seems to be, that the citation is good, if the pannel has not been forty days out of the kingdom, before the citation at his dwelling-house.<sup>2</sup> And truly there seems sufficient reason for this rule: for one who has been domiciled in Scotland, is not to be presumed to have no one there who attends to his affairs, at least for six weeks after his absence, and, therefore, the presumption is, rather that a libel left there will come to his knowledge, within that recent period, than if it were left at the Cross of Edinburgh, and Shore of Leith.

18. Though the form is different, the substance and import of a citation on an indictment and criminal letters is the same; that is, to appear on a certain day and underlie the law, in a certain Court.

There is a difference, in point of form, between a citation on an indictment and criminal letters, which, if not explained, may lead to error. A citation on an indictment calls the accused to appear on a certain day, in a particular Court, and underlie the law; whereas, on criminal letters, the form is to come within so many days to *find caution* to appear and underlie the law.<sup>3</sup> This difference, however, which formerly was in substance, is now in form only; since, in neither case is any thing done or expected to be done by the pannel but appear at the appointed diet of the trial.<sup>4</sup> In a late case, accordingly, where it was objected to the citation of a noted offender who was tried on criminal letters, "that he had been cited merely to appear and underlie the law,"

<sup>1</sup> Robert Creswell, Feb. 10, 1766; *ibid.*—<sup>2</sup> John Trood and Others, Aug. 12, 1771; Hume, ii. 259; Andrew M'Quaker, Feb. 1, 1725; Hume, ii. 260.—<sup>3</sup> Hume, ii. 260.—<sup>4</sup> *Ibid.*

in the form applicable to indictments only, instead of being cited in the old form, "to come and *find caution* for his appearance to underlie the law on a day named," the Court sustained the answer, that this distinction between the citation on indictment and criminal letters, was an antiquated and unmeaning piece of form; that it had been departed from by the clerk of Court, with the knowledge and approbation of the Court; and that it would have been absurd to have applied the old style to a citation on criminal letters containing a capital charge, on which the offender was instantly to be imprisoned without the possibility of obtaining bail.<sup>1</sup> The compendious mode of citation on criminal letters, therefore, to appear and underlie the law, instead of finding caution to do so, may now be considered as sanctioned by judicial authority.

19. Having completed his citation, the officer must verify the fact by an execution, which must be in the form prescribed by the late act, and be signed by one person who witnessed the proceeding; but it is not necessary to produce this execution unless outlawry or the forfeiture of a bond of caution is moved for.

The *execution of the libel* is one of the writs in criminal practice which most requires attention and accuracy; and, in times out of number, the course of justice has been entirely defeated by critical and punctilious exceptions to that document. These results were the more distressing as they were in most cases totally unfounded in justice, or any real evil to which the prisoner had been exposed, but arose from an excessive but natural strictness in the application of the salutary desire for correctness in criminal proceedings. They gave a temporary triumph to the counsel who discovered the error at the expense, too often, of many months additional imprisonment to his unfortunate client; for, except in the case of the last criminal letters against a prisoner who had taken out his letters of intimation, it was seldom that any real benefit accrued from such objections to the prisoners on whose behalf they were stated.

Formerly, it was necessary that the facts of the citation should be set forth in an execution under the hand of the messenger,

<sup>1</sup> James Moffat, or M'Coul, June 12, 1820; Shaw, No. 9.



and of two witnesses specially designed,<sup>1</sup> in whose presence the thing was done. This, however, is no longer necessary, as by the schedule annexed to the act 9 Geo. IV. c. 29;<sup>2</sup> not only is there no mention there of more than one witness, but he is not to be designed at all, but merely to sign his name, with the word "witness" after it. This enactment has very much simplified the form of this writ, and retaining those parts which are really essential, cut off those which are superfluous, and tended only by complicating its clauses to introduce frivolous objections regarding it. But as the statute has now reduced the form of the writ to what is really material, any omission of what it has enjoined must, of course, be fatal.

Every execution must, by the express words of the act, be in terms of schedule B, annexed to it. This schedule, which is given below,<sup>3</sup> seems chiefly to require three things:—

1. In the first place, the execution must specify, and of course correctly, the *crime* or crimes charged in the indictment.

2. It must enumerate correctly the number of pages of the *libel*, and *not* of the libel and lists.

3. It must set forth the *day* of service on the pannel.

4. It must specify the *mode* of service, as by personal execution, leaving at the dwelling-house, distinguishing whether with a wife, servant, &c., and the execution in these last cases at the Market-Cross.

5. It must specify the day of compearance, which must of course correspond to that contained in the short copy of citation delivered to the pannel.

6. The messenger who executes it must sign the execution with the witness, and they must of course be the same persons with those who sign the short copy of citation; for if they are not, that proves that they were not witnesses to the premises.

These points are *inter essentialia* of an execution; and as they

<sup>1</sup> 1587, c. 86.—<sup>2</sup> Schedule B. sup.

<sup>3</sup> Schedule B, for Execution of Citation.

A copy of a criminal libel containing a charge of theft (or whatever the crime may be) consisting of \_\_\_\_\_ pages, and having annexed to it a list of witnesses and assize, (when the trial is by jury,) was, on the \_\_\_\_\_ day of \_\_\_\_\_, served by me upon J. K., by delivering the same to him personally, (or as the case may be), on which copy was marked a notice of compearance on the \_\_\_\_\_ day of \_\_\_\_\_

A. B. Macer,

Or other officer of the law.

E. F., witness.

are all retained, and justly retained by the statute, they leave this important instrument as much the object of attention as before.

1. With respect to the description of the *crime* contained in the libel, it has been found that it is no objection that the execution does not refer to, or take notice of, the *aggravations* libelled in the indictment, if the crime is mentioned generally "in manner mentioned in the said indictment."<sup>1</sup> It is not necessary, therefore, to allude to aggravations, farther than by a general reference to the indictment, and it is advisable to adhere to this style, as messengers are extremely apt to commit errors in abridging the aggravations in a libel. But it is indispensable that the *whole* crimes charged be described; and care must be taken to distinguish between such as are copulative, and such as are alternative; for an error, in this respect, by destroying the identity of the libel served, and the libel referred to in the execution, will be fatal to the citation.<sup>2</sup>

2. If a discrepancy appear between the number of *pages* in the libel served on the prisoner, and that referred to in the execution, it will also be fatal. Where the execution, accordingly, set forth that the messenger had delivered a libel consisting of twenty pages, and from the service copy produced, it appeared that it consisted of twenty-two, this was held a fatal objection.<sup>3</sup> If there are more libels than one against the same pannel for the same crime, they should be numbered, No. 1., No. 2., &c., and the execution refer to them as so numbered.<sup>4</sup> The objection has been sustained, that there are several indictments in the same circuit against a prisoner, and that the execution does not distinguish the one from the other.<sup>5</sup> But it is not necessary now that the messenger should sign the pages of the libel, or certify any such signature in his execution.

3. The day of service on the pannel must be correct, and correspond with that contained in the citation itself. It will vitiate the execution if the dates set forth therein, or in the copy of citation delivered to the pannel, are inconsistent with each other, or the diligence on which they proceed.<sup>6</sup> But the execution need

<sup>1</sup> James Innes and Others, March 16, 1826; Hume, ii. 262.—<sup>2</sup> Thomas Meldrum, Nov. 20, 1826; Syme, p. 17.—<sup>3</sup> Wright and Dick, July 18, 1832; Justice-Clerk's MS.—<sup>4</sup> Malcolm Gillespie, Aberdeen, Autumn 1827.—<sup>5</sup> Robert Mackinlay, Glasgow, Sept. 1829; Shaw, No. 38; Robert M'Gregor, Aug. 6, 1753; Hume, ii. 261.—<sup>6</sup> Auchterlony, Jan. 19, 1716; Hume, ii. 261.

not, and therefore should not, refer to the diligence on which it proceeds, or say any thing of its date.

4. The mode of execution must be correctly specified. The dwelling-house where the execution was left must be set forth, by name and situation,<sup>1</sup> and the mode in which the thing was done, as by leaving the libel with the servants, within the house, or affixing it to the door, accurately and correctly set forth.

5. If there is a discrepancy between the day of compearance specified in the short copy of citation, and that contained in the execution, it is of course fatal, as destroying the identity of the proceeding referred to in the two instruments.

6. It is equally a good objection, if there is a discrepancy between the messenger or witness who signs the citation, and those who sign the execution. Where the witnesses specified accordingly in the short copy of citation, were "*John Wilson and Michael M'Culloch,*" and the execution set forth that it was done in presence of *William Keeler and Michael M'Culloch,* this was justly held a fatal objection.<sup>2</sup> So, also, where an execution bore to be signed by one messenger, while the short copy of citation was signed by another, this also was held fatal.<sup>3</sup>

It is an important point, whether an execution is to be held as *probatio probata* of the facts it mentions, or whether it can be disproved by parole testimony. It has been held that an execution against a pannel is not *probatio probata* of the facts it alleges, if seriously impugned, on the ground of containing a falsehood, and that parole proof of the alleged discrepancy is competent.<sup>4</sup> In the citation of a *witness*, indeed, it has been held that the execution cannot be set aside by parole proof, that one of the witnesses who was represented as present at the execution, was truly not there.<sup>5</sup> But, as already mentioned, the citation of pannels proceeds on different principles from that of witnesses; and it is impossible to maintain, that when proof is offered that a material part of the service was wanting, or a fatal error committed in so important a step as the citation of a pannel for a criminal trial, the proof is to be excluded, merely because the messenger has chosen to assert the contrary in his written execution.<sup>6</sup>

By the late act it is not necessary to produce the execution

<sup>1</sup> Thomson and Robertson, April, 1827; unreported.—<sup>2</sup> John Fergusson, Jan. 17, 1825; record.—<sup>3</sup> Michael Ronald, Glasgow, April, 1818; unreported.—<sup>4</sup> John Proudfoot, Perth, April, 1823; unreported.—<sup>5</sup> James Scott, Nov. 19, 1827; Shaw, No. 165.—<sup>6</sup> Hugh Fraser and Others, June 22, 1675; Hume, ii. 247.



unless sentence of fugitation or of forfeiture of a bail-bond is moved for, "without prejudice to such execution being exhibited to disprove objections to service when stated to the Court; and it shall be no objection to the admissibility of the officer or witness, who served such libel, to give evidence respecting such service, that their names are not included in the list of witnesses served on the accused."<sup>1</sup> The practical effect of this regulation has been, in nine cases out of ten, to exclude objections to this instrument altogether, as they are generally founded, not upon the omission of any thing which should be served on the accused, or any thing wrong in that branch of the officer's duty, but upon errors in the writ reporting the proceedings, which are immaterial to the justice of the case, and are not now brought to light. When fugitation or forfeiture of the bail-bond were moved for, they of course must be produced, and therefore the law regarding them is still an important branch of practice.

Although, however, the messenger under this act is admissible to prove the service, he cannot be adduced to supply any defect which appears *ex facie* of the execution; and therefore the objection, since it passed, was sustained, that the execution did not state that he had made open proclamation at the Market-Cross at the time when he affixed the copies; and the offer to prove that all was *rite et solemniter actum* by the oath of the messenger or witness employed, held incompetent.<sup>2</sup>

A citation given during the life of one king does not fall by his death. This was found in a case where the citation was given on Jan. 29, 1820, the day of George III.'s death, and the pannel pleaded that it fell by that event, and that he was entitled to the presumption that the execution took place after his decease. The objection was repelled.<sup>3</sup> But a citation given in name of a deceased king *after* his death is void; and therefore a pannel was dismissed from the bar who was cited in Feb. 20, 1820, on criminal letters running in name of Geo. III., who died on 29th Jan. 1820.<sup>4</sup>

<sup>1</sup> 9 Geo. IV. c. 29. § 7.—<sup>2</sup> Thomas Soutar and Others, Perth, Sept. 8, 1828; Shaw, No. 176; Alex. Angus, Inverness, May 3, 1824.—<sup>3</sup> Gill M'Leod, Feb. 14, 1820.—<sup>4</sup> Neil Ferguson, March 13, 1820.

## CHAPTER IX.

OF THE CALLING OF THE DIET—ITS DESERTION AND  
FUGITATION.

BEFORE the jury is sworn, several important steps take place at the calling of the diet. The prisoner may not appear; a motion may be made for his fugitation; or the prosecutor may be unable to go on with the trial at that diet. These different cases require a separate consideration.

1. The prisoner cannot be called on to appear till the day of compearance fixed in his short copy of citation.

Of course, if a prisoner is cited to stand trial on a particular day, he cannot be called to answer to the libel till that day arrive. Even with the full concurrence of the pannel, or at his express desire, that period cannot be accelerated.<sup>1</sup> In a case, accordingly, where a libel was prematurely called by the Advocate-depute, on the day before the diet of compearance, and he had pleaded guilty both to the Court and assize, upon the error being discovered and stated by that gentleman, he was assolized and dismissed from the bar.<sup>2</sup>

2. The diet of a criminal process is a peremptory diet, and falls on the day of compearance, unless then called and kept alive by a continuation of the diet, by act of Court.

It is a point of invariable and ancient custom, that the diet of a criminal process is a peremptory diet, and not like that of a summons in civil matters, which may be brought into Court after the diet is passed, at any time that suits the pursuer's convenience.<sup>3</sup> Unless then expressly continued by an act of Court on the day of compearance, the libel must be called on that day, and in some way or other disposed of, or it perishes and can never

<sup>1</sup> Hume, ii. 263.—<sup>2</sup> John Allan Wilson, Sept. 15, 1826; Hume, ii. 263; Aberdeen.  
—<sup>3</sup> Mackenzie's Obs. on Stat. 74; Hume, ii. 263.

afterwards be revived.<sup>1</sup> It may be continued, however, by an entry in the Books of Adjournal, in the presence of a single judge, and does not even require his signature, provided it is signed by the clerk in his presence;<sup>2</sup> and when several cases stand for trial on the same day, which always takes place at Circuits, they are continued from one day to another, by the general continuation of diets at the close of each day's sittings.

So strictly is this rule interpreted, that it is held that the diet falls if not continued by the act of a judge, or of the clerk in his presence; even in the case of an interruption of public business by a national fast, thanksgiving, or other solemnity. Accordingly, the diets were all continued on an old occasion, in consequence of a thanksgiving for the naval successes over the Dutch.<sup>3</sup> No continuation can take place either on the motion of the prosecutor or pannel before the case comes into Court, for till that occurs the judges are not authorized to look at the proceedings.<sup>4</sup>

If at the proper diet the prosecutor has not, in the case of criminal letters, reported the letters duly executed, he loses that libel, and is liable in certain penalties by the older statutes.<sup>5</sup> For the details of these provisions, now by the change of practice become a subject of curiosity rather than use, it is sufficient to refer to the learned work of Baron Hume.<sup>6</sup>

3. If on the day of comparance the parties are absent on both sides, the libel falls.

If neither the prosecutor nor the pannel are present when the libel is called, it falls, as a matter of course, and cannot afterwards be revived; but the prosecutor, if he intends still to proceed, must raise a fresh libel.<sup>7</sup> To this, by our older practice, was added the forfeiture of the bond of caution, which the private prosecutor has lodged to insist, though this has now gone out of practice.<sup>8</sup> Formerly, if the accused had found caution to appear, the Court might proceed to outlaw him, even in absence of the prosecutor, considering his absence as a failure of duty to his sovereign, and the engagement in his bail-bond;<sup>9</sup> but this for a

<sup>1</sup> Hume, ii. 263.—<sup>2</sup> *Ibid.*—<sup>3</sup> June 7, 1665.—<sup>4</sup> James Macrae, July 12, 1790; Hume, ii. 264.—<sup>5</sup> 1535, c. 35; 1579, c. 78; 1593, c. 170.—<sup>6</sup> Hume, ii. 264, 265.—<sup>7</sup> Hume, ii. 265.—<sup>8</sup> *Ibid.*—<sup>9</sup> Mackenzie, ii. 21, 7; Thomas Falconer, June 1, 1669; Hume, ii. 265.



century and a half has fallen into disuse, and nothing now follows in such a case but the falling of the libel, and the liberation of the accused from that instance.

4. If the pannel appears at the calling of the libel, but the prosecutor does not appear personally against him, the instance falls, and the pannel must be dismissed from the bar, unless a reasonable cause for his absence is stated, in which case it is only adjourned.

As the *personal* presence of both prosecutor and pannel is indispensable in all criminal cases, it follows, that if the former is absent, and no excuse tendered for him, while the latter appears, he is entitled to have the diet deserted *simpliciter*.<sup>1</sup> This, however, does not infer a liberation from the *charge*, like a desertion *simpliciter* on the motion of the prosecutor himself, but only a liberation from the particular libel which is in Court, and should have been insisted in on that day.<sup>2</sup> A new libel may again be raised against the prisoner; but in the case of private prosecutions, it is in the power of the Court to refuse the second letters, if the prosecutor's conduct appear to be oppressive, or to issue them only on payment of the expenses previously incurred by the pannel at the first diet.<sup>3</sup> To secure this, the Court in former times were in use to enjoin the clerk of Court not to issue new letters but on a special warrant *in presentia* from the Lords; and this, as a reasonable and just precaution, seems competent at this day.<sup>4</sup>

The *personal* presence of the prosecutor, and not his attendance by an advocate or procurator, is indispensable to authorize the Court to move in the trial;<sup>5</sup> but if a fair excuse be offered for his absence, as by sickness, delay in travelling, inability to get forward to the place of trial, or the like, they have it in their power to adjourn the diet merely to a farther day. To tender such an excuse, or bring evidence by a surgeon's certificate, oath of witnesses, or the like, of the reason of the delay, it is competent for the prosecutor to appear by counsel or agent. This rule, which had been recognised in several older cases,<sup>6</sup> was

<sup>1</sup> Hume, ii. 266; Geo. Bannerman, July 11, 1709.—<sup>2</sup> Ibid.—<sup>3</sup> Sinclair of Barrack, Nov. 28, 1699; Hume, ii. 266.—<sup>4</sup> Hume, *ibid.*—<sup>5</sup> Ibid.—<sup>6</sup> John Monteith, March 13, 1662; David Colquhoun and William Buntine, Dec. 18, 1727; Lockhart of Lee, July 5, 1751; Hume, ii. 267.

fully set forth in a judgment of the Court, in a case of comparatively recent date, where it was found, that “in all prosecutions before this Court, whether by indictment or criminal letters, the prosecutor must be present at all diets of Court, unless, upon special cause shown, he is excused by the Court, and the diet continued to another day: but find that the prosecutor’s absence at the first diet of this trial, is no sufficient cause for deserting the diet.<sup>1</sup> In short, the trial cannot proceed, nor the pannel be outlawed, unless the prosecutor be personally present; but if his absence be satisfactorily accounted for to the Court, the diet may be adjourned to another opportunity.

5. The Lord Advocate may appear in person, or by his deputies; and an indictment raised by one Lord Advocate, may be taken up and insisted in by his successor in office.

As the whole powers of the Lord Advocate, great as they are, are communicated to his deputies, it follows, that if any of these gentlemen appear to insist in a prosecution, it is the same thing as if his Lordship appeared in his own person.<sup>2</sup> For the same reason, an indictment, or criminal letters, raised by one Lord Advocate, does not fall by his death, but may be insisted in by his successor in office; the prosecutor being regarded, not as any particular individual, but the holder, whoever he is, of that high office. Criminal letters, accordingly, raised at the instance of Henry Erskine, in 1784, were taken up, and insisted in by his successor in office, Ilay Campbell:<sup>3</sup> and a libel raised at the instance of the Honourable Charles Hope, by Sir James Montgomery his successor.<sup>4</sup> And in a case where an indictment for service at the instance of Henry Erskine, as Lord Advocate, was served on a prisoner in the jail of Inverary, on 4th April, and on the 21st March, Mr Colquhoun’s commission was produced in the Court of Justiciary, it was the opinion of the late Lord Meadowbank, that though the diet was deserted, no good objection would have lain to the trial.<sup>5</sup>

In such a case, it is also competent for his majesty, by a special mandate, or letter, to empower some qualified person to insist

<sup>1</sup> Smith, Hamilton, and Christie, June 26, 1778.—<sup>2</sup> Hume, ii. 267.—<sup>3</sup> See John Grant’s Case, Jan. 12, 1784.—<sup>4</sup> See Rich. Myndham’s Case, Oct. 10, and Dec. 3, 1804; Hume, ii. 267.—<sup>5</sup> Hume, ii. 268.

in the prosecutions already raised, or raise new ones. The Queen's solicitors were authorized to do so, by a letter to that effect, on June 6, 1713, on occasion of the death of Sir James Stewart.<sup>1</sup>

6. In the case of a prosecution by a body corporate, or a number of individuals, they may all appear by a factor specially empowered, who appears for them all; and if there are several distinct pursuers, the one may withdraw, without prejudicing the others.

Cases frequently occur, under private prosecutions, where a number of individuals concur in a prosecution; and it is impossible for them all to appear at the bar as prosecutors; as, when a libel is raised by a body corporate, or other numerous association of persons, who cannot all be expected to appear. In such a case, our practice, from necessity, sustains the expedients of the prosecution being conducted by a special attorney, or factor, whose presence is accepted as sufficient.<sup>2</sup> In a case, accordingly, where the libel was raised in the name of *certain persons* described as the Governor and Directors of the York Buildings Company, for themselves, and in behalf of that Company, and of Mr Henry Streachey, their factor, specially empowered for that effect, conform to warrant and commission, lying in the hands of the Clerk of Justiciary, and the factor produced not only his general commission of factory, but an extract from the Company, under the hand of their secretary, of a special authority to carry on the prosecution; the appearance of the factor alone was sustained as sufficient.<sup>3</sup> But it is not competent to raise a libel in the name of a *mercantile firm*, for in such a case the pannel does not know who his individual prosecutors are; and therefore, in a case before the Court of Session, where a libel for fraudulent bankruptcy had been raised at the instance of the trustee on his sequestrated estate, and of James Potter and Co., creditors of the pannel, the Court dismissed the libel.<sup>4</sup> But by Mr H. Drummond's act,<sup>5</sup> it is now competent for the trustee, or any creditor whose claim has been ranked on a sequestrated estate, to prosecute for this offence, and, of course, his presence will be sustained as sufficient, without that of any of the

<sup>1</sup> Hume, ii. 268.—<sup>2</sup> Ibid.—<sup>3</sup> Thos. Mathie, March 20, 1727; Ibid.—<sup>4</sup> Adam Rennie, Dec. 11, 1810; Hume, ii. 268.—<sup>5</sup> 7 and 8 Geo. IV. c. 20.



creditors, an instance of which lately occurred in a private prosecution before the Justiciary Court for that crime.<sup>1</sup>

If the prosecution is at the instance of several persons, some of whom insist, while others are absent, it was long ago laid down by Mackenzie, that if the several interests are distinct, the absence of one or more of the complainers ought not to hinder the others, who have a sufficient title of their own, to prosecute;<sup>2</sup> and to this opinion Baron Hume has added the weight of his authority.<sup>3</sup> It is to be observed, however, that in an old case, where the libel was at the instance of three pursuers for the murder of their three brothers, and two of them were absent at calling, the Court deserted the diet in the *joint* libel, and allowed each of the pursuers *separate* letters for the murder of his own relation; a proceeding which appears more agreeable to principle than that approved of by these authorities.<sup>4</sup>

If letters are raised at the *instance* both of the Lord Advocate, and a private individual, either may be absent or withdraw from Court, and disclaim the process, without interfering with the title of the other.<sup>5</sup> Nay, as already mentioned, in Colonel Charteris's case, the like was found, where the libel was at the instance of a private party, with the concurrence only of the Lord Advocate, and this concurrence was withdrawn after the calling of the libel.<sup>6</sup> But the case is different if, in a prosecution which has his lordship's concurrence only, the *private* party withdraws, for he is the real prosecutor; the Lord Advocate is only a name, and therefore, if he is out of the field, the process falls. But if the prosecution is at the *joint instance* of the private party and the King's Advocate, then the withdrawal of the private party will not prejudice the right of the public prosecutor to go on with his instance *in vindictam publicam*. Nay, this was found competent in one case, even where the prosecution was at the instance of the private party, with concurrence of the Lord Advocate, and the private party had withdrawn;<sup>7</sup> but it seems doubtful whether this precedent, which allows the formal concurrence of the King's Advocate to be turned, after the case is called, into his substantial instance, would be followed in modern times.

<sup>1</sup> George and James Wilson, July, 18, 1832; unreported.—<sup>2</sup> Mackenzie, ii. 21. 6.—

<sup>3</sup> Hume, ii. 268.—<sup>4</sup> Duncan Gordon and Others, June 11, 1677.—<sup>5</sup> Hume, ii. 269.—

<sup>6</sup> Colonel Charteris's case, April, 4, 1723; Ante, p. 104.—<sup>7</sup> Couhoun and Buntine, Dec. 26, 1727; Hume, ii. 269.

7. If the prosecutor appears, but the accused is absent, the only competent course is to outlaw him for non-appearance.

It has been our invariable custom, with one single exception introduced in bad times, in a case of treason, that if the accused does not appear, no trial for the offence with which he is charged can take place. It is justly held, that there can be no security for the fair discussion of a case, unless the accused is present, and has the means of stating all the defences which may occur on his side; and that the severe punishments of the Justiciary Court should not be pronounced, except *causa cognita*, and in circumstances where there is evidence to show that it is really deserved.<sup>1</sup> If, therefore, the pannel escape from jail in the interval between a verdict of guilty delivered and sentence pronounced, no sentence can legally be pronounced in his absence, but he can only be outlawed, if his apprehension cannot be obtained to hear sentence pronounced against him.<sup>2</sup> Nay, such has been the force of the general impression on this head, that the Court on one occasion refused to desert the diet, even on the prosecutor's own motion, in respect the pannel was absent, but continued the diet to give him an opportunity to appear.<sup>3</sup> In a late case, however, on special cause shown, this latitude was allowed;<sup>4</sup> but it is not to be regarded as an ordinary or usual step of process, or in any other light than as one which the Court allow only in cogent reasons.<sup>5</sup> Nor can it be pleaded as a matter of right, but of indulgence only, that any number short of the whole pannels, in such a case, can be accepted for the rest.<sup>6</sup>

The same indulgence is granted to the accused in this matter which is granted to the prosecutor, viz. that if reasonable proof be brought, by surgeon's certificate on soul and conscience, oaths of witnesses, or the like, that he is unable to attend, the diet will be adjourned, and sentence of fugitation not pronounced. But, in such a case, it is competent for the prosecutor to disprove this by contrary evidence; and in a case, accordingly, where the pannel's counsel produced certificates, on soul and conscience, of his

<sup>1</sup> Hume, ii. 270.—<sup>2</sup> Hume, ii. 270; James M'Gregor, 1752; Maclaurin, No. 60.—

<sup>3</sup> Sir John Mackenzie and Others, Feb. 18, 1712.—<sup>4</sup> Allan M'Lean and Others, June 18, 1763.—<sup>5</sup> Hume, ii. 270.—<sup>6</sup> Innes and Others, Feb. 22, 1713; Ibid.

inability to attend, but the prosecutor led contrary and more satisfactory proof, sentence of outlawry was pronounced.<sup>1</sup>

If, therefore, the pannel, when duly cited, fails to appear, or duly accounts for his absence before the Justiciary Court, he must be outlawed. If before an inferior judicature, this cannot be done; but his bail-bond is declared forfeited, and warrant is granted for his imprisonment, which may be carried into effect forthwith, within its jurisdiction, and when duly indorsed, in any part of the United Kingdom.

8. The effect of outlawry is, that the accused forfeits his person in law; becomes incapable of bearing testimony, suing or defending in any process, civil or criminal; and may be put to the horn, whereby his movable estate escheats to the crown.

The effect of a sentence of fugitation is, that the person of the accused is forfeited in law,—*amittit legem terræ*,—so that he cannot bear testimony on any occasion, or pursue any process civil or criminal, or act as a juryman, or claim any personal privilege or benefit whatever from the law.<sup>2</sup> One of the most important of these effects is, that he loses in strict law the benefit of the Act 1701, and must be reponed before he can take out letters of intimation; for that law is one of the highest privileges of a British subject, and it would be absurd that inferior privileges should be lost by failure to appear, and this, one of the most interesting of any, be retained.<sup>3</sup> The sentence of the Court also, is a warrant for the denunciation of the accused as a rebel, and the putting of him to the horn; the effect of which is, that his movable substance escheats to his Majesty; and if he remain a year in that condition, the profits of his heritable estate for his lifetime are forfeited to the superior.<sup>4</sup> An instance of the loss of the *personæ standi in judicio* by sentence of outlawry, occurred lately in the case of Ebenezer Anderson, who was outlawed for fraud and embezzlement, before the Perth Circuit, in Spring 1828, upon which the Court (First Division) refused to allow him to plead in an important action against him, depending in the Court of Session, and pronounced decree in terms of the libel.<sup>5</sup>

<sup>1</sup> John Davidson, Perth, Sept. 16, 1822; Record.—<sup>2</sup> Hume, ii. 271.—<sup>3</sup> Barnard Clunes, Dec. 15, 1753; Hume, ii. 273.—<sup>4</sup> *Ibid.*—<sup>5</sup> Cheyne and Mackersey v. E. Anderson, July 4, 1828; Shaw, vol. vi. 1061.



The ground of the decree being the contumacious absence of the accused, he cannot avoid it by pointing out errors, how gross soever, in the libel. If such exist, and it is clearly irrelevant, he is only the more inexcusable for not appearing to answer to so defective a charge.<sup>1</sup> Even therefore, where so glaring a defect existed, as an omission in a libel for deforcement, to set forth of the day of the crime, the Court, while they sustained the objection in favour of a pannel who appeared, pronounced sentence of outlawry without hesitation against those who did not.<sup>2</sup>

Absence abroad on foreign service, *reipublicæ causa*, has been sustained as a sufficient excuse for not appearing, and though the case is an old one, being founded on substantial justice, it would certainly still be followed as a precedent.<sup>3</sup> Clear proof of inability to appear from ill health, is also a good excuse, and was held relevant in a late instance, although upon the evidence, as contrasted with that led for the prosecutor, the allegation was held disproved, and sentence was accordingly pronounced.<sup>4</sup> But there is no authority for holding, that any business or engagements, how pressing soever, will be any bar to the pronouncing of sentence of outlawry, and the sustaining any excuse of that kind, would obviously open the door to frauds and evasions of the law innumerable. The course to adopt in such a case is, for the Court to pronounce sentence of fugitation; and the accused, if he is really in earnest, and is not merely making an excuse of business to avoid outlawry, has it in his power to appear in Court and pray to be reponed, which on the prosecutor's consent, which is given of course on his personal surrender, will always be granted.

The sentence of outlawry also is a warrant for an application for letters of caption, or a new warrant to apprehend and secure the outlaw: And in the event of his being imprisoned on such a warrant, he has no right to bail, how trivial soever the offence may be. To obtain such an indulgence, he must apply to be reponed; and in this request, unless the prosecutor consent, the Court are not compelled to indulge him, until he stand accused on a new libel at the Bar, when, and not before, he is entitled *de jure* to be reponed, in order to go on with his defence.<sup>5</sup>

<sup>1</sup> Cheyne and Mackersy v. E. Anderson, July 4, 1828; Shaw, vol. vi. 1061.—<sup>2</sup> Jas. Farquharson and Others, March 4, 1673.—<sup>3</sup> Major Macdougall, March 6, 1693; Hume, ii. 271.—<sup>4</sup> John Davidson, Perth, Sept. 16, 1822; record.—<sup>5</sup> Robt. M'Gregor, Dec. 20, 1753; Hume, ii. 272.

9. But though not personally present, the pannel may state any objections to his citation; because the Court are only entitled to fugitate upon proof of a regular execution of the libel.

Notwithstanding the general rule against the competence of stating objections against fugitation, unless the pannel is personally present, there is one class of objections which he has always been held entitled to state by his agent or counsel, and that is, those which relate to the sufficiency of the citation; for no one is bound to appear unless cited in regular and competent form; and this appears in the style of the sentence of fugitation itself which proceeds against him,—“as he who was lawfully cited to compear, and failed to comply therein.”<sup>1</sup> Not only, therefore, in several old,<sup>2</sup> but in a great variety of modern cases, it has been found competent to state objections to citation, even though the pannel did not appear personally. This was done in particular in the case of the Croy rioters, where the Court held it competent for Jean Fraser to object to her citation, though she did not appear personally upon the ground; and that part of the criminal letters, containing the warrant for her citation, was filled up in the country, after the letters had issued from the Court.<sup>3</sup> So also, the Court refused to fugitate in a still later case, in respect in the short copy of citation produced the pannel was called to answer to the *crime* libelled, whereas she was charged with three separate *crimes* in the libel.”<sup>4</sup> But if the pannel be forth of the kingdom, and it is objected that he should have been called on the long *judicia*, the prosecutor will have a good reply to such an objection, if the pannel is not prepared with a mandate from his client in foreign parts.<sup>5</sup>

10. If an accused party has been fugitated, he is not entitled to be reponed as a matter of right, until he is about to plead to a new indictment; but this is frequently consented to by the public prosecutor, upon the pannel surrendering his person in Court; and thereafter he

<sup>1</sup> Hume, ii. 271.—<sup>2</sup> Andrew Kennedy, July 29, 1672, and Aug. 20, 1672; Walter Buchanan, June 30, 1727; Archd. M'Alister and Others, Dec. 17, 1736.—<sup>3</sup> Hugh M'Donald and Others, June 9, 1823.—<sup>4</sup> Jas. Grant, and Jas. M'Kerran, July 16, 1827; Syme, 245.—<sup>5</sup> John Forrest, April 19, 1823; Shaw, 109.

may be admitted to bail, if the case will allow that privilege.

The consequence of a man being fugitated, being that he loses all the privileges of a British subject, and among the rest the important one of being entitled to the benefit of bail, it is frequently a matter of importance to be relieved, and restored to these important advantages. For this purpose, he must apply to the Court to be reponed; and the first condition of such an application, is, that he surrender himself up, and thereby give a solemn pledge of the sincerity of his disposition to abide by the laws of his country.<sup>1</sup> Even if this be done, however, he is not entitled to bail as a matter of *right*, until he is about to plead to a new indictment, in which case, to enable him to plead his defence, the Court will straightway repone him, without asking any consent from the prosecutor.<sup>2</sup> Previous to matters having arrived at that stage, however, he is not entitled to bail, but with the prosecutor's consent, and therefore the usual course, when a petition for relaxation is presented, is to intimate it to the Lord Advocate, or one of his deputies, and they write their consent at the foot of the petition, sometimes without any condition, sometimes on condition of the accused finding bail; whereupon the Court straightway repone him against the sentence.<sup>3</sup> It is the usual course for the public prosecutor to consent at once to the relaxation of the petitioner, if he has delivered himself up, but they cannot be compelled to do so, and they may annex to their consent such conditions, in regard to bail, as they deem necessary to secure his attendance at the trial.<sup>4</sup>

The Court also may qualify their deliverance, finding the petitioner entitled to bail, on such conditions, as to bail or otherwise, as they think fit. Nor is it to be understood, that this, of being reponed, is a concession upon which an outlaw can insist, either with the prosecutor or the Court, till the diet for his trial has arrived.<sup>5</sup> On various occasions, accordingly, the Court have annexed certain conditions to the relaxation, as refunding the cost of previous proceedings at the private instance against him,<sup>6</sup> paying a certain sum in name of costs by a certain day,<sup>7</sup> and

<sup>1</sup> Hume, ii. 272.—<sup>2</sup> Robt. M'Gregor, Dec. 20, 1753; Hume, ii. 272.—<sup>3</sup> Hume, *ibid*; John Walker, Nov. 19, 1801.—<sup>4</sup> Alex. Brown, March 14, 1804; Hume, *ibid*.—<sup>5</sup> Hume, ii. 273, 274.—<sup>6</sup> Patrick Duguid, Feb. 4, 1750.—<sup>7</sup> Muoro, March 8, 1739; Burnet, June 27, 1715.



refunding the expenses of the pursuer and witnesses.<sup>1</sup> Nor is it incumbent on them to repon, even on such conditions, or personal surrender; on the contrary, they may refuse it altogether, and maintain the sentence of outlawry in full force till the very day of trial, if it appears indispensable to the ends of justice that this course should be adopted.<sup>2</sup>

Considerable doubt was formerly entertained on the question, whether a sentence of fugitation exhausted the libel, or it was still competent to proceed upon the old libel, and try the prisoner thereon? On the one hand it may be urged, that the fugitation is no exhausting of the libel, inasmuch as its conclusions are not for outlawry, but punishment; and the sentence declaring it, passes only in consequence of his contumacy in not appearing to stand trial;—on the other, the fugitation seems a warning to the witnesses and assizers not to attend; and there is no authority for their subsequent citation, as no continuation of the diet is on record. And although this difficulty is now removed by the late Act,<sup>3</sup> declaring, that it shall be no objection to witnesses or assizers that they appear without a warrant: Yet the more serious difficulty remains, that the *libel itself* has fallen, in consequence of its not being disposed of by some deliverance on the day of compearance; for the sentence of fugitation, which is an extraneous act of the Court, not concluded for in the libel, cannot be regarded as any disposal of it. There are many cases, however, on record, which seem to infer, that the accused may still be tried on the old libel.<sup>4</sup> In some of these cases, however, the libel had been kept in Court by the appearance of some of the parties called, and in none did any trial take place; so far as appears on the old libel.<sup>5</sup> In modern practice, the custom uniformly has been, to proceed to trial upon a new indictment, and as this is obviously a safe course, and obviates all objections, it should always be adopted.

It is usual for the pannel to be reponed before his trial commences; but if this has been omitted, and no motion for reponing has been made by the pannel, the proceedings are notwithstanding valid, and the sentence will be sustained.<sup>6</sup>

<sup>1</sup> Andw. Munro, Feb. 26, 1700; Hume, ii. 271.—<sup>2</sup> Hume, ii. 274.—<sup>3</sup> 9 Geo. IV. c. 29.—<sup>4</sup> Finlay M'Intyre, July 14, 1712; Burnet, June 27, 1715; David Strang, June 12, 1738; Hume, ii. 275.—<sup>5</sup> Hume, ii. 275.—<sup>6</sup> John Wilson, May 31, 1830; Shaw No. 205.

11. Though both parties are present, the diet may be continued to a certain day, but it must not be continued indefinitely; and the party making the motion, if the prosecution is private, may be subjected in expenses, if the Court see cause.

If both parties are present, although the diet must somehow or other be disposed of, yet this may be done by a continuation merely, which is intimated by a deliverance from the Bench or Clerk of Court to all concerned. Some specific day, however, must in all such cases be specified in the deliverance, and a continuation in indefinite terms is illegal and null.<sup>1</sup> This motion may be made either by the prosecutor or pannel; but the Court are not constrained to grant it, unless sufficient cause is shown by the party making the motion; and they may, in prosecutions at the private instance, qualify the deliverance by any finding as to previous expenses that seems just.<sup>2</sup> In those at the public instance, no finding as to expenses can take place, because the crown never either claims or pays expenses; but if the Court see any symptoms of oppression on the one hand, or a desire to evade justice on the other, they may and should refuse to accede to the motion, and constrain the refractory party to proceed with the instance at that diet, or allow it to fall to the ground.

12. It is also competent for the prosecutor, if he sees cause, to move the Court to desert the diet *pro loco et tempore*; and if this be granted, he may draw a fresh libel for the same offence; but the motion may be either granted or rejected, according as it shall appear to have originated in fair or vindictive motives.

It sometimes unavoidably happens, that though still resolved to bring the pannel to justice, the prosecutor cannot proceed upon that particular libel. He may have discovered some error in the citation of the pannel, or in the libel or list of witnesses, which would be fatal to the prosecution if insisted in at that diet. In such cases, the ends of justice require that he should have the power of dropping the defective, and raising a more correct libel;<sup>3</sup> but it is equally indispensable that he should not possess the

<sup>1</sup> Hume, ii. 275.—<sup>2</sup> Robert Story, Dec. 12, 1748; Hume, ii. 275.—<sup>3</sup> Hume, ii. 275.

unlimited and uncontrolled power of so doing, or it might be converted into an instrument of the most manifest oppression. Between these extremes, our custom has selected the fair medium of not permitting the prosecutor to throw up and renew the libel at his own pleasure, but only to move the Court to do so; and in this request they may, and frequently have, refused to gratify him, unless they are satisfied with the reasons assigned for the step.<sup>1</sup> In a noted case, accordingly, the Solicitor-General expressly disclaimed any such power of deserting diets without the authority and intervention of the Court, and this has ever since been held to be the fixed rule on the subject.<sup>2</sup>

But although the Court may thus refuse to desert the diet on the prosecutor's motion, yet they are not entitled to oblige the prosecutor to specify his reasons for making that motion.<sup>3</sup> This it may frequently be contrary to the duty of a public prosecutor at least to do; or it may be of such a kind as cannot be publicly avowed. The remedy in the Court's hands, if they have not sufficient confidence in the prosecutor to rely upon his assurance without a specification of reasons, is to desert the diet against the prisoner *simpliciter*.<sup>4</sup> And this should be done in every case where, in a prosecution at the private instance, the party who conducts it declines to specify the reasons on which his motion is founded; for no such reasons for concealment exist in that case as in that of the public prosecutor, and the same reliance is not to be placed on an advocate, how respectable soever, under the control of an agent, as a public officer discharging an important duty, free from any such fetters.

If the prosecutor is present, and insists on his libel, the Court cannot throw it out against his will, except by a judgment finding it to be irrelevant. They may continue the diet from time to time, till the convenient season for proceeding with it arrives; but they cannot throw it out against his will, if he is willing to have their judgment upon it, such as it is.<sup>5</sup>

In the cases already mentioned, the prosecutor deserts the diet *pro loco et tempore* only; and this qualifies the proceeding by the indication of an intention to proceed against the pannel on some future occasion and a fresh libel, and this is undoubtedly competent to him.<sup>6</sup> In like manner, if the Court desert the diet

<sup>1</sup> Hume, ii. 276.—<sup>2</sup> Archibald's case, March 1, 1768; Hume, *ibid.*—<sup>3</sup> Alexander McPhie, Inverness, Sept. 1763; Burnet, 310.—<sup>4</sup> Hume, ii. 276.—<sup>5</sup> Hume, ii. 277.—<sup>6</sup> *Ibid.*



*simpliciter* against a pannel, on account of some irregularity in the citation, or some error in the libel or lists; that judgment, decisive as it is, determines the fate of that particular process only, and cannot preclude the raising of a new libel in a more improved form.<sup>1</sup> But if the diet is deserted *simpliciter* on the *prosecutor's own motion*, this is held to be a final renunciation of the right of prosecution for that offence, and a complete bar to any renewed proceedings regarding it at his instance.<sup>2</sup>

## CHAPTER X.

### OF PLEADING AND RELEVANCY.

GREAT changes on the form of pleading, and the discussion on relevancy, have taken place within these few years. The debates on relevancy are now conducted for the most part *viva voce*, instead of written pleadings, according to the old practice; and that mode of debate reserved for the more important cases where serious points of law have occurred, requiring deliberate consideration. The pleading by the prisoner is regulated by a late act in a new manner, better calculated to combine the two objects, of publicity in the proceedings, and expedition in the discharge of business.

1. If the pannel have any thing to object to his citation, he should state it before he answers to the libel; but if no objection is offered, he must then be asked by the presiding judge whether he means to plead Guilty, or Not Guilty.

The nature of an objection to the citation of the pannel evidently implies that he should not be called upon to plead to the libel; because, it amounts to this, that he has been cited irregularly; in other words, not cited at all. Such an objection, therefore, should be stated *in limine*, before any proceeding takes place in regard to pleading to the libel; because it is the very nature

<sup>1</sup> Walter Buchan, Dec. 18, 1727.—<sup>2</sup> William Leslie, Jan. 21, 1783; Hume, ii. 277.

of the objector's plea, that he cannot legally be called on to plead to that libel at all.<sup>1</sup>

If, however, no objection to the citation is stated, or being stated is repelled, it is then the duty of the presiding Judge to ask the pannel whether he means to plead guilty or not guilty, for, according as he does the one or the other, a different course of proceeding must be adopted.

It is enacted by 9 Geo. IV. c. 29, § 12, "That when an accused person, on being brought to the bar, shall say that he means to plead *not guilty*, and does not desire that the criminal libel exhibited against him shall be read over, it shall not be necessary to read over such libel before proceeding to the trial of such person." This enactment dispenses with the necessity of reading the libel only in the case of a prisoner pleading *not guilty*; and therefore, if he pleads guilty, the old common law still holds, which requires that the libel should be read aloud.<sup>2</sup> Nor was it without due consideration, and sufficient reasons, that this apparently anomalous rule was established. The object was, that in every case the audience should be made acquainted with the proceedings that were going forward, and the nature of the offences which were visited with the punishments that were pronounced; and as this could not be done unless in those cases where a confession was to take place, the libel was read aloud. In those which go to trial, the publicity is sufficiently secured by the proceedings which follow. Nor is it of less importance that the attention of the Judge should in every case be drawn to the facts of each particular case immediately before pronouncing sentence, which is secured by the evidence in the trial, in cases where the pannel pleads *not guilty*, and the reading of the indictment, where he confesses his crime.

The first step, therefore, in a criminal trial, after the diet is called, is to ask the prisoner whether he means to plead guilty or *not guilty*. If the former, to order the indictment to be read; if the latter, to ask him whether he wishes it to be read or not, and if he does, to have it read over by the clerk.

In practice it is seldom found that any time is saved by not reading the material part at least of the indictment; because if the jury enter upon the trial without knowing anything of the case, except from the printed indictment in their hands, they are

<sup>1</sup> Hume, ii. 273.—<sup>2</sup> Ibid.

extremely apt to understand little of the evidence as it is going forward. The best plan to combine both objects has usually been found to be to read the charge, stopping with the close of the minor proposition. This explains the nature of the case, without involving their minds in technical details of which they understand nothing.

2. If the pannel is insane or intoxicated, or unable, from any cause, to understand what he is about, he should not be permitted to plead to the charge; but if he can understand it, it is no objection to his doing so, that he is deaf and dumb, or unable at the time to speak.

As the step of pleading guilty or not guilty is so important in every trial, and may draw after it consequences so important to the life, liberty, or estate of the pannel, it is in an especial manner the duty of the Court, equally as the prisoner's counsel, to take care that he is in such a state of mind as to understand what he is about, and duly aware of the irreparable and momentous results consequent on the step he is about to take. If, therefore, the pannel is either intoxicated, insane, or an idiot, it is the duty of his counsel to state his mental situation as a bar to his pleading to the charge, and the Court will thereupon instantly proceed to investigate the matter by all competent evidence. It is, however, no objection to a pannel's pleading to a charge, that he is deaf and dumb, provided it be made out by sufficient evidence that he understands what he is about;<sup>1</sup> nor that he is unable at the time, from accident or disease, to articulate, if his intellects are clear; and accordingly, in a case where such an impediment, unaccompanied by mental aberration, existed, the plea of not guilty was written down by the pannel.<sup>2</sup>

3. If a plea of insanity or idiocy is put in, in bar of trial, it is to be judged of by the Court alone, without the intervention of an assize; and in judging of this matter, witnesses may be examined on both sides who are not contained in the list of witnesses.

<sup>1</sup> Jean Campbell or Bryce, April 1817; Hume, ii. 278.—<sup>2</sup> Hugh Ross, Nov. 16, 1818; Hume, *ibid.*



Formerly it was much doubted, whether in a case of insanity being pleaded in bar of trial, it was the Court or the assize to judge of the evidence,<sup>1</sup> and many authorities existed on both sides. But at length this interesting matter was settled by a judgment of the Supreme Court, in the case of David Hunter, Feb. 16, 1801, on which occasion, after a full enquiry into the practice, it was found, "that the plea of insanity pleaded in bar of trial, ought to be tried by this Court without the intervention of a jury."<sup>2</sup> This precedent has uniformly been followed on similar occasions since that time. Thus, John Lyall's plea of insanity in bar of trial having been sustained, he was delivered over to the custody of his relations; though, as it afterwards appeared that his mental disorder had been owing to a temporary cause, he was indicted anew for the same offence, tried and convicted.<sup>3</sup> In this case, it was held by the Court that the true test of liability to stand a trial was to be found, not in the point whether he was in a condition to conduct himself with prudence or propriety in a criminal trial, but whether he was *doli capax* with reference to that particular case, and able to understand the nature of the plea which he was required to put in to the libel.<sup>4</sup> Evidence in like manner was taken by the Court in cases where the plea of idiocy or insanity was put in in a great variety of subsequent cases, which met with the most deliberate consideration.<sup>5</sup>

The proper interlocutor to pronounce in such a case, is to find "that the pannel is not a proper object for trial at present, and therefore desert the diet against him *pro loco et tempore*, but ordain the pannel to be carried from the bar back to the Tolbooth of Edinburgh, therein to be detained in close custody until the farther orders of the Court."<sup>6</sup> In the case of a person proved to be a dangerous idiot, the interlocutor was, "find it sufficiently proved that the pannel is a fool or natural idiot, and from the violence of his temper dangerous to all with whom he may have interference; and therefore order him to be carried back from the bar to the Tolbooth of Inverness, therein to be detained in close custody until the farther orders of this Court; reserving always to the pannel, in the event of his coming to the use of his reason,

<sup>1</sup> Hume, ii. 144.—<sup>2</sup> David Hunter, Feb. 16, 1801; Hume, *ibid.*—<sup>3</sup> John Lyall, Jan. 3, 1811; Hume, *ibid.*—<sup>4</sup> *Ibid.*—<sup>5</sup> James Essex, Aberdeen, Sept. 1815; Donald McIlliken, Inverness, April 1816; John Warrand, Jan. 17, 1825; John Smith, June 25, 1827.—<sup>6</sup> As in John Warrand's case, Jan. 17, 1825; Shaw, No. 132.

to apply to the High Court of Justiciary for instructions with regard to his future disposal.<sup>1</sup>

In the event of a prisoner confined on these or similar warrants, regaining the use of his reason, so as to render him a fit object of trial at that time, whatever he was when he committed the offence, the proper course is to apply by petition to the High Court of Justiciary, or the Circuit, if the prisoner is in their jurisdiction; and it is competent so to do, either accompanied or not by certificates as to the convalescence alleged. Upon this, the Court will forthwith remit to two or more medical men to examine with the jailor, or other persons that may be suggested, into the state of the prisoner; and, thereafter, evidence should regularly be taken, *viva voce*, in presence of the Court, and after intimation to the public prosecutor; although in cases where such examination might be inconvenient or costly, they may receive certificates on soul and conscience, or affidavits emitted in presence of a magistrate. Upon advising the evidence taken in any of these ways, the Court pronounces such an order as the case may seem to require. Frequently, after the pannel has lain sometime in jail, he is removed by order of Court, with consent of the public prosecutor, and on the application of his friends, from jail to a lunatic asylum, as was done in the cases of John Smith, July 16, 1827, and John Warrand, Jan. 17, 1825, already noticed. It is not unusual, also, to pronounce an order delivering a pannel confined on such an order to his relations, upon their finding security to keep him in safe custody in a lunatic asylum all his life, or until his convalescence shall be established to the satisfaction of the Court; but in such a case the cautioners are liable, if he is liberated otherwise than upon authority of the Court, and all such applications should be intimated to the public prosecutor for his consent and approbation.

The Court in like manner investigate themselves the mutual state of a pannel, who is placed at the bar in such peculiar circumstances, as, from being deaf and dumb, to suggest rational doubts as to his competence to understand either the libel with which he is charged, or the nature of the plea which he is required to put in in answer to it.<sup>2</sup>

4. It belongs to the Court, and not to the jury, to

<sup>1</sup> Donald M'Killiken, Inverness, April, 1816; Hume, ii. 144.—<sup>2</sup> Jean Campbell, June 30, 1817; Hume, ii. 145.

investigate the pannel's identity, when pleaded in bar of trial.

For the same reasons, if any question arise as to a pannel's identity, it is the province of the Court, and not of the jury, to take evidence and determine concerning it; as if he allege, when brought into Court, that he has been brought into Court instead of another who is the true pannel; or that he has been served with an indictment intended for another person.<sup>1</sup> This was determined with reference to a capital convict who escaped from jail, and was taken a month after the day fixed for the execution: on being brought to Edinburgh, he denied that he was the person convicted on the former occasion, and insisted that this matter should be tried by an assize; but the Court, after a full argument, and a review of all the precedents, held otherwise, took evidence of the identity themselves, and ordered a new day for his execution.<sup>2</sup> In like manner, a capital convict who had made his escape from the Jail of Glasgow in Autumn 1791, and was taken and transmitted to Edinburgh in December following, was sentenced by the Court, without the intervention of a jury, for execution on another day.<sup>3</sup> Prisoners who have escaped from jail under sentence of transportation,<sup>4</sup> or even escaped from the hulks,<sup>5</sup> have repeatedly had their identity enquired into by the Court alone; and upon that being established, had the old sentence of new pronounced against them; and the same has been done with one who had escaped from jail when lying there under a sentence of imprisonment.<sup>6</sup> In case of a return from transportation, it is also competent, as already stated, to indict the prisoner for the capital felony created by the statute;<sup>7</sup> but if this is done, he must be tried by jury. Thus, upon the whole, the rule is, that if the prisoner is charged with the *new offence* of returning from transportation or banishment, and upon a libel concluding for the additional pains provided for that new offence, he must be tried on a regular indictment by jury;<sup>8</sup> but if he is merely to have his identity established to have the old sentence of new pronounced against him, the Court are properly intrusted with that duty.

<sup>1</sup> Hume, ii. 145.—<sup>2</sup> Patrick Young, March 15, 1788; Hume, *ibid.*—<sup>3</sup> Plunket, Dec. 20, 1791; *Ibid.*—<sup>4</sup> James Turnbull, Dec. 30, 1817.—<sup>5</sup> David Tennant, Jan. 7, 1817.—<sup>6</sup> William Forrest, Feb. 5, 1821; Hume, ii. 145.—<sup>7</sup> 5 Geo. IV. c. 84; *Ante*, vol. i. p. 561.—<sup>8</sup> James Baillie, March 1773; Hume, ii. 146.



5. The pannel is not obliged to plead simply Guilty or Not Guilty ; but he may qualify the confession by an admission of part, and a denial of the remainder, of the matter libelled ; but if he does not distinctly admit his Guilt of part of it, his plea will be taken as amounting to Not Guilty.

Though the usual form of pleading is by a confession or denial of the charge, yet it frequently happens that a pannel is desirous of admitting a part only of it, and denying the remainder ; or he wishes to qualify his admission by the statement of some facts which he hopes may alleviate his punishment. It is competent for him, in such a case, to put any plea he chooses on record ; but it must be done under this provision, that if the prosecutor is not satisfied with the admission as it stands, he may lead a farther proof ; and that if there is any ambiguity in the meaning of his expressions, the Court will construe it in the most favourable manner for him as a plea of not guilty.<sup>1</sup> It is not competent, however, now, as it was in the older practice,<sup>2</sup> to plead guilty by a reference to any extrajudicial confession previously made or contained in the pannel's judicial declaration ; but the statement, such as it is, must be made *de novo* in presence of the Court, and when he is perfectly aware what he is doing. If, therefore, there is any ambiguity in this particular, or the distinct confession of some part at least of the criminal matter libelled is not made in presence of the Court, the plea is to be taken as one of not guilty, and a jury impannelled for the pannel's trial in common form. In a case, accordingly, where the pannel said he recollected many things that he had done, but that he did not know whether he was guilty or not guilty, this was justly considered as a plea of not guilty.<sup>3</sup> In cases of uttering forged notes, or reset of theft, it frequently happens that the pannels admit the uttering the notes on the receipt of the goods, but deny the guilty knowledge ; this is of course always considered as a plea of not guilty, and the pannels put on their trial as such.

Though the prosecutor usually is, yet he is not bound to rest satisfied with an admission by the pannel of the whole matter

<sup>1</sup> Hume, ii. 279.—<sup>2</sup> Andrew Arnot and Others, Dec. 5, 1665 ; Francis Bell, July 27, 1674.—<sup>3</sup> John Lyall, June 15, 1812 ; Hume, ii. 278.

libelled, and much less of course of any part of it. On the contrary, it is quite competent for him, after the pannel's plea is put on record, to have a jury impannelléd, and lead evidence so that the nature of the case may be fully before the Court in pronouncing sentence, and in such a case the jury should convict him if he is found guilty, not merely on his own confession, but the evidence led. Evidence, accordingly, was led, after a plea of guilty had been entered on record, in an important case, by the examination of two witnesses, and the pannels transported for life.<sup>1</sup> This step, however, is usually not taken, unless there is something peculiar in the case which renders it indispensable that the fact it embraces should be more completely before the Court than by the mere confession of the accused, and it should never be done without the accused being warned of that intention before his plea of guilty is recorded.

6. No one is bound to answer to more than one libel at a time for the same offence ; but it is competent during the running of one indictment to serve a second, provided that at calling the prosecutor makes his choice of one to proceed to trial with, and deserts the other.

It is a principle of the Scotch law, that no one is bound to answer to more than one libel for the same offence. If, therefore, the pannel has been served with more than one, whether different in substance, or in their lists of witnesses, or of assize ; and if these be all in Court at the same diet, he is entitled to know, before pleading to any of them, on which the prosecutor now insists, and to have the diet deserted with respect to the others.<sup>2</sup> In like manner, if, after serving one libel, the prosecutor shall see cause to serve another, the pannel may in like manner insist, that before proceeding to the latter, the field shall be cleared by a desertion of the former duly put upon record.<sup>3</sup> This matter, after having been at one period the subject of diversity of practice,<sup>4</sup> was at length settled, after great consideration, in the case of William Edgar, 26th May 1817. This man was indicted for administering unlawful oaths ; and parties having been heard on the relevancy of the libel, the diets were adjourned,

<sup>1</sup> James and William Gordon, July 16, 1827 ; Ante, i. 180.—<sup>2</sup> Hume, ii. 279.—

<sup>3</sup> Ibid. ii. 279, 280.—<sup>4</sup> Lindsay and Brock, Nov. 15, 1717, and Colonel Charteris, Jan. 29, 1723.

for the purpose of preparing informations, from the 9th April to the 19th May. In the interval, the Lord Advocate served him with a new indictment to stand trial on the 19th May; and at calling the diet of the new libel on that day, he objected that he could not be called on to plead to the new libel, while the old one was still current against him; and that this old libel being now in *manibus curiæ* must be disposed of by the Court, before a new one could be validly executed against him. The Court ordered a search of precedents, the result of which was, that the competency of serving a new libel, while the former one was still undeserted, was fully established; but the instances of proceeding to trial on a second libel, while the first was still undisposed of, were of recent date, and in unobjected cases. Upon this their Lordships found "that the service of the second indictment during the currency of the first indictment was competent; but in respect that his Majesty's Advocate has judicially declared that he has abandoned the first indictment, and deserted the diet of that indictment, without prejudice to the prosecutor insisting against the pannel on the second: Find that the service of the second indictment, on the 3d May, being fifteen days before the diet of compearance, gave him the benefit of the legal *induciæ*; therefore, repel the objection to that plea, and ordain the pannel now to plead to the said indictment."<sup>1</sup>

7. No amendment of the libel, by any addition to the record, or alteration of its clauses, is competent, after the pannel comes to the bar; but it is competent for the prosecutor to strike out any part of the libel which he pleases, provided that there remains, after the expunging is completed, a relevant charge whereon to try the prisoner.

It arises from the first principles of criminal jurisprudence, that no prosecutor can be permitted, by any additions made to the record after the pannel is at the bar, or any declarations or writings in regard to it, to alter its nature or character.<sup>2</sup> Something of this sort, indeed, appears to have taken place in two old cases:<sup>3</sup> but it has been unknown for above one hundred years, and certainly would not be permitted in modern jurisprudence.

<sup>1</sup> William Edgar, May 26, 1817; Hume, ii. 279, 280.—<sup>2</sup> Hume, ii. 281.—<sup>3</sup> Robt. Carmichael, Jan. 15, 1700; John Robertson, March 25, 1708.



It is quite a different case from this, however, if the prosecutor, instead of seeking to make any alteration on, or explanation of, or addition to his libel, merely insists upon his right to expunge certain charges or words from the record, leaving the remainder of the libel to stand exactly as it did before. His power to do this arises from his absolute control over the whole indictment, from which he can strike out any part, by virtue of the same power, by which he can depart from any charge or aggravation it contains. He can depart from any charge, or part of a charge at calling, but he can add none; and in like manner, he can strike out any charge, or part of a charge at calling of the libel, but cannot make any addition to what was fifteen days before served on the prisoner. The competency of striking out of the record at the bar, accordingly, has been established in several cases, but no countenance has ever been given to the addition of any thing to it. Thus, in a case at Aberdeen, where the pannels were charged with theft, by housebreaking and stouthrief, the prosecutor at the bar, before the prisoner pleaded to the indictment, departed from the charge of theft, and moved that the word "theftuously," in the charge of stouthrief should be struck out of the record, which was done accordingly, and upon the remainder of the libel the pannels were put on their trial, convicted, and executed.<sup>1</sup> In like manner, in another case at Glasgow, the prosecutor moved, before the pannels pleaded to the indictment, that the words in the description of the *locus* "parish of Gorbals and" should be struck out of the record. This was strenuously resisted by the pannel: but Lord Justice-Clerk Boyle and Hermand allowed it to be done; and they were tried and executed on the libel, after the expunging had taken place.<sup>2</sup> So also, in another case at Glasgow, several pannels were charged with the robbery of a foreigner, described in the libel as a "native of New Zéaland," and also sufficiently described by his trade and residence in Glasgow. As some difficulty was anticipated in proving that he was a native of that island, and his designation was complete without it, the prosecutor moved to have these words struck out of the record, which, after some opposition, was admitted by the Court.<sup>3</sup> In a case at Perth, the public prosecutor "passed from the charge in

<sup>1</sup> Donaldson, Buchanan, and Forbes Duncan, Aberdeen, Spring 1823.—<sup>2</sup> Edward M'Caffer, and Others, Glasgow, Sept. 1823; Shaw, No. 104.—<sup>3</sup> Per Lord Justice-Clerk and Pitmilley; Philip Murphy and Others, Glasgow, Sept. 1826; Hume ii. 281.

the major proposition of the indictment, of forcible abduction and seizure, as a separate charge, reserving to himself to prove the seizure of the gun mentioned in the minor proposition, as an ingredient of the assault libelled. Lord Gillies sustained the libel, under the restriction contained in the minute by the prosecutor.<sup>1</sup> So also, the Solicitor-General, in the High Court, departed from a charge of housebreaking in the minor proposition, to which there was no corresponding major; and the Court “found the libel, *as now limited*, relevant to infer the pains of law.”<sup>2</sup> It is obvious, therefore, that the competency of this proceeding is fully established; but it is necessary that it should be watched with the most vigilant attention, and never permitted where, by the retrenchment of words, the charge is substantially varied, or any injustice likely to arise to the pannel.<sup>3</sup> The abandonment of *entire* charges or aggravations is, of course, always competent to the prosecutor, because from that proceeding the prisoner can derive nothing but benefit.

8. If the pannel pleads guilty, and the prosecutor does not insist upon leading any farther evidence, an interlocutor of relevancy is to be pronounced, and his confession taken down in the record; after which sentence may be moved for, without any assize being impannelled to try the case.

Formerly it was a fixed principle of law, that no confession ever could be received as evidence of guilt, but what was taken in presence of the assize. The result of this was, that after the prisoner had pleaded guilty to the Court, it was necessary to impanel a jury to hear the confession repeated, who immediately found him guilty in terms of his own confession. As this, however, was an unmeaning formality, and consumed much valuable time, which might have been better bestowed upon the consideration of the cases which went to trial; it was therefore enacted, by the 9 Geo. IV. c. 29, “That when after an interlocutor of relevancy shall have been pronounced, a person indicted before any criminal Court shall plead guilty to the crime or crimes of which such person is accused, it shall no longer be necessary to name a jury for the purpose of deciding on the guilt

<sup>1</sup> Thos. Thomson, April 14, 1831; Shaw, No. 192.—<sup>2</sup> R. Alexander, and J. McCourt, June 27, 1831; Shaw, No. 217.—<sup>3</sup> Hume, ii. 281.

of such person; but the Court, before whom such accused person shall be tried, shall, upon such confession being made, have power forthwith to pronounce the sentence of the law, in the same manner as if a verdict of guilty had been returned: provided always, that such plea of guilty shall be made in open Court, and shall then and there be subscribed by the pannel, or by the pannel's procurator, and shall be authenticated by the signature of the Judge."<sup>1</sup> Of course, it is the same thing whether the pannel pleads guilty to the whole libel, or to any part of it: the procedure is the same in both cases. The whole formality to be observed in such a case, therefore, is to have it distinctly understood and explained to the prisoner what he is really pleading guilty to; to have the record of his confession signed by him or his counsel, and authenticated by the signature of the Judge. The prosecutor usually passes from the remainder of the charge before sentence is moved for; but this is not indispensable, because the confession forms the measure of the pannel's guilt, and nothing contained in the libel, and not embraced in the confession, can be brought against him after sentence is pronounced, either on the same or any subsequent libel. Evidence may be led, as already stated, if the prosecutor sees cause in addition to the confession, before moving for sentence; but after that is done, the checquer is closed as completely as if the pannel had tholed an assize.

It need hardly be observed, that it is competent for a pannel to plead guilty at any stage of his trial; in which case, it is the duty of the jury to find him guilty in terms of his confession, and of the evidence led. This is matter of every day's practice. In a late case at Glasgow, one of the prisoners who had stood his trial, offered to plead guilty after the presiding Judge had closed his address, and just before the jury had enclosed. The case was a capital one, and the Lord Justice-Clerk declined to receive the confession at so late a stage, and the jury were charged with the case, and returned a verdict as to him of not proven.<sup>2</sup> The step was the result of an arrangement with the prosecutor, who was desirous, even at that period, to save the offender's life by a restriction on moving for sentence. This was unknown to the Court when they declined to receive the confession; and it may be doubted whether the result would have been the same if it

<sup>1</sup> § 14 —<sup>2</sup> John Stewart, George Buckley, and Others, Glasgow, Sept. 1826.



had. Indeed it is difficult to see any ground on which a pannel can be prohibited from making a confession at any stage before the verdict of the jury is returned; and availing himself of the chance, how slender soever, of moving the mercy of the Crown, or the clemency of the Court, by such a mark of contrition, even at the eleventh hour.

9. If the pannel means to go to trial, and in addition to a general plea of not guilty, has any special defence, as *alibi* or the like, to state, he must lodge special defences, which must be lodged with the clerk of Court at least the day before the day of the trial, and should be read aloud before the trial commences.

Where, besides the general plea of not guilty, it is the intention of the pannel to state some special defence, as that he was in a different place at the time libelled, or the like, he is bound to state this in a special defence, which must be lodged at least the day before the diet is called in the hands of the clerk of Court. It is enacted, by 20 Geo. II. c. 43, § 41, "That the pannel shall give into the clerk of Court the day before the trial, in writing subscribed by the pannel, or one of his procurators, such account of the facts relating to the matter charged against him in the said libel or indictment, and thereto briefly subjoin the heads of such *objections or defences*, as he shall think fit, or be advised to make at his trial."

This regulation, like all others for the regulation of defences by prisoners, has in practice been very much evaded in consequence of the difficulty of enforcing such rules against persons in their unhappy situation, and the little interest which the prosecutor in general has to make any complaint of such irregularities, or exclude any part of the pannel's proof in consequence of the non-observance of the statutory rules. It is not to be imagined, however, from this circumstance, that these rules have gone into desuetude; on the contrary, they are held to be *in viridi observantiâ*, when brought under the notice of their Lordships; and in a late case, the Court observed, "That it was certainly most irregular, and in direct violation of the rules of law, and acknowledged practice of this Court, to bring forward evidence in exculpation, without having previously apprized the prosecutor of the facts proposed to be proved by lodging irregular defences

along with the exculpation and a list of witnesses."<sup>1</sup> They recommended to the prosecutor, however, in that particular case, to wave the objection, which was accordingly done; but the Court declared they would rigidly enforce the rule in future. In several late cases the Court have adhered to this resolution, and refused to allow an alibi to be proved, unless notice was given of it in the defences, so as to put him on his guard in the examination of his own witnesses.

An extraordinary indulgence was in one case granted to a prisoner by the Lord Advocate's consent, under protest that the example should not be drawn into a precedent. On the application of the prisoner, warrant was granted to transmit him for a single day, under a sure guard, to a quarter of the country, when he declared he would be able to discover a village where he slept thirty miles from the *locus delicti* on the night libelled, though he did not know its name. He did not avail himself of the liberty, and was convicted and sentenced to be executed.<sup>2</sup>

10. Every prisoner in the High Court, or Circuit Courts, is entitled to the benefit of counsel; and before the inferior court, to the assistance of such procurators as practise before it.

The Scotch law, differing in this interesting particular from that of England, does not leave the pannel to take charge of his defence alone; but justly deeming that from his confinement in prison, his ignorance of legal subtleties, and his anxiety of mind, he cannot be supposed capable of undertaking so arduous a task, gives him the benefit of legal advice in all cases whatever. This was long ago provided by the act 1587, c. 91, which orders, "that all and quhatsumever lieges of this realme accused of treason or of quhatsumever crime, sall have their advocates and procurators to use all their lauchful defences, quhom the Judge sall compell to procure for them in case of their refusal; that the sute of the accuser be not tane *pro confesso*, and the party accused prejudged in ony sute before he be convicted be lauchful trial." In terms of this excellent enactment, which has ever since been and still is *in viridi observantiá*, every prisoner, whether charged

<sup>1</sup> Alexander Brown, Glasgow, April 1814; Per Lords Meadowbank and Pitmilley.—

<sup>2</sup> George Walker, July 14, 1801; Hume, ii. 283.

with the highest or the lowest offence, is equally entitled to the benefit of legal assistance ; and it is invariably afforded to him, insomuch, that if the prisoner has not previously applied for counsel or agent, the Court will assign them to him as soon as the diet is called. Nor has this privilege been found to lead to any of the abuses, or the evil consequences, which are so uniformly held forth in England, as likely to ensue from its adoption. On the contrary, in this as in every other department, necessity moulds practice into a reasonable and practicable form. As the pressure of business increases, the necessity of expedition and dispatch is more strongly felt by all parties : confessions take place by advice of counsel in cases where resistance is hopeless, or is likely to render the pannel's case worse than it appears on the indictment ; speeches are dispensed with on both sides, in those instances where nothing can be said against the evidence ; and the weight of pleading and legal ability reserved for those more doubtful cases, where it is really called for by the interests of justice, and where it often interferes with decisive effect in favour of the innocent prisoner. Criminal business is conducted, it is believed, on the Circuits, nearly as rapidly in Scotland as England ;<sup>1</sup> and at all events it goes on fully as rapidly as is consistent with the interests of justice, the due investigation of each case, and the comprehension by the public, for whose reformation it is intended, of what is actually going forward.

11. The pannel having by advice of counsel pleaded either Guilty or Not Guilty, he is next asked by the presiding Judge, whether he has any objection to offer to the relevancy of the libel ; and if he has any, the debate takes place in the first instant *viva voce*, in addition to which, if they see cause, the Court may order written informations.

Formerly the debate on the relevancy was one of the most tedious and cumbersome parts of legal duty ; being dictated to the clerk of Court in the form of objections, answers, replies, and duplies, which often spun out to exorbitant length.<sup>2</sup> This laborious process

<sup>1</sup> On two occasions, when the author was advocate-depute at Glasgow, the assizes were the heaviest in the island, not excepting York and Lancaster ; but in both, the business was concluded in eight days of actual work.—<sup>2</sup> Hume, ii. 284.



was first curtailed by the act 1695, c. 4, which directed that there should be first a debate upon the libel, and then written informations. Even this, however, let in a flood of ingenious and unprofitable legal disquisition; until, at length, the Court were relieved from what Baron Hume justly calls, "this tedious and unprofitable bondage," by the 20 Geo. II. c. 43, which established the present form, which has ever since continued.<sup>1</sup> This is by a verbal debate on the relevancy, which is followed by an immediate judgment of the Court, if they have made up their minds one way or other; and if not, and the case appears sufficiently important to justify such a step, they may order informations to be lodged by a certain day, and adjourn the diet until the period fixed for their advising.

In whichever way the relevancy of the libel is determined, it is the province of the Court alone, and belongs in nowise to the assize. They may be, indeed, and generally are in Court during the discussion, which is usually attended with this good effect, that it makes them acquainted with the nature of the case, and the questions involved in it, before they are called on to judge of the evidence; but still it is no objection to the proceedings, if some, or even all of them, are absent on the occasion.<sup>2</sup> At this stage of the proceedings they are merely spectators, and noways entitled to interfere in regard to it.

12. In pronouncing the interlocutor of relevancy, the Court have to consider whether the libel is formal; whether it sets forth as a major, a crime or crimes known in law; whether the minor is correctly connected with it; whether the offence is duly and legally specified, and such a description of it as law deems necessary before the case is laid before an assize.

The important matters which fall under the consideration of the Court, in deliberating on the interlocutor of relevancy, have already formed the subject of an ample commentary.<sup>3</sup> It is sufficient, therefore, to observe in general, that the objections to an indictment embrace all the matters which have been there enlarged on; the legality of the crime specified in the major proposition,

<sup>1</sup> 20 Geo. II. c. 43, § 41, 42.—<sup>2</sup> Gray and Duncan, July 1751; Maclaurin, No. 59.—<sup>3</sup> See Chap. vii. of Libel on Indictment.

the sufficiency of the description of the pannel, the charge made against the prisoner in the outset of the minor, the description of the *locus delicti*, the specification of the time and manner of the criminal act, with any aggravating circumstances under which it may have been committed by the pannel. In fixing these matters *ab ante*, before the proof is entered upon, or the assize is enclosed, our practice is regulated by the consideration that the law should be defined, the legal import of the libel determined, and its sufficiency ascertained, while yet the minds of all concerned are fresh and their intellects clear, and before they are burdened with the additional weight of important matter which the proof produces. Every thing connected with the legality of the charge, therefore, is determined before the assize is enclosed; every thing connected with the evidence in support of it, reserved for the consideration of the jury under the direction of the Court, so far as legal points are concerned, at its termination.<sup>1</sup>

The history of the interlocutor of relevancy, so important a matter in the Scotch criminal practice, and in which modern times have so widely deviated from the usages of former years, is fully given in Baron Hume's commentaries.<sup>2</sup>

13. The relevancy must be determined in every criminal process before the proof is entered upon; and an interlocutor of relevancy, once pronounced by the Supreme or Circuit Court, is final and irreversible.

Various reasons concur for the rejection in criminal matters of the practice of taking a proof *before answer*, as it is termed, or before the relevancy of the facts is ascertained, which is so well known in the civil Courts. It is not just that a party should be exposed to the agony, suspense, and expense of a trial upon allegations which may not in the end turn out to be not relevant to infer his guilt; or that the jury should enter upon their sacred and important duties in a form which may possibly never lead to any practical result. For these reasons our practice utterly disowns any thing in criminal matters like a proof before answer; and requires that in every case the Court shall have pronounced a final interlocutor on the relevancy, before any part of the proof is entered upon. In the only case in which a contrary proceed-

<sup>1</sup> Hume, ii. 285.—<sup>2</sup> *Ibid.* 285, 295.

ing had been adopted, the Court found "the interlocutor of the Sheriff, allowing a proof before answer, irregular, as a relevancy ought to have been found before going to proof."<sup>1</sup>

As this sort of interlocutor is a necessary step of process, so it is, by our custom, final and irreversible in the Court where it was pronounced.<sup>2</sup> This principle renders the interlocutor of relevancy final in all cases in the High Court or Circuit Courts; because there is no higher jurisdiction who can review their proceedings; and in like manner, makes all interlocutors of relevancy by inferior Judges irreversible except by the Supreme Court, who possess a general controlling power over all their proceedings. There is no appeal from an interlocutor of relevancy by the Sheriff-Substitute to the Sheriff-Depute, as in civil matters. This principle was applied by the Court in a late case, where it was moved in arrest of judgment, that certain assizers had been wrong designed, and the objection was, by the Judges on the Circuit, certified for the consideration of the High Court. Besides insisting on these, the counsel for the prisoner began to object to the relevancy of the libel, observing that it charged a theft committed in the shire of Renfrew, and yet was tried in Stirlingshire; but the Court immediately interposed, observing that those matters were determined by the interlocutor of relevancy, which was now final.

14. If a point of civil right is involved in the discussion of a criminal trial, it is not competent to sist procedure till the civil question is determined; but the Court must, as they best can, determine the civil question in the course of the criminal process.

It frequently happens that a point of civil right is involved in a criminal prosecution; and a solution of it one way or another is indispensable to its right determination. Thus, in a case of bigamy, either of, or both, the marriages may be disputed; in one of theft, the property of the things stolen may be alleged to be in the pannel, and that in seizing it he was only vindicating his own; in cases of perjury, or fraudulent bankruptcy, the most difficult questions in these intricate branches of law, may be involved in the charge before the jury. In such cases, it was not unusual in former times for the criminal Court sometimes to con-

<sup>1</sup> William Brown, March 19, 1783; Hume, ii. 301.—<sup>2</sup> Hume, ii. 302.



tinue the diet until the civil interest was determined,<sup>1</sup> or to remit the matter straightway for the decision of the Court of Session.<sup>2</sup> Both these practices have now gone entirely into disuse. How intricate soever the civil question may be which is involved in the criminal charge, it must be considered and determined on by the judge and jury.<sup>3</sup> This is matter of daily practice, and was in a signal manner exemplified in 1785, on occasion of the many trials of persons for taking the trust oath, in all of which the matter was straightway remitted to an assize, though depending in a great measure on a question, and that, too, none of the easiest, of civil right. In the case, accordingly, of Ann Johnston, Inverness, Spring 1829, which was a charge of theft to a great amount against the prisoner, from an old gentleman with whom she lived at Dingwall, Lord Mackenzie, without hesitation, entered on the consideration of the validity and legal import of the testamentary writing under which it was alleged the intromission had taken place.<sup>4</sup> In like manner, in a late case, the Justiciary Court sustained as relevant, an indictment which charged a factor on a landed estate with embezzlement to a great amount from his employer, although it was alleged that a civil action on the same specious facts had been instituted for recovery of the balance said to be due.<sup>5</sup>

15. By special statute, all criminal proceedings must be with open doors, excepting in cases of rape, adultery, and the like.

By 1693, c. 27, it is enacted, "that after the debate concerning the relevancy of criminal libels, dittays, or exculpations, made by the parties or their procurators, are closed, the commissioners of Justiciary, and other criminal Judges, shall advise the same with open doors, in presence of the pannel, assize, and others; declaring always that in cases of rape, adultery, and the like, the said commissioners may continue their former use and custom, by causing remove all persons except parties and their procurators at the leading of the probation as they shall see cause." Under the words rape, adultery, and *the like*, the power

<sup>1</sup> William and Alexander Gordon, Aug. 4, 1663; Hume, ii. 302.—<sup>2</sup> Innes of Dunkinty and Others, July 18, 1712; *ibid.*—<sup>3</sup> Hume, ii. 304.—<sup>4</sup> Unreported.—<sup>5</sup> John Dickson, March 1828; unreported. The case was adjourned after the relevancy was found, and has not since been resumed, owing to the excessive intricacy of the accounting.

of closing the Court is justly held to apply to cases of assault with intent to ravish, lewd or indecent practices, sodomy, or the like, where indecent details may be expected to be brought to light. But it does not apply to cases such as raising dead bodies, when anatomical or revolting details only may be expected, not likely to corrupt the morals of the audience.<sup>1</sup>

## CHAPTER XI.

### OF THE ASSIZE.

THE subject of the assize is one of the most important in criminal law, from the peremptory nature of the rules which obtain in regard to it, and the absolute impossibility of any error being retrieved after they are sworn. Previous to that event, every thing is open to amendment; the diet may be deserted, and a new libel served, with any inaccuracies amended; but after the jury are sworn, all power of amendment is at an end. The libel and the pannel are thenceforward in the hands of the assize, and how defective soever it may be, still the pannel is entitled to have his fate determined by it alone. In a case, accordingly, where it was discovered, after the jury were sworn, that the principal witness against two of the parties was absent, the jury necessarily found them not guilty.<sup>2</sup>

1. The assize from which the jury is balloted, consists in general of 45, but in some cases of 65 persons, taken from the lists made up in terms of the late Act.

The old Scotch law in regard to jurors has been totally altered by a late act, 6 Geo. IV. c. 22, which both alters the class of persons from whom they are drawn, the mode of making up their lists and citations, and the composition of the jury, which is struck to try every particular case.

By this act it is provided, 1. "That every man, except as herein after excepted, being between the years of twenty-one

<sup>1</sup> Granville Sharp and Others, June 6, 1814; Hume, ii. 304.—<sup>2</sup> Campbell, Kelly, and M'Donald, Nov. 6, 1827; Syme's Cases.

and sixty years of age, residing in any county or stewartry in Scotland, being qualified to serve as a juror in terms of the 6 Anne, c. 26, entitled, an Act for settling and re-establishing a Court of Exchequer in Scotland, viz. Every such man at the time of trial, on which he may be required to serve, having and being seised in his own right, or in right of his wife, of lands or tenements of an estate of inheritance, or for his or her life, within the county or shire, city or place, from whence the jury is to come, of the yearly value of Five Pounds at the least, or shall be then worth in chattels and personal estate, the sum of Two Hundred Pounds Sterling at the least, shall be qualified and shall be liable to serve on juries in Scotland, before any Court there, civil or criminal, competent to try causes by jury."

2. The persons exempted are, "All Peers, all Judges of the Supreme Court, all Sheriffs and Stewards of counties and stewartries; all Magistrates of royal burghs; all Ministers of the established religion, who have duly taken the oaths and declaration required by law, and whose place of meeting shall be duly registered; all parochial schoolmasters; all Advocates, practising as members of the Faculty of Advocates; all Writers to the Signet, practising as such; all solicitors practising before any of the Supreme Courts; all procurators practising before any inferior court, having severally taken out their annual certificates; all clerks, or other officers, of any Court of Justice; all jailers, or keepers of Houses of Correction; all Professors in any University; all physicians and surgeons duly qualified as such, and actually practising; all officers in his Majesty's army or navy on full pay; all officers of custom or excise; all messengers-at-arms, and other officers of the law, shall be, and are hereby freed and exempted from being returned and from serving upon juries."

3. The Sheriff of each county shall, on or before the 1st of January 1826, make up a roll of persons within his county who are qualified as aforesaid, and liable to serve as jurors; and the names and designations of all such persons shall be entered in a book, to be called "The General Jury-Book," to be kept in the Sheriff-Clerk's office of each county, and to be open, on all lawful days, to the inspection and examination of any person, on payment of one shilling.

4. As soon as such roll or list of jurors, qualified as aforesaid, shall have been made up and inserted in the said general jury-book, the Sheriff of every county in Scotland shall select there-



from the names of all persons qualified to be special jurors, in terms of the 55 Geo. III. c. 42;<sup>1</sup> and such names so selected shall be entered in a book to be called "The Special Jury-Book," to be kept in the Sheriff-Clerk's office of each county, and to be open for inspection as herein directed with respect to the general jury-book; and the persons whose names shall be entered in such special jury-book shall be liable to serve as special jurors, in all civil causes to be tried by special juries, and on all criminal trials, as herein before directed.

5 and 6. Special regulations are inserted for making up the lists for the counties of Edinburgh and Lanark.

7. And be it enacted, "That when the attendance of jurors is required for trials before the High Court of Justiciary at Edinburgh, or before the Court of Exchequer or Judge-Admiral, or in the Jury Court, when held in Edinburgh, notices, writs, or precepts, shall be issued from the said respective Courts to the Sheriff of Edinburgh, specifying the number of jurors required; and the said Sheriff shall thereupon return a list taken from the said general jury-book, in the order in which they therein appear, subscribed by him, containing the number of persons required; which return, when made to the High Court of Justiciary, or to the Judge-Admiral, when forty-five jurors are required, shall contain twenty-four for the city of Edinburgh, six for the town of Leith, six for the remainder of the county of Edinburgh, four for the county of Linlithgow, and five for the county of Haddington, or as near as may be in these proportions, according to the number required more or less than forty-five: provided always, that in all criminal trials one-third of the number required, or if the number required cannot be divided equally into thirds, a number as nearly as can be to a third, more or less, at the discretion of the Sheriff, shall be persons qualified as special jurors, and shall be distinguished in the return accordingly: provided that, in the event of the list so taken from the general jury-book, not being found to contain the said proportion of special jurors, the deficiency shall be supplied by names to be taken from the special jury-book; and this rule shall in like manner be observed in regard to return from all other counties."

8. "And when the attendance of jurors at the circuits is required, notice shall be given by the Clerk of Court, to the She-

Viz.—Persons who pay cess on L.100 of valued rent in the shire, city, or county where they dwell, or taxes to the Crown on a house of L.30 yearly rent.

riffs of the counties within the circuit, of the number of jurors required; and each Sheriff shall thereupon return to the said Clerk, a list, subscribed by him, taken from the general and special jury-books aforesaid, containing the number of persons so required, which return, when forty-five jurors are required, shall contain ten for the county of Berwick, seven for that of Peebles, eight for the county of Selkirk, twenty for that of Roxburgh, thirty for that of Dumfries, fifteen for that of Kirkcudbright, ten for that of Wigton, thirty-five for that of Ayr, ten for that of Renfrew, twenty-five for the city of Glasgow, Anderston, Gorbals, and the Calton; nine for the rest of the county of Lanark; five for the county of Dumbarton, ten for that of Bute, thirty-five for that of Argyll, twenty-five for that of Stirling, ten for that of Clackmannan, ten for that of Kinross, fifteen for that of Perth, fifteen for that of Fife, ten for that of Kincardine, twenty-five for that of Aberdeen, ten for that of Banff, six for that of Elgin, six for that of Nairn, eighteen for that of Inverness, nine for that of Ross and Cromarty, three for that of Sutherland, and three for that of Caithness, and wherever a greater number than forty-five jurors shall be required, the numbers in the return aforesaid shall be increased according to the proportions above specified: Provided always that it shall be competent for the Court of Justiciary, as circumstances may require, to alter these proportions by act of adjournal.

9. " In all criminal trials in any inferior Court, the Clerk of such Court shall be furnished with names from the jury-books of the county in which the Court is held, containing the number of persons required, one-third being persons qualified as special jurors.

10. " Provided always, that the Sheriffs, in all returns of jurors, made by them, to any Court whatever, shall take the names in regular order, beginning at the top of the list in the said jury-books, in each of the counties and districts aforesaid, respectively, as required: and as often as any jurors shall be returned to them, they shall mark, or cause to be marked, in the said general jury-book of their respective counties, and also in the special jury-book in the case of special jurors, the date when any such juror shall have been returned to serve; and in all such returns they shall commence with the name immediately after the last in the preceding return, without regard to the Court to which the return was last made; and taking the subsequent names in the

order in which they shall have been entered as herein directed, and so to the end of the lists respectively."

11. "The Sheriff of every county in Scotland shall prepare, in the manner herein directed, new and correct lists of jurors, in such time as the same may be completed, and entered in books as aforesaid, to be deposited in the Sheriff-Clerk's office, before the first lists shall have been completely gone through; and as soon as the whole names contained in any of the former lists shall have been returned to serve as jurors, the Sheriff shall proceed to take the names of those so required from the new lists so prepared, beginning at the top, and proceeding regularly to the end, as herein directed; and as often as, and immediately before any list shall have been completely gone through, a new list shall be prepared and entered in books as aforesaid, and be made use of in the manner herein directed."

12. "Where a person shall by law be entitled to the privilege of having a majority of landed men for jurors on his trial, the Sheriff, when required, shall make a return of the names of landed men, in the order in which such books appear in the books as aforesaid, so that a majority of the jurors contained in such return shall be landed men."

13. The lists required as herein directed by the Sheriffs to the Clerks of Court, and none other, shall be used for the several trials for which the same shall have been required.

14. "Provided always that no irregularity in making up the lists as herein directed, or in transmitting the same, or in the warrant of citation, or in summoning jurors, or in returning any execution of citation, shall constitute an objection to jurors, whose names shall be served on any person accused of any crime; reserving always to the Court to judge of the effect of an objection founded on any felonious act, by which jurors may be returned to serve in any case contrary to the provisions of this act."

15. "It shall and may be lawful for the Lord Justice-Clerk, or any one of the Lords Commissioners of Justiciary, and they are hereby authorized and empowered, at any time to direct to be summoned as jurors to serve on any criminal trial in the High Court, or Circuit of Justiciary, any such number of persons exceeding forty-five, as may be deemed necessary: and it is hereby provided, that the warrant for summoning jurors shall only require the signature of one of the said judges; and it shall not be necessary to annex a copy of the signature of such judge to the list of assize served on the accused."



The qualification for special jurors, by this act, was found to be in many counties such as not to furnish an adequate number for the discharge of their important duties. It was therefore enacted, by a supplementary act, 7 Geo. IV. c. 8., "that every person, residing within any county or stewartry in Scotland, who shall be infeft in, and possessed of lands and heritages in any part of Scotland, yielding the sum of one hundred pounds sterling of real rent, per annum, or upwards at the time; and also, every person residing within any county or stewartry in Scotland, who shall be possessed of personal property to the amount of one thousand pounds sterling, or upwards, shall be qualified to serve as a special juror in Scotland, exclusive of, and in addition to those qualified to serve as special jurors, in terms of the fore-said act, passed in the 55th year of the reign of his late Majesty." It is also provided, "that the number of special jurors to be entered at any time in the special jury-book for any county, shall not exceed one-third of the total number of common jurors entered in the general jury-book of such county, after the names of the special jurors shall have been deducted therefrom."

These statutes contain nearly the whole law applicable to the original structure of the assize as it now stands. The provision as to the incompetence of stating any objection to a juror, on the ground of any error in his citation, is still farther strengthened by the 9 Geo. IV. c. 29, § 7, which puts an end to all such objections by the general enactment, "That it shall not be competent in any criminal cause or prosecution whatsoever, for any prosecutor or person accused to state *any objection* to any juror, or to any witness, on the ground of such juror or witness appearing *without citation*, or without having been duly cited to attend." This provision relates to errors in citation only, and not to such as may have occurred in making up the lists, but those in that department are also sufficiently guarded against by the 14th section, already quoted; and it is provided by the jury act, that all such objections, and, indeed, *all objections* of *every* description whatever, must be stated before the jury are sworn. The words are, "And it shall not be competent to state *any objection* to any juror, after he shall have been sworn to serve."<sup>1</sup>

The Court have repeatedly exercised the power which the statute confers of summoning an additional number of jurymen;

<sup>1</sup> 6 Geo. IV. c. 22, § 16.

sixty-five is the number usually chosen. This was done on a representation of the Lord Advocate, in the case of the Croy rioters, 13th May 1823; and in all cases it is usual to summon sixty-five to the Glasgow Circuit. And it is provided, by act of adjournment, 22d June 1831, that if there are "more than three cases set down for trial on the same day, or more than three persons are included in one indictment, to require the Sheriff of Edinburgh to return to the office of the Clerks of Justiciary, a list of sixty-five persons qualified and liable to serve, to be summoned as jurors on the said trials."

This provision renders the objections formerly insisted on against the citation of jurors, of little practical importance. It is sufficient to observe, therefore, that the warrant to summon the assize in the case of a prosecution by criminal letters, is in the will of the letters themselves; if by indictment, it is in the letters of diligence under the signet of the Court.<sup>1</sup> By 1 Will. IV. c. 37, it is farther provided, "that it shall be sufficient, for the legal citation of any juror or witness, in any cause or legal proceeding, civil or criminal, that such citation be given by any officer of the law duly authorized, without witnesses: And it is hereby provided, that the oath of such officer, in support of the execution, shall be held and received as sufficient evidence of such citation, when the same shall be questioned in a Court of law." It has been found, that in the citation of jurors for the Circuit, it is not sufficient, if the execution proceeds in virtue of the Sheriff's precept *alone*, without any mention of the justiciary warrant; but that it is otherwise if the execution bears, that the citation was in virtue of the Sheriff's precept, proceeding on the justiciary warrant:<sup>2</sup> And when an error occurred in the execution, in describing the date of the justiciary warrant, which was set forth as of date *Aug. 6*, instead of *July 6*, but the Sheriff's precept was correctly described, and that precept correctly referred to the justiciary warrant by its true date, an objection founded on the error in the execution was repelled.<sup>3</sup> In a late case, it was objected to the array of a Circuit, that it was not appointed in terms of the 23 Geo. III. c. 43, which orders such appointment to take place between the 1st and 20th Aug. for the Autumn Circuit, whereas this is dated July 11. It was answered, that the warrant annexed to the Porteous Roll has in reality no date; but on the

<sup>1</sup> Hume, ii. 307.—<sup>2</sup> Ewen Mathewson, Inverness, May 1824.—<sup>3</sup> John McIntyre, Inverary, Sept. 1822.

day on which the circuits are fixed, the Judges issue a precept to their clerk, to annex such warrants to the Porteous Roll when they come in, and that the pannel has no right to enquire when that warrant was annexed. The Court repelled the objection.<sup>1</sup>

To verify the fact of his having cited the jury, the officer has to exhibit under his hand a written execution, setting forth his having done so, which, by immemorial custom, anterior to the 1 Will. IV. c. 37, is good without witnesses under the hand of the officer alone.<sup>2</sup>

2. When the day of trial arrives, the jury are chosen by ballot, one-third from the special list, and two-thirds from the common, and each prisoner is entitled to challenge five jurors, without assigning any reason, and any number, if he can establish a legal ground of declinature.

Formerly, the judge who presided at the trial, named the jury of fifteen from the forty-five persons contained in the list of assize; but as this practice gave rise to many complaints, and much misrepresentation, a remedy was provided for it by Sir W. Rae. It is provided, by the 6 Geo. IV. c. 22, “that it shall be lawful for each person on trial, before any Criminal Court, to challenge five of the jurors, and also, for the prosecutor to challenge five of the jurors, in all, for any one trial, without being obliged to assign any reason therefore; and which challenge shall be made when the name of each juror is drawn, as herein directed, and shall not afterwards be allowed: And such challenge shall of itself disqualify the person or persons challenged, from serving as a juror or jurors on such trial: Provided always, that of the five special jurors to be chosen, not more than two shall be allowed to be challenged by each person accused, and each prosecutor: Provided always, that such challenges without reason assigned, shall nowise deprive a person accused, or the prosecutor, of the right respectively competent to them, to object to any juror or jurors on cause shown: But declaring, that if such objection shall be founded on the want of sufficient qualification, as provided by this act, such objection shall only be proved by the oath of the juror objected to; and it shall not be competent to take any objection to any juror after he shall have been sworn to serve.”<sup>3</sup>

<sup>1</sup> Jas. Stewart, Inverness, Sept. 1823.—<sup>2</sup> Hume, ii. 307.—<sup>3</sup> § 16.



The mode of choosing the jury is then specified. "That in all criminal trials by jury, the number of jurors to be returned to the Criminal Court-house shall be forty-five, unless otherwise directed: And the jurors for the trial of any case shall be chosen in open Court by ballot, from the lists of persons summoned and served upon the accused; and for that purpose, the clerk of Court shall cause the name and designation of each juror, to be written on a separate piece of paper or parchment, all the pieces being of the same size, and shall cause the pieces to be rolled up as nearly as may be in the same shape, and the names of the special jurors shall be put together into one box or glass, and the remainder into another, and being respectively mixed, the clerk shall draw out the said pieces of parchment or paper, one by one, from both boxes or glasses, in the proportion of one from the box containing the names of the special jurors, and two from the other box; and if any of the persons whose names shall be so drawn, shall not appear, or shall be challenged, with or without cause assigned, and set aside, then such farther number shall be drawn until the number required for the trial shall be made out; and the persons so drawn and appearing, and being sworn, shall be the jury to try the accused, and their names shall be taken down and recorded in the minute-book kept by the clerk: But providing that when challenges are made, and jurors set aside, their places shall be filled up with other names, by drawing by ballot as aforesaid, from the box or glass containing the description of jurors challenged respectively: Provided that where the accused is a landed man, and a return of jurors made accordingly, a majority of the jurors for trial shall be taken by ballot from the list of landed men, returned by the Sheriff as herein directed, and the remainder from the list of jurors not special, subject always to challenge as aforesaid."

"And be it enacted, that the jurors chosen for any particular trial, may, when that trial is disposed of, without any new ballot, serve on the trials of other persons accused, provided such persons and the prosecutor consent thereto: And provided also, that the names of such jurors are contained in the list of assize served on the accused, and that such jurors are duly sworn to serve on each successive trial."

"And be it farther directed, that the several Courts aforesaid shall respectively have power to excuse any one or more jurors

from serving on any trial or trials, the ground of such excuse being stated in open Court."

These regulations form an excellent code of laws, for the important matter of arraying and setting the assize. In so far as they provide for the choice of the jury, and the mode of their being challenged, they have been found in practice to answer extremely well; and by the good sense of prisoner's counsel, in not insisting without some real reasons, in any extensive challenge, and not demanding a fresh ballot, till the former jury is fatigued by their labours, have been found to work very smoothly in practice. In one particular alone, and that is a most important one, the statute stands in need of amendment, or rather, the change which it introduced has been carried too far. The qualification of L. 200 for an ordinary jurymen, has been found, both in the civil and criminal Courts, to have brought a class into the jury box, incapable, in a great variety of cases, of understanding the intricate and important questions which are submitted to them for decision. They become utterly confounded, in particular if the proceedings are protracted to any considerable length, and after four or five hours' attention to the evidence, are generally guided by the most able speech which is addressed to them on its import. Verdicts in consequence, both in the civil and criminal Courts, have become much more uncertain than formerly, and the opinion has extensively spread among practical men, that if you can only protract the proceedings to a certain length, or the case is one of any considerable intricacy, little reliance can be placed on the verdict of the jury being conformable to the evidence which has been laid before them.

3. Besides his peremptory challenge, there are various objections to jurors founded on infamy, outlawry, enmity to the pannel, minority, or the like, which must be substantiated by the party for whom they are proponed, before they are received by the Court.

It is not to be supposed that either the prisoner or prosecutor is deprived of his right to challenge jurymen on cause shown, by the peremptory challenge with which he has been indulged by the late act. On the contrary, either of these parties may still challenge a jurymen on cause shown, though he has exhausted his peremptory challenges, though it is not very likely that this

right will be exercised, as the object can in general be so much more easily gained by simply challenging the objectionable juror without assigning any reason. But as such challenges may be exhausted, and an objectionable juror drawn for a trial after they are over, the old law on the subject of challenges to assizers still requires some explanation.

Infamy is without doubt a disqualification; and to this the recent statute,<sup>1</sup> rendering infamous persons admissible witnesses after the period of their punishment has expired, forms no exception; for that statute only restores their competence to give testimony, without touching the disqualification to pass on an assize.<sup>2</sup> Outlawry is also a disqualification; for one who has been thrown out of the pale of the law, for disobedience to its commands legally conveyed to him, is not to be permitted to exercise the high and important functions of judging on the lives or liberties of others.<sup>3</sup> It is also a good objection to a juror, if he has evinced deadly malice or animosity against the pannel, not merely by actions but words, for there is not the same reason for overlooking such expressions in the case of a juror as in that of a witness, who often cannot be supplied.<sup>4</sup> It is likewise a good objection if the juror was a minor at the time of passing on the assize,<sup>5</sup> or if he was insane, deaf, dumb, or an idiot; for the law cannot extend this important power of judging on others to those whom it deems unfit to intrust with the management of their own affairs.<sup>6</sup>

But these and all other objections must be stated before the jury is sworn; for by the late act, "it shall not be competent to take *any* objection to any juror after he shall have been sworn to serve."<sup>7</sup>

4. If a landed proprietor is to be tried, he is entitled to have a jury, a majority of whom are composed of landed men.

It was a very ancient privilege of landed men, by the Scotch law, to be tried only by their peers; that is, by landed proprietors like themselves. This, however, in process of time came to be so far modified, that the pannel, if a landed man, was entitled

<sup>1</sup> 9 Geo. IV. c. 32, § 3 and 4.—<sup>2</sup> Hume, ii. 310.—<sup>3</sup> Ibid.—<sup>4</sup> Ibid.—<sup>5</sup> Menzies, Dec. 13, 1790; John Sharpe, March 5, 1821; Hume, ii. 310.—<sup>6</sup> Hume, *ibid.*—<sup>7</sup> 6 Geo. IV. c. 22, § 16.



only to insist on a majority of the assize being landed men;<sup>1</sup> and to that extent the privilege still subsists;<sup>2</sup> and provision is made for it as already noticed in the recent act of Parliament on the subject.<sup>3</sup> This privilege, however, belongs only to a landed proprietor infest, and not the eldest son or apparent heir of such an one;<sup>4</sup> and it extends to landed proprietors properly so called, and not every petty feuar or portioner in a village, and still less to any one infest in security or relief only, or on any inferior title to that of property.<sup>5</sup> It lies also upon the pannel, if he means to avail himself of this privilege, to allege and prove it by immediate production of his infestment;<sup>6</sup> and the verdict is always good, though there have been no landed man on the assize, if the pannel has either expressly waived his right, or tacitly departed from it, by not bringing forward his claim to that privilege.<sup>7</sup>

5. Peers, for offences amounting to treason or felony, are only liable to be tried in the Court of the Lord High Steward; but for ordinary offences, not amounting to felony, they may be tried by an ordinary jury.

By the Treaty of Union, it is provided, "That the peers of Scotland shall be tried as peers of Great Britain, and shall enjoy all privileges of peers, as fully as the peers of England now do, or as they or any other peers of Great Britain may hereafter enjoy the same." The trial of a British peer for treason, felony, or misprision of treason, must be in the Court of the Lord High Steward; a Court composed entirely of peers who have right to sit and vote in Parliament.<sup>8</sup> A bill must previously be found by a grand jury, composed of a bench of Justices named by special commission under the Great Seal, who are to take their inquisition in the same manner as the Justices of Oyer and Terminer in England by a grand jury of twelve men who may be Commoners.<sup>9</sup> This matter is more particularly regulated by a late statute, the 6 Geo. IV. c. 66, on which a full commentary has already been given.<sup>10</sup> But for ordinary cases of assault, or

<sup>1</sup> Royston, 251; Hume, ii. 312.—<sup>2</sup> Reid of Bara, Nov. 15, 1703; Montgomery of Wrae, Feb. 20, 1716; Hume, ii. 312.—<sup>3</sup> 6 Geo. IV. c. 22, § 12.—<sup>4</sup> Fraser, July 9, 1675.—<sup>5</sup> Hume, ii. 312.—<sup>6</sup> Sutherland, June 27, 1715.—<sup>7</sup> John Lindsay, Jan. 31, 1791.—<sup>8</sup> Blacket, iv. c. 19, § 7.—<sup>9</sup> Hawk. 2. 44. 15; 1 Hale, 347.—<sup>10</sup> Ante, ii. 14, et seq.

inferior delinquency not amounting to felony, peers may be tried by an ordinary assize like other persons; an instance of which occurred about a century ago in the trial of the Earl of Morton for assault, on which occasion the highest in rank on the jury was a baronet, with eight landed men;<sup>1</sup> and more lately the same was done with the Earl of Mar for a similar offence, who was convicted by an ordinary jury, such as the statute directs to be summoned for the trial of a landed man.<sup>2</sup>

6. The persons entitled to be exempted from serving on an assize are those specified in the statute, and no others are entitled to any exemption whatever.

The Jury Act, 6 Geo. IV. c. 22, § 62, having specified who are the persons legally entitled to plead an exemption, it follows that no exemption grounded on profession or avocation is to be admitted, excepting of those enumerated in that act, or some previous statute. Accordingly, it was found, on a petition from the incorporation of fleshers in Edinburgh, who had acquired a sort of tacit exemption from this duty, "that persons exercising the trade of a flesher in Scotland are under no legal disqualification from serving on juries in criminal cases, and that the statute 6 Geo. IV. c. 22, does not exempt them from so serving."<sup>3</sup> The persons enumerated by the statute have been already given, and they comprehend probably all those who can now claim an exemption. Practising physicians and surgeons are expressly mentioned; and this right, in the surgeons of Edinburgh at least, is founded by several old grants,<sup>4</sup> and a recent determination of the Supreme Court.<sup>5</sup>

7. It is a good objection to an assizer if he is erroneously designed; but neither that nor any other objection can be stated after the jury is sworn.

It has been already stated, that the objection of not having been duly cited is now justly put an end to, with reference to the case of an assizer equally as a witness.<sup>6</sup> But the case is dif-

<sup>1</sup> Earl of Morton, March 4, 1740; Hume, ii. 313.—<sup>2</sup> Earl of Mar, Dec. 18, 1831; ante, ii. 17.—<sup>3</sup> Petition of Fleshers, May 29, 1826; Record.—<sup>4</sup> Charter, Queen Mary, May 11, 1567; gift, William III., Feb. 8, 1694.—<sup>5</sup> Petition of Surgeons of Edinburgh, July 17, 1799.—<sup>6</sup> By 9 Geo. IV. c. 29, § 10.

ferent with his designation. That description is given in order to enable the pannel to determine whether any of the persons there named are at enmity with him, or infamous, minors, or subject to any legal disqualification. If, therefore, there be an error in the description, whether it occurs in the record or the copy served on him, or both, he is entitled to plead the objection; because, in the one case he has not got a copy conform to the principal list, in the other he has been misled as to the person concerning whom he should make his enquiries.<sup>1</sup>

But it is equally clear, that all such objections must be stated before the jury is sworn, otherwise they cannot afterwards be received. This has been long settled in the case of a discrepancy between the designation served on the pannel and that contained in the record, where the record was correct, and the error lay in the pannel's copy;<sup>2</sup> but it was thought that a different rule should be followed where the error lay in the *record itself*, which was correctly transferred to the pannel's copy.<sup>3</sup> But the matter seems now to be altogether settled by acts of Adjournal and Parliament; for the act of Adjournal, July 9, 1821, expressly enjoins, that any objections founded on a discrepancy between "the said doubles and the record," shall be stated before the jury is sworn; the act of Parliament, 9 Geo. IV. c. 29, declares it incompetent to state any objection to any jurors, on the ground of his not being duly cited, or appearing without citation, which excludes the ground of objection where the error lies in the record; and the act 6 Geo. IV. c. 22, § 16, puts an end to the whole matter, by enacting, "That it shall not be competent to state *any objection to any juror*, after he shall have been sworn to serve." The English law is founded on the same principle, it having been found by the twelve Judges, on an objection moved in arrest of judgment, that the jury had been returned by the Sheriff, who was one of the prosecutors, that it should have been moved by way of challenge of the jurors, and that it came too late in arrest of judgment.<sup>4</sup>

8. The record is the rule as to who have or who have not served on the assize, and as to whether they were sworn or not.

<sup>1</sup> Hume, ii. 315.—<sup>2</sup> Case of Bywater, Feb. 27, 1781.—<sup>3</sup> Hume, ii. 316; Alexander and William McLeod, Sept. 22, 1819, Inverness; Shaw, No. 28.—<sup>4</sup> Conrad Shepherd's case; Leach, i. 58.



The record of a trial being made up by the clerk of Court under the eye of the Judge, it follows that it is the only test by which all questions as to who the persons were who passed on the assize, and what formal steps were taken during the course of their duty, and that in neither of these particulars can it be impeached by parole testimony. This principle has been applied by the Court in two different cases, in the first of which it was moved in arrest of judgment, that "*Andrew Dickson, younger of Stonebyres,*" was the person named in the list, but that the record proved that "*Henry Dickson, younger of Stonebyres,*" had sat on the jury. The Court held the discrepancy fatal, and not to be remedied by parole proof as to the identity of the two persons, though in fact no *Henry Dickson* was summoned for the assize, and the error merely consisted in the marking by the clerk of *Andrew's* name on the record.<sup>1</sup> Again, in another case, where it was moved in arrest of judgment, that five of the jury had not been sworn, which was offered to be instantly verified by their oaths, the Court, after great consideration, repelled the objection, in respect the whole proceedings, down to the close of the trial, had taken place without stating the objection, and that "after so long an interval, parole evidence to contradict and impeach the regularity of the proceedings, as appearing on the face of the minutes of Court, which are the regular and authentic record thereof, is inadmissible, and cannot be taken into consideration." The pannel afterwards received a royal pardon, but under circumstances which precluded the possibility of its being supposed that the legality of the judgment had been questioned in England, which was not the case.<sup>2</sup>

9. After being balloted for, the jury is sworn, and proceed to consider the evidence; but if the pannel agree to it before proceeding to proof, a new assize may still be substituted by ballot for any reasonable cause.

After being balloted for, and arranged in the jury box, the assize are sworn to try the case by the following oath. "You fifteen swear by Almighty God, and as you shall answer to God at the great day of judgment, you will truth say, and no truth conceal, in so far as you are to pass on this assize."<sup>3</sup> This oath,

<sup>1</sup> Thomas Middlemiss, May 1816; Hume, ii. 316.—<sup>2</sup> James Hannah, May 2, 1809, and July 12, 1809; Hume, ii. 316, 317.—<sup>3</sup> Hume, ii. 317.

which is venerable from its antiquity, indicates that in remote times the office of juror was blended with that of witness on the trial. When once named and sworn, the assize cannot be removed without the consent of both sides, "unless," Baron Hume says, "for necessary reasons emerging at the time, such as insanity, minority, or the like."<sup>1</sup> Certain it is that in more than one instance the Court have, with the pannel's consent, substituted one assizer for another after the jury was sworn, but before the proof commenced.<sup>2</sup> But all these cases occurred before the late act introducing the formation of the jury by ballot, and therefore are not to be absolutely taken as precedents to be now followed without farther consideration.

It is declared by act of Adjournal, Sept. 9, 1817, that when the same assize serve on successive trials, which is generally the case, "it shall be sufficient to prefix their names in the record to the first trial, and to refer to them on the record of the other trials, as having been reappointed and sworn for these also."

10. When sworn, the Jury are to be set aside for the trial of the case; but if the proceedings are stopped by the illness, death, or lunacy of any juryman during its continuance, the proceedings are all swept away subsequent to the interlocutor of relevancy, and the pannel may be tried again with a new jury balloted from the same list of assizers.

In the general case, where a jury are once balloted and sworn, they are charged with the case, which must terminate by their verdict one way or other. But it is settled, after great consideration, that if in the course of a trial a juror is taken ill, or becomes insane, so that the trial cannot proceed, the whole proceedings are to be held as swept off subsequent to the interlocutor of relevancy, and the pannel may be tried *de novo* by a new jury balloted at a subsequent diet from the original list of assize.<sup>3</sup>

<sup>1</sup> Hume, ii. 317.—<sup>2</sup> Simpson and Brown, July 24, 1786, on account of deafness of juror; and James McDougal, July 4, 1814, on account of one being owner of Bank of Scotland Stock, on a trial for issuing its forged notes; Hume, ii. 317, 318.—<sup>3</sup> Mrs Smith's case, Feb. 1827; Syne, p. 91. The law is the same in England. Foster, p. 16; Campbell, iii. 207; Russell, Crown case, 224.

## CHAPTER XII.

## OF PAROLE PROOF.

THE most important subject in criminal law is that of parole proof; because, by far the greatest proportion of the evidence in most cases is derived from the depositions of the witnesses. The rules in regard to their admissibility, and the questions which it is competent to put to them, therefore, as well as those regarding the designations by which they are to be distinguished in the list of witnesses served on the pannel, are of the very highest importance. At every step a question occurs on which the life of a prisoner may come to depend, and the distinctions necessarily admitted are so numerous, that constant practice can alone render them familiar to the most able lawyer.

The English, in this matter, have accumulated a much greater number of decided points, than are as yet fixed in our practice; partly, because their law, from the long experience of jury trial, has become familiar with all the difficulties which arise in practice in such cases; and partly, because being on some points in this matter founded on thin and technical distinctions with which we are happily unacquainted, it has thence accumulated to a much greater bulk. The English cases may fitly be quoted as precedents, or at least referred to as illustrations, in all points where the principles of the two laws are the same, and greater practice, or a more extensive field of crime, has alone occasioned the more complete decision of doubtful questions in their practice: But as their principles are on many points essentially different, this reference must be very cautiously admitted, and never except in those cases where some common principle, applicable to both systems of jurisprudence, lies at the bottom of the questions in both countries.

In treating of this important subject, the natural order is to consider first, the citation of witnesses; next, the designation in the list of witnesses served on the pannel; third, the mode of their being sworn, and the power of compulsion in that particular which Courts of law enjoy; fourth, the oath they must take,



purging themselves of enmity, partial influence, and corrupt considerations calculated to sway their testimony ; fifth, the objection which may be moved to them on the footing of nonage, infamy, imbecility, near relationship to the pannel, or the like ; and lastly, the mode of their examination, and the questions that may be put to them in relation to different crimes, and the different pannels which may appear at the bar.

#### SECT. I.—OF THE CITATION OF WITNESSES.

THE law on this point has undergone a remarkable change of late years, from the operation of Sir William Rae's act, which has done more than all the previous efforts of legislation to relieve our Courts from the necessity of applying indiscriminately those strict and technical rules which naturally arise and spring from laudable motives, in all systems of criminal jurisprudence, where justice is observed ; but which, when carried too far, and not curtailed by the correcting hand of the legislature, become the disgrace of that branch of law, and expose it alike to the ridicule of the inconsiderate, and the reprobation of the wise.

It was formerly an established principle, that if the witness be *ultroneous*, that is to say, if he appears to give evidence, without having been legally called upon to do so, he must be rejected, on the ground that he had shown an undue desire to appear in the case ; and that he must be held, *presumptione juris et de jure*, to have appeared without due legal compulsion, if any error, how trivial soever, could be discovered, either in the mode of his citation, the short copy of citation served upon him, or the execution of citation returned by the messenger to the process.<sup>1</sup> The principle on which this rule was founded appears to have been consistent with equity, and an anxious desire for the purity of the sources of evidence ; but when pushed to its full consequences, it led to the most extravagant and unjust results. No stronger proof of this can be desired than is afforded by the fact, that in the trial of a pannel for murder, the objection was sustained to all the witnesses, and proved fatal to the prosecution, that the messenger, when he cited them, had not the Porteous Roll, containing the warrant for their citation, upon him, but had left it at

<sup>1</sup> M'Gaughler and M'Iver, Sept. 14, 1819 ; Geo. Warden, March 12, 1819 ; both unreported.

the office, although the designation was perfectly correct, and the citation unexceptionable in every other particular ;<sup>1</sup> that in another case, the objection was also sustained to the execution of the citation, and in like manner proved fatal to the case, that the copy of the list of witnesses served upon the pannel, did not bear that the same was signed by the Advocate-depute, according to the usual practice ;<sup>2</sup> and in a third, the objection was sustained, that while the execution of citation returned by the messenger, bore it to have been executed by John Morrison, macer, in presence of James Morrison and John Lindsay, witnesses ; the instrument itself laboured under the following defect—that the last syllable *son*, of James Morrison, was evidently superinduced on the letters *ness*, and that the word “witness” was written on an erasure.<sup>3</sup>

When objections of this sort, which were totally unintelligible to the great body of mankind, and did not in the slightest degree affect the justice of the case in which they occurred, proved frequently fatal to prosecutions, and murderers or highway robbers walked away from the bar, when the clearest evidence existed against them, merely because their counsel had discovered some erasure, or the mistake of an S for an N, or a James for a John, in the execution of citation returned by the messenger who cited the witnesses,—it is not surprising that the administration of criminal justice was considered as subject to irremediable uncertainty, and chance, more than either justice or mercy, regarded as regulating its decisions. Fortunately, these evils no longer exist, from the simple enactment of a statute, which now forms the sole law on the subject.

1. It is no longer competent to state any objection to a witness, on the ground of his having been irregularly cited, or appeared without any citation at all, provided his designation is correct in the list of witnesses served on the pannel.

By the 9th Geo. IV. c. 29, § 10, it is enacted, “ And whereas frivolous objections and exceptions are raised to the form and mode of citing witnesses and jurors, and of setting forth the executions of such citations ; be it enacted, That it shall not be com-

<sup>1</sup> John Proudfoot, Perth, Spring 1823 ; Hume, ii. 369.—<sup>2</sup> Ann Somerville, June 4, 1821 ; Hume, ii. 369.—<sup>3</sup> George Warden, March 12, 1819 ; unreported.

petent, in any criminal cause or prosecution whatsoever, for any prosecutor, or person accused, to state any objection to any juror, or witness, upon the ground of such juror or witness appearing without citation, or without having been duly cited to attend."

It is farther provided, "that all notices of compearance or attendance, whether left with parties accused, or jurors, or witnesses, and all executions of citations, may be either in printing, or in writing, or partly both;"<sup>1</sup> and "That it shall be no objection to such service, or to the citation of any juror or witness, that the officer who discharged the duty was not at the time possessed of the warrant of citation."<sup>2</sup>

The effect of these enactments is to prevent either party in a criminal case from founding on objections against the citation of witnesses, or the total want of any citation at all. Nor is there any thing unjust in this. If the prisoner has received a correct designation of the witness in the list of witnesses served upon him, and thereby acquired the means of ascertaining the evidence which they are to give against him, which is amply provided for by another clause of the same statute to be henceforth considered,<sup>3</sup> he has truly got all that he is entitled to demand, or which it is consistent with the ends of justice that he should obtain. How the witness came there, and whether he volunteered to give evidence or not, is a matter with which the pannel has no legitimate title to interfere, for in most cases the witnesses voluntarily step forward, at least in the precognition; and they must do so, for how else is the prosecutor to know who they are who can give information on the subject? and whether he has been regularly or irregularly cited, though it may be an important matter for the witness himself, if there is any question of levying a fine upon him, or moving for his apprehension, upon the ground of his having wilfully failed to appear, is a matter with which the pannel has no sort of concern.

All notices of compearance, whether left with jurors or witnesses, being now regular, though partly printed, and partly written, it is advisable that such writs should either be in one uniform style, or in a printed form, with the blanks filled up. The act does not contain any schedule for the form of such notices; but it is advisable that the form be as simple as possible, provided it specify distinctly the place and date of compearance, and the trial in which the witness is to give testimony.

<sup>1</sup> § 8.—<sup>2</sup> § 7.—<sup>3</sup> § 11.



2. It is sufficient citation of any witness in a criminal cause, if it be given by a messenger of the law, duly authorized, without witnesses; and the oath of such officer is good evidence of the citation, without producing any written execution of citation.

Although objections to the citation of witnesses can no longer be moved by the pannel, nor any execution of citation against them, either called for, or examined by him; yet it is not to be imagined from this, that such executions are utterly useless, or can be safely dispensed with in any criminal trial. For it is frequently necessary both for the prosecutor and pannel to move the Court to apprehend a witness in consequence of his having wilfully, and to defeat the ends of justice, failed to appear, or to have the fine legally exigible levied for the same dereliction of duty; and in either of these cases it becomes necessary to produce some evidence of the first citation, in order to authorize these ulterior measures of severity. Upon this subject, it is provided by the 1st William IV., c. 37, "That it shall be sufficient for the legal citation of any juror or witness, in any cause or legal proceeding, civil or criminal, that such citation be given by any officer of the law, duly authorized, without witnesses; and it is hereby provided, that the oath of such officer, in support of the execution, shall be held and received as sufficient evidence of such citation, when the same shall be questioned in a court of law."<sup>1</sup>

Under this enactment, if the party in a criminal cause is either prepared with a written execution of citation against a witness who has failed to appear, or has the officer who left the citation at hand to prove the fact, and he has reason to believe that the witness has voluntarily absented himself to defeat the ends of justice, he may apply to the Court for a warrant of imprisonment against such witness, which will be immediately granted. And with reference to this last mode of proof, it is enacted by the prior statute, in relation to the citation of the *pannel*, "that it shall be no objection to the admissibility of the officer or witness who served such libel, to give evidence regarding such service, that their names are not included in the list of witnesses served on the accused."<sup>2</sup> This provision, however, it is to be

<sup>1</sup> § 7.—<sup>2</sup> 9 Geo. IV. c. 39.

observed, applies *in terminis* only to the proof of the citation of the *pannel*; and as there is no similar enactment in relation to the admissibility of the officer, though not included in the list who cited the witnesses, and such a deviation from the common law on this point is not to be inferred by implication or analogy, it is obvious that the party who means to proceed in this manner against any absent or contumacious witness, must either be prepared with a regular written execution, or have the officer who served the notices on the witnesses included in the list: for otherwise there will be no mode of proving the indispensable matter of the previous citation.

3. If the fact of a witness having been duly cited, and failed to appear, is made out to the Court in either of the methods above stated, they will, on the application of either the prosecutor or pannel who desires his testimony, grant warrant for his apprehension and incarceration, till he find caution to appear and give evidence, to secure his appearance at the next diet of the trial.

It frequently happens that witnesses, after citation, either abscond, or wilfully absent themselves, in order to avoid giving evidence when called upon at the trial; and in such cases the ends of justice imperatively require that effectual means be taken to prevent a repetition of the delinquency on any future occasion. The witness, therefore, who, after due citation, fails to attend or offer a sufficient excuse, is in the first instance subjected in a fine, or unlaw, as it is called, of 100 merks; and that equally, whether he has been cited personally, or at his dwelling-place.<sup>1</sup> In addition to this, the Court, upon such *prima facie* evidence being submitted to them, of wilful disobedience to the law, as arises from the concurring facts of previous citation and failure to appear or send a sufficient excuse, will grant warrant for the apprehension of such witness, and his imprisonment till liberated in due course of law. This is matter of daily practice; and the contumacious witness, who thus finds himself imprisoned, can only obtain relief, if he desires liberation before the trial comes on, by applying to the Court, by whose warrant he stands imprisoned, setting forth his contrition, and offering caution to appear and give evidence; and it lies in the breast of the Judge to

<sup>1</sup> Hume, ii. 373, 374.

whom the application is made, to grant or refuse its prayer, according as he shall see cause. Such a case does not fall under the provisions of the act 1701, because the person imprisoned is not in custody, in order to trial: but if any oppressive use should be made of this power of imprisonment, without doubt the sufferer would obtain relief by application to the Court of Justiciary, or suspension and liberation at common law.

Nay, farther, if either party has good cause for believing that any material witness proposes to abscond or leave the country, before the diet of the trial comes on, he will in like manner obtain the means of securing his testimony by application to the Court before whom the trial is to proceed. There is this difference, however, between this case and the former, that here, as the diet of compareance has not yet arrived, the Judge has no *prima facie* evidence of contumacious absence to proceed upon; and, therefore, the prosecutor or pannel must give in a regular application, and support it by oath, that he has good and probable cause for believing that the witness named means to abscond or secrete himself, in order to disappoint the course of justice. The prayer of the petition should be to have the witness named, apprehended, and committed, till he find caution to appear and give evidence; and in fixing the amount of the bail, the Judge should proceed as nearly as may be by the standard established by the act 1701, as now amended in this article of bail.<sup>1</sup> Numerous cases accordingly exist, in which, on such an application from either party, warrant has been granted for the apprehension and committal of the suspected witnesses till they find caution to appear and give evidence, both at the instance of the prosecutor<sup>2</sup> and of the pannel.<sup>3</sup>

It is competent to take the same step in urgent cases, where no other remedy exists, when a precognition is going forward, and the Sheriff, before whom it depends, may, upon the like application and oath, grant warrant accordingly.<sup>4</sup> So it was held by Lord Justice-Clerk Hope and Meadowbank, at Dumfries, Autumn 1805, where their Lordships held that the Sheriff had power, and in most cases ought, to exact caution from persons resident in England, for their appearance here as witnesses on a

<sup>1</sup> Hume, ii. 375; Burnet, 469; Stat. 1681, c. 9.—<sup>2</sup> July 12, 1751, Thomas Gray; Feb. 26, 1737, William Maclachlan; Hume, ii. 375; Burnet, 469; Aberdeen, Autumn 1827, in trial of smugglers, Inverness.—<sup>3</sup> Aug. 25, 1712, William Steil and Gilbert Welsh.—<sup>4</sup> Hume, ii. 375; Burnet, 469.



trial, in the same way as, in England, a Scotchman would be bound to prosecute and appear as a witness in the trial for a crime committed against him in that country.<sup>1</sup>

But what if the witness cannot find caution? May he be committed absolutely till the trial comes on; or is he entitled, in respect of that inability, to his immediate liberation? It is the necessary and salutary rule of law, that in such a case the witness may be committed absolutely,<sup>2</sup> and it was accordingly so done with John Ker and Helen Horstoun, July 20, 1714; the only condition of the commitment being, that the petitioner shall pay their expenses during the time of their imprisonment.<sup>3</sup> The same step has been frequently taken of late years, in cases where necessary witnesses, unable to find caution, were suspected on reasonable grounds of an intention to abscond. In all such cases, however, the application is made *periculo petentis*; and if it is unfounded or malicious, it may be made the foundation of an action of damages which may be attended with very serious consequences.<sup>4</sup> For this reason, as well as on account of the extraordinary and severe nature of the remedy which is thus, from unavoidable necessity, in some cases adopted, the Judge to whom the application is made should be cautious in admitting it; and if he has the least reason to suspect improper motives, and in all cases where it is made by a private party, examine the petitioner in person, as to the grounds on which his suspicion is founded, in the same manner as he should do on an application for a *meditatio fugæ* warrant against a civil debtor.

Farther occasions frequently occur in which, from the disturbed state of the country, the excitement generally prevailing in regard to that particular case or other causes, there is reason to believe that a witness cannot be safely allowed to remain at large, either from the fear of intimidation, tampering, or improper practices to bias his testimony. — In such cases, it is competent, on the application of either party, under the like safeguard of an oath, and personal examination of the applicant by the Judge, where that is deemed necessary, to commit him to some place of sure custody, as the Castle of Edinburgh, or the Castle of Dumbarton, there to aliment himself if he be able so to do, or, in

<sup>1</sup> Burnet, 469.—<sup>2</sup> Hume, ii. 375.—<sup>3</sup> *Ibid.*; and Glasgow, Sept. 1826, Philip Murphy and Others, where the chief witness in a case of robbery, a native of New Zealand, was committed to the tolbooth of Glasgow, as he could not find caution some months before the trial, and remained there till he appeared and gave evidence.—<sup>4</sup> *Ibid.*

default thereof, to be alimeted by the applicant, at a rate to be fixed by the Court.<sup>1</sup> In a great many cases, accordingly, where danger to the witness, or the course of justice, is to be apprehended from their continuing at large, or remaining in the ordinary places of confinement, the Court have directed them to be confined in such secure places. Thus, Anne Clarke and two other women were directed to be confined in the Castle of Edinburgh previous to the noted trial of Nairne and Ogilvie, lest they should be tampered with by either party;<sup>2</sup> as were John Campbell and others, who were, however, under commitment as *socii criminis*, in the not less noted case of Andrew M'Kinlay, July 1817, for administering unlawful oaths.<sup>3</sup> In some cases the warrant has been to imprison the suspected witness "till farther orders," as was done in the case of Smith and Brodie on August 13, 1788, with two witnesses, Graham Campbell and Mary Hubbart, who were charged by the Lord Advocate with an intention to abscond.<sup>4</sup> "It is now ordinary," says Royston, "to grant warrant for imprisoning witnesses till they find caution, and may even refuse bail, if there is just reason to apprehend they will forfeit their bail-bond rather than compear."<sup>5</sup>

If a witness be in prison, serving on board a ship, or in a place privileged from arrest, or if he be unable to attend from the fear of diligence, the Court will grant him a protection for such time as may be necessary to enable him to come to the trial and return to his place of safety.<sup>6</sup>

4. The warrant of any Judge for the citation of a witness, is now, by special statute, made to run beyond the territory of that Judge over all Scotland, and it may be executed alike by an officer of the Court which grants the warrant, or by one of that within whose jurisdiction it is to be put in force.

Formerly a circuitous process was necessary for the citation of a witness who resided beyond the territory of the Judge Ordinary, within whose bounds the trial was to proceed. He could authorize the citation of witnesses within his own jurisdiction, but not those who resided beyond it, because his powers entirely ceased when his territory was past. In like manner, the Por-

<sup>1</sup> Hume, ii. 375.—<sup>2</sup> Aug. 6, 1765; Hume, ii. 375.—<sup>3</sup> Ibid.—<sup>4</sup> Ibid.—<sup>5</sup> Royston, 271.—<sup>6</sup> Burnet, 471; Hume, ii. 375.

teous Roll for the Circuit contained a warrant from the Court of Justiciary for the citation of all witnesses within the Sheriffdom embraced in that Circuit, but not any residing in any other part of Scotland. To remedy this inconvenience, letters of supplement, as they were called, were obtained from the High Court of Justiciary, directed to macers and messengers-at-arms, authorizing the citation of such witnesses as could not be reached by the ordinary diligence of the local authorities. As this process was attended both with delay and expense, it was enacted by the 1 William IV. c. 37, § 8, "That when the attendance of any person shall be required as a witness in any criminal cause or proceeding, or in any prosecution for a pecuniary penalty, before any Court or magistrate in Scotland, such person, although not residing within the jurisdiction of the Court or magistrate granting the warrant of citation, may be cited on the warrant of such Court or magistrate, and this either by a messenger-at-arms or by an officer of the Court or magistrate granting the warrant, or by an officer of the place in which such person may be for the time; and such citation shall be sufficient to enforce the attendance of such person as a witness, in all respects as if such person had been resident within the jurisdiction of the magistrate by whom such warrant shall have been granted; and farther, that any sentence or decree for any pecuniary penalty or expenses, pronounced by any Court or magistrate, may be enforced against the person or effects of any party against whom any such sentence or decree shall have been awarded in any other county, as well as in the county where such sentence or decree is pronounced: provided always, that such sentence or decree, or an extract thereof, shall be first produced to, and indorsed by a Court or magistrate of such other county competent to have pronounced such sentence or decree in such other county."

The effect of this clause was to introduce a total but not uncalled for change in the common law in this particular; by enabling the warrant of a judge for the citation of a witness, to be executed *extra territorium*, it has in effect constituted all Scotland, in this particular, into one great sheriffdom, and rendered the indorsation of such warrants of citation, or the obtaining of supplemental ones from the Justiciary Court, altogether unnecessary. The enactment applies, not only to witnesses cited for any criminal trial, but any "criminal proceeding," the effect of which is, to render



it not less applicable to witnesses cited for precognition, than for formal criminal trials.

5. For the compelling the attendance of witnesses residing in England or Ireland, special provision is made by Acts of Parliament, which authorize the same process against the witnesses residing there, who neglect a citation to appear in a Scotch Court, as if it had applied to a Court in their own country.

Provision was made to a certain extent, to compel the attendance in criminal trials, in any of the three United Kingdoms, of witnesses residing and cited in any other part of these kingdoms. By 45 Geo. III. c. 92, § 3, it is enacted, that on proof made in a certain form, of due service of the *subpœna*, or other process of citation, the witness failing to obey was to be proceeded against and punished, in like manner as if such process or *subpœna* had issued out of the Supreme Criminal Court in the witness's own country. But it is provided by this act, "that none of the said last-mentioned Courts (the Courts of the county to which the witness is summoned), shall in any case proceed against, or punish any person for having made default, by not appearing to give evidence in obedience to any writ of *subpœna*, or other process for that purpose, unless it shall be made to appear to such Court, that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence, had been tendered to such person at the time, when such a writ of *subpœna*, or other process, was served upon such person." An example occurred, of the proceedings in terms of this statute, against Charles Field, a London attorney, cited there to attend on the trial of Andrew Belch, tried for forgery at Edinburgh, Jan. 3, 1806.<sup>1</sup>

This statute, burdened with the condition of proof being made, that the witness, at the time of receiving the *subpœna* received the tender of a reasonable sum of money, to bear his charges to the place of trial, and of his return home, was of little real service in practice. This was the more unreasonable, because a witness in the ordinary case in England, receiving a *subpœna* to attend in one of the criminal Courts of his own country, is not exempted

<sup>1</sup> Hume, ii. 376; Burnet, 470.

from attachment, on the ground that his expenses were not tendered at the time of service of the subpoena, although the Court would have good reason to excuse him for not obeying the summons, if in fact he had not the means of defraying the necessary expenses of the journey.<sup>1</sup> And it has been ruled by Judges Park and Garrow, that a witness who had been served with a subpoena, and at the time had had no money tendered to him, is not entitled to demand that his expenses shall be paid before he is examined.<sup>2</sup>

To remedy this inconvenience, therefore, and place the witnesses in the two countries, as nearly as possible on the same footing, it was enacted by a subsequent statute, 54 Geo. III. c. 186, that letters of *second* diligence issued in Scotland, for compelling the attendance of witnesses residing in England, Wales, or Ireland, to criminal trials in Scotland, shall be indorsable in the Courts of Westminster, and certain other Courts, and when indorsed, shall authorize the bearer to apprehend the witnesses therein, and convey them to Scotland without any tender of expenses. The words are, “ that from and after the passing of this act, all warrants issued in England, Scotland, or Ireland, respectively, may, and shall be indorsed, and executed, and enforced, and acted upon, in any part of the United Kingdom, in such and like manner as is directed by the said recited act, of the 13th year of the reign of his present Majesty, in relation to warrants granted in England or Scotland, respectively, as fully and effectually, to all intents and purposes, as if all the provisions of the said act, were in this act repeated and re-enacted. And that it shall be lawful for any judge of his Majesty’s Courts of Record at Westminster, of the Court of Session in the County Palatine of Chester, or of any of the Courts of great Sessions in Wales, or for any judge in any of his Majesty’s Courts of Record in Dublin, to indorse any letters of second diligence issued in Scotland, for compelling the attendance of any witness or witnesses resident in England, Wales, or Ireland, upon any criminal trial in Scotland; and such letters shall, upon such indorsement, have the like force and effect as the same would have in Scotland, for the purposes of the trial or trials in respect of which such letters shall have been issued, without any tender of any expense or expenses of any such witness or witnesses, any thing contained

<sup>1</sup> Philips, 11 ; Russell, ii. 641.—<sup>2</sup> King v. Cook, 1 Car. and P. p. 321 ; Russell, ii. 641.

in the said last recited act of the forty-fifth year aforesaid notwithstanding.”

The law in Scotland recognises no right in a witness to insist for payment of his travelling expenses before examination, and in point of fact, they are never paid till the trial is over, when the Sheriff of the county at the Circuits, and the Crown-agent at Edinburgh, pay them, according to certain fixed rates for which they receive credit in their public accounts with Exchequer. If a witness is so poor as to be unable to move from want of funds, which not unfrequently happens, and he has a long journey to go, he is usually supplied with the necessary sum *in limine* by the Sheriff of the county where he resides, who is reimbursed by Exchequer, upon proper evidence of the facts, when the final settlement for the expenses of the trial takes place.

## SECT. II.—OF THE DESIGNATION OF WITNESSES.

As the law has provided, with that wisdom, and attention to the interests of the pannel, which in so peculiar a manner distinguishes the Scottish jurisprudence, that he shall have a list of witnesses served upon him along with the libel, and that none shall be examined whose names are not contained in that list, it follows as a necessary consequence, that any error in the name or designation of these witnesses is a fatal objection to their examination, and that equally whether it occurs in the record copy of the list, or in the copy served on the pannel.<sup>1</sup> For if it occurs in the former, then the witness proposed to be examined is not contained in the list annexed to the original libel; if in the latter, then the pannel has not been duly warned to make enquiries at the right person, and he was entitled to rely on the principal list being the same as the copy he has received. Upon these grounds it has long been held as a fixed point in our law, that the designation of a witness must be correct, both in the record and the copy served on the pannel, and that these two copies must agree.<sup>2</sup> But the law has recently undergone a most remarkable alteration for the better, in regard to the stage of the proceedings when it is incumbent on the prisoner's counsel to state such objections.

<sup>1</sup> Hume, ii, 376.—<sup>2</sup> Ibid.



Formerly it was held, that it is competent to state an objection to the designation of a witness, equally with one to the execution of citation produced against him, after the jury was sworn, and, of course, after the prosecutor's case was irrevocably perilled upon the issue of the present trial. The result of this was frequently in the highest degree injurious to the administration of justice. It was the established course for the pannel's counsel in such a case, to give the prosecutor no hint whatever of the inaccuracy which had been discovered, to let the jury be sworn, and proceed as if no objection whatever existed, and to state the objection for the first time when the witness was tendered at the trial, and it was too late to remedy the error. If he was a material witness, and the objection was sustained, the consequence frequently was, that an acquittal took place, under circumstances the most adverse to public justice; because, so far from having been deceived or misled in his enquiries concerning such witness, it was evident from the very fact of the designation being objected to, and the error proved out of his own mouth, that the pannel had obtained such information, as led him to discover the witness, and that it was from the designation given that its inaccuracy had been discovered. It is the most striking proof of the accuracy with which criminal proceedings have been conducted in Scotland for many years past, that, considering the critical and punctilious nature of the objections which were frequently sustained by the Court, so few guilty persons escaped from errors in the designations of the witnesses adduced against them; and it will hardly be credited in other countries, that on many Circuits, where seventy and eighty cases were brought to trial, and 1300 or 1400 witnesses were cited for examination, not one error either in the indictments or the designations of the witnesses, was discovered even by the acuteness of a numerous and intelligent array of counsel.\*

To correct these manifold evils, which at length had become so serious as to throw discredit in many cases on the administration of justice in this country, various enactments have been made both by the Court and the legislature, which now form the law of the land.

\* At the Circuits of Glasgow, Autumn 1826, and Spring 1828, not one objection, either to the indictments or the list of witnesses, was sustained, though in the former there were 72 indictments, and 1232 witnesses; and in the latter, 84 indictments, and 1370 witnesses.

1. Any objection to a witness founded upon the alleged omission of any part of the record in the list served on the pannel, or any discrepancy between the record and that list, must be stated before the jury is sworn, or it cannot afterwards be received.

By the act of Adjournal, July 9, 1821, already noticed, it is enacted, "That all objections founded upon the alleged omission, in the said doubles, of any part of the record, or upon any discrepancy between the said doubles and the record, must be proposed before the jury are sworn to try the case, with certification that no such objection shall thereafter be entertained; and farther, the said Lords direct and appoint that the Sheriff and Sheriff-clerks of the several counties respectively, shall take especial care that the doubles of all criminal libels, lists of witnesses, and lists of assizers, to be served on parties accused, be accurately compared with the record in all respects, and written out in a clear and legible hand, before delivery to the officer for execution." This enactment is so clear that its import can hardly be misunderstood. If the objection to the witness is one arising from any omission in the pannel's copy of part of the name or designation contained in the principal list, which forms part of the record, or on any discrepancy between them, it must be stated before the jury is sworn; and if that opportunity is allowed to pass, it cannot afterwards be received. The effect of this enactment was to prevent the course of justice from being interrupted by one extensive class of cases, by which it had formerly been impeded, viz. that founded on a variation between the list of witnesses served on the pannel and that contained in the record. It is perfectly just, if a material discrepancy exists in this particular, that full amends should be made to the prisoner; but it is not just that this amends should be carried the length of giving him a complete immunity from his crime, which was too often the case, from the objection being sustained after the assize was sworn. By compelling it to be stated *in limine* by this act, the prosecutor is warned of the objection that exists; and if he deems it fatal, and the witness indispensable to his proof, he can remedy the error by moving the Court to desert the diet *pro loco et tempore*, and serving the pannel with a fresh libel and list, in which the previous error is corrected.

2. If, owing to any error in the name or designation of a witness, the pannel can make it appear that he has been unable to find out such witness, or has been deceived or misled in his enquiries concerning him, the same shall be stated before the jury is sworn, and no objection of that description shall afterwards be received.

The act of Adjournal above quoted remedied part of the evils so much felt in our former practice, arising from the proponing objections to witnesses after the evidence, before the assize had commenced. But still a large class of evils remained, viz. that arising from the proponing of objections to the sufficiency of designations, or their correctness in the principal list itself, and which had been correctly transferred into the pannel's copy, after the jury was sworn, and when the consequence of the witness being cast frequently was that the pannel was acquitted. To remedy this inconvenience, and render it necessary to state such objections at such a stage of the proceedings as rendered it possible for the evil to be supplied, it was enacted by Sir William Rae's act, 9 Geo. IV. c. 29, § 11, "That if, owing to any error in the name or designation of a witness *as given in the list served along with the criminal libel*, a person accused can make it appear that he has been *unable to find out such* witness, or that he has been *misled or deceived* in his enquiries concerning such witness, the same shall be stated to the Court before the jury is sworn, and the Court shall thereupon give such remedy as may be just, and no objection of *that* description shall be afterwards received."

Many different points occur in regard to this enactment which require separate consideration.

1. In the first place, it is sufficiently clear on this and the former act of Adjournal, that if the pannel's copy is correct, but the designation contained in the list in the record is wrong, still the objection must be stated before the jury is sworn. For although, as the error is not in "the list served along with the criminal libel," the case does not fall under the enactment in the statute, still it is directly provided for by the act of Adjournal, which enjoins that all objections founded on a discrepancy between the record and the pannel's list shall be stated before the jury is sworn, under certification that no objection of that kind shall afterwards be received.



2. If the record and pannel's copy agree, but both contain an error, it seems sufficiently clear, that if the objection consists in this, that the designation was *insufficient*, and, consequently, that the pannel could not find him out, so as to ascertain what he was to say at the trial, that objection also must be stated before the jury is sworn. Such an objection comes obviously under the description, "that the pannel has been unable to find out such witness," to which the statutory rule applies.

3. If the objection amounts to this, that the pannel, by an erroneous description given in the designation, had been "misled or deceived in his enquiries concerning such witness," then, in like manner, by the express words of the statute, the objection must be stated before the jury is sworn. A case of this description occurred at Dumfries, soon after the statute had passed, before Lord Alloway. It was there objected, after the jury was sworn, to Thomas Coulthard, designed as "now, or lately, residing with *Thomas Coulthard*, labourer in Gasstown, in the parish of Dumfries," that the pannels had found a *Thomas Coulthard* at Gass-town, but had been unable to find a "*Thomas Coulthard* residing with *Thomas Coulthard*," and that in point of fact there was no such person at Gasstown. The fact was, that he resided with *James Coulthard* there, and so the designation should have borne. But to this it was sustained, as a sufficient answer on the prosecutor's part, that though the name of the person with whom the witness resided should have been stated as *James Coulthard*, instead of *Thomas Coulthard*, yet, that as the pannels admitted having found a *Thomas Coulthard* at Gasstown, and he would prove from the witness's own mouth that this was the witness, it could not be alleged that they "had been misled or deceived in their enquiries concerning such witness," and, therefore, that the objection came too late, as the jury was sworn. The witness having been called in, and sworn that he had been precognosed by an agent on the prisoner's part, the objection was repelled.<sup>1</sup> It is obvious, that all objections which resolve into the fact of the pannels' having been misled or deceived in their enquiries concerning the witness, must be stated before the jury is sworn. And it is necessary, not only that it should be stated before the jury is sworn, but that the pannel shall be able to show that, in consequence of the faulty designation, he has been unable to discover

<sup>1</sup> James Watling and James Green, Dumfries, Autumn 1828; Syme, Appendix, No. iv. p. 50.

and precognosce the witness. So it was held by the Lord Justice-Clerk Boyle, in a case where it was objected before the jury was sworn, to a witness, that he was designed as tenant in "Heaton Mill, in the parish of Cornhill, and county of Durham," and it was objected that there was no such parish. This was repelled, on the ground that the pannel could not allege that he had made any enquiries concerning him.<sup>1</sup>

4. But if the case be put of an objection of a different nature being taken, a different decision should, it is thought, be given. Suppose it is stated, when the witness is adduced to be sworn, that this is a *different person* from that specified in the list—that *John Johnston*, ironmonger in Prince's Street of Edinburgh, for example, was the person specified in the list, and that this is *James Johnstone* there. The objection there is not so much that the pannel has been deceived or misled in his enquiry concerning the person specified in the list, for he may have found out a person of the name and designation there given, and been satisfied that he had nothing material to depone to in the case; but that *instead* of the person he was thus led to enquire about, *another* has been brought forward at the trial, who is *not* contained in the list, and who, therefore, cannot be examined against him. It may, no doubt, be true, that he has been "unable to find out" this the real witness, or that, from the error in the designation, he has been "misled or deceived" in his enquiries concerning him; and, therefore, it may be contended, that the fit occasion for proposing the objection should have been before the jury was sworn. But still it may well be doubted, whether, in consequence of this omission, he can be debarred from proposing so fatal an objection, as that the witness adduced was not contained in the list; and whether the statute, in declaring that "no objection of *that* description shall afterwards be received," has not in effect left the door open, perhaps intentionally, for the proposing of such objections as do not relate to the sufficiency of the designation, or the misleading of the pannel, in regard to him, but to the identity of the man adduced with the person specified in the list of witnesses. Had the rule been meant to be universal, it is conceived the enactment would have been general, that no objection of *any* sort shall be stated against a witness, after the assize is sworn; in the same manner as it is in regard to the exclusion

<sup>1</sup> Thomas Rodgers, Jedburgh, Sept. 1831.

of objections against citation of witnesses, in the section of the act immediately preceding. These views, however, are given as mere speculation, unsupported as yet by any decided case, and on which no lawyer should rely till they have received that sanction; and it is certainly a circumstance hostile to their soundness, that the impression of the bar is, that all objections to the designation of witnesses of whatever kind, must be stated to the Court before the assize is sworn, and that in consequence of this impression, objections of this description have since the date of the act in a great measure disappeared from our practice.

The provision of the statute is, that upon such an objection being stated before the jury is sworn, "the Court shall thereupon give such remedy as may be just." It is not said what this remedy is to be, and it is perhaps as well that the enactment is in general terms, without limiting the relief to any particular course of conduct. In some cases obviously, where the designation is essentially erroneous, as if the witness is designed John instead of James, or drover instead of clothier, or residing in Prince's Street instead of George Street, or the like, the only remedy is to desert the diet *pro loco et tempore* on the prosecutor's motion, if he insists upon the examination of the witness, in order to the preparation of a libel and list in which the error is avoided. In others, particularly where the designation is objected to as insufficient, or the complaint is, that the pannel has been unable to discover the witness, or that he has been misled or deceived in his enquiries concerning him, a more appropriate remedy, and more for the interest in many cases of the pannel himself, would be to adjourn the diet for such a time as may be necessary to enable him now to complete his enquiries, instead of being thrown over to the next term or circuit for trial. But this is a point which, though well worthy of consideration, has not yet occurred for the determination of the Court, and on which, consequently, no rule to be relied on can be given.

3. The description of the witness may be written on an erasure in the record copy of the list, or it may be interlined in a different handwriting from the body of the libel or list, provided it be above the signature of the public prosecutor, or in a marginal note signed by him, and admitted by him to be part of the record.



It is obviously indispensable that the list of witnesses annexed to criminal libels should frequently be altered, after the record copy of the libel is sent to the country from the Justiciary office at Edinburgh, not only because errors may have been detected in the designation contained in the precognition after it was transmitted to Edinburgh, but because they have been inaccurately copied over by the framer of the indictment, or because the witness has shifted his residence since the designation was originally taken. It is, accordingly, a settled rule, that the designations in the list, like the most material parts even of the libel itself, may be written on an erasure,<sup>1</sup> or interlined in the hand of another person from the one who wrote the body of the list.<sup>2</sup> The principle of law is, that the signature of the prosecutor at the bottom of the page, or to the marginal note containing the alteration, covers all the alterations, interlineations, or erasures, both in the principal libel and list of witnesses, even though the signature was adhibited before the alterations took place; and that the seal is finally put to the record then only when the copy is made out for service on the pannel. This point, after having been long disputed, has been at last set at rest by an authoritative judgment of the Supreme Court.<sup>3</sup>

4. It is indispensable that the name of the witness be in the main correctly given; but a slight variation in the mode of spelling will not be sufficient to cast him, if the sound be substantially the same.

The first requisite in a correct designation of course is, that the witness be correctly *named*; because, if the name is wrong, the person proposed to be examined is not the one contained in the list, and no person can be examined who is not to be found there. On this principle, even a trifling variation is sustained, if it is in such a letter, or such a part of the word as changes the name into a different one.<sup>4</sup> Thus, in the trial of Smith and Brodie, Mary *Hibbut* was challenged, because she was set down Mary *Hubbart* in the list, and the objection was sustained.<sup>5</sup> So, also, the objection that a witness's real name was Isobel *Low*, and that she was styled Isobel *Law* in the list, was rightly sustained.<sup>6</sup> Thus,

<sup>1</sup> Lindsay and Dick, Oct. 9, 1820; Shaw, No. 41.—<sup>2</sup> Robert M'Intosh, Aberdeen, April, 1822; Shaw, No. 68.—<sup>3</sup> Duncan Clerk, May 15, 1827; unreported; Hume, ii. 372.—<sup>4</sup> Hume, ii. 372, 373.—<sup>5</sup> Smith and Brodie, Aug. 27, 1788; Hume, ii. 371.—<sup>6</sup> William Smith, Aug. 20, 1791; Hume, *ibid*.

also, the objection that the witness's name was Thomas *Kinnear*, and that he was called Thomas *Kinnaird* in the list, was also deemed fatal.<sup>1</sup> On the same principle, the objection was sustained, that the name *Mackersie*, which was the pannel's real name, had been changed into *Mackenzie* in the lists served on the pannel.<sup>2</sup> The mistake *James MacEwan* for *John MacEwan*, was rightly sustained as a fatal objection in another instance.<sup>3</sup> Margaret Monro, designed in the list wife of Andrew *MacLellan*, being objected to, on the ground that she was the wife of Andrew *M'Lennan*, and that these two were different names, this objection was also on right principle sustained.<sup>4</sup> So, also, the mistake *M'Tiggan* for *M'Figgan*, was held fatal.<sup>5</sup> The objection that a married woman swore her husband's name was Charles *More*, whereas he was designed Charles *Mouat* in the lists, was also held fatal.<sup>6</sup> Another witness, the mother of the child killed, was set aside on the ground that she was designed Elspeth *Marion* Buchanan, and she swore *in initialibus*, that her name was not Elspeth *Marion*, but Elspeth *Meney*, and that she was christened by that name after the surname of an uncle, although she was usually called *Meney*, and had in one service for six months been called *Marion*. This objection was, after full argument, sustained, in respect it occurred in so material a point as the name of the mother of the person charged as murdered.<sup>7</sup> A witness was cast whose name was spelt Robert *Henry* in the prisoner's copy of the list, whereas, in reality, it was Robert *Hurry*.<sup>8</sup>

These instances are sufficient to demonstrate the strictness which is justly held indispensable in the *name* of the witness; that being so material a point that any error in it changes the identity of the person proposed to be examined, and at once lets in the objection, that the person proposed to be examined, is not the person contained in the list. In all of them, it is to be observed, the error was of that kind which *changes the name*, and not such as amounted only to a different mode of spelling or pronouncing the same name. Wherever it amounts to such a minor variation as this only, *modo constat de persona*, the objection should be repelled. On this ground, it may be doubted, whether

<sup>1</sup> Stevenson, Field, and Others, Nov. 28, 1808; Hume, ii. 371.—<sup>2</sup> Philip Mackenzie, April 22, 1813; Hume, *ibid.*—<sup>3</sup> Mary Kennedy, Oct. 1, 1818; Hume, *ibid.*—<sup>4</sup> Shaw, No. 24; Ann Tayne, April 15, 1819.—<sup>5</sup> Shaw, No. 45; David Muir, Sept. 12, 1821.—<sup>6</sup> Campbell and M'Kay, Dec. 15, 1823; unreported.—<sup>7</sup> J. Fergusson, May 16, 1831; Justice-Clerk's notes.—<sup>8</sup> Thomas Car, March 13, 1828; unreported.

the Court did not do wrong when they sustained the objection that a witness was named in the list Thomas *Farm*, who subscribed his name *Fairholm*; these being different modes of writing, or pronouncing the same name.<sup>1</sup> A more correct judgment was given in another case, where a witness's name was spelt *Backie* in the list, and it was objected, that her name was *Bache*. This was unanimously repelled by the High Court, not only for another reason to be immediately noticed, but on the ground that the difference was immaterial, being in the mode of spelling only.<sup>2</sup> On the same ground, the designation *Susanna Caffield*, even when occurring in so material a witness as the person ravished, was held to be good, though she deponed her name was *Cawfield*, there being different modes of pronouncing the same name.<sup>3</sup> On this principle, the variation, *Robinson* instead of *Robertson*, *Darymple* instead of *Dalrymple*, *Johnston* instead of *Johnstone*, *Clerk* instead of *Clark*, *Davidson* instead of *Davison*, *Robison* instead of *Robinson*, *Rae* instead of *Ray* or *Reay*, *Stuart* instead of *Stewart* or *Steuart*, are all held an insufficient variation to found an objection even in the designation of the pannel, and much more in that of a witness.<sup>4</sup> Thus, *Elspeth Robertson* was held to be substantially the same name as *Elizabeth*, and an objection founded on that discrepancy repelled;<sup>5</sup> as was *Fyshe Palmer*, when the objection was stated that the pannel was indicted under the name of *Fische Palmer*.<sup>6</sup> In all these cases, the ruling principle is that of *idem sonitus*, or the same name under a slight variation only of spelling or pronunciation; a principle acknowledged in the English law, as well as our practice.

5. If the witness is sufficiently specified *aliunde*, it is not necessary to add the name of his parents, or the master whom he serves, or the person in whose house he resides. If these particulars, however, are added, a material error in the name of any of these persons will be held fatal; but a slight error, or an error in a *double* description, which leaves enough to distinguish the witness correctly given, will not have this effect.

<sup>1</sup> James Gray, July 11, 1737; Hume, ii. 371.—<sup>2</sup> James Wilson, March 14, 1826; Justice-Clerk's MS.—<sup>3</sup> John Cook, Dumfries, Sept. 1804; Meadowbank and Armadale; unreported; Hume, ii. 158.—<sup>4</sup> Hume, ii. 158.—<sup>5</sup> Elspeth Robertson, Nov. 15, 1728; Hume, ii. 159.—<sup>6</sup> Fyshe Palmer, Sept. 1793; Hume, ii. 159.



It is, in the general case, possible to describe a witness sufficiently, by setting forth his name, profession, and place of residence, without specifying either the names of his parents, master, or landlord. But if these particulars, or any of them, are in point of fact added, whether unnecessarily, or from inability to find a correct and sufficient designation in any other way, a *material* error in any of these particulars will be fatal. Thus, two witnesses having been designed servants of David *Low*, when they were in reality servants to David *Law*; the error was held sufficient to cast them both.<sup>1</sup> So also, a witness designed as the daughter of *William* instead of *James*, was also cast.<sup>2</sup> In like manner, where the designation was "now or lately residing with James Simpson, shoemaker in Gilmerton, aforesaid," the objection was unanimously sustained by the High Court, that the witness did not reside with James Simpson, and had not done so "lately," in the legal sense of the word, but that he had been dead for four months.<sup>3</sup> And where it was objected to a witness, that the only clue given for his discovery, was, that he resided with his master, Geddes, who is designed as residing in Inverness, when in fact he does not reside there, and has not done so since Whitsunday last, and has disappeared; the witness was withdrawn at the suggestion of the Court.<sup>4</sup>

But while this strictness is necessarily admitted, where the error lies in such essential particulars, as form the distinguishing part of the designation, or are essential to the discovery of the witness, it is not the less material to observe on the other, that where the error is more trivial, or where, though something is wrong in one part of the designation, enough remains correct to distinguish the witness in the other, the objection will be repelled. Thus, it having been objected to James Newbigging, designed, as "now or lately residing with his father, William Newbigging, mason;" that his father is not *now* a mason, and has not been so for five years, but has for that time been a green-grocer; the objection was rightly repelled, upon the ground that he was once a mason, that his residence is correctly given, and that enough right exists in the designation, to enable the pannel to discover the real individual meant to be examined.<sup>5</sup> So also, where the witness was designed as residing in "Scotland Street, Edinburgh, in the

<sup>1</sup> John Ker, April 17, 1821, Perth; unreported.—<sup>2</sup> Alex. Aitken, Perth, Autumn 1823; unreported.—<sup>3</sup> Geo. Thomson, July 8, 1822; unreported.—<sup>4</sup> Hugh M'Donald and Others, June 1823.—<sup>5</sup> William Beatson and Others, July 18, 1822; unreported.

parish of St Cuthbert's, and county of Edinburgh," and it was objected, that Scotland Street is not in the parish of St Cuthbert's, the objection was repelled, upon the ground that "Scotland Street, Edinburgh," is sufficient as a residence, and that the subsequent error, in a town where the parish is not the usual mode of specifying a residence, will not vitiate that correct description of the witness's residence, upon the principle *utile per inutile haud vitatur*.<sup>1</sup> Where the objection was, that the witnesses were described as "tenants in New Ulva," whereas they only resided with their father, who was the tenant there, the designation on the same ground was held to be sufficient;<sup>2</sup> and where it was objected to "Margaret M'Laren, servant to Miss Catherine Purves, North Frederick Street, Edinburgh, and now or lately servant to Hugh Herdman, cooper, Candlemaker-row, Edinburgh," that she never had been a servant to Herdman, the objection was repelled, in respect the first part of the designation was correct.<sup>3</sup> On the same principle, where the witness was designed as "daughter of Thomas Foot, soldier, deceased, presently or lately residing with the said Mary Murray," the designation was sustained, although she was the daughter of Charles Foot, the other part of the designation being correct and sufficient.<sup>4</sup>

5. The proper name for a married woman is that of her husband, by which she is usually distinguished; and though it is usual to add her maiden name also, that is not necessary, and where it is given alone, is held objectionable, if no other clue for her discovery is added.

After a woman is married, she in common parlance bears her husband's name, and is distinguished by that appellation, from all other persons in her vicinity, of course it is the proper designation which she should receive, and although it is usual to add her maiden name also, yet this is a mere superfluity drawn from the analogy of the law in civil contracts, and noways necessary, unless another woman of the same Christian name, married to a man of the same name and trade, exists in the same place. Thus, it being objected to Isobel M'Callum, designed as wife of John

<sup>1</sup> Margaret Greig and Others, July 13, 1826; unreported.—<sup>2</sup> Duncan Galbraith and Others, Sept. 10, 1821, Inverary; Shaw, No. 43.—<sup>3</sup> Margaret Boug, Jan. 19, 1824; unreported.—<sup>4</sup> M'Kenzie and M'William, Ayr, April 1813; unreported.

M<sup>c</sup>Callum, that her maiden name was Fraser, which was not set forth, the objection was rightly repelled, upon the ground, that the individual was clearly distinguished, and that this is an ordinary way of naming a married woman.<sup>1</sup> This precedent was followed in a case where the witness was designed as “Elizabeth M<sup>c</sup>Pherson, residing on the south side of South Street, Perth,” and it was objected, that her proper name was *Kennedy*, that being her deceased husband’s name, and that she exercised the trade of a hair-dresser, with the name *Kennedy* above the door. The witness was rightly rejected, as the designation *in substantialibus* was such as was calculated to mislead.<sup>2</sup>

But on the other hand, if to the maiden name of a woman, though she is married, there is added such a designation as clearly distinguishes her from any other person, it is held to be sufficient. Thus, where it was objected, to “Margaret Huddleston, now or lately servant to Mrs Jane Blair, in Buccleuch Street of Dumfries,” that, though Huddleston was her maiden name, yet she had been married to a man of the name of *Glover*, and that that name should have been added, the Court unanimously repelled the objection, on the ground that the correct designation of her mistress sufficiently distinguished the individual.<sup>3</sup> So also, a married woman being designed as “Catherine Provan, daughter of the deceased Robert Provan, and now or lately residing with her mother, Janet Jardine, or Provan, in Lockerbie aforesaid,” and it being objected, that she was the wife of John Reid, and should have been designed as such, or at least by his name; the objection was repelled, in respect it appeared from the deposition of the witness, that her husband did not live there, but only came to it occasionally, and that the designation in other respects was correct.<sup>4</sup>

7. The description of the place of abode, or trade of the witness is sufficient, if it furnish the adequate means to the pannel for directing his enquiries, and such as with ordinary attention, would have been sufficient for leading him to the true person, although it may be inaccurate in some subordinate particular.

<sup>1</sup> Owens and Collins, Glasgow, Sept. 1792; Hume, ii. 372.—<sup>2</sup> J. Stewart, Perth, Sept. 1824; Shaw, No. 123.—<sup>3</sup> David Haggart, June 11, 1821; Justice-Clerk’s Notes.  
—<sup>4</sup> Samuel Rutherford, Dumfries, Sept. 1825. Shaw, 143.



There is a distinction in reason and principle, between an inaccuracy in the name of the witness, or that of his parent, if it is given, and in the profession which he follows, or the place where he dwells. In the first case, the objection is so strictly personal, and enters so completely into the essential parts of the designation, that any error in these particulars, at once lets in the objection, that the witness presented is a different person from the witness designed. But the case is different with the residence or profession of the witness. In such a case, there is seldom any dispute about the identity; the objection is not, that a different witness from the one designed is presented, but that the description of the trade or residence was so incomplete, or so inaccurate, as to mislead the pannel in his enquiries, and that for *that* reason he should be rejected. For the disposal of cases of this description, the rule founded on reason and justice which is adopted in our practice, is, that if the description is such as enables the pannel to make enquiries, and might, with ordinary care, have led to the discovery of the true person intended, he is not entitled to have the witness cast upon subordinate inaccuracies; but that if the error or defect was of such a kind, as either rendered it impossible to discover who the witness is, or was calculated to mislead in the enquiries concerning him, the designation will be held bad, and the witness set aside.

The first case in which this principle was laid down was that of John Gardiner, for rape, Perth, Oct. 1811. It was there objected to Margaret Gardiner, the person ravished, that she is designed as “daughter of James Gardiner at Peattie, parish of Kettins, and county of Forfar,” whereas her father was dead long before the date of the indictment, and she herself had removed to a different place of residence. It was replied that Margaret Gardiner is designed in the libel as sister to the pannel. The interlocutor was in these words, “In respect the purpose of serving the pannel with a list of witnesses is, that he may be able to make suitable enquiries after them, and discover who they are, and that in this particular case the pannel could be at no loss to discover who or where the witness now called was, as she is described as the daughter of his own father, and that their father, in whose house they had both been living, was but recently dead, therefore, in this special case, repels the objection.<sup>1</sup> The prin-

<sup>1</sup> John Gardiner, Perth, Oct. 1811; Hume, ii. 372.

ciple on which this interlocutor was rested is unquestionably correct, and in that particular case it is certain the pannel could be at no loss to discover who the witness was, as she was his own sister; but it is liable to this objection, that it *supplied* what was defective in a designation in the list by a reference to the body of the libel; a proceeding which more recent practice has almost completely abandoned. But this precedent was soon after followed by an authoritative judgment in the Supreme Court, in a case which has always since been understood to settle the law on a rational and decisive footing. The witness there objected to was John Bruce, described in the list as "Apprentice to David Tait, hardware merchant, Royal Exchange, Edinburgh," and the objection, which was instantly verified by the production of his indenture, was, that he was not apprentice to David Tait, but to William Muir. The fact, however, turned out to be, that he had been bound apprentice to Mr Muir, who had resigned his business in favour of David Tait; that though the indenture was not assigned, the witness was employed in the shop at apprentice's wages, and that he had styled himself, when examined in pre-cognition, apprentice to Mr Tait. In these circumstances the designation was most justly sustained, on the ground that such a description was here given as at once led the pannel to the shop where the witness was daily employed, and that whether he was apprentice, or employed at apprentice's wages, neither affected his identity, nor could have misled or kept the pannel in the dark in his enquiries. The interlocutor was special, well expressing the law on this important point: "Find that the description of the witness, John Bruce, contains such a description of the occupation of the witness, and the place where he exercised it, as furnished adequate means to the pannels for directing their enquiries with regard to him; and that the inaccuracy on which the objection is founded, could not have defeated such enquiries if made with any measure of the most ordinary attention; therefore repel the objection."<sup>1</sup>

The subsequent cases have done little more, than follow out and apply the leading principle thus established, with equal regard to the interests of justice, and the rights of the pannel. Thus, where it was objected to William Buchan, designed, "one of the accountants of the Bank of Scotland;" that he was not

<sup>1</sup> Maedonald and Black, June 7, 1813; Hume, ii. 373.

*accountant*, but a clerk in the accountant's office; but it turned out, that Mr Buchan was an *old* clerk in the office, and often acted as accountant, subscribing on such occasions, *pro-accountant*, a majority of the Court held, that the inaccuracy was not such as could mislead the pannel in his enquiries, and therefore repelled the objection.<sup>1</sup> This was followed in another case, where the objection, that Elizabeth Clerk, designed as "wife of Donald Buchanan, miner, at Cornbucbarrow," was truly his widow, he having died some weeks before the service of the indictment; was repelled, as enough was given to distinguish and lead to the discovery of the witness.<sup>2</sup> On the same principle, where it was objected to David Annat, now or lately apprentice to William Anderson, mason in Lochie, "in the parish of Liff, and county of Forfar;" that Lochie was in the *united* parish of Liff and Binnore, and that there is no such parish as that of Liff, the objection, as truly frivolous, was justly repelled.<sup>3</sup> So also, where a witness was designed Thomas Somerville, "residing in Wellington Street, parish of St Cuthbert's, and county of Edinburgh;" and it was stated, that he had been imprisoned for debt two months prior to the service of the indictment; the answer was sustained, that his family continued to reside in Wellington Street, and that therefore a just clue was given, although the words, "now or lately residing in Wellington Street," were not added, which would have rendered the designation correct.<sup>4</sup> In like manner, where it was objected to Elizabeth Hart, that she was only described as "wife of Charles Fortune, tanner, residing in the White Horse Close, Canongate, Edinburgh," and that for the last four months he had been a prisoner in the tolbooth of Edinburgh; the answer was sustained, that the object of designations in the list, was to inform the pannels where to find them, and that the witness had resided at the White Horse Close, long after her husband's imprisonment, and could be heard of there.<sup>5</sup> So also, where it was objected to "Alex. Clark, designed crofter at Clochan, in the parish of New Deer, and county of Aberdeen;" that he had been for three years in the service of a farmer elsewhere, and only occasionally came home, and on Saturday nights; but it appeared from the evidence of the witness, that his family

<sup>1</sup> Thomas Gray, July 11, 1814; Hume, ii. 373.—<sup>2</sup> Per. Lord Gillies and Cowan, Stirling, April 1817; Hume, ii. 373.—<sup>3</sup> Johnstone and Ferguson, Perth, Sept. 16. 1822; Shaw, No. 71.—<sup>4</sup> Archd. Ormand, Dec. 9. 1822; Shaw, No. 82.—<sup>5</sup> Robt. and Catherine Stewart, June 8, 1818; Hume, ii. 364.



resided there; the designation was sustained, on the ground that there was a sufficient clue, and that that is truly a man's home where his family reside, "*ubi lares et focos habet.*"<sup>1</sup> Where a man had been a weaver early in life, and then for seven years a sailor, and then a weaver for five years prior to citation, and he was designed "weaver," the objection was in two different cases, affording nearly the same *species facti*, repelled.<sup>2</sup> On the same principle, it being objected to John M'Andrew, designed "solicitor in Inverness;" that he does not reside, but only has a writing-office there; the objection was repelled, and it was laid down, that a man is correctly designed as trader in such a town, if his shop is placed there.<sup>3</sup> The designation, William Thomson, labourer, Langside-brae, was sustained as sufficient, the parish and county being added.<sup>4</sup>

It has repeatedly been held, that a witness, even in the humblest walks of life, is sufficiently designed by his trade and residence in the street even of a large town, or in a borough of smaller dimensions. Thus, the designation "John Kain, labourer, now or lately residing in High Street of Glasgow," was sustained as sufficient by the Lord Justice-Clerk, though it was strongly urged that the street was of great length, and that the witness had not been found.<sup>5</sup> This was followed by the whole Court, in the case of Joseph Bogle and others, Nov. 22, 1824, where the designation objected to as insufficient, was that of "Isabella Duffie, or Farmer, wife of Philip Farmer, labourer, now or lately residing in Cowgate of Edinburgh," and this was said not to give an adequate clue. The Court, after a full argument, unanimously repelled the objection.<sup>6</sup> On the same principle, the designation "John Gordon, sawyer, now or lately residing in Borrowstonness," was held sufficient, though it was argued that the county, and a street of the borough should have been added.<sup>7</sup> So, also, a witness designed "wife of William Luke, sailor, residing in Stirling," was sustained, although it was strongly urged by the prisoner's counsel, that such a designation in a large town, such as Stirling, truly gave no clue whatever. But it having come out

<sup>1</sup> James Webster, Aberdeen, April, 1826; Pitmilley and Alloway; unreported.—

<sup>2</sup> Robert M'Gavin, Perth, April 1826; unreported; and Beatson Forsyth, July 18, 1822, High Court; unreported.—<sup>3</sup> Macdonald and Others, June 1823; unreported.

<sup>4</sup> Thomson and Fram, January 22, 1827; Syme, 59.—<sup>5</sup> Mary Horn or Macstraffie, Glasgow, Sept. 1823; unreported.—<sup>6</sup> Joseph Bogle and Others, Nov. 22, 1824; Shaw, No. 131.—<sup>7</sup> Stephen Frew, March 13, 1821.

in the course of this witness's examination, that this woman had for three years regularly exercised the trade of a midwife, in that borough, the Justice-Clerk stated, that that particular should have been added to her designation; that the prosecutor is bound to give all the information to the pannel which he himself possesses, and that the reason why the trade and street is held a sufficient designation, even with the lowest class of witnesses, is, that nothing else can in general be given, as the habitations of such persons seldom have a number affixed to them.<sup>1</sup> In truth, it seems just, that in any considerable town, such as Stirling, Perth, Inverness, Kilmarnock, &c., the street in which the witness resides should be added, for it is next to impossible in such a case, if the witness is in the lower rank of life, and has no shop of his own, to find him out, and such, accordingly, has been the usual course in subsequent times. It was sustained as a sufficient objection to Walter Turnbull, designed brother of the said John Turnbull, who was sufficiently designed, that no residence or trade of the witness himself was given.<sup>2</sup>

Although, however, it is never necessary to add the number of the street, yet if this is done, and it proves incorrect, the witness will be cast. Thus, a witness having been designed as residing at 128, Trongate Street of Glasgow, and it having been objected that he resided not at No. 128, but at No. 158, the objection was sustained.<sup>3</sup>

Moreover, though this latitude has been introduced into our practice, where the designation given is such as with ordinary attention might have led to the discovery of the witness, yet where a trade or residence, positively erroneous, is given to the witness, the principle of law still is, that he must be rejected; and the Court will have the less scruple in enforcing this principle now, as such objections must be stated before the jury is sworn, and therefore the sustaining them will not, as was too often the case under the old law, lead to the acquittal of a guilty person. Thus, a witness being designed as residing in "Arthur Street, Edinburgh," and it being proved by her that she resided in *East Arthur Place*, Edinburgh, which is at right angles to Arthur Street, though at its foot, the objection was sustained.<sup>4</sup> A witness designed as "silkweaver now or lately residing in Bull's

<sup>1</sup> William Ward, Dec. 22, 1817; Justice-Clerk's notes.—<sup>2</sup> George Brock, Jan. 6, 1817; Hume, ii. 373.—<sup>3</sup> Barnard Kean, Glasgow, Sept. 1821; Shaw, No. 47.—<sup>4</sup> M'Gill and M'Donald, Nov. 27, 1826; Syme, 19.

Close, Edinburgh," was set aside, as it appeared that he did not *reside* in Bull's Close, but only rented a loom there, and lodged elsewhere.<sup>1</sup> In like manner, a witness designed as residing in Arthur Street, Edinburgh, when it turned out that she resided in Middle Arthur Place, was cast and withdrawn.<sup>2</sup> So also three witnesses were set aside in a case at Aberdeen, in consequence of the omission of the word *street* after *Hutcheon*, in the list annexed to the libel.<sup>3</sup> On the same principle, where the designation was "daughter of the deceased A. B., labourer in Cam-lachie," without specifying where the witness herself resided, this was justly held to be an insufficient designation, as affording no clue whatever for her discovery.<sup>4</sup> So also, where a witness was designed as "tenant in Balnab, in parish of Urquhart and county of Ross," the objection was held good, that the parish of Urquhart is in the county of Nairn.<sup>5</sup> It is obvious that any error in the parish, unless the place is so considerable as to be known of itself, is an insurmountable objection; because it sets the witness into an entirely wrong quarter to make enquiries. The case is otherwise when the place is sufficiently known of itself, as Edinburgh, Glasgow, Perth, Dumfries, &c. There the error in the parish is of no consequence, as it is not by the parishes, but the streets or names that places in such towns are usually sought after.<sup>6</sup>

In the designation of witnesses in the lower ranks of life, care should be taken to describe their *residence*, by the person with whom they lodge, if they do not keep a house of their own. If a labourer or weaver lodges in the house of a lodging-house-keeper in Canongate of Edinburgh, or Gallowgate of Glasgow, it affords no clue whatever to describe them as residing in that street. The prosecutor must go a step farther in such a case, and describe the name and trade of the *householder* under whose roof they dwell. This is invariably the practice of late years, wherever the witnesses are in the middling or lower ranks of life, and do not keep a house of their own.

In the designation of persons in the higher walks of life, possessing a *status* or rank in society, carrying on a profession in a particular town, officiating as a clerk in a banking-house, or the like,

<sup>1</sup> William Robertson, July 12, 1821.—<sup>2</sup> Mysie Brown, March 13, 1827; Syme, 152.—<sup>3</sup> John Mathers, Aberdeen, April 1828; unreported.—<sup>4</sup> James Gilchrist, Glasgow, Spring 1808; Burnet, 454.—<sup>5</sup> Donald Campbell and Others, Inverness, Sept. 24, 1816; unreported.—<sup>6</sup> Vide Ante, p. 266.



the rule is greatly and justly modified, and it is held sufficient to mention their place of abode and profession generally, without giving such a detail of the residence as would be held necessary with persons in a humbler sphere. On this principle, the designation, "Cashier of the Greenock Bank Company," was held sufficient, without any specification either of the witness's residence, or the place of business of the bank.<sup>1</sup> It has for many years been the invariable practice to design all officers and clerks in banks, or other public offices, by the name of the bank, as "clerk in the office of Sir William Forbes and Company, bankers, Edinburgh," instead of their private residence, that being in truth the clue which most certainly and easily leads to their discovery. On the same principle, all persons holding a public situation, as the Sheriffs of counties, Justices of Peace, Procurators-fiscal, Judges of every sort, Professors in Universities, and physicians or surgeons of note, are held to be sufficiently described by their profession and general place of residence or business, without any specific description, as "Dr Thomas Charles Hope, professor of chemistry in the University of Edinburgh." So also a clergyman of a parish is sufficiently described as such, without specifying his place of residence, and any considerable merchant or master manufacturer, by his description as merchant or manufacturer in Glasgow or Edinburgh. But where a general professional designation of this description is alone given, it must be correct or the witness will not be received; and on this principle, where a witness was designed as "one of his Majesty's Justices of Peace for the county of Forfar," and it was objected that he was not on the roll of Justices, but only a Justice *qua* provost of the burgh of Forfar, the designation was held to be insufficient, and the objection sustained.<sup>2</sup>

Frivolous objections were frequently moved to the words "now or lately residing with," as leaving it in doubt whether it was the residence of the witness which was described, or that of another person which left no adequate description of his dwelling. Thus, where the designation was "David Knox, carter, now or lately residing with his mother, Magdalen Wilson, or Knox, widow of David Knox, carter at Gilmerton, in the parish of Libberton and county of Edinburgh," it was objected that no residence was given for the son, and that the designation of the

<sup>1</sup> M'Kay and M'Niel, April 1817, Glasgow; unreported.—<sup>2</sup> Alexander Martin or Milne, July 14, 1824; unreported.

father, who was dead, was not enough. But the reply suggested by Lord Mackenzie was sustained by the Court, that the word "residing," in the beginning of the designation, naturally connected with the habitation assigned in the end, and that the residence of the witness must be held to be the place there specified.<sup>1</sup> A similar objection was repelled in a late case, where the designation "Christian Thomson, now or lately residing with James Dickson, labourer at Loanside, in the parish of Dalkeith," was objected to, on the ground that no residence for Dickson was set forth. The answer was unanimously held good, that the word "residing" clearly applies to both.<sup>2</sup> So also where a witness was designed "A. B. or C., wife of D. C., tanner, and now or lately residing in Burnet's Close, High Street, Edinburgh," it was held that this gave the residence of the husband as well as the wife.<sup>3</sup>

Decisions have varied upon the effect which should be given to the fact of two persons of the same trade, name, and surname existing in the same place, a circumstance which frequently occurs, especially in Highland parishes. In one case, a witness designed "John Monro, now or lately residing in Rhinovic, in the parish," &c., was cast, as there were two John Monros there.<sup>4</sup> But later decisions, pronounced since these matters have been frequently brought under the notice of the Court, have settled this point on a different and a more correct footing. Thus, where it was objected to the designation of Thomas Somerville, described as "residing in Wellington Street," that there were two Thomas Somervilles residing there, the objection was, after full consideration, repelled by the whole Court.<sup>5</sup> This precedent was followed by Lords Pitmilley and Alloway at Inverness, May 1826, where the designation, "Donald Ross, now or lately residing at Altass, in the parish of Creich and county of Sutherland," was objected to, on the ground that there were two Altass's, and three Donald Ross's residing at the two. The objection was, after a full argument, repelled, on the ground that there could be no difficulty in discovering the witness, and that unless the prisoner could assert and prove that he could not discover which it was, the objection was without foundation.<sup>6</sup> The whole Court gave a similar judg-

<sup>1</sup> James Mitchell and John Sharp, July 11, 1825; Shaw, 136.—<sup>2</sup> William Thomson and Others, Jan. 22, 1827; unreported.—<sup>3</sup> James Jones, March 13, 1826; unreported.—<sup>4</sup> Inverness, April 1816; John Ross.—<sup>5</sup> Archibald Ormond, Dec. 9, 1822; record.—<sup>6</sup> James McLean, Inverness, May 1826; unreported.

ment in the case of Isabella Blinkhorn, January 1824, where Finlay Hay, designed "carter, now or lately in Johnston, in the Abbey Parish of Paisley," was objected to, on the ground that there were two Finlay Hays, father and son, both carters, who both resided there. The answer was unanimously held to be good, that the pannel could easily, by sending to Johnston, discover which it was.<sup>1</sup> This point, therefore, may be regarded as fixed, and there can be no doubt that it is fixed on right principle, for by the very fact of stating the objection, the pannel proves that he *has discovered* the witness, as well as the other person bearing the same name.

The designation, present prisoner in the tolbooth of Edinburgh, Glasgow, &c. is justly held sufficient, unless there are other prisoners of the same name also confined there, in which case it is advisable, if possible, to add some other distinguishing mark, as the trade, father's name, &c. to distinguish the one from the other.<sup>2</sup> The objection that a witness was designed "John Campbell, present prisoner in the Castle of Edinburgh," accordingly was repelled, even though it was alleged at the same time, that all access to the witness had been refused; it being held, that the proper remedy in the latter case would have been to have made an application to the Court for authority to visit the prisoner, which would unquestionably have been granted.<sup>3</sup> And even where there are other prisoners of the same name in jail, it deserves consideration whether there is any rational ground on which the objection could be sustained, since the law has been settled, that it is no good objection in the ordinary case that there are two persons of the same name, surname, and trade, in the same village or town; for how narrow are the limits of a jail, and how easy of access the prisoners there, compared to the smallest village or town in the open country? At all events, this objection is one like all others which go to the sufficiency of the designation, or the means of getting at the prisoner, which must be stated before the jury is sworn, and which, therefore, the pannel has little interest to propone.

8. It is a good reply to any objection founded on an error in a name, that the witness is designed as he has designed himself, and signed when examined in precog-

<sup>1</sup> Isabella Blinkhorn, Jan. 1824; unreported.—<sup>2</sup> Hume, ii. 373; Andrew M'Kinlay July 19, 1817; *ibid.*—<sup>3</sup> Andrew M'Kinlay, July 19, 1817.



dition ; or to an alleged insufficiency of designation, that the pannel has made no enquiries to discover the witness.

It is impossible that any prosecutor, how accurate or industrious soever, can be acquainted with the names of all his witnesses, except from their own report or signature. If, therefore, he designs a witness by the same name and mode of spelling as the witness has designed, or signed himself, he has done his utmost to be accurate; and the pannel will not be permitted afterwards to object, that that mode of signing or spelling was erroneous, since, whether it is right or wrong, it at least fixes the identity of the person, seeing he himself signed in that way, and has furnished him with the means of discovering who he was, as is proved by his having discovered and stated the objection.<sup>1</sup> But it is a different matter where the error occurs in the designation of the trade, or habitation of the witness ; for the prosecutor, though he cannot be supposed to know from personal knowledge the names of the witnesses, is yet supposed to know where they live, from his having known how to get at them.

It is also a good answer to any objection to the sufficiency of the designation of a witness, if the pannel has not made any enquiries or attempt to find them out. This was held as fixed law in many cases before the late statute was passed ;<sup>2</sup> but since that took place there can be no doubt upon the matter. The objection to the sufficiency of the designation must now be stated before the jury is sworn, on the ground of the pannel's having "been misled or deceived in his inquiries concerning such witness, or *unable to find out* such witness;" and, of course, unless he can allege that he had sought for him, he cannot allege any of these things.

9. If the witness is designed as residing in a particular place, he will not answer the description unless he is actually residing there at the time ; but under the words "now or lately," which are now usually added, it is sufficient if the witness has resided there at any time during the term preceding the Whitsunday or Martinmas last, before the service of the list.

<sup>1</sup> James Wilson, March 14, 1826 ; unreported. — <sup>2</sup> Archibald Ormond, Dec. 9, 1822.

If the prosecutor designs a witness as presently residing in a particular place, or keeper of a toll-bar, without any addition, it is evident that the designation is erroneous if he does not reside there, or keep the bar, at the time of serving the libel, and so it has been held.<sup>1</sup> This principle was applied with great, and, it may be thought, with excessive strictness, at Aberdeen, Spring 1826, in the case of John Murray. The principal witness in that case, which was one of rape, was designed “Christian Urquhart, daughter of, and *then*, and now or lately residing with Alexander Urquhart, at Knockies, in the parish of Turriff and county of Aberdeen.” It was objected, that she did not reside with her father at the time of the assault, but came there *a fortnight after*, and had lived with him since, but at the time libelled lived with a Mr Milne, in a different parish. Lords Pitmilley and Alloway sustained the objection, in respect it occurred in so important a particular as the description of the person assaulted, and the pannel was in consequence acquitted.<sup>2</sup> But this case, which was judged on the principles applicable to the description of a person injured, which are different from those which regulate the designation of a witness, may now be fairly considered as wrong decided, since the learned Judges themselves who pronounced the decision, came to be satisfied on consideration that it was adjudged with excessive strictness. The designation was in the main correct; it rightly set forth the witness’s present residence and name; and the particular added *unnecessarily*, in regard to her residence at the time of the assault, was a matter of no sort of moment, an inaccuracy in which neither affected the identity of the person, nor could possibly mislead the pannel in his enquiries. But this case, where the principle was thus pushed to an extreme length, shows the accuracy which is requisite where a positive allegation is made as to the present residence of a witness.

To obviate this risk, the practice has been introduced, and has now become a fixed matter of style, to design the witnesses as “now or *lately* residing” in the place described. In interpreting the words “or lately,” the Court have adopted the reasonable and just principle of holding it to apply to the *whole term* preceding that in which the service of the libel occurred, so that if the witness resided there at any time during that term, the desig-

<sup>1</sup> Adam Scot and Others, Jedburgh, Sept. 1815.—<sup>2</sup> John Murray, April 1826; Hume, ii. 198.

nation is deemed sufficient. This principle appears to have been first laid down at Glasgow in October 1818, in the case of Macmillan and Rob, where it was objected to Colin Black, designed "porter, now *or lately* residing in King Street, Calton of Glasgow," that he does not *now* reside in King Street, but in Catherine Street, to which he moved from King Street at Whitsunday last. The Court repelled the objection, upon the reasonable and sufficient ground, that as Whitsunday and Martinmas are the ordinary terms of removal from dwelling-houses, the phrase "lately" cannot so well be limited by any period as by the term preceding that in which the indictment is served.<sup>1</sup> This was followed by a judgment of the whole Court on January 11, 1823, where it was objected to Isaac Martin, designed as "now or lately residing with Arthur and Colquhoun, publicans, Dow's Close, High Street, Edinburgh," that the witness has not resided with Arthur and Colquhoun since the last term of Martinmas. The Court sustained the answer, that the witness had been servant there up to the *Whitsunday preceding*, and that the phrase "now or lately," embraces the whole period of the term preceding that in which the libel is served.<sup>2</sup> The same rule was followed in a prior case, where it was objected to Janet Cairns, designed as "daughter of Andrew Cairns, deceased, architect in Edinburgh, and now or lately residing at Kilmun aforesaid," that the first part of the designation afforded no sort of clue; and that as to the second, she had left Kilmun six months before the service of the libel. The Court repelled the objection.<sup>3</sup> The same principle was followed by the High Court in a late case, where it was objected that a witness designed "as now or lately residing in Burnet's Close, Edinburgh," had been three months in jail at the date of the service of the libel, the words "or lately" being held amply sufficient to render the description sufficiently accurate,<sup>4</sup> and a decision to the same effect was given in a later case, where the objection taken to a witness was, that he was only designed as residing at Camelon, whereas he had removed from thence fifteen weeks before the service of the indictment.<sup>5</sup> The Justice-Clerk decided the point without allowing an answer from the prosecutor.

<sup>1</sup> Knox, M'Millan, and Rob, Oct. 2, 1818; Hume, ii. 374.—<sup>2</sup> Charles M'Laren and Others, Jan. 11, 1823; Shaw, No. 83.—<sup>3</sup> J. M'Dougall, April 19, 1817, Inverary.—<sup>4</sup> James Jones and Others, March 13, 1826; unreported.—<sup>5</sup> Francis Cockburn, Stirling, April 1828.



10. Every objection to the designation of a witness must be stated before the witness is sworn; and if not then stated, it cannot afterwards be received, how well soever founded in itself.

When a witness is brought into Court, the pannel is asked whether he has any objections to him, and if none are stated, or if stated, if they are repelled, he is sworn. After that has been done, it is a fixed principle that no objection to designation can be received, even though it should be perfectly well founded in itself, and has come to the knowledge of the pannel for the first time in the course of the examination.<sup>1</sup> So it was unanimously held by the Court in the case of Ebenezer Knox, June 16, 1817;<sup>2</sup> and the law has since been often laid down in the same manner from the chair, with the concurrence of the whole Court, though, from the point being considered as so fixed, no argument took place in regard to it, nor any argument entered in the record.

### SECTION III.—OF THE SWEARING OF WITNESSES.

1. All objections tending to exclude the witness, of whatever kind, must be stated before he is sworn.

THE rule of law, that all objections to witnesses must be stated before they are sworn, is not confined to objections to their citation or designation. It applies also to all objections tending to *exclude* his testimony, founded on the fame, situation, or behaviour of the man, as that the witness is infamous, or interested in the issue.<sup>3</sup> So strongly is this principle founded in our practice, that even where it accidentally came out in the course of the examination of a witness, that she had been convicted of reset at a previous Circuit Court, it was laid down as clear law on the Bench, that no objection to her admissibility could be founded on that circumstance, in respect that she had been sworn without objection, although in that particular case the Lord Advocate consented *ex gratia* not to press her examination.<sup>4</sup>

The rule, however, applies only to objections to *admissibility*, or which go to exclude the witness altogether. Certainly the

<sup>1</sup> Burnet, 455; Hume, ii. 373. 376.—<sup>2</sup> Hume, *ibid.*—<sup>3</sup> Hume, ii. 376; Burnet, 455.  
—<sup>4</sup> Adams and Reid, June 16, 1828; Hume, ii. 376.

same does not hold with those minor imputations, which go only to impeach his veracity, or diminish his credibility with the jury, such as previous convictions for crimes not inferring disqualification to give testimony, irregularity of life, intimacy with the pannel, near relationship, or the like, which go to affect his *credit* only. These facts may be, and constantly are elicited, either in cross-examination or in the course of an examination *in initialibus* only.

Farther, though the rule is absolute, that all objections to admissibility, must be stated before the jury is sworn, yet cases may be figured where it must be competent in one shape or another, either by motion in arrest of judgment, or application to the royal mercy, to have the whole proceedings set aside. Put the case, that a stranger personates a witness, answers to his name, and is sworn as he, and that in the course of the examination the truth comes to light, can it be imagined, that in such a case no redress can be obtained, and that a trial tainted with so fatal an irregularity must necessarily be sustained?<sup>1</sup>

2. If no objection be stated, the witness is to be sworn in common form, according to the method of the religious persuasion to which he belongs, the affirmation of a Quaker being now, by special statute, equivalent to the oath of another individual.

Where no objection is stated to the witness, he is next to be sworn, and the words of the oath admirably calculated both to impress the witness with the solemnity of the occasion, and prevent the subterfuges by which the truth is too often attempted to be concealed, are in these terms:—"I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth, in so far as I know, or shall be asked on this occasion." Then follow the purging the witness from malice and partial counsel, which shall be immediately considered.

Those of the Protestant church, whether Episcopalian, Presbyterian, or Dissenter, are all sworn, standing uncovered, with the right hand uncovered held up. But Catholics are sworn holding the right hand on a cross drawn in pencil or chalk on the Gospels,

<sup>1</sup> Hume, ii. 376; Burnet, 455.

that being the form which is considered most obligatory by persons of that religious persuasion. A Jew is sworn in the usual manner, with this difference, that he puts on his hat, and holds the Old Testament between his hands when taking the oath; and so it has been done on various occasions.<sup>1</sup> It has been held in England, that a Mahometan witness should be sworn on the Alcoran, and that is the practice in such cases in that country.<sup>2</sup>

Formerly it was enacted, by an express statute, that no Quaker could be permitted to give evidence in a *criminal* trial, unless he took the oath in common form, though the case was otherwise in civil matters.<sup>3</sup> But this is now altered by the 9 Geo. IV. c. 29, which enacts, "that every Quaker who shall be required to give evidence in any criminal cause or prosecution, shall, instead of taking the oath in the usual form, be permitted to make his or her solemn affirmation or declaration, in the words following: 'I do solemnly, sincerely, and truly affirm and declare,' which affirmation or declaration shall be of the same force and effect in all Courts of Justice, as if such Quaker had taken an oath in the usual form; and if any Quaker, making such affirmation or declaration, shall be convicted of having affirmed and declared any matter or thing, in such a way, as if the same had been sworn to in the usual form, it would have amounted to perjury, every such offender shall be subject to the same punishment, to which persons convicted of perjury are liable; and if any Quaker shall refuse to make such affirmation and declaration, or having made the same, shall refuse to give evidence, or shall wilfully conceal the truth, or be guilty of wilful prevarication, such Quaker shall be liable to the same pains of law which apply to such offences respectively where an oath is administered."<sup>4</sup> The effect of these enactments, is to put the solemn affirmation of a Quaker on a footing of equality, both in respect of solemnity, credibility, and responsibility, when emitted in a criminal trial, with the oath of an ordinary witness.

3. It is incumbent on every witness, excepting Quakers, to take an oath, and they must take the solemn affirmation above set forth; and if the witness decline, he may be summarily imprisoned by order of the Court.

<sup>1</sup> John Rennie, July 16, 1821; Laidlaw and Spittal, Glasgow, Sept. 1823; unreported.—<sup>2</sup> John Ryan, 1784; Leach, i. 54.—<sup>3</sup> 22 Geo. II. c. 46. No. 37.—<sup>4</sup> 9 Geo. IV. c. 29. § 13.



It sometimes happens, that witnesses, from religious scruples, refuse to be sworn, resting their determination in general on the well-known text in scripture, "swear not at all," which they consider as decisive, not only against unnecessary or profane swearing, but any taking of an oath whatever, even on the most necessary or solemn occasions. However much law may respect conscientious scruples, even in their most absurd or extravagant consequences, it cannot admit as an excuse from taking an oath, what obviously strikes at the root, not only of all judicial procedure, but of all binding obligation between man and man. It is therefore settled, that in such a case, the obstinate witness may be committed, and such committal may continue, until it appears to the Court, that the length of the confinement has expiated the offence. In the trial of Thomas Muir, accordingly, Aug. 30, 1793, a witness who refused to take an oath, was committed to jail, though as he relented after entering the prison, he was brought back at his own request, and emitted an oath in common form.<sup>1</sup> The same obstacle occurred in a later case, and a committal to prison was attended with a similar effect of overcoming the witness's scruples, and inducing him to take the oath.<sup>2</sup> But in a subsequent instance, a witness, who on religious scruples refused to swear, was committed to prison, and after lying there for a fortnight, was liberated on his expressing contrition.<sup>3</sup> This man declared in the witness's box, that he would not take an oath, though called on to swear against a man whom he had seen murder his wife before his eyes; an admission which, Lord Gillies justly observed, rendered all hesitation as to the course which should be pursued in regard to him unnecessary.

4. Children under the age of twelve years cannot be put upon oath, but they may be examined on declaration, if they appear to be intelligent, and to understand the obligation of speaking the truth, though without that sanction.

It happens very frequently in criminal trials, that children are called upon to give the most important information, from having witnessed acts of the greatest moment in the case; and when

<sup>1</sup> Hume, ii. 377.—<sup>2</sup> Donald Elphinston, June 1, 1824; unreported.—<sup>3</sup> Christian Tweedie, June 22, 1829; Shaw, No. 196.

they are simple and ingenuous, they generally give better evidence than any other person. The rule has now been for a number of years fixed, that a child may be sworn *above*, but cannot be sworn *under* twelve years; but that, though they *may* be sworn above that age, this *should not* be done under fourteen, if it appears, from defect either of education or intelligence, that he does not understand the solemnity of an oath.<sup>1</sup> Numerous cases exist on both sides of the line, which demonstrate how completely this rule is established in our practice.

Thus, on the one hand, in the case of Richard Broxup, Dec. 29, 1800, Christian Dalzell, a witness for the prosecutor, "having declared she was *below twelve* years of age, which was not denied by the public prosecutor, therefore the Lords find that she *cannot be put upon oath*, but that it is competent to take her evidence by way of declaration."<sup>2</sup> All witnesses since that time, below that age, have been examined by declaration only. Thus, Lachlan M'Intosh, "being only ten years of age, was examined, not upon oath, but by declaration only."<sup>3</sup> David Alvick, a boy of fourteen, was examined in the same way;<sup>4</sup> as was Joseph Alison, aged eleven, in a still later instance.<sup>5</sup> The same was done with a child of eleven years of age, whom the Court refused to have sworn, but examined on declaration.<sup>6</sup> A girl of ten years of age, emitted her declaration only in a subsequent case,<sup>7</sup> and the rule of never swearing a witness below that period is now fully established.

On the other hand, it is established by an equally clear train of precedents, that a child above twelve years of age *may* be put on oath if he appear to understand its nature, and that this *will* be done if his intelligence and education fit the witness to receive it. Thus, in the case of Charles Fallon, Aug. 10, 1775, alleged to have been committed on a girl hardly arrived at woman estate, Betty Tweedale, aged fourteen and some months, Mary Sneddon, aged thirteen and some months, and Janet Blackie, aged twelve and some months, were sworn without objection.<sup>8</sup> In a later case, Margaret Yule, aged thirteen, was also sworn.<sup>9</sup> Still more lately, a boy of thirteen and some months was sworn after

<sup>1</sup> Hume, ii. 341; Burnet, 391.—<sup>2</sup> Richard Broxup, Dec. 29, 1800; Hume, ii. 341.  
<sup>3</sup> John Batterly, Jan. 11, 1805.—<sup>4</sup> John Brown, Perth, Oct. 7, 1811; *ibid.*—  
<sup>5</sup> Joseph Rac, July 22, 1817.—<sup>6</sup> John Gibb, Aberdeen, Spring 1817; unreported.—  
<sup>7</sup> Inglis, M'Gilp, and Grant, Dec. 27, 1826; Niel and Bruce, June 4, 1827; Syme, 187.—<sup>8</sup> Hume, ii. 341.—<sup>9</sup> Daniel M'Kay, July 3, 1781.

some preliminary questions from the Court.<sup>1</sup> And in the case of Archibald M'Quarry, Nov. 24, 1817, a boy of thirteen and some months was sworn as a witness, though that was objected to, both on the ground of his nonage, and his bad character, having been repeatedly in bridewell.

But it is not imperative on the Court to swear a witness little more than twelve years of age; but they may examine him on declaration only, if his state of intelligence or defect of education seem to point to that as the more expedient course. Thus, in one case a boy under fourteen,<sup>2</sup> and in another case a boy above twelve,<sup>3</sup> were examined on declaration only, as it appeared from their answers that they did not understand the nature of an oath. The same course was adopted for a similar reason in much earlier cases. Thus, William Rankin was examined on declaration, though turned of thirteen;<sup>4</sup> as was John Paterson, aged twelve and six months;<sup>5</sup> and another boy, though past thirteen, on which occasion the Court declared a witness under fourteen should not be sworn if he does not understand the nature of an oath.<sup>6</sup> Children of a much earlier age may be admitted to give evidence by way of declaration, where the justice of the case requires that they should be received. Thus, Lord Braxfield admitted, in a case of fire-raising, the declaration of a girl of *eight*, and a boy of *six* years.<sup>7</sup> At Dumfries, May 1774, the principal witnesses were two boys, one of ten, and one of nine years of age.<sup>8</sup> And in the case of Findlater, Inverness, Oct. 1749, the two chief witnesses were a girl of nine, and a boy of thirteen.<sup>9</sup> A girl between eight and nine was admitted on declaration in the case of Davidson, Aberdeen, Sept. 1765.<sup>10</sup> Our later practice has been entirely conformable to these precedents. Thus, in a case of assault with intent to ravish, a girl of nine, and a boy of ten, were lately admitted to give their evidence.<sup>11</sup> A child of eight years of age, the person ravished, was received, and gave her evidence by declaration, in the case of James Burtney, Nov. 15, 1822;<sup>12</sup> and in that of John Lovie, Aberdeen, Sept. 27, 1827, who was most

<sup>1</sup> Main and Aitchison, March 25, 1818; Hume, ii. 342.—<sup>2</sup> Alex. Buchan, April 26, 1819; Shaw, No. 26.—<sup>3</sup> Alex. Sinclair, Inverness, April 8, 1822; Shaw, No. 67.—<sup>4</sup> David Young, July 31, 1738; Hume, *ibid.*—<sup>5</sup> John Reid, Aug. 1, 1774; *ibid.*—<sup>6</sup> Adam Scott, Jedburgh, Autumn 1805.—<sup>7</sup> Janet White, Jedburgh, April 1782; Burnet, 343.—<sup>8</sup> Macknight, Dumfries, May 1774; Burnet, *ibid.*—<sup>9</sup> Findlater, Inverness, Oct. 1749; Burnet, *ibid.*—<sup>10</sup> *Ibid.*—<sup>11</sup> James Purves, Jedburgh, Autumn 1819; unreported.—<sup>12</sup> Unreported.



ably defended by Mr Cockburn, a boy only seven years old was examined on declaration, concerning a fact intelligible to an infant of his years.<sup>1</sup> These precedents render it unnecessary to refer to other cases where the same was done with witnesses from seven to ten years of age, the names of which are given in the note.<sup>2</sup>

The age of the witness is to be judged of by the time when he first appears to give evidence; and therefore, if he is of the fit age at that time, he may be sworn, though at the time when the facts spoken to occurred, he was too young for that to have been done.<sup>3</sup> This, however, is to be understood only if the facts spoken to are such as a person at the age of the witness when they occurred could understand, and they occurred not very long before the period of the trial.<sup>4</sup> Instances accordingly have occurred in our practice, of a witness of twenty-two being allowed to depone to facts which he witnessed when only eleven years and a half old;<sup>5</sup> and of a witness being rejected under circumstances somewhat similar.<sup>6</sup> In truth, no fixed rule can be laid down for such cases; but they must be governed by their own circumstances, as the nature of the facts to be deponed to, the age of the witness when they occurred, the distance of time between that and the trial, and the degree of intelligence which he exhibits when tendered for examination.<sup>7</sup>

5. Persons cannot be sworn as witnesses who are idiots, insane, or labour under total incapacity arising from any physical defect; but those who are deaf and dumb may be received, if of sufficient intelligence and capacity to understand the nature and obligation of an oath.

It results from the first principles of evidence that no person is to be allowed to give testimony in criminal trials any more than civil cases, who is not fully aware of the import of what he is swearing, and capable, from the state of his mind, of fully understanding both the obligation of an oath, and the facts involved in his deposition. Of course idiots, madmen, or lunatics, must be excluded, if they are either constantly in that condition,

<sup>1</sup> Hume, ii. 342.—<sup>2</sup> David M'Ilwan, Ayr, Sept. 1815, a boy of nine; Gibb, Perth, April 27, 1817, a boy of nine.—<sup>3</sup> Hume, ii. 342.—<sup>4</sup> Burnet, 396; Hume, *ibid.*—<sup>5</sup> Gavin Dunbar, July 12, 1637; Hume, *ibid.*—<sup>6</sup> Love and Others, March 4, 1687; *ibid.*—<sup>7</sup> Burnet, 396.

or subject to such frequent returns of the malady, and at such short intervals, as renders their testimony unfit to be relied on.<sup>1</sup> If any one be deranged at times only, his testimony may be taken, at least *cum nota*, concerning any matter which has fallen under his observation when in a state of sound health, if he is in the same state when examined at the trial, and no such serious fit of insanity has since intervened as to cloud his recollection, and cause him to mistake the illusions of his imagination for the events he has witnessed ;<sup>2</sup> but if these requisites be wanting, he should either be totally rejected, or received with the greatest caution.<sup>3</sup> The law of England is the same on this head.<sup>4</sup>

It is the province of the Court alone, to decide upon an objection of this description, as upon every other matter which relates to the admissibility of or legal objection to testimony. Where, therefore, the objection of insanity or idiocy is stated, it is their duty to proceed to take the evidence that may be offered, and either to admit the witness, reject him, or admit him *cum nota*, as the justice of the case may seem to require. This was accordingly done in several early cases,<sup>5</sup> as well as in a late case, where the objection was that the chief witness, the person robbed, had been in a strait waistcoat recently, before the robbery was committed, and was generally accounted an insane person. A proof was allowed ; but the import of it was, that the insanity was of that kind only, which frequently arises from excessive drinking, and rapidly subsides with the termination of that state of excitement ; and the witness was accordingly admitted.<sup>6</sup>

It is no objection to the admissibility of a witness that he was born deaf and dumb, and continues so at the time of the trial, if he has received such tuition, by signs or otherwise, as renders him capable of distinct memory, and of understanding the nature of an oath. This was settled, after full consideration, in a case where the chief witness, in a case of rape, was deaf and dumb ; but had been instructed by teachers, by means of signs, in regard to the nature of an oath, of a trial, and the obligation of speaking the truth on such an occasion. After taking evidence in regard to her qualifications in this respect, from those who had instructed her, the Court found that she was of sufficient capacity to be examined as a witness, and allowed her to be examined accord-

<sup>1</sup> Hume, ii. 340 ; Burnet, 390.—<sup>2</sup> Hume, *ibid.* ; Burnet, 390.—<sup>3</sup> *Ibid.*—<sup>4</sup> Philips, i. 20.—<sup>5</sup> Love and Others, May, 4, 1687 ; Hume, ii. 340.—<sup>6</sup> Thomas Meldrum, Dec. 11, 1826 ; Syme, p. 31.

ingly by means of interpreters. She gave her deposition, in a manner perfectly satisfactory, by means of signs; but having failed in establishing the completion of the crime, the prisoner was acquitted.<sup>1</sup> The rule is the same in this particular by the law of England.<sup>2</sup>

6. All persons who believe in God and a future state are admissible, of whatever creed or religion they may be; but in England avowed atheists or infidels are utterly inadmissible.

It frequently happens that persons are called on to give evidence, who are neither Christians nor Jews; but Mahometans, Gentoos, Lascars, Chinese, or others, who are entire strangers to the Christian faith. The rule of our law, accordingly, is, that such persons, whatever their persuasion may be, are admissible to give evidence, if they believe in God and a future state.<sup>3</sup> They should, in all cases, be made to take our oath, coupled with any additional solemnity, which their own faith has established to increase its obligation. The proper mode of examining a witness, to ascertain their competence in this particular, is not to ask if he believes in the Gospel, or Jesus Christ, but whether he believes in God and a future state; and if he does, he is admissible. This question should be asked where there is any doubt of it before the witness is sworn.<sup>4</sup> A Mahometan should be sworn on the Koran; a Gentoos with his hand touching the foot of a Brahmin.<sup>5</sup> But whatever is the form of the swearing, the nature of an oath is everywhere the same; it is an appeal to Heaven, calling upon God to witness what is said, and invoking his vengeance if it is false.<sup>6</sup>

The law of England is settled upon the same principle, it having been fixed by them, after solemn argument and great consideration, that the depositions of witnesses, professing the Gentoos religion, who had been sworn according to the ceremonies of their religion, under a commission out of Chancery, ought to be admitted in evidence.<sup>7</sup> But they have qualified this principle with the exception, that infidels who believe not in God, or a

<sup>1</sup> Alex. Martin, June 30, 1823; unreported; Hume, ii. 340.—<sup>2</sup> Ruston's case; Leach, i. 455; Phil. i. 20.—<sup>3</sup> Burnet, 395; Stewart Nicolson, Dec. 6, 1770; Morrison and Green's case, March 5, 1705; Burnet, *ibid.*—<sup>4</sup> Phil. i. 23.—<sup>5</sup> Morgan's case, Leach, i. 64; Phil. i. 25.—<sup>6</sup> Phil. i. 25.—<sup>7</sup> Omichund and Barker, A. and K. i. 21; Phil. i. 23.



future state of rewards and punishments, cannot in any case be received.<sup>1</sup> It has not yet come to be determined with us, whether such an exception from the obligation of giving testimony can be admitted in favour of those professing, or *alleging* they profess such opinions. But when the point shall arrive, it is well worthy of consideration, whether there is any rational ground for such an exception; whether any man can be credited who affirms that he disbelieves in a Supreme Being; whether the risk of allowing unwilling witnesses to disqualify themselves by the simple expedient of alleging that they are atheists, is not greater than that of admitting the testimony of such as make this profession; and whether, therefore, the proper method of dealing with such characters is not to compel them to take the oath, by the usual compulsitor of imprisonment, and leave their evidence to the jury, with the observation, that they have either uttered a falsehood in the face of Heaven, or have professed an absurdity, which proves their minds to be differently constituted from that of ordinary men.

7. After a witness is sworn, he is purged of rewards, malice, and partial counsel, and it is his duty to answer every question which the Court hold he is bound to do; and if he refuse to answer any one, or remain silent, or appear in the box in a state of intoxication, he is liable to be instantly imprisoned.

After a witness is sworn, he holds down his hand, and is asked by the same oath, Have you any malice or ill-will at the prisoner? Have you received any reward, or promise of reward, for giving evidence? has any body told or instructed you what to say on this occasion? If he answers these questions, which are called the examination *in initialibus*, in the negative, he is then examined concerning the facts of the case. An ample commentary on these points will be found in the subsequent sections of this chapter.

Sometimes the witnesses on being so questioned, say they have malice to the prisoner. This generally means that they wish them to be punished if they are guilty, and they are set right by being asked whether they would say any thing false against him.

<sup>1</sup> *Fachina v. Sabine*, Stra. 1104; *Morgan's case*, Leach, i. 64; Phil. i. 23.

If a question is put to a witness, which he hesitates to answer, it is his privilege to appeal to the Court, who will not fail to instruct him as to his duty; protecting him, and permitting him to decline to answer, if he is legally entitled to do so, and explaining to him that it is his duty to make a full disclosure if he has no such privilege. But if, instead of this his obvious and safe line of conduct, he takes upon himself either to remain silent, or to refuse to answer any question which the Court hold he is legally bound to answer, he may be summarily imprisoned. On this principle, a witness, who, after being sworn, stood silent, and refused to say a word, was imprisoned for four months, and only liberated by a petition to the Court setting forth his contrition.<sup>1</sup> For the like reason, a witness, in a late case, at the Glasgow Circuit, who appeared at the bar in a state of intoxication, was committed to prison for six weeks.<sup>2</sup>

If the witness does not understand English, he is to be examined by an interpreter, who is sworn "truly and faithfully to interpret between the Court, the prosecutor, and the witness." This is frequently done with Gaelic witnesses, whose circumlocutions and evasions generally give rise to no small difficulty and embarrassment to all concerned.<sup>3</sup>

Any attempt to evade and escape from giving testimony, will be summarily punished by the Court where it occurs. Upon this principle, where two witnesses, after being locked up by the macer in the witnesses' room, contrived to make their escape, they were found guilty of contempt of Court when apprehended, and sentenced to a month's imprisonment.<sup>4</sup>

#### SECTION IV.—OF THE OBJECTIONS OF INFAMY AND SOCIUS CRIMINIS.

Besides the objections already considered, which go to prevent a witness from being sworn, on the ground of incapacity or unfitness to give testimony, there are others, which are personal to the witness, and exclude him from giving testimony either in general or in the particular case which is before the Court—of

<sup>1</sup> James Roxburgh, Ayr, Spring 1822; Hume, ii. 140.—<sup>2</sup> Winter Circuit, 1830; record.—<sup>3</sup> Allan M'Lean, Dec. 1, 1828; Shaw, No. 169.—<sup>4</sup> Thomas Innes and John M'Ewan, Feb. 28, 1831; Shaw, No. 211.

these, the chief are infamy and near relationship to either of the parties in the cause.

1. A witness is rendered infamous by a conviction for perjury, or subornation of perjury, or any of the greater offences, or any crimes involving the *crimen falsi*, if obtained in a jury trial.

It is a fixed principle, that a conviction for any of the graver and more serious offences, if obtained on a jury trial, infers infamy, and this formerly disabled a witness in all future time from giving testimony.<sup>1</sup> The crimes, a conviction for which was attended with serious and indelible effects, were, in the first place, all those offences which involved the *crimen falsi* in all its branches, such as forgery, falsification of writings, perjury, subornation, making or uttering false coin, falsehood, fraud, and wilful imposition, or swindling, bigamy, and fraudulent bankruptcy.<sup>2</sup> The like holds of all those great and atrocious crimes which by law forfeit the offender's life and goods, though from the indulgence of the Crown, or a restriction of the libel by the public prosecutor, this effect may not have taken place in that particular case, as treason, murder, robbery, rape, fire-raising, hame-sucken, sodomy, incest, piracy, plundering of wrecks, attempting to murder by shooting, stabbing, or cutting.<sup>3</sup> To these must be added, theft and reset of theft, when prosecuted before a jury;<sup>4</sup> though the sentence should have been imprisonment only, or banishment from a particular shire or borough.

On the other hand, no such mark attaches in pursuance of a sentence of fine and imprisonment for a common assault, or a petty riot, or breach of the peace, or theft of small articles or sums without a jury, or the penalties of clandestine marriage, usury, or offences against the revenue laws, as decerned for in Exchequer.<sup>5</sup> It has been unanimously held by the Supreme Court, that a conviction of deserting in time of war to the enemy, by a court-martial, did not infer disqualification, but affected credibility only.<sup>6</sup> A conviction for an aggravated assault has been held to be no objection to admissibility,<sup>7</sup> or one for assault

<sup>1</sup> Hume, ii. 353; Burnet, 400.—<sup>2</sup> Burnet, 401; Hume, ii. 353.—<sup>3</sup> Ibid. ibid.—

<sup>4</sup> Ibid. ibid.—<sup>5</sup> Hume, ii. 401.—<sup>6</sup> Janet Anderson and John Fogarty, July 8, 1822; Shaw, No. 64.—<sup>7</sup> Thomas Templeton and James M'Kennie, May 2, 1818; Ayr Record.



and deforcement.<sup>1</sup> In general, the usual test relied on in those cases, such as theft, fraud, or reset, where the higher degrees of the offence inferred infamy, and the lower did not, was, that the witness was inadmissible if convicted by a jury, but otherwise, if in a summary way, without the intervention of an assize.<sup>2</sup>

There are several crimes lying between these extremes, of a more doubtful character;—such as violating sepulchres, culpable homicide in its lower degrees, rash driving, or steering boats; serious rioting; outrageous or aggravated assault; sedition, or the like. No cases have yet occurred which warrant the assertion that a conviction for such offences, even when accomplished by the intervention of a jury, infer legal infamy; and the general tendency of practice in modern times, which is to abridge objections tending to disqualify and receive them against credibility only, leaves little room for doubt that they will be held not to infer an absolute inability to give testimony, but be considered as stains on credibility only.<sup>3</sup> In the case of Scott and Adamson, Glasgow, May 1805, it was held that a conviction for sedition would not infer infamy; and it has recently been held by the Court, that a conviction for several acts of mobbing and rioting, with assault to the danger of life, would not disqualify.<sup>4</sup> In England, the law seems to be settled, on the whole, in the same manner. There they hold that every branch of the *crimen falsi*, as forgery, perjury, subornation, and all crimes which involve the charge of falsehood, and affect the public administration of justice, renders the witness incompetent;<sup>5</sup> and the like holds with the whole class of cases which comes under the denomination of felony; insomuch, that a special statute<sup>6</sup> was necessary to admit a person convicted of petty larceny to give testimony.<sup>7</sup> Outlawry with them has the same effect with conviction, if following on a charge of treason or felony, and therefore it disqualifies if for such a charge;<sup>8</sup> a principle to which there is nothing analogous in our practice. It is the crime, and not the punishment, which confers the infamy; and therefore one who has stood in the pillory for a libel on government, a trespass, a riot, &c., is not disqualified,<sup>9</sup> while, on the other hand, one convicted for any breach of the *crimen falsi* is incompetent, though a fine should have been the only punishment.<sup>10</sup>

<sup>1</sup> Burnet and Brown, Jan. 10, 1820, unreported.—<sup>2</sup> Hume, ii. 353; Burnet, 400.—<sup>3</sup> Hume, ii. 353.—<sup>4</sup> M'Gavin and Others, Dec. 1831; Justice-Clerk's notes.—<sup>5</sup> Phil. i. 28, 29.—<sup>6</sup> 31 Geo. III. c. 35.—<sup>7</sup> Phil. i. 29.—<sup>8</sup> Hawk, ii. 48, 22; Phil. i. 30.—<sup>9</sup> Phil. i. 30; Gilbert, 127.—<sup>10</sup> Crosby's case, State Trials, x. 42; Phil. i. 31. Russell, ii. 594.

2. By recent statute, a conviction for perjury or subornation alone renders the witness permanently inadmissible; a conviction for any other offence, though in the most solemn manner, disqualifies only so long as the punishment of the offence endures.

The law has undergone a great change on this point within the last few years. Formerly it was held that the stain once contracted by the conviction for any crime inferring infamy, could not be washed out except by a royal pardon, or act of Parliament, and till so effaced, rendered the witness incompetent to give testimony for the whole remainder of his life.<sup>1</sup> The effect of this perpetual exclusion came to be sensibly felt in the administration of justice, where the increase of crime had rendered it necessary frequently to have recourse to the testimony of *socii criminis* and other abandoned characters, and the frequency of jury trial had exposed numbers of such persons to the disqualifying effect of a conviction inferring infamy. It had been found in our Courts that a man remained disqualified even after he had served out his term of transportation for seven years, and had returned to Scotland.<sup>2</sup> To remedy these inconveniences it was enacted by the 1 Wm. IV. c. 37, "That where any person who hath been, or shall be, convicted of any crime excepting perjury, or subornation of perjury, and shall have endured the punishment to which such person shall have been sentenced for the same, such person shall not thereafter be deemed, by reason of such conviction or sentence, an incompetent witness in any court, or proceeding, civil or criminal." This statute has very much abridged the importance of the legal questions as to the infamy attached to conviction for certain offences, it being now fixed, that as soon as the punishment has been endured to its conclusion, that is, when the fine has been paid, or levied on the imprisonment in lieu of it undergone, or the period of imprisonment has expired, or the convict has returned, having served out his time in transportation, he is, except in the special case of a conviction for perjury or subornation, restored to the power of giving testimony. The law is the same in England; it being settled with them that endurance of the punishment in all felonies not punishable by death, amounts to a

<sup>1</sup> Hume, ii. 356.—<sup>2</sup> Janet Black v. Nicol. Brown, Dec. 22, 1815; Fac. Col.

statutory pardon, and consequently restores the competency of the convict; and by a recent statute, that “where any offender hath been, or shall be convicted of any felony not punishable with death, and hath endured, or shall endure, the punishment to which such offender hath been, or shall be, adjudged for the same, the punishment so endured shall have the like effect as a pardon under the Great Seal;” and that no misdemeanour, except perjury, shall render a party an incompetent witness after he has undergone the punishment.<sup>1</sup> It has been found by the Court of Justiciary, that this statute does not extend to Scotland, and it was in consequence of that decision that the Scottish statute above quoted was passed.<sup>2</sup>

3. To produce this effect of rendering the witness incompetent during the period that his disability lasts, or affecting his credibility at any time, the conviction must be proved in the best and most authentic way, according to the custom of the country where the sentence was pronounced.

To have the effect of excluding a witness from giving testimony, the conviction founded on must not only apply to him, and the term of punishment be still current at the time of his being called on to give his testimony, but it must be proved in the best manner. This is done in Scotland by production of an extract or certified copy of the conviction and sentence; that is, a copy under the hand of the clerk of the Court where it was pronounced, which being a probative instrument, proves itself, and by the oath of a witness who heard the sentence pronounced, or saw the convict in jail under it, and knows that it applies to him. In England or Ireland the judgment, as well as the conviction, must be proved; and the general rule is, that the judgment can only be proved by the record, or a copy of the record;<sup>3</sup> and so far is this carried in their practice, that even an admission by the witness itself of his being in prison under a judgment for grand larceny, or of his having been guilty of perjury on another occasion, will not make him incompetent, however it may affect his credit.<sup>4</sup> Accordingly, in a case in our Courts, where the objection of infamy was brought forward against a witness, and an irregular copy of the

<sup>1</sup> 9 Geo. IV. c. 32. § 3, 4.—<sup>2</sup> In March, 1830.—<sup>3</sup> 48 East. 79; 1 Phil. 31.—

<sup>4</sup> Rex v. Teale; 11 East. 309; 1 Phil. 31.



proceedings, and sentence was produced, which was sought to be supported by parole testimony of the man having been put in the pillory in Ireland, the answer was sustained, as that the seal of the court was wanting; and that though witnesses might prove the facts of the man having stood in the pillory, they could not prove the cause of his having done so. The witness was accordingly received.<sup>1</sup> And in a late case, the objection founded on a conviction for sedition was disregarded, in respect both that it was not proved by a conviction produced, and that the crime itself did not infer infamy.<sup>2</sup>

4. Convictions on minor charges of theft, reset, fraud, or embezzlement, by the Sheriff or Magistrates, without a jury, do not form an admissibility, but affect credibility only.

It is not to every conviction and sentence, even for the graver offences, that law attaches the consequence of legal infamy. In general, this serious effect does not follow on a conviction before those inferior magistrates, such as justices of the peace, sheriffs of counties, and magistrates of boroughs, who are in use to try all such cases, even of the graver offences, as amount to police offences only, without a jury.<sup>3</sup> And from the generality of this practice, the rule has come to be quite settled, that convictions for minor cases, even of theft, reset, and other disgraceful crimes, do not infer legal infamy, if they have been obtained in a summary way without the intervention of a jury.<sup>4</sup>

It is not to be imagined, however, from this principle, that convictions of this summary nature are altogether overlooked in our law. On the contrary, they are admitted in evidence, if regularly proved, and go to affect the credibility of the witness in the estimation of the jury. A conviction by the magistrates of Aberdeen for theft of 5s. 6d. from the body of a drowned person, and which sentenced the prisoner to be pilloried and banished the borough, was accordingly sustained as an objection to credibility only;<sup>5</sup> and the same effect was given to a conviction

<sup>1</sup> Deans, Sept. 26, 1729; Burnet, 403; Hume, ii. 355, 356.—<sup>2</sup> Scott and Adamson, Glasgow, May, 1805.—<sup>3</sup> Hume, ii. 354; Burnet, 400.—<sup>4</sup> M'Pherson and Others, Jan. 11, 1808; Daniel Turnbull, July 15, 1818; Hume, ii. 354, 355; Burnet, 400, 401.—<sup>5</sup> M'Pherson and Others, Jan. 11, 1808; Hume, ii. 400; Murray and Stewart, Sept. 6, 1817; High Court, Catherine Stewart and Others, June 8, 1818.

before the magistrates of Glasgow, where the prisoner was sentenced to twelve months' imprisonment in the Bridewell of Glasgow, on a conviction for the crime of uttering base coin,<sup>1</sup> and to one before the magistrates of the same city, sentencing the witness to nine months' confinement in bridewell, and banishment for life from the borough, in pursuance of a conviction for the crime of theft.<sup>2</sup> When brought forward in this way as an objection to credibility only, the conviction should still be proved in the regular way, by production of an extract of the conviction, and the oath of a witness that it applies to the witness; but there seems no objection to this oath, being that of the witness himself in the box, admitting that the conviction shown him applies to himself, since of all other persons he is best acquainted with the fact, nor to this proof being brought forward on cross-examination or interrogators *in initialibus* after he is sworn; and this has been frequently done in late cases.

It is also competent, and very frequent, to affect a witness's credit, by asking him on a cross interrogatory, whether he has ever been in bridewell? whether he has been in jail on charges of theft? whether he was tried before such a court, &c.; and these questions are allowed to be put and proved in this manner by the witness's own admission. Their object is not to fix a conviction for any specific offence upon the witness, for if that were the case it would require to be done by production of the extract of the conviction; but to prove that he is a person of loose and irregular habits, who has been frequently in the hands of the officers of justice, and actually undergone punishment for certain offences, no matter what they are.

5. General imputations upon the character of the witness, or charges of specific crimes, or irregularities, which have not been made the subject of trial, are not allowed to be proved, to the effect of excluding his testimony; but these points may, to affect his credibility, be put to the witness himself, he having always the privilege of declining to answer.

Nothing was formerly better established in our practice, in Baron Hume's words, than that "to allow a summary impeach-

<sup>1</sup> Alex. Thomson, Sept. 7, 1812; Hume, ii. 355.—<sup>2</sup> Daniel Turnbull and Others, July 15, 1818; Hume, ii. 355.

ment of the character of a witness, in the course of a trial, or allow any, even the strongest testimony of a general nature against him, as a base or a profligate person, is held with us to be an improper and indeed an unfair proceeding, with respect equally to the prosecutor and the witness; and that our Judges uniformly refuse to listen to any general challenge, how strong soever, of the character of a witness, as a dissolute, immoral, or unprincipled person." Suffice it to cite the case of Nairn and Ogilvie, where it was objected to Ann Clerk, one of the chief witnesses for the Crown, "that she was a person of evil fame, a notorious liar and dissembler, a known sower of sedition in families, and a common whore, who had lived for years in a bawdy-house. But to none of these reproaches did the Court pay any regard, though to a certain extent they considered a charge of enmity and malice imputed to this woman."<sup>1</sup> "Nor have any instances occurred," says Burnet, "where they have allowed a proof of this sort *even to the effect of touching the credit* of a witness, at least we have not discovered such a case."<sup>2</sup> No stronger illustration of the principle on which the Court have proceeded in this matter can be given, than what occurred in the trials of Bruce and Falconer, Nov. 1788, where a witness of the name of M'Donald was objected to, as an infamous and dishonest person, and immediate proof offered of his having been guilty of several acts of theft, all of which, however, were disregarded by the Court, and no proof allowed of these particulars. And in the case of William Crawford, Dec. 6, 1818, the Court *would not allow a proof* of the allegation that a witness adduced, was of abandoned character, and unworthy of credit on oath.<sup>3</sup> In short, our usage in this matter for many years back, has been uniformly to allow no proof *de plano*, either general or specific, of any criminality imputed to a witness, so as to affect either his credit or competency, unless it be evidence of a regular sentence or conviction following on such charge; in other words, that it is *infamia juris*, and not *infamia facti*, which goes to disqualify.<sup>4</sup>

The principles on which this rule was founded, were the unfairness to the prosecutor, of thus allowing aspersions to be thrown out upon the character of a witness, which he is probably unprepared with evidence to obviate, how unfounded soever they may be; the hardship upon the witness himself in being thus com-

<sup>1</sup> Hume, ii. 352.—<sup>2</sup> Burnet, 397.—<sup>3</sup> Hume, ii. 359.—<sup>4</sup> Burnet, 397.



pelled to lay his life and conversation open upon a criminal trial, without either warning, or the opportunity of vindicating himself, and the great length to which such enquiries might extend, the rashness and lubricity incident to all general testimony respecting matters of this sort, and the boundless field which such investigations lay open to the indulgence of the bad passions.<sup>1</sup>

But there are a different set of considerations, which also weigh powerfully on this subject. These are the infinite diversity in the character of witnesses, the infamous lives of many of those who are presented in the box, and the extreme injustice of allowing a man, possibly of the most abandoned or profligate habits, to be presented to juries, as equally deserving of credit with a witness of the most unimpeachable life and virtuous conduct. To these considerations was added, the growing influence of the English law, which has daily been more and more felt, since the introduction of jury trials into our practice, and in which, as will be immediately shown, such discrediting questions are, under certain limitations, allowed to be put to witnesses.

The two contending principles were brought into collision, in the most favourable circumstances, for the modification of the old rule, in the noted case of *Burke and M'Dougal*, Dec. 24, 1828. These persons were charged with three separate murders, and Hare, the associate in their crimes, was asked, after he had given a full account of his participation in one of them, Whether he had ever been engaged in another murder? The question was objected to, and argued, though briefly and imperfectly, as was unavoidable at the close of a long and fatiguing trial; and the Court allowed the question to be put, the witness being fully warned first, that he was at liberty to decline answering the question, a privilege of which he availed himself, and nothing was elicited.<sup>2</sup>

This decision was shortly after followed by another, which carried the principle a step farther, and has completely fixed the law on the subject. This was the case of *Geo. Ferguson, James Lindsay, and others*, June 28, 1829. These men were tried before the Sheriff of Perth, on a charge of rioting and assaulting various persons, who were suspected of having been engaged in lifting dead bodies in some churchyards in Cupar Angus, and

<sup>1</sup> Hume, ii. 352, 353; Burnet, 396, 397; *Jas. Gray*, July 11, 1737; Hume, ii. 354.  
<sup>2</sup> Syme, 365, 367.

the question proposed to one of the witnesses, who was one of the persons assaulted, was, whether he had ever been engaged in *lifting dead bodies*. The Sheriff of Perth, (D. M'Neil, Esq.) proceeding on the old Scotch law, decided that the question was incompetent; but on a bill of advocation, and a full argument, the Court held the question competent, and as it had been disallowed in a jury case, where it might, if answered in the affirmative, have affected their verdict, quashed the proceedings, and liberated the prisoner.<sup>1</sup> Since that time, it has been held to be settled law, that it is competent to *ask a witness*, on cross-examination, any particular questions as to crimes or improprieties of which he has been guilty, or any punishment in a general way which he has undergone, and such questions are daily put without objection in our Courts; but in all such cases, it is the privilege of a witness, if he chooses, to decline answering the question.

This is the whole length, however, that the relaxation of the old rule has yet gone in our practice. It has not yet been determined, whether it is competent to discredit a witness, not merely by admissions drawn out of his own mouth, but by the evidence of others, as by adducing persons to prove that he had been guilty of particular crimes, not followed by conviction, or that they know of such and such imputations on his character, or that they would not credit him on oath or the like. But from the rule laid down by the Supreme Court, that it is competent to ask a witness, whether he has himself given a different account to others from that which he has now given upon oath to the jury, but that it is not competent, except when the words spoken were part of the *res gesta*, to contradict his statement in that particular by the testimony of others,<sup>2</sup> it may be anticipated, that the one will not follow as a matter of course from the other, and that very great difficulty will be experienced before so great a departure from the principles of Scotch law on this subject is admitted.

In considering this point, it is of importance, both to attend to the principles of the law of England on the subject, and the distinction between the foundations of their law in this particular, from that of this country.

In England, "the party against whom a witness is called, may examine other witnesses as to his general character, but they will not be allowed to speak to particular parts of his conduct; for

<sup>1</sup> Unreported.—<sup>2</sup> William Hardie, Jan. 24, 1831; Shaw, No. 210.

though every man is supposed to be capable of supporting the one, it is not likely that he should be prepared to answer the other without notice :”<sup>1</sup> and “in answer to such evidence against character, the other party may cross-examine the witnesses as to their means of knowledge, and the grounds of their opinion; or may attack their general character, and by fresh evidence support the character of his own witness.”<sup>2</sup>

But if a witness, on being questioned whether he has been guilty of a felony or some infamous offence, deny the fact, the party against whom the witness has been called, will not be allowed to prove the truth of the charge, such evidence being considered inadmissible, either for the purpose of contradicting or discrediting him. “Look ye,” said Ch. J. Holt, “you may bring witnesses to give an account of the general tenor of the witnesses’ conversation, but you do not think we will try at this time whether he be guilty of robbery.”<sup>3</sup> And so the law was laid down in Sayer’s case,<sup>4</sup> and Watson’s case, in both of which the point underwent great consideration.

With regard again to the questions of this sort, which may be asked of a witness himself, decisions have very much fluctuated in the English practice. There are two *nisi prius* decisions which hold, that a witness *cannot be asked* a question, the object of which is to degrade his character.<sup>5</sup> But the better opinion seems to be, that there is no objection in point of law to asking the question; but that the objection arises in a later stage of the cross-examination, if an attempt is made to compel him to answer.<sup>6</sup> Instances of such questions being put, accordingly, are extremely numerous in the English Courts, and they occurred and were allowed in cases where the prisoners were best defended, and the greatest consideration was bestowed on the point.<sup>7</sup> They hold, however, that a witness is not bound to answer such questions, though they may be competently put.<sup>8</sup> In this particular, the decision given by one Judge in Burke’s case, is perfectly in unison with the most approved English law on the subject.

In considering this point with reference to its future applica-

<sup>1</sup> Sayer’s case, 6 State Trials, 298, 316; De la Motte’s case, 21 State Trials, 811; Phil. i. 290.—<sup>2</sup> Phil. i. 300.—<sup>3</sup> Rookwood’s Cases, State Trials, xiii. 211; Phil. i. 300.—<sup>4</sup> State Trials, xvi. 246, 286; Phil. *ibid.*—<sup>5</sup> Rex v. Lewis, 4 Esp. 225; M’Bride v. M’Bride, *ibid.* 242.—<sup>6</sup> Phil. i. 294.—<sup>7</sup> Rex v. Edwards, 4 Term. Rep. 440; Hardy’s case, 24 State Trials, 726; East. ii. 311.—<sup>8</sup> Phil. i. 291; Sayer’s case, 6 State Trials, 259.



tion to the Scottish practice, it is of importance to observe the ground on which the putting of such questions is rested in the English law. "The advocates," says Philips, "for a *compulsory power* in cross-examination maintain, that as parties are frequently *surprised* by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary; and that if a witness may not be questioned as to his character at the moment of trial, the property, and even life of a party, must often be endangered."<sup>1</sup> Such are the considerations which have been urged in England, for a power of *compelling* witnesses to ask such discrediting questions; and it is obvious that they have less application to our practice, because a list of witnesses must, with us, be always served on the prisoner along with the libel, at least fifteen days before the trial. Farther, they permit the prosecutor, whose witnesses are attacked, to attack, in his turn, the witnesses brought to discredit them, and to bring farther evidence to support the character of his own witnesses; all which may do very well in their practice, where witnesses may be re-examined even by the Judge in summing up the evidence, and an indefinite number of unknown witnesses may be adduced on both sides, but is utterly impracticable in our Courts, where the prosecutor must close his case before the pannel's defence begins, and can lead no evidence in reply, nor examine any witnesses but those contained in his list. When the due weight is given to these considerations, it will probably be the opinion of all sensible men, that the old rule of the Scottish practice has been rightly relaxed to the extent admitted in Hare's case, which is essential towards bringing before the jury the facts elicited by the previous enquiries concerning the witnesses; but that no farther relaxation should be permitted; and in particular, that either to compel witnesses to answer such questions, or to allow the pannel, after the prosecutor has closed his case, to bring separate proof either in regard to the general character, or specific acts of guilt alleged against the witnesses examined, would not only open the door to interminable discussions, but is at variance with the established mode of conducting trials in this country.

<sup>1</sup> Phil. i. 289, 290.

6. The competence of a witness who has suffered a conviction for an offence inferring infamy, is restored, even before the expiry of the period of the punishment, by a royal pardon or act of Parliament.

Formerly it was much doubted, whether the competence of a witness who had been convicted of an offence inferring infamy, could be restored even by a royal pardon.<sup>1</sup> But these doubts are now at an end since the solemn decision of the Court in the case of Bell and Mortimer, July 22, 1800, where it was stated as an objection to the admissibility of Robert Mason, that he had been convicted of theft by the Circuit Court at Glasgow, and sentenced to be transported for life and whipped. To this it was replied, that he had received a pardon from the Crown, although he had since been in prison on a charge of vending false coin. The Court, after a full argument, unanimously held, that the witness was admissible in respect of the pardon, reserving his credibility to the jury.<sup>2</sup> Even before the sentence was pronounced which fixed the point, it had been held, that a witness is admissible in our Courts, if he has been convicted by a foreign tribunal, of an offence inferring infamy, and pardoned by the sovereign authority in that country,<sup>3</sup> if the law of that country allows a witness to be rehabilitated in that manner. It has now for long been held as a fixed point, that a royal pardon completely restores the competence of a witness, and that, too, equally, whether he has been convicted of an offence inferring infamy, or is only in prison on a charge having that effect, which, though it could not disqualify on the ground of conviction, might on that of undue influence; of which last an example occurred in the noted case of Robert Emond, Feb. 6, 1830, where two witnesses imprisoned in Edinburgh jail, on a charge of embezzlement and theft to a great amount, to whom the prisoner had made important disclosures, were pardoned by the Crown, and admitted and examined for the prosecution without objection, though under the reservation of their credibility of course to the jury.<sup>4</sup>

In England the same doubts were at one period started as to whether a royal pardon can do more than remove the punishment, or be attended with the effect of removing the blemish on the

<sup>1</sup> Burnet, 405; Hume, ii. 356; M'Kenzie, ii. 26, 86; Dirleton, 224; Stewart's Answers.—<sup>2</sup> Hume, ii. 356; Burnet, 407, 409.—<sup>3</sup> Smith and Brodie, Aug. 27, 1788; Burnet, 405.—<sup>4</sup> Unreported, vide ante, vol. i. p. 77.

character. But it is now settled by a long series of decisions, that a pardon for treason or felony, even after conviction or attainder, not only takes off every part of the punishment, but also clears the party from the legal disabilities of infamy, and all other consequences of his crime. The pardon they hold renders the witness a new creature; the crime indeed may still be objected as affecting his credit, but the conviction cannot be urged against his competence as a witness.<sup>2</sup>

7. A *socius criminis* is an admissible witness, though his credibility is reserved to the jury; and if he is called by the prosecutor, he is relieved from all responsibility for his share in any offence embraced in the same indictment with that on which he is adduced.

It has been now settled for a very long period in our practice, that a *socius criminis* is an admissible witness for the prosecution. This rule, arising out of the necessity of the case, *ne crimina maneat impunita*, and the impossibility of obtaining a conviction in many of the most important cases, unless the testimony of such persons is received, has been established in the law of all civilized countries. Of course, as they are frequently the most worthless of the human race who are so adduced, and in almost all cases are proved by the very act of being brought forward to have superadded the guilt of treachery to their associates, to that of original accession to the offence with which the prisoner stands charged, their testimony must be received with great caution, and never made the ground of a conviction, unless supported in all its essential particulars by unsuspected testimony.<sup>3</sup>

Where a crime is committed by one party upon, or by the accession of another, one of the guilty parties is on this principle clearly admissible against the other. The original thieves, therefore, are good witnesses against the reseters, and several of the most important convictions for reset have been obtained by the aid of the juvenile depredators whom the reseters employed as the instruments of their infamous traffic.<sup>4</sup> In England also the thief is a good witness against the resetter.<sup>5</sup> On the same ground one of the parties in sodomy may be adduced against the

<sup>1</sup> Phil. i. 35.—<sup>2</sup> Reilly's case, Leach, 510; Phil. i. 35.—<sup>3</sup> Hume, ii. 367; Burnet, 416.—<sup>4</sup> White, Paisley, and Others, Glasgow, Autumn 1813; Vide ante, vol. i. 336.—<sup>5</sup> Phil. i. 39; Leach, i. 467.



other, and the woman who is operated upon in procuring abortion against the man who lends himself to that detestable attempt.<sup>1</sup>

It has long been an established principle in our law, that by the very act of calling the *socius*, and putting him in the box, the prosecutor debars himself from all title to molest him for the future, with relation to the matter libelled.<sup>2</sup> This is always explained to the witness by the presiding Judge as soon as he appears in Court, and consequently he gives his testimony under a feeling of absolute security as to the effect which it may have upon himself. If, therefore, on any future occasion the witness should be subjected to a prosecution on account of any of the matters contained in the libel on which he was examined, the proceedings would be at once quashed by the Supreme Court. This privilege is absolute, and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice indeed may often be defeated by a witness retracting his previous disclosures, or refusing to make any confession after he is put into the box; but it would be much more put in hazard if the witness was sensible that his future safety depended on the extent to which he spoke out against his associate at the bar. The only remedy, therefore, in such a case, is committal of the witness for contempt or prevarication, or indicting him for perjury, if there are sufficient grounds for any of these proceedings.<sup>3</sup> In this respect the security of the *socius*, and the safeguard against the contamination of the sources of evidence, is much stronger in this country than in England, where it is held that the circumstance of having been adduced by the Crown is not a bar to trial, but only the foundation for a recommendation to the Crown for mercy, and is entirely dependent on the witness's making a full and fair disclosure.<sup>4</sup> If, therefore, he breaks this condition, and refuses to give full and fair information, he will be sent to trial to answer for his share in the transaction.<sup>5</sup>

But what shall be said if the witness was originally called by the Crown, and is thereafter prosecuted at the instance, not of any of the public prosecutors, but of the private party who has suffered from the offence? Is the protection of the witness abso-

<sup>1</sup> Robertson and Bachelor, July 1806; Burnet, 41.—<sup>2</sup> Hume, ii. 367; Smith and Brodie, August 1788.—<sup>3</sup> Syme, 395.—<sup>4</sup> Leach, i. 113, 119, 121, ii. 770; Phil. i. 38.—<sup>5</sup> Phil. i. 39.

lute against all molestation in relation to the matter libelled, even at the instance of such a prosecutor; or are the hands of the Crown alone tied up by such a proceeding on the part of one of its established officers? This point occurred for trial under circumstances of all others the most favourable for the admission of the prosecution, in the well-known case of William Hare, 2d Feb. 1829. The *species facti* there was, that the prisoner had been examined as a witness on the trial of Burke and M'Dougal, on 24th December, 1828, for three murders, was examined as a witness in relation to one of the charges, that of the old woman Docherty, but not in relation to the other two, one of which was of a poor idiot, well known in Edinburgh under the name of *Daft Jamie*. Public indignation having been strongly excited against Hare for his admitted accession to this murder, and his rumoured participation in others, an effort was made to have him brought to trial at the instance of the relations of Daft Jamie, and he was accordingly apprehended at their instance, and a pre-cognition commenced before the Sheriff of Edinburgh. A suspension and liberation was immediately brought, in which it was contended, that, having been adduced as a witness for the Crown in Burke's case, he could not be thereafter brought to trial in relation to any of the matters contained in that libel, at the instance of any party whatsoever; and the Court, after hearing parties fully, first *viva voce*, and then in informations, found the proceedings not competent, and liberated the prisoner. The grounds on which they proceeded were, that although a private party may conduct a prosecution himself, with concurrence of the public prosecutor, and thus acquire in a great degree the control over the proceedings, yet if he lets the case get into the hands of the public prosecutor, and a *socius* is in consequence called by him on the trial, he has made his election to abide by his judgment in the conduct of the case, and cannot, after having got the benefit of the disclosures on the first trial on the public prosecution, take the matter up at his own instance by any proceedings for the crimes contained in the original libel on a second.<sup>1</sup>

It has not yet been settled whether the same will hold if the prosecution in the first instance was at the instance of the private party, and this is followed by a subsequent proceeding against a *socius*, examined at that trial by the Lord Advocate. It is not

<sup>1</sup> Syme, 373, et seq.

difficult, however, to anticipate what the decision, if the case should occur, would be. The principle established in Hare's case, that the private party, if he allows the case to be taken up by the public prosecutor, has made his election to be governed by his conduct, whatever it may be, is equally applicable to the Lord Advocate, if he chooses to allow the prosecution to go on at the instance of the private party, with this additional circumstance against the competence of any such ulterior proceeding in such a case, that by his concurrence, which must have been adhibited to the first prosecution, he is much more strongly implicated in whatever occurs in that trial than the private party is, who merely gives information to the public authorities, and takes no farther charge of the proceedings.

It is only, however, the counsel for the prosecution at the trial—who, in ninety-nine cases out of an hundred, are the King's counsel—who are invested with this uncontrolled power of tying up the hands of justice by calling one of the accomplices in a crime as a witness for the prosecution. Inferior magistrates or jailers have no power of thus restraining prosecutors by promises of pardon to certain prisoners in the event of their being taken as King's evidence; and if they do so without authority from the Crown counsel, they exceed the limits of their duty, and the prisoner from whom these confessions have been obtained, may, nevertheless, be brought to trial.<sup>1</sup> But if any attempt is made to use as evidence against them the declaration obtained by such means, the Court will interfere to prevent such a perversion of the equity of judicial proceedings. The rule is the same in England; it being held there, that the examining magistrate has no power to admit a *socius criminis*, or approver, as he is called, as a witness for the prosecution, but that it lies on the Court and the counsel for the Crown to do this at the trial.<sup>2</sup>

It was held in one case, that a soldier adduced as a *socius criminis*, who was himself under confinement as a military delinquent, on account of his share in the transaction concerning which he was brought to speak, was, nevertheless, receivable as a witness; and the objection that he ought not to be received as a witness, unless the Court could protect him from a court-martial, repelled, upon the ground that the Court had the power to

<sup>1</sup> Daniel Grant and Others, Oct. 6, 1820; Shaw, No. 46; M'Kinlay and Gordon, Nov. 23, 1829; unreported.—<sup>2</sup> Per Justice Park, Hertford, 1824, Thurtell's trial.



interfere for his protection, and would not fail to do so if he were endangered in consequence of his evidence at that trial.<sup>1</sup>

8. It is not competent to convict on the single testimony of a *socius criminis*, but that evidence may be of great weight if it is fairly given, if it admit the witness's share in the transaction to such an extent as appears to have been the fact, and if it is corroborated, wherever it can be, by unsuspected testimony.

As the evidence of one witness, if wholly unsupported, is insufficient to warrant a conviction, even if he be a person of the highest character and most unsuspected reputation, of course, the evidence of a *socius*, who always must stand contaminated, more or less, by what he has admitted on the trial in regard to his accession to the delinquency in question, must be insufficient to produce that effect.<sup>2</sup> It is otherwise in England, where it is held, that if his evidence is believed by a jury, a prisoner may be legally convicted upon it, though it be unconfirmed by any other evidence as to the prisoner's identity.<sup>3</sup> But on this, as on most other points affecting the weight due to testimony, the difference between the two laws is not so great as would at first appear, it being the practice in Scotland to convict very nearly upon the evidence of the accomplice, if he is confirmed, where confirmation was possible, by good evidence; and the rule in England being, that the Judge is to advise the jury to regard the evidence of an accomplice only in so far as it may be confirmed by unimpeachable testimony.<sup>4</sup>

It is not to be expected, however, nor is it required in the law either of Scotland or England, that the *socius* is to be confirmed in *every* particular by other witnesses, for if that were the case where would be the use of bringing him? In every case where an accomplice is adduced, he is expected to divulge something not known to the unsuspected witnesses, and which is, nevertheless, material to the prisoner's conviction. It is sufficient, therefore, if he is supported by unimpeached testimony, in those parts of his narrative where such confirmation is possible; and if this is the case, it affords fair ground to believe that he also

<sup>1</sup> William Dreghorn, Feb. 16, 1807; Hume, ii. 367.—<sup>2</sup> Burnet, 410.—<sup>3</sup> Atwood's case, Leach, ii. 521; Durham's case, *ibid.* 538; per Lord Ellenborough, in *Rex v. Jones*; Camp. ii. 133; Phil. i. 40.—<sup>4</sup> Phil. i. 40.

speaks truth in regard to those other matters, or other prisoners, where no such confirmation has been adduced.<sup>1</sup>

The true way, therefore, to test the credibility of a *socius*, is to examine him minutely as to *small* matters, which have already been fully explained by previous unsuspected witnesses, and on which there is no likelihood that he would think of framing a story, nor any probability that such a story, if framed, would be consistent with the facts previously deposed to by unimpeachable witnesses. If what he says coincides with what has previously been established in the seemingly trifling, but really important matters, the presumption is strong that he has also spoken truly in those more important points which directly concern the prisoner; if it is contradicted by these witnesses, the inference is almost unavoidable that he has made up a story, and is unworthy of credit in any particular.

It frequently happens that a *socius* is at first extremely unwilling to speak out, especially against some of the prisoners; or that he gives a clear and true narrative up to a certain point, but fails, in direct opposition to what he has said in precognition, in the identification of the prisoners, or the account he gives of the share they had in the transaction. In such cases it is frequently said that he is altogether unworthy of credit, because he has prevaricated or perjured himself in certain particulars, and, therefore, that the jury must reject his testimony altogether. There seems to be no rational ground for such an opinion. It is always to be recollected, that a *socius* is brought there to speak against his inclinations and old associates; it is to be supposed, therefore, that he will frequently endeavour to screen them as much as possible. But what is extracted out of him by the force of minute examination, in opposition to such a predisposition, often produces a greater impression on an intelligent jury than any other testimony; so evidently does it bear the mark of truth oozing out, notwithstanding the utmost efforts to prevent its escape. The case is very different if the *socius* exhibits an undue anxiety to criminate the prisoner and exculpate himself, for that directly begets the suspicion that he is acting under the influence of revenge or some malignant passion, which at once renders suspicious the whole of his testimony.

The true way to deal with an unwilling accomplice is to sub-

<sup>1</sup> Phil. i. 41.

ject him to a rapid and minute course of examination, without threatening or attempting to intimidate him. Against such attempts he is usually sufficiently steeled by the previous abandoned habits of his life; but it generally happens that he is thrown off his guard in the course of a long and minute examination, and that the truth escapes him in spite of the utmost efforts on his part for its concealment. In such a case an intelligent jury must judge for themselves what they are to believe, and what they are to disbelieve, and they will be regulated in this particular by the support afforded to part of his testimony, by the previous or subsequent evidence at the trial, and the mode in which the suspected testimony has been delivered in their presence.

#### SECTION V.—OF THE OBJECTION OF RELATIONSHIP.

The objection of relationship is one which in some cases amounts to an absolute bar to the witness's examination, and in others, to a consideration only against the witness's credibility. It is a matter of primary importance in the law, to lay down fixed and intelligible rules in this particular.

1. In a prosecution at the instance solely of the Lord Advocate, the nearest relations, both of the prosecutor and injured party, are competent witnesses on either side.

As the public prosecutor in Scotland takes up cases from a sense of public duty, and without any feeling of resentment or patrimonial wrong, it follows that he is nowise liable to be influenced by personal feelings in the conduct of his duty, and, therefore, still less can it be supposed that his relations, how near soever, are to be influenced by any improper motive, or be liable to the slightest suspicion of undue partiality in the case.<sup>1</sup> And this will hold though the injury, which is the subject of trial, was done to the Lord Advocate or any of his near relations personally.<sup>2</sup> Of this rule, it is sufficient to cite as an example, a case where Colonel Francis Dundas, brother to the Lord Advocate for the time, was received as a witness in the course of a trial for

<sup>1</sup> Hume, ii. 343; Burnet, 431.—<sup>2</sup> Burnet, 431.



a riot, in which a violent attack was made on the house of his lordship himself.<sup>1</sup>

Farther, it is equally established, on sound and just principles, that the nearest relations of the injured party, without even excepting husband and wife, are admissible as witnesses, on a trial at the instance of the public prosecutor;<sup>2</sup> and that, not only in relation to those wrongs of a patrimonial nature, which may be supposed not very strongly to rouse the feelings, but those personal and irreparable injuries which excite the strongest feelings of resentment in the human breast. Thus, the widow of the person killed has been admitted times out of number;<sup>3</sup> and his children in an equally numerous train of precedents;<sup>4</sup> and mothers and fathers in all cases where an injury or death has been inflicted on their children.<sup>5</sup> Juries, indeed, will attach such weight only to the testimony of those witnesses who are evidently speaking under the influence of these strong feelings as they deem just; but there is no principle in law, on which they can be, in all cases, either excluded or represented as suspicious to those who are to judge of their testimony.

2. If the prosecution is at the joint instance of the public prosecutor and injured party, the nearest relations of the latter are competent witnesses; and the same holds with the near relations of the injured party, where the prosecution is at his instance with concurrence, under reservation of their credibility to the jury.

It sometimes has happened, especially in our older practice, that the prosecution is at the *joint instance* of the Lord Advocate and injured party; and in such cases, it has been the rule of our practice to admit the nearest relations of the latter, equally as if the prosecution was at the sole instance of the public prosecutor;<sup>6</sup> and that equally whether the prosecution concluded solely for the pains of law, or also contained a conclusion for damages to the injured party.<sup>7</sup> Where the prosecution is solely at the instance

<sup>1</sup> John Taylor and Others, July 12, 1792; Burnet, 431.—<sup>2</sup> Hume, ii. 343.—<sup>3</sup> Rebecca Wallace, Aug. 1, 1757; Walter Redpath, Nov. 26, 1810; Brown and Wilson, Aug. 12, 1773; Campbell and Helm, Nov. 8, 1827; Hume, ii. 343.—<sup>4</sup> Campbell and Helm, Nov. 8, 1827, and others.—<sup>5</sup> John Scott, Perth, April 1829, and others; James Glen, Nov. 10, 1827; Syme, 267.—<sup>6</sup> Robert Frank, July 13, 1669; Bassil Eids, Aug. 4, 1709; Hume, ii. 345, 346.—<sup>7</sup> Burnet, 430.

of the private party, and he concludes for public punishment only, it was at one period the subject of controversy, whether his kinsmen were admissible or not. In a case where there was a penury of witnesses, the nephew to the pursuers was admitted in regard to the occult matter *cum nota*, although the conclusion was for damages equally as the pains of law.<sup>1</sup> In another earlier case, this objection, mixt up with malice, was sustained as relevant to exclude ;<sup>2</sup> and in a trial for deforcement, the prosecutor's bastard son was allowed only to prove the verity of the messenger's execution.<sup>3</sup> But a son by affinity was received in a former case, who had married the prosecutor's bastard daughter.<sup>4</sup> But there seems no doubt, that in modern times the near relations of the prosecutor would be admitted, at least *cum nota*, in all those cases where the private prosecutor insists for the pains of law only, and does not mix up with that character the objection of interest in the civil or patrimonial conclusions of the libel. Where this is the case, it seems equally clear that those near kinsmen should at all events be excluded, who either have right to any share of the damages or assythment themselves, or are interested in them as next of kin to the persons who are ; but beyond this there seems no rational ground on which the exclusion can be extended.

3. The nearest relations of the pannel, under certain exceptions, are admissible, both for and against him.

Under two important exceptions, which will immediately be considered, it is fixed that the nearest relations of the pannel may be examined either for or against him. How unwelcome soever the necessity, public interest requires that they should be compellable to give evidence in the general case, against even those to whom they are bound by the strongest ties of consanguinity or affection.<sup>5</sup> Thus, a sister is admissible against a sister ;<sup>6</sup> a brother against a brother ;<sup>7</sup> and a mother against a daughter.<sup>8</sup> This point is held so completely fixed in the general case, that it is never stirred in our practice.

As near relations are subjected, from motives of public policy,

<sup>1</sup> Macandlish and Others, July 16, 1744.—<sup>2</sup> Mather of Tarbet, Aug. 19, 1691.—  
<sup>3</sup> John Douglas, Dec. 15, 1690.—<sup>4</sup> Francis Mellum, Feb. 21, 1676.—<sup>5</sup> Hume, ii. 346 ;  
 Burnet, 431.—<sup>6</sup> Major Weir, April 6, 1670.—<sup>7</sup> Andrew Adam, Feb. 20, 1710 ; James  
 M'Nair, March 15, 1751 ; Hume, ii. 346.—<sup>8</sup> Helen Gordon, Sept. 1765 ; Burnet, 431.

to this often cruel and heart-rending necessity, so it is equally settled that the pannel has the benefit of their testimony, such as it is, in his own favour. Nothing is more common, accordingly, than to see the mothers, fathers, brothers, and sisters of prisoners adduced at trials to give evidence in exculpation for their unfortunate relatives under trial at the bar. Their evidence is always received, and generally is brought forward to prove an *alibi* in the pannel's favour; but the attempt for the most part fails, it being too often evident that they are brought forward to give a colour to a story got up which has no real foundation; and that they are swearing under the influence of the strongest affections of our nature, warring against the sense of the obligation of an oath, too often, in persons in their situation, feebly felt and imperfectly understood.

4. Husband and wife are, in every case, inadmissible for or against each other, except in the case of personal violence directed by the one against the other.

It was formerly the subject of doubt, whether a wife might not be made to bear evidence against her husband;<sup>1</sup> but these precedents, drawn from disturbed or tyrannical times, have now lost all their authority, and it has come to be regarded as a fixed and sacred rule of evidence, that husband and wife are utterly inadmissible against each other.<sup>2</sup> This rule was applied in a case where the pannel was an Englishman, and tendered his wife to prove an *alibi*, accompanied with a strong statement that he was unable to bear the expense of bringing down other witnesses from his own country; but she was found utterly inadmissible.<sup>3</sup> The rule is the same in England; it being quite settled that husband and wife are mutually incompetent for or against each other.<sup>4</sup> And, indeed, so strong and irresistible are the reasons, founded on domestic peace and tranquillity, which have led to this rule, that it must obviously obtain in the laws of all civilized states. For the same reason no declaration of the husband or wife is admissible for or against each other.<sup>5</sup>

To this rule, however, there is one important exception, ac-

<sup>1</sup> Hume, ii. 348, 349.—<sup>2</sup> Smith and Brodie, Aug. 27, 1788; Hume, ii. 349; Burnet, 432.—<sup>3</sup> Smith and Stevenson, Dec. 8, 1806; Burnet, 433.—<sup>4</sup> Russell, ii. 604; Phil. i. 80.—<sup>5</sup> Phil. i. 84.



knowledged both by the law of England<sup>1</sup> and Scotland, and that is, that where the husband or wife has suffered *personal injury* from the other spouse, the suffering party may be allowed to give evidence against the aggressor; for else a rule intended in a great degree for their protection, would be perverted into a source of oppression. This was established so far back as January 1694, in the noted trial of Elliot, Maxwell, and Nicolson, for forgery, conspiracy, and attempt to poison;<sup>2</sup> and the rule was solemnly confirmed by the High Court in a subsequent case, when the objection that the wife was inadmissible against her husband, was stated, argued, and overruled, in respect she was adduced to prove an injury on her person.<sup>3</sup> The same principle was applied to an injury by a wife to a husband, in a late case, where the husband was admitted without objection, to prove an attempt to hang him by his own wife when asleep, which had very nearly proved successful.<sup>4</sup>

But what shall be said of the case where the husband or wife is accused of bigamy? Does the general rule of mutual incompetency apply to such a case, or does it fall under the exception of injuries directed against the person, in which they may be admitted? Burnet inclines to think, that in such a case the husband should not be received, in respect that the marriage should be proved otherwise;<sup>5</sup> and the law was laid down in the same manner by Lord Gillies, at Aberdeen, in a case where the first wife in a private and irregular marriage, was adduced against her husband charged with bigamy, and it was strongly urged, that in such a case, not only was the injury *sub judice* directed against himself, but she was a necessary witness to prove the celebration of the first marriage.<sup>6</sup> It is certain, also, that the rule is settled in the same way in England; it being fixed there, that on an indictment for a second marriage during the continuance of the former, the first wife cannot be a witness, but the second may, as soon as the first marriage is established, because she is in that case not clothed with the character of a wife.<sup>7</sup> These authorities must be held to settle the law so far as precedent is concerned; but it is worthy of consideration whether they have done so in

<sup>1</sup> State Trials, i. 393; Phil. i. 87; Lord Audley's case, Hall, i. 301.—<sup>2</sup> Hume, ii. 350; Burnet, 433, 434.—<sup>3</sup> Benjamin Ross, May 11, 1824; unreported.—<sup>4</sup> Mysie Graham, March 13, 1827; Syme, 154.—<sup>5</sup> Burnet, 433.—<sup>6</sup> John Rodger, Sept. 1813; Hume, ii. 349. In that case, however, she was afterwards sworn and examined as a haver of a letter libelled on.—<sup>7</sup> Hale, i. 393; Phil. i. 87.

consistency either with justice or principle. Having once, for just and necessary reasons, admitted an exception to the general rule, in the case of a wife who has sustained a personal injury from her husband, is there any principle on which it can be held *not to include* that case where the injury to herself and her family is the greatest, from a desertion of them both by the head of the family? Nor is the reason of exclusion founded on the peace of families here of the slightest weight, but rather the reverse; for a husband who has been guilty of bigamy, has proved himself dead to all sentiments of that description, and having already deserted his first wife for another woman, he has given the clearest evidence that no farther family dissensions need be apprehended from her appearing to give evidence against him.

It has been held, that, although a wife cannot be adduced as a witness against her husband, yet she may be brought into Court and identified as the person who had passed one of the notes which he was charged with having stolen, and this has been accordingly done.<sup>1</sup> This is using the wife as a *production*, though not as a witness. But it may be doubted whether this precedent would now be followed. It is perfectly competent, indeed, for the prosecutor to establish, by the evidence of other witnesses, that the wife of one of the pannels tendered in change part of the stolen property, because that is a fact which is proved without having recourse to her at all, similar to finding the stolen property in his house, or the like, which often form the most relevant and important parts of the proof; but to admit her as a production against her husband, when she is inadmissible as a witness, seems to be contrary to principle; though supported doubtless by a decision, that if a witness was inadmissible from having been wrong designed, he still may be produced in evidence against the prisoner without being examined.<sup>2</sup> This observation, however, will not apply to the production of the first wife as a piece of evidence in cases of bigamy; for there she is not brought forward to fix the subsequent crime upon him, but merely to substantiate the fact, or supply a link in the chain of evidence of the first marriage; a matter, in which it may be absolutely indispensable that she should be seen by the witnesses, like the dead body in a case of murder, or body-lifting, with a view to establish the fundamental

<sup>1</sup> Larg and Mitchell, Jan. 26, 1817; Hume, ii. 349.—<sup>2</sup> Hill, Boyd, Hay, April 1822, Glasgow; Hume, ii. 394.

fact of the identity of the person seen by the witnesses with that described in the indictment. It is by no means unusual, accordingly, to libel upon the first wife as a production in cases of bigamy, and to admit her as an object to be looked at by the witnesses at the trial.

Various other exceptions to this rule, regarding husband and wife, are admitted in the English law, which are deserving of notice in our practice.

1. If a woman is taken away by force and married, she may be a witness against the ravisher, for though a wife *de facto*, she is not held one *de jure*.<sup>1</sup>

2. Where the wife has made contracts, or acted as agent or *negotiorum gestor* for her husband, she may be adduced as a witness against him by those persons with whom he has thus permitted her to deal in his name or on his account.<sup>2</sup>

3. A wife is held competent to prove the fact of her own adultery, though her husband is interested in the issue of the trial.<sup>3</sup> The same principle was followed in Scotland, in the trial of a man for murder, where the defence was that he had caught the deceased in the act of adultery with his wife, and she was admitted without objection when cited in exculpation to prove the fact.<sup>4</sup> But this applies only in the special case of provocation arising from adultery, which is so secret a matter that in general it is known only to the woman alone, and is hardly ever committed by her in presence of others; and therefore an opposite rule was adopted, and the wife's evidence was rejected in a subsequent case, where the defence of the prisoner against a charge of murder, was *general maltreatment* of his wife by the deceased, in proof of which he proposed, not to adduce the wife herself, but to produce her declaration emitted in precognition before the Sheriff.<sup>5</sup>

5. A child within the years of pupilarity is inadmissible, either for or against its parents.

The same reason founded on the peace of families, and the hardship to which witnesses would be exposed if they were liable to be called on to give testimony against those on whom they are entirely dependent for comfort, affection, and subsistence, which

<sup>1</sup> Hale, i. 302; Phil. i. 86, 87.—<sup>2</sup> Emerson v. Blonden, Esp. i. 142; Phil. i. 88.—<sup>3</sup> Rex v. Reading, Hard. 82; Phil. i. 89.—<sup>4</sup> Christie, Nov. 6, 1731; Burnet, 434.—<sup>5</sup> William Goldie, July 13, 1804; Burnet, 434.



have led to the exclusion of husband and wife from giving testimony against each other, have led to the adoption of a similar rule in regard to children within the years of pupilarity. This principle, so obviously founded in the helpless and dependent condition of children at those early years, and the terrible conflict of feelings to which they would be exposed if they were called on to give testimony either for or against those on whom they were entirely dependent, and in whom all their affections centered, was strongly enforced by able judges in several previous cases,<sup>1</sup> and at length fully adopted, after full argument and great consideration, in the case of Isabella Blinkhorn, 7th June, 1824, where, on the trial of the pannel for the murder of one of her children, of nine years of age, a boy of twelve years and seven months her son, was rejected as a witness, and the pannel in consequence escaped with a verdict of not proven. It was admitted in this case by the Crown Counsel, that a pupil child is in the general law inadmissible when either of its parents was at the bar; but that this principle should suffer an exception in cases such as the present, where the parent was charged with a fatal injury directed against one of the children themselves; that it was on this ground that a wife was allowed to give evidence against her husband in case of injury directed against herself, and that unless this principle were extended to pupil children, where the pannel was charged with acts of violence directed against one of their number, a privilege intended for their protection, would be converted into the means of their secure destruction. This argument, however, did not prevail with the Court.<sup>2</sup> This precedent was followed a few days after, in another case of murder, where two children, below the years of pupilarity, who had witnessed the fatal deed, were tendered as witnesses, and rejected by the Court.<sup>3</sup>

The years of pupilarity in a boy are fourteen, and in a girl twelve years of age; but there seems no ground for distinguishing in this matter between the two sexes; and as in Isabella Blinkhorn's case, a boy of twelve years and seven months was rejected, it is probable that fourteen years would be taken as the boundary of the inadmissible age in both sexes. It has been held that a girl of *sixteen*, who was adduced as a witness against her

<sup>1</sup> David Cunningham, June 23, 1806; Alex. Brown, April 26, 1814, Glasgow; Hume, ii. 347.—<sup>2</sup> Isabella Blinkhorn, June 7, 1824; Shaw, No 116.—<sup>3</sup> William Dwine, June 14, 1824; Hume, ii. 348.

mother, for the murder of her father, was inadmissible, though she, of course, had her option to decline to give testimony if so inclined.<sup>1</sup>

This principle, however, of the inadmissibility of a pupil child to give evidence against its parent, must suffer one exception, viz. that where the injury was directed against the *child itself*. To hold it inadmissible, would be to deliver over these helpless creatures to the rage or vindictive passions of their parents, who must always have opportunities of committing acts of cruelty on their children, when no other persons are present. On the same principle, that evidence may be supported by the account which the suffering child gave *de recenti* of the injury to others; a mode of getting at the truth, which, in the case of very young children, is generally more satisfactory than what they give at the distance often of months at a public trial.

It was allowed also in one case for the prosecutor, to ask a surgeon the account which two pupil children had given at the moment when they came to him for medical aid, of the injuries inflicted by their father on their mother, for which he was at the bar on a charge of murder.<sup>2</sup> This, it was justly observed, is a more satisfactory way of getting at the truth, than by the examination of such witnesses *ex intervallo*, when the events they relate may probably be forgot, or blended with fiction in their minds. This exemption to the general rule, however, should be allowed only to the extent of admitting the *res gesta* to proof in this indirect way; that is, the account of the transaction given to other witnesses by the pupil children at the time of, or shortly after, its occurrence, and which formed their *causa scientiæ*, or the way in which they were brought in contact with the subject matter of the trial. Certainly it will not do to go a step farther, and examine other witnesses, *ad longum*, on the account which the pupils gave of the transaction *ex intervallo* to them; for that would be allowing that to be proved circuitously and by hearsay, which could not be brought forward directly out of the mouths of the children themselves.

6. A child above the years of pupilarity has an option to give evidence, or not, against his parent, as the witness

<sup>1</sup> Helen Reid, Aberdeen, April 1816; Hume, ii. 348.—<sup>2</sup> Alexander Brown, April 20, 1814; Hume, ii. 347.

pleases ; but if the injury was directed against himself he must give testimony, how unwilling soever.

It is a fixed principle in our law that a child cannot be compelled to give evidence against its parents, whatever age soever the child may be. This proceeds from the *metus perjurii*, or unwillingness to expose a witness to a situation where the temptation to perjury is so strong as to be almost overpowering, which is so strongly established in our law, and which is justly presumed to be in an especial manner likely to occur, if a son or daughter is called on to give evidence against their parents.<sup>1</sup> This is matter of daily practice, and was exemplified at Glasgow, autumn 1829, in the case of Margaret M<sup>c</sup>Intyre and Marjory Lennox, where the sister of the latter of these parties, who had witnessed the child-murder by her sister and mother, who were both at the bar, declined to give testimony, and her option, in respect her mother was concerned, was, as a matter of course, admitted by the Court.<sup>2</sup>

It would appear, however, that this privilege of the child does not obtain where the parent is put on trial for an injury on the child itself. In that case it is bound to depone, upon the same principle, that a wife in a similar case is admitted against her husband. Where a prisoner accordingly was indicted for rape and incest on his own daughter, who was a girl above pupilarity, Lord Meadowbank, after a full argument, refused to inform the witness that she might decline giving evidence, and she was sworn, and emitted her testimony in common form. The prisoner escaped, owing to the crime being laid in the indictment as committed in a different year from what appeared at the trial to have been the true period of the offence.<sup>3</sup>

Has the parent the same privilege in declining to give evidence against a child at the bar ? It was held by Lords Gillies and Hermand in one case where the prisoner was indicted for forging the name of his father and brother on a bill, that the father might decline giving testimony, upon which the Advocate-depute withdrew the witness.<sup>4</sup> A similar point occurred at Perth, where a daughter was accused of forging a bill on her father, and the Advocate-depute moved to desert the diet, with a

<sup>1</sup> Hume, ii. 346 ; Burnet, 432.—<sup>2</sup> Ante, vol. i. 159.—<sup>3</sup> William Thomas Lundie, Ayr, Sept. 8, 1824 ; Hume, ii. 348.—<sup>4</sup> William Leack, Aberdeen, April 18, 1818 ; Hume, ii. 348.



view to try the question at Edinburgh, whether the father had an option of giving testimony as against her; but the death of a necessary witness prevented the case being farther prosecuted.<sup>1</sup> Mr Burnet states, that in such a case the parent has the option as well as the child;<sup>2</sup> and Mr Hume states the point as not yet maturely fixed, and as a desirable object for decision by the Supreme Court.<sup>2</sup> In these circumstances the weight of authority rather preponderates to the side of giving the option to the parent as well as the child; though certainly, notwithstanding its being recommended by humanity to the witness, there are many reasons against extending this right to decline giving testimony beyond those cases where it is fixed by a clear and settled course of precedents.

7. The agent or counsel employed by the prisoner in conducting his defence, or in the matter which has given rise to the trial, though previous to the crime, are not at liberty to divulge any facts which have come to their knowledge, in that capacity, or after that employment began; but they may be called on to disclose what has done so *tanquam quilibet*.

There is one class of persons whom the prisoner, from the intimate connexion which subsisted between them and the accused at the trial, cannot cite on his behalf; and that is the agent and counsel whom he has professionally employed to conduct his defence, and who are presumed on that account to be incapable of giving an unbiassed testimony in regard to that particular case.<sup>4</sup> For the same reason, these persons cannot be called on to reveal the facts, or produce deeds which have thus professionally come to their knowledge or possession, when examined against the panel;<sup>5</sup> for, as Mackenzie justly observes, though it is for the interest of the commonwealth, that truth should be brought to light; yet “it is likewise the interest of the commonwealth not to reveal the secrets of private persons, and thereby to render all confidence and trust suspected.” “*Reipublicæ quidem interest ne crimina maneant impunita; sed reipublicæ quoque interest*

<sup>1</sup> Ann Patterson, Perth, April, 1827; reversed.—<sup>2</sup> Burnet, 432.—<sup>3</sup> Hume, ii. 348.—<sup>4</sup> Burnet, 435.—<sup>5</sup> Hume, ii. 350; Burnet, 435; Fisher v. Fleming, Phil. i. 140.

pietatis et necessitudinis officia sarta tecta conservari sine quibus nihil sanctum haberi potest nec inviolatum."<sup>1</sup>

This privilege, however, is not to be pushed beyond due bounds. Though extending to every thing communicated or acquired in that particular case, at whatever period of time, yet it does not extend to information acquired concerning it, not in a professional capacity, but as an intimate friend or acquaintance, or even to professional disclosures made without relation to the facts charged in the indictment; and accordingly, in the noted trial of Sir Archibald Kinloch, Mr Charles Hay, advocate, was examined respecting circumstances even which had been imparted to him as ordinary counsel to the pannel's family, but before the unfortunate incident which gave occasion to the trial. They were, however, remotely connected with it, as relating to conversations which passed between the deceased and him, relative to family settlements, a fortnight before the fatal deed, and which were supposed to be one cause of the grudge entertained against the deceased, his brother, by the prisoner. There was no appearance, however, of his having been consulted by the prisoner at all, or any facts communicated by him either before or after the fact charged; and in this state of the case, the Court, upon the objection being stated by the witness himself, unanimously held he was bound to depone.<sup>2</sup> Upon the same principle, it was held by the Court in another case, that where the agent for the pannel was cited for the Crown, he was bound to answer concerning those matters which fell under his knowledge otherwise than as agent, and he was examined accordingly.<sup>3</sup> The limitation of the rule is strictly consonant to justice; it being obvious that the communications only which have been made to the witness professionally are within its spirit, not those facts which have fallen under his notice as an ordinary individual. Accordingly it has been held, that an agent may be examined concerning matters even connected with professional employment, if they were not such as came to his knowledge *qua* agent for the prisoner in the matter charged in the indictment.<sup>4</sup>

It is to be observed, however, in what time this limitation is to be understood. Facts which have come to the witness's knowledge professionally in relation to the matter charged, unques-

<sup>1</sup> M-Kenzie's Obs. on Act 1621.—<sup>2</sup> Burnet, 436; Hume, ii. 350; Sir Archibald Kinloch, June 1795; *ibid.*—<sup>3</sup> Thomas Wilson, Jedburgh, Jan. 25, 1790; Hume, ii. 350.—<sup>4</sup> Wilson, Jan. 25, 1790; Burnet, 436.

tionably fall under the protection, though not obtained from the pannel himself; as for example, disclosure made by his relations or friends previous to the trial, memorials laid before counsel, notes furnished to agents, or the like, if done with that view. Under that head must be included facts gathered by the agent himself in the course of precognosing the witnesses, or by his clerk in copying or reading that precognition, or attending the examination of the witnesses under it. Farther, the privilege extends, under a limitation to be immediately noticed, to all professional communications in relation to the matter libelled, though long anterior to the date of the crime, if in regard to matters which are now charged as forming part of, or adduced in evidence regarding, it. Accordingly, in two late cases, it has been held in the Court of Session, after full consideration, that professional communications between agent and client, though occurring many years prior to the commencement of the suit, if relative to the subject matter therein involved, could not legally be disclosed by the former of these parties.<sup>1</sup> If, therefore, the disclosures which were made to Mr Hay in Sir Archibald Kinloch's case, had been made, not by the deceased, as they were, but the *pannel*, or made to him by any one as the pannel's legal adviser, there can be no doubt that it would have been held to be privileged. Our rule, in short, is the same as that so well expressed in the English law, that "confidential communication between attorney and client are not to be revealed at any period of time, nor in an action between third parties, nor after the proceeding to which they referred is at an end, nor after the dismissal of the attorney. The privilege of not being examined to such points as were communicated to the attorney, while engaged in his professional capacity, is the privilege of the client, not of the attorney, and it never ceases. "It is not sufficient," says Judge Buller, "to say the cause is at an end; the mouth of such person is shut for ever."<sup>2</sup>

8. This privilege extends only to the three privileged classes, of counsel, solicitor, and attorney, and does not embrace disclosures to physicians, or intimate friends, nor to communications even to these privileged advisers,

<sup>1</sup> Sir W. Pulteney v. Lady Bath's executors: Fac. Coll. Lumsdaine v. Balfour, Nov. 15, 1829; Shaw's Rep.—<sup>2</sup> Per Buller, 4 Term Rep. 759; Phil. i. 140.



if done with a view to the perpetration of the crime in question, or any other offence.

This privilege is confined to legal advisers, properly so called, that is, to counsel, attorneys, and agents. It does not extend either in the English<sup>1</sup> or Scotch law, to communications made to, or facts acquired by, any other intimate or confidential friends, how solemn soever may have been the occasions on which the information was received.<sup>2</sup> On this principle it has been held, that a physician even was bound to disclose the secrets divulged to him in the course of his professional attendance,<sup>3</sup> however much it may be to be lamented that such disclosures should ever be made the subject of judicial publication. If this holds with a physician or surgeon, and the information they acquire in death-bed scenes, much more must it apply to intimate friends; or communications made to law agents as ordinary individuals, and apart from professional consultation or confidence, as to which there is no sort of doubt, both by the Scotch and English law, that their examination is competent.<sup>4</sup>

Baron Hume extends the same rule to communications made to clergymen, for the sake of spiritual consolation, if prior to the incarceration of the prisoner, though he holds that those subsequently made are inviolable.<sup>5</sup> It may reasonably be doubted, however, whether there is any good ground for this distinction. Confessions made to clergymen at any time, in order to unburden the conscience, and receive the spiritual consolation which guilt so often requires, and religion alone can afford, seem to be the most sacred of human communications; and the reasons for their inviolability, as much stronger than those which have led to the establishment of the rule in regard to legal advisers, as the affairs of the next world are superior to those of this. Certainly it would be a strange anomaly if disclosures made to an attorney about the most trivial affair relating to temporal property are inviolable, and those made to a priest, for the far higher concerns of eternal welfare enjoyed no protection. And though there is a certain degree of expedience in not permitting such comfort to be given to criminals in the prosecution of their crimes, yet there is too much reason to believe that to the hardened offender such a deprivation would be a matter of no sort of consequence,

<sup>1</sup> 4 Term Rep. 758; Phil. i. 141, 142.—<sup>2</sup> Hume, ii. 350; Burnet, 438, 439.—

<sup>3</sup> Duchess of Kingston's case; Phil. i. 142.—<sup>4</sup> Burnet, 438; Hume, ii. 350; Phil. i. 142; per Lord Kenyon, in *Wilson v. Rastall*; 9 State Trials, 582.—<sup>5</sup> Hume, ii. 350,

while it might deprive the novice in guilt, in whom reformation is practicable, of a chance at least of being reclaimed to the ways of virtue. Certain it is, that there is no instance in our record for the last century of such a species of evidence being resorted to, and from the jealousy which the Court justly entertain towards all communication of such a kind, even when coming from other quarters, there seems no reason to believe that they would now permit it to be introduced.

This protection, however, if held to be established, must be circumscribed within the same narrow bounds as that awarded to communications to legal advisers. Whatever, therefore, a clergyman becomes acquainted with as a friend, however intimate, of the family or the pannel, he is just as much obliged to disclose as an ordinary individual. What is privileged are those disclosures only which are made under the faith of clerical fidelity, to obtain religious advice or consolation; the confession, in short, of the Catholic church, to make which there is an universal disposition in every repentant mind, and which, when unaccompanied with the unauthorized or premature *absolution*, by which they are too often followed, is one of the most powerful engines which exists for the reformation of the human heart. But in England such confessions may be given in evidence, though made from religious persuasion, if uttered to others than the clergyman himself. Buller once admitted a confession made by a Papist to a Protestant clergyman, and the prisoner was convicted and sentenced thereon;<sup>1</sup> and though Lord Kenyon said, in a subsequent case,<sup>2</sup> that he would have hesitated before he admitted such evidence, yet its competence was fully established by the opinion of all the Judges, in Gilham's case, Easter Term, 1828,<sup>3</sup> when a confession made to a mayor and jailer, from the advice of a clergyman, was held admissible.

There is another exception also to these privileged communications, and that arises out of the obligation of every one to divulge a crime which is proposed or communicated with a view to obtaining aid or assistance in its *perpetration*. Certainly, in such a case, both reason and authority fail in supporting the privilege. Criminals the most depraved, frequently employ agents or assistants in the commission of their offences; and it is absurd to suppose, that because these agents happen to be their legal

<sup>1</sup> Rex v. Sparks; Russell, ii. 610.—<sup>2</sup> Dubonno v. Levett; Peake, 78.—<sup>3</sup> Rex v. Gilham; Russell, ii. 648.

advisers, therefore their communications must not be brought to light as articles of evidence in bringing home that very delinquency to the prisoner. An agent, therefore, may be compelled to swear to his client's having declared his purpose to commit the crime to him; or having undertaken a criminal employment by his desire, as in the case of forgery by falsifying a deed, the copy of which was sent to him by his employer<sup>1</sup>. On the same principle, a man of business who got a forged bond from his employer, who was employed to give it in, and saw the date and witness's name filled up, has been admitted without objection.<sup>2</sup> This principle seems to be recognised in the law of England; it being there held that an attorney who prepares deeds granted on an usurious consideration, may be called on as a witness to prove the usury, for that does not come to his knowledge in the character of an attorney, "he being, as it were, a party in the original transaction."<sup>3</sup>

It is held in England, that an attorney is not at liberty to give parole evidence of the contents of a deed deposited with him, in his professional character, nor to produce a copy of it.<sup>4</sup> The Attorney-General, if questioned concerning his reasons for filing an *ex officio* information, may refuse to answer;<sup>5</sup> a principle which is unquestionably applicable to the Lord Advocate of Scotland. It is held, however, that any communication made to a counsel or attorney, not for legal advice, but to obtain information as to a matter of fact, is not privileged; as, where a client asked an attorney whether he could safely attend a meeting of his creditors, it was held, the attorney might be examined as to that to prove the bankruptcy.<sup>6</sup> But they justly hold with us, that a person who acts as an interpreter or agent, or an attorney's or barrister's clerk, cannot be called on to reveal professional communications, for they stand in precisely the same situation as the attorney himself.<sup>7</sup>

By the Scotch law, a counsel or agent may in any case be called on to give evidence as to the handwriting of his employer, or his subscription of any deed, which is the subject of investigation, for in such cases there is no professional confidence; and therefore the rule fails if the fact of the client having subscribed the deed was disclosed to them confidentially.<sup>8</sup> The

<sup>1</sup> Kilk. voce witness, No. 7; Burnet, 437.—<sup>2</sup> Andrew Adam, ditto, Feb. 1710; Burnet, 436.—<sup>3</sup> Duffie v. Smith; Peake, 108; Russell, ii. 610.—<sup>4</sup> Per Bayley; Phil. i. 140.—<sup>5</sup> Rex v. Horne; State Trials, xi. 283.—<sup>6</sup> Bramwell v. Lucas; Russell, ii. 614.—<sup>7</sup> Russell, ii. 611.—<sup>8</sup> Burnet, 437.



same rule obtains in England; it being held that an attorney may be called to prove his client's subscription, though his knowledge of it was obtained by seeing him subscribe the bail-bond in the action,<sup>1</sup> or to prove his client's identity;<sup>2</sup> or if the question be about an erasure in a deed or will, he may be asked whether he ever saw the deed in another plight than that in which it now appears; for that is a fact of his own knowledge, but he may not be put to discover any confessions made to him by his client on that head.<sup>3</sup> But if a person has been confidentially consulted, on the supposition of his being an attorney when he is not so, it has been held that he may be compelled to answer.<sup>4</sup>

9. Witnesses employed to obtain information, either by the public authorities or the private parties injured, are not bound to disclose the parties who employed them, or the nature of the communications which passed between them and their employers.

In the complicated and corrupted state of society in which we live, it is frequently necessary for government, or the public authorities, to employ officers of justice, spies, or informers, with a view to the detection of conspiracies and other hidden offences, which may prove in their effect, if unchecked, in the highest degree detrimental to the interests of society. We may lament the necessity which exists for employing such characters too often, at least as depraved as those whose crime they are to divulge, but while the evil subsists, the unavoidable means of tracking it out cannot rationally be complained of. On this principle it has been held, that a witness employed by government to collect information at a meeting of one of the Corresponding Societies, is not bound to disclose the name of his employer, or the nature of the communication which subsisted between himself and the officer.<sup>5</sup> In the same case Chief Justice Eyre observed, "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has obtained universally, on account of its importance to the public, for the detection of crimes,

<sup>1</sup> *Hurd v. Moring*; Carr. and P. i. 372; Russell, ii. 613.—<sup>2</sup> *Stark*, ii. 239; Russell, ii. 613.—<sup>3</sup> *Bull. N.P.* 284; Russell, ii. 613.—<sup>4</sup> *Fountain v. Young*; 6 Esp. 113; *Phil. i.* 291.—<sup>5</sup> *Hardy's case*, *State Trials*, xxiv. 753; *Phil. i.* 295.

that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed.”<sup>1</sup> The same principle has been adopted in all the trials for treason of late years; and even when the parties were willing to disclose the sources of their information, the Court, on public grounds, prohibited it.<sup>2</sup> “If the name of an informer,” said Judge Buller in Hardy’s case, “were to be disclosed, no man would make a discovery, and public justice would be defeated.”<sup>3</sup>

Upon the same principal, official communications between the governor of a province and its law officers, were not allowed to be enquired into;<sup>4</sup> or the orders given by the governor of a foreign colony to a military officer under his command;<sup>5</sup> or the report of a military Court of Enquiry, in an action of libel by an officer, respecting whose conduct the Court had been appointed to enquire.<sup>6</sup> So also, the minutes taken before the Privy Council were held not liable to be called for.<sup>7</sup> On these points, we have little decided matter yet, in our Courts; but as they relate to the general law and government of the country, there can be no doubt, that these precedents would be deemed worthy of serious consideration; and it is the uniform practice of our Judges, to check all enquiry into such sources of information, when pointed at by the counsel on either side of the bar.

10. Any offer made for a compromise, or any admissions made in the course of such an offer, or in the communications or correspondence regarding it, is a privileged matter, and cannot be divulged in civil cases; but they are admissible evidence, at least *cum nota*, in prosecutions in criminal cases, at the instance of the public accuser.

It is a principle in the law of evidence, wisely established for sufficient reasons, in the law both of Scotland and England in civil matters, that any offer of compromise made by either of the parties, or any admissions, whether verbal or written, made in the course of such a negotiation, are inadmissible against the party who made them.<sup>8</sup> In England, it is held on the same principle, that an arbitrator cannot be permitted to disclose any concessions

<sup>1</sup> Phil. i. 808.—<sup>2</sup> Brod. and Bing. ii. 162; Russell, ii. 615.—<sup>3</sup> State Trials, xxiv. 814.—<sup>4</sup> Wyalt v. Gore; Russell, ii. 615.—<sup>5</sup> Cook v. Maxwell, Stark, ii. 183.—<sup>6</sup> Horne v. Lord F. Bentinck; Brod. and Bing. 130; Russell, ii. 615.—<sup>7</sup> Sayer’s case, State Trials, vi. 288.—<sup>8</sup> Smyth v. Petland’s Commissioners, May 20, 1809; Fac. Coll.

made in an action before him, or any facts that came to his knowledge in the course of an examination of the parties' books, nor any concessions or admissions made by one party during the reference for making his peace and getting rid of the suit.<sup>1</sup> But it is otherwise with them as to regular admissions on record, in a submission which may be proved by production of the document in which it is contained, or the arbiter's testimony, in the same way as if they had occurred in a regular Court of Justice.<sup>2</sup> The principle on which admissions or concessions made in the course of, or with a view to a compromise, cannot be given in evidence, while regular admission in an arbitration case may, is, that in the first case there is room for the presumption, that the party abated somewhat of his just rights, or admitted some facts that might have been disputed, with a view to get quit of the risk, vexation, and expense of a litigation; whereas, in the latter, he stood upon his full rights, and conceded nothing he could avoid, and consequently, what he has admitted must be presumed to have been known by him to be so well founded that it could not be denied.

This principle is clear, and of known application in civil trials, where the party who makes the admission, is himself the pursuer or defender in the action; but it becomes a more nice and difficult matter to apply it to criminal matters, where a public prosecutor interferes, and the question occurs, how far he can be fettered or disabled from proving, what the pannel has admitted to the private party injured? Upon this point our practice does not furnish us with sufficient materials to give detailed rules, and the subject itself will be more fully considered in treating of Proof by Admission or Declaration. But the principle of law, seems to be somewhat similar to that adopted in England, in regard to the proof of admission in an arbitration, viz. that what is admitted voluntarily, whether from the force of compunction, or an overwhelming sense of guilt to the private party, or any of his witnesses, is admissible evidence without any qualification; but that any proposal made for a compromise, or any admissions of guilt with a view to avoid imprisonment or prosecution, must be received *cum nota*, experience having proved, that to avoid the terror of incarceration, admissions are frequently made, which

<sup>1</sup> Westlake v. Collard, Bull, 236; Russell, ii. 611.—<sup>2</sup> Slack v. Buchanan, Peake, c. 6; Russell, ii. 611.



go beyond the real guilt of the party making them. But for the proposition, that such proposals are altogether inadmissible in evidence even when made with this view, there is no sort of authority, and it is contrary to the whole system of our criminal law, which is mainly founded on the principle, that the public prosecutor is the unfettered master of all prosecutions for crimes, and that nothing done by the private party can tie up the hands or abridge the proof of the public accuser. In practice, accordingly, it is common to ask the witnesses, whether the prisoner made any confessions, proposed to restore any of the stolen goods, offered any thing by way of compromise, &c. although in almost all such cases, it was to avoid prosecution or *trouble*, as it is called, that such proposals were made, and they frequently form an important part of the evidence on which convictions are obtained.

#### SECT. VI.—OF THE OBJECTION OF ENMITY AND PARTIAL COUNSEL.

There are no objections to the admissibility of witnesses which are more frequently made, or more generally fail upon investigation, than that of *enmity and partial counsel*. The reason of this is, that they generally present themselves in very forcible colours to the minds of the pannels, especially in cases of assault, murder, or other personal injuries, which vehemently excite the passions, and thence they are induced to urge their counsel to state to the Court, when, on an examination of the facts, they generally turn out to be either unfounded, or so exaggerated as to affect the credibility of the witness only. The rules on this head, however, still form an important part of the law of evidence.

1. It is no objection to a witness that he is the sufferer by the crime with which the pannel stands charged, nor that he has voluntarily given information to the public authorities, and endeavoured by fair means to support his evidence by that of others, nor has expressed wishes for the conviction and punishment of the offender.

It is generally unavoidable when an injury, especially of a personal or obvious nature, has been inflicted by one on another, that the injured party should feel a desire for the conviction and punishment of the offender. This feeling is not only natural in the individual wronged, and in his immediate relations, friends, or dependents, but it is, in aggravated cases, shared by the neighbourhood in which he resides, and it forms the foundation on which the whole fabric of criminal justice is reared in civilized society. It is impossible, therefore, to hold, that a witness is to be rejected, merely because he entertains the just and natural resentment for his wrongs, or that his kinsmen or relations are to be set aside, because they participate in these natural and unavoidable feelings.<sup>1</sup> For a very long period back, accordingly, it has been held to be no objection to a witness, that he is the sufferer by the wrongs for which the pannel is to answer, and wherever that objection has been stated, it has been instantly overruled.<sup>2</sup>

On the same principle, it has long been settled that it is no objection to the admissibility or credibility of a witness, that he has given information to the public authorities, and become in this way instrumental to the apprehension of the offender.<sup>3</sup> Such an objection is obviously of no weight whatever, when directed against the actual sufferer by the injury, or any of his kinsmen or friends, because they are justified on every principle of justifiable private resentment, and public justice, to take such a step; nor will it in the least strengthen the objection, though the suffering party, or his friends or kinsmen, has accompanied the officer who made the searches, and manifested a considerable degree of warmth and anxiety on the occasion.<sup>4</sup> Such conduct the law considers as natural and justifiable on the part of the sufferers by the wrong in question; and accordingly, the objection has been repelled when stated against that party.<sup>5</sup> It is indifferent therefore, in this question, whether the witness was called on by the magistrate along with others, or went himself to that officer, or any legal authority, to disclose what he knew of the matter.<sup>6</sup>

<sup>1</sup> Hume, ii. 357.—<sup>2</sup> James Cranston, Sept. 10, 1723; John Irvine, Sept. 24, 1744; Hume, ii. 357.—<sup>3</sup> Hume, ii. 352; Burnet, 428.—<sup>4</sup> Johnie, Inverness, May 1775; Johnstone, Ayr, May 1766; Burnet, 428; Chas. M<sup>c</sup>Mahon, Dec. 10, 1827; Syme, 282; Donald Rankine, Inverary, Sept. 11, 1821; Shaw, No. 44; Burnet, 428.—<sup>5</sup> Murdison and Miller, Jan. 8, 1773; Hume, ii. 352.—<sup>6</sup> Hume, *ibid.*; Burnet, 428.

For the same reason, it is no objection to the credibility, far less to the admissibility of the sufferer or his kinsman and friends, that they have been heard to express themselves in strong terms as to their wishes that the prisoners should be proved guilty and convicted. Law cannot forget that such sentiments are allowable and justifiable to such parties on the occasion, if they do not exceed the bounds of a reasonable resentment. If they do, they render the witness suspected, and tinge his credibility; if they are so strong as to show that to gratify his revenge he would not hesitate to swear what *was false*, they may in certain cases render him altogether inadmissible. Ample illustrations of these positions will be found in the sequel, in treating of the expressions of enmity, which are sufficient to disqualify or discredit a witness. In the case of James Glen, Nov. 10, 1827, for the murder of his bastard child, it was objected to Margaret M'Comb, the mother of the child, that she had declared "she would hunt the pannel like a dog to the gallows;" that she was pregnant to him, and had received promises of marriage from him which he had not kept. She was, nevertheless, held admissible, and having sworn, when examined *in initialibus*, that she would speak the truth, and denied any particular malice, was received without even any reservation of her credibility.<sup>1</sup>

2. A Procurator-fiscal, Sheriff, Magistrate, police or sheriff-officer, are not liable even to suspicion because they discharge their duty, by making enquiries, or conducting, as in duty bound, a precognition against the accused.

As cases will not prove themselves, nor can accused persons be brought to justice unless some one exerts often a very great degree of vigilance and attention in tracing out the evidence against them, it follows that a vigilant and faithful discharge of these duties by a police or sheriff-officer, magistrate, procurator-fiscal, or other person officially intrusted with the conduct of the case, is no objection whatever either to their admissibility or credibility. In acting thus, in a matter in which they have no personal interest, law presumes that they are actuated by a sense of public duty, or a laudable desire to repress crimes, without the slightest tincture of undue animosity against the pannel. In

<sup>1</sup> Syme, 267.



cases innumerable, accordingly, police and sheriff-officers have been examined without objection, and by their testimony mainly contributed to the conviction of the offenders, although they were proved to have taken the most active part in procuring evidence against them. And in one case, where the objection was stated against a sheriff-officer, that he had precognosed two of the witnesses for the Crown who had already been examined, the Court unanimously repelled the objection; laying it down, at the same time, that the objection of agency or partial counsel can never be sustained against a magistrate or police-officer for making the enquiries incumbent on them by their official duty.<sup>1</sup>

The agent of the private party is objectionable if he has taken precognitions, and been present at the examination of witnesses, if examined in relation to any matter on which he has heard their declaration, because it is to be presumed, that having no personal knowledge of the matter, what he can tell will be only a repetition at second hand of what he has heard them say. But he may be examined as to facts which he himself witnessed in the case, and where he speaks of his own knowledge as to the conduct and state of the pannel when emitting declarations which he had been called on to authenticate, as one of the instrumentary witnesses.<sup>2</sup>

3. Witnesses are not to be rejected though they are actuated by a feeling of hostility to the pannel, and have vented it in the most intemperate expressions, if not manifested by some overt act; but they are to be admitted, with a reservation of their credibility to the jury.

In all questions concerning the rejection or discrediting of witnesses on the ground of enmity, two things are in an essential manner worthy of consideration. The first is, the extreme license which persons in the lower ranks of life usually give to their tongues, and the asperity with which they speak of each other upon slight, and often unintelligible causes of provocation, without being actuated by that degree of malice towards a party, as would induce them to swear falsely against him on the solemn occasion of a criminal trial. The second is, the facility with which stories of violent expressions of enmity may be got

<sup>1</sup> George Begrie and William Paterson, Jan. 8, 1820; Shaw, No. 5.—<sup>2</sup> Mrs Smith's case, Feb. 1827; Syme, 115.

up by the pannel's friends against a witness, and the ease with which one of them could disqualify himself and get quit of the painful duty of speaking the truth against him, by merely admitting that he was actuated by mortal enmity, if this objection were readily sustained in Courts of law. For these reasons, it has long been the settled rule of our practice not to set aside a witness on account of an expression of enmity, how violent or pointed soever, if not accompanied by some positive deed or overt act, indicating the reality of such sentiments, and not at so remote a period, or followed by such circumstances, as may presume a reconciliation between the parties.<sup>1</sup> The following examples will illustrate the disposition of our law in this particular,—without going back to the older authorities, which are still, however, of direct application to present practice.

In the case of Nairne and Ogilvie, Anne Clarke was received against the pannels, though it was alleged that she bore them deadly malice, and had threatened to bereave them of their lives, reserving to the consideration of the Court how far the expressions alleged, if proved, might invalidate her testimony.<sup>2</sup> In a later case, the expression by a witness, since citation, that “right or wrong she would bring the pannels to the gallows,” not being confirmed by any overt act, was found insufficient to exclude her testimony.<sup>3</sup> So also, when the expressions alleged were, that the witness had repeatedly threatened to swear away the pannel's life, and had asked money of him to buy off her evidence, the objection was overruled, in respect it appeared from her examination *in initialibus*, that she was a friend and confidant of the pannel, with whom she had concerted this device, to exclude her testimony.<sup>4</sup> On the same ground, where it was objected, in a trial for sedition, to a witness, that he had said “he would do every thing in his power to get the pannel hanged,” the objection was repelled, upon the ground that no facts were condescended on or proved to support the objection, and that it would enable every witness to disqualify himself if such allegations were sustained.<sup>5</sup> One of the cases in which the legal principle is best stated, is a much older one, before Lords Kilkerran and Auchinleck. It was there *objected* to a witness “that he harbours deadly malice against the prisoner, and has been heard to say, he would persecute him to

<sup>1</sup> Hume, ii. 360 ; Burnet, 412.—<sup>2</sup> Nairne and Ogilvie, Aug. 1765.—<sup>3</sup> Brown and Wilson, Aug. 1773 ; Hume, ii. 362.—<sup>4</sup> Andrew Young, Dec. 6, 1790 ; Hume, *ibid.*—Thos. Muir, Aug. 10, 1703 ; Hume, ii. 363.

the death, and would pull down his feet at the gallows, on an occasion of some dispute they had had sometime before." *Answered*—*No facts* are here condescended on from which to infer deadly malice, but *words* only said to have been uttered by the witness, but which, as he will be purged of malice *in initialibus*, cannot be held *hoc statu* to disqualify him. The Court "were of opinion that the *inimicitia capitalis* is not sufficiently qualified; as without some *fact* is alleged and proved inferring it, every expression, however strong, is understood to be taken off by the witness purging himself; not to mention that often expressions are uttered by a witness, with the design to cast himself, and therefore admit the witness, but allow the expressions charged to be proved to affect his credibility."<sup>1</sup> The principle of law is here so well expressed as to leave nothing to be desired; words of enmity, how strong soever, are understood to be taken off or neutralized by the oath *in initialibus*, that the witness has no malice or ill-will against the pannel; but *deeds* indicate a more settled and malignant purpose, and against them therefore the initiatory oath is held to be no sufficient safeguard.

The same rule has been constantly followed in later times; the practice of the Court being to admit the objection to instant probation, and to judge of its weight according to what is proved by the witnesses. In general it turns out that the facts, as they appear in evidence, fall far short of what is alleged in the objection. This occurred, and the objection in consequence failed in the cases of James Strong, Perth, Oct. 1811, and John M'Bain, Inverness, April 1812. Even when expressions of malice are proved, they are almost always, when unaccompanied by deeds, disregarded, or allowed to affect credibility only. Thus, in the case of James Harkness, it was objected to John M'Kenzie, that he was an old enemy of the pannel, and had openly branded him with the murder in question; and against David Thomson, that he had been himself indicted, along with others, for the murder, and had failed to appear; that he had since been imprisoned, run his letters on the same charge, and been liberated; that he had then given information against the pannel, and taken an active part in the precognition. All this was found irrelevant to exclude, leaving the credibility of the witnesses to the judgment of the jury.<sup>2</sup> In like manner, in a subsequent case where the pannel

<sup>1</sup> Walter Graham, Dumfries, April 1758; Burnet, 413.—<sup>2</sup> James Harkness, April 3, 1797; Hume, ii. 362.



was charged with false conspiracy, a witness was objected to on the double ground of enmity and interest; in as much as the precognition was taken at his suggestion, and a person had then attended as agent for him, and put questions to the witnesses, and as a conviction of the pannel would disqualify her from giving testimony against the present witness in a prosecution in the Ecclesiastical Court. All this was held, after a proof taken, to affect the credibility of the witness only.<sup>1</sup>

Precedents too numerous to be all quoted, have occurred to the same purpose in still later times. Thus, in James Miller's case, it was objected to Robert Stevenson that he had on various occasions expressed himself to have the strongest malice against the pannel; in particular, that he would do all in his power to hang him, and that if the city of Glasgow wanted an executioner, he would himself put the rope about his neck. This was repelled as an objection to admissibility, reserving its effect on credibility only.<sup>2</sup> A similar decision was pronounced by the High Court, about the same time, where a special cause of enmity was set forth from an information for theft, which the pannel had lodged against the witness; the proof not having fully supported the objection.<sup>3</sup> Proof was allowed of strong expressions attended with an attempt to suborn in another case; but the witness was, nevertheless, received, and gave strong testimony against the accused; there having appeared reason to believe that the story was got up to disqualify the witness.<sup>4</sup> A proof of malicious expressions, viz. that the pannel "had forged his name to a bill, that he would hang him without trial, judge, or jury, and that if some pence would hang him, he would pay it," was in like manner allowed in a later case, and overruled for the same reason of an apparent design, on the witness's part, to disqualify himself.<sup>5</sup> In a case tried before the late Lord Meadowbank and Lord Pitmilley, the expressions alleged were, that he had said "the pannel deserved to be whipped, and if no one else would do it he would do it himself, and dip the whip in vitriol, that he would take his sweet life away." Both these learned judges laid it down as clear law, that all this, supposing it true, was an objection to credibility only; that it was settled a hundred years ago, that mere loose expressions, unaccompanied with *facts* indi-

<sup>1</sup> Mary Scott, May 10, 1816; Hume, ii. 362.—<sup>2</sup> James Miller, July 2, 1818; Hume, ii. 359.—<sup>3</sup> William Crawford, Dec. 6, 1818; Hume, *ibid.*—<sup>4</sup> Ross and Ward, July 13, 1819; Hume, *ibid.*—<sup>5</sup> John Crab, Perth, April 1827; Syme, 45, 46.

cating an antecedent cause of enmity, are not enough to render the witness inadmissible, though they may affect his credibility.<sup>1</sup> A similar decision was pronounced at Glasgow, where the expressions proved were, that the witness had said, a fortnight before the trial, that "he would do all he could to hang the pannel, and that he would dish the b——r." This was held to affect his credibility only.<sup>2</sup> The expressions that the witness would "swear any thing to hang the pannel, so as he might get the reward offered for his apprehension," and that he had taken active measures for his apprehension, was held sufficient only to discredit, and a proof allowed with that view, but it totally failed.<sup>3</sup>

Thus, upon the whole, the rule is established on the firmest foundation, that expressions of malice and ill-will, how strong and pointed soever, will fail of disqualifying a witness if unaccompanied with such overt acts, or actual deeds, as indicate a settled resolution of revenge, although they may more or less affect his credibility according to their intensity, and the weight due to the testimony by which they are established.

4. But if the witness has indicated a settled purpose of revenge or hostility by overt acts, and these have occurred under circumstances which give no ground to presume reconciliation, this will have the effect of excluding his testimony altogether.

Although the objection of enmity is now hardly ever sustained except to affect the credibility of the witness only, yet cases have occurred, and may occur, where the hostility is so deep-rooted and inveterate as to call for his total exclusion. This is the case wherever it is manifested, not in vehement or rash expressions only, but in such actions as indicate a settled resolution of the mind; and instances have frequently occurred where, in such circumstances, the witness has been totally excluded. Thus, in an old case, a witness was set aside, because recently before the fact spoken to, he had been engaged in a quarrel with the pannel, in which blood had flowed on both sides;<sup>4</sup> and the same precedent was followed a century after, where it was proved against the chief witness, that he had fired a pistol at the pannel

<sup>1</sup> James Brown, Glasgow, April 1821; unreported.—<sup>2</sup> Robert Rae, Glasgow, Sept. 1825; unreported.—<sup>3</sup> David Little, Glasgow, Jan. 1831; Justice-Clerk's MS.—<sup>4</sup> Cunningham, July 30, 1677; Hume, ii. 363.

with intent to kill him.<sup>1</sup> On the same ground, strong expressions of malice, if consequent on a great personal injury received, may be a good ground for setting aside the witness, the malice here being founded on fact as well as words; nor will it alter the case, if the expressions are sufficiently strong, and the injury great, though the witness was the person injured by the crime with which the pannel is charged.<sup>2</sup> Upon this ground, the judgment of the Court seems to have proceeded in a case where the pannel was charged with rape and incest on his own mother-in-law, and expressions indicating the most inveterate malice were proved against her; these words, coupled with the grievous previous injury set forth in the indictment, were deemed by Lord Kames sufficient to exclude.<sup>3</sup> It is probable, however, that in such a case, where the witness was a necessary witness, without whose testimony the case could not be proved, the Court would now admit the witness, under a reservation of the weight due to her testimony.

Under this head may be classed those cases in which it has been held, that the manifestation of an undue and highly suspicious degree of zeal for the apprehension and conviction of the pannel, by overt acts of hostility or persecution directed against him, are sufficient to set aside his testimony. So where a gentleman in Rosshire had taken an active part against the pannel, who was accused of housebreaking and fire-raising, and caused to be inserted in the newspapers an advertisement, in which he directly asserted his guilt, and called on the clergymen in all the parishes to give warning from the pulpit, and had offered a reward of L.50 for his apprehension, which he had actually paid or granted his bill for to the proper authorities; it was held by the Court, (Hermard and Succoth,) that he had evinced such undue zeal to forward the prosecution, as disqualified him as a witness.<sup>4</sup> It may be doubted, however, whether the proper course would not have been to have admitted the witness *cum nota*, as his acts, how strong soever, only were directed to obtain the bringing the pannel to justice. A more correct judgment was pronounced by Lord Pitmilley, in a similar case, which excited a great deal of attention at the time. This was the case of Patrick Sellar, factor to the Marquis of Stafford, for culpable homicide and oppression.

<sup>1</sup> Edgar Wright, Dec. 15, 1788; Hume, ii. 363.—<sup>2</sup> Burnet, 413, 414.—<sup>3</sup> Jas. Cullen, May 1768; Burnet, 414.—<sup>4</sup> David Ross, Inverness, April 1821; Record; and Shaw, No. 33.



It was there objected to the witness, Robert MacKid, Sheriff-substitute for Sutherland, that he had evinced the strongest malice and partial counsel by his actions; that he had imprisoned the pannel on an illegal warrant, which the Court of Justiciary had set aside; unlawfully refused to admit him to bail; without complaint or trial struck him off the roll of procurators in the Sheriff Court; written a partial and inflammatory account of his conduct to the Marquis of Stafford; dissuaded those who wished to be bail for him, and said that the pannel ought to be hanged, and that Botany Bay was too good for him. It turned out, however, on a proof being taken, that the warrant had been quashed by the Justiciary Court on an *informality*, and on that account only had the pannel been admitted to bail in a capital case. All this that learned Judge held to be sufficient to discredit the witness, and he was received *cum nota* accordingly, though the advocate-depute, on the recommendation of the Judge, passed from his examination.<sup>1</sup> In a prior case, it had been held that the publication in the newspapers of a violent and exaggerated account of the affray which led to the homicide, was no objection to admissibility, but to credibility only.<sup>2</sup> And a similar decision was pronounced at Stirling, April 1821, where it appeared that the witness had been instrumental in preparing, and had read when insisted, a false and exaggerated account of the law.<sup>3</sup>

Thus on the whole it appears that the safer course, where facts indicating excessive enmity are proved against a witness, is to admit him under the proper reservation of his credibility to the jury; and that then only is he to be entirely excluded where the facts indicating the hostility are of such a strong and malignant character, as to give reasonable ground for belief that to nothing whatever that he says can any credit be attached.

5. It is a good objection to the credibility of a witness if he has been guilty of undue and illegal agency against the pannel; and where the acts proved are very strong, or corrupt, they will disqualify him altogether.

Akin to the objection of enmity or malice is that of undue and corrupt agency; which, wherever it appears, and more especially in one who has not suffered injury from the pannel, and therefore

<sup>1</sup> Patrick Sellar, April 1816, Inverness; Hume, ii. 359.—<sup>2</sup> Mitchell and Miller, Jan. 3, 1803; Burnet, 414.—<sup>3</sup> James Cuddie, Stirling, April 1821; unreported.

may be held excusable for a more than usual degree of activity in the case, is held a good objection. Where the facts are very strong, it may disqualify altogether; where they are less material, they will discredit only. Thus, where a witness had been tampering with the pannels, and had offered to bring one of them off if he would absolve the others from the charge, he was set aside.<sup>1</sup> The objection of undue and corrupt agency was sustained by the Lords Justice-Clerk Boyle and Reston, in a late case, where it appeared that the witness, having a material interest in the issue, had been an active, corrupt, and officious agent, in obtaining evidence for the prosecutor, and had been tampering in an undue manner with some of the witnesses.<sup>2</sup> So also it was held by Lord Kames at Aberdeen, May 1768, that the objection of undue and corrupt agency was sufficiently made out, and he was set aside accordingly.<sup>3</sup>

It is only, however, where there are appearances of *corrupt* agency or tampering with witnesses that this objection is sustained to *exclude*; in cases of undue and officious zeal and activity, the witness is discredited only. To this purpose was the interlocutor of the Lord Justice-Clerk, in a case where it was objected to a witness, that he had attempted to suborn three witnesses; but as the evidence did not show any corrupt intent, but only an excessive zeal to collect true evidence, he was admitted *cum nota*.<sup>4</sup> So also Lord Meadowbank repelled the same objection at the taking a proof, where some officious conduct appeared, but nothing indicating a corrupt intent.<sup>5</sup>

6. It is no objection to a witness that he is ultroneous, or that he has appeared altogether without a citation.

It has been already stated that so far was the principle of rejecting a witness if he was ultroneous, formerly carried, that any irregularity in the citation, however critical, if sufficient to found an objection to that instrument, was held sufficient to exclude his testimony altogether. But for the great evils consequent on this rule, Sir William Rae's act has found a remedy, it having enacted, "That it shall not be competent in any criminal cause *or proceeding* whatsoever, for any prosecutor or person accused to

<sup>1</sup> Spalding of Ashintrelle, May 4, 1687; Hume, ii. 351.—<sup>2</sup> Robert Garrow, Aberdeen, Sept. 1817.—<sup>3</sup> Burnet, 420.—<sup>4</sup> Alex. Nimmo, Stirling, Oct. 16, 1813; Justice-Clerk's MS.—<sup>5</sup> Angus Cameron, Perth, Oct. 5, 1811; Hume, ii. 351.

state any objection to any juror or witness, on the ground of such juror or witness appearing without citation, or without having been duly cited to attend."<sup>1</sup> It is to be observed here, that the objection is declared to be unfounded, if stated in any criminal *proceeding*, as well as cause; an expression which excludes it in those cases where the witness has come forward without citation in any precognition or previous process, as well as a regular trial.

7. It is not a good objection to a witness that he has heard the declarations or depositions of other witnesses in the same case, either read or delivered.

It was formerly much disputed, and a most distressing diversity of judgments existed on the question, whether a witness was disqualified because he had been present at the precognition, and instances were not wanting of the whole witnesses in a trial being set aside on account of that circumstance.<sup>2</sup> But as this separate examination of witnesses was neither always practicable nor expedient, and it seldom could affect the credit due to their testimony, this rule met with strenuous opposition from our greatest legal authorities.<sup>3</sup> And it was gradually encroached upon, and at last finally abandoned by the Supreme Court. First, the objection was repelled, when stated against a surgeon, who was cited to give a professional opinion, who had heard the declarations of the pannel emitted *in causa*;<sup>4</sup> next as against a magistrate, who was called to prove the prisoner's declaration, and had heard the witnesses precognosed;<sup>5</sup> and at last the point was deliberately settled by a judgment of the whole Court in the case of William M'Leod, 14th Dec. 1801, which was fully argued on an advocacy from a deliverance of the Sheriff of Edinburgh in informations. A witness had here been present at the precognition, and heard the declarations of the other witnesses emitted, and he was objected to on this ground. The Court found "That it is not a sufficient objection, in the particular circumstances of this case, to the admissibility of the witness, that he at one time acted as agent for the prosecutor; also, that his having attended the precognition is not a sufficient objection in this case, where it appears that

<sup>1</sup> 9 George IV. 29, § 10.—<sup>2</sup> Brown and Murray, July 13, 1791; Thomas Muir, Aug. 1793; Burnet, 421.—<sup>3</sup> Hume, ii. 380; Burnet, 420, 421.—<sup>4</sup> James Harkness, April 3, 1797; Burnet, 421.—<sup>5</sup> Ker, Jan. 13, 1792; Burnet, *ibid*.



no improper motives, either on the part of the witness or the public prosecutor, gave rise to such attendance.”<sup>1</sup> This judgment was rightly qualified by the addition “in the circumstances of this case,” because, without doubt, if the witnesses have been precognosed in presence of each other from corrupt or improper motives, it would still furnish a good objection at least to their credibility, and, if they appeared to have participated in the iniquity, to their being received at all. The law has accordingly been held as quite settled by this authority, for all those cases where corrupt and officious intermingling of the witnesses, during their examination, is not established in evidence. It was so held by Lord Meadowbank in a case where a medical man, in a case of culpable homicide, was objected to from his having seen the precognition, and formed his opinion from the facts therein stated; it having been justly observed, that, independent of the general rule, as fixed by the case of M’Leod, such an objection was peculiarly inapplicable to a witness called upon to give a professional opinion, as without being made acquainted with the facts of the case, as stated in the witness’s declaration, he could not come at a just conclusion.<sup>2</sup>

Though the law is settled in this way, it is still, however, a proper precaution in magistrates to separate witnesses as much as possible during their examination from each other; for the pannel’s sake, that they be not strengthened in their opinion of his guilt, or have their recollections of facts blended with hearsay by listening to the declarations of each other; for that of public justice, that the effect of the simultaneous coincidence of many different testimonies to the same end, may not be weakened. To this, however, there is an exception in the case of a medical witness who is called to give an opinion merely professional, for he should see the precognition, or hear the declarations of the witnesses, as well as the subjects on which he is called to speak, on the same principle on which he is directed to remain in Court during the trial, till the medical *opinion* of other witnesses begins.

On the same principle on which the law is fixed in this manner in regard to precognitions, it is settled, that if, from any accidental circumstance, the witness has heard, in another trial, the depositions of other witnesses in relation to the precise matter which is now again brought under trial, it is no objection to his admissi-

<sup>1</sup> William M’Leod, Dec. 14, 1801; Hume, ii. 380; Burnet, 421, 423.—<sup>2</sup> W. Richardson, Dumfries, Sept. 1824; per Lord Meadowbank.

bility. This was first settled in a case where it was objected to a witness, that he had deponed as a witness in the trial of the pannel's son, for the same offence, and on a libel precisely the same as that now in Court; this was held to be no objection.<sup>1</sup> The same rule was followed in another case, where the pannel having been tried at Edinburgh, and the verdict set aside, on account of the minority of one of the jurymen, it was held on a subsequent trial of the pannel for the same offence, that it was no objection to the admissibility of the witnesses, that they had remained in Court and heard every thing that was said by the succeeding witnesses on the former trial.<sup>2</sup> Finally, this point was settled by a deliberate judgment of the whole Court in the case of Mrs Smith, whose trial having been brought to an abrupt conclusion, by the illness of a jurymen, when the evidence for the prosecution was nearly closed, it was held when she was again put to trial for the same offence, that the objection against the witnesses being again received against her was unfounded, although they had all remained in Court, and heard the evidence on the previous occasion, from the moment when their own examination was concluded.<sup>3</sup>

#### SECT. VIII.—OF THE OBJECTION OF INTEREST AND UNDUE INFLUENCE.

UNDER the head of interest and undue influence, are included all those objections, whether on the footing of pecuniary connexion with the accused, promise of reward upon conviction, undue means to sway the testimony, or the like, which go to corrupt the sources of evidence, and render it probable that the truth may be suppressed or coloured from the interested motives of the person giving testimony. They form an important and extensive part of the English law; but in our practice they are reduced to a much narrower compass; a sure proof that we have steered clear of the nice and technical distinctions which usually prevail, where a particular branch of jurisprudence has swelled to an unusual bulk. On many points, however, the English law is directly applicable in this matter to our practice.

1. It is no objection to a witness that he is the sufferer

<sup>1</sup> John Blackwood, Jan. 10, 1818; Hume, ii. 380.—<sup>2</sup> John Sharpe, Glasgow, April 1821; per Lord Pitmilley.—<sup>3</sup> Mrs Smith's case, Feb. 19, 1827; Syme, 93.

by the wrong which is the subject of trial, and has a direct pecuniary interest in the conviction of the offender ; but that circumstance may, in certain cases, affect the credibility of his testimony.

It frequently happens that, as a direct injury to property has been occasioned by a crime, so a patrimonial interest must necessarily arise upon its conviction,—as where a thief or a robber is caught with the stolen property in his possession, or a bill is challenged on the head of forgery ; it is impossible to deny that the principal party has a material interest in the issue of the trial ; in the first case, by recovery of the stolen goods ; in the second, by the establishment of the forgery, and his consequent liberation from the debt. If, however, the sufferer and principal witness were to be excluded, on the ground of the interest which he thus has in the issue of the trial, the result would be that the greatest crimes would frequently remain unpunished, as without his testimony the *corpus delicti*, the very foundation of the proof, could not be established. For these reasons, it has long been a fixed principle of our practice, that a witness, who is himself the sufferer, is not to be excluded by the unavoidable desire to recover or disburden his property, any more than he is by the just and unavoidable desire to have the person punished who has done an injury to himself or his relations.<sup>1</sup> This point was solemnly argued in the trial of Thomas Wilson, Jan. 25, 1790, where it was objected to the witnesses whose names were forged, that they had a material interest in getting quit of the signatures which stood against them ; but this was unanimously overruled ; and the persons whose names are forged have been uniformly considered since, not only as competent, but in some cases as necessary witnesses.<sup>2</sup>

Upon the same principle, it is now the established practice to admit the parties injured, or threatened with injury, in forgeries on banks, the post-office, and other public bodies, as well those whose names have been forged, as those who have been defrauded or imposed on, in all cases of forgeries on individuals, fraud, embezzlement, or swindling.<sup>3</sup> The rule is the same in the law of England, though they are much more favourable to the reception of that objection than we have ever been in this country ; it being a

<sup>1</sup> Hume, ii. 364 ; Burnet, 441.—<sup>2</sup> Thomas Wilson, Jan. 25, 1790 ; Burnet, 444 ; Hume, ii. 365.—<sup>3</sup> Burnet, 445.



fixed principle with them, that in criminal prosecutions, the party injured may be a witness;<sup>1</sup> and that, equally, although on a conviction he would be entitled to a reward,<sup>2</sup> or to restitution of his property from the offender.<sup>3</sup> It was formerly held, that a witness, whose name was forged, could not be adduced as a witness to prove the forgery;<sup>4</sup> but this is altered by a recent statute, which enacts that, "On any prosecution by indictments or information, either at common law, or by virtue of any statute, against any person for forging any deed, writing, or instrument, or other matter whatsoever; or for uttering or disposing of any deed, writing, or instrument, or other matter whatsoever, knowing the same to be forged; or for being accessory, before or after the fact, to any such offence, if the same be a felony; or for aiding, abetting, or counselling, the commission of any such offence, if the same be a misdemeanour; no person shall be deemed to be an incompetent witness in support of any such prosecution, by reason of any interest which such person may have, or be supposed to have, in respect of such deed, writing, instrument, or other matter."<sup>5</sup>

The rule being thus settled by the law of both countries, much less is any interest sustained as sufficient to exclude which is only remote and consequential, and not a direct consequence of the issue of the action.<sup>6</sup> Thus it is no objection to the testimony of a jailer, in a case of prison-breaking, that he is responsible for the escape of the prisoner, if it happened by negligence, or may lose his situation in consequence;<sup>7</sup> or to the testimony of herds or shepherds, in a case of sheep-stealing, that they were answerable for the loss of the sheep, if it occurred through their negligence;<sup>8</sup> or to a messenger or his assistants, in a case of prosecution for deforcement, that they may be remotely interested to avoid the consequences of their irregularity or misconduct.<sup>9</sup> Nor does it let in the objection of interest, if it be such a one as arises from the act of the pannel himself; as where he has raised a process of recrimination, and called, as defenders, some of the witnesses in the prosecutor's list.<sup>10</sup> Accordingly, in a case of murder, where it was objected to one of the prosecutor's witnesses that the pannel had raised a process of defamation against him for

<sup>1</sup> Starke, 771; Russell, i. 602.—<sup>2</sup> Phil. i. 119.—<sup>3</sup> Russell, ii. 602.—<sup>4</sup> Phil. i. 121; Russell, ii. 602.—<sup>5</sup> George IV. c. 32, § 2.—<sup>6</sup> Hume, ii. 365; Burnet, 447.—<sup>7</sup> Irvine of Hellow, July 23, 1673; Hume, *ibid.*—<sup>8</sup> Murdison and Miller, Jan. 8, 1773; Hume, *ibid.*—<sup>9</sup> Hume, ii. 365; Burnet, 446.—<sup>10</sup> Burnet, 448; Hume, ii. 366.

accusing him of the crime, the Court repelled the objection.<sup>1</sup> In such a case, the proper course is to admit the witnesses who have been summoned in the counter action *cum nota*, which has been done in more than one instance.<sup>2</sup> Or the Courts may give the precedence to either process, or conjoin the two, as shall seem agreeable to the justice of the case.<sup>3</sup>

As little does it create any objection to the testimony of a witness that he is implicated in another process, the issue of which may, in a great degree, depend upon the result of the one in which he is now cited. Though this may create a bias in the witness's mind, it is not held to be sufficient to exclude his testimony, whatever observation it may justly let in on his authority.<sup>4</sup>

In all these cases, although the objection of interest is not allowed to cast the witness, it may more or less affect his credibility; and it is to that point that the consideration of juries, with the assistance of the lights derived from the Bench, should principally be directed. There can be no doubt that when the interest is direct and powerful, as where a witness is called to prove the forgery of his signature to a bill for a large sum of money, it forms a suspicious ingredient in his testimony; and that he should be received *cum nota* by the jury, if there is the slightest ground to suspect from his character, situation, or the general complexion of the case, that he is speaking under the influence of an improper feeling;<sup>5</sup> and it is, in a great measure, in the power of discovering the existence of such a bias, that the value of a jury trial consists.

2. It is not a good objection to the admissibility of a witness, but it may affect his credibility, that he has a direct pecuniary interest in the conviction of the offender, as by the promise of a reward or a share of his estate, if offered by statute or the public authorities.

Much doubt was formerly entertained on the question whether a witness, who is directly interested in the conviction of the panel, and is not the party injured, was an admissible witness; and in one case it was held, after a deliberate argument in informations, that a witness who had a claim as an informer to a reward of

<sup>1</sup> Harkness, April 3, 1797; Burnet, 448.—<sup>2</sup> M'Pherson and Laidlaw, Feb. 25, 1712; Baud, July 17, 1792; Hume, ii. 366; Burnet, 448.—<sup>3</sup> Hume, ii. 366.—<sup>4</sup> Burnet, 448, 449.—<sup>5</sup> Hume, ii. 365.

L.50, payable on the conviction of the offender, under a revenue statute, was not an admissible witness.<sup>1</sup> The obvious inexpediency of this rule, however, in consequence of the increasing depravity of the times, and the impossibility of obtaining evidence in many of the most important cases in any other way, have led to a reconsideration of this decision; and it is now established by a series *rerum judicatarum*, though not as yet confirmed by a judgment of the Supreme Court, that such an objection is ill founded. It was first held, in a case of assault and deforcement of revenue officers, that one of the officers assaulted, and a witness for the prosecution, although the informer, and on that account entitled by law to a certain reward on conviction of the offender, was admissible.<sup>2</sup> This was followed in another case when the pannel was accused of fire-raising, and the objection stated to a witness of a reward, payable on conviction, was overruled.<sup>3</sup> In pronouncing this judgment, the learned Judge proceeded upon the ground stated by Burnet, that the objection of interest does not apply to that created for the necessary purpose of obtaining evidence for the detection of crimes, and by the force of a public law, if no undue means have been used to make the witness speak what is false; and that it has been the constant practice to admit witnesses in assaults on revenue-officers, though they have before them the prospect of a reward, payable on conviction. This was followed by Lord Justice-Clerk Boyle, in a late case where it was objected to a witness, that a reward of twenty guineas had been offered for the conviction of the offender, and that arrestments had been used in the hands of the clerk of Court, on that sum, by a creditor of the witness, in a civil action of damages. The Court, on the authority of the cases already quoted, repelled the objection.<sup>4</sup> Although, therefore, the point has not yet been definitively settled by a judgment of the Supreme Court, yet it may be held as settled till the contrary is established by that high authority, that the objection of interest arising out of a reward payable on conviction, is no bar to the admissibility of a witness. It has been held that it is no objection to a witness, in a case of culpable homicide, by the overturning of a coach, that he had raised an action of damages, on

<sup>1</sup> Dec. 8, 1738, David Coulton; Hume, ii. 364.—<sup>2</sup> Per Lord Kennet, Inverness, May 1780; Burnet, 447.—<sup>3</sup> Per Lord Hermand, Ayr, Sept. 1817; Margt. Crossan, Hume, ii. 364.—<sup>4</sup> Per Lord Justice-Clerk Boyle; Charles Small, Jedburgh, Autumn 1831; Justice-Clerk's MS.



account of the overturn, against the coach proprietor, though it may touch his credibility.<sup>1</sup>

It is the more probable that this will be the fixed principle of our law, from the light in which this objection has long been regarded by the law of the sister kingdom. It is held in England, that "Persons entitled to rewards, on the conviction of offenders, whether the rewards be given by Act of Parliament, by proclamation, or by private persons, and persons entitled to restitution of their property, on the conviction of the offender, are competent to give evidence."<sup>2</sup> This was deliberately fixed by the opinion of all the Judges, in the case of the rioters in 1780, against whom witnesses were brought, entitled to the reward offered by royal proclamation, and the objection thence stated to their testimony was overruled.<sup>3</sup> And so far is this principle carried in their practice, that even where a prosecutor had laid a wager that he would convict the offender, he was held competent;<sup>4</sup> a precedent which it is extremely doubtful if we would adopt in our practice; for it is a principle with us, that an interest created by the witness himself may afford a disqualification.<sup>5</sup>

However this may stand, certain it is that in regard to one class of witnesses, the legislature have interposed by special statute, to put an end to such an objection. By 6 Geo. IV. c. 108, § 105, which extends to both parts of the united kingdom, it is enacted, "That if, upon any trial, a question shall arise, whether any person is an officer of the army, navy, or marines, being duly authorized, and on full pay, or an officer of customs or excise, evidence of his having acted as such, shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary; and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness, upon the trial of any suit, or information, on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty."

If these principles are well founded, there can be no doubt that, whatever may have been the case formerly,<sup>6</sup> a witness would not now be set aside in a deforcement, because he is the private party whose diligence has been hindered, as he has an interest

<sup>1</sup> Gowans and Scott, Glasgow, Jan. 1831.—<sup>2</sup> Phil. i. 127; Ruddlelaw, Leach, 157, 132.—<sup>3</sup> Rioters' case; Leach, i. 314.—<sup>4</sup> Rex v. Fox, Stra. i. 652; Russell, ii. 602.—<sup>5</sup> Burnet, 449.—<sup>6</sup> Hume, i. 507, and ii. 364.

under the statutes in the goods of the convict, as escheated for payment of his debt. A stronger effect cannot be given to such an interest, which is in reality for reparation of a wrong inflicted by the pannel, than is allowed to the desire of a plundered man to regain recovery of his goods stolen, or a person forged on to get quit of the responsibility arising from the forged signature; both of which are constantly and justly disregarded by the Court.

It need hardly be added, that although in these cases, the objection is not sustained to the admissibility of the jury, yet it may in them all affect his credibility; a matter which is liable to be influenced more or less by every interest or passion, other than the strict feeling of justice and love of truth, which affects the human breast.

An opinion was thrown out by the Court, in the case of John Baillie, Glasgow, April 1823, that a creditor on a bankrupt estate becomes not a competent witness against a party indicted for perjury, by lodging and swearing to a false claim of verity under the Bankrupt Act. The witness was withdrawn, so that the matter was not pressed to a decision.<sup>1</sup> It may be doubted, however, whether there is any solid foundation for the exclusion of a witness in such a case; the pecuniary interest at stake being altogether elusory, compared to that which is disregarded in cases where bills having the names of parties forged, are proved by their testimony to be false; and the principle of our law being "that the only interest which, in the prosecution of crimes, law will pay regard to, as sufficient altogether to exclude the testimony of the witness, is when there is a direct and immediate interest created by the witness's own act and deed, and arising from an undue and corrupt motive on his part."<sup>2</sup> Accordingly, in another case, where, in a prosecution at the Lord Advocate's instance, for fraud and imposition, practised against the British Linen Company, an objection stated to James Bell, their managing clerk, upon the ground that he was a partner, and as such, interested in the event of the suit, was repelled.<sup>3</sup> It was impossible to see any ground on which such an objection can be sustained to admissibility, whatever effect it may justly have on credibility, after the rule of the common law, so well and long established, that the injured party, in case of theft, fraud, and forgery, is competent against the pannel.

<sup>1</sup> John Baillie, Glasgow, April 1823; unreported.—<sup>2</sup> Burnet, 449.—<sup>3</sup> N. Kirby, March 27, 1799; Hume, ii. 365.

3. A witness is rendered incompetent by all rewards, or promises of reward, made by the party calling him, and all undue tampering with the witness, or giving him instructions how to depone from that quarter, with a view, either to induce him to swear falsely, or give his evidence in a particular way.

The lives and liberties of all persons in the country being entirely dependent, in criminal trials, on the oaths of those who are adduced as witnesses against them, it is of the utmost importance that the sources of evidence should be preserved free from contamination. On this ground, it is justly held as a fixed principle of law, that wherever there appears any undue attempt, either to influence, corrupt, or tutor testimony, the witness so practised upon is to be excluded *in odium corrumpentis*, whether or not he has yielded to the solicitation.<sup>1</sup> Under this head would fall any promise made to him of a future pardon for his *other* crimes, if he is instrumental in convicting the accused, provided it came from the prosecutor, or some one authorized by him. But it is otherwise with an unconditional pardon already procured.<sup>2</sup> And any inferior magistrate, who so far forgets his power as to give assurances of this sort, is indeed guilty of a wrong, but he cannot, by such unauthorized proceedings, take away the interest of the private party, much less of the Lord Advocate, in his testimony.<sup>3</sup> So it was held by the Court, in a case where a very pointed allegation of this sort was made, but disregarded in respect it had not come from the Lord Advocate or any one for whom he was responsible.<sup>4</sup> The legal principle on which the distinction is founded, was well brought out by Lord Kilkerran, in a case at Inverness, where it having been objected to a witness that he had been promised, by a *third party*, as much money as would pay his rent, but not received any instructions how to depone, the answer was sustained, "That as the prosecution is allenary at the instance of his Majesty's advocate, any offer made by a *third party* to a witness, cannot set him aside, or deprive the crown of the benefit of his testimony."<sup>5</sup> This prece-

<sup>1</sup> Hume, ii. 377; Burnet, 415.—<sup>2</sup> Hume, ii. 377; Emond's case, Feb. 6, 1830; Ante, i. 77.—<sup>3</sup> Hume, ii. 377.—<sup>4</sup> Brodie, Aug. 1788.—<sup>5</sup> M'Donald, Sept. 1754; Inverness, per Kilkerran; Burnet, 415. The case of Baxter, Perth, May 1808, (Burnet, 415,) is bad law; vide Hume, ii. 377, and Burnet, 415.



dent was followed by the whole Court, in a late case, where it came out on the examination of a witness *in initialibus*, that the turnkey of the jail, having learned he had heard material confessions of the prisoners, promised him his liberty, from the charge on which he was imprisoned, if he would go and repeat it to the Sheriff. He understood he was to tell the truth, and that his liberation from the charge was absolute, whatever story he told. The Lord Justice-Clerk, Lord Pitmilley, and M'Kenzie, were clearly of opinion that the objection was ill founded, as the jailer was not appointed by the Lord Advocate, and he was in nowise responsible for his proceedings. Having gained the point of law, the Lord Advocate passed from the examination of the witness.<sup>1</sup>

4. It does not fall under the description of a good deed tending to corrupt testimony, if the witness is merely promised, or has received, his travelling expenses, or is promised the means of leaving the country, if his safety, from the threats of others, is endangered from the testimony he has given.

As every witness must, sooner or later, be paid his travelling expenses for coming to the trial, it follows that he is not to be considered as disqualified, or even suspected, if he has received a sum of money adequate, and not more than adequate, for that purpose, either from any of the public authorities, or the private party injured. Without doubt, the proper party to apply to in the event of the witness being so indigent as to be unable to advance his own travelling charges, is the Sheriff or Procurator-Fiscal of the county where he resides; who are frequently in the practice of making such advances to the poorer class of witnesses who have been cited for distant trials, if they are really unable to find money to transport themselves. Upon the same principle, there seems no absolute objection to the private party or his agent making a similar advance, provided it is really required, and no more is advanced than is necessary to convey the witness to the place of trial. Such a proceeding, however, from the suspicions to which it is necessarily subject, and the abuses of which it may be made the instrument, is extremely hazardous, and should never be resorted to, except in cases of real necessity, and then

<sup>1</sup> M'Kinlay and Gordon, Nov. 25, 1829—unreported.

in the most open way, and with the greatest precaution against any sinister purpose being understood. It has been held, that where a jailer had furnished a witness with a pair of pantaloons to appear in Court with, as his own were so ragged that he could not with decency be seen with them on in such a situation, he was on that account no ways liable to objection.<sup>1</sup>

It is a much more delicate question, whether a witness will be disqualified by a promise having been made to furnish him with the means of leaving the country, or emigrating, after his testimony has been delivered. Certainly, if the promise of that security is made in the least degree dependent on the nature of the evidence he is to give, it will set aside his testimony; it having been decided by the Court, and on sound principles, that although a promise of reward, if the witness would speak out, would not disqualify a witness, though it might discredit him, yet such a promise, if he gave a particular evidence, would clearly exclude him altogether.<sup>2</sup> But where the promise is no ways dependent on the nature of the evidence to be delivered, but it is absolute to take effect on the conclusion of the testimony whatever it be, and the circumstances of the case are such from popular excitement, threats held out to the witness, the state of the country, or the like, that, without the promise of the means of security and escape, he either will not speak out at all, or no reliance can be placed on his testimony, it is a matter deserving of the most deliberate consideration, whether the most unqualified promise of the means of leaving the country should be sustained to the effect of excluding the witness. This question is the more material, because it is evident from the example of Ireland, where by the effect of popular intimidation, the conviction of offenders charged with the most enormous crimes, has, in many places, been rendered impossible, and from the commencement with too great success<sup>3</sup> of such a system in this country, that unless such a method

<sup>1</sup> M'Kinlay and Gordon, Nov. 25, 1829—unreported.—<sup>2</sup> Holmes, Dec. 3, 1799; Burnet, 416.—<sup>3</sup> In the case of Wm. Brown and Others, July 3, 1832, the prisoners, who were capitally charged with housebreaking, cutting and maiming, for combination purposes, escaped, owing to the effect of intimidation to the principal witnesses. They had had their ears cut off, and appeared in Court in that condition; but though they gave a distinct account of the transaction up to the identification of the pannels with whom they were well acquainted, and whom they had clearly identified in the precognition, they totally failed in that particular. One was committed for perjury in consequence. In every trial for offences connected with combination, for a number of years past in the west of Scotland, the effect of intimidation to the witnesses has been too apparent.

of counteracting the effect of intimidation is sustained as legal, the prosecution of the most serious and dangerous offences may be abandoned.

In the noted case of Andrew M<sup>c</sup>Kinlay, July 19, 1817, tried under circumstances of considerable public excitement, it turned out upon the examination *in initialibus* of John Campbell, the principal witness, who was lodged in the Castle of Edinburgh for the sake of security, that being afraid of bad consequences to himself and his wife if he remained in Britain, after appearing as a witness at the trial, he had declined to become one, unless he received a passport to the Continent, and the means of carrying him there, that the prosecutor (H. H. Drummond, Esq. A.D.) had accordingly come under an engagement to that effect, and that he considered this as still a subsisting engagement, and one on which he was entitled to rely. Upon this, some of the Bench expressed an opinion, that it was needless to go farther or enquire into the truth or falsehood of the main story, since in either view he was inadmissible; if true, he was still under the influence of an existing engagement; if false, he was perjured and unworthy of credit. The witness had sworn "that there was no attempt made to instruct him in any way, as to what he should say in giving evidence as a witness," and he had previously expressed, in vivid terms, his dread of being assassinated by his former associates, and even dying by torture, if he should fall into their hands after giving evidence. The witness was, in obedience to this opinion, withdrawn, and the prosecution in consequence failed.

It deserves consideration, whether there is any foundation, either in the law of Scotland, or the principles of justice, for this decision. Promises of the means of escape, in such circumstances, cannot be regarded as bribes or good deeds on the prosecutor's part; they are merely measures to counteract and neutralize bad deeds and threats on the side of the prisoners or their associates. It is unquestionably wrong, where no effort is made to bias a witness on one side, to make the slightest promise of protection on the other; but where threats of death are staring the witness in the face on the prisoner's part, is there any thing exceptionable in the prosecutor's merely promising him the means of *avoiding* those threats? To do this is not to offer a bribe; it is only to withdraw the witness from a threat held out on the other side.

It is settled law that a witness is not disqualified by the great-



est of all good deeds, or withdrawing him from the most imminent of all dangers, by admitting him as a witness for the Crown. Public policy, and reasons of necessity, *ne crimina mancant impunita*, have been justly held to sanction the adoption of this rule. Is there any reason why a different decision should not be given in regard to securing him against similar danger on the side of the associates of the pannel; or any consistency in holding that he is *not* disqualified by having his life saved by being admitted King's evidence, and *is* disqualified by having his life saved by furnishing him with the means of emigration?

The ground on which the decision is said to have been rested,—viz. that if what he said was false, he was disqualified as perjured,—if true, as bribed,—is in an especial manner worthy of reconsideration. If this be a sufficient ground for excluding testimony, it enables any unwilling witness in every case to extricate himself from the disagreeable necessity of giving evidence, by simply saying, when examined *in initialibus*, that he has received a promise of reward, which, whether true or false, will equally serve the desired object of effecting an exclusion. Is it agreeable to principle to enable a witness, in every case, by so thin a device to disqualify himself? With submission, if such an effect is to be produced, it should be by evidence independent of the witness himself, and not by merely sustaining his assertion, whether true or false, as relevant to produce that effect.

There is the less impropriety in hazarding these observations, not only from the opinions repeatedly expressed from the Bench in regard to the doubtful nature of this decision, but from the express judgment of Lords Justice-Clerk and Hermand at Glasgow, in the subsequent case of Daniel Grant and Others, Oct. 6, 1820. It was there objected to the witness, John Dick, that he had already prevaricated and contradicted himself in the course of his examination *in initialibus*, having stated, in one part of that examination, that Mr Salmond, the Procurator-Fiscal, desired him to give evidence against the prisoners, which he had stated to Mr Salmond was false; and afterwards, that Mr Salmond had desired him to speak the truth, and held out that prospect of advantage to which he had deponed, to induce him to speak the truth. The rule, *Falsum in uno, falsum in omnibus*, here applies, and utterly destroys the credibility of the witness. 2d, The witness has sworn that he is quite innocent of the crime charged against the pannel, whereas he is attempted to be addu-

ced as a *socius criminis*. 3d, The witness has declared that Mr Salmond told him of the prospect of the charge of assault being remitted to the Magistrates, in the event of his giving evidence in this case, instead of being tried before this Court, which unquestionably would be an advantage, as the magistrates have not the power to inflict the punishments competent to this Court. In the case of M'Kinlay, it was found that it is of no consequence to enquire whether the witness who deponed *in initialibus*, that he gave his testimony under the influence of a promise, is speaking truth or falsity, since, in either case, he is completely discredited. The Advocate-Depute answered, *inter alia*, "That the opinion thrown out by the Court in M'Kinlay's case was utterly unfounded in the principles of the law of Scotland, was contrary to former precedents, and had been considered erroneous and frequently disapproved of from the Bench." Upon this debate, the Court *repelled the objection*, and allowed the witness to be examined.<sup>1</sup> After this decision, it may safely be concluded, that the *ratio* adopted in M'Kinlay's case, of the witness being disqualified, whether he spoke truly or falsely *in initialibus* in regard to the promise of safety, can no longer be maintained; and considering the great importance of this question, and the evident approach of times when intimidation will be liberally applied to witnesses, it is probable that the Court will take the first opportunity, by a deliberate judgment, to settle the law on the point. The true principle appears to be, that it is in the general case improper to make any promises of the means of removal, any more than any other advantage, to the witness; but that where intimidation has either been actually applied, or is apprehended on reasonable grounds, it is no objection to his admissibility that the means of removal or emigration have been furnished by the public authorities, or the prosecutor, to himself and his family.

5. Instructions or tutoring how to depone, form an absolute bar to examination, if given to the witness by the prosecutor, or those for whom he is responsible; if given by a third party, they will affect his credibility only.

As it is of the last importance that a witness should tell only what he himself has witnessed, not what is put into his mouth by

<sup>1</sup> Daniel Grant, Peter Crosbie, and Others, Glasgow, Oct. 6, 1820; Shaw, and Record.

others, it is a sacred rule that he shall be totally excluded by any instructions how to depone, provided they have come from the prosecutor, or those for whom he is responsible.<sup>1</sup> Whether these instructions have been given before or after citation, whether the witness has agreed or not to tell the story thus put into his mouth; and whether the interference with the witness amount to absolute tutoring, or to that subordinate species of instruction which consists in devices to overawe, seduce, or taint their memory, they are equally reprobated by the law, and equally, if fixed on either party, prevent their having the benefit of his testimony.<sup>2</sup>

Irregularities of this sort, however, may sometimes have occurred without the corrupt or guilty view of getting up false testimony at the trial, as writing to the witness letters on the subject of the trial, furnishing him with a statement of facts on points where his memory was defective, sending him notes or observations on what he is to say, or the like. Such practices, though entered into *optima fide*, and with no view whatever of either inducing him to speak falsely, or putting into his mouth what he had not actually witnessed, are nevertheless irregular and exceptionable, and subject the party using them, if not to the hazard of losing the testimony so practised upon altogether, at least, of having it submitted to the jury *cum nota* only.<sup>3</sup> To publish in the newspapers, therefore, any account whatever, and still more any inflamed or exaggerated account of the transaction previous to the trial, is always an exceptionable proceeding, which never fails, where it is brought under their notice, to attract the censure of the Courts;<sup>4</sup> and, if it can be shown that it has been composed, or even seen and perused by the witnesses, must materially affect their credit.<sup>5</sup>

It is not, however, deemed any improper interference with a witness, if either party merely precognosces him, and takes down a written statement of what he is to say. This is absolutely necessary for the preparation of the counsel on both sides, and, therefore, it is the duty of a witness, without hesitation, when applied to by the agent of the party against whom he is adduced, to give a full and unreserved statement of what he has to say in relation to the matter libelled. But he should accept no explanations or additional statements from those who take down the examination; and, if any thing of the kind be attempted, it will

<sup>1</sup> Burnet, 419; Hume, ii. 378.—<sup>2</sup> Burnet, 419; Hume, ii. 378.—<sup>3</sup> Hume, ii. 378.—

<sup>4</sup> Robt. Emond, Jan. 28, 1830.—<sup>5</sup> Burnet, 419.



be deemed an improper interference with his testimony; and, if done by either of the parties or their agents, may, in some cases, lead to the exclusion, in all to a discrediting of the testimony.

It is not unusual for such witnesses as are obviously unwilling to tell the truth, to be put on oath by the Sheriff or magistrate who conducts the precognition; and it is no objection to their testimony that they have previously been sworn and examined in this manner: although the witness, before emitting his deposition *in causa*, is entitled to call for his previous deposition, and have it destroyed before his face; in order that he may be perfectly unbiassed in giving the evidence which is to affect the prisoner. But that power which the law has rightly given to public magistrates officially intrusted with the preparation of cases, it has, with equal propriety, denied to private and unauthorized individuals who should take this method of fixing down the witnesses on either side to a particular story. Accordingly, where the prosecutor had taken declarations on oath from the witnesses in a tavern, and kept them in his agent's custody to overawe them at the trial, they were all set aside.<sup>1</sup>

It is not to be imagined, however, that the same effect follows from the giving of instructions or tutoring witnesses, if done by another party than that which adduces them at the trial. Certainly it is not to be imagined, that it is in the power either of the prosecutor or pannel, to disqualify, or seriously discredit the witnesses adduced against him, by the simple device of tampering with them, and endeavouring to bias or corrupt their testimony. Such nefarious practices may recoil on the heads of those who attempt them, but they cannot be permitted to injure the party against whom they are directed. As little is the prosecutor or pannel liable to be affected by what may have been officiously done or attempted by third parties to affect the witnesses on either side: at least, their evidence is not to be set aside by such interference, however much it may influence the credibility of their testimony to the jury.<sup>2</sup> In several cases, accordingly, where it was objected to witnesses for the prosecution, that they had acted as agents in the cause, had written letters on the subject, and endeavoured to procure evidence, the Court have overruled the objection to the admissibility, reserving its effect on the credibility of the witness, in respect these persons were not employed

<sup>1</sup> John M'Caul, April 13, 1714; Hume, ii. 378.—<sup>2</sup> Burnet, 426-427.

by the prosecutor, and so could not disqualify themselves, or be disqualified, by the officious interference of third parties.<sup>1</sup>

#### SECT. IX.—OF THE EXAMINATION OF THE WITNESSES.

THERE is no branch of the law which, although well established in practice, is so little illustrated or defined in books as the examination of witnesses. The questions which may competently be put to them, the privilege of declining to answer which they enjoy, the means of refreshing their memories which are admissible, all form matters of daily recurrence in the Courts, and which it is of the utmost moment that both Judges and counsel should be perfectly familiar with. Where our own authorities on this important subject are deficient, reference may safely be made to the more extended experience and detailed systems of the English law.

1. The best evidence must be produced, not only in every case, but in every branch of a case, of which its circumstances will admit.

The rule that the best evidence must be produced which the circumstances of the case will admit, is obviously founded in the highest equity; because the best evidence produces the greatest certainty; and when it is withheld, where the party has the power to bring it forward, a strong presumption thence arises that it would destroy the weaker, and is kept out of view to prevent the detection of the fallacy which it contains.<sup>2</sup> The meaning of the rule, however, is not that the strongest possible evidence shall be given in every instance, for that would be obviously, in most cases, impossible; but, that no evidence shall be given, which, by the nature of the thing, implies that better evidence exists, which is withheld. On this principle, therefore, a copy of a deed must not be produced where the party can get at the original; and indirect evidence must not be referred to, where it is plain from the deposition that direct exists. If, therefore, it appears from the examination of the witnesses, that eyewitnesses in a case of robbery or murder exist, and are accessible, it forms a just observa-

<sup>1</sup> Harkness, April 3, 1797; M'Kinley, March 27, 1799; Robt. Barr, Glasgow, April 1801; Burnet, 427.—<sup>2</sup> Burnet, 598; Phil. i. 232.

tion to the jury, that, if they are not brought forward, it is because the prosecutor was aware that they would weaken the force of what had been stated by the indirect witnesses. Not that a party is to be fettered in his arrangement of his proof; for often it makes the case more lucid to reserve the direct proof for the last; but that if, upon the whole, the best evidence is not brought forward, which the case demonstrates exists, the presumption is, that it would have been fatal to the case.

This rule, however, suffers many limitations.

It presupposes, in the first place, that the best evidence *is competent*. If it exists, but is not competent, the prosecutor is not blamable, because he recurs to a secondary and inferior species of proof. If, therefore, in a case of murder, it appears to have been witnessed by the pannel's husband or wife, or a pupil child, the prosecutor is, of course, not required to attempt the illegal measure of bringing them forward, and, therefore, the case may be competently proved from first to last by constructive evidence, or the testimony of those admissible witnesses who have approached nearest to the fatal act before and after its commission.

In the next place, the rule in regard to the best evidence, does not by any means require that *the whole* direct proof which exists should be brought forward. Certainly, if the prosecutor brings forward *as much* of the direct evidence as, with the other circumstances, is sufficient to establish the prisoner's guilt, he is not required to go a step farther, and overload the case with the whole direct testimony which it appears exists. If, therefore, a theft was witnessed by four persons, it is sufficient, in general, if two of them are examined. It is advisable, however, in such cases, to have the other witnesses who saw the fact in attendance, in order that they may be tendered to the prisoner if he thinks he can make any use of them, or examined for the prosecution, if it appears that their opportunities of observation were closer or more accurate than those of the witnesses whose depositions have already been laid before the jury.<sup>1</sup>

In the third place, parole proof is admitted in many cases to expedite business, and where no suspicion of any fraud exists, although better evidence in writing exists, and is accessible at the time of the trial. Thus it has been settled by the opinion of the twelve Judges of England, that it is sufficient in the case of peace-officers, justices of the peace, constables, &c. to prove by

<sup>1</sup> Burnet, 599.



their oath, that they hold and acted in these characters, without producing their written appointments.<sup>1</sup> And in the case of officers of any branch of the revenue, it is by special statutes enacted, that where it comes to be questioned whether they are such, proof of their being reputed to be so, or of their having exercised the office, is good evidence of the fact in any indictment, action, or information.<sup>2</sup> So also on an information against a military officer for making false returns, it is sufficient to prove that he stood in the character alleged in the charge, without adducing direct evidence of his appointment.<sup>3</sup> This principle is *in viridi observantia* in our practice, to which the statutes on this subject, relating to revenue officers, extend; and every day is exemplified in cases of deforcement, in which the proof of the appointment is held to be complete by the oath of the officer, without production of his commission.

Fourthly, proof of ownership in criminal cases is often sustained by the mere oath of the party, although the written instruments are not produced, which form the best evidence of it. Thus, in cases of theft, it is frequently necessary to prove to whom certain articles belong, and this is always held to be sufficiently done by the oaths of the persons injured, without production of the written instruments by which the property of the stolen articles was vested in the party from whom they were taken. Where it was objected, accordingly, in a case of theft, that property of a certain kind could not be proved by parole testimony, but required production of the written title, whether disposition or infestment, by which it was conveyed to the holder, the objection was at once overruled by Lord Mackenzie.<sup>4</sup> So also in ordinary cases, the facts of parties being married, or of a child being of a certain age, &c., are held to be sufficiently proved by their own oaths, or that of their parents or near relations, without production of the extract of proclamation of banns and the certificate of marriage in the one case, or the certificate of birth or baptism from the parish register in the other. But this exception to the general rule is to be understood in a reasonable sense, and is properly applicable only in those cases where the matter to which that written evidence refers is incidentally brought in, or forms a subordinate part of the

<sup>1</sup> Case of Gordons, 1789; Leach, i. 585; Phil. i. 236.—<sup>2</sup> 11 Geo. I. c. 30, § 32; 26 Geo. III. c. 77, § 13; and 6 Geo. IV. c. 112, § 114.—<sup>3</sup> Rex v. Gardiner; Camp. ii. 513; Phil. i. 237.—<sup>4</sup> Ann Johnston, Inverness, Spring 1829; unreported.

charge. Certainly in those cases where the violation of the right constituted by such written instrument, forms its main part and essence, as if a conspiracy were charged to carry off a landed estate by the means of false titles, or where bigamy is charged against the husband, it is indispensable for the prosecutor to commence his case by production of the genuine written titles in the one case, and of the marriage certificates in the other. In the ordinary case, it is because proof of possession on the part of the person on whom the injury was inflicted is sufficient to support a charge of theft or robbery, as well as one of property, and that the best evidence of possession is the oaths of the possessors, that the practice has become general of proving such points by the oaths of witnesses only; and wherever, therefore, the essence of the charge depends on the words of a written title, it must be produced, and no parole proof of its contents will be admitted.

Fifthly, in a prosecution for forging, or uttering forged notes, the best evidence of the forgery unquestionably is the oath of the persons whose names are forged. But, from the perfect familiarity which the other clerks of the bank acquire with the signature of one of their number, and the multitude of cases for which the same bank officers are frequently summoned in different parts of the country on the assizes, the rule has come to be established both in Scotland<sup>1</sup> and England,<sup>2</sup> that it is not necessary that the signing clerk to the bank should be produced, if witnesses acquainted with his handwriting state that the signature of the note is not his handwriting. This point was decided by the opinions of all the Judges. And, on the same principle, it has been held in Scotland, that where the signature of a social firm is in use to be adhibited by different persons, it is not necessary to bring any of these persons; but it is sufficient if a bank officer is brought who swears that the signature forged is that of one or other of them.<sup>3</sup> These cases, however, are exceptions to the general rule, and, in general, the principle is applicable, that in cases of forgery, the person whose signature is forged, must, if alive, be produced to prove that the writing libelled on is not his handwriting.

## 2. Parole proof of the contents of a written instrument

<sup>1</sup> Christian Kennedy, Nov. 9, 1829; unreported.—<sup>2</sup> Russell, ii. 407; Russ. and Ry. 378.—<sup>3</sup> Mary Smith or Selkridge, Perth, Autumn 1827; unreported; Ante, i. 411.

is incompetent, unless it is first established that neither the original nor a copy exists.

The best evidence of the contents of a written instrument unquestionably is the production of the instrument itself, which will speak for itself. The next best evidence, if it is lost, is production of a copy proved to be correct by the person who took it, and failing that, recourse must be had to the oath of the person who heard the instrument read, and can speak with more or less accuracy to its contents. From this the rule necessarily follows, that parole proof of a written document cannot be brought, if it is accessible and extant to the party founding on it;<sup>1</sup> although, in some particular cases, a witness who has perused a multitude of documents too numerous to be produced, is allowed to give a verbal testimony as to their general import.<sup>2</sup> On this principle, it has been repeatedly held in our Courts, that where a regular declaration has been taken by a magistrate, it is incompetent to prove, by parole testimony, what the prisoner said on the occasion of his examination, but that it is competent to bring evidence of what passed between him and any other than the magistrate, in a conversation which was never intended to be reduced to writing.<sup>3</sup> The general rule is, that wherever a written instrument exists, it is incompetent to ask any question in regard to its contents, as the document itself should be produced; but to this it will be deemed a sufficient reply, if either the document is proved to be lost, or to be in such a situation as to be neither accessible to the party founding on it, nor the diligence of the Court. If a copy exists, and it can be proved, by the oath of the party who made it, to be a correct transcript, that is the next best evidence of the contents of the deed to the original; but a mere unauthenticated scroll or copy is much weaker, and in fact amounts to nothing, because there is no evidence that it is either faithfully copied, or taken from the same original deed.

When examined as to a matter touched on in a written instrument, the witness is allowed to refresh his recollection by looking at the writing, if he has it in his custody, though it is of such a kind as cannot legally be produced in evidence, as when a receipt

<sup>1</sup> Russell, ii. 621.—<sup>2</sup> Roberts v. Dixon; Peake, 83; Russell, ii. 621.—<sup>3</sup> Per Lord Justice-Clerk; Thomas Johnston, 24th Sept. 1831; unreported; Lord Justice-Clerk's MS.



for payment of money was given on an unstamped paper in the witness's custody.<sup>1</sup> So also where a witness had received money, and given a receipt for it, which could not be read in evidence for want of a proper stamp, and the witness who had written it had become blind, so that he could not read it, it was allowed to be read to him.<sup>2</sup>

The general rule is, that a witness, to assist his memory, may use a written memorandum, if it has been made by him shortly after the occurrence of facts to which it relates; but, if he cannot speak to the fact from recollection, any farther than as finding it entered in a book or paper, such book or paper ought to be produced, and, if not legal evidence, his testimony amounts to nothing.<sup>3</sup> Though the entries in the general case can only be referred to, if made by the witness himself, yet if the witness has frequently examined them soon after they were written, and always found them correct, he may refresh his memory by referring to them, as if they had been written by his own hand;<sup>4</sup> but he will not be allowed to refresh his memory by a *copy* of a paper made by him six months after he had written the original, if the original, in whatever state, is in existence.<sup>5</sup> When a witness refreshes his memory from memorandums, it is always proper that the counsel of the adverse party should have an opportunity of looking at them when he is conducting his cross-examination.<sup>6</sup>

3. Hearsay is in the general case inadmissible evidence; but it is admissible where the wounded person, who is since dead, has deliberately recounted the injury he has sustained; where an injured party has, *de recenti*, narrated to others the violence he has undergone; or where an exclamation, by third parties, took place as part of the *res gesta* of the transaction which the witness describes.

From the general principle, that the best evidence must in every case be produced, it follows, as a corollary, that if any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the

<sup>1</sup> *Rambert v. Cohen*, Esp. iv. 213; *Russell*, ii. 621.—<sup>2</sup> *Jacob v. Lindsay*; East, i. 460.—<sup>3</sup> *Doe v. Perkins*; Term. Rep. iii. 749; *Russell*, ii. 622.—<sup>4</sup> *Brough v. Martin*; Campb. ii. 112.—<sup>5</sup> *Jones v. Stroud*; Carr. and P. ii. 196.—<sup>6</sup> *Hardy's Case*; State Trials, xxiv. 824; Phil. i. 275.

ruth. The reason of this is, that evidence ought to be given under the sanction of an oath, and when the witness is subject to cross-examination ; and not on the mere repetition of the expressions of third parties, not spoken under any such security for the extrication of truth, and possibly mistaken in their import in the channels through which they have subsequently passed.<sup>1</sup> This rule has long been established in our practice ; Balfour declares “ a witness deponing that he heard that which he depones from another man, should not have faith, because he should not depone *de alieno sed de proprio auditu.*”<sup>2</sup> And it was one of the reasons assigned for reversing the forfeiture of Fletcher of Saltoun in the act 1690, that one of the witnesses against him “ deponed upon report and *ex auditu.*”<sup>3</sup>

To this general rule, however, thus firmly established both in the Scotch and English law, there are several exceptions.

1. Hearsay is admitted by our practice, in regard to the account which a person who has received a mortal wound has given of the manner in which he was injured, and that not only on death-bed, or under the impression of death, or the sanction of an oath, but at any time between the wound and the death, provided only it was done seriously and deliberately, and at a time when the deceased appeared to be aware of what he was saying, and in the possession of his faculties.<sup>4</sup> Without doubt, if the statement was made in the form of a deposition or dying declaration before a magistrate, and is authenticated in the usual way in the shape of a regular declaration, it is entitled to greater credit than a mere verbal statement, both on account of the greater solemnity of the occasion on which the narrative was delivered, and the additional safeguards against error, which the presence of the public authorities, and the embodying of the statements into a written form at the moment of its delivery, have occasioned ; but still the account given of the transaction at any time between the wound and the death, is admissible evidence, varying in weight according to the circumstances under which it was given, and the degree of deliberation and solemnity which attended its delivery.<sup>5</sup> Numerous cases, both in early and later times, prove this to be the law of Scotland. Thus, in the trial of Nicolas Cockburn for murdering his stepmother, a surgeon who attended the deceased, and Mr Dundas of Arniston, who acted as a justice of peace on the

<sup>1</sup> Phil. i. 243 ; Burnet, 600 ; Hume, ii. 406, 407.—<sup>2</sup> Balfour, 381.—<sup>3</sup> 1690, c. 16.  
—<sup>4</sup> Burnet, 600 ; Hume, ii. 407.—<sup>5</sup> Hume, ii. 407, 408.

occasion, deponed at large to the account which the deceased, in her illness, had given them of the violent and sudden manner in which she was taken ill, of the pannel having prepared breakfast for her, of the various shifts and subterfuges he had used to avoid detection; in short, of the whole grounds of her belief that the pannel had been the cause of her death.<sup>1</sup> The same sort of evidence was taken in the dying declaration of the deceased, proved by parole testimony, which was taken in two later cases, both of which were deliberately considered.<sup>2</sup> The same rule has been repeatedly adopted in later times. Thus, on the trial of John Melvin for murder, it was objected to a question tending to expiscate whether the deceased had ever in private given the witness any more full account of her misfortune, that such a question was inadmissible, unless the words were uttered in presence of the pannel, or in the contemplation of death, neither of which had there occurred; but the objection was repelled upon the ground that no such limitation of the rule, in regard to the declarations of an injured party now deceased, is recognised in our practice.<sup>3</sup> The statement given by the deceased, who was a boy of eight years of age, to his mother, of the way in which he met with the fatal injury, in the course of a private conversation with him, was allowed to be proved by her testimony in a later case, although it was strenuously argued that such evidence was admissible only when taken on oath, or in the shape of a regular declaration.<sup>4</sup> The same decision was given in the High Court in a still later case, without hearing the prosecutor in reply. The mother of the deceased was there asked as to the account which he had given her of the way in which he had received the mortal injury. This was objected to on the ground that the alleged conversation was neither committed to writing in the form of a written declaration, nor uttered in contemplation of death, nor under the sanction of an oath. But the objection was unanimously repelled, upon the ground that every word the deceased spoke, on the subject of his injuries, from the time he received them till he died, was *competent* evidence, varying in respect of *weight* according to the solemnity of the occasion on which they were uttered, and the degree of calmness of mind with which they were attended.<sup>5</sup> The same

<sup>1</sup> Nicolas Cockburn, Aug. 12, 1754; Hume, ii. 408.—<sup>2</sup> Andrew Wilson, Aug. 12, 1755; Mungo Campbell, Feb. 26, 1770.—<sup>3</sup> Per Lord Meadowbank, Sept. 23, 1811; Hume, ii. 408.—<sup>4</sup> Lawrence Fraser, June 5, 1826; unreported.—<sup>5</sup> Alex. M'Kenzie, March 13, 1827; Syme, 161.



rule has been followed in still later cases on the Circuit, indeed, but argued by the first counsel at the bar.<sup>1</sup>

In England the dying declaration of the deceased, in cases of murder, that is, the declaration made under the apprehension of death, has always been regarded as admissible evidence.<sup>2</sup> And they admit a verbal account as confirmatory of a written statement, if made on the same day, and under the same impression of approaching death as the written one.<sup>3</sup> But, with these exceptions, they do not admit verbal proof of the statements of the deceased, unless made before a magistrate, and in presence of the prisoner.<sup>4</sup> The difference between the Scotch and English law, in this respect, must always be kept in view, when any attempt is made to reason from the one to the other.

2. The account given of the injury he has sustained, by a person assaulted, to a third party, though he is *not dead*, is competent evidence if done shortly after the injury was received, and it may be adduced to confirm what he has previously sworn to before the jury.<sup>5</sup> This appears to have been settled so far back as the middle of the last century, in the noted trial of the Macgregors, for the forcible abduction and marriage of Jean Kay, on which occasion, a declaration she had emitted before two of the Judges in private, shortly after she had escaped from their hands, was libelled upon and admitted in evidence, she having, in the interval, languished and died; and it was again used in evidence against his brother and associate, Robert Macgregor.<sup>6</sup> This rule, thus established, has now completely taken root in our practice, not only in cases where the party injured has died from some accidental cause before the trial comes on, but in cases where he is alive, and has been examined at full length on the subject before the jury. Thus, in the case of Alexander Aitken, Perth, Autumn 1823, witnesses were allowed to be examined as to the accounts given, *de recenti*, of the injury to them by the party injured.<sup>7</sup> The competency of such examinations was fully admitted by the Court in the case of Alexander Mackenzie, March 13, 1827, although the point at issue then was the admissibility of the declarations by a deceased sufferer by violence.<sup>8</sup> So also where a young weaver

<sup>1</sup> J. Lovie, Aberdeen, Autumn 1827, per Lord Pitmilley; Jean Aitken or Humphreys, Aberdeen, Autumn 1829, per Lord M'Kenzie; Ante 1, p. 75, 81.—<sup>2</sup> *Rex v. Reason and Trant*. State Trials, vi. 202, 205; Phil. ii. 275.—<sup>3</sup> Phil. i. 278; Reason and Trant. Ibid.—<sup>4</sup> Leach, i. 212, 231, 251.—<sup>5</sup> Hume, ii. 409; Burnet, 602.—<sup>6</sup> Macgregor, Aug. 3, 1752; Dec. 27, 1753; M'Laurin; Hume, ii. 409.—<sup>7</sup> Unreported.—<sup>8</sup> Alex. M'Kenzie, March 13, 1827; Syme, 161, but unreported on this point.

had been assaulted, and had vitriol thrown over his clothes by six men, for combination purposes, after he had concluded his testimony, the Court allowed proof to be brought of the account he gave of the transaction, and the way in which his clothes had been burnt, to the woman with whom he lodged, on going home immediately after the injury.<sup>1</sup>

In cases of rape, this privilege on the prosecutor's part, of confirming the testimony of the sufferer by the witnesses to whom she has, *de recenti*, narrated the transaction, has, in an especial manner, been established.<sup>2</sup> Farther, if the woman produce to those to whom she makes the disclosure, one article of the assailant's dress, as a sleeve-button, a portion of his neckcloth, or the like, whereby the person who made the assault can be discovered, what is said on this occasion may be competently given in evidence to confirm her testimony.<sup>3</sup> These principles have been frequently exemplified in our practice. In the case James M'Cartney and James M'Cummings, Glasgow, April 1828, where rape, followed by cutting and stabbing the woman ravished, was charged, the account which she gave when she returned home all bleeding early in the morning, of the way in which she had been used by the pannels, was allowed to be fully laid before the jury by the person to whom it was told, though she had just before been examined herself.<sup>4</sup> The same was done in another case, where the girl assaulted was only eight years old, and she had, *de recenti*, disclosed the particulars of the rape to her mother, at the same time that she had exhibited the consequences of the injury on her person.<sup>5</sup> And, in a late instance, where the pannel was charged with ravishing a full-grown woman, the account which she gave of the transaction to different witnesses next day, was laid without reserve before the jury.<sup>6</sup>

This privilege, on the prosecutor's part, of confirming the testimony of the principal witness in cases of personal injury, by the account, *de recenti*, given by him or her to others, is, however, to be restricted within narrow limits. It applies only to the actual sufferer by the wrong which is the subject of investigation; and is not to be extended to any other witness. If, therefore, any attempt is made in the ordinary case to confirm the testimony of a witness, by the account he has extrajudicially given

<sup>1</sup> Alex. M Kay, Peter M'Conocher, and Others, Glasgow, Sept. 1823, Ante, i. 191.—<sup>2</sup> Hume, ii. 407; Burnet, 602.—<sup>3</sup> Ibid.—<sup>4</sup> Per Lord Justice-Clerk, James M'Cartney and James M'Cummings, Glasgow, Spring 1828.—<sup>5</sup> James Burtway, Nov. 18, 1822; unreported.—<sup>6</sup> Thomas M'Kenzie, Feb. 18, 1828; Syme, 330.

of the matter, the Court will at once interfere to check the irregularity. Farther, even in the case of the actual sufferer, it is not every account which he has given to others, which will be allowed to be repeated in evidence. It is those accounts only to which this privilege is extended, which are connected, more or less directly, with the *res gesta* of the injury, or which were so recently given after it, as to form, in some sort, a sequel to the actual violence. Upon this principle, the account which the injured party has given of the assault to his family, or those with whom he lodged, when he returned home, and exhibited his wounds, is clearly admissible, or which fell from him on that or the following day, when recounting the transaction, or showing his wounds to his friends; but a different decision would be given if an attempt were made to prop up his evidence by the account which he gave of it to strangers some days or weeks afterwards, and without the intervention of any thing which connected it with, and rendered it in some degree, the natural sequel of the violence. Accordingly, in a case where the extrajudicial account attempted to be proved by the person assaulted, had occurred *ex intervallo*, and without any connexion with the *res gesta* of the injury, it was stopped by the Court.<sup>1</sup>

3. In the third place, when it is once proved that a witness, injured by any crime, is dead, it becomes competent to prove by the evidence of third parties, who have heard what he said in regard to the subject of the trial, the import of his conversation or declaration. This was settled, after a full argument, in the case of James Moffat or M'Coul, June 12, 1820. The Court there held that it was competent to prove what was said by Likely, the cashier of the Bank, as to the recovery of part of the money stolen; that party himself being dead, though at the time of the conversation he was quite well.<sup>2</sup> That party, however, was the cashier of the bank broken into on that occasion, and therefore it is not yet settled whether the same will hold in the ordinary case of a witness who has died without being the sufferer on the occasion. In like manner it was held, after a full debate in another case, where the pannel was accused of having murdered a young woman who was with child to him, that it was competent to prove both the conversations she had had with witnesses relative to her fears of death from him, and her pregnancy before she was amissing,

<sup>1</sup> John Anderson, Dumfries, April 1826; unreported.—<sup>2</sup> James Moffat, June 12, 1820, unreported on this point; Burnet, 600, 602.



and also that there was a rumour in the country that she was with child to the pannel.<sup>1</sup> It has been thought at the bar that it is competent to produce in evidence against a party the declaration emitted by witnesses before the Sheriff, when examined in pre-cognition, if they are since dead, *valeat quantum* ; or to prove by the oath of the Sheriff or others present at that examination, the import of what they said, if the declarations themselves have been lost ; and instances are not wanting of such a declaration being libelled on as a production intended to be used at the trial ; though, from the parties pleading guilty, the competency of producing such evidence was not judicially determined, excepting in one case where it was sustained by Lords Gillies and Meadowbank, the witness having been an old woman, and examined on oath, after having been warned of her situation. The deposition was libelled on and produced, though she was not the injured party.<sup>2</sup> In the case of Hugh Chalmers, and others, 14th June, 1813, the libel referred to two declarations emitted by two of the persons wounded on the occasion libelled, who were then in a dangerous state ; but before calling the case, the Solicitor-General stated, that as the witnesses were still alive he did not intend to produce the declarations, but that he had no objection to consent to their being received for the pannels, if the Court thought they could be received as evidence. The Court, “ in respect that William Macfarlane and Duncan Graham are in the list of witnesses, and *admitted to be still alive*, find that the said declaration cannot be used in evidence either for or against the pannels.”<sup>3</sup> This interlocutor implies that it was the circumstance of the witnesses being *still alive* which rendered their declarations inadmissible ; and, in that point of view, it is clearly well founded in law ; but it may be inferred from it, that if they had been dead they would have been competent. Still, in this case also, the declarations libelled on were those of the parties injured by the assault ; and therefore, for aught yet fully established, in the Supreme Court at least, this exception to the general rule seems to be confined to the case of the hearsay or declaration sought to be laid before the jury, being that of the person injured by the crime in question.

Upon this point it is well worthy of consideration, whether the Scotch law, at least in the civil department, is not affected by

<sup>1</sup> Alexander Sinclair, Inverness, April 1822 ; unreported.—<sup>2</sup> A. McIntosh, April 18, 1822, Inverness.—<sup>3</sup> Hume, ii. 410.

what fell from Lord Chancellor Brougham, in a late case in the House of Peers. Allowance must, no doubt, be made for the difference between the Scotch and English law in this particular, and the greater latitude which our Courts have allowed to the account given of an injury by a wounded person than has obtained in the English practices; but still there seems much weight in what fell from that high quarter, and it is in an especial manner worthy of consideration, if any attempt should be made to extend the introduction of hearsay in our criminal law beyond the limits hitherto and wisely established.

4th, Both the Scotch<sup>1</sup> and English law<sup>2</sup> admit hearsay evidence as to any thing which forms part of the *res gesta*, which is the subject of the enquiry. The principle on which this is founded is, that the witness must give a connected and intelligible account of the transaction, and he can neither do this, nor can the most material parts of his testimony be frequently understood, unless an account is also given of what was said by others, either at or shortly after the occasion libelled. For example, if John finds James wounded, and bleeding on the highway, and James tells John that he had been fired at with a pistol, and robbed, and that the robber is dressed in a particular dress, and has carried off certain articles, and taken a particular road, and John in consequence pursues by that road, and finds a man making off, dressed in the manner described, and bearing with him such articles as he has been informed were lost; certainly in such a case the verbal information from John is a link and circumstance of the fact, which is equally admissible as any other part of the story.<sup>3</sup> In like manner, in a case of robbery, if one of the by-standers calls out that he saw it done by a man in a blue jacket and red waistcoat, and immediately upon hearing these words, the prisoner dressed in that manner, sets off and runs; certainly in such a case the words first spoken, which formed the commencement of so important a part of the evidence, are admissible in evidence, even although the person who actually uttered them has disappeared, or cannot be produced at the trial. Whenever also it is necessary, in the course of a case, to enquire into the nature of a particular act, or the intention of the person who committed it, proof of what was said by him at the time of doing it, is admissible in evidence, for the purpose of showing its true character.<sup>4</sup>

<sup>1</sup> Hume, ii. 406; Burnet, 601.—<sup>2</sup> Phillips, i. 278, 279.—<sup>3</sup> Hume, ii. 407.—<sup>4</sup> Phil. i. 278; Burnet, 601.

Upon this principle, it is constantly the practice in our Courts to admit proof of any thing said on occasion of, or shortly after, the criminal act in question, and when the pannel was still present, as explanatory of, or forming a link in the chain of evidence by which it is to be brought home to him at the trial. Thus, in a trial for murder, an exclamation at the moment the fatal act was committed, by a young boy of five years of age, who witnessed it in presence of the pannel, was allowed to be proved in the High Court, by other witnesses who heard it, although the boy himself, by reason of his tender years, could not be adduced.<sup>1</sup> On the same principle, it is quite established that every thing said by others in the presence and hearing of the pannel, in relation to the subject libelled, as charging him with the offence, recounting the circumstances of evidence against him or the like, is admissible, though it took place long after the time libelled; because his conduct or words under such imputations, or in the hearing of such assertions, is good evidence against him, and unless the words are proved, the import of his conduct, whether in answering or remaining silent, cannot be appreciated. The words spoken by others in such a case are allowed to be proved, not because they would be evidence against the pannel in his absence, but because every thing that he says or does at any period after the time libelled, in relation to the crime in question, is evidence against him; and the tendency of those words or that conduct cannot be judged of till the words spoken by others in his hearing which gave occasion to, or preceded it, are known to the jury. As this is the principle of the rule, it fails in all cases when, from the parties being absent, the effect of the words spoken by third parties *upon them* cannot be ascertained; and therefore, in a case where a pannel charged with murder by arsenic was endeavouring to prove in exculpation, that the deceased had taken it voluntarily and committed suicide, and for this purpose asked a druggist in the neighbourhood whether a boy came in about the time of the death of the deceased and asked for arsenic, this was allowed to be put, but the Court would not allow the question to be asked where he said he came from, in respect this could only be proved by the boy himself.<sup>2</sup>

Upon the same principle, in cases of riot, combination, or conspiracy, it is competent to prove as evidence against the pannel,

<sup>1</sup> Wm. Pollock, Feb. 13, 1826; unreported.—<sup>2</sup> Mrs Smith, Feb. 1827; Syme, 121.



not only his own words, but those spoken by any of the party with whom he was engaged on that occasion to explain their motives or design.<sup>1</sup> Having once laid a foundation, by proving that the pannel acted with the rioters, or was participant in their designs, (for it is indispensable in the first instance to do that,) the prosecutor is entitled to adduce against the pannels all facts and circumstances tending to show the common design with which they were actuated; and amongst the rest, the cries, vociferations, or words of the mob, as much as the devices on the banners which they bore, or the weapons with which they were armed. It is a matter of daily practice, accordingly, to admit proof of all these things in such cases.

In cases of conspiracy or treason, it is competent to prove against a pannel, if he is once implicated in the design, conversations equally as actions held by those with whom he had communicated with others, though out of his presence. Thus, if a witness is proved to have conversed with the pannel and others on a certain day, on the common subject of the conspiracy, it is competent to prove that some days before, this witness conversed with some of the same persons in presence of others, though not of the pannel, and to give the words that passed so far as they can be recollected; the whole said on such occasions being evidence of the conspiracy with which the pannel was more or less connected by his presence at a different time. "If you give," said Chief Baron Shepherd, "sufficient evidence to send to a jury of conspiracy, then any circumstance which takes place under such circumstances, is evidence to be considered by the jury whether it consists of the conversations, or acts of the conspirators done at different times."<sup>2</sup> In deponing to such conversations, the witness must give the actual words, if he can recollect them; if he cannot do that, he may give the substance, as nearly as he can; but he is not allowed to give the impression merely produced on his mind, without either the words or the substance.<sup>3</sup>

Under this principal of giving the *res gesta* of the transaction, the English contrive to admit almost all that is allowed in Scotland, of the accounts given by the sufferers in cases of assault. "It is matter of everyday experience," said Mr Justice Lawrence, "that what a man has said of himself to his surgeon is evidence in an action of assault, to show that he has suffered by rea-

<sup>1</sup> Hume, ii. 407; Phil. i. 280.—<sup>2</sup> Treason Trials, ii. 71, 72.—<sup>3</sup> Ibid. ii. 518, 519.

son of the assault.”<sup>1</sup> So also in cases of rape, what the girl said, so recently after the fact as to preclude the possibility of practising upon her, is held to be admissible as part of the transaction.<sup>2</sup> So also it was held by Holt, in an action by a married woman for trespass and assault, that what she said immediately on receiving the hurt might be given in evidence;<sup>3</sup> and the same has been determined as to the words spoken by a wife at the moment of elopement, stating the reason of her doing so, which were held evidence against her husband in an action of criminal conversation, brought by him against her paramour.<sup>4</sup>

On this principle, of an exclamation made at the moment, being part of the *res gesta*, it is sometimes competent to prove the words spoken by a party on such a crisis, who could not, by reason of personal objection, be received at the trial as a witness, as a husband or wife, a child beneath the age of puberty against its parents, or the like.<sup>5</sup> By doing so, evidence is not let in circuitously, which would be inadmissible directly; but the facts that occurred, and the words spoken at the moment of the crime, and in the pannel’s presence, which are indispensable to a right understanding of the case, are merely substantiated. But there is no sufficient authority for extending this exception to the general rule against the indirect admission of the evidence of incompetent witnesses, beyond the words spoken at the moment; and the doctrine laid down in Burnet on this point must not be taken in the unqualified terms in which he has delivered it.<sup>6</sup>

As testimonies of this sort may thus serve to strengthen the case against the pannel, so on the other side, they may competently be referred to as aiding his defence. In many cases, accordingly, the dying declarations of the deceased have been proved by the pannel, in order to show that the fatal wound was inflicted accidentally, or under circumstances of great and justifiable provocation.<sup>7</sup> This is nothing more than substantial justice requires; and in general, it may be observed, that whatever may competently be proved by the prosecutor against a prisoner, may in like manner be referred to on his side, in order either to disprove the libel, or extenuate his offence. What the weight due to such testimony may be, is a separate matter; but the principles of competency are the same on the one side as the other.

<sup>1</sup> East, 188, 198; Phil. ii. 279.—<sup>2</sup> Brazier’s case, East, vi. pl. crown, i. 444; Starke’s, 242; Phil. ii. 279.—<sup>3</sup> East, vi. 193.—<sup>4</sup> East, vi. 193.—<sup>5</sup> Burnet, 602.—<sup>6</sup> Burnet, 602.—<sup>7</sup> Samuel Hale, Dec. 23, 1726; John Downie, Dec. 12, 1770.

There are many other exceptions to the general rule concerning hearsay, established in the English practice, and which, from their obvious justice or expedience, will probably, before long, be engrafted on our law. Thus,

1. Hearsay is admitted in questions of pedigree or remote relationship. "On enquiring into the truth of facts which happened a long time ago, the Courts have varied from the strict rules of evidence applicable to modern facts of the same description, on account of the great difficulty of proving those remote facts in the ordinary way by living witnesses. On this principle, hearsay and reputation, by those who may be supposed to have known the facts, are admitted in cases of pedigree.<sup>1</sup> But the tradition must be from persons having such a connexion with the party to whom it relates, that it is natural and likely, from their domestic habits and connexions, that they are speaking the truth, and are not labouring under any mistake."<sup>2</sup>

2. Hearsay is admitted in declarations by a deceased parent as to the time of a child's birth; and a written memorandum to that effect, stating the time of the birth, has been admitted as good evidence.<sup>3</sup> And on the same principle, a memorandum by a deceased surgeon, as to the time of a birth which he attended,<sup>4</sup> or the account given by a deceased person of his own bodily state, during illness, or immediately after injury, has been received.<sup>5</sup>

3. Hearsay is admitted in questions of boundaries, customary rights, parochial manners or customs, provided the persons whose declarations are proved had the means of knowledge, and no interest to misrepresent.<sup>6</sup> And on this ground, entries by a deceased rector of parochial or ecclesiastical dues have been admitted as evidence for his successor, upon the ground that they could not have availed himself, and that there is no reason to believe he would have made false entries to benefit his successor.<sup>7</sup>

4. Hearsay is admissible in questions of public right, as whether a corporation has a right to exact tolls on a public navigation. And the same principle applies to questions respecting general customs concerning parishes, manors, or the inhabitants of towns or other places.<sup>8</sup>

5. Declarations of deceased persons are admitted when they

<sup>1</sup> *Higham v. Ridgway*, East, x. 120; *Berkely, Peerage*; Camp. iv. 404, 421.—<sup>2</sup> Per Lord Eldon, *Whitelocke v. Baker*, Ves. xiii. 514; Phil. i. 245.—<sup>3</sup> Phil. i. 258; *Herbert v. Tuckal*, Raym. 84.—<sup>4</sup> East, x. 120—<sup>5</sup> East, vi. 193, 198; Phil. i. 254.—<sup>6</sup> Phil. i. 256.—<sup>7</sup> Phil. i. 258.—<sup>8</sup> *Ibid.* i. 263; East. xiv. 256.



appear to have been made against their own interest, as entries in their books, charging them with the receipt of money on account of third parties ; or admitting the payment of money due to themselves.<sup>1</sup> And on this ground, entries in the books of a tradesman by his deceased shopman, who therein supplies proof of a charge against himself, have been admitted in evidence as a proof of the delivery of goods, or of other matter therein stated within his own knowledge.<sup>2</sup>

4. It is not in general competent to contradict what a witness has sworn to on oath, by any proof of what he has declared extrajudicially ; but any witness may be asked whether he made *de recenti*, or as part of the *res gesta* a different statement from what he has now given to the jury ; and if that witness is the person injured, his credit may be impeached by proof that *de recenti* after the transaction, or as part of the *res gesta* at the time, he made an extrajudicial statement to others different from that now given on oath.

No position is better established in the Scotch law, than that it is not competent to discredit what a witness has said on oath to the jury, by proof that he had made other and contradictory statements to witnesses in previous conversations, or to the examining magistrate in precognition.<sup>3</sup> A question of this sort was put to a witness in one case, viz. “ Whether he had ever given a different account of the matter when precognosed,” and he having answered in the negative, an indictment was preferred against him for perjury ; but upon a debate on the relevancy of the libel, the irregularity of the question on the former trial was displayed in such forcible colours, that the diet was deserted by the prosecutor.<sup>4</sup> On the trial of Watt for treason, Aug. 1794, when the English law was the rule, a question of this sort was put to a witness, but the Court recommended that no question should be put, which was not competent by the law of Scotland ; evidently implying that such a course of interrogatory could not be pursued in our practice.<sup>5</sup> At length this question received an authoritative judgment of the Supreme Court, in the case of Harkness, April 1797. An attempt was there made to prove that the sur-

<sup>1</sup> Phil. i. 266 ; Warren v. Grenville, Stra. ii. 1129.—<sup>2</sup> Phil. i. 269.—<sup>3</sup> Burnet, 463 ; Hume, ii. 409, note, and ii. 381.—<sup>4</sup> M'Carley, Aug. 27, 1777 ; Burnet, 464.—

<sup>5</sup> Watt's case, Aug. 1794 ; Burnet, 465.

geon, who had examined the body, had given a different account when precognosed, from that now given on oath; but the Court unanimously held that this was not competent; that the only evidence which could legally be laid before the jury was that which was given in their presence on oath, and that to allow this to be invalidated by any thing he may have said extrajudicially, was not only without precedent, but of the most dangerous tendency; that it was on the principle that such evidence is incompetent, that the rule was established that a witness was entitled to call for his precognition, and see it cancelled before he began to give his testimony; and that to adopt an opposite principle would be productive of the greatest confusion, and the worst consequences upon the whole system of trial; because if the pannel was allowed to *invalidate* the testimony of witnesses by what they had said out of Court, the prosecutor must be allowed to *confirm* it by the best evidence of what he had said elsewhere, that is, by production of his written declaration in the precognition; and that thus trials would come to depend, not upon evidence taken on oath in presence of the jury, but on a comparison of loose assertions or exaggerated statements made in unguarded moments by witnesses, and now recounted through the uncertain medium of the recollection of third parties.<sup>1</sup>

This decision has since that time been held to have completely established the rule. The matter underwent a full discussion in the High Court in the subsequent case of Janet Thomson, July 13, 1826. It was there attempted to discredit the previous statement of a witness by proof that he had previously given a different account of the matter to witnesses proposed to be adduced; but this the Court unanimously held incompetent, upon the ground that wherever such an attempt is to be made, a foundation must be laid for it in the cross-examination of the witness meant to be discredited, which had not been done in that case; and that it is in the general case incompetent by the law of Scotland to discredit what a witness says on oath by proof of what he had said previously; and that the only exception to this rule is in the case of the injured party himself, whose declaration previously made may be adduced either to confirm or invalidate his testimony on oath, provided it formed part of the *res gesta*, or was given immediately after the injury had been received.<sup>2</sup> This was

<sup>1</sup> James Harkness, Aug. 27, 1727; Burnet, 464.—<sup>2</sup> Janet Thomson, July 13, 1826; unreported.

followed in another case, by Lord Alloway at Aberdeen, where, after a full argument, a similar attempt, not falling within the excepted case, was repelled;<sup>1</sup> and a similar judgment was pronounced by Lord Pitmilley at Perth, where the principal witness was attempted to be discredited by proof of what he had previously said; but this was held incompetent, in respect the words referred to had not been uttered at the time of the transaction.<sup>2</sup> And in a subsequent case, it was again held by the High Court that it is not competent to bring evidence that witnesses, when not on oath, gave a different account from what they had sworn before the jury.<sup>3</sup> This rule was solemnly affirmed, after great consideration, in the case of William Brown, J. Henderson, and Others, Nov. 12, 1832, where it was proposed to read from the record of a former trial, a totally different account, which the principal witness had given of a similar assault to that in hand, committed by the same parties on the same day, against another person, which he had also witnessed, to invalidate his testimony. On that occasion he had declared he could not identify the pannels, which he now did; but this the Court held incompetent, declaring that a witness could not be discredited by being asked whether on a former trial for another crime, he had sworn truly or falsely.

But to this rule there is one exception, namely, when a party injured has, either at the moment or *de recenti* after it, given a different account of the transaction from that now given to the jury. The admission of such evidence is founded on the highest equity; for as it is competent for the prosecutor in that single case to support the witness's statement on oath by what he has previously stated extrajudicially, so by parity of reason, it must be competent for the prisoner in the same circumstances to discredit it by the same species of evidence. This is more especially the case in questions of rape, where so much in general depends on the woman's testimony; where it is so easy for her to convert a case of voluntary connexion into one of violence; where this is so difficult to disprove on the man's part, if connexion has really taken place; and where every word which falls from the woman's mouth shortly after the alleged crime, is of such vital importance, in determining how the fact really stood. Upon these grounds, in the case of James Young, Ayr, Sept. 1823, charged with an assault on Mary Muir, with intent to ravish, Lord Succoth

<sup>1</sup> James Webster, Aberdeen, April 1826; unreported.—<sup>2</sup> James Robertson, Perth, Sept. 1827; unreported.—<sup>3</sup> Wylie, Nov. 10, 1829; Shaw, No. 197.



allowed the question to be put to William Kenneth, an exculpatory witness, "Whether the witness, Mary Muir, had, at any time in April, told the witness, William Kenneth, that she had not been very ill used by James Young in the field?"<sup>1</sup> This point has since that time undergone a very deliberate discussion, in the case of Wm. Hardie, Jan. 24, 1831. In that case the panel was indicted for discharging loaded fire-arms at one Boyles, and he swore, on his cross-examination, that he had his stick carelessly in his hand and not held up, and that he had never said otherwise. The prosecutor's proof being closed, the prisoner, in exculpation, proposed to adduce a witness to prove that Boyles had given a different account of what passed at the spot, from what he had sworn to at the trial; and in particular, that on the Monday after the affray took place, which had occurred on the Saturday, Boyles had told the witness that he had held up his hand and stick in a threatening manner, Boyles having previously sworn that he did not. After a full argument, the Court refused to allow the question to be put.<sup>2</sup> In pronouncing this judgment, the Court proceeded on the ground that it is competent to contradict the testimony of a witness by what he said at the time when the subject of the trial happened, or shortly after it, such matter being in fact part of the *res gesta*, just on the same principle on which it is competent to support his testimony by similar statements made to the by-standers at the time, or those with whom he communicated shortly after; and that if malice is specially alleged, and an anterior cause for it is stated, it is competent to prove specific words or facts implying it, provided a proper foundation has been laid in the cross-examination of the witness himself, as was done in the case of Nairne and Ogilvie,<sup>3</sup> and Allan Stewart, April 1813,<sup>4</sup> but that these are the only excepted cases; and that to allow any farther latitude would be a dangerous novelty, as giving room for persons interested in the fate of the prisoner, to come forward with a statement he had made, which was totally false, but which at that period of the trial he had no means of rebutting, and tending to substitute for deliberate testimony given on oath in the presence of the jury, fragments of conversations on former occasions, given under no such sanction, and possibly misunderstood or misconceived on recollection by the persons by whom they were reported.<sup>5</sup>

<sup>1</sup> James Young, Ayr, Sept. 1823; Shaw, No. 110.—<sup>2</sup> Wm. Hardie, Jan. 24, 1831; Shaw, No. 210.—<sup>3</sup> Hume, ii. 362.—<sup>4</sup> Ibid. ii. 399.—<sup>5</sup> Justice-Clerk's and Lord Medwyn's notes. By these high authorities the account given of this case in vol. i. p. 225, must, in some degree, be corrected.

Thus it appears that the rule in our practice is firmly fixed, and on the most just and rational foundation; the general principle being that what a witness says on oath is neither to be bolstered up nor invalidated by extrajudicial statements; and an exception to this rule being established in the special case of the injured party having *de recenti*, or as parts of the *res gesta*, given an account of the transactions to others, which on the one hand may be proved by the prosecutor to confirm, and on the other by the pannel to invalidate his testimony.

In the English law, it is established that the credit of a witness may be impeached by proof, that he has made statements out of Court on the same subject, at variance with what he has sworn at the trial; and, therefore, a letter written by him, or a deposition signed by him, may be used as evidence to contradict his testimony.<sup>1</sup> Great doubt has existed in their practice, whether the party who called the witness might in such a case show that he had affirmed the same thing on other occasions, and so was consistent with himself.<sup>2</sup> Judge Buller has laid it down that such evidence is clearly inadmissible in chief, and seems doubtful whether it is so in reply; and the law was laid down in the same way by Lord Chancellor Eldon and Lord Redesdale, in the great case of the Berkely Peerage, June 5, 1811.<sup>3</sup> But the very fact of the question being agitated in their Courts whether such evidence is admissible in reply, suggests an important distinction between their practice and ours on this head, which sufficiently accounts for the distinction between the law of the two countries in this particular. They allow evidence to be led in reply, and nothing is more common than to see the Judge re-examine witnesses to elucidate any particular point, even in so late a stage as his charge to the jury. In Scotland, on the contrary, nothing can be proved by the prosecutor or Judge after his case is closed, excepting by the cross-examination of the prisoner's witnesses; and hence evidence to impeach the veracity of witnesses may be freely admitted in the one country, where the means of rebutting it in reply exist, which are unknown in the other, where none such are recognised. In all cases where it is proposed to contradict a witness in the cases, when that is allowed by previous extrajudicial statements, a foundation should first be laid by the cross-examination of the witness himself, who is meant to be contradicted on the point; and unless this is done, the contradictory evidence should not be allowed to be adduced.<sup>4</sup>

<sup>1</sup> Phil. i. 301; De Saily v. Morgan, Esp. ii. 691.—<sup>2</sup> Ibid. Phil. i. 301.—<sup>3</sup> Phil. i. 301, 302.—<sup>4</sup> Hume, ii. 409, note; Phil. i. 292, 293.

5. It is incompetent, in the general case, to put any questions to a witness as to his general character or conversation, but he may be asked as to particular offences or convictions; and when the guilt of the pannel is in some degree dependent on the character of the witness in certain particulars, as in cases of rape or assault, the witness may be asked questions concerning his previous life in that particular, or it may be proved by others if a previous foundation has been laid by the cross-examination of the witness in chief upon the point.

It has been already mentioned that the Scotch law has undergone a great change from the decision in Burke's case,<sup>1</sup> followed up as it immediately was by the decision in the case of the Cupar rioters.<sup>2</sup> By these decisions it has been settled that it is competent to ask a witness whether he has been engaged in any *specific* crimes, although they have no connexion with the crime under investigation, the question having in the last of these cases been sustained, put to a witness in a case of mobbing and rioting, whether he had ever been engaged in lifting dead bodies. In all such cases, however, it is the undoubted privilege of the witness to decline answering, according to the rule, *nemo tenetur jurare in suam turpitudinem*. In Burke's case, accordingly, while the Court allowed Hare, the witness, to be asked whether he had ever been engaged in any other murder, they expressly warned him that he was at liberty to decline answering, which he accordingly did.<sup>3</sup>

It is not competent, by our practice, to adduce any evidence by others to show that the witness is a man of *general* bad character, or not worthy of credit on oath, whatever may be the rule on that head by the English law.<sup>4</sup> As little is it competent to elicit such matters from him by questions put to himself with the design of discrediting him; at least, there is no authority as yet for such a proceeding; and considering the boundless field of investigation which it would open up, and the great scope for the gratification of the base and malignant passions which it

<sup>1</sup> Burke and Macdougall, Dec. 24, 1828.—<sup>2</sup> James Lindsay and Others, June 28, 1829, unreported; vide ante, i. 216.—<sup>3</sup> Syme, 365, 367.—<sup>4</sup> Hume, ii. 352, 353; Burnet, 460, 462; Nairn and Ogilvie, Aug. 12, 1765; Wm. Craufurd, Dec. 6, 1818; Hume, ii. 359.



would afford, there seems great doubt whether it ever will be admitted. In considering this question, when it shall again occur, it is of importance to recollect, that in England they allow the character of a witness which has been impeached to be supported by fresh witnesses, and that they are not fettered by any list in the persons they may examine on that point;<sup>1</sup> in all which particulars the Scottish practice is essentially and fundamentally different.

It may frequently occur that a question is asked of a witness which involves him in some criminal matter, and it is of importance to know in what cases he may decline answering. Upon this subject the following rules seem to be established:—

1. No one is bound to answer a question where the answer may infer an infamous crime against himself, excepting *socii criminis*, in regard to the special criminal matter libelled, as to which they are protected by being adduced as King's evidence.<sup>2</sup> So far was this carried in the Court of Session, that the judicial examination of a clerk to a government receiver-general, in a civil case, charged with embezzlement, was found to be incompetent, "as the facts, if proved, would infer infamy;"<sup>3</sup> and although, in a subsequent case, the judicial examination of a claimant in a multiplepinding, against whom it was objected that the fund *in medio* which he claimed, consisted of bills purchased with money stolen from the other claimant, was allowed, yet this was under the reservation always, that he might decline to answer any question which he thought fit, a privilege of which he largely availed himself in the judicial examination which followed.<sup>4</sup> By infamy is here understood infamy in the legal sense, that is, a crime, a conviction for which infers the legal disability of infamy; and therefore a witness is bound to answer a question merely inferring a *disgraceful act*, if the answer of it is essential to the justice of the case in hand, as whether he had been bribed, or instructed, or agreed to depone in a particular way, contrary to the truth.<sup>5</sup>

The law of England is settled the same way; it being a principle with them that a witness cannot be compelled to answer any question which may expose him to a penalty, or to any kind of punishment, or to a criminal charge.<sup>6</sup> It has accordingly been decided by the opinion of all the Judges, that on an indictment

<sup>1</sup> Phil. i. 300.—<sup>2</sup> Burnet, 460, 461.—<sup>3</sup> Campbell v. Gordon, Dec. 1, 1809; Fac. Coll.—<sup>4</sup> Moffat v. Miller, June 1819, unreported.—<sup>5</sup> Burnet, 462.—<sup>6</sup> Hardy's case, State Trials, xxiv. 720; Phil. i. 286.

for rape, the woman is not obliged to answer whether on a former occasion she had had criminal intercourse with other men, nor is evidence of such intercourse admissible.<sup>1</sup>

2. In Scotland the privilege ends here, and a witness has no privilege from deponing as to facts which do not infer infamy, properly so called, but tend merely to subject him to pecuniary penalties, or a civil action of damages, as for fraud or malversation, whether connected with the matter at issue, or collateral to it.<sup>2</sup> The rule long ago established is, that "no objection made by a witness against his deponing is to be sustained, except when the fact put to him might infer infamy, though it might infer against him fraud or damage."<sup>3</sup> In such cases the law does not regard the interest as of that high and overpowering kind, as to infer a reasonable probability of perjury, or stand against the interest of public justice in the revealing of truth.<sup>4</sup> In England it was much doubted whether a witness could be compelled to answer a question which might involve him in civil pecuniary consequences; and on a reference to the twelve Judges, on occasion of Lord Melville's impeachment, four were of opinion that he could not in such a case be compelled to make the disclosure, and the others, including Lord Eldon, held he could.<sup>5</sup> To obviate these doubts, it was enacted by the 46 Geo. III. c. 37, "That a witness cannot by law refuse to answer a question relevant to the matter at issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the ground that the answering such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty or any other person or persons." This is an English statute, but it seems to embody the principles of the Scotch common law on the subject.

3. The point whether a witness can competently object to answering any questions which tend to *degrade* his character, though they may neither subject him to legal infamy nor civil questions, has not yet been determined in our practice, because the right of asking as to particular crimes has been of such recent introduction. It is very frequent now to ask suspected witnesses, on a cross-examination, whether they have ever been in bride-

<sup>1</sup> Hodgson's case; Phil. i. 286, 287; Dodd v. Norris; Camp. iii. 519.—<sup>2</sup> Burnet, 463.—<sup>3</sup> Kilk. voce witness, No. 6.—<sup>4</sup> Burnet, 463.—<sup>5</sup> Parl. Debates, vi. 234, 245.

well; whether they have been often in the hands of the police; whether they live in a brothel, &c., and on such occasions the Court usually interpose, and tell the witness that he is not bound to answer the question unless he pleases. The English law on this subject was fully laid down in Cooke's case by Chief-Justice Treby. "Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, *but they have not been obliged to answer*; for although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy; and if it be an infamous thing, that is enough to preserve a man from being bound to answer, merely for the reproach, and it shall not be put to him to answer a question whereon he will be forced to forswear or disgrace himself. So persons have been excused from answering, whether they have been committed to bridewell as pilferers, vagrants, &c.; yet to be suspected only, is a misfortune and shame but no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable."<sup>1</sup> And the same rule has since that time been confirmed by other Judges of high authority, and in cases which received great consideration.<sup>2</sup> The competency of asking these questions, therefore, seems to be established on the one hand, and the witness's privilege of declining to answer them on the other.

There are two special cases which are peculiarly worthy of notice upon this point, that of a man tried for rape, or assault with intent to ravish, and that of cases of assault, culpable homicide, or murder. The material question is, whether the character, temper, and habits of the sufferer, by the violence in any of these cases, can competently be enquired into on cross-examination?

It had come to be fixed in Scotland, long before the decision in Burke's case, which, to a certain extent, permitted such an investigation in the ordinary case, that in cases of rape, the previous character of the woman, in respect of chastity, might competently be made the subject of cross-examination; the obvious importance of that enquiry in that particular case, having led to that relaxation of the general rule then established. Accordingly, it has been held competent to interrogate the woman ravished as to

<sup>1</sup> State Trials, iv. 748; Phil. i. 291.—<sup>2</sup> See John Friend's case, State Trials, iv. 259; per Lord Ellenborough, Rex v. Lewis, Esp. iii. 225; Layer's case, State Trials, vi. 259.



her having had connexion with other men previous to the occasion libelled.<sup>1</sup> And, in the subsequent case of James Wilson, 15th July, 1813, after the prosecutor had adduced witnesses to support the woman's character, it was allowed to the prisoner to call witnesses to impeach it, by imputing to her acts of criminality even *subsequent* to the time libelled.<sup>2</sup> But in such cases due notice of the intention to impeach the woman's character must have been given in the defence, in order that the prosecutor may have an opportunity of supporting it if that is in his power; and where that is omitted, such proof will be rejected.<sup>3</sup> The character of the principal witness in a case of rape, was allowed to be enquired into by the Lord Justice-Clerk Boyle, in a subsequent case, the pannel having given notice of his intention to impeach it to the prosecutor.<sup>4</sup> After the decision in Burke's case, there can be no doubt of the competency of putting such questions, or leading such proof regarding the woman's *previous* character in all cases of rape; though more doubt may exist as to whether it should be extended to acts *subsequent* to the time libelled. At all events, any proof of irregularities subsequent to the time in question, though it may afford a presumption of anterior lubricity, is obviously of less importance in considering the question, whether the connexion has been forced or voluntary, than such proof anterior to that event; for this reason, that having once lost her chastity in the manner libelled, the woman may have been rendered reckless or desperate in future.

In England, on the trial of an indictment for rape, evidence is admissible on the part of the prisoner, that the woman bore a notoriously bad character for want of chastity and common decency, or that she had previously been criminally connected with the prisoner, but it cannot be shown that she had been criminally connected with *other* individuals.<sup>5</sup> In an indictment for assault, with intent to ravish, general evidence of the woman's bad character previous to the supposed offence, is clearly admissible, but evidence of particular facts to impeach her chastity cannot be received, not even for the purpose of contradicting her answers on cross-examination.<sup>6</sup> But she may be cross-examined as to particular acts of irregularity or indecency, though her answers to such questions are conclusive. And if, on cross-examination,

<sup>1</sup> Smith, Glasgow, Spring 1805; Burnet, 462.—<sup>2</sup> Hume, i. 304.—<sup>3</sup> Alex. M'Kervie, Sept. 1813; Hume, ii. 304.—<sup>4</sup> James M'Cartney and James M'Cummings, Glasgow, Spring 1828.—<sup>5</sup> Hodgson's Cases; Phil. i. 190.—<sup>6</sup> Phil. i. 190; Starkie, ii. 243.

she admit her own misconduct in some earlier transactions, it is competent, on a re-examination in chief, to enquire into her conduct subsequent to them, or for the purpose of restoring her credit; and witnesses may be called for the purpose of showing that her character has been retrieved.<sup>1</sup> Accordingly, where the prosecutrix, in an indictment for assault with intent to ravish, had been cross-examined as to having been sent to the house of correction, evidence of her subsequent good conduct was admitted in support of the prosecution.<sup>2</sup>

It is a general rule in England, that a party cannot bring evidence to support the character of a witness, unless it has been impeached either by cross-examination, or the evidence of witnesses.<sup>3</sup> But, if the character of a witness has been impeached, even on cross-examination only, evidence on the other side to general good conduct may be adduced.<sup>4</sup>

In cases of assault or homicide, especially where the matter has originated in a quarrel between the parties, it is frequently of importance to know whether the character of the deceased or injured person, particularly in respect to his quarrelsome or fiery disposition, can competently be made the subject of investigation. In one case on the Circuit, general proof of the quarrelsome temper of the person assaulted was rejected as incompetent;<sup>5</sup> and in another case, where the pannel was charged with culpable homicide, by cruel usage of a boy in a manufactory, proof of rules and regulations tending to show that the pannel's conduct to the boy killed had been cruel, was rejected.<sup>6</sup> But, in the last case, there was a difference of opinion on the bench; and the former was prior to Burke's case, which changed the law in this particular; and it may reasonably be doubted, whether, since that decision in 1828, the competence of such an investigation by cross-examination, and when a foundation has been laid by cross-examination of the prosecutor's witnesses, does not follow as a matter of course. Where the defence of the prisoner consists in provocation, the relevancy of such an enquiry seems indisputable; since it is much more *likely* that a person of a bad temper, and quarrelsome habits, has been betrayed into some of his usual excesses on the occasion libelled, than one who has always been remarkable for his meekness and

<sup>1</sup> Starkie, ii. 242, 243; Phil. i. 190.—<sup>2</sup> Per Holroyd, Rex v. Clarke; Stark. ii. 241.—<sup>3</sup> Stark. i. 248; Russell, ii. 685.—<sup>4</sup> Stark. i. 148; Russell, ii. 685.—<sup>5</sup> Per Lord Justice-Clerk, A. M'Caughie, Dumfries, April 1824; unreported.—<sup>6</sup> Per Lord Meadowbank, J. Meekison, Perth, Sept. 1830; dissentient, Lord Mackenzie.

serenity of disposition ; and, if *relevant*, on what principle are questions touching it to be held as *incompetent*, after the admissibility of such an investigation by cross-examination has been fully established in the case of ordinary witnesses, and in regard to points not immediately connected with the matter at issue ? For these reasons, there is every probability, that the competence of such an investigation will ere long be fully established in our Courts, in all those laws where the quarrelsome temper of the person assaulted enters into the merits of the pannel's defence ; but, in such a case, without doubt it will be held indispensable, that due notice of the intention to bring forward such proof should have been given by the pannel, that the prosecutor may be on his guard to support his own witness's temper by his own witnesses ; and due consideration had in admitting it, of the difference between the English law, which admits the examination of any witnesses not contained in his list on the prosecutor's part, and ours, where no such liberty is recognised.

6. If a witness is incompetent against one pannel at the bar, he cannot be examined against any other, at least in relation to any criminal matter with which they are jointly charged.

If a witness is adduced against several prisoners, who are jointly charged with one offence, he may be liable to a good objection in a question with one, and not with the others ; and it may be argued, that because he cannot be examined against the one, it is no reason why he should be rejected in matters relating to the others. But our Court, justly influenced by the consideration, that it is impossible to say how, in the course of a trial, the evidence against one prisoner may be brought to bear against another, have justly rejected such testimony *in toto*, when both prisoners are implicated in one charge. Accordingly, in a case where several prisoners were at the bar, charged with stouthrief, it was held incompetent to adduce the wife of one against any of the others at the bar, although she was allowed to be brought into the Court, and identified by the other witnesses, as the person who had passed one of the stolen notes.<sup>1</sup> It rather appears, however, that this last privilege of exhibiting a witness as a production, where she cannot be permitted to depone, should

<sup>1</sup> John Law, James Mitchell, and Alexander Steel, Jan. 8, 1817 ; unreported.



not be admitted, unless in cases where she is expressly libelled on as a *production*, which is usually done with the first wife in cases of bigamy. The like had previously been found in regard to the agent of one of the pannels, who was held to be inadmissible in regard to all.<sup>1</sup> The same rule has long ago been established in the civil Court,<sup>2</sup> and it is now held a fixed and sacred rule of criminal jurisprudence.

The rule of the law of England is the same, it being there settled that the wife of a prisoner cannot give evidence for him, nor for any one of several others indicted along with him, where a joint offence, as a conspiracy, is charged, and an acquittal of the others would be a ground for the discharge of her husband;<sup>3</sup> nor can she be adduced in any case either for or against the prisoners, where the cases of the co-defendants cannot be separated.<sup>4</sup>

7. A witness, before he begins his deposition, is entitled to have his previous declaration, or deposition, taken in precognition, cancelled.

To preserve the mind of a witness free and unbiassed, when giving his testimony, it is competent for him, before he begins his deposition in the trial of the prisoner, to call for his declaration or deposition, emitted in precognition, and have it destroyed, that he may be absolutely at freedom in the story he is to tell.<sup>5</sup> And even if the declaration previously emitted be not cancelled, it can never be employed in evidence against him, whether for prevarication or perjury.<sup>6</sup> It was once, indeed, attempted to found an indictment for perjury on a comparison of what the witness had said in precognition, with what he swore to on the trial, but the relevancy of the charge having been objected to, it was abandoned, and nothing of the kind has since been renewed.<sup>7</sup> There are many and obvious reasons why the witness should not be fettered or intimidated at the trial, by the apprehension of an indictment for perjury hanging over his head for any deviation from what he declared in precognition; and, therefore, it makes no difference although the witness was sworn in the precognition; for although, if that be the case, and the depositions are irreconcilable, he has certainly committed perjury on the one

<sup>1</sup> O'Neils, March 19, 1801; Burnet, 607.—<sup>2</sup> Kilk. voce Witness, No. 17.—<sup>3</sup> Russell, ii. 604.—<sup>4</sup> Rex v. Frederick, Stra. ii. 1095; Russell, ii. 604.—<sup>5</sup> Hume, ii. 381.—<sup>6</sup> Ibid.—<sup>7</sup> Nov. 27, 1777, Patrick M'Curly; Hume, ii. 381.

occasion or the other, yet the interests of justice on behalf of the pannel will not allow that, in his ultimate deposition, on which possibly the fate of the prisoner then at the bar may depend, he should be constrained, by the fear of punishment, to adhere to what may be a false story.

8. A pannel is entitled to see, by himself or his agent, and precognosce the witnesses for the Crown ; and if this is refused, application should be made to the Court.

It is absolutely indispensable to the fair examination of the witnesses on both sides, that they should be mutually seen and examined by the agents for the parties, and a complete precognition of what they are to say, furnished to the counsel at the trial. If a witness is in confinement, or otherwise inaccessible to either party, a petition, stating the fact, should be presented to the Court, who will thereupon give such remedy as the justice of the case requires, by appointing the precognition of the witness in question to proceed in presence of some person to guard against improper practices.<sup>1</sup> In the case of M'Kinlay, 19th July, 1817, where a witness Campbell was confined in Edinburgh Castle, and it was objected to his admissibility, that the prisoner's agent had been refused admittance to precognosce him, it was unanimously laid down that every prisoner is entitled to see and precognosce the witnesses to be adduced against him, and that if this is refused, even on the day of trial, they would grant redress by adjourning the diet ; but that, as no such application had been made in that case, the prisoner had missed his opportunity, and the objection could not be received in bar of examination.<sup>2</sup> In practice, the way in which this matter is usually settled, where a *socius criminis*, or other person under confinement, is to be examined on behalf of the prisoner, is for the Crown agent or Procurator-fiscal to grant an order for the admission of the prisoner's agent or counsel to conduct the precognition, in presence always of one of their clerks, or of a person authorized by the magistrates, or public authorities, in order to prevent improper use being made of the opportunity thus obtained.

9. It is competent to prove confessions made under any circumstances by a pannel, even when in jail, or to

<sup>1</sup> Murray Stewart, Sept. 6, 1817, unreported ; Nairne and Ogilvie, 1765.—<sup>2</sup> M'Kinlay, July 19, 1817 ; Record, and Hume, ii. 374.

fellow-prisoners, provided that in such a situation no improper means have been used to elicit or obtain it ; but if they are made under promises even by one not authorized to make them, they can be received *cum nota* only.

Common sense demonstrates, that a confession of guilt made by a prisoner, under any circumstances, is one of the strongest presumptions against him ; and accordingly it has, from the earliest time, been held to be admissible evidence in our practice.<sup>1</sup> The degree of weight due to the confession will depend on the circumstances under which it was given, and the degree of credibility due to the witnesses by whom they are to be established ; but that it is in every case of some weight is self-evident, and it forms a leading article of evidence in a great proportion of criminal cases. The weight of such a confession is always greatly strengthened, and in fact, when so supported, amounts to sufficient evidence of itself of the pannel's guilt, provided the corpus delicti be established, if it be connected with some article of real evidence which establishes its accuracy, as if the accused say, when apprehended or afterwards, that the stolen goods will be found secreted in such a place, and search is made there, and they are found accordingly, or that the knife which committed the fatal wound will be found in such a pond or river, and search is made there, and it is found accordingly.

The great difficulty in such cases is where the confession has been obtained under questionable circumstances, as by a jailer or a fellow-prisoner when in confinement, or under a promise by some person, however unauthorized, either that no prosecution should be instituted, or that it should be conducted with lenity. In the first case, the rule is settled, that confessions are admissible, though obtained in such critical circumstances, provided no improper means have been used to obtain it ; but that if this is the case, they will not be received. Thus evidence was received of a confession made in jail, in a conversation with the jailer and his son ;<sup>2</sup> and in another case, of a confession made to a fellow-prisoner in jail, when lying on the same straw on the floor ;<sup>3</sup> and in a third, of conversation between the prisoners in jail relative to the housebreaking of which they were accused.<sup>4</sup> In later times the same rule has been fully established. Thus evidence was

<sup>1</sup> Hume, ii. 333, 334.—<sup>2</sup> James Mitchell, Jan. 9, 1678 ; Hume, ii. 335.—<sup>3</sup> Anderson and Marshall, Dec. 2, 1728.—<sup>4</sup> John Andrew and Others, March 14, 1774.



admitted from a jailer's wife of a conversation which she accidentally overheard in jail between two prisoners when in the water-closet; the Judge, who admitted it, at the same time stating, that if she had placed herself intentionally there as an eavesdropper to overhear the conversation of the prisoner, he would not have allowed the evidence to be adduced.<sup>1</sup> More lately still, the same species of evidence was held by the Court to be clearly competent, in a case where a prisoner had been accidentally put into a cell with a witness, to whom he made a disclosure of his guilt,<sup>2</sup> although, from other reasons, the Lord Advocate having gained the legal point, declined to examine him; and in a case of murder, which was most deliberately considered, the evidence of two prisoners in custody in Edinburgh jail, on a charge of theft and embezzlement to a great amount, who had received in prison a most important confession from the pannel, was admitted, it having been previously ascertained that they were put into the pannel's cell from no sinister design, or to entrap him into a confession, but merely from the crowded state of the jail at the time.<sup>3</sup>

On the other hand, wherever improper means appear to have been taken to elicit a confession, as by placing persons in the pannel's cell to inveigle him into conversation on the subject, or where official persons have gone to him and held out unwarrantable hopes of pardon, or advantage has been taken of a confession made for the purpose of spiritual consolation to a clergyman, the Court will interfere and prevent the confession being used against the pannel. So the law was laid down by Lord Justice-Clerk Boyle, with the assent of the whole Court, in the case of M'Kinlay and Gordon, Nov. 23, 1829, above mentioned. And on this principle, several old cases, in some of which a confession was obtained by the crown counsel in jail, in the hope of the witness being taken as a witness for the crown; while in another the disclosure made to a minister of religion for the disburdening of the conscience of the witness, were allowed to be given in evidence, are justly censured by Baron Hume,<sup>4</sup> and will doubtless rather be regarded in future as beacons to be avoided, than as precedents to be followed.

Cases not unfrequently occur where confessions have been obtained from pannels by means of promises made by persons

<sup>1</sup> Per Lord Justice-Clerk Boyle; Tait and Stevenson, Jedburgh, April 1824; unreported.—<sup>2</sup> M'Kinlay and Gordon, Nov. 23, 1829; Shaw, No. 199.—<sup>3</sup> Robert Emond, Feb. 6, 1830; ante, i. 77.—<sup>4</sup> Hume, ii. 335.

not authorized to tie up the hands of the public prosecutor, and questions may arise how far they should be admitted to proof by the witnesses to whom the disclosures were made. There is a natural repugnance in every equitable mind against the reception of confessions so improperly elicited, or any breach of the understood, if not expressed compact under which they were delivered; but still it cannot be affirmed that there is any authority in our practice for rejecting such confessions altogether. On the contrary, in a case where the prisoners had made a confession to the injured party, on a promise that their lives should be saved, and had pointed out where the stolen goods were deposited, which were in consequence recovered, it was held that the confession might be received in evidence, reserving its weight to the jury, although the prisoners, in consequence of a most proper recommendation from the jury, received a transportation.<sup>1</sup> It was laid down in the case of M'Kinlay and Gordon,<sup>2</sup> already so often alluded to, that promises made by no one can tie up the public prosecutor, or be rejected on that ground, excepting those made by himself, or those whom he appoints, or for whom he is responsible; and the proper course to adopt, where any such improper confession has been obtained, is to allow it to be received, reserving its weight, after all the circumstances attending the way in which it was obtained has been fully explicated to the jury, who, if they deem the prisoner unjustly dealt with, will doubtless throw it out of view altogether.

By the English law, a verbal confession, improperly obtained, cannot be received in evidence; but things which happen, or acts done afterwards, such as the finding or recovering of stolen goods, may be given in evidence, and by other witnesses, although these things happened, or those acts were done, or those witnesses obtained in pursuance of such confessions.<sup>3</sup> Lord Eldon has laid it down, that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he would direct an acquittal, unless the fact proved would have been sufficient to warrant a conviction without any confession leading to it.<sup>4</sup> The rule now is, to leave to the consideration of the jury, the fact of the witness having been directed by the prisoner where to find the stolen

<sup>1</sup> Honeyman and Smith, Dec. 26, 1815; Hume, ii. 335.—<sup>2</sup> Nov. 23, 1829; Shaw, No. 199.—<sup>3</sup> Leach, 263, No. 131; Jane Warrickshall's case; Lockhart's case, *ibid.* 386, 265, No. 181; Phil. i. 108; Russell, ii. 650.—<sup>4</sup> East, ii. 658; Russell, ii. 651.

goods, and his having found them there; but not the acknowledgment by the prisoner of having put them there.<sup>1</sup>

The rule in England is, that a confession, to be admissible in evidence, must have been free and voluntary, that is, not extracted by threats of violence, nor elicited by direct or implied promises, or the exertion of improper influence, however slight.<sup>2</sup> "Confession," says Blackstone, "even in cases of felony at common law, are the weakest and most suspicious of all testimony, very liable to be obtained by artifice, false hopes, promises of favour, or menaces, seldom remembered accurately, or reported with precision, and incapable in their nature of being disproved by other negative evidence."<sup>3</sup> So in a case where the prosecutor asked the prisoner, on finding him, for the money, which he had taken out of his the prosecutor's pack, and said before the money was produced, "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;" upon which the prisoner took it out and gave it to him. It was held by a majority of the twelve Judges that the evidence was inadmissible.<sup>4</sup> And Judge Buller has laid it down, that in a case where hopes of favour had been given, and the prisoner refused before the magistrate to confess except upon conditions, there must be very strong evidence of explicit warning by the magistrate not to rely on any expected favour on that account; and it ought clearly to appear that the prisoner thoroughly understood such warning, before his subsequent confession could be given in evidence.<sup>5</sup> But the case is otherwise, if the inducement to a confession proceeded from some one who had nothing to do with the apprehension, prosecution, or examination of the prisoner; for a promise made by a person who interferes without authority of any kind, is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess.<sup>6</sup> And it was held by a majority of the twelve Judges, in a case where the prisoner made a confession on the interrogation of a police officer, but without threats or promises of any kind, that the confession was rightly received on evidence.<sup>7</sup> In applying these authorities to our practice, it is always to be recollected that their rules in regard to the admission of *declarations* are different from ours, as they do not allow written declarations to be taken from accused persons, although they admit parole proof of confessions obtain-

<sup>1</sup> East, ii. 658.—<sup>2</sup> Russell, ii. 644.—<sup>3</sup> Blacket, iv. 357. See Foster, 243.—<sup>4</sup> Jones' case; Russ. and Ry. 152.—<sup>5</sup> East, 658.—<sup>6</sup> Rex. v. Gibbons, 1 Carr. and P. 97; Russell, ii. 646.—<sup>7</sup> Thornton's case; Russell, ii. 647, 648.



ed by police officers by questioning prisoners in their custody,<sup>1</sup> and that they permit a conviction on an extrajudicial confession *alone*; a proceeding unknown in our law.

It is allowed in England to prove against a prisoner a confession, which he had been induced to make to the jailer and mayor, by the religious persuasions of the chaplain to the jail.<sup>2</sup> There is no reason to believe that our practice would allow a confession to be proved, made to the clergyman *himself* for the sake of spiritual consolation;<sup>3</sup> but there seems no room for rejecting a confession made to *others*, as the officers or magistrate, by a prisoner under the influence of religious persuasion, even of the strongest kind; for in doing so, the prisoner is so far from having been misled or deceived in any particular, that the punishment he is to receive in this world is precisely the thing which he wished to incur, in the view of obtaining for him the benefit of forgiveness in another.

10. It is competent for a witness to refer to notes made up at the moment to refresh his memory; and a professional witness may read a report or memorandum so made up as his testimony, he always confirming it on oath as a true report; but notes or accounts of transactions made up *ex intervallo* are not admissible.

It is frequently made a question, whether a witness may refer to notes or memorandums made to assist his memory. On this subject, the rule is, that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory;<sup>4</sup> but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible.<sup>5</sup> It is accordingly usual to allow witnesses to look to memorandums made at the time, of dates, distances, appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony, or even to read such notes to the jury as his evidence, he having first sworn that they were made at the time, and faithfully done. In regard to lists of stolen goods in particular, it is now the usual practice to have inventories of them made up at the time, from the information of the witness in pre-cognition, signed by him, and libelled on as a production at the

<sup>1</sup> Thornton's case; Russell, ii. 649.—<sup>2</sup> Rex v. Gilham; Russell, ii. 648.—<sup>3</sup> Hume, ii. 335.—<sup>4</sup> Burnet, 459; Gordon Kinloch, June 29, 1795; *ibid.*—<sup>5</sup> Burnet, *ibid.*

trial, and he is then desired to read them, or they are read to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved at the trial, and much more correctness and accuracy is obtained, than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance perhaps of months from the time when they were lost.

With the exception, however, of such memorandums, notes, or inventories, made up at the time, or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parole evidence, and *viva voce* examination, and convert jury trial into a mere consideration of written instruments.<sup>1</sup>

There is one exception, however, properly introduced into this rule; in the case of medical or other scientific reports or certificates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath that it is a true report. The reason of this exception is founded in the consideration, that the medical, or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed, that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subjected to a farther examination by the prosecutor, or a cross-examination on the prisoner's part, and if he is called on to state any facts in the case unconnected with his scientific report, as conversations with the deceased, confessions heard by him from the pannel, or the like, *utitur jure commune*, he stands in the situation of an ordinary witness, and must give

<sup>1</sup> Burnet, 459.

his evidence verbally in answer to the questions put to him, and can only refer to jottings or memorandums of dates, &c. made up at the time, to refresh his memory like any other person put into the box.

11. Witnesses should not remain in Court to hear the depositions of the other witnesses who precede them ; but to this there is an exception in the case of medical witnesses, who should remain to hear the deposition of the witnesses who depone to the facts of the case ; but they should be examined on matters of medical opinion apart from each other.

It is a general rule in the Scotch law, that the witnesses should be examined separately, and this principle is *in viridi observantia* at this hour. It is founded on the importance of having the story of each witness fresh from his own recollection, unmingled with the impression received from hearing the deposition of others in the same case ; and although it is impossible to prevent previous conversation between them, yet the existence of this comparatively inconsiderable evil, which cannot be avoided, is justly considered as no reason for voluntarily incurring a still greater, at the very moment of the trial. It is impossible that a person who hears the evidence at a trial, can avoid taking up an impression one way or other as to the facts which it involves ; and if the witnesses who are to be called late in the day, have heard important evidence from those who have gone before them, it is not in human nature that they should not give more decided testimony one way or the other, than they would have done if their minds had been unbiassed by every thing excepting what they themselves had witnessed. For these reasons, our practice in this particular seems to be founded in sounder principles, and a more thorough regard for the interests of the prisoner, than the English, which, in the general case, allows all the witnesses to be present at the examination of each other ; and it is to be hoped, that whatever other parts of our institutions are swept away in the growing passion for innovation, this at least will be allowed to remain as a monument of the wisdom and humanity of the Scottish legislature.

It results from this principle that it is a good objection to any



witness, if he has been in Court during the examination of another witness, and so heard any part of the testimony on which he may shape his own.<sup>1</sup> But it is only when the proof begins that this necessity for the removal of the witnesses arises, and it is no objection to a witness that he has been present during the discussion on the relevancy, nor is their removal usually enforced till the balloting of the jury begins.<sup>2</sup>

The witnesses, when the proof begins, are put into a room apart, which is kept locked by the macer or officer of Court, who attends at the trial. During this period, it is not competent for the prisoner's counsel to have access to them when so enclosed;<sup>3</sup> and they are brought out one by one, when called by the party for whom they are cited. But although the rule is, that witnesses are to be kept detached from all communication with others during the continuance of the trial, until they are called out and examined, yet the rule on this head is by no means of the positive and unbinding nature of that which is laid down by statute<sup>4</sup> for the keeping apart of the jury. It is not therefore sufficient, *per se*, to disqualify a witness, that a person by mistake, or even by design, has got access to them while enclosed, unless he has been conversing or tampering with them.<sup>5</sup> But, undoubtedly, if a case of tutoring or tampering, as by conveying of bribes, instruction, or information as to how previous witnesses have deponed, were to occur, it would exclude the witnesses who had lent themselves to such corrupt proceedings. During the period of their confinement, it is the duty of the witnesses to remain quiet, waiting until they are called; and, therefore, if they break out, or by connivance or stratagem make their escape, they may be summarily punished upon proof of the fact by the Court; and, on an occasion of this sort, a month's imprisonment has been inflicted.<sup>6</sup>

It is competent to re-examine a witness who has concluded his deposition, provided that in the interval he has not been in Court, or heard any part of the proceedings;<sup>7</sup> and where the witness is to speak to a different set of facts from those on which he has previously been examined, or which will come with better effect in a later stage of the trial, it is not unusual to have this

<sup>1</sup> Hume, ii. 379; Burnet, 466, 467.—<sup>2</sup> Mill, June 20, 1810; Burnet, 467.—<sup>3</sup> Macpherson and Others, Jan. 7, 1808; Hume, ii. 379.—<sup>4</sup> 1587, c. 92.—<sup>5</sup> Bertram and Leckie, July 17, 1792; Burnet, 467, 468.—<sup>6</sup> Thomas Innes and John M'Ewen, Feb. 28, 1831; Shaw, No. 211.—<sup>7</sup> Hume, ii. 381; James Hamilton, July 18, 1811; James Wilson, July 16, 1813.

done.<sup>1</sup> It is a good objection, however, to the re-examination, if the witness has remained in Court during the interval since his examination ceased, or had any improper intercourse with the party for whom he was cited; but it is not a good objection, if the witness, after his first examination was concluded, has left the Court, and gone to a public-house in the neighbourhood, even though he was there engaged in a conversation with a witness who had been examined, as to what other witnesses had said in the interval.<sup>2</sup> A witness for the Crown may be examined in exculpation, though he has remained in Court after his examination for the Crown has ceased, if the prosecutor does not object; but he cannot be examined again for the Crown, even with the pannel's consent.<sup>3</sup>

To this rule, however, there is an important exception in the case of a medical witness called on to give a professional opinion, who not only may, but ought to remain in Court when the examination of the witnesses *in causa* goes on; and this applies equally to the medical men cited for the pannel as the prosecutor, if they are to give a professional opinion on the case.<sup>4</sup> The reason is, that the medical men are to give an opinion on the whole facts of the case, and some of the most important of these facts are the appearance of the wounds on the body when first seen by the witnesses, and of which, consequently, they only can give an account. In all the late trials for murder, accordingly, in particular those of Mrs Smith, Lovie at Aberdeen, and others, the medical gentlemen on both sides, who were to give a professional opinion, were present during the whole of the trial.<sup>5</sup> This, however, applies only to medical witnesses who are to give a professional opinion properly so called, that is, who are to state their opinion as to the death or wounds which have been received. If they are to be examined as witnesses *in causa*, as to the ordinary facts of the case, they must be enclosed with the other witnesses.<sup>6</sup>

Though the medical witnesses, who are to give a professional opinion, should hear the whole *facts* of the case detailed by the other witnesses, whether professional or ordinary, who are examined in the cause, yet it is usual, when one medical man begins to give *an opinion* on the case, to cause the other medical men to

<sup>1</sup> Gilchrist, July 13, 1831; unreported.—<sup>2</sup> Ibid.—<sup>3</sup> William Craufurd, Dec. 7, 1818; unreported.—<sup>4</sup> Joseph Rae and Robert Reid, July 22, 1817; unreported; William Richardson, Dumfries, Sept. 1824, unreported on this point.—<sup>5</sup> See Syme's Cases.—

<sup>6</sup> Joseph Rae and Robt. Reid, July 22, 1817; unreported.

retire. The reason of this is, that it has been found by experience, that medical men, even of character and information, are generally so prone to contradict each other, or to adhere to the side on which they are cited, that it is never safe to let them hear each other's testimony. The proper way to do, therefore, is to allow the medical men who are to be examined as to opinion, to hear the whole evidence relating to the *facts*, whether from the ordinary or the medical witnesses, and to remove them as soon as a medical opinion is about to commence.

It is not yet settled whether, when one medical man contradicts another on a point of opinion, it is competent to re-examine the first, in order to clear up the difficulty. In a late case this point occurred. Lords Gillies and Meadowbank were for admitting the re-examination, and the Lords Justice-Clerk and Hermand against it. The examination, in these circumstances, was not pressed by the Crown.<sup>1</sup>

12. Witnesses are to be examined without being led; the cross interrogatories are conducted by the same rules as the examination in chief; and all the evidence is taken in presence of the jury, and summed up by the presiding Judge at the close of the trial.

When a witness has been regularly sworn, he is first examined by the counsel of the party for whom he was adduced, after which, the other party commences the cross-examination. It is all taken in open Court in presence of the parties, their counsel, attorneys, the judge, and the jury.

Leading questions, that is, questions which suggest to the witness the answer he is to give, are not permitted either by the Scotch<sup>2</sup> or English law,<sup>3</sup> in any material part of the case. This is to be understood in a reasonable sense; for if it were not allowable to approach the points at issue by such questions, examinations would be swelled out to an immoderate length. To abridge proceedings, therefore, and bring the witness as rapidly as possible to the material points on which he is to speak, it is allowed to the counsel to lead him on to that length, and to recapitulate to him the acknowledged facts of the case, which have been established by previous testimony. But when he approaches

<sup>1</sup> R. M'Leod, March 1, 1824; unreported.—<sup>2</sup> Burnet, 466.—<sup>3</sup> Phil. i. 282.



the matter on which he is to give new or important testimony, he should be left to himself, and nothing said which may suggest the answer which is expected.

It is often a convenient way of examining, to ask a witness, whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got, than by putting separate questions, for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel.

Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner, that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony which it is desired to overturn.

It frequently happens, that in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied, or but partially admitted before. In such cases, there is no good ground on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studi-

ously withheld, and the second is as carefully put forth; and it frequently happens, that in this way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal.

The mode of examining in cross in our Courts is the same as in chief, and no greater latitude in leading is allowed in the one case than the other.<sup>1</sup> In general the rule is, that you can only examine in cross, on subjects touched on in the examination in chief; but this does not apply to the prosecutor, who is allowed in cross-examining a witness adduced in exculpation, to put any question pertinent to the issue, whether cross to the pannel's examination or not, "the rule of cross-examination being not applicable to the Crown."<sup>2</sup> The principle on which this is founded is not that any right is vested in one party in a prosecution which is not enjoyed by the other, but that as the whole matter at issue, to which each witness can speak, must be brought out in the prosecutor's examination, what is cross to that must be cross to the whole relevant matter hitherto adduced. If the pannel has any questions on his own side to put, he may examine the witness in chief himself; and this is every day done, a privilege which the prosecutor does not enjoy with the pannel's witnesses, as he can adduce no proof in reply; and therefore he must be permitted to enjoy that privilege in cross-examining the pannel's witnesses, which the latter enjoys by the power of adducing them on his own side in chief.

In England, the rule is, that though in the examination in chief, leading questions may not be put, yet they are allowable in the cross-examination; and that the counsel who examines the witness, may lead him immediately to the point on which his answers are desired.<sup>3</sup> If the witnesses betray an unwillingness to speak fairly and impartially, they may be questioned as minutely as possible; nor is there any danger in leading too much, where the witness is unwilling to follow.<sup>4</sup> But even in cross-examination, it is not allowable to put words into the witness's mouth which he is to echo back again.<sup>5</sup> A witness cannot

<sup>1</sup> Stevenson and Others, Nov. 28, 1828; Burnet, 466.—<sup>2</sup> James Begbie or Ferrier, March 6, 1826; Justice Pitmilly, Meadowbank; unreported.—<sup>3</sup> Hardy's case, State Trials, xxiv. 755; Phil. i. 283.—<sup>4</sup> Ibid.—<sup>5</sup> Per Buller, State Trials, xxiv. 659; Phil. i. 284.

be examined as to any fact, which, if admitted, would be collateral and irrelevant to the matter at issue; but if it is relevant, it is admissible, however remote its bearing on the case. A witness cannot be cross-examined, unless he is sworn on the other side; but as soon as this is done, he may be cross-examined, though no questions have been put to him in chief.<sup>1</sup>

All evidence is taken in presence of the prisoner, judge, and jury, and the old cumbersome method of taking down the whole evidence in writing is now happily dispensed with. By 23 Geo. III. c. 45, it is enacted, all crimes may be tried by the Court of Justiciary without any taking down of the evidence, but by the Judge in his notes, under the provision, that before enclosing, the evidence should be summed up by the presiding judge to the assize. This privilege is by a late statute extended to the Admiralty and Sheriff Courts, it being provided, "that it shall and may be lawful for the High Court of Admiralty, and for the Courts of the Sheriff respectively, to proceed in, try and determine all causes and prosecutions for crimes before them, where the trial is by jury, by verdict of such jury, upon examining and hearing the evidence of the witness or witnesses in any such cause or prosecution *viva voce*, without reducing into writing the testimony of any such witness or witnesses, in the same manner, and according to the same rules, as is observed in trials before the Court of Justiciary; and it is hereby provided, that the judge trying such causes or prosecutions, shall preserve and duly authenticate the notes of the evidence taken by him in such trial, and shall exhibit the same, or a certified copy thereof, in case the same should be called for by the Court of Justiciary."<sup>2</sup>

With regard again to trials before any inferior Court, *not by jury*, it is enacted, "That in trials of crimes before the Sheriff, or other inferior Court in Scotland, without a jury, no part of the proceedings, which is not in use to be taken down in writing in trials by jury, shall be so taken down, excepting only the deposition of the witnesses."<sup>3</sup> Under this enactment it is still necessary, in trials before the Sheriff and magistrates, according to the old form, to reduce the depositions of the witnesses to writing; but arguments on relevancy, objections, &c. which are not necessarily taken down in writing in the Justiciary Court, need not be taken down in that form, unless the matter appears to be

<sup>1</sup> Esp. i. 357; Phil. i. 285.—<sup>2</sup> 9 Geo. IV. c. 29, § 17.—<sup>3</sup> Ibid. § 18.



of such importance, with a view to review, as to call for that solemnity.

In trials by the Sheriff, under the police jurisdiction, conferred by the same act, it is enacted, "That the Sheriff so trying any such offence, shall preserve a note of the evidence taken by him on such trial, and shall exhibit the same, or a certified copy thereof, in case the same shall be called for by the Court of Justiciary."<sup>1</sup> In all police acts, it is provided, that the case they may try may be summarily disposed of without the evidence being reduced to writing.

13. Witnesses who prevaricate, or obstinately conceal the truth, may be summarily committed to prison by the Court before which they are tried; or, if the falsehood appears more flagrant, they may be committed from the box to prison on a charge of perjury.

When witnesses are called into the important and solemn situation of giving evidence against a prisoner, on which his life, liberty, or property may depend, they are held to be in a peculiar manner subject to the authority of the Court before which they are examined; and, therefore, any prevarication, perjury, or wilful concealment of the truth by witnesses in the course of examination, or any attempt to bias, corrupt, or direct their testimony, may be either summarily punished on the spot by instant committal to jail, or made the subject of petition and complaint at the instance of the public prosecutor, or of committal for regular trial, or indictment for perjury or subornation. There are numerous precedents in our practice of such offences being punished in all the three ways.

Committals for prevarication, or obstinate concealment of the truth, were long ago pronounced by Baron Hume to "be so numerous, that no enumeration of them was practicable;"<sup>2</sup> and the increasing corruption and depravity of the age has since that time led to a still larger array of precedents. Indeed, there is hardly a Circuit now, especially at Glasgow, where several witnesses are not subjected to imprisonment for various periods, from six weeks to four months, for offences of this kind. Thus, to give only a few instances, a witness adduced in exculpation

<sup>1</sup> 9 Geo. IV. c. 29, § 20.—<sup>2</sup> Hume, ii. 140.

was found to have prevaricated so much on oath that he was committed for two months.<sup>1</sup> For a slighter instance of prevarication a witness in another case was sent to jail for three weeks.<sup>2</sup> James M'Kinlay, a witness, in respect of gross prevarication and concealment, was committed to the jail of Glasgow for four months, the first month to be fed on bread and water.<sup>3</sup> Six weeks' confinement in bridewell, with hard labour, and the food of bread and water, was summarily awarded against a witness for prevarication on oath;<sup>4</sup> two months for the same offence in another case.<sup>5</sup> If a witness, after being sworn, refuses to answer a question which is deemed competent by the Court, he may be summarily sent to jail. In a case where the witness had done this, and been imprisoned, on a petition from the culprit, setting forth that he was penitent, and craving liberation, the Judges certified the case from the Circuit, and the High Court found, "that the conduct of the petitioner was highly criminal, and calculated to obstruct and defeat the ends of justice;" and they therefore remanded him to prison for four months.<sup>6</sup>

On the same principle, if any attempt is made to tutor or practise upon a witness in the course of his examination, or before it, the person guilty of such practices is liable to summary trial and punishment. Thus, a pannel was sent to jail for privately whispering to a witness in the course of a trial;<sup>7</sup> and another witness, for destroying part of a sederunt-book called for in a precognition, was, on a complaint at the instance of the Lord Advocate, sent to prison for three months.<sup>8</sup> This was done, indeed, during the previous stage of precognition, but the same is competent if attempted in the course of, or immediately before, a trial. An agent for a prisoner was, on a petition and complaint presented by the Lord Advocate, sentenced to a month's imprisonment, and declared incapable of practising before any Criminal Court in Scotland, he having tried to persuade a witness to leave Glasgow, where the trial was to be held; and not succeeding in that, had tried to get her to disqualify herself

<sup>1</sup> James Alexander, Glasgow, April 1823; unreported.—<sup>2</sup> Charles M'Laren and Others, Jan. 11, 1823; unreported.—<sup>3</sup> Murdoch Martin, April 1831; Justice-Clerk's MS.—<sup>4</sup> David M'Ewan and Daniel M'Leod, Glasgow, Sept. 23, 1829; Shaw, No. 183.—<sup>5</sup> Andrew Tod, Jedburgh, April 1825.—<sup>6</sup> Case of Alexander Ker, on trial of James Roxburgh, Ayr, Spring 1822, and High Court, June 3, 1822; Hume, ii. 140.—<sup>7</sup> Wm. Smith, July 6, 1714; Hume, *ibid.*—<sup>8</sup> James Dun, March 11, 1793; Hume, *ibid.*

by swearing she had malice against the prisoner, and to answer yes or no, according to signs he should make to her in Court, and threatened her with prosecution and the pillory if she did not act agreeably to his instructions.<sup>1</sup>

14. The evidence of a single witness, how clear and conclusive soever, is not sufficient to warrant a conviction; but the evidence of one witness is sufficient, if it is supported by a train of circumstances, or even a chain of circumstances alone is sufficient, if it is so strong as to leave no reasonable doubt in a rational mind.

It is *triti juris* in this country, that the evidence of a single witness is not sufficient to warrant the conviction of a prisoner.<sup>2</sup> No matter how high the credit of this one witness may be, or how clear and consistent the story he has told, it does not amount to the full measure of legal evidence, if it stands totally unsupported.<sup>3</sup>

But this rule is to be taken in a reasonable sense, and is not to be carried to the extravagant length to which it is often pushed by counsel, desirous of perplexing juries in cases too clear to admit of dispute on any rational grounds.

In the first place, it does not apply to circumstances in a chain of circumstantial proof, each of which may competently be proved by a single witness.<sup>4</sup> This, though at one time doubted,<sup>5</sup> is now fully settled, and matter of daily practice. If, therefore, one witness prove the fact of the theft and housebreaking; another, the pannel being seen near the spot; and a third, the finding the stolen goods, or part of them, in his possession, without doubt the measure of evidence is full, and hundreds of prisoners are convicted every year on such evidence.

In the next place, the want of a second witness may be supplied by a chain of circumstances, each link in which is proved only by a single testimony. Thus, if one man swear that he saw the pannel stab the deceased, and a second depone to his flight from the spot, the appearance of blood on his clothes, the bloody instrument found in his possession, or the like, certainly these

<sup>1</sup> Robert Stirling, Feb. 27, 1821.—<sup>2</sup> Hume, ii. 383; Burnet, 509.—<sup>3</sup> *Ibid.*—

<sup>4</sup> Hume, ii. 384; Burnet, 515; John Troublecock, Dec. 11, 1722.—<sup>5</sup> Burnet, 515, note.



are as good, nay better than a second testimony to the act of stabbing.<sup>1</sup>

In the third place, where a number of instances of the same crime are charged under one general denomination, and connected together, and forming part of one and the same criminal conduct, as subornation, adultery, &c., each separate act may be competently established by the evidence of a single witness, as each act is in truth nothing but the link by which the guilt upon the whole is established.<sup>2</sup> But this does not apply to separate crimes, which have no connexion with each other, but are merely repeated acts of the same offence, as acts of theft, robbery, uttering forged notes, or the like, as to which the same evidence is justly required in each charge, as if they stood in so many separate indictments.<sup>3</sup>

In the fourth place, convictions may legally take place on circumstantial evidence alone, provided only it be so clear and conclusive as to leave no reasonable doubt in an intelligent mind. Of this the whole course of our records affords ample proof, and convictions on such grounds are a matter of everyday occurrence, of which many examples have been given in the first volume of this work.<sup>4</sup>

Lastly, if one witness to the fact of the criminal delinquency of the pannel exist, the want of another may be supplied by his confession in his declaration before a magistrate.<sup>5</sup> But the declaration is not sufficient, how clearly soever it may admit the guilt, if there is no other evidence excepting as to the *corpus delicti*; and, accordingly, in a case of theft, where the *corpus* was clearly proved, and the prisoner had confessed, but there was no other evidence in the case, the Court directed an acquittal.<sup>6</sup>

It is stated by Burnet, that two witnesses are requisite to the *fundamental* facts, as the *corpus delicti*, although one is sufficient to each circumstance in the collateral.<sup>7</sup> There is no authority in our modern practice for this position. On the contrary, numerous cases, especially of robbery, have occurred where the pannels have been convicted, with the approbation of the Bench, on no other evidence, as to the *corpus delicti*, than a single witness, supported by circumstances tending to bring home the guilt to the prisoner. Without doubt, however, in such a case the single

<sup>1</sup> Hume, ii. 384.—<sup>2</sup> Ibid. ii. 385.—<sup>3</sup> Ibid.—<sup>4</sup> Hume, ii. 385, 386; see cases in vol. i. 73 et seq., 241 et seq., 312 et seq.—<sup>5</sup> Burnet, 519.—<sup>6</sup> Dunlop, Hunter, and Armour, Dec. 8, 1823; unreported.—<sup>7</sup> Burnet, 516.

witness to so fundamental a fact as the *corpus delicti*, must be a person of good credit, and who has given consistent testimony; for unless this is the case, the prosecution resting on his single testimony, as to the fact of the crime having been committed, is deficient in an essential particular. And the want of a second witness to the *corpus* may be supplied by the same *indicia* which go to fix the crime on the prisoner; as, for example, if the man robbed depone to the fact of his watch having been seized and carried off; and a second, to the same watch being found in the prisoner's custody. But the confirmation must be *extrinsic* to the witness, and therefore if the only confirmatory evidence is that of persons to whom the person injured has told the same story as he has now done on oath, that still leaves the case resting on the oath of a single witness, and, if there is nothing else in the case, is insufficient to warrant a conviction.<sup>1</sup>

By the law of England, it is held that the testimony of a single witness is a sufficient legal ground for conviction of any crime or misdemeanour,<sup>2</sup> even when this single witness has been the accomplice in guilt of the accused person.<sup>3</sup> In strictness, therefore, a conviction may proceed on the evidence of an accomplice totally unsupported.<sup>4</sup> But as the dangerous consequences of this rule are obvious, it is in the discretion of the Court in such a case to direct the acquittal of the prisoner, unless some part of his evidence is supported by unsuspecting testimony.<sup>5</sup> But it is not necessary that this confirmation should extend to every part of the accomplice's evidence, if the jury think he is to be believed upon the points which the confirmation does not reach.<sup>6</sup> Accordingly, where an accomplice was examined on the part of the prosecution, and was confirmed in the testimony he gave as to some of the prisoners, but not as to the rest, Judge Bayley told the jury, that if they were satisfied by the confirmatory evidence which had been given, that the accomplice was a credible witness, they might act upon that testimony with regard to the other prisoners, although in so far as his evidence affected them, it had received no confirmation, and all the prisoners were convicted.<sup>7</sup> To the same effect, in a case mentioned by Lord Ellenborough, as having within these few years been referred to the twelve

<sup>1</sup> Burnet, 519.—<sup>2</sup> Blacket, 357; Hawk. ii. c. 46, § 3.—<sup>3</sup> Rex v. Jones; Campbell, ii. 133.—<sup>4</sup> Rex v. Attwood; Leach, i. 464; Rex v. Durham; Leach, i. 478; Russell, ii. 599.—<sup>5</sup> Smith and Davis's case; Leach, i. 479.—<sup>6</sup> Phil. i. 39; Stark, p. iv. 29.—

<sup>7</sup> Rex v. Dawber; Stark, iii. c. 34, note A; Russell, ii. 600.

Judges, where four men were convicted of burglary, on the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of any of the prisoners, though he was supported on other points; the Judges were unanimously of opinion that the conviction of all four was legal, and upon that opinion they suffered the sentence of the law.<sup>1</sup> And in a late case, the whole Judges were of opinion, that an accomplice did not require confirmation as to the person he charged, if he was confirmed in the other particulars of his story.<sup>2</sup>

To this general rule, however, the English admit two exceptions. In high treason no one can be convicted except on the oaths of two witnesses, either both to the same overt act, or one to the one and one to the other of the same kind of treason, unless the party shall plead guilty in open Court.<sup>3</sup> In all cases, however, where the overt act charged is the assassination of the king, or any direct attempt against his life, or against his person, the prisoner shall be tried upon the like order of trial, and upon the like evidence, as if he stood charged with murder.<sup>4</sup> And in perjury, the evidence of one witness is not sufficient to convict the pannel, for that would be only one oath against another.<sup>5</sup>

At first sight there appears an extraordinary difference between the English rules on the subject of proof, by the unaided testimony of accomplices, and our practice; Mr Hume having laid it down, that the oath of a single accomplice, even *when supported* by that of the person robbed, who swears to the pannel as the man who did the deed, is not sufficient evidence; upon the ground that the second witness must be an unexceptionable witness, and not one liable to any suspicion.<sup>6</sup> In later times, however, the conviction of persons for robbery, upon such evidence as the learned author here deems insufficient, and even slighter, has been very frequent.<sup>7</sup> And on this, as on other points, where the principles of the two laws seem fundamentally at variance, the difference in practice is really not so considerable as might be expected; the English in general requiring the single witness to be so supported as almost amounts to the testimony of a second person; and the Scotch deeming such confirmatory circumstances sufficient, as amount to little more than is held adequate on the south of the Tweed.

<sup>1</sup> Rex v. Jones; Camp, ii. 133.—<sup>2</sup> Brikett's case; Russ. and Ry. 252.—<sup>3</sup> 25 Edward III. c. 25, § 12; Russell, ii. 637.—<sup>4</sup> 39 and 40 Geo. III. c. 93.—<sup>5</sup> Russell, ii. 544, 545.—<sup>6</sup> Hume, ii. 383.—<sup>7</sup> Vide vol. i. 249, et seq.



## CHAPTER XIII.

## OF DECLARATIONS AND CONFESSIONS.

## SECT. I.—OF DECLARATIONS.

IT is a settled principle of the law of Scotland, that no weight is to be attached by the jury, excepting to evidence delivered or proved in their presence.<sup>1</sup> But it does by no means follow from this that the judicial declaration of the prisoner, voluntarily given before a magistrate, regularly authenticated, and proved to have been emitted in his sound and sober senses, is not a material *article of evidence* against him. On the contrary, the principle of law and the rule of common sense is, that every deed done, and every word spoken by the prisoner subsequent to the date of the crime charged against him, is the fit subject for the consideration of the jury, and that if duly proved, it must enter into the composition of their verdict.<sup>2</sup> Of course, among the circumstances which may be of weight, either for him or against him, none can be more material than what he deliberately said himself when brought before the magistrate for examination. If the story then told is probable in itself, and agrees with what the witnesses have proved, in those particulars in which it is susceptible of confirmation, it is as material a circumstance in his favour, as, if it is absurd or incredible, and contradicted by their testimony, it is a circumstance of weight against him. And this is the true view of the prisoner's declaration. It contains his account of the matter laid to his charge, just as the libel contains the story in regard to it told by the prosecutor. The libel may be pleaded against the prosecutor, but it cannot be evidence in his favour; and in like manner, the declaration may be evidence against the prisoner, but cannot be founded on by him as containing proof in his favour. But, though a prisoner is no more entitled to refer to a declaration as evidence of the truth of what it contains, than the prosecutor is to found on the libel for the same purpose, yet he is fully entitled to found upon the declaration as a material circumstance in his favour, if it contains a full, fair, and candid statement, such

<sup>1</sup> Hume, ii. 324; Burnet, 488.—<sup>2</sup> Ibid. ii. 325.

as bears probability on its face, and if it is confirmed by what the witnesses, either on one side or the other, prove at the trial. To this extent a declaration may, and often is, of material service to a prisoner; for during the collision of evidence and argument in a jury trial, it is rare that truth is not in the end extricated; and when that takes place, the balance almost always inclines to the party which has first and most openly spoken it. A declaration, therefore, is in general as great a benefit to an innocent, as it is a disadvantage to a guilty person; and in both cases it conduces to the great ends of criminal law, the conviction of the guilty and the acquittal of the innocent.

Nor is it any objection against the admission of declarations that it is enacted by the act 1587, c. 91, "That the hail accusations, reasoning writs, witnesses, and uther probation and instruction quhatsamever of the crime" be taken in presence of the assize. For the meaning of that is not that the jury are not to consider occurrences or declarations which took place at an earlier period, *if duly proved before them*, an interpretation which would exclude all parole testimony in regard to past events; but only that they are not to consider such past events unless so established. If this is done in regard to declarations by the oaths of the magistrate and witnesses proving that they were taken from the pannel in his sound and sober senses, they are as much proved before the jury, as any particulars in regard to his conduct subsequent to the transaction libelled, which are deemed most material against him.

There is truly no ground whatever, therefore, for the reproaches sometimes brought against the Scotch law for its admission of such declarations as articles of evidence against a prisoner. These complaints originate in general in a sense of the strong presumption which these instruments frequently rear up against a guilty prisoner, and the great difficulty experienced by his counsel in getting over them, forgetting that they aid the innocent as much as they weigh down the guilty. Least of all can such reproaches be founded on any thing connected with the English law; for their practice admits much weaker evidence, viz. conversations with pannels, or acknowledgments of guilt made by them to witnesses, as sufficient *per se* to warrant a conviction. Their principle is, "That a free and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible

in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true."<sup>1</sup> And the highest authorities have now established, that a confession, if duly made and satisfactorily proved, is sufficient *alone* to warrant a conviction, without any corroborating evidence whatever.<sup>2</sup>

1. The declaration of a pannel, duly taken before a magistrate, is admissible evidence against a prisoner, if it is proved after the manner required by law.

Though often pleaded in former times, the objection that a pannel's declaration is not admissible evidence against him by the law of Scotland, has now for a long time been abandoned. The objection which was pleaded to the jury was expressly overruled by the late Lord Meadowbank, in the case of John Watson, in 1806.<sup>3</sup> It had been repelled by the High Court in several older cases.<sup>4</sup> Nay, what is much stronger in a trial for sinking ships, to defraud insurers, declarations were allowed to be given in evidence, though emitted in a *civil* action at the instance of the pannels for recovery of the policy of insurance.<sup>5</sup> Nor does there seem to be any good objection to such a production; for although such a declaration is not a judicial one properly so called, that is, it was not emitted by the prisoner before a magistrate, with a view to a criminal trial, yet it is evidence of what he said on a certain solemn occasion in relation to the matter libelled; and if it would be competent to prove such statement, if made before witnesses, as it unquestionably would, both by the Scotch and English law, by their oaths, much more must it be competent to establish it by the far superior evidence of the written declaration taken from his mouth which he subscribed on the occasion.<sup>6</sup>

2. The declaration, before it can be admitted against the pannel, must be proved by two witnesses on oath, who sign the instrument, or admitted by the pannel, by a minute on record, to have been freely and voluntarily emitted in his sound and sober senses.

<sup>1</sup> Gilbert, 123; Lamb's case; Leach, ii. 554; Russell, ii. 644.—<sup>2</sup> Wheeling's case; Leach, i. 311; Elridge's case; Russ. and Ry. 440; Falkner's case, *ibid.* 481; Russell, ii. 644.—<sup>3</sup> John Watson, April 23, 1806; Hume, ii. 325.—<sup>4</sup> Margaret Stewart, March 1743; James M'Pherson, Dec. 1743; John Irving, Aug. 6, 1744; Hume, ii. 326.—<sup>5</sup> M'Iver and M'Callum, July 1784.—<sup>6</sup> Hume, ii. 327.



Before a declaration is read to the jury, it must be proved by the oaths of two persons who were present when it was taken down, or admitted by a signed minute of the pannel's counsel, entered on record, that it was freely and voluntarily emitted when the pannel was in his sound and sober senses.<sup>1</sup> This is usually done, except in capital cases, by a signed admission to that effect, put by the pannel's counsel on record; but if this is not agreed to, it is absolutely necessary that the declaration should be regularly proved before it is received, and that equally whether it is tendered in the most trivial trial or the most important.<sup>2</sup> It has been found, accordingly, that a declaration is not duly proved, and cannot be received in evidence, till it is established by the evidence of *two* concurring witnesses.<sup>3</sup>

Farther, these witnesses, to establish the declaration, must be able to swear that it was emitted by the prisoner, in their presence, when he was in his sound mind and sober senses, and when neither enticed by promises on the one hand, nor intimidated by threats or insinuations of danger on the other.<sup>4</sup> To abbreviate the proceedings, the witnesses are in general merely asked by the prosecutor "whether the declaration was freely and voluntarily emitted when the pannel was in his sound and sober senses," without entering into any farther detail as to the state of his mind, or the absence of threats or intimidation in regard to him. But if it be seriously alleged that the reverse of this was the case in any respect, as that the pannel at the time was in liquor, or insane, or intimidated by threats, or seduced by promises, certainly these particulars must be fully enquired into, and any ambiguity in regard to them cleared up before the instruments are made use of against the prisoner. This is to be done by the oaths of the magistrate who took the declaration, the clerk who wrote it, or the witnesses who signed it, and who themselves heard and saw it emitted, written, read over, adhered to, and signed by the pannel, or by the magistrate in his presence, and themselves authenticated it by their subscriptions, so as to be able at any time to speak with confidence to the document exhibited to them being that which contains the substance of the prisoner's declaration.<sup>5</sup> It is not, however, in all cases absolutely necessary, especially if the declaration be very short, that the instrumentary witnesses

<sup>1</sup> Burnet, 491; Hume, ii. 328.—<sup>2</sup> Burnet, 491; Hume, ii. 328.—<sup>3</sup> Patrick Niel, Feb. 24, 1777; Hume, *ibid.*—<sup>4</sup> Burnet, 491; Hume, ii. 328.—<sup>5</sup> Hume, ii. 329; Burnet, 490.

should both *sign* the writing ; and accordingly, it has been held, that where the declaration was a very short one, and the witness who was examined was positive as to its contents, that it was sufficiently proved by the oaths of two persons, though one of them had not signed it as an instrumentary witness.<sup>1</sup> But this authority is not to be relied on as a precedent in the general case, and where the declaration is either longer, or has been followed or preceded by others, so as to render it more doubtful whether the instrument put into the witness's hands is the precise one which contains the declaration which they heard emitted, and to which they are called to speak ; and therefore it should be an invariable rule to make the witnesses sign the declaration at its close. But it is quite sufficient if they sign the last page ; and the objection that that page only was signed has been repelled.<sup>2</sup>

It is not unusual to have the first declaration, where it has been taken in a remote situation, or is subject to some irregularity, referred to in a second one taken in the legal manner, and docketed as relative thereto, and there admitted to have been freely and voluntarily emitted. This was objected to in one instance, on the ground that this first declaration could only be proved in the usual manner, by the oaths of the magistrate and clerk, or instrumentary witnesses. But this objection was repelled by the following interlocutor : “ Find that the first declaration of this pannel, if taken before a competent magistrate, is sufficiently proved by having been specially admitted and docketed as relative in the second declaration, as being freely and voluntarily emitted by the pannel.”<sup>3</sup> But if the first declaration has been taken before a person who is *not* a magistrate, it cannot be propped up by being merely referred in the second regular one ; but the prosecutor in such a case is entitled to found upon the second declaration only, it being open to the pannel to call for the first, if he shall be so advised.<sup>4</sup>

If there appears to be any doubt as to the prisoner having been in his sound and sober senses when he emitted the declaration, the Court will require satisfactory evidence on that head before they are admitted against him. Where the docket, which is usually subjected to a declaration, stating that this was the case,

<sup>1</sup> Ann Forbes or Swan, April 13, 1827, Perth ; per Lords Justice-Clerk and Mackenzie ; Syme, App. 44.—<sup>2</sup> Ewen Matheson, Inverness, May 1824 ; unreported.—<sup>3</sup> George Wylie, Sept. 1817, Perth ; Hume, ii. 329.—<sup>4</sup> *Ibid.*

did not bear that the pannel was in his sound senses at the time of the examination, and the magistrate before whom it was taken stated on oath that he had purposely omitted to state that fact, because he had doubts whether it was the case or not, from his appearance and manner when the declaration was taken, the Court justly refused to allow it to be read.<sup>1</sup> But it is only where the evidence throws a doubt on the pannel's being in his sound senses at the time, and not where he was merely nervous, agitated, or hysterical, when under examination, that this effect takes place; for these are not unfrequently the accompaniments of guilt, and should not, therefore, be construed into the means of screening it from punishment. In a late case, which received the most deliberate consideration, it was objected to the first declaration, that at taking it, the pannel, owing to a severe fit of hysteria, was not in a fit state to be examined. It appeared in evidence, that on the night preceding the day of her examination, she had been in a very agitated state, and was alternately incoherent and insensible; and in the same state on the night following, and that about two months before she had been in a state of hysteria, bordering on epilepsy, for three or four days. On the other hand, it was proved by the Sheriff-substitute, who took the examination, that she was calm and collected till the last question, when she suddenly became agitated, gasped, and fell back; that she as suddenly recovered, and was quite calm when the declaration was read over to her; and that he had seen nothing since to make him suppose she was not then in her sound and sober senses. Upon this evidence the Court allowed the declaration to be read, reserving its credibility to the jury.<sup>2</sup>

3. The declaration must be not only signed by, but emitted in presence of, a magistrate; and, if this has not been done, it cannot be admitted in evidence against him.

As a declaration is an instrument of so solemn a kind, and which may operate in many cases so seriously against a prisoner, the law has wisely provided that it shall be taken only in presence of a magistrate legally authorized to officiate on such an occasion.<sup>3</sup> If, therefore, it is taken only in presence of a clerk, or other official person, and not of the magistrate, it is illegally

<sup>1</sup> James Connacher, Ayr, April 1823; Hume, ii. 328.—<sup>2</sup> Mary Smith or Elder, Feb. 18, 1827; Syme, No. 34.—<sup>3</sup> Hume, ii. 329.



taken, and cannot be used in evidence against the accused.<sup>1</sup> Nay, it is not sufficient although the pannel was examined by the Procurator-fiscal, and the declaration committed to writing, and acknowledged to have been correctly taken down at a subsequent time by the prisoner, in presence of the magistrate; for what the law requires, is not only an acknowledgment in presence of a magistrate, but the safeguard against improper practices which arises from his presence during the whole time of the examination.<sup>2</sup> In a case, accordingly, where the magistrate examiner swore, that the examination was not *taken* in his presence, but read over to the prisoner, and adhered to by him when he was so, the Court at once interfered, and declared that the declaration could not be used in evidence against him.<sup>3</sup>

But though this rule is well established, and upon just grounds, on the one hand, it is not to be imagined, that it is required that the declaration should, literally speaking, be taken by the magistrate. The questions are usually put by the Procurator-fiscal, or his clerk in his presence, and the answers dictated by the magistrate, or that may be done by the Procurator-fiscal if the magistrate is in the room at the time. It is not indispensable that the magistrate should be present the *whole* time the examination is going forward; a burden which, when criminal business is very heavy, would frequently be insupportable; but he should be present, or within call, the whole time; and, unquestionably, should not be absent when the greater part of the examination is committed to paper.

4. The declaration must be emitted by the prisoner freely and voluntarily; that is, he must answer of his own accord the questions put to him, uninfluenced by promises on the one hand, or threats on the other, proceeding from persons in official situations, or connected with the prosecution.

When it is said that a declaration must be freely and voluntarily emitted, the meaning is, not that nothing is to be taken down but what the prisoner *volunteers* to tell, for in that case seldom

<sup>1</sup> Susannah Hughs, Sept. 18, 1811; John Erskine, Dec. 14, 1818; John Ronald and Others, Nov. 5, 1817; Hume, ii. 328-9.—<sup>2</sup> James Davidson, Aberdeen, April 1827; Hume, ii. 327.—<sup>3</sup> Woodness and Smith, July 19, 1819; unreported.

any thing would be taken down at all ; but only that the answers which he gives to the questions put to him, or what he chooses to add of his own accord, shall be emitted without improper solicitation, promises, or threats directed against the prisoner.<sup>1</sup> It is no objection to a declaration that it is all emitted in answer to interrogatories ; and, if the prisoner chooses to decline answering any or all of these questions, he is perfectly at liberty to do so, and no compulsion whatever can be legally employed to compel him to speak out ; but, on the other hand, the prosecutor is entitled to have the question, and the fact of the prisoner's having declined to answer it, put down in the declaration ; a thing which is constantly done in practice, and by which it frequently happens that the most important presumptions are obtained against a prisoner ; for certainly nothing in general tells more against a prisoner with a jury, or any body of sensible men, than a refusal to answer all the questions which have any bearing on the crime with which he is charged.<sup>2</sup>

Words spoken by persons in authority, or who are officially intrusted with the conducting of examinations, are justly held to be much more weighty than those uttered by mere bystanders, or inferior functionaries ; and, therefore, much less will be sufficient to exclude a declaration, if uttered by the magistrate examiner or Procurator-fiscal, than if emanating from a clerk, jailer, or turnkey. In one of the treason trials at Glasgow, it came to be considered how much short of a threat or promise was sufficient to cast a declaration. It there appeared that the prisoner had emitted his first declaration before Mr Aiton, Sheriff-substitute of Lanarkshire, after he had been told by that magistrate that he was at liberty to say what he thought proper ; but that he thought the more candid he was in his declaration the better it would be for himself, and that, if he was in that situation himself, he would be candid and speak explicitly. The Court, upon this, were of opinion that that declaration could not be received. A second declaration, in the same case, was taken by Mr Pringle, acting as one of the Sheriff-substitutes, and on that occasion the former declaration was read over to him, and he emitted a second. Mr Pringle told the prisoner that he need not answer any questions, but said nothing more ; and, in particular, did not warn

<sup>1</sup> Burnet, 491 ; Hume, ii. 331.—<sup>2</sup> John Wilson and Others, July 4, 1831 ; Justice-Clerk's MS.

him not to criminate himself. In these circumstances, the Court being of opinion that the first declaration was objectionable, that the second virtually contained it, as it contained an adherence to it in presence of the magistrate, and that nothing sufficient was done by the second judge examiner to remove the impression produced by the first, held that neither could be received.<sup>1</sup> In another case, a declaration was emitted in presence of a town-clerk, who proved that he had been in a private room with the prisoner and the agent for the bank on whom the forgery was committed, before the declaration was taken, and that the bank agent held out to the pannel, that if he confessed the crime, and gave information by which the principals in the forgery might be detected, it would contribute to his safety, it would do him good, and he would be allowed to turn king's evidence, that this and several other conversations of the same sort took place at the pannel's desire, and that it seemed probable that these assurances influenced the pannel in making the declarations which followed, it was very properly moved by the prosecutor (Home Drummond, Esq.) that they should be withdrawn.<sup>2</sup>

But while this is established on the one hand, it is not less fixed on the other, that to cast or seriously affect the credit of a declaration, such promises or inducements must be held out by some person qualified by his official situation, or his connexion with, or agency for the prosecutor, to influence the prisoner's mind; and that if they are merely thrust in by some officious person, who had no proper title to interfere, they will not affect the legal instrument. Thus, in a case where a promise was made by Mr Stainton, manager of the Carron Works, whose premises had been broken into, that if the prisoners would confess, "not a hair of their heads should be touched;" and they shortly after desired to be taken before a magistrate, where they made a full confession; it was held that the declaration was admissible, reserving the credit due to it to the jury; upon the ground that however strong the promise may have been, it was made by a party who had no legal title to interfere, and whose rash or unauthorized promises could not fetter or injure the public prosecutor.<sup>3</sup> In like manner, where the declarations were proved in common form by the witnesses who authenticated them, to have been

<sup>1</sup> Wilson's case, Glasgow, July 20, 1820; Treason Trials, ii. 45, 47, 170, 186.—

<sup>2</sup> M'Kay and M'Neil, April 25, 1817, Glasgow; unreported.—<sup>3</sup> Honeyman and Smith, Dec. 26, 1815; record.



freely and voluntarily emitted, the Court refused to allow a proof of the allegation that it had been stated to the prisoners by the sufferers on the occasion, that if they would confess, nothing should be done to them.<sup>1</sup> But, in a case where the promise of safety was alleged to have been made, not by any of the private party injured, but Captain Robison, the Superintendent of Police, accompanied by insinuations as to other good deeds in the event of a confession being made, the Court allowed a proof, but it failed to substantiate the allegation, and the declarations were admitted.<sup>2</sup>

5. It is a proper precaution on the part of the magistrate examiner to warn the prisoner that what he is to say may be used in evidence against him, and that he is not bound to declare more than he thinks fit, but these are not essential solemnities, which must be proved to validate the instrument, or whose want can be pleaded as a fatal defect.

When proceeding to examine, the magistrate will do right to warn the prisoner, that any acknowledgment he shall then make may, and probably will be afterwards used against him at his trial; and he ought also to acquaint him with his privilege, which he may not always know, of declining to answer if he please.<sup>3</sup> Although, however, these are proper and humane regulations which the upright magistrate should never fail to adopt, yet it cannot be affirmed that the practice in this particular has settled into any thing like an established usage; nor are they among the circumstances which the prosecutor must prove, or in practice does prove, before the declarations are admitted.<sup>4</sup> In the case of James Wilson, Glasgow, 20th July, 1820, charged with high treason, and which received the most deliberate consideration, it was proved, in regard to the second declaration libelled, that the prisoner was not told any thing, but that he need not answer any thing unless he pleased; but the omission to give advice not to criminate himself, or that his declaration might be used in evidence against him, was not considered as any objection to that declaration taken *per se*, although it was set aside in consequence

<sup>1</sup> Samuel Ferguson, April 19, 1819, Dumfries; record.—<sup>2</sup> M'Laren, Grierson, and M'Ewan, Jan. 11, 1823; record.—<sup>3</sup> Hume, ii. 330.—<sup>4</sup> *Ibid.*

of improper advice in this particular, from the Sheriff-substitute who took the first declaration.<sup>1</sup>

6. A declaration is not of the nature of an instrument requiring a testing clause, or the writer's name or designation, or the solemnities of the act 1681; but it should contain the names and designations of the magistrate examiner, and the witnesses who are present and sign the indictment; and it should be signed by the prisoner, or, in his presence, by the magistrate.

A declaration is not of the nature of a patrimonial instrument, requiring, either by usage or statute, the solemnities of the act 1681. It does not therefore require a testing clause, or the names or designations of the writer or witnesses; nor is it subject to the punctilious questions, in those particulars, which arise from our several statutes in regard to probative writings.<sup>2</sup> It has been found, accordingly, that it is no valid objection to a declaration, that it does not bear by whom it was written.<sup>3</sup> Custom, however, has introduced several solemnities for the authentication of the writing, which are so established by usage that they cannot be dispensed with. In particular, it must bear the name and designation of the magistrate examiner, and the signature of the witnesses in whose presence it is taken; and, therefore, in a case where the first declaration tendered was that taken as a witness, not as an accused person, and was authenticated by a docket, in which it was not stated to be before witnesses, and only signed by the Sheriff-substitute and the initials of the Procurator-fiscal, it was held unanimously that it could not be received; it being observed, *per totam curiam*, that though the act 1681 does not apply to prisoners' declarations, yet the signature of the witnesses and magistrate examiner is indispensable.<sup>4</sup> It is usual to give the designations of the magistrate examiner, clerk who writes the instrument, and witnesses who attest it; but though these are proper precautions which should never be neglected by the careful magistrate, it cannot be affirmed that any thing except the signature of the witnesses and magistrate is indispensable.<sup>5</sup>

<sup>1</sup> Hume, ii. 332; Treason Trials, 170, 186.—<sup>2</sup> Hume, ii. 330.—<sup>3</sup> Wm. Watt, Perth, Spring 1801; Burnet, 492.—<sup>4</sup> Renton and Fullerton, July 13, 1826; unreported.—

<sup>5</sup> Burnet, 490.

The declaration should be signed by the prisoner, if he can write, and is willing to do so; that is, every page as well as the last should be so signed. The magistrate also who takes the declaration should sign every page; but in practice the witnesses sign only at its close.<sup>1</sup> If the prisoner either cannot sign it, or declines to do so, which very often occurs, it should be signed by the magistrate in his presence, and the fact of his having either declared himself unable to write, or declined to subscribe the declaration, set forth at the close of the instrument.<sup>2</sup> In describing the declaration in the indictment, care should be taken to describe it correctly by the signature of the pannel, or the magistrate in his presence, setting forth at the same time the case of its not being signed in this manner. "And you the said A. B. having been apprehended and brought before C. D., Sheriff-substitute of Edinburgh, there did in his presence, at Edinburgh on the 3d day of April, 1832, emit and subscribe a declaration," or "emit a declaration which was subscribed by the said Sheriff-substitute in your presence, you having declared you could not write," or "you having declined to subscribe the same." If an error in this particular occur in the description of the declaration in the indictment, it will probably prove fatal to the instrument, by destroying *ex facie* of the description, and the instrument produced, the identity of the one and the other.

A declaration taken by a person professing to act as a Justice of Peace, who is not in the commission, is illegal, and cannot be used in evidence;<sup>3</sup> but it may competently be taken by a bailie of barony, though his name is not in the commission of the peace;<sup>4</sup> and if a declaration has been taken by a magistrate, who has two characters in him to entitle him to take that step, either as a provost or a Justice of Peace, it is good, though it is signed by him as Justice of Peace, and he has not qualified himself to act in that character; for *utile per inutile haud vitatur*, and if a man has a legal character in him he does not lose it because he signs in one which he has not.<sup>5</sup>

If the indictment describe the declaration as taken in presence of one magistrate, or to be of one date, and it turns out, upon production, to be taken before another magistrate, or of a different date, it must be rejected, because the instrument described

<sup>1</sup> Hume, ii. 330; Burnet, 490.—<sup>2</sup> Burnet, *ibid.*—<sup>3</sup> George Wylie, Sept. 18, 1817, Perth; Justice-Clerk's MS.—<sup>4</sup> Thomas Hay, Feb. 2, 1824; Justice-Clerk's MS.—<sup>5</sup> Gil-  
lon, April 11, 1831; unreported.



as lodged in the clerk's hands, and to be used in evidence against the prisoner, is not the one which is sought to be produced. But though it is certainly proper in all cases to give the date in the indictment, yet it is not held such a solemnity as cannot be established by equipollents; and, accordingly, in a case where the declarations were described as signed by the pannel, of the days of the month they respectively bear, and they were described also as lodged in the clerk's hands, but the year was omitted, it was held unanimously that they might be used in evidence.<sup>1</sup> There is no doubt, however, that the date is indispensable in the declaration itself; and if the date there given be incorrectly copied into the libel, and not merely part *omitted*, leaving enough to fix its identity *aliunde*, it must be rejected, because the instrument described is not the one tendered in evidence.

7. The party accused should never be examined upon oath; and if he has been examined upon oath, no subsequent judicial declaration can be taken from him; and it is incompetent, by merely referring to a declaration taken from a witness in precognition, to convert it into one which may be used against him as pannel.

It is a sacred rule of law, *nemo tenetur jurare in suam turpitudinem*; and, therefore, the tendering of an oath to an accused person, and thereby compelling him either to perjure himself, or admit his own guilt, is the worst species of oppression. It was, therefore, justly declared, at the Revolution, in the Claim of Rights, "That the forcing the lieges to depone against themselves in capital crimes is contrary to law, however the punishment is restricted." This has been justly extended by subsequent practice to the taking of oaths from accused persons, in all cases whatsoever.<sup>2</sup> Nor is this all; as facts may be elicited by the obligation of an oath which may be of the utmost prejudice to the prisoner, and, if once admitted on oath, they may subsequently be elicited in the course of a judicial examination, it is justly held as a fixed rule, that if it has once happened that a prisoner has been put on oath in the course of a precognition, he cannot be subjected to a judicial declaration; or if such a one has been taken, it cannot be used in evidence against him.<sup>3</sup> Nay,

<sup>1</sup> John Hannah, July 20, 1806.—<sup>2</sup> Burnet, 491.—<sup>3</sup> *Ibid*.

so far is this principle carried in practice, that it is the general practice for the Crown counsel to indict no prisoner from whom a deposition has been taken; a rule which makes it the duty of all magistrates intrusted with the taking of precognitions, to consider well before they put any party on oath, whether there is any chance of his being deemed a fit subject for a trial; for by so doing, he may preclude from prosecution the person who ultimately appears to be its fittest object. But it cannot be said that this equitable usage has grown up into a settled rule, or that a prisoner would be legally entitled to object to an indictment, upon the ground that he had been put on oath in the course of the precognition regarding it, although such a fact would probably be considered by the Crown counsel as a sufficient reason for deserting the diet *simpliciter*.

There is no principle or usage, however, against converting a witness examined in a precognition, who has not been put on oath, into an accused party; and this is very frequently done in practice; nor can it be avoided; for it often happens that suspicion falls upon the wrong party at first, and that it is only in the course of the investigation which follows that it is discovered that there is more reason to inculcate some of those who have been examined as witnesses. In such cases, the rule to be observed is, that the declaration taken from the prisoner as a witness in precognition, cannot be made part of his judicial declaration, how clearly soever it may be admitted by the prisoner to have been freely and voluntarily emitted, and to contain nothing but the truth; for the lines of separation between judicial examinations and declarations, as a witness, are permanent, and cannot, by any admission or consent on the prisoner's part, be crossed.<sup>1</sup> The course to pursue in such a case is to take the whole declaration *de novo*, as if no previous examination as a witness had taken place, without any reference whatever to that previous examination; and if the prisoner desires it, he is entitled to see his declaration emitted as a witness destroyed, before he commences that as an accused party.<sup>2</sup>

8. Before the declaration is signed by the prisoner, or by the Judge on his behalf, it is essential that it be read over to him, and any corrections or alterations he may

<sup>1</sup> Renton and Fullerton, July 13, 1826; Justice-Clerk's MS.; Burnet, 491.—<sup>2</sup> Burnet, 491.

have to suggest taken down ; but it is not indispensable, though it is usual, to mention that this was done in the instrument itself.

Before closing the declaration, it is proper, and indeed necessary, that the whole be distinctly read over to the prisoner, who may not have sufficiently understood or attended to every passage, that he may acknowledge it as his account of the matter, correctly taken down and deliberately adhered to.<sup>1</sup> It is not, however, indispensable, nor is it the uniform practice to state in the declaration itself that this was done ; nor is this a matter like that of the sound mind of the prisoner on the declaration being freely and voluntarily emitted, which must be established by parole proof.<sup>2</sup> It is, on the contrary, presumed in favour of the magistrate and clerk, that they acted correctly in this particular, leaving it to the prisoner, if he denies that this was done, to prove it by the persons present on the occasion. Undoubtedly, however, it is the usual and correct course in all such cases, to mention that the instrument was read over to the prisoner before signing ; and where this is omitted to be mentioned in the indictment, the legitimate consequence appears to be, that the prosecutor must establish by parole proof that it was done before he can be allowed to lay the document before the jury.

9. Every declaration taken from a witness who does not understand English, must be explained to him, both when taken down, and when read over to him by a sworn interpreter ; but it is not indispensable that this should be set forth on the face of the declaration, but sufficient if it is proved to have taken place by the witnesses present.

It frequently happens, more especially in those districts where, to the misfortune of the inhabitants, the Gaelic language is still spoken, that the prisoner does not understand English. In such a case, of course the examination must be conducted by means of a sworn interpreter, and the declaration must be read over to him by the same means. Nay, as it is indispensable that the witnesses should both know what is going forward, and not be mere spec-

<sup>1</sup> Hume, ii. 330. — <sup>2</sup> Ibid.



tators of an examination which they do not understand, it is necessary that both the witnesses should understand that language as well as the interpreter; and it has been held a good objection, that one of them only understood it.<sup>1</sup> But it is not necessary that any of these facts should be stated in the declaration or docket; and they are presumed to have been done, but if seriously denied, an investigation will take place, and the case be determined according as it shall appear in evidence.<sup>2</sup> In a late case, it was objected that the sworn interpreter employed on the occasion was the clerk to the Procurator-fiscal, and had been active in getting up the precognition, and that the Sheriff-substitute who took the examination was not present during part of it. A proof was allowed, and it appeared that the examination took place before the Sheriff-substitute, the Fiscal, and his clerk, who acted as interpreter; that the Sheriff fell asleep at intervals during the examination, and may have slept half an hour altogether; but that he was awake when it was read over and explained to the pannels, and that the interpreter had been occasionally employed on commission to take evidence, but had never acted as a private agent. The Court repelled the objections.<sup>3</sup>

10. If a second or third declaration requires to be taken from a prisoner, it is necessary that the first, and all previous ones, should be read over to him before doing so; but it is not necessary, though it is usual, to mention this on the face of the declaration; and this will be presumed in favour of the magistrate, unless disproved by the prisoner; though if this is done it will be rejected.

It generally happens that, after the first declaration has been taken from the prisoner, it becomes necessary, from additional facts having come to light, to take a second, and sometimes a third and fourth declaration. In such a case it is indispensable that the first, or all the preceding declarations, if there are more than one, should be read over to the prisoner, in order that he may enter upon his new examination with his memory fully refreshed as to the story he has previously told, and have an opportunity of adding any thing, or making any correction which he

<sup>1</sup> Robertson, Perth, May 1770; Cameron, Perth, Autumn 1805; Burnet, ii. 492.—

<sup>2</sup> M'Kay and Cameron, Feb. 21, 1831; Justice-Clerk's MS.—<sup>3</sup> M'Kay and Cameron, Feb. 21, 1831; Justice-Clerk's MS.

may desire.<sup>1</sup> So strictly is this rule followed, that in a case, where four declarations had been taken from the pannel, and he proved that at emitting the fourth, the three previous ones had not been read over to him, though he desired it, the fourth was rejected, but the three previous ones were admitted, leaving it to the pannel to call for the fourth declaration if he should be so advised.<sup>2</sup> In that case the pannel had desired to have his previous declarations read over to him, and been refused; but it was held by Lord Pitmilley, in a subsequent case at Glasgow, that this made no difference in the case; that the law required that all the prisoner's declarations should be read over to him before he emitted another one, and that whether this was omitted from the negligence of the magistrate, or his refusal to accede to the prisoner's desire in this particular, it was immaterial, and the declaration, tainted by this omission, could not be received.<sup>3</sup> The same principle was laid down by Lord Justice-Clerk Boyle and Lord Pitmilley, in a still later case at Aberdeen; although, as it was admitted by the prisoner's counsel that the last declaration did not relate to the same offence as the preceding ones, it was allowed to be read as well as the preceding ones; the Court holding that if the subject-matter of them all had been the same, it would have been inadmissible.<sup>4</sup> In a late case where it appeared on evidence that the first declaration had not been read over when the second was emitted, but both were read over and adhered to when the third was taken, it was held by Lord Meadowbank that the second could not be used in evidence.<sup>5</sup>

But it is not indispensable that the second or subsequent declaration should bear *in gremio*, that the first or preceding ones were read over before it was emitted; and therefore if the prosecutor can prove that this was done, the declaration will be received, though it is not set forth on its face.<sup>6</sup> The principle of law here applies that *omnia presumuntur rite et solemniter acta*; a presumption which it lies on the pannel to overcome, by alleging and proving that the omission to read over the declaration took place. But if the declaration does not bear *in gremio*, that the first declaration was read over at taking it, this must be proved when objected to by the witnesses who were present on the occa-

<sup>1</sup> Hume, ii. 330.—<sup>2</sup> Murray Stewart, Sept. 6, 1817; Justice-Clerk's MS.—<sup>3</sup> M'Kechnie, Glasgow, Sept. 1817; Hume, ii. 331.—<sup>4</sup> Barnet, Sept. 24, 1818, Aberdeen; Justice-Clerk's MS.—<sup>5</sup> M'Kechnie and Campbell, Perth, Sept. 1828; unreported.—<sup>6</sup> Alex. Duncan and Samuel Hippiisley, Aberdeen, Oct. 3, 1821; Hume, ii. 331; Shaw, No. 36.

sion; and if they cannot establish the fact, it will be cast.<sup>1</sup> In a case where the first declaration had been transmitted from a distant part of Scotland to Edinburgh, for the consideration of the crown counsel, and the pannel, at his own request, had emitted a second declaration, the objection was repelled, that a copy only was read over to him before emitting the second instead of the original instrument.<sup>2</sup>

11. If the pannel has emitted more than one declaration, it is not competent for the prosecutor to produce any one of these documents without the other ones, if the pannel desires that they should be brought forward.

The successive declarations of the pannel are looked upon as a whole, and as containing *tota materia perspecta* the story told by the pannel. It is not, therefore, competent for the prosecutor to select any of these declarations which he pleases, and lay aside the remainder; but if he founds on any one declaration he must lay the whole, if the prisoner desires it, before the jury. This principle, though overruled in an older case,<sup>3</sup> was fully established in the case of Whyte in 1814, and has ever since, from its manifest equity, been held as fully established in our practice.<sup>4</sup> Nor does it make any difference although the first declaration contains a mere refusal to answer, from intoxication or any other cause, if a paper in the form of a declaration, and narrating that fact, was made out; and therefore, if such an instrument exists, and is not libelled on, the effect will be to render the subsequent declarations inadmissible.<sup>5</sup> And if the warrant of commitment be produced, which bears, "having considered the declarations of witnesses and judicial examination of the prisoner," and this is anterior in date to the declaration libelled on, this is good evidence of the existence of a prior declaration not libelled on, and therefore renders the subsequent one inadmissible.<sup>6</sup> This mistake is very likely to occur, especially in cases where the precognition is begun by country justices, because they frequently take declarations from the prisoners in the same form as the examination of

<sup>1</sup> Per Lord Gillies; Mary Reid, Dumfries, Sept. 19, 1817, unreported; Anne Tayne, April 15, 1819, Inverness; per Lord Reston.—<sup>2</sup> David Earl, Ayr, April 14, 1823.—<sup>3</sup> Patrick Anderson, July 25, 1799; Hume, ii. 326.—<sup>4</sup> Thos. Whyte, July 13, 1814; Hume, ii. 326.—<sup>5</sup> Whyte's case, ut supra.—<sup>6</sup> Per Lord Justice-Clerk; J. Carruthers, Sept. 24, 1831, Dumfries.



the witnesses, and it is overlooked from that circumstance ; but as an omission to libel on it may lead to such serious consequences, care should always be taken to ascertain whether such documents exist, and if they do, to libel on them as a production, however objectionable or irregular in point of form they may be ; because by doing so, those which are regular will be received in evidence, although the pannel should succeed upon a formal objection in setting aside those which are irregular.<sup>1</sup>

But as this principle sometimes must lead to a stretch of justice in favour of the pannel, it is received under due limitations. If, therefore, the same number of declarations which the pannel has emitted are libelled upon as productions against him, but a mistake has occurred in the description of one of them, as by describing it as dated on the 9th July, instead of the 5th July, the true date, the Court will not permit such an error to cast the other declarations, but will allow them to be received, reserving to the pannel to call for production of the declaration erroneously described, if he shall think fit.<sup>2</sup> This case is substantially different from that of a total omission to libel on one of the declarations. The prosecutor has here showed no disinclination to produce all the declarations which the prisoner emitted. He has, on the contrary, libelled on them all ; and he has merely been prevented from using them all as evidence by an objection to the description stated by the prisoner himself. — If, therefore, the pannel is allowed to call for the real declaration erroneously described, in order to tender it in evidence himself, he obtains all the advantage which justice requires. In like manner, if it be objected to a second declaration, that a prior one really taken was not libelled on, but it appears that this prior one, from the description given of it in the second, bears no evidence on its face of having been taken by a magistrate, the objection founded on the omission to libel on it to production of the second will be repelled.<sup>3</sup> So also a second declaration may be produced, where a first was irregularly taken, but has been libelled on, and the pannel, by stating the objection, has set it aside, unless the pannel can prove that some other declaration was emitted, which was not libelled upon at all.<sup>4</sup> But when the first declaration was not dated, and not

<sup>1</sup> Geo. Standfield, Jan. 7, 1816 ; Hume, ii. 327.—<sup>2</sup> Standfield's case, Jan. 7, 1816.

—<sup>3</sup> Thos. Johnston, Sept. 24, 1831 ; Justice-Clerk's MS.—<sup>4</sup> Brannan, March 14, 1820 ; Justice-Clerk's MS. ; David Craw, Robt. Cruickshanks, March 14, 1820 ; *ibid.*

referred to in the second, it was excluded, though the second was admitted in the third.<sup>1</sup>

A mere clerical error will not have the effect of setting aside a declaration, where it neither affects its meaning nor identity. Thus, where the pannel's declaration was produced, as signed by the Sheriff for him in respect he could not write; but in setting down that reason, the clerk had omitted the word "write," the objection stated on that ground was repelled.<sup>2</sup>

12. It is competent to take any number of declarations which are deemed necessary from a pannel; but it is seldom that more than three are taken, and that number should not be exceeded if it can be avoided; but it is no objection to any of these declarations that they were taken after the pannel was committed for trial.

As the evidence against accused persons is often procured slowly and with difficulty during the progress of a precognition, it follows that no limit can with propriety be assigned to the taking of declarations; because the most important points on which the prisoner is to be interrogated frequently emerge only at the latest stages of the investigation. But although for this reason it is not unusual to see four or even five declarations taken from a prisoner in relation to the same offence, yet this is a practice which, both as oppressive to the prisoner and perplexing to the jury, should not be adopted, unless in the circumstances of the case it was unavoidable. Although, therefore, the Court have never thrown any doubt upon the *competence* of taking any number of declarations from a prisoner, they have more than once expressed great doubts of the *expediency* of taking an unusual number; and intimated their disapprobation of such a proceeding to the magistrate examiner, where it was not called for by special circumstances. Two declarations are almost universal in every case of importance; three are very frequent; but it is not advisable to go beyond that number, unless circumstances emerge which render it unavoidable.

It is, however, no objection to a second or third declaration that it was taken after the pannel was committed for trial,<sup>3</sup> for it

<sup>1</sup> Erskine, Perth, April 1828.—<sup>2</sup> Knight and Pennicuck, Jan. 9, 1815; Hume, ii. 327.  
—<sup>3</sup> Wm. Paterson, Feb. 13, 1815; Hume, ii. 327.

often happens that new evidence arises, and farther enquiries become requisite after that period; and in that situation the prisoner, foreseeing that he is to be tried, will be more on his guard, and less disposed to speak out, than before full commitment.<sup>1</sup>

13. If a declaration is taken from a prisoner in relation to a different offence from that to which a previous one had referred, it is not necessary to read over the prior declaration to him before emitting the second; nor is it any objection to the production of the second declaration that the first was not libelled on.

The principle of law is, that all the declarations of a prisoner in regard to any offence are to be regarded as one story told at different times, and therefore it is that the previous declarations must be read over before a subsequent one is taken, and they must all or none be libelled on. But the case is different where several declarations are taken relating to different offences or different acts of the same offence; because each of these forms an *unum quid* in itself, and is no more connected with the other charges than with a crime investigated at a different time or place. In such a case, therefore, it is competent to take successive declarations in relation to these different charges, without alluding in the subsequent to the previous ones, and to produce or libel on the one without noticing the others, provided that all those relating to the *same charge* are conducted and libelled on according to the rules already explained. In such a case, it is usual and proper, in libelling upon the declaration, to specify them in this way: "And you, the said A. B., did, at Glasgow, on the 2d day of February, 1832, emit and subscribe a declaration in relation to the charge first above libelled; and you did again, at Glasgow, on the 12th and 15th days of February 1832, emit and subscribe two several declarations in relation to the charge second above libelled."

14. The declaration, if taken before a magistrate and duly proved, and still extant, is the only evidence of what the pannel said on the occasion, neither liable to be contraverted on the part of the prosecutor nor pannel, that what he said was different from what is taken down.

<sup>1</sup> Hume, ii. 327.



The declaration of a prisoner being so solemn an instrument, and taken under so many safeguards for its correctness and fidelity, constitutes the only test of what was truly said on the occasion; and cannot be controverted by parole evidence on either side, as to what he really said being different from what there appears.<sup>1</sup> To admit parole proof to set aside or explain away such a document would be to allow a solemn written instrument to be controlled by the uncertain memory of witnesses, contrary to one of the most fundamental principles in the law of evidence.<sup>2</sup> But this applies only to what is declared before a magistrate, and forms part of the declaration properly so called; what is addressed to the bystanders and not taken down, may be so proved by witnesses.<sup>3</sup> And if the declaration have perished without the prosecutor's fault (for if by his negligence or deed it certainly could not), and the *casus amissionis* proved, it seems to be competent to recur to the testimony of the witnesses present, as the next best existing evidence, though certainly not entitled to the same weight as the original formal instrument, made up under so many safeguards for its accuracy on the occasion.

15. The declaration of one prisoner, however much evidence against himself, is no legal proof or presumption against any other prisoner charged with a share in the same offence.

There is a natural and inevitable inclination in all persons charged with crimes, in combination with others, to endeavour to shift the burden as much as possible off themselves, and fix it on their neighbours; and as this is done under the strong feeling of the desire to avoid punishment, it is justly considered a fundamental principle of law, that the declaration of one pannel, though good against himself, cannot be received as any evidence against the rest.<sup>4</sup> This rule is daily laid down in the Courts, and in a late case, where it was attempted in an advocacy of a judgment pronounced by the Sheriff, in a question regarding some bank-notes which were alleged to have been stolen, to found at the instance of the bank, on the declaration emitted by one of the prisoners against the other, the Court unanimously found the demand incompetent.<sup>5</sup>

<sup>1</sup> Hume, ii. 332; Burnet, 493; Emond's case, Feb. 6, 1830.—<sup>2</sup> Ibid, Hume.—

<sup>3</sup> Emond's case, ut supra.—<sup>4</sup> Burnet, 494.—<sup>5</sup> Stirling Bank v. Butler, Feb. 9, 1818, unreported.

But what shall be said to the converse of the proposition? is it competent to prove in favour of a prisoner, what has been admitted by another one charged with the same offence? The principle of the rule does not apply here, because, in taking the guilt upon himself, and exculpating his associate, a prisoner is acting against his own interest, and therefore, his story is not only not liable to the suspicion which exists in the other case, but the presumption in point of reason lies the other way, that no one would take blame upon himself to the exclusion of others, unless impelled to it by an overbearing sense of truth. It is accordingly laid down by one authority, that "a prisoner, who in his declaration has made a fair acknowledgment of his own guilt, with all its accompaniments, and does not appear to have any particular inducement to exculpate another, may be presumed to speak truly in regard to him; and therefore, his declaration may, even as to this, be received as a circumstance of evidence, he not being then convicted, nor rendered legally infamous, so as to render his declaration wholly inadmissible as a circumstance in favour of his *correus*."<sup>1</sup> In a case also, where two persons were charged with the murder of a revenue officer, and one of them died before the trial, his declaration was, with the prosecutor's consent, read to the jury in behalf of the other, though the circumstances of that declaration were not very favourable to its truth.<sup>2</sup> In a later case, however, where one prisoner had confessed in her declaration, that she alone had committed the theft, and the other, who was also charged with that offence, was proceeding to prove that declaration, with a view to found on it in exculpation to the jury, though it had not been produced but only libelled on by the Crown, the Court interposed and stopped the attempt, unanimously holding that it was incompetent: That the declaration of a prisoner could not be founded on at all, if not produced by the Crown, and that what one prisoner said there, could neither be evidence for or against another prisoner.<sup>3</sup>

In one case it was objected to the judgment of the Judge-Admiral, in a case of sinking ships to defraud insurers, that the declaration emitted by the prisoner in the civil action, which had formerly depended in the same Court relative to the same matter, had been admitted in evidence against him; but the Court sus-

<sup>1</sup> Burnet, 474.—<sup>2</sup> Reid, March 1784; Burnet, 495.—<sup>3</sup> M'Queen and Robson, June 4, 1832; unreported; Gillies, Moncreiff, Meadowbank.

tained the sentence.<sup>1</sup> Indeed it does not appear that there is any thing incompetent in such evidence, for if every thing which the prisoner says, subsequent to the commission of the crime, may be proved against him, as it unquestionably may, on what principle is that to be excluded which he said on a solemn occasion, and which is proved in the most regular and authentic way? In particular, in such a case as that of sinking ships or burning houses to defraud insurers, there seems, in a peculiar manner, to be no impropriety in receiving such evidence, because the raising an action for the insured value, is in fact the ulterior steps taken for obtaining the expected gain from the offence, and as such, any declaration emitted in it, is an important link in the proof of the offence.

16. The declaration of a prisoner, how clear and explicit soever in admitting his guilt, is not *per se* sufficient to warrant his conviction, if not supported by some evidence not merely as to the *corpus delicti*, but his participation in the offence.

It is impossible to dispute, that the declaration of a prisoner admitting his guilt, is one of the strongest circumstances which can possibly be imagined, to warrant the conclusion that a jury should convict him of the offence; and it is accordingly always considered as a most decided circumstance against him. It is not, however, *per se* sufficient to warrant his conviction, and so the Court uniformly lay down the law to the jury, when such a case comes before them. Nor is it sufficient for the prosecutor to say, that the *corpus delicti* is proved by evidence, and that the prisoner in his declaration has confessed the crime; he must go a step farther, and support that confession by some circumstance of evidence connecting him with the criminal proceedings. So it was held by the Court in just such a case, where the three prisoners were charged, two with theft, and one with reset. The *corpus delicti* was distinctly proved by two witnesses against all the panels, and against two the evidence of their accession was deemed quite satisfactory, both by the Court and jury. But, to implicate the third in these proceedings, there was nothing but his

<sup>1</sup> M'Iver and M'Callum, July 1, 1784; Burnet, 495.



own declaration, in which he fully admitted his guilt, and gave a clear and circumstantial detail of its commission. The Court, in these circumstances, held the evidence insufficient to connect him with the proved delinquence, and he was, with their approbation, acquitted by the jury.<sup>1</sup> The case is different with a confession made by pleading guilty before the jury; for the law holds, that what a man admits in the hour of trial, before the jury who are to pronounce him innocent or guilty, is entitled to much more consideration than what is previously declared to, however distinctly, before a magistrate.

## SECT. II.—OF CONFESSIONS PROVED BY PAROLE PROOF.

OUR practice agreeing in this particular with the English law,<sup>2</sup> does not refuse to listen even to confession, purely verbal or occasional, of guilt; though, on account of the disadvantages which attend them in the manner of proof, and sometimes the circumstances which give rise to them, they cannot be considered as entitled to the same high degree of credit as those which are made with more solemnity and deliberation, and proved in a more regular and unexceptionable form.<sup>3</sup> Indeed, a verbal confession is often so interwoven with the most important parts of the evidence against the prisoner, as the finding of stolen goods with the culprit, divulging where they are to be found, or, in a case of murder, his exclamations when brought into the room with the body, with the appearances of the wounds, &c. that it is impossible that the story told by the witnesses can either be rendered intelligible, or its importance appreciated, without such declarations being allowed to be proved. The law regarding verbal confessions proved by parole proof, therefore, forms an important branch of the law of criminal evidence.

1. Verbal confessions, or admissions inconsistent with innocence, may be proved by parole proof, and weight will be attached to them according to the circumstances in which they were emitted.

As the substance of a confession is the same, whether it is

<sup>1</sup> Dunlop, Hunter, and Armour, Dec. 8, 1823; unreported.—<sup>2</sup> Russell, ii. 644.—

<sup>3</sup> Hume, ii. 333.

proved by written or parole proof, it follows that all the principles formerly laid down in regard to the necessity of written declarations being emitted freely and voluntarily, and under the influence of no misapprehension or threats, is equally applicable to confessions verbally proved, with this difference, that as the same safeguards do not exist to exclude improper practices or influence in the one case as the other, even clearer evidence should be required of their being emitted under no undue influence in the latter case than in the former. Confessions are received in evidence, or rejected as inadmissible, according as they are or are not entitled to credit. A free and voluntary one is entitled to the highest credit, and therefore it is admitted as proof; but where a confession is extorted by fear, or elicited by promises, it comes in a much more questionable shape. Still it is *admissible* by our practice, leaving its credit to be observed on to the jury by the counsel for the prisoner, if it was given under circumstances which throw a doubt upon its credibility. In strong cases of undue influence, it should be altogether set aside; where the evidence of that taint is not so strong, it should be received, reserving its credibility to the jury, who, if they do not deem it worthy of credit, will attach no weight to it whatever.

Innumerable cases have occurred where the words spoken by the pannel after the crime charged against him have been proved by parole evidence.<sup>1</sup> Indeed, there is hardly a case of any importance where the evidence on both sides is minutely sifted, in which words spoken, or verbal confessions made by the prisoner subsequent to the time libelled, do not constitute a material part of the charge against him. Many authorities on this head are given by Mr Hume;<sup>2</sup> but it is needless to give authority for a position which is illustrated every day in every Criminal Court in the kingdom.

Confessions of this sort come with most effect when they are connected, as is very frequently the case, with some articles of real evidence, which put it beyond a doubt that the statement given is in the main true. Thus, if a person is apprehended on a charge of theft, and he tells the officer who seized him, that if he will go to such a place, and look under such a bush, he will find the stolen goods; or he is charged with murder or assault, and he says that he threw the bloody weapon into such a pool,

<sup>1</sup> Hume, ii. 333, 334.—<sup>2</sup> Hume, ii. 333, et seq.

in such a river, and it is there searched for and found; without doubt, these are such strong confirmations of the truth of the confession, as renders it of itself sufficient, if the *corpus* is established *aliunde*, to convict the prisoner.

But even when not coming with the support of such confirmatory circumstances, a confession, if adequately proved, will form an article; and, in most cases, a most important article of evidence against the prisoner. The admissions made to the officer who apprehended him, the expressions used at the moment of his seizure, the subsequent disclosures made to the persons who were near him in jail or elsewhere, all form the competent subject of consideration, if established by sufficient and credible evidence. In all the most important trials which have taken place of late years, the words uttered by the accused in this way, subsequent to the acts charged against him, have formed the subject of investigation, and in many have materially strengthened the evidence on which the conviction was rested.

2. If a verbal confession has been made, even on a promise of safety or protection from the injured party, or any one else, except the public prosecutor, or those acting for him, it may, in public prosecutions, be proved against the pannel, reserving its weight and credibility to the jury.

The objection usually urged against verbal confessions is, that they were made under a promise of safety by some one whom the prisoner was entitled to consider as having a title to interfere in the matter. Thus, nothing is more common than for a prisoner to confess, upon an understanding, express or implied, to the party injured, that he is not to be prosecuted; and this pledge he finds himself unable to redeem, when the case comes to be insisted in by the public authorities. In such cases the rule is, that if the public prosecutor, or any person identified with him, as the Procurator-fiscal, Sheriff, Clerk of Court, or the like, have given assurance of protection, the confession cannot be given in evidence; but that if the private party only, or an officious third person, as a constable or sheriff-officer, or the like, has given such assurance, it cannot exclude the proof of such confession, however much and justly it may weaken its weight with the



jury.<sup>1</sup> The principle on which this is founded is the same as that which lies at the bottom of all our rules on the subject, viz. that it is not in the power of a private party, by any promises or indiscretions on his part, to tie up the hands, or restrain the proof of the public prosecutor. By so doing, he may limit and restrain himself, but he cannot affect those to whom the public administration of criminal justice is intrusted. In a case, accordingly, of theft and housebreaking, where the manager of the company whose premises had been broken, had induced the pannels to make a confession to him, on a promise that their lives should be safe, and they, in consequence, pointed out where the money was concealed, and, at their own request, emitted a full confession in their declaration to the Sheriff of the county, it was held, on an objection to the admissibility of proof of these confessions, that it was admissible, "reserving to the jury the credit and effect due to them;" and they were accordingly convicted, but recommended to mercy, and received a transportation pardon.<sup>2</sup> But the case is different where a person in authority has made such a promise; and accordingly, where a confession was said to have been given under a promise of safety from the superintendent of police, and a suit of clothes, the allegation was held relevant and admitted to proof, but it failed on the evidence.<sup>3</sup>

The English law in this respect is founded on a different principle from that of this country; and this difference must be kept in view when any attempt is made to quote authority from the one to the other. In England it is held, that a confession, though extrajudicial, if duly proved, is *of itself*, without the aid of any additional circumstance, sufficient to warrant the conviction of a prisoner.<sup>4</sup> This being the strong and decisive effect which they give to a confession, it is justly held by them that such a confession, to be admissible, must be proved to have been freely and voluntarily made, and that it becomes inadmissible if it is tainted by any promises of pardon or application of threats.<sup>5</sup> But the case is widely different in this country, where no such effect is given to a confession, how deliberately and solemnly soever it may have been made; but it is only admitted as an article of

<sup>1</sup> Honeyman and Smith, Dec. 26, 1815; Hume, ii. 335.—<sup>2</sup> Honeyman and Smith, Dec. 26, 1815; Hume, ii. 335.—<sup>3</sup> M'Laren and Grierson, Jan. 11, 1823.—<sup>4</sup> Wheeling's case; Leach, i. 311; Eldridge's case; Russ. and Ry. 440; Russell, ii. 644.—<sup>5</sup> Warwickshall's case; Leach, i. 263; Russell, ii. 645; Lockhart's case; Leach, i. 356.

evidence, to be taken into consideration with the other proof, in determining on the guilt of the prisoner. When such is the law, it is reasonable that every confession, if proved by credible evidence, should be received against the prisoner; provided always, that it was not elicited by fraudulent or deceitful promises on the part of the prosecutor; and such accordingly is the law of Scotland.<sup>1</sup> It is not to be imagined, however, from this circumstance, that every confession of a prisoner is to have equal weight with the jury, or that they are not entitled, and indeed bound, to take into account all the circumstances under which it was given, and to give little weight to it, or throw it out of view altogether, according as these circumstances appear to incline less or more against the admissions.

Farther, in the English law it is only where the promises were given by the prosecutor, or some one authorized by or connected with him, that they are allowed the effect of casting the confession: where they have been made by others not connected with him, and not legally entitled to tie up his hands, they have no such effect.<sup>2</sup> Thus, in a case tried before Mr Justice Bailey, where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but that on his being examined before the committing magistrate next day, he was frequently cautioned by the magistrate not to say any thing against himself; a confession in these circumstances before the magistrate was held to be clearly admissible.<sup>3</sup> So also, where it appeared that a constable told the prisoner he might do himself some good by confessing, and the prisoner afterwards asked the magistrate if it would benefit him to confess, on which the magistrate said he could not say it would, and he then declined confessing, but afterwards made a full confession to another constable on his way back to prison; this was unanimously held by all the Judges to be admissible.<sup>4</sup> In like manner, where a confession was made to a surgeon by a mother, charged with the murder of her bastard child, and it appeared that the surgeon had held out no inducements to confess, but a woman who was present had advised her to do so, the confession was held admissible by Justices Park and Hullock, they observing at the same time, that if the promise had been made by any person having autho-

<sup>1</sup> Hume, ii. 335, 336.—<sup>2</sup> Russell, ii. 645, 647.—<sup>3</sup> Lingate's case; Phil. i. 105; Russell, ii. 645.—<sup>4</sup> Rosier's case; Phil. i. 105.

urity, as a constable or the prosecutor, the case would have been different.<sup>1</sup> And the result of the whole late cases on the subject is stated to be, "that a confession is not inadmissible, though made after an exhortation, or admonition, or similar advice to speak out, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution, or examination of the prisoner; for a promise made by a person who has no authority of any kind, is not presumed to have such an effect on the mind of the prisoner as to induce him to confess."<sup>2</sup>

In some old cases it has been held in Scotland, that confessions made to the public prosecutor, as the Advocate-Depute or the Solicitor-General, in jail, were admissible.<sup>3</sup> It is hardly necessary to observe, that these cases are to be regarded as beacons to be avoided, not precedents to be followed. Baron Hume, while he justly censures these judgments, inclines to the opinion that though the confessions so elicited should have been rejected, yet facts thence following, as the finding of money in places pointed out by the prisoner, might legally have been given in evidence.<sup>4</sup> It appears, however, that it is the juster and the safer course to reject, not only the testimony which is tainted by such proceedings on the part of the prosecutor, but also such facts as have occurred or come to light in consequence of such communications between the prisoner and prosecutor. In England, however, it has been laid down as clear law, in a case which received great consideration, that although a confession obtained from a prisoner, by means of promises or hopes of impunity held out to him, could not be used in evidence against him at his trial, yet if goods were recovered, or a corpse found at the place mentioned in such confession, *this fact* was competent and receivable evidence.<sup>5</sup>

3. It is competent to prove confessions made in jail, either to jailers or fellow-prisoners, provided that they are proved to have been made without undue influence, or proved by undue means; but it is not competent to prove confessions made to a clergyman of any persuasion.

From a very remote period in our practice, it has been held

<sup>1</sup> Elizabeth Gibbon's case; Carr. & P. 97; Russell, ii. 646.—<sup>2</sup> Russell, ii. 647.—<sup>3</sup> Elspeth Robertson, Nov. 15, 1728; Wilson and Hall, March 10, 1736.—<sup>4</sup> Hume, ii. 335.—<sup>5</sup> Per Justice Park, Jan. 1822; Hertford Thurtell's case, and Phil. i. 108.



competent to prove confessions made in jail by one prisoner to another, or which have been overheard by the turnkeys and jailers.<sup>1</sup> This delicate branch of the law of evidence has recently undergone renewed discussion, and is now settled on an equitable footing. In a case at Jedburgh, it was proposed to prove by the jailer's wife, certain conversations which she had overheard by accident between two pannels in jail. The Justice-Clerk stated, that if she had been placed there like an eavesdropper to overhear such conversations, the evidence could not be received ; but that if she heard it accidentally, and without design, it might be received ; and, as it turned out on her examination that this was the case, her testimony was received, and the prisoners were convicted.<sup>2</sup> This was followed in the High Court in a case which received the greatest consideration. Robert Emond was there charged with two murders, and it was proposed by the prosecutor to prove various conversations which he held in jail with two prisoners of the name of Tait and Murray, who had been placed in the same cell with the prisoner from the crowded state of the jail, and which amounted very nearly to an admission of his guilt. These witnesses were under a serious charge of theft and embezzlement, which might have affected their lives, and, before they began to give their evidence, the Lord Advocate laid on the table a royal pardon for their crimes. The Court, after satisfying themselves, by the examination of the jailer and prisoners, that they had been put there accidentally, and not *ex proposito* to entrap the pannel into a confession, admitted the evidence ; observing, at the same time, that it would have been competent even without the royal pardon.<sup>3</sup> The competency of admitting such evidence had been previously fixed in the case of Stewart and Guthrie, July 14, 1829, and J. Cumming Gordon and M<sup>c</sup>Kinlay, Nov. 26, 1829, on which last occasion the objection to its admissibility was fully argued and repelled.<sup>4</sup> The result of these cases seems to be, that conversations held, or confessions made in jail, are admissible in evidence, provided that they are proved to have been freely and voluntarily emitted, without promises or threats of any kind, and that the evidence of these was obtained without any premeditation or de-

<sup>1</sup> James Mitchell, Jan. 9, 1678 ; Margaret Main, Jan. 19, 1701 ; Anderson and Marshall, Dec. 2, 1778 ; John Andrew and Others, March 14, 1774 ; Hume, ii. 336.—

<sup>2</sup> Tait and Stevenson, Jedburgh, April 1824.—<sup>3</sup> Robert Emond, Feb. 1830 ; Justice-Clerk's MS.—<sup>4</sup> Shaw, No. 199.

sign laid by those having the custody of the establishment. Without doubt, these precautions are necessary in all such cases; and when any evidence of this kind is proposed to be adduced, it is the duty of the Judge to sift narrowly, by previous examination, the circumstances under which it has been obtained, and of the jury to remember that even when presented in the most unexceptionable form, it is always of a suspicious character; that it often proceeds from a hoped or obtained exemption from prosecution, in consideration of the evidence so tendered, and generally flows from the most worthless of the community, who have superadded to the crimes for which they were themselves placed in confinement, the betrayal of their fellow-prisoners, who had incautiously confided to them the secrets of their lives.

In one old case, a minister of religion was examined as to a confession made in his presence, and that of two bailies of the borough.<sup>1</sup> And there is nothing exceptionable in the admission of such testimony, if he heard the confession *tanquam quilibet*; that is, if he heard it as an ordinary acquaintance or by-stander, and not in the confidence and under the seal of religious duty. But our law utterly disowns any attempt to make a clergyman of any religious persuasion whatever divulge any confessions made to him in the course of religious visits, or for the sake of spiritual consolation;<sup>2</sup> as subversive of the great object of punishment, the reformation and improvement of the offender.<sup>3</sup> But, if confessions are made, not to the clergyman, but the jailer or magistrate, in consequence of the exhortations of a clergyman, these are rightly received as evidence; because law cannot enquire into the conscientious motives which may influence a guilty man to unburden his conscience; and, possibly, the import of the religious advice may have been, to incur, by a full confession, the punishment of sins in this world, in order to expiate the offence and diminish its retribution in the next.<sup>4</sup>

4. It is unlawful, at common law, to refer a criminal libel to oath, even though it is prosecuted only *ad civilem effectum*.

It being a general principle of law, *nemo tenetur jurare in suam*

<sup>1</sup> Anderson and Marshall, Dec. 2, 1728; Hume, ii. 335.—<sup>2</sup> Hume, ii. 335.—<sup>3</sup> Vide ante ii. p. 538.—<sup>4</sup> Rex v. Gilham, determined by all the Judges, Easter 1823; Russell, ii. 648.

*turpitudinem*, it follows, that all attempts to prove a criminal libel by the oath of the pannel, whether emitted in the earlier or latest stage of a case, is inadmissible and illegal.<sup>1</sup> It is accordingly laid down, as already noticed in the claim of right, that to oblige the lieges to depone in capital cases, albeit the libel is restricted, is contrary to law.<sup>2</sup> And, though not declared by the same high authority, it is held to be equally unlawful to exact an oath from any one on any charge affecting his person or liberty, or which, though not insisted on to that extent in the particular case, is of a base or infamous nature.<sup>3</sup> Accordingly, in several late cases, all attempts of this nature have been utterly disowned and rejected in cases of a criminal nature, or arising out of a criminal delinquence, though insisted in *ad civilem effectum*. It was accordingly held by the Court, in a case for the infringement of certain revenue statutes in the matter of distilling, which declared it competent to prove the libel by the oath of witnesses, or *confession* of the party, that this confession meant a free and voluntary confession, and not one extorted by an oath; and the sentence accordingly following on a reference to oath was suspended.<sup>4</sup> In a subsequent case, a still stricter rule was applied by the Court of Session. It there appeared that a civil action of damages had been brought in the Sheriff Court of Lanarkshire against two defenders, for a violent assault committed at night on the highway; and this was referred to their oaths. The pursuer declined to prosecute criminally, and the Lord Ordinary and Court successively found that such reference was incompetent, even in the civil action.<sup>5</sup>

In trials for usury it is declared competent, by special statute, to refer the matter to the pannel's oath;<sup>6</sup> and an instance has occurred, where on such a reference, and in supplement of the other probation led in support of the libel, the accused were acquitted.<sup>7</sup> It is not likely that such a case should arise in modern times; though, if it did, there seems some difficulty in applying these old precedents to the altered views which have since prevailed on this subject.

<sup>1</sup> Hume, ii. 326, 327.—<sup>2</sup> 1689, c. 13.—<sup>3</sup> Hume, ii. 337.—<sup>4</sup> Lachlan Graham, May 17, 1800.—<sup>5</sup> Brown v. Miller and Smellie, Feb. 16, 1828; Shaw and Dunlop, vi. 561.—<sup>6</sup> 1600, c. 7.—<sup>7</sup> Robert Lauder, Sept. 4, 1668; James Wilson, Nov. 11, 1667.



## CHAPTER XIV.

## OF WRITTEN EVIDENCE AND PRODUCTIONS.

THE most important part of the written evidence, which is usually adduced, consists of the declaration of the accused, on which an ample commentary has already been given.<sup>1</sup> But, besides this important instrument, there are a variety of other productions which are of the utmost importance in criminal trials. Thus, in cases of forgery the production of the forged instrument, and the writings of the prisoner and the person forged on, by which the offence is to be detected; in theft or robbery, of the stolen or robbed goods found on the pannels, which are to be identified by the person from whom they were taken; in murder or assaults, of the weapon by which the wounds were inflicted, or of the medical reports by which the progress of the injury is to be traced, form among the most important links in the chain of evidence. The consideration of the law regarding such productions, therefore, forms an important branch of the subject; and they are fitly classed together, as the rules for their identification and admissibility in evidence are nearly the same, and form the subject of constant practice in all the criminal Courts.

1. It is indispensable to the production of a writing or any other article against the prisoner, that it be described in such a way as to distinguish it from other articles of the same description.

The same minuteness is obviously not required in the description of articles to be produced in evidence, as articles stolen or the like, which are not libelled on as productions; because, in the one case, all the information which the pannel receives is from the indictment, in the other he is referred to the articles themselves in the clerk's hands. The rules for the description of articles, therefore, in the libel, are not, *in terminis*, applicable to the goods intended to be made use of as productions; but the

<sup>1</sup> Ante, ii. p. 555, chap. 13.

principle is, that in the latter case any description will be held sufficient which distinguishes the article, and serves as an index whereby it may be discovered in the hands of the clerk of Court.<sup>1</sup> Thus it is sufficient, in the ordinary case, if the libel describe generally the *kind* of thing meant to be used in evidence, as a knife, a dagger, a pistol, a gun, a bludgeon, a woollen cloth, or the like, referring the pannel for a minute description to the articles themselves produced in the clerk's hands.<sup>2</sup> A number of authorities on this point are given by Mr Hume, which it is unnecessary to quote, because the rule is matter of daily practice. The point seems to have been settled in two cases at the close of the last century, in the first of which it was objected to the description of a production, that it was merely "a pocketbook and sundry of the papers stolen therewith;" but this was repelled.<sup>3</sup> In the second, which was the noted case of Smith and Brodie, the description in the libel was this, "a gold watch, with a chain, seal, and key, a chest or trunk, containing various articles; a five pound bank-note, an iron coulter of a plough, two iron wedges, an iron crow, a pair of curling-irons or toupee tongs, a spur, a dark lantern, a pair of pistols, several false keys and picklocks, and two spring saws, being all to be used in evidence against you at your trial," &c. The objection was, "that all these articles admit of a variety of conclusive descriptions, such as the maker's name and number of the watch, the device upon the seal, the date and number of the note, &c. but as no such descriptions are given, the pannel is left in the dark as to the articles to be used in evidence against him." The Court "repel the objection stated to the producing and founding upon the articles specified in the objection, and mentioned in the indictment."<sup>4</sup>

But although it is doubtless competent to describe productions in this general way in most cases, yet there are others in which a more minute specification must be given; and in all, if the description contained in the libel prove erroneous, the article will be cast as a production. In particular, in all cases where the article to be described constitutes the *corpus delicti*, as forgery, perjury, incendiary letter, or the like, the written instrument must be described by such marks as will distinguish it from all others, as its date and signature, title, beginning words, or the like.<sup>5</sup> The same rule applies to other capital articles of evidence,

<sup>1</sup> Hume, ii. 391.—<sup>2</sup> Ibid.—<sup>3</sup> Johnstone, June 19, 1786.—<sup>4</sup> Smith and Brodie, Aug. 28, 1788; Hume, ii. 393.—<sup>5</sup> Hume, ii. 391; Burnet, 504, 505.

such as the pannel's declarations, extracts of previous convictions for theft, or the like, which must be correctly specified by their dates, and the Magistrates before whom they were emitted or took place, as without such marks no fair or distinctive description can be given, or such as distinguishes that particular paper on which so much depends, from any other of the same sort. If therefore an error occur in the date of any such document, or the Court or Magistrate before which it was obtained, or the like, it will cast the production, for this plain reason, that the instrument described in the libel is not the one now tendered in evidence.<sup>1</sup> On this principle certain convictions for theft were cast in respect they were libelled on as obtained before "the Magistrates of Edinburgh," whereas the convictions produced bore to be before "the Judge presiding in the Police Court of Edinburgh," even though they generally were the Magistrates.<sup>2</sup> But slight variations in the description from what should have been given, have not in every case the effect of excluding the production. Thus where a conviction for swindling was described as being a conviction and sentence, whereby the pannel was sentenced to twelve months' imprisonment in the Tolbooth of Edinburgh, and it turned out, upon production of the conviction, that it was in the Bridewell of Edinburgh, but the description was in other respects correct, the objection was after some hesitation repelled, upon the ground that the conviction is the material thing, and that an error in the subordinate matter of the sentence does not affect the essential part of the aggravation libelled, which is not of being convicted and *sentenced* but *convicted* only.<sup>3</sup>

Where a description is given of an article to be used in evidence, it must be correct, or the production of it will be prevented. Thus the libel having given notice that a L.5 *bank-note* was to be used in evidence against the prisoner, and the note produced being the bank-note of a *banking company*, the objection was sustained, how thin and critical soever, that a bank-note means the note of a chartered bank, and that the proper name for the note of a private banking company is a *banker's* note.<sup>4</sup> It may well be doubted whether this case was not adjudged with excessive strictness; but be that as it may, this decision is followed in practice, and the practice, in consequence, constantly

<sup>1</sup> Burnet, 505; Hume, ii. 390, 391; Buchanan of Leney, March 14, 1687.—<sup>2</sup> Geo. Gowans, June 25, 1827; Syme, 223.—<sup>3</sup> John Law, July 13, 1824; Justice-Clerk's MS.—<sup>4</sup> Smith and Brodie, Aug. 1788; Hume, ii. 390.



followed, of libelling on money in bank-notes, as “bank or banker’s notes.” But here, in like manner as in the former instance, an inconsiderable error which does not touch the essential parts of the description will be disregarded. Thus bank-notes are usually described by their date and number, thus: “As also a bank-note for one pound sterling, of the Royal Bank of Edinburgh, bearing to be dated 1st May, 1824, and to be numbered A.  $\frac{321}{175}$ ,” and without doubt any discrepancy between these figures and those on the note produced, will be fatal to the production. But an omission to libel on the *letter* prefixed to these figures, as A. in the example given above, though it is usually done, is not fatal to the note produced, as if the note is described as numbered  $\frac{610}{136}$ , and the one produced has these figures, but with the letter A. prefixed; this has been held a bad objection, in respect the letter is no part of the number, and not an essential part of the description.<sup>1</sup>

In libelling on a conviction, it is not necessary to specify the aggravations that may have been contained in it; but it is sufficient if it is described as a conviction for the radical offence. Thus if the libel mention a conviction for assault, as one of the productions against the prisoner, this is held to be a correct description, although the conviction produced bear that the pannel had been three times previously convicted of the same offence.<sup>2</sup> But the conviction must be described as before the Court where they really were pronounced; and therefore where they were described as obtained before “the Magistrates of Perth,” whereas those produced were not before the Burgh Court of Perth, but the Magistrates sitting in the *Police Court*, the objection was sustained.<sup>3</sup> It has been held that a dying declaration is sufficiently described by its date, and the signature of the Magistrate who took it as a “deposition or writing bearing to be dated 6th April 1826, and to be signed G. Tait,” without any thing more.<sup>4</sup>

In libelling on stolen articles to be produced in evidence, it is very usual, of late years, to describe them by a reference to the previous description contained in that part of the libel, which charges the goods stolen; thus, “which declaration, as also the stolen goods above specified, to which sealed labels are now at-

<sup>1</sup> Scott and Adamson, May 1, 1805; Glasgow, Hume, ii. 391.—<sup>2</sup> John Duff, Feb. 27, 1827; Justice-Clerk’s MS.—<sup>3</sup> Alex. Carmichael and Geo. Melville, Perth, April 1825; Shaw, p. 137; same in Geo. Gowans, June 25, 1827; Syme, 223.—<sup>4</sup> James Martin, July 3, 1826; unreported.

tached." This is a very convenient method, because the description of the stolen goods in the previous part of the charge, is always as correct as it can be made; and if it is sufficient in that part of the libel which charges the pannel with the crime, *multo majus* must it be held adequate in that part which merely contains a catalogue of the articles to be produced in evidence, and where consequently lesser accuracy is required. In this description, it is sufficient if the article stolen is described by its *generic* appellation, though the particular *species* of which it is a member is not given; and therefore the description of a quantity of "*cambric goods*" was sustained as sufficient, though in point of fact, when produced, they turned out to be *cambric* muslin; that being a subordinate classification not affecting the generic appellation.<sup>1</sup> But if stolen goods are described as productions by certain marks, and these marks turn out to be different from those actually on them, it will cast them as a production, as if they are described as labelled *J. B.*, when in truth they are labelled *J. Bruce*; <sup>2</sup> or if the numbers on bank-notes are said in the libel to be not clearly discernible, when it appears on production that they are discernible; in such a case they were cast as a production.<sup>3</sup>

It has also become usual now, or rather universal, to label all the productions which are to be used in evidence, and to describe them as having sealed labels attached to them. This practice is attended with this advantage, that it serves to fix the article to which the reference is made, and thereby renders a less accurate description necessary than if no such precaution had been taken; for if the pannel is warned that the article of a certain kind labelled is to be used in evidence against him, and he finds an article of that kind in the clerk's hands so labelled, he can hardly by possibility be mistaken as to the article intended. It has not passed into an universal practice to do this, and therefore, a pannel cannot state it as an objection to the production of certain articles in evidence against him, that they are not labelled.<sup>4</sup> This is a proceeding introduced merely for the convenience of the prosecutor, and to facilitate the description of goods to be used in evidence, on their production at the trial; and therefore the pannel has no reason to complain, if, though not labelled, he gets

<sup>1</sup> M'Kechnie and M'Cormick, Glasgow, Sept. 1817; ante, ii. 297.—<sup>2</sup> Johnstone and Others, Nov. 23, 1818.—<sup>3</sup> Hugh Ross, Nov. 16, 1818; unreported.—<sup>4</sup> Wright and Nicol, March 14, 1823; Wm. Scott and Chas. Lyon, April 1823, Perth; Justice-Clerk's MS.

such a minute description, as precludes any reasonable chance of his misunderstanding what is really referred to.

It is also very usual in cases where there are a great number of productions to be made, as in forgery, fraudulent bankruptcy, perjury, or the like, to specify the whole productions in a separate inventory; and this practice has the advantage of enabling both the prosecutor and the Court to turn to the article intended with much greater facility, than if it is contained in the middle of a long indictment. In such a case, the inventory must be signed by the clerk of Court, if the libel is in the form of criminal letters, and by the prosecutor, if it is in that of an indictment, and the articles specified must be referred to in this manner: "which declaration, as also the various articles, writings, documents, books, and accounts, specified and contained in the inventory No. 1, hereunto annexed as relative hereto, being to be produced in evidence against you." The inventory of articles to be used in evidence, should be distinct from that of articles libelled on as stolen, unless it is thought proper to rest on the description of the stolen goods, as containing that of the articles to be used in evidence, which is perfectly competent and is frequently done. Where this is the case, and the stolen goods are specified in an inventory annexed to the indictment, the reference to the productions should be in these terms:—"which declaration, as also the various articles above *or hereafter* libelled on as stolen as above specified, or part thereof;" or thus, "which declaration, as also the various articles specified and contained in the inventory No. 1, hereunto annexed as relative hereto, being all to be used in evidence," &c. These different rules arise necessarily from the position of the list of productions, as before or subsequent to the reference to them in the libel.

2. It is not sufficient, that the articles meant to be produced, are specified in the libel or relative inventory; they must also be produced in the clerk's hands in due time, which in general is at least two days before the trial.

For above a century past, it has been the invariable practice,<sup>1</sup> that all documents or articles, of whatever sort, intended to be

<sup>1</sup> Since Sir Robert Dunbar's case, Nov. 1714; Hume, ii. 388.



produced against a prisoner at his trial, shall be lodged in the hands of the clerk of Court for his inspection, a reasonable time before the trial. After considerable fluctuation, the rule on this head has at length been settled on an equitable footing, which gives no room for complaint on either side, which is this: That no article can be used in evidence against the pannel, with respect to which the libel has not warned him of the prosecutor's intention so to use it; but that it is sufficient if the article is lodged with the clerk of Court *in due time* before the trial, that is, in such a time as in the circumstances of the case, allows him sufficiently to examine and inspect it.<sup>1</sup> What is considered in law as "due time," though a very important point, has for very sufficient reasons been left undetermined. Every thing depends on the circumstances of the case; two days may be ample time in most cases, the whole fifteen allowed for the service of the libel, hardly sufficient in another where the productions are very voluminous and complicated. The practice on this head usually is, that the articles are lodged in the clerk's hands two days before the trial, which is usually found to be quite sufficient; but in cases where the productions are very numerous, they should be lodged if possible at the time of service of the libel, because, if this is not done, it is probable that the case may be delayed on the prisoner's motion, upon the ground that he has not had sufficient time to inspect the documents. In general, this can be done with ease, because the whole productions must have been in the hands of the counsel who drew the libel, from whom they can at once be transferred to the Justiciary office. It is not by any means unusual for the Court to put off a trial, upon a solemn affirmation on the professional character of the counsel, that the productions were so voluminous, that they had been unable, during the time since their lodging in the clerk's hands, to make themselves masters of their contents.

It has been decided in two cases, that where articles were produced, but sealed up in the clerk's hands, it is a sufficient compliance with the law; and that if the pannel desires to have the parcels opened, it lies upon him to make an application to the Court for that purpose.<sup>2</sup> Nay, what was much stronger, it was determined in one case on the Circuit, that where the libel gave

<sup>1</sup> Hume, i. 388; Burnet, 504.—<sup>2</sup> Adam Lyall, Jan. 3, 1811; and Alex. O'Kane, Jan. 13, 1812; Hume, ii. 389.

notice, that certain sealed parcels were to be used in evidence at the trial, it was a sufficient compliance with the law if the parcels never were produced at all, but remained in the hands of the Sheriff-clerk of the shire from whence the case came, who produced them for the first time at the trial; the pannel being allowed, however, full time to inspect the contents, if he desired it, during the trial, which was to be suspended for that purpose, if he desired it.<sup>1</sup> This case, however, has not been followed in practice in later times, nor is it probable it ever will be quoted as an authority to be implicitly relied on, after the strong and conclusive reasoning of Baron Hume on the subject.<sup>2</sup> Indeed there seems much reason, should the point occur again in practice, which is not likely, as subsequent usage has been much more favourable to the prisoner on this subject, than the secases would render necessary, to reconsider this matter before it becomes too late. From whatever source it has arisen, it is certain, that this rule of producing the articles intended to be used in evidence in the clerk's hands, is now become one of the cardinal points of our criminal practice; and it seems impossible to hold, that this rule is adequately complied with, if any of these productions are either withheld altogether till the trial is going on, or produced in sealed parcels, which neither he himself nor his counsel have any means of examining. Those who know how laborious an operation it is in many cases, to arrange and describe documents or productions for a trial, will be best able to appreciate the utter impossibility of going over such voluminous productions in the space of a single day; and therefore the only course which should be followed, in all cases where the productions are voluminous or intricate, is to lodge them in the clerk's hands at the time when the libel is served, and in such a form as to be there perfectly accessible to the prisoner. This applies, however, only because the reason of it extends to cases where the productions are numerous and complicated; in the ordinary case, and especially where stolen goods, how numerous soever, are produced, the ends of justice are completely attained, if they are lodged in process in the High Court, according to the usual practice, on the Saturday preceding the Monday on which the trial comes on; and on the circuit, in the hands of the circuit clerk, who arrives at the place where the assizes are to be held, in general two

<sup>1</sup> Will. Muir, Oct. 12, 1813, Glasgow; Hume, ii. 389.—<sup>2</sup> Hume, *ibid.*

days before the business commences, and this is the uniform custom in such cases.

In cases of horse or cattle stealing, where these animals are to be produced, in order to their being identified, they are in the usual manner described as lodged in the clerk's hands, that the prisoner may have an opportunity of seeing them. When the day of trial arrives, or rather the day before, they are placed in some convenient court or stable near the Court-house, to which the clerk of Court gives the direction, and there seen and examined by the witnesses. This course has been frequently adopted of late years with the approbation of the Court;<sup>1</sup> and the only thing to be attended to in such cases, is to have the witnesses in attendance and inserted in the list, who can prove that the animals so produced, are the same with those which are libelled on as stolen.

3. An extract of a conviction or sentence of a Court, proves itself, as does any writ which is probative in terms of the act 1681; but the application of the sentence must be proved by at least one witness.

As the law of Scotland, in criminal, equally as civil matters, holds an extract of a sentence of a court of law to be probative, and as much entitled to faith as the original, unless falsehood is alleged, it follows that a regular extract is *probatio probata* of the truth of what it contains, not only requiring no confirmatory proof, but admitting none to contradict its tenor.<sup>2</sup> If, therefore, the extract be *ex facie* unexceptionable, labouring under no apparent nullity, and recording the proceedings of a court competent to investigate the matter under discussion, it is to be held *pro veritate*, and is not liable to be impeached or discredited by any parole proof of irregularities in the proceedings which terminated in the judgment.<sup>3</sup> This important point was long ago settled in a case where it was moved in arrest of judgment at a time when the depositions of witnesses were engrossed in the record, that the record had been falsified by the alteration of a word in one of the depositions, after the witness had signed it, and left the Court. The plea was overruled, in respect that the alteration, which was merely from *him* to *them*, made no sort of difference on the sense; that there does not appear, from inspection of the

<sup>1</sup> John Gall, Aberdeen, Sept. 1827; Robert Waugh, Jedburgh, Sept. 1825.—<sup>2</sup> Burnett, 474, 475.—<sup>3</sup> Ibid.



record, to be any ground for suspecting that such an alteration took place, and that the plea “resolves into a challenge of the record of Court, offered to be proved by parole evidence, which cannot be admitted, especially as the same was not challenged before the witness left the Court.”<sup>1</sup> This was followed by a judgment of the whole Court in the noted case already mentioned of Hannay, where, after the verdict of the jury finding the man guilty had been recorded, and a day had elapsed before moving for sentence, it was then moved in arrest of judgment that five of the jurymen had not been sworn. The case was certified for the consideration of the High Court, and received the most deliberate consideration; but the Court ultimately repelled the objection,<sup>2</sup> upon the ground that it is necessary for the security of the subject, as well as the due administration of justice, that the greatest faith should be given to the records of Court; and that, “after so long an interval, parole evidence, to contradict and impeach the regularity of the proceedings, as appearing on the face of the minutes of Court, is inadmissible, and cannot be taken into consideration.” A judgment, proceeding on the same principle, was long ago pronounced by the Supreme Court on advising informations in regard to a suspension of the sentence of a Sheriff Court. It was there objected to a sentence of the Sheriff of Forfar, that the verdict was erroneous, as the Jury had been divided in opinion, and the Chancellor had erroneously given his casting vote in favour of the prosecutor. It had been recorded without objection; but before moving for sentence, which was delayed for some weeks, the objection was stated by petition to the Sheriff, and afterwards insisted in by suspension in the Supreme Court. The Court found, “that in this case they cannot let the suspender into the evidence offered by her for disproving the verdict.”<sup>3</sup> On the same principle, it was lately held by the Supreme Court, in a case where it was objected to certain convictions produced against a prisoner, which stated merely that the witnesses had been examined, without adding that they had been sworn, and it was offered to be proved by parole evidence that in point of fact this had not been done, parole evidence was incompetent to establish that fact.<sup>4</sup>

But any objections arising *ex facie* of the record produced, or

<sup>1</sup> Headrick, Oct. 1773, Stirling; Burnet, 476.—<sup>2</sup> Hannay, July 12, 1809; Burnet, 481, 482.—<sup>3</sup> Nicol's case, Nov. 1767; Burnet, 481.—<sup>4</sup> Thomas Connor, Jan. 23, 1826; Justice Clerk's notes; Gunn and M'Gregor, March 2, 1829.

which can legitimately be inferred from the expressions it contains, may competently be stated against it. Thus if it appear *ex facie* of the convictions, that some of them bear that the witnesses were "sworn and examined," and others "examined" only, this is held to be such decisive evidence of that essential solemnity having been wanting in regard to those so marked, that the convictions cannot be used in evidence.<sup>1</sup> But if the convictions bear having "considered the declaration of the accused and taken evidence," this is held good evidence that the witnesses were put on oath; these expressions being justly held to warrant the inference that they were put on oath, the legal meaning of evidence being such as is legally taken.<sup>2</sup> In like manner, if a conviction should be produced for an offence which the Court where it was pronounced is clearly incompetent to try, as a sentence by a Sheriff for treason, murder, rape, fireraising, or robbery, without doubt the Court would be bound to ordain it to be withdrawn as illegal on its very face. By 41 Geo. III. c. 90, it is enacted, that copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorized, shall be probative in all Courts of either kingdom.

This high faith and confidence, however, is reposed only in the original records of Court, or a regular extract or certified copy, under the hand of the proper officer legally charged with the custody of such documents, and the transcribing of copies of them for the use of the lieges.<sup>3</sup> The same credit therefore is not to be given to copies, however fair or unexceptionable, if made not by the regular custodier of the record, but any other clerk; and therefore where copies of English decrees were produced, not regular extracts, they were rejected by the Court.<sup>4</sup> But if the decree is extracted, it is never necessary to call the extractor to prove its verity, because as a probative writ it proves itself; not even in the case of all others the strongest, where the decree of another Court is received as *probatio probata* of the truth of its contents, as in the case of a remit from the Court of Session, after a conviction for forgery.<sup>5</sup> A protest has been held a probative document, and proves itself without calling the person who signs it as a witness.<sup>6</sup> But it may be doubted whether this

<sup>1</sup> Allan Grant and Others, March 5, 1827; Syme, 144; Ann Dykes and Helen Good, Nov. 9, 1827; *ibid.* 263.—<sup>2</sup> M'Queen and Robson, June 4, 1832, unreported.—<sup>3</sup> Burnet, 482-3.—<sup>4</sup> Murray Stewart, Sept. 6, 1817, unreported.—<sup>5</sup> Burnet, 483; Reid, Aug. 12, 1780.—<sup>6</sup> John Thomson, Sept. 1822; Perth.

would now be followed, and the calling of the person who signed it dispensed with, since stricter ideas on the subject of evidence have come to prevail. The only case of legal exception to the necessity of proving writings, seems to be where the decrees of Courts, or extracts of them, are produced, or an instrument is rendered probative by the act 1681.

When the record of a foreign Court is founded on, it must be verified according to the forms in use in that country. Thus, a copy or exemplification, as it is called, of a record of an English Court, is not received with us unless it is under the seal as well as the hand of the Court, which is the usual mode of authenticating copies of records by the English law.<sup>1</sup> Accordingly, where it was objected to a witness, that he had stood in the pillory in Ireland for coining, and a copy of the judgment of the Court of King's Bench in that country signed, it was said, by the proper officer, was produced without the seals of the Court, the production was held inadmissible.<sup>2</sup>

Judgments or deliverances of Courts of law, on which diligence or other legal proceedings have followed, which have become the subject of trial or investigation, are probative without the oath of the judge or magistrate who signed them; and if they have acted in these characters, and been reputed magistrates, their commissions and appointments as such will be presumed, unless the contrary be proved.<sup>3</sup> Thus, in the case of the deforcement of a constable, if the prosecutor think it necessary to produce the warrant, it is good evidence, without bringing forward the Justice to swear to its being his warrant, and, least of all, obliging him to produce evidence of his being in the commission of the peace.<sup>4</sup>

Besides records, properly so called, there are other writings of a public nature, as parish registers, books of corporations, of public companies, or the like. These, however, do not prove themselves like records of Courts, but must be proved by parole evidence, which properly is that of the officer or clerk who writes them, and can swear to the accuracy and fidelity with which they are kept.<sup>5</sup> In all such cases it is necessary that the entire books should be exhibited, and not any part of them; that is, the entire book containing the entry which is founded on, in

<sup>1</sup> Burnet, 483.—<sup>2</sup> Deans, Sept. 1729; Burnet, 483.—<sup>3</sup> Burnet, 484.—<sup>4</sup> Ibid. But in Stevenson, Ayr, Autumn 1801, Lord Armadale held it necessary to prove a Justice-warrant by one of them.—<sup>5</sup> Ibid.



order that it may be compared with those which precede and follow it, and the faith due to the writing judged of by the appearance of correctness in the book where it occurs. The proper party to prove such books is the clerk who made them, or if he is dead or removed from the situation, the one who has succeeded him and now keeps them; or if he is dead or cannot be got, some person acquainted with the handwriting, and who can speak to the manner in which the books were kept. Where the originals cannot be produced, the only regular evidence is a copy sworn to by one or more of the members of the incorporation, or by the clerk or other officer who either made the copy or compared it with the original, for the mere extract of a writ not probative will not be sufficient. But it should be an invariable rule, wherever they can possibly be got, to produce the *originals* of all books, documents, or papers which are required to be adduced; for if this is not done, there is always an imminent risk of the copy being rejected upon the ground of the original not being produced. A signal instance of this occurred in the case of James Murray, charged with the theft of three valuable parcels of bank-notes from the Stirling bank. A document was there produced, purporting to be a list of bank-notes sent in one of the parcels by the coach from which the theft was committed; but as it turned out that it was only a *copy*, and not the original, though sworn to by the clerk of the bank to be correct, it was rejected in evidence.<sup>1</sup>

Notarial instruments, executions of messengers, and the like, executed according to the solemnities of law, are probative *per se*, if not challenged on the ground of forgery.<sup>2</sup> It is advisable, however, always to have one of the witnesses to such instruments in the list, in order to be ready to afford any explanation regarding it which may be required, or to swear to the verity of the subscriptions if they shall be denied.

It is to be observed, however, in all cases in which a conviction or sentence is to be produced, either in proof of a charge against a prisoner of being previously convicted, or to discredit or disqualify a witness, that the conviction or extract produced, only proves that a man of the name thus set forth was convicted on that occasion; but it does not prove that that man was the prisoner at the bar, even although the name is the same, because

<sup>1</sup> James Murray, Feb. 16, 1825.—<sup>2</sup> Burnet, 485.

many different persons may bear that appellation. To connect the conviction, therefore, with the prisoner or witness, the party adducing it must go a step farther, and prove by the oath of a witness who knows the fact, that the conviction applies to the prisoner. If he was either present during the trial, or saw the person convicted in jail afterwards on the sentence, this is held a sufficient cause of knowledge to warrant him in swearing to the application of the sentence.

4. Private writings, such as reports or certificates, letters, papers, or correspondence, if tendered in evidence, must be proved to be genuine by the best evidence, which is held to be in the first instance the writer ; next, those who have seen him write ; after that, those who have corresponded with him ; and, lastly, engravers and other persons of skill, who judge *comparatione literarum*.

Many of the most important parts of proof frequently depend on written evidence of this description.

The medical reports or certificates which are made up by a surgeon, or medical man, who attends a person assaulted or murdered, after they have received the injury, form in general a most material part of the proof in cases of that kind. The rule in regard to them is, that they should be made up by the medical man at the time, or in a few days after he has ceased to attend the patient ; that they should be written in his own hand, and the original produced to him at the trial, proved by him to be a true report, and then read to the jury. In this way the evidence is in reality given, under the sanction of an oath, with this additional circumstance to ensure its accuracy, that it is supported by a written memorandum made out at the time, and more likely to be correct than what is recollected at a subsequent period. The medical witness may be farther examined by the prosecutor, and should be cross-examined by the prisoner in relation to the matters contained in the certificate, and any farther questions asked which may seem material to the justice of the case on either side. A medical report is admissible, though made up *ex intervallo* ; but in such a case it is not entitled to the same credit as one made up at the moment, and containing a diary of the symptoms of the case as they actually occurred, made out at

the moment. For the same reason, where the sufferer's case has been protracted to a considerable length, more than one report should be made out; or if it is all engrossed in one, it should continue the account of the symptoms in the form of a journal from week to week; at least, if made out in that form, it will be esteemed more worthy of credit than if all made up at once at the termination of the case.

If alive and accessible, the medical gentleman must of course be called to prove that his report or certificate is a true account, and to stand any cross-examination regarding it. If he is dead, his report may be proved to be his handwriting by those who have had good access to know that it is so; and it will be received as evidence, not amounting indeed to what is sworn to in presence of the jury, but as what he deliberately wrote down at the time as a statement of what took place. But if he is alive, but merely unable to attend, from illness, absence, or any other cause, there is no authority for holding that it can be tendered in evidence to be proved by another person, for that would be like proving what an absent living witness has said by the testimony of others, which is clearly incompetent.

Private writings of every description, when tendered in evidence, must be sworn to by some competent evidence, to be the handwriting of the party which they profess, or are alleged by the producer to be. If this is not done, a Court can pay no sort of regard to them, for they may be documents forged or got up for the occasion, without being the handwriting of any of the persons which they profess to be. The rule in regard to the proving of writings is, that the best evidence which can be adduced is in every case to be brought forward; and on this point, the best evidence is that of the writer himself; next, that of those who have seen him write the writing in question; next, that of those who have seen him write other deeds, not the one in question; next, that of those who know the handwriting generally, from having corresponded with him, or had a charge of or been connected with his affairs; and lastly, that of writing-masters, engravers, and other persons who speak from their professional skill, and *comparatione literarum*.<sup>1</sup> The law of England is nearly the same on this point.<sup>2</sup> These several gradations of proof should be attended to, in all probation of writings, where there is any

<sup>1</sup> Hume, ii. 395; Burnet, 501.—<sup>2</sup> Phil. i. 485, 492. 5th Edit.



reason to expect a serious dispute as to whether the writing produced is or is not genuine, and the weaker evidence not brought forward if the stronger can be had. But in ordinary cases, where the authenticity is not disputed, it is sufficient to ask a witness who has access to know the handwriting to be proved, whether it is the handwriting of the person alleged, without examining the person himself, or any one who saw him write that particular deed, and this is constantly done in such cases in the Courts without objection. It is not necessary to prove bank-notes to be genuine by the officers of the bank; they prove themselves if not challenged as forgeries;<sup>1</sup> and in cases of false coin, it is not necessary to adduce the officers of the Mint, but any goldsmith, to speak to the baseness of the coin tendered.<sup>2</sup>

It was at one period disputed in our practice, whether proof of the authenticity of writings *comparatione literarum* is competent; and M'Kenzie and Royston have justly intimated their opinion, that it is not such a means of proof as a judge ought to rely *solely* on, but one which amounts to a ground of presumption only.<sup>3</sup> It has now, however, been for long settled, that such proof, though doubtless inferior in weight to that of those who have seen the person write, or know his handwriting from personal knowledge, is nevertheless a competent species of evidence, and such as must be sent to the jury; and this has been settled after great consideration, not only in criminal<sup>4</sup> but in civil cases.<sup>5</sup> In two late cases, the point was considered so far settled by these decisions, that proof *comparatione literarum*, in supplement of other and superior evidence, was admitted without objection, and entered materially into the conviction which was obtained in both.<sup>6</sup> The competence of this species of proof, therefore, is fully established; though the Court do not attach in general great weight to it, from the fanciful and contradictory nature of the evidence which is frequently given by such persons, and certainly would in no case hold the authenticity of a writing proved by this, unsupported by any other species of evidence.

In England, a strong repugnance has always been felt to the

<sup>1</sup> Clerk and Brown, Nov. 9, 1802.—<sup>2</sup> Hugh Johnson, April 20, 1805.—<sup>3</sup> Royston, Burnet, 503.—<sup>4</sup> Clerk and Brown, Nov. 9, 1802; Campbell of Burntbank, March 29, 1721; James Stein, Dec. 5, 1736; Hume, ii. 396; Burnet, 503.—<sup>5</sup> Melville v. Crichton, March 1821; on a hearing in presence, on a bill of exceptions from the Jury Court, ante, i. 412.—<sup>6</sup> John M'Leod Gillies, June 20, 1828; John Jaffray, Spring 1815, Jedburgh, per Lord Pitmilley; Hume, ii. 396.

admissibility of proof, by similitude of handwriting; and it was one of the many grounds on which the attainder of Algernon Sidney was reversed, that that species had been employed against him. They admit the testimony of engravers and inspectors of franks, to speak to the general appearance of a handwriting, and say, whether it was in a natural or imitated character.<sup>1</sup> And the general conclusion at which they have arrived is, that persons of skill may be called to ascertain, whether handwriting is genuine, or whether it was written at repeated strokes, like the writing of a person attempting to imitate the hand of another; but that they cannot be allowed to give their opinion on the point, whether the same hand which wrote another paper, wrote also the feigned paper.<sup>2</sup>

5. Dying depositions or declarations are admissible against a prisoner, if the person who emitted them has died before the trial; and they do not require to be drawn out in the form, either of probative deeds or judicial declarations, but must be authenticated at least by the subscription of the magistrate who takes it, and should regularly bear the subscription also of the clerk who wrote it, and must be proved by their oaths to have been emitted in the sound and sober senses of the declarants.

The general rule of law unquestionably is, *testibus non testimoniis credendum*; and therefore, written depositions, how regularly and solemnly soever they may have been taken, are not in the general case admissible; for every witness must, by 1587, c. 90, give his evidence in presence of the assize.<sup>3</sup> But to this rule there is an important and necessary exception in the case of persons who have received a mortal injury from the prisoner, and whose subsequent statement, reduced to writing in the form of a declaration, or the more solemn one of a deposition, is tendered in evidence after his death.<sup>4</sup> It has been already stated, that such statements are admissible, even when proved by the parole evidence of those who heard them, and much more so, if contained in a written instrument made out at the time, under every precaution for the truth of the narrative, and the fidelity of the tran-

<sup>1</sup> *Revit v. Braham*, 4 T. R. 497.—<sup>2</sup> *King v. Cator*, 4 Esp. N. P. 117, 145; *Phil.* 526.—<sup>3</sup> *Burnet*, 495.—<sup>4</sup> *Hume*, ii. 407; *Burnet*, 498, 499.

script. It is justly presumed, that a declaration, and still more a deposition emitted under the solemn and understood circumstances of approaching dissolution, is more likely to be true, and more probably purified from the passions of the world, than a statement given under any other circumstances, and therefore a degree of credit is attached to such written documents, greater than is given to any other species of evidence, excepting the testimony of a witness emitted in presence of the assize.<sup>1</sup> Numerous instances, accordingly, are on record, where not only the depositions,<sup>2</sup> but the declarations of injured persons have been received in evidence, and had a most material effect upon the issue of the trial.<sup>3</sup> Nor is it only dying declarations in the proper sense of the word, that is, declarations emitted on death-bed, or in contemplation of death, that are receivable in this manner; but any declaration emitted by the deceased subsequent to the injury which is the subject of trial in relation to that event; with this difference only, that declarations or depositions emitted in the immediate view of dissolution, are more worthy of credit than those emitted under no such solemn impression. The plea has been expressly overruled, that statements by the injured party can only be received when they are dying declarations in the proper sense of the word, and uttered in contemplation of death.<sup>4</sup>

In the law of England it is in-like manner settled, that the declaration of a deceased person, as to the party who struck him the mortal blow, is admissible evidence if emitted in such a state of mind on the part of the deceased, as showed he had the approach of death before his eyes at the time.<sup>5</sup> They do not admit such declarations, unless under the impression of approaching dissolution, though made before the deceased was informed he was in that dangerous state, being rejected;<sup>6</sup> it being decided too by all the Judges, that the question as to whether the deceased thought himself dying, is a point for the determination of the judge before the evidence is admitted, and not one to be left for the decision of the jury.<sup>7</sup> And they uniformly hold, that dying declarations,

<sup>1</sup> Hume, ii. 407; Burnet, 498, 499.—<sup>2</sup> Will. Allan, Dec. 27, 1825; Alex. M'Kenzie, March 14, 1827; Syme.—<sup>3</sup> Will. Goldie, July 13, 1804; Mary M'Kinnon, March 14, 1823; Daniel Elphinstone, June 21, 1824.—<sup>4</sup> John Melvin, Sept. 1811, Aberdeen; Hume, ii. 408.—<sup>5</sup> East, i. 124; Woodecock's case, Leach, i. 502.—<sup>6</sup> Welbourn's case, East, i. 358; Russell, ii. 684.—<sup>7</sup> Welbourn's case, ut supra; Johns's case, East, i. 358; Russell, ii. 687.



though made with a full consciousness of approaching death, are only admissible in evidence, where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration;<sup>1</sup> and on this principle it has been held by Justice Bayley, that in trials for robbery, the dying declarations of the person robbed were inadmissible.<sup>2</sup> It is otherwise, however, if the injured party in any crime has emitted a deposition before a magistrate which is signed by him; it is admitted in evidence, if the party who made it has died before the trial.<sup>3</sup>

It is not necessary, nor is it the custom, for such declarations or depositions to be made either in the form of judicial declarations, or with the testing clause of the act 1681. It is sufficient if it is authenticated by the subscription of the magistrate who took it, and signed by the party if he can write; and sworn by the magistrate and another witness to have been emitted in the sound senses, and under the solemn impression of approaching dissolution.<sup>4</sup> Nor is the last requisite indispensable; but it is sufficient if the witnesses swear that the declaration was deliberately emitted, and that the deceased was aware what he was saying; though, if done under the impression of death, it is an additional circumstance of weight in considering its credit. In practice it is usual for the magistrate to sign the declaration, and at least one witness who is present at the time to authenticate it by the subscription of his initials, and this precaution should be taken in all cases. In all cases the writing should be read over to the deceased, before the signatures are adhibited.

Where the dying declaration or deposition is taken from a person who only understands Gaelic, it should be emitted by means of a sworn interpreter; and read over to him by the same means. In a case mentioned by Burnet, the Court refused to allow the declaration to be read, because it appeared that at the time it was taken, all present were in great confusion, and the witnesses were at variance as to whether it had been read over to the deceased by a sworn interpreter before signing.<sup>5</sup> In all cases it must be proved, before a declaration is admitted in evidence, that it was deliberately, freely, and voluntarily emitted; and, if no witnesses are included in the list to establish that, it should be

<sup>1</sup> Per Abbot, C. J. in *Rex v. Mead*; Russell, ii. 687.—<sup>2</sup> Russell, ii. 687.—<sup>3</sup> Fleming and Windham for rape, per all the Judges; Leach, ii. 856.—<sup>4</sup> Hume, ii. 407; Burnet, 500.—<sup>5</sup> Ross of Culrossie, Inverness, Oct. 1777; Burnet, 500.

rejected.<sup>1</sup> It is advisable, if a magistrate can be procured, that he should be present and sign the declaration ; but it is not indispensable, and, in many situations, that advantage cannot possibly be obtained in the interval between the wound and the death. In such cases, therefore, it is sufficient if the declaration of the deceased is taken by any respectable and known individual, as the clergyman of the parish, a neighbouring heritor, or farmer, or the like. And in judging of the form of a written instrument taken under such circumstances, the Court will not require the forms and solemnities justly expected where a Sheriff and Procurator-fiscal attend at the examination, but be satisfied if the declaration is proved to have been freely and voluntarily emitted, under such precautions to ensure its accuracy and fidelity, as would naturally suggest themselves to men impressed with a love of justice in that situation. In all cases the original declaration or deposition should be produced ; there being no authority for the use of a copy or extract in evidence ; nor is it possible that such an instrument can be authenticated and proved in the way requisite to give it legal validity.<sup>2</sup>

In all cases the written declaration or deposition can be given in evidence only if the party who emitted it has actually died before the trial. If this is not the case, the written document must be rejected, and the trial adjourned till the party himself can be got to attend, if the prosecutor considers his evidence indispensable to the case. In the case of Chalmers, accordingly, where such declarations were tendered in evidence by the pannels, with the prosecutor's consent, when the persons who emitted them were alive at the time, the Court, "in respect the declarants were alive, and their names inserted in the list of witnesses, find that the declarations are incompetent evidence, and that the consent of the prosecutor is not sufficient to authorize their admission as evidence in exculpation."<sup>3</sup>

6. Depositions or declarations emitted by witnesses, when formally examined before a magistrate in relation to the matter libelled, are admissible against him, if the emitters have since died ; but they cannot be founded on if they are still alive, even though they cannot be brought forward to the trial.

<sup>1</sup> Duncan M'Gregor, Jan. 22, 1753 ; M'Laurin, 753 ; Burnet, 500.—<sup>2</sup> Burnet, 500.

—<sup>3</sup> Hugh Chalmers and Others, June 14, 1813 ; Hume, ii. 410.

It being a general principle of law, that what a witness who is now dead has deliberately said in presence of others may be proved by the persons present who heard him;<sup>1</sup> much more must the same hold, where the substance of his declaration was taken down in a written instrument in presence of a magistrate, with a view to elucidate in precognition the precise matter which is now made the subject of a public trial. Many objections arising from the tendency of witnesses to mistake expressions, and the probability of their account of what a deceased person had said in relation to the matter at issue, being different from what he intended, exist against receiving the former species of evidence, which cannot be stated against the admission of a declaration or deposition taken by a magistrate in precognition, in relation to the very matter now at issue, read over to the deceased before signing, and with all the precautions to ensure accuracy usually observed by those habituated to the taking of such instruments. There seems, therefore, to be no possible objection to such a production being received in evidence, as soon as it is established that the party who emitted it is since dead; for without doubt, unless this is done, it is utterly inadmissible.<sup>2</sup> In the case, accordingly, of James Macgregor, charged with abduction and forcible marriage, a declaration emitted by her, the principal sufferer on the occasion, before two of the Lords of Session, wherein she had fully recounted her injuries, was, after an argument, allowed to be used in evidence, first against one of the accused,<sup>3</sup> and subsequently against his brother and associate.<sup>4</sup> In a case at Dumfries, where a surgeon's deposition was libelled on who died before the trial, the Advocate-depute, afterwards President Blair, stated that if he had known of his death he would have libelled on the deposition as a production; and as it was, he consented to its being used for the prisoner, and it was produced and read accordingly.<sup>5</sup> No case has occurred of late years, where the competence of this species of evidence has been made the subject of investigation; but the declarations or depositions of persons assaulted or robbed, who have since died, taken before the magistrate who conducted the precognition, have been repeatedly libelled on of late years, and their production deemed so unobjectionable, that the prisoner pleaded guilty in a great degree on

<sup>1</sup> Ante, ii. p. 512.—<sup>2</sup> Burnet, 497; Hume, ii. 409.—<sup>3</sup> James Macgregor, Aug. 3, 1752.—<sup>4</sup> Robert Macgregor, Dec. 27, 1753; Hume, ii. 409; Burnet, 497.—<sup>5</sup> Hunter's case, May 1778, Dumfries; Burnet, 496.



account of its import,<sup>1</sup> though defended by Messrs Jeffrey and Maitland, and was transported for fourteen years.

The rule is the same in England, although they are much more scrupulous in the general case about admitting declarations or depositions of deceased persons, than we are in this country. It is there considered as a settled rule, that if it be previously proved satisfactorily to the Court, that the witness is dead<sup>2</sup> or insane,<sup>3</sup> or has been kept away by the practices of the prisoner,<sup>4</sup> or is prevented by sickness or inability from attending,<sup>5</sup> his deposition may be given in evidence on the trial of an indictment, provided the deposition was duly taken upon oath in the presence of the prisoner when charged before a magistrate.<sup>6</sup> And in the case of depositions taken before the coroner, it is settled that in the cases above mentioned, they are admissible against the prisoner, though he was absent at the time of taking the inquisition.<sup>7</sup> And it has been decided by all the Judges, that in the case of an indictment for rape, the deposition of the girl, since deceased, upon whom the offence had been committed, taken on oath before the committing magistrate, might be read in evidence though it was not signed by her;<sup>8</sup> but the magistrate himself must subscribe the examinations and informations taken by him.<sup>9</sup>

Parole evidence, to add to or vary the deposition, is not admissible;<sup>10</sup> and as it is usual for the magistrate to take the deposition in writing, parole evidence of the information is inadmissible, till it is shown that it was not reduced to writing.<sup>11</sup>

There is no authority as yet in our law for holding that if a witness is alive, though unable to attend from sickness, absence, or any other cause, the declarations or depositions emitted by him before a magistrate, can be brought forward against him.

7. It is not, in the general case, competent to control or explain away a written instrument by parole evidence, but such evidence is admissible, if it be once proved that the written deed has perished without the fault of the prosecutor.

<sup>1</sup> Particularly in a case of stouthrief tried in the High Court, Ewen M'Donald and James M'Bean, March 15, 1830.—<sup>2</sup> Phil. i. 351; Hale, i. 305.—<sup>3</sup> Rex v. Ennoill, T. R. iii. 720.—<sup>4</sup> Harrison's case; State Trials, iv. 492.—<sup>5</sup> Phil. i. 351.—<sup>6</sup> Russell, ii. 660.—<sup>7</sup> Phil. i. 354; Russ. ii. 661.—<sup>8</sup> Rex v. Fleming and Windham; Leach, ii. 854.—<sup>9</sup> Russell, ii. 662.—<sup>10</sup> Per Holroyd, Thornton's case; Phil. i. 352.—<sup>11</sup> Rex v. Fears-hill; Leach, i. 202; Russell, ii. 663.

It being a general rule that the best evidence must, in every instance, be brought forward of which the case will admit,<sup>1</sup> it follows, that proof of an inferior quality, or secondary evidence, cannot be received till it is proved that no evidence of a superior quality, or what is called primary evidence, can be produced. A copy, therefore, cannot be produced if the original can be got,<sup>2</sup> and extending the same principle to the application of parole proof to written evidence, it follows that no written instrument can be controlled by parole proof, for that would be to allow the superior kind of evidence to be counteracted or explained away by the inferior.<sup>3</sup> This, however, is to be understood only of deeds properly so called, that is, contracts executed according to the formalities prescribed by law, as wills, dispositions, leases, contracts, or the like; but it does not apply to mere writings executed by a party, unless they are jottings or memorandums made out at the moment when the events to which they refer took place. It would not do, therefore, for a witness examined on oath to pull out of his pocket some written statements made out by him *ex intervallo*, and not under the sanction of an oath, or to refer to such existing in process or elsewhere; but, when on oath, he may competently refer to memorandums or notes made out at the time, which, along with his oath, form the best evidence.

But the stamp laws have no relation to criminal matters, and therefore, in a case where the libel set forth the receipt of two sums by the pannel, and in evidence of the fact, receipts on unstamped paper were tendered by the prosecutor, and it was objected, that such documents could bear no faith in judgment, the Court repelled the objection, upon the ground that all that was meant was, that an unstamped document should not be received as evidence of the transaction relative to which it was granted, in a question between the party who granted it, and the one who took it, or those deriving right from him, but by no means to deprive the public prosecutor of his right, by such informal documents, to lay the foundation for the proof of a crime.<sup>4</sup> The rule is the same in the law of England, it being there held, that written instruments without stamp may in some cases be admitted, when called on to prove something collateral, and not

<sup>1</sup> Hale, ii. 290.—<sup>2</sup> Gilb. 13 Bull, N. P. 293.—<sup>3</sup> Phil. i. 380, 600; Ves. Jud. i. 402; Jackson v. Cator, Ves. 688.—<sup>4</sup> Aaron Bramwell, July 28, 1819, Justice Clerk's MS.

for the purpose of being enforced between the parties;<sup>1</sup> and on this principle, a bill of exchange or promissory note may be given in evidence though unstamped, to support an indictment for forgery, or for the guilty uttering of a forged instrument.<sup>2</sup> The Court of King's Bench unanimously held, that a draft for payment of money might be given in evidence, though unstamped, and drawn more than ten miles from the place of payment, and therefore not legally good without a stamp.<sup>3</sup> But in another instance, where the indictment was for setting fire to a house, with intent to defraud insurers, it was held by all the judges, that though the policy was properly stamped, yet, as the memorandum on the back of the policy, stating that the goods therein contained had been removed to another house, in which last house the fire-raising was committed, was not so, the policy could not be tendered in evidence; the essence of the charge in that case, depending on the existence of a valid contract of insurance supportable in the civil Courts, which was there wanting.<sup>4</sup>

8. The mere fact of finding letters of others, indicating a criminal design, in the pannel's possession, is not evidence of his participation in it; but, if coupled with other letters of his in answer and concurring, they afford a presumption of accession, which it lies upon him to elide.

Taken purely by itself, and not confirmed by any answer from the pannel, or any circumstance in his conduct, the mere fact of finding in the pannel's possession, letters or writings of others indicating a guilty design, is of course no decisive evidence against him.<sup>5</sup> But credit cannot well be refused to a letter from the pannel, which implies a confession of his guilt, or relates or alludes to the circumstances of the fact, though the letter be found in his own pocket, or it has been intercepted before it has reached the place of its destination.<sup>6</sup> A letter, accordingly, addressed and sent to a companion of one of the pannels, and recovered from him, has been admitted as evidence against the writer at his own trial.<sup>7</sup> In such a case, it is of course necessary, that it should

<sup>1</sup> Phil. i. 553.—<sup>2</sup> Hawkwood's case, Leach, i. 292; Morton's case, East, ii. 955; Re-culist's case, Leach, ii. 811; Russell, ii. 554.—<sup>3</sup> East. i. Pl. Cr. Add. xvii.; Phil. i. 556; Pooley's case, Bos. and Pul. iii. 311.—<sup>4</sup> Rex. v. Gillson, Taunt. i. 25; Phil. i. 557.—<sup>5</sup> Hume, ii. 396; Burnet, 487.—<sup>6</sup> Ibid. Burnet, 487.—<sup>7</sup> Main and Acheson, March 25, 1818; Hume, ii. 396.



first be proved that the handwriting is the pannel's, by one acquainted with his writing; but when this is done, letters written by the pannel at the time in relation to the matter libelled, often form the most material part of the evidence against him. An instance of this occurred lately in a case of forgery, where the letters written by the pannel, at the time when the bills charged against him as forgeries fell due to different persons, for the purpose of intercepting the notices sent by the banks to the acceptors, formed the most important part of the proof of guilty knowledge against him.<sup>1</sup>

In cases of conspiracy, combination, treason, sedition, or the like, material evidence often arises from the writings of others than the prisoner himself, and the question is of importance, how far such can be admitted as evidence against him? On this important matter, the rule both by the Scotch and English law is, that when once a pannel is proved to have been a member of an association formed for a particular purpose, the proceedings of the association are evidence of more or less weight against the prisoner,<sup>2</sup> even although neither in his handwriting, nor found in his possession; for one who joins a body, associated for a particular purpose, by so doing adopts as his own all their actings, in pursuance of the general and avowed object of the conspiracy. This matter was fully considered on occasion of the sedition and treason trials, both in Scotland and England, in 1793 and 1794. In Muir's case, there was produced a passport of the Commissary of the Section of the Tuileries, in favour of citizen Thomas Muir, and a certificate dated 15th January, 1793, of his having been admitted a member of the United Irishmen in Dublin. In Skirving's case, a letter found in his possession addressed to him from Palmer, was received in evidence; and in Gerald's case, March 1794, a copy of a newspaper, authorized by the association to publish their speeches, motions, and resolutions, was without objection admitted as evidence. In the case of Downie and Watt, Sept. 1794, letters from Hardy of London, to Margarott, Skirving, and others, and from them to Hardy, were without objection received in evidence; and in like manner, in Hardy's trial in England, a letter from a member of the association to which Hardy belonged, addressed to Margarott then at Edinburgh,

<sup>1</sup> Malcolm Gillespie, Sept. 1827, Aberdeen.—<sup>2</sup> Burnet, 486, per Justice Buller, Hardy's Treason Trial, i. 365.

which had been intercepted; as also the proceedings and minutes of the association at Sheffield, and of the British Convention at Edinburgh, were admitted as evidence of the acts of the Society in London, they being all previously proved to have been implicated in the same general conspiracy.<sup>1</sup> But it was laid down at the same trial, that papers found in the possession of conspirators with the prisoner, but subsequently to his apprehension, should not be given in evidence, unless there was evidence to show their previous existence.<sup>2</sup> In a prosecution for a conspiracy, it has been found, that letters addressed to the prisoners, and intercepted at the Post Office after their apprehension, could not be used in evidence against them, as they had never been in the custody of the prisoners, or in any way adopted by them. But in Watson's case it was held, that papers found in the lodgings of a conspirator, at a period subsequent to his apprehension, might be given in evidence against him, where there was a strong presumption that his lodgings had not been entered by any one in the interval between the apprehension and the finding, and the papers were intimately connected with the objects of the conspiracy as detailed in evidence.<sup>3</sup>

It is no objection, that such papers have not been published, to their being used in evidence. In Algernon Sidney's case, the ground of objection was, not that the papers had never been published, but that they did not relate to the treasonable matters charged in the indictment;<sup>4</sup> and the rule now is, that writings plainly applicable to some treasonable design in the indictment, may clearly be given in evidence of such design, though not published.<sup>5</sup>

9. An article may be produced by a witness, and referred to in his deposition, although not libelled on as a production; but in such a case, it must be taken away by the witness who refers to it, and cannot be shown to the others, or left with the jury, or made a production in the proper sense of the word.

The rule, that no document, production, or article whatsoever can be used in evidence, if it is not previously libelled on, is a

<sup>1</sup> Per Buller, Hardy's trial, i. 365; and Burnet, 487.—<sup>2</sup> State Trials xxiv. 452.—

<sup>3</sup> Stark, ii. N. P. C. 140.—<sup>4</sup> Per Abbot in Watson, Stark, ii. 147.—<sup>5</sup> East, Pl. Cr. 119; Russell, ii. 702.

sacred principle which admits of no modification. But it is altogether a different thing, if the witnesses produce an article of evidence in the course of their testimony to illustrate it, or refresh their own memory, which is not laid by them on the table of the Court to be exhibited to other witnesses, or examined by the jury, but carried away by them after their testimony is concluded. In such a way it is competent to produce an article of evidence, or exhibit it to the jury, although it is not libelled on or described in the indictment as a production.<sup>1</sup> On this principle it is competent to refer to notes or memorandums made at the time, to refresh the memory of the witness; or to produce books or other documents, to enable him to speak with accuracy to dates, figures, or other details; or to produce the staff or weapon with which an injury was inflicted, although none of these articles have been libelled on as productions.<sup>2</sup> Accordingly, it has been decided, that after a witness had been rejected, upon the ground of having been improperly designed, he may still be brought into Court and exhibited to or by one witness, it being understood of course, that if once made use of in this way, he is not again to be exhibited to any other witness, or at all used as a production.<sup>3</sup> Nothing is more common, accordingly, than for witnesses to bring their jottings or articles of evidence which are not libelled on as productions, but which they exhibit to the jury to illustrate their own evidence, and take away with them when they leave the box. An instance occurred where this was objected to, but held competent in a case where the pannel was charged with malicious mischief, by throwing vitriolic acid on the cushions of a carriage, whereby it was corroded. The prosecutor, not knowing that the injured cushion was in existence, had not libelled on it as a production; but the coachman, who was cited as a witness, brought it with him, and he was allowed by the Court to exhibit it to the jury to illustrate his evidence, upon condition that he took it away with him after it was closed.<sup>4</sup>

<sup>1</sup> Hume, ii. 394.—<sup>2</sup> Ibid.—<sup>3</sup> Hill, Boyd, Hay, April 22, 1822; Hume, ii. 394.—

<sup>4</sup> Colin Campbell, Sept. 1823, Inverary.



## CHAPTER XV.

## OF PROOF IN EXCULPATION.

THE ample commentary already given on the subject of parole proof renders any lengthened commentary on the rules of proof in exculpation unnecessary. A few simple rules will embrace all that it is necessary to add on this head.

1. The plea of *res judicata* is good to form a bar to a new trial, if it appears that the former one, whether it terminated in a conviction or acquittal, was *bona fide* raised and regularly gone through before a competent Judge, that it related to the offence which is now a second time brought *sub judice*, and if it proceeded through all its stages, to a sentence condemnatory or an acquittal.

The plea of *res judicata* is not unfrequently advanced by prisoners, either upon the ground of their having been already tried and convicted for the offence with which they are now charged, or having obtained the benefit of an absolutor from the charge. The effect of such a plea in either case, if sustained, is the same, amounting to a clear bar to trial, if well founded, but on that very account the more necessary to be scrupulously and minutely examined, lest, under its cover, the most flagrant offenders should escape with a nominal or inadequate punishment.

Upon this important matter the following rules are observed:—

1. If the Lord Advocate, or the party injured, have prosecuted in the Justiciary Court, whether at Edinburgh or on the Circuit, unquestionably he must be content with the result which he has obtained, and cannot molest the pannel with any new proceedings in relation to the matter libelled.<sup>1</sup> Nor will it alter the case although the name of the offence be changed, as by charging as homicide or murder, what was formerly libelled on under the name assault; or as theft, or breach of trust, what was

<sup>1</sup> Hume, ii. 479.

formerly the subject of trial under the name of robbery, or the like. The Court will not permit the important principle that no man is to be tried twice for the same offence, to be evaded upon such flimsy grounds; and the prosecutor has himself to blame if he has been so negligent in his conduct of the case, or so hasty in instituting proceedings in regard to it, that he has brought on a trial, when the nature of the case which was to be the subject of trial was not fully understood, and the prisoner in consequence has escaped with an inadequate punishment, or no punishment at all, from the offence having been charged under an erroneous denomination.<sup>1</sup>

2. Even although the proceedings have taken place in an inferior Court, and at the instance of the private party, with concurrence of the public prosecutor, the same effect will follow, if they have truly amounted to a trial for the *species facti* again brought under discussion, though under a different denomination, and not to a trial for a totally different offence.<sup>2</sup> In a late case, accordingly, where the pannel was charged with a violent assault on the person of Thomas M<sup>c</sup>Innes, one of the borough officers of Canongate, the plea of *res judicata* was sustained in respect of a decree for £5 sterling of damages given by the Judge of the Police Court, on a complaint at the joint instance of the private complainer and the Procurator-fiscal, charging him with that assault.<sup>3</sup> This precedent was followed by the public prosecutor, and perhaps pushed to an undue length, in a still later case, where the offence charged was different from the one on which the former conviction had taken place, in respect they related to the same *species facti*. The prisoner was there charged with murder, and in bar of trial, there was put in a conviction, at the instance of the Procurator-fiscal, for *assaulting* the person who afterwards died of his wounds, on the occasion and in the place libelled, which had been tried before the Police Court, and terminated in a fine of half a guinea. Nothing could be more obviously inadequate than the punishment was to the offence now charged; but as it related obviously to the same occurrence, the Court certified the objection from the Glasgow Circuit, where it was stated, to Edinburgh, and the case was no farther insisted in by the public prosecutor.<sup>4</sup> This case shows how extremely cau-

<sup>1</sup> Per Lord Pitmilley, in *Christian Paterson*, Dec. 22, 1823; unreported.—<sup>2</sup> *Hume*, ii. 479; *Burnet*, 588; *Hume*, ii. 466.—<sup>3</sup> *Jas. Watt*, Feb. 16, 1824; *Shaw*, No. 114.—

<sup>4</sup> *John Robertson*, Glasgow, Dec. 1831.

tious inferior judges should be, in interfering with cases either of a serious nature, or where the real complexion of the case, or the ultimate consequences of the injuries, have not been fully ascertained; and how easily, by a want of due caution in this particular in the Police Court, the greatest criminals may escape with a totally inadequate punishment.

3. But in judging, whether the new offence charged is or is not the same as a former one, on which judgment has already been pronounced in an inferior Court, the Court can look only to the record, proved by production of itself or a regular extract, and cannot admit parole proof to establish, that an offence with which a pannel is charged at the bar, is in reality the same as one bearing a different denomination which was formerly the subject of trial. This rule was aptly illustrated by the case of Christian Paterson, already noticed. This woman was charged with murder or assault; and it was objected to the trial, so far as the charge of assault was concerned, that the pannel had been already punished by thirty days' confinement in Bridewell for that very offence. Upon production of the conviction, however, it appeared that she had merely been punished for "drunkenness, fighting, and returning from banishment," on the occasion libelled; and as these charges were all *ex facie* different from those contained in the indictment, the Court held unanimously, that the trial might proceed, and that the parole proof offered, that they both related to the same transaction, was inadmissible.<sup>1</sup> It is worthy of observation, that in this case, the plea of *res judicata* was only stated against the charge of assault, and not against that of murder, though the pannel was defended by the acutest criminal lawyers at the bar;<sup>2</sup> a fact which renders it extremely doubtful, whether the prosecutors were not unduly timorous, when they did not insist at least in the charge of murder in the case of John Robertson already mentioned; or whether there is any rational ground on which, when an offence so totally different emerges as that of murder from a Police assault, the plea of *res judicata* can be sustained against the heavier charge, even on the clearest possible evidence from the record of the previous proceeding having related to the same criminal acts.

However this matter may stand, when it is brought under the view of the Court, it is quite clear, that the plea of *res judicata* cannot be founded on a criminal proceeding at the instance of the

<sup>1</sup> Christian Paterson, Dec. 22, 1823; Justice-Clerk's Notes.—<sup>2</sup> Messrs Jeffrey and Menzies.



private party, though with concurrence of the Procurator-fiscal, if it has not terminated in a punishment *in vindictam publicam*, but in a fine or assythment to the private party, in name of *solatium* or damages.<sup>1</sup> The lines of separation between civil and criminal actions are quite distinct, and neither can be pleaded as a bar to the other; a sentence of death for murder will not exclude a claim of damages and assythment, at the instance of the injured party; and in like manner, a decree of damages and assythment cannot exclude the right of the public prosecutor to insist for public punishment.<sup>2</sup>

4. Neither his Majesty's interest, nor that of the individual, however, can be affected by any previous conviction or acquittal in an inferior Court, unless it was obtained in a serious and regular trial, truly calculated to answer the ends of public and private justice.<sup>3</sup> If this were not the rule, it would be in the power of private parties, by means of simulate or collusive actions, to defeat altogether the administration of public justice. This obtains even in case of a prosecution at the instance of the Procurator-fiscal, if the proceedings appear to have been of a doubtful character, and the punishment plainly incommensurate to the offence which really was committed.<sup>4</sup> Still more will the same hold if the prosecution was at the private instance with concurrence only of the Procurator-fiscal, in which form, as the private party is the real *dominus litis*, collusion, or improper proceedings, will be much more readily presumed than in those that are at the instance of the public accuser.<sup>5</sup>

5. To substantiate the plea of *res judicata*, the former proceeding must be one subject to no inherent vice, or fatal irregularity; it must have been regularly and orderly conducted, and terminated in a conviction and sentence, or acquittal, which cohered with and was legally adapted to the charge preferred.<sup>6</sup> If, therefore, there has been some inherent and radical vice in the prior proceedings, such as taints them altogether, and renders them, in the estimation of law, no legal proceedings at all, as if one of the jurymen was a minor, and, therefore, only fourteen legal jurors have sat upon the assize;<sup>7</sup> or if one of the jurymen has been taken

<sup>1</sup> John McNeil, Perth, April 1826, per Lord Pitmilley, unreported.—<sup>2</sup> Hume, ii. 480.—<sup>3</sup> Ibid.; Burnet, 588.—<sup>4</sup> Innes of Dunkinty, Nov. 20, 1723; Hume, ii. 480; John Higgins, July 11, 1723; Ibid.—<sup>5</sup> William Paterson, Dec. 9, 1751; John Brymer, Feb. 7, 1676; George Hardie, Jan. 9, 1677; Hume, ii. 481.—<sup>6</sup> Burnet, 588; Hume, ii. 466.—<sup>7</sup> John Sharpe, March 5, 1821; and Menzies, Dec. 1790; Hume, ii. 469.

ill so as to render the conclusion of a former trial, after the evidence had proceeded a certain length, impossible ;<sup>1</sup> or if the proceeding referred to was before a single justice of peace, instead of *two or more* justices, as required by law ;<sup>2</sup> or if the verdict in the former case has been accidentally lost in the hands of the chancellor, or burnt, or so defaced as to be illegible.<sup>3</sup> In all these and the like situations, the plea of *res judicata* cannot be maintained, and the pannel may be put on his trial a second time, because the prior proceedings were not such as any legal consequence, one way or the other, can be attached to.<sup>4</sup> But if the former proceeding was regular so far as the trial was concerned, and merely failed from an error in the locus laid, or the name of the person injured, or the like, it is held that as this is not a supervening accident, or inherent and irremediable vice, but a blunder *constructione juris*, to be imputed to the prosecutor, or those for whom he is responsible, the pannel is entitled to take the benefit of the former trial such as it was, and cannot be again put on his trial for the same facts under an amended denomination.<sup>5</sup>

6. The obtaining of a verdict either condemnatory or of absolutor on a criminal, either at the instance of the public prosecutor or the private party, is no bar to an action being raised by the injured party for reparation of the patrimonial injury in the civil Court ; and, in that process, the civil Judge is not to receive the judgments of the criminal Court as evidence one way or the other, but is to remit the case for trial by jury just as if no criminal proceedings at all had occurred.<sup>6</sup> This is the counterpart of the rule, also well established, already noticed, that an absolutor or sentence condemnatory, though in the criminal Court, yet, on the civil conclusions of the libel, can afford no bar to a criminal prosecution for the same facts ;<sup>7</sup> and both proceed on the great lines of distinction between civil and criminal proceedings, and the separate evidence to which each looks to support its own judgments.

2. The nearest relations of the pannel, with certain exceptions, are admissible in his favour.

It has been already mentioned, that how unwelcome soever

<sup>1</sup> Mary Elder or Smith, Feb. 12, 1827 ; Syme's cases.—<sup>2</sup> William McLellan, Sept. 14, 1824 ; record.—<sup>3</sup> Hume, ii. 470.—<sup>4</sup> Hume, ii. 470.—<sup>5</sup> John Hannah, Nov. 4, 1806 ; Hume, ii. 466. Eut see ante, ii. 287.—<sup>6</sup> Hume, ii. 479 ; Kilk. No. 2, Res Judicata.—<sup>7</sup> Ante, ii. p. 66.

the necessity, the nearest relations may be called upon to give evidence *against* their kinsmen at the bar.<sup>1</sup> Of course, the same rule holds when called in exculpation; and, accordingly, nothing is more common than to see the parents, brothers, sisters, and even children of pannels, above the years of puberty, adduced in their favour.<sup>2</sup> Without going back to older precedents, suffice it to say, that a pannel's mother was admitted in one case of recent date,<sup>3</sup> his father in another,<sup>4</sup> a brother in a third,<sup>5</sup> a sister in a fourth,<sup>6</sup> and a daughter of the age of sixteen in a fifth.<sup>7</sup> The calling of brothers and sisters is now become so common on the part of pannels, that it is almost matter of daily practice; though, unfortunately, seldom with any good effect to the prisoner, because they are usually adduced to support some incredible or absurd story of *alibi*, which carries its own refutation on its face.

3. Husband and wife, and children under the age of pupilarity, are mutually inadmissible when called in behalf of their parents.

To the general rule regarding the admissibility of near relations in favour of each other, there are the same exceptions as when they are adduced against their relations in the case of husband and wife, and minor children. It is settled that the wife or husband of a pannel can no more be examined for than against the other spouse at the bar;<sup>8</sup> and that as it is not competent to examine husband or wife personally in such a case, so neither is it competent to produce any declaration emitted by them, or any words spoken by them on a previous occasion.<sup>9</sup> On the same principle, it is incompetent to call, for one of the pannels, the wife of another pannel, also at the bar for the same act.<sup>10</sup>

It is equally settled that a child, under the years of pupilarity, is as inadmissible for as against its parent,<sup>11</sup> being deemed incapable of exercising the option requisite on such an occasion.<sup>12</sup>

4. The objections of nonage, infamy, tutoring, interest,

<sup>1</sup> Ante, ii. p. 460.—<sup>2</sup> Hume, ii. 400, 401.—<sup>3</sup> Ferguson, Glasgow, Autumn 1829; *ibid.*—<sup>4</sup> James Colquhoun, Dec. 26, 1826; Syme, 50.—<sup>5</sup> Matthew Clydesdale, Oct. 1818, Glasgow.—<sup>6</sup> William Buchanan, Aberdeen, Spring 1823.—<sup>7</sup> Eliz. Goodwin, Oct. 1, 1819; Hume, ii. 401.—<sup>8</sup> Smith and Stevenson, Dec. 8, 1806; Hume, ii. 400.—<sup>9</sup> William Goldie, July 13, 1804.—<sup>10</sup> George and Robert Wilson, Dec. 18, 1826; Syme, 40.  
<sup>11</sup> *Ibid.*—<sup>12</sup> Hume, ii. 401.



and the like, are the same in proof in exculpation as in that adduced for the prosecution.

Disqualifications or discrediting circumstances of this sort, are obviously subject to the same rules on whichever side of the proof they occur. The agent for the pannel has been held to be an incompetent witness in his behalf, or even on behalf of his associate at the bar charged with the same crime ;<sup>1</sup> a decision which, without doubt, is well founded in relation to such matters as fell under his knowledge as agent ; but which would probably not be extended to such cases, not often likely to occur, where the agent is called to speak to certain facts which came to his knowledge *tanquam quilibet*, before his agency commenced. As to these he seems competent, under reservation of his credibility, in consequence of the subsequent bias which his employment may be supposed to have occasioned.

It has been already noticed, that where it is desired by one of the pannels, the trial of his associate will take place in the first place, in order that if acquitted, he may have the benefit of his evidence when he himself is put upon his defence ;<sup>2</sup> and this has been frequently done of late years. But what shall be said if one pannel in exculpation leads proof tending directly to throw the guilt of the transaction upon his associate ? This very frequently occurs ; because, where the prosecutor has established the *corpus delicti* against all the pannels, and brought it home to them all generally, they endeavour to throw the crime on each other by proof led in exculpation, with the professed design merely of liberating themselves. This occurred in one case, where it was objected for one of the pannels, that the writings proposed to be adduced for the other went to criminate him, and that it was only competent for the prosecutor to do this ; but the Court allowed the production objected to.<sup>3</sup> In a still later case, where forgery was charged against two pannels, and uttering against one of them only, proof was offered by the one charged with the forgery only, that the forged signatures were all traced upon the window upon genuine signatures by the party charged with the uttering ; and this was strongly objected to by the counsel for the other party, as tending to fix the whole crime upon him to an extent not even attempted by the prosecutor ; but the Court al-

<sup>1</sup> O'Neils, March 19, 1801 ; Hume, ii. 402 ; Burnet, 584.—<sup>2</sup> Ante, ii. p. 241, 242.

—<sup>3</sup> Clerk and Brown, Nov. 9, 1802 ; Hume, ii. 402.

lowed the evidence, with the observation, that what was proved by one pannel could not be evidence against the other, however powerfully it may operate in his own favour.<sup>1</sup> In such cases, it is no doubt true that the proof led by one pannel may often prejudice, and most seriously prejudice, the case of the other; because, however much the Court may lay it down to the jury, that they are not to allow their minds to be influenced by any thing proved by any prisoner except in his own favour, it is perfectly impossible but what the jury, if they see the crime clearly fixed by credible testimony on one of the pannels, even though adduced by his associate, should not view his case with a very different impression from what they would have done if no such evidence had been adduced. But such a result is unavoidable, and is the counterpart of a corresponding advantage which one prisoner sometimes gains, and rightly gains, from his associate in his declaration, or elsewhere, taking the whole blame of the transaction on himself. Undoubtedly, however, if a jury do take such evidence into consideration, they should do so with the utmost possible caution; recollecting that it is brought forward by one prisoner under the pressure of the strongest motives to fabricate false testimony, and often supported by their associates and others; witnesses of all others the most likely to lend themselves to an attempt of that description.

As to associates, or supposed associates, against whom there is as yet no libel at all in Court, the pannel is not entitled to insist that they should be brought to trial before he is disposed of.<sup>2</sup> There is no authority for holding that such persons are incompetent witnesses for the accused; though it is seldom of course that they are adduced, because they have no protection, when called for the pannel, from a prosecution at the instance of the Lord Advocate, and seldomer still that their testimony, coming from so polluted a channel, can have any weight with a jury.

5. If the pannel has occasion to call for writings in exculpation, the Court will grant such a diligence in addition to the usual one for the citation of witnesses.

If the pannel has occasion to found on writings not in his own custody, he of course requires the aid of a diligence for that pur-

<sup>1</sup> Malcolm Gillespie and J. Skene Edwards, Aberdeen, Autumn 1827.—<sup>2</sup> Hume, ii. 402.

pose. This is granted, whenever demanded, by the Court; an instance of which occurred, if necessary to cite an authority for so simple a matter, in the case of Mackenzie and Others, Dec. 30, 1802.<sup>1</sup>

6. It is not competent to refer the verity of the charge to the prosecutor's oath, either in public or private prosecutions.

It is evident that it would be fruitless to allow a reference by the pannel to the oath of the prosecutor in those cases where the case is taken up at the public instance, because he knows nothing of it but from the information laid before him, and, of course, cannot be expected to depone on such a reference.<sup>2</sup> And even in cases where the prosecution is at the private instance, there seems to be no authority for any other safeguard than the oath *de calumnia* already commented on, which may always be tendered to the prosecutor.<sup>3</sup> Baron Hume, indeed, hesitates as to whether such a reference may not be competent on a special point, which has emerged in the case, known to the prosecutor alone,<sup>4</sup> but though there seems much reason in the opinion he expresses, it is not as yet countenanced by any decision of the Court.

7. The declarations by the sufferer under the enquiry complained of on death-bed, or at any time after it was received, if he has since died, may be given in evidence for the prisoner.

As evidence of this description is competent against a pannel, and often forms the most material part of the proof against him, it must of course be admissible in his favour;<sup>5</sup> and indeed it must be regarded as even of more weight when it inclines in the pannel's favour than when it is adduced against him; because in such a case it is brought forward in opposition to the natural and allowable resentment which he may be supposed to feel for the injury he has undergone; whereas, in the former, such declarations are clouded by the influence, more or less, which such feelings may be supposed to have had. It is matter of established

<sup>1</sup> Hume, ii. 402.—<sup>2</sup> Hume, ii. 403.—<sup>3</sup> Ante, ii. 115.—<sup>4</sup> Hume, ii. 403.—<sup>5</sup> Hume, ii. 479; Samuel Hale, Dec. 23, 1726.



law, accordingly, that the pannel may prove in his own favour every word which comes out of the mouth of an injured party in the interval between the injury and his death.<sup>1</sup> For the same reason, it is competent for the pannel to call for, or produce the deposition or declaration of a deceased witness which he deems material to his defence;<sup>2</sup> but though such depositions have been taken, they are incompetent evidence for the pannels equally as the prosecutor, even with the consent of the opposite party, if the witnesses who emitted them are still alive, even though they cannot attend the trial.<sup>3</sup>

As to the delicate question how far it is competent on either side to contradict a witness on oath by examining him or others as to statements formerly emitted not upon oath, it is sufficient to refer to the ample circumstances in the Chapter on Parole Proof.<sup>4</sup>

8. The defence of alibi is of all others the most decisive when duly substantiated; but the evidence adduced in support of it requires to be minutely considered, and the plea is not to be sustained, unless the circumstances were such as to render it impossible that the crime could have been committed.

One of the most ordinary pleas resorted to by a pannel is that of alibi; and doubtless when duly qualified and fully proved, it is among the most effectual of any; but it requires to be carefully scrutinized, both as to the sufficiency of the evidence and the inference to be drawn from the facts, if fully proved; because the plea is not conclusive unless the alibi is circumstanced and qualified in such a manner as makes it not only unlikely, but impossible, that the pannel could have done the deed at the time and place libelled; because the proof of alibi is in most cases a direct impeachment of the veracity of the prosecutor's witnesses, which is not to be admitted on light grounds, and because, it is a plea of that short and simple sort, with respect to which the pannel's witnesses can easily contrive an uniform and false story, such as the prosecutor cannot well disprove, as he can cite no new witnesses in reply.<sup>5</sup> Indeed all the circumstances may be true,

<sup>1</sup> Hume, ii. 409; Reid, March 1784; Burnet, 589.—<sup>2</sup> John Downie, Dec. 12, 1774; Hume, ii. 410; Carse and Orr, Glasgow, Spring 1775; Burnet, 589.—<sup>3</sup> Hugh Chalmers and Others, June 14, 1813; Hume, *ibid.*—<sup>4</sup> Ante, ii. p. 522, 523.—<sup>5</sup> Hume, ii. 410, 411; Burnet, 596.

and the falsehood lie only in applying them to a different day or hour from that on which they actually occurred; and it is by that contrivance that pleas of alibi are in general rendered so difficult to disprove. For these reasons, there is no defence which requires to be so minutely considered or in which the searching force of able cross-examination is frequently more required.

It is a general principle in the first place, that alibi is not to be sustained as a defence, unless it renders it *impossible* that, if true, the offence could have been committed by the prisoner.<sup>1</sup> On this ground it was repeatedly found at the time when special interlocutors of relevancy were in fashion, that an averment that the prisoner was at a different place from that mentioned in the libel, *near to*, or *about* the time when the offence was committed, could not be admitted to proof, unless the distance or other circumstances were such as rendered it *impossible* that the prisoner could have been at the place libelled at the time set forth in the indictment.<sup>2</sup> Thus, in a case where persons were indicted for riotously plundering a ship in the harbour of Leven, but it appeared that their houses were situated hard by, and they did not specify the hours when they were at home, their defence of alibi was passed over without notice.<sup>3</sup> In like manner, in another instance where alibi was proponed as a defence, it was disregarded, because all that the pannels offered to prove was, that they were in bed on the night libelled, at eleven o'clock, and were found in bed next morning after the fire-raising with which they were charged had taken place; in respect the distance was only two miles, and they might have risen, committed the deed, and returned to bed.<sup>4</sup> In another instance, the same plea was disregarded where the pannels were charged with accession to the great tumult at Glasgow in 1725; in respect that the defence only stated that on the day libelled, they were at Earston, three miles from Glasgow, at twelve, at the same place at four in the afternoon, and at seven in the evening at Rutherglen; and that none of these allegations rendered it *impossible*, but only improbable, that the pannels should have been at Glasgow in the intervals between these hours.<sup>5</sup> And accordingly, when it was stated in additional defences put in for these parties, that they were at Long Calderwood at two o'clock of the same afternoon, and at Upstart Hall at

<sup>1</sup> Hume, ii. 411; Burnet, 596.—<sup>2</sup> Burnet, 596; Hume, ii. 411.—<sup>3</sup> Andrew Fairney and Others, July 25, 1720.—<sup>4</sup> Wm. and Alex. Fraser, Nov. 8, 1720.—<sup>5</sup> James and William Darrach, Oct. 1725.

three o'clock, and that both these places were *six* miles from Glasgow. The Court found "the cause relevant to exculpate the pannels from any facts alleged to be actually done by them *during the said time.*" Many more illustrations of the same rule are given by Baron Hume.<sup>1</sup>

In the next place, it is essential that the plea of alibi shall be adequately *proved*. In judging of this matter, the Court and the jury have chiefly to consider the character of the witnesses who speak to the fact, the manner in which they give their evidence, and the comparative weight due to them, and the witnesses for the prosecution. It is frequently no easy matter, even by the most skilful examination, to detect the falsehood of an alibi. By making the witnesses speak to the events which really took place on a particular day, and merely applying them to the day libelled, they are sometimes able to present a story to the jury which hangs remarkably well together in all its parts, and wears all the air of truth, because the events described are true in themselves in relation to each other, and only false when applied to the particular day in question. The only way in which it is possible to expose an artfully got up imposture of this description, is by a minute and rapid cross-examination of the witnesses applied to the circumstances previously detailed in evidence by the witnesses for the prosecution, in order to detect falsehood in some inconsiderable and not previously considered particular. Frequently the trick may be exposed by asking the alibi witnesses, after they have fully and minutely narrated the events of the day libelled, to give an equally detailed account of the preceding and succeeding days; and their total inability to do that, shows that with reference to that particular day they must have been practised upon. Of course the weight due to their testimony is increased if they can point out some particular circumstance, as by an examination before the magistrate a few days after, in relation to the matter libelled, or by hearing that the accused was apprehended upon the charge, and being thus led to turn what they knew of it over in their own minds, which led to its being fixed in their memory; or if they can exhibit some entry in an account or written document duly proved, and bearing the marks of authenticity which confirms their story as to date or time. But, after all, the jury are frequently reduced to the difficult and painful duty of weighing the testimony on the one side against those on

<sup>1</sup> Hume, ii. 412, 413; and see Sympson, No. 22, No. 29, No. 32.



the other; and in doing so, it is their duty, on the one hand, to recollect that the presumption of law as well as of justice is against the prosecutor, and therefore that if the evidence on both sides is equal, or nearly so, they should incline to the side of mercy; and on the other how much more easy it is to get up a false story of alibi, where the whole to be proved is the presence of the prisoner at a particular place at a particular time, than a false account of all the minute particulars relating to so many different matters, which is necessarily implied in the proof of a false charge against a prisoner.

9. Identity of person is frequently a matter of the greatest importance to the prisoner; and in weighing the evidence on that head, the jury should rather consider the identification which took place at the time, or shortly after the time, when the events libelled took place, than what takes place *ex intervallo* in their presence, after the dress or look of the prisoners may have been changed, or the strength of their own recollection diminished.

In every trial the prisoner must be proved to be the man who committed the offence libelled; and therefore the rules in regard to identification constitute a material part of his defence. As the prosecutor may, and generally must, bring evidence to fix the identification on the prisoner of being the man who committed the acts libelled, so the pannel may bring evidence of an opposite description, either to show that he was not the person, or that the proof on the other side is counterbalanced by still more credible evidence of an opposite tendency. Important questions frequently arise on this point, in regard to which little information is to be derived from the books.

Where the question is a direct one of identity, it is by no means necessary that two witnesses should speak to that fact explicitly. Frequently one witness swears directly to the man, and another says he resembles him, but he cannot swear he is the same. Certainly this, along with some other circumstance, as vicinity to the spot, finding the stolen goods upon him or the like, is sufficient proof of identity. In estimating the comparative weight due to oaths on the subject of identity, it is of importance to recollect that recognition is much more probable, and mistakes in regard

to identity are much less likely *de recenti* than *ex intervallo* ; more especially as, on the first occasion, the dress of the parties is generally the same as when the events in question took place ; whereas on the latter it is usually altered, and their appearance has frequently undergone a change from the effects of confinement. On this account, the material point for the prosecutor to establish is, that the prisoner was recognised as the man by the witnesses, when examined in precognition soon after the injury ; and their testimony on that head may be received and considered, even although they can say nothing as to the prisoner at the bar, provided the prosecutor prove that that was the man shown them before the magistrate ; for in so doing they narrate the *res gesta*, and a most important part of the *res gesta* connected with the case.

In regard to the point whether the prisoner is entitled to insist that he shall be removed from between the policemen or soldiers who form his guard, the rule is that it is competent to do this where the prosecutor consents ;<sup>1</sup> but that it cannot be insisted in by the prisoner as a matter of right, if the prosecutor does not consent.<sup>2</sup> It is always a most hazardous thing for the counsel for the prisoner to propose ; for if the witnesses for the prosecution pick out the prisoner out of the crowd when so removed, it is decisive as to his identity ; whereas if they merely identify him when he is standing between the officers, he has always the observation to make to the jury that his being in that situation helped them to believe he was the same.

Sometimes the witnesses say that they recognised the person shown them in precognition to be the person referred to in their evidence, but that they cannot say that the prisoner at the bar is the same whom they saw when formerly examined. In such a case, it lies upon the prosecutor to prove that he is so, and then the chain is rendered complete.

It was once decided that a prisoner is not entitled, as a matter of right, to have access by his counsel to examine the witnesses in custody for the prosecution.<sup>3</sup> But usually this is indulged as a matter of course by the Crown agent, who allows the prisoner's agent and counsel to attend to precognosce those who are in jail, and to be adduced as witnesses, in presence of one of his own

<sup>1</sup> Bell, July 23, 1800 ; Walker, July 20, 1801 ; Burnet, 594.—<sup>2</sup> Crichton, Perth, Autumn 1803 ; Burnet, *ibid.*—<sup>3</sup> M'Pherson, Jan. 7, 1808, Inverness.

clerks, or some official person, to prevent improper practices being applied to them.

10. Evidence as to character is of weight in a doubtful case, and is always competent; and in cases of homicide, assault, rape, or the like, the pannel may lead evidence as to the temper of the injured party.

Common sense demonstrates that in all cases, where the scales of evidence hang at all even, proof of character must be of considerable weight; because it is far more unlikely that a person of good character would commit a disgraceful offence than one of abandoned or dissolute habits. For these reasons our practice uniformly admits a proof of good character on the prisoner's part, although it only allows, in very special cases, evidence of bad character to be led by the prosecutor, and that only when it specially has reference to the charge in hand, as habit and repute to one of theft, or previous conviction to any offence. The rule of evidence is still stricter; the prosecutor is never allowed to refer to the proved bad character of the prisoner as heightening the probability that he has been guilty of any particular criminal action; while the prisoner is always allowed to refer to the character he has established, if favourable, as casting the balance in his favour in a doubtful case.<sup>1</sup>

From its very nature, however, such proof of character can be available only in doubtful cases. If the facts of the libel are clearly established, and the felonious intent is evident, as if the stolen goods are found in his custody, and he is identified as the thief by the person from whom they were taken, it is obviously in vain for him to refer to his general character, as rendering it unlikely that he committed that proved offence. But in cases of a more doubtful complexion, as where there is a doubt as to the veracity of the prosecutor's witnesses, proof of character often interferes with decisive effect in the prisoner's favour. This is in an especial manner the case in all those instances where the facts are proved or admitted, and the question is *quo animo* they were committed; as if stolen goods are found in his custody, or money suspected to be embezzled is traced into his possession. Honesty and integrity of character are of the greatest moment in all such

<sup>1</sup> Burnet, 591; Hume, ii. 413.



cases, in supporting any account which he may be able to give as to the innocent or unintentional possession of such articles.

In cases of assault or homicide *in rixa*, the character of the prisoner as a man of an easy temperament, not likely to be ruffled or put into a passion, is obviously of great importance in determining the question, often involved in obscurity, by whom the affray was commenced, or who was most to blame during the progress. Such proof accordingly is clearly competent;<sup>1</sup> and has been frequently admitted in practice.<sup>2</sup> For the same reason, the pannel's former acts of aggression, if violent and repeated, and especially if recent, are just grounds of presumption against him, as they show the true character, the *quo animo* of the fatal blow.<sup>3</sup> Such matters, accordingly, may always be proved by the prosecutor *de recenti*, and even for a remote period, if libelled on under the name of previous malice; and in every case, if the pannel begins to cross-examine or point to evidence as to his peaceable character, the prosecutor, till his proof is closed, may rebut it by contrary evidence.

Sometimes a proof of the character of the party injured is competent in relation to the matter libelled. Thus in assaults or homicides *in rixa*, proof of his quiet peaceable temper is competent,<sup>4</sup> and has been frequently admitted.<sup>5</sup> In cases of rape also, the character of the woman may competently be enquired into, as it enters into the essence of the question whether the connexion was forced or voluntary.<sup>6</sup> In several cases such proof has been admitted, both of general loose behaviour, and specific acts of impropriety, though at the distance of years before;<sup>7</sup> and they enter so deeply into the essence of the case, that their relevancy and competency can never be the subject of dispute.

<sup>1</sup> Hume, ii. 413; Burnet, 591.—<sup>2</sup> M'Ghie, Jan. 17, 1791; Burnet, 591; M'Caughie and Brown, Dumfries, Spring 1824; Justice-Clerk's notes.—<sup>3</sup> Hume, ii. 413.—<sup>4</sup> Hume, ii. 413; Burnet, 591.—<sup>5</sup> M'Caughie and Brown, Spring 1824, Dumfries; Justice-Clerk's notes.—<sup>6</sup> Burnet, 592; Hume, ii. 413.—<sup>7</sup> Swords, May 1769, Glasgow; Smith April 1805, Glasgow; Burnet, 592.

## CHAPTER XVI.

## OF THE VERDICT OF ASSIZE.

The subject of the verdict of the assize was formerly one of the most complicated of the law, and innumerable were the examples, in which, after the instances had been completely proved, the greatest criminals escaped from some informality on the part of the assize in drawing up their verdict. But from these evils we have been effectually delivered by Sir William Rae's act, which has introduced such salutary improvements into all the branches of our criminal practice, and in none more than this, by the abolition in general of written verdicts; and the niceties of the old law in this particular, now become the subject of curiosity rather than practical use, may safely be dismissed with a very brief examination.

1. No adjournment of the assize is competent, after they have once been sworn to try the case, except on special grounds, and then under the safeguard of due precaution against any intercourse with its members.

The necessity of preserving the jury clear from all tampering, solicitation, or corrupt practices, during the progress of a trial, has led at common law as well as by the force of statute, to the rule that there can be no adjournment in the general case after the assize is sworn; but they must be kept by themselves, apart from the world, and without any extraneous intercourse from the time they are first sworn till their verdict is delivered.<sup>1</sup> So far is this just and necessary rule carried in practice, that in the case even of interruption owing to unavoidable accident, as the sudden illness of a juryman or the pannel, there can be no adjournment of the sitting, nor any continuation of the trial with the same assize, but the jury must be discharged, and a new jury balloted on a subsequent occasion from the same assize to try the case afresh. This point was settled in a case which was brought by

<sup>1</sup> 1587, c. 91; Hume, ii. 414, 415.

motion in arrest of judgment from Glasgow, where the diet of a trial had been adjourned till next day from the illness of a jurymen, the Court found, "that after the jury was sworn, and charged with the pannel, the trial ought not to have been adjourned, but that, from the necessity of the case, the jury ought to have been discharged, and the pannel subjected to a new trial; and therefore in this case, as the jury separated after they had been sworn, find the proceedings null and void."<sup>1</sup> The law has been applied in the same way in a still later case, which received the greatest consideration.<sup>2</sup> In England, it is also settled, that if the proceedings be interrupted by the illness of a jurymen or prisoner, the jury must be discharged, and the prisoner sent to a new jury.<sup>3</sup>

This peremptory rule, however, is to be understood only of such adjournments of the assize as lead to their *separation*, and being mingled with their fellow-citizens. It does not apply to the adjournment for half an hour or so, under the eye of the Court, and the inspection of their macer, for rest, refreshment, or other necessary purposes, when they do not leave the box or the adjoining room, and have no intercourse with others. This takes place every day in long trials. Nay, it has been held to be no objection to a trial, that one of the jurymen, on such an adjournment, had gone home for a short time, and reached his lodgings, and begun to converse with his landlord, though not upon the subject of the trial, this being all previous to their being enclosed, and obviously no *mala fides* in the case.<sup>4</sup> In cases of extreme fatigue, the Court may adjourn till next day; the jury in the interval being sent to a neighbouring tavern, to sleep under the charge of a macer, sworn to keep them from any intercourse with others; and this has been done in several cases;<sup>5</sup> but in all such cases it is proper to have a previous written consent from both parties entered on the record.<sup>6</sup>

2. No intercourse with the assize should take place after they are sworn; but a slight communication, if done

<sup>1</sup> Janet Ronald, July 11, 1763; M'Laurin, 760; Hume, ii. 415.—<sup>2</sup> Mary Elder or Smith, Feb. 5, 1827; Syme, p. 71, et seq.—<sup>3</sup> John Stevenson, June 1791; Leach, ii. 546; Anne Scalbert, 1794; Leach, ii. 620.—<sup>4</sup> Robert M'Donald, Inverness, Sept. 1821; Shaw, No. 35; Justice-Clerk's Notes; Thomson and Neilson, Aug. 15, 1806.—<sup>5</sup> Geo. M'Kenzie and Others, Jan. 6, 7, and 8, 1803; and Provost Stewart, Oct. 27, 1747; Hume, ii. 417.—<sup>6</sup> Hume, *ibid.*



without any sinister design, previous to their enclosure, is not necessarily fatal to the proceedings.

For the same laudable purpose of preventing any improper intercourse with the assize, after they are charged with a case, it is a rule in our practice, that no assizer once entered on his office shall leave his place, but with the permission of the Court, and attended by one of its officers; that the proceedings shall stop till his return, and no one shall have intercourse with the assize, or any of them, either in or out of Court, by conversation or otherwise, at any period of the trial.<sup>1</sup>

This rule, however, how just and necessary soever, not being, in *this* stage of the proceedings, before the jury are enclosed, founded on any statutory enactment, but on the equitable principle of the common law, is to be construed in a fair and reasonable, not a captious or punctilious sense. It is not therefore to be supposed, that the proceedings shall be straightway held null and void, on account of any intercourse, how trivial soever, with the assize, the result of accident or inattention, and not of any corrupt design on any side; but in this matter, the Court will investigate the whole proceedings, and sustain the trial or not, according as any corrupt design, wilful deviation from duty, or probable injury to the pannel, does or does not appear.<sup>2</sup> In several old cases, where the intercourse was of this description, trivial and transient, the objection has been repelled.<sup>3</sup> These precedents were followed in two late instances, the first of which has been already mentioned;<sup>4</sup> while in the second, one of the jurymen had, on an adjournment of the business for a short time, gone to a neighbouring public-house, but not spoken about the case, though he had spoken on indifferent subjects, and there got some spirits, and returned to the Court after an interval of fifteen or twenty minutes, while the clerk of Court was still in company with the remaining jurors. Informations were ordered, and the Court repelled the objection.<sup>5</sup> In a case of unavoidable intercourse, as from one of the jurymen being taken ill, and a physician is sent by the Court for his benefit, no objection lies to the proceedings.<sup>6</sup>

<sup>1</sup> Hume, ii. 417.—<sup>2</sup> Ibid. ii. 418.—<sup>3</sup> Eliz. M'Naughton, Feb. 19, 1767; Peter Bishop, March 16, 1767; Kath. Nairne, Aug. 1765; M'Iver and M'Callum, July 15, 1784; Robt. Lyle, Jan. 17, 1754; Hume, ii. 418.—<sup>4</sup> Robt. M'Donald, Inverness, Sept. 1821; Shaw, No. 35, *supra*; ante, ii. 632.—<sup>5</sup> Thomson and Neilson, Aug. 15, 1806.—<sup>6</sup> Alex. M'Kenzie, March 14, 1827; Syme, 172.

3. After the jury are enclosed to consider their verdict, all intercourse with them is positively prohibited, under the pain of positive nullity.

After the jury have arrived at the last and most important stage of their duty, when they are left to themselves to deliberate concerning their verdict, their proceedings are regulated by positive statute. It is enacted, by 1587, c. 92, "That how soon the haille persute, diffenssis, and answirs thairto ar fullie hard be the asyiss, gif ony of the saids asyssoures hes ony doubt quhair of they wad be resolvit, that they propone the same oppinly in presence of the pairties in face of judgement, befoir thai pass out of judgement thameselfis. And immediatelie after that the said assyise hes chosin thair chancellor, the clerk of the Justiciarie sall enclose the said assyise them alane, or in ane house by thameselfis, and suffer na persouen to be present with thame, or repair to them in ony wyse, nather clerke nor utheris, under pretense of farder informatioun, resolving of ane dout, or ony uther culler or occasioun qhatsumever. But that the said hous be halden fast, and na man present thairin bot the said assasirs, and that they be not sufferit to come out of the said hous for qhatsumever caus, or to continew the geving of thair sentence to an uther tyme; bot that they be inclosit as said is, unto the tyme they be fully agreit, and returne thair answir be the mouth of the said chancellor to the judge. And our Soverane Lord, with advise foirsaid, decernis, declairis, and ordainis, that gif any of the saidis accuseris informares of his hienis advocat, utheris personis qhatsumevir, pretend in ony ways in tyme cumin, to informe, sollist, reasone, dispute, speik, or repair to the said assyis, after thair removing furth of judgement, and inclosing of thame, in manir about vritten, or utherwys transgress ony poynt of this present act: In that caise, the partie accusit sall be holden and pronouncit clear and innocent of thai crymes and tressonis then layit to his charge. And this present act sall be ane sufficient warrand to all assysouris in criminal causis hereafter, to pronounce the partie accusit, cleane and innocent, in cais ony of the premissis beis contravenit."

By this statute a plain and invariable rule is laid down for the conduct of the jury at this period; all intercourse after that period must absolutely cease, from which if they swerve, the law will presume, in the ordinary case, some irregular and partial purpose

on the part of the accuser, and will not require, as with respect to the period before enclosing, where all is ruled by the common law, any special proof to that effect towards applying the statute.<sup>1</sup> A conviction was annulled accordingly, because a sheriff-officer had more than once entered the apartment, and one of the jury had left it and spoken to some one without, though there was no evidence of any thing particular or suspicious in the conversation held by him on that occasion.<sup>2</sup>

Even, however, in this last and most secluded stage of their proceedings, it is not to be supposed that the Court are deprived of all discretion in the matter, or absolutely obliged to sustain every act of intercourse, how trivial soever, as a clear bar to all farther proceedings. For what if it appear that it was the pannel himself or his friends who solicit them in his behalf, possibly with the very view of stating the objection to the verdict, if it shall prove unfavourable? Certainly it is not to be imagined that he can profit by so fraudulent an attempt to defeat the ends of justice.<sup>3</sup> And even where this is not the case, an act of intercourse evidently innocent, as thrusting some quills under the door to them, to enable them to write out their verdict;<sup>4</sup> or receiving a medical man sent them by the Court after enclosure, along with the macer, to attend a juryman taken violently ill,<sup>5</sup> will not be held to found any objection. All such acts of intercourse, however, should take place through the Court and the macer, their established organ of communication with the jury; and if not done in this way, they are always in the highest degree hazardous and reprehensible.<sup>6</sup>

4. The commencement of the operation of the statute is from the actual enclosure of the jury.

There is no warrant in the words of the statute, any more than the reason of the thing, for holding that the sanction of the act applies at an earlier period than "after their removing forth of judgment, and *enclosing of them* in manner above mentioned."<sup>7</sup> There is no warrant for holding them enclosed before they actually are so, except in the case of some immoderate and needless delay, which they are plainly blameable for not avoiding.<sup>8</sup>

<sup>1</sup> Hume, ii. 420.—<sup>2</sup> Sanderson, July 1739; Maclaurin, No. 46.—<sup>3</sup> Hume, ii. 420.—<sup>4</sup> Kirkpatrick and Others, Dec. 8, 1760; Hume, *ibid.*—<sup>5</sup> George and Robert Wilson, Dec. 18, 1826; Syme, 42.—<sup>6</sup> *Ibid.*, ii. 421.—<sup>7</sup> Hume, ii. 421.—<sup>8</sup> *Ibid.*



But where such undue delay does occur, and one of the jury in consequence is separated from the rest, and mixed with others; the rule of the statute will be applied from the time when they should have enclosed; and, accordingly, in a case where the interlocutor ordaining the assize to enclose had been signed, and they had left the Court-room, but they had delayed enclosing, and, in the interim, one of their number had strolled away, and was in a quarter of an hour after found in his lodgings in Perth, and the assize then enclosed and returned their verdict, the Court straightway set it aside as being contrary to the act 1587, c. 92.<sup>1</sup> But if such an undue delay to enclose has not taken place, the objection will be repelled; as if the clerk had read out the interlocutor ordaining them to enclose, and one jurymen had left the Court-house, and got a few steps away unattended, and being then met, returned to Court soon enough to hear the clerk call over the names of the whole assize;<sup>2</sup> or if the jury remain in Court ten minutes to collect their notes, and some transient conversation take place with some of them, as they were passing through the audience to enclose;<sup>3</sup> or if the absence is casual, and for fifteen minutes only, though after the interlocutor ordering them to enclose was pronounced, if there is nothing in the case at common law to render the proceeding objectionable. In the last case, the Court found, “in respect that the irregularity complained of happened *before the jury was enclosed*, find that the act 1587, c. 92, does not apply.”<sup>4</sup> At one period the jury were sometimes charged with another case, depending on analogous facts, before enclosing; but that is an irregularity which certainly would not be sanctioned in modern practice.<sup>5</sup>

5. The assize must remain enclosed till they are agreed on their verdict, but that may be determined by a simple majority, and must be delivered verbally by the mouth of their chancellor, unless where the Court shall direct a written verdict to be returned, in consequence of the verdict not being returned before the Court adjourns.

The direction of the act 1587, c. 92, is, “that they be enclosed as said is, unto the time they be fully agreed, and return their

<sup>1</sup> M'Callum and Menzies, May 12, 1800; Hume, ii. 421.—<sup>2</sup> William Mills, Aug. 11, 1785; Hume, ii. 422.—<sup>3</sup> Elizabeth M'Naughton, Feb. 19, 1767; Ibid.—<sup>4</sup> Thomson and Neilson, Nov. 5, 1806; Hume, ii. 423.—<sup>5</sup> Ibid.

answer by the mouth of the said chancellor to the Judge." The meaning of this, as explained in practice, is, that they shall remain enclosed either till their verdict is delivered *viva voce* by the mouth of the chancellor; or till it is committed to writing, authenticated by the hands of their chancellor and clerk, and sealed up.<sup>1</sup> When this is done, the verdict is held as made up, and the jury may separate, provided they all meet again at the time and place appointed by the Court to have it opened; and, in the intervening period, it should remain in the hands of the chancellor.

Formerly all verdicts were written; a rule attended with this signal inconvenience, that the composition of this nice and delicate instrument was left to the unaided efforts of men often but little skilled in the way of framing it; that all correction of an error once made was impossible; and no parole explanation could be received by the Court as to what their intentions really were. The frequency of escape of prisoners, clearly proved guilty, upon inaccuracies of this description, loudly called for a remedy; which has been cautiously and judiciously applied by Sir W. Rae in successive statutes, the combined effect of which has been to eradicate this useless and cumbrous formality almost entirely from our practice.

This was done first by 54 Geo. III. c. 67, which enacted, that where the juries were unanimous, a *viva voce* verdict might be received. As this was found in practice to be a very great improvement, it was next enacted by 6 Geo. IV. c. 22, No. 20, "That all verdicts, whether the jury are unanimous or not, and whether given on a consultation in the jury-box, or after retiring and enclosing, shall be returned by the mouth of the chancellor of the jury, unless where the Court shall direct written verdicts to be returned; and the same rules shall apply in regard to the receiving such verdicts as are observed in the case of unanimous verdicts in the Court of Justiciary; provided always, that in all cases of verdicts being returned by the mouth of the chancellor of the jury, where the jury shall not be unanimous in their verdict, the chancellor shall announce the same, so that an entry thereof may be made in the record; and, provided also, that when in such a case a jury is enclosed, none of the jurors shall be allowed to separate, or to hold communication with other

<sup>1</sup> Hume, ii. 423.

persons, until their verdict shall have been returned in their presence by the mouth of their chancellor." This alteration having been found to be highly beneficial in practice, it was at length enacted by 9 Geo. IV. c. 29, § 15, "That verdicts in writing shall be discontinued in all cases when the verdict is returned before the Court adjourns; and when on a trial before the High Court of Justiciary at Edinburgh, a jury shall retire to consider their verdict, it shall be sufficient that one Judge remains in Court to receive the verdict; which Judge shall have power to see the verdict duly recorded when delivered, and to dismiss the jury, and to assoilzie the pannel if not convicted by such verdict; but if the pannel shall be found guilty, or the terms of the verdict be such as may appear to require the consideration of the Court, such Judge shall continue the diet, and commit the pannel to prison." No similar provision was made for receiving verdicts in this manner before the Circuit Courts, because every single Judge, at common law, there enjoyed such powers.

The effect of these enactments has been to put an end to written verdicts almost entirely; as it is extremely rare that a single Judge cannot sit to receive their verdict; an exertion which should always be made by the Court where it is possible, as it permits explanations by the jury of what they really intended, and avoids those errors which are so extremely frequent in cases where written verdicts are returned. If, however, this cannot be done, the verdict must still be returned in writing; nor can this be avoided, as in such a case they have to separate before they make their return, and of course might be practised upon if it is not written out and sealed before they break up for the night.

It is obvious from these enactments, that a verdict is perfectly good which is made up in open Court, and without the jury ever leaving the box, and nine-tenths of the verdicts which are delivered are made up now in that way. But if the jury should still prefer the form of a written verdict from the inability of the Judge to remain in Court till it is received, it is the safer course for them to adhere to the rule of the old law, that the sederunt must not be broken up, even to ask the Judge a legal question, till it is finally written out; although the Court in one instance held, though by the narrowest majority, that in such circumstances, it was no objection that they returned into Court to put a legal question to the bench.<sup>1</sup>

<sup>1</sup> M'Neil, Buchanan, and Noble, Oct 2, 1818; Hume, ii. 424



6. If any attempt is made by the prosecutor to contravene the act 1587, it is the duty of the assize themselves to take cognizance of the matter, and straightway themselves declare the accused party innocent.

On this point the provision of the statute is quite express. It declares, "And this present act shall be a sufficient warrant to all assizes in criminal causes hereafter, to pronounce the accused party clear and innocent, in case any of the premises is contravened."<sup>1</sup> Thus the assize themselves, in case of any such attempt by the prosecutor against them, are clearly entitled to vindicate their own honour, and apply the law by immediately finding a verdict for the pannel.<sup>2</sup> If the assize are not disposed to avail themselves of this statutory privilege, which would be a dangerous step to take *de plano*, in these altered times, their proper course is to state the fact to the Court, who will not fail to apply such a remedy, by enquiring into and punishing the guilty party, whether in the assize or elsewhere, according as the justice of the case may seem to require.

7. Whether the jury retire or not, they must all be together when the verdict is returned; and if it is done *viva voce*, it must be delivered by their chancellor, with their concurrence.

The verdict can, in the ordinary case, be only received in the presence of all the persons of the assize. They must hear it read out, if written, or delivered orally, if *viva voce*, in open Court, in presence of the Judge, and then and there acknowledge it as their verdict. The way of returning a *viva voce* verdict is as follows: The jury are asked by the presiding Judge if they are agreed on their verdict, and who is their chancellor, or who speaks for them. The chancellor then announces the verdict aloud, standing along with the rest of the jury, which in general is either "Guilty" or "Not Guilty," "Proven" or "Not Proven." It may, however, be a special verdict, finding certain things or charges proven, and the remainder not proven; and in either case, it is the duty of the clerk to take down carefully the words of the verdict, so far as they are consistent with legal phra-

<sup>1</sup> 1587, c. 92.—<sup>2</sup> Hume, ii. 424.

seology ; and having embodied them in the record, he then reads it aloud, and the question is put to them by the presiding Judge, "Gentlemen, is this your verdict?" If they assent, it becomes then a written verdict, and is as little liable to be explained, modified, or altered, as if it had been made up under the old law in a written form.

If the verdict is written, the Chancellor, from the jury-box, where the jury have all assembled at the hour appointed, in open Court, delivers the verdict, sealed, to the presiding Judge. He opens it, and after reading it himself, hands it to the clerk, by whom it is *verbatim* engrossed in the record ; and when finished, read aloud by him to the jury, and the Judge or clerk asks them, "Gentlemen, is this your verdict?" If they assent, they are straightway discharged, and the duty of the Court is to consider and apply the sentence.

The great superiority of the *viva voce* to the written verdict consists in this, that in the former case the jury, after announcing their verdict, may receive the observations of the bench as to its form and legal import, by which means the many technical forms and niceties by which they were formerly embarrassed, are avoided. The verdict is ultimately still written ; but the writing takes place by the experienced hand of the clerk of Court, and under the eye of the Judge ; instead of being made out by persons too often entire strangers to every species of legal procedure.

Of course it is the duty of the Judge who receives the verdicts to give any explanation on any subject connected with it which the jury desire ; and it is also his duty to explain to them any technical or formal difficulty which may defeat the purpose they have in view, or render their verdict inapplicable to the case. In doing so, he is not in the least degree interfering with their clear and undoubted privilege of judging on the evidence ; he is merely explaining to them the technical form in which their opinion should be expressed, and pointing out the inaccuracies which might prove fatal to their intentions. It is the Judge alone who is entitled thus to hold communion with the jury at this the last and most critical stage of their duty ; if the counsel on either side have any thing to observe, it should be put through the Court. Wherever the Judge sees that the jury, from inadvertency or ignorance of legal niceties, have committed any error in point of form, as by returning a general verdict of Guilty, where there is

an alternative charge, or returning a verdict of Guilty of theft, but without violence, in a case of robbery, or of theft in a case of fraud or breach of trust; or wherever it is not clear from the terms employed, to what extent they may mean to find the pannel guilty, where there is an aggravated charge which admits of degrees; or wherever, in short, there appears any formal error, ambiguity, doubt, or room for double construction, in the verdict, it is his duty to explain the law to them, and desire them to reconsider their verdict. For this purpose they may either lay their heads together in the jury-box, or re-enclose once and again, until they can embody their opinion in a regular form, free from any technical objection. But if they have once clearly and regularly expressed their meaning, after the import of the word employed has been fully explained to them, the Judge must receive and record the verdict, how absurd soever it may be, or contradictory to the evidence which has been submitted to them.

Numerous instances accordingly have occurred, in which this sort of consultation on the form of the verdict has taken place between the jury and the Court; and in which the latter have declined to receive the verdict until it has been embodied in a regular form, and contains an apt answer to the conclusions of the libel. In a late case in the High Court, the jury, after enclosing, proposed to return a certain verdict; which the Court declined to receive, as inapplicable to the charge in the libel; they next re-enclosed, and proffered a verdict in different terms, which was held to be equally unsuitable; they were then enclosed a second time, and at last returned with a verdict of guilty of theft, which was received, and followed by a sentence of transportation.<sup>1</sup> In another case, the jury, under the old form, brought in a verdict, finding "James Alexander, present prisoner in the tolbooth of Hamilton, guilty," &c. It was objected that this verdict applies to James Alexander, present prisoner in the tolbooth of Hamilton, but the pannel is designed in the record copy of the indictment to which he pleaded guilty, as "now or lately weaver at Flemington, in the parish of Avondale, and county of Lanark," and that therefore the person convicted was not the person libelled. The Court asked the jury whether the person at the bar was the person referred to by them; and they having said he was, the Court, on a certification, repelled the objection, and pronounced

<sup>1</sup> George Robertson, Dec. 18, 1826; Syme, 43.



sentence.<sup>1</sup> In like manner, in another case, also under the old written form, the jury having found a special verdict, beginning, having "considered the *indictment* raised against the pannel," &c. and it having been objected that it was not on an indictment, but *criminal letters*, that he was tried, the Court asked the jury whether, by the word indictment, they meant the criminal letters upon which he had been tried; and they having said they did, the Court, on a certification, repelled the objection.<sup>2</sup> Of course the two last cases being instances of asking the jury what they meant under the old written form, are *a fortiori* applicable to a *viva voce* verdict where such questions are matter of everyday practice.

8. If the verdict be delivered in writing, it is competent for the assize to challenge it as not their verdict, or as containing a material omission or error; but it is not competent to challenge it as having been irregularly and improperly obtained from them.

The chief purpose of requiring the jury to be all assembled when the verdict is announced by the Chancellor is, that they may be all there to say whether the verdict delivered is really their verdict, or if any fraud or error has altered it from what they intended. If the whole jury, with the exception of the Chancellor and clerk, assert that the writing now given in is not their writing; or that a material word, as that of *Not* before guilty, is omitted or the like; there seems to be no doubt that the objection is competent, and may be stated to the Court, and proved by the oaths of the assize.<sup>3</sup> But if the import of the objection is not a fundamental change or error of that description, but that there was some impropriety or irregularity in making up the verdict, or putting or collecting the votes or the like, there seems to be great doubt whether such an objection can be received after a written verdict has been made up, and the jury have dispersed; for the presumption in such a case rather is, that they have been improperly practised upon in the interval between their verdict being made up and its being opened by the Court while they were separated and open to solicitation; and, accordingly, in the only case in which such an objection was stated in that stage, it

<sup>1</sup> James Alexander, Glasgow, April 1823.—<sup>2</sup> Wm. Campbell, Sept. 1823, and Nov. 7, 1823; Record.—<sup>3</sup> Hume, ii. 429.

was held incompetent,<sup>1</sup> in respect it had been received and recorded in presence of the pannel without objection.

If the verdict be in writing it cannot be amended, explained, or supplied by the assize in Court, on the question or suggestion of the Judge, except to the limited extent of asking them whether they meant the prisoner at the bar by the pannel, or the like. It must be taken, with all its imperfections, how gross soever, on its head, and its import determined by the rules of legal construction applied to the charge, without any explanation from the person who delivered it.<sup>2</sup> It is in the power of avoiding such an absurdity, by the Judge asking the Chancellor what was meant, and suggesting the correction of any technical error that may have occurred, that the great advantage of *viva voce* verdicts consists; and it is so great, that since that species of verdict was declared, the other has almost entirely disappeared from practice.

9. It is no objection to a verdict that it is dated the day of the trial, though not written out till the next day, if the sederunt has continued without intermission from the one day to the other.

This point occurred in a late case. It was objected to a verdict that it bore date Sept. 11, 1821, whereas the assize did not enclose till past twelve o'clock on the night of that day, so that it really was written on the 12th. The objection was certified and repelled by the Court, and the accused had sentence of death.<sup>3</sup> On the same principle, it is no objection to a verdict following on a trial on Saturday, that it is written out and dated on Sunday morning.

10. It is competent for the jury to return a verdict of guilty, either as actor or art and part; and on the latter verdict the Court are warranted in pronouncing the same sentence as on a simple conviction as guilty.

As the law holds that a person who is art and part in any offence is just as guilty as one who is guilty as actor or chief agent, and as every libel contains an alternative conclusion of guilty in that form, it follows that the jury may convict a pannel in the

<sup>1</sup> Janet Nicol; Maclaurin, No. 78.—<sup>2</sup> Hume, ii. 431.—<sup>3</sup> Donald Rankine, Nov. 19, 1821; Shaw, No. 53.

due form as well as the other, and that on the verdict "guilty art and part," the highest pains of law may follow.<sup>1</sup> The examples of this are so numerous as to exceed all possibility of enumeration.<sup>2</sup>

11. A general verdict of guilty is held to mean guilty of the whole charges in the libel, unless they are inconsistent with each other, in which case, as there is an inextricable ambiguity, no sentence can follow.

The jury are charged with the *whole* libel against the prisoner, and therefore, if it contains more charges than one, or many aggravations of one charge, a verdict of guilty generally is held to be a return to the whole libel, and to imply a conviction of all the charges as libelled.<sup>3</sup> In a case, accordingly, where the verdict on a charge of murder was guilty generally, and it was objected that this was insufficient, on the ground that it should have said that he was guilty of the "crime libelled," and that without such an addition the verdict did not properly apply to the charge, the Court repelled the objection.<sup>4</sup> On the same principle, in a still later case, where the pannel was charged with culpable homicide and reckless steering of a steam-boat, and the jury returned a verdict of "guilty" simply, without adding "as libelled;" and it was objected that this was an uncertain verdict, as it did not appear whether they meant to convict of both charges or one only, and that in such a state of uncertainty no sentence could follow; or, at all events, the conviction must be presumed to apply to the minor charge only; the Court, on a bill of suspension from the High Court of Justiciary, where the objection had been repelled, unanimously affirmed the judgment without hearing the prosecutor in reply, upon the ground, that a general verdict of guilty, where the charges are not inconsistent with each other, is a return to the whole libel.<sup>5</sup>

But if the libel contains charges inconsistent with each other, this rule cannot be applied. For example, if the charge is an alternative one of theft or robbery, reset of theft, theft or breach of trust, or the like, a general verdict of guilty cannot cover the

<sup>1</sup> Hume, ii. 441.—<sup>2</sup> Crawford and Bradley, Feb. 4, 1812; M'Donald, M'Intosh, and Sutherland, March 21, 1812, on which all three were executed.—<sup>3</sup> Hume, ii. 442.—

<sup>4</sup> James Gilchrist, June 13, 1808; Hume, ii. 442.—<sup>5</sup> Ezekiel M'Haffie, Nov. 26, 1827; Hume, ii. 193.



whole indictment, because the charges it contains are alternative, and cannot co-exist. In these circumstances, if the verdict is written in these terms, matters are inextricable; and the consequence is, that no sentence can be pronounced.<sup>1</sup> As this result, how complete soever a defeat of justice, is unavoidable, and plainly flows from the legal principles applicable to the subject, it should be carefully attended to in all inconsistent or alternative charges, and the jury always informed that a general verdict of guilty on such a libel is inept, and that they must find the pannel guilty of one or other of the alternative charges.

12. To authorize a sentence, the verdict, if not a general return to the libel, or part thereof, must convict the pannel of the particular crime set forth in the libel.

It is obviously indispensable that the verdict shall convict the pannel, not of a different crime from that stated in the libel, how analogous soever to it, but of the identical offence there set forth.<sup>2</sup> If, therefore, on a charge of robbery, the jury find the pannel guilty of theft;<sup>3</sup> or on a charge of theft, of reset, or of what amounts to that minor offence;<sup>4</sup> or on a charge of theft by house-breaking, of housebreaking only, or housebreaking with intent to steal;<sup>5</sup> or on a charge of concealment of pregnancy under the 49 Geo. III. c. 14, of concealment only, without the other requisites of the statute;<sup>6</sup> or of uttering only, on a statute which punished the forging only and not the uttering, and the common law charge has been abandoned;<sup>7</sup> or of being habit and repute a thief, without any finding as to the theft to which it is charged as an aggravation;<sup>8</sup> or on a charge of rape, of assault with intent to ravish,<sup>9</sup> no sentence can follow on the verdict.

There is an exception to this rule, which is in daily use of being put in practice in the case of a charge of murder, which authorizes the jury to return a verdict of guilty of culpable homicide. And in all cases where a crime is set forth with several aggravations, it is in the power of the jury either to find the

<sup>1</sup> Sinclair, M'Lachlan, and Baird, Glasgow, Sept. 1825; Hume, *ibid.*; David Watt, Nov. 15, 1824.—<sup>2</sup> Hume, ii. 449.—<sup>3</sup> Peter Wallace and Others, April 17, 1821, and May 21, 1821; Shaw, 21.—<sup>4</sup> Charles Stewart and James Irvine, Aug. 1, 1800.—<sup>5</sup> Wm. Tarras, Aberdeen, Spring 1802, and June 10, 1802.—<sup>6</sup> Christ. Murray, April 1811, Jedburgh; and June 5, 1811.—<sup>7</sup> Peter Heughan, Aug. 24, 1810.—<sup>8</sup> Allan Henderson, Sept. 15, 1802; Hume, ii. 450.—<sup>9</sup> Peter Peldie, May 30, 1791; *ibid.*

panel guilty generally, which means guilty of the whole charge as libelled, or guilty of so much of it as they deem proven; as “guilty of theft, aggravated by housebreaking, but find the charge of habit and repute not proven;” or, “guilty of assault to the effusion of blood, but find the aggravation of being to the danger of life not proven.” Under a charge of assault, especially with intent to rob, a conviction of simple assault is clearly competent.<sup>1</sup>

But if the crime is not set forth with aggravations in this way, but as a *substantive* offence, as assault with intent to ravish, assault to the danger of life, or so forth, then, on a verdict finding part of the charge only proven, as the assault, but not the intent to ravish, or the assault, but not to the danger of life, no sentence can follow on the verdict, because the jury have not found the identical and *sole* charge set forth in the libel proven. It is otherwise in the English law, as they hold, that under a charge of petty treason the jury may convict of wilful murder,<sup>2</sup> and under a charge of burglariously entering a dwelling-house and stealing money, a conviction of simply stealing the money can be sustained.<sup>3</sup> In our practice such a conviction could be sustained only if the housebreaking was laid as an aggravation, which it always should, and in such a case a similar verdict is every day returned.

13. The verdict should always be finding the panel guilty of the crime libelled, under such deductions, if any, as the jury think fit; but it is no objection to a verdict, that it finds the panel guilty of the crime set forth in the major, without such an addition.

It is a fixed rule of law that the verdict must apply to the indictment, and convict the panel, not of the crime or crimes specified in the major proposition generally, but of that particular instance of it set forth in the minor.<sup>4</sup> It is however very necessary to observe on this head, that the conviction is good if the verdict is applied to the charge sufficiently in substance and to ordinary apprehension, though not expressed in the most correct fashion, nor in such words as makes it a literal echo of the

<sup>1</sup> James Keir, Perth, April 1820.—<sup>2</sup> Henrietta Radbourne, July 1787; Leach, No. 15.—<sup>3</sup> Withall and Overand; Leach, 49; John Comer; Ibid. 212, 4th ed.—<sup>4</sup> Hume, ii. 452.

libel.<sup>1</sup> The proper way, undoubtedly, is for the jury to find the pannel guilty of the crime libelled, or the crime as libelled, under any exceptions which they may deem not proven, if there are any such in the case; and these words should never be omitted by an intelligent jury or cautious Judge, especially if the crime is stated under aggravations, because they at once connect the verdict with the *species facti* described in the libel.

But although these are the proper and unexceptionable words which remove all doubt as to the application of the verdict to the crime, yet it is not to be imagined that a verdict is open to exception, which does not employ them, or finds the pannel guilty merely of the crime set forth in the major without adding as libelled.<sup>2</sup> A verdict, accordingly, finding the pannels guilty of “*theft*, but not reset of theft, and find the charge of housebreaking not proven,” was sustained after a full argument, though the words were wanting “as libelled;”<sup>3</sup> and in two later cases the pannels have been executed on verdicts which found them “guilty of murder,” without any farther addition to connect the finding with the murder in the libel.<sup>4</sup> So also where the jury convicted the pannel “of fraudulently and feloniously using, uttering, and vending the forged note libelled on,” it was held to be a good verdict though the circumstances of the uttering were not referred to.<sup>5</sup> In three other cases mentioned by Mr Hume, the verdict was held good though it did not bear the offence libelled, but general expressions merely, which obviously referred to it.<sup>6</sup>

14. Should a special verdict be returned, it must find proven the facts, or part of them, set forth in the libel; and they must amount to the crimes, or some of them, specified in the major.

Special verdicts were formerly very much in use; but they have now become in a great measure obsolete. It is sufficient, therefore, to observe in general, that if the jury, instead of returning a general verdict of guilty or not guilty, choose to find certain special facts, as that the house was entered, but the door was open, or the gun was fired, but not with intent to kill, or the

<sup>1</sup> Hume, ii. 453.—<sup>2</sup> Ibid. ii. 454.—<sup>3</sup> Haggart and Forrest, July 12, 1820.—<sup>4</sup> Mrs M’Kinnon, March 15, 1823; James Allan, Dec. 27, 1825.—<sup>5</sup> Bell and Mortimer, July 1800; Hume, ii. 455.—<sup>6</sup> Eliz. M’Naughton, Feb. 19, 1767; John Leproick, June 30, 1784; Robert Lillie and Others, Oct. 10, 1797; Hume, ii. 454.



like, the Court have then to consider, 1. whether these facts are the facts charged in the indictment, or fall under the general allegations there made; and, 2. whether such of them as are found proven, amount to the crimes or any of them libelled.<sup>1</sup> But it is unnecessary to enter into the niceties of this matter, not only because they are fully given by Baron Hume;<sup>2</sup> but because they have now become in a great measure obsolete, and from the opportunity of conversation between the Court and the chancellor of the jury, which the delivery of *viva voce* verdicts occasions, no such verdicts will, in all probability, be again returned.

15. If the verdict take no notice of any of the charges, it is held to amount to an acquittal on these points.

It only remains to add, that as the libel, with all its contents, is submitted to the jury, so if they do not find the pannel guilty generally, but guilty of some particular charges only, this is held to be a good verdict as to some of these charges, and to amount to an acquittal of the others.<sup>3</sup> Our practice rightly construes silence in these particulars, in such a special case, to amount to an absolutor of the charges so passed over; but holds the verdict unobjectionable in so far as the charges are concerned, which are held proven.<sup>4</sup>

16. A verdict is no warrant for a sentence, unless it is either general of guilty, or finds facts clearly amounting to the crimes, or some of them, libelled.

A jury may find some facts nearly akin to those charged proven; but if they do not actually amount to the crimes, or one of them charged, the verdict is no sufficient warrant for a sentence. If, therefore, they find the possession of the stolen goods proven, but not the guilty knowledge;<sup>5</sup> or the facts sworn to be false, but not that the oath was emitted knowing them to be false, in a charge of perjury;<sup>6</sup> or that the forged note libelled was uttered by the pannel, but not in the guilty knowledge;<sup>7</sup> or that the child was missing, and no aid called for in the birth, but not that the pregnancy was concealed;<sup>8</sup> or the housebreaking, but not the in-

<sup>1</sup> Hume, ii. 455, 456.—<sup>2</sup> Hume, ii. 454, 462.—<sup>3</sup> *Murdison and Miller*, M'Laurin, No. 89; *William Paton, David Black, and Others*, May 26, 1770.—<sup>4</sup> Hume, ii. 462.—<sup>5</sup> Hume, ii. 447; *James Johnie*, May 23, 1775; *Burnet*, 156.—<sup>6</sup> *Ibid.*—<sup>7</sup> *Anne M'Kechnie*, Sept. 11, 1827; *Hume*, *ibid.*—<sup>8</sup> *Magdalen Alexander*, Dec. 12, 1715.

tent to steal libelled, no sentence can follow on the verdict. To be the warrant of a sentence, the jury must find the prisoners guilty, or some facts proved which are libelled, and clearly amount to guilt in the estimation of law.<sup>1</sup>

17. It is not competent to contradict the record of the proceedings of the jury, *ex intervallo*, by parole evidence; but if an error, which has obviously crept in *per incuriam*, appears, it may sometimes be got over, upon the mistake being *de recenti* orally explained.

It was found in the case of John Hannah, already mentioned, that when the jury were entered on the record as sworn, and no objection was moved on the head of this not having been done till after the verdict was returned, and sentence was moved for, it is not competent to go back upon the matter and disprove the record by parole proof, that this truly was not done.<sup>2</sup> But if an error has occurred, obviously only clerical, as by omitting the name of one of the jury in the sederunt of their names at making up the verdict, and this is immediately objected to, and it is proved that he was truly present by the other assizers, though his name was omitted, the objection will be repelled.<sup>3</sup> So also the inserting a juryman's name under a somewhat different spelling from that previously used, as using the word *Robison* instead of *Robertson* in the sederunt of the assize, will not constitute an objection, if the persons are proved to have been the same.<sup>4</sup> The objection that the verdict bore having considered the "indictment," where in truth the pannel was tried on criminal letters, has been held by the whole Court to be nugatory, the jury having declared that by the word "indictment" they meant the criminal letters on which the trial proceeded.<sup>5</sup> But no judgment can follow on a verdict falsifying the locus in a libel; for that is a direct negative of the charge submitted to them in an essential particular.<sup>6</sup> If an ambiguity appears in the verdict, the pannel, *in dubio*, is entitled to the more lenient construction; and, therefore, in a case of murder, where the indictment stated that the blows were inflicted with intent to murder, and the jury found

<sup>1</sup> Hume, ii. 447.—<sup>2</sup> John Hannah, Ju'y 12, 1809.—<sup>3</sup> Eliz. Stewart, April 1813, Aberdeen, per Meadowbank.—<sup>4</sup> William Robertson, Jedburgh, April 1821; unreported.—<sup>5</sup> William Campbell, Nov. 17, 1823.—<sup>6</sup> Peter Gordon, Nov. 16, 1812.

the pannel “ guilty of the crime libelled, but not with intent to murder,” this was held to be such a sentence as amounted only to the most aggravated kind of culpable homicide, and she was transported for life instead of being executed.<sup>1</sup> It is no objection to a written verdict, that it is partly written and partly printed.<sup>2</sup> In a written verdict it is not indispensable that the verdict should set forth the choosing of a chancellor, or specify the name of the person who executed that duty.<sup>3</sup> In a case where the pannels were charged with one murder and ten acts of robbery, and the murder was departed from, and the jury found Napier guilty of the eighth charge of robbing Brodie, and Grotto of the tenth charge for robbing Bruce, whereas these charges were the eighth and tenth acts of robbery charged, but the ninth and eleventh of the whole indictment, it was held that the meaning of the jury was clear, and that sentence must follow.<sup>4</sup> Where a libel charged the robbery of three pounds *in notes*, and six shillings in silver; and it appeared on the proof that the whole £3, 6s. was in silver; it is quite competent, under the words, “all which, or part thereof,” for the jury to return a verdict, finding the prisoner “guilty of robbing six shillings or thereby;” for a prosecutor is not bound to prove his whole libel, if he proves as much as amounts to the crime stated in the major proposition.<sup>5</sup>

## CHAPTER XVII.

### OF SENTENCE, EXECUTION, AND PARDON.

THE concluding step in a criminal process, is the passing of sentence, which, with the pardon by which it may be alleviated or removed, naturally concludes this treatise of Criminal Law.

1. The Court, if a verdict of guilty to any extent has been pronounced, may either pass sentence *de plano*, or adjourn the doing so till a subsequent opportunity.

<sup>1</sup> Mary Horn or Muckstraffie, Nov. 26, 1823.—<sup>2</sup> Anne Brown, Perth, April 1824; Douglas and Adie, Feb. 4, 1822.—<sup>3</sup> Peter M’Kinlay and William Donald, Dumfries, Spring 1819.—<sup>4</sup> Napier and Grotto, March 31, 1812; Hume, ii. 454.—<sup>5</sup> Freebairn and Mitchell, Glasgow, Sept. 1817.



In passing sentence, the Court may either proceed forthwith on receiving the verdict, or they may adjourn at their pleasure to some later day. If any motion is made, or objection stated in arrest of judgment, they are bound to hear any thing which the pannel has to state at the time; but they are not bound to give him a farther adjournment to prepare his arguments, or to take time to consider, unless they see cause.<sup>1</sup> They will never indeed refuse to do either of these things, if they are supported by any substantial reason, or the appearance even of justice to the prisoner; but they cannot be demanded as a matter of right, either by the prosecutor or the pannel, and considering the hands to which the conduct of private prosecutions and prisoner's defence is often of necessity intrusted, there are very sufficient reasons why it should not be established, that it is an indulgence to which all prisoners can as a matter of right lay claim.

2. No objection to the libel or to the proof admitted, can be received in arrest of judgment.

The proper stage for proponing objections to the relevancy of the libel is, before the interlocutor sustaining it is pronounced, and to the evidence laid before the jury when it is first tendered. If therefore, the proper opportunities for stating such objections are allowed to pass without bringing them forward, they cannot be received in arrest of judgment by the Court, but must be laid before the advisers of the Crown, there to receive such weight as they are in justice entitled to in producing a pardon or mitigation of sentence.<sup>2</sup> And this rule holds equally good, if the Circuit Court of Justiciary, which is a Supreme Court, has sustained the relevancy of an indictment or question put to a witness, in excluding any review of such finding in the Supreme Court, if the case has been certified as to the punishment to be pronounced for the consideration of that supreme tribunal.<sup>3</sup> The same must hold as to every discrepancy, however great, between the indictment and the evidence adduced in support of it; as for example, if the fact is proved to have occurred in a different parish or county from that stated in the libel. Still, if this discrepancy, how glaring soever, has been got over by the jury, it lies not within the pro-

<sup>1</sup> Nairne and Ogilvy, Aug. 14, 1765; Hume, ii. 463.—<sup>2</sup> Hume, ii. 463.—<sup>3</sup> Chas. Tawse, Nov. 1818; Hume, ii. 302.

vince of the Court to give effect to the objection by refusing to pronounce sentence, but, after it has been passed, application must be made to the Royal mercy.<sup>1</sup>

3. A sentence, whether absolvitor or condemnatory, is a complete bar, not only to any subsequent trial for the same offence, but for any other crime involving the same *species facti*, whether at the instance of the public or private prosecutor.

It is an old and fundamental principle of the Scotch law, that no one can *thole an assize*, as the phrase is, twice for the same offence; that is, he cannot be twice tried on the same matter or charge.<sup>2</sup> And this applies to the case even of a new prosecutor, if the libel be laid for the same criminal conclusions; that is to say, neither the Lord Advocate nor the party injured can insist for the pains of law, or atonement to the public, if the pannel has been already either acquitted or convicted in a prosecution for those pains at the instance of the other.<sup>3</sup> Nor does the same principle fail in those cases, which are far from numerous, where a pannel is liable to prosecution, at the instance of any of a numerous list of injured persons, as in a case of perjury, by taking the oath of trust or possession: Certainly he cannot be made to undergo successive trials at the instance of as many freeholders, as choose to harass him in this sort of way, but shall have his quietus from the issue of the first, whatever that may happen to be.<sup>4</sup> It need hardly be observed, that this rule applies to criminal conclusions properly so called, and that a sentence, either of absolvitor or condemnatory, is no bar to a prosecution on the same facts in a Civil Court, for the patrimonial injury sustained by the suffering party.<sup>5</sup>

Nor does it alter the case, if the new prosecutor chooses to alter the shape of the former charge, and lay his libel for the same facts under a new denomination of crime, stating them perhaps as fraud instead of theft, falsehood instead of forgery, assault or riot instead of deforcement or hamesucken, or the like. The law will not suffer itself to be evaded on such easy pretences, but will at once quash any subsequent libel, if the substantiality for

<sup>1</sup> Hume, ii. 464.—<sup>2</sup> Hume, ii. 465.—<sup>3</sup> *Ibid.*—<sup>4</sup> *Ibid.*—<sup>5</sup> Creditors of Skene v. Bonnar, Dec. 4, 1789; John Ker, Dec. 17, 1793.

the criminal acts, contained in the former criminal prosecution, and which arrived at its natural termination by a sentence one way or other on the evidence.<sup>1</sup>

On the plea of *res judicata*, and the numerous distinctions to which it gives rise, enough has already been said.<sup>2</sup>

4. Both parties must be present when sentence is pronounced, and if the pannel cannot then be reached, he can only be fugitated.

It is a sacred rule of law, that both parties must be present at moving for sentence; the prosecutor, because no step in the process can legally be taken but in his personal presence; the pannel, because, for aught yet seen, he may have something to allege why sentence should not pass against him.<sup>3</sup> This applies equally to a sentence condemnatory as an acquittal, neither of which can be legally pronounced, unless the pannel and prosecutor are both present.<sup>4</sup> If he escapes in the interval between the verdict of the jury and sentence being moved for, it is equally incompetent to pass sentence or assoilzie him; but sentence of fugitation may be pronounced on the prosecutor's motion, as on one who contumaciously refuses to appear at the last diet of his trial.<sup>5</sup>

On the same principle, the pannel, at the time when sentence is moved for, must be in his sound and sober senses, capable of stating or suggesting any thing that may be of service to him in such an emergency. If, therefore, he is either insane, drunk, or disordered in his senses, no sentence can be pronounced while he is in that unseemly state, but the proceedings must be adjourned till he is in a fit condition to undergo such a crisis of his fate. If he appears on probable grounds to be insane, it is the duty of the Court to take evidence in regard to his mental condition, and delay pronouncing sentence until his mental health is restored, or the appearances of disorder are proved to have been feigned.<sup>6</sup>

5. The prisoner cannot apply for bail as a matter of right, after the verdict of the jury has been pronounced.

It has been already mentioned, that the prisoner is not entitled

<sup>1</sup> John Hannah, Nov. 4, 1806; Hume, ii. 466; but see ante, ii. 286, 287.—<sup>2</sup> Ante, ii. 624, 630.—<sup>3</sup> Hume, ii. 471.—<sup>4</sup> Ibid.—<sup>5</sup> Ibid.—<sup>6</sup> Ibid.



to apply for bail, after the assize have enclosed to consider his case;<sup>1</sup> and that the parties have then entered into a judicial contract, the nature of which is, on the one hand, that the prosecutor must abide by his libel, how defective soever it may be, and on the other, that the prisoner renounces the benefit of bail, and engages to be personally present to legalize the proceedings, and receive sentence in the event of conviction. Where an application for bail accordingly was made after verdict returned, the Court granted it only on the prosecutor's consent, and on the sum in the bail-bond being fixed much above what was legally exigible from a person in his rank of life.<sup>2</sup> There seems to be no doubt on principle, that bail cannot be legally applied for after verdict pronounced; for in such a case, if it is a conviction to any amount, however small, the Court are bound to take care, that it is carried into effect *in specie*, and not exchanged for the mere forfeiture of a bail-bond, which to many prisoners would be an elusory penalty, and be generally totally disproportioned to the punishment about to be awarded. It is constantly, therefore, held by the bench, that after the jury have been enclosed, the prisoner, unless the prosecutor consents, must be kept in custody till sentence is pronounced; although, from the point being one about which no difficulty ever was experienced, it is not one which has come to be fixed by recorded decisions.

6. If a female convict has been convicted of a crime requiring a capital punishment, she is entitled to have sentence delayed, or if it has passed, to be respited, if she is pregnant, till her delivery takes place.

The principle, that a pregnant woman must not be executed till after her delivery, and thereby an innocent being prevented from entering into the world, is obviously consonant to justice and humanity, that it has been received by the laws of all civilized states, and was not even violated during the worst days of the French Convention. It has accordingly been always received in our practice, and that equally whether the prisoner be quick with child or not.<sup>3</sup> The proper course, therefore, to adopt in such a case, is for the Court to delay pronouncing sentence, and in the meantime remit to midwives, and other persons of skill, to report upon the prisoner's situation; and if it turn out that she is

<sup>1</sup> Waddell, Glasgow, Autumn 1808; Ante, ii. 175.—<sup>2</sup> Bell and Others, Glasgow, Spring 1800; Ante, ii. 175; Hume, ii. 94.—<sup>3</sup> Hume, ii. 471.

really pregnant, the Court will delay pronouncing sentence, and in the meantime direct them to report from time to time, till it appears that she has been delivered. This course, which had been adopted in several older cases,<sup>1</sup> was solemnly fixed after full consideration, in a case which was recently certified from the Circuit at Perth, and it appeared from the report of medical men, that the prisoner was five months gone with child. The Court upon this remitted to them to visit her from time to time, and report anew on the 24th November, which they did, setting forth that she had been delivered on 12th October, when they proceeded to pass sentence of death, which was carried into execution.<sup>2</sup> The pannel was there convicted of an atrocious murder, which rendered a permanent commutation of punishment impossible; but unless in cases of such crimes, it is probable it would not now be deemed advisable to carry into complete execution a capital sentence, after a delay produced by such a cause; but, if the prosecutor did not feel himself at liberty to restrict the libel, which may be competently done even on moving for sentence at that late stage, the royal mercy would interpose to prevent the execution of the capital sentence.

7. The sentence cannot direct any capital sentence to be carried into execution sooner than 15 days, nor more than 21 days from the date of the sentence, if to the south of the Forth, nor in less than 20 days, or more than 27, if to the north of that river; but inferior corporal punishments may be ordered to be inflicted in the first situation after the expiration of eight, in the second of twelve days after pronouncing sentence.

The law on this subject is contained in the 11 Geo. IV. and 1 William IV. c. 37, which regulates the time in capital cases, and the 3 Geo. II. c. 32, which fixes it in cases of inferior corporal punishment. Their import has been already fully explained in a chapter to which it is sufficient to make reference.<sup>3</sup>

In all cases where the punishment is neither capital nor corporal, the sentence takes effect instantly from the moment it is pro-

<sup>1</sup> Helen Geddes, March 2, 1658; Katherine Nairne, Aug. 1765; Mary Langlands, Nov. 17, 1785; Hume ii. 471.—<sup>2</sup> Margaret Cunningham, May 1806; Hume, ii. 471.

—<sup>3</sup> Vol. ii. c. 2, p. 62, 63.

nounced. This applies to sentences of imprisonment or transportation, which, although corporal in one sense, as confining or removing the body, are not considered as inflicting corporal *pains* in the sense of these statutes, or as falling under any of the statutory regulations in that particular.

8. If any error has been committed by the Circuit or Supreme Court in naming a day for a corporal punishment, either within or without the statutory period, or on a day of public fast or thanksgiving, it may be amended, and a proper day named by the Supreme Court, but this power of rectifying an error is not enjoyed by Inferior Courts.

In consequence of the statutory regulations which have been mentioned, every judgment for corporal pains now mentions a day of execution ; but if it should happen, from inadvertence, that the Supreme or Circuit Court have fallen into any error in this particular, it is in their power to alter it if the error is observed before the day for execution arrives. Many instances have occurred, accordingly, in which, on an error being observed in the day fixed for a corporal punishment or execution by the Circuit Court, it was corrected by the Supreme Court.<sup>1</sup> But it is only the Supreme Court, either at Edinburgh or on the Circuit, which possess this power ; and, therefore, if an inferior Judge has committed an error in this particular, it can be rectified only by an application to the Lords of Justiciary, and cannot be cured by *sist*, or other remedy obtained in the inferior Court. In a case, accordingly, where the Sheriff of Edinburgh had pronounced a sentence, ordering a prisoner to be scourged on the *eighth day* after sentence, and he applied to be relieved of that part of the sentence as being contrary to the 3 Geo. II. c. 32, which forbids all corporal punishment to the south of the Forth till after the *elapsing of eight days* from the date of the sentence, and the Sheriff refused to recall that part of the sentence, but *sisted* execution till the 3d August, to let the eight days expire, the Court suspended the sentence, in so far as the corporal sentence was concerned, *simpliciter*.<sup>2</sup> The proper course to have adopted would

<sup>1</sup> June 3, 1731, Janet Hay ; June 30, 1784, James Jack ; Hume ii. 473.—<sup>2</sup> Adam Mackay, Aug. 25, 1796 ; Hume, ii. 473.



have been for the prosecutor to advocate the case to the Supreme Court, with a view to the requisite alteration of the sentence.<sup>1</sup>

9. The Justiciary Court also possesses the power of respiting sentence in urgent cases, whether pronounced by themselves or any Inferior Court.

Besides these, there are several other situations, in which, for the furtherance of justice or other urgent considerations, it is indispensable that a convict should receive a temporary respite. For what if a capital convict become insane after sentence; or a woman is discovered to be pregnant, and it would be an unseemly or barbarous step to carry the sentence into execution in that state; or if clear evidence is discovered that the pannel is entirely innocent of the charge, or if he falls into such a state of grievous illness, as to be incapable of enduring, without manifest peril, a corporal punishment, or if it is known or supposed on probable grounds, that a pardon is on its way, and will speedily arrive;—in these and the like situations, it is indispensable that a respite should be granted, and the Court of Justiciary, as the supreme criminal tribunal since the suppression of the Privy Council, is the natural and only authority which can grant it.<sup>2</sup> Numerous instances accordingly exist, both in former and recent times, of such an interposition of the Supreme Court to respite prisoners sentenced to corporal punishments. Thus, a woman condemned to die by the Regality Court at Glasgow, was respited by the Supreme Court, upon a petition, accompanied with evidence, that she was pregnant;<sup>3</sup> and the same was done in a similar case to another female petitioner, even although the reports produced along with her petition did not fully prove the alleged pregnancy.<sup>4</sup> In like manner, on a petition from a woman sentenced to be scourged, setting forth, that she was seven months gone with child, the Court gave orders to delay the execution for the space of forty-two days after her delivery.<sup>5</sup> So also William Tennant obtained a respite for three weeks, on the ground that there had not been time to lay before his Majesty the report in his case.<sup>6</sup>

<sup>1</sup> Adam Mackay, Aug. 25, 1796; Hume, ii. 473.—<sup>2</sup> Hume, ii. 474.—<sup>3</sup> Rachel Rodger, Nov. 27, 1736.—<sup>4</sup> Mary Langlands, Nov. 17, 1785.—<sup>5</sup> Sarah Robertson, Nov. 13, 1790; Hume, ii. 474.—<sup>6</sup> William Tennant, March 3, 1790.

The same dispensing power has been liberally exercised in later times. Thus, a pannel convicted on the Circuit and sentenced to death, was respited till the 28th June, to give time to a petition for mercy on the part of the jury, which had been sent to the Justice-Clerk instead of the Secretary of State, and, from this circumstance, the answer could not arrive in time to save the pannel's life.<sup>1</sup> On the same principle, respites have been granted to various convicts, upon the ground that their execution stood for an early day, that an application for mercy had been made to the proper quarter, but not in time to receive an answer, unless a delay for a short period was granted.<sup>2</sup> And, in a late instance, upon a report by the Lord Justice-Clerk, that he had transmitted a recommendation by a jury in favour of a particular young man, but not yet received an answer from London, owing to the roads being blocked up with snow, the Court respited the prisoner from the 18th to the 28th February, which had ultimately the effect of saving his life.<sup>3</sup>

On the same principle, where from some unlawful act of the pannel himself, as by escaping from jail, a rescue at the gallows, an artifice to prevent execution, or the like, it becomes impossible to carry the sentence into execution at the day appointed, it is competent for the Court to fix a new day for carrying it into effect.<sup>4</sup> Where a sentence had been respited accordingly, and, in consequence, the original day of execution was passed, and a letter had arrived from the Secretary of State, stating that it was his Majesty's pleasure that the respite should cease, the Court fixed another day for the execution.<sup>5</sup>

So also, if in consequence of the pannel sentenced to a corporal punishment in the inferior Court, having applied for a review of the judgment in the Supreme Court, the day of execution is allowed to pass, the Court, if they ultimately affirm the sentence, will appoint a new day for carrying it into effect.<sup>6</sup> This has been done in several cases.<sup>7</sup> And, on the same ground, where a pannel had obtained a respite from the Court of Justiciary upon the false pretence that he had certain important discoveries to

<sup>1</sup> Hans Regilson, June 15, 1811.—<sup>2</sup> James Stewart, March 1, 1799; Andrew Lawrie, Feb. 9, 1809; Hume, ii. 474.—<sup>3</sup> Charles M'Laren and Others, Feb. 10, 1803; Hume, ii. 474.—<sup>4</sup> Hume, ii. 474.—<sup>5</sup> John Cowie, Jan. 4 and Jan. 9, 1804.—<sup>6</sup> Hume, ii. 475.—<sup>7</sup> John Findlay and Jean Watson, July 1739; James Smith, Feb. 16, 1753; Lyall's case, Jan. 17, 1754.

make, the Court totally disregarded his plea, that as the original day of execution had passed, no other could be named, and sentenced him afresh on a new day.<sup>1</sup>

10. If a lawful sentence has been given, but, from mistake or inattention, has not been carried into effect, or full effect, on the appointed day, it cannot thereafter be legally enforced.

If a sentence has been lawfully pronounced, but the day fixed for carrying it into execution has been allowed to pass from accident or inadvertence, the Sheriff or Magistrate intrusted with the performance of that painful duty, cannot legally carry it into effect on a later day.<sup>2</sup> For the appointed day of execution is the limitation of the sentence, and the pannel has done nothing by his acts, either legal or illegal, to prevent it from being carried into effect at that time. If, therefore, this time has anyhow, without his interference, or that of a riotous assembly or rescue on his behalf, been suffered to elapse, he is entitled to the benefit of that circumstance.<sup>3</sup> Nay, farther, even the Supreme Court, if the appointed time has elapsed in this manner, without the matter having been brought before them, are bound to give no new order as to the pannel, but for his absolute discharge from confinement; for they are not entitled to interfere to correct the errors or negligence of inferior courts, unless legally called on for that purpose by the prosecutor in due time, or unless the prisoner himself has, by his illegal conduct, rendered their interposition necessary.<sup>4</sup> In a case, accordingly, where a prisoner had avoided execution, owing to an error of the Magistrates of Edinburgh, having first failed to execute him on the day appointed for the sentence as being a public fast, and yet neglected previously to apply to the Lords of Justiciary to name another day, the Court in the end obtained for him a free pardon.<sup>5</sup> In like manner, in another case, where a man had been banished from Scotland, by sentence of the Court of Justiciary, under certification of being scourged, in terms of his sentence, on the *first* market-day after his commitment, and he had returned to Scotland, and been imprisoned, but not scourged on the *first* market-day after

<sup>1</sup> Willam Gadesby, Feb. 15, 1791 — <sup>2</sup> Hume, iv. 475. — <sup>3</sup> Ibid. — <sup>4</sup> Ibid. — <sup>5</sup> Fleming, 1682; Royston, notes, 291; Hume, ii. 475.



his recommitment to the jail of Perth, it was held by all the Judges that the man could not be scourged, as the day assigned had elapsed, and the Lord Advocate consented to his prayer, to be allowed to go into banishment again.<sup>1</sup>

The same rule must be followed, and on the same principle, if the convict, after being executed, survives the sentence, or is brought to life by his relations. For, though the sentence certainly is to be “hanged by the neck till you be dead,” yet if owing to the inattention of the magistrates, or executioner, or accident, this sentence is not carried into full execution during the appointed time, it becomes as incompetent to go on with, or renew it at a subsequent time, as it would have been to have executed the sentence at first on a different day from that specified in the sentence.<sup>2</sup> In a case, accordingly, where a woman was recovered after being hanged for the full period, no attempt was made to put the sentence in force a second time; but she lived unmolested in Edinburgh for several years afterwards.<sup>3</sup> But it would be otherwise if the full execution of the sentence were prevented by an external act, or the violence or fraud of the pannel; as if he should break from the officers or escape, or obtain a surcease of justice for a short time by a rescue, or the exhibition of a forged respite or pardon, or the like. In such a case, as the period fixed in the sentence has elapsed without the execution being completed, in consequence of external fraud or violence, the magistrate will be held excusable if he carries it into execution as soon as he can after its expiry. But if the day elapses without this being possible, the safer course appears to be to apply to the Supreme Court by petition, setting forth the fact, and the cause of the interruption in the course of justice, and they would, in all probability, fix a new day for the execution, upon the principle that no one can be allowed to profit by his own illegal act, or that of others for his behoof.

11. It is not competent for the Court which pronounced a sentence, to amend, alter, or vary it, whether it was done by the Supreme or any inferior Courts.

The principle of law in criminal matters is, that after a sentence is pronounced, the Court is *functus officio* in regard to that

<sup>1</sup> Charles Graham, Dec. 20, 1780; Hume, ii. 475.—<sup>2</sup> Hume, ii. 476.—<sup>3</sup> Margaret Dickson, 1724; *Ibid.*

matter, and therefore it cannot, upon a reclaiming petition or otherwise, make any alteration upon a sentence once pronounced.<sup>1</sup> It was found accordingly by the Justiciary Court, above a century ago, in a case where the Magistrates of Edinburgh applied by petition to have some alteration made on a sentence pronounced by the Court of Justiciary, "That the process brought before this Court is terminated by the verdict of an assize, and the sentence pronounced thereupon; and by the form of this Court, that sentence cannot be altered by the Lords pronouncers thereof, and the said sentence contains the full warrant for execution of the same."<sup>2</sup> So also in a case where a prisoner had been sentenced to transportation at the Circuit Court at Inverness, and was afterwards suffered to enlist without the knowledge of the Court, and returned with his regiment to Scotland, and was there apprehended and threatened with whipping under the certification contained in his sentence, the Court found, "that as the petitioner never was transported in terms of the sentence of the Circuit Court of Justiciary, he is not liable to be whipped, and prohibits the Magistrates of Inverness from executing that part of the sentence; but find that he must remain in prison till he is transported, in terms of his former sentence."

As it is not competent for the Supreme Court to review, amend, or alter their judgments in any particular when they have been embodied in the form of a sentence against the prisoner, still less is it competent for an inferior court to assume such a power. In a case, accordingly, where the Magistrates of Glasgow had passed sentence on John Tweeddale, ordaining him to be confined at hard labour for a twelvemonth, but reserving to themselves power to shorten that term if they shall see cause; the Lords found that the Magistrates of Glasgow had no power to reserve to themselves, or any of their number, to mitigate the sentence they had pronounced.<sup>3</sup> On the same principle, in a case where certain country justices had, on a reclaiming petition, altered a sentence which they had previously pronounced, the Court "found it was not competent for them to review or alter their first sentence."<sup>3</sup> For the same reason no appeal is competent *in criminalibus* from the judgment or sentence of the Sheriff-substitute to that of the Sheriff-depute; but the only me-

<sup>1</sup> Hume, ii. 476-7.—<sup>2</sup> Magistrates of Edinburgh, 31st Dec. 1716.—<sup>3</sup> Magistrates of Glasgow, 13th June, 1803; Hume, ii. 476.—<sup>4</sup> John M'Nish and Janet Drysdale, 23d May, 1810.

thod by which either can be reviewed is by suspension or advocacy in the Supreme Court.<sup>1</sup>

It is hardly necessary to observe, that a criminal sentence is irrevocable as soon as it is pronounced, and that there is no time allowed for reclaiming days, as in the civil court before extract.<sup>2</sup> In a case, accordingly, where a prosecutor had complained by petition of a sentence so far as it found him liable in expenses, the Court refused the petition as incompetent, and found him liable in expenses.<sup>3</sup>

Though not possessed of the power of reviewing or altering their sentences, however, the Justiciary Court have occasionally, *ex intervallo*, supplied an *omission*, where something material has been omitted in the petitioner's favour in the original sentence. On this principle, where a person had been ordered to be confined in consequence of a conviction for murder in a state of insanity, but they had omitted to modify the penalty in the bond, the Court, on a petition, supplied that omission, and fixed the penalty at L.100 sterling.<sup>4</sup> On the same principle, when a prisoner had been sentenced to imprisonment, and thereafter to be detained in jail till she should find security, and she had lain in jail for five years after the period of her imprisonment had expired, from inability to find caution, the Court, in respect of the length of her confinement, ordained her to be set at liberty without any security.<sup>5</sup> This case is not likely to arise now, as by the late act all sentences, ordaining a party to be imprisoned till they pay a fine, or find security to keep the peace, must specify a period when the imprisonment is to cease, though such caution has not been found, or penalty paid;<sup>6</sup> but it illustrates the general controlling power which the Justiciary Court possess, and the interference in mitigation of otherwise irremediable evils, which, in virtue of their *nobile officium*, they frequently exercise.

On the same principle, where the punishment of transportation has been pronounced, the Court were frequently in use, before any regular provision for their removal was made, to modify the mode of carrying the sentence into effect, on the prisoner's application, and for his benefit, as by releasing a prisoner under sentence of banishment from Scotland, on his own security to remove, in respect he could not find caution from others that he

<sup>1</sup> So held in suspension, *Roger v. Gray*, 20th June, 1821; Record.—<sup>2</sup> *Hume*, ii. 477.  
—<sup>3</sup> *James Fife*, 22d Dec. 1797.—<sup>4</sup> *Peter Lawson*, 21st May, 1821; *Hume* ii. 476.—

<sup>5</sup> *Elizabeth Stewart*, 12th Nov. 1822; *Shaw*, No. 81, and Record.—<sup>6</sup> 9 Geo. IV. c. 29, § 21.



would do so;<sup>1</sup> or by allowing a person under sentence of transportation to enlist in a regiment quartered abroad, where no opportunity of transporting him had occurred;<sup>2</sup> or by allowing a person who had got a pardon on condition of being transported, and when there was no regular contractor for the transportation of felons to be found, upon finding an individual who would find contract for that purpose, and the Lord Advocate's consent being obtained.<sup>3</sup> These cases are no contradiction to the rule already given as to the irreversable nature of a criminal sentence; they are instances of the modification of the mode of carrying it into execution, in virtue of the general controlling power which the Court enjoys over the criminal police of the kingdom.

12. The Court of Justiciary possess a general power, in cases where the health of a convict is seriously endangered by confinement, to make such a modification of the sentence as justice may require.

It frequently happens, that a person under sentence of imprisonment becomes ill, in consequence of which his life is endangered from the continuance of his confinement. In such situations the Court have a general controlling power, in virtue of which they may liberate the prisoner for such a time, and on such precautions to insure his return as the justice of the case may seem to require.<sup>4</sup> In many cases, accordingly, the Court, upon a certificate from a physician, that the life of a prisoner was endangered by confinement, have liberated him on security, "that upon recovery of his health he shall return to the tolbooth of Edinburgh, therein to remain until the full space of his confinement shall be completed."<sup>5</sup> This deliverance proceeded on the consent of the Lord Advocate; but although it is desirable to obtain this, wherever it is possible, yet the Court are fully entitled to judge of his Lordship's conduct in this particular, and if he refuse his consent without due cause, to grant such warrant without it. Warrant for liberation, under security to the extent of L.200, was granted in like manner in a case where the Lord Advocate consented;<sup>6</sup> and in another instance, where the like concurrence had been obtained.<sup>7</sup> But in another case, where his

<sup>1</sup> Janet Jamieson, Jan. 10, 1734.—<sup>2</sup> Walter Denny, July 1, 1735.—<sup>3</sup> James Fullerton, Jan. 15, 1784.—<sup>4</sup> Hume, ii. 478.—<sup>5</sup> James Fisher, June 22, 1781.—<sup>6</sup> John Fraser, Aug. 2, 1809; record.—<sup>7</sup> Aaron Bramwell, Feb. 4, 1820; record.

Lordship did *not* consent, but left it to the Court to do as they should see cause upon the certificates of the surgeons produced, the Court, “in respect of the said certificates, and whole circumstances attending the state of the petitioner’s health, in this case, grant warrant to the magistrates of Dumbarton to liberate the petitioner, on his finding caution to the extent of L.40 sterling, to return to jail on the recovery of his health, and to undergo the remainder of his sentence.<sup>1</sup> In all these cases the liberation was burdened with the condition of finding caution; but there does not appear to be any absolute bar to such an interposition, upon juratory caution, or no caution at all, in cases where the danger to the prisoner is imminent, and there appears sufficient evidence that he is in such destitute circumstances, or so little known as to be totally incapable of finding security. At least this would probably be done in cases where the sentence on which the confinement proceeded, was one of imprisonment only; but in the case of those under sentence of transportation, the safer course appears to be to grant warrant for their removal to some jail where they can obtain the benefit of air and exercise, as the jail at Edinburgh, that at Ayr, &c. there to be maintained till recovery, or removal to the hulks, at the expense of the party legally subject to the same.

13. The highest punishment known in the law is that of death, which in all cases draws after it the escheat of the whole moveable estate; and in cases of atrocity, the body may be ordered to be hung in chains on the spot where the crime was committed.

The times are fortunately now past when an offender, even of the deepest dye, can be subjected to any severer bodily punishment than that of death. Formerly, a female offender in cases of treason was liable to be burnt; but this horrid barbarity was removed by 30 Geo. III. c. 48, which directs that in cases of treason and petty treason, a female offender shall be drawn on a hurdle to the gallows, and hanged by the neck. By 54 Geo. III. c. 146, a man convicted of treason shall have judgment in the like terms, and the head be afterwards severed from the body; but power is reserved to his Majesty to order by sign-

<sup>1</sup> Hugh M’Farlane, June 9, 1817, record; and Hume, ii. 478.

manual, after such judgment, that the convict shall be carried to the place of execution, in such way as the order shall appoint, and that he shall be executed by severing the head from the body, instead of hanging by the neck. In the execution of Robert Watt, Sept. 1794, all these circumstances of indignity were remitted, excepting the severing of the head after death<sup>1</sup> a piece of barbarity on lifeless remains which never fails to be shocking to the feelings, and should always be remitted on such melancholy occasions in future.

With respect to the disposal of the dead body, this is given back to the relations of the deceased, excepting in cases of murder, where a different course must, by special statute, be adopted. By 25 Geo. II. c. 37, it is directed, that the sentence shall specify the delivery of the body to a surgeon or anatomist for dissection, who is usually the Professor of Anatomy at Edinburgh or Glasgow. In cases of atrocity it is sometimes ordered that the body shall be hung in chains, which is competent under the statute, and has been frequently practised both in ancient<sup>2</sup> and more modern times.<sup>3</sup>

It is also another consequence of the same punishment, from the remotest times, at common law, that the whole moveable goods of the pannel are escheat to the Crown; and the sentence contains an order, "and ordains his whole moveable goods and gear to be escheat and inbrought to his majesty's use." The sentence is thus a warrant for immediately collecting his moveable effects for his majesty's use, and this effect takes place without any denunciation at the horn,<sup>4</sup> simply upon the warrant contained in the sentence, in which respect it differs from the escheat consequent on outlawry for not appearing to answer a charge, which falls as in civil debts on denunciation at the horn, following on the sentence of outlawry only;<sup>5</sup> but by special statute, this denunciation may be made either at the head burgh of the debtor's domicile, or at the market-cross of Edinburgh, within six days after the sentence of fugitation, and registered either in the books of the head burgh of the debtor's domicile, or in the books of adjournal of the Justiciary Court.<sup>6</sup>

Excepting, however, in cases of treason, where the English law is now extended to Scotland, the Scotch law admits no cor-

<sup>1</sup> Hume, ii. 482.—<sup>2</sup> John Dow M'Gregor, April 4, 1637; John Black, Dec. 2, 1652; Norman Ross, Nov. 22, 1751; Andrew Wilson, Aug. 13, 1755.—<sup>3</sup> Robt. Scott, Jedburgh, Autumn 1823.—<sup>4</sup> Ersk. ii. 5, 57.—<sup>5</sup> Ibid.—<sup>6</sup> 1592, c. 128; Ersk. ii. 5, 57.



ruption of blood, nor any forfeiture of the real or heritable estate upon a capital conviction;<sup>1</sup> so that the eldest son of a man executed for murder, may, without challenge, take up and enjoy his estate. Baron Hume, however, gives it as his opinion, that in the case of a capital convict making his escape from the execution of sentence, the rents of his lands accrue to the superior, from the necessity of the case, during his natural life, because he is civilly dead, and so incapable of taking them up himself, and yet naturally alive, and so in a situation to exclude his heir from making up a title to them, in connexion with his right as heir.<sup>2</sup> With deference, however, to that great authority, there seems no insurmountable difficulty on feudal principles in holding that the rents accumulate for behoof of the next heir, *in mobilibus*, who at common law would be entitled to take them; and that as soon as the disability of his drawing them is removed by the convict's death, his executor becomes entitled to reap them, as rents unpaid during his predecessor's life, on the same principle on which those unpaid during an apparent heir's life devolve to his executor.<sup>3</sup> If a person be found guilty of murder, and sentenced to be hanged, but dies in prison or kills himself before execution, the professor of anatomy is not entitled to receive the body, but it must be given back, if required, to his relations;<sup>4</sup> and if a sentence of death be pronounced, but commuted into one of transportation for life after service, but before trial of another charge, the running of that punishment is a bar to the pannel's pleading or being brought to trial for the second charge till it be removed.<sup>5</sup>

14. The next punishment to death is transportation beyond seas, which has long been incorporated with our common law, and must now be inflicted for life in all cases of forgery or uttering, capital by the former law, without exception.

The punishment of transportation has, for above a century, been completely incorporated both with our common and statutory law. It was frequently carried into effect in former times, by the pannel being ordained within a certain time to transport himself under certification of various severity in case of

<sup>1</sup> Hume, ii. 483.—<sup>2</sup> Ibid.—<sup>3</sup> Lord Banff, July 24, 1765; Dict. p. 52, 57.—<sup>4</sup> William Pollock, March 22, 1826.—<sup>5</sup> William Wood, March 9, 1824; vol. i. p. 559.

non-compliance or return. But now by the 25 Geo. III. c. 46, and 5 Geo. IV. c. 84, the certification is made capital, whether the convict has agreed to transport himself or been transported. The words are, "that if any offender who shall have or shall be sentenced or ordered to be transported, or banished, or have agreed, or shall agree to transport himself or herself, on certain conditions, either for life or any number of years, shall be afterwards found at large, within any part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offenders shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being thereof lawfully convicted, shall suffer death, as in cases of felony, without benefit of clergy." For trials for the offence of returning from transportation, see Chap. XXVIII.

By the 2 and 3 William IV. c. 123, it is enacted, "That where any person shall, after the passing of this act, be convicted in Scotland or Ireland, of any offence now punishable with death, which offence shall consist wholly, or in part, of forging or altering any writing, instrument, matter, or thing whatsoever, or of offering, uttering, or disposing of any writing, instrument, matter, or thing whatsoever, knowing the same to be forged or altered, or of falsely personating another, then and in each of the cases aforesaid, the person so convicted of any such offence as aforesaid, or of procuring, or aiding, or assisting in the commission thereof, shall not suffer death, or have sentence of death awarded against him, but shall be transported beyond seas for the term of such offender's life.

"Provided always, and be it enacted, That notwithstanding any thing herein before contained, this act shall not be construed to alter or affect the said recited act, or any other act or law now in force, so far as the same may authorize the punishment of death to be inflicted upon any person convicted either in England, Scotland, or Ireland, of forging, or altering, or of offering, uttering, or disposing of, knowing the same to be forged or altered, any will, codicil, testament, or testamentary writing, with intent to defraud any body corporate, or person whatsoever, or of forging or altering, or of uttering, knowing the same to be forged or altered, any power of attorney, or other authority, to transfer any share or interest of or in any stock, annuity, or other public fund, which now is, or hereafter may be transferable, at

the Bank of England, or South Sea House, or at the Bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate, or person whatsoever, or of procuring, aiding, or assisting in the commission of any of the said offences, but that the punishment of each and every of the said offences, and for procuring, aiding, or assisting in the commission thereof, shall continue to be the same as if this act had not been passed."

"And in order to prevent justice being defeated by clerical errors, or verbal inaccuracies, be it enacted, that in all informations or indictments for forging, or in any manner uttering any instrument or writing, it shall not be necessary to set forth any copy or fac-simile thereof, but it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same, any law or custom to the contrary notwithstanding."

Under this act it is only the "offences *now punishable with death*," relating to forgery or uttering, which are declared to be punishable with transportation for life. In cases of forgery or uttering, therefore, not previously punishable with death, and in which a restriction of the libel is not required, it is not imperative on the Court to pronounce a sentence of transportation for life. This, which is abundantly obvious on the words of the statute, was lately fixed, after full consideration, in a case certified for the determination of the Court, as to the punishment to be inflicted, from the Dumfries Circuit. The pannel there pleaded guilty to a trifling charge of uttering a forged letter of guarantee for payment of a rent to the amount of 12s.; and the Court, holding that neither at common law, nor under the 45 Geo. III. cap. 90, was this a capital case anterior to the statute, justly pronounced the limited punishment of six months' imprisonment only.<sup>1</sup>

There can be no doubt that this statute was well meant; but in practice, in Scotland at least, it must prove a very great aggravation of the punishment undergone by prisoners convicted of such crimes, because it prescribes one unvarying rule for the punishment of all cases of forgery and uttering which were previously capital, and sentences them all to transportation for life; whereas, under the old system of a restriction of the libel, the Court was authorized to modify the punishment according

<sup>1</sup> Feb. 25, 1833.



to the magnitude of the offence, which varied from a few months' imprisonment in trifling cases, to transportation for fourteen years, or life, in the more aggravated; another proof among the many which the Scotch law affords, of the superior practical severity of an unbending statutory punishment, even though apparently and in a few cases more lenient, to the system of restriction and arbitrary punishments which formerly prevailed, and forms so remarkable a feature in its criminal jurisprudence. The Court are now compelled, even in cases of uttering a single forged note, to pronounce sentence of transportation for life, a severity totally unsuited in many cases to the crime, and which generally renders a modification of the punishment by the Crown necessary; a system which tends to introduce into our law that disparity between the sentences pronounced and those inflicted, so loudly complained of in the English law, and from which, under the former system, our practice was so remarkably free.

Provision is always made for the transportation of offenders, either to the Hulks or Penitentiary in England, or to New South Wales, by Government, and till that is done they remain in jail. All sentences of transportation, accordingly, contain a warrant to detain the convict in jail "till an opportunity offer for his transportation." From the date of the sentence he becomes subject to the severe law against returning from transportation, and is liable to be capitally prosecuted if found at large, though he has never been removed from prison. It has been found in England, that it is lawful to pass a second sentence of transportation on a person in his trial on a new charge, though his first term had not expired, the second term to be computed from the date of the second conviction.<sup>1</sup>

15. Banishment from Scotland is now abolished, except in those cases, now comparatively few, and in a great degree obsolete, where it is affixed by special statute as the punishment of particular offences.

Banishment from Scotland was at one period a very frequent punishment, and in imitation of that practice, the absurd custom was very frequent of banishing criminals from one county to another. But these relics of barbarism are now swept away by

<sup>1</sup> George Bath and Others; Leach, i. 203.

Sir William Rae's act, 1 Geo. IV. c. 37, which enacts, "That it shall not be competent for any Judge or magistrate to pronounce upon any person whatsoever, convicted of any crime, a sentence banishing such person forth of Scotland only, or forth of any borough or district, or county of Scotland, save and except in those cases where by any act or acts of the Parliament of Scotland the punishment of banishment forth of Scotland is enacted and specially provided for any specific offence." The effect of this enactment has been to abolish altogether the practice of banishing from one part of Scotland to another, and to confine banishment from Scotland to those cases, now comparatively rare, where such a penalty, as in cases of conviction of the celebration of clandestine marriages, is prescribed by special statute. In such cases the various and uncertain pains of our ancient law, in cases of return, are now exchanged for that of imprisonment and whipping on the first market-day after conveyance to the jail where the person is at the date of his sentence.<sup>1</sup>

16. In cases of transportation and banishment, the civil interest, if any, which the jailer or creditors may have in detaining the person of the convict, must yield to the public interest in the execution of the sentence.

Sentence of banishment or transportation may sometimes interfere with the civil interest of the convict's creditors, who may have claims against him in jail, or may have used the diligence of the law to attach him there for a civil debt. It is fixed law, however, that such civil and patrimonial interests must yield to the paramount interest of the public in getting quit of so dangerous a character as one sentenced to such a punishment; and, accordingly, the criminal sentence of banishment or transportation prevails over an arrestment at the instance of creditors,<sup>2</sup> equally as over the pretensions of a jailer to detain the convict for payment of his fees.<sup>3</sup>

There can be no doubt that criminal diligence must prevail over civil, in relation to goods belonging to convicts, in so far as their use for the purposes of evidence at the trial is concerned.<sup>4</sup> But it is a different question how far goods in the hands of the

<sup>1</sup> Hume, ii. 486.—<sup>2</sup> William Douglas, Nov. 16, 1752; Hume, ii. 487.—<sup>3</sup> David Din, July 14, 1752; Kilk. No. 4.—<sup>4</sup> Hume, ii. 488.

clerk of Court, or of the Sheriff in a precognition, may not be arrested after the ends of criminal justice have been satisfied, and there seems no objection to this being allowed, and the ordinary principles of competition in civil cases applied when this has been done. In one instance the Court found "that goods or money taken possession of by the officers of the law for the purposes of public justice, are not arrestable;" and, accordingly, they granted the prayer of the petition of a man whose stolen bank-notes had been arrested in the hands of the clerk of Court, although they had been arrested in his hands by a creditor of the petitioner's.<sup>1</sup> But in a late case where a similar petition had been presented, praying for redelivery of goods used in evidence, which was met by an arrestment laid on in the clerk's hands, the Court "refused the desire of the petition, reserving to the parties to dispute their preference before the civil Judge, as accords."<sup>2</sup> The true principle appears to be, that no civil diligence can be permitted to prevail over, or interfere with, the interest of the public in the trial of criminal offenders; and, therefore, the goods must be forthcoming in the Sheriff or clerk's hands till all the purposes of trial are ended; but when this has been done, they become open to attachment like any other moveables for civil debt, and any competition regarding them should be judged of in a multipoleinding raised in the name of the clerk in the civil Court.

17. Whipping and the pillory are the only corporal pains, inferior to death, which are still in use; and of these the first is the only one which, from its frequency, is deserving of a place in a practical treatise of jurisprudence.

Whipping has been frequently inflicted of late years, especially in cases where personal injury, accompanied with circumstances of cruelty, has been brought home to the pannel, as in a very atrocious case of discharging loaded firearms with intent to murder, where it was superadded to transportation for life;<sup>3</sup> in a bad case of assaulting and stabbing with a knife, where it was joined to transportation for seven years;<sup>4</sup> in a case of biting off a nose,

<sup>1</sup> Matthew Boyd, Jan. 11, 1811; Hume, ii. 488.—<sup>2</sup> James Thomson, Dec. 9, 1812; *ibid.*—<sup>3</sup> John Kean, Glasgow, Spring 1825.—<sup>4</sup> Alexander M'Kay, July 12, 1825.



where it was joined to twelve months' imprisonment;<sup>1</sup> and in a barbarous case of assault with intent to ravish, where it was joined to seven years' transportation.<sup>2</sup> For farther instances of this punishment, see the Chapter on Assault and Real Injury.<sup>3</sup>

The pillory is much less frequently inflicted now than formerly; and, indeed, there has been hardly an instance of its being inflicted for the last fifteen years. It is obviously an unjust and unequal punishment; being excessively severe to any convict who happens to be obnoxious to the populace, and proportionally light to those who are not the objects of such obloquy. It was much in use in former times;<sup>4</sup> but it is to be hoped the good sense and justice of our Judges will be slow to revive a mode of punishment which subjects the prisoner to the passions of the rabble, as likely to exceed the dictates of justice in one case, as they fall behind them in another.

18. The punishment of infamy is affixed by statute to several, and by common law, to other offences, and it still forms a part of the daily practice of the Court.

Another, and a very serious punishment, is that of infamy, whereby the convict is cast out of the number of trustworthy persons, and becomes incapable of office, or honour, or of officiating on any inquest or assize.<sup>5</sup> To these serious disabilities were added that of incompetence to bear evidence in any Court civil or criminal, but that is now removed, except in the case of perjury, or subornation of perjury, by the 1 William IV. c. 37, as soon as "the person convicted of any crime shall have endured the punishment to which such person shall have been sentenced for the same." But as long as the term of imprisonment or transportation lasts, the disability to give evidence continues, and it is removed only by its termination.<sup>6</sup>

By special statute, this disgraceful condition is the appointed addition to the punishment in certain offences, as bigamy,<sup>7</sup> perjury,<sup>8</sup> subornation of perjury,<sup>9</sup> fraudulent bankruptcy,<sup>10</sup> bribery in a Judge,<sup>11</sup> and some others. And, independent of statute, infamy naturally attaches to a conviction, if by the verdict of a jury, of any of those offences, such as theft, reset of theft, for-

<sup>1</sup> Charles M'Ewan, July 13, 1824.—<sup>2</sup> James M'Ewan, March 14, 1831; George Scott, Dumfries, Autumn 1824.—<sup>3</sup> Vol. i. 186, 196.—<sup>4</sup> See Hume, ii. 489.—<sup>5</sup> *Ibid.*  
—<sup>6</sup> *Vide ante* ii. 442.—<sup>7</sup> 1551, c. 19.—<sup>8</sup> 1555, c. 47.—<sup>9</sup> 1475, c. 63.—<sup>10</sup> 1579, c. 93.  
—<sup>11</sup> 1621, c. 18.

gery, swindling, and the like, which are universally felt to be of a base and degrading nature, springing from a sordid and deceitful disposition, not a mere quarrelsome or fiery temperament.<sup>1</sup> In a late case, infamy was insisted as an addition to the punishment in a case of confessing a single act of fraudulent bankruptcy before the Supreme Court;<sup>2</sup> and in another, where a conviction was obtained for obtaining and opening letters by means of cozenage and false pretences, and personating another, where six weeks' imprisonment was the only sentence, it was deemed necessary by the prisoner's counsel (Mr now Lord Moncrieff) to obtain from the Crown a remission of the infamy implied in or consequent on the sentence, though not expressed.<sup>3</sup>

Infamy, however, does not follow a conviction for any of the inferior crimes, as adultery, clandestine marriage, petty riots, common assault, prison-breaking, deforcement, sending a challenge, usury, smuggling, or seduction of artificers.<sup>4</sup> Nor does it follow a conviction even for the greater crimes, as theft, reset, fraud, or swindling, if the instance of it was trifling, and the conviction obtained without a jury.<sup>5</sup> Without doubt, in the latter cases where the conviction was with a jury, infamy must attach to the convict. In general, it may be observed, that infamy attaches to the crime and not to the punishment; and, therefore, it would not follow a punishment even by pillory or scourging, if awarded, not in pursuance of a conviction for any of the base and sordid crimes, but a mere assault, riot, or the like proceeding, from the excess of passion, and from no fraudulent or interested motive.<sup>6</sup> Such punishments may affect witnesses' credibility, but they do not of themselves, independent of the crime on which they followed, render them incompetent to give evidence, even before the punishment has been endured.

19. The most usual punishment in trifling cases, is imprisonment, which is seldom now made to extend to more than two years, but to which the addition of solitary confinement for a limited period, or hard labour, or feeding on bread and water, or abstinence from all spiritous and fermented liquors, or caution to keep the peace, is frequently superadded.

<sup>1</sup> Hume, ii. 489.—<sup>2</sup> George Wilson, July 19, 1832.—<sup>3</sup> Alexander Borland, June 5, 1826; ante, i. 367.—<sup>4</sup> Hume ii. 990.—<sup>5</sup> Ibid.—<sup>6</sup> Hume ii. 490; Phil. i. 30; Bull, 292; Leach, ii. 496.

Imprisonment is another of our ordinary punishments which is chiefly applied to the inferior offences. In all cases, the sentence must specify the period for which it is to continue; and if a fine is imposed, and caution is to be required to keep the peace, it must also mention a period, "at the expiry of which the person sentenced shall be discharged, notwithstanding such penalty shall not have been paid or caution found."<sup>1</sup> Long imprisonments are justly looked upon with great disapprobation by the Court, both as tending to destroy the convict's character, and as imposing a useless burden upon those charged with the maintenance of the prisoners. Of late years, no sentence of imprisonment for more than two years has been pronounced, and even in serious cases, eighteen months has been the limitation of the period; confinement from one month to twelve, is usually awarded in ordinary cases of assault, theft, reset, and the like.

It is very frequent to insert in the sentence some addition to imprisonment, suitable to the peculiar character of the offence of which the prisoner has been found guilty. Thus, nothing is more common in police cases, where the period of imprisonment cannot exceed sixty days, than to sentence the prisoner to be confined half that time in a solitary cell, or to be fed on bread and water; but that addition of solitary confinement should not exceed that period, even though the imprisonment is much longer, for it has been found by experience, that solitary confinement for a longer period is a punishment of extreme severity, frequently heavier than the prisoners can bear. Hard labour, which is generally now at the tread-mill, stands in a different situation, as it is performed by the prisoners together, and under proper regulations, is not injurious to their health, and it accordingly is frequently imposed for the whole period of confinement, even of six, nine, or twelve months. Abstinence from spirituous or fermented liquors, or caution to keep the peace for a certain period, under a certain penalty, is a frequent and most appropriate addition, in those cases, unhappily too numerous, where the injury has arisen from a violent and ungovernable temper, or the immoderate use of ardent spirits; an indulgence which forms the national disgrace of Scotland, and from which, directly or indirectly, at least three-fourths of the crimes which are committed are daily proved to have arisen.

<sup>1</sup> 9 Geo. IV. c. 29, No. 21.



20. Escheat of moveables, or loss of office, form the peculiar and statutory punishment of certain offences.

In cases of deforcement, bigamy, perjury, and some other offences, escheat of moveables is one article of the statutory pains.<sup>1</sup> As it is a penalty, however, altogether unequal in its operation, being in some cases excessively severe, and in others, nothing at all, it is plainly a relic of barbarity, and as such, the fit object of legislative correction. Should a case occur, where, from the magnitude of the moveable estate, the penalty thus imposed is disproportioned to the offence committed, the Crown would doubtless remit the forfeiture in Exchequer, if not in favour of the person convicted, at least in that of his family or relations.

Loss of office is also the appropriate punishment of various offences, which involve falsehood or corruption in that capacity. Thus a Judge or clerk of Court may properly be deprived of office for wilful corruption, or malversation in their important duties; or the Magistrate of a burgh, culpable for failure to quell a tumult, or any burgess, or freeman, for joining in such tumults, may be deprived of their several franchises or offices. This, accordingly, was part of the sentence against various persons convicted of accession to the great meal mobs in 1720, in Anstruther, Montrose, and Dundee.<sup>2</sup>

21. For petty assaults or breaches of the peace, the lighter cases of culpable homicide, and other police offences, it is very usual to inflict a fine of various amount, according to the circumstances of the delinquent.

For petty riots and breaches of the peace, and such transgressions as do not indicate a corrupt or depraved disposition, but were the ebullition of transient passion, or accidental intoxication, and have not terminated in any serious injury, it is usual to inflict a pecuniary fine, varying according to the circumstances of the party in fault, from ten shillings to many hundred pounds.<sup>3</sup> The "imposing of exorbitant fines," or such as the offender either cannot pay or not without ruin, is one of the methods of replenishing an exhausted Exchequer, which was formerly much in use, and is justly set forth as one of the public

<sup>1</sup> Hume, ii. 492.—<sup>2</sup> David Barry, James Duncan, Thomas Gilkie, May 30, and Aug. 9, 1720; Hume, ii. 492.—<sup>3</sup> *Ibid.*, ii. 493.

grievances at the Revolution; and by another article of that great charter, the disposing of fines and forfeitures before sentence, is declared contrary to law.<sup>1</sup> Since that time the imposing exorbitant fines has almost entirely gone out of use, and they now seldom amount to more than a few hundred pounds, even on offenders of respectability or station in life. It is still, however, a punishment frequently imposed, either in cases of mitigated delinquency, where the crime was the result rather of error in judgment than criminality of intention,<sup>2</sup> or where it was the effect of the slightest degree of criminality, although a fatal result has ensued,<sup>3</sup>—and the rank of life or health of the party, and the state of the jail is such, as to render confinement, even for a short period, a punishment of more than ordinary severity. In all these cases the fine goes to the Crown, and must be levied and accounted for by the Sheriff of the county to the proper officer of the Exchequer, and the sentence must specify a period within which the imprisonment must cease, though the fine has not been paid.<sup>4</sup> It is much to be wished that some method could be introduced of awarding it, in circumstances where the Court thought fit, to the sufferer under the injury: a proceeding which would combine public punishment with reparation to the injured party, and might be so managed, through the intervention of the public prosecutor, as to keep it free from the obvious objection of biasing or affecting his testimony.

In cases in inferior courts, and in all instances where the private party is a pursuer, jointly with, or with the consent of the public prosecutor, it is usual not only to conclude for a fine for his Majesty's use, but an award of damages, *solatium*, and expenses to the private party.<sup>5</sup> In either case, the complainer is not left to the ordinary and tedious diligence of the law for recovery of the sums decreed, but has immediate remedy for them by the terms of the sentence itself, which ordains the offender to be imprisoned, under the limitation above specified, till payment of the several sums of fine, *solatium*, and expenses.<sup>6</sup> If the prosecution is at the instance of the public prosecutor only,

<sup>1</sup> Hume, ii. 1689, c. 13.—<sup>2</sup> Alexander M'Lean, Inverness, Autumn 1826, where a fine of L.20 was the punishment imposed on an Excise officer, who had severely wounded a smuggler, under an erroneous impression of duty.—<sup>3</sup> Richardson, Dumfries, Autumn 1824, when L.300 was the fine on a gentleman convicted of a slight case of culpable homicide.—<sup>4</sup> 9 Geo. IV. c. 29, § 21.—<sup>5</sup> Hume, ii. 493.—<sup>6</sup> James Justice, Aug. 4, 1744; Hume, *ibid.*

it was once thought doubtful, whether the like award can pass against the pannel for payment of the *expenses*;<sup>1</sup> but it seems to be now held that in such a case the like summary and instantaneous remedy is competent for payment of the expenses incurred in the prosecution, as for the fine imposed to the Crown.<sup>2</sup>

If a complaint be brought by the injured party, with concurrence of the Procurator-fiscal, for criminal or illegal proceedings, concluding for damages to himself, and a fine to the fiscal for the public interest, and a fine be awarded to the fiscal, as well as damages to the private party, he thereby acquires a *jus quesitum* in the fine so awarded, and may insist for it directly in his own name, though the original complaint was with his concurrence only, and the private party has in its later stages compromised or abandoned the prosecution.<sup>3</sup> If money be subscribed by certain persons to bring a particular set of offenders to punishment, and the Procurator-fiscal before the Justice of Peace Court conducts the prosecution, and he employs an agent in the Court of Session to conduct the case, the private subscribers are all liable to the Edinburgh agent in payment of his account.<sup>4</sup> Where a decree had been pronounced by the Circuit Court, finding the private party, in a prosecution at his instance, with concurrence, liable in expenses, but without modifying the sum, it was held competent to get the account taxed by the clerk of Court, and the amount inserted in the extracted decree, without any farther decree of the Judge, decerning in terms of his report, as is necessary in civil cases.<sup>5</sup>

22. No appeal is competent from the Court of Justiciary to the House of Lords; and it is only competent to obtain a remission of the sentence by pardon, or remission from the Crown, or reversal in the legislature.

It was at one time strenuously contended that an appeal to the House of Lords is competent against a sentence of the Court of Justiciary; but after a variety of unsuccessful attempts, it is now settled by a long series *rerum judicatarum*, that no such proceed-

<sup>1</sup> Andrew Robertson, July 12, 1803; Hume, ii. 493.—<sup>2</sup> Robert and David Cochrane, March 14, 1803; Hume, *ibid.*—<sup>3</sup> Hugh M'Glin and Others, Feb. 24, 1820; Fac. Coll. No. 25.—<sup>4</sup> Fisher v. Ronald, Bell, and Others, Jan. 29, 1818; Hume, ii. 493.—

<sup>5</sup> Cameron v. M'Intosh, Feb. 25, 1833.



ing is competent.<sup>1</sup> Without doubt, however, every sentence of a Criminal Court, even the highest, may be reversed by the legislature, and instances of this are not wanting in our practice.<sup>2</sup> These remissions are either *ex debito justitiæ*, or *ex gratia*. In the first case, the restitution extinguishes every sort of interest, public or private, which depends on the sentence, not only any claim of damages or assythment, at the instance of the injured party, but even all patrimonial rights, arising to strangers out of fines, confiscations, or forfeitures, though followed with possession in the interval, under the warrant of gifts from the Crown.<sup>3</sup> But one who is restored *ex gratia* merely, has no pretensions to the same sweeping results, but must accept, by way of favour or bounty, whatever the statute gives him, without any claim to bygone profits, or recovery of the tenements or subjects themselves from those who, for onerous causes and *bona fide* have acquired them.<sup>4</sup>

Though the Court of Session, as already noticed, are *ex necessitate* intrusted with the power of respiting sentences for a limited time, to give time to apply to the royal mercy, or the like, yet the Crown alone is invested with the power of permanent and final remission.<sup>5</sup> Which necessary and enviable prerogative is universal in point of extent, and supreme in degree, embracing all pains whatsoever for the public interest, of whatever magnitude, or nature, or extent, no matter by what Court pronounced, or for what crime imposed.<sup>6</sup> But this power of remission, how broad and ample soever, though it embraces the pains *in vindictam publicam* imposed on a prosecution at the private instance, does not reach the assythment, damages, *solatium*, or expenses due to the private party injured, which remain due and may be recovered notwithstanding the broadest and most unqualified pardon from the Crown.<sup>7</sup>

The mode of obtaining such a royal pardon, is, by a letter of remission, which is transmitted with the royal sign manual, without bearing any advice or consent, from the Secretary of State's office, to which all applications for such a boon, must be made to

<sup>1</sup> Lieut. Ogilvie, Aug. 1765; George Dempster, March 7, 1768; per Lord Mansfield, in Mungo Campbell, Feb. 7, 1770; per Lord Mansfield, in Murdison and Miller, March 10, 1773; per Lord Mansfield, in Bywater, Spring 1781; M'Laurin, 581, and Robertson and Berry, May 8, 1793; Hume, ii. 504, 506.—<sup>2</sup> Fletcher of Saltoun, and Swinton of Swinton, by 1690, c. 16 and 41.—<sup>3</sup> Hume, ii. 504.—<sup>4</sup> *Ibid.*—<sup>5</sup> Hume, ii. 495.—<sup>6</sup> *Ibid.* ii. 496.—<sup>7</sup> Hugh M'Neill, March 4, 1717; Hume, ii. 496.

the keeper of the Great Seal in whose hands, as a matter of course, it receives its consummation. It is then presented in the Justiciary Court, which of course pronounces an order in terms of the pardon, directed to the magistrates intrusted with the execution of the sentence, and record the remission in the books of adjournal.<sup>1</sup> This pardon may be pleaded or presented in Court in absence of the pannel; but in prosecutions at the private instance, it will be allowed and given effect to, only on its being shown, that the private complainer has been satisfied, or on caution found to pay the assythment, as it shall afterwards be modified in the proper Court.<sup>2</sup>

Royal pardons are either absolute or conditional. Those of the latter description are by far the most frequent, as they are usually meant to soften the extreme rigour of the sentence, without absolving the convict altogether from punishment. Remissions of a sentence of death are now very frequently burdened with the condition of transportation for life. In such a case, the Court qualify the pardon with the infliction of the lesser sentence, and grant warrant for carrying it into full effect.<sup>3</sup>

The King has also the power of respiting sentence during pleasure, or for a limited time, a proceeding which is of very frequent application; where the sist is to ascertain a day only, it bears by common style an order for execution on that day, if a farther sist be not notified in the interval. But during the dependence of such sist or application for mercy, the pannel is not entitled to be released on caution, but must remain in jail, there to await the issue of his application.<sup>4</sup>

Acts of indemnity, of more frequent use formerly than in these times, may also interfere to prevent an offender from being brought to trial; on this subject, now one of antiquarian research more than practical use, it is sufficient to refer to Baron Hume's Commentaries.<sup>5</sup>

The processes by which the sentences of Inferior Courts may be reviewed in the Justiciary Court, have been already considered.<sup>6</sup> It need only be farther added on that subject, that it was recently held by the Supreme Court, on a suspension of a sentence pronounced by the Sheriff of Edinburgh, with the assistance of

<sup>1</sup> Hume, ii. 500.—<sup>2</sup> Hume, ii. 499.—<sup>3</sup> Paul Thomson, and William Porterfield, Dec. 14, 1801; James Inglis, Feb. 22, 1808; Roger Young, Feb. 8, 1803; John Edward Stock, July 12, 1803; Record; Hume, ii. 501.—<sup>4</sup> John Lindsay, March 21, 1791.—

<sup>5</sup> Hume, ii. 503.—<sup>6</sup> Ante, ii. 25, 30.

a jury, upon the ground of an erroneous charge by that learned judge in point of law, that there are no *termini habilis* in such a case for a review, as there is no record either of the charge of the judge, or the grounds on which the jury proceeded.<sup>1</sup> There can be no question, that this is a well-founded decision, and the only mode of competently obtaining a review in such a case, is to get a special verdict pronounced by the jury, finding certain facts proved, which may bring out the question of law which it is desirable to have argued in a higher tribunal; and every upright judge in an inferior Court will feel relieved rather than hurt by such a proceeding being suggested.

<sup>1</sup> J. M. Kelvin, Dec. 31, 1832.



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*N. B.*—This Index refers to the First Volume of this Work, formerly published under the title of “PRINCIPLES OF THE CRIMINAL LAW OF SCOTLAND,” as well as to the present Volume.

## ERRATA.

### IN FIRST VOLUME.

- Page 199, line 5 from bottom, before "relevant" insert not.  
483, line from top, for "Session," read Justiciary.

### IN SECOND VOLUME.

- Page 130, line 8 from top, after "grant" insert warrant.  
142, line 18 from top, for "Committee," read committer.  
149, line 24 from top, for "Gul. I." read Gul. IV.  
252, line 4 from top, for "July," read August.  
253, line 9 from top, for "crime," read time.  
333, line 5 from top, for "let," read left.  
350, line 12 from top, for "seeing," read suing.  
361, line 7 from bottom, for "mutual," read mental.  
444, line 13 from top, before "admissibility" supply objection to.  
449, line 3 from bottom, for "one Judge," read our Judges.  
565, line 8 from top, for "indictment," read instrument.