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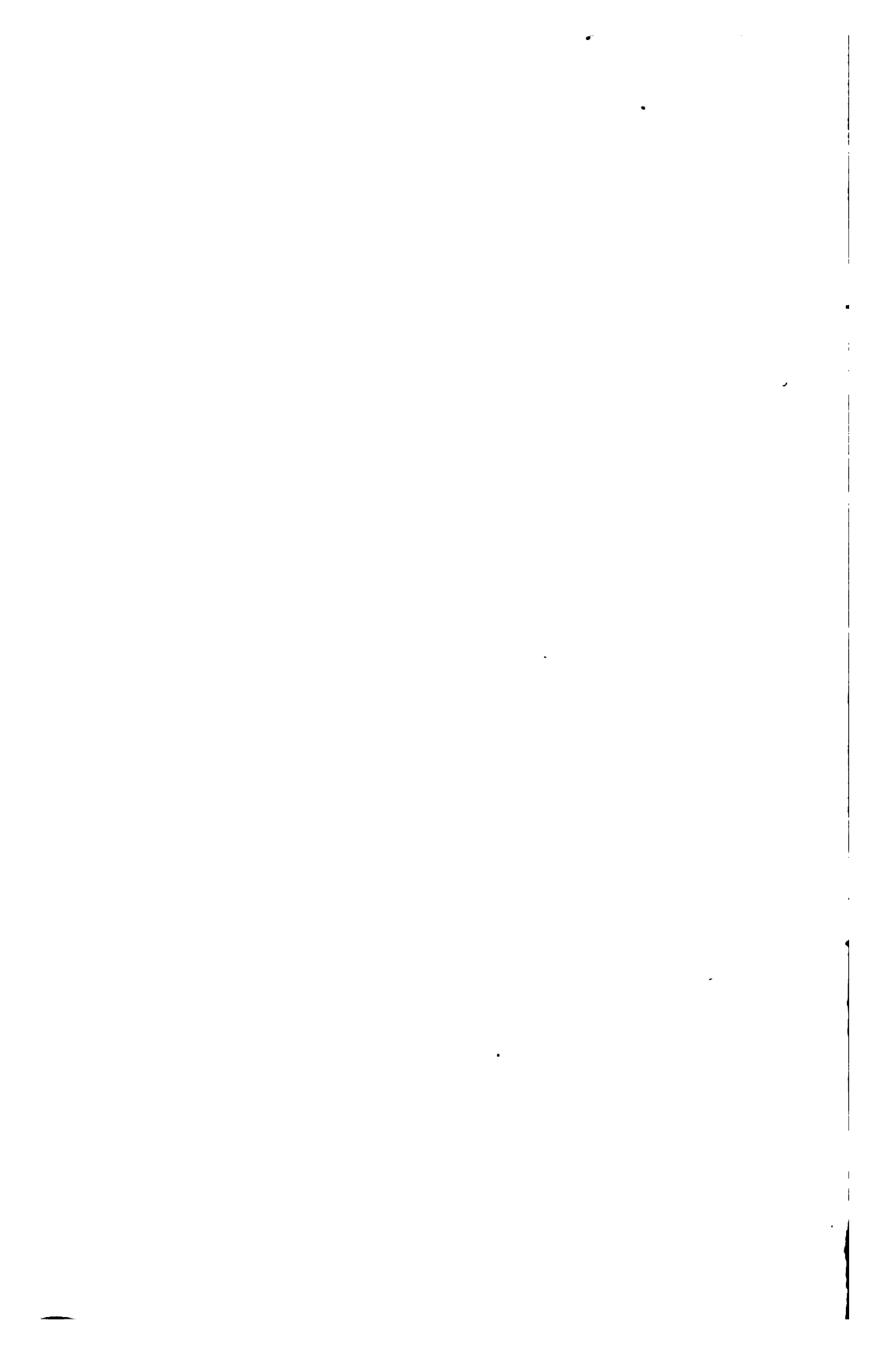
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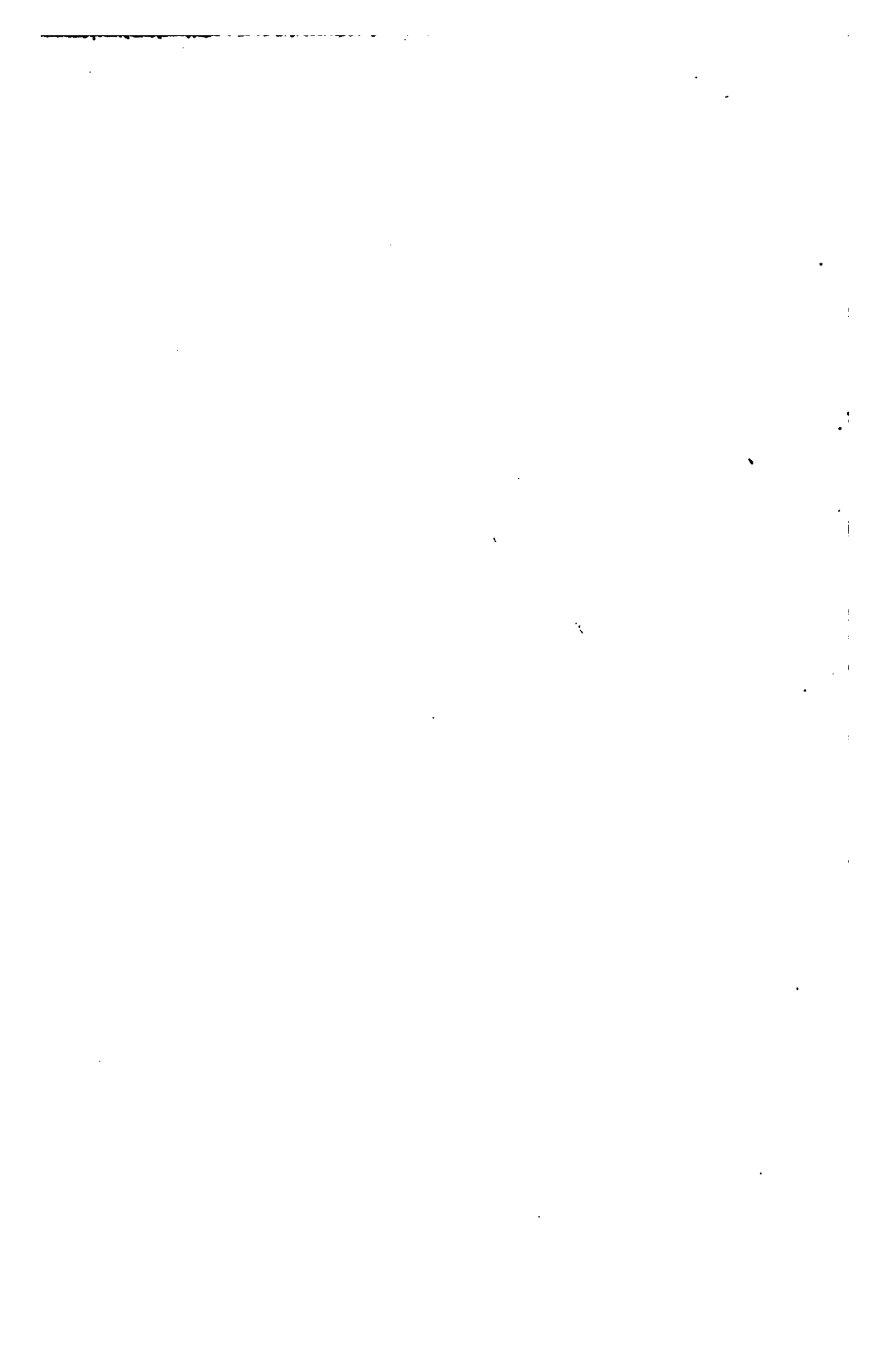






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JUSTICIARY COURT PROCEEDINGS

JULY 1905



THE RECORDS
OF THE PROCEEDINGS OF
THE JUSTICIARY COURT

EDINBURGH

1661-1678

Edited, with Introduction and Notes, from a MS.
in the possession of JOHN W. WESTON, Esq., by

W. G. SCOTT-MONCRIEFF,
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VOLUME I.

1661-1669

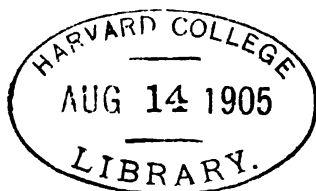


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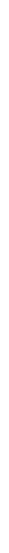
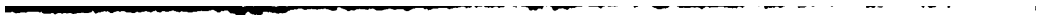
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CONTENTS

	PAGE
INTRODUCTION,	vii
PROCEEDINGS OF THE COURT,	1
INDEX,	333



INTRODUCTION

It seems to me that a short sketch of the administration of Criminal Law in Scotland in former times would not be out of place by way of introduction to this curious collection of trials now presented to the members of the Scottish History Society. To those acquainted with our modern criminal courts, superior and inferior, with their well-defined jurisdictions and relative position towards each other, there seems something like chaos when their attention is turned to any such criminal record as the one before us. It deals with a period, when, although the Court of Session had been over a century in existence, the Court of Justiciary was still in the future, when mere local authorities possessed powers of startling magnitude, and the interference of the Scottish Privy Council in the administration of justice was a matter of daily occurrence. We know nothing now of justice deputes, of serious crimes being dealt with by municipal magistrates, or of special commissioners being nominated to try particular offences. Again, nothing is better known to us in the present day than our carefully developed system of public prosecution, whether by Crown counsel or by procurator fiscal, a system which works over the whole country, and deals with both small and great offences, and one of which it may be said that we, as Scotsmen, are justly proud. But in the seventeenth century we find, alongside of State prosecutions, private prosecutions, and those at which both public and private interests were represented.

From very early times there was in Scotland a high official known as the Justiciar. He represented the king, who, how-

ever, might, and sometimes did, preside personally in a judicial capacity. As this Justiciar, known later as the Justice General, was the depute of the king, so he in turn had deputes who could act throughout the country. Provision was made for eight deputes by the Act 1587, c. 82. Before the establishment of the Court of Session, the Justiciar and his deputes were not confined to criminal matters, their civil jurisdiction, however, being subject to the control of Parliament, which, by means of committees, really performed a considerable amount of judicial work, including the decision of what would now be considered small debt causes.

For a long period there were two Justiciars, one for the north, the other for the south of Scotland, the river Forth being the dividing line. Edward I., indeed, appointed eight, having made four divisions of the country, and given two to each. In Queen Mary's time, however, there was a reversion to the old plan of having only one official for both north and south. It was characteristic of our Scottish way of doing things that the office originally conferred upon an individual came to be vested in a great feudal family, and the duties nominally exercised by the representative of that family. This state of matters continued long after the institution of the Court of Justiciary, and indeed down to 1836, when, by statute, the offices of Justice General and that of Lord President of the Court of Session were united in the person of a professional and salaried judge.

The deputes appointed to act on behalf of the Justice General were either nominated by him or by the king. We find that Messrs. Colville, Cuninghame, and Mackenzie, all gentlemen mentioned in these Records, held royal commissions; and it would rather appear that those who were in such a position were not limited to acting in the absence of the Justice General, but could sit along with him and exercise equal authority, whereas deputes appointed by him could act only in his absence.

In addition to the judges so appointed, the Privy Council, which was always at hand, and ever ready to interfere, was in the habit of appointing certain assessors to the deputes, with whom, says Hume, 'they might advise concerning such difficulties as occurred to them: or (shall I rather say) who might acquaint them with the views of his Majesty's counsellors and secure compliance with their wishes.'

The same writer has in the following passage well described the state of matters which existed at the period when these trials took place: 'Under the old system, the Justice and his deputes could hardly be said to maintain their rank as a sovereign or even an independent court of law. On the part of the Privy Council, little scruple was entertained of preventing their jurisdiction or obstructing the channels of their justice, under various pretences and by proceedings of different kinds. Sometimes, and this was the least exceptionable way, in the shape of the trial of the accused before themselves; but in the case of a conviction, remitting him for sentence to the justice, who proceeded on the decree of Council as *probatio probata* of his guilt. Sometimes (and this, though strictly forbidden by statute, was often done in the case of slaughter and of witchcraft) by granting special commissions of justiciary to private and unskilful and often keen and officious persons for the trial of certain offenders or crimes of a certain class. . In other, and frequent instances, in the shape of what was then termed a precognition, being an inquiry, if such it may be called, into the circumstances of the fact, set on foot at the instance of the party accused, and at such a diet as he made choice. And of this proceeding, according to Mackenzie, so manifold were the abuses, that of the many persons who had applied to the Council for precognitions, he had never known one who was brought to justice.'

It was in 1672 that the Act which founded the present Court of Justiciary was passed, the new commission, which that Act ratified, having been issued in January 1671. The most

important feature of this statute was the abolition of the justice deputes, and the substitution in their place of the Lord Justice Clerk and five of the ordinary Lords of Session.

The hereditary Justice General still retained his seat, although he seldom occupied it. But a notorious instance of his appearing, and that for a purpose, is afforded at a much later date than the one we are dealing with. The trial of James Stewart in Aucharn for the murder of Colin Campbell of Glenure in 1752 has been rendered classical by the genius of R. L. Stevenson. The Duke of Argyll, as Justice General, presided upon that occasion, when the scene of trial was Inveraray, and the majority of the jury—judge selected—Campbells. Although there was little but a bare suspicion against the accused, his conviction followed as a matter of course. Argyll added insult to injury by telling Stewart that he had had a most impartial trial.

Although the character of the Supreme Criminal Court was distinctly improved by the substitution of regular judges for the deputes, we find a reluctance still exhibited to have a bench quite independent of royal control. The statute of 1672 did not confer office for life, and successive commissions were issued containing the words *durante nostro bene placito*. In point of fact, judges during the remaining years of Stuart rule were removed and restored at pleasure.

It is perhaps fortunate that the local tribunals throughout the country possessed such considerable powers. Because although the new Justiciary Court was enjoined to hold Justice Ayres or circuits, and the towns at which its diets were to be held were fixed, it appears that no circuits took place in Scotland between the end of Charles II.'s reign and the year 1708.

We find cases contained in this Record, tried before a court in Edinburgh, which were brought from different and distant parts of the country. But the justice deputes had also circuit duties to perform, and were expected to attend at least

once a year at the head burghs of the sheriffdoms, where they seem to have been recognised with all the honours now shown to a higher order of judges.

The chief, at least nominally, of all the inferior courts was that of the sheriff. This office, like that of the Justiciar or Justice General, had in course of time become patrimonial and hereditary, the duties being performed by deutes. Nor does there seem to have been any provision, until the reign of George II., when heritable jurisdictions were abolished, for the depute sheriff having legal qualifications. Yet the sheriff's powers were great. He was not only the competent judge in all minor offences, but in the case of a murderer taken red hand, as it was called, he could sentence to death, and did so. Indeed, some great authorities held that the sheriff could try a murderer, so long as the proceedings were concluded within forty days. The magistrates of certain burghs are sheriffs within their royalty, and we find the Lord Provost of Edinburgh presiding at a trial for murder so lately as 1783. Murder was of course not the only capital offence in those days, and the sheriff's jurisdiction in such cases as theft enabled him frequently to pronounce a capital sentence. Such a one was given in 1785 by the Sheriff of Forfar for house-breaking.

But perhaps the local jurisdictions of the greatest practical importance were those exercised by the lords of regality and barons within the limits of their respective regalities and baronies. The lord of regality had as great a civil jurisdiction as the sheriff and a greater criminal. The latter was, according to Erskine, 'truly royal.' In fact, treason seems to have been the only crime which could not be tried in the regality court. Even the barons had a jurisdiction practically as great as that of the sheriffs. Like the sheriffs, all those judges acted through deutes.

As has already been pointed out, these trials reveal more than one kind of prosecutor. In modern times the public

official acting in the public interests has quite superseded the private individual seeking compensation or punishment for a wrong inflicted upon himself or family. Crime may and has been viewed in two lights, as a wrong or injury done to the individual, and as one done to the community. It is obvious that in primitive times the first was the aspect most considered, and hence the private prosecutor is always the first in point of date. But as the community strengthened and government began to assert its power, there arose the necessity for an official to represent the public and protect its interests, for our law did not recognise any right in the individual to demand reparation for a wrong done, not to him or his, but to the nation. Hence crimes committed against the State or the Church, such as treason, heresy, or blasphemy, early called for a public prosecutor, and as times became less barbarous, even offences against the individual were dealt with in the public interest, so that they might not go unpunished through lethargy or inability to prosecute on the part of the injured person. Therefor the King's Advocate or Public Prosecutor could act even in cases which affected chiefly private persons without obtaining any consent or concurrence from them.

While the private prosecutor had to show a substantial interest, he could insist upon more than mere compensation or damage. He was entitled to demand the full penalty which the common law or statute imposed for the crime committed. Nor was the right of private prosecution limited to the injured person. Near relatives, for example, of a person murdered or ravished, could seek vengeance for the injury done. But two things were, or came to be, necessary. After the establishment of a public prosecutor, his concurrence, where at least more than a pecuniary penalty was sought, was requisite. It might be refused, and he might be compelled to give it, and we have one case recorded in which the private prosecutor was allowed to proceed after the Lord Advocate had withdrawn his consent. But the private person could not present a libel at his

own pleasure. Again, he had, under statute, to find security to insist in the prosecution which he had started. This was very proper. The indefinite confinement of accused persons was a sore grievance at the period we are dealing with, and there are indications of it in the proceedings now before us. The case of Bessie Martin mentioned by Hume, who described herself as 'lying in the thieves hole in a most miserable conditione starving for hunger and cold,' was, we fear, not a singular one, and the Court had frequently to order prosecutors to proceed with their processes, and to discharge prisoners because no one remained to accuse them.¹

The title of Lord Advocate has long been borne by the Crown Prosecutor in Scotland, at least as far back as 1598. An earlier title, which also continued to be used, was King's Advocate, mentioned in the Act 1579, c. 78. The office came into prominence during the seventeenth century, the period at which unpopular State prosecutions were so rife, and several successive Lord Advocates obtained an evil reputation in consequence. One of the most celebrated of these we find acting as a justice depute shortly after the date at which this Record commences. It will be noticed in these trials that the Advocate usually appears by deputy, reserving himself, then as now, for cases of outstanding importance.

Our Scottish courts, both civil and criminal, long groaned under the burden of tedious written proceedings. To this fact, however, we doubtless owe not a little of the information contained in this manuscript. The indictment, instead of being a brief statement of the crime charged, was a lengthy document, which at one time seems to have contained a good deal of the information as to facts which the prosecutor intended to lay before the jury. In such cases as those of Weir and Mitchell, we find the accused actually preached at for

¹ The Act of 1701, for preventing wrongous imprisonment and against undue delays in trials, put a stop to this evil.

his iniquities. In its syllogistic form the indictment indeed continued to be unnecessarily long and wordy down to 1887. But it was by no means the only document in the case. It nearly always gave rise to a debate upon the relevancy; and in the seventeenth century the custom was for counsel upon both sides to dictate to the clerk of court what they had to say. Then arose defences, answers, duplies, triplies, and so on. Again, just at the date when this Record begins, 1661, it had become customary to take down at large the depositions of the witnesses; and apparently the court sometimes acted upon such evidence, although it had not been given in its presence. Lastly, the verdict was in writing.

The admission of evidence in those days was based upon what Hume calls a 'narrow scheme.' Light is thrown upon it in the pages which follow. Sex, and even personal deformity, might prove a bar to testimony. The most serious obstacle in the way of ascertaining facts was the general exclusion of female witnesses, and the exceptions to the rule only made it the more absurd. In what were considered atrocious, occult, and domestic crimes, women were occasionally admitted, but each case as it came up raised wranglings, and had to be disposed of by the judge. Probably in almost any kind of criminal charge *penuria testium* might open the door to the female witness, but where this could not be pleaded she was kept out, no matter how important and vital her evidence might be. Reference may be made to the case of Fraser, under date November 17, 1673.

This suspicion of women lingered down to recent times. It needed a modern statute to make it clear that a woman could witness the execution of a deed.

The confession of the prisoner, even when made under suspicious circumstances, or when not satisfactorily proved to have been made at all, was at the date of these trials a convenient mode of securing a conviction. The confession need not have been made before the assize nor before a

magistrate, for ministers and others might receive it. But when once made it could not easily be got over, and even in cases involving a death punishment a previous confession warranted a verdict of guilty. In the political trials following the Pentland rising, it will be seen how much use was made of confessions which, even quite possibly, were obtained under torture. The prisoner, as in the case of Finlay Macgibbon, December 3, 1669, might deny the verity of his confession, but in that case it was held found 'that a confession taken be the justices and subscrivit be the pannel is judicial and cannot be retracted here at the barre.' Confessions made to the Lords of Justiciary or Privy Council were held to prove themselves without the evidence of the parties subscribing them, or who were present when they were uttered.

In modern practice we only know of three verdicts, viz. 'guilty,' 'not guilty,' and 'not proven.' This record exhibits a greater variety of forms. In former days the verdict was sometimes a comparatively lengthy affair, resembling a judicial interlocutor, and giving rise to questions of construction. Such terms were used as 'fylit,' 'culpable,' or 'convict' on the one hand, and 'clean,' 'free,' and 'innocent' upon the other. In fact there was considerable latitude of expression. Popularly it is supposed that there is always a broad distinction between a verdict of not guilty and one of not proven when given by a Scottish jury. But while they have sometimes intended to recognise such a distinction, and returned a verdict of not proven in what may be called suspicious cases, this is certainly not always the case, and many a person whose innocence is very doubtful leaves the dock with a verdict of not guilty. For a long time the regular Scots verdict was 'proven' or 'not proven,' having reference to the libel which the Court had found relevant and remitted to an assize. The idea at that period prevailed that such a verdict as guilty or not guilty might, to quote Hume, 'cover a complex and more enlarged view of the case, such as might be alleged to

encroach upon the functions of the Court.' It seems difficult to see why.

A curious case relating to a verdict will be found under date February 26, 1672. The verdict of an assize could be challenged on the score of error, and we have various instances of steps being taken to do so. Procedure was in such cases regulated by the statute 1475, c. 63. The jurors could be punished, although where there had been an acquittal the prisoner benefited by it. Assizes of error were amongst the evils complained of by the Estates in 1689, and no longer exist.

The sentence was pronounced by the doomster or dempster. Scott, it will be recollected, has introduced this ghastly functionary with dramatic effect at the trial of Effie Deans. Hume says that the dempster was the common executioner, and seems to infer that his duties were confined to capital cases, but from this Record we find that he had a wider scope. The author highly approves of even minor sentences being pronounced by him, although doubtful as to the necessity for his oath of office.

The punishments we find varied ; they sometimes surprise us by their leniency, more frequently by their severity.

Like the sister kingdom, Scotland had many statutes which imposed the penalty of death, but it may be questioned whether in its practical results our system was ever so sanguinary as that which prevailed south of the Tweed. At the present day, there is certainly an extraordinary difference between the number of executions in England and in Scotland, more persons being hanged in the former country in one year than in the latter within a generation. The reluctance of a modern Scottish jury to convict upon a capital charge is very remarkable. In former days scruples were not so great. Towards one class of offenders no mercy was shown. It is appalling to think of the number of old women strangled and burned during the short period with which this book deals.

The ordinary mode in Scotland of putting to death, even in cases of treason, and when the criminals were persons of high rank, was hanging, although the heads of traitors were usually cut off for subsequent exposure. It is curious to find that the more humane, and certainly more dignified, practice of beheading was reserved, as a rule, for atrocious murderers and notorious thieves. A clumsy imitation of the French system of breaking upon a wheel was not unknown. Heretics and witches were burned, either 'quick' or after strangulation, while gipsies and some female offenders were drowned. Sometimes, to aggravate the punishment of exceptional criminals, a hand was struck off before execution. In the case of Roy Roy, mentioned at p. 200, we read that this mutilation was so badly performed that the blundering executioner was dismissed from office.

Long periods of imprisonment were not commonly given. Hume is proud of the fact, which was perhaps as much due to the absence of prison accommodation as to any disposition towards leniency. The old idea of punishment was something which the criminal could feel, and that sharply. Pain and disgrace were considered the best checks upon crime. Hence our brandings, dismemberings, boring of tongues and ears, nailing of lugs and pinching of noses, exposure in the pillory, jugs, stocks, or cuckstool.

Banishment was frequently the penalty, and this might be from the country or only from a district, as in one case we find, from the three Lothians.

Torture was not, of course, so much a mode of punishment as a means of extracting the truth, or at least information useful for the prosecution. In theory the sanction of the Privy Council was necessary before it could be inflicted, but as a matter of fact inferior tribunals, particularly in cases of witchcraft, did administer torture. While the confession thus extorted could be used subsequently as evidence of the victim's guilt, and even of the guilt of others implicated

by him, if his assertion of innocence held out against the agony, he secured no immunity from further persecution. Torture as an instrument of the law reached its perfection between the Restoration and the Revolution. It was not actually rendered illegal until the passing of 7 Anne 21 in 1707, which enacts that after the first day of July in that year 'no person accused of any capital offence or other crime in Scotland shall be subject or liable to any torture.' The usual instruments of torture made use of by the Privy Council were the thumbscrews and the boot;¹ but the lay and clerical tormentors of suspected witches seemed to have favoured the system of depriving their victims of sleep, an expedient which worked well, as by producing delirium it greatly added to the fascination of the confessions.

These Records amply illustrate the unsettled state of the country, and that apart from the special disturbances which the Government policy in Church and State brought about. The proceedings for 'blooding and wounding' and deforcement are numerous. Men attacked with drawn swords in the darkness of the night. The offenders were often persons of position. Thus we find Rose of Kilravock and Lord Gray declared fugitives. The Master of Herries charges Viscount Kenmure with a theft of title-deeds. In one case we find a sheriff-court dissolved in confusion because of the appearance of the accused armed with formidable weapons. We have a curious instance of a commission of fire and sword granted upon June 8, 1665 to Sir James Macdonald, to enable him to execute barbaric justice upon the house of Caipoch, when, as we learn, a present of the heads of the offenders was made to the Privy Council for exhibition in public places.

¹ 'The Boots and Thummikins were (it is said) imported into this country from Russia by a Scotchman who had been long an officer in the service of that Power.'—Maclaurin's *Criminal Cases*. The officer referred to was doubtless Sir Thomas Dalzell of Binns, Commander-in-Chief of the Scots forces, who had previously served in the Russian army.—W.

Naturally hamesucken was of frequent occurrence. This peculiar term was applied to 'the felonious seeking and invasion of a person in his dwelling-place or house,' and was at the time we are dealing with, and for long after, a capital offence. In order to establish the charge, the accused must have visited the house with the intention of assaulting, but, once in it, an attack upon the servants or children was sufficient to constitute the offence. To assault a man in his shop or place of business, or in an inn where he may happen to be, is not hamesucken. In the case of *Sydsersf*, June 4, 1669, the Court did not sustain a charge of hamesucken when a comedian had been assaulted in his theatre.

There are two crimes frequently dealt with in these Records which have now ceased to be prosecuted, viz. adultery and usury. Both are statutory. The oldest Act relating to adultery is of pre-Reformation date. But it was a crime to which the Reformers paid special attention in their desire to restore the law of Moses in all its severity. The Act 1563, c. 74, was passed, to use the words of Hume, 'in the very heat of the Reformation,' and it visited *notour* adultery with the penalty of death. The Legislature continued to deal with the subject down to the beginning of the eighteenth century. To constitute *notour* adultery a child must have been procreated, or the bedding and concert of the guilty parties must have been open and well known, or they must have exhibited defiance of the Church's admonition. Simple adultery met with a lighter punishment. The extreme penalty of the law was seldom enforced in any case, and the crime was one which the lax morality of the Restoration age was not calculated to deal severely with. The consequences of adultery were, in course of time, left entirely to the civil courts, and when Hume wrote he was able to record that, while the statutes still remained, the offence had not for many years been the subject of a criminal prosecution.

Usury forms the subject of various lengthy and ingenious

arguments in some of the cases now before us. The Canon law prohibited the taking of interest; but such a law was not congenial to the habits of the Scots after they had thrown over the authority of Rome. Accordingly all our statutes were passed to regulate the rate of interest, and the earlier ones were really more favourable to the lender than that of 12 Anne 2, 16, which reduced legal interest to five per cent., and which regulated the matter for the long period of one hundred and forty years. At the date we are dealing with, the rate of interest was six per cent.

Under date March 7, 1665 (p. 123), there will be found notice of the prosecution of some fleshers in Edinburgh for breaking Lent. This may call for explanation. It is well known that in so far as ritual and ordinances were concerned, the Restoration Episcopacy was of a most nominal character. There was probably not a single bishop upon the Scottish Bench who really cared about the observance of Lent. To men of Leighton's stamp it was a matter of supreme indifference, while to the baser sort it could have meant only an interference with their round of good living. In pre-Reformation times, and also in the days of Laud, there had been provisions relating to Lent, and in February 1662 these were revived by an Act and proclamation of the Privy Council, which was, however, based upon purely civil grounds. It covered not only Lent, but the weekly fish days, viz. Wednesday, Friday, and Saturday, and discharged all persons from eating, killing, or selling in markets 'any sort of fashes' during that time and upon the said days. The object is thus set forth: 'Whereby the young brood and store will be preserved, so that hereafter the hazard of scarcity and dearth may be prevented, and the fishes, which by the mercy of God abound in the salt and fresh waters of this kingdom, may be made use of for the food and entertainment of the lieges; to the profit and encouragement of many poor families who live by fishing.'

The most curious fact of all is that this Act met with the hearty approval of Wodrow. He says: 'This proclamation was merely a requisition of a civil keeping of Lent, and the weekly fish days, for the preservation of the young bestial and the consumption of our fish, which the Lord has so bountifully given us; and had the council seen to the execution of this good act as well as they did the severe and bloody acts against presbyterians, it had been much for the interest of the lieges.'

The trials in this collection, which may perhaps excite the most general interest, are those for witchcraft. The subject has always had a peculiar fascination. It may perhaps be said that the history of Scottish witchcraft has still to be written. It has of course been dealt with by many writers, and from different points of view. To a man like the late C. K. Sharpe, it afforded ample scope for exhibiting the superstition and folly of Presbyterian ministers, and he deals at large with it in his very interesting introduction to *Law's Memorials*. Of the same malicious spirit was Hugo Arnot, who has collected trials, and whose comments are never friendly to the Church. He was a notorious instance of the sceptical reaction which characterised the eighteenth century, and which was not entirely confined to laymen. The belief itself then only lingered in remote parts of the country and amongst obscure dissenters. Upon the other hand, men like Law and Sinclair, the author of *Satan's Invisible World Discovered*, were firm believers who would as soon have questioned the truth of Christianity as the reality of Satan's manifestations and the existence of those who were in direct communication with him.

Of a like view was the English Baxter, and, at a much later date, John Wesley. England has afforded an example of an early doubter, born before the time, in Reginald Scott, author of *The Discovery of Witchcraft*, against whom may be set Glanville, a dignitary of the Church. But in Scotland I question if there was a single sceptic to be found during the

seventeenth century. If there were any such they judiciously concealed their doubts. What men like Sir George Mackenzie really thought upon the subject it may be difficult to say. One cannot but think that when religious conviction was weak and philosophy had some sway, a belief in witchcraft could hardly have been strong.

When we come to such a writer as Baron Hume, we find exhibited a certain feeling of shame over the follies of the past, combined with a sense of relief that he is no longer bound, as a teacher of law, to lay down any doctrine upon the subject. The Act 9 Geo. II. c. 5 had converted the witch into a cheat and impostor, and substituted the pillory for the stake.

Although the belief in and prosecution for witchcraft had existed in all respectable Christian countries for centuries, there can be no doubt that, in so far as Scotland was concerned, it was after the Reformation that these dealings with Satan came as it were to the front. Witches were to be found everywhere; their discovery became a fine art; Privy Council, justice deputes, special commissioners, ministers, and elders had their hands full. There may be various explanations of the fact. To the old school of Protestants, it was obvious that while Popery prevailed the powers of darkness, having everything their own way, were at rest. But beyond doubt the Reformation placed in the hands of every man a book, considered to be of binding authority, and containing a law which doomed the witch to death. The place of Satan in the scheme of theology became much more important than it had hitherto been. Men were driven to trace every evil thing to him, to find him constantly at their side with his evil suggestions and his cunning snares. All events assumed a gloomy aspect; every misfortune in life was either the direct act of the enemy of mankind or the just judgment of an angry God. The earth below and the air above alike were full of manifestations of the supernatural. Further, by the system which the Reformers adopted and spread over the country, there was

placed in every parish an individual, possessed of some learning it might be, but not necessarily of any sense, whose course of education had led him to silence all doubts over Satanic agency, and whose kirk-session supplied him with active and willing assistants in his battle with the unseen foe.

The Scottish Act against witchcraft, by its very date, 1563, points to the part which the Reformed Church played in bringing this sin and its punishment into prominence. But it is only fair to point out that the suppression of Presbytery at the Restoration, and the substitution in its place of Episcopacy and all ungodliness in high places, had no effect upon the witchcraft crusade. On the contrary, it is recorded that at one sederunt of the Privy Council, held upon November 7, 1661, no less than fourteen commissions for the trial of witches in different quarters of the country were granted. There can be no doubt, however, that had the authorities adopted a different course, a wild protest would have arisen from the Covenanting section, to whose members it must have been some comfort to find that, although they themselves had lost the power, the witches were to enjoy no respite.

One thing is certain, that in these prosecutions gross cruelties were inflicted, particularly in the preliminary stages, in order to procure for the Court something in the shape of a confession. 'Torture,' says Hume, 'of one kind or other seems to have freely been made use of. The most common mode was the thrusting of pins into the body, and the denial of sleep for many successive days and nights.' The same writer mentions the case of Alison Balfour, where the torture was applied, in her presence, to her husband, her son, and her daughter, a child of seven years old. All these iniquities were frequently committed under the superintendence of the ministers, ever active agents in bringing the offenders to punishment.¹ Although some attempts seem to have been made to discourage

¹ See *Scotland and the Protectorate* (Scottish History Society), p. 382.

that utter abomination, the professional witch-finder, prickers, or persons who undertook to discover Satanic marks upon the bodies of the accused, were frequently employed. Fountainhall mentions one Kincaid, 'a famed pricker.'¹

When we turn to the trials reported, with the greatest gravity, in this volume, our first impulse is to conclude that all concerned in them, judges, juries, counsel for both prosecution and defence, and, for the most part, the parties at the bar, were insane. The arguments, of a manifestly stereotyped character, with which it was sought to break down the indictments, seem as preposterous as the charges which the latter contained. For common sense there was no place. The Scriptures and the Act of Mary quite excluded the sceptic, and the sheer absurdity of the whole thing never seems to have dawned upon any mind. For the religious fanatic there was some excuse, but under the Restoration Government fanaticism in all its innocent aspects was repressed with stern cruelty. To my mind the worst feature in this whole matter was the position taken up by such men as Mackenzie and others, from whom as persons to some extent emancipated from superstition better things might have been expected. These rollicking statesmen, who used to toast the devil in their cups, might at least have shown some sympathy with his more humble followers in their affliction.

Mr. Andrew Lang has well said, 'What went under the name of witchcraft was a web of fraud, folk medicine, fairy tale, hysteria, and hypnotic suggestion, including physical and psychological phenomena still unclassified.'² As to the witches themselves, it must be kept in mind that there was no lunatic asylums in those days, while, owing to the prevailing

¹ In Mr. Meyer's *Human Personality* it is suggested that the insensible spots on the witches were no doubt really anaesthetic, the *zones analgesiques* of the patients of Pitiés or Charcot. Witchcraft, in fact, was 'a gigantic and cruel psychological and pathological experiment conducted by inquisitors upon hysteria.'

² *Hist. of Scotland*, vol. ii. p. 432.

type of theology, the many lunatics who must have been at large were very likely to have their minds concentrated upon infernal persons and things. This may account for some of the wilder flights of fancy which the confessions exhibit. Many wretched beings suffered in consequence of being 'delated' by a confessing witch, so that one lunatic might involve the ruin of many sane persons.¹

In the *Transactions* of the Scottish Society of Antiquaries for 1887-8 there will be found two very interesting and valuable contributions upon the subject of witch trials. They contain a number of indictments and confessions of the accused, with the findings of the assize, and the sentences, in connection with two different but almost contemporaneous outbreaks of sorcery, the one in Kinross-shire, the other in Forfarshire. There are also most suggestive remarks by the contributors, Mr. Burns Begg and Dr. Joseph Anderson.

In these papers much light is thrown upon the legal or sometimes illegal machinery made use of in connection with this class of cases. The Kinross witches were tried by the justice depute, Mr. Colville. Those of Forfarshire came before a commission specially appointed by the king through the Privy Council. But in both counties we find that the important work had been done before the courts sat. The confessions had been wrung from the prisoners, taken usually before the minister, assisted by some elder or leading heritor and a notary. These confessions had, in the ordinary case, simply to be thrown into the narrative form so as to appear in the indictments. 'Ye confessed' was enough, the jury could

¹ The late Mr. Campbell, in his interesting work upon *Witchcraft and Second Sight in the Highlands and Islands of Scotland*, points out a distinction between the northern and the southern witch. 'The highland witches,' he says, 'have of course many points in common with their sisters of the south, but comparatively there is little repulsive or horrible in their character. Tales regarding them make no mention of incubus and succubus, midnight meetings, dances with the devil, and more of the horrible and awful, the ravings of poor women driven crazy by persecution and torture.'

but return one verdict, and there could be but one sentence, 'to be stranglit to the death,' with a subsequent cremation of the bodies. The terrible mischief done by 'delating' is forcibly shown. The Kinross witches were women in the habit of meeting Satan at unholy parties, and were frequently able to give the names of those present, thus laying foundation for further proceedings. Who played the part of Satan at these gatherings—the man, sometimes in black, and sometimes in grey clothes, with the Scotch blue bonnet? Mr. Begg has a theory that the real Satan was a discharged soldier, or other form of tramp, and that these women were the victims of 'unscrupulous and designing knaves, who personated Satan for their own guilty purposes, and who, by working upon the ignorant terrors of their victims, induced them to become their abject slaves. The country at that time, owing to the recent Revolution, was still in a very unsettled condition, and no doubt the rural districts were swarming with discharged soldiers and others trained to no handicraft or trade, and dependent for their subsistence on whatever in the course of their wanderings came within their reach. To outcasts of that stamp the blinded allegiance of a dozen or so of the residents in a rural district must have appeared to be an advantage well worth securing by any means and at all hazards.' This theory seems worthy of consideration. The Scottish incarnation of Satan devoted his energies almost entirely to women. The warlock in Scotland is a rare being.

Dr. Anderson, in presenting his set of attested and authenticated confessions, says: 'It seems to me that we shall never understand the attitude of the educated mind of the seventeenth century towards witchcraft until we are able to examine and compare a large number of such documents from different parts of the country. They disclose many things besides the mere curiosities of the processes and the confessions.'

The last execution of a Scottish witch seems to have taken

place in Sutherlandshire in the year 1722, under a sentence pronounced by the sheriff-depute of that county. 'This old woman,' says Mr. Sharpe, 'belonged to the parish of Loth, and among other crimes was accused of having ridden upon her own daughter, transformed into a pony, and shod by the devil, which made the girl ever after lame both in hands and feet, a misfortune entailed upon her son, who was alive of late years. The grandmother was executed at Dornoch; and it is said that, after being brought out to execution, the weather proving very severe, she sat composedly warming herself by the fire prepared to consume her, while the other instruments of death were making ready.'

Prior to this date we find evidence of a sceptical spirit being at work in high places, as is shown by the correspondence between the Lord Advocate (Robert Dundas) and the sheriff-depute of Caithness in 1719, over the case of the enchanted cats of Scrabster. The curious will find it preserved in Sharpe's Introduction to Law's *Memorials*. The witchcraft cases are chiefly at the beginning of our period. It must not be supposed from this fact that they diminished. The true explanation doubtless is that they were being dealt with by commissions holding local sittings. Although the crime involved death at the stake, it was apparently not sufficiently important to occupy the time of the justices. It will be noted, however, as regards a number of the later cases, that the prosecutions failed through the absence of prosecution. In the case of the Weirs it may be a significant fact that, although the 'Major' was reputed a wizard, and is generally remembered as such, sorcery was not charged against him, while his sister was not convicted as a witch, although indicted for witchcraft.

Probably from the public point of view the most important cases in this Record are the political trials, which are mainly connected with what is often called the Pentland rising, although, more strictly speaking, it was the Galloway rising,

which met its end and dispersion amidst the Pentland Hills. The Government, having sent Sir James Turner with some troops to the south-west of Scotland to promote the interests of conformity after the usual methods, the barbarities of his soldiers drove some of the 'honest' men to have recourse to arms, and they were so successful as to be able to surprise and take prisoner Sir James himself at Dumfries, upon November 15, 1666. The movement gaining strength, the insurrectionists advanced in a north-easterly direction through the counties of Ayr and Lanark, the Covenant being solemnly renewed at Lanark, until they reached the neighbourhood of Edinburgh, where, after a brave resistance, they were routed by General Dalziel. This rising proved a very godsend to the Government, as it formed an excuse for all manner of petty tyrannies down to the date when the murder of Archbishop Sharpe presented even a better. The number of prisoners taken, some of them persons of importance with estates to lose, kept, as will be seen, the lawyers busy. The first trial, that of Captain Arnot and nine others, took place before the Justice-Clerk, assisted by a justice-depute. Both Mackenzie and Lockhart were engaged for the defence, and as there could be little doubt about the facts, their whole forensic strength was expended in an ingenious, but of course perfectly hopeless, attempt to break down the relevancy of the indictment. The first objection was to the mode of citation of the accused, or rather to the absence of due citation by herald, pursuivant, or macer, as required in cases of treason. If the arguments *pro* and *con* were not clearer than they appear in this report, it may well be doubted whether the bench understood them, but its duty was clear enough. No allegiance proffered for the pannels could be sustained.

The second ground of defence was of greater importance, and called forth greater and more learned contendings upon both sides. It arose upon the alleged fact. It was said that the rebels, who had been modelled upon the system of an

army, had been dealt with as such by the king's general, and offered quarter when they laid down their arms. Such quarter offered and accepted formed a bar to these subsequent proceedings. Much reference to Grotius and other learned writers followed. Crown counsel indignantly repudiated the idea of treating this miserable rising as constituting a state of *bellum*, to which the laws relating to quarter could apply. They denied the power of the general to grant quarter; all that he offered or could give was protection from immediate slaughter upon the spot. Further, it was contended that the averments relating to this offer of quarter were too vague. The preliminaries having been got over, the trial itself was but a short affair, as the accused were convicted entirely upon their own confessions already taken before members of the Privy Council and now adhered to. Then followed a busy time for the executioners.

The trial of Maxwell of Monreith and others, a second set of Pentland Hill rebels who had managed to escape, raised a question of much legal importance, the disposal of which throws a curious light upon the Government policy of that unhappy period in our history. 'The king's servants,' says Hume, whose bias, if any, was not upon the popular side, 'not content with the many victims whom the chance of war threw into their hands, had judged it material to the authority of government that the estates of the fugitives should be laid hold of, and themselves be deterred from continuing in, or returning to, the country, by the terror of a capital sentence hanging over them, and ready for execution on their being taken. What the Lord Advocate invited the court to do was startling and unquestionably novel. The fugitives were not only to be outlawed, having failed to appear, they were to be tried, and if found guilty condemned in absence and unheard. Outlawry would have given their moveable goods immediately, and their real estates at the end of a year, to the king. But condemnation would be followed at once by forfeiture, while

at the same time it placed formidable obstacles in the way of the fugitives' return.

To fortify his argument the Advocate presented an opinion from the Court of Session judges, and the fact that he did so illustrates that the distinction between the civil and the criminal had not then been sharply defined. This opinion approved of the trial in absence as a competent and lawful process, but it is significant that even in those days it was thought necessary, or at least expedient, to obtain a judicial opinion. The arguments in favour of the application will be found in the text.

This action upon the part of the authorities was ratified and placed beyond question by the statute 1669, c. 11. 'In consequence,' again to quote Hume, 'from that time down to the Revolution this sort of process was a thing in ordinary practice. It is to be noted that while the judges thus infringed the ancient law of the realm by proceeding to trial in the absence of the accused, they rigidly adhered to the other side of that same law, and refused to let any counsel appear, or any defence be offered on his behalf.'

It will be observed from the case of Robinson and others (vol. ii. pp. 113-116) how severely any offence committed against the 'curates' was dealt with. The effort made to save Robinson, a specimen of whose workmanship may still, doubtless, be seen at Holyrood, failed, and the reason is given by our author, who exhibits no sympathy with the popular cause.

These records are of little value as precedents in criminal law. Our principles and our procedure have certainly altered much since those days, and the Restoration period is perhaps the last to which any one would go in search of a binding authority. No accused person could now, to take but one example, be convicted upon a confession which he desired to retract. Some of the crimes have ceased to be recognised as such, although the statutes which created them may remain unrepealed.

The lawyer of that period had hardly any authorities in his

own language to fall back upon. A Scottish case is rarely quoted. He had to search through the ponderous volumes of Clarus and the other civilians and canonists who are so frequently referred to. He had certainly to be familiar with Latin. Moreover, he was called upon for an exercise of ingenuity in discovering flaws in indictments and procedure, which certainly gave ample scope for his abilities and power of reasoning. While, however, there is much which is obsolete, these proceedings had nevertheless their share in building up our criminal jurisprudence, as will be seen by the fact that such a writer as Hume makes use of them in his *Commentaries*.

Their great value, however, consists in the light which they throw upon the social and political history of that age; and they will be welcomed by the student of that most interesting if somewhat melancholy period.

In the years 1891-2 the late Mr. Charles Scott, Advocate and Clerk of Justiciary, contributed several articles upon the Archives of the High Court to the *Juridical Review*. Unfortunately, owing to the sudden and lamented death of the learned author, upon April 10, 1892, these articles were never finished. Those contributed will be found in volumes three and four of the *Review*. In dealing with the official literature of the Court, Mr. Scott says: 'The ordinary books include two classes, the Minutes of Court and the Books of Adjournal. The former are supposed to consist of the actual minutes of the proceedings, taken in Court by the clerk at the time, and the Books of Adjournal to be duplicates of these minutes made afterwards, along with copies inserted therein at full length of all Acts of Adjournal, Commissions of Judges and Officials, and other important documents. There are of course no signatures in the Books of Adjournal, but many interlocutors and orders in the minutes bear the signatures of the senators and others. It is not easy at the earlier periods, however, to distinguish the original minutes from the Books of Adjournal. The former are often so clear and free

from mistakes and corrections that they could scarcely have been written in Court, and it is quite certain that in point of fact scrolls or rough notes were sometimes made from which the minutes were written out.'

The Manuscript now printed, through the kind permission of its owner, Mr. Weston, upon which an interesting article was furnished by the *Scotsman* some years ago, would appear to be a copy of the Books of Adjournal, with notes and comments suggested by the cases. The writer, as shown by a reference in the text, wrote at a date some years later than that of the cases recorded.

After the matter was taken in hand by this Society, the Manuscript was collated with one in the possession of the Faculty of Advocates. They were found to be practically identical so far as they go. While Mr. Weston's, however, after a blank between November 12, 1674 and January 10, 1678, continues until February 24, 1679, the Advocates' Manuscript ends upon January 19, 1674. It has been suggested that both Manuscripts are copies from a common source.

It may be mentioned that in the official records of the Justiciary Court there is a hiatus between 8th August 1676 and November 27, 1677. The Signet Library also possesses a Manuscript collection of trials covering the period between 1661 and 1730. There are in it at least certain of the notes to be found in the Weston and Advocates' Manuscripts. It is doubtless to the latter of these that Baron Hume refers (ii. 288). He writes of 'the author of the MS. Abridgment of the Books of Adjournal which seems to have been made towards the end of the seventeenth century,' but he mentions no name. He quotes the observations which will be found made upon the case of Margaret Taylor under date June 24, 1663.

In the library of the Society of Antiquaries there are three volumes which were presented to that Society in 1806 by Mr. John Dundas, W.S. They contain Records of the Court of

Justiciary from 5th February 1584 to 8th July 1723. The two first volumes are entirely manuscript, while the third contains a number of printed and written 'Informations,' in addition to the record of trials.

It is obvious from these various Manuscripts that the records of our Criminal Court must have called forth a considerable amount of interest as well as industry on the part of law students.

It has been thought advisable owing to the blank in the Manuscript, which occurs between November 1674 and January 1678, to conclude these volumes with the last entry under the former date, and to give from the continuation the second trial of James Mitchell in 1678, which supplements that contained in the text, by way of appendix. Our record begins at a date thirty-seven years later than that at which Mr. Pitcairn's collection of trials ends. There seems to be material for at least partially filling up the gap still existing, and it is to be hoped that this may yet be accomplished.

I wish to convey my thanks to the following gentlemen : to Mr. John W. Weston, Clerk of the Police Court, not only for the use of the Manuscript, but for certain notes identified by the letter W. ; to Mr. Fitzroy Bell, Advocate, for assistance in the collation of the Manuscript ; to Mr. John Rankine, K.C., and Mr. J. T. Clark, Keeper of the Advocates' Library, for their aid in the revision of the proof-sheets. To Mr. Clark I am also indebted for information relating to the members of Faculty whose names appear in connection with the cases recorded. To Mr. Mill of the Signet Library, who has done so much useful work for our Society, was intrusted the copying of the Manuscript for the press. The Index is also his work.

W. G. SCOTT-MONCRIEFF.

June 1905.



JUSTICIARY COURT PROCEEDINGS

JUSTICIARY PROCEEDINGS

Penult^{mo} Junii 1661.

THIS volume begins with what past immediately after the King's Restitution from the cruel and tyrannous Exile of the Usurper Cromwell. The first Dyet is marked and dated as follows:—

Curia Justiciariorum, S. D. N.

Regis tenta in Prætorio Burgi de Edinburgh penultimo die mensis Junij 1661, per magistros Alexandrum Colvill¹ de Blair, Joannem Cuningham et Georgium M^oKenzie, Advocatos, Justiciarios Deputatos dict. S. D. N. Regis per Mandatum et Dispensationem Parliamenti.

The said Mr. Alexander Colvill is one of the old Deputes² who served before the King's Exyle, and the other two are by new commissions, and this is their first sederunt. Their commissions are not here recorded, as ought to have been, but it is afterwards recorded upon the 7th of July 1662, bearing date 10th May 1661.

Observe from the foresaid words, *Per Mandatum et Dispensationem parliamenti*, that when a Parliament sitts, as was at this time, the Criminal Court could not sitt but by Dispensation.³

¹ The name of Alexander Colville of Blair does not appear in the Faculty list. Cunningham was of the Caprington family, and created a baronet in 1669. He died in 1684. Sir George Mackenzie, of the Seaforth family, was born in 1636; passed advocate in 1659; Lord Advocate from 1677 to 1686, and re-appointed in 1688. Popularly remembered as the 'Bloody Mackenzie,' he is known to men of letters and lawyers as a learned author and the founder of the Advocates' Library. He died in London in 1691.

² As to deputes, see Preface.

³ No Court could sit during the Parliamentary Session, except in virtue of a Dispensation granted by Parliament, and similar entries are found in the Sederunts of the Court until the Union in 1707. This arose from the Judges being *ex officio* Members of Parliament and having to attend its sittings.—W.

At this time S^r Robert Murray¹ obtained a commission to be Justice Clerk in place of S^r John Hamilton of Orbiston, but Sir Robert's commission is not here recorded. The first thing in this Book is a Commission of Deputation by the said S^r Robert Murray to Mr. Alexander Hamilton who was Depute to Orbiston, dated 18th January 1661, and bears to be in corroboration of his former commission granted be Orbitson *ad vitam*, which Commission is recorded after Instruments taken on the production thereof, but I find no new admission upon it.

John Barrowman and John Campbell admitted Macers or Court officers during pleasure.

Henry Monteith, servitor to Robert Murray, keeper of the Tolbooth of Edinburgh, admitted Dempster of the Court, and the Admission bears, he gave his oath *de fideli*, whereof I can see no use, seing its impossible he can be unfaithfull, the whole duty of his office being to repeat the words of the Sentence condemnatory as the Clerk reads it.

John Cuninghame,² Writer to the Signet, produces a Commission from the King, creating him his Majesties Writer and Receiver of all Escheates, ffynes, and Unlaws, under the Treasurer Principall and Depute, to which the Justices gave consent under Protestation that the same should not prejudice the Justice Clerk and his Deputes.

The Justices grant a Warrant for the liberation of Janet Clark, prisoner in the Tolbooth of Edinburgh for the crime of Witchcraft, for which she had been long detained after she was cleansed by the Verdict of ane Assize, she enacting herself judicallie to abstain from the crimes in time coming.

Edinb^r, 5 July 1661. Another Court holden per mandatum et dispensationem Parliamenti.

The Justices assigns the 19 July to the Accusers of Jean

¹ Sir Robert Murray, or Moray, is best remembered as one of the founders and early presidents of the Royal Society. He had nominally been Justice-Clerk since 1651, but he never seems to have done much judicial work. He belonged to the more respectable class of Scottish administrators, and has called forth the praise of Burnet and Wodrow. He died suddenly at Whitehall in 1673, and was buried in Westminster Abbey.

² Admitted 1660; died 1694.

Brown and Margaret Wyllie, prisoners for the alledged crimes of Witchcraft, to insist against them, and ordains the King's Advocate to be acquainted that they will sett them to libertie upon caution to sist them the day forsaid, and accordingly they were sett at liberty upon caution of the sum of 5000 mks.

Janet Miller, Prisoner in the Tolbooth for Witchcraft appointed to be sent back to Kirkliston where she lived, there to be tried by such Commissioners as the Parliament or Councell should nominate, and that for the ease of the witnesses and assizers and in regard none compeared to inform at Edinb^r.

Jonet Richmond, Prisoner in the said Tolbooth since Aprile 1659 for the alledged murder of a child at Inverlochie; there being no Pursuer nor Evidence brought against her is sett at liberty by warrand.

Mr. Harry Hay¹ is ordered to speak with the ffrinds of W^m Murray to insist against James Edmonston of Wolmet for the slaughter of the said William.

Edinb^r, 12 July 1661. Another Court by Dispensation of Parliament.

Thomas Neilson enacted for Lawburrows to Stewart of Kettlestoun and his family.

Edinb^r, 19 July 1661. Court holden be Mr. Alex^r Colvill, Mr. Jo. Cunninghame, and Mr. Geo. M^cKenzie.

Richard Brown and Helen Geddes, Prisoners in the Tolbooth of Edin^r (for Adultery I suppose), enacted not to company together under pain of Death, and to satisfie the Kirk Censures, and appointed to be whipt within the Prison and then to be put at liberty.

Adam Barras for venting of ffalse money, enacted to banish himself from Scotland and never to return under pain of Death.

Edinb^r, 26 July 1661. The same Judges pt.

David Murdoch, who had passed under the name of John

¹ Admitted advocate 1627.

Garvy *alias* Stewart, indited for stealling of 7 cows, and John and James Thomsons fleshers in Haddington for receipt thereof, Murdoch confesses Judiciallie and the Dyet is continued as to him and John Thomson, and James Thomson is for his absence declared fugitive, but with this condition that if he verifie that he was infirm and sickly at the time, or appear at the first of August and be reponed.

Musselburgh, 29 July 1661. Court holden by the same three Deputes.

David Johnston, Agnes Loch, and some others, indyted and found guilty of Witchcraft. There is nothing remarkable in this Process, ffor the Lybell is upon the common grounds of Compact with the Devill, Renouncing of Baptisme, keeping Meetings with the Devil and accepting his mark, and found relevant and proven by Judicial Confessions without any debate or opposition. In this Tryall the Earl of Lauderdale,¹ Baillie of [the] Regality of Musselburgh, is admitted to sitt with the Justice Deputes upon his desire, in respect the Pannells were inhabitants of the Regality.

Edinb^r, 1st August. Court holden by the same three Deputes.

Jean Brown, relict of umqll George Cochran in Corstorphine, and Margaret Wyllie her midwife, indyted for the murder of a child, born be the said Jean and cleansed by the Assize.

Eodem die, post meridiem, David Murdoch and the forsaid Thomsons tryed. Murdoch found guilty upon his confession, and the pronouncing of the doom delayed against him till next Court day. John Thomson cleansed by the Assize, and

¹ Afterwards duke. The regality of Musselburgh was held by the Maitland family, as successors of the monks of Dunfermline, from the Reformation until 1709. Except in cases of treason and witchcraft, a Lord or Baillie of Regality had within his own territory a like jurisdiction as the Court of Justiciary had over other parts of the kingdom. This being a case of witchcraft, the Earl of Lauderdale, one of whose titles was Lord Musselburgh, as Lord of Regality claimed his right to sit with the Justice Deputes, and accordingly John Preston the Baillie of Regality sat with the Justice Deputes. To Lauderdale Sir George Mackenzie in 1677 dedicated his *Laws and Customs of Scotland in Matters Criminal*.—W.

James Thomson formerly outlawed for his absence, reponed upon production of a Testificate of his inability to travell and the Diet as to him deserted.

Dalkeith, 3d August 1661. Court holden by the same three Deputes.

Mr. James Hunter admitted subclerk under Mr. Alex^r Hamilton upon production of a Commission during pleasure, the Commission not recorded here.

William Tait admitted and sworn Dempster for this Court. Elspeth Graham in Dalkeith, Christian Paterson in Newbottle and divers other persons living thereabouts, indyted and found guilty of the crymes of Witchcraft and Sorcery, some of them are found guilty and condemned and others continued. The only remarkable thing in the Process is, that Christian Wilson ¹ one of the Pannells having killed her Broy^r by Sorcery, and being suspected thereof by the minister and others, she was brought in to touch his corps, and upon seeing thereof she prayed that God who made the sun to shine on that house would bring the murder to light, and immediately thereafter she touching the Corps it bled, tho it bled not before when touched by others. This and the other points of the Lybell proven by famous Witnesses. The Justice Deputes ordain the Baillie of Dalkeith to carry Jonet Clerk prisoner to Edinburgh and to insist against her on the 9th of this month.

Edinb^r, 6th August 1661. Court holden by Mr. Alex^r Colvill and Mr. John Cunninghame.

A Pursuit at the instance of Mr. Pat. Oliphant against Sir John Weeymss of Bogie and John Guthrie for false imprisonment continued till Nov^r next.

Christian Thom in Leith, Prisoner, indited of the murder of a child and cleansed. Three warrands issued out by the Justices to require persons to insist at certain days contained in the warrands, against Prisoners incarcerate upon their declarations.

¹ This case referred to in Maclaurin's *Criminal Trials*. Similar evidence as to the corpse bleeding upon being touched by the prisoner admitted in the trial of Sir Philip Stanefield of Newmilns, for murder of his father in December 1687.—W.

Edinb^r, 7th August 1661. Court holden be Mr. Alex^r Colvill and Mr. John Cuninghame.

Margaret Brysson, Elspett Blackie, and divers others indyted and found guilty of Witchcraft and Sorcery, and condemned to be strangled and burnt. Nothing remarkable in this Process save this in Margaret Bryson's case, which I note down to be a warning against Passion and Imprecations. That she having fallen out with her husband for selling her cow, she went out in a passion to the door of her house in the night time, and there did imprecate that God or the Devil might take her from her husband, after which immediately the Devil appeared to her and threatned to take her soul and body if she entered not in his service, whereupon immediately she covenanted with him and renounced her Baptism.

Edinb^r, 8 August 1661. The same two Justices in Court.

George Clepon and John Dick indyted at the instance of Marion Shorless and the King's Advocat's Substitute, and found guilty of Hame-sucken and of the Robbing and Stealling of her Back cloaths and Houshold furniture, whereupon Clepan is adjudged to be hanged, but the sentence delayed against Dick till the 27 instant.

Edinb^r, 20th August 1661. The same two Justice Deputs in Court.¹

Mr. Da. Dinmure,² Substitute for the King's Advocate against Jonet Ker, Helen Casse, Isobal Ramsay, Margt. Hutchison, and Jonet Miller, indyted for Witchcraft and Sorcery. The first two, viz. Jonet Ker and Helen Casse, are found guilty upon their judicial confessions, and Jonet Miller is cleansed. The only thing remarkable is as to Isobal Ramsay and Margt. Hutchison. As to this Ramsay there are two threatnings lybelled emitted by her against Christian Porteous, and that the effect fell out according to the threatnings.

¹ Although it does not appear that Sir George Mackenzie sat as one of the Justice Deputes in this case, he refers to it frequently in his *Laws and Customs of Scotland in Matters Criminal*, under Title x. 'Witchcraft.'—W.

² Admitted advocate June 21, 1661; re-admitted June 25, 1675; Justice-Depute, 1664 (see p. 95); will recorded November 26, 1695.

2d. That she conversed with the Devill and received a sixpence from him, the Devil saying that God bad him give her that, and He asked her How the Minister was. The Interloq^r upon this, which is immediately subjoined to the Lybell and before the names of the Assisers bears, that she confessed the Threatnings and that she received a dollar from the Devil, which she thereafter fand to be a sklait stone, which confession the Justices finds not to be relevant, but yet they referr the same to the consideration of the Assise. Observe here that the opinion of the Justices may be taken anent the validity of a Confession, but their opinion cannot determine the Assize, and therefore tho the Justices declares the Confession to be not relevant, yet they leave to the Assize to do as they thought fitt with it, and if it were not so, there would be no use of Assises, but the Judges might do all, and yet our Law has not appointed so, but the constitution of Assise is a fundamentall of the kingdom; but tho the Opinion of the Justices could not determine the Justice, observe that they have regard to the opinion and layes no weight upon the Confession, but upon the Testimony of Witnesses, whereby both the Threatnings and the Dammage was proven. The reasons that occurs to me for the opinion of the Justices were these: 1^o That the Confession did only acknowledge the Threatnings which were not relevant per se without Confession of the Dammage also. 2^o As to the receipt of the Dollar, it could not import per se tho' she had known the Giver to be the Devil, but indeed it seems He dissembled himself and put on a mask of Piety because He asked for the Minister and said that God bad give her the money. The next thing that I consider in the Process is Marg^t Hutchison's part of it, because there is debate in it, and therefore I sett down her part of the Lybell and the Dispute and Interloq^r thereupon as follows: 1^{mo} It is lybelled that she threatned John Boost for calling her a witch, and within few days after by throwing a piece of raw fflsh into his house, which was burnt into the ffire after dogs and Catts had refused to eat it, a disease seized on his catt, which made her to fight and sweit to death, which was apparently designed for himself. (2^o) That on the 14 July 1660 she threatned John Bell for contending with her husband, and immediately

thereafter 3 Catts entered into his house, which were like to devour him, whereupon two of his children dyed and his wife contracted a long disease. (3^o) That after her Threatnings Hary Balfour contracted the pains of a woman in childbirth with an universall swelling in his body whereof he also dyed. (4^o) That John Soutter after her Threatning that he should not thryve, fell in a frenzie and madness. (5^o) That Thomas Crichton and others after her Threatning should make an ill end, dyed suddenly. (6^o) That she appeared severall nights at midnight combing her head at the ffireside, doors being shutt, and affrighted his wife, and the last of these nights by her touching the wife's pap when her child was sucking, the child dyed. (7^o) That she came to the house of Jonet Bell at which time a little dog walked up and down the house, and she immediately dyed. (8^o) That for many years bygone she had been holden and repute a rank Witch, and had been delated by confessing Witches.

The Dispute upon this Lybel (which is the first Dispute in the Book) is as follows: 1^{mo} Mr. Nathaniel Fyfe, for the Pannel, alleadges that the Proposition of the Dittay does not lybel Compact with the Devil, and the subsumption founded on particular deeds of Malefice lybelled is not relevant to infer the Crimes of Sorcery and Witchcraft, because they might have been done by natural causes without the Devil's accession.

Replyed, the Proposition is opponed bearing expressly Compact with the Devil, and the subsumption is likewise opponed bearing that the particular deeds of Malefice were done by Inchantment and Sorcery in general. And it is not necessary nor possible to condescend on the means by which the Devil operates, but there being a Condescendence of *Minæ præcedentes et damnum subsequutum* specially in occult crimes.

Duplyed, the *Minæ et Damnum* make but a presumption at most in this case where the Damnum is nothing but death or sickness, which is the effect of Mortality.

Triplyed, oppones the constant practice of the Justice Court sustaining such Dittays, where the deeds of Malefice are lybelled to be done by Sorcery and Witchcraft, tho' it be not condescended on *quibus modis, medijs et artibus* it was done.

It was further alleadged for the Pannel, that the first Article of the Dittay anent the piece of raw flesh thrown into the fire in John Boost's house, cannot infer a Deed of Malefice, seeing its only lybelled that the Catt dyed.

Replied, that the Dittay is opponed bearing that this was done by Inchantment and Sorcery, which is sufficient to infer the pains of the Dittay, albeit the designed effect did not follow, and to make out the Inchantment, oppones that circumstance in the Dittay, and the flesh when it was thrown in the fyre did crack like a Pistole.

The Justice Deputes by their Interloquitor fand that part of the Dittay anent the Pannell's renouncing her Baptism and entering in Paction with the Devil relevant; and sicklike fand the 6th Article anent the child Marion Clerk relevant *per se*; and also fand the hail remanent Articles joined with same and Deletion relevant *conjunctim*. The witnesses being adduced against the said Margaret Hutchison, the Assize cleansed her. The reading of the Verdict is continued till the 27th of this instant, and the Assize appointed to attend.

She gets a new Lybell afterwards and is condemned. *Vide* page 14th, 10 September 1661.

The Tryal of Margret Allan continued till the 27th instant, and the Laird of Newhall enacted to be ready to insist.

The same day appointed for the Tryal of Jonet Clerk, prisoner, and a Macer sent to the Baillie and minister of Dalkeith to have their Witnesses and Informers summoned to that day.

Edinburgh, 21st August 1661. Court holden be Mr. Alexander Colvill and Mr. John Cunninghame, Deputes.

Thomas Burntfield, prisoner, indyted and ffound guilty of being art and part of the Robbing of Adrian Jacob's house, and of the stealing of his household furniture and back cloths. The pronouncing of the sentence delayed, *vid.* 27th instant. There being several women witnesses adduced in this case, the Justice Deputes declared, that they would not in time coming

admitt any woman as a Witness in the matter of Theft, but only *ex officio*.¹

The same day William Reid, prisoner, aged 38 years, being brought out of Prison by the Justice Deputes, and interrogate by them, confest judicallie as follows, that in Sept^r 1658, he being a Corporall of Horse in the English Army and sent out by his Captain to scoutt, he being for the time in the Glen of Ogle, did command George Cob and W^m Ogilvy, two of his horsemen, to scoutt in the countrey and observe what men were doing and whom they might apprehend, and that the first man they mett in their scoutting was George Lindsay, brother to the Laird of Pittairly, and that the Deponer's two scoutts desyred the said George Lindsay to take quarters of them, and George required them to take quarters of him, which they refusing, George presented a Pistoll to them which misserved and George Cobb fired and killed Lindsay. Also confessed that he was in the King's Army at Inverkeithing² and Worcester, upon which confession the Advocate Substitute took Instruments.

The same day James Butter brought out of Prison and examined. Declared he was in Montrose's Army in the Hills anno 1654, and being sent to take the Shepherd of Glamis, and took him and afterwards was forced to make his peace with the English. That he was within a quarter of mile where George Lindsay was killed at the time, and that he was killed by Geo. Cob and W^m Ogilvie, upon which Confession Instruments were also taken. The Justice Deputes assigned 4th Sept^r for the Tryall of W^m Reid and James Butter, and ordained Henry Lindsay to be ready to insist.

27 Aug^t 1661.

David Murdoch, formerly convict of Robbery, upon his Confession, is upon the representation of the Justice Deputes to the Counsell that this was his first fault and done for

¹ See Introduction.

² The battle was fought in July 1651 between Leslie's troops under Sir John Brown and those of Cromwell, commanded by General Lambert. It resulted in a decisive victory for the latter.

necessity and that he was penitent, appointed to be banish'd and no further Punishment to be inflicted on him.

Eod. Die. Thomas Burntfield and John Dickson, formerly convict of Robbery, sentenced to be hanged on a fforenoon betwixt 10 and 12 hours at the Castlehill of Edinburgh.

The 10 of September appointed for the Tryall of Marg^t Allan and Jonet Clerk accused of Witchcraft, and Thomas Neilson accused of Theft, and their Accusers to be ready, conform to three severall orders and the Magistrates of Stirling to assist at the taking of the Thief.

4 September 1661.

William Reid and James Butter indyted and accused for their treasonable Desertions of their charge in his majesties Army in *annis* 1650, 1651 and 1654, wherein they were employed as soldiers for Defence of the kingdome against the commonemie, and for being airt and part of the Slaughter of George Lindsay employed in his majesties Service under command of the Earl of Middleton,¹ and robbing his horse and cloaths, carrying them to the Castle of Glames commanded by an English Garrison, committed by them and their Accomplices George Cob and W^m Ogilvie in the Glen of Ogle in August 1654. The Witnesses and Assysers not p^{td}, but thereafter they compeared and became enacted to the 13 Nov^r.

Eodem die. Margaret Porteous and Margaret Grieve dilated for the Crime of Witchcraft contained in their Indytmnt, sett at liberty upon enacting themselves to abstain from Charming and to compear when called.

Edinb^r 10th Sept^r 1661.

Margaret Hutchison formerly accused of Witchcraft and assoillied, is of new indyted of points not in the former Dittay, viz. entering in Covenant with the Devill and renouncing her Baptisme, and that by Sorcery Katharine Wardlaw whom she

¹ John Middleton, Lieutenant-General of Horse, was taken prisoner at the Battle of Worcester, and committed to the Tower, from which he escaped. He was made in 1660 Earl of Middleton, High Commissioner of Scotland and General of the Forces in Scotland.—W.

threatned became distracted for two days and two nights, and again the Pannell hearing her say that she was the cause of her sickness, did laugh and recover her, as also that she had brought sickness upon Beatrix Melvill, spouse to Mr. Charles Lumsden¹ at Dudingston, so that for 20 days she was not able to go out of her chamber, and lastly that by common fame she had been holden and reputed to be a notorious witch for many years bygane.

Mr. Andrew Birnie² for the Defender alledged that the Article of the Indytement relating to Katharine Wardlaw was not relevant, because it does not condescend upon the means and methods of the Sorcery and Inchantment as Charms, Syllabs, Circles, and other Ceremonies whereby the Devil does effectuat his purposes by his Instruments which ought to be condescended on, because it cannot be denied but the Devill may immediately produce these effects by himself, and truly does it, and they are not the naturall product of Sorcerys and Inchantments used by witched creatures *et in dubio*, a distemper is to be ascribed to nature, and as to that woman's recovery the Indytement is no less irrelevant, the means of Sorcery whereby she recovered not being condescended on. (2^o) In Veneficijs its generally granted that *una et eadem persona non potest esse saga ligans et solvens*, which two offices are always bestowed by the Devill on distinct persons. (3^o) Its an undoubted ground in law in the subject of Witches that *in commutationibus et translationibus semper lucratur Demon*, and therefore the Devill does never loose a Disease from one but by transmitting it as from a person more significant, as from an elder to a younger and from a beast to a man, whereas this Lybell bears the disease to have been translated from Kath. Wardlaw upon her catt, and for the next article in the Dittay, repeatts the same defence, viz. that the Dittay does not condescend upon the Sorcery and prestiges whereby the Pannell did effectuat the particulars lybelled, seeing if these means of Inchantment and Sorcery were con-

10th Septer.
Witchcraft.

¹ The Rev. Charles Lumsden, or Lumisden, presented to the parish of Dudingston, near Edinburgh, in 1641; died 1686.

² Admitted advocate in 1661; Dean of Faculty 1675; raised to the Bench, under the title of Lord Saline, in 1679.

descended upon the Pannell would have this good Defence, that these means condescended on hath not an intrinsick and phisicall nature to produce the recovery of the Person alledged to be bewitched.

His Majesties Advocate oppones the Dittay and constant practise of this Court sustaining Dittays thus conceived as appears *passum* through the Books of Adjournall.

The Justices by their Interloq^r which is placed immediately betwixt the Lybell and the names of the Assizers and before the Dispute, find the first article of the Dittay relevant *per se* to make the Pannell pass to the knowledge of an Assize being joined with fame and dilation, which Interloq^r seems to me unclear,¹ for the first article being compact with the Devill was relevant *per se* without fame or dilation, and the 2d Article containing Threatning and Malefice, seems also to be relevant *per se*, and I suppose that the last words of the Interloq^r after *per se* must be relative to the 3d Article anent the minister of Dudingston's wife. Note Wardlaw tho lybelled to be maleficiate yet is admitted Witness.²

The Assize having considered the Depositions of the Witnes, found her guilty of the malefice committed upon Katharin Wardlaw as done by Sorcery, and assoillies her from the other malefice without respect to ffame and delation whereof the Verdict contains nothing, nor of the Compact with the Devill. This Verdict is written in the Book after the following Process which interveens, there being one Verdict upon both Processes.

Eod. Die. Thomas Neilson, sledger in Leith, indyted for stealing of a Horse out of the wood of Tillibody, and that being a notorious Thief and Robber, formerly he was enacted in the Books of Adjournall and Town Court Books of Stirling for his behaviour and found guilty by the Assize. Stealling a Horse.

Eod. Die, post meridiem Court holden be Mr. Alex^r Colvill and Mr. John Cuninghame. Witchcraft.

Jonet Cock in Dalkeith formerly accused at Dalkeith and

¹ Sir George Mackenzie also thought this interlocutor very severe.

² Persons to whom injuries were alleged to have been done by witches were admitted as witnesses, but (if the evidence was not otherwise weak) *cum nota*.

delayed, indyted and accused for Sorcery and Witchcraft at the instance of Sir John fletcher,¹ the king's Advocate, and Mr. Robert Dagleish,² his Substitutue, in manner following, viz. That albeit be the Law of God in the 18 chapter of Leviticus and 20th of Deuteronomy, all Witches and Sorcerers, Users and practisers of Sorcery and Witchcraft are appointed to be punished by Death, as also by the 73d Act Parl. 9 Queen Mary, it be expresly statute that no person of whatsumever degree or quality practise any manner of Witchcraft or Sorcery or give it out that they have such skill there throw to abuse the Lieges and that under pain of Death, notwithstanding the said Janet Cock, laying aside the fear of God and Reverence of Laws, had betaken her self to the Service of the Devill and practised devilish Charms, Witchcraft and Sorcery be the space of 24 years bygone, and thereby had damnified and killed sundry of the King's Liedges as 1^{mo} about 24 years ago by Charms, she cured the child of Janet Graham, another Witch, lately burnt, and transferred the Disease upon a child of Agnes Pindie coming in to the house where she was curing the other sick child.

10th Septer.
Janet Cock's
Tryal for
Witchcraft.

Agnes Spindie having upbraided her therefore she came to the house of Agnes eight days thereafter and gave her a blow on the cheek, whereupon she immediately lost her speech and turned mad. (3^o) A young woman present turned also mad. (4^o) Mr Hugh Campbell³ reproving her for these actions immediately also turned mad. (5^o) That Jonet Spindie, sister to the said Agnes, having reproved her for the ill done to her sister, she desired her to lay her sister upon a bed and she should be well, which being done she immediately by Sorcery and Witchcraft recovered her Speech and Witts. 6^o Thomas Scott, ffather to the said young woman, was also by her sorcery made mad, and upon his Threatnings to cutt the Pannell in pieces, she recovered the daughter, by which it is evident that by Sorcery she has laid on and taken off Diseases. (7^o) That after threatning, she killed a child of William Scotts fostered

¹ Was appointed Lord Advocate at the Restoration, but resigned office in 1664. He was accused of gross corruption.

² Admitted advocate 1647; appointed solicitor for the Kirk 1643; King's agent 1664; died October 12, 1662.

³ Hugh Campbell was the minister of Dalkeith between 1634 and 1659.

by Helen Turnbull, having predicted the same by these words that should get her leave from her master and a lash on the arse, and having threatned her with trouble, poverty and wrestling with the world, succeeded. (8°) Having conceived hatred agt. William Mitchell for smiteing her, said she would see him hanged and make a shamefull end, and accordingly he was hanged att Dalkeith. (9°) There being an outfall betwixt the Pannell and James Douglass in Dalkeith, he the next day riding out the way, fell with his horse and recovering, saw the Pannell beside him and immediately contracted a sickness and died, and declared that in the time of his sickness he saw her often at the bed foot. (10°) That she kept company with the Devil, and came with him and severall of his associates to Elizabeth Pringle's house in *anno* 1655 when the doors of the house were close, and wrestled to get from her the child in her arms. (11°) That having conceived a malice against William Scott, she bewitched his horse and turned him furious, and a countreyman present for the time having caused him take off the horse shoes and put them in the fire, telling him that the first person that should come in after the shoes should be taken hot out off the ffire would be the witch, and immediately the Pannell came in, who was never in the house before, and without any business. (12°) That she laid a heavy disease upon John Richardson in Dalkeith for calling her a Witch, whereof he died, declaring that he saw her at his bed foot the time of his sickness. (13°) That in *anno* 1661 she predicted and foretold that a whirlwind should arise and take away Christian Wilson, a suspected Witch, in her transport from Dalkeith to Niddrie, where she was to be confronted with other persons, which accordingly fell out. (14°) The Lybell bears the names of many Witches who *did* dilate her for a Witch and a keeper of their meetings, and who being confronted with her did bear it in upon her by circumstances. And lastly, that she had many times confesst her self to be a Witch¹ and engaged in the Devill's service, and had received his mark and had renewed her Confession without compulsion.

¹ Sir George Mackenzie states that the devil's mark was given 'by a nip in any part of the body, and it is blew sometimes like the impression of a hare's foot or the foot of a rat or spider.'—W.

10 Septemb^r.
Janet Cock's
Tryal for
Witchcraft.

Agt. this Lybell it was objected and alledged be Mr. Andrew Birnie, Prör for the Pannell, 1^o. That the proposition of the Lybell anent the Compact with the Devill and renouncing of Baptism is not relevant except the time and place were condescended on. 2^o. That the first particular Article anent the transferring of a Sickness from one child to another child of Agnes Spindies is not relevant except the means of sorcery were condescended on, without which the sickness which is a naturall disease cannot be ascribed to Sorcery, and farder the disease which was transferred, being transferred from the child of a Witch (as the Lybell bears), it must be repute a naturall disease (ffor no Witch does ill to the child of another Witch), and being a naturall disease, by the opinion of Lawyers it could not be transferred, and swa the disease which seiz'd Agnes Spindie's child could not be the disease which was on the other child. And to the 2d Article anent the blow given to Agnes Spindie, tho her madness had followed on it, it cannot be called Sorcery, because a blow is the naturall cause of a distemper, and a distemper the naturall cause of madness. And to the 3d and 4th Articles, no means of Sorcery condescended on. And to the 5th it was no mean of Sorcery but a naturall remedy to recover Janet Spindie by putting her in her bed. And to the 6th Article the Threatning lybelled was against William Scott's nurse only and not against his child, and therefore the dammage suffered by the child cannot be imputed to be Threatning, as also the Threatning being only that the nurse should get her leave from her Master, the same might have been effected without Sorcery. And to the 8th Article bearing that she threatned against William Mitchell that he should be hanged, which fell out a little thereafter, she might have done that from conjecture, such threatnings being usually made by persons injured, and if any crime could be inferred from this, it is not sorcery, but that which the Lawyers call Deuteroscopia,¹ which is not lybelled. And to the 9th Article bearing James Douglass his falling from his horse, it might have been by accident, and his saying that he

¹ Maclaurin in his *Arguments and Decisions*, p. 728, says that 'Deuteroscopia seems to be Greek for second sight.'

saw her at his bed foot when he was sick, might have proceeded from a distempered brain. As to the 10th Article, bearing that Elizabeth Pringle saw her in her house in company of the Devill, taking her child from her, it might have been the fancy of a distempered brain, and that she came in when the doors were close is contrary to the nature of bodys. The 11th Article is not relevant, because it is not lybelled that the Pannell used any prestige or enchantment against the horse of William Scott, and where Inchantments are not made appear, the diseases must be attribute to naturall causes, which in horses are very many, and as to what was predicted from the heating of the horses shoes, it is a ground of Dittay agt. him who used the prediction, but not agt. the Pannell, against whom the prediction was made. And to the 12th article not relevant, except the causes of John Richardson's disease were lybelled. The 13th, anent the prediction of the whirlwind, is not relevant, except it were lybelled that she had raised it, and by what means, and the Defence condescends upon this means whereby the Devill's Instrument raises Tempest *effodiendo scrobem*,¹ and by pouring water into it, and in defect of water, lotium, and by stirring the liquor so poured, these things being done by the Instrument of the Devill, he by his compact with that Instrument stirrs up the Tempest. 2°. It is not lybelled that she did foretell a Tempest, but that she said, would it not be a good sport if a Wind would come and take away the person lybelled from these who transported her. 3°. Suppose she had foretold a Tempest, it does not therefore follow that she did it by Sorcery, because it may be foretold from a naturall cause; and 4°. The storm which arose did not deliver the woman as is lybelled. The 14th Article is not relevant, because holden and repute a Witch is no Probation, and the Testimony of Dying Witches is of less import to prove because they are gravatæ with all sort of Crimes, and whereas this Article also bears that Margaret Brunton, a confessing Witch, did declare in face of the Pannell that about 16 years ago, she being in the house of James Steill in Dalkeith visiting a sick child, she saw the Pannell and Jean Dickson,

¹ *i.e.* by digging out a ditch or grave.

another Witch, lying over the child, and whispering to one another, and they commanded Margaret Brunton to go from them, and that after Margaret and the dog of the house had been for some time together in a closs room, the door being oponed the dog rushed out, and Margaret was found with another woman and a Plate of Blood standing beside them, and the dog was found dead without the house, and the child immediately recovered, from which it is concluded that the child was cured by Inchantment. It is answered that all this cannot inferr the crime of Witchcraft against the Pannell, unless it were lybelled that she did speak words and use means not efficacious in themselves to produce the recovery of the child, and that the head of the dog which is lybelled to have been ammissing, had been applied to the child, and of the finding of the Plate of Blood on the Table can prove nothing against the Pannell, who was a stranger in that house where it was found, and not obliged to know whether there was blood in it or not. And to the last Article founded on the Pannell's extrajudiciall Confession oppones the judiciall denyall.

Mr. Robert Dagleish, substitute for the King's Advocate, oppones the Dittay, and takes Instruments of the Pannell's Judiciall Confession of her seeing a round thing in her house after she had discorded with that James Douglass who is lybelled to have fallen from his horse by her Threatnings. This is the sum of the Lybell and Dispute, which in the Lybell amounts to 14 Articles, but the Dispute as its marked in the Journall Books reduces them to 10.

The Justice Deputes by their Interloq^r fand the last part of that Article anent the stricking of Agnes Spindie and her dumbness and madness following thereupon, together with the madness of the minister and maid lybelled and the lybelled recovery of them which is contained in the 2d, 3d, 4th, and 5th Articles of the Lybell (as I have marked them) relevant *per se*, and the first Article which the Interloq^r calls the first part of the first Article anent the transferring of the disease from one child to another relevant allenarly as joyned with these other particulars of the madness, and finds that part of the Lybell anent the recovery of Dickson's child, which the

Dispute in the Book makes to be the 9th Article, but is truly the 14 and so I have marked it relevant *per se* as joined with the confrontation lybelled, and finds the hail remanent Articles of the Dittay relevant allenarly as joined with these points which are found relevant *per se* or either of them joining therewith the ffame and delation lybelled and that notwithstanding of the Defences, and sustains the Dittay and ordains the same to be put to the knowledge of an Assize.

The Witnesses being examined the Assize fand the said Pannell clean and not guilty of the last part of the Articles anent the striking of Agnes Spindie her child, and the Dumbness and madness following thereupon together with the madness of the Minister and maid lybelled, and of the recovery of them, as also fand her to be clean and innocent of that part of the Article anent the recovery of Dickson's child with the confrontation lybelled, and also cleansed her of the remnant points of the Inditement except of being dilated be other persons who were called Witches, and of her extrajudicial Confession to the Minister and others, and because these Articles are not found relevant *per se*, the Assises referred the samen to the Justices consideration, whereupon Mr. Andrew Bruce, procurator for the pannel asked and took Instruments.

10 Sept. Janet
Cock's Tryal
for Witchcraft.

Edin^r 11 Sep^r Court holden be Mr. Alexander Colvill
and Mr. John Cunningham.

Margaret Hutchison upon the last lybell and verdict condemned to be strangled and burnt at Wester Duddingstoun,¹ and the Laird of Duddingstoun younger, enacted to see the sentence executed, viz. 10 Sept^r *eod. anno*.

Thomas Neilson found guilty upon the 10 Septem^r of the Theft. crime of Theft, decerned to be hanged.

The trial of Margaret Allan prorogate.

Mr. John Rollo of Piltoun,² Advocate, gives in a Petition to the Justice Deputes, representing that he having a Commission under the Privy Seal for being sherriff Depute of Stirling

¹ The estate of Duddingston was held by a family of the name of Thomson from 1552 to 1673. Sir Thomas Thomson was created a Baronet of Nova Scotia in 1636.

² Admitted 1631.

before the King's Exile, the Englishes did contrive a proces of Bribery against him in the year 1653, upon design to thrust him from his office, upon which sentence of Deprivation followed, craving therefore that the Justice Deputes would review and annull this proces upon the several nullities and defects mentioned in his Bill, and that they would give Warrant to the Justice Clerk to delete the same out of the Criminal Registers, which desire the Justice Deputes granted.

Edr 6 Novemr 1661. Mr. John Cunningham and Mr. George M^cKenzie holding the Court.

Wrong: Im-
prison^t on Sun-
day.

Sir John Weems of Bogie formerly accused at the instance of Mr. Patrick Oliphant for False Imprisonment or causing apprehend him with Caption in the Church Yard upon Sunday between Sermons. The Diet formerly continued is now deserted.

Eod. die. John Risk, merchant in Edin^r accused for wearing of forbidden weapons and the slaughter of John Spittle. Dyet continued to 8 November.

Another Diet continued to the same day against Henry Craigtoun, Dilated for art and part of the Slaughter of Alexander Chrystie.

William Auchinleck, brother to the Laird of Balmanno, and Thomas Gernilton, brother to the Laird of Pottie, for wearing forbidden weapons and firing a pistol at Margaret Ainslie, spouse to John Palmer, in Kirkaldie, by way of Ham-sucken. Continued.

Edin^r 8 Novem^r 1661. Court holden be Mr. John Cunningham and Mr. George M^cKenzie

The Diet against John Risk again continued to the 11 instant.

Edr 11 Novem^r. Court holden be Mr. John Cunningham.

The Diet against John Risk again continued to the 18 instant.

Janet Cock's
ad Tryal for
Witchcraft.

Janet Cock formerly indited and cleansed of Witchcraft, accused of new again upon 13 new Articles of Malefice not contained in the former lybell, there is Compearance for her

be Mr. Andrew Birnie and Debate in the Cause. The Justice Deputes be their Interloq^r sustains the first, sixth, and ninth Articles relevant *per se et separatim*, which contains Threatnings and Dammage following, and extraordinary Cures and ill deeds done by Sorcery and Ceremonies, without Condescending on the means of the Sorcery. They also ffind the 3, 7 and 12 Articles which contains threatnings and malefices following relevant only as conjoyned with fame and Dilation. How this does agree with the first part of the Interloq^r I leave others to judge, for I find no strength in the Dispute as to thir Articles more then the others. And lastly the Justice Deputes ffind the rest of the Articles allenarly relevant as joined with these of the two former members of the Interloq^r, and remitts the same to the consideration of the Assise. And yet all thir Articles are also Deeds of Malefice following Threatnings, so that all the Deeds of the lybell being Threatning and Malefice, I wonder how the Interloq^{rs} come to differ. They sustain also the Defence for the pannel, that one of the Sicknesses lybelled was the product of the falling Sickness, relevant to assoillie from the imputation of Sorcery as to that point.

The lybell is proven be witnesses, and I observe that the same persons who are mentioned in the Dittay for the receivers of the Injuries are the persons examined as witnesses. The Assise ffinds her guilty of the 1. 4. 9. 11 and 12 Articles.

Injured received
as Witnesses.

Edin^r 12 Novem^r. Court holden be Mr. John Cunningham.

The said Janet Cock condemned to be strangled and burnt at Dalkeith where she lived, and a Baillie of Dalkeith becomes enacted to see the Sentence execute.

The Diet at the instance of Thomson and others against Chrysties of Craigtoun. Deserted of consent.

Edin^r 13 Novem^r. Court holden be Mr. Alexander Colvil and Mr. John Cunningham, Deputes.

William Menzies his Diet continued till the 15 instant.

The Diet at the instance of Coll. James Menzies of Culdair against John Bain Camron also continued.

Breaking
Prison.

Sinclair of Dunbeath and his Majesties Advocate against Sinclair of Assairy and others for breaking of prison of Thurso, making their escape and taking some thieves with them. Denounced fugitives and their Cautioners unlawed.

Mungo Murray, son to Corseburn, amerciat for not reporting letters. George Lyon appeirand of Wester Ogle and M^cNab of Steilshill. Their unlawing continued till the next day.

The Criminal diet Hary Lindsay agtt. William Reid and James Butter continued till the 15 instant. As also the Diet John Thomson against Chrysties.

Edin^r 14th Novem^r 1661. Court holden be Mr. Alexander Colvill.

James Bannatyne of Newhall and the Advocate against Margaret Allan for Sorcery and Witchcraft. The Diet deserted.

George Lyon and John M^cNab, witnesses in the Cause pursued be the nearest of kin ag^{tt} William Reid and James Butter, being formerly warned *apud acta* to compear each of them under the pain of 800 merks, are accordingly amerciat.

Witnesses
Ammerciate.

Edin^r 15 Novem^r 1661. Mr. Alexander Colvil and Mr. George M^ckenzie Justice Deputes.

The Diet anent Cap^t Menzies continued till the 28 Novem^r.

The Diet Lindsays against Reid and Butter continued till the same time.

Order the Purs^r
to insist with
Certification.

An order to require my Lo: fforester¹ to insist against James Smart, prisoner, and give information with certification he shall be sett at liberty.

The Diet Thomson against Christies. Continued till 8 Janry. 1662.

Nov. 18.

Edin^r 18 Nov^r 1661.

Advocatus ag^{tt} John Risk for Slaughter, continued.

Edin^r 28 Nov. 1661.

John Ban Camron and Coll. Menzies his Cautioner compearing and putting him to underly the Law, and none com-

¹ This title is now held by the Earl of Verulam.

pearing, to insist. He is ordained to enact himself for his good behaviour in time coming and to compear when called, and thereupon is sett at liberty.

Defender compearing and not insisted agt. is sett at Liberty upon caution.

The Diet friends of Lindsay ag^{tt} Reid and Butter again continued, as also the Diet ag^{tt} James Smart and Capt. Menzies to the 3 and 10 Decem^r.

Edin^r 3d Decem^r 1661. Court holden be Mr. Alexander Colvil.

The Diet friends of Lindsay ag^{tt} Reid and Butter continued to 5 March 1662. As also the Diet against Capt. Menzies till the next Court day.

Ed^r 10 Decem^r 1661.

Alexander Menzies as Cautioner for Capt. Menzies compearing and excusing the Capt.'s absence by reason of sickness is liberate from his Cautionery and the diet deserted because none compeared to insist.

Defender's sickness liberates the Cautioner.

James Smart compearing and the Lo: fforrester his accuser absent, the diet is deserted and he liberate.

Edin^r 3d Janry. 1662. Mr. John Cunningham and Mr. George M^oKenzie pnt.

A Diet against the soldiers aftermentioned continued till the 6 day.

Edin^r 6 Janry. 1662.

Nicolas French, Thomas Gaites, Edward Baites, soldiers in the Citadel of Leith,¹ convict of the Slaughter of John Burd, soldier in the Castle of Edinb^r. The first of them as Actor and the last two as art and part. The pronouncing of Doom delayed till the 10th Inst.

Slaughter.

Mr. James Steuart in Aberdoig agt. William Blair in St. Andrews for Theft and Robbery. The purs^r present and defender absent and excused for his sickness. The Diet continued.

Edin^r 10 Janry. 1662.

Nicolas French found guilty on the 6 Inst. sentenced to be hanged.

¹ The Citadel of Leith was built by General Monk in 1656, and soldiers were quartered there in 1661.—W.

An order to site assisers and witnesses agt^t. some Thieves and Witches.

Order the Pursuer to insist otherways the Defender will be set at liberty.

An order ordaining Glenlyon to insist against Hugh Ross and some others, prisoners, for theft, with Certification they will be put at liberty.

Edin^r 21 Janry.

Mr. James Steuart against William Blair amentioned. The Diet deserted.

Stealling Sheep

John Raes elder and younger indited for stealing of four sheep about Samuelstoun and Bitterden, taken with the fang.¹

The Justice Deputes sustains this Defence for John Rae younger, that he was but twelve years of age and acted by his ffather's command and ffand the Dittay relevant against the ffather, who is found guilty by the assise. Pronouncing of the Sentence continued till the 24 instant. As also the Diet of Katharine Williamson for Witchcraft, and Glenlyon ag^{tt} Hugh Ross till the said day.

Edin^r 24 Janry. Mr. John Cunningham and Mr. George Mackenzie, deputes present.

John Rae, elder, by advice of the Privy Council is adjudged to be burnt in the cheek with the Castle mark of Edin^r² within the Tolbooth thereof, and thereafter banished the three Louthians, and enacted in the Journall books for that effect.

The two diets abovementioned again continued till the³

Edin^r 27 Janry. 1662. Mr. John Cunningham, Depute present.

Witchcraft.

Agnes Williamson in Samuelstoun indited for witchcraft and sorcery, cleansed be the assise. There is debate in this cause as follows. 1^o. He being accused for killing a horse by sorcery, its answered for the pannel *non constat* whether

¹ That is to say, with booty in their possession.

² The triple-towered castle of the city arms.

³ Blank in manuscript.

he died by sorcery or by diseases. Replied, it appears to have been by sorcery, because the horse being sound was suddenly affected and some things extraordinary in his death, viz. a lump of flesh was taken out of his upper lip, and the pannel was heard to utter strange expressions before his death. Duplied, Tho the death was extraordinary, yet not without the compass of naturall causes, and all might have fallen out without compact with the Devil. Birnie oppones the Dittay. 2^o. There being another Article of her Dittay for taking away the fusion of some meal. It was alledged that this Article was not relevant, for as the giving of fusion, so the taking it away belongs to the power of God.

Birnie replys. That albeit this power properly belongs to God, yet the same may be permitted to the Devil and his, by natural causes the fusion for productions given, so by natural causes it may be taken away. Fife duplies That the Defence is still relevant unless it could be made appear that the pannel did that deed by paction with the Devil. Birnie oppones his former answer.

3^o There being a 3d Article that she had raised a whirlwind and thereby had carried away Robert Lauder's house in Samuelstoun and hurt the said Robert. It is alledged that the Article is not relevantly lybelled, unless it were said it was done by compact with the Devil. Replied, its sufficient to lybell that the deed was done by means and ways of Inchantment which imports Witchcraft.

4^o It was alledged as to the rest of the Articles, 1^o *minæ et damnium secutum* are at most but a ground of Torture as also Extrajudicial confession is but of the same force and was extracted in Torture which was not lawfull, and she retracts that confession. 2^o Dilation of dying and penitent witches is of no force because by the sentence they were infamous, *infamia juris et facti*. And likewise it is clear from Law that *qui disparavit de capite suo, non est audiendus de capite alterius*, and as to bruit and fame it is not *inter probationes* but *inter Judicia levia* tending *ad particularem inquisitionem*. Birnie replys that he insists only upon the Testimony of dying witches, with bruit and fame, which are violent presumptions *et Judicia proxima delicti*, ffor who can be a fitter witnes then a penitent

person, and none can be so litle byassed as one who is to die, and moreover witchcraft is *crimen exceptum*, and in such crimes probation is priviledged, and whereas it is alledged that Threatnings and effects following are not sufficient probation, its answered that witchcraft being a deed of darkness and perpetrat by hid means *Mince et damnum secutum* are of great force, specially *contra personas qui solent exequi minas*, and where the *Damnum secutum* is not an ordinary and accustomed prejudice, but extraordinary, such as one of the Deeds here lybelled, viz. the firing of a malt kiln in that place thereof most remote from the fire, the nearest part being untouched, as also oppones the pannells Judicial confession taken before the Commissioners of parliament who had power to put her to an assise. Fyfe oppones his former answers and alledges that unless the Confession be Judicial before the assisers, the same can operate nothing.

Agnes William-
son's Tryal for
Witchcraft.

The Justice Deputes finds the 3. 4 and 5 Articles relevant conjunctim joyning thereto the fame and diliation lybelled, and finds the remnant articles of the Dittay insisted upon not relevant *per se* but allenarly conjoynd with the former articles. I think strange of this last part of the Interloq^r seeing these Articles contains deeds of malefice after threatening except one of them which bears that she having invited her neighbours to be present with her at the birth of a child, she immediatly after birth abstracted the child by sorcery.

Nota that the Confession before the Commrs of parliament is not touched in the Interloq^r, for the Interloq^r relates only to the lybell and that confession is not lybelled upon particularly but only diverse confessions in generall. But it seems the Justices laid no weight upon it, because the pursrs pror. having replied thereon and positively offered to prove it, they do not sustain the reply, but passes it by. But in the proces against Mitchell for killing of the Bishop of St. Andrews day of 167, the Justices sustained his confession emitted before the Council proven be witnesses. *Nota.* Extrajudicial confessions is lybelled in the 8 Article and so falls within the last part of the Interloq^r anent the Articles not sustained *per se*.

This pannel is cleansed by the verdict of the assise.

Edin^r 28 Janry 1662. Court holden be Mr. John Cunningham, Justice Depute.

Glenlyon agtt. Hugh Roy and others, continued to 10 february.

Margaret Ramsay for the murder of a child, continued to the same day.

Edin^r 10 february. Mr. John Cunningham only in the Court.

Glenlyon ag. Roy and Margaret Ramsay. Diet again continued till the 12 february.

Advocatus ag. Janet Gray for the murder of a child continued and the accuser and witnesses appointed to be ready.

Edinb^r. 12 february 1662. Court holden pr. Depute M^cKenzie.

The Diet against Roy and Margaret Ramsay again continued till the 17 inst.

Ed^r 15 february. 1662. Court holden be Depute Cunningham.

Janet Gray, spouse to Thomas Inglis in Carnwath found guilty of the murder of her child in manner mentioned in her Dittay.

Edin^r 17 february. 1662. Court holden per Depute Cunningham.

The said Janet Gray condemned to be hanged. Glenlyon ag. Roy farder continued till the 3^d of March.

Edin^r 20 february. 1662. Court holden per Depute Cunningham.

Alison Kellie and Advo. ag. Home for forging of false writts, viz. a false Discharge whereby the purs^r is made to discharge two Apprisings of great sumes. The Defender declared fugitive for not compearance to underly the law and his Cautioner unlauded. Defer fugitate for not com-
pearing.

Edin^r 26 february. 1662. Court holden per Depute M^ckenzie.

Advocatus and agt^t. and others for slaughter, declared fugitive.

Edin^r 28 febr. 1662. Court holden per Depute M^ckenzie.

february 28.

The relict and son of Captain Patrick Lindsay against Alexander Lindsay of Pittairly, for the Slaughter of the said Capt. The Defender declared fugitive.

Edin^r 1 March, 1662. Court holden per Depute Cunningham.

Witnesses absentunlawed.

William Cockburn, messenger, ag. David Simpson and others for Deforcement. The absent witnesses unlawed. The Diet continued and a new Dilligence granted to the pursuer against Witnesses who of new finds caution to insist.

Edinb^r 3 March 1662. Court holden per Depute Cunningham.

The Diet Glenlyon against Roy and others, and the Diet against Margaret Ramsay again continued.

Ed^r 5 March, 1662.

A Diet Robert Anderson against George Smith, continued to 3d Aprile.

Murder of a child.

Margaret Ramsay indited for the murder of her child, committed in October 1661, and throwing the same in the North Loch of Ed^r found since. She acknowledged the child to be hers—cleansed by the Assise for want of probation. I observe here two strong presumptions, first, not calling Women to the birth of the child. 2^o Throwing the child in the Loch to conceal the birth and murder, and yet the Assise cleanses *ut supra*.

Tho' cleansed by the Assise for want of probation, yet an arbitrary punishment inflicted by the Lords.

Edinb^r 6 March 1662. Mr. John Cunningham, sitting Judge.

Sentence against the said Margaret Ramsay is pronounced, whereby considering that she was cleansed by the Assise of

the Murder she is not decerned to die, but yet considering that she confest that she was with child and concealed her being therewith, and that she brought out the said Child privately without the help of Women, and did prevaricate anent the casting thereof in the North Loch of Edinb^r, Therefore they decerned and adjudged her upon the 7 March instant to be whipt thro' the high street of Edinb^r and banisht from the said burgh, suburbs and privileges thereof not to return thereto without license from his Majesties Privy Council.¹

Nota here a point of the form of Court, that albeit this sentence be not a sentence of Death, yet it bears to be pronounced be the Dempster, and I think all Sentences upon verdicts ought to be so.

Eodem die William Cockburn, messenger, against David Simpson in Dryburnfoord and others for Deforcement. Deforcement.
he was poynding Thomas Bryson his goods, at the instance of John Cockburn of Ryslaw, and for Invading, beating and wounding of the said William in the execution of his office, and taking from him the goods poynded.

Mr. Robert Sinclair² for the pannel alledges that the pannel could not pass to the knowledge of an Assise for the Deforcement lybelled, because the ground of the Letters of poynding is a Tack of the Lands of Newbigging, sett to Thomas Bryson be James Cockburn, brother to Christopher Cockburn of Newbigging and assigned be James to the pursuer, upon which Right the pursuer could not warrantably poynd, because James Cockburn the Cedent had no right to the Lands of Newbigging, but the same belonged to his Brother Christopher, who does not assign, and tho' James did sett the Tack, yet it was but for the behoof of his brother Christopher, who was and had been long furious, and the Duties is made payable to Christopher, and the pursuer knowing this he ought not to have taken an assignation from James, specially seeing he knew the verity, and albeit his assignation were good as it is not, yet he could

March 6.
Da. Sympson's
Tryal for De-
forcement.

¹ This case is referred to by Sir George Mackenzie as one in which the justices reserved to themselves the right in certain circumstances to inflict punishment although the accused had been acquitted by the assize.—W.

² Probably Sinclair of Stevenson, who was appointed a Lord of Session after the Revolution, but never sat upon the bench.

not as Messr. poynd for himself, but were here as party, and so the poynding is to be lookt upon as illegall without a messenger, and so might lawfully be opposed. (2^o) No ways acknowledging the Lybell, the same is most relevant because it does not condescend upon the Goods poynded, and if the same were condescended on, offers to prove they did not belong to the Tenant. (3^o) *Et separatim* suppose both these defences were repelled, yet absolvitor from any Deforcement because the pointing was unjust and unwarrantable, and would have inferred a spulzie if it had been perfected, because offers to prove that the Tack duty was either paid before or suspended at the time.

4^o Any opposition that was made was not upon the Account of the poynding, but Christopher and John Cockburns having fallen in a struggling betwixt themselves, Willam the pursuer, who was a great way before with the Goods, coming back again and wounding one of the pannells' sisters with his sword, he was opposed on that account only.

Mr. Andrew Birnie replys. To the first oppones the Dittay bearing the pursuer to have acted *qua* Messr. and not *qua* Creditor in the poynding, but 2^o *Nihil impedit* why he might not both be assigney and messenger in the execution of a sentence pronounced by another Judge. To the second it was replied that the pursuer cannot condescend in the Lybell upon the particular goods, because the poynding was not consumat, but the tack ¹ is, he has done the equivalent, because he produces the execution of the poynding condescending particularly; and to the pretence that the goods did not belong to the Tenant, its not relevant, unless he would alledge that the proprietor of the Goods did compear upon the ground of the Lands, and that he did offer to depone that the goods did belong to him.

To the 3^d it was replied that the Messenger, pursuer, was not obliged to consider upon the point of Right, whether the Debt was satisfied or not.

To the last viz., That Christopher and John Cockburns did fall astruggling and did wound one of the pannells—it is

¹ 'fact.' Adv. MS.

replied that the samen is contrary to the Inditement bearing expresly the pursuer to have been *in actu licito* and to have been violented and deforced. 2^o Whenever the Defenders shall insist upon any injury done by the said Christopher and John Cockburns they shall have an answer, especially seeing neither Christopher nor John are pursuers but allenarly William, whom the alledgeance doth not meet. And farder, the messenger having lybelled that he was deforced and that he was assaulted by the pannells with staffs, forks, etc. and beaten, it was lawfull for him having defensive weapons, to make use of the samen in his own defence.

Mr. Robert Sinclair duplies, that the first Defence stands relevant notwithstanding of the Reply for the assignation of the Tack duty be not taken in his name, yet it was to his behoof, whereupon his oath of calumny was craved.

To the 2^d it was Duplied, that the Messrs execution cannot stand for a Condescendance to fortifie the generall lybell except he would offer to prove otherwise, that there was goods before him the time of the alledged deforcement, and as to the kine mentioned in the execution, offers to prove they belonged to the Cottars and not to the Tenant, and that they were given back to the Cottars upon their compearing to make faith.

March 6.
Da: Sympson's
Tryal for De-
forcement.

To the 3^d it was Duplied that the Defence stands relevant notwithstanding thereof, ffor as to the first part of it, there can be no Deforcement but where there is a lawfull poinding, and there can be no lawful poinding where the Debt is satisfied or suspended, and as to the not Intimation of the Suspension non relevat because the day of Compearance was not come, before which time it was sufficient to intimate at any time, but farder the suspension was produced, which was sufficient without Intimation to stay the poinding, the day not being past.

To the 4, Duplied that the Defence stands relevant unless the pursuer would offer to prove that he was invaded and beaten before he drew his sword, which is not so much as lybelled, and the contrair is offered to be proven, that at the time when Christopher and John Cockburns were struggling, the pursuer being at a considerable distance before, and no person near him nor offering him injury, he came riding back to the place where the pannells were, and offered to draw his

sword and do violence when the Defenders had nothing but staffs in their hands, likeas in fortification of the Defence it is offered to be proven that the pursuer since said, that if David Simpson, one of the pannells, had not hindered him, he had run him thro'.

The Justice Deputes by their Interloq^r ordains the Dittay to pass to the knowledge of an assise, notwithstanding of the 1st, 2d, and 3d Defences and Duplyes, and remitts the 4th Defence and Duply to the consideration of an assise, and declares that they will receive the Defender's probation thereof. The Defender propones an exception against the witnesses that they were parties assisting the pursuer in the poynding, which is repelled and the witnesses sustained.

The assise by the plurality of votes ffand David Simpson, one of the pannells, to be guilty of the Deforcement in manner mentioned in his Dittay, and ffand the rest to be clean and innocent, but I find no verdict upon the ffourth defence and duply, which by the Interloq^r is referred to the assise, which they ought either to have found proven or not proven, seeing it eluded the lybell.

Edin^r 7 March 1662. Mr. John Cunningham sitting in Judgement.

The pronouncing of sentence agtt. David Simpson in the fors'd Deforcement is continued till the 3d of Aprile, and the Judge declares it to be upon the Chancellour's desire and other considerations.

Defer not insisted against is sett at liberty, upon Caution.

The same day Hugh Roy, after many continuations of Diets, is sett at liberty in respect Glenlyon their accuser compeared not to insist, but enacts himself in the books of Adjournall to compear the 5 May and to behave peaceably under the pain of death.

Pror appearing for Purs^r with a Prory from them saves them being unawed.

Edin^r 13 March 1662, Mr. David Dinmuire designed Justiciary Substitute by Mr. George M^cKenzie, Justice Depute, sits in Judgement.¹

Agnes Livingston relict of James Ure of Shargartoun, and

¹ The Justice Deputes were not deputes to the Justice - General, but were styled his Majesty's Justice Deputes, and as such had the power of appointing a substitute.—W.

his Tenants, against John Monteith of Strowiebeg, and John Wright his miller, for the crimes of Theft, Robbery, and Oppression.

The Judge refuses to unlaw the pursuers absent and the Cautioner for not compearing to Insist, in respect Alexander Livingston, writer in Ed^r compeared as pr^{or} for them and produced a subscribed pr^{ory} which the Justice Depute sustained as sufficient, and continued the Diet till the sixth of June.

Edin^r 3 Aprile 1662. Mr. John Cunningham sitting in Judgement.

The which day David Simpson in Dryburnfoord, found guilty of Deforcement as is mentioned upon the 6 March, compearing to receive his sentence, produces a warrant from the Privy Council, narrating the whole dispute in the Cause, and that he was only found guilty by a vote, as the assisers had informed him, and therefore craving that the sentence to follow upon the verdict might be remitted, or at least the pronouncing of the sentence delayed till the suspension should be discust before the Lords of Session, and bearing that the Council upon this petition had appointed the Earls of Roxburgh and Haddingtoun¹ to hear the parties and to consider the rights and injuries alledged done by the parties to other, and to report to the Lord Chancellour to whom the Council gives power to determine therein as he shall think just, and in the mean time discharges the Justice Deputes to proceed any farder without the Chancellour's order, which order being produced and recorded in the Generall Books, the Justice Deputes continued the Diet till the 5 June.

Nota. That this act of the Council referring to two of their number to hear the parties upon the point of Right with power to the Chancellour to determine, is somewhat extraordinar after the Justice Deputes had given Interloq^r upon the point of Right, and I have not observed any applications to the Council to meddle with the point of Right on the Interloqrs. of the Justices in law, but only for rectifying verdicts of the assise, and I think there was sufficient ground in this case,

¹ William, second Earl of Roxburgh; John, fourth Earl of Haddington.

Aprile 3.
Warrant from
the Pr. Council
to supercede
sentence till
Parties were
heard before
them.

seeing the Assise gave no credit upon the fourth defence and Duply found relevant by the Justices.

The same day the Justice Deputes continue the Diet at the instance of the nearest of kin of George Lindsay against William Reid and James Butter, and another Diet at the instance of Robert Anderson against George Smith in Montrose till the 5 June.

Edin^r 16 Aprile 1662. Mr. John Cunningham and Mr. George M^ckenzie, Deputes sitting in Judgement.

Diet deserted because Pursuer not ready to Insist.

Robert Brand, maltman, in St. Andrews, dilated and accused of adultery committed in 1649 or 1650, with his servant woman, for which he made his publick repentance. The Diet deserted because the Informer was not present nor the Advocate ready to Insist.

Ed^r 17 Aprile 1662. Mr. John Cunningham and Mr. George M^ckenzie sitting in Judgement.

Bestiality.

Andrew Love, prisoner, indited for the horrid and abominable crime of Bestiality committed by him with severall mares and cows belonging to the persons and designed by the marks and colours condescended on, confesses the crime judicially in presence of the assise. He is found guilty, condemned to be first strangled, and then burnt at the Castle hill of Edinb^r.

Arbitrary Punishment inflicted on a minor upon an extrajud: confession of Witchcraft.

The same day James Welsh, prisoner, being examined by the Justice Deputes anent his Delating several persons to be witches and his own guiltiness of witchcraft, confessed by him several times before the Minister and Elders of Haddingtoun, the Justice Deputes, albeit they could not put him to the knowledge of an assise, both in respect of his nonage and of his absolute denial of the said Crimes whereanent he was examined, yet in respect that they found him prevaricate, and that thro' his lying practices he had defamed many of his Mäties leiges. Therefore for other considerations moving them, they ordained him to be publickly whipt through the High Street of Edinb^r and to be put in the Correction house¹

¹ Known by the name of Paul's Work, situated in Leith Wynd, and founded by Thomas Spence, Bishop of Aberdeen, in the reign of James II., 'for discipline and training of idle vagabonds.'—W.

thereof, and kept at work be the space of one year, and gave order to the Magistrates of Edinb^r to put the order to execution.

Edinb^r 5 May 1662. Mr. John Cunningham sitting in Judgement.

The which day the Diet against Hugh Roy, servitor to the Laird of Strowan and others, at the instance of Glenlyon, is deserted in respect of their Compearance and willingness to underly the Law, and they become enacted in the books of Adjournall for their good behaviour in time coming under the pain of death.

Edinb^r 3 June 1662. Mr. George M^ckenzie sitting in Judgement.

Advocatus agt. Alexander Dalgleish and others, fleshers in Haddingtoun, for theft of a carcass of beef and mortally wounding of Barbara Wilson, continued.

Edinb^r 5 June 1662. Mr. George M^ckenzie sitting in Judgement.

The pronouncing of the Sentence against David Simpson in Dryburnfoord, continued till the 2 July.

The Diet at the instance of the nearest of kin of George Lindsay against William Reid and James Butter, also continued till the 17 June inst.

Eod. die. John Campbell of Edinample as procurator for Donald M^cIleonnell and Archibald M^cNester his tenant against George Petrie in Easter Gowrdie, for stealing, at least receipt of two horse. Continued of consent till the 17 June.

Robert Anderson against George Smith in Montrose. Diet deserted at the desire of the King's advocate.

Eod. die. Dalgleish and Thomas Burton agt. John Angus and others, fleshers in the Canongate, Dilated and Accused for the Robbing and Stealing of a carcass of beef belonging to the pursuers, and Thomas Vanright, one of the Pannells for the murder of Barbara Wilson, spouse to Thomas Burton, out of whose house the carcass was taken, by giving her a stroke with his folded neive upon the heart, breast, and belly, so

Robbery
and

that she was never well thereafter, but languished for the space of seven or eight weeks till she died.

Mr. Andrew Birnie for the pannells alledged that they ought to be assoilied from the theft lybelled, because they being fleshers and freemen of the Canongate, they took and seized the carcase of beef from the pursuer, an unfree man be vertue of the seal of cause.¹ The pursuer passes frae this article and Insists against Gilbert Vanright only, for the killing and murdering of his wife.

Murder.

The Justice Deputes Ordains the Dittay in so far as concerns Gilbert Vanright his wounding and killing the pursuer's wife, to be put to the knowledge of an Assise.

Eod. die. In this cause John Wilson is admitted as a witness notwithstanding that he had sold the flesh to Burton the pursuer and had substitute him to sell it. Margaret Smith tho a woman also admitted witness, and Alexander Dagleish one of the pannells, but the point lybelled against him past from, and John Angus, another of the pannells in the same point also admitted.

The Assise finds the pannel guilty of the strikeing, but innocent of the wounding and killing. Whereupon the pannel is ordained to find caution to answer on the 17th inst. to hear and see a sum modified against him for the striking under the pain of £200, and accordingly caution is found.

The book bears also that there was an act produced whereby the Baillies of the Canongate² had fined Gilbert Vanright for the striking of the said Barbara Wilson, therefore the Justices modified no new fine nor called this new act.

Edinb^r 6 June 1662.

Alexander Livingstone as procurator for Agnes Livingstone his sister and her Tenants against John Monteith and his Miller for Theft and Robbery formerly continued, and now by consent of parties deserted.

¹ The sale of flesh by unfree men, *i.e.* those who were not members of the Corporation of Fleshers, was prohibited.

² The Canongate was originally a Burgh of Regality, the superiority of which was purchased by the city of Edinburgh from the Earl of Roxburgh in 1636, and governed by a baron and bailiff, appointed by the Edinburgh Town Council.—W.

Edinb^r 17 June 1662. Mr. Alexander Colvill and Mr. John Cunningham, Deputes, sitting in Judgement.

Mr. David Dinmuire and Mary Campbell, in Dysart, against Patrick oig M^cNicoll, for forcing and ravishing the said Mary and having carnal dealings with her at the time lybelled. The Diet continued till the first of July.

Eod. die. The King's adv: and John Campbell younger of Glentorchen against sundry highlanders for stalking, shooting, and slaying of Deer. Outlawed for not Compearance and their Cautionry unlawed. Killing Deer, unlawed for not compearing.

Eod. die. The King's advo: and Donald M^cIleonnell and M^cNester, tenants to Edincaple, against George Petrie in Easter Gowdie, for stealing of two horses, at least theftous resett thereof. Restitution of a stolen horse sought.

Dinmuire for the pannell denies the Theft, and as to the resett alledges that the pannel ought to be assolied, because he offered him to prove that the horse lybelled were bought by the pannel in a publick mercat, viz., the Lady fair of Dundee, in the ordinar mercat from Robertson, for a full price, whereby he is *bona fide* possessor, which in law liberates him *a culpa et pœna*, and as to the conclusion of Restitution, the same is only competent to be pursued before the Civil Judge. And even in that case there could be no restitution except the pursuer follow the order of this current parliament, whereby it is statute that the owner of the stolen goods ought to follow the Thief *usque ad sententiam* before he can have restitution, and so if the pannel shall be acquitt of theft, there can be no restitution followed, but ought to be remitted as said is.

Mr. Robert Dalgleish substitute to the King's Advocate opones the Dittay. The Justice Deputes ordains the Dittay to pass to the knowledge of an Assise, and refers to them the consideration of what is proponed and alledged, by the pannel, which is all one as if they had expresly found the Defence relevant.

The Assise all in one voice declared the pannel to be Clean, Innocent, and not Guilty of the Theftous stealing and resetting lybelled. ffor I find the witnesses they prove nothing, but that the horses belonged once to the pursuer and were taken from

him, but knew not by whom, and the pannel proves expresly that he bought them in the mercat and payed the price, so that the verdict in the terms as sett down is all one as if it had said, finds the Defence proven.

Edin^r 1 July 1662. Mr. George M^ckenzie sitting in Judgement.

Mary Campbell agtt. Patrick oig M^cNicoll for the rape as mentioned. Diet deserted in respect it was perremptor, that the King's advo: nor no other person compeared to Insist.

Ed^r 2 July 1662. Mr. Joⁿ Cunningham and Mr. George M^ckenzie sitting in Judgement.

July 2.
forgery.

Advocatus agt. Robert Binning, writer in Edinbr^r, Indited for falshood in manner after mentioned, that notwithstanding it be expresly provided Statute and ordained be diverse acts of parliament and specially be the 80 act, par. 6 Ja. 5, and by the 22 act par. 5, and act 44 and 47 par. 6 Q. Mary, and by the 22 act of the 23 par. Ja. 6, that all false nottars and bearers of false witnessing, and all that makes false Instruments or causes make the samen, or any others false writers or using of the same wittingly, or are accessory to the making thereof, that all persons be punished in their persons and goods with all rigour according to the disposition of the Common Law, and the pains due to the Committers of falshood, as in the saids acts of parliament at more length is contained; nevertheless it is of verity that Katharine Thomson, indweller in Dudingston, being indebted to the persons lybelled in sumes of money conform to Decreets dated, and the said Robert Binning in the month of made up, forged, and devised a false suspension of the said Decreet containing Relaxation, bearing date all written with his own hand, and devised and counterfeit the name of J. K. writer to the Signet, as if he had subscribed the same and falsified and counterfeit the Signet and the hand of the keeper, as if the same had been signet 12 Aprile last, and falsified and feigned a note bearing the same to have been Registrate in the Sherriffs Register of Edinbr. day be Clerk, whose name and subscription manuall he forged and feigned thereto, of the which false suspension he gave copies to the Charger, and relaxed the said K. T., and the said suspension and relaxation being presented

to the Lords of Session be Mr. W. S., Keeper of the Signet, and they having examined the pannel and diverse witnesses, they not only ffand the said suspension and relaxation with the note bearing the Registration, to be false, forged, and devised, and his Majesties Signet counterfeit and affixed thereto, but also they ffand another paper which was exhibited by Nicol Craig in D., by which commission was given to him under the hand of the Lord Whitekirk¹ and Sir William Bruce,² Clerk to the Bills, to take the oath of the said K. T., to be also false, forged, and feigned, and therefore the saids Lords Decerned and Declared the saids Letters of Suspension and Relaxation, Execution, Indorsation, and Registration thereof, to have been from the beginning null, and the Letters, Signet, subscription and registration with the said Warrant for taking the said Katharine her oath, to be false, forged, feigned, and made up, and the said Robert is feigner and forger of the samen art and part thereof, and of the Counterfeiting the King's Signet to the samen suspension. And also ffand by you the said Robert, your own confession, that in *Anno* 1657 years or thereby, you was convict and punisht for an other forgery, viz., for making up a Charge to put your self at liberty out of the Tolbooth of Edin^r, where ye was lying, to which charge you had battered the end Signet and subscription of an old Letter under the Signet, and therefore the saids Lords remitted you the said R. B. to the Justice Generall and his Deputes to underly the law criminally, and recommended to his Majesties Advocate to process you that justice might be ministrate upon you to the terror of others to committ the like hereafter. I have sett down his Inditement at length, it being the first of this kind I have mett with in the book, to let see the form thereof.

After reading of the Inditement, the pannel confesses the falshood committed by him anno 1657, and denies the rest of the Dittay, and for Answer thereto, produced the Defences underwritten, which were pubickly read in face of Court, whereof these are the substantiall heads.

¹ John Scougal of Whytekirk, nominated an ordinary Lord in 1661, and died 1672.—Brunton and Haig.

² Of Stenhouse, succeeded to the baronetcy, as third baronet, in 1660. Died 1682.

ffirst as to that part of the Dittay bearing that he forged the Suspension, all that he did was this, That having given in a Bill, he wrote out the Letters in hopes the Bill should be past, but the Bill being refused, he returned the Bill and Letters with the Instructions thereof, to the partie and umq^{ll} John Linn, Presenter at the Kirk of Dudingstoun, filled up the date of the Letters which was given him blank, and never saw them thereafter. 2^o Denies the forging of any of the hands of the Clerk of Register, Keeper of the Signet, or Counterfeiting of the Signet, but acknowledges he put wax on it to be ready for the Signet, which is usuall, and generally denies all things concerning that Deed, and concerning the forging of the Commission under the Lo: Whitekirk's hand, referring the same to the Deposition of Nicol Craig. And as to the forging of the charge to put at liberty for himself, in the English time he was already punisht for it. And as to that part of the lybell anent his writing the execution of relaxation, alledges that Allan the messenger, circumveened the pannel when he was drunk, by diting it to him, leaving the names of the parties blank, which Allan did insert and did subscribe and stamp the execution, so that this is the Deed of the Messenger and not of the pannel.

The King's Advocate, instead of all farder reply, produced an Act of Sederunt of the Lords of Session (the copy whereof is ingrost in the adjournall books) finding the pannel to be forger and feigner of the Letters of Suspension forsaid, at least art and part thereof, and of counterfeiting his Majesties Signet, remitting the pannell to the Justice Generall and his Deputes to underly the law criminally for the samen, upon production whereof the Justice Deputes in respect of the tenor of this remitt, did referr the Triall of the same to the Justice Generall and his Deputes, but so as that they declare that they take it as direct to themselves, and notwithstanding that the Deputes remitts it to the Justice Generall and themselves, yet with the same breath the Deputes of themselves finds the Dittay relevant and ordains the same to pass to the knowledge of an assise, which Interloq^r is subjoined after ingrossing the forsaid act of Sederunt.

The Assise being sworn, the King's Adv: repeats the above

mentioned Act of Sederunt *per modum probationis*, and protests for wilful error if the pannel be cleansed. Whereupon they by plurality of votes find the pannel guilty of the Crimes contained in the Dittay conform to the Act of Sederunt.

Observe here that when a writt is civilly improven before the Session, by a clear and liquid probation, and not upon presumptions only, then the Lords of Session makes an Act of Sederunt, remitting the Pannel to be criminally tried, and this Act being produced to the Assise, it is *probatio probata*, upon which if the Assise condemn not, they are liable to willfull error, but where the probation before the Lords of Session is but presumptive, they do not find the Writt false but null, and does not remitt to a Criminal Triall, because less probation may suffice for improving *quoad effectus civiles quam ad effectus criminales*. Secondly, observe that tho this remitt was sufficient probation to the Judge, yet he did not give Sentence thereupon but referred it to the verdict of an assise whose Sentence absolvitor would have freed the pannel, and this shews that the Constitution of assises is a fundamentall law not to be altered even in the clearest case where there is no use of an assise.

George Scott, mess^r against Alexander Gordon of Torries, for beating and wounding, and William Cockburn agt. David Simpson and White agt. Reid for wrongous Imprisonment, continued.

Edinb^r 3 July 1662.

Robert Binnie adjudged to be hanged at the mercat Cross of Edinb^r upon the 11 Inst. with the false Letters about his neck. White gt. Reid, the Diet deserted.

George Scott, mess^r against Alexander Gordon, delated and accused for coming upon the 5th of Aprile last to the Complainers house in the parochin of Oine and sherriffdom of Aberdeen, and there be way of Hamsucken invading him in his own dwelling house and beating and wounding him in severall places of his body in manner at length mentioned in the Criminal Letters. The Justice Deputes ordains the pannel to propone his Defences.

Mr. Alexander Gordon for the pannel alledges he cannot be judged by the Justices because he is already judged and

ffined by the Sherriff of Aberdeen, conform to Acts of parl. Ja. 3 par. 8, cap. 63. Ja. 6. par. 22. cap. 8. article 5.

Its answered by Mr. Andrew Birnie, substitute for the Advocate, 1° That the crimes lybelled being Deforcement, Mutilation and Hamsucken, they were not competent for the Sherriff but proper for the Justice Court only. 2° The sentence pronounced by the Sheriff is by collusion when the pursuer was not insisting but affixed to his sickbed, he having several ribs of his body broken at the time, as is instantly instructed by a Testificate from his Surgeon and others famous persons, likeas the Sherriff's sentence was after the raising of the Criminal Letters. The Diet continued till the 5 instant.

Edinb^r 5 July, 1662. Mr. John Cunningham and Mr. George Mckenzie holding the Court.

The same parties and their prōrs again compearing, Mr. Alexander Gordon for the pannel produces the sherriffs Decreet whereby the Pannel is decerned to pay 20[£] to the party and 52[£] to the fiscal, and alledges that the same was pronounced before the Execution of the Criminal Letters, and that the precept thereupon is execute the same day that the Criminal Letters are execute.

Birnie joins to his former answers that albeit the pro^r fiscal could insist for the King's interest, yet he could not prejudice the pursuer of Dammage and Reparation. Mr. David Thoirs¹ takes instruments That be the sherriffs Decret the pannel is found guilty of beating and wounding the pursuer. Birnie for the purs^r answers that *ob contingentiam Causæ* the Crimes of beating and wounding cannot be seperate from the Crime of hamsucken, and it being proper to the Justices to judge the latter, they ought also to judge the former.

The Justice Deputes by their Interloq^r ffinds the Dittay in so far as concerns the pursuers assithment and ordains the same to pass to the knowledge of an assise, vide 6 Sepr. 1662. Dewar g^t Baxter. The Pursuers prōrs produced their wittnesses and repeated the Chirurgeon's Testimony and the sherriffs Decreet to prove beating and wounding.

¹ Admitted advocate, 17th June 1661.

The assise finds the pannel guilty of beating and wounding conform to the Sherriff's Decreet, and cleansed him of the hamsucken.

Edinbr 7 July 1662. The same Judges present.

The which day the Justice Deputes decerns the @named Alexander Gordon to pay to George Scott £100 of assithment, allowing the sherriffs £20 in the first end of it, and to find caution of Lawburrows, George Scott having given his oath in Court that he feared bodily harm.

Edr 9 July 1662. All the three Justice Deputes present.

Sir Thomas Steuart of Gairntully¹ and Mr. Andrew Birnie, Horse stealing. substitute for the King's advocate g^t David Reid in Bedston, William Lindsay in Brithwood, Andrew Lindsay, his son, dilated and accused for stealing and away taking from the lands of Murthlie, two horses belonging to the pursuer, marked as is lybelled at least for theftous resetting. The purs^r consents to the deserting of the Diet as to David Reid and insists against the two Lindsays, who being ordained to propone their Defences.

Sir George Lockhart² for them alledges that they cannot pass to the knowledge of an assise, because whether these horses were taken from the ground lybelled belonging to the accuser yea or not, it can neither import theft nor resett of theft against them, because its offered to be proven that And^v Lindsay, one of the pannells did buy the horse from John Kid and payed fourty shillings and a score of Lambs at the price, and being questioned by the accuser's agent, for buying the horses the same were delivered to him upon refunding 20 sh. sterline.

Mr. Andrew Birnie replies, the Defence cannot elide the July 9. Horse stealing. Lybell, which stands yet relevant as its conceived, bearing

¹ Grandtully.

² This famous lawyer was a son of Sir James Lockhart of Lee, and was admitted advocate in 1656. After a most successful career, he became Lord President in 1685 in succession to Sir David Falconer. He was shot by Chiesley of Dalry in 1689.

that the horses were stolen and resett by the pannells, which the Defence of buying cannot take away, the same being not in a publick mercat but in a clandestine way at a rate disproportionall to the worth and from a person unknown. And as to the redelivery, it cannot be repected because its no voluntar deed of the pannel, but was done after the horses were challenged and marked upon the ground of the lands where the pannell dwells, and only one of the horse was redelivered for the price payed to evite this pursuit.

Duplys Lockhart. The Defence stands relevant to elide the Dittay, that it cannot be put to the knowledge of an assise because the same not being a simple denial, but such a qualification thereof as takes off the relevancy, the Defence ought to be sustained, and if it be proven that the Pannell's intromission was by a clear vendition and not in the way and manner lybelled, it can neither import theft nor resett of theft, ffor as it is competent to elide an Inditement of homicide by a defence of self defence, so it is competent to elide an Inditement of theft by a defence of buying for a true price.

Triplied by Birnie. He oppones the answers and that the defence cannot exclude but restrict the Dittay, whereas an alledgeance of self defence excludes a Lybell of Murder.

The Justice Deputes declares that before they will pronounce an Interloq^r they will take the depositions of the Defender's witnesses, and therefore, and for certain other causes moving them, they continue the Diet till the morrow, as also they continue the Diet at the instance of Hary Lindsay against William Reid and James Butter till the morrow.

Mr. George
M^ckenzie made
conjunct Justice
Depute during
life.

Eod. Die. Compeared Mr. George M^ckenzie, one of the Justice Deputes and produced a Gift and Letters under his Majesties Privy Seal making and constituting him his M^aties Justice Depute conjunct with Mr. Alexander Colvill during all the days of his lifetime, and solely after his decease, and desired his oath to be taken for his faithfull administration in the said office, which Gift and Letter being publickly read in Court, Mr. Alexander Colvill took his oath *de fidei administratione* and ordained the said Gift to be insert in the books of Adjournal, which is accordingly insert.

Edin^r 10 July 1662. The same three Deputes present.

Gairntully passes from the forsaid pursuit and thereupon the diet is deserted.

Eod. Die. Hary Lindsay, brother to George Lindsay of ^{Murder.} Gildie against William Reid and James Butter, prisoners, indited and accused for coming upon the 15 August 1654, to the Glen of Ogle, where George Lindsay of Gildie was then employed in his Majesties service under the command of the Earl of Middleton,¹ and there shot and wounded him in several parts of his body, whereof he languished the space of 12 hours and then died of the samen in manner at length sett down in the said Dittay.

The Pannells denies the Dittay altogether to be of verity, and William Reid alledges that he is an Irishman born and thereupon produced his Majesties Act of Indemnity and craved the benefit thereof, and that if he killed the said George Lindsay, he did it when he was in open hostility with the Englishes and thereupon desired his Commission from them formerly produced to be read. His Majesties Advo: takes instruments upon production of the said Commission from the Englishes, and answers that the samen cannot be respected being granted in September 1654, whereas the murder wherefore he is impannelled was committed in August² preceeding, and so the samen cannot be aserived to any Commission.

The Justice Deputes sustains the Dittay relevant and ordains the same to be put to the knowledge of an assise. The Assise having considered the Depositions of the Witnesses, they ffind William Reid guilty of the slaughter and James Butter to be innocent. The pronouncing of the sentence continued till the 13 of August.

¹ John, first earl. Born in 1619. Like many other eminent men of his times he changed sides in the course of his career, repressing a royalist rising in 1647, and commanding the king's forces in 1653. For some time after the Restoration all-powerful, he died in 1673 in comparative obscurity as Governor of Tangier.

² 'April' in Adv. MS.

Edin^r 12 July 1662. Mr. Alexander Colvill and Mr. George M^ckenzie, Deputes, present.

Unlawed for
not paying a
fine.

Alexander Gordon of Torries and his Cautioners unlawed for not payment of the fine imposed for George Scott. The same day Gilmartin M^cIneard enacted to compear before the Justice Deputes when he should be required on a citation of 15 days to answer for all crimes that should be laid to his charge.

Ed^r 16 July 1662.

Unlawed for
not reporting
Letters.

John M^cDonald unlawed for not reporting of Criminal Letters, at the instance of Gilbert Richard of Barkskimine, against sundry persons for willfull and temerarious error in cleansing William Snodgrass, Gardiner in Sanquhair Castle, accused for breaking the said Gilbert's chamber and carrying away his money.

Eod. Die. There is a petition given in by Sir Alexander Cumming of Culter and others, representing that Criminal Letters were raised agt. them and 36 persons more, at the instance of Irvine of Kincaussie and his Majesties advocate, to compear this day before the Justices for Convocation of the Leidges and other crimes, craving the action to be remitted to be tried before their Lordships at the next Circuit Court at Aberdeen, because it would be troublesome to bring so many Defenders and Witnesses to Edinburgh in the harvest time.

Edin^r 18 July 1662.

The desire of the petition is granted, and the like desire is granted to Irvine of Kincaussie in a reconvention.

Edin^r 30 July 1662.

John M^cDougall and his Cautioner unlawed for not reporting Criminal Letters.

Edinb^r 31 July 1662.

The Justices continues the pronouncing of the Sentences in the action William Cockburn against David Simpson in Dryburnfoord till the 5th November.

Ed^r 1 August 1662.

The Court holden by the Deputes Colvill and Cunningham.
Andrew Cunningham of Legland against James Cochran for
deforcement of a messenger, continued till the first of November.

Eod. Die. Marion Lawson indited and accused for murder ^{Murder of a child.}
of a man child brought furth by her, having concealed her
being with child and brought it furth alone in her Mistriss'
byre, no person being present, she immediatly murdered the
same and threw it in a well, wrapt in a piece of linnen cloath,
to conceal her fornication, by which the Dittay concludes she
was the murderer.

The Justice Deputes finds the dittay relevant and ordains
the same to pass to the knowledge of an assise. The purs^r for
verifying the Dittay, produces witnesses before the assise, who
all depone that they heard her confess before the minister and
others in the paroch, that the child taken out of the well was
hers, and that she bore it living. As also she adhered to her
confession taken by Depute Colvill 19 May last, bearing that
she confest the fornication and her being with child to James
Penman, and that she had told the same to him and concealed
it from all others, and that she had born it alone and was
stilled born and never cried or stirred and that she wrapped it
in a cloath, concealed it for a day and threw it in the well
where it lay six weeks.

The Assise unanimously unexcepted, cleansed the pannel,
laying no hold on the Depositions or Confession as sufficient
probation, but in respect of the presumptions arising there-
from, they remitted the pannel to the consideration of the
Justice.

Edinb^r August 4, 1662.

Mr. Robert Dalgleish, substitute for the Advo: against
Thomas Smith and Walter Lyle for Robbery, continued till
the 13 instant.

Edinb^r 6 August 1662.

The relict and children of George Wyllie agtt. Hugh ^{fugitate for not}
Crauford, the Defender declared fugitive for not ^{compearance.}

Edinb^r 13 August 1662.

Reid for
slaughter
sentenced.

William Reid, formerly convict as guilty of the slaughter of George Lindsay, is sentenced to be headed, and the sentence bears to be in obedience of an Order and Act of Privy Council which is ingrost in the Doom, and proceeded upon a petition given in by the accusers to the Council representing the whole matter of fact criminal dittay and dispute and verdict of the Assize, and craving that in regard the Justice Deputes had had a scruple upon the English Act of Indemnity, that the Lords of Council would warrand them to proceed without respect thereto, in regard that the same being proponed upon in the dispute, he was remitted to an assise and found guilty.

Eod. die. The Triall of Walter Lyle and Thomas Smith delayed.

Edinb^r 14 August 1662.

fforgery.

Hery Sterline of Ardoch accused for forgery of a Testament surrogating John Hadden¹ of Glenegies, to Mr. John Rollo, minister at Dumblane, in place of the pr^{or} fiscall, and for using the same to get payment of sumes. The Diet deserted because the pursuer would not find caution to insist at a new Diet.

diet deserted.

The same day John Rae, writer, compears and produces a petition given in by Dougall Campbell and Collonel Menzies to the Earl of Middleton, his Majesties Commissioner, with a Deliverance by his Grace thereon, discharging the Justices to proceed in a Criminall pursuit raised against them at the instance of Donald Campbell and others for a heirship committed *anno* 1654, because if any such thing was done in a hostile manner in the troubles agtt. persons in the service of the Marquiss of Montrose for which the Petitioners are indemnified by a clause of the 15 Act Parl. *anno* 1661, rescinding and annulling the proceedings of the parliaments and Conventions that were holden in the time of these troubles.

Order from his
Majesties Com-
missioner dis-
charging them
to proceed in
any or. action
to be raised agt.
Doug. Camp-
bell, etc.,
because the
Delict was com-
mitted in the
late wars.

Edinb^r 15 August 1662.

Marion Mein against Thomson and Edmonstone for theft, continued.

¹ or Haldane of Gleneagles.

Edinb^r 20 August 1662.

Compared John Rae and produced the said Warrant granted by my Lord Commissioner, with a new Deliverance extending the Warrant to Collonel Menzies Sub^t Middleton, and took Instruments protesting that the Justices should not proceed. The Justices ordained the presenter to intimate the same to the pursuers, declaring that they would not call the action at the day appointed.

As also agt.
Coll^t Menzies.

Eod. die. Marion Lawson being brought out of ward, the Justices taking to consideration that albeit upon the first instant the assise had cleansed her of the murder of the child, yet by their verdict they remitted her to the consideration of the Justices in respect of the presumptions, therefore they adjudged her to be whipt thro the High Street of Edinb^r and to be banisht from the sherriffdom of Midlothian and Lanerk, where she committed the fact, and she enacts her self accordingly.

Arbitr. Punish-
mt. inflicted by
the Justices
upon presump-
tion notwith-
standing the
assise have
cleansed her
for want of
Proof.

Edinb^r 23 August 1662. Deputes Colvill and M^ckenzie
in the Court.

Alexander Bayne against Thomson and Edmonstone for
Theft—continued.

Edinb^r 25 August 1662.

The which day the same persons entering upon the pannel, the Justice Deputes for their information, did examine some of the summoned witnesses upon oath, who deponed that they knew the kine lybelled to have been in the possession of the pursuer, and that since they saw them in Stirling park, where the pannells lives, and where one of them is a butcher, and another a gardiner, but knows nothing of the stealing of them.

Cow lifting.

After receiving of these Depositions, the Justice Deputes ffand that the cows lybelled belonged to the purs^r and decerned them to be delivered to her or any having her power, and ordains the provost and baillies of Stirling to take triall of the goods if they were bought in a publick mercat, which being proven, the Justices assoilies the Defenders from any

Criminal pursuit and ordains them to have action for the prices of the goods and their prejudice as accords.

Nota.—I have not observed any such Interloq^r as this in the Criminall Registers referring a point to be tried by others out of the Court, and before report assoiling nor wherein the Judges themselves decerns in the point of right and restitution upon the Testimonies of the witnesses.

Edinb^r 29 August 1662.

The which day Mr. James Carmure, indweller in Edinb^r became judicially enacted to pay 40d ilk day for the entertainment of Margaret Pace during her abode in prison, and that ilk Saturday to her self or the clerk of the Tolbooth for her use.¹

Andrew Paton appointed to be sett at liberty, finding caution.

Edinb^r 5 Sep^r 1662.

James Dewar and his Cau^{rs} unlawed for not reporting Criminal Letters against Alexander Baxter and diverse other persons in ffyfe, duly execute, and John Sanders one of the Def^{rs} not unlawed because no exoneration² given in against him, and yet his Cau^r who became enacted to present him, is outlawed, but thereafter the Diet is continued till the next day.

Unlawed for
not reporting
Letters.

Edinb^r 6 Sep^r 1662. Deputes Colvill and M^ckenzie are present.

James Dewar against Alexander Baxter and others, dilated and accused for coming to the Lands of Barnhill with their associates where James Dewar lives, and for beating and wounding him and his shearers, who were at work, to the effusion of their blood, and thereby guilty of oppression. Mr. Andrew Birnie for the pannells alledges they cannot pass to the knowledge of an assise, because Dewar having pursued

Invasion and
oppression

¹ With regard to the alimentering of untried prisoners, it was a direction of the Justiciary Court to the Magistrates of Edinburgh, of date 5th July 1661, that they should imprison no one unless caution was found in the Books of Adjournal by the pursuer to aliment the prisoner, and the Bishop of Edinburgh was appointed to visit the prison to see this carried out.—Mackenzie's *Criminal Law*, p. 455.—W.

² 'Execution' in Adv. MS.

an action of Ejection against the Countess of Murray and Alexander Baxter before the Lords of Session, they were assolied from the action, and it was found that Baxter, by vertue of his Tack from the Countess, had right to the Lands of Barnhill lybelled, which Decreet Birnie produced and took instruments, and after his Decreet was obtained, Dewar came to the lands forsaid to shear the Corns as if they had been his own, and all that Baxter did was to oppose him by force, which he might very well have done, the possession and the Corns being his own.

Invasion and oppression.

Replies. Mr. David Dunmuire for the purs^r ought to be repelled in respect of the Dittay bearing the Corns to be the purs^r Corns, and offers to prove it, and that he was shearing them in a peaceable way, by beating and effusion of his blood, and esto the Corns had belonged to Baxter the pannel, yet that cannot excuse him for Invasion, ffor in law, *qui rem etiam suam non jure occupat punitur*.

Duplies. Birnie, that the Decreet forsaid declaring the pannell's right, declares sufficiently *quod jure occupavit*, and the pannel being repulsed from shearing by violence, it were lawfull for him *vim vi repellere* and to shear the Corns, specially it being offered to be proven that the pannells came there in a peaceable manner with shearing hooks, and the other partie with forks and staffs. 2^o If any ryot was committed, it cannot be now judged by the Justices, because the barron of the Barrony of Inchcolm, in which the lands of Barnhill lies, has already judged and ffined the pannel in 50^l and produces the baron baillies Decreet.

Duplies Dinmuire, The ffine is not proportionall to the fault, and the pursuit was not at the instance of the Compl^r and therefore he may yet mean himself to the Justices, specially considering that having compeared before the Baillie in obedience to his Citation and craved justice, he was put out of the Court and the doors shut as appears by an Instrument produced.

Triplies Birnie that the pain and . . .¹ inflicted by the Baillie was sufficient for the alledged Injurie, there being nothing lybelled but blows, whereby the Compl^r was not

¹ 'ffyne' in Adv. MS.

disabled from going about his affairs, and by the *lex aquilia* where reparation is sought for such injuries, the pursuer should lybell and condescend *quanti valuit anno retro et quanti [hodie]*. 2° The pursuer being cited to compear before the Baillie, he ought to have defended himself, and by the verdict of the Inquest its found he was the provoker and yet the Baillie fined the pannel because there was blood.

The Justice Deputes notwithstanding of the alledgeance and Duplies, sustains the Dittay as relevant and ordains the same to pass to the knowledge of an assise.

The Pannel, Alexander Baxter, is found guilty of the blooding and wounding James Dewar by the testimony of witnesses, and others of the pannels are found guilty as art and part, the rest assoilied.

Whereupon the Justice Deputes decerned Alexander Baxter and George Bell to be americiat in 100 merks, two part to be payed by Baxter, the third part by Bell, and the Baillies Amerciaments not to be regarded, and ordained them to find caution or go to prison while they payed it, vid. 5 July 1662, Scot q^r Gordon where the sherriffs prevention and ffine is sustained *pro tanto*, but both is one upon the matter.

Edinb^r 11 Sep^r 1662.

ffugitate notwithstanding abroad and not cited on 60 days.

The Relict and son of John Coltherd q^{ra} Christopher Bannatyne, John and Sir William Bannatynes. The Justice Deputes deserts the Diet quoad Christopher, and setts him at liberty upon finding Caution to appear the first of Novem^r, and the other two declared fugitives notwithstanding of this Defence that they were out of the Country and were not cited upon sixty days conform to use, which is repelled.

Eod. die. Margaret Pace accused for Theft and assoilied.

Edinb^r 4 Nov^r 1662.

Compearance of the Def^r liberates his Cautioner.

William Steuart *alias* M^oGilanders summoned at the instance of the Lord Halkerstoun¹ and his tenants for theft and robbery.

¹ Sir Alexander Falconer of Halkertoun, created Lord Falconer of Halkertoun, 1647; Lord of Session, 1639; M.P. for Kincardine, 1643-7; Commissioner of the Treasury, 1645; superseded as a Lord of Session, 1649, 'for malignancy'; re-stored, 1660; died 1671.

Compears and offers to underly the Law and protests for Liberation of his Cautioner, which is admitted.

Eod. die. Christopher Ballantyne, younger of Overhall, indited for the slaughter of John Coltherd, compears and protests for relief of his Caur. As also there is an Act of Privy Council produced and recorded granting a precognition to Sir John and William Ballantynes, sones to the Laird of Corhouse, and discharging the Justices to proceed in any Criminal process for a time.¹

Livingstones in Kilsyth against William and Patrick Leiths, breether to Leith of Harthill, for slaughter, continued till tomorrow.

John Ballantyne, younger, of Corhouse against Hamilton of Gilkerscleugh and others, for mutilation of the pursuer, and accession to the slaughter of John Colthird, continued till the 1st of Decem^r.

Edinb^r 5 Nov^r 1662.

The Diet against Simpson of Dryburnfoord, continued.

Livingstones q^r Leiths for the slaughter of²

Livingstone. Alledged for the pannel by Mr. William Maxwell, no process because he got but a short Coppie and not a full Double of the Letters, conform to Act 33, par. 6. Q. Mary.

Is a short Copping the substance tho not a full Double sufficient? Yes.

Birnie oppones the execution bearing a Copie to be given, and the short coppie bears the tenor of the Letters. The Justice Deputes sustains the Defence in respect of the Act of Par^l and constant practicque of the Court.

Ed^r 6 Nov. 1662.

Collonel Alexander Cochran unlauded for not reporting Criminal Letters, raised at the King's Advocate's instance and his as Informer, against Robert Barclay and others. Francis Snodgrass unlauded for not reporting Criminal Letters, as also John Smith, a defender in the same process with Robert Barclay for slaughter, declared fugitive.

Unlauded for not reporting letters.

¹ The Privy Council here, although the accused had been declared fugitive on 11th September, directed the judges not to proceed with the trial.

² Blank in original.

Edinb^r 21 Nov. 1662.

Earl Athol
made Justice
Generall.

The Earl of Athol¹ is admitted Justice Generall by taking the oath of alledgeance subscribing the Declaration and acknowledging of the royall prerogatives with the other Declaration subscribed 5th September 1662, and gave his oath *de fidei*. His patent is here recorded.

Edinb^r 26 Nov^r 1662.

Adultery.

John Reidpath, Tinkler, indited and accused for Adultery with Katharine Stevenson, a married woman, himself being also married, and openly cohabiting with her for severall months, for which the Assise found him guilty on his Confession.

Sheep stealing. John Watson, in Lamingtoun, prisoner, found guilty of stealing 40 sheep, likewise upon his own confession. There is neither sentence pronounced nor Diet continued marked in the book.

Edinb^r 2 Decem^r 1662.

The Diets anent the slaughter of John Colthird, and mutilation of young Corhouse, again continued till 4 January next.

Edin^r 4 Decem^r 1662. Deput Cunningham holding the Court.²

William Dobie, weaver in Glasgow, indited and accused for that albeit by the 10th Act 10 par^l Ja : 6. It be statute, That all his Majesties subjects content themselves in quietness and dutifull obedience to his highness and his authority, and that none of them presume nor take upon hand publickly to declaim nor privately to speak or write any purpose of reproach or slander of his Majesties person or government, or to deprave his Laws or Acts of par^l or misconstrue his proceedings, whereby any misliking may be moved betwixt his Highness and his Nobility and his loving subjects, under the pain of death, as in the said act of par^l and other laws made thereanent at length is contained. Nevertheless its of verity that the said William Dobie upon the of October last bypast,

¹ John, second earl and first marquis ; born 1631 ; appointed Justice-General on 16th August 1661 (see new Douglas) ; Keeper of the Privy Seal, 1672 ; Extraordinary Lord of Session, 1673 ; K. T., 1687 ; died, 1703.

² This is the first of the political trials.

being in the Miln of Garroch and speaking anent my Lo: Commissioner's Grace his going to Galloway, he there most traiterously shaking off all fear of God, reverence and regard to his Majesties sacred Person and authority, uttered these ^{Treason.} speeches. That he hoped before his Majesties Commissioner went to Kenmure there should be an other Bout of it, and that he should be turned back, and that he hoped to see the king pulled off his Throne, and that the king and his whole party should be hanged or it be long, by which treacherous speeches, he has directly contraveened the tenor of the said Act of Parliament and incurred the pain and punishment of Death thereinmentioned, which ought to be inflicted upon him with all rigour by the tenor and example of others. The Justice Depute sustains the Dittay to inferr the Punishment contained in the Acts of Parliament, and ordains the same to be put to the Tryall of an Assize.

The Assize finds the Pannell guilty of the reproachfull speeches lybelled, uttered against his Majestie and his Highness Commissioner, but the Sentence is not here pronounced nor is the pronouncing continued till another day.

Eod. die. John Reidpeth, Tinker, being brought to the ^{Adultery.} Pannell to receive his Sentence for the double Adultery whereof he was found guilty upon the 26th Nov^r last. The Sentence of this being Death by the Law, viz. Act Parl. .¹

There was application made to the Privy Council by the King's Advocate to know their pleasure if they would mitigate their Sentence or not as is usuall in small thefts and many other cases. The Council by their Act, dated 2^d December 1662, which is here produced by the Advocate and recorded, appoints the Pannell to be scourged through the High Street of Edinb^r from the Castlehill of Edinb^r to the Netherbow on a forenoon, to be banished, and accordingly the Sentence is pronounced.

Observe here, that the Justices cannot mitigate the pains of Law, but if they have a mind to have this done they are in use to apply to the Privy Council.

¹ Adultery was made a capital offence by the Act of 9 M. Par. 9, c. 74.

Edinb^r 10 December 1662.

It is here marked that tho this was a Diet, yet none of the Judges mett, so that many Criminal Letters here mentioned to have been execute to this day, were not called.

Nota. If this Diet had been neglected because of some publick Solemnity, then the Law would have continued the Letters to the next Diet, but there being no such reason, and Criminal Letters being to a peremptor Diet which cannot be continued without calling as may be observed by the whole practise of the Journall Books, it follows that thir Letters and Executions became null, and Parties and Cautioners compearing and taking Instruments upon production of the Letters I think they should be free in strict form.

Edinb^r 12 December 1662.

Mr. Ninian Lewis of Merchiston ag^t Patons for breaking of the House of Merchistone, John Paton, one of the Pannells, declared fugitive and the Diet as to the rest continued till 3rd Feb. 1663.¹

Edinburgh 6 January 1663.

William Cockburn agt. David Simpson in Dryburnfoord, pronouncing of Sentence of new continued of consent of parties till the 3^d of March, betwixt and which time, allows them to be heard by the two Lords of Privy Council to whom the Council referred it. This reference from² the Counsell was upon an application to rescind the Verdict.

Edin^r 7 Janry 1663.

Ballantynes their action anent the Slaughter of Colthird again continued till 3^d March.

Edinb^r 8 January 1663.

The Relict of Duncan Caddell and his sons agt. John Gillanders for slaughter of the said Duncan, the Def^r declared fugitive.

Slaughter.

¹ Date written in later and different hand; blank in Adv. MS.

² 'to' in Adv. MS.

Edinb^r 29 January 1663.

Robert Scott pursued for stealling of the cloaths of Pat Theft. Maxwell, son to Mr. William Maxwell, Advocate, declared fugitive.

Edinb^r 3^d feb. 1663.

Andrew Paton in Burrowmuirhead and Robert his son, prisoners for breaking of the House of Merchiston, sett at liberty upon caution to reenter when called.

Eod. Die. John Watson in Lamington, found guilty 26 Theft. Nov^r last for stealling of 40 sheep, is sentenced to be hanged by an order from the Privy Council here recorded, which bears that the Justices by the King's Advocate had asked their advice whether they should proceed to the Sentence of Death or not, seeing the Pannell had restored the price to the Owner.

Edinb^r 11 feb. 1663.

John and Pat. M^rvoris ag^t Donald M^rniccoll for Slaughter, continued.

Edinb^r 24 feb. 1663. Deput Cuningham pt.

Alexander Kennedy, sometime Porter in the Castle of Ed^r, Forgery. now prisoner, dilated and accused for the crime following, viz. ffor that notwithstanding of the common, municipall Laws and constant practise of this kingdome, the fforgers, Counterfeiters and Devisers up and Users of ffalse Bonds, obligations and other Writts, are to be punished be tinsell of their lives and moveable estate and especially by the 22^d Act, 23 Parl. Ja. 6, it is statute and ordained, that whosoever makes any ffalse writ or is accessory to the making thereof shall be punished with the pains due to the Committers of ffalshood, which by the constant practise of this kingdome is the pain of Tinsell of Life and moveable estate, and that it shall not be but that after Tryall of the Writt quarrelled it be found ffalse the passing from or Declaration of the Party that he will not use the same shall no ways free him from the punishment due to the committers of ffalshood as at more length is contained in the said Acts whereupon it is subsumed that

Alex^r Kennedy's
Tryal for
Forgery.

the Pannell has forged, feinzied, counterfeited and made up the six Bonds, Obligations, and Contracts under written, four of the which Bonds are alledged granted by the deceast John Renton of Lamberton, therein designed Constable of the Castle of Edinb^r, to the deceast Dame Agnes Renton, Countess of Levin, all dated 17 Octo^r 1648, by each of which four Bonds, the said umqⁿ John Renton granted him to have borrowed (here follows the contents of the Bonds as they are made payable to the Lady and her Daughter, then follows the tenor of a Contract made up by the Pannell betwixt himself and Lamberton, be which he is obliged to pay 3000[£] to the Pannell upon his delivery to him of the forsaid six Bonds by the Lady Leven's warrand, and Alex^r upon receipt of the forsaid sum is obliged to deliver the Bonds and the Lady's warrand, and subsumes that the Pannell is the fforger of all these Writts, or airt and part, and that the Lo: of Session has found so by a Decreet of Improbation, dated 22 July last, and finds that the Pannell is an infamous and perjured person, and has remmitted him to be criminally tryed, and ordained the King's Advocate to proces him, which being found by an Assize, he ought to be punished with the Tinsell of Life and moveables, to the terror and example of others.

Mr. And. Birnie, Prōr. for the Pannell, alledges the Dittay is not relevant, because it does not condescend wherein the Pannell is fforger of the Writts lybelled, whether in the Subscription of the principall party, granter, or Subscriptions of the Witnesses, or date, or some other substantiall head. 2^o. Nonrelevat accessory or user *because by the Act of Parlia^t the User of a false Writt unless he byde by it* is not liable to the punishment of ffalsehood. Neither is Accession relevant unless the way of his accession be condescended upon, frae which Condescendance a Defence may result. 3^o The Lybell non relevat in so far as it concludes Tinsell of Life and Goods, because the Act of Parliam^t lybelled on does not express the Punishment, but refers to prior Acts, and it is clear both from K. Ja^s the 5th and Q. Mary's Acts that the Punishment is restricted to Imprisonment, Banishment, etc. which is placed *in Arbitrio Judicis*.

My Lo: Advocate to all this oppones the Dittay as it is lybelled, and the Act of Parl^t whereupon it is founded bearing the punishment of ffalshood to be inflicted on such as are fforgers and users of false Writts, or art and part thereof, and both the Act of Parliament and custom of the Justice Court has determined the pain to be loss of Life and Moveables.

Duplys Birnie to the last part of the Advocate's Alledgiance, that it is to be understood only as to falsifying Writts that can proceed only from authority, and oppones the Act of Parliament.

The Justice Depute ordains the Dittay, notwithstanding of the Answer, to pass to the Tryall of an Assize. The Assize being sworn, the King's Advocate produces the Lo: of Session's Decreet of Improbation *per modum probationis*, and thereupon the Assize finds the Pannell guilty *as art and part, accessory and user* of the false Writts mentioned in the Dittay, conform to the Decreet of Session. *Vide* sentence 12th instant.

I repeat here my Observe which I made on Birnie's Sentence day of 1662.

Edinb^r 3 March 1663.

The Diet anent the killing of John Coltherd be Ballantynes, as also the Diet ¹Cockburn-ag^t Simpson of Dryburnfoord, continued to different days.

Eod. Die. Mungo Murray, son to M^r John Murray,² Macer admitted. minister at Trinity Gask, produces a Commission from the Earl of Athole, Justice Generall, to be the principall Macer and Officer of the Justice Court, which is recorded, and he thereupon admitted, giving his oath *de fidei*.³

Edinb^r 4 March 1663.

Compears David Simpson in Dryburnfoord, who was formerly found guilty of a Deforcement, and upon Applica- Deforcement.

¹ William, Adv. MS.

² Transferred from Kinkell to Trinity Gask, 1639; died, 1662. Mungo was his second son.

³ The Macers of Court, of whom there were three, were appointed *ad vitam aut culpam* by the Lord Justice-General.—W.

tion to the Privy Councill complaining of the Verdict of the Assize, had obtained a reference to two of their number to consider the cause. He now produces an Act of Councill after they had considered discharging the Justices to proceed thereupon, they desert the Dyet.

Letters reported
the Pursuer's
Cautioner is
free.

Eod. Die. M^r Rorie M[']kenzie compears as Prör. and having Warrant from M^r Hector M[']lean, minister etc. produces Criminall Letters duely execute against severall Highlanders for stealling of his cows, and against M^r John M[']lean their landlord for componing with them and not presenting them to Justice, whereupon the Pursuers Cautioner is freed and the Defenders declared fugitive and denounced.

Observe here, that when Defenders do not compear, the Pursuer may compear by a Prör. which may be frequently seen in the Journall Books.

Edinb^r 12 March 1663. Deput Cuningham.

Alex^r Kennedy convict *ut supra* of falsehood, sentenced to be hanged at the Cross of Edinburgh.

Edinb^r 10 June 1663.

Defenders not
compearing,
are declared
fugitive.

Sir Jo: fforbes¹ of Craigievar produces for himself and in name of his Tenants, Criminall Letters raised and execute at their instance ag^t Andrew Schaw, Lauchlan M[']intosh, and divers other Highlanders, to find caution for thèir appearance in the Justice Court, and having so reported the Letters, protests to have up his Bond, which protestation is admitted. The said Shaw, M[']intosh and divers others of the Defenders are declared fugitive, others compear and the Dyet is continued.

Eod. Die. Another Diet at the instance of Doctor Alex^r Douglass of Doun ag^t James Craig, Burgess of Banff, and Hamilton of Dalziell ag^t Jas. Cleland. In the first the Diet is continued, and in the last the Defender is declared fugitive.

¹ Second baronet, eldest son of Sir William Forbes, known as the 'Red Sir John.' Born 1636; succeeded 1648; died 1703.

Edinb^r 15 June 1663.

Doctor Douglass ag^t Craig again continued.

Craigievar ag^t Shaw and others, Geo. ffarquharstone, one of the Defenders compears and offers to underlye the Law and the Diet *quod* him deserted and the Diet is adjourned for the rest till tomorrow.

Edinb^r 16 June 1663. Deputes Colvill and M[']kenzie in the Court.

Sir John fforbes of Craigievar ag^t John fferguson, W^m Reid, Thomas Don, and Christian Mudie, four of the Defenders @ment^d present and indyted and accused for being art and part of the steilling at least of the theftous receipting of 12 oxen frae Craigievar and Geo: Mitchell his tennant at the times lybelled. The Pursuer and the King's Advocate compearing, the Justice Deputes after hearing of both partys delayed the Tryall thereof till the Pursuer should first discuss the same by an Action of Restitution or otherways whereupon both Parties took Instruments and protested for Relief of their Cautioners acted for their appearance which the Justices admitted.

Theft and Receipt delayed till discuss by an action of Restitution.

The said day upon a Petition presented by Mathew Mill, prisoner, and one of the Persons convened at the instance of the Laird of Dalziell, representing that he was not able to entertain himself in Prison. The Justices appoints the 2^d of July for his Tryall and Dalziell to pay him a groat per Diem and to be ready to insist the said day, and his order to be intimate to Dalziell with certification that if he insist not the day forsaid, the Petitioner shall be sett at Liberty.

When a prisoner is poor, a short day is assigned for his Tryal and the Pursuer decerned in an interim Alimnt.

Edinb^r 24 June 1663. All the three Deputes in Court.

fforbes in Leslie against severall Highlanders for Theft and Robbery and receipt of Pleugh Oxen from the Pursuer and his Tenants, receipting, mantaining and harbouring of Thieves and Robbers, componing, concording, and taking Theft boot from them in manner specified in the criminall Letters. Instruments taken for the Pursuer on the reporting most of the Defenders compears and the Diet *quod* them is deserted, and

Theft, Robbery, and Receipt.

as to the absents, they are not declared fugitives, in respect not lawfully summoned.

Adultery.

Eod. Die. Margaret Taylor indyted and found guilty upon her judiciall confession in presence of the Assize of the Crime of Adultery with William Wallace, and of bringing forth a child in that adulterous copulation, as also the Assize found her and her sister, Agnes Taylor, actors art and part of the Murder of that child, and the ground of this part of the verdict, tho not exprest, was that the Libell did bear that the mother had concealed her being with child, and had brought it furth in an obscure place in the fields, and had thrown it into a water within a sark and had confessed the murder judicially without Torture before the Baillie of Borrowstounness, which Lybell as it was conceived qualified and circumstantiate. The Justice Deputes fand relevant and referred it to the knowledge of an Assize, and the Witnesses did truely prove all the circumstances as they were found relevant.

Observe here a sure way taken to prevein scruples that might arise before an Assize for want of a positive Probation of the murder. The Pursuer lybells all the Presumptions and the extrajudiciall Confession, whereupon he founds, which did put the Justice to give their Interloq^r upon the Relevancy of that probation as it was circumstantiate, and the Justice Deputes having found it so, the Assize had nothing ado but to consider whether these circumstances and presumptions were proven, and all of them being proven and joined together was a very sufficient Probation, so both the Interloq^r and Verdict were just.

Edinbr 25 June 1663, Depute Colvill in Court.

fforbes of Leslie having summoned severall witnesses in the action @ men^t, he is decerned in the charges with this quality as to some of them that if he paid the half without a charge of Horning he should be free.

Edinbr 2 July 1663. Depute Colvill in Court.

Katharine Reid indyted for nocturnall Theft and Robbery committed in the house of John Meldrum in Vean, accompanied

House-
breaking.

with W^m Taylor whom she called her husband, and other notorious Thieves, binding the said John Meldrum and those in his family with cords and pricking them with Bodkins, and for returning to the kingdome after she was banished for former thefts and breaking the King's Prison. The Pannell denies the Dittay.

The Justice Deputes sustains the Dittay and ordains the Pannell to be put to the knowledge of an assize and declares that they will examine the present Witnesses upon that part of the Pannell's Defence, that the goods which were found with the persons in company with the Pannell were recovered by them by David Leitch and Helen Baillie. The Assize upon the testimony of the witnesses, fand the said Katharine Reid guilty of stealling the goods of the said John Meldrum, and upon the 4th of July she is sentenced to be hanged.

Edinb^r 7 July 1663. Deputes Colvill and Cuninghame present.

William Lockhart, Writer to the Signett, produces a Reccomendation from the Privy Council to the Justice Deputes for continuing the Diet in the Mutuall Processes betwixt John and Sir W^m Ballantynes and Hamiltons anent the killing of Colthird, whereupon the Diets are continued till the 5th of December, that the Precognition may proceed in the mean time.

Eod. Die. Patrick M^cnaught q. the Laird of Pinkill his master ag^t W^m Gordon and others for the crimes of Hame-sucken and oppression, continued to 4 August.

Mr. Ro^{tt} Preston of Preston amerciate as Cautioner for Da: Perison for not reporting Criminall Letters ag^t Ja. Belfrage and others. The Book contains this memorandum, that albeit the Pursuer fand caution to report and insist this 7th of July. Yet the messenger had charged to find caution to the 17th to which they fand caution, and therefore wee will find them compearing that day and the Diet deserted.

Edinb^r 10 July 1663.

John Lyon of Craigston having taken out Letters agt. a number of Highlanders for severall crymes of Theft and

Reccomendation from the Pr. Council to continue a Diet.

Cautioner Ammerciate for not reporting the Letters.

Pursuer excused for not reporting Letters because no messenger would execute them agt. the Defenders.

receipt, and having found caution to report them duely execute to this day under the usuall penalty. He is excused in regard he could get no Messenger to go and cite them in Badeneough where they lived, and is declared free of the Penalty upon which he took Instruments.

Edinb^r 17 July 1663.

A Defender, verifying by his copy the day of Comp: and not insisted agt., the Diet is deserted. Murder of a child.

The Dyet @ment^d wherein Mr. Robert Preston is Cautioner, being this day as the Defenders verified be their Coppys, and none compearing to insist, the Diet is deserted.

Eod. Die. Bessie Brebner accused for the murder of a child, begot in fornication, by stopping the mouth and stiffling it in token of her guiltiness, which not only she concealed, but when she was with child, and was challenged, did swear the contrary before the minister and Elders, did bring furth the child privately without a midwife, and after the murder, clandestinely burried the child, and being conscious of her guilt fled, and after apprehension ingeniously confest, where-through it appears she is art and part of the murder, which being found by an Assize, she ought to be punished in terror and example of others.

This is the form of such Lybells, and the like was found relevant agt. Margaret Taylor, 24 June 1663. See my Observe thereupon. This Pannell confesses the Dittay judiciallie with tears, and craves God pardon, and is found Guilty and sentenced to be hanged.

Edinb^r 29 July 1663. All the three Deputes present.

M'kenzies of Suddie, elder and younger, and severall other persons, indyted at the instance of Donald Whyte in Mullochie for invading him with drawn Swords, cutting and wounding him in severall places of his Body, and for burning his ffeuel with a Convocation of the Lieges in the Commonty lybelled, and for oppressing him and leading home a part of the ffeuell, which firing of the ffeuell is lybelled as a deed of Statutory Treason. The Justice Depute ordains the Pannells to propone their Defences agt. the Dittay.

It was alledged be Jas. Stuart¹ for the Pannell to the first point of the Dittay, not relevant, because it was a necessary deed of self defence. Against the 2nd Article of the Dittay for fire raising, not relevant as its lybelled, because the Act of Parliament is as to Houses and Corns, and extends not to the ffiring of feuell in muires and mosses, which never was repute Treason. Lo: Advocate instead of Answer consents that the Justices consider the Punishment. It was thereafter alledged be Stuart, that the ffuall pertained to Suddie, being casten upon his own ground. The Justices declares they will take consideration not only whether the Pannells did cast the Peats, but also if the Moss pertained to Suddie, and if he was in use to cast in it without interruption.

It was alledged by Stuart agt. the 3^d Article, not relevant, because no violence committed in the House. The Justices sustains this as oppression and not as Hamesucken, and ordains the Dittay to pass to the knowledge of an Assize. The Witnesses being examined, the Assize found Suddie younger guilty of wounding said David Whyte, pursuer, and severall other of the Pannells having confessed judiciallie the burning of feuell as belonging to themselves and not to any of the Pursuers, therefore the Assize refers that matter to the consideration of the Judges and assoillied the haill Pannells frae the rest of the Dittay, as not proven. The Sentence is 4 August.

Eod. Die. George Graham, merchant in Edinb^r indyted and accused at the instance of Eliz^t Ramsay and the king's Advocate, for steilling of a Bond of £100 sterl. as also agt. Edward Billing, Englishman, for the same cryme, the Justice Deputes continue the Diet till the first of November upon Mr. David ffalconer, Advocate, his compearing for Byllings, and producing a Warrant under the hand of Depute M'kenzie, allowing him to go to London for doing his necessary affairs, after he was cited to this day and dispensing with his compearance to a day in October, providing his Cautioner should

¹ Sir James Stewart of Goodtrees, admitted 28th November 1661; Lord Advocate 1692; died 1713.

be content to continue at this day, which is the express condition of the Warrant.

This is the first time I have observed any of the Judges of the Court to grant such a Warrant.

Edinb^r 30 July 1663.

Julian Stevensone, relict of M'clellan indyted for Slaughter, ordained to find new Caution and continued.

Edinb^r 4 August.

Kenneth M'kenzie, younger, of Suddie, is fined for the Ryot @ment. in 200 mks. to the King and 300 mks. to the Party, this is for the wounding only, and as to the burning of the feuell, the Justices supercedes Sentence till such time as the point of property and possession be discust civilly before the Judge Ordinary, and that it be discust before them which Party had best right and who had done wrong.

Eodem Die. M'Naught of Strowan and Thomas Boyd of Pinkill agt. Gordon son to the Lady Cardines and others, dilated and accused ffor that albeit the Crimes of Hamesucken and oppression of the Lieges within the Dwelling Houses and possessions, are crimes of high nature and severly punishable, yet upon the day lybelled the Defenders came to the said Strowan's Dwelling House of Strowan, and having entered within the same, they by violence extruded him and his family furth of the same and possest themselves thereof and of his haill goods, without any Warrant or Order of Law, and continue still in the said violent and illegal possession, committing thereby the Crimes of Hamesucken and Oppression in the highest degree, whereof they and ilk ane of them are Actors art and part, which being found by an Assize—Mr. Robert Dickson,¹ Advocate for the Pannells, alledges that the Pannells cannot pass to the knowledge of an Assize, because they entred to the possession lybelled by virtue of Letters of Ejection against the Pursuers and committed no other violence but

¹ Robert Dickson does not appear, from the Faculty lists, to have been admitted advocate until 1666.

such as is usuall and necessary in all Ejections, that is to say, to enter the House, and extrude the possessors, and the Lybell does condescend upon no other Violence and therefore is not relevant to infer a Cryme, and the point of Right ought first to be discust before the Civil Judge before the Ejection can be quarrelled criminally.

Answers Mr. William Cuninghame,¹ that he oppones the Dittay bearing that the Pursuer was masterfully invaded in his own House with a Convocation of the Lieges, and the possession violently taken from him and yet detained. Dickson farder alledges the Lybell is not relevant to inferr Hamesucken, because it does not bear that the Pursuer's Person was invaded in his House without which there can be no Hamesucken. The Pursuer oppones the Dittay. The Justice Deputes sustains the Dittay to infer the Punishment due to Injury, Wrong, and Oppression, and declares they will take consideration of the Pannell's Defence after Probation is led and verdict given, whether Sentence shall be sisted till the discussing thereof before the Judge Ordinary or not.

Observe here that albeit the Defence be relevant to elide the Dittay, yet seeing the Justices are not the Judges in the point of Right, and that the dismissing of the Assizers and Witnesses might be burdensome to the Pursuers and themselves, therefore they proceed to the Verdict and sists there if they think fitt, so that if the Pannells prevail in the civil pursuit, then the Verdict will be of no use, this is the usuall practise. *Vide*

But immediately after this Interloq^r the Assize cleanses the Pannells.

Eodem Die.

There is a Petition presented to the Justices be W^m Pursuer Wallace in Borrowstounness, late Chamberlain of Kinniel, making mention that he being incarcerate within the Tolbooth of Edin^r for the alledged Crime of Adultery (committed with Marg^t Taylor who is found guilty of the same) and for the murder of her Child, of which she is also found guilty *ut supra* whereanent he had petitioned the King's

Pursuer ordered to insist agt. Defender within a very short day, otherwise the Defender will be liberate upon caution.

¹ Admitted 22nd January 1662.

Advocate and the Privy Council for a Tryall, and that the Council had ordained the Advocate instantly to insist, otherwise Petitioner to be put at liberty, and accordingly the Justice Deputes had appointed him to be sett at liberty upon finding caution, notwithstanding whereof the Clerk delays to accept the caution for the Petitioner's compearing to underlye the law. The Justices appoints the King's Advocate to insist betwixt [*sic*]¹ and Tuesday, or otherwise that the Petitioner may be sett at liberty upon finding Caution under the pain of 12000 merks to answer q^r he shall be called upon a citation of 15 days and immediately upon his finding Caution an Order is granted for his liberty.

Edinb^r 20 August 1663 all the 3 Deputes present.

Murder.

William Dodds indyted and accused of the Murder and Slaughter of Andrew Hardie of Tullochshill, having laid wait for him in the way as he was near his house, as he was to pass from that to Ed^r where he assaulted and wounded him with a Durk of the which wound he died, of which he was actor art and part and in token of his guilt immediately fled from his house, and being charged to compear before the Justices he fled and suffered himself to be declared fugitive, and remained at the Horn lurking till he was lately taken by virtue of Letters of Caption direct at the instance of the nearest of kin of the Defunct, wherethrow he has taken the Guilt upon him and ought to be punished.

This Murder is lybelled to have been in Nov^r 1640. The Justices sustains the Dittay as its conceived and ordains it to be put to the knowledge of an Assize. The Probation of this Crime is by Witnesses, none of them depones that they saw the Defunct killed, but it's proven they saw him dead, but they declare they knew not who killed him, but two of the Pannell's servants prove that being at the Pleugh, they heard a great shriek and that the Pannell came immediately to the Pleugh and rode away upon one of the Pleugh horses. Others depone that the Pannell and the Defunct were Brethren in Law, that they knew no malice betwixt them, but that the

¹ Blank in MS.

Pannell was never seen in Kirk nor Mercate, nor to attend upon his calling since that fact, tho he used to keep Mercats before, and the Servants of his house for the time depones that they staid half a year and never saw him in his house after that fact. With these Depositions the King's Advocate produced to the Assize the Pannell's confession taken before Colvill, Justice Depute, dated 10 August instant which was read to the Assize, but the Journall Book does not bear the contents of it, nor whether he adhered to it or not. Also produces the old Caption to instruct that he had been Rebell since the fact, and repeated all these *per modum probationis* and protested for an Assize of Error.

The Assize finds him Guilty upon the Depositions of the Witnesses and the Verdict contains no mention of the Confession.

Nota. That seeing *Minae* are not proven nor the committing of the fact it self nor no mention of the Confession in the verdict. The ground of verdict has been *Damnum Sequutum¹ et Fuga*. This is not unlike to another Criminall Process pursued be the King's Advocate and the nearest of kin of W^m Marshall ag^t W^m Mirrie who was found guilty and hanged for the murder of the said Marshall. *Vide* 10 day of July 1682.

Eodem Die. James Gordon of Newton declared fugitive at the instance of the King's Advocate, and Ro^{tt} fforbes late Tutor of Craigievar, and Margt. Lindsay his Spouse for the Slaughter of Alexander Lindsay of Williamston her ffather, as he who was summoned to find Caution for his compearance, Fugitate for not compearance. to underlye the law.

Edinb^r, 2 and 4th Septe^r 1663. All D's present.

The King's Advocate agt. John Campbell of Kinloch and others for Slaughter of Duncan, Alex^r, Ro^{tt} Menzies's and John Scott. This Action, not a Reconvencion, is continued to the 4th instant, and at this day many of these conveened in the Reconvencion, are past from.

¹ *Secutum* in Adv. MS.

Edinb^r 9th September.

There is a Decreet Absolvitor proceeding upon a Verdict of Assize, cleansing John Campbell of Kinloch, John Menzies of Shaw, John M^ravish, and John M^robwig there, and John Menzies, son to umqll. Duncan, who were the only persons insisted against, but I find not the Process it self in the Book.

Slaughter.
Remitt from
the Exchequer
anent it.

Eodem Die Compeared Thomas Moncreif¹ one of the Clerks of Exchequer and produces an Act thereof, whereby the Lords of Exchequer reccomend to the Justice Deputes to take Tryall whether the Slaughter committed by Hugh Crawford upon George Wyllie was casually or on precogitate malice, and to that effect to peruse² the Depositions taken in Exchequer or to examine Witnesses of new, to do any other thing for their Information as they shall think fitt, and to report to the Exchequer, that they might inform the king, in regard that Crawford had procured³ a Signature of Remission and had produced it in Exchequer to be past, bearing that his Majestie was informed that the Slaughter was committed on occasionll Rencounter, contrary to what is now represented to the Lords of Exchequer. In obedience whereunto the Justice Deputes did examine witnesses and gave in their Report, representing that the Slaughter was upon a casual Rencounter and without any precogitate malice in Crawford, because 1^{mo} It was committed in an Alehouse where Wyllie was the Inviter and Crawford had refused to go with him till he was prest. 2^o Crawford invited company to go with him to be witnesses, which he would not have done if he had designed a Slaughter 3^o Wyllie provoked Crawford and assaulted him.

Nota. Upon this Practise of Exchequer it is not only lawfull, but it is the duty of those who serve the king to stop Deeds procured from the king by misinformation contrary to Law or Right untill the king be better

¹ Eldest son of David Moncreiff of Rapness, Orkney; purchased the lands and barony of Moncreiff from his cousin, Sir John, in 1663; Clerk of the Exchequer 1661; created a baronet of Nova Scotia 1685; died 15th January 1715. See Seton's *House of Moncreiff*, p. 53, *et seq.*

² 'procure' in Adv. MS.

³ 'produced' in Adv. MS.

informed, but if the king's Deed be such as it appears to be upon right information *ab initio*, or that after information from his Ministers, he command them to proceed, then the king is furthwith to be obeyed. See for this Tulden and the other Doctors upon the Title C. *de precibus imperatori offerendis*, and upon that other Title C. *Si, contra jus vel utilitatem publicam, vel per mendacium fuerit aliquid postulatum vel impetratum.*

Edinb^r 24 Sept^{er} 1663.

John Brown dilated and accused for manifest Adultery with Adultery. Eupham Happyland, spouse to Henry Dury, as also the said Eupham being accused they produced the King's Remission and betakes themselves thereto, which is produced and recorded, in respect whereof the Diet is deserted, and Henry Dury the Accuser compearing protested that the Remission should not be prejudicial to any action competent or that might be competent to him against the said Eupham or any other person for sums of money, goods, gear, and plenishing pertaining to him or her or which were acquired during the marriage betwixt them or any wise conceived in any of their favours, as also that the same should not be prejudicial to any person that had acquired or should acquire the Gift of her Escheat as accords, notwithstanding of the Remission produced remitting the Crime allenarly, and the Pannell protests in the contrary, as also Henry Durie protests for Relief of his Cautioner in regard he had reported the Letters duely execute.

Eodem Die.

William Dods who was found guilty of the Slaughter of Andrew Hardie, 20 August last, being brought to hear Doom pronounced, its continued till the 2^d of Oct^r with Certification if he produce not an Assythment from the Partie against that time they will proceed.

The Justices pronounced Sentence of Death against Agnes Taylor, formerly found guilty of the murder of her child.

Edinb^r 2 Octo^r 1663.

W^m Dods for the Slaughter of Andrew Hardie is adjudged

to be beheaded and his moveable Goods to be escheat to his Majesties use.

Edinbr 4 Nov. 1663.

Isobal Seton Lady Berefoord against George Graham and Eliz^h Ramsay and Edward Byllings for Stealling of Writts, continued till the 11th and in the mean time Byllings absent is declared fugitive conditionally if he appear at that day to be reponed and his Cautioner unlawed.

Edinbr. 5 Nov. 1663.

Advocatus q^r David Bruce in fforgundie against John Craigie of Dumbarney for wrongous Imprisonment continued.

Alexander Baillie being dilated and accused for stealling Goods out of the House of Humbie and a horse, comes in the king's will.

Edinbr 11 Nov^r 1663, Deput Cuninghame pt.

Theft.

George Graham, merchant in Edinbr and Elizabeth Ramsay, widow there, and Edward Byllings, Englishman, indyted and acused at the instance of Isobal Seton Lady Bairfoot and the king's Advocate, That albeit the Crymes of Theft and Receipt be crymes severly to be punished, nevertheless in feb. 1663 the said Isobal Seton having put a locked Bonnet Case containing Seāll Writts in the house of the said Isoball Ramsay, she and the said Geo : Graham and Byllings cutted the bonnett case and theftously stole and away took furth thereof severall Writs belonging to Isobal Seton, and particularly a Bond be Arthur Achmoutie in Bellendrien, in the County of Longfoord in Ireland, containing 100 £ sterl. prinⁿ with penalty and @rents, and Edward Billings received the Bond from Geo. Graham and carryed it to Ireland with a letter from Graham desiring Auchmoutie to pay the Debt to Billings, whereupon he recovered payment and delivered Bond with other stollen papers to Auchmoutie, wherethrow it appears that the forsaid Persons are actors art and part of the Theft and concludes Punishment and Restitution of the sums in the Bond.

Mr. David ffalconer, advocate for the Pannell's alledges that

the Dittay in so far as it inferrs Theft or Receipt against the Pannells from the writing or carrying of the said Missive Letter, or from having of the bond, is not relevant *per se* except *fraudulosa contractatio* be proven, yet the true definition of Theft it is *fraudulosa contractatio rei alienæ*, ffor a bond may be in a person's possession upon good, lawfull or onerous accounts, and if simple having should make a Theft, then all Actions of Exhibition would be in effect Actions of Theft. 2^o Geo: Graham had an assignation to the Bond, and the Pursuer has acknowledged it, whereupon he takes Instruments, and tho' it be true that the Assignation was destroyed by Isoball Seton or came in her hands, yet *hoc non obstante*, Geo: Graham was in *bona fide* to write to the Debitor to pay the money to Billings, but the truth is, it was never paid, and albeit there be a Discharge under the hands of Billings, yet it was granted *spe numerandæ pecuniæ*.

Replies Mr. Andrew Birnie for the Pursuer, oppones the Dittay as its lybelled and qualified. 2^o Its both calumnious and irrelevant for the Band and cancelled Assignation being lybelled to have been in the custody of Isobal Seton (the same presumed Liberation specially betwixt extraneous Persons such as she and Geo: Graham were, and whereas it is pretended that the Discharge was granted by Edward Byllings *spe Theft of Writts. numerandæ pecuniæ*, oppones the Discharge bearing receipt of the money.

It was further replied by Mr. Da: Dunmure substitute for the King's Advocate, that he oppones the Dittay founded as to Geo: Graham upon the common law and Act of Parliament, and as to simple receipt and having is most relevant, seing in Law *apud quem res furtiva quesita inventa est is presumuntur*¹ *fur* and the Dittay subsumes and makes appear by the Missive under Geo: Graham's hand that the stollen Bond was in his possession, and was delivered by him to Billings, and take up the money from Achmutie, and that without any order or warrant from the Pursuer who is Creditor in the Bond.

Duplys ffalconer, denying always the Lybell both as to the having and receipt of the Bond, that esto he had had the same

¹ 'presumitur' in Adv. MS.

in his Custody, yet seeing he did trust the Bond and Assignation to the keeping of Mrs. Byllings, he might very well take the Bond back from her, and as to the cancelled Assignation in the Lady Bairfoot's hand non relevat unless she could make it appear from Geo: Graham. And the truth is he never gave back the Assignation, but she came to it *vixs et modis*, and so Geo: Graham had good reason to writ to the Debitor to make payment.

Duplies Birnie, that the Pannell Geo: Graham his Intromission with the Bond must be presumed theftous and fraudulent, because it is expressly lybelled that the Pursuer was in possession of the Bond and Assignation *et hodie possidens præsumitur heri possidens*. 2^o After the Assignation of the Bond granted to George Graham was cancelled and retired to the Cedent he was *in pessima fide* to write for payment of the money. 3^o He can never make it appear that the Assignation was in his custody.

Elizabeth Ramsay, one of the Pannells, denies the Dittay.

The Justices Deputes sustains the Dittay relevant as its lybelled, and ordains the same to pass to the knowledge of an Assize with and under the consideration of the Defence proponed for the Pannell George Graham, and sustains the writing of the Letter as a qualification of the Dittay not a Crime *per se* of Theft.

The Pursuer for proving this Lybell adduces 6 Witnesses. *Nota* that the 3^d 4th and 5th thereof, viz. Alexander Haitlie, Tho^s Ramsay, and Tho^s fforbes refers and adheres to former Depositions taken by Just. Dep^t Colvill upon the 20th Septer, and adheres thereto, on which I observe these things, 1^o That in dark and hidden matters, the Justices for their own information have examined witnesses even upon oath, to inform themselves before the cause came to be insisted in, for tho' this cause was called on the 17 and 29 of July last, yet it was never insisted in till this day. 2^o There is no necessity that these Depositions be taken in a fenced court according to this practise, ffor the 20th of Septer. which is the day on which thir Depositions are taken, is not marked for a Court Day in the Journall Books. 3^o Albeit these Depositions were taken upon Oath, yet they were not sufficient nor probative before the Assize, because the witnesses are examined again in presence

of the Assize, which had been needless if the first testimonies taken outwith the presence of the Assize could have been probative as indeed they were not, ffor by an express Act of Parl. vizt. Act 91 Parl. 11, Ja. 6, it is statute and ordained that the hail Process and probation, that is to say the reading of the Lybell, Dispute, Depositions of Witnesses, and other Proofs, shall be used before the Assize in presence of the Party accused and his Procurator. Upon this probation¹ the Witnesses and production of an attested double be Geo. Graham to Auchmoutie, desiring him to pay the money with an attested double of Edward Bylling's receipt of the money, the Inquest did find George Graham guilty of the receipting and fraudfull using of the Bond lybelled. Edward Byllings, one of the Defenders, absents himself at the time of the Sentence and is declared fugitive, and Maurice Trent, his Cautioner, unlauded, but they find none guilty but George Graham.

Eodem die.

Julian Stevensone enters the Pannell and offers to underlye the Law and protests fer relief of her Cautioner. The Justice-Deputes in respect the Advocation is not produced, continues the Diet till the 5th of January.

Edinb^r 16 Nov^r 1663.

John Johnston of Elsiehiells is ammerciate for not reporting criminall Letters.

Edin^r 26 Novr. 1663. Deputes Cuninghame and M'kenzie.

David Bruce in ffor gundie agt. John Craigie of Dumbarney and John Lamb, Burgess of Peirth, the Defenders are indyted and accused for taking the Pursuer Prisoner out of his house, Beating, wounding, and wrongous Imprisonment. blooding and wounding him, binding him with cords, carrying him Prisoner and detaining him in the Tolbooth of Peirth.

Mr. James Cheap² compares for the town of Perth, and takes Instruments upon David Bruce for his appearance at the

¹ 'Disposition of' in Adv. MS. 'Of the letter' added in Adv. MS.

² Admitted 19th June 1646.

Bar, and protests that the town may be free. Mr. Andrew Birnie compares for the Pannells and alledges that they had power to apprehend the Pursuer because they are Justices of Peace who by the 38 Act Parl. anno 1661 are empowered to apprehend and imprison such as are suspected of Crymes, and the Pursuer is not only suspected, but dilated and filed by the Deposition of his Associates and by a Testificate from famous Gentlemen to be a common and notorious thief. Replys Mr. William Maxwell¹ for the Pursuer. 1° Dumbarney is no Justice, and John Lamb is only a Justice within the Burgh of Perth, and had no warrant from other Justices within the Shyre. 2° The Justices of the Shyre could not have apprehended the Pursuer without a complaint from some party injured, and a formall Citation given by a constable to appear before them to answer to the Complaint with Certification if contumacious they would issue furth a Warrant to take him, which was not done in this case. 3° The Justices of Peace have not power to incarcerate or detain parties in prison where responsall caution is offered and responsall cautioners were offered here, viz. the Lord Ruthven² and Mr. Pat. Oliphant, who were refused, and to clear the unwarrantable proceeding of John Lamb, one of the Pannells, he held a Court with concurrence of A. B. and H. M. which he had no power to do, and refused to admitt Procurators for the Complainer and to accept of a Bond of Caution from him, and to purge himself of partiall counsell, and to admitt of relevant objections against the witnesses, as appears by an Instrument under the hand of the Clerk of Court. And lastly, it was unlawfull to bind a person with ffetters as this pursuer was, not being convict. Duplys Birnie for the Pannells, oppones the Act of Parliament anent the Justices of Peace, authorising all the persons named in the Act without any restriction of their jurisdiction *ubi lex non distinguit neque nos*. 2° Oppones the Testificate of the Clerk of the Justice of Peace bearing their custom and practise, which agrees with the procedure of the Pannells. 3° John Lamb's designation

¹ Of Auldhouse and Springkell; admitted 26th November 1633; died 1695.

² First lord; created a peer 1651; and died 1673.

be Act of Parliament for a Justice of Peace must be understood with relation to the shyre and not to the Town of Pearth allenarly, because as to the Town of Peirth, he needed no nomination, being a Magistrate of the Burgh, and all Magistrates as such are Justices of Peace by the law of the nation. 4^o The Pannells were not obliged to accept the caution offered, because Theft is not aailable Crime, and suppose it wereailable, yet by the date of the Bond produced, it appears he was incarcerated before it was offered. 5^o It is altogether false there was no Complainer for the Pannell. John Craigie did grant Bond to John Lamb to insist against the Pursuer as a Theif before he was apprehended. 6^o As to his being fettered with cords, there was reason for it, because being once taken before, he made his escape and was declared fugitive. Triplys Maxwell, for the Pursuer, that he opposes his former Debate, and as to the Bond given by John Craigie to insist against the Pursuer, it cannot be respected because it is offered to be proven it is made up since the captive upon design to justify the Pannells, and tho it were of a true date, yet it cannot be respected except he had been enacted in the Justice of Peace his books to insist, and had there condescended upon the Crimes, and that the warrand of the Justices for the capture had proceeded upon this Caution and had been made relative thereto, and as to the pretence that Theft is notailable, opposes the constant practise and the dangerous consequences which might follow if Justices of Peace should be allowed to apprehend and incarcerate whom they pleased upon light Dilations. Quadruplyes Birnie for the Pannells, that the ground of the capture is not a light suspicion, and opposes the Testificate of famous gentlemen to prove that the pursuer was *pessimæ famæ* and the depositions of his accomplices fying him for notorious facts of Theft, and opposes the Act of Parliament anent the power of the Justices of Peace in such cases. Quintuplyes Maxwell for the Pursuer, the Testificate forsaid proceeds from mean persons, two of them being Browsters who envyed the Pursuer as their Neighbour of the same Trade, because most people came to his house, and suppose the Testificate were of greater weight, yet it could not be sufficient ground of Imprisonment of the Pur-

suer till first he had been conveyen before the Justices and his crymes condescended on, and caution found to pursue him in their books. This Dyet is continued till the morrow, being the 12th day, at which time Depute Cunninghame being present in the Court, this Interloq^r is pronounced. Sustains the Defence, Duply and Quadruply, for the Pannell, and repells Triply and Quintuply proposit for the Pursuer, and swa deserted the Dyet, whereupon the Pannells took instruments.

Eodem die 26 Nov^r.

David Bruce, Pursuer in the other Action, is indyted and accused for some particular Thefts mentioned in his Dittay, and the Diet continued till the 1 of March next.

Edinbr. 1 December 1663. In this Sederunt there is marked S^r John Home of Renton, Just. Clerk, which is the first time he sitts,¹ and Cuninghame and M^cKenzie, Deputes, as also the Lo: Halkerton and Sir Ja^s Lockhart of Lee² as assessors named by the Privy Council.

Nota the Assessors are not marked in the Sederunt, but after it.

Att this Dyet there is produced an Act and Order of the Privy Council, dated 24 Nov^r 1663, bearing that the Privy Council having heard and considered the Report of the Earl of Tweeddale,³ the Lord Halkerton, Justice Clerk and Lee anent a verdict of an Assize given against Geo: Graham, merchant in Ed^r in a Process pursued against him be the Lady Bairfoot before the Justices, they appoint the saids Tweddall,

¹ The Justice Clerk had until this time only been Clerk of the Court and Assessor to the Justices, and the Privy Council, by an Act of Council, dated 8th December 1663, in ordaining the Justices to proceed with the case, 'fardir Declaires That the Lord Justice Clerk is one of the Judges of the Justice Court, and has power to sit and voat therein.' This power was confirmed to him by the Commission of Justiciary, 1671, and by Statute in 1672.—W.

² Born 1596; Judge 1646; Lord Justice Clerk 1671; died 1674.

³ John, second Earl and first Marquis of Tweeddale. Born 1626; died 1697. For a short time he held the administration of the country, and was distinguished for his wise and moderate policy.

Halkerton and Lee, or any two of them to be joined as Assessors to the Justice Clerk and Justice Deputes for cognoscing that Verdict and Probation whereupon it proceeded and for pronouncing their Sentence in that matter, whereupon the Justice Clerk and Deputes, with consent of the Assessors, continues the Diet till the 10 of Decer., and ordains both Partys to attend peremptorily.

Edinbr 2 Decer. 1663.

The mutuall Pursuit anent the Slaughter of John Coltherd which were formerly continued to this day are of new continued till the first of feeb. next, there being an Act of Privy Councill produced upon the Supplication of John, Sir W^m and Christopher Ballantynes, ordering the continuation as to them.

Edinbr 10 December 1663. In this Sederunt there are Renton, Just. Clerk, Cuninghame and M^ckenzie, Justice Deputes, the Earl of Tweddale, Lord Halkerton and Lord Lee, Assessors.

Nota after the words *Curia legitima affirmata* is as follows

Assessors to my Lord	} John E. Tweddale,	
Justice Clk. and Justice		Alex ^r Lo: Halkerton,
Deputes be the Counsell's		Sir Ja ^s Lockhart,
Act		of Lee.

The which day Geo: Graham compears and produces two Acts of the Privy Councill here engrost, the first thereof dated 24 Novr. 1663, bears that the Counsell having heard the Report of Tweddale, Halkerton, and Lee, anent the forsaid verdict, they name them Assessors *ut supra*. This is the Act mentioned in the head of the other page. The 2^d Act is dated the 31 Decer. 1663, and proceeds upon a Petition given in by the Lady Bairfoot for a Recommendation to the Justices to proceed, and thereupon the Counsell ordains the Justices and their Assessors to proceed and declairs the power of the Justice Clerk and Assessors as to voting.

Observe that it declares the Justice Clerk to be one of the Judges of the Justice Court and to have power to

Assessors.

sit and vote herein as also that the Assessors have power to sitt and vote, whereby it appears to me that the Justice Deputes have contraverted the power both of Justice Clerk and Assessors as to the priviledge of sitting and voting.

After this Tryal was ended by the Justices and the Verdict returned by the Jury finding the Pannell guilty, yet 3 Privy Counsellors is added as Assessors and the P. is assoillied.

After production of these two Acts the Journall Book bears that the Justice Clerk, Justice Deputes and Assessors have considered the Lybell at the instance of the said Lady Bairfoot against George Graham, with the Defences proponed by his Advocate for him against the relevency of the Lybell with the remanent Dispute, the Interloquitor of the Judges and verdict of the Assize. They find that the verdict does not meet the Indytement, seeing the Indytement is only for Theft of the Bond lybelled,¹ art and part thereof, and the verdict finds George Graham guilty of the receipting and fraudulent using of the Bond alledged stollen, which they find distinct Crimes, therefore they Assoillie the said George Graham from this instance, whereupon he took Instruments and protested for Relief of his Cautioner.

Nota as this [Interloquitor] was most inept, impertinent and unsuitable to the Lybell, so it was upon the matter unjust because it did find Geo: Graham guilty of the Receipt before there was any person convict for stealling, and much of this mistake of the Assize did proceed upon the error of the Debates by which the Advocates of both sides do dispute anent receipt of the Bond which was not a part of the Lybell. Also I think that the Justice Deputes of themselves might have inclosed the Assize again to have rectified this Verdict, it being inept and disconform to the Lybell. *Vide* 9 Feb. 1664 where a new Lybell for receipt of this Bond is raised, continued to the 10 and 17 days, and then deserted.

Eodem Die.

Lo. Just. Clerk's Commission recorded.

The gift granted by his Majestie to Sir John Home of Renton to be Justice Clerk *ad vitam* is here recorded under

¹ Under recent legislation it is now competent to find a verdict of guilty of reset under a charge for theft.

the Great Seall, dated 4 June 1663 with these words on the back thereof, Edin^r 23 June 1663, the which day the Lords Commissioner's Grace produced in Parliament the Patent within written, which being publickly read, the Parliament did with all chearfullness acknowledge his Majesties choice of Sir John Home of Renton as a most fitt person to be Justice Clerk and Master of the Ceremonies, and for publick testimony of his admission to the saids Offices, the Lord Commissioner's Grace delivered to him the Patent who with all humility received the same upon his knee, having first taken the Oath of Alledgiance and *de fidei administratione*. Sic Sub^r H. Primrose.¹

Edin^r 15 December.

Hugh Crawford of Sundieshaw, formerly indyted for the Slaughter of George Wyllie, produces his majesties Remission under the Great Seal, after reading whereof, the Justice Clerk and Justice Deputs admitted the same and ordained him to find Caution to assythe the Partie conform to the Laws of the Kingdome, whereupon he and certain Cautioners became enacted for the Assythment.

Remission for
slaughter ad-
mitted upon
finding caution
for the Assyth-
ment.

Edin^r 22 December 1663. Just. Clk. and Cuninghame pr^t.

Barbara Smith, servitrix to Sir John Smith of Grothill, indyted and found guilty for the murder of a child brought furth by her in Sir John's house in Edin^r by thrusting in Peats in the mouth thereof with a stick, and after the murder obscuring it in his Cellar, the Pannell is found guilty upon her Judiciall Confession and sentenced to be hanged.

Murder of a
child.

Edin^r 22 December 1663.

Mungo Noble and others pursued at the instance of James Scott, tenant to Mr. William Maxwell and the King's Advocate for his interest for cutting of Greenwood,² declared fugitives for absence and the Diet continued as to others compearing.

¹ This is an error. The original commission in the Books of Adjournal is signed by 'Archd. Primrose.' (See footnote in Appendix, vol. ii.)

² 'Green wood' in Adv. MS.

Eodem Die.

Theft and
Stouthrief.

Lady Mary Douglas¹ and Donald M'Donald, ffar of Sklaity, her husband for his interest against Alex^r Murray and other three messengers, for coming to her house under Silence of Night, breaking open coffers and carrying away the Abzuilziements of her Body, Rings, Jewells, Books, Parapharnalia Jocalia of the value of and refusing to give them back being required when she offered to depone they were hers, as also when Sir John Smith of Grothill, to whom they were disponed, offered to depone they were hers. Of the which Crymes of Theft, Stouthrief, the forsaid Persons complained upon and ilk ane of them are Actors art and part, which being found by an Assize, etc. Mr. W^m. Maxwell, Advocate for the Pursuer, Declares he founds his Dittay upon the 83 Act 11 Parl. Ja. 6th. and 33 Act 4 Parl. Ja. 5 and produces the Inventory of the Goods mentioned in the Dittay.—Answers Mr.

Nota. That the proposition of the Dittay is founded upon Laws and Acts of Parliament in generall without condescending and the submission thereof relates only to an Inventory but does not repeat it.

Andrew Birnie for the Pannells, alleadges that the Act 83 is a new Dittay and neither the Act nor the Inventory are seen.—The Justices ordains the Pursuer to insist in the Dittay and continues the Diet and the Cautioners till 4 January next and ordains the Pannells to see the Inventory till then.

1664.

Edinb^r 4 January.

The forsaid Action being again called, and Sir James M'Donald not being ready to insist, the Diet is deserted.

Edinb^r 5 January.

Thomas Lennox, Glover, Burges of Edinb^r, reports the Letters raised at his instance and the King's Advocats for his Interest agt. Richard Murray of Burghtown,² and Gottrey

Letters
reported to
Defenders
absent are
fugitate.

¹ Daughter of Robert, Earl of Morton. Her husband was the eldest son of Sir James Macdonald of Sleat.

² ? Broughton.

M'Leir, messenger, for forging, counterfeiting, and making up at least falsly and fraudulently vitiating in the Dates the Writs following, viz. an Assignation from John Mure, Writer, to W^m Stuart of Egoriness, of a Band granted by the said Tho^s Lennox and¹ John Mowbray for £307, 10s. Scotts, as a part of a greater sum in the Band resting with the Bill. Letters and Charge of Horning given thereupon at length mentioned in the Criminall Letters, and Burghtown and the Messenger being absent are declared fugitive.

Edinb^r 8 January 1664.

W^m Thomson, David Brodie, and Ja: Arthur, convict and Theft. found guilty upon their confession of stealling 3 Cowes or Horse hydes, and old Coat and £27, the punishment restricted to Banishment and Scourging. 23 feb. 1664.

Edinb^r 15 January 1664.

Julian Stevenson, relict of umq^{ll} Robert M'Clellan in Knockindarroch, indyted for Slaughter art and part of James Canon of Mondrogat, compears with her Cautioner to underlye the Law, but in regard of an Advocation depending at her instance before the Privy Councill agt. the Stewart of Kirkcudbright and Sherriff of Wigtoun yet undiscust, the Dyet is adjourned to the 3^d day of the next Justiceair, to be holden for the said Sherriffdome and Stewarty, or to compear sooner before the Justice Deputes on a lawfull Citation of 15 days warning, whenever she shall be called, whereanent she finds Caution.

Edinb^r 2d feb. 1664.

The Diets in the Criminall Process against John, Sir W^m and Christopher Ballantynes for killing of John Colthird, often @mentioned, is again continued till the first of August next, upon production of an Act of Reccommendation from the Privy Councill, bearing that the Precognition before the Councill could not be gotten expedie because many of the witnesses were out of the Countrey.

¹ 'to' in Adv. MS.

Eodem Die.

The other Criminall Process at the Instance of the said John and Sir W^m Ballantynes agt. Hamilton of Gilkerscleugh and others, for being art and part of the forsaid slaughter and mutilating, the Pursuers being also called, the Defenders compearing, the Judges in regard of the many Diets which had been formerly in the Process, and that neither the Accuser nor King's Advocate compears to insist, deserts the Diet.

Eodem Die.

fine remitt
to the Cautioner
upon a lawfull
Excuse of the
pursuer for not
reporting the
Letters at the
Day.

The Justice Clerk and Justice Deputes remmitts an Ammerciament to John Melvill, merchant in Ed^r, imposed upon him as Cautioner for Thomas Manson, Commissary Depute of Ross, for not reporting Criminall Letters. In regard he makes it appear he was impeded by storm, and his Band is ordained to be given up or to be delete out of the Books, in regard the Diet was deserted. This is upon a Reccomendation from the Privy Counsell bearing to be purchast upon the Cautioner's Petition this here recorded, and the Justices ordains the Clerk Depute and the Messenger who intented the Pursuit to pay 40£ to two of the Defenders who compeared in name of Expenses and Horning to be direct for the same.

Edinb^r 3d ffeb. 1664.

Dyets continued
and after pre-
sented the
Remission and
P. ordained to
compear under
the Penalty of
10,000 mks.

Alexander Lindsay of Pittairlie,¹ indyted for the slaughter of Pat Lindsay, sometime Capt. Lieutenant to the Lord Spynie,² produces a Signature of Remission under his Majesties royall hand, and protests that he no ways acknowledges the Guilt by production thereof, after presenting whereof the Diet is continued till the 24 instant, and the Pannell is appointed to enact himself to compear under the pain of 10,000 mks. and then to be sett at Liberty.

Edinb^r 8 ffeb. 1664.

King's Advocate agt. Gavin Gray for beating and wounding Ja: Gray in Grayesook, his ffather, contrary to the Act of Parl^t cleansed.

¹ 'Pitcarely' in Adv. MS.

² Third Lord Spynie. Succeeded 1646; died 1676.

Edinb^r 9 feb. 1664.

Lady Bairfoot agt. Geo: Graham, There being new Criminal Letters raised at the Lady's instance agt. Geo: Graham for receipting of an Bond stollen from Isoball Seton (for in the former Letters there was only Theft lybelled). Its craved that the Lady and Cautioner may be unlauded for not reporting. Alledged for them be Mr. Andrew Birnie that the Letters were truly execute and given in to the Register of Hornings against the Pannell for not finding Caution to appear, and they are detained there not by the Pursuer's negligence but by warrand from the Lords of Session, and so they ought not to be unlauded. Receipt of
stollen writts.

Replies Mr. Ro^t Sinclair for the Defenders, that the Alledgiance ought to be repelled because the Defender, being unwilling of a delay, did extract the Letters off the Signett and delivered them to the Pursuer, and she might have had a new Execution from the Messenger, or an Extract from the Register, and he is content presently to hold himself as cited, and to underly the Law.

Duplys Mr. William Maxwell for the Lady, that nothing can fulfill the Bond granted by the Lady and her Cautioner for reporting but the principall Letters and Executions, and therefore untill these can be recovered the Diet must be continued.

The Dyet continued until the 10th instant. Whereupon Maxwell, again for the Lady, protests that the Diet may be either deserted or such a time given to insist as betwixt the date of the Letters and this Diet, and that they may have liberty to summond a new Assize upon the forsaid Letters conform to the Act of Parliament. Mr. Ro^t Sinclair, for Geo: Graham, protests in the contrary in regard that notwithstanding of the stopping of the Letters at the Register, yet the Pursuer might have done all Diligence upon the Extract of the Letters, which the Lords of Session be their Act declared sufficient, and Mr. Billings being a stranger and being come of purpose hither and willing to underly the Law, it ought to be determined.

The Diet against Billings also continued till the morrow, and from that to the 17th day, with certification if the Lady

be not ready to insist, the Diet shall be deserted and no Letters nor Precepts to be direct thereafter except by Warrant of the Justice Clerk and Justice Deputes jointly, and its declared by the Judges that the Extract of the Letters given to the Lady is sufficient for her to insist, albeit she want the principall.

Edinbr 17 feeb. 1664.

The Diet in the forsaid Process is deserted, and all new Letters discharged to be given out except by order as aforesaid, and a Decreet booked thereupon, which contains a long and reflective Petition given in be Edward Billings to the Privy Council against the Lady Bairfoot, with a reference thereupon to the Justices.

Eodem Die.

James Sword, armorer in St. Andrews, agt. James Sword, late Provost thereof, James Pitcairn, Patrick Kilgour, and other 12 Burgesses of that Burgh for alledged Perjury in serving Andrew Sword, Apothecary in that Burgh, Heir of Line to the deceast Henry Sword, Indweller there. The Pursuer compearing and reporting the Letters, and the Defenders also compearing, the Diet is deserted, and the Defenders their Bond of Cautionry is appointed to be given up by the Justices upon a Reccomendation from the Privy Council, proceeding upon Andrew Sword's Petition, representing to the Council that the Letters were raised out of malice for no other end but that the Petitioner as he was served Heir of Line by the forenamed Defenders as Inquest, so he was intending that they should serve him Heir of Conquest, and for that cause had advocate to the Lords of Session the Brieves raised by the Pursuer of the Criminall Letters whereby he intended to serve himself Heir of Conquest and the Pursuer of the Criminall Letters knowing that the Inquest would serve the supplicant Heir of Conquest, He the said Pursuer raised the Criminall Letters with a Reduction of the other Service before the Lords of Session to affright them from proceeding, and thereupon craving that the Council would reccomend to the

Justices to desert the Diet, which the Council accordingly did, and the Justices obeyed as said is.

Observe that no Criminall Letters whereof the event depends upon a pursuit before the Lo: of Session should be raised untill first the event of the civil pursuit be known as in the case forsaid, and the case of forging or fabricating of Writts and many other cases which are always tryed first before the Civil Judge, and if the Criminall Pursuit should be first intended, the Justices have good cause to desert the Dyet that Parties, Witnesses and Assizers be not put to too much trouble by too frequent attendance occasioned by often Continuations.

Edinb^r 18 ffeb. 1664.

George Black, James Middleton, messenger and the Kings Advocate agt. Mr. James Reid of Bara, Alex^r Reid his brother german, John Reid, eldest lawfull son to the said Mr. James, and Arthur Simpson in the Kirktown of Bourtie, his Tenant and James Skeen, merchant in Aberdeen, and others for Deforcement. The Dyet continued, Mr. James Reid and Arthur Simpson being excused as unable to travell upon production of Testificates and the rest compearing. The next Dyet of Compearance is 7th June.

Edinb^r 23d ffeb. 1664.

The which day W^m Thomson, James Arthur and Da : Brodie being brought furth of ward and presented to the Pannell to receive the Doom for the severall thefts whereof they were convict 8 January last, there is a Warrant of the Privy Council produced whereby in regard the Council was informed that the Thefts were but pyking Thefts, do therefore reccomend to the Justices to cause mark them with the Town of Edinburgh's burning iron or scourge them or both as they shall think fitt and find them to deserve, and to cause them enact themselves to be banished the kingdom, and the Magistrates of Edin^r to see them shipped, according to which Reccomendation the Justices ordains each of them to receive 7 stripes from the Hangman at the Mercate Cross, and to be banished and to

lye in Prison till there be occasion of shippis, and the Magistrates to take care to see the Sentence execute.

Nota the Councill's Warrant necessary to restrict the Punishment.

Edinb^r 24 feb. 1664.

Alexander Lindsay of Pittairly indyted for the slaughter of Patrick Lindsay, continued till the 22 of March.

Edinb^r 1 March 1664.

Advocatus and Andrew Butter, Provost of Peirth and others Informers, agt. David Bruce in fforgrundie for stealling of Horse and Sheep and many other deeds of Theft, deserted, and the Pursuer ordained to pay the Witnesses Expenses.

Edinb^r 4 March 1664.

Perjury fugitate
for absence
and his Caution-
ers unlawed.

Lauchlane Leslie, servitor to the Earl of Levin produces the Criminall Letters raised at the Earl's instance agt. Gavin Dick, Taylor, Burgess of Edinb^r for perjury, and the Defender being absent is declared fugitive and his Cautioners unlawed.

Edinb^r 22 March 1664.

Stealling
Writts.

Advocatus and Ro^t M^r of Herreis¹ agt. Alex^r Viscount of Kenmure,² for robbing and stealling five Trunks full Writts of the Estate of Kenmure, among which were severall Rights of Comprising taken blank in the name and belonged to the Pursuer as Heir of Line to Robert Viscount of Kenmure, lately deceast, and all which were consigned and deposited by the mutuall consent of the Pursuer as Heir of Line forsaide to the said deceast Viscount and the Defender as his Heir of Taillie untill the Right should be discust, and were taken away by the Defender and his accomplices in the Lybell, and concludes for the pains of the Acts whereupon the Dittay is founded, viz. 50 Act Parl. 11. Ja. 6. whereby Theft in

¹ Succeeded to Herries and Nithsdale peerages upon the death of his father in 1677. Died 1696.

² Fifth viscount; succeeded as heir male of Robert, fourth viscount, in 1663. Died 1698.

a Landed Gentleman is declared treason. This Diet is continued as to the Viscount of Kenmure, in regard there is not a full number of Assize and the Assizers are unawed.

Edinb^r *ult.* March 1664.

Advocatus and Beatrix Gawine, Relict of umq^{ll} W^m Keith in the Milltown of Gavill and the sons of the Defunct agt. Thomas Keith in Canuster for the Slaughter of the said umq^{ll} W^m Keith, the registrate Letters are produced whereby the Defender is denounced for not finding Caution and he thereupon declared fugitive.

Edinb^r 12 Aprile 1664.

Thomas Harper, Cordiner, in Ed^r compears and excuses James Ayton and produces a Testificate of his Infirmitie subscribed by the Minister and Elders but not bearing to be on Soul and Conscience. Witnesses are also examined and he excused, and the Justices ordains him at the next Dyet to be carried to the Court and the Cautioner to continue.

The like done in the case for James Elder, Baxter in the Canongate. Thomas Harper aforementioned indyted for Usury also continued till the next Diet.

Edinb^r 20 Aprile 1664, Deput Cuinghame p^t.

The aforementioned James Aitkin, James Elder and Thomas Usury. Harper compear and offer themselves to Tryall. The Diet is continued as to Aitkin and Harper and James Elder is insisted against, that notwithstanding by the 222 Act Parl. 14 Ja. 6 it be statute and ordained, that whosoever committs Usury or Okery, that is to say, takes more @rent or profite for Loan of Money than is prescribed by the Laws of the Kingdom, whether the same be great or small upon Pledge, Obligation, Act or Contract, shall ammitt and tyne his principall Sum or Stock, and be the 247 Act Parl. 15 Ja. 6. that all Usurers and Okerers shall be conveyened before the Justice, and shall not only be punished in their persons and be confiscation of their moveable goods, but also shall forfeit the Sums lent out by them upon Usury in manner at length specified in

the said Acts, likeas by severall other Acts of Parliament, Acts of Councill and Laws of this Kingdome, the taking of more @rent or profite for money than is prescribed by the Laws of the Kingdom for the time, as also by the Common Law the crime of Usury is reprobate as *L: improbum C. pro quibus infamia rogatur*, and by the Canon Law *Decreti Secunda parte causa 13*, nevertheless it is of verity that the said James Elder for the sum of 800 mks. lent be him to Walter Lightbody, merchant, has for the same sum taken more than ordinary Interest these two years by gone, viz. 8 per cent. Throw committing whereof the said James Elder has contraveened the tenor of the said Acts of Parliament made against Usurers and Okerers. The Justice ordains the Dittay to be put to the knowledge of an Assize. The Assize finds him Guilty. The Probation is by two Witnesses who saw the @rent paid. The Justices thereupon ordains his Moveables to be escheat, and ordains him to find caution under the pain of £1000 for his entry before them or before the Privy Councill, whenever he shall be required to undergo such other punishment as they shall think fitt to inflict upon him.

Edinb^r 21 April, 1664.

Adultery and
Murder of his
wife.

Advocatus and the nearest of kin of Margaret Cuninghame, spouse to John Swinton, Baillie in Corstorphin, and Jonet Brown, widow there, for the Murder of the said Margaret his Wife under trust, and for the Crimes of Adultery, bearing that albeit Murder under trust be punishable as Treason by the loss and fforfaulture of Life, Lands and goods, and by the 74 Act. Parl. 9. Q Mary, and 105 Act. Parl. 7. Ja. 6. nottour and manifest Adultery be punishable with Death, yet nevertheless the said John Swinton being married to his said Wife divers years and having procreate severall children upon her, and undutifully conversing and haunting with evill company and women of bad fame and reputation, and because his said Wife testified her self to be dissatisfied, he did often beat her and upbraid her, and did neither bed nor diet with her as became a Husband, no did keep company with her and withdrew her entertainment, and did converse and diet out of his House with the said Jonet Brown, and committed Adultery with her

after he was advertised by the Justice of Peace to forbear her company within her dwelling house or ane or other of the chambers or office houses thereof, and thereafter having conceived a hatred against his wife by the instigation of the said Jonet Brown, contrived to murder her, and for effectuating thereof, they two being in company with the said umq^l Margaret Cuningham in their dwelling house in Corstorphin, and having of purpose sent away the servants upon certain pretended errands, they committed the said Murder on her by giving her divers mortall wounds, whereof she immediately thereafter died and was left by them wallowing in her blood within the cellar of the said dwelling house, and swa she was murdered by him at the instigation of the said J. B. and they or either of them are actors art and part of the samen Murder, as also of the forsaid Crymes of Adultery, etc. and concludes *in communi forma*.

The Pursuers personally present and reporting the Letters duely execute are compearing by Mr. David Dinmure at whose instance the Lybell is raised, as substitute for the King's Advocate, and Mr. Ro^t Sinclair, Advocate, and the Pannells are compearing by Sir Geo. Lockhart and Mr. Geo : Mckenzie, who at this time had laid down his place as Justice Depute.

It was alledged for the Pannells by their said Advocates denying the Dittay, that the murder under trust lybelled was not relevant as found¹ upon the 51 Act Parl. 11 Ja. 6, except there be some other trust condescended on than that common trust and assurance betwixt man and wife, because the Trust meant by that Act has been by the custom at least must only be interpret to be meant of a Trust which hath induced the Person killed to come under the shelter of the killer, and after a previous and preceeding enmity and the word Assurance is only made use of to express a Trust betwixt these who were formerly Enemies as the 51 Act Parl. 12 Ja. 2. Likeas the crime of Parricide is by our law stated as a distinct Crime from murder under Trust, albeit that there cannot be a Trust of this nature.

Replis Dunmure that he oppones the Lybell and the forsaid

¹ 'founded' in Adv. MS.

Swinton's Trial
for Adultery and
for the Murder
of his Wife.

Act of Parliam^t anent Murder under Trust which ought to be extended to the Trust of a Wife to her Husband as being the greatest of all Trusts, and to the pretence that Murder Trust presupposes a preceeding enmity, and that the person murdered is under the murderer's protection oppones the constant practique, in particular the Case of James Douglass agt. Andrew Rowan in Barnhill for the murder of his Wife, *anno* 1627, agt. whom a Dittay of Treason was lybelled and sustained on the forsaid Act of Parliam^t and he condemned, and as to the other part of the Alledgiance, stating Parricide as a distinct Cryme frae the murder, it is no other distinct but as Species from Genus, murder being Genus and Parricide one of the species.

Mr. Robert Sinclair for the Pursuer declares that they insist not in the qualification of the Dittay to import Treason but to aggravate the Crimes of simple Murder and Adultery to which they restrict.

Conform to the which Declaration the Justice Depute sustained the Dittay, and ordained the same to pass to the knowledge of an Assize, and declares that he having formerly examined the witnesses finds the nature of this Crime such as he thinks fitt to make use of Women as Witnesses for proving thereof.

Nota the Justices did right, for this was *Crimen occultum* to be made out *per indicia* arising from the Testimonys of the Witnesses as appears by the Lybell it self; which bears that no person was present at the murther but the two Pannells, the Servants of the house being sent out upon errands.

The Assize upon the Testimony of the Witnesses fand John Swinton guilty of the murder and cleanged Jonet Brown, and fand them guilty of the crime of Adultery with others but not clear that it is nottour Adultery, they referred that to the Justices, declaring they filed them only of Simple Adultery.

Upon which Verdict John Swinton was condemned to be beheaded at the Mercat Cross of Ed^r the 1st day of May next, which was accordingly execute, but the Sentence relates only to the Murder, and could not be otherwise where the Adultery was not Nottour.

The Probation that was for the Crime of Adultery in this Process, Agnes Johnston the 11th witness depones she saw them in the Act and Helen Miller and Mary Scott, the 15 and 16 Witnesses depones upon their being in bed together, and that they heard a noise, and many depones upon their conversing in suspect places, kissing and embracing, and that he did forbear his wife's company.

The Murder is proven thus, 1st that there was none in the house when the murder was committed but the Husband and Wife, and that the Body was hidden aud obscur'd after the Murder, and that the wounds were such as the Wife could not give to herself, and a Servant of the house depones, that the goodman sent her an errand before the murder was committed, and shut the doors behind her, and opened them himself again, and that he was long in coming to the door, and pretended he was sleeping. Many prove the beating her formerly. All which Probation was sufficient to convince any Assize that he was guilty of both the Crimes.

Edinb^r 22 Aprile 1664. Mr. Jo: Cuningham, Depute, present.

Thomas Harper, Cordiner, indited for severall points of Usury and continued.

Eodem Die.

Sir Alex^r Forbes of Tolquhone¹ accused for the bleeding and wounding Mr. William Innes, Writer in Edinburgh, in manner contained in the Dittay, viz. by giving him a wound on the 13th instant at the Cross of Edinburgh, under the left pap with a Whinger, and immediately thereafter giving him a second wound, saying he would gar 50 pieces procure him a Remission tho he should kill him. Blooding and wounding.

Tolquhone produces the Act of the Baillies of Edinb^r as Justices of Peace in themselves, and Haliday, their officer, compearing and being sworn, deponed that he had charged Tolquhone and the Witnesses upon the 14 instant,

¹ Fourth laird of Tolquhone, son of Walter Forbes. Married Bethea Murray, daughter of the laird of Blackbarony.

whereas Mr. W^m Innes his charge to compear before the Justices is on the 15th day. In respect of the which Decreet the Justice Depute found no Process. The Justice Depute declares that in case the Baillies of Edinburgh modifie not the Assythment betwixt and Tuesday next, the Justices will then modifie it themselves.

Edinbr^r 26 Aprile 1664.

John Hamilton agt. Geo. Smith, merchant in Kilmarnock, indited for wilfull throwing the Pursuer over his Stair, thereby bruising his body and mutilating him of both his arms, continued till the 14 June.

Mr. William Innes having applied to the Magistrates of Edinburgh to modifie the Assythment in his action mentioned 22d instant, and having taken Instruments, upon their refusall the Justices upon production of this Instrument with a Petition given in to them, modifies 400 merks, with this Declaration that if Tolquhoon make payment of the one half upon intimation of this order without furder Process or Execution, that then he shall be free of the remnant, otherwise to be liable in the hail.

Edinbr^r ult. May 1664. Deput Cuningham, present.

Gregory agt. M^r
of ffrendraught,
etc.
Slaughter.

David Gregory, Burges of Aberdeen, brother to umq^{ll} Mr. Alex^r Gregory of Netherdale, and his relict and Cusin Germans and King's advocate for his interest against James M^r of ffrendraught, James Crichton of Kinnairdie, ffrancis Crichton, his son, James Duffus, servitor to the said ffrancis, George fforbes, servitor to the said M^r of ffrendraught, W^m Innes there, Geo: Mearns there, Ro^t Garras there, James Howie, son to George Howie in Comislie, for the Murder, at least Slaughter, of the said Mr. Alex^r Gregory, Pannell, all the rest are declared fugitive for not finding Caution to compear except ffrancis Crichton who is prisoner in the Tolbooth of Edinbr^r, for whom Mr. Geo: M^rkenzie, advocate, compeared and produced a letter from the King direct to the Justice Generall and Justice Deputes, desiring them to sist all Process as to ffrancis Crichton untill his Majestie should be informed by his

Privy Council at their meeting in June next, whether Mr. Alex^r Gregory did die of the wounds given be the said Francis to him, bearing that the king was informed he did not die of them. The same day Robert Collace in Auchingowll and James Moriell, his servant, two of the Pursuer's witnesses, are unlauded for their absence, and the Diet continued till the 3d of June.

Edinb^r 1 June, 1664. Mr. Da : Dinmure, Just. Depute, in Court.

Advocatus and Thos. Lennox, Glover in Edinburgh, agt. ^{Vitiation.} Richard Murray of Burghtown and John Gordon of Kirkonnell, who became Cautioner for him on the 11 of feeb. last to present him to underlye the law for falsifying and vitiating in the dates an Assignation made by John Muir, Writer, to William Stewart of Eggernis, of £30 resting of a greater sum contained in a Bond granted by Jo: Moubray and the said Thomas Lennox to John Mure thereupon in August 1659, with the Bill, Letters and Charge of Horning following thereon. The Cautioner is unlauded for not presenting Burghtown this day and Burghtown declared fugitive, which is mentioned to be the second time for the same cause, this Sentence bearing expressly that because the said Richard Murray was formerly declared fugitive and put to the Horn for the said Cause, also decerns and ordains him of new to be denounced, and the first denunciation is marked day of 166 .¹

Eodem Die.

John Cuthbert in Tillielumb accused of Adultery with Margaret Whyte, his own servant, and declared fugitive.

Edinb^r, 2d June 1664. The Just. Clerk and Depute Cuninghame present.

This day Mr. Robert Dickson compares for the Viscount of Kenmure and produces an Act of Privy Council, whereby in respect the Counsell upon Kenmure's Petition to them desiring that they might grant Warrant to some of their

¹ '5th January 1664' in Adv. MS.

number to inventory the Writts of the estate of Kenmure, mentioned in the Criminall Process depending at the Mr. of Herreis instance agt. him, had ordained the Master to be cited to answer to that supplication, therefore reccomends to the Justices to continue the Dyet which accordingly the Justices do continue till the 15 of June next.

Eodem Die.

The Diet against Thomas Harper for Usury, continued till the 9th of June.

Edinb^r 3d June 1664.

The Diet at the instance of the nearest of kin of Mr. Alex. Gregory agt. Crichtons continued *pro secundo* till the first of July.

Edinb^r 7 June 1664.

The Lord Blantyre¹ agt. James M'culloch for Theft continued.

George Black agt. James Middleton, Messenger, agt. Mr. James Reid of Bara, and his son and others for Deforcement deserted, the son being present to underlye the Law and the ffather and Arthur Simpson excused for sickness, for which cause it deserts not only as to them but as to all the absents.

Edinb^r 8 June 1664.

Advocatus and Alex^r Chisholme agt. John Myle M'Lean and many other Highlanders for Theft, declared fugitives and the Witnesses for absence unlawit.

Morison of Dairsie and others agt. Rot. Shaw, Messr., and others for Oppression, continued till the morrow.

John ffouler and his servants agt. Dickson and Beltie for Oppression and Hamesucken, declared fugitives.

Edinb^r 9 June 1664.

Morison of Darsie and others agt. Shaw, messenger *et E. contra*, continued till the 13th instant.

¹ Fourth baron; succeeded 1641.

Edinb^r 13 June 1664. Lo: Just. Clk. and Depute Cuninghame present.

Advocatus and Alex^r Chisholm agt. a number of Highlanders for stealing a great many Horses and Cows, and for wilfull fire-raising and burning of Houses, Angus M^cGillichallum one of the Defenders found guilty of the fire-raising and Hugh Mule *alias* Hutchison M^calaster Boujj is cleansed of all points of the Dittay, the burning was in March last. Horse-stealing and wilfull fire-raising.

The Justice Deputes continue Doom till they advise with the Counsell. There is no dispute in the cause nor reason given for this delay.

Morison of Dairsie agt. Shaw, messenger, continued for the third time and the absent Witnesses unlauded each in 100 mks. conform to the Act of Parliam^t. The contrary action also continued and absent witnesses unlauded. Witness absent unlauded each in 100 mks.

Harper for Usury again continued till the 20 of June.

Edinb^r 14 June 1664.

Advocatus and Jas. Scott, tenent to Mr. W^m Maxwell, advocate, agt. Jno. Graham and others, Steillers and Cutters of Greenwood. The Diet deserted of consent and another Diet at the instance of the same Pursuer against W^m Thomson, continued till the morrow and then deserted.

Alexander Cuninghame, brother to the Laird of Grange, against George Smith in Kilmarnock, again continued till the morrow and then deserted.

Edinb^r 15 June 1664.

Advocatus, Walter Graham, Messr., Mr. George Norvell, advocate, and Walter Graham of Kirktown agt. Mr. Dougall Campbell of Lag for Deforcement, continued to 17th June instant.

The Viscount of Kenmure's affair agt. the Master of Herries again continued.

Edinb^r, 20 June 1664. The Just. Clerk and Deput Cuninghame present.

Mr. Geo: M^ckenzie, Advocate, substitute to the King's Usury.

Advocate, agt. Thomas Harper for Usury, in which action James Cuninghame as ffactor for the relief of Glencairn, Donatar to Usury, is also a Pursuer. Its alledged for the Pannell no Process at the ffactor's instance because the constituent is dead. The Judges sustains Process at the King's Advocate's instance, and ordains the ffactor's name to be delete out of the Summonds, whereupon Mr. Andrew Birnie protests this may be without prejudice of Glencairn's gift.

Thereafter Mr. Thomas Baird for the Pannell, alledged that albeit the Band bore more @rent than 6 pcent and be in the Pannell's name, yet it does not prove against the Pannell unless it can be made that he made use of this Band. Replies Advocatus and Birnie, 1^o An usurious paction is sufficient for the pains of Usury. 2^o offers to prove if need be that he made use of the Bond by pursuing or raising Horning thereon. The rest of the Debate is little worth. The Diet is continued till the 27th day.

Edinb. 22 June 1664.

Thomas Tweedie, merchant in Ed^r, against John Mitchell, smith. The Pursuer is ammericate for not reporting the Letters.

Edinb^r 23^d June 1664.

The Master of Herries agt. the Viscount of Kenmure for Stealling the Writts, again continued till the first of November next by Warrant of an Act of Privy Councill.

Edinb^r 24 June 1664.

The Laird of Dairsie agt. Shaw for Oppression and *E. contra* for Deforcement deserted.

Edinb^r 27 June 1664.

Advocatus agt. Harper for Usury, again continued till 4 July next.

Edinb^r 29 June 1664. Deput Cuninghame present.

William Stark, cordiner in Glorat and his spouse agt. Killing by a blow on the ear.
 Malcolm Brown, miller in Lennox mill, for killing William Stark, younger son to the Pursuer, by giving him a blow upon the right ear with so great violence that he never heard any in that ear, but being carried hom, languished be the space of six weeks and then died of the said blow. Mr. Andrew Birnie for the Pannell alledges that the Lybell is not relevant unless it had been lybellled that the blow was such that it did produce Death. 2^o offers to prove that the Defunct long after the blow without any wound or bruise was doing his affairs.

Mr. David Dinmure for the Pursuer oppones the Dittay, bearing that the Pannell struck the Defunct on the right ear and that he died of that stroke, and the Pursuer being *in lybello* must be preferred to the Probation.

The Justices sustains the Dittay and ordains the same to pass to the knowledge of an Assize with the burden of the forsaied Defence, whereanent he will take probation, and remitts both Dittay and Defence to the knowledge of an Assize.

The Witnesses proves the giving of the blow but nothing of Deafness or that Death followed on it, but on the contrary say they saw the boy in good health after the blow, and that he and his Parents declared they would not lay the Death upon the Pannell, upon which the Pannell is cleansed.

Edinb^r, ult. June 1664. Dep^t Cuningham present.

Advocatus and Da: Seton agt. William Ogilvie, prisoner. Prisoner sett at liberty because Pursuer not ready to insist.
 This prisoner is sett at liberty upon the Advocate's declaring that he had no Information agt. him and that Seton was not ready to insist.

Alexander Baillie found guilty of Theft and by the Council's recommendation ordained to be marked in the Cheek or whipped, is decerned to be whipped in the Tolbooth and to receive 30 stripes and to be banished the kingdome never to return under pain of death. Punish^t for Theft by the Pr. Councils recommendation.

Edinb^r, 1 July 1664, the Earl of Athol Justice Generall, the Justice Clerk and Deput Cuninghame present.

The Lord Blantyre and M^r David Dinmure, Advocate, substitute to the King's Advocate, against James M^cCulloch for Theft, continued to the 4th of July.

Eodem Die.

The nearest of kin of M^r Alexander Gregory agt. the Viscount of ffrendraught, James Crichton of Kinnairdie and ffancis Crichton, brother to the Viscount. The Diet continued as to the first two, and ffancis declared fugitive for his absence by virtue of an Act of Privy Councill remitting the matter to the Justice after they had suspended the Tryall for a while upon a letter from the King in regard that the said ffancis by his escape out of the Tolbooth had taken the guilt upon him, after which the Councill refused to proceed in the Precognition which they had begun for his majesties information.

Edinb^r 4 July 1664.

The Viscount of ffrendraught¹ and James Crichton of Kinnairdie his father enters the Pannell. The Lybell against them (and ffancis declared fugitive) is as follows, that notwithstanding by the law and practique of the Kingdome, Slaughter of any of the Lieges be punishable with Death and confiscation of the committer's goods, and by the 51 Act 11 Parl. Ja. 6 it is statute that where the person is slain under trust,² credite, and assurance and power of the party slayer, the crime is Treason and Lese-Majeste punishable with the loss of life, land, and goods, as also by the Laws and Acts of Parliament

¹ James, second viscount.

² The statute declared a murder under trust to be 'quhair the partie slaine is under the traist credite assurance and power of the slayer.'

'The enactment was meant for those cases where the deceased had put himself into the killer's power, or at that particular time, under the pledge and assurance (either express or implied in the situation) of hospitality and protection.'—Hume, i. 286.

of the Kingdom, the taking and imprisoning of the Lieges without Warrant is a crime of a very high nature, to be punished as incroaching upon his Majesties power and royall authority, nevertheless it is of verity that the saids Defenders having conceived deadly hatred and malice against the said M^r Alex^r Gregory of Netherdale, and the said ffrancis Crichton. having on the 7th March last rencountred with the s^d M^r A. G. at the house of M^r Alex^r Garne,¹ minister at fforg, the said ffrancis treacherously invited the said M^r A. G. to go alongst with him from the said house, which he fearing no harm accordingly did, and as they went along the said ffrancis Crichton without any provocation and forethought felony and precogitate malice drew his sword and ran at the said umq^{ll} M^r A. G. thinking to have killed him at one thrust, but the s^d M^r A. G. eviting the stroak and closing with him not offering to do him any pre-judice at all, the said James Duffus drew his sword and strak at the said umq^{ll} M^r A. G. whereat his horse running away and the said ffrancis mounting his horse, he divers times ran upon the said umq^{ll} M^r Alexander, who yielded himself prisoner to the s^d ffrancis and delivered to him his arms being required by him sua to do, hoping that his honour would thereupon have obliged him to have desisted from all further troubling and assalting him, but upon the contrary the sd ffrancis basely and treacherously with the assistance of the said ffrancis² Duffus his servant, pursued him more eagerly then of before, fired pistolls at him, gave him severall wounds in his head and breast to the effusion of his blood in great quantity and then caused him to mount up behind the s^d Jas. Duffus and carried him to the house of Geo: Morison of Bognie and put him in a chamber wherein the s^d Ja: Visc^t of ffrendraught was lodged, and there the said ffrancis Crichton left him and upon the morn being the last of March last by past about 3 hours in the morning the s^d ffrancis Crichton accompanied with Walter Hendry, gardiner at ffrendraught, W^m Innes there, Geo: Mearns there, Ro. Tarras there, Ja: Howie son to Geo: Howie in Comistie and the s^d James Duffus, all in arms, came to the

Viscount of
ffrendraught
and his brother
ffrancis Tryall
for the murder
of M^r Alex^r
Gregory.
Lybell.

¹ Or Garden, minister of the parish of Forgue between the years 1645-66.

² A mistake for James.

Lybell.

said House of Bognie where the said umqⁿ Mr A. G. was lying bleeding in his wounds. They and the said James, Viscount of ffrendraught and Geo: fforges his servant, after many base and opprobrious threatnings uttered by them agt. the s^d M Alex^r G. most inhumanely and barbarously drag him out of his bed as he was lying bleeding in his wounds, and that without cloak, hat, shoes, or boots, and did cast him overwhart an horse upon his breast, his head and arms hanging on the one side and his legs on the other side and so carried him away in a cold and stormy morning to Geo: Young's house in Cranloch being an obscure place and miles distant from the said House of Bognie where they kepted him prisoner, fasting, in his wounds, be the space of 3 days *tanquam in privato carcere* and then deserting and leaving him. He was upon the 13th of the said month, by the help of some friends, carried to the Burgh of Aberdeen where he lay languishing of the s^d wounds and other bad usage which he had received of the fore-named persons and then died of the same, and swa was cruelly and unnaturally killed and murdered by them, of the which Murder under Trust at least Slaughter upon precogitate malice and forethought felony, as also of the said usurpation of his majesties authority in taking and apprehending unwarrantably a free Liege, the foresaids persons and ilk ane of them, as also the said Ja. Crichton of Kinnairdie, by whose instigation and hounding out the forsaid crime of slaughter upon forethought felony and precogitate malice and usurpation of his majesties authority were committed, are actors art and part, and the same being found by an Assize.

Diet deserted
as to Kinnairdie
the ffather
of the De-
fenders.

The Justices deserts the Diet *simpliciter* as to James Crichton of Kinnairdie, declaring that the parties pursuers shall never be heard to pursue him and also that no new Letters be direct against him at the King's Advocate's instance without Warrant of the Justice.

Pleadings.

It was alledged for the Viscount of ffrendraught the only Pannell insisted against (all the rest being either denounced fugitives or absents or past frae) that the Pursuer ought to condescend upon what law he founds the Lybell as to the *Crimen plagii*, and if the [*sic*] insists against the Defender as Actor or as art and part only.

M^r Da: Dinmure for the Pursuer declares, they insist for art and part of the murther and the crime of Plagium and founds the Dittay as to plagium upon L. 6. § 2 *Favia de plagiarijs*. Their words *l. Favia cavetur ut liber qui hominem ingenuum aut libertinum invitum celaverit, invinctum habuerit emerit, sciens dolo malo quive in eorum qua re socius erit, quique servo alieno servaere persuaserit, ut a Domino Dominave fugiat: vel eum, eamve invito vel insciente Domino, Dominave celaverit invinctum, habuerit emerit sciens dolo malo, quive in ea re socius erit: ejus pœna teneatur*, and as for the pain of his Crime it is contained in the 7th Law of the same Title to be arbitrary. Visc^t ffren- draught's Tryal for the murder of M^r A. Gregory. *ffirst of all the stealling of a free man was capitall as appears per Leg. 1. hoc tit. both against the buyer and seller of him, the pecuniary pain was abolished and these who were taken in the crime were punishable pro delicti modo et plerumque in metallum damnabuntur, ut pateat ex l. 7.* Pleadings.

The Justices Sustains the Dittay only Art and Part of the murder and taking and incarcerating the King's free Lieges. Interioq^r.

M^r Geo: M^rkenzie for the Pannell says, the Pannell cannot pass to the knowledge of an Assize for either of these, because, they being statutory crimes, and wherein there is more of lapse and faculty of Judgement than activity committed against the Law of the Nation, the same cannot be inferred against such of the Pannells who are minors, especially seeing by our Law Lib. 3 cap. 32 § 15 Reg. Majes. *qui infra ætatem est de nullo placito tenetur respondere per quod possit amittere vitam aut membrum*, and by an express decision related in the Gloss of the 2 Book of the Majestie cap. 41 betwixt his Majestie and the Abbot of Arbroth, this Law is expresly corroborate and it was found that upon a Statutory Crime a minor could not pass to the knowledge of an Inquest upon a Libell inferring Loss of Life or Limb, of which both Law and Decisions the learned Skeen, our countreyman, hath from the Civil Law given a reason upon the Gloss upon that first chapter, *Nam minor vel juvenili calore vel imperitia aliquod dicere vel facere potest quod vitæ ipsius nocere potest.*

Its replied be M^r David Thoires for the Pursuer, 1^o That Murder under Trust and plagium are crymes of a very high nature and opposes the 21 Act Parl. 14 Ja. 6 about the

middle of the Act, where the Crimes lybelled are expressly punishable as treason.

Nota. This is the Act cited in the Dispute but the true Act is¹

2° Howbeit. Minors *infra pubertatem* may plead mitigation of or exemption from Payns, yet these minors who are *majori- tate proximi* can plead no more.

The Viscount ordained to pass to the know- ledge of an Assize.

The Justices desert the Diet *simpliciter* as to the said James Crichton of Kinnairdie, as is marked before, and ordains the Viscount of ffrendraught to pass to the knowledge of an Assize notwithstanding of the Defences for the Crimes of Murder, incarcerating and detaining an free Liege and for art and part in these Crimes.

Assoillied.

The Assize having considered the Testimonies of the Wit- nesses adduced, they all in one voice cleansed the Viscount of ffrendraught of the Crimes lybelled.

The Proof that was led.

The Witnesses examined in this process are only two, George Morison of Bognie and George Mowat, his servant, who had been examined in the Precognition before the Councill. Bognie adheres to his former Deposition made before the Counsell, and farder says the night the Defunct was brought to his House the Viscount stayed up all that night and went not to bed, but staid beside the Defunct, because it was the Viscount's chamber where the Defunct lay in. That the Viscount was not att Young's house when Bognie went there, that both the Defunct and the Viscount wrote to this Deponent to come to them. He saw not the Defunct casten over the horse, that the Defunct wrote Letters to his wife of his condition, and the Viscount desired him to blot it out, and he refusing, the Viscount tore it. That the Letter buire his being wounded by ffancis Crichton but buire nothing of his restraint. That the 2^d Letter buire nothing of ffancis Crichton his wounding him. That after the Deponent came to Young's house, he saw no restraint upon the Defunct. Depones that the Defunct said to the Viscount in Bognie's house, seeing he had not been accessory to any thing against him that he would continue so, and not meddle with the Defunct, whereunto the Viscount answered nothing. That he heard the Defunct spear at the

Visc^t ffrend- raught Tryal for the murder of Mr. Al. Gregory.

¹ See 11 Parl. James 6, c. 51.

Viscount what meant the scouring of the Guns, whereunto he answered, that he was to do with his guns what he pleased. Says that the Viscount oft times used to scour his Guns. Depones that he heard the Defunct say he was well pleased that he was brought to the Deponent's house because he was his friend, and had good skill in Chirurgery. That the Defunct was not as a Prisoner in the Deponent's house. That the Defunct never offered to go away nor the Viscount ever hindered him. That when they took away the Defunct out of the Deponent's house, they pretended they were taking him to a Chyrurgeon at Rain, but being a fould day they went to Cranloch. That he heard the Defunct say that the Viscount had used him civilly and acknowledged it and promised compensation. The Proof that was led.

Mowat, the other witness, also adheres to his Deposition before the Councill, and farder says that his Master went to the Viscount at Cranloch. He saw no rudeness, but saw the Defunct go out and in as he pleased ; saw no company with him ; saw him go out and in about the yards. He was not at Bognie. He saw no injury done by the Viscount at Cranloch to the Defunct, but saw them drink together. He saw no restrain put upon the Def^t but he might have gone away the 3^d night.

I have insert these Depositions word by word, first because ffrancis Crichton who was esteemed the principall actor and made his escape out of Prison and was declared fugitive *ut supra* has in this year 1683 returned to the kingdom with a Warrant for a new Precognition to the Privy Council and after Tryall and Debate, has obtained a Remmission. 2^o That David Gregory, the Defunct's heir does now challenge Bognie for not using his endeavours to rescue the Defunct his Superior, and upon this same Depositions has raised a Declarator against him before the Lords of Session, to hear and see it found and declared that he has tint and ammitted his few.

Eodem Die.

The Process of Usury against Thomas Harper, and my Lord Blantyre's Process against M^cculloch again continued untill the 6 of July and at that day continued till the 11th.

Edinb. 6 July 1664.

David M^cbrair is enacted as Cautioner for Ro^t M^cbrair, his son, to answer when he shall be required for such Crimes as shall be laid to his charge for the alledged beating of Jonet Lawrie upon the 6th of July 1664 within the Parl^t House, under the pain of 500 Ms.

Edinbr. 7 July 1664.

The Lord Blantyre agt. James M^cculloch, lately his Servitor, for the Theft and Receipt of Money, cleansed by the Verdict of ane Assize.

Edinbr. 11 July 1664. The Just. Clk. and Cuninghame present in court.

Beating and
Wounding.

Jonet Laurie agt. Ro^t Lyne in Rigside, Robert M^cbrair and others for cutting of Greenwood and wounding the Pursuers to the effusion of their blood. The cutting of the Wood being past frae and the Diet as to that deserted.

It was alledged by Sir Rot. Sinclair¹ that as to the beating and blood (always denying the Dittay) the Pannalls cannot pass to the knowledge of an Assize because any beating and blooding that was committed upon the said Janet Lawry, pursuer or her servants, was in hindering them to carry away certain Timber which was cutt upon the Lands of Netherwood, and were lying there knitt and coupled for the use of Sir Ro^t Murray and his servants, then possessor of these Lands.

Laurie ag.
Netherwood
and others.
Beating and
Wounding.

Replis Mr. David Dinmure oppones the Dittay bearing, that the Pursuer and her Tenants were peaceable grazing upon the lands of Netherwood with their goods, and that the Pannells armed with Slings and Staves did strike them to the

¹ Of Stevenson, nominated a Lord of Session at the Revolution. On 29th July 1680, he was tried with Fletcher of Saltoun before the Court of Justiciary for 'seditiously and factiously opposing, at least obstructing, his Majesty's Service in putting the Act of Privy Council to execution for levying 5500 men out of the militia.'

effusion of their blood, and esto that Sir Robert Murray have right to the lands and did give the tollerance forsaid to cutt the Tries, yet the Pannells ought not to have beaten and wounded the Pursuers.

Sinclair thereafter alledges against the Dittay that its generall and irrelevant, not condescending upon the day, month nor year in which the crime was committed.

Dinmure condescends it was on the day of May last. Sinclair farder alledges that he is content that the Dittay so far as it bears the beating and wounding to be done upon the lands of Keltown shall pass to the knowledge of an Assize, but in so far as its lybelled to have been on the lands of Netherwood oppones his first defence.

Dinmure Replys to that first Defence farder *non refert* whether Sir Ro^t Murray who grants the tollerance had right to that wood or not, seeing even a person having right should not defend his own in an unlawfull manner *nam qui rem etiam suam non jure occupat punitur ut invasor*, and the question is not here about the right of the Wood but *ad vindictam* for the Ryot.

The Justices ordain the Dittay to pass to the knowledge of an Assize with and under the burden of Mr. Ro^t Sinclair's Defence, and declares they will take probation both for proving the Dittay and Defence, and will consider the same after the Verdict.

The Assize found the Dittay Not Proven by the Witness and therefore cleanses the Pannells.

Eodem Die.

Andrew Burnett, Burgess of Aberdeen, indyted of Usury, continued to the 15 of July, and Thomas Harper for Usury to the 2d of August.

Edinbr. 15 July 1664.

The forsaid Dyet against Burnet deserted. It appears by the Lybell as its here narrated that the Usury is for setting a Back Tack of the lands of Door to the Lord ffraser, the heretor

and granter of the Wodsett, for more than the ordinary @ rent.¹

Edinbr. 18 July 1664.

Beating in the
P^t House when
the Lords were
sitting.

Robert M^cbrair, son to David M^cbrair of Arnigill, indited for strikeing Jonet Lowrie, relict of the Provost of Dumfries, upon the 6th of July instant, within the new Session House of Edinbr. upon a forenoon between 10 and 12 a clock, when the Lords were sitting, by the violence of which Stroke she fell to the ground, and thereby has contraveened the 173 Act Parl. Ja. 6, and has incurred the pain of Death. This Dyet continued till the 20th instant, and then of consent of both parties deserted.

Eodem Die.

Advocatus and Alex^r fraser, messenger, agt. Robert Adam in Carnbulg, and others, for Deforcement. This Diet continued also till the 20 instant, and from thence to the 21, at which time the Pannells are assoillied.

Edinbr. 1 August 1664.

John Lyon of Craigston and the Advocate for his interest agt. a number of Highlanders for Theft and Receipt; the Defenders declared fugitives for absence.

Eod. Die.

Advocatus and the relict and n. of kin of John Colthird agt. Sir John and Sir William Bannatynes, sons to the Laird of Corhows, and Christopher Bannatyne of Overhall, continued to the 1st of feb. next upon a reference from the Privy Council, proceeding upon the Petition of the s^{ds} Sir John and Sir W^m Bannatynes, bearing that they were necessarily out of the Kingdome.

¹ It must be borne in mind that 'rent' or interest annual was then regulated by statute. By 11 James 6, cap. 52, £10 for each hundred; by a statute of 1649, £6 for each hundred.

Eod. Die.

Walter Drummond at the Mill of Menstrie, incarcerated in the Tolbooth of Lithgow for the alledged Slaughter of David Crawford of Kilbryd, upon his Petition to the Justices representing that he had purchased a Remission and had assythed the Parties, obtains a Warrant to the Magistrates of the said Burgh to sett him at liberty so being he be not arrested for any other Cause therein.

Slaughter.
Upon getting a
Remission and
assything the
Parties is
liberate.

Edinbr. 2 August 1664.

The Diet at the instance of the King's Advocate agt. Thomas Harper for Usury again continued.

Eodem Die.

Mungo Campbell, Writer in Edinbr. reports the Criminall Letters raised at the instance of Gibbon M^cGibbon in Lawers, brother to umq^d Gilbert M^cGibbon for himself and in name of the relict and other nearest of kin of the said umq^d Gilchrist for the Slaughter of the said Gilchrist and others, and protested that his Cautioner may be exonered.

Edinbr. 3d August 1664.

Patrick Craigie, Burgess of Kirkwall agt. David Sinclair of Ryssie, Geo: Sinclair of Gyre, Alex^r Stewart of Orpher, indited for the Crimes of Deforcement, the Defenders compearing and offering to underlye the Law, and the Pursuer W^m Mudie ffiar of Melsetter, James Manson, Mess^r at whose instance the Criminall Letters are raised, but only the said Pat: Craigie who had no Prory. from them, therefore the Diet is deserted and the Defenders and their Cautioners liberate.

Edinbr. 5 August 1664.

Sir W^m Bannatyne gives in a Petition to the Justices bearing that he had frequently attended the Diets appointed for his Tryall in the criminall action pursued agt. him and his Brother Sir John and others for the alledged Slaughter of John Colthird, and that at last this day was appointed peremptorily to the pursuers to insist with certification, and that

he being now one of the Gentlemen Ordinary of his Majestie's Bed Chamber and necessitate to attend his charge he could not consent to any furdur delay, therefore craved that if none would compear to insist, the Justices might do as they thought fitt, upon which Petition the Justices desert the Diet as to the Supplicant and discharge the giving out any new Letters agt. him without their Warrant.

Edinbr^r 10 Aug^t 1664.

Mungo Boswell younger of Duncannear cautioner for his ffather unawed for not reporting the Criminall Letters raised at the ffather's instance agt. John Aird.

Edinbr. 24 of August 1664.

Advocatus agt. Walter Miller, maltman at the West Port of Edinbr., Robert Porteous, broiderer in Edinbr^r, Robert Brown stationer there, Alex^r Innes, merchant there, Mr. James Daes, minister at Ersiltern,¹ for Usury, continued till the 8th of November.

Edinbr^r 5 Octo^r 1664.

Deput Cuningham present.

Perjury.

Sir Thomas Stewart of Garntully² against Mr. James Row,³ minister at Monivaird for Perjury. The Pursuer being called to report the Letters direct at his instance for charging the Defender to find caution to underlye the Law in the said Crime, compears Mr W^m Sydeserf, writer in Edinbr^r, and declared that he had become Cautioner for the Defender's compearance, but it not being possible he could attend, he had produced a Warrant under the hand of the Earl of Athol, Justice Generall, dated at Edinbr^r 30 July 1664, whereby his

¹ Earlston. James Daes was deposed from this parish in 1659, and re-appointed under an Act of Parliament in 1661. We can well understand from those facts to which party in Church and State this gentleman belonged.

² Grandtully.

³ Formerly at Muthill, was minister of Monivaird between 1665 and 1680. Said to have been the author of a sermon called the 'Pockmanty,' preached in St. Giles, Edinburgh, 1638.

Lop. does continue the Diet from this day to the 16 of November next to come upon thir considerations he behooved this day to attend the provinciall Synod of the Province where he lives, and though he could be at Edinburgh as he cannot, yet he could not have the opportunity of Advocates to defend him, as also produced an Execution under a Messenger's hand, bearing that conform to the command of the said Warrant, had intimate this continuation to the Pursuer Garntully, and therefore craved that the Justices would also continue the Diet and the Cautioners to the said 16 of November, conform to the tenor of the Warrant, which desire the Justices grant in obedience to the forsaid Warrant and Execution.

Edinb^r 25 Octo^r 1664.

Advocatus against Alexander Scott, Goldsmith in Edinb^r, John Nisbett, James Wilson, W^m Blackwood, and many other Merchants and Inhabitants of the Town, for Usury, continued to the 22 of Nov^r. The Lybell is here at length repeated and sett down.

Edinb^r 1 November 1664.

The Master of Herries agt. the Viscount of Kenmure for M^r of Herries
alleged Stealling of the Kists of Writts of the Estate of ag^t the
Kenmure, mutuallly deposite in the house of untill the rights Viscount of
of the Pursuer as Heir of Line and the Defender as Heir of Kenmure for
Taillie be discust is again continued by Reference from the stealing Writts,
Council to the 1st of Decer. next. continued.

Eodem Die.

Advocatus and Margaret Stephen, relict of Andrew Ker in Midbeltie, Arch^d and Elizabeth Kerrs, his children, reports the Criminal Letters at their instance ag. William ffarquharson, son to Thomas ffarq^sone in Colliestone, and Arthur Braidie his serv^t for the murder and slaughter of the said Andrew Ker, and the Defenders for their absence declared fugitives.

Eodem Die.

James Stuart offers himself to underly the law in all such Crimes as should be laid this day to his charge conform to

the obligation granted be him and his Cautioners, and protests for their exoneration and freedome, which protestation is admitted in regard no person compears to insist.

Edinb^r 7th Nov^r 1664.

The Diet against Thomas Harper for Usury is again continued.

Edinb^r 8 Nov^r 1664.

The Diet at the instance of the King's Advocate agt. Walter Miller, maltman, Robert Porteous, Alex^r Innes, merchants, Robert Brown, stationer, and Mr. James Daes minister at Ersilton, for Usury is again continued to the 22 instant.

Eodem Die.

Advocatus ag. Watson in Grayhillock for Deforcement continued till the 10 instant.

Edinb^r 10 Nov^r 1664.

William Stuart and Robert Abercromby, messengers in Aberdeen, and the Lord Lyon agt. the s^d Watson, again continued till the 2d of May next, and Ro^t Watson one of the Defenders is declared fugitive.

Edinb^r 15th Nov^r 1664.

Pursuer and his Cautioner un-
lawed for not
reporting the
Criminall
Letters in
£1000 for a
Barron and
100 ms. for a
Yoeman.

James Ogilvie of Ragwell and his Cautioner un-
lawed for not reporting the Criminall Letters agt. Walter Ogilvie of
Boyne and others, viz. in £1000 for Boyne being a great
Baron, and 100 marks for every one of the rest being Yoemen,
and there is 80^l of charges modified to W^m Brockie, one of the
Defenders compearing with provision that if the one half be
payed without legall Diligence then it shall be accepted for
the rest.

Eodem Die.

William Baird reports the Criminall Letters agt. Peter
Logie, Baillie of the Queensferry for wrongous Imprisonment,

and the Defender's absence is excused upon production of a Testificate of his infirmity, and the Diet continued till the 6th December next.

Defender's
absence excused
by producing
a Testificate of
his Infirmity.

Eodem Die.

Robert Wilson as Cautioner for Callum M^cVorish in Tambea and others tenants to the Laird of Keir, that they should report the Criminall Letters raised at their instance ag^t a number of Highlanders, is unlauded.

Edinb^r 16 Nov^r 1664.

Sir Tho^s Stewart of Garntully ag^t Mr. Ja. Row, minister att Monyvaird for perjuring himself in an Action pursued at his instance against Gairntullie for certain Stipends wherein Gairntullie having referred payment to his Oath because he could not find the Discharges, he swore upon his great Oath, they were never paid. The Defender compearing and neither the Pursuer nor the King's Advocate being present to insist, the Diet is deserted.

Edinb^r 22 Nov^r 1664, Dep^t Cuninghame present.

Advocatus and the Earl of Glencairn's ffactor against Alexander Scott, goldsmith, James Wilson, W^m Blackwood and Agnes Burgund, his Spouse, and the severall persons contained in the respective Dittays of Usury, formerly continued to this Diet, the Pannells being 19 in number, all present.

Advocatus
craves severall
for Usury.

The King's Advocate declares *hoc loco* he insists against, W^m Rutherford, John Purdie, merchants in Edinb^r, Mr. James Daes, minister at Ersiltoun and the said W^m Blackwood and his wife, and the Diet is continued as to all the rest till the 7th of March next.

5 of the De-
fenders only
insisted ag^t
here.

Mr. Andrew Birnie, Substitute for the King's Advocate, insists ag^t Mr. James Daes, Minister at Ersiltown, and the said W^m Blackwood and his wife in the first place his Lybell is recorded with the others therein contained on the 8th of this month, from which time it was continued to this day. The Proposition of the Dittay is the same as to all the Defenders, being

founded on the Municipall, Civil and Canon Laws against Usury, viz. 222 Act Parl. 14 Ja. 6 and 247 Act 15 Parl. Ja. 6 appointing the crime of Usury to be pursued before the Justices and *l. improbum C. quibus causis infamia irrogatur*, and in the 2^d part of the *Decretum causa 13*, the substance of which Acts are narrated and the Proposition in the Lybell formed as may be seen in a like Lybell sett down of before the 20th day of April 1644. The Subsumption against Mr. James Daes upon these Acts and Laws is that in *anno 1644* he lent to John Learmonth, Portioner in Ersiltoun 2412 mks and took Surety of his lands by way of Wadsett, but never asked possession, but asked 8 p. cent, and renewed the Band yearly for principall and @ rent at 8 p. cent, whereby he made the bygone @ rents coalesce in a principall sum, and by virtue of that renewed Bond yearly and exorbitant @ rent upon @ rent he made the principall sum of 2412 mks that was lent in the 1644 to amount to 4730 merks, whereas if he had exacted the annual rents but according to the Acts of Parliam^t the sum would have been 1000 mks or 1000 £ less, being but months time.

Mr. Andrew Birnie, Substitute for the King's Advocate, restricts the Lybell so far as it is ag^t Mr. James Daes to be abovementioned particular and makes use of the remanent particulars of the Lybell only as aggravations ag^t him.

Mr. Ro^t Sinclair for the Pannell Answers that the Contract insisted on being a right of Wadsett granted in *anno 1644*. It was lawfull for the Pannell to make the contract bearing 8 pcent being then conform to the Standing Law of the Kingdome and the Law restricting @ rents to 6 p. cent not being made till the year 1649. And as to that part of the Lybell bearing that he took Bonds, accumulating the @ rent with the principall, there is no law to make such accumulation Usury, and as to the Quota of the sum due to the Pannell in the year 1653, it is true that by a Bond of Corroboration so much is due to the Pannell, but that Bond of Corroboration is granted for severall other sums.

Birnie Replies That the Bond of Corroboration is opposed which is for no other sum but the accumulate annualrents and for probation of his Lybell, Declares that as to the Articles

insisted on for aggravation he refers them to the Pannell's Oath, and as to the other Article he proves it scripto.

The Interloq^r is in these terms (which I do not well understand). The Justices will not sustain Process for 8 p. cent the contraverted years viz. from 1649 to 1652. Interloqr.

As to the remanent Pannells insisted ag^t Sinclair for one of them viz. W^m Rutherford, Alledges the Dittay not relevant because it condescends not on the time, and as to John Purdie and William Hamilton they deny the Dittay, and Birnie for the Pursuer condescends ag^t Rutherford and thereupon the Witnesses are received.

Nota John Learmonth the Debitor is admitted as one of the Witnesses against Daes *cum nota* and is purged of informing ag^t him in this particular and of all malice, and renounces all benefite he may get by the pursuit and proves positively that Daes compted with him at 8 p. cent in *anno* 1653. But the other witness is *Testes ex auditu* only, and also W^m Hamilton of Murehouse is received *cum nota* against W^m Rutherford to prove that he exacted 12 p. cent from the Deponent's mother and from the Deponent and his ffather for the money lent to his mother, And in like manner Tho. Kincaid of Wariston is received Witness ag^t W^m Blackwood, his creditor being purged as John Learmonth is.

The Assize fand the Dittay Not Proven against any of these five Pannells and cleanses them, and here their severall Decreets Absolvitor is insert.

Edinb^r 26 Nov^r 1664. Dep^t Cuninghame present.

Advocatus viz. Sir John Nesbitt of Dirlton¹ ag^t John Strachan, servitor to Geo. Turnbull, Baxter in Edinb^r, indyted and accused That albeit by the 78 Act Parl. 14 Ja. 2 and 75 Act Parl. 9 Q. M. and 83 Act *ibid.* and 17 Act Parl. 18 Ja. 6, Convocations within Burgh without consent

Mob in Edin^r raise ag^t Sir Walter Seton, farmer of the Customs. Lybell.

¹ Son of Sir Patrick Nisbet (Lord Eastbank). Admitted advocate 1633, and appointed Lord Advocate and a Lord of Session in 1664. He was the last man who held both offices at the same time. He resigned in 1677, and died in 1687. He is remembered as the author of *Dirlton's Doubts*.

of the Magistrates be prohibite under pain of Death, and by the 5th Act of the 1st Sess. of Parl. begun *anno* 1661, all Convocations be prohibite under pain of Treason, contrary to all which Acts, upon the 24 November instant, the s^d Jo: Strachan did convocate and assemble together a great number of the Apprentices and Inhabitants of Edinburgh, and marched up and down the streets with them to that height and degree of Insolence and to the affronting of Justice itself whereof the City of Edinburgh is the chief seat and where the King's Commissioner was residing for the time, That his Majesties said Commissioner was forced to give orders to the Lord Lyon, then commanding in the Castle of Edinb^r, to bring down a party of the Soldiers from the said Castle to suppress the said Tumult, which partie the said John Strachan and his Associats did resist with their arms in their hands, and the s^d Jo: Strachan having conceived a deadly hatred against Sir Wa: Seton,¹ then ffarmer of the Customs, for no other cause but that he was faithfull in his duty. He the said John and his Associates did assault and make search for the said Sir Walter by way of Hamesucken at the house of James Cockburn of that ilk, where he was lodged, and did threaten the said James Cockburn and broke up his doors to the terror of his wife and family and rifled his Goods and papers, and took Bond of the said James that he should appear in any Court to be holden by the Apprentices of Edinb^r, and opposed the Magistrates and the Castle soldiers who came to rescue the s^d James and Sir Walter Seton, and continued in these insolent practises till the soldiers overpowered them and took them in the very act, wherethrow the said John Strachan is guilty of the Crimes of Sedition and of complication of unlawfull Convocations, Rising in Arms, Hamesucken, Theft, and Treason, and of contraveining the forsaid Laws and Acts of Parliament, att least of one or other of them, and was a ringleader, at least was actor and promoter thereof, at least present in the said tumult and commotion and committing of the Crimes forsaid and art and part of the same, and has incurred the pain of Treason, at least the pain of Death and loss of life and moveables and the same ought to be inflicted on him to the terror of others.

¹ Of Abercorn. Created baronet 1663. Died 1692.

My Lord Advocate declares he insists 1^o *loco* against the Pannell upon the Crimes of Commotion and Convocation and upon Hamesucken not as a distinct Crime but as an aggravation of the other Crimes lybelled and that he insists upon the Acts of Parliament. Pleadings.

Mr. Geo: M^ckenzie, one of the Advocates for the Pannell Answers the Indytement as it is founded upon the Acts lybelled not relevant to inferr the pain of Death, and particularly as founded upon the 78 Act 14 Parl. Ja. 2 because the punishment in the said Act is only specified to the confiscation of their goods and their lives to be at the king's will because no arbitrary punishment in law can be extended to the pain of Death, and thereby Death cannot be inflicted till his Majestie be acquainted and declare his will, not as founded upon the 75th Act 9, parl. Q. M. because both be the Rubrick and Tenor of the said Act such convocations are only discharged wherein the parties conveyed keep men upon wages and pay, not upon the 83 Act of that Parl. because the same strikes against such as keep privy conventions, cloath themselves with weapons, goes with sound of Trumpett and open Bands jointly. None of the conclusions of this Dittay subsuming any of these Acts as the said Act is only temporary only forbidding such heinous Conventions without licence of her Highness or her Magistrates without mention of successors as the Dittay bears. Nor upon the 17 Act Parl. 18 Ja. 6, because the same inflicts not Death but a bodily punishment, and by the opinion of all Lawyers the generall of bodily punishment gives no warrant to any Magistrate to inflict the Punishment of Death. Nor is there any subsumption founded upon the 5th Act, 1st Sess. of his Majesties late Parlia^t because both by the Rubrick and Tenor thereof his Majesties prerogative as to the Militia is only asserted and such Conventions as impinge thereupon only prohibite.

S^r Geo. Lockhart another of the Pannell's Procurators farder says for him that the subsumption of the Dittay as to that member thereof of the Pannells being only present is not relevantly subsumed upon the Laws lybelled in the proposition because sole presence without a qualification of concurrence by command or accession by Deeds particularlie to be con-

descended on and lybelled is in no law sufficient to infer the crimes lybelled in the proposition ag^t the Pannell.

My Lord Advocate to the haill alledgiances aforementioned oppones the Acts of Parliament lybelled and the subsumption of the Dittay lybelled *in terminis* upon and conform and in the express words of the same, and where it is pretended that the Act of Parliam^t K. Ja. the 2^d does not contain capitall Punishment but only an ordinary pain. The said Act is opponed bearing that the Contraveeners of the same should be in the King's will as to any punishment he should please to inflict indefinite, and his Majestie, at least his Grace the Commisioner and the Privy Counsell, who represent his Majestie, has upon most just grounds and considerations declared his Majestie's will and that the pain of Death should be execute against the Pannell. But to take away all pretence it is clear by the other Acts of Parliament lybelled, and in speciall by the Acts of Q. M. that Tumults, Commotions and Uproars being of so dangerous consequence both as to the crime itself and as to the preparative and concernment of his Majestie, and People, is and ought to be punished at least with the pain of Death, and where it is pretended that the Deeds and Crimes lybelled do not fall under the compass and qualifications of the s^d Acts of Parliam^t and deeds, circumstances and qualifications libelled are opponed as being directly the case, and the terms of the said Acts of Parliament anent Commotions and Tumults and it is not necessary that the haill qualifications contained in the s^d Acts should be lybelled, it being sufficient that ane or other of the same, speciallie such as are materiall and imports and necessarily infers the motion and crime of Tumult and Commotion, which is the crime intended to be prohibite by the saids Acts, and that the for-said Cryme is lybelled and qualified with all the heinous and aggravating circumstances and aggravations, Tumults and Uproars. It is remmitted to my Lo. Just. Clk. and that the Deeds and Circumstances lybelled do amount to more than the s^d crime of Sedition, and as to the pretence that the said Act of Q. M. is temporary, and that the saids Acts do only militate in the case of private conventions and Tumults, the saids pretences are evasions of no weight, seeing Kings, Queens

and Princes do not dye as to their politick capacity, and authority of Laws and Acts made by them, and the same are in law constructed to be perpetuall unless they be limited to endure for a certain time only which is not in this case, and the forsaide Acts and other Acts of Parl. are ratified and renewed by the s^d Act of Parl^t of K. Ja. 6 afore cited which bears no limitation, and privy Conventions are understood to be such as are without authority or warrand of Magistrates, and that this is of that nature stout and notoure and where it is pretended that the said Act of Parl. Ja. 6 doth not contain the pain of Death but only arbitrary punishment, the s^d Act is opposed, renewed and rectifying the former Acts of Parliament, and declaring the contraveeners to be liable conform to the laws. And where it is alledged that the crime lybelled is not relevantly inferred upon the naked circumstances of being present, unless it were also lybelled that the Pannell did concur and was accessorie, the said Act of Parliam^t and the Common Law is opposed, and the said Act bears that all persons present at such unlawfull and seditious and tumultuous Convocations are liable to the forsaide pains. And it being the duty of all good subjects to concur to the suppressing of such Commotions and Tumults, at least not to countenance them, and in such occasions of Tumults and Sedition, speciallie under cloud and silence of night, where all persons be the Act and severall distinct actings cannot be known of necessity of law and reason the presence of any subject who doth not oppose such Tumult, imports downright accession to the same, otherways so heinous a crime and wherein his Majestie and whole countrey is so much concerned that the same should be punished be example should never be proven and consequently should never be punished, which is absurd.

The Justice Deput Sustains the Dittay as it is lybelled and declared by my Lord Advocate and Ordains the same to pass to the knowledge of an Assize and declares that he sustains the presence with the being in Arms and deeds of accession lybelled.

And after the witnesses were examined the King's Advocate desired the Justices before inclosing of the Assize to advise with the Councill for nothing is proven against the Pannell

Interloquitor.
After the Proof is led the Pr. Council is advised upon the matter before the Assize inclosed.

but his simple presence in Cockburn's house with a glass band of iron in his hand, and this by two Witnesses only, none of which prove any rude carriage, but on the contrary one of them depones that he dealt with others in favours of Cockburn, whereupon the Justices continue the Diet till the 28 instant and after that it is continued from time to time.

Edinb^r 28 Nov^r 1664.

An Assizer
absent is fined
in 200 mks.

Patrick Smith of Breko, ammerciate in 200 mks for not compearing to pass upon the Assize of John Strachan.

Edinb^r 29 Nov^r 1664.

Theft and Rob-
bery fugitate
for not com-
pearing.

Compeared James Wallace of Bardren and produced the Criminall Letters raised at the instance of James Provan in Inchbellie against Buchannans and others for Theft and Robbery, and the Defenders absent are declared fugitive.

Edinb^r 1 December 1664.

The Master of Herreis ag^t the Viscount of Kenmure for Theft of the writs continued by a warrand from the Councill.

Eodem Die.

The Justices modifies £80 to be paid be Garntullie to Mr. James Row for not insisting¹ with provision that if he pay the one half upon intimation w^tout farder Diligence.

Edinb^r 6 December 1664.

The Dyet ag^t Peter M'grigor continued to the 10 of Janry. for Theft pursued by James Provane and the pursuer ordained to pay the Witnesses; Peter Logie indyted of wrongous imprisonment again continued to the 7th ffebruary.

Edinb^r 8 December 1664.

Isoball ffindlay and others against Alex^r Bell for oppression.

¹ That is to say, not proceeding with his prosecution.

The Pursuers and their cautioners unlawed for not reporting the Letters. The Defender compares and protests for Relief of their cautioner, which is admitted.

Edinb^r 15 December 1664.

George Mowat unlawed for not reporting Criminall Letters raised against Geo : Cheyne of Girsto.

Edinb^r 20 December 1664.

The Justice Depute declares that he was discharged be the Lords of the Privy Councill to proceed ag^t Barbara Drummond for the alledged Witchcraft, in regard the Privy Counsell had remmitted her to be tryed in her own Countrey.

Edinb^r 4 January 1665.

The Lord Blantyre and his Cautioner unlawed for not reporting the Criminall Letters against James M^cculloch, lately his servant, and the Defender compearing, the Diet is deserted and warrand given that no new Letters be issued furth without the command of the Justice Generall, Justice Clerk and Justice Depute.

Lo: Blantyre
unlawed for not
reporting crim.
Letters against
his Servant.

Edinb^r 10, 11, and 12 Janry. 1665. The Just. Clk. and Deput Cuninghame present.

James Provane in Inchbellie and the King's Advocate ag^t Theft. Pat. M^cGrigor, prisoner, indyted for coming on the 18 of July last at 12 a clock at night to the pursuers house of Inchbellie, and calling for him to come out to shew him the way to an Alehouse, and upon his refusall threatned to burn the house above his head and kill him and his family, and his wife having opened the door for fear, the said Pat. and his accomplices carried away a great quantity of linnen cloath which was lying in his house, he being a Bleacher, and forced him by Threats to deliver his goods and money, of the which the sd. Patrick is found guilty but assoillied from the Hamesucken, *vide* 17 day.

Edinb^r 17 Janry. 1665.

Patrick M^cAlpine for Theft declared fugitive.

Eodem Die.

Andrew Robinson in Chappelton unlauded for not reporting Criminall Letters against the Laird of Luss.

Eodem Die.

Sentenced for
Theft only 8
days given the
Criminall.

Pat. M^cGrigor found guilty of Theft on the 11th instant, sentenced to be hanged at the Mercate Cross of Edinb^r on the 25 instant.

Edinbr. 25 Janry. 1665.

Richard ferguson indyted for ffalse coin and continued from time with John Strachan, formerly accused for assaulting of Sir Walter Seton.

Edinbr. 1 ffebruary 1665.

ffleshers indyted
for breaking
Lent.

Michael Tweedie in Edinb^r against the ffleshers in Ed^r and Leith for killing and eating of ffeshes in Lentron and other forbidden times, continued till the 7th of March.

Eodem Die.

The Master of Herreis ag^t the Viscount of Kenmure for Theft of Writts again continued.

Eodem Die.

The Criminall Process against Bannatyne younger of Corhows, etc., again continued by Order of the Councill the Absents of the Defenders excused.

Edinb^r 7th and 15 ffeb. 1665.

Murray against Peter Logie first continued and then deserted.

Edinb^r 7 March 1665.

This day severalls of the fleshers of Edinb^r conveyed for breaking of Lent and the Diet *quoad* them deserted and the fleshers of Leith declared fugitives for absence.

Eodem Die.

Advocatus against Alexander Scott, goldsmith in Edinburgh and many other of the inhabitants of that Burgh frequently mentioned in the Diets afore written and continued till this Diet, it is now deserted.

Edinb^r 8 March.

Donald M^ccallum and many other Highlanders declared fugitives for stealling of cows frae Rorie M^ckenzie of Demalowark and M^coneill, etc.

Eodem Die.

Robert Scott, cautioner for Hugh Ross of Kilravock and his brother and for Ross of Clova to report Criminall Letters against Lauchlan M^cintosh unlauded.

Eodem Die.

Many Highlanders conveyed at the instance of the same pursuers are declared fugitives.

Ed^r 14 Aprile 1665.

Marion Smith, servitrix to Mr. Alex^r Swinton, writer in Ed^r confesses Adultery with him and the murder of the child, is convict and sentenced to be hanged.

Edinb^r 2 May 1665.

Robert Abercromby, messenger and the King's Advocate against John Watson in Greyhillock of Pitgerso, and W^m

Abercromby
Mess^r agt.
Watson for
Deforcement.

Watson his son indyted and accused, that whereby Act 8 Parl. 11 and Act 150 Parl. 12 Ja. it is statute and ordained that all Deforcers of Messengers or Officers or troublers of them in execution of the office of any Summonds or Precepts direct by his majesty or any other Judges within this Realm or in putting of Decreets to due Execution, or if that the saids Officers or any other Persons be deforced in doing of the same, or be molested, invaded or pursued to the effusion of their blood be any person or persons whom they shall by virtue thereof summond or charge, or any others of their causing and command that the saids Deforcers or Pursuers of his Majesties officers and others forsaid, their lives and goods shall be in the King's will, and farther shall forfeit and tynne their haill moveable goods, the one half thereof to pertain to his majestie, and the other half thereof to the partie offended as in the saids laws and Acts of Parliam^{ts} at more length is con^d. Upon which it is subsumed to execute Letters of Caption at the instance of James Watson, son to Andrew Watson, fflesher Burges of Aberdeen, and the said Andrew as his Tutor and administrator of law for his interest and Clara Brown his spouse, and by virtue thereof having upon the 23^d of July last come to the said John Watson's dwelling house and apprehended the said Clara, the s^d John and his accomplices armed did sett upon the Messenger and reft and took away from him his arms and rescued and took from him the said Clara his prisoner, and so deforced him in the execution of his office, whereupon the Messenger broke his wand of Peace and protested for Remeid of Law, of the which Deforcement aforementioned the said John and William Watsons are Actors art and part, and the same being found by an Assize they ought to be punished in their persons and goods to the terror and example of others.

The Pannells deny the Dittay and the Justice did find the same relevant, and ordained the same to pass to the knowledge of an Assize. The Witnesses being examined, the Assize by a plurality of votes cleansed John Watson the ffather, and fand William the son guilty. The other defenders are declared fugitives.

Clara Brown and the other Defenders in that Process who

were declared fugitives for absence, are excused upon a Petition in respect of their Infirmity, and the Clerk is discharged to book or extract anything against them, and in the same cause John Rochwhanell in Aberdeen a witness, is unawed.

Edinb^r 6 May 1665.

William Watson being found guilty at the last Diet of the Deforcement therein^d his is decerned to forfault and ammitt his moveable goods, the one half to the king as escheat and the other half to the Party at whose instance the Letters are direct, and to remain in prison till farder order.

Sentence for
deforcing a
messenger.

Edinbr. 17 May 1665.

Advocatus against Margaret Hamilton, relict of Ro^t Bedford, Englishman, merchant in Leith, indyted for the crime of Adultery committed during the marriage with Geills Tyrie, Englishman, Surveyor in Leith, now prisoner in the Tolbooth of Edinb^r in the years of God 1658 and 1659 and subsequent years untill the decease of her Husband, or ane or other of the days of the said years, within the dwelling-house of her husband, and the better to palliate the crime under the colour of Hospitality, the said Geills did take up his lodging in the said Robert his house, and was there dieted, pretending he could not be so well accomodated elsewhere. And the severall contrivances of their converse and the places of the house are all lybelled, and that the s^d Geills did write into his Books a note of the birth of these children which were his own and of the death of such of them as deceast, and that the said Geills having gone to London, she did entertain amorous correspondence with him by Letters under borrowed names, and having estranged her affection to her husband, she contrived his Murder, and for that end employed a servant to buy poison, and that having failed she did on a night lybelled, bind his hands when he was in bed upon design to murder him in his sleep, and that having also failed, she on another night about 11 a clock at night when he was a bed with some of his children, did surprise and cruelly murder and strangle him,

Adultery and
murder of her
husband.

Lybell.

and thereafter with the canon bullet that she used for breaking of her coalls, did give him many deadly strokes upon the head and thereby killed him outright, and to palliate the murder she resolved to bury him soon after his decease, and if the wound should be discovered, to give it out that he had it by a fall on the stair, and did take off his bloody shirt and conceal it in the cellar among the coalls, and put clean linnens upon him, but the friends of the Defunct supposing he had died of an apoplexie, would not suffer him to be soon buried but called for Physicians and Chyrurgeons. These are the substantiall heads and circumstances of the Lybell.

My Lord Advocate declares that he insists not upon thir quality of the murder under Trust and Parricide as distinct Crimes but only as aggravations of the murder.

The Pannell after hearing of the Dittay read and her former confessions, confesses with tears the Crimes of Adultery and Murder thereinmentioned as the same is lybelled and circumstantiate, as also after the Assize were sworn, the bloody cloath and the iron bullett were produced in her presence, and she again confesses the crimes lybelled as they are circumstantiate. As also there are two or three witnesses, viz. a baillie in Leith and the Physicians and Chyrurgeons, who declare *de corpore delicti*, that they saw Robert Bedford dead, wounded as is lybelled; and that they saw some taits of hair and other tokens which had been gifted to the Pannell by Giells Tyrie, taken out of a little coffer in her custody.

The Assize finds her guilty of the said Crimes of Murder and Adultery, whereupon she is sentenced to have her head struck off on the last day of May instant.

Edinb^r 7th June 1665.

The Justices considering that this day is appointed to be a day of ffasting and humiliation through the kingdome for the success of his Majesty's navall forces, wherethrow Courts of Justiciary cannot be kept on the same, therefore continues all Lybells execute to this day till to morrow, as if the morrow had been the day of Compearance.

M^r Geo. M'kenzie, Advocate as Procurator for and in name

and behalf of Donald Ross of Cunmoyne and his sons, etc. and Hugh Ross of Kiltravock, compears in the action for Slaughter pursued against them at the instance of the Relict of Angus M'intosh and protests for the relief of their Cautioner in regard that none compears to pursue them.

Edinb^r 8 June 1665.

Intran some of the saids Rosses and offers to underly the law. Others absent are declared fugitive and the diet is continued as to some of them who were not formerly cited till 1 of August next.

Eodem Die.

Advocatus and Sir James M'Donald of Sclate against some of the M'donalds of the house of Caipoach for killing of Alex^r M'donald of Caipoach and his brother within the house thereof, by giving 33 wounds to Alexander and 28 to his brother. This horrid and atrocious murder made a great noise in the kingdom and a commission of fire and sword was granted to Sir Jas. M'Donald agt. the murderers and their associates by virtue whereof he killed and destroyed many and besieged others in a house, and having forced them out by fireing, he cutt off their heads and presented them to the Privy Council to be sett in a publick place.

Commission of fire and sword granted to Sir Ja. M'Donald which he executes ag^t the murderers, cutts off their heads and presents them to the Privy Council.

Edinb^r 15 June 1665.

James Graham against William Henry and others for killing of his son, continued to the 13th of July.

Edinb^r 1 July 1665.

The Master of Herries against the Viscount of Kenmure continued till the 1 of November next upon a new Warrant from the Council.

Edinb^r 4 and 5 of July 1665.

John Galloway, writer in Edinburgh, against James Williamson in Crooketstane, for 5 points of Usury, viz. (1^o) for

Galloway ag^t Williamsons for Usury.

taking a Boll of Meall and £3 Scotts for the loan by the @rent. The 2^d article is of the same nature. The 3^d is taking a Boll of Meall for six weeks loan of 100 mks. the oats being worth 10 mks. 4^o for taking the grazing of 20 lambs yearly for two years for the loan of 200 merks beside the usuall @rent. The 5th is like the first and 2^d, all which are found relevant by the Justices and were contraventions of the Acts of Parliament lybelled on, particularly the 22^d Act 14 Parl. Ja. 6th which prohibites taking more for the loan of money than the ordinary @rent. The Book of Adjournall settis down no defences but mentions only in generall that there was alledgiances proponed. The Pannell is cleansed and found not guilty.

Eodem Die.

Robert Muschett, writer in Edinburgh, Procurator for David Muschett, son to umq^l David Muschett of Spittleton reports the Criminall Letters against John Mitchell younger, tenant in Lohead for the Slaughter of the said umq^l David Muschett of Spittleton, whereupon the Defender is declared fugitive.

Edinb^r 13 July 1665.

Robert Cumine, Cautioner for Duncan Cumine in Craigowry unlawed for not reporting Criminall Letters.

[Edinb^r 13 July 1665.]

Severall tradesmen in Stirling criminally conveened and not compearing are excused upon a warrand from the Counsell and the Diet continued till 1st of November because of a Precognition depending before the Counsell.

Edinb^r 20 July 1665.

Robert Douglass, called of Auchintullich, declared fugitive for the Slaughter of Wiliam Lindsay.

M^r James Beton, Doctor of Medicine, for Perjury, continued.

Edinb^r 1st August 1665.

Kilravock against a number of Highlanders for Theft and Receipt,¹ continued till the 8th of November because the Defenders being formerly denounced fugitives and now relaxed, the Relaxation was not intimate to the Pursuers, so that they could not be ready to insist.

Eodem Die.

Another Diet at the instance of James and W^m Leitches against Donald Ross in Kilmoyne and his sons, etc. for murder, also continued.

Eodem Die.

John Ritchie in Kirkhill, indyted for stealing some timber from John Barrock, out of his house in Ardletham, the Pursuer not present and the Diet deserted.

Edinb^r 2^d August 1665.

Thomas Kinnaird, younger of Cubine, for Slaughter, continued to the 5th instant.

Eodem Die.

Sir Thomas Stewart of Garntullie ag^t M^r James Row, minister at Monyvaird, for the crime of Perjury, in manner mentioned in the Criminall Letters, viz. ffor denying upon oath the receipt of certain Stipends and Teind Tack Dutys from the Pursuer and his Chamberlain, whereof the Discharges are now produced.

Perjury Sir
Thos. Stewart
ag^t M^r Ja.
Row, minister.

M^r Nathaniel fife, advocate for the Pannell alledges the Dittay as it is founded upon the Deposition, is not instructed because the Deposition produced is not subscribed by the Pannell as may be seen in the Lybell the 9th instant.

Replys M^r Geo: M^rkenzie, he instructs sufficiently by the Decreet absolvitor granted to the Pannell upon that Deposi-

¹ 'resetts' in Adv. MS.

tion, which Decreet is subscribed by the hand of the Clerk of the Process, and narrates the Deposition, and such Decreets were never refused for Instructions in a criminall pursuit of this nature.

Duplys fffe, the Deposition can be no ground to infer Perjury, because it is only a Deposition *ex credulitate* and as he remembred for the time *et non ex simplici veritate* and contained no *mendacium* in it, *cum mendacium sit affirmatio vel negatio contra id quod est in mente*. And there being *nullum mendacium* there cannot be *perjurium quia perjurium nihil aliud est quam mendacium juratum vel juramento firmatum*. (2°) Duplys Thoirs that the Deposition does not at all contradict the Discharges because he does not depone that he granted no Discharge but that he received no money or payment for the granting, and if he had been interrogate whether he had granted a Discharge or not, he might have elided the same by referring to Sir Thomas Stewart's oath that the Discharge was granted upon trust without payment. (3°) Replys fffe there can never be Perjury inferred frae this deposition, because there cannot be a Crime *sine dolo* and there cannot be *dohus* alledged in this case where all the consequence of the Debate is but 20 sh. sterling, and none will suppose that the Pannell being a minister, would willingly and by fraud have ventured his life and his soul, his fame and reputation and his moveable escheat, which is the pain of Perjury *pro re tam minimi momenti*, and therefore wee must presume he did it ignorantly and consequently he cannot be found guilty of Perjury having so acted by ignorance and mistake.

Duplys M^ckenzie for the Pursuer That in law Perjury is inferred from every false assertion being sworn, and here the Pannell has sworn falsely in so far as he has sworn contrary to his Discharges, and as to the pretence, that he did it ignorantly, the positive oath is opposed, and if a pretence of ignorance could defend against Perjury, where the pretence is no way made out but is *contra ipsam rem gestam*, then it would be impossible to make perjury from any Deposition, because every person would pretend that he swore according to his knowledge and was mistaken, and certainly a positive oath is of greater force than when a man swears *per verbum credo*, and

yet all lawyers are clear that the word *credo* adjected to a preceeding positive assertion inferrs perjury, as may appear from all the Citations repeated in the addition to the first number and 58 quest. of Julius Clarus and the 6 quest. of Vigelius Bossus, and the reason given by the Lawyers is that Deponents if they doubt, should first inform themselves if their doubt be of that nature that all means of clearing are perished, or if there be means yet to clear them. And seeing no judge ever denyed to grant time to a doubter to clear himself, it is the doubter's own fault if he be not cleared, and no man can defend himself by that which is his fault, and if this mean of reparation arising from Perjury be taken from who refers to oath, then the remedy ag^t perjury would be irreparable, and Perjurers would be encouraged to ommitt the means of information to the end they may *reportare lucrum ex supina ipsorum ignavia et ignorantia assertata*. And as to that part of the Reply, viz. that there is no contradiction betwixt the Oath and the Discharge, the Lybell is opponed, bearing expresly that the Oath denys payment which the Discharge confesses. And to that last part of the Reply which bears that the Discharge was granted *spe numerandæ pecuniæ*, the Oath is opponed which bears no such quality, and a quality not adjected to the oath is to be rejected.

The Justice gives no Interloq^r at this time, but for certain good considerations moving him, continues the Decision to the 9th instant, and ordains both parties to cite witnesses for proving both their Alledgiances.

Edinb^r 8 August 1665.

Mr. John Glass of Pittentien against Anthony Murray, Pat. Glass, Writer in Edinburgh, and others for Oppression, deserted.

Eodem Die.

Gideon Murray and George M^cAla, merchants in Edinb^r ag^t Gilbert Haliburton, Baillie of Burntisland, for wrongous imprisonment, deserted of consent.

Edinbr. 9 August 1665.

Sir Thos.
Stewart of Garn-
tullie agt. Mr.
Ja. Row, minis-
ter, for Perjury
delayed for a
year till it be
tryed by the
civil Judge.

Sir Thomas Stewart of Garntullie against Mr. James Row. Minister at Monyvaird. The Justices having heard the Debate in this action of Perjury upon the 2^d instant and continued pronouncing Interloq^r till this day, give now this Interloq^r, That in regard the Crime insisted on is founded upon an Act of the Commissariot of Dunkeld, bearing that the Pannell did depone in manner mentioned in the Dittay, and that the Pannell refuses he did so depone, and in respect the subsequent Deposition is not produced, therefore continues the matter untill the first Tuesday of August 1666, to the effect the Pannell may quarrell that act before the civil judge be reduction if he pleases, that the matter being civilly discust the Justice may the more deliberately resume the consideration of the forsaid Debate.

Edinb^r 17 October 1665.

Robert Wrie, Writer in Edinburgh, being bound as Cautioner for James Wrie, and James as principall, under the pain of 10,000£, that James should compear before the Justices to answer for the crime of Adultery when he should be called, the obligation continued.

Edinb^r 1 November 1665.

The Master of Herries ag^t the Viscount of Kenmure, again continued, as also the Diet at the instance of the nearest of kin of Jo. Coltherd against Sir John and Christopher Bannatynes, and the Diet Graham ag^t Hendersons.

Edinb^r 8 Nov^r 1665.

Ross of Kilravock ag^t Hector M'laughlan, etc. continued, Thomas Glass of Pittentien conveyned be Gilbert Murray declared fugitive.

David Sinclair of Southdun agt. Laurence Caldell continued.

Edinb^r 10 November 1665. Deput Cuninghame present.

Severall of the inhabitants of Beldormy and others summoned to bear witness in the Criminall Action, John Lyon of Muresk against Pat. Roy M^cGrigor unlawed.

Eodem Die.

John Roy in Auchinhandork indyted and accused at the instance of the said John Lyon of Muresk and at the instance of his Lady and son upon the 21 Act Parl. 1, Ja: 6, made against these who receipt, fortifie, maintain or give meat, harbour and assistance to Thieves in their theftuous stealling and deeds, either in their coming thereto or passing therefrae, or intercommune or tryst with them to that effect any manner of way without Licence, ordaining the Contraveeners to be called as art and part of the deeds. Nevertheless the said Jo. Roy and others his associates did fortifie, mantain and give meat to Pat. Roy M^cgregor, Gregor Beg M^cGregor, his brother, and Lauchlan M^cintosh, Vagabonds and Thieves, in their coming to steal 60 oxen and 17 cows belonging to the said John Lyon, and in their going away therefrae, and sent them meat and drink to the places where they lay, 3 days before and after the committing thereof, and swa was art and part of the Theft. Receipt Thieves.

The Pannell compearing with his Advocates and declaring himself willing to pass to the knowledge of an Assize, and the Pursuer's Advocate representing that he had done Diligence to summond an Assize and they were not ready.

The Justice Depute continues the Diet till the first of the next Circuit to be holden for the Sherriffdome of Banff, and excuses Christian Caldell, mother to John Roy, another defender, in respect a Testificate of her inability, and upon production of the like Testificate, they excuse James Gordon in Laggan and Jean Gordon his spouse, conveened for fortifying, giving meat and drink to Pat. Roy M^cGregor and Gregor Beg, his Brother, and the said Lauchlan M^cintosh, Vagabonds.

Item, the same day the said Pat Roy, Gregor Beg and M^cintosh, with many others are declared fugitives at the instance of the same Pursuer.

Edinbr 14 November 1665 and 15 *ead.*

Ross of Kilravock ag^t Hector M^claughlan continued till the morrow, and then continues it to the 23^d instant.

The same 15 day Leitch ag^t. David Ross continued and Pringle of Lees ag^t. James Ker of Lintown and others for Deforcement also continued.

The Relict of Colthird ag^t Sir John and Christopher Bannatynes, again continued till the 1 of August next.

Edinbr 17 November 1665.

Sinclair of Southdun ag^t Laurence Caldell, continued till the 22^d instant, and then continued till the 23^d.

Edinbr 22 November 1665.

Robertson of Newbigging ag^t John Mill and others for Deforcement, continued.

Eodem Die.

Mr. Geo. M^ckenzie, Advocate, *excusatorio nomine* for Ross of Kilravock and his sons, formerly declared fugitives, and produces a Warrant from the Counsell to continue the Diet, which is accordingly done till the 1 of June next, and ordered that nothing be extracted in the mean time.

The like continuation is granted to other Highlanders.

Edinbr 23^d Nov^r 1665.

Robertson in Newbigging ag^t John Mill and others, for Deforcement. Severall of the Defenders declared fugitive, and the Diet as to the rest twice continued.

As also upon the said 23^d day Sinclair of Southdun ag^t. Laurence Caldell, is continued. The same continued again upon the 1st of December.

Edinbr. 1 Decer. 1665.

Mr. John Hay of Hayston against Doctor Beton. The Diet deserted.

Edinb^r 7 December 1665.

Mungo Campbell, brother to J. Campbell of Wathick, and James Comrie, messenger, against Sir William Graham of Gartmore, and others, for Deforcement, deserted.

Edinb^r 17 December.

The Diet abovementioned ag^t Ker of Lintown and others deserted.

Edinb^r 27 Decer. 1665. The Justice Clerk and Depute Cuninghame present in the Court.

The which day Geo: Porterfield and John Graham, merchants in Glasgow, are declared fugitives for not compearing to underlye the Law, being summoned on a Lybell of Treason, viz. They being of known of dissatisfaction to his Majesties interest and government, and not being content to live in this kingdome, where they had their wives and families, did leave this their native countrey in the Months of ¹ Holland. Porterfield and Graham fugitate for depraving the laws and traducing the Government when they were in Holland.

this present year and repaired to the United Netherlands, notwithstanding that his Majestie is engaged in open and declared war and hostility against the States and Inhabitants thereof, to correspond with his Majesties enemys, [and do daily correspond with and assist those enemies, Adv. MS.], and these persons and each of them, has written, contrived, or dispersed seditious Lybells or Pamphletts, and has uttered and spoken scandalous and seditious Speeches, Lies, and Calumnys, to the reproach, contempt, and slander of his Majesties Estate and Government, meddling thereby in affairs of State, depraving his Majesties Laws and Acts of Parliament and misconstruing the publick proceedings on purpose to vent their own inveterate malice and dissatisfaction, and to beget, stirr up, the like in others, and to strengthen and encourage the common Enemy, and the saids persons who doth conceal and not reveal the Authors of the scandalous Writs and Speeches, and in speciall in the month of ¹ of this instant year and upon the first and remanent days or ane or other of the days of the

¹ Blank also in Adv. MS.

said month, they and each of them did most seditiously in Amsterdam, Hague, and other towns and places of the said united Provinces, utter and vent the Speeches aftermen^d at least to the same purpose that the proceedings and acts of his Majesties late Parliament and respective sessions thereof, and namely the Act for taking the Oath of Alledgiance, the Acts rescinding the Pretended Parl^t in the years 1640, 1641, and thereafter the Acts against Separation, and divers other Acts of the said Parliam^t are unjust and unlawfull, and that the subjects may lawfully refuse to obey the same. These are the substantiall heads of the Lybell, whereupon they are declared fugitives.

Eodem Die.

Collonell John Kirkpatrick, Collonell Walter Scott, Collonell Luis Erskine, Lieut. Coll. Thomas Livingston, Lieu^t George Lauder, Lieut. Coll. Coutts, Major Jo. Kirkpatrick, Major Henry Graham, Capt^t Geo. Coutts, Captain Evertson Kirkpatrick, Captain Colzier, Cap^t Sir W^m Sandilands and the haill remanent Scotts officers in the service of the United Provinces at the time are also declared fugitives for not compearing to underlye the law in the Lybell of Treason pursued ag^t them, containing the Crimes underwritten, viz. the forsaid persons and each of them respectively being gentlemen and subjects of this Kingdome and native born within the same, at the least such of them as are not native born in this Kingdome of Scotland descended of Scotts parents upon the ffather's side, and having transmitted and derived to them from their respective ffathers, grandfathers and others accessors¹ being Scottsmen and subjects of this Kingdome of Scotland, yet they have most disloyally and unreasonably broken and violated their faith and alledgiance to his Majestie and committed the Crime of Treason in manner underwritten. In so far as his Majestie being engaged in war ag^t the States of the United Provinces, the said persons and each of them respective has undertaken and accepted and are presently employed in Service as Collonells, Captains, Lieutenants, Ensigns, and in other

Scotts officers
in the service
of the Dutch
while at war
with the King
fugitate.

¹ 'ancestors' in Adv. MS.

places and military charges for and under the said Estates, his Highness, declared enemies, and are in arms and do concurr with and assist and adhere to his Majesties enemies forsaids, and not content to have disallowed and declared themselves enemies to his Majestie be their treasonable and hostile actions and practises in manner forsaid, they have proceeded to that height of perfidiousness, disloyalty and treason, as expresly be Solemn Oath and Engagement, to disown their Sovereign and to acknowledge his Enemies to be their Sovereign Superiors, in swa far as the saids States of the United Provinces apprehending that their officers of the Scotts and English nations should be dismist and their places given away, and that the said States having thereafter thought fitt that some of the officers of the saids nations should be taken in service again, but with a Proviso that they should beside their usuall Military Oath, declare and swear be Solemn Oath, that they do acknowledge none other besides the United Netherland Provinces for their sovereign superiors, and that in the security of their conscience they believe not to be bound to respect and obey, nor shall during their service respect or obey any commands of what quality or of what-somever than theirs¹ the Lords of the States of Holland and west friezland their Pay-Masters, and divers of the Officers of the saids Scotts and English nations as became good subjects and countrey men, having refused to engage in the said service under his Majesties Enemies to take the said Oath, nevertheless the saids Persons and each of them, in the months of March, Aprile and May, of this year and upon the first and remanent days of the said months, or ane or other of the saids days or months, within the Province of Holland, or ane or other of the saids United Provinces, to the effect they might obtain, enjoy and retain the said offices and employments under the said Estates his Majestys Enemys, notwithstanding the said war betwixt² his Highness and the said Estates, did take the said Oath and Engagement to the said Estates, designed in the said Oath their Paymasters, intimating and acknowledging thereby that the base and

¹ 'of what quality soever than theirs' in Adv. MS.

² 'was between' in Adv. MS.

mercenary relation and interest of pay and paymasters was more prevalent with them than the most knit and sacred Bonds of honour, conscience and alledgiance, Likeas divers of the saids Persons, and in special the saids Coll. John Kilpatrick, Coll. Lues Erskine, and the said Lieut. Coll. Couttis and the saids Majors Kilpatrick and Graham and the saids Captains Coutts, Kilpatrick, Sandilands, to palliate and in some measure disowning their Sovereign Lord and Prince, has most unnaturally disowned and disclaimed their Country, denying that they were Scottsmen, to the great disdain, contempt and dishonour of their Countrie, ffriends and ffamilies, in so far as in them lyes. Albeit to all men of Honour and Ingenuity their interest and relation to their Country is so tender and dear that even Heathens have thought themselves obliged to dy for their Country, and the saids Persons did ever before profess and acknowledge themselves to be Scottsmen and were most commonly designed Scotts Officers, and were employed before and again upon taking the said Oath in service by the said Estates under the notion of Scotts Officers, in doing whereof they have not only dishonourably and undutifully disclaimed their Countrey but most treasonably have disowned and denyed their subjection and alledgiance to his Majestie as King of Scotland, and thereby in doing of the other deeds @written, the forsaid Persons have committed the treasonable Crimes @specified in manner at length specified and contained in the criminall Letters of Treason raised against them at the instance of his Majesties Advocate for his Highness's interest thereanent, and they that were lawfully charged upon the 14th day of October last by past be John Telpher Mossman, Herauld, and Alexander Murray, Pursevant, to have found caution acted in the Books of Adjournal for that effect lawfull time of day bidden and the forenamed Persons not compearing and entering, my Lord Justice Clerk and Justice Depute therefore by the mouth of John Short, officer of Court, decerned and adjudged the hail forenamed Persons and each of them to be denounced our Sovereign Lords Rebels and put to the Horn as fugitives and unlaws frae his Majesties Laws, for the treasonable Crimes @written, and ordained all their Lands, Heretages, and

other Goods whatsoever to be escheat and inbrought to his Majesties use, which was pronounced for Doom.

Edinbr. 23d December 1665. The Earl of Athol, Lord Justice Generall, and Deput Cuninghame in the Court.

The which day Mr. William Murray, Advocate, compears and presents a Gift of the Office of Justice Deputy granted to him during his lifetime be the Justice Generall, whereupon he is admitted and the Gift recorded.

Nota. That when this Court judged by Deputes and before the late institution of Commissioners of Justiciary the King had his Deputes, and the Justice Generall had his Deputes.

Edinbr. 29 December 1665. Mr. W^m Murray sitting in Judgement.

Advocatus and William Laury in Cothouse Mill ag^t Mungo Weir in Westermosscroft for Theft, declared fugitive.

Edinburgh 1st January.

The Master of Herries ag^t the Viscount of Kenmure, again continued by a new Warrant from the Council.

Edinbr 2d January 1666.

James Graham ag^t David Hendersone and divers other Persons in Stirling, for Slaughter of John Graham, son to the said James. The Diet is deserted upon a Warrant frae the Privy Council, bearing that they had taken a Precognition in this matter by examination of Witnesses, and found that the Slaughter was accidentally committed in a Tumult occasioned by the Defunct's brother, and therefore discharges all criminall pursuits raised or to be raised, and a protestation for relief of their Cautioner is admitted.

Edinbr. 4 January 1666.

Robert Paterson, merchant in Edinburgh, against John Neilson, merchant in Stirling, for Adultery, continued.

Edinbr 9 January 1666.

Sir Jo. Hume of Renton, Justice Clerk, against Robert Todrig in Ayton, for Theft, continued to the 23^d instant, and the Defender ordained to produce a Decreet of Poinding with the executions thereof whereupon he founds.

Edinbr 18 January 1666. Deputs Cuninghame and Murray present.

Lauchlan M^cintosh one of the three Vagabonds formerly mentioned in the Letters raised at the instance of John Lyon of Muresk, and now Prisoner in the Tolbooth of Edinbr indyted and accused for many Thefts and Robberies committed by him accompanied with Patrick Roy M^cgregor, Gregor beg M^cgregor and others his accomplices against the said John Lyon of Muresk and many other persons in his Lybell. The Assize finds him guilty of the Theft committed against Muresk, whereupon he is sentenced to be hanged at the Mercate Cross of Edinburgh, the 14 feeb. next.

Edinbr 23 January 1666. Deput Cuninghame and Murray in Judgement.

Poinding an Ox
in labouring
time.

Advocatus and Sir John Hom of Renton, Just. Clerk against James Todrig in Ayton, George M^cean in Coldinghame, W^m Home there and William Alison in Westerestoun, indyted and accused as follows, that where notwithstanding the Laws and Acts of Parliament of the Kingdome and constant practiques thereof, the crimes of Theft, Stouthrief and receipt of Theft are punishable by Death and confiscation of the committers goods, as also by the 98 Act 6 Parl. Ja. 4 it is Statute that no manner of Sherriff or Officer poind nor distrenzie the Oxen or other Goods belonging to the Pleugh and that labours

the ground the time of ground labouring where any other goods or lands are to be appraised and poinded, and by the 110 Act par. 7. Ja. 6 and 82 of his 11 Parl. it is statute that both the Committers as also their Receipters, Suppliers, maintainers, authors or hunders out are to be esteemed and punished as Thieves, and being convict therefore to incurr the pain of Death, Confiscation of the Committers Goods, as in the said Laws and Acts of Parliam^t at more length is contained, upon which it is subsumed that the Defenders or ane or other of them came to the Lands of Renton and took away one of the Pursuer's Pleugh oxen in October, being labouring time and within some house after he had been yoked in the pleugh at least upon some pretended Title did poind him when there was other Goods poindable, and concludes for the pains of the said Acts of Parliament.

William Hoom, one of the Defenders, denies the taking of this Ox, the rest confess the poinding and taking away the Ox in manner con^t in the execution of poinding produced.

Mr. Geo. M^cKenzie for the Pursuer insists mainly for taking away the Ox in labouring time contrary to the 98 Act of the forsaid Parl. Ja. 4, when other goods might have been poinded, and uses the other Act of Parliament as an aggravation.

Answers Mr. John Harper for the Pannell, that the said Act of Ja. the 4th founded on, tho' it prohibits poinding of labouring goods in labouring time, yet it does not appoint that to be a ground of Dittay, and therefore the Pannell cannot pass to the knowledge of an Assize on the Dittay as its founded on that Act, but the Pursuer ought to pursue civilly for a Spuillie.

Replys Mr. Geo. M^cKenzie that the said Act of Ja. the 4th and the Common Law therein narrated is a sufficient ground of Dittay, ffor tho the Act does not appoint the away taking of Pleugh Goods to be a ground of Dittay, yet it declares it to be unwarrantable, and the away taking of the goods of others unwarrantably is Theft and a ground of Dittay by the intention of the said Act tho it be not so exprest, and where a punishment is not exprest, yet if the Crime be declared unwarrantable, there must be an arbitrary punishment at least, seeing the expressing of a punishment is not essentiall to the crime.

Duplys Harper for the Pannell, that tho by the 33 Act Parl. 4 Ja. 5. in fine, it is there appointed that even Depredations, Masterfull Reifs and Spuillies shall be first civilly decided, and much more ought a Poin ding for a just debt, viz. a ffyne imposed upon the Pursuer for his absence frae the Head Court of the Bailliary of Coldinghame.

Duplys M^ckenzie that the Act whereupon this Reply is founded is altogether in desuetude, and the reason why it was in practise when the Act was made, appears from the very Act it self to be that the Justice General was then the supream, civil and criminall Judge. 2^o Tho this case were a Spuillie as its Theft and Robbery, yet there is no necessity of a previous civil pursuit except the Goods pointed had been such as might have been pointed and yet Spuillie because not rightly pointed, but this pointing is wrong, not for want of formality, but because prohibit goods are pointed. 3^o This Act of Parliament being relative to a Criminall away taking of Goods only, there can be no Reply founded on it for the Pannell except first he acknowledge his away taking of that Ox to be criminall. 4^o Where its pretended that the Act of James the 4 strikes only ag^t such as actuallie looses the Oxen out of the Pleugh, the practise of the Lo. of Session is opposed in March 1631 and July 1635, and the daily practique which interprets this Act of the Season of Labouring.

The Justice finds that notwithstanding what has been said for the Pannells, they ought to pass to the knowledge of an Assize, and that the away taking and pointing of a labouring Ox in labouring time is an Injury and wrong punishable by the Law, *pœna applicanda fisco*, and declares they will take consideration of what has been offered for the Pannells to extenuate the Crime at the time of Sentence if they be convict.

The Pannells are convict except William Hoom, and each of them are fined in an Unlaw of 40[£] to the King and commanded to prison till farder order.

Eodem Die.

The Justice Deputes continue the Actions pursued at the instance of Robert Patersone ag^t Neilson and Robert Knox

and others ag^t Alexander Hoom of Ayton till the 24 of January instant.

And here ends this Book of Adjournall beginning at the penult of June 1661 and ending the 23 Janry. 1666.

THE BOOK OF ADJOURNALL beginning 24 January 1666, ending the 14 December 1669.

Edinburgh 24 January 1666.

Advocatus and Robert Paterson, merchant in Edinb^r his Informer, against John Neilson, merchant in Stirling, for Adultery. The Dyet deserted.

Edinb^r 26 and 29 January 1666.

The first of these days the Deforcement pursued by Robert Knox against Alex^r Hoom of Aytoun is continued to the next day, and then deserted.

Edinb^r 1 ffeb. 1666.

Sinclair of Southdun ag^t Laurence Caldell and others for Wrongous Imprisonment. The Cautioner of Pursuer and Defenders are both unla^wed each of them in 3700 merks conform to the Act of Parl^t. The first for not reporting the Letters, and the 2^d for not presenting the Defenders. *Nota* that Defenders can only be declared fugitives in the case of not reporting Letters where they fand Caution to compear.

Cautioner un-
lawed in 3700
mks. for De-
fenders absence
and not report-
ing the Letters.

Edinb^r 27 ffeb. 1666.

Robertson of Newbigging ag^t Mill and others for Deforcement, continued till 12 of June next.

Robert Buchannan ag^t John M^cvorish for mutilation, continued to 5th of that month.

Edinbr. 22 March 1666.

Advocatus and James Cairns ag^t Hilstein and others, continued till 4th Aprile.

Edinbr. 23 March 1666.

Usury.

Adam Muschett merchant in Edinburgh ag^t Colin Hay, merchant there, and others for Usury. The Pursuer insists ag^t John Wetherspoon, one of the Defenders 1^{mo} loco upon this ground that he retained 22^l less or more of the principall at least received it back again and maire, has the rent of an Yard upon account of the Loan.

Muschett ag^t
Hay for Usury.

Maxwell for this Pannell alledges (1^{mo}) As for the Yard he has it by a proper wadsett bearing onerous causes and nothing can be proven in prejudice thereof *nisi scripto vel juramento*, but the Defenders must retain the Yard ay and whill he be paid of the sums contained in the Wadsett at least the Right is a Tack by way of contract of the nature of a Wadsett and relating to a Wadsett Right and to endure during the not Redemption of the principall Wadsett.

Birnie replies that he oppones the Right of the Yard which beareth no special cause be it self but generall, notwithstanding that the cause in the principall Wadsett is special. (2^o) The Witnesses in this Tack ought to be admitted for proving that there was no distinct cause of this Tack but the cause of the Wadsett it self because by the [—] Act Parl. 18 Ja. 6¹ its expressly declared that the crime of Usury is not only proven be Oath of party but by Witnesses.

Duplies Maxwell that if the Witnesses insert be admitted it must not be to prove Pactions made at the time of the Tack in case any be consistent with the same, such as Paction for exorbitant Usury or for Retention or taking back a part of the money specified in the Tack.

The Justices continue the Dyet untill the 5th of June, and from that its continued till the 11th when there is a new dispute for John Purdie, another of the Pannells, and Interloquitor thereon.

Eod. Die the said Adam Muschett and his Partners in the Tack of the Usury are unawed for not reporting Criminall Letters against William Calderwood, Apothecary in Edinburgh and others.

¹ The Act seems to be Parl. 16, James 6, c. 7.

Edinb^r 4 Aprile 1666.

Alexander Burnett, merchant in Aberdeen, ag John Johnston in fforesterhill for making double Alienations, continued till the 6th of November, and Robert Reid, Procurator in Aberdeen, one of the Witnesses is excused and John Jamiesone in Tillieberry unlauded. This Lybell is founded on the 105 Act Parl. 7 Ja. 5, 140 Act Parl. 12 Ja. 6.

Making double
Alienations.

Edinb^r 6th Aprile, 1666.

James Bruce, Messenger, ag^t Ja. Hamilton of Elerstone for deforcing him in the execution of a Caption against him, continued upon a Reference from the Privy Council, bearing that Elerston had conveened the Messenger before them for a Ryot committed in the manner of executing the Caption and that the same was submitted and 7th of June deserted.

Deforcement.

Edinb^r 1st June 1666.

Adam Muschett ag^t James Harper for Usury. Mr. David Dinmure for the Pannell alledges that the subsumption of the Dittay cannot be proven be extraneous Witnesses but by these insert in the Band and speciallie it ought to be so here when the sum alledged given for the Loan of the money extends to £100.

Usury.

Replies Mr. George M^cKenzie that the Defence ought to be repelled, seeing the subject of this Debate is founded upon a Paction and Receipt altogether extrinsick to the Band lybelled, and is not Usury inferred from the Band it self.

The Justice Deputs repell the Defence in respect of the Reply and ordains the Dittay to pass to the knowledge of an Assize and to be proven by Witnesses not insert in the Writs.

The Assize cleanses the said James Harper of the Deeds of Usury lybelled.

Eod. Die the said Adam Muschett ag^t John Allan Taylor. and others for Usury, past frae and deserted, and the same Pursuer's Cautioner unlauded for not reporting the other Criminall Letters raised at his instance and at the instance of

John Smallat, ffactor for the Earl of Glencairne, donator of the Usury ag^t Bessie Dickson and others.

Edinburgh 1st June.

Continuation of a Diet to an uncertain day is the same with deserting the Diet.

Mr. Robert Dickson, Advocate, as Procurator for the Viscount of Kenmure, pursued by the Master of Herries in the Criminall Action for stealling of the Writs frequently above mentioned produces a new warrand frae the Privy Council to continue the Diet till the Council's furdur order. *Nota* This was all one as to command the Justices to desert it, because they cannot continue till an uncertain day and therefore they do desert it.

George Weir in Blackhill, declared fugitive for the Slaughter of Andrew Cleland.

Eodem Die divers Witnesses unlauded for not compearing in the Actions pursued by James and William Leitches ag^t Ross of Kilmorie and others, and the Laird of Kilravock and his Tenant ag^t Hector M^cLaughlane and others, and this last Action continued as also the Action the said Adam Muschett ag^t Wetherspoon.

Edinburgh 4 June 1666. Deput Cuningham only present.

Slaughter.

M^cIntosh ag^t Ross of Kilmony and others indited for the Slaughter of Angus M^cIntosh, Procurator for the Relict and nearest of kin of the Defunct.

Sir Geo. Lockhart for the Pannells alledges that att the time and place lybelled 2 of the Defenders, Donald Ross and Hector M^cLaughlanegeir were in their own houses, distant from the place of the alledged murder 4 or 5 miles. Like as the said Murder having been committed in the inner part of the said Marion Taylor's house in Tarnua where the fire stands, the other two were in a distant room of the said house and so having been *alibi* the time of the alledged murder, they cannot pass to the knowledge of an Inquest.

Replies Birnie that neither members of the Answer is relevant against that part of the Dittay anent commanding and

hounding out because a Person *alibi* may be guilty of that part, and the last member anent being in the next room is not relevant to elide giving assistance and rescuing.

The Justice Depute ordains the Dittay and Defence to be put to the knowledge of an Assize, and as to the rescue in swa far as the same is used to prove or presume Councill or command, finds it relevant *in sua natura*, in nature of Presumption but prejudice to the King's advocate to insist for rescuing as a distant cryme at any time hereafter.

The Assize finds the Pannells clean and not guilty.

Eod. Die. The Laird of Kilravock and his brother ag^t Hector M^claughlan and others for Theft and Robbery also cleansed.

The Earl of Glencairn¹ and his ffactors ag^t Patrick Listoun for Usury, continued till the morne.

Edinbr. 5th June 1666.

John M^cvorish declared fugitive for mutilation of Robert Buchannan, and his Cautioner unawed.

John Brown, Merch^t in Ed^r Cautioner for reporting the Criminall Letters at the instance of Katharine ferguson ag^t George Smith in Tullich and John ffarquharson in Glengarden for killing of Duncan Sanderson, the Pursuer's husband, declared fugitive.

Cautioner
declared fugi-
tive for not
reporting the
Letters.

Thomas Wilson of Mostoun, merchant in Banff, unawed for not reporting the Letters at the instance of the nearest of kin of James Chrystie in Mostoun, against John Neill in ffortrie and his sons for slaughter of the said Chrystie, as also the Defenders declared fugitives and their Cautioner who was bound to present them unawed.

Earl of Glencairn and his ffactors ag^t Colin Hay for Usury, continued till the 11th instant, and ag^t Wetherspoon till the 14th of August next.

¹ Tenth earl. Succeeded 1664; died 1670.

Edinb^r 7th June 1666.

James Gray, merchant in Edinburgh, and his messenger against Hamilton of Ellerston for Deforcement, deserted upon an excuse proponed for the Defender, that he was necessarily out of the kingdom, and the pursuer ordained to pay the expenses of the Witnesses.

Edinb^r 11th June 1666. Deput Cuningham, p^t.

Usury.

The Earl of Glencairn, Donatar to the Usury and his Commissioner ag^t John Purdie, another of the Defenders in the abovementioned Lybell against Colin Hay and John Harper, which Purdie is insisted against upon this head, that he committed Usury in swa far as he received @rent for 500 merks for a term or two before the same was due, contrary to the Act Parl. *anno* 1621.

Mr. Geo. M^ckenzie for the Pannell alledges, that the Pannell cannot pass to the knowledge of an Inquest upon this part of the Lybell or Condescendance because the forsaid Act of Parl^t on which it is founded does only prohibite the retaining of @rent the time of the Lending or the taking of it before the Term of Payment appointed by the Bond which certainly must be understood of the first Term's payment of @rent, there being no other term for annualrent particularlie exprest, and tho' it be true that this exaction inferrs Usury, yet it cannot against this Pannell who is a stranger bred all his time in Pole, ignorant of our Law, and the point being *in apicibus juris et res minimi momenti* which he is content to rectifie, and Mr. David Dinmure adds, that the Act of Parliam^t being express that no @rents should be taken the time of the loaning the money, it cannot be extended to this case where it was taken after the Loaning tho' before the @rent was due, specialiie against this stranger who has been in Pole be the space of 28 years, and may probablie be ignorant of the Law, and tho' *Ignorantia Juris in prohibitis non excusat regulariter*, yet where it is *Ignorantia Juris Specialis et Statutorij* and the point *Delictum*, yet being *sine damno* and being done in a place

ubi non est copia peritorum Juris and ignorance in this case and circumstances excuses, and its positively offered to be proven that this Pannell was bred in Pole all his days, and that he was but a very short time in Scotland before the Loaning of the money, and so it was impossible for him to know that Act of Parliament which was made 40 years before and had never hitherto been practis'd on any person, and the *Res* is small as said is *et de minimis non curat Prætor*.

Replies Sir Ro^t Sinclair, substitute to the King's Advocate, that he opposes the Dittay and the Act of Parliament, which does not only prohibite and declare the taking of @rent beforehand to be Usury, but where the same is retained the time of the Loaning, but expresly statutes that these who exacts, craves or receives the @rents of the sums lent, untill the term of payment appointed by the Bond be come and past, committs the Crime and incurre the pain of Usury which must be understood of the term of payment of @rent, and the Pannell has received two terms @rent before @rent was due, whereby the Debitor wants the @rent thereof till the time it was due, and the maxime *de minimis non curat Prætor* does not hold *in prohibitis*, and tho' the Pannell has been bred abroad, yet he is originally a Scotsman and ought to have known the law and committed the crime in Edinburgh where he had opportunity to advise.

The Justice finds the Article of the Dittay founded upon the Act of Parliament for taking annualrent before hand before the term of payment, relevant to be put to the knowledge of an Assise.

The Pursuer produced the Discharges whereupon the Pannell is found Guilty, and the action is continued as to Colin Hay and the rest of the Defenders till the 7th of August. *Vide* 6th July where the Justices are discharged by Act of Council to pronounce sentence.¹

¹ This case and the subsequent rescinding of the Justices interlocutor by the Privy Council are referred to at some length in Mackenzie's *Criminal Law*, under Title xxiv., 'Usury.'—W.

Edinb^r 13th June 1666.

Robertson of Newbigging ag^t Mill and others for Deforcement, continued as to some and deserted as to others.

Edinb^r 19th June 1666.

Procurator ffiscall of Air against Heron and Cubbison, advocation continued.

Edinb^r 22 June 1666.

Muschett against Andrew Watson, fflesher, burges of Aberdeen for Usury, continued.

Edinb^r 25 June 1666.

Bloodwitt.

John Ross of Strathmore against Robert fforges att the Mill of Melgum for blooding and wounding. Birnie for the Pannells alledges, that the Lybell is no wise relevant unless the pursuer had condescended upon the wounds and quality thereof, ffor if nothing be condescended on but the scratch in the hand, the same was occasioned by the Pursuer's gripping the Pannell's sword, to which he gave occasion himself.

Mr. Da. Thoires in name of the Advocate oppones the Lybell bearing relevantly that the Pursuer was assaulted by the Pannells with drawn swords under cloud and silence of night, which is sufficient to inferr the conclusion of the Dittay. 2^o Oppones the Lybell bearing expressly blooding.

The Justices finds the Lybell relevant, and the Assize upon the Testimony of the Witnesses finds him guilty, and at the next Dyet which is the 28 of June, he is appointed to be put in Prison during the Justices farder pleasure.

Edinb^r 28 June 1666.

Nothing but the continuance of the Watson's for the Usury and the forsaid Sentence, and 29 June and 2d July the same continuation.

Edinb^r 6 July 1666.

Compears Jno. Purdie and produces an Act of Privy Council whereby they upon a Reprobation made to them of the

Debate in John Purdie's case for the Usury and of his being a stranger ignorant of the Law, discharges the Justice to pronounce any Sentence.

Edinb^r 9 July 1666.

Muschett ag^t Harper and others for Usury, continued. The Lord Duffus¹ against Murrays and others, Sorner and Vagabonds for Theft, Robbery and Oppression, declared fugitives.

Edinb^r 17 July 1666.

Advocatus and William M^ckindlay, Messenger, against Donald M^cadam in Glasbeg, and others for Deforcement, continued.

Robertson and Torrie ag^t Laing and others for Deforcements continued.

Edinb^r 1 Aug^t 1666.

The Relict of Colthred ag^t Bannatynes for Slaughter, continued by a Warrant frae the Secrett Council till last March next.

A Petition presented to the Justices be James Steill in Galgray, complaining that a Messenger had not execute his Letters against two executors by collusion with them, craving therefore the Diet might be continued. The Justices does not grant the desire but ordains them to pass new Letters and reccomends to the Advocate to pass the Bill, which is an instance to prove how punctuallie the fforms of this Court are observed.

Not sufficient for craving a Diet to be continued to say the Messenger had not execute the Letters.

Patrick, Lord Gray,² for Deforcement declared fugitive and his Cautioner unawed in the Action pursued against him before the Justices at the instance of James Inglis and David Bruce, Chamberlains to the Earl of Winton, and their Mess^r and sicklike the M^{rs} Tennants are declared, fugitive and the Witnesses unawed.

¹ This peerage created in 1650, in favour of Alexander Sutherland (died 1674), became extinct in 1875.

² Eighth lord. Succeeded 1663; died 1711.

Edinb^r 7 August 1666.

Muschett ag^t Colin Hay and others for Usury, and Stewart of Garntullie ag^t Mr. James Row, minister at Monyvaird, for Perjury, continued till 10th of August.

Edinb^r 10th August 1666.

Muschett and others, ffactors for the Earl of Glencairn, against Colin Hay and others, continued as to them all to the 13th of November, except Andrew Watson who is continued to the 4th of Dec^r and deserted as to Robert Gib in Stirling.

Sir Thos.
Stewart of
Garntully g.
Mr. James
Row, minister,
for Perjury.

Sir Thos. Stewart, of Garntully, and the King's Advocaete against Mr. James Row, minister at Monyvaird, indicted for Perjury, in manner lybelled and sett down 2nd day of August¹ 1665. *Nota* the Interloq^r following thereupon 9th day of August¹ that same year. The Justices would not sustain the Commisary of Dunkelds Dec^t narrating the oath whereupon the Lybell of Perjury is founded the oath it self. Nothing produced in regard the Pannell's Procurators declared they would reduce the Decreet, but allowed them time to reduce it, and accordingly a Reduction being intended wherein the double of that Deposition was produced and the production thereby satisfied. The Lords of Session did reduce that Dec^t. This being necessarily premitted for understanding the following debate.

Mr. Nathaniel fife for the Pannell alledges, that he cannot be put to the knowledge of an Assize upon the Indictment as its founded on the Deposition, because its not subscribed by the Pannell, nor 2^{dly}, as its founded on the Commissary's Dec^t because its reduced by the Lords of Session, and he swears but according to knowledge.

Replys S^r Geo. M^ckenzie that tho the Disposition not subscribed by the Deponent can be no foundation of a Dec^t in a Civill Action, yet it can be the foundation of a Criminall for Perjury. If the Pursuer offer to prove by witnesses that the

¹ Dates supplied from Adv. MS.

Pannell did swear as is lybelled and that because in Criminall Actions all matters of fact are probable by Witnesses, and that the Pannell did swear so, is matter of ffact which positively is offered to be proven be Witnesses beyond exception, and as to the Reduction of the Commissary's Dec^t it is of no import as to this action, seeing the Deposition stands as it was and the verity thereof still offered to be proven. 2^o The quality of the Deposition according to knowledge cannot defend from Perjury, because in the first part of the Deposition he is positive, and suppose he had been ignorant at the time, yet this quality cannot defend, because he ought to have informed himself, and if it should defend, all oaths and Depositions would resolve in nothing, because the Deposition would not prove in the Civill Action, but would be a ground of absolutor and could be no foundation for a criminall action, and refers to the Citations contained in the former Debate, and therefore the Pannell who was at no pains to enquire of Perjury. the Discharges contrary to his Oath, all written with his own hand, and but about two or three months ago, should be look't upon as *Perjurius maxime temerarius*.

Duplys Mr. Andrew Birnie for the Pannell that his Defence stands [good and] relevant notwithstanding of the Reply, and he oppones his Decreet reductive wherein the production was holden satisfied by the coppie of that Deposition, and swa that Deposition being reduced it can produce no effects speciallie considering that the Dec^t reductive bears that the verity of the Deposition and the grounds thereof are referred to the Defender's Oath, and he depones negative and that last Deposition is not quarrelled nor is made a ground of this Dittay. 3^o An Oath according to knowledge can be no more a ground of perjury than *Juramentum calumniæ vel credulitatis*, and neither in these nor in this case can there be a ground for a Lybell of Perjury, seeing the Deponent's conscience and knowledge is made the measure of his Deposition. The Justices continue the pronouncing of this Interloq^r till the morrow, but not decided till 21 Nov^r next.

Eod. Die. John Herron and John Cubbison who had Theft, obtained Letters of Advocation from the Privy Council of a

Criminall Pursuit pursued against them for Theft at the instance of John and Quintein M^cAdams, before the Court of Air, advocating the same to the Justice Generall and his Deputes, bringing with them the Dittay upon the 19 of June last, which Advocation being then produced before the Justice Deputes and called and continued till this Dyet, and now the raisers of the Advocation compearing and producing the Letters with the Executions thereof, bearing that upon the 9th July last, they by virtue of an Act of Adjournall dated 19 June, had intimate the same to the Procurator ffiscall and to the Pursuers and delivered to each of them a coppie personallie, apprehended to compear before the Justices to answer in the s^d matter, with Certification if they compeared not this day the Dyet should desert. The Justices upon production hereof advocate the cause and ordain the raisers of the Advocation to find caution to appear to answer at the instance of the said Pursuers of the said principall Cause whenever they shall be called before the Justices at their instance upon a citation of 15 days. *Nota* I have sett down this at length to shew the form of advocating a Criminall Process.¹

Edinb^r 11 August 1666.

Sir Thomas Stewart against Mr. James Row, the pronouncing of the Interloquitor continued till 13 November.

Edinb^r 14 August 1666.

Muschett against Harper and Wetherspoon for Usury continued and . . . James Brown, another Defender, declared fugitive and his Cautioner unawed.

Edinb^r 4 Sept^r 1666.

William M^cKindlay, messenger, ag^t Donald M^cAdam and others for Deforcement, continued till the 29 Nov^r next.

¹ Advocation in criminal cases was ordinarily raised by the Privy Council, and is stated by Sir George M^cKenzie to be 'the away-calling of an intended cause or pursuit from an inferior, incompetent judicatory to a higher or more competent.' —W.

Advocatus ag^t George Keith at the Mill of Aden, etc., for Theft and Robbery continued till 13th Nov^r next, in respect the Execution did not bear coppies to be given to each partie, which are ordained to be given ag^t the said Dyet, *vide infra* 13 November 1666 where the Dyet is deserted.

Robert M^cinveir and John M^cAdam for Deforcement, declared fugitives, and their Cautioners unawed.

Edinb^r 7 and 8 Sept^r 1666.

The Dyetts against Andrew Watson, Hugh Roxburgh, and others, for Usury, continued.

Edinb^r 6 Nov^r 1666.

Thomas Leidshoom for Stealing from Walter Ranken, merchant in Dundee, declared fugitive and his Cautioner unawed.

James Cairns, Vintner, and William Cockburn, messenger, against Walter Hilstein and others for Deforcement, deserted.

Alexander Burnett, merchant in Aberdeen, and the King's Advocate, against Johnston of Closterfeat, for making double Alienations, deserted upon production of a sufficient Testificate of the Defenders Inability to travell and that there were neither Witnesses nor Assisers summoned.

William fforbes, naturall son to umq^{ll} John fforbes of Leslie, Slaughter, convened for the Slaughter of Irvine of Kincaussie, his Cautioner, John fforbes of Leslie compearing be his Procurator, is freed upon his verifying that he is now prisoner in the Tolbooth of Aberdeen, and a Commission direct from the Privy Councill to the Earl of Marischall, then Sherriff Principall of the Shyre of Aberdeen, and other persons for trying him upon this Commission. He was afterwards sentenced and hanged at that place near Aberdecn, betwixt it and the Bridge of Dee, called the Hardgate, where the Slaughter was committed. Some thought this case hard because it was done in the time of the troubles and after the Generall Act of Indemnity, but others who know better, say that it was not done in a hostile manner, but upon a private quarrell.

Edinb^r 13 Nov^r 1666.

Robert Smith against Alexander Smith at the Mill of Alathine, for Slaughter, continued till the morrow, and George Smith, another Defender, declared fugitive, and witnesses unawed.

Sir Thomas Stewart against Mr. James Row, for Perjury, continued till 20 November.

Earl of Glencairn ag^t Colin Hay and others for Usury, continued, and as to Rachell fforrest, another Defender, deserted.

Eod. Die. Major George Keith of Knock, designed formerly at the Mill of Aden, being conveyed at the instance of Alexander Smith for Theft and Robbery of his Goods, produces a Warrant frae the Privy Councill discharging the Justices to proceed because any intromission that the said Geo: Keith and the other persons had was upon this Title, that Smith was fugitive for a Murder, whereupon Keith as Sherriff Depute of the Shyre and the other Persons as his Officers, intromitted with these Goods for the King's use and made offer of them to the fugitives nearest friends if they would find Caution to make them furthcoming, which they refused. In obedience whereunto the Dyet is deserted. And the same day George Smith, son to the said Alexander Smith, is declared fugitive for the said Slaughter and the witnesses unawed.

Vituous Intromission by a Sherriff.

Edinb^r 14 and 15 Nov^r 1666.

Slaughter.

Robert Smith in Corbshill against Alexander Smith for Slaughter, continued till the 15th and on the 15th he is tryed and indited for the Slaughter of the said Robert, for coming to him upon the last of Aprile by past upon the highway as he was going from the Kirk of Achredie to his own house, and wounding him with a durk at the right pape, whereof he dyed. The Pannell is acquit.

Edinb. 16th Nov^r ¹ 1666.

Slaughter.

Robert Hume ag^t W^m Moncreif, Prisoner in the Tolbooth

¹ 'Eodem die' in Adv. MS.

of Edinb^r for the Slaughter of W^m Hume in Burntisland, the Pursuer's son, by giving him a mortall wound in the breast, whereof he died. The Lybell is verified by his confession before my Lord Advocate and Witnesses received judicialle in presence of the Assize, whereupon he is found guilty.

Eod. die the Earl of Glencairn and his Commissioners ag^t John Wetherspoon for Usury, continued till 1st January next.

Edinb^r 20 Nov^r 1666.

The severall Dyetts at the instance of James Inglis and David Bruce, against the Lord Gray and his Tennants, and the King's Advocate against Robert Harvy, Smith, and W^m Harper, Taylor, for Tumults committed by them in the Town of Edinburgh, and Sir Thomas Stewart ag^t Mr. James Row for Perjury, continued to severall Dietts, and severall of the Lord Gray's Tennants in the forsaid Action, declared fugitives and their Cautioners unlauded. As also severall of the Inhabitants of Edinburgh and Canongate, convened for the said Tumult, are declared fugitives.

Eod. Die. William Crawford of Brockloch, for Deforcement, declared fugitive.

Edinb^r 21 Nov^r 1666. The Justice Clerk, pt.

Thomas More, prisoner in the Tolbooth of Edinburgh, indicted for the slaughter of Robert Wright in Congerton, by shooting him with a Gun through the body, and is found Guilty by the Assize. The Probation made use of is, his Judiciall Confession, taken before the Sherriff of Roxburgh and the Deposition of severall witnesses. The first two depones, that they heard him emitt that Confession, and the rest that they heard him in many other places confess. But the 2^d witness depones expresly he saw the fact committed, and the first witness repeats his Deposition before the Sherriff which probably contains that in it. But if it be not in it, then the Assize has condemned upon the proving that Judiciall

Confession to have been emitted with the other extrajudicial Confessions and the positive testimony of the 2^d witness who depones he saw the fact done.

Sir Thomas Stewart of Garntully against Mr. James Row, Minister. This Action twice debated before, viz. 2nd day of August 1665 and 10 August 1666, receives now this Interloq^r from the Justices, finding the Defence and Duply proponed for the Pannell relevant and that the Dittay ought not to pass to the knowledge of an Assize, in respect the Deposition, which is the ground of the debate and Pursuit, is reduced before the Lords of Session, whereupon the Defender takes Instruments and protests for relief of his Cautioner.

Edinbr^r 22 November 1666.

The Relict and son of Gordon of Braiklie against 21 persons of the name of ffarquharson for the Slaughter of the said Braicklie, as also a reconvention of Braicklie's men and ffriends for killing John M^ckenzie and some other persons belonging to Inverey, indited at the King's Advocate's instance, likewise continued both to the 30 Nov^r instant.

Edinbr. 23d Nov^r 1666.

James Inglis and David Bruce against the Lord Gray for Deforcement, continued.

Thomas More convict upon the 21st instant of the slaughter of Robert Wright, is sentenced to be beheaded.

Edinbr^r 29 November 1666.

James Inglis and David Bruce ag^t the Lord Gray, for Deforcement, continued.

M^ckindlay ag^t M^cadam for Deforcement, continued.

Edinbr. 30 Novr. 1666.

The Relict and son of Gordon of Bracklaw ag^t ffarqrsns for slaughter, continued by warrand frae the Privy Councill till the 4 June next.

Edinb^r 3 December 1666.

Nisbett ag^t Carmichael for Usury continued.

Edinb^r 4 December 1666.

Muschett ag^t Carmichael, and Harper again cont^d as also the Pursuit at the s^d Muschett's instance ag^t Andrew Watson, merchant in Aberdeen, for Usury, continued.

Eod. Die. Ninian Gellie, Messr. and Dame Grissell Campbell ag^t the Sherriff of Bute for Deforcement, continued.

Edinburgh, 5 December 1666, Sir John Hume of Renton, Justice Clerk, and Mr. William Murray, Justice Depute, holds this Court, and it seems to me that Mr. John Cuninghame has left his charge, for I find him not in any Sederunt since the day of ¹ nor in any Sederunt hereafter tho this and the following Sederunt be spent upon the Pursuits against the Rebels who rose in arms in the Western and Southern Shires.

Because here begins the Processes ag^t the Rebels who fought at Pentland Hills wherein there are exact Lybells and fine Debates, I resolve to sett them down at length as they are in the Books.²

Sir John Nisbett his Majesties Advocate
against

Arnot and others—

Intran

Captain Andrew Arnott ³

Major John M^cCulloch ⁴

Some of the Rebels who fought ag^t the King's forces at Pentland hills arraigned, condemned and execute.

¹ Blanks also in Adv. MS.

² The indictment in this case, which is a curious specimen of such a document, really sketches the movement which, originating in Galloway, in consequence of the oppressive conduct of Sir James Turner, terminated in the battle of Pentland, when the insurgents were defeated by General Dalzell. The whole pleadings will be found printed at length in *Wodrow*.

³ Brother of the laird of Lochridge.

⁴ 'A reverent old gentleman.'—*Wodrow*, ii. 38.

Gavin Hamilton in Mauldslie in Carlouck Parish.

John Gordon of Knockbreck.¹

Crystall Strang,² tenant in Kilbryd.

Robert Gordon, brother to John Gordon of Knockbreck.

John Parker, wake³ in Kilbride parochine.

John Ross in Mauchline.

James Hamilton, tenant in Kittiemore.

John Shiells in Titwood.

Lybell.

Ye and ilk ane of yow are indyted and accused, for that albeit by the common law and the law of nations and the law and practise of this kingdome and many clear and express Acts of Parliament, the rising of his Majesties subjects or any number of them and their joining and assembling together in arms without his Majesties command, warrand and authority, and specialle when the same is not only without but against and in opposition to his Majesties authority and laws, are most horrid and heynous crimes of Rebellion, Treason and Lease-Majestie in the highest degree, and all persons committing and guilty of the said crimes or any ways accessory thereto or who doth abett, assist, receipt, intercommune with⁴ or keep correspondence with such Rebels or otherways do supply them in any manner of way, and being required by proclamation or otherwise, doth not rise with and assist his Majesties Lieutenant and others having power and authority for repressing the saids Rebels, ought to be proceeded against and severly punished as Traytors conform to the Laws and Acts of Parliament of this kingdome, and in particular it is statute and ordained by Act 3 Parl. 1 Ja. 1, that no man openly and noutourly rebell ag^t the King under the pain of fforfaulting life, land, and goods, and be Act 37 of the said Ja. 1 Parl. 2, it is statute that no man shall wilfully receipt, mantain or do favours to open and manifest Rebels against the King's Majestie and the common law under pain of fforfeiture. And by Act 14 Ja. 2 parl. 6 entituled, That none rebell against the King's person and authority, it is statute

¹ He and his brother are described by Wodrow as youths of strong piety and good learning and parts. Knockbreck is in Galloway.

² Or Christopher.

³ Walker.

⁴ 'with' deleted in Adv. MS.

that whosoever doth rebell against the King's person and authority or make war against the King's lieges, that they should be punished according and after the quality of their offence and rebellion. And by Act 25 Ja. 2 parl. 6 entituled Sundry points of Treason, it is statute that if any man committ or do Treason against the King's person and rise in fire and weir against him or receipts any that has committed treason or supplie them in help red or counsell, they shall be punished as Traytors, and by the 144 Act of Ja. 6, parl. 12, it is statute that wherever any declared Traitors or Rebels repair in any part of this Realm, none of our Sovereign Lord's lieges shall presume to receipt, supply or intercommune with them or to give them any relief or comfort, and immediately upon knowledge of their repairing in the bounds, all his Highness's obedient subjects shall do their exact diligence in searching and apprehending of the saids Traitors and Rebels, and that with all speed they certifie his Majestie or some of his Secret Councill or some chief person of authority and credite within the shire that such Rebels are within the same, under the pain that the said Traitors and Rebels ought to sustain if they were apprehended and convicted be Justice. Likeas by Act 5 of his Majesties late Parl. and 1st Sess. it is declared that it is and shall be high treason to the subjects of this kingdome or any number of them more or less upon any ground or pretext whatsoever to rise or continue in Arms to make peace or war, or make any treaties or Leagues with forreign princes or Estates, or among themselves without his majesties speciall authority and approbation first interponed thereto, and all his Majesties subjects are discharged upon any accompt or pretext whatsoever to attempt any of these things under the said pain of Treason. And by Act 7 of his Majesties forsaid Parliament and 1 Sess. thereof, all his Majesties subjects are discharged and inhibite that none of them presume upon any pretext or any authority whatsoever to require the renewing or swearing of the League and Covenant or of any other Covenant or publick oaths concerning the Government of the Church or Kingdom without his Majesties speciall warrand or approbation, and that none of his Majesty's subjects offer to renew or swear the same without his Majesty's Warrand as they shall be answer-

Trial of Rebels
who fought at
Pentland hills

able at their highest perrill. Nevertheless Yee and ilk ane of you and your associatts shaking off all fear of God and conscience of duty, alledgiance and loyalty to his sacred Majestie, your native and sovereign prince and naturall tenderness to your country, has most perfidiously and treasonably contraveened the said Laws and Acts of Parl^t and committed the forsaid crimes in a manner after specified in swa far as, this his Majesties ancient Kingdom having for many years suffered and indured all the calamities and miseries and tragicall effects and consequents of an intestine and civil warr and foreign usurpation, and now after his Majesties happie Restitution beginning to recover of so long and wasting a consumption throw the blessing of God, and his Majesties incomparable goodness and clemency having by an Act of Oblivion secured the lives and fortunes of Yow and others who were conscious to themselves and might have justly feared to be under the lash and compass of Law and Justice, and when his Majestie and People had good reason to expect security and quiet at home, and assistance against his enemys abroad, yet ye and a Partie of Seditious persons retaining and persisting in your inveterate disloyalty and dissafection to his Majesties Government and Laws, did take advantage and opportunity of the time when his Majesty was engaged in a chargeable and bloody war with divers of his neighbour Princes and States, being jealous of and envying his Majesties greatness and prosperity and the happiness of these Kingdoms under his Majesties Government, and having contrived and projected a horrid Insurrection and Rebellion tending to involve again his Majesties Kingdoms in blood and confusion and to encourage and strengthen his Enemys, did rise, convene and assembly your selves together in arms and upon the day of November last did march to and entered within his Majesties town of Dumfries in a hostile manner with your drawn swords and other arms did besett the house where Sir James Turner,¹

¹ Born in 1615, the son of a minister, and knighted at the Restoration; a man of some literary and military reputation, whose career was of a somewhat adventurous kind. This Dumfries insurrection led at the time to the loss of his commission, but at a later period he was again in command of troops, and was granted a pension by James VII. He was the author of several works. The date of his death seems uncertain.

one of the Officers of his Majesties forces was lodged, for the time, and did violently seize upon the said Sir James his person and goods within his lodging and did detain and carry him about with yow captive and as an lawfull Prisoner taken from an Enemie, and did search for and would have taken the minister of the said Town if he had not escaped, and while yow were in the said Town, ye and your complices and Associates did many other acts of Insolency and Rebellion, and having in manner forsaid oppenly avowed and proclaimed your Rebellion in so publick and insolent a way to the great contempt and affront of authority, ye and your Complices in pursuance of the same by your selves and others your Emmissarys and Instruments sent up and down throw the country of purpose to be Trumpetts of your Sedition, did convocate his Majesties People and Subjects and did endeavour to stir them up and perswade them to join in the forsaid Rebellion, and did seize upon the person's horses and arms¹ and did plunder and raffle the Goods and Houses of divers of his Majesties good subjects, and in speciall of faithfull and loyall ministers and by seditious sermons, insinuations and other practises, did so far prevail within the Stewartry of Kircudbright and Shyre of Wigton and the Shyres of Air, Lanerk and other western Shyres, that many persons flocking and resorting to yow and your complices, ye and they had the boldness to send a considerable partie to his Majesties Town of Air and to seize upon and take all the arms were there, and not content to proceed to the height of Rebellion in manner forsaid, yow and your complices did presume to regulate your monstrous and irregular Rebellion in the formality and frame and under the name and notion of an Army and to form and modell your selves in Troups, Companys, Regiments, and to name Captains of ffoot, Commanders of Troops and other officers under the command of Wallace of Auchins, Joseph Learmont and other persons of known dissafection to his Majesty and his Government. And tho his Majesties Lieu^t Generall did march speedily for repressing the said Rebellion and Insurrection and his Majesties Privy Councill did emmitt and issue a Proclamation declaring the said Insurrection to be manifest and

¹ 'and arms' not in Adv. MS.

horrid Rebellion and High Treason, and commanding the said Rebels to desist and lay down arms with Certification if they should continue in their Rebellion they should be proceeded against as desperate and incorrigible Traytors, and discharging all his Majesties subjects to join, resett, supply or intercommune with and commanding them to rise and join with his Majesties Lieu^t Generall and the fforces with him under the pain of Treason, yet yow and your Accomplices did obstinately continue and march in Arms throw the cuntry with your modelled army as if these had been an Enemy, and in capacity to rencounter and dispute by arms with your Sovereign Lord and his forces, and did in a warlike and hostile manner and posture enter within his Majesty's town of Lanerk,¹ and there upon Monday the 26 of Nov^r to palliate your Rebellion with the colour of Religion, did renew and take the Oath of the Covenant, and thence did march quartering all along upon and oppressing his Majestys good subjects untill they had the boldness and confidence to approach within two miles of his Majesties City of Edinburgh where his Majesties Judicatorys and Lords of his Privy Councill and Session were sitting for the time, and having quartered all night within the Parishin of Colinton, at so near a distance from the said City, yow and your accomplices upon the 28 of November did dare and presume to encounter, engage, and fight with his Majesties Army and fforces under the command and conduct of his Majesties Lieutenant Generall and other officers at Pentland hills, and did wound and kill in the said fight and conflict, divers of his Majesties good subjects, and endeavoured and did all ye could to destroy his Majesties Army, untill be the mercy of God and the conduct and valour of his Majesties Lieu^t Generall and Officers and Soldiers under him, ye and they were vanquished, rowted and dissipated, in doing of which and ane or other of the saids Deeds, ye and ilk ane of yow and your complices has committed and incurred the crime and pain of Treason and are guilty of being Authors, Actors, Abbettors, and Accessors to the said Rebellion, and of receipt-

Trialls of the
Rebells who
fought at Pent-
land hills.

¹ In commemoration of this event, the right arms of the accused were, after their execution, ordered by the Privy Council to be sent and affixed in Lanark.

ing, joining, being with, or otherways supplying the saids Rebels during the said Rebellion, and are art and part of the same, and therefore yow and ilk ane of yow and your complices ought and should be exemplarly punished with the loss and fforfaulture of life, lands and goods as Traytor to his Majestie to the terror and example of others to do the like in any time coming.

Pursuer	Procurators in Defence
Sir John Nisbet of Dirlton, knight, his Majesties Advocate.	SIR GEORGE LOCKHART.

SIR GEORGE M^cKENZIE.

Pursuers	Procurators in Defence.
	MR. WILLIAM MAXWELL.
	MR. WILLIAM HAMILTON. ¹
	MR. ROBERT DICKSONE.

My Lord Advocate produced his Warrant from the Privy Council to pursue with all diligence a Process of fforfaulture before the Justices against the forenamed Rebels subscribed by Peter Wedderburn,² Clerk of the Council. And the forenamed Advocates in defence produced also an Act of Privy Council dated 4 December instant granting power and warrant to them to plead for the forenamed persons.

Observe here and in all other Processes of Treason to be found in the Books of Adjournall that such warrants are still produced, for it is not safe for the Pursuer to insist without a Warrant, and the Advocates are allowed be Act of Parliament, viz. Act ³ parl. Ja. 6 to defend Traytors, yet for the greater security they are in use to obtain such Warrants from the Counsell or from Parliament, if the Pursuits be tabled there, and this is done by the Defenders giving in Petition to the Parliament or

¹ Son of Hamilton of Bangour. Admitted 1664. Left the bar, but readmitted in 1676. Appointed a judge under the title of Lord Whitelaw in 1693, and justice-clerk in October 1704. He died in December of the same year.

² Of Gosford. Appointed clerk of the Privy Council in 1661; raised to the bench in 1668; died 1679. The Act is James 6, Parl. 11, c. 38.—Brunton and Haig.

³ Blanks in Adv. MS.

Privy Councill, craving such and such Advocates to be authorized for his Defence.¹

ASSIZA.

Sir Alexander Urquhart of Cromarty.
 Sir Hary Hoom of Herdrig.
 Sir Laurence Scott, of Clerkington.
 Sir Alexander fforbes of Tolquhon.
 Jo. Hoom, Serv^r to the Earl of Hoom.
 Walter fforbes of Blackton.
 Adam Hepburn of Humbie.
 Alex^r Sandilands, merch^t in Ed^r
 John Johnston, merch^t there.
 William Hay, merch^t there.
 Walter Burne, merch^t in Ed^r
 John Lyon, merch^t in Edinb^r
 John M^gill, merchant there.
 James Cowan, merch^t there.²
 George Graham of Cairny.

The Assize lawfully sworn and admitted without objection: ffolows the Dispute, which is sett down word for word, tho it may be much abridged.

Pleadings,

Mr. W^m Maxwell alledges for the Pannells, that they cannot pass to the knowledge of an Assize upon this Indytement nor no Process against them upon this Citation, because this being an Indytement of Treason, all charges to be given to persons so indyted ought to be by an Lyon Herauld, Pursevaut or Macer, and is so ordained by Act of Parliament thereannt

¹ In cases of treason His Majesty's advocate was authorised to pursue either by an order from the Privy Council or by a warrant under His Majesty's hand, which authority was produced by him in Court.

Act 38, Parl. 11, Jas. 6 allowed advocates to plead in defence in all cases of treason pursued before Parliament, but by 90 Act, Parl. 11, Jas. 6 they were allowed to plead in any Court without licence, and judges were empowered to compel them to plead in such cases, although advocates in assisting pannells, 'especially in treason, used to protest that no escape of theirs in pleading may be misconstrued.'—Mackenzie's *Criminal Law*, p. 458.

² This name is not in the text, but appears in the Adv. MS. and in Wodrow. The list in text is obviously incomplete.

Ja. 6 P. 12, C. 125 in *anno* 1592. But so it is that thir Pannells are not charged by Heralds, Pursevants or Macers conform to the Act and therefore are not obliged to answer.

My Lord Advocate Replys to the Alledgiance that it ought to be repelled as no ways relevant because the Act of Parliament doth militate only in that case when any person is charged be Letters of Treason to deliver their Howses or do any other thing under the pain of Treason and doth not militate in the case of Citations and speciallie in this case when the parties imprisoned and the daily uncontroverted practique is opponed, there being nothing more ordinary than the persons guilty of crimes and specially of Treason, and being in hands and prisons for the same, should be brought to Tryall without any other formality or citation but giving them a Dittay.

Is a Citation upon a Lybell of treason valid tho not given by Heralds or Pursevants as the Act of Parl. directs? Yes.

Sir Geo. Lockhart for the Pannells Duplys that the Defence stands relevant notwithstanding of the Reply, because the Act of Parliament is opponed which bears the express reason thereof to be founded upon the importance and weightiness of the crime of Treason which equally militates whether the Parties accused of such crimes be in prison year or not, and practique. and custome has cleared the sense of the said act of Parliament, ffor it is noutour and known that all Indytements of Treason before the Last Parliament given to parties accused thereof albeit in prison yet it was done by Heralds and Pursevants as being the Solemnity required by the said Act, and there is no Warrant from the Act of Parliament to restrict it in the case of charging or delivering of Houses or the like.

rth Defence.

Sir Geo. M^okenzie for the Pannells says further that the Defence stands relevant notwithstanding of the answer, seeing an Indytement is not a Citation¹ and the Act of Parliament is opponed declaring, that if any other execution of Treason should be otherwise execute, the same is null, and the Particle any comprehends all, and therefore the Act is conceived in the same terms except it had been said² expresly, that all Executions if execute in manner forsaid shall be null, and Skeen does explain the same in manner forsaid, neither can

¹ 'is a summons and a citation.'—*Wodrow*.

² 'as if it had said.'—*Wodrow*.

the Act of Parliament be restricted to executions anent delivering of Houses, because after that the particle of the Act is finished, this begins with a new distinction and Item.

My Lord Advocate Triplys the former Answer and Act of Parliament is opponed being clear and express anent charges and executions under the pain of Treason as the Dittay and Charge given to the Pannells bears no Certification that they should appear under the pain of Treason and cannot be subsumed conform to the Act of Parliament that the execution in question is an execution under the pain of Treason, and as for the Citations the time of the late Parliament it cannot be obtruded, because such Solemnity if any was used before so high a Judicatory as the Parliament, was unnecessary and superfluous and *Superflua non nocent* and cannot be urged as practise.

Mr. William Maxwell for the Pannells quadruplyes that the Defence stands relevant notwithstanding of the Triply that whereas it is alledged that the Act is only where there is an Certification under the pain of Treason, but this Dittay bears no Certification of such a pain. It is answered that the Dittay concludes the pain of Treason, so that the Certification and Conclusion are *idem* Treason and there is no Letter for Treason or Indytment for Treason, but the pain and certification is Treason, and the Defence stands good from the Act of Parl^t. And whereas it is alledged that the Citation before the Parliament be Heralds (the Parliament being so supream a Judicatory) was superfluous. It is answered that the Parliament being a Supream Judicatory they might the better dispence with it, and yet all these charges was by Lyon Heralds, but the Justices in their proceedings are tyed down to proceed conform to the Laws of the Kingdom.

The Justices repells the Alledgiances proponed for the Pannells in respect of the Reply.

Sir George Lockhart for the Pannell Alledges that the Dittay cannot be put to the knowledge of an Assize whereupon to infer and conclude the pain of Death against the Pannells because (always denying the Dittay) yet albeit the Pannells had been accessory to the Acts and Deeds of Rebellion lybelled, yet as it is acknowledged by the Dittay it self, they did frame

Interloquitor
whereby the
Pannells are
overuled as to
their first de-
fence.

and modell themselves in the notion of Officers, Regiments, Companys, and were assaulted by his Majesties Lieutenant Generall and forces, who by virtue of his capacity and Commission, he and all officers and soldiers under his command might and *de facto* did upon the taking and apprehending of the Pannells, grant them quarter, whereupon they were taken and laid down their arms, and which Quarter being *publica fides* and offered and granted in manner forsaid to the Pannells, should be inviolably observed and secure them as to their lives.

The 2^d Defence is, that the Pannells got Quarters.

My Lord Advocate Replys that the former Alledgiance ought to be repelled as most irrelevant and having no ground or foundation in law, and as to that pretence that it is acknowledged in the Dittay that the Pannells and their Accomplices who joined with them in the late Rebellion did modell themselves in Companys and Regiments and in an Army, it is most absurd to infer from that which is lybelled as a heinous aggravation of their presumption and rebellion, that they should have had the boldness to put or think themselves in a capacity to dispute by Arms with their So: Lord and master, should be a ground of defence or extenuation, and as to that assertion that the Generall, and not only he but his inferior Officers and the meanest of his soldiers was in a capacity to grant Quarters and to secure the lives of Traytors and Rebels, it is a most unwarrantable and illegal assertion, and with all respect to the Gentleman who oppones the same, it is answered, that it is an alledgiance most derogatorie to his Majesties Royall power and prerogative who has only power to remitt Crimes and in speciall Treason the greatest of Crimes, so that either to assume or to give and prostitute so high a Prerogative to any other person, and especiallie to Officers and common Soldiers, it does reflect upon his Majesties royal prerogative, unless it were relevantly alledged that his Majestie had be his Commission given so high power expresly to his Generall and Soldiers to remitt and secure the lives of Traytors, which cannot be fancied much less alledged, and as to the point and pretence of Quarters and that *ipso facto* their persons were found in arms, they got quarters and were secured to their lives even in other questions. It is most questionable and though *ex honestate* it may be pretended yet

2^d Defence.

in bello justo the persons that are taken upon Quarters may be spared, yet *ex necessitate* there is no obligation to that purpose except there be an express Capitulation and deditiō and explicite paction to that effect. But in this case it is without all question where there is not *Bellum justum* but *perduellio* there are not *hostes* but *proditores* there is not the least shadow of pretence for the plea of Quarters except his Majesty had expressly empowered his Generall and all under him to secure the Lives of the Rebels subdued by him, and that wee are not in the case of *Bellum justum* it is more than evident, seeing *Bellum justum* is only betwixt Princes or States that has no dependance one upon another, and cannot debate and decide the differences but by the law of arms and *Bellum est inter pares et Judicium est in subditos* and that in this case there is no *jura belli* either *post summum* quarters or such like, seeing be the common law *Resistentia subditorum* is altogether forbidden and unlawfull and they are not *Hostes* but *proditores* and by the law of this nation and specially the Acts of Parliament that are cited in the Dittay, it is not War or *Bellum* but Treason in the highest degree, for a number of his Majesties subjects to rise in arms without tho' it were not against his Majesties Authority, as in the case of this Rebellion, so that seeing wee are not in the case of *Bellum* this Defence being founded upon a pretended just *Bellum* its most irrelevant especially being considered that his Majesties Councill in pursuance of their duty for repressing of the said Rebellion and Treason, has emmitted a Proclamation founded upon the common law and the laws of this Kingdome declaring the same to be Rebellion and high Treason, and commanding the Rebels to lay down their Arms with Certification that if they should continue in Arms they should be holden and proceeded against as desperate and incorrigible Traitors and should be incapable of all mercy and pardon.

Sir Geo. M^ckenzie for the Pannells alledges, that Pannells and such as appear for them (except Arnot for whom they do not alledge the getting of Quarters) do with all submission to his Majesties Prerogative propone both the forsaid Defence and this Duply, intending to assert his Majesties prerogative by sheltering themselves under his mercy and acknowledging

that his power is so great that the meanest of his soldiers can give Quarters, and without debating the justice of the war which they here decline, it is alledged for them that *Capti in Bello* abstracting from *justum* or *injustum* are in its latitude capable of Quarter, and Quarter being given them by such as are listed soldiers, doth secure them as to their lives, seing *eo ipso* that soldiers are commissioned and listed, they have power for that which is necessarily inherent in their employment, and Quarter uses to be valued *Jura Belli* when given by the meanest soldier for such only uses to give Quarter, Generall Persons, and Superior Officers not being ordinarily in use to take prisoners. So that seeing these had power to give which is only here controvertable when given is valid without debating the justness of the War, ffor seeing any of the Pannells being in arms might have disputed and defended his own life and might have possibly reached the lives of the greatest who opposed them in accepting of Quarter and laying aside their Arms, they have in effect ransomed their life and exchanged it in favours of his Majestie and his fforces with the lives of others, and many lawyers debating this subject do call this a Transaction and should be kept upon that account, and namely Grotious cap. 11 § 14 lib. 3, where he debates this case indefinitely and Claudius de Cotle *de Jure et priviledgiis militum*, Paris de Puteo *de re militari*, and in reason soldiers who may defend their own life are not obliged nor is it customary when Quarter is given them to seek the granters commission, Seeing *nec mora patitur nec est consentaneum naturæ actus*, private soldiers being in use generally to grant the same, and what is customary *semper inest* except it be expresly forbidden and the prohibition so known to the transacters that they are thereby put in *mala fide*, and the difference betwixt *Bellum quoad justum* and *injustum* lyes not here, seeing the reason of Quarter is the sparing in prudence the blood of the one partie and the conserving of humanity in that of the other, the one whereof is at least common to both *Justum* and *Injustum*, but the difference is, that in *Bello justo* prisoners taken tho without Quarter cannot be killed but in *injusto* they may, except they have a Quarter, and that Quarter is given betwixt King and Subjects when formed once, whether justly or unjustly, in modelled arms.

It's offered to be proven by persons who understand that trade to have been actually allowed betwixt the Hollanders and the K. of Spain, betwixt the Protestant Rochellers in France and their King, and allowed by his Majesties forces in the Hills and the rebellious English, tho there was no just war among these parties upon the ground forsaid, neither is it debated that any but his Majestie can grant remmissions, but in listing in¹ Soldiers and their giving Quarter his Majestie does in effect give it. And seeing no armys nor soldiers could subsist without Quarter *quando aliquid conceditur omnia concessa videntur sine quibus principale concessum consistere nequit*, and as the Counsell for seen reasons might without express warrand from his Majestie, have secured upon submission the lives of these prisoners, so might much more soldiers whose proper trade and calling it is.

Sir Geo: Lockhart for the Pannells Duplies farther, that the forsaid Reply for the Pannells founded upon the offering of Quarters to the Pannells, and the accepting of the same stands relevant and is no ways eluded by the said Reply, and that there may be no mistake what the Pannells and their Procurators do plead under the terms and notion of Quarter, it is condescended that Quarter mentioned in the Defence is proponed and understood in thir terms, viz. that the Pannells being in Arms and in action of resistance and not in the power of the takers did give up their arms and became in the power of the takers upon the granting of Quarter, and that Quarter so given should in law and reason operate the security of the lives of persons so taken is evident and apparent in so far as it is a Transaction and paction and *fides data est accepta* and accordingly fulfilled upon the part of these who were taken, and in law all Pactions and Transactions being *Justitiæ* cumulative it abstracts and does not consider the quality and merit of persons but the terms, sense and meaning of such pactions and transactions. And whereas it is pretended that the granters of Quarters, specially mean Soldiers, had no power to do the same, as encroaching upon his Majesties Prerogative, it is answered ought to be repelled, because what his Majesties officers and soldiers did act consequentially and suitable to the

¹ 'in' not in Adv. MS.

nature of the offices and to the exercise of their duties did flow from and was warranted by his Majesties authority, so that they ought not to be contrary distinguished, the authority of his Majesty's officers and soldiers being derived from his Majesty as the fountain of the same but speciallie in this case where first before they did enter in fight there was no discharge or prohibition as to the granting of Quarters, but on the contrary the Lieu^t Generall and all the officers being present were witnesses to the granting of Quarters, and therefore the same were not the acts of simple soldiers but acts warranted and authorized by the knowledge and example of persons having supream command, and as to that part that there was not *Bellum justum* upon the part of the Pannells and their Accomplices, it is answered that the Pannells do with all humility and submission acknowledge the same, but the consequence that can be inferred thereupon is not that Quarter given should be observed, but that Quarter might have justly been refused, and there is no doubt but *Jura Belli* which do naturally arise without express covenant or paction, cannot be extended to this case. But notwithstanding whereof where Quarter was granted in manner forsaid it cannot be so intrepert in law or reason as to be a snare to any who was resisting the power of the granters justly or unjustly, and it is a common and known distinction *inter deditos et captos*, the first being in the case of a simple surrender which can import no more but at most a submission upon mercy. But it is far otherwise in the case of persons taken upon the express terms of granting and accepting of Quarter, and that this position is neither absurd nor illegall nor destitute of the authoritie of eminent lawyers. And the practise of most famous and military nations may appear from the learned and judicious Grotius who has written *ex instituto* and most excellently upon the same subject which he entitles *de Jure belli ac pacis*, and who in his 19 cap. lib. 3 entitled *de fide inter hostes* ¶ 6, after having premised what does import *fides*, which he resolves not only to be inferred from writ or words but even from sense known and customary, he does expressly state this question, *quid ergo*¹ *dicemus de subditorum bellis adversus Reges aliasque summas potestates*, where he

¹ 'ergo' not in Adv. MS.

resolves the question upon the former ground that paction and transaction does abstract from the quality and demerit of persons that *illis etiam data fides servanda id est generaliter fidem datam servandam etiam perfidis*, and the reason is clear because there is no apparent reason why the granters of Quarters having interponed their faith, why they should violate the same, and as to that pretence that none grant Quarters but those who remitts the crime of Treason, it is answered that it is humbly conceived there is a vast disparity from the Act of Remission of either the crime of Treason or any other. It is *pura oblatio* and the sole act of the granter, whereas the granting of Quarters it may be of paction and transaction *in impetu in furore belli*, and in contemplation whereof persons supposing themselves secured as to their lives by Quarter, and becomes in the power of the Granters without resistance, and as to that ground that his Majestie be the authoritie of the Lords of his Privy Councill did emmitt an Proclamation declaring that the contravention lybelled was a Rebellion, and that all that were accessory thereto, if they did not lay down their arms, should be incapable of mercy. It is answered first¹ that albeit this Proclamation, as the Pannells pretend, was not intimate nor did consist in their knowledge, yet suppose it had been known it cannot elide the Quarter granted to the Pannells, because notwithstanding of² any such Proclamation, the Pannells were in *optima fide* finding his Majesties officers and soldiers who cannot be supposed but to have known his Majestie and the Lo: of Privy Councill their sense and meaning of the Proclamation, which behooved to have restrained them from giving of Quarter. Yet notwithstanding the same was granted, the Pannells had reason to believe they were sufficiently warranted to that effect and has rested upon their faith in accepting the same, and albeit be proclamation they were declared incapable of mercy, that in neither reason nor words can be interpret to the case of Quarters, which was not an Act of simple mercy but upon Transaction and Paction.

Sir George M^ckenzie adds to his former alledgiance that pactions betwixt king and subjects though they cannot be

¹ 'first' not in Adv. MS.

² 'of' not in Adv. MS.

forced, and it is but Rebellion in Subjects to require them, yet being once made they not only are ordinarily kept amongst all nations, but his Majestie who now reigns having made with the greatest of¹ the Rebels a more dishonourable paction, did observe the same, viz. the Parl^t 1649, which his Majestie ordered to be observed by an express order.

My Lo: Advocate answers and triplys (1^o) Tho wee were *in Bello*, as wee are not, and in the case of Quarter, yet the Alledgiance is no ways relevant as it is proponed and qualified, and it is not condescended what persons gave Quarters to the Pannells or any of them, nor in what terms, and to inferr Quarters and Impunity from the naked taking of the Pannells and because they are Prisoners, it is without any Law or Reason, seeing the Pannells might have been overpowered and tane be force, and it is to be presumed that his Majesties army, being more numerous and victorious, that they were overpowered and vanquished, and that they were not taken either upon an express and implicite condition and capitulation, and the Rebels being rooted, etc. cannot be thought that his Majesties officers and soldiers and persons of such valour would have given Quarters upon account of a pretended Transaction and in order to their own safety, and that they would own their lives so dishonourably to Traytors.

(2^o) The former answer is repeated and it is most evident that wee are not in the case of Quarters, and so where there is *Bellum* and where there is the relation of *Hostes*, it may be pretended that Quarters ought to be observed with abstraction from the qualitie of the difference of the war, whether just or unjust, as, for when war is betwixt his Majestie and any of his neighbour Princes and Estates, tho it be unjust upon the part of his Enemys, Quarters may and ought to be kept. Yet in this case where there is no *Bellum* but Rebellion and *proditio et lesio majestatis*, where there is not *Hostes* but *proditores* such as all Traitors are, that are in the condition of the Pannells who perfidiously doth rise up ag^t their sovereign Lord, there can be no pretence for any priviledge of *Jus Belli* and of Quarters, and as to that pretence that *fides publica est servanda*, it is without all question then² that when *ffides*

¹ 'the greatest of' not in Adv. MS.

² 'then' not in Adv. MS.

is given by an express Treaty not only betwixt his Majestie and any other stranger Princes or States, but betwixt his Majestie and his subjects by an Act of pacification, any other Treaty ought to be observed religiously, but we are not in the case where *fides publica* is given either by his Majestie or any authorised by him and having express power to that purpose, and that his Majesties Generall or his officers, soldiers, has power to grant any such *fides* unless their commission were express to that purpose, is *Petitio principij*, and is altogether denied, and that the most that Quarters can import in this case, tho it could be made out that Quarters was granted, is, that the Generall and his Officers and Soldiers, may by granting of Quarters, might have secured them as to that which were in their power, viz. that they should not be then presently cut off but that they should have secured them from that which was not in their power from the just stroke of Justice, it is altogether denied. And as to the pretence of Transactions and the reasons and arguments adduced for the Pannells to that purpose, if there were any weight, the most it could operate were to be motives for making a Law to that purpose that his Majesties Officers *eo ipso* that they were in power to serve under him should have power by granting of Quarters to secure the lives of Traitors, but there is no such law, and a Generall being commissioneate and having gone to suppress Rebels without a hint to the purpose forsaide, the Defence upon Law or Act of Parliam^t known in this countrey is most irrelevant, specially it being considered, that it is an undoubted principle that Treason being of so high a nature cannot be remitted but by an immediate grant and remission of his Majestie under the Great Seal, or some person having commission under the Great Seall expresly. As to authoritys from the lawyers mentioned in the Alledgiance, they are but the opinions of private men and does not amount to the authority of Law, specially in this kingdom, there being clear and express Acts of Parliament and fundamentall Laws that his Majesties lieges and people should be governed and judged by his Majestys laws allenarly, and not by the Laws of any other nations, much less by the simple opinions of School dictates of Lawyers. Likeas the said authoritys tho they

were of any weight, they do not meet or quadrate the case in question, in respect they are only in the case of *Bellum* as said is, or when there are express and publick Transactions by Treaties, Edicts, or Acts of Honestie or Oblivion, and Grotius tho he might be suspected as being the subject of an estate who had shaken off the Government of their prince, yet he is most clear in the case that there is no *Bellum* betwixt subjects and their Sovereign Lord, and that *resistentia subditorum* is *vetita omni jure* and cannot pretend to be *jura* and rights of priviledges of war, unless the Sovereign authority be pleased to condescend so far as to capitulate expressly and treat with the Subjects. And it is a most groundless pretence that if a Transaction betwixt the Generall or any soldiers and officers as to the matter of Quarters, seeing it cannot be said that the generall had power to transact by an express capitulation betwixt him and the Rebels, and is without all question that the Generall could have secured the Rebels of this Army by an transaction be himself without an express warrand either from his Majestie or from his Counsell, and consequently seeing by a downright and express Transaction of treaty could not secure Traytors, it is gratis and without warrand asserted that he and much less his officers and common soldiers, could be a pretended implicate Transaction secure and indemnify Traytors. And its without all question (notwithstanding the pretences to the contrary), seeing if his commission had related to Quarters, as it could not in the case having to do with Rebels and Traytors and not with an enemy, and if his commission had been express that he should not have power to secure the Rebels by Quarters but that they should be altogether incapable of mercy, no person could have the confidence to assert that he would grant Quarters in the case forsaid, and it is clear that wee are in a stronger case seeing the Generall had no such commission and power to grant Quarters, and the Counsell by their Proclamation forsaid does declare the Rebels as said is incapable of Pardon, which being intimate to the Generall and being sent to him and to all persons concerned be proclamation in the ordinary form, to plead ane pretence of ignorance or *bona fides* is most frivolous and unwarrantable, seeing *Ignorantia juris nemini prodest*, and

it was their own fault if being engaged and busied in their rebellious course they did not come to the knowledge of the said proclamation being founded upon the common law and the law of the kingdome, it being a principle of both that Traytors being *miles* and no men be the construction of law as to any benefite and capacity of any pretended transaction. And as to¹ the instances from the practise of Spain, Holland and² France and other kingdoms, they do no ways quadrate in this case, and the same being as said is of *publica edicta* and express treaties and transactions, in respect of all which the Defence ought to be repelled.

Mr W^m Maxwell for the Pannells quadruples, that whereas it is answered that the Defence is indefinitely qualified not condescending upon the person, granter of the Quarters, and what manner, it is answered, that it shall be condescended on in writ who granted the same being listed officers and Soldiers under the manner of the same was in the usual form under command, and that the manner of the same was in the usual form that Quarters are granted, viz. assurance of their lives from these who granted Quarters. Next, whereas it is alledged that Quarters cannot be presumed to have been granted, his Majesties army being victorious and the other partie routed who alledges to have gotten Quarters, it is answered, that no presumption can be admitted against a positive Defence which is offered to be proven. As to the 3^d whereby it is alledged there can be no Quarters sustained as lawfull but where the war is just, it cannot be in this case betwixt his Majesties Generall and the Rebels, its answered that the Pannells oppones their former answers and adds that the question is not here in the lawfulness of the Pannell's quarrell, but whether or not his Majesties Lieutenant Generall,³ being constitute as a Generall be his Commission, could give Quarters or not, which the Pannell mantains he had power to do, being his Majesties Lieu^t Generall be Commission, neither needed he any such express power for giving of Quarters insert in his Commission, because *inerat* in his Commission and every listed

¹ 'to' not in Adv. MS.

² 'and' not in Adv. MS.

³ 'Generall' not in Adv. MS.

off^r or soldier under him, he having by the said commission the like power as any other princes Generall and others under him has, and to hold the contrary it seems strange, for it was never called in question in any nation heretofore, nor did ever his Majestie or his royall ffather call in question the Quarters granted be their Generall, Officers, or listed Soldiers under them in the fields, but esteemed the same ever sacred to be kepted even in these who were in a modell of an Army for Rebellion in the time, and if Quarters should not be kepted but elided by a secondary way of Pannelling the persons receivers of the Quarters, it should both entrench upon the word of the Generall, his commission and soldiers, to whom none hereafter may give trust, especiallie in a matter of that high concernment after their lives are secured to them by a publick Transaction without consent of his Majestie and his Counsell, the Pannells first leaves that to the consideration of his majesty and his secret Councill, if the Generall being clad with a commission from his Majestie has not power to treat, to grant Quarters, or receive any of these who are in Rebellion to peace, wherein his commission is ample and not restricted, the Pannells answers no furdur but oppones the amplitude of the commission, the constant course observed by his Majestie and his ffather's generalls of before, the assurance given of their lives by the Quarter and the dangerous consequence may ensue thereupon. And whereas it is alledged that the Pannells being Traytors the Quarters cannot operate for them to exeem them from the Tryall and inflicting the punishment conform to the Law of the Kingdome, since they must be ruled by the laws of the Kingdome, and there is no law that can warrand them for Rebellion or exeeming them from the punishment due to Rebels. It is answered, that the case now in debate is, whether Quarters given to persons modelled in an Army in the fields, if they having received Quarters, there being no law to discharge their Generall to give Quarters if they do not lawfully accept thereof, be lawfully granted, ffor albeit the **Laws** of the Kingdom unless in the time of peace amongst all the subjects, but in the time of war where is two Armys in the fields, there the law of Arms has place and the Law of Nations whereupon the faith given in Quarters is founded

must be kept and never was broken. And as for the Allegiance that if the Generall had been restrained by the Commission to give Quarters, the Quarters given by him could not be respected. And it is alledged that the case is alike here, there being a Proclamation emmitted by the Councill declaring the Pannells' acting to be Rebellion, and that they were commanded by the same to lay down their arms within a certain short space, otherwise to be proceeded against as the worst of Rebels and Traytors and not to have mercy.

It is answered, 1^o That the Proclamation did no ways derogate to the Generall's Commission which remained as absolute as before, so long as he remained in the fields, nor does the Counsell by the said Proclamation discharge him to give Quarters thereby to retrench the power of his Commission. 2^o The Commission could not be known to the Pannells, who could not have access to the Mercate Crosses where the same was to be promulgate, Proclamations at Mercate Crosses being the course of making known the Counsell's pleasure in peaceable times. But the course of war is when two Armies is in the fields the one sends a Trumpet with a Proclamation to intimate the same. 3^o They not knowing of the Proclamation in the time of the conflict, and the Pannells being required to lay down their arms shewing it was the Councill's will, and Quarters being given them thereupon, as they would have a good defence if they had laid down arms within the time prescribed by the Proclamation, if the same had come to their knowledge. So likewise, in this case being intimate to them the time of the Quarters, and they having given obedience thereto upon assurance of their lives, the faith and assurance given to them of their lives ought not to be broken in respect whereof the Defence stands relevant notwithstanding of the former Triply.

Sir Geo: M^cKenzie for the Pannells adds that the subject matter of this Debate is the Law of Arms, and there being no express positive law to regulate the same, it is offered to be proven by such as understand the Law of Arms that Quarter is allowed where subjects in arms uses against their Prince tho' given but by private soldiers, except there be an express prohibition in the contrary. Likeas it is offered to be proven

by the Generall, Lieutenant Generall, and other officers, that in this case they either gave Quarter or allowed the giving of Quarter of which he himself can only give an account, and all the lieges of the nation are herein concerned, seeing all subsequent and supervenient broills and commotions every man to make sure shall cutt his neighbour's throat, so that the innocent shall have no defence and Rebels shall be fortified in their courage and necessity which legittimats all other acts in the opinion of such as *in furore belli* consult with nothing but with their safetie, will obdure them much more than formerly, and of ordinar Rebels make them insupportable Traytors and Rebels, and that place in the Kings spoken by one of the Prophetts to the King of Israel is here remembred, will there take the life of those whom thow hast taken by the Bow and Sword.

Mr William Maxwell for the Pannell John Shiell in Titwood, says, the conclusion of the Dittay cannot be inferred against him because it is offered to be proven that he was in the Army with his Majesties Generall the time of the Proclamation, which coming to his knowledge if he had any arms, then he was willing to lay them down, and so having obeyed the Proclamation by his willingness if he had been in the fields, so that if he had been out with the rest of the Pannells, he would have had the benefite of the said Proclamation, and being in firmance and prisoner with the Generall, being most willing to obey the Proclamation, the conclusion cannot be inferred against him. And whereas the Proclamation bears that even for these who should give obedience thereto, the effect thereof to them could be to come in¹ mercy. The Pannell doth humbly conceive the Counsell's meaning was never to take the lives of those who obeyed the Proclamation, specially seeing the Certification is express thereto, such as are disobedient they should be proceeded against as traytors.

Mr Rob^t Dickson for the Pannell John Ross repeats the hail former Defences upon the benefite of Quarter and repeats the first Defence proponed for John Shiell, and humbly craves the benefite of his Majesties Proclamation.

Defence for the
Pannell John
Shiell.

Do. for John
Ross.

¹ 'to.'—*Wodrow*.

My Lord Advocate Answers shortly to the alledgiance for Shiell and Ross, and adhered to and repeated for John Ross that the same merits no answer, in respect the saids persons were taken as Spyes and Emissarys for giving intelligence to the Rebels, and were prisoners for the time, and their arms being taken from them upon the occasion forsaid, they could not lay down the same nor plead the benefite of the Proclamation concerning these who should be in arms the time of the issuing and proclamation of the same, whatever the import and benefite and extent of the Proclamation be, which the Pursuer neither doth nor is concerned to dispute in the case of the saids Pannells.

The Interloq^r
on the
Relevancy.

The Justice Repells the Defence, Duply and Quadruply proponed for the Pannells in respect of the Reply and Triply proponed by his Majesties Advocate, as also the Defence proponed for Sheill and Ross in respect of the Reply, and Ordains the Dittay to pass to the knowledge of an Inquest.

The Confes-
sions of the
Pannells
repeated for
probation.

Cap^t Arnot's
Confession.

My Lord Advocate for proving the Dittay produces the Pannells' Confessions made to the Lords of his Majesties Privy Councill and to the Committee of them whereof the tenor follows, viz., the said Captain Andrew Arnot did confess that he did join with the Rebellious partie in the west at Air and came along with them in their march to this country, and that he did accept the command of one of their Troops and did ride on the head thereof, and that he came with them to Lanerk and took the Covenant with them there, and did go along with them to Bathgate, Colington, and Pentland, and was at the late ffight in arms with his sword drawn.

Major M^ccul-
loch's Confes-
sion.

The said Major John M^cculloch did confess that he joined with the Rebels at Air and came with them to Lanerk and there took the Covenant with them, and continued with them in Arms and Rebellion untill Wednesday the day of the conflict at Pentland where he was in Arms and taken prisoner.

Gavin Hamil-
ton's Confes-
sion.

The said Gavin Hamilton did confess that he joined with the Rebels and came along with them and that he was in M^cClellan of Barscobb's troop and was in arms in the ffight at Pentland where he was taken.

The said John Gordon did confess that he joined with the Rebels before they came to Lanerk, where having taken the Covenant with them he marched and came along with them to Colington and Pentland on horseback and in arms with them at the conflict where the Rebels were defeat.

John Gordon's
Confession.

The said Cristall Strang did confess that he joined with the Rebels and was at Lanerk with them and took the Covenant and came along with them to Pentland and was an horseman in arms with Sword and Pistolls, under the command of Captain Paton, commander of one of the Rebels Troops and was in arms at the late Conflict.

Cristall Strang's
Confession.

The said Robert Gordon did confess that he joined with the Rebels at Dowglass and came along with them and had charge as a Cornet of a Troop of Horse whereof . . . Maxwell younger of Monreif was Captain, and that he was in arms with the Rebels at the late Conflict.

Robert Gordon's
Confession.

The said John Parker did confess that he joined in arms with the Rebellious party in the West and came along with them to Pentland and was there under the command of Collonell Wallace.

John Parker's
Confession.

The said John Ross did confess that he joined with the Rebels in the West and that at the desire of Mr. John Guthrie, one of the Officers of that partie, he went along to discover if the king's fforces were coming to Kilmarnock, being in Arms, having Pistolls with him and going along with John Shiells and certain other persons to bring the Rebels intelligence.

John Ross's
Confession.

The said James Hamilton did confess that he joined with the Rebellious partie and was with them at Lanerk where he did take the Covenant and marched along with them in Bar-scobb's Troup with Swords and Pistolls and came along with them to Colington and from thence to Pentland, and was there in arms when the Rebels were defeat.

Ja. Hamilton's
Confession.

The said John Shiell did confess that he joined with the Rebellious partie in the West and that he was employed and did go at the desire of Mr. John Guthrie and some of the officers that commanded that partie, with John Ross and other prisoners as a Spye to see if the King's fforces were coming to Kilmarnock and bring the Rebels intelligence.

John Shiell's
Confession.

Which Confessions being read to the Pannells and they particularly and severally interrogate conform thereto, they judicially in presence of the Assize acknowledged and renewed the same, whereupon Lord Advocate took Instruments.

Verdict of the
Assize.

The Assize all in one voice by the mouth of Sir Alexander Urquhart of Cromarty their Chancellor fand all and every one of the Pannells Guilty and culpable of the particular treasonable Acts contained in the Indytement, and their Confessions, which Confessions is repeated word be word in the Verdict and then says and that conform to their severall Confessions *Sic Sub^r Alex^r Urquhart.*

Sentence.

ffolows the Sentence. My Lord Justice Clerk and Justice Deputes decerns and adjudges the saids Captain Andrew Arnot, Major John M^cCulloch, Gavin Hamilton in Mauldslie in Carlouk Parish, John Gordon of Knockbreck, Cristall Strang, tenant in Kilbride, Robert Gordon, brother to John Gordon of Knockbreck, John Parker walker in Kirkbride Parishin, John Ross in Mauchline, Jas. Hamilton, tenant in Kithemoor and John Shiells in Titwood, as being found guilty by an Assize, of the treasonable crimes forsaid, to be taken ffriday the 7th December instant betwixt 2 and 4 hours afternoon to the Mercate Cross of Edinb^r and there to be hanged upon a Gibbett till they be dead, and after they are dead, their heads¹ and right arms to be cutt off and disposed upon as the Lords of his Majesties Privy Councill shall think fitt, and all their lands, heretages, goods and gear to be forfault and escheat to his Majesties use for the treasonable crimes forsaid, which was pronounced for Doom.

This Sentence was accordingly execute, for at the day appointed the haill forenamed persons were all hanged together upon a long Cross tree of a Gallows erected for them of purpose.

Absent Assisers
americiat.

The said day Sir John Cowpar of Gogar, James Dewar, late Baillie in Canongate, Sir Alexander Keith of Ludwharn, John Scott, merchant burges of Edinb^r, John Boyd late Baillie there, William Bruce, Skinner there, ² Stiven, hatmaker there, Collonel John Home of Plenderqhaist, and George Cock-

¹ 'hands' in Adv. MS.

² Blank in MS. ; blank also in Adv. MS.

burn of Piltoun, ameriat for being absent from the forsaid Assise.¹

Edinb^r 12 December 1666. Court holden be Sir John Home of Renton and Mr. William Murray, Justice Depute.

Sir John Nisbet his Majesties Advocate
against M^cKhail,¹

Mr. Alex^r Robertson and others

Intran or persons at the bar.

Mr. Alex^r Robertson.

John Neilson of Corsack.²

George Crauford in Cumnock.

John Lindsay in Edinb^r.

John Gordon in the paroch of Irongrein. and Thomas Lennox.

The Diet continued till the morrow being the 13 inst. as to Mr. Hugh M^cCaull² Humphray Colquhoun, and Thomas Lennox.

The said Mr. Alexander Robertson indited and accused at the instance of Sir John Nisbet, his Majesty's Advocate, upon a lybell of Treason, conform³ word by word to the lybell sett down in the Diet immediatly preceeding. There are two Advocates to witt Mr. John Eleis and Mr. Robert Dickson marked for them, but no debate for their case being the same with these who are condemned in the former proces, they could have no Defence but what is repelled here.

Alexander Douglas of Blackestoun, James Cockburn of that Assise. ilk, James Hamilton, por^r Mountainhall, John Watson, merch^t in Edinb^r, Henry Chaip, vintner there, Patrick Scott of Langshaw, Alex^r Scott, goldsmith, John Archibald of Glen, John Oliphant, merchant, Alexander Crookshanks, merchant, Adam Lessly, mer^{tt} in Edinb., James Boyd of Temple, Thomas Noble,

¹ The absence of jurors in this and the following case is significant. 'I do not find,' writes Wodrow of this case, 'they gave themselves the trouble of hearing advocates but make short work.' Of the previous trial he says, perhaps truly enough, 'They heard the advocates plead a little for form's sake.'

² A few days previously M^cKail and Neilson had been tortured with the 'boots' under a Privy Council order. 'When Mr. Hugh M^cKail suffered there was scarce ever seen so much sorrow in onlookers. Scarce was there a dry cheek in the whole street or windows at the Cross of Edinburgh.'—*Wodrow*.

³ 'conform' not in Adv. MS.

merc^t in Ed^r, Andrew Caldell, vintner, John Boyd, late baillie of Edin^r all lawfully sworn and admitted without objection.

My Lo: Advocate for proving this Dittay produced the pannells their¹ Confessions, made to a Committee of the Privy Council, which being read to the Pannells, the tenor thereof follows, viz. the said Alex^r Robertson did confess that he did rise and joyn in arms with the Rebellious party and that he was one of these that went to the town of Dumfries and seized upon Sir James Turner; and that he went amongst with the said party to Air, and that he was at Lanerk and took the Covenant with the rest of the said party there, and came amongst to Colintoun and Pentland hills; and that he was in arms in the conflict there with Cap^t Arnot against his Majesties forces with sword and pistol, and that he had his sword drawn and discharged his pistol in the said fight.

Alex^r Robert-
son's Confes-
sion.

John Neilson's
Confession.

The said John Neilson of Corsack did confess that he was with the Rebels at the taking of Sir James Turner at Dumfries, and that he did join with these men that rose in the West, and that he came amongst with them in arms and that he was at Pentland in arms with the Rebels there.

Geo: Crauford's
Confession.

The said George Crauford in Cumnock did confess that he came to the Rebels and joined with them and was a horseman in Balmagachan's troop and was at Lanerk where he took the Covenant with them, and came amongst with them to Pentland where he was taken beside Mortounhall.

John Lindsay's
Confession.

The said John Lindsay, indweller in Edinb^r did confess that he went away with two out of this town, and being armed with sword and pistol did join with the rebellious party under the command of Mr. George Crookshank, and was with them at Lanerk where they took the Covenant, and that he was at the late fight with sword drawn and pistol shott.

John Gordon's
Confession.

The said John Gordon did confess that he was in arms and did join with the rebellious party under Neilson of Corsack's command, upon horseback, and was with them at Air, Ochiltree and Lanerk and was out upon a party at the taking of the Covenant there, and that he was at the late Conflict in the field with his sword drawn.

Which Confessions being publickly read to them as said is,

¹ 'their' not in Adv. MS.

they judicially in presence of the Assise, acknowledged and renewed the samen, and my Lo: Advo: took Instruments thereupon.

The Assise being inclosed and having elected Patrick Scott ^{Sentence.} of Langshaw their Chancellour they by the mouth of their Chancellour reported the forenamed persons guilty each of them in the terms of the first Confession. Whereupon the Justices decerned them to be taken upon Friday the 14th of December instant, to¹ there to be hanged on a Gibbet till they be dead, and thereafter their heads and right arms to be cutt off and to be disposed of as the Lords of the Privy Council should think fitt, and their lands, heretages, goods and gear to be forefault and escheat to the king.

Here also some absent assisers are americiat, to witt, Sinclair of Rosline, Thomas Robertson, brewer in Edinb^r, James Gilchrist, merchant there, Mr. Robert Prestoun of Outtershill and a number of tradesmen in Edinb^r each of them in 100 merks.

Edinb^r 13 and 18 Decem^r 1666. The Justice Clerk and Mr. W^m Murray, present.

The first of these Diets is continued, and on the second there is brought to the barr the following persons.

Mr. Hugh M ^c Kell.	Ralp Shiells, collier in Air.
Thomas Lennox.	W ^m Peddan, merch ^t there.
Humphray Colquhoun. ²	John Wardrop, merch ^t in Glasgow.
Mungo Kaip in Evandaill.	Rob. M ^c Millan, „
	John Wilson, in the parish of Kilmauers.

Which severall persons being also indited at the instance of Sir John Nisbet, his Majesties advocate, upon a lybell of treason, conform word by word to the lybells of the former Diet.

My Lo: Advocate compears and produces his Warrant from the Privy Council to insist against them, and a note of

¹ Blank in Adv. MS.

² 'Humphray Colquhoun, when he died, spoke not upon the scaffold and ladder like an ordinary townsman, but like one in the suburbs of Heaven.'—*Wodrow*.

their Confessions taken before a Committee of the Privy Council, which they judicially renewed in presence of the Assise, viz. Sir William Murray of Newtoun, John Smollet, Dean of Gild of Dumbartoun, James Pollock, merchant in Edinb^r, John Crow, merchant there, Arthur Buchanan of Sound, John Gray, merch^t in Edinb^r, Thomas Harper, cordiner there, James Tait, merchant there, Robert Young, merchant there, Thomas Forbes of Blacktoun, Lieutenant Collonel George Herriot, John Scott, merchant in Edinb^r, James Gilchrist, merchant there, Patrick Borthwick, Robert Robertson, merchant. Which Assisors being lawfully sworn and no objection in the contrary, they by the mouth of the said Sir William Murray, whom they elected to be their Chancellour, reported the forenamed Rebels to be guilty of joyning with the Rebels in arms, conform to their severall Confessions, for which they are sentenced to be hanged at the Cross of Edinb^r the 22d of this instant December, and to have their heads and right arms cutt off, to be disposed as the Council shall think fitt.

Burgh of Glasgow, 17 December, 1666.

The Court holden be Alexander, Earl of Linlithgow, John, Earl of Wigtoun,¹ Alexander, Lord Montgomery,² and Mungo Murray,³ Commissioners constitute by the Privy Council for trying of Rebels, conform to their Commission, dated the 5th of the said month, then produced and recorded, wherein diverse other noblemen and Privy Counsellors are named with them, and a Commission is here likewise recorded to Mr. Thomas Gordon to be their Clerk.

ffour rebels
condemned
and executed
at Glasgow.

At this Diet Robert Buntein in Phinnick parish, John Hart in Westquarter in Glasfurd, Robert Scott in Shavock in the parish of Dalserff, Matthew Paton, shoemaker in Newmilns, are indited and accused upon a lybell also conform to the former, where Sir William Purves and the King's Sollicitor

¹ John, sixth earl; died 1668.

² Afterwards eighth Earl of Eglinton; died 1701.

³ Wodrow gives a terrible instance of Murray's cruelty.

represents the King's advocate. In which proces these four pannells are found guilty, also upon their Confessions, by an Assise of several Magistrates and merchants in Glasgow, and are sentenced to be hanged at the Mercat Cross of Glasgow, and their heads and right hands to be cutt off and sett up in the publick places of the town.¹ And here the Lairds of Raploch, Silvertounhill, Castlemilk, Torrence, Scotstoun, Blackhall, and others are fined for being from the Assise.

Att the Burgh of Aire, 24 December 1666.

The Court holden by the Earl of Kellie,² William Drummond Charles Maitland of Hattoun,³ and James Crichton, Sheriff of Nithsdale, Commissioners named by the forsaid Commission.

Att which Court John Greir in ffour Merkland, John Graham, servant to John Gordon in Midtoun of Old Crachan, James Smith in Old Crachan, Alexander M^cCulloch in Carfairn, James M^cMillan in Marduchat, George M^cCartney in Blairkennie, John Short in the parochin of Dalry, Cornelius Anderson, taylour in Aire, James Blackwood, servant to John Brown in Phinnick paroch, William Welsh in the paroch of Kirkpatrick, John M^cKoull, son to John M^cCoull in Carfairns, James Muirhead in Irongray, being found guilty upon a lybell conform to the preceeding lybells word be word of the treasonable Crimes therein contained upon their judiccial Confessions, some of them for being in the whole acts of that Rebellion, and every one of them being present at Pentland hills and some other of the acts of it. They are forfaulted and sentenced to be hanged, viz. two of them at the Mercat Cross of Dumfreis and the rest of them at the burgh of Aire, and their heads and right arms to be affixt in the publick places of these towns.

Twelve Rebels
convict and
hanged at Air
and Dumfries.

¹ Wodrow says that it was at the execution of these men 'the abominable practice was begun which turned afterwards so common of the soldiers beating drums when the sufferers spoke to the spectators before their death.'

² Third earl; died 1677.

³ Brother of the Duke of Lauderdale, whom he succeeded as third earl in 1682. He became a Lord of Session in 1669; died 1691.

Edinb^r 20 December 1666.

Advocatus and John Ross of Strathmore against Robert forbes at the Miln of Melgum, indited and accused for invading and wounding the said John Ross in several parts of his body, by which bloody wounds the sinews and nerves of the said John his right hand was cutted and mangled and thereby he mutilate in his long and litle fingers of his said right hand, whereof he is altogether made unable and impotent to make use of the samen, and concludes the pain of Death conform to the Acts of Parliament and practiques of the kingdom, whereby the crime of mutilation is punishable as Manslaughter, that is by Death and confiscation of Moveables. This is continued to the 25th June, where after Debate the pannell is acquitt. I shall sett down the Debate in that place when I come to it, but I have marked the Lybell here and not there, because it is here only repeated.

Edinb^r 21 December 1666.

Thomas Blaikhall in Bodichraw, and And^r Miln his cautioner, unlawed for not reporting the Criminal Letters raised at the instance of the said Blaikhall and ¹ Sir Alexander fforbes of Tolquhoun, Alex^r Vans his servant and others, and the said Sir Alexander fforbes compearing he excuses the rest of the Defenders as not being lawfully cited, which excuse is admitted.

Edinb^r 26 December 1666.

Adam Muschet g. Colin Hay and others for Usury, continued, and Patrick Listoun in Overlistoun, declared fugitive and the Diet deserted as to Thomas Arthur, because deceast.

Edinb^r 1, 2 and 5 January 1667.

The said first day Musschet ag^t John Wotherspoon for Usury, continued.

¹ 'against' in Adv. MS.

The said second day Advocatus ag^t Robert Harvey, smith, and William Harper, taylour, in Edinb^r for tumult and uproar committed by them within the City, continued to 15 february. next.

Adam Mushet and Grierson against And. Watson, flesher in Aberdeen, for Usury—deserted.

Ed^r 10, 15 and 22 Janry. 1667.

The said 10th day the Action William Burges, merch^t in Aire against William Crauford of Brockloch, and others, for Deforcement—continued as to the parties present and severals of the Defenders absent declared fugitives.

The said 15 day, Sir Dougall Steuart,¹ Sherriff of Bute for Deforcement—continued because Sir Dougall was employed in settling the affairs of the west country.

The same day James Steuart of Ambresmore, Donald M^cKindlay, merchant in Rothsay, Ninian Bannatyne, ffir of Kames, cautioners² for presenting John Steuart of Gallachan and others, are unlawed and the Defenders are declared fugitives for not compearing to answer in the Action raised against them at the instance of Mr. And^r Graham in Meiklebaron, for assaulting and breaking his house upon the night and these seizing upon Ninian Gellie, messenger, and carrying him prisoner with several other persons to the Tolbooth of Rothsay and deforcing of the said officer in executing Letters of Horning and poynding at the instance of Dame Grizell Campbell, relict of Sir James Steuart of Kirktown, and the said Mr. Archibald Graham her husband for his interest, against the tenants of Sir Dougall Steuart of Bute, and taking back the poynded goods from her.

The said 22d day John Ley sometime in Berriehill, declared fugitive for the Slaughter of William Balfour in Dilbreck.

Alexander Wardrop ag^t Pedies for burning of a coal heugh continued.

Edinb^r 24, 26 and 29 Janry. 1667.

Alexander Wardrop of Carntyne ag^t. John and Robert

¹ Second baronet; died 1672.

² 'cautioners' not in Adv. MS.

Pedies coalheughers in Carntyne heugh, first indited before the Regality Court of Glasgow at the instance of the said pursuer and the procurator ffsicall of the Court, for destroying and drowning the coalheugh of Carntyne, which lybell is founded upon diverse Acts of Parl^t and namely upon the 146 act of the 12 parl. Jam. 6. whereby wilfull destroying of coalheughs is declared punishable as the crime of Treason, and upon 84 Act par. 6 Ja. 6. whereby the destroyers of Policy and publick works and others of that nature are ordained to be tried by an Assize and conform to their verdict to pay the skaith of the parties and to be unlaed. And on the 68 and 69 chap. of the old law called Quon : Attach : ratified by the 115 Act par. 14 Ja. 3. by which old law it is appointed that the skaith of parties wronged shall be taxed by an Assize to be led thereanent. And lastly the Lybell is founded on the 56 Act 1, session par. 1661 whereby it is expresly statute and ordained that all Coalheughers and others workmen in the Coalheughs of this kingdom work all the six days of the week except the time of Christmass, upon which severall Acts of Parl. it is subsumed not only that they did forbear and abstain from working many days, but that at other times when they wrought they did it most irregularly in manner lybelled and condescended on, contrair to the Injunctions of the oversman, whereby they have contraveened the forsaid Laws and Acts of Parl., and concludes for payment of 1500 merks to the purs^r as the avail of the dammage done to him, and for draining of his coal and restoring it in as good condition as it was, and for an Unlaw to the procurator ffsicall and corporall punishment.

Of this pursuit there is an advocation raised calling it from the Baillies of the Regality to the Justices upon these reasons. 1^o That by the 146 Act par. 12. Ja. 6. which is one of the Acts whereon the Dittay is founded the Crime lybelled is declared punishable as Treason and therefore no inferiour Judge can be competent to this action, but the same belongs to the Justice Generall and his Deputes.

2^o The Baillie has behaved most partially in this action because of his repelling these just Defences. 1^o That the Pursuer was at the Horn and so had not *personam standi in judicio*. 2^o That other persons stood infest and had right to

the coal. 3^o That the Defenders were willing to find Caution to answer, but the pursuer would not find caution to insist. 4^o They declined the Baillie by reason of his relation to the pursuer, all which they referred to the Oath of the Baillie and pursuer, and therefore the Defenders having found Caution acted in the Books of Adjournall to answer upon the 22 Janry. instant, the Cause ought to be advocate.

The Pursuer Wardrop for himself and in name of the procurator fiscall compears with Mr. John Eleis, his procurator, and produces the Dittay, and after reading thereof with the Advocation.

Wardrop of Comtyne g. Coalhewers for wilfull destroying and drowning his Coal-works.

It was alledged by Sir George M^ckenzie for the pannells that the Cause ought to be advocate in respect of the first reason contained in the Advocation and Act of Parl. whereupon it is founded bearing the crime lybelled to be punished as Treason, to which the Baillie of Regality is not Judge competent. 2^o *Esto* the pain were but arbitrary. Yet even in that case it requires a *nobile officium Judicis* which an inferior Judge cannot have.

Answered to Mr. John Eleis for the Pursuer, that the first reason of Advocation insisted on ought to be repelled, in regard there is no Act of Parliament produced or cited secluding inferior Judges from judging in the crime of Treason. 2^o *Esto* it were so that there¹ were laws excluding inferior Judges from judging in cases of Treason, yet they behooved to be interpret *secundum jus commune* which knows no other Treason but Perduellion and Lese-Majestie, such as rising in feir of weir against the king. But as to statutory Treason such as the crime lybelled is, the same is most competent to fall under the cognition of Lords or Baillies of Regalitie, even as they may judge Theft in a landward gentleman, tho it be likewise statutory Treason. (3) If the Defenders had compeared before the Baillie of the Regality and proponed this Defence of Incompetency, the Pursuer would have restricted his Lybell *ad pœnam pecuniariam fisco applicandam*, but if by their untimeous advocation they have prevented the same *sibi imputent*. And as to the 2^d Reason, it is answered 1^o (Denying the Court of Regality to be an inferior Judicatory being

¹ 'there' not in Adv. MS.

within its own territory *ultima provocationis curiæ* which may repledge from the Justice Generall himself) It was never debated that they might not decern arbitrary mulcts and by an Assize cognosce upon the dammage and interest of parties, as it is clear by severall Acts of Parliament, and it is against all reason that these persons who out of malice had drowned the Pursuer's Coalheugh should have reason by advocating the cause, and consequently his workmen to Edinburgh, far distant from the work thereby to endanger it more.

Replied Mr. George M^ckenzie for the Pannells, that the Law makes no distinction in the way of procedure betwixt Statutory and Common Law Treason, *et ubi Lex non distinguit neque nos*, and the Act of Parliament founded on appoints the crime lybelled to be Treason and to be tried as such, and the pretence that Courts of Regality are not inferior Courts is altogether denyed, and the contrary is evident because the Lords of Session may and daily does reduce their Decreets in civil causes and advocates causes both civil and criminall in the case of partiality and iniquity, and so they cannot be supream courts, and the Advocation now under Debate is an instance, and it were unreasonable that it should be otherwise, seeing a Lord of Regality may and does often appoint his own servant to be a Depute who cannot be supposed fitt for faulting, and the pretence that the Lybell may be restricted to a pecuniary mulct is not sustainable, for Crimes must be insisted in, as they are intended and lybelled, and as parties cannot pass from them, so they cannot restrict them nor pass from one Article to insist on another.¹

Interloquitor.

The Justice Deputes having considered the said Indytement, Advocation, and Reasons thereof with the Advocates for both parties their Alledgiances, Answers and Replis, with consent of both Parties Ordains the forsaid Dyet to desert in so far as the Crimes contained in the Indytement are capitall and may be extended to a corporall punishment, in respect the said Alex^r Wardrop, pursuer, declared judicially that he past therefrae, and as for the civil part of the said Pursuit, viz. for

¹ Sir George M^cKenzie in his *Advocations of Criminal Causes* states another point raised in this case was 'whether though burning a Coal-heugh was treason by statute, yet if drowning of it fell under that statute.'—W.

Dammage and Interest sustained by the said Pursuer through drowning of the Coalheugh in case the Pannells shall be found guilty thereof, the Justice Deput remitts the same to be tryed before the Baillie of Regality of Glasgow before whom the said pursuit was first intented, or before any other Judge competent, upon which both parties takes Instruments and protests for relief of their Cautioners.

This Debate is marked at the 24 of January, and all of it is again sett down with the Interloquitor in the Act of Adjournall following upon the Debate marked the 29th day

Edinb' 24 January 1667.

Sir Dougall Stewart, sherriff of Bute and Dougall Campbell ^{Deforcement.} his servant indyted and accused for the Deforcing of Ninian Gelly, messenger, in the execution of the forsaid Poinding at the instance of Dame Grissell Campbell, Relict of Sir James Stewart of Kirktown and Mr. Arch^d Grahame her Husband for his interest, continued till the 4th of June next, and severall other of the Defenders declared fugitives.

Edinb' 1 feb. 1667.

John Logan in Ardmannoch indyted for the Crime of Mutilation, continued to the 5th instant.

Eodem Die.

John Murray of Pennyland reports the Criminall Letters ^{Lifting Cows.} raised at his instance and at the instance of Alexander Sinclair of Telstein and many other gentlemen in Caithness against John Neilson and many others inhabitants in the Shire of Sutherland, being 100 at least, for coming to the ground of the lands belonging to the Pursuers and carrying away a great many cows from every one of them. The Defenders are all declared fugitives.

This was a great harrasship and made a great noise in the kingdome and the Judicatories thereof, viz. the Privy Councill, Justice Court and Session, and has been the

root of quarrells and bloodshed, particularly betwixt the family of Dunbeath in Caithness and the family of Scawrie in Sutherland.

Edinb^r 5 feeb. 1667. Mr. W^m Murray, pt.

Slowan g^t
Logan for
Mutilation.

The Lord Herreis¹ against John Logan in Ardmannoch, raiser of the Advocation against the procurator ffiscall of the Regality of Tarreglis and belonging to the Lord Herreis, where he is indited and accused before the Master of Herries as Baillie of the Regality, for the Mutilation of James Slowan in one of the liths of his ffingers, and for payment of a great sum therefore, as also in another Lybell is indyted at the instance of William Mure of Knockshinnoch for stealing of his sheep.

Compears Mr. ffancis Hay, advocate for the Pannell and produces the Advocation given be deliverance of the Lords of Privy Council upon the Pannells finding caution in the Books of Adjournall to compear at this Diet to underlye the Law in the said two actions with the executions of the saids Letters against the Lord and Mr. of Herries and their said Procurator ffiscall and Clerk, charging them to compear to bring the Dittays with them to hear and see the same advocate because the Defenders of the Advocation compears and produces the Dittays after production and reading whereof Mr. ffancis Hay, Procurator for the Pannells repeats his reasons of Advocation lybelled and eiked and craves the cause to be advocate to the Justices which reasons are (1^o) That as to the mutilation lybelled which was done 20 years ago, it is offered to be proven that it was at the instigation of the Mr. of Herreis and so he cannot sitt as Baillie to judge it. (2^o) The Baillie has repelled this most relevant Defence that the mutilation if any was committed was done by the said John Logan while he was actually in Arms as a soldier in Collonell Lockhart's regiment and so has the benefite of the Act of Indemnity, and as to the Theft libelled, it was only but the taking back a Hog from the said James and W^m Mure's which they had taken frae the Pannell,

¹ Seventh lord and third Earl of Nithsdale. Died 1677.

and the Master of Herreis did instigate the Pursuer to pursue the Pannel before his own Court when the Pannell was pursuing them for the Theft of the Hog before the Stewart of Kircudbright.

Answered be Mr. Ro^t Dickson for the Master of Herreis, that the reason of Advocation ought to be repelled because not instantly verified as it ought to be in the Justice Court where the Diets are peremptor and Parties should come instructed and produces my Lord Herreis charter of the said regality of Tarreglis.

The Justice Depute having considered the Advocation with the libelled and eiked Reasons with the Dispute and Charter produced, Repells the alledgiance proponed for the Pannell and remitts the Cause to be tried in the said Regality Court ^{The Cause remitt.} where it was first intended.

Eodem Die.

James Inglis and David Bruce, chamberlains to the Earl of Winton against Patrick Lord Gray for Deforcement the Diet deserted of consent.

Edinb. 14 and 20 feb. 1667.

The said 14th day the Diet against W^m Harper, taylor, and John Harvie, smith in Ed^r for Convocation, again continued to the 5 of March next and then again continued to the 20th of that month and from that to the 26th.

Eodem Die.

John Gordon, prisoner for Theft sett at liberty enacting himself to appear when called because none compeared to insist.

Mem. The Book bears this prin^l warrand to be in the hands of the Magistrates of Edinburgh.

Eodem Die.

Adam Muschett against Threipland for Usury deserted.

Edinbr. 5 March 1667.

William M^cIndlay, messenger ag^t William Drummond in Drummond, Andrew M^cKinnan and others there and John Graham son to Sir W^m Graham of Gartmore and others, deserted.

Edinbr. 20 March 1667.

John Young, prisoner in the Tolbooth in Edinburgh, indyted and accused for breaking the house of David Greenlees in Danskin in the Parish of Garvock and sherriffdome of Haddington and for taking away his money extending to 450 merks with certain goods and plenishing, and beating himself and family and thereby guilty of the Crimes of Theft, Stouthrief, Receipt of Theft and Hamesucken of the which he is found guilty and the pronouncing of the Sentence delayed.

Edinb^r 25 March 1667.

Pat. Roy
M^cgregor and
Pat. Drum-
mond two
notorious Rob-
bers and Mur-
therers convict
and execute.

Patrick Roy M^cgregor and Pat. Drummond, prisoners in the Tolbooth of Edinburgh, indyted and accused for that notwithstanding by the Laws and Acts of Parliam^t of this Kingdome, the crimes of Theft, Robbery, Stouthrief and receipt of Theft, Sorning and taking black maill, wilfull fire-raising, taking, apprehending, and incarcerating and detaining his Majesties free lieges, the killing and murdering of them, they being in the power of the takers, the rising and continuing in Arms of any number of his Majesties subjects without his Majesties Warrant and Authority, are punishable by Death and fforfaultry of the committers Lands, Goods, Gear, at least capitallie and with the loss of their escheat, Nevertheless the said Pat. Roy being one of the company and associates of Lauchlane M^cIntosh (this was he who was condemned for the forsaid Crimes day of 1665)¹ when the said Lauchlan did sorn up and down the Countrey and did committ the hairship against John Lyon of Muresk at Belshiries for which the said Lauchlan was condemned and execute *ut supra*, and the said Pat, being also declared fugitive upon the infor-

¹ '18 Jan. 1666' put in pencil in Adv. MS.

mation and prosecution of the said John Lyon, and Letters of intercommuning and commission of fire and sword being direct against the said Patrick, he in resentment of the said proceedings vowed to be revenged on the said John Lyon, and in prosecution thereof came to his lands of Belchiries and the said Pat. Drummond came there also with their associatts and plundered them, and the said John Lyon having gone up to the saids Lands to defend them and being lodged in his house of Belchiries the saids Pannells and their Associates upon the last of Aprile 1666 did besett the house and brought straw and corn from the barn yard and fired the same about the house where the said John Lyon and Alex^r Lyon, his son, were, and forced them out upon capitulation for their lives, and thereafter carried them away with all their goods, horses, and furniture to the Highlands to the Braes of Abernethie at 16 miles distance from Belchiries, and there killed the said John Lyon and his son, giving them many wounds and strokes, and left their bodys in the open fields and thereafter quartered upon their lands of Belchiries and oppressed the poor inhabitants, and thereafter with the number of 40 men did assault the town of Keith in Banffshyre for not paying black mail, and fought against these who opposed them and in particular agt. Alexander Gordon of Glengaroch and his brother Thomas Gordon and John Ogilvie of Milton and their followers and did wound and mutilate the said John Ogilvie and Thomas Gordon and the Pannells themselves being ill wounded at the time and not able to flee far, were taken prisoners the next day and conveyed from Shyre to Shyre to the Tolbooth of Edinb^r where they are now prisoners, of the which Crimes, etc. or ane or other of them they are Actors art and part and ought to be punished.

The Assize finds them Guilty Actors art and part of the haill crimes afore written, whereupon they are sentenced to be taken upon the 27 of March instant to the Mercate Cross of Edinburgh betwixt 2 and 4 hours in the afternoon and there to be execute in manner following, viz. the said P. Roy M^cGregor and P. Drummond their right hands to be first cutt off by the executioner and then to be hanged to the death and thereafter their bodies to be hung up in chains upon the

Verdict.

gallows betwixt Leith and Edinburgh, and their hail goods to be escheat to his Majesties use, which sentence was accordingly execute. *Vide* the like sentence agt. their Accomplices 7th of May 1668.¹

Nota. This Pat. Roy M^cgregor was a most notorious and villanous person, but of a most couragious and resolute mind. He was a little, thick, short man, red-haired and from thence called Roy Roy. He had red eyes like a Hawk and a fierce countenance which was remarked by every person. He endured the Torture of the Boots in the Privy Counsill with great obstinacy and suffered many strokes at the cutting of his hands with wonderfull patience, to the great admiration of the spectators, the Executioner having done his duty so ill that the next day he was deposed for it.

Edinb^r 26 March, 2. 3. 16. 17 of Aprile, and 8 of May 1667.

There is nothing in all these days but continuations of Dyetts, viz. of W^m Harper and Ro^t Harvie for convocation within the Town of Edinb^r and of persons conveyen for Usury whose Diets have been mentioned and continued before, and only one person, viz. William Wright in Dumblane for Usury, declared fugitive.

Edinb^r 9 May 1667. Att this Diet there was present Earl of Athol, Justice Generall, Renton, Justice Clerk, and Mr. Murray, Justice Depute, the case being a Tryall of opposition and difficulty.

Hoom of Eccles
ag^t Douglass of
Spot and Mr.
W^m Douglass
for Slaughter.

Advocatus and John Hoom of Eccles against Archibald Douglass of Spott, Mr. W^m Douglass, son to umq^l Sir Ro^{tt} Douglass of Blackerston, indited and accused upon criminall Letters raised against them and William, Master of Ramsay at the instance of the said Advocate and John Hoom of Eccles, his informer, for the Slaughter of Sir James Hoom of Eccles,

¹ This date struck out in Adv. MS. and '18th Jany. 1666' substituted.

his ffather, in a sett combat, contrary to 12 Act 16 Parl. Ja. 6. prohibiting Duells without licence.

Procurators for the Pursuer.

HIS MAJESTIE'S ADVOCATE.

MR. JOHN HARPER.¹

MR. PAT. HOME.¹

Procurators in Defence.

SIR GEORGE LOCKHART.

SIR GEORGE M^CKENZIE.

SIR RO^{BT} SINCLAIR.

MR. THOMAS LEARMONTH.

The Master of Ramsay being called, the Pursuer, John Home of Eccles and the King's Advocate declares that tho' he be absent, they will not insist to have him declared fugitive and as to him the Dyet deserted.

Hoom of Eccles
g^t Douglass of
Spott and Mr.
W^m Douglass
for Slaughter.

There is no Defence proponed against the Dittay and therefore the Interloquitor bears that the Justices ordains the same to pass to the knowledge of an assize, nothing being objected against the relevancy, for the pannell simply denied it. But all the following debate runs against the Inquest which was judged by the hearers to be for gaining of time in order to procure a remission.

Interloq^r upon
the Lybell.

Sir George Lockhart for the pannell objects first against such of the assisers as are not barrons that they cannot pass upon the Inquest because it is Statute cap. 67 *Quon. Attach.* that no man should thole judgement or be judged by a man of inferior state, but be their Peirs, that is an Earle by Earles, an Barron by Barrons, an valvasseill be valvasseills,² an burges be burgeses, and which statute is consonant to law and reason, and is made for the security of the lives and fortunes of His Majestys Leidges, having an most speciall confidence in their own Pears and equals in the case of accusations, and therefore it is that these orders and degrees of severall persons are particularly condescended on and determined by the Statute.

Objections ag^t
the Assise.

Sir George M^ckenzie also for the Pannells further adds that Skeen in his treatise anent the way of procedure before the Justice gena^{ld} Cap. 4 is of the same opinion, for in the 3 Act he lays down a generall conclusion that no man should be

¹ 'Advocate' is added in Adv. MS. Home appears in the Faculty List, but not Harper. Home was the son of Sir John Home of Renton. Admitted advocate 12th January 1667; baronet 1677; died 1723.

² 'ane vavassour be vavassours.'—Skene's *quon. attach.*

judged be another of inferior state, but by his own Pears, viz., Barron be Barrons, and cites¹ the forsaid Statutes *Quon. Attach.* and a statute of Alex^r 2^d Cap. 4, and Craig in his last Diegesis Lib. 2 further says that this conclusion is founded on the feudall law and reason that vassalls should be judged *per pares Curie*, whom he defynes to be convassalls *id est* holding land of the same superior.

The Lord Advocate answers that the objection is nowise relevant, being without any warrand of law, statute or practice, and whereas it is pretended that it is warranded be Statute be the place cited in *Quon. Attach.* merits no answers, it being known *Quon. Attach.*² contains no statutes and is only as Craig has inculcat a rapsodie of pretended customs of the Laws of England, and was never in custom nor authorised by any Law or Act of Parliament. And that the law of the Ma^{uo} and specially *quon. attach.* never is nor ought to be looked upon as Law. It is clear by diverse Acts of Parliament ordaining the saids books to be considered, and if it should be found fit that any of the same should be authorised so that untill upon a review the place cited have been thought fit to be retained and authorised to have the force of Law and Act of Parliament made to that purpose, the saids books can be looked on but as apocrypha and opinion of private lawyers.³ And that it is so is further apparent be the 2^d place cited, for the Statutes of Alex^r which doth only militat in the case of knights, whereas if it had been the common received law that in all other cases the pannells should be judged be their pears, there needed no special Statute as to Knights, and it cannot be presumed that any of the Pannells are knights. If there were any respect to be given to the said pretended citations, it had been understood *in terminis*, all laws of that nature being *stricti juris*, and it cannot be found that the Defender is an barren, there being nothing produced for instructing thereof. 3^{uo} the time of the said pretended law, the way of Judgeing was not as now *pares curie* being Judges

¹ 'cites' not in Adv. MS.

² 'merits no answers, it being known *Quon. Attach.*' not in Adv. MS.

³ This opinion of the value of Skene's *Regiam Majestatem* is also that of Cosmo Innes, the eminent antiquary, in his *Scotch Legal Antiquities*.—W.

both in the point of law and probation, upon which consideration there may be some pretence of tendernes and confidence in persons of that same quality and *pares*, whereas now Inquests are not in effect Judges but as Witnesses. 4^{to} If there ever had been any such law, it is obsolet and antiquate be desuetude and perpetuall custom in the contrary, there being nothing more ordinary then that burgesses being persons above all other exceptions have been alwise received upon inquests. And if any question should be now made it needs not be represented because great inconveniences would follow, there being so great difficulty to get Barrons to be upon Inquests, and the pain under which Assisers are summoned being so small and inconsiderable.

Replied by Sir George Lockhart that the objection against the Inquest stands relevant notwithstanding of the answer, where be the Laws and authorities cited are nowise elided, for as to what is alleadged against the Citation out of *Quon. Attach.* it imports not whether *Quon. Attach.* falls under the word Statute or not, it being certain and acknowledged by Skeen in his preface to the Scots version of these ancient Laws that the book *Quon. Attach.* does contain the word of our ancient Custom and Laws, and albeit Craig does seem to contradict and distrust the authority of that book, yet as he himself acknowledges his opinion therein was singular, and as Craig acknowledges where any of the customs contained in that book has been nowise in custom nor acknowledged they are to be counted as authentick and specially they are in authority as to the point in question agreeing thereanent with the Statute formerly cited out of King Alex^r, enacting that persons to be indyted should be judged by their Peers, and again be the 8th chapter of his Statutes it is enacted that persons of Assise upon life and limb should be free holders be Charters. And whereas it is pretended that his last Statute of King Alex^r does only proceed in the case of Knights and so evinces that the place cited in *Quon. Attach.* is not authentick, and that this also appears by the Acts of Parliament granting Commissions to purge and revise the saids Books, it is replied, that King Alexander's Statute does rather confirm than derogate from the *Quon. Attach.* In respect K. Alexander's Statute

states only *causam specialem* how Knights should be judged and the Resolution is as large as the question that they should be judged be Knights, which is exactly conform to *Quon. Attach.* determining the very same, so that it is an most unwarrantable consequence to infer from a Statute determining a special concern derogation to former laws and customs, not mentioning the case of the said Statute, specialie seeing there is not an imaginable or apparent reason for any speciality as to the case of Knights being possibly far less considerable in property and interest than Barrons and ffreeholders, so that the paritie of the reason being the same, there is more ground for the extension of the Statute of King Alexander (albeit *in casu speciali*) to other cases of the like nature, than to infer a Derogation therefrae. And to that part of the Answer anent the Acts of Parliament granting commissions to revise the Books of *Quoniam Attach.* the argument is retorted, ffor the same doth rather evince the authority of the said Book, and albeit it may prove there were things in them worthy of expunging, which is incident to ancient Laws and Customs, yet *hoc ipso* that they are appointed to be revised as Laws, it proves that they are Laws, and Skeen doth rationally infer and conclude, so in respect the Commission is granted in these terms to revise and collect the Laws of this Realm, beginning at the Books of Law called *Reg. Majest.* and *Quon. Attach.* [See for this Skeen's said preface.] And this is likewise apparent from the Acts of Parliament relating to the said Books, presupposing the authority thereof [which Skeen cites in that preface], and whereas the answer bears that none of the Pannells are Barrons, it is offered to be proven that one of the Pannells, viz. Archibald Douglass of Spott is a Barron and that instantly be the persons who have read his Infestment or by the Registers where it is booked, bearing that he is infest in the Lands and Barrony of Spott, and as to that part of the Answer which bears, that there is not the same parity of reason that was of old, that persons should be now judged *per pares curiae*, in respect the Inquest are now only Judges of probation but anciently were also Judges of right, its Replied 1^o That suppose there were not the same parity of reason, yet that is not sufficient to infer abrogation of these Laws and

Objections agt.
the Assize in the
triall Eccles agt
Douglass of
Spott, etc. for
Slaughter.

Customes, so long as there is sufficient reason for preserving of the same, ffor its beyond all question and an undoubted principle in law that the maxim *cessante ratione juris, cessit ipsum jus* does not hold *in causa finali inadequata*, which if it be deficient *inadequata non tamen cessit legis dispositio* if any part of the ffinal cause remain, and the materiall grounds and reasons inducive of the said Laws and Statutes do yet remain founded upon the importance of the case of Life and upon the confidence and tenderness the law justly presents, every man may expect from his own Peers, and albeit Inquests are not now the Judges of points of Relevancy, which for the most part are of no difficulty, Dittays being founded regularly upon inconvtrverted law and customs, yet they remain Judges as to the point of probation not only as to the point what is proven but as to the point, what is a valid and concluding probation, wherein great and intricate difficultys may and often do occur. And as to the pretence that these old Laws and Customs are antiquate, it is replied first, that it is nottour and known the saids Laws and Customs are in punctuall observance as to the case of noblemen who cannot be judged but by noblemen of their own Peers. (2^o) The priviledge introduced by the said Laws and Customs being only a Declinator which is but *meræ facultatis*, that is giving power to Pannells to make use of it if they will, it does not follow that the not making use thereof which is arbitrary for parties to do or not does inferr a desuetude of the Statutes because things which are *meræ facultatis* which parties may plead or not plead, as they please being once introduced by Law can never prescribe *non utendo* but by contrary laws or practises to the said Statutes as when parties having pleaded the Benefite of such Laws the same has been refused *in Judicio contradictorio* tho' they had interest to plead. And as to the inconvenience urged¹ viz. that if these laws were observed it would be difficult to get assizes, its replied that this inconvenience is easily obviate by exacting of the ffines from absent assizers imposed by law, whereas the inconveniencys on the other hand ar far greater of consequence the said Laws and Customs being the great and fundamentall securities of the lives and fortunes of the subjects where anent

¹ 'urged' not in Adv. MS.

there cannot be too great caution or provision specially as to the quality of their Judges, and which the law has most rationally determined to be their Peers and equals as having a most special confidence in them, and it would be of dangerous consequence if persons of lower degrees than Peers should be admitted who may be such as want judgement and integrity and perhaps *pessimæ et prostitutæ famæ* and therefore that ancient law which appoints *pares curiæ* to pass upon Assizes is a just and rationally law tending to the security of the best of subjects and noways innovat nor abrogate, and therefore ought to be punctually observed.

S^r George M^ckenzie adds to this reply, that the answer thats made to that Statute of K. Alex^r, cap. 2¹ inferring from expressing of Knight an extension to all other orders and degrees mentioned in *Quon. Attach.* Its replied, that by the word Knight is meant the generall degree of vassalls, in which sense Knight's service is still understood to be *Servitium militare* in the generall, and be the Latine translation it is not translated *Eques* which is a Knight by speciall order, but *miles*, which in all that Book is the term given to a Vassall, and synonymum with a ffreeholder, which is expressed by the exegeticall particle or, in the same paragraph, where it is said that he shall thoill of knights or of severall ffreeholders, so that by this Statute and this paragraph heretable ffreeholders should be judged by heretable ffreeholders, which is sufficient to astrict the objection tho the first authority had not been founded upon, especially seeing the same Skeen has upon the margine of the place cited, exprest that *miles debet judiciari per pares* and makes *libere tenentes et milites* to be *pares*, which doth abundantly signifie that the word Knight is not taken in the strict exception of a particular order as is contended. And seeing by our Law a Barron is interpret to be of parity with a Lord, it being no disparagement both by our law and practique *in maritagione hæredis* for a superior to offer a Barron's daughter to a Lord, being his vassall, it were against all reason and

¹ The statute provides that 'Eif anie Knicht is indited be the said inquisition for anie trespasse he sall thoill ane assise of Knichts or of heritable freeholders.'—W.

equity that since Lords had the priviledge to be only judged by their *pares*,¹ that the same should be denyed to Barrons, seeing *inter nobiles et Barones nullum est disparagium et Baro qui de Rege tenet quantuscunque fecerit primum gradum nobilitatis potest sibi ascribere*, and in the 69 page of Craig's Book there are these words *queri potest unde nomen* (Lords) *sane a principio nihil nisi Barrones fuerunt neque adhuc sunt*, and that Lords having had this priviledge is very clear by the Lord Ochiltree's Case, and the late Case of the Viscount of ffrendraught, all which are founded upon the same laws. By which it appears they are yet² in *viridi observantia*, and Skeen's testimony in this criminall form of process shews them to be yet recent, that Book being but lately writt by whose authority likewise in the beginning of *Quon. Attach.* it is clearly delivered that these Books are authentick, which is likewise furdre clear from the 114 cap. Ja. 1. par 9. which ordains no excuse to be received but such as are settled by Law, and there is no other Law for these but *Quon. Attach.* which Book is by the priviledge granted be his Majestie for printing thereof, called the Laws of this Kingdom. Neither is the alledgiance of *pares curie* enervat by the difference betwixt the Assizers now and of old, and if they were now only Witnesses that being clear by their choising a chancellor by their voting by their Sentence called a Doom, and not only are they Judges in the matters of fact, but seeing all Lybells by the Act of Parliament mentioning art or part generally do go to the knowledge of an Inquest without debating any Relevancy, it is most clear that the Relevancy of what is art and part belongs to the Inquest, than which nothing is more intricate or more *in apicibus juris*, and to leave to the knowledge of an ignorant Assize that which concerns with Law the life and estate of a Gentleman Barron, were most unreasonable and of a most dangerous consequence.

Duplied to all this by his majesties Advocate that he repeats and oppones his former Debate and that neither in the case of law or custom is there warrand for the said assertion that no person can be upon the Assize of Barron but Barrons seeing it is clear by the Acts of Parliament aforementioned that the

¹ 'Peers' in Adv. MS.

² 'yet' not in Adv. MS.

Book of *Quon. Attach.* is not mentioned therein as positive and authentick law, having force and strength of authentick Law, but in a generall sense that a Book of Law uses to be taken, that is for a Book treating of Law or containing the opinion of Lawyers, in which sense wee usually call the Books of Craig, Balfour and Dury, Books of Law.¹ And that old Book cannot be said to be a Book of Law having the authority of Law seeing its appointed by the² Act Parl. Ja.³ that the Books of the old Law be considered and in case it should be thought fitt that then they should be authorised which supposes they wanted authority and force of Law, and were only to get it if it should be thought fitt, so that till it be made appear be some positive Statute that the force of Law has been given to these Book of *Quon. Attach.* they must be still looked upon as wanting the authority of Law. And as to the Statutes of K. Alexander, it is evident they do not concern the present question being only in the case of Knights as said is and none of the Pannells here are Knights, and whatever pretence be for extending laws upon parity of reason, the laws and statutes cited being *stricti juris* cannot be warrantably extended, and whereas it is pretended that the determining an particular case in a posterior law does not derogate frae a preceeding generall law, and that by the said Law of *Quon. Attach.* before the Statutes of Alexander, it is clear that Barrons could not be judged but by their Peers.

It is duplyed that this is *Petitio principii*, it being altogether denied for the Reasons forsaid that *Quon. Attach.* was authentick law before the time forsaid, and it is most rationally and concludently inferred that the position viz. that Barons should be judged by their Peers could never be thought authentick law, seeing the question and decision in the case of knights in the Statutes of Alexander had both been superfluous and impertinent if in the generall it had been clear by good and authentick Law that every person should be judged by his Peers, and how little respect ought to be given to the

¹ Sir Thomas Craig's *Jus Feudale*, Sir James Balfour's *Practicks*, Lord Durie's *Decisions*.

² Blank also in Adv. MS.

³ James I, Parl. 3, c. 54. Blank also in Adv. MS.

forsaid obsolete Law Books it¹ is not only clear from the opinion of Craig and has often admonitions to that purpose, but from the Books themselves which contain a rubbish of most gross positions and tenetts contrary to law and custom, so that if there be anything of authority among them it is *cum multo stercore* as appeareth by the forsaid place cited out of the *Attach.* seeing it beareth that Earls should only be judged by Earls, whereas there is nothing more nottour and usuall than that Earls should be judged by Lords and Barrons, and how little respect should be given to that Book entitled *Statuta Alexandri* as containing authentick law, it is clear be cap. ² subjoined to the forecited place being the 3d of that same Book which bears expresly that no person can be tried for the loss of his lands *nisi per probos libere tenentes per cartas.* Whereas there is nothing more ordinary nor the question of life and land may be judged under the pain upon the Sacramentum or Oath of persons and witnesses that are not *libere tenentes* and that have no interest in land, and whereas it is pretended that the word *miles* is not to be understood of *Eques* or knights, tho' it be so rendred by Skeen, but as its taken ordinarily in the forsaid Books for those that hold lands *per servitium militare,* it is answered that Skeen's authority which the Defenders cry so much up, and his interpretation of the same word is opposed, and albeit it should be interpreted for a vassall that holds *per militare servitium* it will not quadrate in this case, seeing the laird of Spott tho it were granted that he is a Barron which is altogether denied, it cannot be said that he holds his lands ward, and the truth is, that the Barrons had the pretended priviledges in question, which is denied, yet the Defenders cannot plead the same, seeing if at any time he had interest as Baron, the same is taken away in so far as if need bees it may and will be offered to be proven that there is a Dec^t of Reduction at his instance of his retour as Heir to his ffather, and his infestment thereupon. And whereas it is pretended that the priviledge forsaid is competent to Lords and Noblemen and cannot be denyed to Barrons, it is answered that it is evinced that the said pretended Priviledge that

¹ 'it' not in Adv. MS.

² Blank also in Adv. MS.

Objections ag^t
the Assize in
the triall Eccles
ag^t Douglass of
Spott for
Slaughter.

Lords and Noblemen should be judged by noblemen is not competent to them, seeing tho the place forsaid bear expressly that Earls should be judged by Earls, yet there is nothing more ordinary than both Erles and Lords should be judged by these who are not of that quality, and that Barrons should be upon their Inquest and Tryal as it was in the case of Balmerinoch¹ and divers other cases, and altho *ex decoro* and in respect of the eminent qualitie and character of nobility, noblemen and great Barrons may often be put upon Assizes, yet there is not an absolute and legall necessity for the samen, and that it is not an undoubted priviledge of Barrons that they should only be judged by their Peers and other Barrons, it is evident by the procedure of Parliaments in which Burgesses will have a decisive voice as to a fforfaulture of Barrons and Gentlemen as well as Barrons themselves which doth clearly evince that the forsaid pretence of priviledge is most unwarrantable and it cannot be thought that the Parliament which is the fountain of law and right would deny to Barrons the forsaid priviledge and right if it were theirs undoubtedly and competent by the law, and as to custom there is no warrant for the said pretence seeing it cannot be instanced that the said objection was ever proponed and sustained, but on the contrary it was ever thought to be of so little weight that it was never offered to be proponed, and as to the argument *ab incommodo* and the pretended inconveniences adduced in the Duplys, incommodum may be a ground for making of laws but does not amount to a law and be the contrair if the said argument were of any weight it will militate as strongly if not more that no persons should be witnesses against Barrons but Barrons, seeing the security of the people may be pretended with as great reason to depend upon the quality of witnesses, and whereas it is pretended there is so great difficulty, and that the Assize is Judges not to the point of ffact but to the point of Relevancy of probation, and whether the Probation be relevant or valid

¹ John, Lord Balmerino was tried in 1635 for a seditious libel on the king and Government, and sentenced to death, but was afterwards pardoned. The assize consisted of eight peers and seven commoners. — W.

or not the Pursuer is formally contrar, and it is the security and interest of the people for which the Defenders do so much plead, that points and questions of relevancy in law neither as to the conception of the Dittay or as to the validity and legality of the probation should only be determined by the Judge, and it is only incumbent on the Assize to cognosce whether the point of fact be proven in that manner of probation which in law or in case of question by the Judge is found to have been valid and sufficient and relevant.

The Justices finds the objection against the present Interloquitor. Assizers relevant and ordains the pursuers to summond a new Assize to the 4th of June next, to which day they continue the Tryall of this action, the most part of which Assize they ordain to be of the Laird of Spot his own quality, viz. Barrons holding of the king and the rest landed Gentlemen holding either of the king or of another Superior by Charter.

Sir Geo: Lockhart for the Pannells produces a Petition, desiring the same may be read bearing, that the two Pannells and the Master of Ramsay being accused and indyted to be punished with Death for the Slaughter lybelled as all of them being Actors airt and part, and that the Slaughter, if any was committed by any of them¹ was without precogitate malice upon a suddenty, in which case it is hard that all of them should be punished capitally, and that rather only he should be so punished who was the immediate Actor and that the other two should go free, and the cognition of this being such a thing² as may be of difficulty to the Inquest to distinguish, therefore craved that the Justices might consult with the Councill anent what Rules they should give to the Inquest and to continue the Diet. This Petition tho it be marked after the Dispute and Interloquitor yet appears to have been presented at the Downsitting of the Court before the triall began because it craves a Continuation of the Diet which by the Interloquitor was granted and yet the Deliverance bears that the desire of the Bill was refused, so that the continuation granted by the Interloquitor, is by reason of the Dispute

¹ 'by any of them' not in Adv. MS.

² 'a thing' not in Adv. MS.

after the Bill was read and denied, and not upon the desire of the Bill.

Sir Francis Scott¹ of Thirlestane and some other absent assisers americiat.

Edinbr 4 June 1667.

The above written Cause being this day again called and a new Assise summoned and Ramsay of Idingtoun and severall other absent assisers unlaued, the King's Advocate declares that he insists 1° *loco* against Mr. William Douglas and continues the Triall of the Laird of Spot till the 3d of July next, and for probation produced witnesses, viz. George Tait, Merchant in Leith, who proves that the Master of Ramsay, Douglas of Spot, Sir James Home of Eccles, the Defunct, and Mr. William Douglas, the Pannel insisted against did hire his coach to Edinburgh and went on a piece of the way, then caused the Coachman turn towards the links of Leith and all of them came out at the Black Craigs² and went through other with their swords drawn and that afterwards Spot and the Mr. of Ramsay engaged together, and that the pannel and Sir James Home made the fashion to red them, and that afterwards the Deponent saw the pannel thrust several times at Sir James and kill him, and saw Sir James fall to the ground thereby and thinks that Sir James received no wounds but what the pannel gave him, and that the pannel urged the Deponent to drive away his Coach, but he stayed and with the help of one of the King's life guard, put the dead body in his coach. Depones also that he saw all the four measure their swords when they went out of the coach, but heard no challenge, and that four of the Lifeguard were present when they fought and desired them to forbear fighting, and that the pannel threatned them and frightned their horses, and that when the Troopers were following the Mr. of Ramsay and Spott the pannel at that time gave the wounds whereof Sir James fell to the ground and died, and that the pannel stood by him with his sword drawn. Depones he heard nothing of their quarrelling before they entered the Coach. Hary Home, one of the Gentlemen

¹ Sir Francis Scott of Thirlestane, Selkirk, created a baronet in 1660.

² The Black Rocks on the sands adjoining Leith Links.

of his Majesties lifeguard, second witness, depones that he saw not the pannell thrust at Sir James but that Capt. Russell told him of it, and that looking about he saw Sir James fall to the ground and the pannell standing by him with his drawn sword, and that when the pannell and Sir James being yet alive were brought in to the house of ffinlason at Leith, he heard the pannell ask pardon of Sir James. And being re-examined, depones that having got all the four swords in keeping, there was blood upon the swords of the Master of Ramsay and Spot but none on the pannell's sword or on the other sword he got from him, which seems to have been the sword of Sir James. And that the pannell refused to give the swords, but upon the Deponent's parole to re-deliver them and saw no blood upon Sir James Home's cloaths.

Cap^t Russel, third witness, depones that as he and his comrades were going to Leith from the Thickwood burn, he saw four men on foot with their swords drawn, and that when he and his comrades came near they desired them to desist, which they refused. That they were fighting so confusedly that he could not discern who were friends or foes. That he saw Sir James Home in black cloaths stumble on his knees, but knew not who he was but that the Master of Ramsay coming off afterwards told him he was his second. Depones that he knows not the pannell by his face, but that the man that was standing by Sir James was carried to Leith with him in the Coach.

Alexander forbes, brother to the Laird of Rivas, 4th witness, depones that he saw the pannell and Sir James at a distance from the other two fighters, and that they were in others arms as if they had been rounding and heard the pannell ask forgiveness of Sir in ffinlasons house.

John Cairny 5th witness, depones that when he came first up he saw the Mr. of Ramsay and Spott together and the Master's foot on Spott's neck, and the Deponent having taken the Master off Spott, saw Spott run at him with his sword and called him Culzean. Saw the pannell and Sir James put in the coach together.

James Cook, servitor to John Brown vintner in Leith, being examined anent the difference that past betwixt these

combatants at dinner in his master's house and after it, depones he heard no difference but this that the Mr. of Ramsay said to Sir James Home and Mr. William Douglas that Spott said he would not do this or that for the King. That he saw Spot pull Sir James Home's man out of the coach.

Sentence.

The Inquest by the verdict fand the pannel not guilty of the combating specified in the Dittay, and by plurality of voices fand him guilty as art and part of the Slaughter. Whereupon the said Mr. William Douglas the pannel was sentenced to be headed upon the 11th of June instant at the Mercat Cross of Edinb^r. After this he took the sole guilt upon him. *Vide* 3 July 1667.

I have sett down the hail Dispute and probation of this proces at greater length then I use to do because it was most zealously prosecute and defended by the friends on one and other side in great numbers and with great heat and violence. Much endeavours were used by those of the name of Douglas for delays to get a remission, but could not be obtained by reason of great opposition. The Earl of Lauderdale, his Majesties Secretary owning the Homes.

The Laird of Spot being committed to prison in the Castle of Edinb^r made his escape out over the Wall and never returned to the Kingdom of Scotland, but obtained a Captain's place in the Scots Regiment in ffrance and sold his Estate. And Mr. William Douglas a litle before his Triall had almost escaped out of the Tolbooth, having cutt the stenchers of the windows with *aqua fortis*. Being ready to go away he was taken.

Eod. Die. The Relict and nearest of Kin of Gordon of Bracklaw against ffarquharson of Inverey and the Continued. *Vide* 3 July 1667, and July 1668.

The Earl of Aboyne¹ and the Advocate for his interest against ffarquharson of Balfour, Garden of Tilliefrosh and others, deserted, as to some others excused for sickness, many gentlemen of the name of Gordon and others declared fugitive.

¹ First earl; died 1681.

Eod. die. Earl of Glencairn g^t Wotherspoon for usury many times before continued and now at last deserted.

Ninian Gellie, mess^r against the Sherriff of Bute and others. The Defenders absent and excused, the pursuer of consent deserts the Diet.

Edinb. 5 June 1667.

Earl of Glencairn and his ffactors against Mr. William Somerveill for usury, continued, as also the Diet William Burges g^t Craufoord for deforcement, as also the Diet John Martin, writer in Stirling against Duncan Drummond of Balhadies for hamsucken and oppression, as also Gilchrist against James Watson and others for Deforcement and oppression.

Edinb^r 6 June 1667.

John Hay of Rainichie against Robert Gordon in Reines for beating and wounding, assoiled and the Defender's wife declared fugitive.

Martin g^t Drummond of Balhadies for beating and wounding, deserted.

Edinb^r 11 June 1667.

Earl of Glencairn g^t Coline Hay, George Gordon, and others for Usury, continued.

Edinb^r 12 June 1667.

Charles Lindsay against William Maxwell one of his Majesties life guard for oppression, continued upon production of a Testificate that the Defender for three months before had been put upon a party for doing of the King service and was not yet returned.

Edinb^r 18 June 1667.

The Earl of Glencairn and Mushet his ffactor agt. Mr. William Somerveill, indited for contraveening the laws against Usury, viz. Act 222 par. 14. Jam. 6. Act 247. par. 15. Ja. 6. Act 28 par. 23. Ja. 6. and *L: improbum pro quibus infamia irrogatur, et decreti secunda parte, Caus. 13.* by taking Bond

from Steuart of Heisleside for 25000 merks, whereof 20000 merks was the just sune and the rest @rents accumulate before they were due. Item having lent 5000 merks more upon a wadsett to the said Heisleside. He took a Bond apart for 200 merks yearly in name of pension which was a Bund or Brybe beside the @rent, and for verifying the first article produced the Discharge of the @rents taken before the band bearing satisfaction and payment, and to verify the second produced the Bond of pension.

Sir George M^ckenzie for the pannel alledges against the first part of the lybell that its not relevantly subsumed upon the Discharge produced bearing the satisfaction and payment, unless it were positively offered to be proven that at the granting of the Discharge payment was truly made, ffor Usury being a crime of oppression, it is necessary in this case that forehand payment was really made, because without that there could be no oppression, it being free for any man to grant a Discharge in what terms he pleased. And often discharges are granted bearing satisfaction and payment where there is nothing but love and favour.

Replies Sir George Lockhart that he oppones the Dittay which is most relevantly lybellled and oppones the Discharge produced to instruct it, which being dated *anno* 1650, grants satisfaction and payment to be made of all @rents till Whitsunday 1660. And is sufficiently probative against the pannel who granted it, and it is not necessary otherwise to prove payment but if the pannel pleases, he may offer to prove that tho' the Discharge bear payment, yet it was granted meerly for love and favour.

M^cKenzie duplyes that a Discharge may be conceived bearing satisfaction and payment, and yet be but *acceptilatio* or *imaginaria solutio* so that unless payment can be otherwise instructed then by Discharge, the lybell cannot be here said to be instructed. And suppose that the Discharge produced had born only satisfaction and not payment, the Discharge could not be urged in that case to instruct the Lybell, because a man may grant himself to be satisfied and truly may be so, and yet take nothing, it not being necessary for satisfaction that there be a payment, for a man may be satisfied when he

Earl of Glen-
cairn ag^t Mr.
W^m Sommer-
veil for Usury.

discharges freely, satisfaction there having no other signification but that he has done it voluntarily and pleasantly, but this cannot make usury because Usury is committed by extortion and this is a deed gratis done, and therefore payment and satisfaction being different, the one cannot be inferred from acknowledgement of the other. And if it cannot be necessarily inferred the inference cannot found a crime,¹ for crimes cannot be inferred from presumptions, and that being only a presumption where the contrair may be true. And whereas the Discharge also bears payment if satisfaction be not relevant *per se*, neither is the word payment relevant to infer Usury, seeing the one is but exegetick to the other and will follow necessarily tho not exprest. And tho the Discharge had only born satisfaction the partie granter would not have thereafter pursued for payment but might have been excluded by a Discharge confessing satisfaction. So that since payment is necessarily included in satisfaction, the word can operate no more than satisfaction. And moreover this Discharge produced is null wanting witnesses and can only be supplied by the Pannell's oath, and in that case he must be allowed to depone not only upon the veritie of the subscription but upon the truth of the cause of the Discharge. And it were hard in this case that an act of negligence such as the granting payment of @rents where none was paid should bind a crime of so great import as Usurie, and the Pannell offers his oath that he received nothing, and suppose he had received, yet it was voluntarily given and so cannot be called extortion, and consequently no Usury which cannot be without extortion and opposes the practise of Purdie.

Sir George Lockhart opposes his former Reply and took notice only so far of the Duply founded upon the nullity of the Discharge for want of Witnesses and offered to prove the same all written with the Pannell's hand, and so is not null upon the Act of Parliament.

The Justices repelled the alledgiances in respect of the Interloquitor. Reply unless the Pannell would alledge that the Discharge was granted for love and favour and for no money or other onerous causes.

¹ 'the crime cannot inferr a crime' in Adv. MS.

Verdict of the
Assize.

The Assize finds the Pannell guilty in exacting and taking 10 p. cent. of the sum of 5000 merks in manner mentioned in the Dittay, as also finds the Pannell guilty and culpable of the exacting the @rent of 20,000 merks 2 years before the same was due, contrary to the Act of Parliament viz. from Whits. 1658 to Whits. 1660, in respect they fand the same sufficiently proven.

Edinb^r 19, 21, 24, 25, 26, 27, and 28 June 1667.

Expences modified to some of the Witnesses ag^t Mr. W^m Sommerveil.

Edinb^r 20 Jnne. The pronouncing the sentence against Mr. W^m Sommerveil continued till the 24 instant.

21 June. Earl of Glencairn ag^t Colin Hay and others for Usury, deserted as to James Harper of Elsrig.

24 June. The Sentence against Mr. William Sommerveil continued till the 25.

Doom against
Mr. W^m Som-
merveil.

25 June. The Justices decerned and adjudged the said Mr. William Sommerveil to have forfeited and ammitted all his moveable goods and gear, and ordains him to find Caution that he shall appear before his Majesties Privy Council or his Highness Justices whenever he shall be called to undergo such other punishment and censure as they shall think fitt, under the pain of 5000 merks.

Advocatus desired the sum whereanent the Usury was committed might likewise be declared forfaulted and protested that notwithstanding the Sentence, it may and shall be leisum to the Pursuer to pursue for forfaulting the said sum conform to Act of Parliament, and Sir Geo. M^okenzie for the Pannell protested in the contrar and that the Sentence might stand as it was pronounced.

Mutilation.

25 June. Advocatus and John Ross in Strathmore ag^t Robert fforbes at the Mill of Melgum, indyted for Mutilation as follows, that where notwithstanding by the Laws and Acts of Parliament and practique of this kingdom the crime of Mutilation is punishable as Manslaughter, that is to say by Death and Confiscation of the committer's goods, nevertheless

it is of verity, that the said Robert fforbes being armed with a Durk, Sword, and other weapons invasive, came under silence of night, upon the 3d of December 1665, to the complainer's dwelling house at the kirktown of Tarline, and there cruelly wounded him in severall parts of his body, to the great effusion of his blood, by which bloody wounds the sinews and nerves of his right hand were cutted and mangled, and he thereby mutilate of the ring and little ffingers of his right hand, whereof he is altogether made unable and impotent to make use of the same, of the which crime of mutilation committed in manner forsaide, the said Robert fforbes is Actor art and part, which being found be an Assize concludes punishment in his person and goods.

Mr. Andrew Birnie for the Pannell alledges the Pannell cannot pass to the knowledge of an Assize for the crimes in the Dittay, because it is *Res hactenus judicata* for which the Pursuer¹ suffered an Assize and was convict and imprisoned. And albeit it be true that Mutilation was not expresly lybelled in that pursuit, but only bleeding and wounding simply or for mutilation, and having elected the first he cannot now return to the second, viz. Mutilation. (2^o) *Esto* that the Pursuer may recur and now insist for Mutilation, yet the Libell as its conceived bearing only the disabling the Pursuer in two ffingers, is not relevant to inferr the crime of Mutilation, because this Crime by the opinion of Lawyers is the cutting off of such a member of the body as has *separatum et distinctum officium* in the body as a leg or arm or hand and that albeit a ffinger may be cutt off or disabled, yet the office of the hand becomes not altogether useless, and swa the cutting off a ffinger cannot be repute Mutilation, no more than the cutting of an ear or loosing of a tooth, ffor the ffingers are but subservient members and for this cites Bartolus, Baldus, Covaruvius *ad tit. Digest. de judiciis pub.*

Ross ag^t fforbes
for Mutilation.

My Lord Advocate Replys that the first part of the Defence bearing to be *res hactenus judicata* ought to be repelled because Mutilation was not pursued nor libelled as the Defence bears, and the 2^d part of the Defence bearing that the Pursuer who had it in his option to pursue for Mutilation

¹ 'Pursur' in Adv. MS.

or Wounding, only did insist for the last, is altogether groundless, in respect at that time it was not competent to the Pursuer to insist for Mutilation, seeing there was no amputation of a member and without amputation there cannot be a pursuit for mutilation within year and day, because the law allows that time that it may appear that the wounded person may be so cured that the member injured may be usefull to him or not, and it is *gratis dictum* and without any warrand that when *duæ actiones* are competent in *criminibus* the intending of the one absorbs the other *et etiam id quod est magnum* should be taken away by that *quod est minus* to wrong the King and his interest, ffor by this rule if a wrong Informer should represent a Slaughter to the King's Advocate as a simple blood and that the Delinquent be pursued for the blood should be acquitt, it would follow that the King's Advocate could not thereafter convene him for the Slaughter, whereby the King would lose the benefite of his moveables which fall and belong to the King by the Slaughter. This no person will offer to defend, and therefore it is yet competent to the King's Advocate to insist for the Mutilation which is punishable as manslaughter, notwithstanding that the crime has been already adjudged as a Blood.

Ross against
forbes for
Mutilation.

And to the 3^d part of the Defence bearing that there is no mutilation in this case in respect there is no *truncatio membri* or *debilitatio* which renders it useless, and that a ffinger is not a member which has *separatum officium*, but is only subservient to the exercise of the hand, it is replied, that this part of the Defence is most irrelevant in respect in law and opinion of Lawyers and by our practise and undoubted custom,¹ which ought to bear down pretended authoritys adduced from foreign Lawyers, the ffinger is a member, the definition of *membrum* being in law *pars corporis quæ habet suam distinctam exonerationem* which is also well quadrat and competent to a ffinger as another member of the body, and it is evident from Broplo. lib. 3 cap 24 treating that maheman² and mutilation may be inferred as well of a disabled finger as of another member of the body *ubi enim nervi ita contracti sunt ut*

¹ 'and undoubted custom' not in Adv. MS.

² 'mahem' old form of 'maim.'

digitus inutilis redditur ad pugnandum vel defendendum or otherwise in his opinion and opinion of ffascines and other Lawyers treating the case of Mutilation.

It is an clear and undoubted Mutilation and as to instances and similies of ane tooth and ear they do no ways meet, seeing the organ of hearing does not consist altogether in the exterior part or lug, and for the tooth, it is controverted whether it be *pars corporis animata*, but the question is without all question in Scotland, seeing divers times Mutilation has been sustained upon the cutting and disabling of ffingers.

The Justices repells the Alledgiance in respect of the Reply, Dittay and Reply,¹ and ordained the Indictment to pass to the knowledge of an Assize, but the Assize finds him not guilty.

The 26 day the pronouncing of the Sentence is continued, and on the 27 the said Robert fforbes entering the Pannell to hear the Verdict and to receive his Sentence, the Justices taking it to consideration, viz. Mr. Wm. Murray who was only sitting in Judgement, that albeit the Assize had cleansed him of the crime of mutilation, yet he being formerly charged before the Justices for the crime of bleeding and wounding, and being found guilty by the Assize and no sentence pronounced agt. him for punishment nor assythment to the partie pursuer, the said Mr. Murray, Justice Depute does therefore ordain him to make payment instantly of £40 of Assythment or to go to prison, and accordingly he instantly made payment.

28 June the Earl of Glencairn agt. Colin Hay and others for Usury, continued.

Edin^r 2d July 1667, Mr. W^m Murray present.

The Actions for the Slaughter of Gordon of Braichlaw g. ffarquharsons and the reconvention at the instance of one of the ffarquharsones for the killing of Jean M^cKenzie, continued till the first Tuesday of July as to some of the Defenders, be reason of a depending Precognition before the Councill, but as to other of the Defenders, viz. Alex^r ffarquharson of Inner-

¹ 'Dittay and Reply' not in Adv. MS.

gald, Charles ffarquharstone of Monaltry, John ffarquharstone of Bellamore, Donald ffarquharson of Alnacorth, and Walter ffarquharstone his son, who compeared and offered themselves willing to underlye the law, the Diet is deserted, and an Order that no new Letters be direct out without an express warrand frae the Justices.

Triall agt^t
ffarqu^ssons for
convocation of
the Lieges and
killing Brach-
law and his
brother.

And here the tenor of the¹ Lybell is sett down, which is not in the former Diets, viz. That John Gordon of Brachlaw and William Gordon his brother, and James Gordon of Cults, being all in a peaceable manner within the house of Braichlaw upon the 17 of Septe^r 1661, expecting no trouble from any person, the persons complained upon and their associats to the number of eight score or therehy, all armed with guns, swords, durks, etc. came by way of convocation to the said house of Braichlaw and lands adjacent thereto, and did drive away the cattle pasturing upon the same, and the said John, James and William Gordons, offering to resist them, they killed the said John and James.

Eodem Die.

Gilchrist M^cThomas against James Jamiesone and others in the Isle of Bute for theft, the Diet deserted of consent because Mr. John Stewart, Advocate for the Pursuer declared that tho he was ready to insist, yet the King's Advocate was not ready, and Sir Geo: M^ckenzie compeared and excuse the Defenders that most of them were women and were not able to travell.

Eodem Die.

Killing Deer.

Charles Earl of Aboyne against ffarquharstone of Monaltry, one of the Defenders conveyened be him for the shooting of Deer, compears Mr. William Moir,² advocate, having a Procuratory from the Pursuer to insist, Compears also the Defender and his Advocate and dissents from farther continuation of the Dyet and offers to underly the Law, and thereupon the Diet is deserted of consent.

¹ 'tenor of the' not in Adv. MS.

² Admitted advocate 12th February 1664; M.P. for Kintore Burghs.

Edinb^r 3 July 1667.

Angus M^cintosh, baillie of the Regality of Spynie ag^t George Grant, son to Bandallach, and severall others of the name of Grant, for mutilating the said Angus M^cintosh and killing of Lauchlane M^cintosh, the Dyet as to George Grant and severall others who compeared, the Diet is continued, and the rest declared fugitives and their Cautioners unlauded and the Diet as to Alexander Duff, one of the Defenders compearing, deserted.

Eodem die.

Sir Ro^t Sinclair, advocate, produces an Act of Council for the Laird of Spott to continue the Diet in the Action for the Slaughter of Hoom of Eccles in ragard that Mr. W^m Douglass had by a Declaration under his hand taken the fact upon him and had suffered, and accordingly the Diet is continued.

Eodem Die.

Alexander Vast, Baxter, Burges of Edinburgh prisoner for the alledged Slaughter of John Libberton, son to Andrew Libberton, workman in Edinb^r gives in his Petition to the Justices with a Remission, and thereupon is sett at liberty.

Edinb^r 9 July 1667.

The Viscount of Stormont¹ ag^t Robert Herreis of Haldkyes Deforcement. for Deforcement of James Murray, messenger, in executing Letters of Poinding at the Viscount's instance ag^t Adam Newall, Chamberlain to the Earl of Southesque, by firing a pistol at Gilbert Cowpar, one of the messenger's assistants, and thereafter assaulting him with his drawn sword.

In this Process Mr. Robert Dickson for the Pannell, craving a sight of the Lybell till the morrow because he had received but a short Cobby and opponed the Executions not bearing delivery of a full coppie, and in fortification offered to make faith he had received but a short Cobby. And Sir Geo: M^ckenzie for the Pursuer replying that he opponed the Execu- Visc^t Stormont
g. Herreis for
deforcng a
Messenger.

¹ David, fourth viscount.

tions bearing delivery of a just Cobby which is the common style of Executions to signify delivery of a full Cobby.

The Justices repelled the Answer in respect of the Reply and fand the Dittay relevant and ordained the same to pass to the knowledge of an Assize, whereupon the Pannell is convict and found guilty of the Crimes lybelled, viz. of troubling the Mess^r his Assistants in the execution of his office and of drawing arms contrar to the Act of Parliament. Doom pronounced 12 instant.

Eodem Die.

The Justices continues the mutuall Actions Angus M^cintosh ag^t Geo: Grant and others for Mutilation *et E contra* for Theft and Receipt till the 12 instant and deserts the Diet in the first as to Pat. Grant of Hillhall and severall others conveened at the instance of the said Angus.

Eodem Die.

Earl of Glencairn and his ffactors ag^t Colin Hay for Usury continued.

Eod: Die.

Charles Lindsay ag^t William Maxwell, son to Maxwell of Orchardtoun, for wrongous imprisonment, deserted.

Edinb^r 10 and 12 July 1667.

Advocatus and Thomas Taylor ag^t Colin M^clener for Theft, declared fugitive.

Eodem Die.

The Viscount of Stormont ag^t Robert Herreis, the pronouncing of Doom continued till the 12th and then he is decerned to forfault his moveables, the one half to the King and the other to the Viscount, Pursuer, and to remain in prison till farder order.

Edinb^r 16 and 17 of July 1667.

The Earl of Glencairn ¹ ag^t Colin Hay and others for Usury, continued both these Diets, as also Neil Campbell of Kilmartine declared fugitive for Deforcement.

Edinb^r 19 July 1667.

Angus M^cintosh ag^t George Grant *et E contra* again continued by a Reccomendation from the Council which discharges the extracting of any certification against the absents of the Grants till the 7th of November next and proceeds upon a Petition given in to the Privy Council by Ro^t Grant of Badavochell representing that Lauchlan M^cintosh and his followers did first sett upon him, having none in company but a boy, and that it was Angus his own followers that killed his two men and that the absents of the Grants are necessarily absent to defend their own country.

Edinb^r 22 July 1667.

The Earl of Glencairn and his ffactors ag^t Colin Hay, Thos. Carmichaell, and others, the Diet is deserted as to Thomas Carmichaell and continued as to all the rest till 2 August next.

Edinb^r 24 and 25 July 1667. The Justice Clerk and Deput Murray present.

David Balcanquell of that ilk ag^t Henry Lawrie and James Skinner, first day continued, and next day insisted ag^t for Perjury, viz. that albeit be the Laws and Acts of Parliament of the Kingdome, it is expresly provided, statute and ordained that all persons who give false testimony in witnessing in any Cause whatsoever shall be punished in their persons and goods with all vigour according to the Disposition of the Civil and Canon Law and Statutes of this Kingdome, and farder punishment to be inflicted upon them according to the quality of

Balcanquell
ag^t Witnesses
for Perjury.

¹ Alexander, tenth earl, succeeded 1664; died 1670.

their fault, Nevertheless the persons complained upon being adduced as Witnesses be Mr. John Rigg, minir of Stramiglo in an Action pursued at his instance before the Lords of Session against David Balcanquell of that ilk for payment of certain viccarage Duties of his Lands within the Parochen, and they being admitted and sworn to depone and declare the verity and truth in the said Cause so far as they should be speired at, they contrary to their knowledge deponed that the Viccarage of the said Parish is paid by severall Heretors and their tenants according to 3 £ Scotts for every pleugh besouth the Water of Miglo, and 2 £ Scotts upon the northside of the Water. And that they knew that the last Minister and this have been in use of receiving payment accordingly, and that the complainer and his tenants have been in use to pay the Minir of the said Church and his predecessors for 7 years together 2 £ for every Pleughgate of land, 4 £ for the viccarage Teinds of his maynes and 40 sh. yearly as the viccarage of the Pleughgang of Carimuir and as much for the Pleughgate of Caringring, which Depositions are altogether false and they by the making thereof have declared themselves perjured persons and false witnesses, which being found by an Assize they ought to be punished accordingly.

Sir George Lockhart for the Pannells alledges, that the Dittay cannot pass to the knowledge of an Assize or be found relevant to be proven any otherways but either by Writts under the hands of the Pannells containing the tenor of the Depositions, or be production of the Depositions¹ themselves containing the said contradictions, and the same cannot be found relevant to be proven by witnesses who should depone the contrary, ffor such contrary Depositions can neither infer Perjury nor make any way faith in prejudice of the first testimonys.

Sir Geo: M^ckenzie for the Pursuer Replys that the Lybell being relevant as it is conceived, it should go to the knowledge of an Assize and they being only Judges to the probation, the same should not be debated untill the Assize be sworn, for there being nothing as to the manner of probation in the Lybell, the manner of probation cannot be debated

¹ 'Dispositions' in Adv. MS.

before the Justices who are only Judges to what is in the Lybell, but the Assisors are the only Judges to the probation who perhaps will need no Depositions at all but judge *ex propria scientia*, and as to the naturall quality of the Witnesses it is only debateable before the Assise.

The Justices finds the alleadgeance proponed by Sir George Lockhart for the Pannels competent to be debated before the Justices before the swearing of the Assise. Interloquitor

Sir George M^cKenzie for the Pursuer, thereafter replies to the first Alleadgeance that all matters of fact are probable *prout de jure* and the subject of the perjury lybelled is matter of fact, such as payment or not payment and falls under the senses and therefore it ought to be proven by Witnesses as well as any other matter of fact, there being no speciall reason of difference. And seeing the Law allows Witnesses for takeing away of men's lives, why not to prove perjury, and if this awelband¹ be taken away by several Witnesses it were to invite them to arbitraryness, which might be very dangerous to the subjects, and specially it would be impossible to prove in a summons of error because the sentences quarrelled by these Summonds are by redargueing of facts and deeds proven by Witnesses, likeas Perjury was found probable by Witnesses by an express decision 6th Aprile 1565, Laird of Rossyth agt. Laird of Innermeath's Witnesses.

Duplys Sir George Lockhart for the Pannels, that it is a novelty without foundation of law or practique to pretend that perjury can be inferred against Witnesses upon a contrary probation be Witnesses, and it is strange to think how posterior Witnesses deponing contrary *super eodem ffacto* should make more faith as to the subject of their Deposition then the prior witnesses who have deponed contrary, and the only habile probation in such a case is write under the hand of the first witnesses contradicting their Depositions or contradictions in their reexamination to their first Depositions and there is but one case in which Lawers allow witnesses to prove perjury against witnesses, and that is when the first witnesses have deponed falsely *verba initalia* testimony as when a witness being of relation to the party or his moveable

¹ 'Aweband' in Adv. MS.

tennent or in other things relating to the habitation of the witnesses, as to which points he not being properly a witness the same may be regarded¹ by the contrary probation, specially not being corroborate by the testimonies of the Contestes, but when a habile witness has clearly deponed *super veritate facti*, it is without all warrand to assert that a contrary probation of other witnesses *super eodem facto* can infer perjury thereupon, and accordingly nether in reprobaters nor in Summonds of error the Deposition of witnesses if ever are or can be redargued upon that pretence that other witnesses were ready to depon contrary thereto. Which if it were sustained it were a preparative not only contrary to the principles of known law but would subvert the foundations and procedure of the Civill Judicatures of the Kingdom, it being impossible that witnesses who have no interests in pursuits but simply to depon the verity, would expose themselves to the trouble and vexation of calumnious pursuits of perjury upon a contrary probation *super eodem facto*, and if this was sustained this court would have work enough to cognosce on pursuitts of perjury, for in all cases of conjunct probation before the Civill Court, and in most of the Cases which occur before this Court, if there be many witnesses, some of them will flatly contradict others, in which case both the contradictors behooved to be repute as perjured, and as to the practique adduced, it is taken from an ancient Author who has asserted many other opinions contrary to what are now in practice, and therefore not much to be regarded. And if it were considered probably it would be found to have been only in the case of witnesses who had deponed falsely to habilitate themselves, which might very well have been, and is consistent with the dayly practique of the Lords in the cases of reprobator and summonds of error.

Tryplys Sir George M^ckenzie for the Pursuer that the speciality duplyed upon is not cleared by any law, and as to the inconveniences adduced, there will be as many inconveniences if the lives and fortune of men be exposed to the unlimited veracity of witnesses, who in this age are become

¹ 'redargued' in Adv. MS.

very loose, and tho there be no reason for contradicting witnesses by other witnesses of equall number and of no greater authority, yet they may be redargued without inconvenience by witnesses of greater number and more integrity, even as for this Cause Assises of Error of a double number are allowed to redargue ordinary assises, and tho' it be presumed as the Duply bears, that witnesses depone truely, yet it may fall out othewise, and so should not be unpunishable, no more than assisers doing wrong are unpunishable, and as Witnesses deponeing falsly anent their habitation, are also presumed to depone truely, and yet their testimonys in that point may be cancelled *per contestes* of a greater number, so redargueing by witnesses ought to be allowed in this case, and there will be no inconveniency as the Duply bears to Criminal Cases nor progressus *in infinitum*, for however Witnesses may slip in civill cases at the first examination yet it is not to be presumed that these who are brought to redargue them will slip or that any witness would be inadvertent in a criminall case because of the great concernment of it, and the practique cited is opposed and should be respected for falsum is probable by witnesses and perjury is falsum.

The Justices finds the Defence and Duply proponed for the pannels relevant.

After the pronouncing of which Interloquitor the said Sir George M^cKenzie for the Pursuer protested that since the Pannels refused to be tryed conform to the testimonys and Depositions of famous and uninterested Witnesses whom he had ready at the bar for proveing of his Lybell, yet this pursuit should not be looked upon as maliciously intended at the Pursuer's instance and that it should be nowise prejudiciall to him to pursue a civill action of Reduction of the Decreet obtained at the Minister's instance before the Lords of Session pronounced upon the Pannell's Depositions as accords of the Law and thereupon asked and took Instruments. Likeas both parties protested for relief of Cautioners, which the Justices admitted.¹

¹ This case is referred to at some length by Sir George Mackenzie under the title 'Perjury,' where he again states his arguments against the justices' finding.—W.

Edin^r 2d Aug^t 1667.

The Earle of Glencairn and his factors agt. James Wilson, merchant in Edinburgh, and others for Usury. The Diet is continued as to the said James Wilson and all the rest untill the 5th of November next, except as to George Herreis wright and Walter Miller, as to whom the Diet is deserted.

Eodem Die.

The Earl of Aboyn¹ agt. the Laird of Abergeldy and divers others to the number of 32 for shooting of Deer, continued to the 3d day of the next Justice Air to be holden in the Sherriff-dome of Aberdeen, or sooner upon 15 days warning if they shall be called, and the Cautioners of both parties are ordained to continue.

Edinbr. 5 and 6 of August 1667.

Robert Herreis formerly found guilty of the Deforcement of the Viscount of Stormont's Messenger, and having lye since in Prison for the same since the 12 of July last, is this day sett at liberty by Warrant from the Justices by a Recommendation frae the Privy Councill, and the Warrant delivered to the Magistrates of Edinb^r.

Eodem 6 Aug^t.

Advocatus ag^t W^m Harper, taylor in Edinb^r and Ro^t Harvy, smith there, indyted for the crime of Tumults committed be them within the Town of Edinb^r continued to the 5th of November.

Edinbr. 15 August 1667. Present in the Court the Earl of Atholl, Justice General, and the Justice Clerk.

*Curia Legittima Affirmata.*²

Assessors to the Justices.

ALEXANDER, EARL OF LINLITHGOW.

WILLIAM, EARL OF DUMFRIES.³

¹ Fourth son of second Marquis of Huntly; created Earl of Aboyne 1660; and died in 1681.

² Not in Adv. MS.

³ Second earl; died 1691.

My Lord Advocate produced an Act of his Majesties Privy Council whereof the Tenor follows, Att Holyroodhouse the 6th of August, the Lords of his Majesties Privy Council having considered the desire of the Justice Generall and Justice Clerk, for having Assessors appointed to them in the Process pursued against Caldwell and others for Treason, have ordained and ordains that with the Justice Generall, Justice Clerk, and Justice Deputes, the Earls of Linlithgow and Dumfries to sitt as Assessors and vote there untill. *Ex^t p. me sic sub^t Pet Wedderburn.*

Assessors nominate by the Council to the Justices for the Trial of Rebels.

Thereafter the persons following are called to underly the Law for assembling themselves together and rising in arms agt. the King and concurring in the late Rebellion, and most part of them being at the fight of Pentland-hills. The names of the persons so called upon are

List of the Rebels.

William Maxwell¹ of Moncreif younger.

John M^cKlellan² of Barscobb.

„ M^clellan³ of Balmageichan.

„ Cannon yo^r of Burnshalloch.

„ Cannon yo^r of Barley.

„ Cannon⁴ yo^r of Mondrogatt.

„ Welsh of Starr.

„ Welsh of Cornley.

„ Gordon of Gavarey⁵ in Kells.

Henry Groir⁶ in Balmaclet.

David Scott in Irongray.

John Gordon in Midtoun of Dalry.

William Gordon there.

¹ According to Burke, William Maxwell and his father, John, both died in 1670. William's second son was made a baronet in 1681. The present representative of this family is Sir Michael Maxwell, seventh baronet.

² Had assisted in seizing Sir James Turner.

³ The subsequent career of this gentleman was remarkable for its misfortunes. His life was twice forfeited. He experienced imprisonment in Scotland, and slavery in the Plantations. Returning after the Revolution, he was made prisoner by the French, and suffered great cruelty. Even after his imprisonment was ended he was shipwrecked, and fell into the hands of the wild Irish. Finally, he ended his days in peace at home. See Wodrow, iv. 334.

⁴ This man afterwards became an informer and betrayer of the saints. 'As apostates generally are, he was very bloody.'—Wodrow, iii. 224.

⁵ Or Gavery.

⁶ Or Grier.

W^m M^cNaught there.
 Robert and Gilbert Cannons there.
 „ Gordon, elder of Bar in Kilpatrick.
 „ Durham.
 Pat. M^cNaught in Carnock.
 John M^cNaught his son.
 „ Gordon, yo^r of Holme.
 „ Dempster of Carradon.
 „ of Darggoner.
 „ of Sundywall.
 Pat. Liston elder p^{tr} of Langton.
 W^m Liston his son in Crofthead.
 Pat. Liston y^r of Overliston.
 Ja. Wilkie in Mains of Cliftonhall.
 W^m Mure of Caldwell.¹
 „ Caldwell ² of Caldwell.
 „ Ker ³ of Kersland.
 Mr. Jo. Cuningham of Bedland.
 „ Porterfield of Quarrelton.
 Alex^r Porterfield,⁴ his brother.
 „ Lockhart ⁵ of Wicketshaw.
 Jo. Hutchison of Lairlaw.
 „ Bell of Middlehouses.
 Mr. Gabriel Semple.⁶
 John Semple.
 Mr. John Guthrie.⁷

¹ The Caldwell estate was gifted to General Dalziel. For an account of the sufferings of the Lady Caldwell, see Wodrow, iii. 439.

² We find Caldwell of that Ilk a prisoner in 1685.

³ Was afterwards betrayed by the informer Cannon, and confined for eight years. He died in Holland.

⁴ In 1684 we find John Porterfield of Duchal convicted and sentenced to death for conversing with this Alexander, his brother, 'a forfeited person.' Wodrow says that John's judge had received a previous promise of his estate.

⁵ In Carluke parish, Lanarkshire. He had marched to join the rebels along with some other convicted men.

⁶ Son of Sir Bryce Sempill, and formerly minister at Kirkpatrick-Durham. He preached the sermon at Lanark. In 1681 he was arrested at Blackcastle, and called upon to answer upon the old sentence of forfeiture. Yet nothing seems to have come of it, and he retired to England.

⁷ Had preached at the renewal of the Covenant at Lanark.

Mr. John Welsh.
 Mr. Samuel Arnot.¹
 Mr. James Smith.
 Mr. Alex^r Pedden.²
 Mr. Orr.
 Mr. William Veitch.³
 Mr. Patown.
 Mr. Cruikshanks.
 Ramsay in the Mains of Arniston.
 John Hutcheson in Newbottle.
 Rew, chaplain to Scotstarvett.
 David Poc in Pokellie.
 Mr. Gabriel Maxwell.
 Mr. John Carstairs.
 Mr. James Mitchell.⁴
 Mr. William fforsyth.

All and every one of these persons are pursued and accused upon a Lybell conform to the Lybells against the preceeding Rebels word by word, and because it would be impossible that they could all be found guilty upon that Lybell, they not having been actuallie at the flight of Pentland hills nor at the other places mentioned in that Indytment, but most of them being only guilty of assembling together in their own countrey in order to join with these Rebels. Therefore that they might be reached on that head there is an addition made to the subsumption of the other Libell immediately before the conclusion thereof, in these words,

Likeas notwithstanding the Laws, Acts of Parliament and Proclamation forsaid, and that thereafter a Proclamation was

¹ Minister at Tongland.

² The prophet of the Covenant.

³ He wrote an autobiography, which was edited by Dr. M'Crie. He seems to have had many adventures, and to have had exceptional good-fortune in escaping the gallows.

⁴ Doubtless the James Mitchell who was subsequently put to death for his attempt upon the life of Archbishop Sharp, which resulted in an injury to the Bishop of Orkney. The breach of faith exhibited towards Mitchell by the Privy Council attracted attention even in those days, and greatly increased the popular animosity against Sharp.

emitted upon the 4 of December whereby his Majestie with advice of his Privy Councill did again discharge and inhibit all his subjects that none of them should offer or presume to harbour, receipt, supplie, correspond with, or conceall the persons therein mentioned, or any other who concurred or joined in the said late Rebellion or upon account thereof appeared in arms in any part of this his Majesties Kingdome, but to pursue them as the worst of Traitors and present such of them as they shall have in their power to the Lords of Privy Councill, the sherriff of the Shire or Magistrates of the next adjacent Burgh royall to be by them made furth coming to Law, certifying all such as shall be found to fail in their dutie therein, they should be esteemed and punished as favourers of the said Rebellion, and as persons accessory and guilty of the samen, nevertheless divers of the forsaid persons did not only most disloyally fail in their duty and did not rise and join with his Majesties Lieutenant Generall and officers under him for repressing and subduing the saids Rebels, but most perfidiously and treasonably did their uttermost endeavours to advance, strengthen and promote the said Rebellion, and in order thereto in the months of

¹ 1666 years and severall days thereof, or ane or other of the said months and days they mett and conveyed at the Bankend, Caldwell,² Knockmadie, Chitterfleet, the Steermes and divers other places within the Western Shyres and Sherriffdomes of ³ and did conclude and resolve to join with the said Rebellious partie, and being armed with swords, pistols and otherwise, they joined themselves in Troops and Companys and did elect and choise Captains, Lieutenants and others officers, and did accept the saids charges and employments, and accordingly did ride and march from place to place, and did write letters to ffriends and neighbours to join with them, and did intercept letters that thereby they might have notice and intelligence where his Majesties Armys and fforces were, and of their fforces, motions and designs, and to the same purpose did go and send out others for intelligence and divers other Acts of Treason and Hostility, and in the months forsaid,

¹ Also blank in Adv. MS.

² 'Caldwell' not in Adv. MS.

³ Also blank in Adv. MS.

as also after the defeat of the s^d rebellious party in the ensuing months betwixt the said defeat and the date of the said Proclamation and one or other of the saids months and severall days thereof, the forsaid persons within the saids western shires and shires of ¹ within their own Bounds and their own Tenents' houses and other places did harbour, conceall, receipt, supplie, correspond and intercommune with the persons particularly @named contained in the said Proclamation the 4th of December 1666 years, and others who concurred and joined in the said late Rebellion and who upon that account appeared in arms, in doing of which, etc. follows the conclusion as in the former Lybell.

The King's Advocate produces his Warrant to insist in this Lybell under the hand of the Earl of Rothes his majesties Commissioner, dated 6 of August 1667, and contains the names of the haill Defenders and produces the Executions with the Lybell bearing the same to be execute the 29 of May, 26, 27, 28 of June, 1, 2 and 3 of July last by past against the whole Defenders respective be Jo. Telfer, Herald, Alexander Murray and James Alison, Purservants, to have found caution in the Books of Adjournall for their compearance.² And in regard of their not compearance, all of them and ilk one of them are decerned and adjudged to be denounced O. S. Lords Rebels and put to his Horn, and all their Lands, Heretages and other goods and gear whatsoever to be forfeited and escheat to his Majesties use as Outlaws and fugitives frae his Highness laws, for the treasonable crimes @written, which was pronounced for Doom.³

Observe here that the name of Denholm of Westshiells is delet out of the Libell, and there is a marginnall note which gives this reason that he was not in the Advocates Warrant which with the Advocates constant practise of

¹ Blank in Adv. MS.

² The executions of the charge were in this case made as provided for by James VI. Par. 12, c. 125.

³ Sir George Mackenzie states that His Majesty's Advocate 'uses not to pursue a summons of treason without a special warrant under His Majesty's hand, or a particular order from the Council which he uses to produce *ante omnia*, and is still marked by the clerk.'

producing orders from the King or his Privy Counsell when he perceives Traitors, shews us¹ that the King's Advocate either cannot or does not pursue any man for Treason without a Warrant.

After these Rebels were all declared fugitives, the King's Advocate desired the Justice Generall, Justice Clerk, and the Assessors to proceed farther to the Triall of the Relevancy of the Indytement, and the same being found relevant, to put the same to the knowledge of an Assize and receive Witnesses therintill (notwithstanding of the parties absence) and the forsaids parties being found guilty by an Assize, to proceed to sentence of Doom and fforfaulture against them, and because the Justices had not been in use to forfault absent persons, but only to declare them fugitive in manner forsaide, therefore my Lord Advocate to satisfy the Justices, produced a Querie given in be him to the Lords of Session anent the Justices power to proceed in this point, containing his reasons why they might proceed. And the Lords of Session their Resolution in favours of the Advocate subscribed by their President thereby to convince the Justices of their own power, and the Resolution is here recorded and the tenor follows.—

Query stated to the Lords of Session anent the Justices power to decide in this affair.

Trial agt. @ 50 Rebels tho absent.

Reasons given in with the Querie to the Lo: of Sess. anent the Justices power to proceed in this case.

Whether or not a person guilty of high Treason may be pursued against before the Justices, albeit they be absent and contumacious, so that the Justice upon Citation and sufficient probation and evidence may pronounce Sentence and Doom of fforfaulture if the Dittay be proven? The reason of the scruple is that processes of fforfaulture are not so frequent that in other ordinary crimes the Defenders if they do not appear are declared fugitives, and the the following reasons appear strong and relevant for the affirmative. (1^o) By the Common Law albeit *regulariter* a partie absent cannot be condemned for a crime, yet in Treason which is *Crimen exceptum* this is a specialitie that absents may be proceeded against and sentenced. (2^o) By the 1 Act Ja. 5 his 6 Parl. it is declared that the King has good cause and action to pursue all Summonds of Treason committed against his person and commonweall, conform to the Common Law and good equity

¹ 'us' not in Adv. MS.

and reason, notwithstanding there be no special law, act or provision made thereupon. And therefore seeing by the common Law, persons guilty of Lese-Majestie may be proceeded against and sentenced tho they be absent. It appears that there is the same reason that the Justices should proceed against and sentence persons guilty of Treason tho absent, and that he is sufficiently warranted by the said Act of Parliament swa to do. (3^o) It is inconsistent with Law, Reason and Equity that a person guilty of Treason should be in better case and his Majestie in worse by the contumacie of a Traitor, the same being an addition if any can be to so high a Crime, and that he should have impunitie and his authoritie be¹ prejudged of the casualitie and benefite arising to him by his forfaulture. (4^o) The Parliament is in use to proceed and pronounce Doom of fforfaulture tho' the partie be absent, and in so doing they not² proceed in and by a legislative way, but as the Supream Judges and the Parliament being the fountain of justice what is just before them is just and warrantable before other Judicatories in the like cases. (5^o) By the @ment^d Act of Parliament it is statute that Summonds and Processes of Treason may be intented and pursued after the decease of the Delinquent against his memory and estate for delating the one and forfeiting the other, whereupon Sentence may follow to the effect forsaid, and therefore seeing Sentence may follow when the Delinquent cannot be present and is not in beeing, it were against all reason that when they are wilfully and contumaciously absent they should not be proceeded against and sentenced if they be guilty, and it were most unjust that his Majestie should be necessitate to call a Parliam^t for punishing or forfaulting of persons being absent or that he should wait untill they dye, especially seeing in the interim the probation may perish by decease of the witnesses. Follows the Lords of Session their opinion. Edinbr. 26 ffeb. 1667. The Lords of Councill and Session having considered the Query @written presented to them by my Lord Bellenden, his Majesties Theasurer Deput. It is their opinion that upon the Justices Citation and sufficient probation taken before the Judge and Assize they may proceed and pronounce Sentence

The Lords of
Session their
opinion.

¹ 'be' not in Adv. MS.

² 'they not' also in Adv. MS.

theirintill¹ and fforfaulture against persons guilty of high Treason tho' they be absent and contumacious. *Sic sub* Jo. GILMOUR,² *I.P.D.*

In this place the Advocates Warrant is recorded and after production thereof and of the forsaid Resolution, the Justices gives the two following Interloq^{ms}.—

They find that conform to my Lord Advocate's desire the forenamed persons may both be declared fugitives for their contumacy and not appearing as also insisted against for their fforfaulture, and 2^{dy} They find the Dittays relevant and ordains the same to be put to the knowledge of an Assize.

Then my Lord Advocate declared that he insisted 1^o *loco* against the persons following, viz.

Collonell James Wallace.	Mr. James Smith.
Major Joseph Learmont.	Pat. Liston in Calder.
. . . M ^c clellan of Barscobb.	W ^m Liston his son.
Mr. John Welsh.	W ^m Poterfield in Qarrelton. Caldwell, Kersland,

and some others are continued till tomorrow and the rest of the List till the 5th and 15 of November next.

ASSIZA

James Sommerveil of Drum.	William Melvil of Dysert.
William Rigg of Carberry.	Collonell James Hay.
Sir Ro ^t Dalziell of	Sir Jo. ffalconer, knight.
Wal. Kennoway, secretary to the Generall.	Jas. Lockhart of Cleghorn. Jas. Hepburn of Bairfoot.
John Ruthvin, tutor of Gair- dine.	

¹ ' therein ' in Adv. MS.

² Sir John Gilmour of Craigmillar passed as advocate 1st December 1628; became Lord President 13th February 1661, and resigned in 1670. The bold stand he made for the Marquis of Argyle in 1661 was long remembered in Scotland. He belonged latterly to the Lauderdale party, and aided in procuring the downfall of the Earl of Middleton.—W.

³ Blank also in Adv. MS.

James Weeymss of Pitkaine.
George Elphinston of Selmes.
Major George Grant.
James Johnston of Sheynes.
Sir W^m Bannatyne, knight.

The Assize being lawfully sworn and no objection to the contrary, the King's Advocate adduces for probation the following witnesses, viz. Sir James Turner one of the officers of the King's fforces whom the Rebels had taken prisoner at Dumfries and had carried alongs with them till the end of this Rebellion of Pentlandhills, where he made his escape by running from the Enemyys into the King's fforces and William Laurie of Blackwood, who as appears by his Deposition, was sent from the King's Lieutenant Generall to Collonel Wallace, Commander of the Rebels, upon design to discover them and who brought back a return. These are the first and 4th witnesses and beside these diverse countreyemen are adduced who prove sufficiently in manner contained in the following verdict.

The Assize being inclosed and having elected James Somerveil of Drumm their Chancellour, they by him return a verdict ffinding the saids Coll. James Wallace, Joseph Learmonth, Mr. James Smith, and Mr. John Welsh, Guilty and Culpable of the Treasonable Crimes contained in the Dittay, viz. The sds. Collonell James Wallace and Joseph Learmonth to have been in and had accession to the late Rebellion, and had charge and command in the Rebellious Army and Commanding in Chief therein, and of being with the Rebels at Lanerk, Colintoun, at the Conflict at Pentland and other places in Rebellion, and the saids Mr. James Smith and Mr. John Welsh to be guilty of joyning with the saids Rebels, and going alongst and marching with their horses and arms from place to place, and being at Lanerk, Colintoun and Pentland with the Rebels. And also the said . . . McClellan of Barscobb to be guilty of the Crime of Rebellion specified in this Dittay and having command in the Rebels Army and going alongst with them in Arms. As also they all in one voice ffinds the s^d Patrick Listoun, elder, and William

Listoun, guilty of the late Rebellion and joyning with the Rebels and being in Arms with them and going alongst with them, and sicklike the said Assise all in one voice find the said William Porterfield of Quarreltoun guilty and culpable of the treasonable Crimes specified in his Dittay in joyning and being in Arms with Caldwell and others persons in the said Rebellion, and meeting, conveening, and keeping Committees together for that effect, and of being present at the taking of Patrick Houston, Servitor to the Earl of Eglintoun, breaking up his Letters, and where he was kept prisoner, and marching and drawing up and going alongst in arms with them in order to the joyning with the rebellious partie in the South and of other circumstances specified in his Inditement. In respect they find the same sufficiently proven—ffollows the Sentence which I sett down verbatim as its in the books, because it is the first Sentence that wee find against Rebels forfaulted in absence.

My Lord Justice Generall, my Lord Justice Clerk and their Assessors by the mouth of Henry Monteith, Dempster of Court, Decerns and Adjudges the saids James Wallace of Auchines, Joseph Learmonth, . . . McClellan younger of Barscobb, Mr. John Welsh and Mr. James Smith, ministers, Patrick Liston, elder in Calder, W^m Liston his son, and William Porterfield of Quarreltoun, to be execute to the death and demeaned as traitors, when they shall be apprehended at such times and places and in such manner as my Lord Justice Generall, Justice Clerk or Justice Deputes shall appoint. As also Decerns and adjudges the forenamed persons and ilk ane of them for the treasonable Crimes above written to have forefaulted, amitted and tint all and sundry their lands, heretages, tenements, @rents, offices, tacks, dignities, steadings, rooms, possessions, goods and gear whatsoever pertaining and belonging to them or either of them, to his Majesties use, which was given and pronounced for Doom upon all and sundry, the premises, his Majesty's Advocate asked and took Instruments.

There is nothing more in this Diet except that Robert Hamilton and James fframe are declared fugitives for cutting of Sir John Harper's wood, and the Continuation of a Diet,

M^cCaul ag^t Charles Lindsay for Slaughter, till 15 November next.

Edinb^r 16 August 1667. The Justice Generall and Justice Clerk present in Court. Assessors, Alexander Earl of Linlithgow, William Earl of Dumfries.

This day my Lord Advocate insists against some more of the persons who are declared fugitives yesterday, to have them also forfaulted, to witt—

William Muire of Caldwell.

. Caldwell of Caldwell, younger.

Robert Ker of Kerseland.

Mr. John Cunningham of Bedland.

Alex^r Porterfield, brother to Quarreltoun.

W^m Maxwell, y^r of Monreiff.

. M^cClellan of

Robert Cannon, y^r of Mondrogat.

Robert Chalmers, brother to Gadgirth.

Mr. Gabriel Semple.

Mr. John Guthrie.

Mr. Alexander Pedden.

Mr. William Veitch.

Mr. Joⁿ Crookshanks.

Pat. M^cNaught in Commock.

and repeats the Depositions of the Witnesses taken previous to the Triall which were produced, read over and adhered to by the witnesses in presence of the Assise, being the same Assise which was yesterday. After reading whereof they ffand the first five persons in this Roll, to witt Caldwell elder and younger, Kerseland, Bedland and Quarrellton's brother guilty of joyning and being marines together in the said Rebellion and meeting, conveening and keeping companies together for that effect and of being present at the taking of Patrick Houston, servitor to the Earl of Eglinton, and breaking up of his Letters when he was kept prisoner, and marching, drawing up and going alongst with arms in order to their joyning with the rebellious party in the West, and guilty of the other circumstances specified in their Inditement, and by the first part of the Verdict the remanent

persons contained in the roll are found guilty of being in and upon the said Rebellion and joining with the saids Rebels, and going alongst marching with them with their horses and arms from place to place conform to their inditements, all which they sufficiently ffand to be proven.

Whereupon the Justice Generall and Justice Clerk gave the like Sentence as against the Rebels yesterday.

These two Processes and Sentences being a new practise gave occasion for an Act to be passed in the first parliament that followed thereafter, to witt, 11 Act, par. 2. cha. 2, dated 15 December 1669, bearing That the king and parliament having considered these two Processes with the lybells, interloq^{ns}, probations, depositions, of witnesses and the Verdicts of Inquests and Dooms of forefaultures proceeding thereupon ffand, That the Justice and their Assessors appointed by the Council in the saids Processes in finding the saids lybells to be relevant and admitting the same to the knowledge of Inquests in finding the same to be verified and proven, and in giving their verdicts and Dooms of fforefaulture thereupon respective, had proceeded justly and warrantably upon relevant lybells and clear evidences and probation, and therefore ratified and approved their proceedings, interloq^{ns}, verdicts and vexive Dooms, and sentences of fforefaulture given and pronounced by them in the saids processes, mentioning the names of the persons and dates of the Sentences above written, and decerns the said processes and Dooms to be valid and effectuall to all purposes notwithstanding the persons found guilty did not compear, as if they had compeared or the same had been pronounced in parliament, and the Advocates service therein is approven. And farder, in respect it were against reason and justice that when any person or persons are accused of high Treason for rising in arms against his Majesty or his authority, when they are cited to underly the law before the Justice if they do not¹ appear, that their absence and contumacy which ought to be an aggravation if any can be of so high and horrid a crime, should be of any advantage to them, Therefore *it is* of new Statute and ordained that in all time coming in all such cases

¹ 'not' not in Adv. MS.

of treasonable rising in arms and open and manifest Rebellion against his Majesty or his successors and their authority, his Majesties Advocate for the time may and ought to insist against and prosecute such persons as he shall be ordered by his Majesty or his Privy Council to pursue. And if they be cited and do not appear, the Justice notwithstanding of their absence may and ought to proceed and consider and give their Interloq^r upon the lybell, and if it be found relevant to admitt the same to the knowledge of an assise, and upon the verdict of the Inquest, finding the same to be proven, the doom and sentence of forfaulture ought to proceed and be given and pronounced in the same manner as if the persons accused had compeared and were present, and some other processes of this nature depending before the parliament are remitted to the Justices with power to them to proceed in them.

The procedure of the Judges in these two processes and the contents of the first Act of parl. furnishes us with several good observations. First wee see that the Judges were not rash and precipitant in a new matter, but proponed their scruple to the King's Advocate that the Justices had not been in use to forefanlt absent persons, neither did the Advocate deal undiscreetly with them but offered his reasons and referred them to the Lords of Session. And there was no person that offered to censure the Judges for this tho the matter did much concern the King, it being no less then the forefaulture of persons who had risen in arms against him, tho the Advocate's reasons were such as did convince the Lords of the Session and which did also convince the parliament as appears by their Act forsaid, which is founded upon his reasons. But the method that is used with the Judges is discreet and sober by offering them reasons and procuring the opinion of the Lords of Session to them, ffor it is hard that Judges sworn to decide by law should be censured for doing it. Secondly, albeit all this was done to the Judges and that they persisted afterwards to ask assessors for the Council, which were not sought till after the resolution of the session, for the session's resolution is in ffeby. 1667 and the Assessors not granted till August that year, yet we never find that the Judges were blamed, so

that even in a new case after a Resolution of law is granted, Judges may be allowed without any imputation of wilfulness to demand assessors, and observe also, that they are demanded by the Judges and not obruded on them. 3^o Observe that after the Judges had given the Resolution of the Session and Assessors named, they continue no longer in their opinions and scrupulosities¹ like hereticks in law, but acquiesce to the Resolution of the Session, and by an express Interloq^r did ffind conform to my Lord Advocate's opinion the defenders might be both declared fugitives for not appearing, and be insisted against for forefaulture. 4^o Observe that albeit this Interloq^r was not without mature deliberation and advice, yet the parliament considered it not as a sufficient rule for the future, but an Act of parl. is made of the tenor of the decision to warrand Judges to proceed so in time coming, which had been useless if the decisions had been sufficient of themselves or having a ratification in parliament.

5^o Observe how tender and careful our Law is to proceed against the subjects in matters of treason, for first this Act of Parl. burdens the King's Advocate to have a warrand from the Privy Council before he pursue. 2^o It limits this pursuit against absents to the case of open and manifest Rebellion against his Majestie and treasonable rising in arms. And such were the cases ratified in this Act, and there is no statute as to reseters of Rebels and Traitors, nor is the persons conveened for statutory treason, such as willfull raising of fire and theft in a landed gentleman.

6^o Observe from that part of the Act of Parliament which testifies the probations and depositions of the witnesses among the other part of the procedure in the forsaid processes, that examination of witnesses previously before the Triall in the cases of treason and causing them swear and subscribe their Depositions, and the reading of these Depositions before the Assise, is sufficient probation to convince the Assise if the witnesses adhere thereto, ffor this was the method used in the last of these two processes which was insisted in on the 16 August 1667, as appears by the Depositions of James Cochran, John Stevenson, John Wilson, John Anderson, John and

¹ 'scruples' in Adv. MS.

William Caldwells, Robert Ker, John Steuart, Robert Gray, and Patrick Houston, marked with the numbers 24. 25. 26. 27. 28. 29. 30. 31. 32 and 34. All which bears that they adhered to their former Depositions. But from the same testimonies it also appears that in so far as these witnesses were brought in to adhere to the Depositions before the Assise, the first Depositions are not of themselves sufficient untill they were adhered to, and that because by the 90 Act par. 11. Ja. 6. it is statute and ordained that in all time coming the hail accusation, raising, writts, witnesses and other probation and instruction whatsoever of the crime, shall be alledged, reasoned and deduced to the Assise in presence of the party accused in face of judgement and no other ways, which is most consonant and agreeable to the Resolution taken by the Lord Justice Generall and the Lords Commissioners of Justiciary, upon a letter written to the King's Majesty to them to examine witnesses previously upon oath in such proces as should be remitted to them by the Privy Council which they restricted only to processes of treason, and declared that they would allow the witnesses to rectifie or enlarge the Depositions upon the pannells interrogators¹ and in that same processes new Depositions were dyted² and the first cancelled.

Edinbr. 22 August 1667.

George Edmonstone in Chappel and Mark Henderson, messenger ag^t Archibald Borthwick, chaplane to the Lo: Borthwick and diverse others for Deforcement, continued to 12 November next.

Edinbr. 1 November 1667.

Home of Eccles against Archibald Douglas of Spott for art and part of the slaughter of the pursuer's ffather, formerly continued several times and at last to this day. The said Archibald is declared fugitive. *Nota*, after Mr. William Douglas, who was the actor, was execute, Spot procured the favour to be Transported from the Tolbooth of Edinburgh to

¹ 'interrogatories' in Adv. MS.

² 'dictated' in Adv. MS.

the Castle thereof, and from that made his escape and was declared fugitive, as will be seen afterwards.

Edinbr. 5 Nov^r 1667.

The factors for the Earl of Glencairn against James Wilson, merchant in Edinburgh, George Gordon, pursevant, and others for usury. Continued till the first Tuesday of March.

Advocatus *gt.* James Cannon of Barby and James Grierson of Dargoner, for Treason. Continued till 15 instant.

Thomas fforsyth in Bridgend unlawed for not reporting Criminal Letters at the instance of Thomas fforges in Setline Brae against John Braidy, for mutilation.

Alexander Short, son to John Short, merchant in Stirline, denounced fugitive upon Criminall Letters, raised at the instance of Mr. Andrew Bruce,¹ advocate, for invading, pursuing, and assailing and waylaying of him in the King's highway, threatning and menacing him to bereave him of his life.

Edinbr. 7 November 1667.

Angus M^cIntosh, baillie of the Regality of Spiny and others, against George Grant son to Ballindalloch and others for wrongous Imprisonment, deserted, and some of the pursuers in this action are declared fugitives in the reconvention.

James More in Knockandoch, raiser of the advocation against the procurator ffiscall of the Regality of Lochars, at whose instance he was conveyened for slaughter, the Justices having considered the reasons of advocation, they advocate the cause and appoints the 27 of December next for the triall, and ordains the said James More to make timeous and lawfull intimation to the Baillie of the Regality and to find caution to compear to underly the law, which caution he instantly fand.

Edinbr. 8 November 1667.

John Murray of Pennylands and others against Gordons for theft, deserted.

¹ In the Faculty List his date of admission is 20th December 1685. He was probably re-admitted in that year.

Edinbr. 11 November 1667.

The ffactors of the Earl of Glencarn against James Wilson, merchant in Edinbr., George Gordon, pursevant, James Wilson, vintner, and John Harper in Newbattle for usury. The Pursuers declares they insist 1° *loco* against James Wilson. The deed lybelled against him is, he having lent a sume of money to George Home of Graden, and having got Bond therefore bearing the ordinar @rent, he did take a bond apart for 1000.£ which was a bud for loaning of the money, which being undoubtedly relevant, the Justices find it so and ordained the Dittay to pass to the knowledge of an Assise without so much as an objection. But after the Assise is sworn and admitted the pursuers desires that the Debitor George Home may be received as a witness against them.

Sir George Lockhart objects that he cannot be received as a witness because he being the Debitor in the sumes and Bonds lybelled and the payer of the alledged usury, he is most suspect, and to admitt him were to lay down a preparative of a most dangerous consequence for Creditors, ffor no sooner should Debtors be irritat by Dilligence but it should be in their power to depone against the Creditor upon exacting more then ordinary @rent which all law has thought good to avoid even in civil and pecuniary interests and much more in criminals where the probation should be without any suspicion.

Replies Sir George M^ckenzie, 1° Graden is not pursuer but the King's Advocate, and he has no interest, the money being paid. 2° The Crime of Usury being a clandestine crime which cannot be proven by other witnesses, the Debtors ought to be admitted, and oppones the practique against Mr. William Somerveil where ¹ the Debitor was admitted 18 Janry 1667.

Duples Sir George Lockhart, that neither in *Civilibus* nor *Criminalibus* the Debitor can do anything that may evacuate or annull the Creditors' security for the sume, and albeit that in *facti contingentia* the sume be payed, yet it might have as well been unpaid, but to shun all unnecessary debate declares he founds his objection upon the 7 Act par. 16 Ja. 6. whereby

¹ Blank also in Adv. MS.

the parl. having under their consideration the determining the way of probation in the Crime of Usury, they determined the same to be by writt oath of party receiver of the said Usury and by the witnesses insert without receiving of the oath of the party given of the said unlawfull profite for eschewing of perjury, whereby it is evident that the Debitor is excluded upon two grounds. The one is, being expresly named and secluded for the reason mentioned in the Act. The other is, that he falls not under the compass of the qualification of the witnesses admitted by the Act, who are the witnesses insert, and whereof there is most evident reason for the crime of Usury, consisting chiefly and principally in the cause and precise consideration for which money is given and taken. There is none habile nor proper to depone thereanent but the witnesses insert, especially in this case where the crime lybelled is the alledged taking of an Band for more then the ordinary @rent, whereof the witnesses insert are to be presumed most properly to have understood the ground of the samen, and as being unconcerned most truly to depone thereon. And as to the practique it is a mistake and the pannells procurators refers it to the memory of the Justices which was truly in this case, that a Discharge being produced acknowledging payment of @rent for terms before hand, and the question being whether the Discharge behooved to make faith that it was for an onerons cause, unless the contrary were proven, or if the pursuer ought to prove the samen, it was found by the Interloquitor that the Discharge in the terms forsaid behooved to make faith, whereupon the Pannell's procurators offered to prove the contrair by the Debitor's oath, which does not concern the case in question or elide the forsaid objection which is of generall concernment, and which beyond all doubt would be an inlett and inroachment upon the interest of creditors, and the foundation of much perjury, which is intended to be obviat by the forsaid act of parliament.

Sir George M^ckenzie triplies for the Pursuers, that he oppones his former answer founded upon the ceasing of the parties interest, and as to the Act of Parliament cited, it is answered (1^o) That the same only relates to the case where the money is owing, in which can only be hazard of perjury,

seeing before the money be payed the Debtor may have interest by either having been receiver himself or for disposing favourably for an Donator, whereby he may have ease, but after the money is payed and Discharges *hinc inde* clearing both parties, and all memory thereof is presumed to be stopped or else such enmity and prejudice as might cast a witness would be presumed still to remain and not be purged by oath. It would follow that in no case whatsoever that Debtor could ever be received a witness against that Creditor ffor that presumed malice still remaining will still spread it self and affect all the Depositions that he could give against the party, for no man can be received witness who is presumed to have malice in any one point, tho without the subject of the Deposition. And a partie confessing that he has malice would certainly be debarred from being a witness in a criminal pursuite tho' he should confess the ground of that malice to arise from an other cause, and the reason inducive of this Act of Parliament as is clear from the Act it self to clear the generalitie of the former, whereby it was found that the Oath of Partie which was not found to be decisive, and therefore it was requisite that by the posterior Act founded on it should be declared that the former Act made the oath only of the Debtor and not of the Creditor to be decisive, and therefore the posterior Act must be so interpret as to exclude the oath of Partie from its being decisive in the way and manner that the oath of the Creditor is, but not from being a Witness, ffor that Act does not exclude all from being Witnesses who are not therein exprest, ffor it is clear and has been often found that Witnesses tho they be not insert may be received as Witnesses, and that it is not to be imagined but that a crime which is so priviledged as to the probation as Usury, commanding even in criminalls the Defender to give his Oath, should not be allowed likewise to have the Debtor who can have no interest to be allowed to depone therein till. And as to the Decision cited, the same is opponed, and tho' the distinction received were allowed by the matters of fact, as it is not it, yet it quadrats in this case that the oath of a partie Debtor may be received, seeing that in that case there were some queries proponed which were no ways contingent with the Discharge

alleged upon, and to depone whereupon he could not be admitted if this Act of Parliament could have excluded him.

Interloq^r.

The Justices find the Objection proponed by the Pannell, James Wilson, elder, against George Home of Graden, relevant, but after this Interloquitor these words are subjoined, 'Thereafter George Home of Graden being sworn deponed that he had given Information of his pursuit to the pursuer,' which would make me think that the Interloquitor has admitted him and that he has been casten upon this head, that he gave Information, for if he had been casten by the Interloquitor as not habile upon another head, to what end was he thereafter sworn upon that head, whether he had given Information or not, seeing that Interrogator¹ is never proponed but upon design to cast the Witness, from which I would readily have concluded that the Interloquitor is wrong written in finding the objection relevant, and that it should have born not relevant, but my scruple is cleared when I consider that Sir George M^ckenzie, who debates here for the pursuers, does acknowledge the Interloquitor as it is here sett down when he cites it in his criminall Tractate title Usury numb. 6.

The Earl of
Glencairn ag^t
James Wilson
for Usury.

Verdict of the
Assize.

The Pannell James Wilson is assoillied by the Assize after they had considered the Testimonys of the other Witnesses—and the Diet continued as to the other three Defenders to the first Tuesday of March.

Edinb^r 12 Nov^r 1667.

George Edmonston of Chappell and Mark Henderson, messenger, against Mr. David Borthwick and divers other persons, for Deforcement, and the Diet continued till 18 of November next.

Edinb^r 15 Nov^r 1667.

Charles Lindsay ag^t W^m Maxwell, brother to Orchardton and *e contra*, continued to 18 of Nov^r and the absent witnesses and assisers unlauded.

¹ 'Interloqu^r' in Adv. MS.

Earl of Glencairn and his ffactors agt. Alexander Williamson, Provost of Peebles, for Usury, continued till the 18 of Nov^r.

Also the Trial of some persons for their accession to the late Rebellion in the West, continued till the 20 of December next upon the desire of the Lord Advocate.

Edinb^r 18 Nov^r 1667, Justice Clerk and Justice Deput Murray, present.

The which day compears judicially Mr. John Preston,¹ Mr. John advocate, and produces a Gift of Generall Justice Deputie Preston, Advocate, made from the King under the privy seall, adding him to the number of Justice Deputes, whereupon he is admitted and his Gift recorded. another Just: Depute.

Eodem Die.

George Adamson in Chappell, agt. Mr. Ard. Borthwick, Deforcement. chaplain to the Lord Borthwick, Samuel Mitchelson, portioner of Middleton, and others, indyted for Deforcement as follows, viz. for taking back 4 oxen, etc. from Mark Henderson, messenger, which he had poinded by virtue of Letters of Poinding, from John Sandilands, and for convocation of the Lieges and robbing the Messenger's horse.

Sir George Lockhart for the Pannells alledges, that the Dittay cannot be put to the knowledge of an Inquest in so far as the said John Sandilands, from whom the goods were poinded, being Tenant to the Lord Borthwick, my Lord for a year's Duty that was resting him, caused arrest the goods and gave Warrant to his said Chaplain, one of the Pannells, to intimate the arrestment and his Right of Hypothecation, after which the Pursuer proceeded to the Poinding, which he ought not to have done.

2^o The Dittay in that part of it anent the robbing of the Messenger's horses, alledged committed by Samuel Mitchelson, another of the Pannells, cannot pass to the knowledge of an Assize, because the said Samuel did most justly make seizure of them when the Messenger had put these horses and the haill poinded goods to pasture among the said Samuel's corns

¹ Admitted advocate 14th January 1665.

and that for security and reparation of the damage, and after he had seized them, he offered them back upon the Messenger's finding caution to answer for the damage before the Sheriff of Lothian, which the Messenger having refused, the said Samuel did desire that he might take back any of the horse he pleased and suffer Samuel to keep the other in custody untill the damage should be tried, and accordingly the Messenger did take back one of the horses and left the other, and swa the said Samuell having done nothing but what was lawfull for him to do be the Law and practique of this and all kingdoms, he ought not to be accused for the same as a Robber.

Adamson g.
Borthwick for
Deforcement of
a Messenger
while pointing
the tenant's
goods.

3^o As to the Convocation contained in the Dittay, the same is not relevant because it is offered to be proven *ut supra* that the Poining was illegall and unwarrantable and so the Pursuer not being in the terms of Law as to the said execution, albeit the Pannells in order to the preservation of their right, had mett together and resisted the Messengers unjust violence in carrying on the said illegall poining, the same is no Convocation but *necessaria defensio rerum* which in law is permitted against any who unjustly endeavours to carry away the same.

Replis Mr. Andrew Birnie for the Pursuer, that notwithstanding of the Defence, the Pannell ought to pass to the knowledge of an Assize, ffor as to the first part of it, it ought to be repelled because the Poining was done and perfyted upon the ground of the lands where the Tenant Sandilands dwelt before the Master made the interruption, so that unless it were alledged that the Master had interrupted upon the ground of the Tenant's Roum the Defence is not relevant because if he had interrupted there he might have had his recourse upon the Tenant.

Query: may a
servant without
producing his
Mr. Warrant
stop a poining
of the tenants
goods for the
last year's rent.
Yes.

2^o The Master did not compear and offer to depone upon the justness of his Debt, and there was no written Procuratory from the Master and no regard ought to be had to the Master's Arrestment, because Arrestments cannot interrupt poining, and . As to the 2^d member of the Defence anent the Robbery of the Messenger's horses lybelled, it ought to be repelled, because its offered to be proven that

Samuel Mitchelson was the occasion of the damage done to his corns in so far as he was the chief hinderer of the Poin- ding and by turning back the goods did accidentally drive them among his own corns. And as to the last member of the Defence against the Convocation, if the Lybell be sustained as to the poiding, notwithstanding of the Defence, then it must necessarily be sustained as to the Convocation.

Duplys Sir George Lockhart for the Pannells, that he repeats and oppones his former Defences agt. the respective Crimes lybelled, and it is most unwarrantable to pretend that a written Procuratory or Commission was necessary from my Lord Borthwick, specially in such a case of Diligence, where the pretended Poin- ding had been carryed on a considerable part of the way before it was known to his Lordship. And it is sufficient to alledge in terms of the Defence that the Lord Borthwick who was Heretor did give Warrant, and which his Lordship will own, and if need bees it is positively offered to be proven that the Warrant was given to appear and stop the Poin- ding upon the forsaid ground that the Tenant whose goods were poided, was Debitor, and which the Pannell Mr. Ard. Borthwick was about to have done, but the Pursuer and his accomplices were so impetuous and violent that they would not so much as listen to the same, and its frivolous to pretend that the Debt should have been instructed otherways than by Arrestment, and that the Pannell Mr. Ard. Borthwick, if he could have been heard, was ready conform to his Master's Warrant to have stated his Master's interest, and truly the Debt was resting owing to his Master, and thereupon the Messenger should have sisted the poiding, or at least should have offered Caution to the Master. And as to the Rapine lybelled, the former Defence is opposed bearing the poiding not to be legall, and therefore Mitchelson had reason to stop it. And suppose the Poin- ding had been legall, yet he ought not to have been damnified, and it is offered to be proven that before he seized the horse, he was damnified in more nor the worth of him.

Adamson g.
Borthwick for
deforcing a
Mess^r when
poiding
tenant's goods.

Triplys Birnie for the Pursuers, that Mr. Ard. Borthwick ought to have had a written Warrant in this case where the parties were all skilfull to write and where he went too and

came back again frae his Master, and swa had the occasion to ask for a written Warrant, and he did offer no Instruction of the Debt, not so much as his Oath, and as to the Hypothecation, it ought not to be regarded because the Goods were driven off of the Tenant's Room to which their Hypothecation is restricted before the Poinding was quarrelled. And as to the dammage done to Mitchelson's corns, if any was it was done after the Deforcement was committed.

Interloquitor.

The Justices finds the Defence and Duplys as proponed by Sir Geo : Lockhart for the Pannells, relevant if proven to elide the Dittay as the samen is proponed.

Proof.

Thereafter it is proven that Mr. Ard. Borthwick, one of the Pannells, came to the Messenger after the Poinding and declared to the Messenger that my Lord Borthwick had arrested the Corns and that he had Warrant from my Lord to stop the poinding, and that the Messenger refused to stop, and that the haill goods were driven upon Mitchelson's corns before Mitchelson came up, and that Mitchelson offered to take a ticket from the Messenger for the skaith, and that the Messenger refused to give it. And my Lord Borthwick upon oath acknowledges he gave the order to Mr. Ard. Borthwick and that the year's Duty was resting to him.

Another Interloq^r

The Justices fand the Defence proven to elude the Ditty, and in that respect fand the Dittay ought not to pass to the knowledge of an Assize, whereupon the forenamed persons Pannells @written and their saids Procurators asked and took Instruments and protested for relief of their Cautioners, which the Justices admitted.

Observe here that albeit in many cases the Justices where a relevant Defence is proponed agt. a relevant Libell are in use to admitt both Libell and Defence to the knowledge of an Assize. Yet here where the Defence touches upon a civil Right of Hypothecation which by their first Interloquitor they had found relevant, they themselves cognosce upon the probation of that Defence and Duply relative thereto.

Edinbr. 18 Nov.

Anent the mutuall pursuits at the instance of Charles

Lindsay against William Maxwell for Wrongous Imprisonment, and at the instance of the said W^m agt. the said Charles Lindsay for Slaughter of John McCowll, the Diet in the last is deserted as to Charles Lindsay and Cautioner of Law Burrows found to him be William Maxwell, and the first action is continued to the 4th of febr. next.

The Diet at the instance of the Earl of Glencairn and his factors against Alex^r Williamson Provost of Peebles, for Usury, deserted.

Edinbr. 26 Nov^r

John Veitch, younger of Dawick agt. Mr. David Thomson,¹ minister at Mannor for Perjury, continued to 10 of December next.

Edinbr. 29 Nov^r

James Brown, elder of Horn and Jean Monorgan his spouse, declared fugitives, and his Cautioner unawed for the crime of Demembration for cutting off the ear of Pat Jackson, and Gilbert Anderson and James Mackie in Horn, witnesses, unawed.

Edinbr. 4 December.

The which day W^m Hay of Brierbuss, Cautioner for Richard Murray of Burghton, being called to present the said Richard to underly the Law in the Crime of fforgerie pursued against him at the instance of Thomas Lennox, glover in Ed^r, for which wee find him twice declared fugitive in the Books of Adjournall of before viz. on the day of 166-, and days of 166-.²

Compears Alex^r McCulloch, writer in Edinb^r *excusatorio nomine* for the said Richard Murray, and declares he was necessarily out of the Kingdom, and produces for him, Letters of Relaxation under his Majesties Signett of the date the 12 of Sept^r last by past, and also a Remission under the Great Seall of the crime @written, which is here recorded, and pro-

¹ Transferred from Dawick in 1663. Deprived for refusing the Test in 1681, but restored in 1682.

² Blanks are also in Adv. MS.

Narrative of the
King's Remmis-
sion.

ceeds upon this narrative that he was the apparent heir of an ancient and honest family and had been always of a good reputation and had served the King faithfully as a Commissioner from a Shyre in the last Parliament and had shewn much zeall for the King's service, as also that he was but found art and part of the falsett, and that the fault was nothing but a precipitation, and the hastning of a legall Diligence for a true Debt, upon production of which Remmission, Instruments are taken and the Diet deserted.

Edinbr. 9 December.

The Earl of Glencairn and his ffactors agt. Alexander Anderson, Weaver in Peebles, and Ja. Brotherstanes, fflesher there, for Usury, continued to the 15 of January next, and deserted against W^m Melross in Drumelzier, another Defender.

Edinbr^r 10 Dec^r and 12, 17, 20, 24 and 27 of that month.

John Veitch, younger of Dawick, agt. Mr. Da. Thomson, minister of Mannor, for Perjury, continued to the 17th instant and then again to the 3d March next.

The which 12 day the Earl of Caithness agt. W^m M^cComie, weaver in Moraven, and others, for Theft, continued, by a Warrant from the Privy Councill, and untill they give farder order.

The which 20 day Advocatus agt. certain persons accessory to the Rebellion in the West, continued to the 4 ffeb. next.

Earl of Aboyne agt. Alaster Stewart in Balmurrell, and John Gae in Braichlie, for killing of Deer, continued to the 24 instant and then declared fugitives and their Cautioners unlauded.

The which 27 day the Action for Slaughter against James More in Knockandoch, is continued to the 2d January next,

1668.

Edinbr. 2d January.

The Dyet immediately aforementioned, and again continued to 10 March next.

Edinbr. 7 January.

James Haliburton, Writer in Edinbr. and Isobel Gellie, his spouse, against Walter Gellie, son to Pat. Gellie, sometime indweller in ffordyce, declared fugitive.

John Hay, writer in Edinburgh, cautioner for Robert Leslie of Auldrain, to report the Criminall Letters raised against George Innes of Cauldcoatts, excused be reason of the ill weather.

The Earl of Glencairn and his ffactors ag^t Isoball Smith for Usury, deserted as to the said Isoball, and as to David Wilson, Litster, both indwellers in Haddinton.

Edinbr. 9 January,

The same pursuers against William Carmichaell in Linlithgow, and William Johnston in Callet, deserted as to the first, and continued as to the 2d.

Edinb. 15 January.

John Heckney at the Bridgend of Glammiss and Thos. Jack, messenger, against Donald Thornton of Balgown, for Deforcement, declared fugitive.

The Earl of Glencairn against Alex^r Andersone in Peebles and James Brotherstones for Usury, declared fugitive.

Edinbr. 22 January 1668.

John White, fflesher in Auchtermuchtie, agt. Thos. fforsyth, and Thomas Watson in ffaulkland for blooding and wounding, deserted.

Edinbr. 28 January.

Angus M^eIntosh agt. More and several others of the name of Grant for Murder, continued till 4 August next.

Edinbr. 4 ffieb. 1668.

Advocatus agt. certain persons for the late Rebellion, continued to 3d of March next.

Eodem Die.

Charles Lindsay of Culmochtrie agt. William Maxwell, son to Orchardtone for Slaughter, deserted of consent of the Pursuer who was not ready to insist.

Edinbr. 14 ffeb.

Earl of Glencairn and his ffactors agt. Usurers, continued as to Thomas Cheisholm, W^m Johnston and Thos. Paterson and deserted as to Ard. Tweedie.

Edinbr. 3 March.

Collonell Innes of Dipple and Sir Ro^d Innes of that Ilk, his Procurator, against Pat. Cumine of Ironside, for waylaying, invading and wounding of the Collonell, continued to the 9th instant.

As also the King's Advocate agt. Cannon of Barley and others for the late Rebellion, and against Harper and Harvey for Tumults in Edinbr., continued till the 2d of June.

Eodem Die.

The Earl of Glencairn and his ffactors agt. George Gordon, Pursevant, James Wilson, vintner in Edinb. and John Harper in Newbottle, for Usury, continued.

Eodem Die.

The nearest of kin of John Gordon of Hairland agt. James Glendinning, younger of Parton, for Slaughter of the said John Parton is declared fugitive.

Eodem Die.

John Veitch of Dawick agt. Mr. David Thomson, minister at Manor, for perjuring himself anent some payments of his Stipend due by the pursuer, deserted.

Edinbr. 9 March.

Sir Rob^t Innes of that ilk, as Procurator for Collonell Innes of Dipple agt. Pat. Cumine of Ironside, James Dunbar and others for invading wounding and mutilating of the Collonell and *e contra*. The said Pat. Cumine agt. Henry Caldell, servant to the Collonell, for beating and wounding the said Pat. Both Dyets continued.

Eodem Die.

George Gordon, Pursevant, and John Harper in Newbottle, indyted and accused for the crime of Usury at the instance of the ffactors of the Earl of Glencairn.

Edinbr. 10 March 1668.

Robert Leslie of Auldcanie ag^t Leslie of Cauldcoatts and others for Hamesucken, deserted as to Pat. Innes of Neathermeast and Alexander Innes of Dalkmore and the s^d Caldcoatts, but James, sister son to Caldcotts, is declared fugitive.

Eodem Die.

Robert Cumine of Altyre against Sir John Smith of Grot-hill, William Buchannan his servant, James Campbell and George Lumisden, Messengers, and John Pollock, Town Officer, in Edinbr. for taking the Pursuer with a Caption after he produced his protection from the King, continued till the 13th instant.

Edinbr. 13 March 1668.

The same Action and the other Actions forsaied at the instance of Collonell Innes against Cumine of Ironside, again continued to the 14 instant.

Edinbr. 14 March 1668.

The said Action Collonell Innes agt. Pat. Cuming, Dunbar and others, is put to a Tryall, and the Dittay against James

Dunbar, servitor to Pat. Cumine, found relevant and admitted to the knowledge of an Assize, and he is found guilty upon his own Confession of shooting a Pistoll at the Coll. and wounding him, and the Sentence continued till the 20 of June next, and the Diet deserted as to Cumine his Master.

As also the Diet at the instance of Cumine agt. Hary Caldell, servitor to the Collonel, is deserted.

As also the Diet pursued at the instance of the Laird of Alter against Sir John Smith of Grothill for wrongous taking him with Caption, is deserted but continued as to the Messenger and Town Officer till the 2d of June next.

Edinbr. 7 May 1668, the Just: Clk. and Mr. W. Murray, pnt. in Court.

Two of the Somers who robbed and murdered Mr. Lyons, elder and y^r of Muresk sentenced and execute.

Advocatus against Alaster More M^cGregor and Jo: M^cIntosh, prisoners, two of the companions and associates of Lauchlan M^cIntosh, when the said Lauchlan did reive and sorn up and down the countrey and committed the Hairship upon Jo: Lyon of Muireesk, for which he was execute and for which the Pannells were also declared fugitives upon the prosecution of the said John Lyon, indyted and accused and found guilty of being actors airt and part of the treasonable fire-raising and burning the House of Belshirie belonging to umq^{ll} John Lyon of Muresk and of taking him and his son prisoners and robbing them of their horses, cloaks and arms, as also of the murder of the deceast John Lyon and his son for which they are sentenced to be hanged at the Mercate Cross of Edinbr. on the 13th of May instant and then to be hung up in chaines betwixt Leith and Edinbr. and immediately before their hanging to have their right hands cutt off. *Vide* Sentence agt. their accomplices 25 of March 1667.¹

Edinb. 1 June 1668.

Pat. Reid in Newbigging and others for Theft and Robbery,

¹ A like sentence was then passed upon their accomplices, Patrick Roy M^cGregor and Patrick Drummond. The bodies of criminals executed in the Grassmarket and elsewhere were sometimes hung in chains on a gibbet on the Gallow Lea, near Shrub Hill, Leith Walk.—W.

continued till 4 instant and severall absents declared fugitive and their Cautioners unlaued.

Edinb. 2d June 1668.

The Earl of Glencairn and his ffactors against Thomas Chisholm in Hairhope, deserted, continued as to William Johnston of Collet and many absent witnesses unlaued.

The Justices also continues the 3 Diets, King's Advocate agt. Cannon of Barley and others for Treason—against Harper and Harvey for Tumults till 4 August—and Laird of Alter against George Lumisden and James Campbell, Messengers, till 20 of June instant.

Edinbr. 4 June 1668.

Avocatus and David Sinclair agt. Alex^r Sibbald of Arnage and Walter Reid, nottar publick, for the Slaughter of Alex, Sinclair, brother to the pursuer and servitor to Pat. Barclay of Towie, deserted as to these two Defenders and Capt. W^m Barclay of Achredie, Richard Barclay, his brother, and Alex^r Crookshank his Servitor, declared fugitives and Rot. Ogilvie, servitor to the said Capt. Barclay, excused be reason of his being incarcerate within the Tolbooth of Aberdeen.

John forbes of Buchorn agt. John Leith in Cairncross for Slaughter, continued.

Edinb. 9 and 10 June 1668.

The same mutuall Actions, Leith agt. forbes *et e contra* again continued to the 10 instant and upon the said 10th day both the Diets deserted of consent and Lawburrows found by forbes to Leith.

Edinbr. 16 June 1668.

The Earl of Athol ag^t Cumine of Alter, deserted.

Edinbr. 20 June 1668.

The pronouncing of the Doom ag^t James Dunbar for the wounding of Collonell Innes of Dipple continued till the 27th

instant and Cuming of Alter remains Cautioner for him but no such Diet in the Book.

The Diet in the Action at the instance of the said Alter agt. the Messengers who apprehended him, deserted.

Edinbr. 2 July 1668.

Earl of Aboyne agt Farquharsons for shooting of Deer, the Diet is deserted.

Eodem Die.

The Relict and Children of John Gordon of Brachlaw agt. Francis Farquharson of Finzean for his accession to the Slaughter of the said Braichlaw, the said Francis compearing and being willing to underlye the law, the diet is deserted.

Eodem Die.

The Earl of Glencairn and his Factors agt. W^m Johnston in Collet and Thomas Paterson in Drumackenhill for Usury, deserted.

William Dunbar in Old Milnes agt. Mckenzie of Pluscarden and others, continued till 7th July.

Jonet Maxwell, Relict of James Armstrang and his sons agt. Robert Johnston, called of Rannieshill, Ard. Johnston of Hayhill, Gavin Johnston of Whitsonhill and John Johnston, youngest of Old-Well, for Slaughter of the said James Armstrang. The Defenders declared fugitives and their Cautioners unawed.

Edinbr. 3 July 1668. Justice Clerk and Mr. Murray, present.

John M^oGrowderoy *alias* Robertson, prisoner, indyted and accused for that he and a great number of his accomplices did kill and slay Duncan, Alexander, and Robert Menzies, and John Scott, indwellers in Skian in Kenimuir parish and acquitt be an Assize.

Eod: Die.

The Justices continues a criminall pursuit at the instance of Angus M^cintosh against James More and divers persons of the name of Grant from the 4th of August next (which is the day of Compearance) untill the 4th of November, upon a representation made in the Petition that the Justice Generall had taken the Decision thereof to himself and had appointed a day to end it.

Edinbr. 7 July 1668.

William Dunbar, tenant in Old Milnes agt. Thos. M^ckenzie, son to the laird of Pluscarden and divers other persons in and about Pluscarden for Hamesucken declared fugitives conform to the criminall Letters raised at the instance of the said W^m Dunbar, Major George Baitman of Dams and Walter Innes of Ortout, proprietars of the ground.

Edinbr. 15 July 1668.

George Grant, son to Ballendalloch and W^m Troup, messenger, against John Grant of Kirdell for Deforcement, declared fugitive.

Edinbr. 4 August 1668.

The Dietts at the instance of the King's Advocate agt. Cannon of Barley for Treason and against Rot. Harvey and William Harper for Tumults, continued till 10 of November next.

Eodem Die.

Earl of Glencairn agt. Hugh Roxburgh and Alexander Jackson, for Usury, continued.

James More agt. Angus M^cintosh for Theft and Robbery, continued.

Edinbr. 6 August 1668.

Advocatus and Robert Lindsay, gun smith in Aberdeen, against Christian Galloway, Relict of umq^{ll} John Ord,

merchant there, for the crimes of Adultery committed be her with Geo: M^ckenzie, son to Bernard M^ckenzie in Stonehyven, and for the murder of the child begot in that adulterous copulation. The defender declared fugitive.

A Cause advocat from some Comm^{rs} appointed to judge theives in the highlands.

The same day compeared John M^crae, portioner of Kilpatrick and produces an advocacion raised by him of an Action pursued against him for Theft before Sir Gilbert Stewart, sherriff Depute of Perth, Pat: Grant, tutor of Grant, Mr. John Nairn of Muckorse, Mr. William Nimo, Mr. David Thors, advocate, and John Cunninghame, sherriff depute of Dumbarten, and any¹ two of them Commissioners appointed for Judgeing such Theives and broken persons as should be apprehended be the Earle of Athol his guard, upon production whereof the Cause is advocate and the raiser thereof is appointed to find caution to answer before the Justices within 15 days after he shall be cited, which Caution he accordingly finds.

Eod. Die.

The King's Advocate and Hugh Monro of Thribell against the Earle of Caithness² and a great many Gentlemen of the name of Sinclair in Caithness, called to underly the law for the crimes of Convocation, houghing and killing of oxen, robbery, theft, receipt of theft, depredation, fire-raiseing, wrongous imprisonment of his Majesties Leiges, specified and contained in the Criminall Letters raised against them, continued unto the 3d December, in respect the Councill had appointed some persons to settle them.

The Crimes @mentioned were committed by the Earle of Caithness and his friends who made an inroad upon the Shire of Sutherland with a company of six or seven hundred men, and there committed the Crimes lybelled, viz. 7 December of this year where his Action³ is insisted in and deserted upon production of remission. In the forsaid cause the absent witnessses are unlawed and farder Dilligence granted to the Pursuer.

¹ 'any' deleted in Adv. MS.

² 'the Actis' in Adv. MS.

³ Sixth earl; died 1672.

Edinbr. 13 August 1668.

The Justices Advocate another cause of murder, slaughter, fire raising pursued be the Procurator Fiscall of the forsaid Commissioners of the Highlands agt. Robert M'allon in Craigfad, and severall others, and deserts the Dyet.

Eod. Die.

John M'cDonald oig and the King's Advocate agt. John M'cCandie and severall other Highlanders for Theft and Robbery, declared fugitive.

The Earle of Glencairn and his ffactors agt. Hugh Roxburgh, for Usury, continued, and agt. Alex^r Jackson, deserted.

Edinbr. 18 August 1668.

Alex^r Houston in Pitgerse indicted for the mutilation and demembration of John Allan son to Thomas Allan in Ellen, and acquitt by the Assise.

Edinbr. 21 August 1668.

Earle of Glencairn and his factors agt. John Bredwood in Coventoun, for usury, continued.

Edinbr. 4th September 1668.

Mr. John Preston. The same Pursuers against Hugh Craig, merchant in Edinburgh, continued till the tenth day.

Eod. Die.

The same Pursuers against Robert Lauder, portioner of Balhaven for the like crime in so far as he having lent a hundred merks to Alex^r Lauder in satisfaction of the @rent thereof, he took from the said Alex^r Lauder by way of tack an Dovecot and two Butts of Land worth fifty merks per annum, and at the end of the Tack refused to allow the same in the principall.

Is it Usury to take a Tack for payment of principall and @ rents, when the rents of the Lands exceeds them both.

Sir George Lockhart for the pannel alledges that the Dittay as its founded on the Tack cannot pass to the knowledge of an Assise, 1^o because the Tack is not produced. 2^o Albeit the Dovecoat and Acres in the Tack had been worth more nor the @rent of the money, which is denyed, yet its not relevant to inferr usury, because the Tacksman had the hazard of all publick burdens and reparations whereby he might have been a loser, and this Tack being dated *anno* 1658 as is lybelled, the pannel cannot be in a worse case than a wadsetter who got a wadsett at that time of greater rent then the @rent of the money *quo casu* it is clear by the 6² Act of the parl. *anno* 1661, intituled Act for payment of Debts betwixt Creditor and Debitor, and that part thereof whereby wadsetters are appointed to compt for their bygone Intromissions, that such as had wadsetts with the burden of all these hazards are only *made liable to compt for the future* and freed from all compting preceeding the date of the Act albeit the Rent of the Lands has far exceeded the @rent, and even where the granter of the wadsett had the hazard, yet the wadsett being before the Act, is not declared usurious, but is only made comptable from the date, and such wadsett where the wadsetter is in no hazard, only declared usurious in time coming, and this Tack, if it were produced will appear to be worse for the Creditor then any of these wadsetts, in so far as it is accepted in satisfaction of the principall and @rents, so that if there had come any hazard to waste the lands, the Tacksman would have lost all, whereas a Wadsetter by Vastations and such contingencies can only lose his @rent, and when the time of requisition comes, he may require his principall sum, and the truth is the Dovecoat which was the only thing considerable, the two Butts not being worth one Boll of meall per annum, did yield the Defender no profite, because the English army lay at Dunbar for the time did waste and destroy.

Replys Sir George M^ckenzie for the Pursuer, 1^o That albeit it be that Tacks be of the nature of Wadsetts and that *de facto* the Pannell might have lost upon his Tack, yet *ex eventu* its offered to be proven that he gained more on his principall and @rents, and yet refused to compt for the superplus to the Pursuer, and seeing the Laws and Acts of Parliament con-

tained in the proposition of the Dittay bear to be made for defending of poor people from oppression and exorbitant exactions, and that this case¹ falls within the reason of the Act, it must necessarily be an usurious case. 2^o *et separatim* its offered to be proven that the design of entering into this Tack was to palliate a former transaction made anent the taking of more @rent than was allowable by law, and that without that the money was refused to be lent, so that the Act of Parliament forbidding simulation *ex eo ipso* forbids the entering into a Tack tho lawfull of its self to palliate Usury and a lawfull Tack entered into for that end is usurious.

Duplys Sir Geo: Lockhart that the last part of the Reply is nowise relevant for *Esto argumenti causa* there had been any such design which is denied, yet it resolves *in nudum conatum delinquendi* in respect the Tack lybelled upon as the result and effect of that transaction is a right altogether unwarrantable by the laws of the Kingdom.

Triplys Sir George M^cKenzie that the Acts of Parliament and all other laws having forbidden simulation, specially the laws of usury, which of their own nature are easily eluded if the indirect cheating of the law were not equally forbidden, it must be understood that cheating and simulation is also forbidden, and the design of the Tack being to palliat usury, it therefore falls within the express prohibition of the Law against Usury, for else the word Simulation in the Act of Parliament can have no effect, for if it should only have effect in the case of unlawfull tacks, it should be altogether superfluous. Then it must take place in the case of Tacks lawfull of themselves but entered into upon design to palliat usury. And whereas it is pretended that this was but *nudus conatus*, it is frivolous, seeing *conatus redduntur in actum* and the fruits of the ground, which are equivalent to a tack duty did far exceed the principall and @rent.

The Justice Depute sustains the Defence proponed for the pannells notwithstanding of the Reply made thereto and repells the Reply *ut concipitur*.

Sir George M^cKenzie for the Pursuer adds that there was a

¹ 'and that this case' deleted in Adv. MS.

formall transaction of takeing more than the ordinary @rent which was previous to the entering into this tack.

The Justice finds the takeing more than the ordinary @rent *per se* relevant and ordains the same to be put to the knowledge of an Assise. Which last Alleadgeance being referred to the pannells oath instead of all further probation, he deponed negative, and the Assise assoilzied him.

Edinbr. 3 Nov^r 1668.

Thomas Rochhead ag^t Elisabeth Muir for adultery continued.

Mr. George Scot of Pittidie against William Smeton, merchant in Kinghorn for stealing of a mare out of Inchkeith,¹ continued.

The Earle of Glencairn against Roxburgh for Usury, continued.

Edinb. 4th Nov^r 1668.

James Moir against Angus M^cintosh for theft and robbery, continued and severall of the other Defenders declared fugitives.

Angus M^cintosh, Baillie Depute of Spanie against Grants and others for wrongous imprisonment, deserted.

James Moir in Knockandoch indicted for the slaughter of Alexander Brand and for the beating of Angus M^cintosh, Baillie Depute forsaied upon different Lybells, both deserted.

Edinbr. 5 Nov. 1668.

Thomas Mulligine indicted for theft at the instance of the Procurator fiscall of Kirkudbright, and having raised an advocacion and found caution to compear at this Dyet, he is denounced fugitive for not compearing and his cautioner unlawed.

¹ Inchkeith, on account of the rich herbage, was long a pasturage for horses and cattle. The soldiers of Maréchal Strozzi called it *L'isle des chevaux*.—W.

Edinb. 6 Nov^r 1668.

The Dyet against Robert Ogilvy for the Slaughter of David Sinclair, continued.

Eod. Die.

James Liddell in Phinnick haugh and his three sons indicted and accused for the crimes of theft committed by them in manner mentioned in the Indictment raised against them before the Commissioners of Justiciary for the highlands, and in the advocation raised before the Lords of Privy Councill to his Majesty's Justices thereanent, continued to the 10th inst.

Edinbr. 9th Nov^r 1668.

Rochhead against his wife for Adultery again continued to the thirteenth instant.

Edinbr. 10th Nov^r 1668.

The @written action against Liddells advocate and deserted together with another Action of the same nature against John Dunes, elder and younger of Wester Cringall, and the same Liddells and a third process of adjudication raised at the instance of John M^cMachy in Monyfeif, against the same Commissioners.

Michael and Mr. Alex^r Malcolms sons to Balbrydie indicted for a rape committed against Nicolas Boswell daughter to David Boswell of Wester Balgownie, and for violent carrying her away from her mother's house declared fugitive and Robert Mill, master mason there their cautioner unlauded, as also Balbedie's chaplane and severall of their accomplices, declared fugitives and the Pursuer Nicolas Boswell and her advocates past from ¹ Douglas, brother to Kirkness and Henry Cheap, son to Mr. James Cheap of Rossie and diverse others.

Eod. Die.

The Dyets in the two Actions at the King's Advocate's

¹ Also blank in Adv. MS.

instance against Cannon of Barley for Treason and against Harper and Harvie for Tumults, continued to the 17th inst.

The Earle of Glencairn and his ffactors ag^t Hugh Craig and Hugh Roxburgh, for Usury, continued to the 23rd inst,

Captain William Barclay of Auchredy designed of Towie and Robert Ogilvy, his servant indicted for the slaughter of Alexander Sinclair, as also Collonell John Fullartoun of Dudwick and severall others, indicted and accused for the slaughter of Richard Barclay at the instance of the said Captain, continued to the 12th inst.

Alexander Adamson, brother to Adamson of Braco, pursued for cutting of the growing trees of the yeard of Crannock and declared fugitive.

This day also Angus M^oIntosh, brother to the Laird of Conadge, produces an Act of Privy Council for continueing the Dyet in the Criminall action raised at the instance of James Moir against severall persons in regard that they had just reason to stay at home because the Action wherein they are concerned being formerly submitted to the Earle of Atholl, his Lordship has determined the same and the Council has interposed their authority and this Act which is here recorded bears the whole manner and heads of the Decreet arbitral.

Edinb^r 12th Nov^r 1668. Justice Clerk Dep^{ts} Murray and Preston present.

David Sinclair
agt. William
Barclay and
Robt. Ogilvy,
for theslaughter
of Alex^r Sin-
clair.

Captain William Barclay and Robert Ogilvy, his servant, indicted and accused at the instance of the King's Advocate and David Sinclair, for being actors, art and part, of the slaughter alleadged, committed be them upon the ground of the lands of Towie, in the house of Paul Watt in Greenbrae upon the 28th March last by past in sae far as the said Captain did strick him over the head with a pistoll and then shot him thro' the leg, and then three of the Captain's accomplices, by his command, fired severall shots at him, and one of these shots was by Robert Ogilvy with a blunderbush, which shot the Defunct in the side, and thereafter the Captain did wound him with a broad sword in the head, of the which wounds he dyed immediatly.

Sir George M^okenzie for the Pannells (under protestation

that he does nowise acknowledge the Lybell or that the Pannells or any in their company committed the Crime, gave the wounds or killed the person lybelled) alleadges that if any such wounds were given they were given in self defence, the Pannells being first assaulted, at least threatned by the Defunct and his accomplices then present. 2^o that the giving of wounds *per se* is not relevant unless it be made appear that the Defunct dyed thereof, and protests, that this being a qualified Dittay, all the qualities thereof may be proven.

Replys Sir George Lockhart for the pursuer that the Protestation permitted¹ in the Defence cannot be admitted because the Defence itself being and resolving in a qualified confession of the fact, it is in law qualified, and to that member of the alternative of the Defence that the Pannell was at least threatned, it is not relevant because in law nothing doth state the case of self defence but actuall invasion *et proportionata defensio cum moderamine inculpatæ tutelæ*, and as to that member of the Defence that the Pannells were invaded, the same ought to be repelled unless special condescendance were made upon the acts, circumstances and haill qualifications of the invasions. Whereupon condescendance being made the Pursuer in fortification of this dittay will make an sufficient reply why the samen are not relevant or otherwise, will eleid them by other acts and circumstances, of which Reply the Pursuer is now precluded so long as there is but a generall condescendance of the acts of invasions.

Duplys Sir George M^ckenzie for the Pannells that this Protestation adjoined to the former defence and under which it is proponed is most consonant to the constant customs of this Court, and as to that part of the Reply, bearing, that threatening *per se* is not sufficient ground of exculpation and self defence, it is duplyed that the same is sufficient, for murder, being an willing and designed killing of an innocent person, whatever may take away design and willingness in the commission of this crime, should be admitted against the crime it self, *Voet: de duell: tit. an minantem liceat occidere*, where he concludes by four arguments *quod licet et Decius L. in omnibus ff de reg. jur. et Cagnol ibid. N. 2.* And the reason is

¹ 'permitted' deleted in Adv. MS.

that a person being assaulted and in hazard of his life, he has reason not to expect that malice be put in execution *Re expectare primum ictum*, but may put himself in a posture of defence how soon he perceives one to be his enemy, but 2^o simple threatenng is not only here proponed, but such a qualified threatenng as will appear by the probation to be sufficient, and the Defender needs not qualify and circumstantiate the same when he propones his Defence, no more than a Pursuer in his Lybell needs to qualify how the Defender is art and part. And the Pursuer is no more prejudged of his reply in this case nor the Defender is of his Defence in the other.

Mr. Andrew Birny for the Pannells adds in fortification of the Defence and Dupply proponed, that the Pannell Captain Barclay was *in periculo vitæ constitutus* in swa far as he was not only menaced but the threatenngs had come the length of *Actus proximus* to violence and blood, there being drawn swords and pistols presented to the Pannell and to his brother and servant in his company, the doors were offered to be broken up upon the Pannell, whereas the Pannell only designed to rescue himself from violence. Likeas the Pannell's brother was wounded before any pretended violence offered by the Pannell. At least, the Pannell was informed, that there were persons lying in wait for him, which was a great ground of suspicion, and from the expressions related to the pannell he had reason to believe that they had way laid his life, for they asked if they knew Barclay was comeing, meaning by the Pannell, and if not they would go to the house where he was, and when he was come, they forced or tempted him to drink and threatned him, at least talked such unbecomeing speeches as are usuall in quarrells and picques, and refused to go out of his room, which was the room of an ale house, Whereas he told them he was come to do his business and desired to be private. And when he found they would not go, he offered then to go and they would not suffer him tho he pretended it was to do naturall duties which were not fit for company, and forced him to do the same within the house, and picqued a quarrell with his brother who was without doors, and wounded him, and when the cry was given that his brother was murdered and when the

Pannell came out to his assistance they still continued to threaten and menace him, so that he was forced to flee alwise backward, and he having desired his horses, they locked the stable door and put the key in their pocket, which proceedings and circumstances in the judgement of all law and doctors ought to be reputed a sufficient ground whereupon the Pannell for his own defence might justly have invaded. Likeas for a further verification of the pannell's innocence and want of design to do wrong, it is offered to be proven that when he came out he had no pistols in his hand, but his pistols were brought him a mile from his house and he came in a sober manner to the said house with his ordinary serv^t and armed in an ordinary way, and brought with him a Notar from Aberdeen, whereas it is not usuall for persons intending to committ crimes to bring witnesses against themselves, and his true design being to sett Tacks of the lands of Towie, he told the company that this was his business and desired them to be gone, and being provoked by the Defunct John Sinclair that the Pannell's company and his should fight two and two, the Pannell answered soberly that he was obliged to have more kindness to his mother's son. All which or one or other of the premises are *per se* relevant to elide the Dittay.

Triplys Sir Robert Sinclair for the Pursuer, that all these qualifications tho' if they be proven they may be sufficient so far to distinguish the nature of the crime, that it shall not be reputed a murder and forethought ffelony, yet they can never be sufficient to elide the Dittay or found a Defence against the slaughter except it were positively offered to be proven that the Pannells were assaulted with drawn swords, bended pistols or such deadly weapons which might impress upon the Pannels a fear of their lives before the Pannels did any deeds of violence, and if the Pannels will condescend and offer to prove in manner forsaid, the Pursuer will elide the same by offering to prove in fortification of his Lybell, that the Pannell committed the slaughter at the house of Pat. Watt, nine miles frae Capt. Barclay's house, and that the said Captain and the other Pannels his accomplices not in a sober manner as is pretended, but with 8 more in company all armed with swords, pistols, short hagbutts and blunderbusses which

are not usual arms to be carried in a sober countrey, so that both his retinue and arms demonstrates that he came with a hostile mind especiallie coming to the said P. Watt's house not far distant from the place of Towie where he had no business; and to the pretence, that he had an interest in the Estate of Towie and that he came there to sett Tacks to the tenants, to hold courts (this of holding courts is not in all the Duply) takes Instruments thereupon, the same being altogether unwarrantable, seeing he had no infetment or valid rights that could authorise him to do such deeds, and indeed it was his coming there for those ends, and as having warned the Lady lifrentrix of Towie and her tenants to remove and his threatening to pull her out by the heels if she would not remove, and to take in the house of Towie which gave the cause to all the evil that followed, and further demonstrates his evil intentions and resolutions before he came, and if need bees its offered to be proven that before Captain Barclay came to P. Watt's house, John Sinclair the Defunct was there and used to resort there, and that Captain Barclay was told he was there and was desired not to come there least some mischief should fall out betwixt him and some of the Lady Towie's friends and servants in the house. 2° If need bees its offered to be proven that Captain Barclay was the first aggressor, and that before the Defunct drew sword or pistol, Captain Barclay called him knave and rascall, and did beat him over the head with a batton to the effusion of his blood, and commanded his servants and accomplices to turn him out of doors. And while they were dragging him out Robt. Ogilvie the other Pannell, did hold a drawn durk to his breast, at least held it in his hand at the time. 3° Albeit all the qualifications of the Defence and Duply could be proven, yet they cannot amount to a just self defence, because the Pannells did not proceed *servato moderamine inculpate tutelæ*. ffor they were not moderate and had other ways to escape the danger, it being acknowledged in the condescendence made for the Pannell, that he was once within a closs room and the doors fast upon him in so far as it is alledged for him that the Defunct offered to break up the doors. Likeas the Defunct having no person in company with him but one, it

Da: Sinclair
ag^t Capt. W^m
Barclay and
his serv^t for
the slaughter
of Alex^r Sin-
clair.

was in the power of the Pannells to have seized upon them and kepted them from doing evil, and that with as great facilitie as it was to put them to the door when they laid hold of them, all which they ought to have done, seeing by the opinion of all Lawyers self and necessary defence is never sustained *sine moderamine* or where parties have other means of escaping the danger. 4^o In the case of lawfull defence it is always considered an *æque periculosa fuerit alterius aggressio* and otherwise the crime of Slaughter is not exeemed nor the party excused from punishment. And here the danger was not equall, not only for the causes immediately above sett down, viz. that Captain Barclay and his partie might have disarmed the Defunct and the single person who was with him, they being so near him when they shot at him that the forrage entered with the ball, but also because Captain Barclay and his company were on horseback and might have gone away without hazard, the Defunct and his comrade being only armed with swords and having no shott about them.

The Justices Repell the hail Defences and Qualifications in respect of the Reply and finds that the Qualification of Self Defence is relevant in this case, that the Defunct Sinclair or his accomplices were the first aggressors without any just provocation given be him, and that he wounded the Pannell's brother or servants and thereafter pursued the Pannell with a drawn sword or bended pistol. *Sic sub^r Jo. Home, W^m Murray, J. Preston.* Interloquitor.

The Assize by the mouth of Ro^t Dempster of Balbougie their chancellor ffand the Pannells Capt. Barclay and Robert Ogilvie Clean and not guilty of the slaughter of the deceast Alexander Sinclair men^d in their Indytements, in respect they ffand the same was done in Self Defence conform to the Justices their Interloquitor. Verdict of the Assize.

After this Verdict was pronounced the Pursuers seemed to be much dissappointed of their expectations, but it was a most judicious and rationall Assize, all landed gentlemen and merchants in Edinb^r who were accustomed to be upon Assizes and most of them since have been thought fitt to be Magistrates and to bear other charges within the city of Edinburgh. And if there was any Remarks on Capt. Barclay's Trial for the Slaughter of Alexander Sinclair.

error in this Assize it was merely in the not adverting to the just Qualifications and the moderation of the Self Defence, ffor I find it proven by some of the Witnesses that Alex^r Sinclair the Defunct did fire the first shot, but as true it is that Robert Ogilvy had invaded him with a drawn durk, and that one Cruickshank, another of Barclay's ffolowers, fired the blunderbuss which wounded Sinclair in the side, and the Pley was so mixed that it was hard to judge who was the Provoker.

Eodem Die.

The said Captain Barclay and the King's Advocate agt. Collonell John fullerton of Dudwick, David Sinclair of Seggett, brother to the Defunct, Alexander Sinclair and divers other persons in and about Towie, accused of the Slaughter of Richard Barclay, brother to the Capt., by giving severall wounds in the forsaid conflict whereof he died within five months. The Pursuer and Defenders present, the Diet is deserted.

This was by all indifferent persons judged to be a sham Process intended upon no other design but to terrifie the Defenders who were Pursuers in the other Process, and this opinion was the more confirmed that no sooner was Barclay assoillied frae the other than he desisted frae this Process.

Edinbr. 13 and 17 Nov^r 1668.

Thomas Rothead in Whitsomhill against Elizabeth Maire his wife for Adultery, continued from the first of these Dietts to the next and then she is declared fugitive for not compearance and her Cautioner, Philadelphia Hall, Relict of Captain George Hall, is unlauded.

In the last of these days the two Diets at the instance of the King's Advocate against Cannon of Barley for Treason and against Harper and Harvey for Tumults, are continued till the last day of December next.

Edinb. 18 Nov^r 1668.

William Cleland younger of ffaskine and William Wilkie of

Haghill, indyted for being art and part of the Slaughter of Gilbert Marshall, at the instance of Arthur Allan, brother in law to the Defunct, continued till the 19th instant and Mr. John Herbertson, late procurator ffiscall of the Commissariot of Glasgow, and Andrew ffergus, his servant, declared fugitives.

As also William M^ccaull against Charles Lindsay, for Slaughter, continued to the same day.

Mr. James Row, minister of Monivaird, agt. William Bourdon, Procurator ffiscall of the Commissariot of Dumblane, for beating, blooding and invading of the Pursuer, being a minister of the Gospell, deserted of consent upon a representation made by the Defender to the Justices, that he had applyed to the Presbetrie whereof the said Mr. James is a member, to settle them.

Edinbr. 19 November 1668.

The aforementioned Processes against Cleland of ffaskin and against Charles Lindsay, deserted.

Edinbr. 23 Nov^r 1668. The Justice Clerk and Deputes Murray and Preston in the Court.

The Earl of Glencairn and his ffactors against Hugh Roxburgh in Brownhill, for Usury, in swa far as the said Hugh having in the year 164 , lent 1800 mks. to Thos. ffleming, he exacted from Whits. 1648 to Whits. 1650, 192^l yearly, which is more than the ordinary @rent and did exact @rent beforehand, at least took Bonds for sumes of money to continue the principall.

E. of Glencairn
and his ffactors
agt. Hugh Rox-
burgh for
Usury.

Mr. John Elleis¹ for the Pannell alledges that he cannot pass to the knowledge of an Assize upon that part of the Lybell, that he exacted £192 of @rent for the fors^d sum of 1800 mks., because any such exaction if it be proven will appear not to have been from the Pannell's own Debtor, but the Pannell having an improper Wadsett upon the Lands of Persland from his Debtor, he assigned the same to Mr. Hary Scott, and in the Assignation he grants the receipt of his principall sum and

¹ Admitted advocate 22nd January 1663.

£192 of @rent or back tack Duties, which can be no ground of a criminall Dittay against the Pannell, 1^o Because it was taken from a third partie and not from the Debitor, and so falls not within the compass of the Acts of Parliament contained in the proposition of the Dittay which do only prohibit exaction of usurious interests from Deb^m. 2^o The Act founded on being in *annis* 1647 and 1649, which are now rescinded by the general Act rescissory and the exactions as they are lybelled being in *annis* 1649 and 1650 when there was no other standing laws for the time restricting @rent to 6 p. cent, these exactions can never inferr Usury. And to the next particular in the Lybell bearing that @rent was exacted before hand contrary to the 28 Act of the 23d Parliament Ja. 6. the Act is opposed which only prohibitts the exaction of @rents before the first term of payment be elapsed, which being *stricti juris* it cannot be extended beyond the precise terms thereof, as was found in the case betwixt Muschett and Purdie.

Replys Mr. Pat. Hoom for the pursuer that Mr. Hary Scott's acquiring of the Wadsett and being the payer of the @rent does not alter the case from Usury because the right of Wadsett as it is granted by Thomas fleming the Debitor is usurious in so far as it bears 196£ yearly back Tack Duty for a principal sum of 1800 mks. The just @rent whereof at 6 p. cent is but 72£, and so the contract being usurious and the said £192 payable in name of @rent as being so exacted as @rent resting from Thomas Scott, the Pannell both by entering in that contract and exacting of that @rent is guilty of Usury, And whereas its pretended that the Acts of Parliament *anno* 1647 and 1649 are rescinded *nihil omnino refert* because they are but rescinded *quoad futura et non quoad præterita*. 2^o The Crime of Usury is expresly excepted from the Act pardoning penall Statutes in the same Parliament *anno* 1661 where the Act rescissory is past, and which Act pardoning the penall Statutes being but the 27th Act, is but posterior to the Act rescissory which is but the 15th. 3^o The Lords of Session by a decision 21 July 1665, George Wauchop of Cleghorn against Robert Lauder and by severall other practiques have granted repitition to Debtors against Creditors of what has been exacted from them more nor 6 p. cent after the Act of

Parliament in *anno* 1649 notwithstanding that it stood rescinded at the time of the decisions because the Act rescissory contains a *salvo* in favours of all Acts, Rights and Securities done by virtue of these laws in favours of any particular persons. And to what is answered to the Act of Parliament of King James, the Act is opposed wherebe there is a generall Statute against all who committs Usury directly or indirectly by taking more @rent than the Act of Parliament allows.

Duplys Mr. John Eleis to that part of the Reply anent the Act rescissory, that he opposes the Act, which not only rescinds but annuls the Acts rescinded *ob defectum autoritatis*. And whenever any of these Acts are thought fitt to be renewed by the Parliament for the good of the people, its always declared in these Acts which renews them, that they shall take effect from the date of the Act rescinded (as appears by the 32 Act of the same Parliam^t *anno* 1661 entituled Act concerning heretable and moveable Bonds, which is declared to have force as to all Contracts and Obligations for sums of money, dated since the 16 of November 1641, which is the date of the rescinded Act of that same tenor) whereas the 49th Act of that Parl. *anno* 1661 made for reducing @rents to 6 per cent does not go back to the Act of that nature *anno* 1669, but statutes only for time coming. And as to the Act for pardoning penall Statutes and the Act of Indemnitie and the exceptions therein contained, no respect can be had thereto, seeing the Pannell makes no use thereof, but defends himself on the point of Law founded on the Act rescissory. And as to what is founded on the Dec^{ts} of the Lo : of Session granting repetition tho the Decrets were produced they could not be probative before the Justices, that being only peculiar to the Lo : of Sess. their Dec^{ts} of Improbation and even tho' they were probative yet *non sequitur* that tho' the Lo : of Session have decerned repetition that therefore the Justices should find a crime ffor this may excuse a *delicto* which could not defend against the Repetition, that the Creditor had a probable ground of ignorance to believe that it was no crime, because there was no standing law, and yet there might have been this ground for repetition that by the custom of the country none exacted more than 6 p. cent.

Triplys Sir George Lockhart for the Pursuer that the Dittay and Reply proponed for fortification thereof stands relevant notwithstanding of the Defence and Duply because the Dittay in sua far as it is founded upon the taking of @rent beforehand be the space of a quarter of a year or thereby, the same is founded on the Act of Parliament 1621 whereby it is most clear, that all taking of @rents before hand and before the Term at which it is due and payable does inferr the crime of Usury, and the pretences mentioned in the Defence are no ways relevant, because albeit it is not contraverted but the taking of @rent before the subsequent Terms does import the same crime, and it is strange to suppose, that either in Law or Reason there could be a materiall reason of diversitie, the prejudice of the Debitor which is intended to be obviate by the said Act being the same in both cases, and so much more in the last case by much the necessity of the Debitor may force him to comply thereintill, seeing he may be unseasonably put to pay the principall sum, and certainly if after the elapsing of the first term of payment the Creditor should exact the @rent beforehand not only of the first term but of one or more terms which should happen thereafter, it were downright and exorbitant Usury which directly falls under the compass of the saids Acts, and without which the same did operate little, if it did only secure against the taking of @rent as to the first term, and did leave the Debitor exposed to the Creditor's unjust exaction as to the remanent. 2^o The Dittay likewise as to that member anent the taking of 8 p. cent. after the 1649, stands relevant, and is not eluded by the Defence and Duply, because the same is sufficiently founded on the Acts of Parl^t viz. the Act of Parliament 1646 and 1649, and inviolable custom and practique that ensued thereupon, be virtue whereof at the time of receiving payment of this @rent, it was unquestionable Usury. So this pursuit being nothing else but finding and declaring it was usury is sufficiently founded, and as to the alledgiance that the Acts of Parl. *annis* 1646 and 1649 are rescinded and that even *ob defectum auctoritatis*, and that the Act of Parliam^t restricting @rents in time coming does not ratifie the preceeding custom as was done in the case of other Acts, where the Parl^t intended the same.

Earl of Glen-
cairn and his
factors agt.
Hugh Rox-
burgh for
Usury.

It is answered 1^o That the restriction of the Act of Parl^t does not impede why this Dittay being founded on the inviolable practise and custom warranded by these laws for the time is not sufficiently founded, seeing the custom and practise¹ which ensued on the saids Acts is so far from being *consuetudo reprobata* as on the contrar the Justices of the Parliam^t thought fitt to releise and that the same should be observed in time coming. 2^o The Rescissory Act of Parl^t albeit it rescind all these Acts of Parliam^t since the 1643, yet the same is qualified with a clear and express *salvo*, by which *salvo*, it is provided that the saids Acts notwithstanding they are rescinded, yet should stand and remain in full force in so far as concerns the private rights and interests of parties, and seeing by the fact lybelled, it cannot be contraverted but according to the Laws and Acts of Parliament then standing, the same did import Usury and by the committing thereof, there was *Jus quæsitum* to his Majestie and *Donatar*, that same *Jus quæsitum* being the private right and interest of parties does fall under the compass of the *Salvo* contained in the Rescissory Act of Parliament, so that the Dittay being not only founded on an uncontroverted custom, but upon the *Salvo* of² the Recissory Act it self in so far as concerns especiallie the Civil Right and Interest, as to the confiscation of the sum and escheat, it cannot be pretended but the Dittay is sufficiently founded notwithstanding of the rescissory Act, and which if it were not sustained it would be the ground of great exactions and extortions, and certainly *hoc ipso* that the Lords of Session does constantly decern Repetition or would deny action for more than 6 p. cent. the samen as injustice, it can be upon no other ground, but because the superplus is usurary the exacting thereof must import the same crime.

Quadruplyes Sir Geo: Mckenzie for the Pannells that in taking of more @rent than the customary and taxt quota, there are two severall parties prejudged, viz. the partie by being exacted whose interest is sufficiently secured by Repetition, and likewise by the transgression of a publick law and

¹ 'warranded by these laws for the time is not sufficiently founded, seeing the custom and practise,' deleted in Adv. MS.

² 'the *Salvo* of' not in Adv. MS.

contemning of authority, the ffisk has a separate interest which is the penalty enjoined for having committed the Crime of Usury and thereby violate the Law and contemned authority, and whatever may be said in mantainance of the private Right of Parties, which may be secured by Repetition *ex bono et æquo* and because of the constant custom, tho the Acts 1647 and 1649 were rescinded, yet it is contended, that where a Crime is intended, it must be against a standing authority, and so the criminall punishment of Usury here craved being craved upon the account of a contemned authoritie, where the authority is declared not to have been a lawfull authoritie, there can be no punishment for the contempt of it, and it being granted that these Parliaments are taken away and to have been null for want of authoritie, it cannot be inferred now that there was a crime then committed, because it is declared now that there was no authoritie then, and the formality of the crime consisting in the contempt of authority, tho' private reparation may be concluded, yet men cannot now be punished for contemning Usurpry,¹ no more than a man may be punished now for being in a Parish where goods were taken away, which likewise was enacted under the Usurperry and was a law then standing, or then a man may be pursued now for transgression of Acts made against the Engagement or the Covenant, and neither can a person be prejudged tho this were not sustained as a Crime, seeing the Parties injured will be sufficiently repaired *quoad* the Privy Interest, because of the last clause of the Act rescissory, which is a sufficient foundation, seeing private rights are thereby reserved, and the Lo: of Sessions Dec^m ordaining reparation will be sufficiently founded upon this Law and Reservation, tho a crime will not thereby be sustained nor can be inferred from the said Act rescissory and that Reservation that the crime may be punished, seeing 1^o Tho the Act rescinding the Parliam^t 1641 etc. contain a Reservation and *Salvo*, yet the Parl^t 1648 is absolutely rescinded without any such *Salvo*, and the confiscation of Moveables is not private interest, nor cannot be called the interest of private persons, but is *vindicta publica* and the interest of the ffisk as is clear

¹ 'usurpy' in Adv. MS.

by this that the Escheat nor no goods confiscatt falls to the partie but to a Donatar, so that the argument may be thus retorted, viz. By forsaid Act rescissory not only the authority is abolished, which Authority is the formall *medium inductivum criminis*, but likewise nothing is reserved but the interest of private parties, *ergo* it is not reserved. Likeas by the late Act of Debitor and Creditor, where Wadsetts granted since the year 1649 are restricted to the ordinary @rents, and where more was taken, it is declared that it shall be imputed as part payment of the principall sum *quoad bygonos*, yet they are only declared usurary *quoad futura*, both which as it implies that they shall not be usurary for bygonos. So the Parl. having had under their consideration the wrong done, they have only secured the private interest of parties. To the Replys and Triplys relating to the 2^d Article, it is quadsupplied that the taking of @rent beforehand, cannot in this case infer Usury because Usury is only *in mutuo* and not *in emptione et venditione*, and here there was no *mutuum* at all betwixt the taker and the receiver of the sum, and the reason why this is made statutory Usury as the Pursuers' Advocates very well debates and solves because the Borrower might be troubled with unjust execution, and forced either to pay before hand, or else might be poynded and imprisoned, and therefore where there could be no possibility of extortion or hazard that way, there could be no Usury, which is our case. ffor Mr. Hary Scott, who was payer of this money could never have been personally distrest, and so needed no extortion in exaction that way, ffor tho Mr. Hary might have redeemed as Assigney yet he could never have been taken with caption or poynded for that debt, and it cannot be imagined that this was taken *Usurari nomine* upon that account, and there is nothing more ordinary than parties because they are going abroad, or are not in the place where the loaner is, they therefore willingly pay the @rent before hand without any coaction which seeming co-action is the only ground why this seems Usury, likeas in this case, there was never Horning or Arrestment used, so there could be no exaction. But the truth is, that the said Mr. Hary being most desirous to have back his own land, did pay the money *eo intuitu*, and some-

thing may be said where the stock is let lye for a year or half a year's interest was taken, yet in this case where only two months were taken in respect whereof, etc. And as to the Act of Indemnity, it is answered that the execution therein extends only to such Usury as was against the Laws then standing.

Adds Mr. Pat. Home for the Pursuer, that he opposes the Alledgiance proponed in the Act rescissory or Act of Oblivion, together with the Act of Parl^t lybelled on.

Interloquitor.

The Justices repells the Alledgiances proponed against the taking of @rent before hand, in respect of the Answers and Duply, and continues to give Interloquitor anent the rescissory Act of Parliam^t untill this day 8 days, being the last of this month, and ordains that part of the Dittay anent the fore-hand @rent to pass to the knowledge of an Assize.

Verdict of the Assize.

The Assize by a plurality of voices finds the Pannell Hugh Roxburgh Guilty and culpable of taking the @rent of 1800 mks. an month or thereby before the term of payment, or the samen was due in respect they fand the same sufficiently proven by Writt. He is sentenced upon the last of this instant¹ to which I referr.

Eodem Die.

The Earl of Glencairn and his ffactors against Hugh Craig, merchant in Edinburgh, and John Braidwood in Covington, Hilherd, for Usury, continued to the morrow, the 24th instant.

Edinbr. 24 Nov^r 1668. Justice Clerk, Deputes Murray and Preston present.

Earl of Glencairn and his ffactors ag^t Hugh Craig for Usury.

The Earl of Glencairn and his ffactors agt. Hugh Craig, merchant in Edinbr. indyted for Usury and for contraveening the Laws and Acts of Parliam^t viz. the 222 Act Parl. 14, and 247 Act Parl. 17 and 28 Act Parl. 23 Ja. 6. where the taking of more than usuall @rent in any manner of way expressly or by simulation is forbidden. As also the 62 Act 1 Sess. 1 Parl. Cha. 2, anno 1661 whereby all bargains and rights

¹ 'month' in Adv. MS.

to be made after the date of the said Act, wherein exorbitant advantage is taken of the Debtors, and yet nevertheless providing either by clauses in the said rights or by Writts apart, the Debtors shall be liable to all hazards of fruits, tenants, wairds, or troubles, are declared to be unlawfull and usury. And the contraveeners to be punished as unlawfull Usurers,¹ conform to the Laws and Acts of Parliament made against Usury and Okerey. And sicklike the 49 Act 1 Sess. 1 Parl. Cha. 2 anno 1661 when the @rent of money was then reduced to be 6 p. cent. yearly in time coming.

These are the Laws upon which the Dittay was founded, the subsumption is, that the said Hugh Craig being creditor to Margaret Balcanquell in the sum of 316^l Scotts, conform to 2 Bonds bearing @rent and penalty, and having lent her 105^l more, he did take of her a Bond of Corroboration *in anno* 1665 wherein the saids sums and @rents are accumulate to 700 mks. and in this Bond he did take from her a Tack of two Booths in the Town of Edinb^r for 9 years from the first Whitsunday or Mart's after the decease of Helen Kelly, life-rentrix thereof, which Term is declared to be the Entry thereof wherein the Duty is made 100^l Scotts yearly and the said Hugh to have retention in the first end of the sums due to him, which Tack is lybelled to be usury. 1^o Because it payed formerly 153^l yearly whereby he had 53^l yearly abated to him by way of gratuity for the loaning of the money or for exorbitant @rent, and to palliate this Usury the Tack was contrived contrar to the said 247 Act Parl. 15 Ja. 6. which prohibits simulation. 2^o This Tack is lybelled to be usurious because Marg^t Balcanquell, the setter of the Tack by an express provision is obliged to free the said Hugh Craig of all stents, publick Burdens and Ground Annualls imposed or to be imposed during the continuance of the Tack contrary to the said 62d Act Parl. 1 Sess. 1 Cha. 2d. Likeas he has liberty to call for his money when he pleases.

Mr. Alex^r Seton² for the Pannell alledges that he ought not

¹ 'And the contraveeners to be punished as unlawfull Usurers' deleted in Adv. MS.

² Sir Alexander of Pitmedden; admitted advocate 10th December 1661; raised to the bench 1677; died 1719.

Earl of Glencairn and his factors ag^t Hugh Craig for Usury.

to pass to the knowledge of an Assize upon this Lybell, 1° Because there being no Deed of Usury lybelled, but the taking of the Tack that can never inferr Usury upon any of the grounds lybelled, ffor as to the first ground whereupon the Tack was quarrelled, viz. that it was sett for a less rent than formerly, that can be no ground whereupon to inferr Usury, because every man has liberty to make his bargains as cautiously as he can, and the house maills in Edinbr. do not always continue at one rate, and a 9 years' Tack such as the Tack lybelled is, will be sett cheaper than a shorter Tack, and that the Tack was taken to palliat Usury is positively denied. And as to the other ground, viz. that the setter of the Tack was obliged to free the Pannell of all Cesses, Publick Burdens, and other hazards, and so the Tack is usurious by the 62 Act 1 Parl. 1 Sess. Cha. 2d. It is answered, 1° that the Act of Parl. relates only to Wadsett rights, and speaks nothing of Tacks, and cannot be extended *in pœnalibus*. 2° *Esto argumenti causa* it could be extended yet wee are not in the case of the Act, which only declares such rights usurious where the Wadsetter is freed of publick burdens, the hazard of war, bankrupt tenants and wasteness. But by the Tack lybelled the Pannell is only to be freed of publick burdens and his Tack might have been made useless to him be fire, plague or other Vastations. And whereas the Lybell bears, that by the Tack the Pannell has liberty to call for his money when he pleases, and so in case of any hazard he would still have called for his money. It's answered that it was very just it should be so, and this is no contravention of any of the Acts of Parliament lybelled, but albeit it be just yet it is not true, ffor by a backbond of the date of the Tack, the pannell expressly superceeds execution for three years in expectation of the death of Helen Kellie, lifrentrix of the Booths, and if she should have lived longer to exclude the benefite of his Tack, there was no reason why he should want his money, and by the same backbond its provided that if she should decease within the 3 years, so that the Pannell was to attain possession, then and in that case the Pannell superceeds execution during all the years of his Tack.

Replis Sir Geo: Lockhart for the Pursuer, 1° Oppones

the Dittay. 2° opposes the said 62 Act of the late Parl bearing, not only rights and wadsetts, but all rights and bargains. 3° Oppones the said 247 Act Parl. 15, Ja. 6. against Simulation, and this Tack was a clear simulation. 4° He offers to prove that albeit the Tack Duty be but 100.ℓ vet the Pannell did sett it for 8 score pounds. 5° Notwithstanding the clause of relief be not for all hazards, yet the same was ever recoverable by the personal obligation, and as to what is founded on the backbond sisting execution, it did only sist for the time, but after that time was elapsed, the execution was competent. 6° There is a great difference betwixt a Tack having no relation to a principall sum, and this Tack which was forced from the Debitor in farther corroboration wherein his necessity forced him to comply. And it is strange to suppose wherein the Debitor has so great advantage should not be usurious, being downright contrary to the forsaid Act against Simulation, and to sustain such a Tack were *fraudem facere legi salvo prerogativo verborum*.

Duplys Sir Ro^t Sinclair, that the Defence stands relevant notwithstanding of the Reply and 1° Oppones the said late Act of Parliament and the clause of it founded on, which in the narrative of the clause bears only proper Wadsetts and statutes only as to such, and albeit in the end of it, it bears that in case any such bargains or rights should be acquired thereafter, that same shall be declared usury. Yet that generall can only be meaned of and must be restriced to such bargains and rights as are mentioned in the narrative and statutory part of all Acts of Parliament, and specially such as concern crimes are *stricti juris* and cannot be extended. 2° Albeit the Tack could fall within the compass of the Act of Parl. yet the crime contained in the Dittay could not be hence inferred, because the setter had not all the hazards as is said. 3° Nothing can be inferred frae the 247 Act Parl. 15 Ja. 6. prohibiting the taking of more nor 10 for the hundred directly or indirectly, nor of any other Acts restricting to 6 p. cent., because none of these Acts extends to locations or Tacks where tenants has hazards, as here the Pannell had of wastness and depauperate tenants, and as to that part of the Dittay that the Booths paid more Tack Duty before the Tack,

as its not relevant, so it cannot be verified, and it was a reparation and division of the Booth, made by the Pannell, which augmented the Duty. And as to that part of the Reply that notwithstanding of the Stents the Pannells could still recover his sums by the personall obligation, it is altogether groundless, for the Pannell behooved still to have allowed the 100£ of Tack Duty yearly, and being satisfied by his possession, his Debt became extinct. And this answers sufficiently that part of the Reply anent the difference betwixt a simple Tack and this which has relation to a principall sum. For albeit this Tack be granted in the same Writt with the obligation for payment of the sum and that retention be given to the Tacksman of his Duty, ay and while his sum be paid, yet there is no law to infer Usury from that, and having sisted execution for his money all the years of the Tack, in manner mentioned in the Answer, it was impossible there could be any execution thereafter, because by the 9 years possession of the Tack the sum would be satisfied.

Triplys Mr. Andrew Birnie for the Pursuer, that Usury is committed by way of Tack as well as Bond or Wadsett is evident by the Act of James the 6th which mentions all Contracts whereby the said exorbitant Usury is palliate. And the late Act of Parliament does also comprehend all rights contained in the Act of Ja. the 6th, and that the Pannell had more nor ordinary @rent is offered to be proven, and that he had no hazard is evident from the personall obligation of Payment upon which he might always have recovered his money if any should be resting at the issue of the Tack.

To all which Sir George Lockhart for the pursuer adds, that he offers to prove in fortification of the Dittay, that the Tack was sett to the Pannell *eo intuitu* that he might have greater advantage than by the simple payment of @rent.

The Justices finds the Defence and Reply relevant proponed against the Dittay, and Repells the Answers made thereto, but finds if it was communed betwixt the Parties at the time of the setting of the Tack, that considering that the two Booths did formerly pay a greater Duty nor the @rent of the money, and that *intuitu* and satisfaction of more @rent nor is allowed by the law, the Tack was sett, the same was

Earl of Glen-
cairn and his
ffactors ag^t
Hugh Craig for
Usury.

Interloquitor.

relevant, and Ordains the same to pass to the knowledge of an Assize.

The Assize finds the Pannell not Guilty of any such com-
muning as is here found relevant. Verdict of the
Assize.

Eodem Die.

The Justices continues the Diets in the Actions, the Lord Strathnaver¹ and his friends against the Earl of Caithness and his friends for Convocation, Hairship and Fireraising, upon a petition given into the Earl of Caithness and that untill the 1st of December next. But W^m Sinclair of Dunbeath, John Sinclair of Murkhill, John Gun, his servitor, and Don: forbes, servitor to Dunbeath are declared fugitives and the expenses of the Witnesses are modified.

Eod. Die.

Earl of Glencairn and his factors agt. John Braidwood in Covinton for Usury, deserted.

Edinbr. 25 Nov^r 1668.

The Earl of Caithness agt. George Lord Strathnaver and John Earl of Sutherland his ffather and the Lord Rae² and severall of my Lord Sutherland's ffrriends for Depredation, Robbery, etc.

Compears Sir Geo: M^ckenzie *excusatorio nomine* for the Defenders and produces an Act of Privy Counsell appointing and admitting the compearance of any ten of the Defenders if they compear to be sufficient for the compearance of the rest, they finding Caution acted in the Books of Adjournall to answer and underlye the Law for the whole Defenders under such pains and penalties as the Justices shall think fitt.

Edinbr. 26 Novr. 1668.

William Troup, messenger, being conveyen before the Commissioners of the highlands for the Slaughter of Alex^r

¹ Afterwards sixteenth Earl of Sutherland ; died in 1733.

² Second Baron.

Chalmers, glover in Elgin, the Cause is advocate and the Diet deserted.

George Grant, son to Ballandallach, and W^m Troup, messenger, against Grant of Kirdells, for Deforcement, continued to the 3d December next.

Edinbr. *ult.* Nov. 1668.

Sentence agt.
Roxburgh for
Usury.

Hugh Roxburgh found guilty upon the 23d of the month, of Usury, is this day sentenced to ammitt his moveables to the King and to find Caution under the pain of 1000£ for his appearance before the Justices, when he shall be called to undergo such other punishment as the Lords of Privy Council shall think fitt, and accordingly finds caution.

Eod. Die.

Sir William Purves, his Majesties Solicitor agt. Thomas ffindlay in West Calder for Treason, Theft, Robbery, and putting violent hands on Mr. James Brown, minister at Calderwood, continued till 7th December next.

Eod. Die.

Advocatus agt. John Crawford, messenger in Edinbr.

Relict of umq^{ll} Boig servant
to Ann Ker, relict of Umq^{ll} Mr. John Duncan, minister at Dundrennan, Jean Crawford, spouse to Andrew Turnbull in Edinbr and Mr. John Dick, son to David Dick there, declared fugitives for receipting Major Learmonth, Welsch of Comley, and others, declared Traytors in the Howses.

Eodem Die.

William Hardie, tenent to the Lord Torphichen, John Gilchrist, shoemaker in West Calder, William Nimmo, taylor there, Adam Grier, and Malcolm Crawford, there, for rising in Rebellion and being at the fight att Pentland hills, declared fugitives.

Edinbr. 1 December 1668.

Mr. Geo: Scott of Pittedie agt. W^m Smeiton, merchant in Kinghorn, for stealling of a meir, deserted.

The Justices also continued the Mutuall Pursuits betwixt the Earl of Caithness¹ and the Lo : Strathnaver to the 4 instant as to all who were present, and John M^crory and some others of the Sutherland men absent, are declared fugitives.

Edinbr. 3 December 1668.

Alexander Agnew, Sherriff Depute of Wigtoun agt. Pat. Kincaid of Auchline, for Stealling a sheep and putting his own mark upon it, the Process is advocate from the Sherriff, and the Diet deserted.

Hugh Monro of Threeboll, agt. the Earl of Caithness, continued till the morrow.

Rothead against Mure for Adultery, continued to the 10th instant,

Mr. John Stewart of Ascog,² Advocate, agt. Dougall Campbell, and others for Theft, continued till the morrow.

George Grant, son to Ballendalloch, against Grant of Kirdells, continued to 7th January.

Edinbr. 4 December 1668.

Earl of Caithness agt. Lord Strathnaver *et e contra*, continued again to the 8 instant.

Mr. John Stewart agt. Dougall Campbell continued to the 1 of June, and the absent witnesses ammerciate.

King's Advocate agt. Thomas findlay, nottar in Wester Calder, for beating of the Minister of Caldercleir, and rising in Arms, continued to 1 June.

Edinbr. 8 December 1668.

Earl of Caithness agt. Lord Strathnaver, again continued till the 11 instant.

¹ 'twixt the Earls of Caithness and Sutherland' in Adv. MS.

² Admitted 10th February 1666.

Edinbr. 10 December 1668. Renton, Justice Clerk,
Deputs Murray and Preston, present.

Rothead of
Whitsomhill
agt. Elizabeth
Muir his wife
for Adultery.

Rothead of Whitsomhill agt. Elizabeth Mure his wife, indyted at his instance for Adultery, and upon the usuall Laws and Acts of Parliament, inswafar as after she had enticed him when he was but a boy of 14 years old at the school to marry her, she within a year or thereby of the marriage went away from his company and stayed away sometimes half a year, sometimes a whole year in Berwick and other places, conversing with men of evil report, and that she absented herself another time 4 years in the north of England, shifting from place to place, and buire two children in Adultery, and that in the years 1665 and 1666, she was seen inclosed in a shop with Adam Wilson, cowper, and committed Adultery within a howse in Edinbr. with James Ritchie, writer in Edinbr., as also with James and Walter Inneses and Geo: Duff, shoemaker, and that Decreet of Divorce is recovered against her before the Commissarys and that she is banished by the Privy Councill.

Rothead agt.
Muir his Wife
for Adultery.

Sir George Lockhart and M^ckenzie for the Pursuer, declares they insist, 1^o *loco* for the Adulterys committed with Ritchie and Innes mentioned in the Lybell.

Sir Rob^t Sinclair for the Pannell alledges that the Lybell as it is now restricted is not relevant, being only in generall in some one or other of the days of the year 1664 or 1665, whereas it ought to have been specified upon the speciall day and the place 2^o the Crime.

Interloquitor.

The Justices finds the Dittay relevant and ordains the same to pass to the knowledge of an Assize and declares that if the Pannell be found guilty, that after the Verdict of the Assize, they will take to consideration the punishment in respect it was alledged for the Pannell, that nottour Adultery is not subsumed in the Lybell, and so the pain of Death not to be inflicted conform thereto.

Immediately after this Interloq^r the Assize is sworn and then there is a new debate as follows.

Sir Robert Sinclair for the Pannells Alledges that there can be no Process at Rothead's instance as the only pursuer, because

he having maliciously deserted her, and the Privy Council in regard thereof having allowed her an Aliment, he the said Thomas to be free of this Aliment and of the Bonds of Marriage, did deall with severall persons to lye with her, and with others to say that they had lyen with her, and offered 50 £ sterling to some persons to bear false witness against her and suborned the Witnesses which were adduced before the Commissarys in obtaining the Divorce, all which is offered to be proven.

Replys Sir George Lockhart that he oppones the Libell, which is not only at the instance of Rothead, but at the instance of the King's Advocate upon the account of publick interest to have her punished, and cannot be excluded upon the pretence mentioned in the Defence against the husband. And as to these pretences made against the husband, they are not in law relevant to make the Husband to be *leno nec promunt crimen lenocinij* which in the opinion of all Lawyers is when the husband *quæstum facit ex adulterio Uxoris* and is prostitutor in order to that end, and admitt that these Acts did amount to inferr *crimen lenocinij*, which is denied. Yet no lawyer ever imagined that *exceptio lenocinij* was receivable in the criminall Process *quoad vindictam et pœnam* in so far as concerned the Divorce or dissolution of the marriage which is not *hujus fori*, and tho this pretence were relevant *in hoc foro*, as it is not, there is no truth in it, and if there be any truth that such expressions did escape the husband, it was when he was in drink, and long after the committing of the ffacts of Adultery lybelled, and was but done by the husband upon the insinuation mentioned in the Defence, and he perfectly knew at that time that the Pannell was *pessimæ et prostitutæ vitæ* and guilty of many Adulterys. And as to the corruption of the Witnesses *non competit hoc loco*, and when the Pursuer's witnesses shall be adduced, the Pannell shall have her legall exceptions.

Sir Geo: M^ckenzie for the Pursuer adds that the Defence founded on the *lenocinium mariti* can never exclude the Criminall Pursuitt but when it is thus qualified, viz. 1^o That the husband was *leno* to the wife in the same act for which he pursues her, but reaches not to other Acts done without his consent nor will the consent to the one inferr any consent to

the other. 2° The *lenocinium mariti* must be by an express paction betwixt the husband and the wife, or else she cannot defend her self thereupon.

Duplys Sir Robert Sinclair for the pannel, that the Defence stands relevant notwithstanding of the Reply *lenocinium* being always where the husband prostitutes the wife, whether it be *propter quæstum* or any other base end. And in this case the husband had an aim at his gain, because he aim'd at the £30 ster. modified by the Privy Council to the wife. 2° The Pursuer acknowledges that the crime of *Lenocinium* is sustained to exclude a civil pursuit, *ergo* it must be sustained to exclude the present pursuit,¹ in regard it will have civil effects, because if the pursuer prevail, a Divorce will follow, and the aliment and jointure will be forefaulted. And the pretence that the Pursuit must be sustained at the Advocate's instance, ought to be repelled, in respect the Advocate is neither present nor is their any Warrant from him in writting to concurr.

The Justices repells the Defence and Duply in respect of the Reply.

The Assise by the plurality of voices ffinds the Pannel guilty of the crime of Adultery committed by her with James Ritchie, mentioned in her Inditement, in respect they find the same sufficiently proven. And indeed it is so, ffor the Lybell bears that in the month of June or July she committed the crime in the house of Colin Dalgleish, in Edinbr. And it is expressly proven by William Rutherfoord who depones he saw them in the Act, and by George Watt, who depones conformis, and that William Rutherfoord and he were present together, and all the Assise in one voice assoilzies her frae the remanent Articles of the Dittay, in respect they find nothing proven ffor as to this point there is no probation of the Act, but there are ill circumstances proven, viz. William Innes proves their being closs in a room at 10 or 11 a clock at night, and that he saw them frequently kissing other, and John Brown, gardiner at Halyrood house, depones that she came to him and desired something to provoke her courses, but knows not if she was

¹ 'ergo it must be sustained to exclude the present pursuit,' deleted in Adv. MS.

with child, so that Sir Geo: M^ckenzie in his *Crim: Treatise*, *capite* of Adultery, numb. 7, relates this practique wrong, for he says that she was condemned upon pregnant presumptions without formal probation. He says also that Swintoun was found guilty upon presumptions, and the woman with whom he committed the fact tho nothing was proved but that the parties were alone, and that the Witnesses heard them in bed together and the bed shake, and yet even in that case also there is one positive witness.

The Justices remitts the pannel to prison till the Doom be pronounced, *vide* the Sentence is on the 8th January next, and is banishment.

Edinb^r 11 December 1668.

The Actions betwixt the Earl of Caithness and Sutherland, continued till the 17 instant.

Edinbr. 15 December 1668.

Finlay Grant and James More, his Cautioner, unlawd for not reporting Criminal Letters against Angus M^cIntosh, and also the said Angus declared fugitive for not finding Caution and not compearance.

Edinbr. 17 December 1668.

The mutuall Actions betwixt the Earls of Caithness and Sutherland and the friends of both for heirship, robbery, fire raising, convocation of the leiges and invading of the countreys many times, continued of before to this Diet and now deserted. The first of these to witt at the instance of the Earl of Caithness is upon a production of a Consent in writt, to which the King's Advocate agrees, and upon production of two Acts of Privy Council interponing their authority to the agreement of the parties and discharging the Justices to proceed, and the other is deserted upon production of a Remission granted to the Earl of Caithness and his friends, The whole heads of the mutuall Dittays are here sett down at length, which any person may read who is desirous to know the grounds of the differences betwixt these two great men.

Edinbr. 24 December, 1668.

The pronouncing of the sentence against Elizabeth Muire, continued till 8 of Janry. next.

Edinbr^r last of December 1668.

King's Advocate agt. Cameron of Barley and others for Treason, continued till the 2d of february next.

Edinbr. 7th Janry 1669.

William Laurie, writer in Edinbr. against Mr. George Gladstaines, minister at Glennairn, for theft and robbery of some timber of a house, continued till first of June next and the absent witnesses unlauded.

Eod. Die.

George Grant, son to Ballindalloch, against Grant of Kirdells, also continued till 14th instant.

Eod. Die.

Thomas Ronald of Woodhill, indited before Sir Gilbert Steuart,¹ Sherriff Depute of Perth, Patrick Grant, Tutor of Grant, Mr. John Nairn of Muckorsie, Mr. William Nimmo, Mr. David Thoires, advocate, and Mr. John Cunningham, Sherriff Depute of Dumbarton, commissioners appointed for the highlands for Judgeing of Thefts, ffor the alledged stealing ing of eleven Nolt furth of the lands of Blackhall belonging to Abercromby, younger of ffetterheit, at least being art and part thereof and resetter in June 1662 or 1663 years. As also for the alledged crime of stealing and away taking from Alexander Crombie, elder, of ffetterneir, an Contract or Bond of reversion or grant of Redemption made by the said Thomas to the said Alexander, and for the theftous cancelling, destroying and away taking of his name from the same, and for certain other pretended crimes spec^t in the Dittay given in or to be given in against him before the saids Commis-

¹ Re-admitted advocate 5th January 1661. 'Formerly admitted under ye usurpers.'—Mylnes MS.

sioners. This cause is advocate by the Privy Council to the Justices upon thir reasons, 1^o That this Dittay does not contain all the particular crimes, but that he is charged *super inquerendis*. 2^o That these Commissioners cannot be Judges competent, but the Lords of Justitiary are the only competent Judges because their commission is only to cognosce upon thieves, not being landed men, that should be apprehended by the Earl of Athol and presented to the Commissioners. But so it is that the Defender is a landed man, having the lands of Woodhall, within twelve miles of Aberdeen. 3^o The pursuit appears to be malicious and upon design to draw the Defender to trouble and expenses. In regard albeit he lives within 12 miles of Aberdeen ¹ where justice may be done upon him if he be guilty, yet he is summoned to compear at Dunkeld. 4^o One of the crimes particularly lybelled is stealing and riving of a Bond of Reversion, and the said Commission gives no power to judge in that crime, but only of thefts committed in the highlands. And as to the oxen he had this to say for himself that they were poynded and tho the poynding was not lawfull, yet he was decerned in a spulzie which was sufficient.

The Justices sustains the reasons of advocacion, and because the procurator ffiscall of the Commissioners did not compear at the appointed day to insist, and in regard the Defender was present, offering to underly the law, therefore they deserted the Diet, and discharged the giving out of new Letters against him for the said Crimes in all time coming. Whereupon the Pannells procurators took Instruments and protested for relief of his Cautioner who is designed to be Hary Likely, Chamberlain to the Laird of Haddo.

Edinbr. 8 January 1669. Rentoun, Murray and Prestoun all present.

John Wishart of Cowbairdie against George Hamilton in Inchstomack, the Viscount of ffrendraught and others for

¹ '3^o The pursuit appears to be malicious and upon design to draw the Defender to trouble and expenses. In regard albeit he lives within 12 miles of Aberdeen,' not in Adv. MS.

wrongous imprisonment, deserted, and at the same time Hamilton, one of the Defenders, continued till 2 february next and the witnesses expenses modified. The crime lybelled is, that the s^d Hamilton having a caption against the Pursuer, he did assign the same to the Viscount who took the Pursuer after raising of a suspension.

There is a Debate made for the Viscount before the Diet is deserted, Sir Robert Sinclair and his other advocates alledges for him that the Lybell bearing that the debt was suspended was not relevant unless it did likewise bear that the suspension was intimate to the Viscount without which he could not be put in *mala fide* to execute the Caption.

Replies Mr. Andrew Birnie, that the Suspension was intimate to the Cedent before the Caption, which is sufficient even against the Assigney who ought to know the condition of Cedent and how matters stands with him, or otherways suspensions may be soon rendred ineffectuall by the Cedent's Assigney after Intimation. 2^o Replies Mr. William Maxwell that the Intimation stands good against the Viscount, because he did not execute the Caption at his own instance as Assigney, but in the name of his Cedent, so that his Assignation in this case can import no more but a procuratory from the Cedent. Likeas the Suspension containing relaxation and the suspender being by vertue thereof relaxt at the Mercat cross, that was as effectuall to put all the leiges in *mala fide* as a published Inhibition.

The Justices sustained the Defence as to the Viscount of ffrendraught unless the Pursuer would alledge that either the Suspension was intimate to him or that the samen consisted in his certain knowledge, that there was an Suspension standing undiscust.

Thereafter the saids Pursuers referred the truth of said Alledgance and Defence to the s^d Viscount's oath, who being judicially sworn deponed he never saw the Suspension lybelled, nor did it consist in his certain knowledge that any such Suspension was, and that the Cedent George Hamilton never told him of any such Suspension. In respect of the which Deposition the Justices fand the Dittay not relevant as to the said Viscount of ffrendraught, and therefore deserted the Diet

as to him. Whereupon the Viscount took Instruments and protested for relief of his Cautioner.

Thereafter the Pursuer having insisted against John Gordon, provost of Bamff, for receiving him into the prison of the burgh of Bamff upon the said Caption after he had produced a Copy of the Intimation to them, and for beating the Pursuer because he expostulate with them.

The Justices fand the same Defence relevant for the Magistrates which they had found relevant for the Viscount, viz. that the Suspension it self was not produced to them nor intimate to the party.

Thereafter they alledged against that part of the lybell anent beating of the pursuer, denying always the same, that it was lawfull for them both to imprison and beat, because the pursuer gave them opprobrious language and put his hand to his sword and durk and said to the Provost, Do it if he durst, which is offered to be proven.

Replied for the Pursuer by his Advocates that they opponed the lybell and the illegality of the procedure, and albeit there had been opprobrious expressions, yet the Magistrates ought not summarly to have imprisoned for the same untill first they had convened and convict the Pursuer judicially.

The Justices find the Defence relevant as to the Incarceration, the pannells proving the opprobrious speeches condensed on, and his offering his sword or durk, and also finds the beating lybelled, relevant, and ordains the same to pass to the knowledge of an Assize.

The Assise having considered the Depositions of the witnesses, they all unanimously ffound the Provost of Bamff and the other Defenders not guilty in respect nothing proven against them. Some absent witnesses in this case are americiat. As to Hamilton it is deserted upon the 2d february next.

The Justices this day also pronounces Sentence against Elizabeth Muire for Adultery, whereof she is found guilty upon the 10th of December last, Banishing her from the Kingdom of Scotland and appointing her to remove betwixt and the first of february next, and never to return under pain of death.

Edinbr. 12 Janry. 1669.

David Steuart, Baillie in Elgin, against Mr. Andrew Hay of Cairnfield and others for the Slaughter of his Brother, Alexander Steuart, messenger in Elgin, continued as to Mr. Andrew Hay untill the 26 of february. next, and farther Dilligence granted against witnesses and the rest of the Defenders declared fugitives.

Edinbr. 14 and 22 Janry. 1669.

Grant agt. Grant of Kirkdells, continued till first of June next.

The ffactors of the Earl of Glencarn against W^m White, merchant in Edinbr. for Usury, continued till 9 february. next.

Edinbr. 23 and 9 february. 1669.

The Said first day Wishart of Cowbardie against Hamilton of Inchstomack for wrongous Imprisonment, deserted for the pursuers not insisting and his Cautioner unawed.

William Ogstoun, servitor to Mr. Alexander Bruce, Advocate, declared fugitive for the Slaughter of Alexander Mackie, shoemaker in Aberdeen.

The said 3^d day John Williamson against Bessie Bruce, prisoner, for wilfull fire raising. She is liberate upon the pursuer's petition in regard she was furious, and his bond to insist delivered up.

The said 9th day ffactors for the Earl of Glencarn against White for Usury again continued till the second of March.

Edinbr. 10 and 11 february. 1669. Deputes Murray and Prestoun present.

Thomas ffalconer of Kincoith against Alexander Home of Lanthill and others for stealing and away taking from the said Thomas in March 1666, 20 bolls of bear and oats which were lying in his Barns of Hallydown, and 30 bolls of oats bear, pease and wheat in his barn yards in Coldingham, and another quantity from his lands of Law, conform to inditement.

It was alledged by Sir Robert Sinclair and the other Advocates for the Pannell, denying the quantities lybelled, that any Intromissions the pannells had cannot infer theft because they intromitted by vertue of a lawfull poynding of the ground upon the Baillie of Coldingham's Decreet, and so did it *authore prætoris*.

Replies Sir George M^okenzie for the pursuer, that the Decreet cannot defend the Baillie Depute, one of the pannells because the Decreet was given by himself, and he can give no Decreet in his own favours. And as to the brocard *Authore prætoris*, it is never to be understood in a Judge's own case who will always authorize his own actions tho never so unjust. 2^o Suppose the Decreet were good, yet the poynding is null, because it was execute before sun rising, whereas all Executions ought to be between Sun and sun. 3^o There was no poynding on the ground of the Lands, but only at the Mercat Cross. 4^o The poynders and Apprisers were not sworn, which was the fault of the Judge, they being of his own creation and so cannot defend the Judge, and declares that he restricts this Pursuit to a Riot and Spuillie, which fully takes off the Defence as its founded on the authority of the Judge and Sentence.

Mr. Patrick Hume farther Replys that the Decreets cannot defend the Pannells because by the Common Law in L. 15 ff Judicijs § 1. A pedanius Judge decerning unjustly *litem suam facit cum dolo malo in fraudem legis sententiam dixerit. Dolo malo autem videtur hoc facere, si evidens arguatur ejus gratia vel inimicitia vel etiam sordes: ut veram estimationem litis præstare cogatur, et Inst. de Oblig. tit. Vel de quasi delicto ubi per imperitium male judicans, vel contra leges facit litem suam*, and specially in this case where the pursuer was not so much as cited to appear, but he might propone lawfull defences, which clearly demonstrates malice or ignorance. And as to the rest of the Pannells, they had no order to poind. 2^o As this is clear from Common Law, so it is clear from our own, that inferior judges doing wrong, may be conveyened before the Superior Judge and be punished in his person and goods and may be condemned in expenses to the Party, Ja. 2. Parl. 14 cap. 77., Ja. 3. parl. 5. cap. 26 Parl. 7. cap. 104. 3^{uo} The

Pursuer was not within the Defender's Jurisdiction, so he ought not to have given Decreets against him. 4^{to} The Decreet being for a fine or unlaw, ought not to have exceeded 10 \pounds and so the Decreet cannot defend the Judge, and it cannot defend the rest of the Pannells, because there was no charge for payment before the pointing.

The Justices Sustains the Defence relevant to elide the Lybell and remmitts the Trial of the matter (that is the validity of the Decreet) to the ordinary Civil Judge. Thereafter the Pannells' advocates offered to prove by the oath of Alex^r Hume of Linthill, one of the Pannells, that he gave order to the officer or messenger to point before there was any Decreet, which he denyes upon oath, and thereupon took Instruments and protested for relief of the Cautioners.

Edinbr. 12 feeb. 1669.

The Diet King's Advocate agt. Cannon of Barley for Treason, and Harper and Harvey for Tumults, continued to 2d March next.

Edinbr. 24 feeb. 1669.

M^cCaul agt. Cha: Lindsay of Colmachtree for Slaughter, continued to 2^d Tuesday June next and the absent Witnesses ammerciate.

John M^cIntire for the slaughter of M^ckenzie in Brachley, declared fugitive and his Cautioner unlawed.

Edinbr. 26 feeb. 1669.

David Stewart agt. Mr. Andrew Hay for Slaughter, continued to 8 June next.

Edinbr. 2 March 1669.

ffactors of the¹ Glencairn agt. W^m Whyte merchant in Edinbr. for Usury, deserted.

King's Advocate agt. Canon of Barley and Harper and Harvey, continued to 1 June next.

¹ 'Earl of' omitted.

Edinbr. 4 March.

The Relict of John Littlejohn against John Garden of Tilliefroskie, for the Slaughter of her husband, continued.

Nicolas Boswall against Michael and Mr. Alex^r Malcolms, sons to the Laird of Balbedie, and others for a Rape committed against her, deserted upon a production of a Remission.

This day an Instrument recorded taken by Jo: M^ckenzie upon his compearance to underlye the Law in the action for Theft at the instance of Donald M^cGregor against him.

Edinbr. 1 June 1669.

James Hay, son to Sir James Hay of Smithfield, unawed for not reporting the Criminall Letters. Dougall Stewart against Dougall Campbell and the Defender declared fugitive.

Laurie agt. Mr. Geo: Glaidstanes, minister, for Theft, continued to the 1st Tuesday July next.

King's Advocate agt. Cannon of Barley, Harper and Harvey and the other action agt. Thomas ffindlay for Rebellion, continued to the 11 instant.

Thomas ffalconer of Kincoith unawed for not insisting against Todrig in the crime of Theft lybelled, and Todrig declared fugitive.

The Lord Colington¹ against Denholm for Theft, continued.

Thomas Sideserf, brother to Dr. Sideserf against Mungo Murray for Hamesucken, continued till 4th instant, and deserted *quoad* the rest of the Defenders.

Advocatus agt. Liddell of Phinnickhaugh continued till the morrow.

George Grant and his Cautioner ammerciate for not insisting against Grant of Hirdells.

Edinbr. 2 June 1669.

James Liddell of ffinnickhaugh, Andrew, James and George

¹ Sir James Foulis of Colinton raised to the bench 1st June 1661; appointed Justice-Clerk in 1684; and died in 1688.

Liddells, his sons, indited at the instance of the King's Advocate, and the Earl of Athole, for many deeds of Theft and for the Slaughter of W^m Robertson, acquitt by an Assize.

Edinb. 4 June.

Sideserf
comedian agt.
Mungo Murray
for Hamesucken.

Thomas Sideserf¹ agt. Mungo Murray for Hamesucken and beating and wounding the pursuer within his house and for drawing his sword within the house at a time when the pursuer was hearing the Rehearsall of his Plays or Comedys, whereof he was master, the house lybelled being the Theatre or Comedy house.

Interloq^r.

The Justices sustains the Dittay relevant to be a crime and riot of a high nature if proven, and ordains the same pass to the knowledge of an Assize.

Verdict.

The Assize upon the Testimonys of the Witnesses finds the Pannell guilty of thrusting himself in at the door of the house lybelled, and of drawing his sword after he got in and thrusting at the Pursuer therewith.

The pronouncing of the Sentence is continued till this day eight days, and the Pannell imprisoned where he is decerned to crave pardon and do it judicially.

Eodem Die.

James Anderson of Westertoun having raised Advocation of an Action before the Commissioners of the Highlands for Theft, Slaughter and other crimes, the cause is advocate and deserted.

Eod : Die.

My Lord Colington against Denholm for Theft, deserted.

Edinb. 8 June 1669.

William McCaull against Charles Lindsay for Slaughter, continued.

¹ Son of Bishop Sydserf of Galloway. He served under the Marquis of Montrose, and settled in Edinburgh at the Restoration. He was the editor of the *Mercurius Caledonius*, published in 1661, and the earliest of Scottish newspapers. He was the proprietor and conductor of a theatrical company, who performed his plays at a theatre in the Canongate and in the tennis court of Holyrood.

John Irvine of Kincaussie agt. John fforbes of Balfigg and Alexander Garrioch of Little Indivie for Intercommuning with W^m fforbes, bastard son to the Laird of Leslie, are declared fugitives, continued to the 25th instant.

Andrew Mowat in Cairns agt. Pat. Dunbar of Blairie, for beating and wounding, declared fugitive.

The kin and friends of the deceast Alex^r Stewart, messenger in Elgin, against Mr. Andrew Hay of Cairnfield, for Slaughter of the said Alex^r, declared fugitive and his Cautioners unlawed and deserted agt. W^m Aird y^r of ffinachtie, another defender.

Kinloch of Bandoch against Rattray of Dalculzean for Theft, deserted upon the Defe^r^m compearance and offering to underlye the Law.¹

Edinbr. 9 June 1669.

Mungo Murray for invading Thomas Sideserf, craves pardon judicially.

Advocatus agt. Cannon of Barley and against Harvey and Harper, continued to the 25 instant.

Edinbr. 15 June 1669.

Thomas Johnston of Ersliag and his sons for the Slaughter of William Bettie, chapman, continued upon production of a Signature of Remmission. The said day Gavin Johnston of Whitsomhill, for the slaughter of James Armstrang declared fugitive and his Cautioner unlawed.

Edinbr. 25 June 1669.

Irvine of Kincaussie and the King's Advocate agt. Alex^r Forbes of Balfigg, and Alex^r Garrioch in Little Indivie for Intercommuning with Alex^r fforbes, brother to the Laird of Leslie after he was declared fugitive, for the Slaughter of the pursuer's ffather, and letters of intercommuning published against him at the head Burgh of the Shire of Aberdeen, the Diet is Deserted, because this day was formerly appointed for

¹ This paragraph not in Adv. MS.

the Triall, and the Pursuer not ready to insist, the Dittay is founded upon the 97 Act Parl. 7 Ja. 5th.

The King's Advocate agt. Thomas ffindlay in Wester Calder, continued to the 29 and then to 27 July.

Edinbr. 29 June 1669.

Richard Wallace, messenger, agt. Hamilton of Balderston, acquitt by an Assize.

Robert Pittillo at the Mill of Kinaltry agt. Donald Sachie for the Slaughter of John Pitillo at the Mill of Haugh, deserted, and James Arrat of Innerquhif declared fugitive.

Edinbr. 2d July 1669.

Earl of Aboyne against Alex^r Stewart and John Gall for killing of deer, deserted.

Edinbr. 6 July 1669.

The Relict of Gordon of Braichlaw and the King's Advocate and the son and the nearest of kin of the defunct against William ffarquharson, elder, at the Mill of Tullich, James Du M^eArchar in Innergald, John ffarquharson of Inverey and divers others of the name of ffarquharson and their accomplices, the Diet deserted for not insisting. As also the Diet at the instance of John M^ekenzie agt. Duncan Gordon.

Edinbr. 7 July 1669.

Alexander Adamson, brother to Bracco, indyted for destroying certain growing trees belonging to John Kerr of Ardicharrald, deserted.

Edinbr. 13 July 1669.

John M^cCaull against Charles Lindsay of Colmachtree for Slaughter, deserted.

William Laurie, Writer in Edinburgh, against Mr. George Glaidstanes in Glencairn for Theft, deserted.

James Sword, messenger, against Robert French of french-

land, for Deforcement in execution of a Caption at Giles Murray's instance. In this Process it is objected that one Murray of Nevil cannot be received as a Witness because he is within degrees defendant to Giles Murray who is the principall party and conjunct pursuer with the Messenger, and tho' there be another Pursuer, viz. the Messenger,¹ yet she is interested in it, likeas this person adduced for a Witness *favereat similem causam* and so may have interest and advantage.

Replies Mr. Andrew Birnie for the Pursuer, that it is a pursuit at the Messenger's instance and the King's Advocate *ad vindictam publicam* which any allyance cannot impede. 2^o This person was a necessary witness, being witness in the execution of the Caption and having no relation to the messenger, who did not expect any elicit Act of Deforcement.

Duplys Sir Geo : M^okenzie, altho he be a necessary witness, yet the Messenger should have chosen indifferent persons.

The Justices repells the Alledgiance and Reply in respect of Interloq^r the Answer.

The Assize finds the said Pannell Robert ffrench guilty, and Verdict. thereupon he is decerned to have ammitted and tint his hail moveables, the one half to the King and the other to Giles Murray and Thomas ffrench and Adam Murray, other two defenders are declared fugitives, and upon the 15th he is sett at liberty upon his petition.

Edinbr. 15 July 1669.

Christian Galloway, Relict of John Ord, merchant in Aberdeen, indyted of Murder, Adultery and Theft, continued to 2 of November next.

Edinbr. 22d July 1669.

Captain Robert Barclay of Achredie agt. Alex^r Steill, sometime in Achredie, Collonell John ffullerton of Dudwick,

¹ 'and tho' there be another Pursuer, viz. the Messenger' omitted in Adv. MS.

George fullerton his son, Anna Dowglass, Relict of the deceast Pat. Barclay of Towie, William Udnie, her servitor, for Theft and Receipt of Theft, the Defenders past frae and the Dyet deserted as to all of them except Steill, who is insisted against, and acquitt by an Assize on the 13 of August next.

Edinbr. 27 and 29 July 1669.

Advocatus agt. Thomas findlay in Wester Calder, for beating of the minister, continued to the 2d of Nov^r next, and Morris against Adams, for mutilation, to the same day.

Edinbr. 3 and 10 of August 1669.

Helen Gourlay agt. Pat. Simpson, for mutilating her, deserted.

My Lord Renton agt. Home of Wedderburn and divers others for oppression, continued to 4 November next.

Edinbr. 13 August 1669. Depute Preston in the ¹

Capt. Barclay
agt. Steel for
theft.

Advocatus and Captain William Barclay of Achredie against Alexander Steill indyted and accused, that where he being in the service of the Pursuer and having the trust of his affairs, he broke away the door of the Pursuer's study and stole away from him the sum of 1000£ or thereby in pieces of gold, with three Dispositions and Charters granted by the Tutor of Towie to the Pursuer, of the Estate of Towie, and other evidences and writts, cloaths and furniture.

Sir Geo: Lockhart for the Pannell Alledges that the Dittay cannot pass to the knowledge of an Assize as to that member thereof, which bears that the Pannell did take the goods and cloaths lybelled out of the house of Achredie, because the Lybell is not speciall and does not condescend on the particulars nor upon the qualifications whereby it will be inferred that the goods lybelled were in the Captain's possession as being in his trunks and cabinetts and the like, and that the way of intromission by the Pannell is such as would inferr a

¹ Blank in MS. ' Depute Preston present in Court' in Adv. MS.

contractation sufficient for Theft and it is not sufficient in general to lybell that the Pannell did carry away goods out of the house of Achredie in respect the Pannell being a servant therein, the goods condescended on might have belonged to himself and been in his own possession and in law must be so presumed, the same being the Abuilziements of his body and if any such quality were sustained to inferr the crime of Theft, there is no servant but might be drawn in question upon the same pretence. 2^o Altho the Dittay were speciall, yet the samen cannot be put to the knowledge of an Inquest because as to the species of the goods condescended on in the Pannell's exculpation, his intromission thereof can import no theft, in respect its offered to be proven that the Pannell being servant to Captain Barclay, did actually wear and make use of the saids Cloaths and Goods during the time of his service, which is sufficient to inferr a right thereto in the Pannell, without necessity to prove it otherwise, it being usuall for servants to get their Master's Cloaths and other furniture, and the pursuit is maliciously intended because the Pannell would not comply with Captain Barclay in other things. And as to the Pannell's Intromission with the Disposition and other papers lybelled, the Pannell denyes it except one Disposition of the lands of Ardleys granted by the Tutor of Towie in favours of the Deceast laird of Towie, and some missive letters, which as the Pannell had them so they were truely delivered to him by Captain Barclay and did not take them out of his study by breaking it up as is lybelled, which quality of having the Pursuer ought necessarily to prove before he can inferr a Theft, and how can a Theft be supposed in this case, a Theft being *fraudulosa contractatio lucri faciendi causa*, which the Pannell never in the least designed, but on the contrary being threatned by Captain Barclay to give them up to him and to comply with the designs for which he is now in prison, the Pannell, for his safetie, fled to the house of Fyvie and delivered the Papers to the Lord ffyvie, as appears by his Lordship's report produced direct to the Lords of Session.

Capt. Barclay
agt. Steill for
theft of money,
cloaths, etc.

Replys Mr. Andrew Birnie for the Pursuer that he insists for the Money, the Disposition lybelled, and for the Cloaths that the Pannell was not in use to wear, and wearing of the

masters Arms is not sufficient qualification of right in the servant, and therefore insists for the @arms which the servant wore, for these properly pertain to the master and are but trusted to a servant for the master's defence, and it is absurd that a servant should plead a right to these by wearing, seeing they are not delivered to the servant *animo derelinquendi nec utendo periunt*, and therefore the exculpation cannot take place as to these arms. And as for the Disposition and other papers, whether the same were taken out of the study after breaking, or trusted to the Pannell, it is all one, for if he faille to redeliver that which is trusted and give it to another, he is guilty of Theft.

Duplys Sir Geo. Lockhart, that he opposes his defence and still affirms that Theft cannot be inferred upon the pretence that the Goods lybelled did once belong to Captain Barclay, and that they are now in the Pannell's possession, but he must lybell and prove *quomodo desiit possidere*, and the Lybell in this point must be so circumstantiate that it must convincingly appear that the Pannell's intromission was not warranted by any preceeding delivery, but was only a Theftuous Contraction, as for example by proving that the goods lybelled the time of the Pannell's intromission, were in such way and manner in Captain Barclay's possession as being in his Trunks, Cabinetts, and Studys, as does thereby make out his right thereto, and moveables being by law and by the ordinary custom transmissable by one person to another without Writt or Witnesses, it is absolutely ridiculous to alledge that it is sufficient for inferring the crime of Theft to prove that the goods once belonged to Capt. Barclay and that thereafter they were in possession of the Pannell, and which if it were sustained, no person's intromission with moveables could be secured from the hazard of being overtaken as guilty of Theft, so that as to goods and Writts not contained in the Pannell's exculpation, the Dittay can be sustained no other wise relevant but that the Pannell intromitted therewith, the same being then in Captain Barclay's possession in manner forsaid, and the Defender's intromission therewith, being by way of Theftuous contrectation, as by breaking open his Trunks, Cabinetts and the like, especially

seeing the Pannell is known to be a young man of good reputation and the pursuer to be *pessimæ famæ* against whom the Lords of Session have lately found great suspicion of forging Writts of great importance, and opposes the Pannell's ingenuous Declaration made to the Lord ffyvie, and his Lordship's Report and the inconvenience formerly alledged that any man may be drawn in question anent his right to moveables and would have difficulty to prove it.

Triplys Mr. Andrew Birnie that the Pursuer does not insist for the Pannell's using during his abode in his master's house and service to which the Defence and Duply only relates, but upon his possessing and using after his coming from his service, for his possession is either as his master's servant or as proprietor, as servant he cannot possess longer than he is in service, and as proprietor he must prove his right of property, and his right cannot be presumed speciallic to his master's Pistolls which he has, which the master has kepted these 15 or 16 years. And as to the Lord ffyvie's Report, it is founded on the Pannell's own assertions, whereby he cannot clear himself, and as to his reputation, refers himself to the Assize, and it shall be made appear be his own confession before the Lords of Session he is accessory to that fforgery.

The Justices fand the Dittay relevant as to that part anent Interloquitor. the money and writts as it is lybelled, viz. by breaking up of the Pursuer's Doors under cloud and silence of night out of his dwelling house of Achredie. And as to that article of the Dittay anent the stealling of Cloaths and Arms, ffinds the same not relevant except it be qualified specially that he stole these goods such a day furth of the House of Achredie, and that they belonged to Capt. Barclay and were in his possession, and that the same were stollen by breaking of doors, chests or Trunks, and finds the defence of exculpation relevant altho the Pursuer should prove the Lybell thus qualified, and reserves to the Pursuer Action of Restitution as accords of the Law.

Thereafter Sir Geo. Lockhart as Procurator for the Pannell, Letters of Exculpation. produced the Letters of Exculpation underwritten, making mention that the said Alexander Steill being pursued before his Majesties Justices for the crimes @specified, had severall

Defences for eluding of the said Indytement and proving his Innocency in the crimes @written, viz. that the Cloaths, Sword, Sword Belt, Pistoll, alledged taken away were not stollen in manner lybelled, and that the taking away thereof, being only by wearing and using the same during his abode with the said Captain Barclay and which wearing was sufficient to purge all theftuous contraction, it being absurd to alledge that servants deserting their master's service yea unwarrantably which cannot be pretended in the case forsaid, and wearing upon their bodys the cloaths and abuilziements they were in use to wear during their service¹ should thereby contract the crime of Theft. 2^o That the said Indytement was not relevant as lybelled unless it were alledged that the Writts condescended upon in the Lybell, were seized and so taken away, as might clearly make out they were not in the possession of the said Alexander Steill, but they were in the custody of the said Captain W^m Barclay as being in his Study, Cabinet and the like, and unless the circumstances were pregnantly condescended upon what way the said Alexander Steill meddled with were with *lucri faciendi gratia*, and in fortification of all it was offered to be proven, that the Disposition lybelled being put in the hands of the said Alexander Steill to the effect he might counterfeit and make one like thereto, and he having no freedom to comply therewith, and not daring to return to the said Captain Barclay, he upon that consideration did bring it alongs with him to the Lord fyvie and delivered the same to him without proposing or demanding the least reward therefore as in the said Letters of Exculpation at more length is contained.

Verdict.

The Assize all in one voice fand the Pannell Alex^r Steill not guilty of any of the Articles of Theft and Robbery libelled in respect nothing proven.

Jo: Clerk,
messr. admitted
Macer.

John Clerk, messenger in Edinburgh, produces a Gift under his Majestie's hand, dated 28 of August 1668, to be one of the Macers of the Criminall Court, whereupon he is admitted.

¹ 'yea . . . service' not in Adv. MS.

Edinbr. 2 November 1669.

Thomas Findlay, Nottar in Wester Calder (of whom we have so many continued Dietts of before) is now at last indyted at the instance of the King's Advocate, for High Treason in rising in arms and joining with Rebels in the late Rebellion in the West, and for receipting and intercommuning with and assisting the said Rebels, and for coming under silence of night to the house of Mr. James Brown, minister att Calderclear, robbing of his goods and beating and wounding him to the hazard of his life. The Pannell present and ready to underlye the Law and neither the King's Advocate nor Mr. James Brown being ready to insist, the Dyet is deserted and new Letters discharged to be given out.

The King's Advocate and Robert Lindsay, gunsmith in Aberdeen, his informer, against Christian Galloway, relict of John Ord, merchant in Aberdeen, formerly declared fugitive for Adultery, Murder and Theft, suspends, relaxes and now compears to underlye the Law. The King's Advocate not being present, and Robert Lindsay, the informer, passing frae the Pursuit, the Dyet is deserted.

The said day Edward Johnstown of Earshag and his sons and his brother and his son, being accused of a slaughter of William Bettie, merchant Traveller, before the Lo: Drumlanrig's Court of Regality, and declared fugitive for their not compearance, whereupon they having meaned themselves to the Lords of Session and having obtained Letters of Suspension and Relaxation upon thir reasons. 1. That they were never lawfully cited. 2. That the crime is remitted commanding therefore Messengers to relax them, and upon which they are relaxed at Dalgarno the head burgh of the said Regality, and in which Letters they have found Caution acted in the Books of Adjournall to appear at a certain day thereinmentioned, now bypast, to answer for any crimes that shall be laid to their charge, and have intimate the Suspension to the Procurator Fiscall of the said Court, which being called at the Day of Compearance, which was the 15th of June last and continued to the 2d of November instant, and now being again called and the suspenders being willing and ready to

abide the Tryall and underlye the Law, therefore craved there might be no farder delay, therefore in respect no person compears to pursue, the Justices deserts the Dyet.

Edinbr. 4 Nov^r 1669.

My Lord Renton agt. Hume of Wedderburn and others, continued to 9 December.

Edinbr^r 9 November 1669.

Alexander Lindsay son to Lindsay of Borthwood declared fugitive for the slaughter of Alexander Davidstone in Spittle.

Patrick Leslie in Newmilne for the alledged slaughter of his wife, continued to the 16 instant.

James Hay declared fugitive for the slaughter of Alexander Stewart, messenger.

Edinbr. 10 November 1669.

Urquhart against Troup and others for cutting of green wood, declared fugitives, and the pursuer Meldrum presents a petition in favours of some of the Defenders, which is granted, and the Diet as to others deserted.

Duncan Gordon in Blackhillock formerly declared fugitive for alledged Theft committed agt. John Leith in Carnwish, suspends, relaxes and compears and offers himself to a Tryal, whereupon the Diet is deserted.

Thomas Moneis, messenger in Aberdeen agt. Geo: Adamson at the Bridge of Don.

William and John Adamsons in Aikinshill, for Mutilation, deserted of consent.

Edinb. 11 November 1669.

Thomas Scott, Englishman, convict and hanged for following Robert Donaldson from Edinbr. in his way to Glasgow and first killing him and then robbing him of his money and horse, and that upon his hearing he was to receive money before his parting from Edinbr. He came only from England but 2 days before he fell in this accident.

Edinbr. 16 November 1669.

The Sherriff of Murray against Pat. Leslie accused before the Sherriff for Murder of his wife, the Process advocate in regard the Sherriff compeared not at the Diet to insist, and Patrick finds caution to compear before the Justices when he shall be called.

David Kinloch of Bairdoch against Alex^r Rattray of Dalvillein, for Theft, deserted.

Advocatus agt. Callum-oig-Mcgregor, indyted and accused for Sorning, lying upon and oppressing the Lieges and poor people in the Country in a masterfull way and for wresting and taking from them meat, drink, lodging and money, without any payment or consideration, and for assaulting and invading and breaking of houses by way of Hamesucken, and for intercommuning with Thieves and Robbers and having trafficking, commerce and correspondence with them and for exacting, levying and taking of black maill frae divers of the people, accompanied with many others of his accomplices, according to the particular Condescendances and at the times and places contained in his Dittay, being no less than a Condescendance of three leaves, and for an Incest committed be him with Eliz^h Mcgregor, sister to Christian Mcgregor after he had lyen with and begot a child upon the said Christian, which he confest in a kirk session judicially before the minister and elders, and was appointed to satisfy for the same.

Advocatus agt. Callum-oig-Mcgregor for Theft, Robbery, Sorning, Incest, convict and hanged.

My Lord Advocate (when Mr. Andrew Birnie stood up to debate for the Pannell) alledged he could not be admitted because after the Lybell was read, he declared he would not appear for the Pannell and removed himself, whereupon the Judge gave his Interloquitor, sustaining the relevancy, and the Pannell was entered to confess, so that if Mr. Andrew will say anything it must be to the Assize.

r^o If a Defender's Advocate can be admitted to debate the relevancy of the Lybell if once he remove out of the Court and suffers the Pannell's confession to be taken, even tho he had not time to prepare himself.

Answers Mr. Andrew Birnie that it is true he removed yesterday after reading of the Libell, because he was not ready to debate, the copy of the Indytement which he received but the night before being 17 or 18 sheets of paper which he had not time to read over, far less to consider, and the Justices by appointing the Indytement to be this day read again, did

allow him to debate the reading over being a virtuall retreating¹ of the Interloquitor.

Replys my Lord Advocate that the Pannell being a Prisoner in Edinburgh, it was sufficient to give him his Dittay yesterday, and if he employed not his Advocates in time it was his own fault, and the truth is he can have no Defence, being guilty by his own Confession of divers of the crimes lybelled, Whereupon the Justices refused to delay, and the reading of the Dittay over again to the Assize is not a retreating of the Interloquitor anent the relevancy of the Lybell, and it being once found relevant it can neither in custom nor honour be found irrelevant, and my Lord Advocate declares that he *primo loco* insists upon the articles of Theft and robbery confessed and condescends upon ten or twelve of them and insists upon the Incest.

Duplys Birnie that he would not contravert the Articles of Depredation or Stealing condescended on but only the Articles of his recovering of Goods back from the Stealers and takeing satisfaction therefore, which he thinks he might lawfully have done.

Tryplys my Lord Advocate that most of the points insisted on are downright takeing and stealing of goods as in speciall anent the takeing of the Earle of Perth's horse, which he confesses he took in the Mount, and that the forsaid Article anent the horse taken from the Lennox's and M^cfarlane, which he confesses was challenged as stollen and that he did transact for the same, and that finding five horses in the Mount he did steall and take them, and these which were found in the hands of John Smith and Allan M^cAllan was a part of the said Horses. And that other Article anent the Horse taken from Angus M^cDonald, which he confesses that William M^currick and his man had, and that he himself went to Laurs and desired him to deal with the said Angus to take back the saids Mares which imports clearly that he did take the same himself, at least that his man and the said William M^currick did take the same away, and that he was accessory to the said Theft in so far as they were resett by him, and was with the said

¹ 'retracting' in Adv. MS.

William his man¹ when he was with him, and that he dealt as said is with the said Angus M^cDonald himself to take the same back. 2^o Tho the Pannell's Confession were not so clear as it is as to the stealing and takeing away the saids goods, yet the Dittay as it is lybelled is unquestionably relevant, to wit, that after these goods were taken away, he did immediatly tell who had taken the same, and who they were, and did take money from the people to give them back, and he did know, as is acknowledged in his confession, that these that had taken them were his own correspondents, and that he used to be and go up and down with them and they with him, and that he had so much power with them as to get goods back upon his token, all which does evidently and pregnantly clear his accession to the takeing of the saids goods by hounding out, intercommuneing, traffiqueing, and corresponding with the saids Theives and broken men, which tho there were nothing else, were relevant to import accession and inferred the Crimes lybelled, as is clear by the Acts of Parliament, and in specially by the Act in King James the 5th his time anent intercommuning with Rebels.

2^o If keeping of men to take back robbed goods and the corresponding with Theives in order to that point, be a contravention of the Act of Parliament anent Intercommuning with Theives.

Quadruplys Birny, it cannot be presumed from the Pannell's knowledge of a Theft or the Committers of it that himself had accession to the committing, for accession cannot be *Sine opē vel consilio* joined with the knowledge, for a very innocent man may have bare knowledge, and as to the Act of Parliament anent traffique and intercommuneing, it does not meet this case, the Act being only against communeing with broken men going or comeing from their hairships or depredations which is *actus illicitus*, but where the Pannell had no other traffiqueing but to take back goods from Robbers, it is hoped the law will never charge that as a crime upon him, and as to all the points of theft lybelled in which the Pannell is challenged as art and part, he propones no defence but refers himself to the Assise.

Quintuplys my Lord Advocate that the Act of Parliament anent intercommuneing with theives when they are going or comeing about the committing of thefts, is without any

¹ 'his man' not in Adv. MS.

distinction to what end they do treat and intercommune with them and the law presumes that such intercommuneing is accession to the Crimes, and the pretence that intercommuneing to get back goods is *actus licitus*, is most frivolous seeing the act of intercommuneing it self is *actus maxime illicitus* and is the duty of all honest men and good subjects having got notice of such crimes and persons immediatly to discover them that they may be apprehended and brought to justice, and the intercommuneing with such persons is a downright assisting them *opē et consilio*, and an encourageing of them in their bad courses, and specially it must be thought in this case where so wicked broken men are suffered to partake of the prey and bestows their pains only for the money that the poor people pays or is forced to give them for recovery of their goods which is evident from the Pannell's Confession, for being asked what way he could prevail to get back the goods he answered it was by shareing with them, this is his answer concerning my Lord Blantyre's horses, where he confesses he receives twenty Dollars from my Lord Blantyre, and it is clear as the lybell is qualified and by the said Confession that some of the goods were taken by his own men, especially William M^cGurruch, and his meeting with the Robbers and others who had taken them within a day or two after the Robbery was committed, and his confession that he knew the goods were taken and that they were broken men that had taken them, are clear Arguments to prove that this case falls within the Act of Parliament anent interrcommuneing and corresponding with Theives, or rather that he is guilty of the saids Thefts himself, it being his ordinary truk¹ to cause steall and robb of purpose that he may get money from the cuntry people upon pretence that he would get back the goods.

Sextuplys Birny that the Act of Parliament is certainly understood of voluntary and spontaneous harbour and corresponding with Theives. But where the intercommuneing is necessary it cannot be disapproved, otherwise any person that follows after their own goods and treats,

¹ 'track' in Adv. MS.

therefore may be conveyed for intercommuneing, and as the parties injured might have communed with the Theives, so might they choice and elect the dexterity of this person and his credit for recovering the goods, and it being acknowledged by the Indictment that the money it self, at least a part thereof was given to the Theives, it is clear the Pannell had no further interest than to travell betwixt them and leill men.

The Justices Repells the hail alleadgeances proponed for ^{Interloq^r} the Pannell and sustains the Articles insisted on relevant, and finds the remanent Articles thereof also relevant, and ordained the same to be put to the knowledge of an Assize.

The King's Advocate repeats the Depositions of the Witnesses and the Pannell's Confession, which is booked and is found guilty by the Assize, of the stealing of the horses of my Lord Perth's tennants and of severall other Thefts, and of the incest lybelled, and of the intercommuneing, corresponding, and keeping company with Theives and Robbers, and of the oppression of the Leidges, sorning, takeing black mail and Hamesucken, and breaking of houses, for all which he is sentenced to be hanged on the 24th inst.

Edinbr. 2d December, 1669. The Jus. Clk. Murray and Preston, present.

Paul Clerk *alias* Cameron, prisoner within the Tolbooth of Edinburgh, convict and sentenced to be hanged for the murder of Finlay Clerk his brother, judicially confessed by him, and for a Robbery. The day of his execution is the 9th of December inst.

Eod. Die.

Finlay M^cGibbon, another Robber, accused of diverse Robberies, Thefts and Murders, and in particular that in the years 1664, 1665 and 1666, he did steall six horses out of the parish of Monyvard, and in the same years he murdered Archibald M^cInked by giving him many wounds whereof he died, and that he kepted company with broken men and vagabonds, and was a Sorner and Oppressor, all confessed by him.

Mr. Andrew Birny for the Pannell alleadges that as to the horse, if any was taken away they were restored back and ten score merks for the skaith, and so the party being satisfied by the Restitution, and the publick Justice by payment of the sum there is no ground for a farder pursuit being on the concurrence of two penall actions, the one whereof is corporall, the other pecuniall, the one does extinguish the other as in the case of *Quadruplum* and *Simplum* of Theft in the Civill Law.

Replys my Lord Advocate 1^{mo} Takes Instruments upon Confession that the Pannell took away the horse. 2^{do} The Defence is most irrelevant and absurd because the Pursuit is not at the instance of any party grieved, but at the instance of the King's Advocate, which cannot be prejudged by any composition given to the party lesed seeing *ipso momento* that the Theft is committed, the Escheat belongs to the King and cannot be taken from the King without his own consent, and it is provided by an express Act of Parliament, to wit the Act 76 Parl. 11 Ja. 6th, that his Majesty may pursue all actions of this nature without concurrence of the parties greived, and farder, suppose the Pannell had but spulzied the horse, the Defence would not have defended him unless he had instantly *made restitution, which was not done in this case, the horse being kept two moneths thereafter.*

Duplys Birny that the concurrence of Penall actions for one and the same Crime cannot subsist and the instance given by the King's Advocate of a spulzie satisfys the Pannell's alleadgence, because if it be civily pursued and violent profits and a penalty decerned, it cannot be thereafter pursued criminally, and the like is in the case of Deforcement, but if the Advocate will alledge that by the committing of the Theft the publick peace of the County¹ was disturbed, then acknowledges the Advocate may insist criminally.

The Justices Repells the Defence proponed for the pannel and ffinds the Dittay relevant and ordains the same to pass to the knowledge of an Assize. But in the probation of this case there arose a difficulty. My Lord Advocate for probation

¹ 'Country' in Adv. MS.

uses the pannell's own Confession taken by the Justices, whereof the tenor follows. 'Finlay M^cGibbon confesses that he sold in ffalkirk to William Russel in Wester Ga about the number of six horse in the year 1655 or thereby and that James M^cNab in Stirling was present at the selling but did not know where they were gotten, but confesses that he stole them in Glentarret in the parochin of Monyvaird.' Which Confession being judicially read to the pannel, it was denied by him to be of verity, and as to the probation of the Slaughter lybelled, there are two witnesses examined upon it and all that they prove is that the Defunct and the pannel and his associates lybelled being all in company together in a house drinking, they removed and the Defunct came back with seven wounds on him and died shortly thereafter, but none of them depones who gave the wounds.

The Justices perceiving this matter to be unclear, they ordained the Assise to inclose to morrow at ten a clock and to give their Verdict upon the Inditement. This was to give the Advocate occasion to apply to the Privy Council, but no reason is exprest.

Edinbr. 3d December 1669.

The Court meeting again on this being the third of December, my Lord Advocate produces an Act of his Majesties Privy Council whereof the tenor follows. 'Att Edinburgh 3 December 1669, the Lords of his Majesties Privy Council having considered an paper and queries therein given in by his Majesties Advocate arising from the case of ffinlay M^cGibbon, prisoner, and pannelled before the Justice, Declared that in the case of the said ffinlay, the Justice ought to determine all questions concerning the relevancy of probation and especially that question whether or not the Confession emitted by the said ffinlay before the Justice Clerk and signed by the said Justice Clerk, be a sufficient probation, tho the said ffinlay should not renew or should disavow the samen at the barr, and Declares that in all other cases where any question doth arise anent the relevancy of probation, the Justice ought to determine the samen and clear what is law. And if the Assise

should proceed notwithstanding of the legall evidence found to be so by the Justice and acquitt, that they are liable to be punished and tried by an Assise of Error, *sic Subr.* Thomas Hay,' which being publickly read was ordained to be recorded.

Mr. Andrew Birnie for the pannel M^cGibbon alledges that he ought to be assoilied, because by the inviolable custom of this Court and by the 91 Act, parl. 11, Jam. 6, it is expressly provided that immediatly after Debate and Defences the Inquest inclose and before parting give Verdict without continuing the same to any other Diet, and if otherwise the pannell to be cleansed, which is grounded on this reason that the Inquest may be practised by either party and seduced to prevent justice, but so it is that contrary to this inviolable law and practise of this Court, the pannel was not put to the knowledge of an Inquest yesterday after Debate and probation was closed, but the Court was adjourned to this day and the Inquest and members dismiss and ordained to close this day, and so were put in a capacity to be practised by the pursuers and informers against the Pannell and therefore . . .

Replys my Lord Advocate, that the Defence is no ways relevant because it is not subsumed conform to Act of Parliament that the Assize was inclosed as to the Pannell, viz. finlay M^cGibbon, or that any person had or could have access to give Information towards him, and the Act of Parliament is clear and express only in that Case when an Assize is inclosed in relation to a Pannell, that there should be no access to the said Assize, and that they should not have liberty to come out or admitt any person to speak with them concerning the Pannell upon whom they were sitting and inclosed, whereas it is nottour, that the Assize was only inclosed as to Paul Clerk and not to this Pannell M^cGibbon. Neither was the Probation closed as to the said finndlay, because there was a Debate concerning the Probation *in jure* and upon a desire of his Majesties Advocate, the Justices did think themselves obliged to continue the Diet or putting the said finndlay to an Assize untill this day, and untill they should give answer to the said question, untill which they have now given answer in behalf of his Majesties Advocate.

Duplys Birnie, that the Act of Parliament does not only

finlay M^cGibbon's trial for Theft, Murder, Robberies.

prohibite the departure of the Assize after Inclosure but does likewise provide (such is the strength of my Argument) that after Defence and Debate the Clerk should immediately inclose them, and which has been the inviolable custom of this Court. Whereas it is pretended that the Probation was not concluded, it is answered that the probation was concluded in so far as the hail Witnesses were sworn and examined, and all the papers which his Majesties Advocate made use of read in judgement, and the Procurator for the Pannell was appointed to speak to the Inquest, which was an Act subsequent to the closing of the Probation, and for that which the Justices determines anent Confession, that is judiciall or not, it cannot be controverted, but the Confession here emmitted is extrajudiciall because not taken in face of Judgement and before the Inquest, and it being matter of fact the Inquest are the properest Judges of it, and therefore it ought to be emmitted before them, specially the Pannell being a Highlander, ignorant of the English Language, and so might have mistaken himself in some of his expressions which the Assize cannot be cleared of but by hearing them examined in their presence. And how can it be pretended in this case that the Confession is judiciall and probative and sufficient to be the ground of the Verdict, seeing after reading of the Indytement in presence of the Court the Pannell was commanded to affirm or deny it, which had been an useless command if the former confession had been formall, legall and sufficient, and it were hard that a Confession like this, taken extrajudicially by one or two of the Justices, when the Law has appointed all probation to be deduced in presence of the Assize, and if 15 of an Inquest be necessary to a Verdict, how can the assertion of a single Judge be sufficient ffor an extrajudiciall Confession taken by himself. And if this method were good, then by the same ground the Depositions of Witnesses might be taken outwith the presence of the Assize and be probative before the Assize,¹ which was never heard of unless the Witnesses were compearing and abiding by these Depositions, and the Pannell's Deposition now produced is not biden by but retreated and can have no

Quer: Should an Assize inclose instantly after the Probation is concluded or if they may be dismissed to another Diet.

¹ 'and be probative before the Assize' not in Adv. MS.

other effect but to justify the King's Advocate that the Pursuit is not calumnious.

ffinlay M^cGib-
bon's Trial
for Theft,
Murder, Rob-
beries, etc.

Triplys my Lord Advocate that the forsaid alledgiance is most frivolous and of no strength, and is not only competent to the Act of Parliament, being only as said is in the case forsaid when the Assize is inclosed and the Chancellor chosen, and when they have sitten being inclosed, but its most injurious to the Justices and Councill, reflecting on both that the Justices should have proceeded contrary to the Act of Parliament, and that the Councill should have approven of their procedure to be so unwarrantable, and where upon a person challenged should be assoillied, and in respect all the papers and probation used by the Advocate was produced, the said pretence is most groundless, ffor Probation cannot be said to be closed untill it be at an period not only as to the production of papers and witnesses, but as to all questions concerning Probation and relevancy of any part of the samen and untill both parties be content that the Assize should be inclosed, whereas it may be remembred that notwithstanding of the papers and Witnesses that was produced, there was a great Debate anent the relevancy of one of the Evidence produced, and the Advocate was so far from acquiescing that the Assize should be inclosed as to this Pannell, that he earnestly desired the Justices that it should not be inclosed, and as to the said Dispute upon the matter concerning the Pannell's Confession, that it might be upon a mistake, it is most frivolous seeing the Pannell did speak most clearly and distinctly in English, and his Confession was not only signed by the Justices but for superabundance signed by the party himself at the last by two Nottars before 4 Witnesses, which in Law is as his own subscription, and as to that assertion that it might be great inconveniency to Pannells that might have emmitted such Confessions, which by the Pannell's Procurator is acknowledged to be judiciall should not be at liberty to retreat the same. It is answered that by the contrar that it should be of a more dangerous and universall consequence if Pannells, after they have emmitted judiciall Confessions, the same should not be looked on as undoubted evidence, unless at the Bar they renew the same, seeing it cannot be expected that persons, tho

never so guilty, upon suggestion of their Procurators, will for their own safety, where Denyall may acquitt them, will refuse at the Bar to adhere to that Confession. And if this practise should be sustained, there should never be a discovery of hainous Crimes and especially of Theft which is committed clandestinely, and upon that account said to be a *furto*, seeing such crimes are not in use to be committed before witnesses. And it is known that there is nothing more ordinary, not only before the Justices, but before the Councill, that parties suspected and dilated of Crimes, should be examined either before the Justices or before the Councill or their Committee, and their Confessions upon such Examinations under their own hand if they can write or otherwise under the hands of the Judges, who did examine, was never untill this time questioned, but that the same is an undoubted Evidence whereupon they may be convicted, tho they refuse to renew their Confession at the Bar. And the pretence that Witnesses their Testimonys cannot be received tho subscribed by them, unless they adhere to the same at the Bar and that by the Law, people are secured that they cannot be tried but by Inquests, and that if their Confessions before the Justices and Councill should militate against them, or refuse to adhere thereto at the Bar, the safety and lives of the Subjects should relye on the Justices, all the forsaid pretences are most frivolous, seeing there is a great difference and the Confession of the Partie, in respect it cannot be presumed that Witnesses, having subscribed their Testimonys before the Justices or emmitted the same, so that they are signed by their hands, should be so impudent as to contradict the same, and they can have no temptation to that purpose, seeing they are not concerned in their own interest, whereas parties having given ingenuous Confessions before the Justices, may and its probable they will always refuse to renew the same, if in so doing they escape. And it is not denyed but Assizers are and ought to be Judges to probation as to the point of fact. But whether either the Testimony of a Witness or a Confession of the Partie used for proving the Dittay doth *de facto* prove the same. But whether the same *de jure* be a valid and legall probation, it does not belong to the Assize but to the Judge, and this being

finlay M^cGibbon's Trial
for Theft,
Murder, Rob-
beries, etc.

a question of Law, is the great security of the People that it should depend only on the Judge, being persons of eminency, integrity, and learning, and who are presumed and obliged to know Law, whereas the Inquest being trusted only in respect of their integrity, which is presumed in all honest persons, and being Merchants and other persons not conversant with Law, they are neither presumed nor obliged to know the same, and if the Confession of the partie being emmitted in a judicall way before the competent Judge, not acting as a private person but *ex officio*, and being signed by the Judge, should it not be a concluding probation both as to the partie and Assize, to give Verdict according thereto, beside many other inconveniences and reasons @express. This would likewise follow to viz. That whereas it is justly provided by Laws and Acts of Parliament that persons guilty of treason may be proceeded against after their death so far as to delete and condemn their memory and forfeit their Estates, to fright all Traitors who have committed treason, that if any person be suspected as guilty of treason and being apprehended, should emmitt a Confession before the Councill or Justices of his guiltiness of the crime forsaide, and should thereafter dye and decease before his Tryall, and a process intended for behalf of his Majesty for condemning the memory of such a traytor and forfeiting his Estate upon so clear an Evidence as his own Confession under his own hand or the hand of the Justices, yet the same should have no weight unless he should be conjured up to renew his Confession at the Bar, if the argument so much pressed would be very weak. And furdur it is added that as it is strange that such a question should be started in any case, it is more strange that the same should be insisted on in this, that where his Confession as said is be not only under the Justices hands but his own, and so in law binding against him tho it were for millions, but being likewise admitted and fortified so strongly, in respect the same is most speciall both as to the number of goods stollen as to the place where they were stollen, and as to the parish, and as to the person from whom the goods were stollen, and were present when the same were sold, and all the circumstances so unknown whose integrity cannot be questioned that it cannot

be thought was suggested to him or elicite from him unless he had freely and of his own accord confest and condescended to the same. Likeas it is clear by the Depositions of William Russell and James M^cnab that both of them did suspect that the saids goods were stollen, seeing Russell would not buy the same but upon surety of the Band produced for warranding thereof. And M^cnab has declared that the same goods were evicted from him and that he was fined and forced to pay a great composition of 100^l sterl. for receipt of the same. And whereas it is pretended that the Confession of the partie under the Justices hand doth only operate so far as to justifie the Advocate that he be not thought a Calumniator in intending such pursuits, the said pretence is most absurdly frivolous and it is known that the Advocate is secured against any such aspersions, being a person in trust in relation to publik interest, and it being his duty to prosecute persons who are suspected of Villanies, and it is remitted to my Lord Justice Clerk whether or not such Confessions be not sufficient as to all intents and purposes, and a most legall and unquestionable probation. And it is known in this case that the Advocate did not act it calumniously, but both the Justices and he were ordered, the Justices to examine, and the Advocate to prosecute the Pannell.

ffindlay M^cGibbon's Trial for Theft, Murder, Robbery, etc.

The Justices repells the Alledgiance and Triply in respect of the Duply and Quadruply, and finds that a Confession taken by the Justices and subscribed by the Pannell is judicial and cannot be retracted here at the Bar, and ordains the Assize to inclose and report their Verdict against the Pannell.

The King's Advocate protests for an Assise of Error in case they acquitt the Pannell.

The Assize being inclosed fand be an unanimous Vote that the said Pannell ffindlay M^cGibbon was guilty of stealing the saids 5 Horses, and that in respect of the Pannell's Confession. Whereupon the Justices ordained him to be hanged at the Grass Markett of Edinb^r 10 December instant.

Edinb^r 8 December 1669.

Archibald Nimmo against the Procurator ffiscall and Sherriff of Lanerk for Theft, advocate and deserted.

Edinb^r 9, 10 and 14 December 1669.

Lo : Renton
against Home
of Wedderburn
and others for
exacting of
Customs.

Renton Justice Clk. against Home of Wedderburn, Pat : Home in Eymouth and others, all indyted at the instance of Renton and the King's Advocate for his interest, as follows, That whereby the law and practique of this kindome, the violent seizing on and taking away Corns without any Order of Law, and exacting of Custom when not due, or exacting more than is due is oppression and particularly by the 46 Act 4 Parl. Ja. 4, it is statute that whosoever exacts more Custom than is due, shall be punished as an oppressor and as Breaker of the Law, as also the removing of merch stones or setting of merch stones upon another man's ground, is punishable by the Civil Law tit. ff. *de Termino moto*. And by the 42 Act Parl. 4 Ja. 4 and 54 Act Parl. 11. Ja. 6. it is statute and ordained that it shall be punishable with Death, nevertheless the saids Defenders, or ane or other of them did seize upon and masterfully reive Corn and Beer from the Pursuer's servants, and disposed of it on the days lybelled, and John Ramsay and Robert Brown, two of the Pannells came on the day of June last by past to the Pursuer's Lands of S. and removed his Merch Stones and placed new Stones whereby they are guilty of Oppression.

At the first calling of this Action which was upon the 9 day forsaid, Mr. Alex^r Spotiswood¹ for the Pannell Home of Wedderburn, protested for recognition of the Pursuer's Lands in regard he is Vassall to Wedderburn, and now pursues him criminally, and then alledged that the Dittay as to this Pannell is not relevant in so far as it concludes Oppression for exacting more Customs than is due, seeing any exaction that was for Corns belonging to the Pursuer imported within the Burgh of Eymouth, and the Pannell offers to prove that he and his Predecessors stands infest under the great Seall in the

¹ Formerly admitted advocate under the usurpers; re-admitted 5th Jan. 1661.

Customs of the said Burgh, and that they and their Predecessors and Tacksmen of the said Customs have been in use and wont to exact the quantities lybelled for all imported Corns conform to the Custom of the Burgh of Dunbar, and any seizure that was made of the Beer was for payment of the said Customs.

Replis Sir Geo : M^cKenzie, That if Mr. Spotiswood insist upon the Pannells Infestment he ought to have it to see.

The Justices ordains the Infestment to be seen and continues the Diet till the morrow and from the morrow till the 14th instant.

Upon the 14th instant Mr. Robert Dickson alledges and resumes the former Defence founded upon Wedderburn's right, and that the seizure was made for payment of the just dues, and Mr. James Daes adds that the Act of K. Ja. the 4th mentioned in the Dittay prohibiting the taking of more Custom than is due, cannot be extended to the seizure lybelled, which was the taking of 2 Bolls Beer for refusing Custom.

Replis Sir Geo : M^cKenzie, that no respect can be had to the Infestment, in so far as it is made a ground of exacting Customs because albeit a charter may be made a ground for exacting frae Vassalls by their consent, yet nothing can be a sufficient ground to impose Customs on others but an Act of Parliament. And if it were otherwise then the king might impose what Customs he pleased by himself alone without the Parliament, which cannot be, and the contrar was decided in the case of an Imposition granted by the King's Majesty to the Town of Linlithgow, which was found not to be valid because not warranted by Act of Parliament. And this is clearly demonstrable by the words of the said 42 Act Parl. 4 Ja. 4, prohibiting the Lieges to take any manner of Taxation other than was wont to be taken by the old Law. And in the 46 Act of the same Parl. it is statute that no customers within Burgh, take more Taxations, Customs or Duties than is statute and used in the old Law, otherways to be punished as Oppressors. So that the Law and not private gifts is the Rule of Customs, and where as it is insinuated that the Acts of Parliament relates to immemoriall possession cannot militate in this case where the uplifter of the Customs has

Lord Renton
ag. Home etc.
for exacting of
Customs.

been in the immemorial possession by virtue of an Infertment, and 2^o That Act only prohibites the taking of more than is due but not simply the taking. To both these jointly it is answered, that the Defence is not relevant except it were alledged that the Laird of Wedderburn stands *per expressum* infert, ffor no Infertment granted to the ffather can be a Warrant for the son's uplifting. 2^o As to the immemorial possession not relevant except it were particularly alledged that the Pannell was in possession of this speciall Custom by virtue of a speciall right, ffor a generall right *cum customis* does only as all other Generall Clauses, give right to such Customs as *provenient ex natura rei* such as the uplifting of all goods that are sett down in a Markett or are sett down in any man's ground who has a Burgh of Barrony, but it were most unreasonable to think that this generall Clause should warrant the uplifting of any Custom, especially Corns whose transportation are most favourable of all other goods, when the person from whom the Custom is taken gets no advantage from him who exacts the Custom, ffor he may as well exact Custom from every man who rides through the streets and lodges in that town, and the Justice Clerk having his own Victuall house in Eymouth which belongs to him, it were most unreasonable and unjust that because he carrys his Corns to his own house, he should therefore pay Custom, and for the carrying of it from that to the ship, nothing can be imposed on him, seeing the right of anchorage and portage belongs to himself, and he *per expressum* infert therein, and the Custom should have been determinedly proponed upon to be only of Corns transported abroad, ffor since Corns transported from one place to another within the kingdome pays no Custom to his Majesty, it being for the use of the Lieges and consumed within the country, much less should any subject, which in Land Impositions occasions a great dearth upon the naturall commodity. As to the 2^d Defence, the Pursuer humbly conceives it answers it self, and the Act of Parliament is opposed and that an Infertment can be no *Titulus coloratus* in this case because *resistit Lex* and is no *Titulus Coloratus*.

Replys farther Mr. Pat. Home for the Pursuer, that seeing

it is provided by the 54 Act Parl. 11 Ja. 6 lybelled, that no Customs and Impositions be exacted without a Warrant, and that the Pannell Wedderburn has no Warrant, he not being infest, and that the Act of Parliament expresly relates to the rights and possessions of persons and their predecessors, the Pannell Wedderburn can not justify himself, he having neither right nor possession.

Mr. William Beaton¹ for the Pannells Duplys that the Reply made by the Pursuer and first thereof making a difference betwixt strangers and the Pannell's own tenants and servants, the same ought to be repelled and the Pannell oppones his Charter and Right produced, by which Right that is given to him the Custom and Anchorage, etc., of all goods imported and exported by any person whatsoever, without any such distinction, and in ffortification thereof the Pannell offers to prove Use and Custom of exacting Custom not only of his own tenants and servants but of all persons whatsoever that imported or exported any goods or commodities. So that if the Pursuer was either Importer or Exporter the Pannell had as good right from him as from any other, and whereas it is alleged that without a speciall Act of Parliament no such Charter could give the Pannell right to the Custom, it is Duply that the Pannell oppones severall rights and infestments both of Customs and Anchorages granted both to Incorporations and private persons, who by virtue thereof being in possession of exacting the Rights contained in their Infestments, could no ways be conveenable civilly, far less could be liable to any criminall Pursuit, as could be condescended on in many parts of Scotland. And as to that part of the Reply that the Pannell produces no right in his person, it is duplyed, 1^o That the Pannell is known to be Heir Generall and Speciall to his ffather. 2^o But tho he were not, yet being appearand Heir he has good right to mantain his ffather's possession, as to the Act of James 6th cited, the Act it self is opponed which speaks only of customs and Impositions whereof there is no Warrant and whereof the uptakers thereof or their predecessors have not been in use and possession as the Pannell was, conform to the possession produced.

¹ Admitted 5th January 1661.

Mr. Patrick Home opposes the former Answer and the Act of Parl. cited.

The Justices find the Defence founded on the Charter cited with immemorial Possession relevant to infer the Crimes lybelled.

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INDEX

- ABERCROMBY or CROMBIE, ALEX-ANDER**, of Fetterneir, 296.
 — yr. of Fetterneir, 296.
 — Robert, messenger, 112, 123.
Abergeldy, laird of, killing deer, 230.
Aboyne, earl of, 214, 222, 230 and *n.*, 256, 306.
Achmoutie, Arthur, in Bellendrien, 72.
Adam, Robert, in Carnbulg, deforcement, 108.
Adamson, Alexander, destroying growing trees, 270, 306.
 — George, at the Bridge of Don, 314.
 — or Edmonstone, George, in Chappel, 245, 250, 251.
 — John and William, in Aikinshill, mutilation, 314.
Adultery, xix, 3, 34, 54, 55, 62, 67, 71, 90, 95, 123, 125, 132, 140, 143, 263, 268, 269, 276, 291, 292, 307, 313.
Agnew, Alexander, sheriff-depute of Wigtoun, 291.
Ainslie or Palmer, Margaret, 20.
Aird, John, 110.
 — Wm., yr. of Finachtie, 305.
Aitkin or Aytoun, James, usury, 89.
Alison, James, pursuivant, 235.
 — William, in Westerstoun, poinding an ox in labouring time, 140.
Allan, Arthur, 277.
 — John, mutilation of, 265.
 — Margret, witchcraft, 9, 11, 19, 22.
Anderson, Alexander, weaver in Peebles, usury, 256, 257.
 — Cornelius, rebellion, 189.
 — Gilbert, 255.
 — James, of Westertoun, 304.
 — John, 244.
 — Joseph, on witchcraft, xxvi.
 — Robert, 28, 34, 35.
Angus, John, flesher in the Canongate, robbery and murder, 35, 36.
Archibald, John, of Glen, 185.
Argyll, duke of, justice-general, x.
- Armstrang**, James, slaughter of, 262, 305.
Arnot, captain Andrew, rebellion, xxviii, 159 and *n.*, 182, 184, 186.
 — Hugo, his collection of *Trials*, xxi.
 — Samuel, rebellion, 233 and *n.*
Arrat, James, of Innerquhif, 306.
Arthur, James, theft, 83, 87.
 — Thomas, 190.
Assault, 41, 106, 108, 246. *See also* Beating and Wounding: Invading.
Assisers fined, 184, 187, 189, 212.
Assizes of error, xvi.
Athol, John, earl of, lord justice general, 54 and *n.*, 139, 200, 261, 264, 297.
Auchinleck, William, wearing forbidden weapons, 20.
Avish, John, 70.
- BAILLIE, ALEXANDER**, theft, 72, 99.
 — Helen, 63.
Baird, Thomas, advocate, 98.
 — William, 112.
Baites, Edward, slaughter, 23.
Baitman, major George, of Dams, 263.
Balcanquell, David, of that ilk, 225.
 — Margaret, 285.
Balfour, Hary, 8.
 — William, in Dilbreck, 191.
Ballantyne or Bannatyne, Christopher, yr. of Overhall, murder, 52, 83, 84, 108, 132, 151.
 — James, of Newhall, 9, 22.
 — John, yr. of Corhouse, 52, 53, 63, 83, 84, 108, 109, 132, 151.
 — Ninian, fiar of Kames, deforcement, 191.
 — sir William, slaughter, 52, 53, 63, 83, 84, 108, 109, 151, 239.
Barclay, Richard, 261.
 — slaughter of, 270, 276.
 — Robert, slaughter, 53.
 — captain Robert or William, of Achredie, slaughter, 261, 270, 276, 307.

- Barnhill, barony of Inchcolm, 51.
 Baron courts, xi.
 Barras, Adam, trial of, for venting false money, 3.
 Barrock, John, in Ardletham, 129.
 Barroman, John, macer, 2.
 Baxter, Alexander, invasion and oppression, 50, 52.
 Bayne, Alexander, 49.
 Beating and Wounding, 84, 93, 150, 215, 257, 259, 260, 277, 304, 305, 308. *See also* Assault: Invading.
 Beaton, William, advocate, 331 and *n.*
 Bedford, Robert, murder of, 125.
 Begg, Burns, on witchcraft, xxv-xxvi.
 Belfrage, James, 63.
 Bell, Alex., oppression, 120.
 — George, 52.
 — John, 7.
 — — of Middlehouses, rebellion, 232.
 — Jonet, 8.
 Bestiality, 34.
 Beton, James, doctor of medicine, perjury, 128, 134.
 Bettie, William, slaughter of, 305, 313.
 Billing, Edward, theft of a bond, 65, 72, 85, 86.
 Binning or Binnie, Robert, writer in Edinburgh, forgery, 38, 41.
 Birnie, Andrew, advocate, 12 and *n.*, 16, 21, 25, 30, 36, 42, 43, 50, 51, 73 *passim*.
 Bitterden, 24.
 Black, George, 87, 96.
 Blackie, Elspett, witchcraft, 6.
 Blackwood, James, rebellion, 189.
 — Wm., usury, 111, 113.
 Blaikhall, Thomas, in Bodichraw, 190.
 Blair, William, in St. Andrews, theft, 23, 24.
 Blantyre, lord, 96 and *n.*, 100, 105, 106, 121, 318.
 Boost, John, 7.
 Borthwick, Archibald, deforcement, 245-251.
 — Patrick, 188.
 Boswell, Mungo, yr. of Duncannear, 110.
 — Nicolas, 269, 303.
 Bourdon, William, beating and invading, 277.
 Boyd, James, of Temple, 185.
 — John, baillie in Edinburgh, 184, 186.
 — Thomas, of Pinkill, 66.
 Braidie, Arthur, murder, 111.
 Braidwood, John, in Covington, usury, 265, 284, 289.
 Braidy, John, mutilation, 246.
 Brand, Alexander, slaughter of, 268.
 — Robert, maltman in St. Andrews, adultery, 34.
 Brebner, Bessie, child-murder, 64.
 Bribery, 19.
 Brockie, Wm., 112.
 Brodie, David, theft, 83, 87.
 Brotherstane, Ja., flesher in Peebles, usury, 256, 257.
 Brown or Watson, Clara, 124.
 — James, usury, 154.
 — — of Horn, mutilation 255.
 — — minister at Calderwood, 290, 291, 313.
 — Jean, witchcraft, 3; child-murder, 4.
 — John, adultery, 71.
 — — merchant in Edinburgh, 147.
 — — vintner in Leith, 213.
 — — gardener at Holyrood, 294.
 — Jonet, in Corstorphin, adultery and murder, 90.
 — Malcolm, slaughter, 99.
 — Richard, adultery, 3.
 — Robert, usury, 110, 112.
 — — oppression, 328.
 Bruce, Andrew, advocate, 246 and *n.*
 — Bessie, fire-raising, 300.
 — David, 157, 158.
 — — in Forgundie, theft, 75, 78, 88.
 — — chamberlain to the earl of Winton, 151, 197.
 — James, messenger, 145.
 — sir William, of Stenhouse, 39 and *n.*
 — William, skinner in Edinburgh, 184.
 Brunton, Margaret, 17, 18.
 Bryson, Thomas, 29.
 Brysson, Margaret, witchcraft, 6.
 Buchanan, Arthur, of Sound, 188.
 — Robert, 143, 147.
 — William, deforcement, 259.
 Buntein, Robert, rebellion, 188.
 Burd, John, slaughter of, 23.
 Burges, William, merchant in Ayr, 191, 215.
 Burgund, Agnes, usury, 113.
 Burne, Walter, merchant in Edinburgh, 166.
 Burnett, Alexander, merchant in Aberdeen, 145, 155.
 — Andrew, burgess of Aberdeen, usury, 107.
 Burntfield, Thomas, robbery, 9, 11.
 Burton, Thomas, 35.

- Butter, Andrew, provost of Perth, 88.
 — James, slaughter, 10, 34, 45.
- CADDELL, DUNCAN, murder of, 56.
- Cairns, James, 143, 155.
- Cairny, John, 213.
- Caithness, earl of, 256; convocation, fire-raising, etc., 264, 289, 291, 295.
- Caldell, Andrew, vintner, 186.
 — Christian, 133.
 — Henry, beating and wounding, 259, 260.
 — Laurence, 132, 134, 143.
- Calderwood, William, apothecary in Edinburgh, 144.
- Caldwell, 234.
 — Wm., of Caldwell, rebellion, 232 and *n.*, 238, 240, 241, 245.
- Cameron, John Bain, 21, 22.
- Campbell, Colin, of Glenure, murder of, *x*.
 — Dougall, of Lag, deforcement, 97, 195.
 — — theft, 291, 303.
 — — 48.
 — — dame Grissell, relict of sir James Stewart of Kirktown, 159, 191, 195.
 — — Hugh, minister in Dalkeith, 14 and *n.*
 — — James, messenger, 259, 261.
 — — John, of Edinample, 35.
 — — yr. of Glentorchen, 37.
 — — of Kinloch, slaughter, 69, 70.
 — — macer, 2.
 — — Mary, in Dysart, 37, 38.
 — — Mungo, writer, 109, 135.
 — — Neil, of Kilmartine, deforcement, 225.
- Cannon, Gilbert, in Midtoun of Dalry, rebellion, 232.
 — James or John, of Barly, rebellion, 231, 246, 258, 261, 263, 276, 296, 302, 303, 305.
 — — of Mondrogat, 83.
 — — John, yr. of Mondrogat, rebellion, 231 and *n.*
 — — yr. of Burnshalloch, rebellion, 231.
 — — Robert, in Midtoun of Dalry, rebellion, 232.
 — — yr. of Mondrogat, 241.
- Canongate, a burgh of regality, 36 *n.*
- Carimuir, 226.
- Caringring, 226.
- Carmichael, Thomas, usury, 159, 225.
 — William, in Linlithgow, 257.
- Carmure, James, 50.
- Carntyne coal heugh, destroying of, 191, 192.
- Carstairs, John, rebellion, 233.
- Casse, Helen, witchcraft, 6.
- Cattle-lifting, 4, 49, 60, 61, 123, 133, 140, 195, 296.
- Chaip. *See* Cheap.
- Chalmers, Alex., glover in Elgin, slaughter of, 289.
 — Robert, 241.
- Cheap (Chaip), Henry, 185, 269.
 — James, advocate, 75 and *n.*
- Cheyne, George, of Girsto, 121.
- Child-murder, 3-5, 27, 28, 47, 49, 62, 64, 67, 71, 81, 123, 264.
- Chisholm, Alex., 96, 97.
 — Thomas, usury, 258, 261.
- Chitterfleet, 234.
- Christie, Henry, of Craigtoun, slaughter, 20, 21.
 — James, in Mostoun, slaughter of, 147.
- Chrystie, Alexander, slaughter of, 20.
- Cleland, Andrew, slaughter of, 146.
 — James, 60.
 — William, yr. of Faskine, slaughter, 276, 277.
- Clepon, George, hamesucken, 6.
- Clerk, Finlay, murder of, 319.
 — Janet, witchcraft, 2, 5, 9, 11.
 — John, macer, 312.
 — Marion, 9.
 — *alias* Cameron, Paul, murder and theft, 319.
- Coal-heugh, damaging of, 191.
- Cob, George, slaughter, 10, 11.
- Cochran, colonel Alexander, unawled for not reporting letters, 53.
 — George, in Corstorphine, 4.
 — James, deforcement, 47.
- Cock, Jonet, in Dalkeith, witchcraft, 13, 20, 21.
- Cockburn, Christopher, of Newbigging, 29, 30.
 — George, of Piltoun, 184.
 — James, of that ilk, 116, 185.
 — — 29.
 — John, of Ryslaw, 29, 30.
 — William, messenger, 28, 29, 46, 56, 155.
- Coin, counterfeit, 3, 122.
- Collace, Robert, in Auchingowll, 95.
- Colquhoun, Humphray, rebellion, 185, 187 and *n.*
- Coltherd, John, murder of, 52, 79, 83, 108, 109, 132, 151.
- Colville, Alexander, of Blair, viii, 1 and *n.*, 3, 5, 6, 9, 13, 19, 21, 22, 23, 37 *passim*.
- Colzier, captain, in the service of Holland, 136.

- Comrie, James, messenger, 135.
 Confessions of prisoners, xiv.
 Convocations, 115, 197, 221, 230, 251, 264, 289, 295.
 Cook, James, 213.
 Correction house in Leith Wynd, 34 and *n.*
 Court of Justiciary, ix-x.
 Coutts, captain George, in the service of Holland, 136.
 — lieutenant-colonel, in the service of Holland, 136.
 Cowan, James, merchant in Edinburgh, 166 and *n.*
 Cowpar, Gilbert, 223.
 — sir John, of Gogar, 184.
 Craig, Hugh, merchant in Edinburgh, usury, 265, 270, 284.
 — James, burghess of Banff, 60.
 — Nicol, 39, 40.
 Craigie, John, of Dumbarney, wounding and wrongous imprisonment, 72, 75.
 — Patrick, burghess of Kirkwall, 109.
 Craw, John, merchant in Edinburgh, 188.
 Crawford, David, of Kilbryd, murder of, 109.
 — George, in Cumnock, rebellion, 185, 186.
 — Hugh, of Sundieshaw, slaughter, 47, 70, 81.
 — or Turnbull, Jean, harbouring traitors, 290.
 — John, messenger, 290.
 — Malcolm, rebellion, 290.
 — William, of Brockloch, deforcement, 157, 191, 215.
 Crichton, Francis, slaughter, 94, 100.
 — James, of Kinnairdie, slaughter, 94, 100.
 — — sheriff of Nithsdale, 189.
 — Thomas, 8.
 Criminal law administration, vii.
 Crookshanks, Alexander, 185, 261.
 — John, 241.
 — Mr., rebellion, 233.
 Cubbison, John, theft, 153.
 Cumming, sir Alexander, of Culter, 46.
 — (Cumine), Duncan, in Craigowry, 128.
 — (Cumine), Pat., of Ironside, invading and wounding, 258, 259.
 — (Cumine), Robert, unlawed for not reporting letters, 128.
 — — of Altyre, 259-262.
 Cunningham, Andrew, of Legland, 47.
 — sir John, viii, 1 and *n.*, 3, 5, 6, 9, 13, 19, 20, 21, 25, 28, 32-35 *passim*.
 Cunningham, John, of Bedland, rebellion, 232, 241.
 — — writer to the signet, 2 and *n.*
 — — sheriff-depute, 264.
 — or Swinton, Margaret, murder of, 90.
 — William, advocate, 67 and *n.*
 Customs, exaction of, 328.
 Cuthbert, John, in Tillielumb, adultery, 95.
 DÆS, JAMES, minister at Earlstoun, usury, 110 and *n.*, 112, 113.
 Dalgleish, Alexander, theft and wounding, 35.
 — Colin, 294.
 — Robert, advocate, 14, 18, 37, 47-48.
 Dalziell, sir Rot., 238.
 — sir Thomas, of Binns, xviii *n.*
 Davidson, Alexander, in Spittle, slaughter of, 314.
 Deer-killing, 37, 222, 230, 256, 262, 306.
 Deforcement, 28, 29, 47, 59, 87, 96-98, 108, 109, 112, 123, 125, 134, 135, 143, 145, 148, 150, 151, 154, 155, 157, 159, 191, 195, 197, 215, 223, 225, 230, 245, 250, 251, 257, 259, 261, 263, 290, 306.
 Dempster, John, of Carradon, rebellion, 232.
 — Robert, of Balbougie, 275.
 Denham — theft, 303, 304.
 Denholm of Westshiells, 235.
 Depredation, 289.
 Deserting from the army, 11.
 Deuteroscopia, 16 and *n.*
 Dewar, James, of Barnhill, 50.
 — — 184.
 Dick, Gavin, tailor in Edinburgh, perjury, 88.
 — John, hamesucken, 6.
 — — harbouring traitors, 290.
 Dickson, Bessie, 146.
 — Jean, 17.
 — John, robbery, 11.
 — Robert, advocate, 66 and *n.*, 146, 165, 181, 185, 197, 329.
 — oppression and hamesucken, 96.
 Dinmure, David, advocate, 6 and *n.*, 32, 37, 51, 73 *passim*.
 Dobie, William, weaver in Glasgow, treason, 54.
 Dodds, William, murder, 68, 71, 72.
 Don, Thomas, cattle-lifting, 61.
 Donaldson, Robert, murder of, 314.
 Doomster or Dempster, office of, xvi.

- Douglas, Alexander, of Blackestoun, 185.
 — of Doun, 60, 61.
 — or Barclay, Anna, 308.
 — Archibald, of Spott, slaughter, 200, 212, 245.
 — James, in Dalkeith, 15, 18.
 — lady Mary, 82 and *n.*
 — Robert, of Auchintullich, slaughter, 128.
 — William, slaughter, 200, 212, 214, 245.
 Drummond, Barbara, witchcraft, 121.
 — Duncan, of Balhadies, hame-sucken, 215.
 — Patrick, sorning and murder, 198, 260 *n.*
 — Walter, slaughter, 109.
 — William, 189.
 — in Drummond, 198.
 Duddingston, 19 and *n.*
 Duelling, 200-201, 212.
 Duff, Alexander, mutilation, 223.
 — George, shoemaker, 292.
 Duffus, lord, 151 and *n.*
 — James, slaughter, 94, 101.
 Dumfries, William, earl of, 230 and *n.* 241.
 Dun, John, of Wester Cringall, theft, 269.
 Dunbar, James, invading and wounding, 259, 261.
 — Pat., of Blairie, beating and wounding, 305.
 — William, in Old Milnes, 262, 263.
 Duncan, John, minister at Dundrennan, 290.
 Durham, Robert, rebellion, 232.
 Dury, Henry, 71.
- EDINBURGH CASTLE MARK, 24 and *n.*
 Edmonston, James, of Wolmet, slaughter, 3.
 Edmonstone — theft, 48, 49.
 Elder, James, baxter in the Canongate, 89.
 Eleis, John, advocate, 185, 193, 277 and *n. passim.*
 Elphinston, George, of Selmes, 239.
 Erskine, colonel Luis, in the service of Holland, 136.
 Execution of criminals, xvii.
- FALCONER, SIR ALEXANDER, of Halkertoun, 52 and *n.*, 78, 79.
 — David, advocate, 65, 72, 73.
 — sir Jo., 238.
 — Thomas, of Kincoith, 300, 303.
- False imprisonment. *See* Wrongous imprisonment.
 Farquharson of Balfour, 214.
 — Alexr., of Innergald, slaughter, 221.
 — Charles, of Monaltry, slaughter and deer-killing, 222.
 — Donald, of Alnacorth, slaughter, 222.
 — Francis, of Finzean, slaughter, 262.
 — Geo., cattle-lifting, 61.
 — John, of Bellamore, slaughter, 222.
 — of Inverey, slaughter, 214, 306.
 — in Glengarden, slaughter, 147.
 — Thomas, in Colliestone, 111.
 — William, murder, 111.
 — at the Mill of Tullich, slaughter, 306.
 Farquharsons, for slaughter of Gordon of Braiklie, 158; deer-killing, 262.
 Female evidence, exclusion of, xiv.
 Ferguson, John, cattle-lifting, 61.
 — Katharine, 147.
 — Richard, false coin, 122.
 Fife, Nathaniel, advocate, 8, 129, 152.
 Findlay, Isoball, 120.
 — Thomas, nottar in West Calder, for beating the minister of Caldercleir, 290, 291, 303, 308.
 — in West Calder, treason, theft, etc., 290, 313.
 Fire-raising, 65, 97, 260, 265, 289, 295, 300.
 Fleming, Thomas, 277, 278.
 Flesh, sale of, by unfree men prohibited, 36 and *n.*
 Fleshers of Edinburgh indyted for breaking Lent, 122, 123.
 Fletcher, sir John, king's advocate, 14 and *n.*
 Forbes, Alexander or John, of Balfigg, intercommuning, 305.
 — sir Alex., of Tolquhone, bleeding and wounding, 93 and *n.*, 166, 190.
 — Alexander, 213.
 — Donald, 289.
 — George, slaughter, 94.
 — John, of Buchorn, 261.
 — sir John, of Craigievar, 60 and *n.*, 61.
 — John, of Leslie, 61, 62, 155.
 — Robert, tutor of Craigievar, 69.
 — — — bleeding and wounding, 150, 190, 218.
 — Thomas, 74.

- Forbes, Thomas, of Blacktoun, 188.
 ——— in Setline Brae, 246.
 ——— Walter, of Blackton, 166.
 ——— William, slaughter, 155.
 ——— illegitimate son of the laird of Leslie, 305.
 Forester, lord, 22 and *n.*, 23.
 Forgery, 27, 38, 41, 48, 57, 255.
 Forrester, Rachell, usury, 156.
 Forsyth, Thomas, in Bridgend, 246.
 ——— in Faulkland, blooding and wounding, 257.
 ——— William, rebellion, 233.
 Foulter, John, 96.
 Foulis, sir James, of Colinton, 303 and *n.*, 304.
 Frame, James, cutting wood, 240.
 Fraser, Alexander, messenger, 108.
 French, Nicolas, slaughter, 23.
 ——— Robert, of Frenchland, deforcement, 306-307.
 Frendraught, viscount of, slaughter, 94, 100 and *n.*; wrongous imprisonment, 297.
 Fullerton, George, theft, 308.
 ——— colonel John, of Dudwick, slaughter, 270, 276; theft, 307.
- GAE or GALL, JOHN, in Braichlie, deer-killing, 256, 306.
 Gaites, Thomas, slaughter, 23.
 Galloway or Ord, Christian, adultery, and child-murder, 263, 307, 313.
 ——— John, writer, 127.
 Garden, John, of Tilliefroskie, slaughter, 214, 303.
 Garne or Garden, Alex., minister of Forgue, 101.
 Garras, Robert, 94.
 Garrioch, Alexander, of Little Indivie, intercommuning, 305.
 Gawine or Keith, Beatrix, 89.
 Geddes, Helen, adultery, 3.
 Gellie or Haliburton, Isobel, 257.
 ——— Ninian, messenger, 159, 191, 195, 215.
 ——— Walter, 257.
 Gernilton, Thomas, wearing forbidden weapons, 20.
 Gilchrist, James, merchant in Edinburgh, 187, 188.
 ——— John, in West Calder, rebellion, 215, 290.
 Gillanders, John, slaughter, 56.
 Gilmour, sir John, of Craigmillar, 238 and *n.*
 Gladstaines, George, minister at Glennairn, theft, 296, 303, 306.
 Glamis castle, 11.
- Glass, John, Pittentien, 131, 132.
 ——— Pat., writer in Edinburgh, oppression, 131.
 Glen of Ogle, 10, 11.
 Glencairn, earl of, 147, 148, 152, 156, 157, 215, 218, 221, 225 and *n.*, 230, 246, 247, 251, 256-258, 260, 262, 263, 265, 268, 270, 277, 284, 289, 300, 302.
 Glendinning, James, yr. of Parton, slaughter, 259.
 Gordon, Alexander, of Torries, beating and wounding, 41, 43, 46.
 ——— of Glengaroch, 199.
 ——— advocate, 41.
 ——— Duncan, in Blackhillock, theft, 314.
 ——— George, usury, 215, 246, 247, 258, 259.
 ——— James, of Cults, slaughter of, 222.
 ——— of Newton, slaughter, 69.
 ——— in Laggan, 133.
 ——— Jean, 133.
 ——— John, of Brachlaw, slaughter of, 158, 214, 221, 262, 306.
 ——— of Gavarey, rebellion, 231.
 ——— of Hairland, slaughter of, 258.
 ——— yr. of Holme, rebellion, 232.
 ——— of Kirkconnel, 95.
 ——— of Knockbreck, at the Pentland rising, 160 and *n.*, 183-186.
 ——— in Midtoun of Dalry, rebellion, 231.
 ——— provost of Banff, 299.
 ——— theft, 197.
 ——— Robert, of Bar, rebellion, 232.
 ——— rebellion, 160, 183, 184.
 ——— in Reines, beating and wounding, 215.
 ——— Thomas, 188, 199.
 ——— William, in Midtoun of Dalry, rebellion, 231.
 ——— hamesucken, 63, 66.
 Gordons, theft, 246.
 Gourlay, Helen, 308.
 Graham, Andrew, in Meiklebaron, 191.
 ——— Archd., 195.
 ——— Elspeth, Dalkeith, witchcraft, 5.
 ——— George, of Cairny, 166.
 ——— merchant in Edinburgh, theft of a bond, 65, 72, 78, 79, 80, 85.
 ——— major Henry, in the service of Holland, 136.
 ——— James, 127, 139.
 ——— Janet, 14.

- Graham, John, stealing and cutting of greenwood, 97.
 ——— merchant in Glasgow, treason, 135, 189.
 ——— slaughter of, 139.
 ——— Walter, of Kirktown, 97.
 ——— messenger, 97.
 ——— sir William, of Gartmore, deforcement, 135.
 Grant, Finlay, 295.
 ——— George, mutilation, 223, 224, 225.
 ——— wrongous imprisonment, 246.
 ——— major, 239.
 ——— John, of Kirdell, deforcement, 263, 290, 291, 296, 300, 303.
 ——— Pat., tutor, of Grant, 264, 296.
 ——— of Hillhall, 224.
 ——— Robert, of Badavochell, 225.
 Grants, for murder, 257.
 Gray, Gavin, beating and wounding, 84.
 ——— Ja., in Grayesook, 84.
 ——— James, merchant in Edinburgh, 148.
 ——— or Inglis, Janet, child-murder, 27, 28.
 ——— John, merchant in Edinburgh, 188.
 ——— Patrick, lord, deforcement, 151, 157, 158, 197.
 ——— Robert, 245.
 Greenwood, cutting of, 81, 97, 106, 240, 270, 306, 314.
 Gregory, Alexander, of Netherdale, murder of, 94 and *n.*, 96, 100.
 ——— David, burgess of Aberdeen, 94 and *n.*
 Grier, Adam, rebellion, 290.
 ——— Henry, in Balmaclet, rebellion, 231.
 ——— John, rebellion, 189, 241.
 Grierson, James, of Dargoner, rebellion, 246.
 Grieve, Margaret, witchcraft, 11.
 Gun, John, 289.
 Guthrie, John, false imprisonment, 5 and *n.*
 ——— rebellion, 183, 232 and *n.*
- HADDINGTON, JOHN, 4th earl of, 33.
 Haitlie, Alexander, 74.
 Haldane (Hadden), John, of Glenegies, 48.
 Haliburton, Gilbert, bailie of Burnt-island, wrongous imprisonment, 131.
 ——— James, writer in Edinburgh, 257.
 Hall, Philadelphia, 276.
- Hamesucken, xi, xix, 6, 20, 42, 62, 63, 66, 96, 116, 198, 215, 259, 263, 303, 304, 315.
 Hamilton of Balderston, 306.
 ——— of Dalziell, 60, 61.
 ——— of Gilkerscleugh, mutilation, 53; slaughter, 84.
 ——— Alexander, depute justice-clerk, 2, 5.
 ——— Gavin, in Mauldslic, rebellion, 160, 182, 184.
 ——— George, in Inchstomack, wrongous imprisonment, 297, 298, 300.
 ——— James, of Ellerston, deforcement, 145, 148.
 ——— in Kittimoore, rebellion, 160, 183, 185.
 ——— sir John, of Orbiston, 2.
 ——— John, 94.
 ——— or Bedford, Margaret, adultery and murder, 125; to be beheaded, 126.
 ——— Robert, cutting wood, 240.
 ——— William, of Murehouse, 115.
 ——— advocate, 165 and *n.*
 Happyland or Dury, Eupham, adultery, 71.
 Harboursing thieves, 133; traitors, 290.
 Hardie, Andrew, of Tullochshill, murder of, 68, 71.
 ——— William, rebellion, 290.
 Harper, James, of Elsrig, 145, 218.
 ——— John, usury, 247, 258, 259, 302, 303, 305.
 ——— sir John, 240.
 ——— John, advocate, 141, 201 and *n.*
 ——— Thomas, usury, 89, 93, 96, 98, 105, 107, 151, 154, 159.
 ——— cordiner, 188.
 ——— Wm., rioting, 157, 191, 197, 200, 230, 258, 261, 263, 270, 276.
 Hart, John, rebellion, 188.
 Harvey, John or Robert, rioting, 157, 191, 197, 200, 230, 258, 261, 263, 270, 276, 302, 303, 305.
 Hay, Andrew, of Cairnfield, slaughter, 300, 302, 305.
 ——— Colin, merchant in Edinburgh, usury, 144, 147, 148, 152, 156, 190, 215, 218, 221, 224, 225.
 ——— Francis, advocate, 196.
 ——— Harry, advocate, 3.
 ——— colonel James, 238.
 ——— James, slaughter, 314.
 ——— not reporting criminal letters, 303.
 ——— John, of Hayston, 134.
 ——— of Rainichie, 215.
 ——— writer in Edinburgh, 257.

- Hay, William, merchant in Edinburgh, 166.
 — of Brierbuss, 255.
 Heckney, John, at Bridgend of Glamis, 257.
 Henderson, David, slaughter, 139.
 — Mark, messenger, 245, 250, 251.
 Hendry, Walter, 101.
 Henry, William, murder, 127.
 Hepburn, Adam, of Humbie, 166.
 — Jas., of Bairfoot, 238.
 Herbertson, John, 277.
 Heritable jurisdictions, abolition of, xi.
 Herreis, George, usury, 230.
 Herries, Robert, master of, 88 and *n*, 96, 111, 120, 122, 127, 196 and *n*, 224.
 — of Haldkyes, deforcement, 223, 230.
 Herriott, lieutenant-colonel George, 188.
 Herron, John, theft, 153.
 Hilstein, Walter, deforcement, 155.
 Home of Wedderburn, oppression, 308, 314, 328.
 — Alexander, of Linthill, theft, 300, 302.
 — in Ayton, 143.
 — George, of Graden, 247, 250.
 — sir Hary, of Herdrig, 166.
 — Hary, 212.
 — sir James, of Eccles, slaughter of, 200, 212, 223, 245.
 — John, of Eccles, 200.
 — sir John, of Renton, justice clerk, 79, 80, 140, 159, 185, 200, 308, 314, 328.
 — colonel John, of Plenderghaist, 184.
 — Patrick, in Eymouth, 328, 330, 332.
 — advocate, 201 and *n*, 278.
 — Wm., in Burntisland, slaughter of, 157.
 — in Coldinghame, pointing an ox in labouring time, 140.
 — forging false writs, 27.
 Horse-stealing, 13, 35, 37, 43, 88, 97, 268, 290, 316, 319.
 Housebreaking, 56, 63, 198.
 Houston, Alex., in Pitgerse, mutilation, 265.
 — Patrick, 240, 241, 245.
 Howie, James, slaughter, 94, 101.
 Hunter, James, 5.
 Hutchison, John, of Lairlaw, rebellion, 232.
 Hutchison, John, in Newbottle, rebellion, 233.
 — Margaret, witchcraft, 6, 7, 9, 11, 19.
 INCRST, 315.
 Inchkeith, 268 and *n*.
 Indictments, verbosity of, xiii.
 Inglis, James, chamberlain to the earl of Winton, 151, 158, 197.
 Innes, colonel, of Dipple, 258, 259, 261.
 — Alex., usury, 110, 112.
 — of Dalkmore, hamesucken, 259.
 — George, of Cauldcoatts, 257.
 — James, 292.
 — Pat., of Neathermeast, hamesucken, 259.
 — sir Robert, of Innes, 258, 259.
 — Walter, of Ortown, 263.
 — 292.
 — William, writer in Edinburgh, 93, 94.
 — 101, 294.
 Intercommuning, 305.
 Interest, rate of, xx.
 Invading and wounding, 50, 64, 66, 190, 258, 259.
 Inverkeithing, battle of, 10 and *n*.
 Irvine, John, of Kincaussie, 46, 155, 305.
 JACK, THOS., messenger, 257.
 Jackson, Alexander, usury, 263, 265.
 — Pat., mutilation of, 255.
 Jacob, Adrian, 9.
 Jamiesone, James, theft, 222.
 — John, in Tillieberry, 145.
 Johnston, Ar., of Hayhill, slaughter, 262.
 — David, witchcraft, 4.
 — Edward, of Earshag, slaughter, 313.
 — Gavin, of Whitsonhill, slaughter, 262, 305.
 — James, of Sheynes, 239.
 — John, merchant, in Edinburgh, 166.
 — of Elsiehiells, for not reporting criminal letters, 75, 155.
 — in Foresterhill, making double alienations, 145.
 — of Old-Well, slaughter, 262.
 — Robert, of Rannieshill, slaughter, 262.
 — Thomas, of Ersliag, slaughter, 305.

- Johnston, Wm., in Collet, usury, 255, 257, 258, 261, 262.
 Justice-clerk, office of, 78 *n.*, 79.
 Justice-depute, office of, viii, 32 *n.*, 139; abolition of, x.
 Justiciar, office of, vii-viii.
- KEITH, SIR ALEXANDER, of Ludwharn, 184.
 — George, theft, 155, 156.
 — Thomas, in Canuster, slaughter, 89.
 — William, in the Milltown of Gavill, slaughter of, 89.
 Kellie, Alison, 27.
 — earl of, 189 and *n.*
 Kelly, Helen, 285, 286.
 Keltown, 107.
 Kenmure, Alexander, viscount of, stealing writs, 88 and *n.*, 95-98, 111, 120, 127, 132, 139, 146.
 Kennedy, Alexander, porter in Edinburgh castle, forgery, 57, 60.
 Kennoway, Wal., 238.
 Ker or Kerr, Andrew, in Midbeltie, murder of, 111.
 — or Duncan, Ann, 290.
 — Arch., 111.
 — Elizabeth, 111.
 — James, of Lintown, deforcement, 134, 135.
 — John, of Ardicharrald, 306.
 — Jonet, witchcraft, 6.
 — Robert or Wm., of Kersland, rebellion, 232 and *n.*, 238, 241, 245.
 Kid, John, 43.
 Kilgour, Patrick, perjury, 86.
 Kincaid, Pat., of Auchline, sheep-stealing, 291.
 — Tho., of Wariston, 115.
 Kinloch, David, of Bairdoch, 305, 315.
 Kinnaird, Thomas, yr. of Culbine, slaughter, 129.
 Kirkpatrick, captain Evertson, in the service of Holland, 136.
 — colonel John, in the service of Holland, 136.
 — major John, in the service of Holland, 136.
 Knockmadie, 234.
 Knox, Robert, 142, 143.
- LAMB, JOHN, burges of Perth, wounding and wrongous imprisonment, 75, 76.
 Lanark, 164 and *n.*
 Lang, Andrew, on witchcraft, xxiv.
 Lauder, Alexander, 265.
- Lauder, lieutenant George, in the service of Holland, 136.
 — Robert, portioner of Belhaven, usury, 265.
 Lauderdale, earl of, 4 and *n.*
 Laurie, William, of Blackwood, 239.
 — (Laury) — in Cothouse Mill, 139.
 — — writer in Edinburgh, 296, 303, 306.
 Law's *Memorials*, xxi, xxvii.
 Lawrie, Henry, perjury, 225.
 — Jonet, 106, 108.
 Lawson, Marion, child-murder, 47, 49.
 Learmonth, John, in Earliston, 114, 115.
 — major Joseph, rebellion, 163, 238, 239, 240, 290.
 — Thomas, advocate, 201.
 Leidschoom, Thomas, theft, 155.
 Leitch, David, 63.
 — James, 129, 134, 146.
 — William, 129, 134, 146.
 Leith, John, in Cairncross, slaughter, 261.
 — — in Carnwish, 314.
 Leith citadel, 23 *n.*
 Lennox, Thomas, glover in Edinburgh, 82, 95, 255.
 — — rebellion, 185, 187.
 Lent, fleshers indyted for breaking, xx, 122, 123.
 Leslie, Adam, 185.
 — Lauchlane, 88.
 — Patrick, in Newmilne, slaughter, 314, 315.
 — Robert, of Auldcanie, 259.
 — — in Auldrain, 257.
 — of Cauldcoatts, hamesucken, 259.
 Leven, earl of, 88.
 — Agnes Renton, countess of, 58.
 Ley, John, in Berriehill, slaughter, 191.
 Libberton, John, slaughter of, 223.
 Liddell, Andrew, James and George, theft and slaughter, 303, 304.
 — James, of Phinnickhaugh, theft and slaughter, 269, 303.
 Likely, Hary, chamberlain to Haddo, 297.
 Lindsay, Alexander, of Pittairly, slaughter, 28, 84, 88.
 — — of Williamston, slaughter of, 69.
 — — slaughter, 314.
 — Andrew, horse-stealing, 43.
 — Charles, 215, 224.
 — — slaughter, 241, 250, 255, 258, 277, 302, 304, 306.

- Lindsay, George, slaughter of, 10, 11, 34, 45, 48.
 — Henry, 10.
 — John, rebellion, 185, 186.
 — or Forbes, Margaret, 69.
 — Patrick, slaughter of, 84, 88.
 — Robert, gunsmith in Aberdeen, 263, 313.
 — William, murder of, 128.
 — — in Brithwood, horse-stealing, 43.
 Linnithgow, Alexander, earl of, 188, 230, 241.
 Linn, John, precenter at Dudingston, 40.
 Liston, Patrick, usury, 147.
 — — of Langton, rebellion, 232.
 — — in Overlistoun, rebellion, 190, 232.
 — — in Calder, 238-240.
 — William, in Crofthead, rebellion, 232, 238-240.
 Littlejohn, John, slaughter of, 303.
 Livingston, Agnes, 32, 36.
 — Alexander, writer, 33, 36.
 — lieutenant-colonel Thomas, in the service of Holland, 136.
 Loch, Agnes, witchcraft, 4.
 Lockhart, Alex., of Wicketshaw, rebellion, 232 and *n.*
 — sir George, 43 and *n.*, 165-168, 172.
 — Jas., of Cleghorn, 238.
 — sir James, of Lee, 78 and *n.*
 — William, writer to the signet, 63.
 Logan, John, in Ardmannoch, mutilation, 195, 196.
 Logie, Peter, wrongous imprisonment, 112, 120, 122.
 Lord advocate, office of, xiii.
 Love, Andrew, bestiality, strangled and burnt, 34.
 Lowis, Ninian, of Merchiston, 56.
 Lumsden, rev. Charles, of Duddingston, 12 and *n.*
 — George, messenger, 259, 261.
 Lyle, Walter, robbery, 47.
 Lyne, Robert, in Rigside, cutting of greenwood and wounding, 106.
 Lyon, Alex., murder of, 199.
 — George, of Wester Ogle, 22.
 — John, of Craigston, 63, 108.
 — — of Muiresk, 133, 140, 198, 260.
 — — merchant in Edinburgh, 166.
 M^cADAM, DONALD, deforcement, 151, 154.
 M^cAdam, John, deforcement, 155, 158.
 — Quintein, 154.
 M^cAla, George, merchant in Edinburgh, 131.
 M^cAllan, Allan, 316.
 M^cAllon, Robert, in Craigfad, murder and fire-raising, 265.
 M^cAlpine, Patrick, theft, 122.
 M^cArchar, James Dhu, in Innergald, slaughter, 306.
 M^cBrair, David, of Arnigill, 106, 108.
 — Robert, assault and cutting of greenwood, 106, 108.
 M^cCallum, Donald, cattle-lifting, 123.
 M^cCandie, John, theft, 265.
 M^cCartney, George, in Blairkennie, rebellion, 189.
 M^cClellan of Barscobb, 182, 231 and *n.*, 238-241.
 M^cComie, Wm., weaver in Moraven, theft, 256.
 M^cCoull or M^cKoull, John, rebellion, 189.
 — — slaughter of, 255, 302, 306.
 — William, 277, 304.
 M^cCulloch, Alex., writer in Edinburgh, 255.
 — Alexander, in Carfairn, rebellion, 189.
 — James, theft, 96, 100, 106, 121.
 — major John, in the Pentland rising, 159, 182, 184.
 M^cDonald, Alexander, of Keppoch, murder of, 127.
 — Angus, 316, 317.
 — Donald, fiar of Sklaity, 82 and *n.*
 — sir James, of Sleat, xviii, 82, 127.
 — or M^cDougall, John, unawful for not reporting criminal letters, 46.
 — John oig, 265.
 M^cean, George, in Coldinghame, poinding an ox in labouring time, 140.
 M^cGibbon, Finlay, murder and robbery, xv, 319-327.
 — Gibbon, in Lawers, 109,
 — Gilbert, 109.
 M^cGill, John, merchant in Edinburgh, 166.
 M^cGillichallum, Angus, fire-raising, 97.
 M^cGregor, Alaster More, fire-raising and murder, 260.
 — Callum oig, sorning, hamesucken, incest, 315.
 — Christian, 315.
 — Donald, 303.
 — Elizabeth, 315.
 — Gregor Beg, cattle-lifting, 133, 140.

- M^oGregor, Pat. Roy, cattle-lifting, 133, 140; sorning and murder, 198, 260 *n.*
 — Peter, theft, 120-122.
 M^oGrowderoy *alias* Robertson, John, slaughter, 262.
 M^olleonell, Donald, 35, 37.
 M^oIndlay, William, messenger, 198.
 M^oIneard, Gilmartin, 46.
 M^oInked, Archibald, murder of, 319.
 M^oIntire, John, slaughter, 302.
 M^oIntosh, Angus, murder of, 127, 146, 257.
 — — — bailie of the regality of Spynie, 223, 225, 246.
 — — — theft, 263, 268, 270.
 — — — Jo., fire-raising and murder, 260.
 — — — Lauchlan, cattle-lifting, 60, 133, 140, 198, 260.
 — — — slaughter of, 223, 225.
 M^oinveir, Robert, deforcement, 155.
 M^oKail, Hugh, rebellion, 185 and *n.*, 187.
 Mackenzie, in Brackley, slaughter of, 302.
 — — — sir George, 1 and *n.*, 3, 4 *n.*, 6 *n.*, 13 *n.*, 15, 20, 22, 23, 28, 30, 34 *passim.*
 — — — George, adultery, 264.
 — — — John, slaughter of, 158, 221.
 — — — theft, 303, 306.
 — — — Kenneth, yr. of Suddie, invasion and oppression, 64, 66.
 — — — Rorie, 60, 123.
 — — — Thomas, of Pluscarden, hame-sucken, 262, 263.
 Mackie, Alexander, shoemaker in Aberdeen, slaughter of, 300.
 — — — James, in Horn, 255.
 M^oKindlay, Donald, merchant in Rothessay, deforcement, 191.
 — — — William, messenger, 151, 154, 158.
 M^oKinnan, Andrew, 198.
 M^oLaughlan, Hector, 132, 134, 146, 147.
 M^oLean, Hector, minister, 60.
 — — — John, 60.
 — — — Myle, theft, 96.
 M^oLeir, Gottrey, messenger, forging writs, 83.
 M^oLellan, John, of Balmageichan, rebellion, 231 and *n.*
 M^oLener, Colin, theft, 224.
 M^oMachy, John, in Monyfeif, 269.
 M^oMillan, James, in Marduchat, rebellion, 189.
 — — — Robert, rebellion, 187.
 M^oNab, James, in Stirling, 321, 327.
 M^oNab, John, of Steilshill, 22.
 M^oNaught, John, rebellion, 232.
 — — — Patrick, 63.
 — — — — in Carnock, rebellion, 232, 241.
 — — — Wm., in Midtoun of Dalry, rebellion, 232.
 M^oNester, Archibald, 35, 37.
 M^oNicol, Patrick oig, rape, 37, 38.
 M^oRae, John, portioner of Kilpatrick, theft, 264.
 M^orobwig, John, 70.
 M^oRory, John, 291.
 M^oThomas, Gilchrist, 222.
 M^oUrrick or M^oGurruch, William, 316, 318.
 M^oVorish, John, mutilation, 143, 147.
 Macers, appointment of, 59 and *n.*
 Maire or Rochead, Elizabeth, adultery, 276.
 Maitland, Charles, of Hatton, 189.
 Malcolm, Alexander, rape, 269, 303.
 — — — Michael, rape, 269, 303.
 Manson, James, messenger, 109.
 Marischall, earl, 155.
 Marshall, Gilbert, slaughter of, 277.
 Martin, John, writer in Stirling, 215.
 Maxwell, Gabriel, rebellion, 233.
 — — — or Armstrang, Jonet, 262.
 — — — Pat., 57.
 — — — William, of Auldhouse, advocate, 53, 76 and *n.*, 82, 97, 165, 168, 178.
 — — — yr. of Moncreif, rebellion, xxix, 183, 231 and *n.*, 241.
 — — — — wrongous imprisonment, 215, 224, 250, 255.
 — — — slaughter, 258.
 Mearns, George, 94, 101.
 Mein, Marion, 48.
 Meldrum, John, in Veau, 62.
 Melross, Wm., in Drumelzier, usury, 256.
 Melvill, Beatrix, 12, 13.
 — — — John, merchant in Edinburgh, 84.
 — — — William, of Dysert, 238.
 Menzies, captain, 23.
 — — — Alexander, slaughter of, 69, 262.
 — — — Duncan, 69, 262.
 — — — colonel James, of Culdair, 21.
 — — — John, of Shaw, 70.
 — — — Robert, slaughter of, 69, 262.
 — — — William, 21.
 Middleton, James, messenger, 87, 96.
 — — — John, earl of, 11 and *n.*, 45 and *n.*, 48.
 Mill, John, deforcement, 134, 143, 150.
 — — — Mathew, 61.
 — — — Robert, master mason, 269.
 Miller, Jonet, witchcraft, 3, 6.

- Miller, Walter, usury, 110, 112, 230.
 Miln, Alexander, 190.
 Mitchell, George, 61.
 — James, rebellion, 233 and *n.*
 — John, yr. in Lochead, murder, 128.
 — William, hanged at Dalkeith, 15.
 Mitchelson, Samuel, deforcement, 251.
 Moir, William, advocate, 222 and *n.*
 Moncreif, Thomas, clerk of exchequer, 70 and *n.*
 — William, slaughter, 156,
 Moneis, Thomas, messenger, 314.
 Monorgan or Brown, Jean, mutilation, 255.
 Monro, Hugh, of Thribell, 264, 291.
 Monteith, Henry, dempster, 2, 240.
 — John, of Strowiebeg, theft and robbery, 33, 36.
 Montgomery, Alexander, lord, 188.
 More, James, in Knockandoch, slaughter, 246, 256, 263, 268.
 — Thomas, slaughter, 157.
 Moriell, James, 95.
 Morison of Dairsie, 96-98.
 — George, of Bognie, 101, 104.
 Mossman, John Telfer, herald, 138.
 Mowat, Andrew, in Cairns, 305.
 — George, 104, 121.
 Mowbray, John, 83, 95.
 Mudie, Christian, cattle-lifting, 61.
 Muir, Elisabeth, adultery, 268, 291, 292, 296, 299.
 — Wm., in Melsetter, 109.
 — (Mure), John, writer, 83, 95.
 — Wm., of Caldwell, rebellion, 232 and *n.*, 241.
 — of Knockshinnoch, 196.
 Muirhead, James, in Irongray, rebellion, 189.
 Mule *alias* Hutchison McAlaster Boujj, Hugh, horse-stealing, 97.
 Mulligine, Thomas, theft, 268.
 Murder, 3, 5, 10, 11, 20, 23, 29, 35, 45, 48, 52, 53, 56, 66, 68-71, 81-83, 84, 89, 90, 94, 100, 111, 125, 127-129, 146, 155-158, 191, 198, 200, 221, 223, 241, 245, 246, 257-258, 260-262, 265, 268, 270, 276, 277, 289, 300, 302-306, 307, 313, 314, 319.
See also Child-murder.
 Murdoch, David, *alias* Garvy, *alias* Stewart, cattle-lifting, 3, 4, 10.
 Murray, countess of, 51.
 — Adam, 307.
 — Alex., messenger, theft and stouth-rief, 82.
 — — pursuivant, 138, 235.
 — Anthony, oppression, 131.
 Murray, Gideon, merchant in Edinburgh, 131.
 — Giles, 306-307.
 — James, messenger, 223.
 — John, minister at Trinity Gask, 59 and *n.*
 — — of Pennylands, 195, 246.
 — Mungo, macer, 59.
 — — son of Corseburn, 22.
 — — hamesucken, 303-305.
 — — commissioner, 188 and *n.*
 — Richard, of Burchtown, forging writs, 82, 95, 255.
 — sir Robert, justice-clerk, 2 and *n.*, 106, 107.
 — Robert, keeper of the Tolbooth, 2.
 — sir William, of Newtoun, 188.
 — William, justice-depute, 139, 159, 185.
 — — slaughter of, 3.
 Muschett, Adam, merchant in Edinburgh, 144-146, 150, 151, 154, 190, 191, 197, 215.
 — David, of Spittleton, murder of, 128.
 — Robert, writer, 128.
 Musselburgh, regality of, 4 and *n.*
 Mutilation, 53, 94, 143, 147, 190, 195, 196, 218, 223, 224, 246, 255, 265, 308, 314.
 NAIRN, JOHN, of Muckorse, 264, 296.
 Neill, John, in Fortrie, slaughter, 147.
 Neilson, John, merchant in Stirling, adultery, 140, 143.
 — — cattle-lifting, 195.
 — — of Corsack, rebellion, 185 and *n.*, 186.
 — Thomas, horse-stealing, 13.
 — — theft, 11, 19.
 Nesbit, sir John, of Dirleton, 115 and *n.*, 159, 165, 167-169, 182, 185, 187.
 — John, usury, 111.
 Netherwood, 106.
 Newall, Adam, chamberlain to the earl of Southesk, 223.
 Newbigging, lands of, 29.
 Newhall, laird of. *See* Ballantyne, James.
 Nimmo, Archibald, 328.
 — William, 264, 296.
 — — in West Calder, rebellion, 290.
 Noble, Mungo, cutting green wood, 81.
 — Thomas, merchant in Edinburgh, 185.
 Norvell, George, advocate, 97.
 OGILVIE, JAMES, of Ragwell, 112.

- Ogilvie, John, of Milton, 199.
 — Robert, slaughter, 261, 269, 270.
 — Walter, of Boyne, 112.
 — Wm., slaughter, 10, 11.
 — — 99.
 Ogstoun, William, slaughter, 300.
 Oliphant, John, 185.
 — Patrick, 5, 20, 76.
 Oppression, 96, 120, 131, 215, 308, 328.
 Orr, Mr., rebellion, 233.
- PACE, MARGARET, theft, 50, 52.
 Parker, John, rebellion, 160, 183, 184.
 Paterson, Christian, Newbottle, witchcraft, 5.
 — Robert, merchant in Edinburgh, 140-143.
 — Thomas, usury, 258, 262.
 Paton, Andrew, housebreaking, 56, 57.
 — John, housebreaking, 56.
 — Matthew, rebellion, 183, 188, 233.
 — Robert, housebreaking, 57.
 Pedden, Alex., rebellion, 233 and *n.*, 241.
 — William, rebellion, 187.
 Pedie, John and Robert, destroying the coal heugh of Carntyne, 191.
 Penman, James, 47.
 Pentland rising, the, xxvii, 159 and *n.* 189, 231-245.
 Perjury, 86, 88, 110, 113, 128, 129, 152, 225, 255, 256, 258.
 Petrie, George, in Easter Gowdie, horse-stealing, 35, 37.
 Pinkill, laird of, 63.
 Pitcairn, James, perjury, 86.
 Pittillo, John, at the Mill of Haugh, slaughter of, 306.
 — Robert, at the Mill of Kinaltry, 306.
 Poc, David, in Pokellie, rebellion, 233.
 Poinding an ox in labouring time, 140.
 Pollock, James, merchant in Edinburgh, 188.
 — John, town officer in Edinburgh, 259.
 Porteous, Christian, 6.
 — Margaret, witchcraft, 11.
 — Robert, usury, 110, 112.
 Porterfield, Alexr., rebellion, 232 and *n.*, 241.
 — George, merchant in Glasgow, rebellion, 135.
 — Jo., of Quarrelton, rebellion, 232 and *n.*, 238, 240.
 — John, of Duchal, 232 *n.*
- Preston, John, advocate, 251 and *n.*, 265.
 — Robert, of Outtershill, 187.
 — — of Preston, 63, 64.
 Pringle of Lees, 134.
 — Elizabeth, 15, 17.
 Prison-breaking, 22.
 Prisoners, alimentering of, 50 and *n.*, 61; indefinite detention of, xiii and *n.*
 Provan, James, in Inchbellie, 120, 121.
 Punishments, xvi, xvii.
 Purdie, John, usury, 113, 115, 144, 148, 150.
 Purves, sir William, 188, 290.
- RAE, lord, depredation, 289.
 — John, writer, 48, 49.
 — — sheep-stealing, 24.
 Ramsay of Idington, 212.
 — in the Mains of Arniston, rebellion, 233.
 — Eliz., theft of writs, 65, 72.
 — Isobal, witchcraft, 6.
 — John, oppression, 328.
 — Margaret, child-murder, 27, 28, 29 and *n.*
 — Thomas, 74.
 — William, master of, slaughter, 200, 212.
- Ranken, Walter, merchant in Dundee, 155.
 Rape, 37, 269, 303.
 Rattray, Alex., of Dolvillein, theft, 305, 315.
 Rebellion, xxvii, 54, 135, 159-189, 231-246, 258, 260, 263, 270, 290, 296, 302, 303, 313.
 Regality courts, xi.
 Reid, Alexander, deforcement, 87.
 — David, in Bedston, horse-stealing, 43.
 — James, of Bara, deforcement, 87, 96.
 — John, deforcement, 87.
 — Katharine, housebreaking, 62, 63.
 — Pat., in Newbigging, theft, 260.
 — Robert, procurator in Aberdeen, 145.
 — Walter, nottar publick, slaughter, 261.
 — William, slaughter, 10, 34, 45, 48.
 — — cattle-lifting, 61.
- Reidpath, John, adultery, 54, 55.
 Renton, John, of Lamberton, 58.
 Resetting, 4, 35, 37, 61, 290.
 Richard, Gilbert, of Barkskimine, 46.
 Richardson, John, 15, 17.
 Richmond, Jonet, child-murder, 3.
 Rigg, John, minister of Stramiglo, 226.

- Rigg, William, of Carberry, 238.
 Rioting, 116, 157, 191, 230, 258, 261, 263, 276, 302.
 Risk, John, merchant in Edinburgh, wearing forbidden weapons and slaughter, 20.
 Ritchie, James, writer in Edinburgh, 292, 294.
 — John, in Kirkhill, stealing timber, 129.
 Robbery. *See* Theft.
 Robertson of Newbigging, 134, 143, 150.
 — Alexander, rebellion, 185, 186.
 — Robert, 188.
 — Thomas, brewer in Edinburgh, 187.
 Robinson, Andrew, in Chappelton, 122.
 Rochhead, Thomas, 268, 269, 276, 291, 292.
 Rochwhanell, John, in Aberdeen, 125.
 Rollo, John, of Piltoun, advocate, 19 and *n.*
 — minister at Dunblane, 48.
 Ronald, Thomas, of Woodhill, cattle stealing, 296.
 Ross of Clova, 123.
 — Donald, of Cunmoyne, 127.
 — of Kilmorie, slaughter, 129, 146.
 — Hugh, of Kilravock, 123, 127, 129, 132, 134, 147.
 — theft, 24.
 — John, in Mauchline, rebellion, 160, 181-184.
 — of Strathmore, 150, 190, 218.
 Row (Rew), Mr., chaplain to Scots-tarvet, rebellion, 233.
 — James, minister at Monivaird, perjury, 110 and *n.*, 113, 120, 129, 132, 152, 154, 156, 158, 277.
 Roxburgh, Hugh, in Brownhill, usury, 155, 263, 265, 268, 270, 277, 290.
 — William, 2nd earl of, 33.
 Roy, Hugh, 27, 32, 35.
 — John, in Auchinhandork, harbouring thieves, 133.
 Russell, captain, 213.
 — William, in Wester Ga, 321, 327.
 Rutherford, William, 113, 115, 294.
 Ruthven, lord, 76 and *n.*
 — John, tutor of Gairdine, 238.
- SACHIE, DONALD, slaughter, 306.
 Samuelstoun, 24.
 Sanders, John, 50.
- Sanderson, Duncan, slaughter of, 147.
 Sandilands, Alexr., merchant in Edinburgh, 166.
 — John, 251.
 — captain sir William, in the service of Holland, 136.
 Scots officers in the service of Holland, 136.
 Scott, Alexander, goldsmith, usury, 111, 113, 123, 185.
 — David, in Irongray, rebellion, 231.
 — sir Francis, of Thirlestane, 212 and *n.*
 — George, of Pittidie, 268, 290.
 — messenger, 41, 43.
 — Hary, 277, 278.
 — James, 81, 97.
 — John, merchant in Edinburgh, 184, 188.
 — in Skian, slaughter of, 262.
 — sir Laurence, of Clerkington, 166.
 — Patrick, of Langshaw, 185, 187.
 — Reginald, his *Discovery of Witchcraft*, xxi.
 — Robert, rebellion, 188.
 — theft, 57.
 — Thomas, murder and robbery, 314.
 — colonel Walter, in the service of Holland, 136.
 — William, 14, 15.
 Scougal, John, of Whytekirk, 39 and *n.*
 Semple, Gabriel, rebellion, 232 and *n.*, 241.
 — John, rebellion, 232.
 Seton, sir Alexander, of Pitmedden, advocate, 285 and *n.*
 — Isobal, lady Bairfoot, 72, 79, 85.
 — sir Walter, of Abercorn, 116.
 Shaw, Andrew, cattle-lifting, 60, 61.
 — Robert, messenger, oppression, 96, 97.
 Sheep-stealing, 24, 54, 57, 88, 196, 291.
 Sheriff, office of, xi.
 Shiells, John, in Titwood, rebellion, 160, 181-184.
 — Ralph, rebellion, 187.
 Shorless, Marion, 6.
 Short, Alexander, assault, 246.
 — John, in Dalry, rebellion, 189.
 — officer of the court, 138.
 Sibbald, Alex., of Arnage, slaughter, 261.
 Simpson, Arthur, in the Kirktoon of Bourtie, deforcement, 87, 96.
 — David, in Dryburnfoord, deforcement, 28, 29, 33, 35, 46, 53, 56, 59-

- Simpson, Pat., mutilation, 308.
 Sinclair's *Satan's Invisible World Discovered*, xxi.
 — of Assairy, prison-breaking, 22.
 — of Dunbeath, 22.
 — of Gyre, deforcement, 109.
 — of Rosline, 187.
 — Alexander, of Telstein, 195.
 — — slaughter of, 261, 270, 276.
 — David, of Ryssie, deforcement, 109.
 — — of Seggett, slaughter, 276.
 — — of Southdun, 132, 134, 143.
 — — slaughter of, 269.
 — John, of Murkhill, 289.
 — sir Robert, of Stevenson, 106 and *n*, 149, 201, 223.
 — Robert, advocate, 29 and *n*, 30, 114.
 — Wm., of Dunbeath, 289.
 Skeen, James, merchant in Aberdeen, deforcement, 87.
 Skene's *Regiam Majestatem*, 202 and *n*.
 Skinner, James, perjury, 225.
 Slaughter. *See* Murder.
 Slowan, James, 196.
 Smallat, John, Glencairne's factor, 146, 147.
 Smart, James, 22, 23.
 Smeton, William, merchant in Kinghorn, stealing a mare, 268, 290.
 Smith, Alexander, slaughter, 156.
 — Barbara, child-murder, 81.
 — George, 28, 34, 35.
 — — in Kilmarnock, mutilation, 94, 97.
 — — in Tullich, slaughter, 147, 156.
 — Isoball, usury, 257.
 — James, in Old Crachan, rebellion, 189, 233, 238-240.
 — sir John, of Grothill, deforcement, 81, 82, 259, 260.
 — Margaret, 36.
 — Marion, adultery and child-murder, 123.
 — Patrick, of Braco, 120.
 — Robert, in Corbshill, 156.
 — Thomas, robbery, 47.
 Smollet, John, dean of gild of Dumbarton, 188.
 Snodgrass, Francis, 53.
 — William, gardener at Sanquhar castle, 46.
 Sommerveil, James, of Drum, 238, 239.
 — William, usury, 215, 218.
 Sorcery. *See* Witchcraft.
 Soutter, John, 8.
 Spence, Thomas, bishop of Aberdeen, 34 *n*.
 Spindie or Pindie, Agnes, 14, 18, 19.
 — Janet, 14.
 Spittle, John, slaughter of, 20.
 Spottiswood, Alex., advocate, 328 and *n*.
 Stanefield, sir Philip, of Newmilns, 5 *n*.
 Stark, William, cordiner in Glorat, 99.
 Stealing. *See* Theft.
 Steermes, 234.
 Steill, Alex., in Achredie, theft, 307, 308.
 — James, in Galgray, 151.
 Stephen or Ker, Margaret, 111.
 Sterline, Hary, of Ardoch, forgery, 48.
 Stevenson, John, 244.
 — or M^cClellan, Julian, slaughter, 66, 75, 83.
 — Katharine, adultery, 54.
 Stewart of Heisleside, 216.
 — of Kettleston, 3.
 — Alaster, in Balmurrell, killing of deer, 256, 306.
 — Alex., of Orpher, deforcement, 109.
 — — messenger in Elgin, slaughter of, 300, 305, 314.
 — David, bailie in Elgin, 300, 302.
 — sir Dougall, deforcement, 191 and *n*, 195, 215.
 — Dougall, 303.
 — sir Gilbert, advocate, 264, 296 and *n*.
 — sir James, of Goodtrees, 65 and *n*.
 — James, of Ambresmore, deforcement, 191.
 — — of Aucharn, trial of, for murder, x.
 — — in Aberdoig, 23, 24.
 — — 111.
 — John, of Ascog, advocate, 222, 291 and *n*.
 — — of Gallachan, 191.
 — sir Thomas, of Grantully, 43, 45, 110, 112, 129, 132, 152, 154, 156, 158.
 — *alias* M^cGilanders, William, theft, 52.
 — William, messenger, 112.
 — — of Egoriness, 83, 95.
 Stiven, hatmaker in Edinburgh, 184.
 Stormont, viscount of, 223 and *n*, 224.
 Strachan, John, rioting and hame-sucken, 115, 122.
 Strang, Cristall, in Kilbride, rebellion, 160, 183, 184.
 Strathnaver, George, lord, depredation, 289 and *n*, 291.

- Sutherland, John, earl of, depredation, 289, 295.
- Swinton, John, baillie in Corstorphin, adultery and murder, 90.
- Sword, Andrew, apothecary in St. Andrews, 86.
- Henry, in St. Andrews, 86.
- James, armourer in St. Andrews, 86.
- — provost of St. Andrews, perjury, 86.
- — messenger, 306.
- Sydeserf, Thomas, 303, 304 and *n.*, 305.
- Wm., writer, 110.
- TAIT, GEORGE, merchant in Leith, 212.
- James, merchant in Edinburgh, 188.
- William, dempster, 5.
- Tarras, Robert, 101.
- Taylor, Agnes or Margaret, adultery and child-murder, 62, 67, 71.
- John Allan, usury, 145.
- Thomas, 224.
- William, housebreaking, 63.
- Telfer, Jo., herald, 235.
- Theft, 4, 6, 9-11, 19, 23, 33, 35, 47, 48, 52, 57, 65, 72, 80, 82, 83, 87, 96, 99, 100, 106, 111, 115, 120-122, 129, 136, 139, 140, 147, 153, 155, 156, 197, 198, 222, 224, 246, 256, 260, 263, 264, 265, 268, 269, 290, 291, 296, 300, 303, 305-307, 314, 315, 319.
- Thoirs, David, advocate, 42 and *n.*, 103, 130, 150, 264, 296.
- Thom, Christian, Leith, child-murder, 5.
- Thomson of Duddingston, 19 *n.*
- David, minister at Mannor, perjury, 255 and *n.*, 256, 258.
- James and John, fleshers in Haddington, trial of, for resetting, 4, 5.
- Katharine, in Duddingston, 38.
- Wm., theft, 48, 83, 87.
- Thornton, Donald, of Balgown, de-forcement, 257.
- Todrig, James, in Ayton, pointing an ox in labouring time, 140.
- Robert, in Ayton, theft, 140, 303.
- Torture, infliction of, xvii-xviii and *n.*
- Towie, 273-274.
- Treason. *See* Rebellion.
- Troup, William, messenger, slaughter, 263, 289, 290.
- Tumults. *See* Rioting.
- Turnbull, George, baxter in Edinburgh, 115.
- Helen, 15.
- Turner, sir James, xxviii, 162 and *n.*, 186, 239.
- Tweeddale, John, earl of, 78 and *n.*, 79.
- Tweedie, Ard., usury, 258.
- Michael, 122.
- Thomas, merchant in Edinburgh, 98.
- Tyrie, Geills, surveyor in Leith, 125.
- UDNIE, WILLIAM, 308.
- Ure, James, of Shargartoun, 32.
- Urie (Wrie), James, adultery, 132.
- — Robert, writer in Edinburgh, 132.
- Urquhart, sir Alexander, of Cromarty, 166, 184, 314.
- Usury, xix, 89, 93, 98, 105, 107, 110, 111, 113, 127, 144, 145, 147, 148, 150-152, 154-157, 159, 190, 191, 200, 215, 224, 225, 230, 246, 247, 251, 255, 256-259, 262, 265, 268, 270, 277, 284, 289, 290, 300, 302.
- VANRIGHT, THOMAS or GILBERT, murder, 35, 36.
- Vans, Alex., 190.
- Vast, Alexander, slaughter, 223.
- Veitch, John, yr. of Dawick, 255, 256, 258.
- William, rebellion, 233, 241.
- Verdicts, xv.
- WALLACE of Auchins, 163.
- James, of Bardren, 120.
- colonel James, of Auchines, rebellion, 183, 238, 239, 240.
- Richard, messenger, 306.
- William, adultery, 62, 67.
- Wardlaw, Katharine, 11-13.
- Wardrop, Alexander, of Carntyne, 191.
- John, rebellion, 187.
- Watson, Andrew, flesher in Aberdeen, usury, 124, 150, 155, 159, 191.
- James, deforcement, 215.
- John, in Lamington, sheep-stealing, 54; to be hanged, 57.
- — in Greyhillock of Pitgerso, deforcement, 123.
- — merchant in Edinburgh, 185.
- Thomas, in Faulkland, bleeding and wounding, 257.
- William, deforcement, 112, 123, 125.
- Watt, George, 294.
- Paul, in Greenbrae, 270.
- Wearing forbidden weapons, 20.
- Wedderburn, Peter, of Gosford 165 and *n.*

- Weir, George, in Blackhill, slaughter, 146.
 — Mungo, in Westermosscroft, theft, 139.
 Welsh, James, witchcraft, 34.
 — John, rebellion, 231, 233, 238-240.
 — William, in Kirkpatrick, rebellion, 189.
 Wemyss, James, of Pitkaine, 239.
 — sir John, of Bogie, 5, 20.
 Wetherspoon, John, usury, 144, 146, 147, 154, 157, 190, 215.
 White, John, flesher in Auchtermuchtie, 257.
 Whyte, David or Donald, in Mullochie, 64, 65.
 — Margaret, adultery, 95.
 — Wm., merchant in Edinburgh, usury, 300, 302.
 Wigtoun, John, earl of, 188 and *n.*
 Wilkie, Jas., in Mains of Cliftonhall, rebellion, 232.
 — William, of Haghill, slaughter, 276.
 Williamson, Agnes, witchcraft, 24.
 — Alexander, provost of Peebles, usury, 251, 255.
 — James, in Crooketstane, usury, 127.
 — John, 300.
 — Katharine, witchcraft, 24.
 Wilson, Adam, 292.
 — or Burton, Barbara, murder of, 35.
 Wilson or Paterson, Christian, witchcraft, 5 and *n.*, 15.
 — David, usury, 257.
 — James, merchant in Edinburgh, usury, 111, 113, 230, 246, 247, 250, 258.
 — John, 36.
 — — rebellion, 187, 244.
 — Robert, 113.
 — Thomas, of Mostoun, 147.
 Wishart, John, of Cowbairdie, 297, 300.
 Witchcraft, xxi-xxvii, 2-8, 11, 13, 19, 20, 22, 24, 34, 121.
 Woodhall, Aberdeenshire, 297.
 Wright, John, theft and robbery, 33.
 — Robert, in Congerton, slaughter of, 157.
 — William, in Dunblane, usury, 200.
 Writs, forging of, 57, 82.
 — stealing of, 65, 72, 73, 80, 88, 111, 120, 127, 146.
 Wrongous imprisonment, 5, 20, 72, 75, 112, 120, 131, 143, 224, 246, 255, 264, 268, 297, 300.
 Wyllie, George, slaughter of, 70, 81.
 — Margaret, witchcraft, 3.
 — — child-murder, 4.
 YOUNG, GEORGE, in Cranloch, 102.
 — John, theft, housebreaking, etc., 198.
 — Robert, merchant in Edinburgh, 188.



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R U L E S

1. THE object of the Society is the discovery and printing, under selected editorship, of unpublished documents illustrative of the civil, religious, and social history of Scotland. The Society will also undertake, in exceptional cases, to issue translations of printed works of a similar nature, which have not hitherto been accessible in English.

2. The number of Members of the Society shall be limited to 400.

3. The affairs of the Society shall be managed by a Council, consisting of a Chairman, Treasurer, Secretary, and twelve elected Members, five to make a quorum. Three of the twelve elected Members shall retire annually by ballot, but they shall be eligible for re-election.

4. The Annual Subscription to the Society shall be One Guinea. The publications of the Society shall not be delivered to any Member whose Subscription is in arrear, and no Member shall be permitted to receive more than one copy of the Society's publications.

5. The Society will undertake the issue of its own publications, *i.e.* without the intervention of a publisher or any other paid agent.

6. The Society will issue yearly two octavo volumes of about 320 pages each.

7. An Annual General Meeting of the Society shall be held at the end of October, or at an approximate date to be determined by the Council.

8. Two stated Meetings of the Council shall be held each year, one on the last Tuesday of May, the other on the Tuesday preceding the day upon which the Annual General Meeting shall be held. The Secretary, on the request of three Members of the Council, shall call a special meeting of the Council.

9. Editors shall receive 20 copies of each volume they edit for the Society.

10. The owners of Manuscripts published by the Society will also be presented with a certain number of copies.

11. The Annual Balance-Sheet, Rules, and List of Members shall be printed.

12. No alteration shall be made in these Rules except at a General Meeting of the Society. A fortnight's notice of any alteration to be proposed shall be given to the Members of the Council.

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