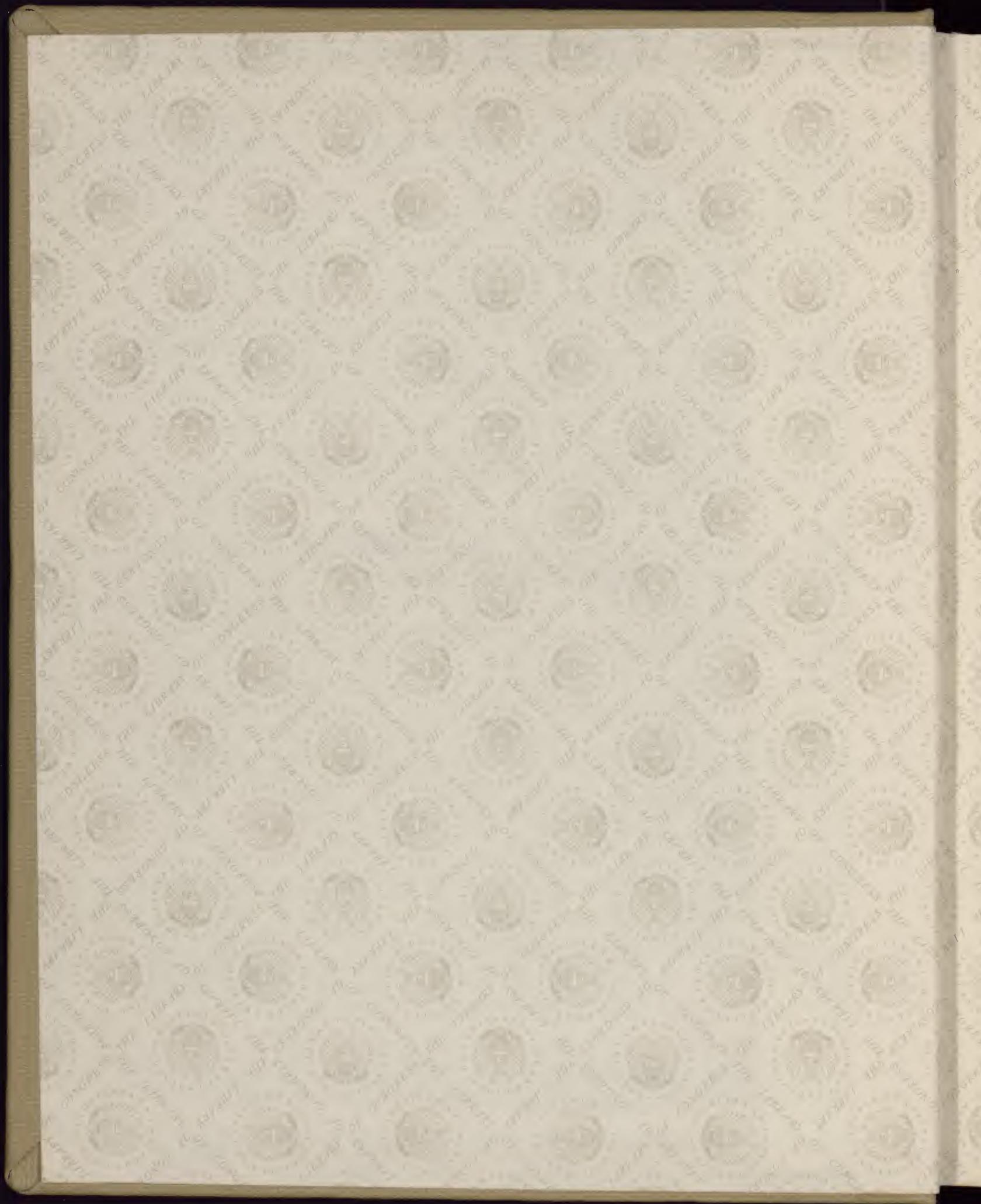
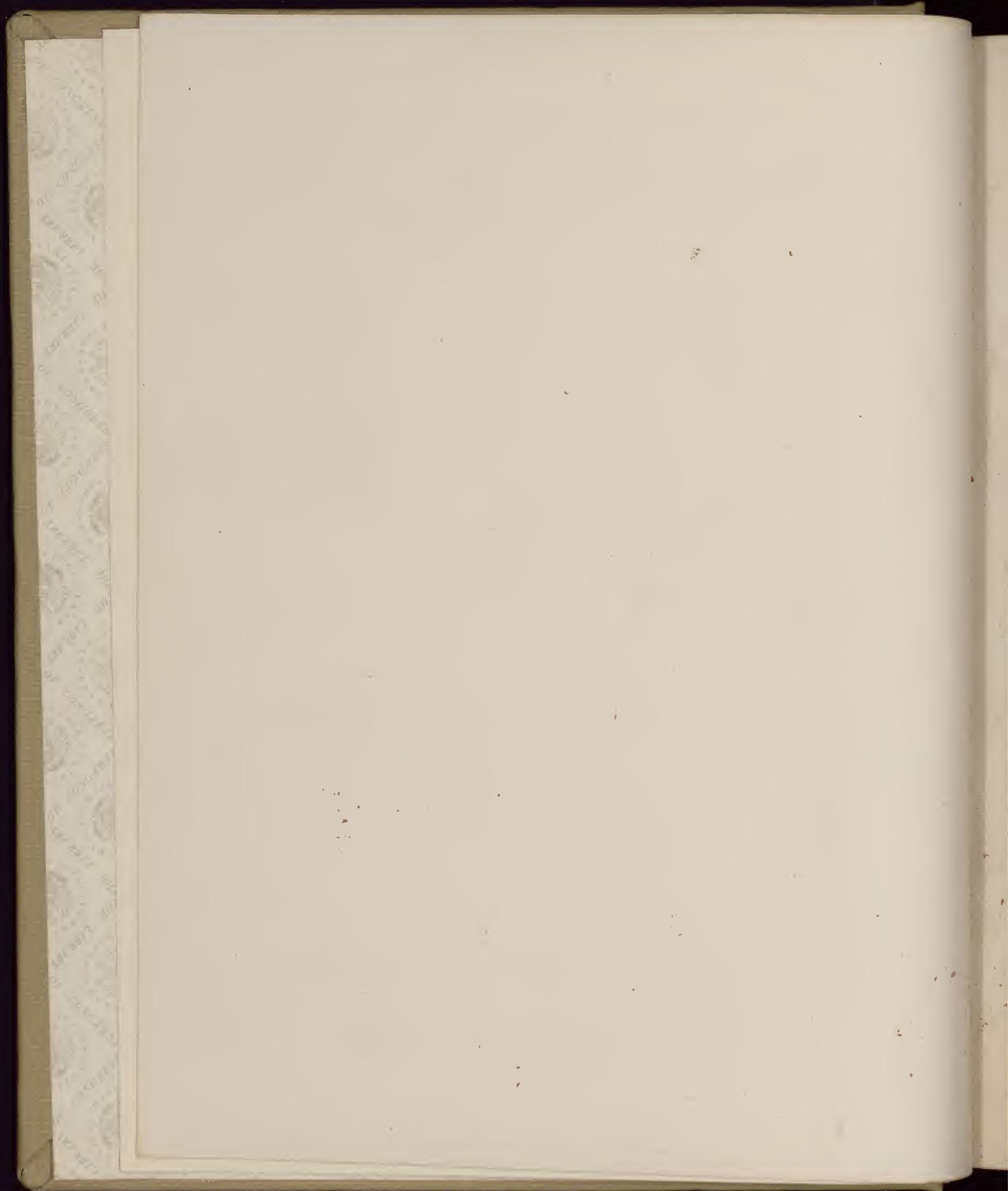


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WITH  
HISTORICAL AND CRITICAL REMARKS.

BY  
HUGO ARNOT, ESQ. ADVOCATE.

*Quae scelerum facies, O virgo, effare, quibusve  
Urgentur poenis? Quis tantus plangor ad auras?*

---

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## P R E F A C E.

## P R E F A C E.

*T*HE Criminal Records of a Country are an historical monument of the ideas of a People, of their manners and jurisprudence: And in the days of ignorance and barbarism, they exhibit a striking, but hideous picture of human nature. The records of Scotland, in particular, present such a frequent display of the extravagance of the human mind, as amuses the fancy after the wearisome detail of form, and the disgusting representation of guilt.

While those materials gratify curiosity, they also afford useful information. They show what bitter fruits are produced under the gloomy climate of a tyrannical Government, and a superstitious Priesthood; and they afford us ample ground of consolation, when we compare those bitter fruits with the blessings which we enjoy under a free government, and in an enlightened age.

To present these trials unabridged, would be to fatigue the reader with tedious rubbish; and to deliver them without illustration or remark, would be to deprive them of that fund of entertainment and information which they ought to possess. But the manner in which I thought it advisable to publish them has laid me  
under

*under certain disadvantages, viz. the necessity of delivering my own opinion upon a variety of difficult and important cases; and of undergoing no inconsiderable degree of labour.*

*In the course however of my search, into voluminous, obscure, and mutilated Records, I derived great benefit and satisfaction, from the polite and chearful assistance afforded me, by the Gentlemen in all the Publick Offices which I had occasion to consult; and in particular from that of Mr NORRIS, Depute Clerk of Justiciary, and of the Messrs ROBERTSONS, Keepers of the Records in the General Register, whose judicious and liberal aid greatly alleviated the trouble of my work. And if it shall be honoured with the publick approbation, I shall think myself amply recompensed for the toil of a long and laborious research.*

EDINBURGH, AUGUST 1.

1 7 8 5.

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E R R A T A.

*Page 32. line 6. for,* In the whole of the depositions there is not a word of the Earl's belt and magic characters, nor of his not bleeding till the belt was unloofed, and of the summons against the Earl of Gowrey's heirs, and the indictments against his followers who were executed at Perth; *read,*—In the whole of the depositions, and of the summons against the Earl of Gowrey's heirs, and of the indictments against his followers who were executed at Perth, there is not a word of the Earl's belt and magic characters, nor of his not bleeding till the belt was unloofed.

*Page 370. line 9. for,* 'tolerant', *read,* intolerant.

A

COLLECTION

OF

CRIMINAL TRIALS.

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OF TREASON.

*Trial of John Master \* of Forbefs, for conspiring to assassinate King James V. for exciting a mutiny in the King's host, and for attempting to sacrifice part of the army to the English.*

**J**OHN Master of Forbefs, on the 12th of June 1536, was <sup>1536</sup> accused by George Earl of Huntly, before the King and the Lords of the Privy Council, of the crime of Treason. The Treason charged was, that the accused had conspired † the King's death, by meditating to kill him with the shot of a culverin,

\* *Master* of Forbefs is a Scottish phrase, signifying eldest son and heir-apparent of Lord Forbefs, and so of the eldest son of any Baron. † Records of Justiciary, 12th June 1536.

1536 verin, when his Highness was in the borough of Aberdeen. The Master of Forbefs protested his innocence, which he offered to maintain by single combat. The Earl of Huntly declared, that his informers were not present; but he would bring a *landed man, or gentleman*, who would avow the charge before the King any day his Highness would appoint, and, failing thereof, he took up the pledge.

The Privy Council having taken the Earl of Huntly bound, under the penalty of 30,000 \* merks, to make good his accusation before the King, or the Court of Justiciary at Edinburgh, against the first of the ensuing month of July; they, at the same time, ordered a herald to charge the Master of Forbefs to enter himself prisoner in Edinburgh castle against eleven o'clock next forenoon, under the pain of treason; or, at least, to find surety, to the amount of 20,000 merks, to stand trial on the day appointed; also, that, during his residence in Edinburgh, he should not approach nearer the Royal palace than the Netherbow-port; and that, when it should please his Majesty to visit the town, the Master of Forbefs should confine himself within his own apartments.

No further procedure was held in this matter till the 8th of December, when the King directed a warrant to the Privy Council, requiring them to give orders to the Justice Clerk to take surety from Lord Forbefs, as well as the Master of Forbefs, that each of them remain in Edinburgh castle till they find bail, to the † extent of 10,000 merks, to appear and stand trial when called on.

On

\* For the value of Scottish money in those times, see Arnot's Hist. of Edinburgh, p. 87. 90. &c. † Rec. of Just. 11th December 1536. 14th July 1537.

On the 14th of July 1537, he was tried for High Treason before the Earl of Argyle, Justice-General, and the Commissioners of Justiciary. The indictment contained several charges, 'That the prisoner was guilty, *art and part* \*, of a treasonable and abominable conspiracy to perpetrate murder † upon the King's most noble person, by the shot of a culverin, when his Highness was in his borough of Aberdeen, for the purpose of administering justice within the northern parts of his realm: That he was concerned, *art and part*, in the treasonable mutiny which arose in the last Royal army that marched to the borders, for national defence, against the English forces, the Scottish army being then at Jedburgh; and that he traiterously conspired the destruction of a part of the army raised to oppose the incursions and ravages of our ancient enemies of England, who were hovering upon the borders, to the imminent peril of the army, and to the great danger of the state: Also, that he traiterously aided our said enemies of England.'

Fifteen persons, some of them men of distinguished rank, and all of them of respectable station, sat upon the jury. They were, Robert Lord Maxwell, William Master of Glencairn, Knight, Sir John Melville of Raith, John Hume of Coldenknows, George Crawfurd of Feddorat, Alexander Leslie of Pitcaple, John Pantoun of Pitmidden, David Duncanson of Standanstanes, John Leslie of Bouquhaine, Nicholas Ross of Auchlossin, James Garioch of Killstane, George Leslie of Newleslie, John Cumming of Cullen, Charles Dempster, and William Leslie of Coclarachie. The jury found him guilty of the whole

A 2

crimes

\* *Art and part* is a phrase in the Scottish law, which denotes, aiding and abetting. It signifies the same with the Latin phrase *ope et consilio*. † The indictment is in Latin, the verdict in English.

1537 crimes charged against him, article by article. Sentence was then pronounced upon him, 'forfeiting his life, lands, and goods, moveable and immoveable; ordaining him to be *barl-ed*\* through the causeway of Edinburgh, and hanged on the gallows till he be dead, and to be quartered and dismembered as a traitor.'

Drummond of Hawthornden, and the later Scottish writers, have thought proper, for what reason I know not, to pronounce † decidedly that this was an unjust sentence. The following reasons, however, lead me to think, that we are by no means entitled to conclude that the jury returned an iniquitous verdict, which was to infer so dreadful a doom; and that our idea of the prisoner's innocence cannot exceed bare conjecture. The evidence given on his trial is not recorded in the books of justiciary, nor was it in use to be taken down at that period; and the presumption surely is, that a jury would not, contrary to their conviction, sacrifice the life, fortune, and fame of a fellow citizen.

About this period two inveterate factions sprang up in Scotland. Lord Forbes was, perhaps, the very first man of rank in the north, '*magnae familiae et factionis princeps* †', who professed the doctrines of reformation; hence we may suspect the partiality of succeeding writers when treating of this Lord and his family. Such of the proceedings against the prisoner as we still can

\* Drawn on a hurdle.  
Scott's Hist. of Scotland, p. 344.

† Drummond's Hist. of the James's, p. 104.  
‡ The case of Gowry affords a notable instance, that a champion of reformation was sure to find in his party advocates ready, not only to wipe off the imputation of conspiracy, but to retort the charge.

can distinctly trace, were neither harsh nor precipitate. The Earl of Buntly, the accuser, was ordained by the Privy Council to find surety, to the amount of 30,000 merks, to make good his accusation; whereas the prisoner, and Lord Forbess, by express warrant, under his Majesty's hand, were required to find surety only for 10,000 merks, to stand trial when called on. Upwards of thirteen months elapsed between the accusation and trial, a period surely sufficient for the abating of passion, and the investigating of truth. The prisoner was a man of impetuous temper and profligate life; a person who, although many believed him innocent of conspiring the King's death, although he denied it on the scaffold; yet the public hardly regretted his fate, on account of his profligacy and wickedness: And he himself acknowledged that he deserved to die for the murder of the Laird of Meldrum. Even in those barbarous times it was not uncommon for a prisoner to be acquitted by his peers of a charge of treason. Robert Lord Lisle was tried before the King himself, by sixteen Lords and Barons\* of Parliament, who pronounced him innocent of the treasonable correspondence with the English with which he was charged. And Archibald Douglass, when prosecuted for the treasonable murder of Darnley †, in the verdict of his jury, experienced the like justice, *or favour*. Two eminent Scottish historians were contemporary with the Master of Forbess. At the time of his trial, Buchanan was thirty-one years of age; and Lesly, it is probable, was about the same period of life. They both mention the conspiracy to assassinate the King; but such is their inaccuracy, that neither of them takes notice of the charge of exciting a mutiny in the Scottish army, or that of a treasonable correspondence with the English. Lesly does ‡ not insinuate that the Master of Forbess suffered an unjust

\* 18th March 1481. Arnot's Hist. p. 643.

† 26th May 1586.

‡ Lesly de Reb. Gest. Scotor. p. 446.

1537 unjust sentence ; but observes that his father, the Lord Forbefs, after a tedious confinement in Edinburgh caſtle, on the ſame account, upon a more minute inveſtigation, was exculpated from every ſuſpicion of guilt. The indeciſive ambiguous report of Buchanan, that many thought the Maſter of Forbefs innocent of meditating an aſſaſſination, at the ſame time that his other crimes rendered him deſerving of death, is the ſlippery foundation on which the careleſſneſs or partiality of later authors has reared the fabric of his innocence, glittering in diſtant proſpect, but vaniſhing upon approach.

I preſent the reader with the paſſage from Buchanan. I will not degrade his ſtile by attempting to tranſlate it. ‘ Joannes  
 ‘ Forboſius, juvenis acer, et magnae familiae et factionis princeps,  
 ‘ ab Huntileio aemulo creditur oppreſſus. Erat enim quidam Stra-  
 ‘ chanus, homo ad quodvis flagitium promptus, multos annos  
 ‘ Forboſio valde familiaris, et omnium ei nequiter patratorum  
 ‘ aut conſcius, aut particeps, aut auctor. Is parum (ut rebatur) ab  
 ‘ eo pro merito cultus ad inimicum ejus Huntileium ſe confert ;  
 ‘ et crimen capitale, vcl ad eum detulit, vcl (ut plurimi putant)  
 ‘ una cum eo conſinxit : Quod Forboſius videlicet, ante annos com-  
 ‘ plures, de rege occidendo conſilium iniecit. Id crimen, quanquam  
 ‘ nec fatiſ firmis argumentis, nec idoneis teſtibus fuiſſet probatum,  
 ‘ et ſtudia inimicorum in judicio neminem laterent, 13 die Julii,  
 ‘ a judicibus, magna ex parte ab Huntileio conductis, damnatus,  
 ‘ capite luit. Sed ejus ſupplicium vulgo minus triſte fuit, quod,  
 ‘ etſi criminis, ob quod poenas dederat, expertem homines crede-  
 ‘ rent, tamen, ob ſuperioris vitae facinora, morte non indignum  
 ‘ exiſtimarent \*.’

\* Buchanani Hiſt. Lib. 14. § 53.

*Mr Archibald Douglass, Parson of Glasgow, for the Treason-  
able Murder of Henry King of Scots.* 1580

**A**rchibald Douglass was cousin to James Earl of Morton, Regent of Scotland. By him he was appointed a Lord of Session on the 11th of November 1578; and, in the interval \* between the downfall and execution of the Regent, he was dismissed from the bench.

On the 31st December 1580, the Earl of Morton, and the prisoner, were both accused before the Privy Council of the murder of Darnley. The King sent privately to apprehend the prisoner, who was then at Norham; but he, having got intelligence of Morton's commitment †; fled to England; and Elisabeth, in the usual stile of her policy, refused to listen to James's repeated entreaties that she would surrender the prisoner to justice.

After being degraded from the bench, the parliament pronounced, in absence, a decree ‡ of *forfaulture* § against him in the month of November 1581. The same parliament passed an act of approbation of the Earl of Arran's || proceedings concerning the murder of the King's father. This act sets forth, that the Earl of Arran had accused ¶ the late Earl of Morton, and Archibald Douglass, as guilty, *art and part*, of the murder of Darnley; that Douglass, conscious of his guilt, had fled to England, and continued fugitive. And a solemn protestation was entered in parliament,

\* April 26. 1581. † Spottiswood's History, p. 310. 348. ‡ This decree is not entered in the rolls of parliament. § Forfeiture. || Capt. James Stewart. ¶ Unprinted Acts, October 24. 1581. General Register.

1586 parliament \* by many Lords, dignified clergymen, and barons, that nothing should hereafter be done contrary to the statutes enacted in A. D. 1571, and 1579, concerning the murderers of the King's father, till his Highness should be of age.

At what time the prisoner returned to Scotland I know not; but, if my notion of his trial be well founded, he returned in the well grounded confidence that all his powerful friends did not die with Morton.

While the King was yet a minor, the ministers and officers of state had the assurance to pass an act under the Great Seal †, restoring the prisoner, in his Majesty's name and authority, against the decree of parliament *forfaulting* him for the murder of the King's father. This act of *rehabilitation*, as it is called, contains, at the same time, an awkward and incongruous clause, declaring, that, if the prisoner should be found guilty of the murder, the act should be of no force or effect. On the 21st of May 1586, within three weeks after the date of the former act ‡, the prisoner received a pardon under the Great Seal for all crimes and treasons committed by him, except the murder of the King's father, and five days after he was tried for that murder.

A commission was passed under the Quarter Seal, appointing Mr John Prestoun §, and Edward Bruce, Advocates, Commissaries of Edinburgh, to sit in judgment upon the prisoner, who  
was

\* The act 1579. c. 36. prohibited and annulled all dispositions and alienations of goods or estates, made, or to be made, by any persons convicted, or to be convicted, of the murder of Darnley, or of the Regent Murray. † Great Seal Records, May 1. 1586. ‡ Ibid. May 21. 1586. § Records of Justiciary, May 26. 1586.

was brought to trial on the 26th of May 1586. It was charged <sup>1586</sup> in the indictment, that the prisoner \*, in the months of January and February 1566, along with James late Earl of Bothwell, James Ormeston of *that ilk*, Robert Ormeston his uncle, James Hay † of Talla, John Hepburn, called John of Bowtown, and fundry other accomplices, did conspire, and finally did determine upon, the murder and parricide of the late Henry King of Scots: That the prisoner, and the other persons mentioned, by themselves, their servants, and their accomplices, were guilty of perpetrating, aiding, and abetting, the treasonable murder of Henry, and of William Tailzeor, and Andrew Mackaig, his grooms ‡ of the chamber, in a lodging beside the *Kirk of Field*, in the burgh of Edinburgh, upon the 10th of February 1566, about two hours past midnight: That they burned the house, and blew it up in the air, by the force of gun-powder, which, for that purpose, they had recently conveyed into vaults, and other low and dark places under ground: That, thereby, the prisoner had

B incurred

\* In the indictment, he is designed Mr Archibald Douglass parson of Glasgow; but, in the *rehabilitation* and pardon under the great seal, he is further designed one of the ordinary Lords of Session, notwithstanding he appears to have been dismissed from the bench in April 1581.

† It was this James Hay of Talla and John Hepburn who actually set fire to the match. The Earl of Bothwell, and others of his accomplices, waited in the courtyard. As it was a quarter of an hour ere the house blew up, the Earl grew impatient, dreading that the match was not rightly kindled, and would have gone into the house to see if the match was burning, had he not been prevented by Hepburn. The conspirators saw the house *rise in the air*, heard the crack, and ran off; Bothwell hied himself down to his lodgings in the palace of Holyroodhouse, and went to bed for half an hour, till the event, which he so well knew, was announced, the news having reached the palace. (See the depositions of four of the conspirators who suffered for this crime, Anderson's Collections, Vol. ii. p. 165.) No mention is made in these depositions of the prisoner Douglass having been present.

‡ The phrase in the libel is *cubicularis*.

1586 incurred the pains of treason, and ought to be punished by the loss of life, fortune, and fame: That, further, he was in the treasonable foreknowledge of the crime, and concealed it, by which he had incurred the like penalty: That, as another circumstance of his being guilty, *art and part*, of perpetrating the said murder, he, in the hurry and bustle which accompanied that deed of darkness, *lost his m<sup>w</sup>lis* \*, which next day being found upon the spot, were acknowledged to be his: That his guilt was farther confirmed by his flight into England, to which he had recourse when summoned before the Privy Council to answer for this crime: That he remained in England several years, which was a tacit acknowledgement of his guilt; and that, in November 1581, he underwent a sentence of forfeiture for the said crime: That his intimate friend, John Binning, who was convicted and executed for the murder in June 1581, did frequently depose and declare, that the prisoner was guilty, *art and part*, of the crime, and did actually devise and perpetrate the same; and that Binning repeated this declaration in presence of the whole people at the place of his execution: And, *lastly*, that James Earl of Morton before his death confessed his foreknowledge of the murder, and declared it was the prisoner who revealed the same to him, and that he, the prisoner, was actually present at the committing of the murder.

The indictment being read, the prisoner produced a warrant from his Majesty, directed to the justices, requiring them to admit his lawful defences. He declared, that, trusting to his innocence, he desired no prolocutor; and he pleaded, that the charge of foreknowledge of the murder, and concealing the same, ought not to pass to the knowledge of an assize, in respect of his.

\* *i. e.* Lost his Slippers.

his Majesty's pardon; and the Court sustained this plea. The court then proceeded to name a jury, when an unusual obstacle to the trial occurred. Of the persons summoned to be upon the jury, a sufficient number did not give obedience to the citation. The absent jurymen were fined, and the trial stopped; but, from whatever cause the absent persons declined to sit on this jury, the prisoner had no mind that the trial should be interrupted. Nor was the court hostile to his wishes. It continued to sit in a pause till a precept directed to the justices and advocate-substitute was procured from his Majesty, *and produced by the prisoner*. This precept set forth, that the prisoner *was presently entered in pannel*, to stand trial for the murder of Henry; that the trial stopped through the not appearing of a sufficient number of jurors; and it required the judges and King's counsel to supply the number of the absents by such gentlemen as happened to be at the bar, or in the court. The advocate substitute desired that this precept might be entered in the process as his warrant, and trial proceeded.

The nine jurymen who appeared, in consequence of their summons, were Patrick *Master of Gray*, chancellor (*i. e.* foreman) of the jury, James Colvill of Easter Weemyss, *Robert Logan of Restalrig*, Andrew Gray of Dunynald, Andrew Logan younger of Cotfield, Gilbert Gray of Baldinran, Mr Samuel Cockburn of Templehall, George Home of Spott, Patrick Johnston younger of Elphinston. Those who were picked from the bar, and added to the list, were William Ker younger of Ancrum, Alexander Baillie of Littlegill, Master Robert Fawside younger of that ilk, Gavin Carmichael of Wrichtlands, James

B 2

Logan

\* Produced at the bar.

1586 Logan of Parsonsknows \*, Andrew Ker of Greenhead, George Hamilton of Preston, and Walter Ker, brother to the Laird of Greenhead.

Seventeen jurymen sat on this trial ; this was uncommon, but not unprecedented †. Nineteen were summoned to be upon it, of whom *nine* only obeyed the citation. The ten who absented themselves were, Sir Archibald Napier of Ednbellie, Knight, Sir John Edmestoun of that Ilk, George Home of Wedderburn, Alexander Dalmahoy of that Ilk, ——— Mowbray of Barnbogle, Francis Douglass of Borg, Thomas Otterbourne of Redhall, George Home of Broxmouthe, Robert Lord Seytoun, and Patrick Cargill of that Ilk. They were fined L. 14 each for their disobedience.

It might naturally be expected, with regard to persons even in the respectable sphere of life to which these jurymen belonged, that the lapse of two hundred years should have consigned their actions, their characters, and their attachments, to oblivion. This, however, is far from being the case ; and, from the circumstances concerning the jurymen which I am still able to trace, I am confirmed in the notion, that this was a collusive trial, devised with no other purpose than to screen the prisoner from the consequences of guilt ; a notion strongly suggested by the royal pardon and act of *rehabilitation*, the shyness of jurymen to sit upon the trial, the prisoner's *producing*, and in all probability *procuring* a royal precept to force on the trial, by supplying the absent jurymen with those persons who happened to be at the bar,

or

\* Parsonsknows was a part of the estate of Restalrig. It is the spot on which the house of Mr Alexander Robertson, one of the principal clerks of session, is now built. † Craig de Feudis, p. 49.

or in the court, the former of whom, it must be presumed, were his friends; and finally, by the jury's returning a verdict, which seems contrary to fact, perhaps also to law and evidence. However infamous, however astonishing it may appear to us, yet one of the original jurymen who were summoned on this trial, George Home of Spott\*, on the 16th of June 1582, was himself tried and acquitted for this individual murder. And in his indictment, it was directly charged, that he was guilty of the murder; or, at least, that he had previous knowledge of it, and concealed the same, *and perfectly knew that the prisoner, and John Binning, the prisoner's servant, were perpetrators of the murder.* Another of the jurymen was Robert Logan of Restalrig, who was convicted and forfeited for his concern in Gowry's† conspiracy. A third person, the Master of Gray, chancellor‡ of the jury, in the course of that very year, was sent by King James ambassador to England to intercede for Queen Mary's life. On this embassy, so *faithfully* conducted, so *fortunately* terminated, Douglass the prisoner had been formerly sent: But his fidelity being suspected, the Master of Gray, and Sir James Melville, were appointed to supersede him; and the languor or duplicity of the prisoner's conduct yielded in point of treachery to the conduct of Gray his successor. Instead of interceding for the captive Queen, the Master of Gray urged Elizabeth to execute the sentence, reminding her of the mean adage, *Mortui non mordent.* He was sentenced for his treachery to perpetual banishment;

\* MS. Abstract of the Records of Justiciary in the Advocate's Library, Vol. i. p. 113. † Spottiswood's History, p. 457. 509.; Robertson's History, Vol. ii. p. 258. ‡ Robertson's History, Vol. ii: p. 167. 182. 246. Append. No. 13. 14.; Spottiswood, p. 351. 352. 353. Spottiswood is here inaccurate. He addresses a letter of the King to the Master of Gray, which was truly addressed to the prisoner, and dated long before Gray set out on his embassy.

1586 nishment; and finally, he acted as Queen Elizabeth's spy in  
Italy\*.

The counsel for the prosecution, in order to prove the indictment, produced the process of forfeiture for this crime, led in Parliament against the prisoner, and sentence following upon it, in November 1581.

The prisoner, in his defence, denied *simpliciter* the first article of the libel\*\*, viz. the actual murder, and being concerned in it, *art and part*. As to the losing his *mxles*, he averred it to be false, and required the same to be proved by any person who  
was

\* To throw every light on this mysterious trial, as well as the subsequent trials of the Earl of Gowry, and Logan of Restalrig, it may not be amiss to state the following genealogical anecdotes, as they will further illustrate the affinity between the families of Gowry, of Gray, of Logan of Restalrig, of Colville of Easter Weemyss, and Johnston of Elphinston. Several persons of the name of Gray and Logan were upon the jury; and three of the name of Ker. The Kers and the Logans were nearly allied: This William Ker younger of Ancrum, had an aunt, Janet Ker, who got certain lands\* from her father, A. D. 1519. And in the family vault of Logan of Restalrig, there still remains a stone bearing this inscription †, 'Lady Janet Ker, Lady Restalrig, quæa departed this life 17th May 1526.' They were again allied in the person of Robert Logan himself, whose Lady's name was Marion Ker ‡. William, second Lord Ruthven, who died A. D. 1553 §, had a daughter Barbara, married to Patrick, sixth Lord Gray, father to the Master of Gray, who sat on this jury. He had another daughter Margaret, married to James Johnston of Elphinston. William's son, Patrick, third Lord Ruthven, who was concerned in the murder of Riccio, had a daughter, Isobel, married to Sir James Colville of Easter Weemyss. Patrick, 6th Lord Gray, and father to the celebrated Master of Gray, married Barbara Ruthven, sister to Patrick 3d Lord Ruthven, and aunt to William first Earl of Gowry. Agnes Gray, sister to the 6th Lord Gray and aunt to the Master, was married to Sir Robert Logan of Restalrig, father to Robert Logan, who was forfeited for Gowry's conspiracy.

\*\* *Libel* is the Scottish law-term for *indictment*.

\* Douglass's Peerage, p. 418. 419. † Arnot's History of Edinburgh, p. 257. ‡ Record of Signatures, 15th July 1607, 6th April 1620. § Douglass's Peerage, p. 305. 314.

was present at the finding of them, or who had seen them at any time from that period to the present hour: That the circumstance of losing his mwles could not be instructed by Binning's deposition, declaring that the prisoner went forth, armed in his *secret* and \* *steel bonnet*, to the committing of that horrible crime; for the road between the prisoner's lodging and the place where the murder was committed, was by no means fit for an armed man " *to pass with † welivat mwles to sick a deed?*" That, in all probability, no such thing was found there, and that it was but a mere fiction. As to the inference of guilt, drawn from his flight into England, upon getting intelligence that he was accused before the King and Privy Council of this treasonable crime, on the last day of December 1580, and his shortly afterwards being forfeited for the same, he declared that he absented himself from the realm out of a just fear, which would have moved any man; for his whole goods and possessions ' *had been introritted with, before any attacking;*' but that, speedily after his leaving the realm, and as soon as he got information that he was charged with this horrible crime, of which he was innocent, he instructed the Queen of England's ambassador in Scotland, for the time, to offer, in the prisoner's name, to present him to the King, that he might stand trial, ' *upon condition that there should be deputed unsuspected judges and persons of assize;*' whereunto his Highness answered, ' *That he would not indent with his subject.*' As for the process of forfeiture produced, it could nowise tend to his conviction, in respect of the letters of *rehabilitation*.

To this the King's Advocate answered, and the answer was solid, That the letters of *rehabilitation* could not restore the prisoner

\* *Secret* is an old Scottish word for an under coat of defence, probably made of wire.

† In velvet slippers to such a deed.

1586 foner against the sentence of forfeiture, which being pronounced by Parliament, and remaining unreduced, could not be done away by any other authority than that which established it; and this he desired might be attended to by the jury. For verifying the indictment, he further produced three declarations and depositions, emitted before the Privy Council by John Binning, late servant to the prisoner, on the 10th, 11th, and 15th May 1581. In these depositions, which were authenticated by the subscriptions of the great officers of state, the deponent firmly and constantly swore, that the prisoner *'passed to the deed doing, the said John Binning and Thomas Gairner, his servants, being with him in company.'* The pursuer produced three other depositions, one by the late James Ormestoun of that Ilk, another by the late John Hay of Talla, and a third by the late Paris a Frenchman.

The prisoner argued, that John Binning's depositions could not militate against him, because they were self-contradictory, the deponent sometimes declaring that the prisoner had gone to his bed on the night of the murder, and that the deponent left his master's chamber and went to his own dwelling-house, where he was taking his repose while that horrible murder was perpetrating; and that, *'hearing the crack of the blowing of the King's house in the air with powder, he rose and came to his master's chamber, where he found him—lying on his bed, reading on a book.'* But declaring, in another part of his deposition, that, on the night of the murder, the prisoner, after supping in his own apartment, nobody being with him but the deponent and Thomas Gairner, both his servants, went out at the back door of his house to the committing of the murder, accompanied by these his servants: That there was another inconsistency in the deposition; for Binning declared, that, on the

next

next day, he attended his master to the tolbooth, *i. e.* to the Court of Session, which was impossible; for the night of the murder was that of Sunday preceding Fastern's Even, which was vacation time, when the Lords did not sit: Further, that the prisoner was not then raised to the bench; and that Binning was not his servant at the time of the murder, nor did he come to his service for two years after; and he pressed it upon the affize to mark these inconsistencies and contradictions. 1586

The King's Advocate answered, that the deposition of Binning was sufficient to testify the libel to be true; for that, in all the material parts of his evidence, he declared the prisoner to be participant in the murder. The prisoner replied, that Binning was but a *single witness*, which was not sufficient to convict, in a civil action, far less to infer condemnation for a capital crime. He pleaded further, that the confession of the Earl of Morton ought not to be regarded, for the same had not been produced in parliament, when the sentence of forfeiture was pronounced against the prisoner; neither was it now laid before the jury; and \*, besides, the confession was emitted after the Earl's condemnation, consequently it was that of a person *dead in law*. Finally, he alledged that the depositions of Ormeston, Hay, and French Paris, far from criminating him, testified his innocence; for that these deponents described the whole circumstances of the *murder committed by themselves and their accomplices*, without making any mention of him. The argument was finished by a reply from the King's Advocate, in which he maintained, that

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the

\* This confession was supposed at the time not to have been produced on purpose to afford the jury a pretext for acquitting the prisoner. And the contrivance and success of this collusive trial were imputed to the intrigues of the Master of Gray, and of Randolph the English ambassador. Moyes's Memoirs, p. 108. for A. D. 1586.

1586 the deposition of Binning, to which he adhered at the hour of death, together with the notoriety of the fact, and the confession of the Earl of Morton, which was '*more than notorious*' to the assize, and to the whole country, and consequently needed no production, were more than sufficient to convict the prisoner: And he protested for an *assize of willful error*, if the jury should *cleansse and acquit him*.

Sir William Stewart, son to Lord Ochiltree, also appeared at the bar, and, as near cousin and kinsman to the King, set forth, that in respect of the prisoner's being convicted in parliament, of *art and part* in the treasonable murder of Henry, if the jury should acquit him, he protested for an assize of willful error. And the prisoner protested in the contrary, in respect of his answers, defences, and letters of rehabilitation.

The jury withdrew, chose the Master of Gray their chancellor, and all in one voice found the prisoner *clean and acquit of being in company with Bothwell, Ormeston, Hay, Hepburn, and their accomplices, in committing the crime as libelled*. The jury then inserted their reasons for acquitting the prisoner, and these were merely a recapitulation of the arguments urged by him in the course of the trial. Only they mention a third person to have been killed in the King's lodging, one William Glen, who was one of his Highness's grooms of the chamber, as well as William Tailziour, and Andrew Makcaig, mentioned in the libel\*.

To

\* In the brief account of the trials of Binning and Home of Spott, that is given in the abstract MSS. of Justiciary Records, there is not a word, either of proof or argument. That I might throw every possible light on the trial of Douglass, I endeavoured

To this account, taken from the public record, I beg leave to subjoin Archbishop Spottiswood's opinion of the trial. ' In the estate,' says he, ' matters went not much better at this time, and amongst others, nothing give more offence than the acquitting of Mr Archibald Douglas, by form of assize. This man was known to be guilty of the murder of the King his father, and had fled into England six yeares before. The Earl of Morton, at his death, and one Binny, Mr Archibald's own servant, who was executed about the same time, did both declare, that he was present at the doing of that wicked fact, for which the King had often, by his letters and ambassages, intreated the Queen of England to have him delivered, yet could not obtain it. At this time a remission being purchaled to him for the concealing of that murder, with a letter of rehabilitation, where by he might stand in judgement and plead against his forfeiture, he was in a jury held the 26th of May declared innocent, and absolved of the crime.

' This was done by the procurement of the Prior of Blantire, who had obtruded himself in the Parsonage of Glasgow, where-

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' of

deavoured to have recourse to the original record; but the volume of Records, or *Book of Adjournal*, (as it is termed), containing the proceedings from 20th Decembee 1580, to 27th November 1584, is not to be found. This vexed me the more, as Binning having been tried on the 3d of June 1581, and the Earl of Morton having been tried before that same court, on the very day preceding, I flattered myself with the hope of giving that trial to the public; but, from a note in the abstract MSS. taken from the volume now missing, I find that Morton's trial was not entered on the Record. MSS. Abstracts, p. 111. 113. 118. I also searched the Records of Privy Council and Justiciary, with a desire of examining their proceedings in A. D. 1567, being the year in which Ormeston, Hay, Hepburn, &c. were condemned and executed for the murder of Darnley: And I can hardly persuade myself that it is owing to accident that the records of both these courts for this year are also missing.

1586 ' of Mr Archibald had been titular, and otherwise than by his re-  
 ~~~~~ ' storing could have no right in law to retain it. Many were  
 ' grieved to see justice in that sort abused, for maintaining a sa-  
 ' crilegious possession; but to have sent him (Mr A. Douglas)  
 ' back to England, with a commission to reside there as ambassa-  
 ' dor for the King, which likewise was done, was an error in-  
 ' excusable; and how he, and the Master of Gray, who was  
 ' chiefe man in that led affise, carried themselves in the Queen  
 ' of Scotland's businesse, wherewith they were trusted, we will  
 ' hear in the end of this year \*.'

*John Earl of Gowry, and Mr Alexander Ruthven, for con-  
 spiring to bereave his Majesty of life at St Johnston, 5th  
 August 1600.*

**T**HE Majesty of Rome had subsisted for many ages, and her  
 sway extended over the fairest part of the globe, ere the  
 punishment of treason was inflicted after the death of the traitor.  
 And it was not till the division of the empire between Arcadius  
 and Honorius, a period when the weakness of government in-  
 creased its jealousies and its severities, that a sentence of infamy  
 could be pronounced after death for that crime, and an action  
 brought for wresting the estate from the heirs of the traitor.  
 With a similar policy, James V. who had long been harrassed by  
 his nobles, solemnly adopted this punishment as a part of our  
 law, when he beheld the storms that were gathering round the  
 throne from the enthusiastic spirit of religious and civil liberty  
 that sprang up at the reformation †.

Sir

\* Spottiswood's Hist. p. 347. † Digestorum, lib. 48. tit. 4. lex. 9.; Codi-  
 cis lib. 9. tit. 8. lex. 5. et seq. A. D. 397.; James V. parl. 6. chap. 69. A. D. 1549.

Sir Thomas Hamilton, King's Advocate, produced before the parliament, on the 4th of November 1600, a summons of treason, duly executed, against William Ruthven, brother, and apparent heir, to the Earl of Gowry, and to Mr Alexander Ruthven; and against his tutors and curators, and all having interest, to hear it found and declared that the said Earl, and Mr Alexander, had committed treason, by attempting to bereave his Majesty of life on the 5th of August 1600. The summons, which contains a minute narrative of the transactions of that busy day, is dated on the 26th of August, precisely three weeks after the date of the conspiracy, and the day of appearance was the 4th of November, an interval sufficient for peoples minds to cool after so great an event, for the defenders preparing their defences, and for investigating the truth.

The execution of the summons was certified when it was first laid before parliament. It was produced a second time on the 11th of November. On the 15th, the parliament resumed the cause; and the Lord Advocate produced the following depositions that were taken before the *Lords of Articles* \*.

Andrew Henderson, chamberlain to the late Earl of Gowry, deposed, that, on the night of Monday the 4th of August, he, after supper, was in the Earl of Gowry's own chamber with his Lordship and Mr Alexander Ruthven. The Earl asked him, What he had to do to-morrow? to which he answered, to ride to Ruthven, to speak with the tenants. His Lordship desired him  
to

\* The *Lords of Articles* were a committee of the different estates of Parliament, who prepared the business that was to come before the house. They were this year chosen on the 11th of November; the depositions were produced in Parliament on the 15th; they must therefore have been emitted between the 11th and the 15th.

1600 to postpone that journey, and to be ready by four in the morning to attend Mr Alexander to Falkland; to take Andrew Ruthven with him; to make haste back with what *answer* his Lordship's brother should order, and to leave Andrew with Mr Alexander. They set off at the hour appointed, and arriving betimes at Falkland, *the Master* sent the deponent at seven o'clock to see what the King was doing. He found his Majesty in the courtyard booted, upon which he returned to the Master, saying, 'Haste you, the King is coming forth.' The Master immediately followed his Majesty, spoke with him for about a quarter of an hour, and, during the conversation, the King frequently clapped him on the shoulder. The Master then bid the deponent ride in all haste to Perth, as he loved Lord Gowry and his honour, and acquaint him that the King would be there with a *slight retinue* speedily, and tell the Earl to cause dinner be prepared for his Majesty. The deponent got back to Perth about ten o'clock, when his Lordship inquired anxiously what answer he had brought; what reception his brother had from the King; and what number of persons was hunting with his Majesty? The deponent \* said, the answer was, to prepare dinner for the King: That the reception his brother had was courteous; and that there were sundry of his Majesty's household, and some Englishmen, hunting with the King. The Earl asked what noblemen were with the King? to which he answered, 'none but my Lord Duke †.' He then went to his own house and put off his boots, and, upon his return, the Earl ordered him to put on his, the deponent's, coat of mail, and plate sleeves. He asked for what purpose? The Earl answered, he had a Highlandman to take in the Shoegate ‡. About half past twelve his Lordship bid him bring

\* Register of Parliament, November 1600; Cromerty's Account of Gowry's Conspiracy, p. 38. *et seq.* † The Duke of Lennox. ‡ Shoe Lane.

bring up dinner. The Earl sat down to dinner with three gentlemen, and, while the first course was on the table, Andrew Ruthven returned from Falkland, and whispered to his Lordship. Soon after, Alexander Ruthven and William Blair came to the Earl, while sitting at dinner, upon which the company instantly rose from table, and my Lord bid the deponent send for his steel bonnet and gauntlet. My Lord then went to *the Inch* \*, and soon returned with the King, the Duke of Lennox, and the Earl of Marr. After his Majesty came to the house, *the Master* of Ruthven asked the deponent for the key of the gallery chamber, who answered, he had not handled it since the Earl came to Scotland. He then went, at *the Master's* desire, and got the key for him from Mr William Rynd. Immediately upon his Majesty's sitting down to dinner, the Earl spoke privately to the deponent in the room where the King dined, bidding him go to the gallery to his brother. He went; the Earl followed; and they being all three in the chamber, my Lord said to the deponent, *tarry with my brother, and do what he bids you.* The deponent then asked the Master's commands, which were, to 'go into the round of the chamber,' into which the Master locked the deponent, and took the key along with him. Here he remained locked up, accoutered in his coat of mail, plate sleeves, sword and hanger, but wanting his steel bonnet. All the while he dreaded that some mischief was to be done; and he kneeled, and prayed to God. In about half an hour Mr Alexander returned, entered the chamber first, having the King by the arm, put on his hat, drew the deponent's hanger, and addressing the King, said, '*Sir, you must be my prisoner; remember on my Father's death.*' And, as he held the hanger at his Majesty's breast, the deponent wrenched it out of his hand. The King said, 'Mr Alexander

\* A level field used as a mall, adjoining to Perth, on the road to Falkland.

1600 ' Alexander, ye and I were very great together; and, as touch-  
 ~~~~~ ing your father's death, Man, I was but a minor.' The King  
 added, ' although ye bereave me of my life, *ye will not be King*  
 ' of Scotland, for I have both sons and daughters.' Mr Alexan-  
 der answered with a great oath, it was not his life that he desired,  
 but a promise to his brother the Earl. The King said, fetch  
 hither your brother; and Mr Alexander stipulated, that the King  
 should not cry, nor open the window till his return, and then  
 went away, and locked the door after him. Upon this the  
 King asked the deponent, ' How came ye in here, man? and  
 ' this deponent answered, As God lives I am shut in here like  
 ' a dog.' The King said, ' Will my Lord of Gowry do me  
 ' any evil, man? This deponent answered, I vow to God I  
 ' shall die first.' He then, at the King's desire, went to open  
 the window; but, before he got it opened, Mr Alexander re-  
 turned, and said to his Majesty, ' By God there is no remedy;'   
 then leaped upon the King, and gripped both his hands, he, Mr  
 Alexander, having a garter in his. Then the King said, ' I am  
 ' a free Prince, man, I will not be bound.' So his Majesty cast  
 loose his left hand from Mr Alexander, and, at the same time,  
 the deponent drew away the garter, and the King leaped out of  
 his grip. He then threw his left arm round the King's neck,  
 and crammed his right fist into his mouth; and his Majesty and  
 he wrestling, the deponent pulled his hand out of the King's  
 mouth. The deponent then reached over the King's shoulder,  
 and pulled up the board of the window, and his Majesty cried,  
 ' Treason! treason!' Mr Alexander spoke thus to the depo-  
 nent, ' *Is there no help with thee? Woe worth thee, thou wil-*  
 ' *lain, we all die!*' Then he clapped his hand to his sword;  
 but the King putting his hands on the Master's, stopped him  
 from drawing it. Thus struggling, they staggered forth of the  
 cabinet into the chamber; the door of which the deponent un-  
 locked,

locked, that he might make his own escape, and let in the King's 1600  
 servants. Just as he opened it, John Ramsay entered, *with a* ~~with~~  
*baruk on his hand, drew his hanger, and laid about him.* The  
 deponent then went down stairs, and, as he came to the front  
 gate, the Earl of Gowry was standing before the gate, accompa-  
 nied by fundry persons, having the deponent's helmet on his  
 head, and a drawn sword in \* each hand. The deponent then  
 went to his own house, where he remained till the King left the  
 town. After this, he went to the bridge, and walked up  
 and down about an hour. When he returned home, his wife  
 asked at him, 'What trouble was within *the place*? To whom  
 ' he answered, *well is me* of one thing, that, if I had not been  
 ' there, the King had been twice † sticked this night: But woe's  
 ' me for the thing that is fallen out.' The deponent added, that,  
 being met by Mr John Moncrieffe on his return from Falkland,  
 who asked, Where he had been, seeing his boots were on? He  
 answered, some miles beyond Erne, not daring to unfold the par-  
 ticulars, as the Earl had forbid him to tell the errand ‡.

The Duke of Lennox deposed, that, on the 5th of August last,  
 being in company with the King at Falkland, he saw Mr Alex-  
 ander Ruthven speaking with his Majesty before the stables, be-  
 tween six and seven in the morning. Soon after the King went  
 a stag-hunting; and having killed a buck in the Park of Falk-  
 land, he desired the deponent to accompany him to Perth, where  
 he meant to have some conversation with the Earl of Gowry.  
 The deponent immediately sent his servant for another horse,  
 and for a sword, and followed the King. When he overtook  
 his Majesty, Mr Alexander was speaking with him. Shortly af-  
 ter the Duke's coming up, the King rode aside, and said to the  
 D deponent,

\* It was common, at this period, for combatants to fight with weapons in each  
 hand; Lord Gowry had been long in Italy, and probably was a good sword's-man.  
 Arnot's Hist. of Edinburgh, p. 70. † Stabbed. ‡ All the  
 depositions are subscribed by the respective witnesses.

1600 deponent, 'Ye cannot guess, Man, what errand I am riding for ;  
 ~~~~~ ' I am going to get a *pose*\* in Perth : And Mr Alexander Ruth-  
 ' ven has informed me that he has found a man that has a pit-  
 ' cher full of coined gold of great forts.' The King at the same  
 time asked the deponent what sort of a man he took Mr Alexander  
 to be ; who answered, ' That he knew nothing of him, but  
 ' as of an honest discreet gentleman.' The King afterwards de-  
 scribed to him minutely the circumstances of *the pose* ; to which  
 the deponent answered, ' I like not that, Sir, for that is not  
 ' likely.' As they rode by the bridge of Erne, his Majesty said,  
 ' That Mr Alexander desired him to keep that matter of the *pose*  
 ' secret, and take nobody with him.' But the King, both at that  
 time, and in the Earl of Gowry's Hall at St Johnston, bid the  
 Duke *take taint* (i. e. take heed) where I pass with Mr Alexander  
 ' Ruthven, and follow me.' When the King was within a mile  
 of Perth, Mr Alexander rode on before the company, on pur-  
 pose, as the deponent believes, to advertise the Earl of his ap-  
 proach ; and, when they were within two *pair of butt-lengths* of  
 the town, the Earl, accompanied by diverse persons on foot,  
 came out to meet the King. Then his Majesty, accompanied by  
 the deponent, the Earl of Marr, Abbot of Inchaffrey, Sir Tho-  
 mas Erskine †, the laird of Urquhill, James Erskine, William  
 Stuart, Sir Hugh Harries, Sir John Ramsay, John Murray, John  
 Hamilton of Grange, and John Graham of Balgowan, passed all  
 together

\* A hidden treasure. This was by no means so improbable a tale, as one, from merely viewing modern manners, would deem it. The King was given to understand that this strange man was an emissary of the court of Spain, furnished with a quantity of gold for the purpose of exciting fresh commotions. When the Earls of Huntly, Bothwell, and Crawford, were tried for various points of treason, A. D. 1589. they (and in particular the Earl of Bothwell,) were convicted of receiving from certain Jesuits, and from Graham of Fintry, large quantities of Spanish gold, for the purpose of raising forces. Rec. of Just. May 24. 1589.

† Created Earl of Kellie.

together to the Earl of Gowry's hall, in company with his Lordship and Mr Alexander Ruthven. The King called for a drink, which was long of being brought to him; and it was an hour ere his dinner was served up. When the desert was on the table, Lord Gowry came to the deponent, and the other persons of his Majesty's suite, and desired them to dine; which they did accordingly in the hall. When they had nigh dined, the Earl came to them from the King's chamber, and called for wine, saying, he was directed from his Majesty's chamber to drink the King's health, to my Lord Duke, and the rest of the company. Immediately after the health was drank, the deponent rose from table to wait on the King, conform to directions; but the Earl said to him, his Majesty *was gone up quietly some private errand*. His Lordship then called for the key of the garden, into which he walked, in company with the deponent, and some others. Soon after, Mr Thomas Cranston came to them, crying, 'The King's Majesty is on horseback, and riding through the Inch.' Then the Earl cried, 'Horse! Horse!' Cranston answered, 'Your horse is in town.' His Lordship made no reply, save continually crying, 'Horse! Horse!' The deponent and the Earl came first out of the garden, through the hall, to the close; and, as they came to the outer gate, the deponent asked at the porter if the King was gone forth, who answered, that assuredly he was not. The Earl said, 'I am sure he is first always. Stay, my Lord, drink, and I shall go up, and get the verity thereof.' Immediately he came down again, and affirmed that the King was gone out at the back gate, and away. Upon this the deponent, the Earls of Gowry and Marr, with the rest of the company, went out at the front gate; and, as they were standing there in the street, deliberating where to seek the King, the deponent heard a voice, and said to the Earl of Marr, '*This is the King's voice that cries, be where he will*. So they all looked up to the lodging, and saw his Majesty

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' looking

1600 ' looking forth of the window, *wanting his hat, his face red,*  
 ~~~~~ ' *and an hand griping his cheek and mouth, and the King cried, I*  
 ' *am murdered! Treason! My Lord Marr, help, help!*' Instantly the deponent, Lord Marr, and the company, ran up stairs to the gallery chamber, where his Majesty was, to have relieved him; but the door was fast. Seeing a ladder, they rushed it against the door; but the ladder broke. They then sent for hammers; and, notwithstanding they thundered at the door with large forcing hammers, they got no entrance, till the Earl of Gowry and his brother were both slain. When they got admission, by assistance of those within the chamber, who helped them to break open the door, they found Lord Gowry lying dead, his brother Mr Alexander being slain, and carried down stairs before their entry. When they entered the room where the King was, the deponent saw, through one of the doors, which was by no means close, the pushing of halberts and swords; but knew none of the combatants save Alexander Ruthven of Free-land; and how soon the said Alexander heard my Lord Duke's voice, he and his accomplices left that door, and gave no further disturbance. Depones, That he saw several of Lord Gowry's servants in arms in the close, both before and after the King dined, and that there was a tumult before the Earl's lodging, and in the High Street, for about two hours after his Lordship's and Mr Alexander's death.

The Earl of Marr's evidence, in most things substantial, corroborated that of the Duke of Lennox.

The Abbot of Inchaffrey deposed, That he saw Mr Alexander Ruthven at Falkland in conference with the King, for about a quarter of an hour, on the morning of the 5th of August. The deponent accompanied his Majesty to Perth, and dined in the  
 Earl

Earl of Gowry's. After dinner, the deponent heard that the King had taken horse, and was gone towards Falkland, and the Earl assured the company it was so; upon which the Duke of Lennox, the deponent, &c. called for their horses. As they waited for them, they heard a voice, and the Duke said, 'Yon is his Majesty's voice, be where he will.' Immediately they saw his Majesty looking out of a window, without his hat, his face red, and crying, 'Help, my Lord Marr! Treason! Treason! I am murdered!'

The Abbot of Lindores deposed in all things, agreeable to the evidence of the Duke of Lennox; adding, that, when the company asked if the King was gone forth, the porter said he was not. The Earl affirmed, he had gone out by the back gate; to which the porter replied it was impossible, for he had the key of that gate. When the King called out of the window, 'Treason!' James Erskine laid hands on the Earl upon the high-street; Sir Thomas Erskine also gripped him, saying, 'Fie, traitor! this is thy deed; thou shalt die.' To which Lord Gowry answered, 'I know nothing of the matter.' A scuffle then ensued: The Earl drew both his swords, and cried, 'I will either be at my own house, or die by the gate;' and, at the head of about thirty persons, he made his way into the place.

Sir Thomas Erskine's testimony confirmed those of the two preceding witnesses. He added, that, when he had got into the clofe, meaning to fly to his Majesty's assistance, Sir John Ramsay called to him to come up the *turnpike* \* *stair* to the very top. When he had got up five steps, he met Mr Alexander Ruthven, who was bleeding in the face and neck. Sir Hugh Herries, and others.

\* The name given to a winding stair, very common in Scotland.

1600 others who were with him, cried, ' This is the traitor ! strike  
 ~~~~~ ' him !' He was struck accordingly, and fell ; and, as he was  
 fallen, he turned his face, and cried, ' *Alace ! I had not the \* wite*  
 ' *of it !*' The deponent then went up stairs to the chamber at  
 the head of the gallery, where were the King and Sir John Ram-  
 fay only ; Sir Hugh Herries and a servant followed him ; im-  
 mediately after, Mr Thomas Cranston entered the chamber with  
 his sword drawn, the Earl of Gowry following, with a drawn  
 sword in each hand, and a helmet on his head. They struck at  
 the deponent and his colleagues, who defended themselves and  
 struck again, and Cranston wounded the deponent in the right  
 hand. At last, Sir John Ramfay gave the Earl a deadly stroke.  
 The Earl leaned to his sword ; a man held him up ; but how soon  
 his Lordship fell, Cranston and the rest of his followers left the  
 room.

Sir John Ramfay deposed, that, after having dined on the day  
 libelled in the Earl of Gowry's, he took his Majesty's hawk from  
 John Murray, in order that the said John might dine. Missing  
 the King, he and the Laird of Pittencrief searched for his Ma-  
 jesty in different apartments ; and, when they came into the  
 close, Mr Thomas Cranston told them the King was on horse-  
 back, and at the Inch. The deponent then run to the stable for  
 his horse, and, as he was at the stable-door, he heard the King's  
 voice, but did not understand what he said. He immediately  
 returned, and, entering the close, he found a *turnpike* † *door* o-  
 pen, into which he entered and went up stairs. Hearing a  
 struggle and din of feet, he run with his whole force against the  
 door which enters from the stair to the chamber at the end of  
 the gallery. Having burst open the door, he saw the King and  
 Mr

\* Blame of it.

† Door of a turnpike stair.

Mr Alexander Ruthven striving and wrestling; his Majesty having Mr Alexander's head under his arm, and Mr Alexander, who was almost on his knees, had his hand upon the King's face and mouth. His Majesty, seeing the deponent, cried, 'Fie! strike him *laigh*, because he has an *pyne* \* *doublet* upon him.' Immediately the deponent cast the hawk off his hand, drew his hanger, and struck Mr Alexander, and the King instantly pushed Mr Alexander down stairs. In the rest, he deposed in all points conform to Sir Thomas Erskine. 1600

Robert Christie, porter to the Earl of Gowry, saw my Lord Duke, the Earl of Marr, and the Earl of Gowry, come into the *close*. My Lord Duke asked the deponent, if the King was gone out? He said, Not. Then Lord Marr said, 'Billy, tell me the verity if his Majesty be furth or not?' He answered, 'In truth he is not.' The Earl of Gowry, looking at him with an angry countenance, said, 'Thou lie; he is furth at the back gate, and through the Inch.' Then this deponent answered, 'That cannot be; for I have the key of the back gate, and all the gates of the place.' Then the deponent saw his Majesty looking out of the window of a turret, crying, 'Treason!' &c. Upon which the Duke, Lord Marr, and others, ran up the turnpike stair to the gallery. After this Lord Gowry came from the high-street into the close, a steel-bonnet on his head, a drawn sword in his hand, accompanied by sundry persons, all with drawn swords. My Lord and his followers rushed up the *turnpike* stair; but the deponent knows not what passed within *the place*, save by report; nor knows he any more of the matter.

John Graham of Urquhill deposed 'conform to the Lord  
' Duke

\* *Pyne doublet* was an under coat of defence, made of wire, to shield from the point of a dagger. It was worn by *piens*, or foot soldiers.

1600 ' Duke of Lennox and Earl of Marr, in all things, *reddens ean-*  
 dem *causam scientiæ.*'

John Graham of Balgowan deposed in all things conform to the Duke of Lennox.

*Twenty-two more witnesses* depose either in confirmation of the preceding evidence, or to other facts of less moment. In the whole of the depositions, there is not a word of the Earl's belt and magic characters\*, nor of his not bleeding till the belt was

\* In the account that was published soon after the conspiracy, both these facts are mentioned, and probably they were both true. From these, two very different conclusions have been drawn, by the ignorance of those who believed, and the partiality of those who discredited the conspiracy; the one, *that the not bleeding of the wound was owing to the magical characters*; the other, *that this tale is so absurd, as to excite strong suspicion concerning the reality of the conspiracy.* The real matter had been simply this: Lord Gowry received the deep and mortal wound by the thrust of a small sword, and he had not immediately bled externally; but, on his clothes on his belt being taken off, and the body being turned into different postures in the stripping, the blood had gushed out. Besides, it frequently happens that, on a person's being blooded after sudden death, no blood will issue for some time; but, when the ferrous part of the blood separates from the grumous, the former will flow out of the wound. This the fond friend often looks on as the mark of returning life, while it is the most certain indication of death.—Necromancy at this period reigned with uncontrouled sway over the gloomy empire of darkness. A belief in the power of charms, and talismans, has prevailed in a greater or lesser degree in most ages and nations: A *judicious sceptic*, therefore, will not ground his disbelief of a *natural event*, because the ignorant witness who testifies it, ascribes it to a *preternatural cause*. An incident, much more remarkable than Lord Gowry's not bleeding till his belt was unloosed, is authenticated in the trial of Philip Stansfield for parricide, A. D. 1688; a trial which it would be superfluous in me to publish, as a proper abridgment of it has already been made by Salmon. James Muirhead surgeon, in the course of this trial, deposed, 'That, upon the prisoner's assisting to lift the body of his deceased father Sir James Stansfield, after it had been sewed up, and clean linen put on, it darted out blood through the linen, from the left side of the neck, which

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was unloosed, and of the summons against the Earl of Gowry's heirs, and the indictments against his followers who were executed at Perth. 1600

The parliament pronounced a sentence, declaring the late Earl of Gowry and Mr Alexander Ruthven to have committed manifest treason in all points contained in the summons; and, therefore, concerning their name, memory, and dignity, to be extinguished; their arms to be cancelled; their whole estate, real and personal, to be forfeited, and annexed to the crown; their bodies to be taken to the Cross of Edinburgh, and drawn, hanged, and quartered; the name of Ruthven to be abolished; and their posterity, and their surviving brethren, to be incapable of succeeding to, or of holding any offices, honours, or possessions\*.

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*'the panel touched; but that when he (the witness) and the other surgeon put on the linen, and stirred and moved the head and neck before, he saw no blood at all.'* This is confirmed by another witness; and it is worthy of remark, that Sir James was not stabbed or shot, but strangled; *Salmon's State Trials*, p. 610.

\* How different this sentence, how different the execrable law of Arcadius and Honorius, upon which it is founded, from the following law of our brave, our free ancestors, the Goths, whom we, notwithstanding, call Barbarians! *'Omnia crimina suos sequantur auctores. Nec pater pro filio, nec filius pro patre, nec uxor pro marito, nec maritus pro uxore, nec frater pro fratre, nec vicinus pro vicino, nec proquinquus pro proquinquo, ullam calamitatem pertimefcant. Sed ille solus iudicatur culpabilis, qui culpanda commiserit; et crimen cum illo qui fecerit moriatur: Nec successores aut haeredes pro factis parentum ullam calamitatem pertimefcant.'* *Leges Wisigothorum*, Lib. 6. tit. 1. L. 8. The reader may compare the above with a certain other law, which his reflection will suggest to him.—This sentence, in one particular, exceeded the capricious cruelty of the Roman Emperors, viz. in the insult offered to the dead bodies. Sticking the head and limbs of traitors upon poles, or hanging the body in chains, is a refinement of modern tyrants. *'Corpora eorum qui capite damnantur, cognatis ipsorum neganda non sunt. Eorum quoque corpora qui exuriendi damnantur, peti possunt: Scilicet ut ossa et cineres collecta sepulturae tradi possint.'* *Digest. Lib. 48. tit. 24. l. 1.*

1600 The Parliament at the same time pronounced a similar sentence on Alexander and Henry Ruthvens, sons to the Laird of Freeland, Hugh Moncrieffe brother to the Laird of Moncrieffe, and Patrick Eviot brother to the Laird of Balhousie. And, on the 22d of August preceding, three of their accomplices, Mr Thomas Cranston \*, and George Craigengelt, servants to the Earl of Gowry, and John Macduff, who with their drawn swords had rushed up the turnpike with the Earl of Gowry, and assaulted Sir Thomas Erskine, &c. on a proof led, as well as their own confessions, were convicted before the Court of Justiciary at Perth, and executed that same day.

I have thus presented the simple evidence, and without arguments to enlighten, or ingenuity to perplex the case, I apprehend the reader has already formed his opinion, whether this was a *plot of Gowry's against the King, or of the King against Gowry.* —I shall now state the following arguments, *which impress me with the most complete conviction, that it was a plot of Gowry against the King.*

*Argument 1st, That an attempt upon the King's person was neither uncommon nor unlikely.* This will be best evinced by a list of the various attempts made by King James's subjects on the person of their Sovereign.

*1st Attempt, 24th May 1578.* The Earl of Morton, one of the murderers of the King's father, seizes the King and the castle of Stirling †.

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\* Lord Gowry had not made these three acquainted with his plot, nor had they any other share in the guilt but joining their master with drawn swords. Records of Justiciary, August 22 1600. † Robertson's History of Scotland, vol. 2. p. 62. Arnot's History of Edinburgh, p. 34.

*2d Attempt*, 23d August 1582. William Earl of Gowry, father to the Earl, whose trial I present, at his own house of Ruthven, with the aid of other Lords, seizes the King, changes his ministers, and keeps him in ward about a twelvemonth. This the church voted to be a good and acceptable service to God, the King, and the country. 1600

*3d Attempt* \*. Francis Earl of Bothwell, nephew to James Earl of Bothwell, who was one of Darnley's murderers, aided by some Popish Lords, assemble at Quarrel-holes †, with a number of persons, for the purpose of seizing the King in his palace of Holyroodhouse, murdering the Chancellor, and overthrowing the established religion.

*4th Attempt*, 27th December 1591. The same Earl of Bothwell, James Douglass || of Spott, and about forty accomplices, surprize the palace of Holyroodhouse, while the King and Queen are

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\* Rec. of Just. 24th May 1589. Spottiswood's Hist. p. 376.—It is worthy of remark, that Logan, in his letter to Lord Gowrie, of the 29th July 1600, on the subject of the intended conspiracy, when speaking of the Earl of Bothwell, uses these words: 'In case God grant us happy success in this errand, I hope to have both your Lordship, and his Lordship, with many others of your lovers, and his, at a good dinner, before I die.' † Close by the village of Restalrig, about a mile distant from Holyroodhouse. || Son-in-law to George Home of Spott, who was tried for the murder of Darnley, and who afterwards was one of the jury-men who sat on the trial of Archibald Douglass for the said murder. By the bye, this George Home of Spott was himself murdered, not without great suspicion of the murder being perpetrated by the said James Douglass, his son-in-law and successor. Douglass's inducement to join the conspiracy, was to relieve his servants who were confined within the palace; and who next day were to be put to the torture concerning the murder of his father-in-law. Johnstoni Rec. Brit. Hist. p. 158. Spottiswood's Hist. p. 386. Moyes's Memoirs, p. 18c.

1600 are at supper, break open the Chancellor's, and assault the royal apartments, kill John Schaw his Majesty's principal equerry, and call for fire to consume such of the doors as they could not break up; but are repulsed by Sir James Sandilands and the citizens of Edinburgh: And eight of the conspirators hanged next morning, without jury, on a gallows erected before the palace gate.

*5th Attempt, 28th June 1592. The same Earl of Bothwell, the Master of Gray, and others, who, in a few months after, were detected in a fresh conspiracy with the Court of Spain, for invading Scotland and England, assault the King in the palace of Falkland at midnight; but, by resistance\* of those within, and by the country, on the early rumour of danger, rising in his Majesty's defence, they are forced to abandon the enterprize; they plunder the royal stables and park of the horses, and betake themselves to flight. Several of the conspirators are slain in the pursuit, or hanged. The Master of Gray is pardoned, that he might have the opportunity of giving additional proofs of his treachery. †*

*6th*

\* Great Seal Record, Book 40. No. 21. 15th Aug. 1593. Pardon to the Master of Gray, his uncle, and two brothers, and to James Graham, brother to the late Laird of Fintry, for treasonably attacking the King's person and the palace of Falkland. Johnstons Rer. Brit. Hist. p. 168. Moyes's Memoirs, p. 188. —To show how grossly the sacred principle of religion was prostituted, how it was a mere mask put on to hide the ambition or avarice of those Nobles, whose piety even modern historians have not been ashamed to celebrate; it is not incurious to observe, that Nobles, of the Popish and Presbyterian religions, frequently united in the same conspiracies. 'The wolf and the lamb shall feed together.' Isaiah, ch. 65. v. 25. The flames of London, in the year 1780, gave a fatal and memorable testimony of the delusion and outrage, which, under the pretence of religion, may still be excited by a champion of the covenant. † There were other attempts of less note upon the King's person, which I pass over.

*6th Attempt*, 17th December 1596. The rabble of Edinburgh, 1600 instigated by the clergy, and countenanced \* by the Lords Lindsay and Forbess, assault with great fury the tolbooth of Edinburgh, in which are the King, his ministers and judges; but are repulsed, or appeased by the magistrates, and more respectable citizens.

*7th Attempt*, 5th August 1600, by *John Earl of Gowry*, and *Mr Alexander Ruthven*, on the person of the King, in the Earl's own house of *St Johnston*.

*Argument 2d.* That the Earl of Gowry was by no means an unlikely person to make such attempt.

Lord Gowry had the misfortune to be born in a country which had been recently stained with a deed of the most diffused and complicated foulness, of any that disgraces the annals of the most corrupt and profligate Court. The Prince under whom he lived, possessed no solid nor permanent authority; nor did his ideas of prerogative correspond with the extent

\* Arnot's History of Edinburgh, p. 43. Moyes's Memoirs, p. 249.—When Ogilvy the Jesuit was brought to trial, his judges, or rather inquisitors, interrogated him about the Pope's right to depose excommunicated princes, and if it was lawful to put such princes to death. In answering these interrogatories, he reproached the court with this attempt. After saying it was not papists but heretics, who inculcated parricide, he goes on thus: 'Pulveraria conspiratio aulicorum fuit, at non sic cum die Septembris vestra (it should be Decembris) quando ingenti armatorum manu regem in Praetorio cum Senatu necare voluistis, quod et fecissetis nisi concursu opificum satellites adjuti e manibus vestris regem eripuissent. Duo millia sunt hodie Edinburgi qui illo die arma tulerunt, et tot esse possunt testes, tres predicantes exhortatos fuisse ad fortiter agendum, clamantes, Deus et ecclesia; cum ex altera parte clamaretur pro Deo et Rege; pro quo facta Edinburgum debebat comburi.' Relatio incarcerationis et martyrii Joannis Ogilbei, &c. typis viduae, L. Kellami, 1615. See his trial below.

1600 tent of his power; for he deemed the *Royal pleasure* to be the standard for measuring out law to the subjects. The people, on the other hand, enjoyed no regular system of liberty, yet were extremely destitute of the respect due to the Sovereign. The turbulent nobles, in gratifying their common pursuits, ambition, and revenge, were restrained by no delicacy of sentiment, no politeness of manners. The clergy held the pulpit to be a sanctuary from which they might declaim without challenge on matters of state; and their bold sentiments, their lofty pretensions, were often unfolded in the most coarse and intemperate language. To add to the public disorder, the kingdom was distracted between two foreign factions, and two rival religions. The Spanish faction united with the Popish; the \* English, with the Presbyterian. The Prince, who guided the car of state over those arduous paths, increased the confusion by his inability to direct it. From a want of judgment, of resolution, and of temper, he frequently connived at, or pardoned the most atrocious crimes, while he punished, with illegal and † excessive rigour, trivial or imaginary offences. Equally unskilled to hurl the imperial thunder, or to encircle his temples with the rays of mercy, he weakened moral distinction, while he broke down the barriers to the commission of the more atrocious crimes.

The murder of Riccio, by Lord Gowry's grandfather, was perhaps the greatest insult ever offered to a woman and a Sovereign, and may be deemed the harbinger of the succeeding tumults.

\* It is highly probable that some persons in the Court of England were privy to this conspiracy. In a letter of Logan's, which is ingrossed in the indictment against George Sprott, who was executed for concealing this conspiracy, there is this passage: 'I trust, and am assured, we shall hear word within few days from them your Lordship knoweth of; for I have care to see what ships comes home by.' Records of Justiciary, August 12. 1608. † See the Index, articles Tenant, Cornwall, Fleming, Guthrie, Maccalzeane, Ogilvie, Rois, Sandilands.

mults. And the Earl's father, when he seized the King at Ruth- 1600  
ven, changed his ministers, and kept him in ward for a twelve-  
month, showed that his respect for Princes was not much greater  
than his father's.

This Earl soon after fell upon the scaffold, and in his death we may probably look for the principal motive to *Gowry's Conspiracy*. The Church, in a solemn act of their Assembly, declared their approbation of the elder Gowry's seizing the King at Ruthven; and the Presbyterian clergy, in their writings and declamations, always enforced this topick, and expressed their opinion, that he fell by an unjust sentence. One of the most eminent and popular of that order was preceptor to Lord Gowry and his brothers. Thus the idea of a murdered father, instilled \* in the conversations of their preceptor, and supported by the authority of the Church, must have made a deep impresson on the youthful minds of the offspring of Gowry. This, indeed, is not simply supported by plausible conjecture; it is instructed by evidence. When Alexander Ruthven approached the King with a drawn hanger, his words were, '*remember on my father's death.*' The same is corroborated by Logan's letters; letters which, from the proof adduced in the following trial, I hold to be *authentic evidence*, particularly in the following passage †: 'I think there is  
' none of a noble heart, or carries a stomach worth a penny, but  
' they

\* To exclude misrepresentation, I desire it may be understood, I neither wish to insinuate, nor do I believe, that Lord Gowry's preceptor, or any of the clergy, instilled into his mind to revenge his father's death; but only, that they must have repeatedly told him his father fell by a hard sentence; and that his mind brooding over this, joined to his ambition, and the state of the country, probably suggested to him this conspiracy against the King, which terminated in the ruin of himself and of his family. Logan's Letters, No. 5. would completely vindicate Lord Gowry's preceptor from such aspersion. † Logan's Letters, No. 5. ult. July 1600.

1600 ' they would be content and glad to see an contented revenge of  
 ~~~~~ ' *Greyfeil's* \* death.'

The family of Ruthven had long been looked upon as the head of that party which was attached to England and the Reformation; and the accomplishments of the latter Gowry qualified him to be the leader of an enterprising faction. The importance he derived from aristocratic influence over his extensive domains, and from the attachment of a powerful party in Church and State, was embellished with the lustre of a royal descent †.

Thus

\* A nickname for the elder Gowry. † William, second Lord Ruthven, the Earl's great grandfather, married Janet Halyburton, eldest daughter, and co-heiress of Patrick Lord Haliburton of Dirleton, whose predecessor, Sir Walter Haliburton, married Lady Isabel Stuart, eldest daughter of Robert Duke of Albany regent of Scotland, third son of King Robert II. The Earl's father, William first Earl of Gowry, married Dorothea, daughter to Henry Lord Methven, who was first married to the Princess Margaret of England, daughter of Henry VII. and widow of James V. It is said Lord Gowry propagated a rumour of his mother's being descended of that marriage, and that many low people about Perth credited the report; (Scot's Hist. of Scotland, p. 553.). Yet it seems demonstrated that she was sprung of a marriage between Lord Methven and Janet Stewart, daughter of John Earl of Athole. Douglass's Peerage, p. 16. 305. 321. Lord Gowry adopted into the arms of his family, A. D. 1597, a sword pointing towards an imperial crown, with the motto, '*Tibi feli*;' Crawford's Peerage, p. 166.

I am induced to believe that, however atrocious Lord Gowry's purpose might be, he did not intend to despatch the King immediately. The evidence of what passed between the King and Alexander Ruthven, as well as a consideration of the most wary steps Gowry could pursue, confirm this notion. Ruthven's speech to the King was, '*Sir, You must be my prisoner*;' and, when he returned a second time, and swore there was no remedy, instead of stabbing the King, he only proposed tying his hands. Whether the brothers consulted their ambition or their safety, it was prudent for them not to despatch the King at St Johnston. The notorious murderer of the King could have little hope of ascending his throne. By throwing

Thus ambition, as well as revenge, might stimulate Gowry to his daring enterprize. Indeed, if his attempt was to be directed against the life of the King, it could no longer be safe for him to remain in the condition of a subject: And the indecent and malicious imputation of bastardy, with which the fanatics reproached King James, might afford a plausible pretext for secluding the royal offspring.

The family of Hamilton, next heir to the Crown, had long lost its popularity, and the Earl of Arran, its head, had lost his judgment; and, although there undoubtedly were several families interposed between Gowry and the Crown, in the strict line of succession, none of them probably possessed power and popularity to support their right. But, if Gowry and his brother were really endowed with those personal accomplishments which have been so highly extolled, and which made their countrymen conceive '*the most sanguine \* hopes of their early virtues.*' Is it absurd to suppose Lord Gowry to have flattered himself, that, in a country where *the church was in danger*, where the

F

trumpet

ing the bloody task upon the hands of an assassin, at an after day, they might shift off the imputation of the parricide; and their partizans might deny, with as much effrontery, that Gowry committed the murder, as they have since done that Gowry hatched a conspiracy. Besides, while the King remained in custody of the brothers, his life was a hostage for their safety, and a check upon any spirited measures in the adherents to the royal cause. The house of St Johnston was but a few yards from the river Tay. Had Lord Gowry been successful in his *actual* attempt to dismiss the King's followers, by telling them the *willful falsehood* that his Majesty was gone; had the shades of night fallen, he might have conveyed the King down the Tay, with equal ease and secrecy; and his Majesty might either be carried prisoner to England, where his mother had ended her days, or to Logan's house of Fastcastle, on the coast of Berwick, where Logan boasts that he had 'kept my Lord Bothwell in his greatest extremities, say the King and his council what they would.' Logan's Letters, No. 4. \* Robertson's Hist. of Scot. v. 2. p. 252.

1600 trumpet of sedition was sounded by the ministers\* who fortified the 'chief block-house of the Lord's Jerusalem,' his piety, popularity, and bravery, should supply the defect in title, and make him be called, while there were nearer heirs to the Crown; as has since happened, in the same country, on a similar occasion.

Sundry dark expressions in Logan's letters, particularly, that the estate of Dirleton † was to be bestowed on him, if Lord Gowry's scheme should take effect, confirm the notion that his Lordship aimed at the Crown.

*Argument 3d, That the circumstances of the 5th August, as established in proof, are consistent ‡ with a plot of Gowry against the*

\* *Vulgo—The Ministers of Edinburgh!* Calderwood's Hist. of the Church, written by appointment of the General Assembly, p. 447. † The Gowry family acquired the estate of Dirleton, one of the best in East Lothian, by the marriage of Lord Ruthven with a daughter of Lord Haliburton. ‡ A celebrated historian has endeavoured to invalidate the testimony of Gowry's conspiracy, recorded before Parliament, by remarking certain discrepancies and contradictions between this testimony and the account of the plot published by the King, recently after the event; and likewise between the evidence given by Henderson before the Privy Council, and that afterwards emitted by him before Parliament. In some of these, he points out discrepancies so trifling, as with me rather tend to strengthen the candour and credibility of the evidence. I present an instance: 'The King asserts, that Henderson opened the window during Mr Ruthven's absence, Disc. 23. Henderson deposes that he was *only attempting to open it* when Mr Ruthven returned; and that, during the struggle between the King and him, he opened it.' Robertson's Hist. v. 2. p. 270.—Such are the conceptions and faculties of man, that it is *morally impossible* for twenty or thirty persons who witness, much more who are concerned in a busy scene of violence and danger, to give a precisely similar account of every minute circumstance; and, were an account tallying so wonderfully to be given in evidence, with me it would destroy the credibility of the whole. The various depositions in the trial of Gowry, in my humble opinion, are very distinct and consistent.

*the King, and incompatible with a design of the King against* 1600  
*Gowry.* 

Of this, I think, any impartial mind may be satisfied, by a bare perusal of the evidence. I shall, therefore, briefly observe, that it is instructed by Alexander Ruthven's coming to Falkland, and taking the King along with him to his brother's house of St Johnston; by the King's setting out immediately after the chase, without so much as a sword; by the slightness of his Majesty's retinue; by the Duke of Lennox, Lord Gowry's brother-in-law, being of the party; by the suspicions which the King expressed to the Duke, bidding him take heed and follow him; by Alexander Ruthven's separating the King's attendants from him, on the false pretext of his Majesty's commands; by his locking the doors as the King and he went up stairs, thereby excluding all followers; by Lord Gowry's attempting, in the mean time, to get the King's suite sent back to Falkland, for which purpose he asseverated the falsehood, that the King was on horseback and away; and, by the King's being reduced to such distress, as to stretch his neck forth of a window, at the top of the house, his face red, a hand gripping his cheek, and himself crying, 'Treason! Help! I am murdered!'—I shall only add, that, if the King had entertained any bloody design against Gowry, it was safer, both to his person and government, and more suitable to his timid counsels, to have taken off Gowry by the dagger of a bravo, or by inveigling him into a plot against the state, than by going in person alone, and unarmed, into the secret chambers of the castle of the greatest baron in the kingdom, there to have murdered him, surrounded by his domestics, his friends, and his vassals, and in the center of his extensive domains. And, if the King had, at his devotion, a person so dexterous in the art of forgery, as he must have had, *if Logan's letters are fictitious*, there could

1600 be no difficulty in convicting Gowry of any crime his Majesty might think fit to lay to his charge.

*Argument 4th, That the letters of Logan of Restalrig, one of the conspirators, afford a separate incontestible evidence of the reality of this conspiracy.*

As this argument rests entirely upon the authenticity of Logan's letters, it falls to be discussed in the following trial of Logan himself:

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Having stated the evidence, and the argument, which impress me with the most perfect conviction of the reality of this conspiracy, it may not be amiss to inquire how so strange a delusion, as the doubting of this conspiracy, has been propagated and maintained.

In those days, religion was not that gentle and holy affection which strengthens and purifies the mind, while it humanizes the heart: It was an ethereal fluid which pervaded the whole mass of the constitution; and whose electric shocks served sometimes to purify, and sometimes to consume: And the political atmosphere, strongly impregnated with the flame, often burst forth in thunder. Whatever the clergy were pleased to inculcate was swallowed with the most stupid and greedy faith; and, from the invariable principles of human nature, I may venture to assert they were the less studious of plausibility in their doctrines, in proportion to the simplicity of their flock.

It

It had pleased the clergy to pass a solemn act of approbation 1600 of the Elder Gowry's apprehending the King, although it was nothing less than an act of open and manifest rebellion. Is it then wonderful that those who justified the successful rebellion of the father, should deny their belief of the disappointed treason of the son \*? When the ministers of Edinburgh were desired to assemble the people, to lay before them the particulars of the plot against the King, and to praise God for his delivery, they refused obedience, alledging that they could not deliver from the † *chair of truth*, a relation of facts concerning which they themselves were dubious. And Mr Robert Bruce, a bold and popular preacher, persisting in his denial, notwithstanding the arguments, the entreaties, and the threatenings of the King, was banished for his disobedience. The spirit of incredulity naturally spread from the pastor through the flock, and it continued to be fostered by the more bigotted of the clergy during the civil wars, which rent the state for a great part of the last century: Indeed, with the different factions, a belief or disbelief in Gowry's conspiracy, became a touchstone of party. When the nation was no longer distracted by virulent contention between church-man and covenanter, loyalist and republican, whig and jacobite; when the minds of men were disposed to receive the truth, a circumstance purely accidental has tended to continue this delusion. An eminent historian appeared, whose writings have stamped a deserved impress upon the opinions of the public. Attached to the *order* to which he belongs, it was natural for him to entertain a higher respect for the opinion and authority of those fathers of the church than they deserved, and consequently to imbibe

\* To deny the reality of plots, unless the treason was sealed with the blood of the Prince, was no new matter: 'Conditionem Principum miserrimam aiebat (Domitianus) quibus de conjuratione comperta non crederetur, nisi occisis.' Suetonius Delphini, p. 595. † Calderwood's History, p. 444.

1600 imbibe in part their sceptical notions concerning Gowry's conspiracy. These he has delivered with a subtilty of argument, an engaging and persuasive manner, which captivate the attention, and rivet the wavering opinion \*, while perhaps they are unable to convince upon a solid investigation of the judgment.

*Robert Logan of Restalrig, for Accession to Gowry's Conspiracy.*

**I**N the year 1608, George Home, Earl of Dunbar, was informed by a gentleman of his acquaintance, that there was one Sprott, a notary at Eyemouth, who had communicated to him some particulars relative to Gowry's conspiracy, which this

\* Human nature is liable to error, from partiality of affection, as well as frailty of judgment; but *candour* is in every man's power. It is therefore my duty to observe, that incontestible evidence is recorded in the books of *Sederunt* of the Court of Session, of the Earl of Gowry, at the time of his death, being creditor to the King in L. 196,465 : 18 : 6, of accumulated sum of principal and interest. By the King's inability to pay him, the Earl was so much embarrassed in his circumstances, that the Court of Session granted him for a twelvemonth a personal protection from the diligence of his creditors, just forty-six days before he was killed. And from the common law, as well as the silence of the public records, it is probable the Earl's creditors were never paid. I am aware that this fact may make a forcible impression upon those who have been accustomed to doubt of the reality of this conspiracy. But a consideration of the following circumstance will entirely remove every suspicion. Lord Gowry was creditor to the King in this sum, as representing his father, the late Earl, who was Treasurer of Scotland, and that, by accopt fitted on the 10th of May 1583, the balance then resting to the Earl being L. 48,063 : 4 : 8 Scots, which (as Scottish money was greater by the half at that time than it is now) was L. 72,094 : 17 : 0 of our present Scottish money of principal, besides seventeen years

this Sprott had kept secret till the persons concerned in it were \* 1600  
 dead. The Earl acquainted the Lord Advocate, and Sprott was instantly apprehended. He was examined before the Privy Council on the 5th of July 1608, and afterwards underwent frequent examinations. His voluntary confession was made the subject of an indictment against him before the Court of Justiciary, as being in the treasonable foreknowledge of Gowry's conspiracy. He was tried capitally on the 12th of August 1608, *upon his own confession alone*. He was convicted. He was condemned to be hanged that very day at the cross of Edinburgh, and his head to be put up on the tolbooth, beside the traitor Gowry's. He confessed he perfectly knew that Logan of Restalrig was in the foreknowledge of Gowry's conspiracy: That letters passed between the Earl and Restalrig on the subject, in the beginning of

years interest at the then rate of ten *per cent*. On the 4th of May 1584, the elder Gowry was convicted, condemned, and beheaded for treason, and his estate forfeited. King James, by a solemn act, restored his son, the latter Gowry, against the forfeiture, and ratified the debt he owed him, which that forfeiture had proscribed, in December 1585. The personal protection to Gowry was granted on the 20th of June, and his Lordship was killed on the 5th of August 1600. Can it therefore be alledged that the King made an attempt upon Gowry, with a view of getting quit of this debt, without maintaining that his Majesty restored to the heir, the estate of a person justly condemned, that he might afterwards murder the innocent heir, in order to wrest back the estate he had conferred from his royal clemency? Gowry was restored by two acts of the parliament, which sat on the 1st, 4th, and 10th December 1585; the one a general act of indemnity and restoration of all persons who had been forfeited since the King's coronation, excepting the murderers of Darnley, and some others. The other was a special statute in favour of the widow and children of William Earl of Gowry. MSS. Acts of Sederunt, Vol. iv. 20th June 1600; Records of Parliament, 1st, 4th, 10th, December 1585; Spottiswood's Hist. p. 331. See the Act of Sederunt which I have printed in Appendix, No. 1. \* Logan of Restalrig, and his servant Laird Bour, died about the year 1606.

1600 of July 1600; that a servant of Restalrig's, commonly called *Laird Bour*, was the messenger employed in these despatches, had some of them in his keeping, and showed them to the prisoner in the house of Fastcastle, among other papers, he Bour, being unable to read, and that he took the opportunity to secret them \*. He confessed that he was often in company with Restalrig, as well as with Laird Bour, heard the conference which passed between them relative to a letter which Bour had brought back to his master from Lord Gowry: That he afterwards inquired of Bour what was going on between his master and the Earl of Gowry? to which Bour answered, 'He believed that the Laird should get Dirleton without either gold or silver, but feared that it should be as dear unto him; and Sprott inquiring how that could be? Bour said, they had another pye in hand nor the selling of any land; but prayed Sprott, for God's sake, he would let be, and not trouble himself about the Laird's business; for he feared, within few days, the Laird would be either landless or lifeless.' By this declaration he uniformly abode. He adhered to it on the scaffold, when he was performing the last solemn duties of penitence and prayer; and he declared that he should give the people a signal of its truth after he was thrown over the ladder; accordingly, to the astonishment of the spectators, he clapped his hands thrice when he was suspended on the gallows. All this is testified in the Records of Parliament under the subscription of the Lords of the Privy Council, the

\* The summons of forfeiture against Logan's heirs, explains more particularly how Sprott came by these letters: That Laird Bour, when he got them back from the Earl of Gowry to be returned to Restalrig, detained the letters; that Sprott stole them from him, and Restalrig becoming apprehensive that Sprott or Bour would betray him, bribed them both with many presents, to keep the secret. See an excerpt from this summons in Appendix, No. 2.

the Archbishop of Glasgow, many noblemen, and the magistrates and ministers of Edinburgh, who were upon the scaffold during the time of his execution. 1600

The *queue* being thus given to Restalrig's guilt, a summons of treason was executed against Robert Logan, his eldest son and heir, and all others concerned, on the 15th of February 1609, to appear before the King and estates of Parliament, on the 12th of April, and defend themselves from the charge of high treason exhibited against the late Logan of Restalrig.

The cause was brought before Parliament on the 24th of June, and his Majesty's Advocate, for proving of the charge, produced George Spratt's declarations \*, and confessions before the Privy Council, the Court of Justiciary, and on the scaffold. His Lordship also produced the depositions of witnesses examined before the Privy Council, and the Lords of articles; and the following letters of the deceased Logan of Restalrig.

## L E T T E R I.

Right Honourable Sir, my duty, with service remembered: Please you understand, my Lord of *Gowrie*, and some others his Lordship's friends and well-wishers, who tenders his Lordship's preferment, are upon the resolution, you know, for the revenge of that cause: And his Lordship has written to me anent that purpose; whereto I will accord, in case ye will stand to, and bear a part; and before ye resolve, meet me and Mr *Alexander Ruthven*, in the *Canongate*, on *Thursday* the next week; and be as

G

warry

\* Register of Parliament, 24th June 1609.

1600 warry as you can. Indeed, Mr *Alexander Ruthven* spoke with me four or five days since, and I have promised his Lordship an answer within ten days at farthest. As for the purpose, how Mr *Alexander Ruthven* and I has set down the course, it will be a very easy done turn; and not far by that form with the like stratagem whereof we had conference in T. S. But in case you and Mr *Alexander Ruthven* forgather; because he is somewhat uncautious, for God's sake beware with his rackleffness as to this of *Padua*; for he told me one of the strangest tales of a Nobleman\* of *Padua* that I ever heard in my life, resembling the like purpose. I pray you, Sir, think nothing, although this bearer understand of it; for he is the special secretary of my life; his name is *Laird Bour*, and was old *Manderston's* man for dead and life; and even so now for me. And for my own part, he shall know of all that I do in this world, so long as ever we live together; for I make him my household man: He is well worthy of credit, and recommend him to you. Always to the purpose, I think best, for our plot, that we meet all at my house of *Fast-castle*: For I have concluded with Mr *Alexander*, who, I think, shall be meetest to be conveyed quietly in a boat by sea; at which time, upon sure advertisement, I shall have the place very quiet and well provided; and, as I receive your answer, I will post this bearer to my Lord: And I pray you, as you love your own life, (because it is not a matter of mowse), be circumspect in all things, and take no fear but all shall be well. I have no will that either my brother, or yet M. N. R. my Lord's old pedagogue, know any thing of the matter, till all be done that we  
would

\* What this story is of a Nobleman of Padua, a learned antiquarian of Italy may possibly be able to unfold. I despair of ever hearing it. Lord Gowry and his brother, as they travelled for their accomplishment, passed a considerable time at Padua.

would have done ; and then I care not who gets wit that loves 1600  
 us. When ye have read, fend this my letter back again with   
 the bearer, that I may see it burn't myself ; for so is the fashion  
 in such errands : And, if you please, write your answer on the  
 back hereof, in case ye will take my word for the credit of the  
 bearer, and use all expedition ; for the turn would not be long  
 delayed. Ye know the King's hunting will be shortly ; and then  
 shall be best time, as Mr *Alexander* has assured me, that my  
 Lord has resolved to enterprize that matter. Looking for your  
 answer, commits you to Christ's holy protection. From Fast-  
 castle, the 18th day of July 1600.

Your's to utter power ready,

R E S T A L R I G.

L E T T E R H.

Laird *Bour*, I pray you haste you west to me about the errand  
 I told you ; and we shall confer at length of all things. I have  
 received a new letter from my Lord of *Gowrie*, concerning the  
 purpose that Mr *Alexander*, his Lordship's brother, spoke to me  
 before ; and I perceive that I may have advantage of *Dirleton*, in  
 case his other matter take effect ; as we hope it shall. Always, I  
 beseech you, be at me, the morn at even ; for I assured his Lord-  
 ship's servant, that I shall fend you over the water within three  
 days, with a full resolution of all my will, anent all purposes ;  
 and I shall indeed recommend you and your trustiness to his  
 Lordship, as ye shall find an honest recompence for your pains  
 in the end. I care not for all the land I have in this kingdom,  
 in case I can grip off *Dirleton* ; for I esteem it the pleasantest

1600 dwelling in Scotland. For God's cause keep all things secret, that my Lord, my brother, get no knowledge of our purposes; for I rather be \* carded quick. And so looking for you, I rest till meeting.

From the *Canongate*, the 18th day of July.

*P. S.* I am very ill at ease, therefore speed you hither.

Your's to power ready,

RESTALRIG.

### L E T T E R III.

Right Honourable Sir, all my hearty with humble service remembered, since I have taken on hand to interprise with my Lord of *Gowrie*, your special and only best beloved; as we have set down the platt already, I will request you that you will be very circumspect and wise, that no man get an advantage of us. I doubt not but you know the peril to be both life, lands, and honour, in case the matter be not wisely used; and, for my own part, I shall have a special respect to my promise that I have made to his Lordship and Mr *Alexander*, his Lordship's brother, although the scaffold were set up. If I cannot come to Falkland the first night, I shall be timely in St *Johnston* on the morn. Indeed, I lippeden † for my Lord himself, or else Mr *Alexander*, his Lordship's brother, at my house of *Fastcastle*, as I wrote to them both. Always I repose on your advertisement of the precise day, with credit to the bearer; for howbeit he be but ane fillie glyed old carle, I will answer for him, that he shall be very true. I pray you, Sir, read, and either burn or send again with the bearer; for I dare hazard my life, and all I have else in the world,

on

\* Buried alive.

† I trusted to, I expected the coming of.

on his message, I have such proof of his constant truth. So com- 1600  
mits you to Christ's holy protection. ~~~~~

From the *Canongate* the 27th day of July 1600.

*P. S.* I used not to write on the back of any of my letters, concerning this errand.

Your's to all power, with humble service ready,  
R E S T A L R I G.

## L E T T E R V.

My Lord, my most humble duty, with service, in most hearty manner remembered. At the receipt of your Lordship's letter, I am so comforted, especially at your Lordship's purpose communicated to me therein, that I can neither utter my joy, nor find myself able how to encounter your Lordship with due thanks. Indeed, my Lord, at my being last in the town, Mr *Alexander*, your Lordship's brother, imparted somewhat of your Lordship's intention anent that matter unto me: And, if I had not been busied about some turns of my own, I thought to have come over to *St Johnston* and spoken with your Lordship. Yet always, my Lord, I beseech your Lordship, both for the sake of your honour, credit, and, more than that, that your life, my life, and lives of many others, who may, perhaps, innocently smart for that turn afterwards, in case it be revealed by any, and likewise the utter wrecking of our lands and houses, and extirpating of our name, look that we be all as sure as your Lordship, and I myself shall be for my own part; and then I doubt not but, with God's grace, we shall bring our matter to an fine\*, *which shall bring the contentment to us all that ever wished for the*  
*revenge*

\* To a conclusion.

1600 *revenge of Machivellian massacring of our dearest friends.* I  
 ~~~~~ doubt not but Mr *Alexander*, your Lordship's brother, has informed your Lordship what course I laid down to bring all your co-associates to my house of *Fastcastle* by sea, where I should have all materials in readines for their safe receiving on land, and into my house, making, as it were, but a manner of passing time in an boat on the sea in this fair summer-tide, and no other strangers to haunt my house while we had concluded on the laying our plot, which is already devised by Mr *Alexander* and me. And I would wish that your Lordship would either come, or send Mr *Alexander* to me, and thereafter I would meet your Lordship in *Leith*, or quietly at *Restalrig*, where we should have prepared an fine hatted kit \*, with sugar and comfeits and wine, and thereafter confer on matters; and the fooner we brought our purpose to pass it were the better, before harvest. Let not Mr *W. R.* your old pedagogue, ken of your coming. But rather would I, if I durst be so bold to intreat your Lordship once to come and see my own house, where I have kepted my Lord *Bothwel* in his greatest extremities, say the King and his council what they would. And in case God grant us happy success in this errand, I hope both to have your Lordship and his Lordship, with many others of your lovers and his, at a good dinner before I die. Always I hope that the King's buck-hunting at *Falkland* this year shall prepare some dainty chear for us, against that dinner, the next year, *jocose hoc*, to animate your Lordship at this time: But, afterwards, we will have better occasion to make merry. *I protest, my Lord, before God, I wish nothing with a better heart nor to atchieve to that which your Lordship would fain attain unto;* and my continual prayer shall tend to that effect; and with the large spending of my lands, goods, yea, the hazarding of my life,

\* A hatted kit is a dish common in Scotland at this hour. It is a preparation of milk kept for some time. The whey is let off, and the remainder is of a pretty thick consistence, and no unpleasent acidity,

life, shall not afray me from that, although the scaffold were <sup>1600</sup> already set up, before I should falsify my promise to your Lordship, and persuade your Lordship thereof. I trow your Lordship has an proof of my constancy already or now. But, my Lord, whereas your Lordship desires, in your letter, that I crave my Lord, my brother's mind anent this matter, I utterly disaffent from that, that he ever should be an counsellor thereto; for, in good faith, he will never help his friend nor hurt his foe. Your Lordship may confide more in this old man, the bearer hereof, my man, Laird *Bour*, than in my brother; for I lippen my life, and all that I have else, in his hands; and I trow he would not spare to ride to hell's gate to please me; and he is not beguiled of my part to him. Always, my Lord, when your Lordship has read my letter, deliver it to the bearer again, that I may see it burnt with my own eyes; as I have sent your Lordship's letter to your Lordship again; for so it is the fashion I grant. And I pray your Lordship to rest fully persuaded of me, and all that I have promised; for I am resolved, howbeit it were to die the morn. I must intreat your Lordship to expedite *Bour*, and give him strait directions, upon pain of his life, that he take never a wink of sleep untill he see me again, or else he will utterly undo us. I have already sent another letter to the Gentleman your Lordship knows, as the bearer will show your Lordship of his answer, and forwardness with your Lordship; and I shall shew your Lordship farther at meeting, when and where your Lordship shall think it meetest. Till which time, and ever, I commit your Lordship to the protection of Almighty God.

From *Gunn's Green*, the 29th day of July 1600.

*P. S.* Prays your Lordship hold me excused for my unseemly letter, which is not so well written as mister were; for I durst not let any writers ken of it, but took two fundry idle days to  
do

1600 do it myself. I will never forget the good sport that Mr *Alexander*, your Lordship's brother, told me of a nobleman of *Padua*. It comes so oft to my memory; and, indeed, it is aparastur\* to this purpose we have in hand.

Your Lordship's own sworn and bunden man, to obey and serve with effold and ever ready service, to his utter power, to his life's end.

R E S T A L R I G.

L E T T E R V.

Right Honourable, my hearty duty remembered, ye know I told you at our last meeting in the *Canongate*, that Mr *Alexander*, my Lord of *Gowrie*'s brother, had spoken with me anent the matter of our conclusion; and, for my own part, I shall not be hindmost. And, finfyne, I got a letter from his Lordship's self for that same purpose; and, upon the receipt thereof, understanding his Lordship's frankness and forwardness in it, God knows if my heart was not lifted ten stages. I posted this same bearer to his Lordship, to whom you may concredit all your heart in that as well as I: For, and it were my very soul, I durst make him messenger thereof, I have such experience of his truth in many other things. He is a silly old glied carle, but wonder honest; and, as he has reported to me his Lordship's own answer, I think all matters shall be concluded at my house of *Fast-castle*; for I and Mr *Alexander Ruthven* concluded, that ye should come with him and his Lordship, and only another man with you, being but only four in company, intill one of the great fishing-

\* Apropos.

fishing-boats, be sea, to my house, where ye shall land als safely 1600  
 as on *Leith* shore, and the house, against your Lordship's coming,   
 to be quiet; and, when you are about half a mile from shore, as  
 it were passing by the house, to gar set forth a waff\*. But, for  
 God's sake, let neither any knowledge come to my Lord, my  
 brother's ears, nor yet to Mr *W. R.* my Lord's old pedagogue;  
 for my brother is kittle † to shoe behind, and dare not enterprife  
 for fear; and the other will dissuade us from our purpose with  
 reasons of religion, which I can never abide. I think there is  
 none of a noble heart, or carries a stomach worth a penny, but  
 they would be content, and glad to see an contented revenge of  
*Greysteil's* death; and the sooner the better his Lordship be  
 quick; and bid Mr *Alexander* remember on the sport he told me  
 of *Padua*: For I think with myself that the cogitation on that  
 should stimulate your Lordship. And, for God's cause, use all  
 your courses *cum discretione*. Fail not, Sir, to send back again  
 this letter, for Mr *Alexander* learned me that fashion, that I may  
 see it destroyed myself. So, till your coming, ever commits you  
 heartily to Christ's holy protection ‡.

From *Gunn's Green*, the last day of July 1600.

If these letters are genuine, the controversy respecting Gow-  
 ry's conspiracy is ended. I shall now state the proof of their  
 authenticity. On the substance of these letters, or what is called  
*the internal evidence*, I shall make few remarks.

There are certain passages in these letters which express such  
 a strength, and originality of feature, as indicate the author to  
 have been a character strongly marked; and give reason to be-

H

lieve

\* Cause hang out a flag.  
 from the last letter.

† Ticklish.

‡ The subscription is torn away

1600 *w* lieve that the person who composed them was not writing under a fictitious signature. In one of them Logan observes, ' your Lordship desires in your letter that I crave my Lord, my brother's mind, anent this matter; I utterly dissasent from that, that he should ever be an counsellor thereto, *for in good faith he will never help his friend, nor hurt his foe.*' In another, he adds, ' for God's sake let neither any knowledge come to my Lord, my brother's ears, nor yet to Mr W. R. my Lords old Pedagogue; for my brother is kittle \* to shoe behind, and dare not enterprise for fear; the other will diffwade us from our purpose, with reasons of religion which I can never abide.' The following passage in letter 1st, in my opinion, confirms its originality: ' When ye have read, send this back again with the bearer, that I may see it burn't myself.' This precaution, which it was extremely natural for a person to suggest, who was writing on so dangerous a subject, yet which might in the issue be neglected, would have been the most absurd paragraph that could be invented by one who was fabricating letters applicable to a period long previous to that on which they were to be produced.

To come, then, to the extrinsic or positive evidence of these letters, it must be remembered, that a testimony of a very singular nature and force has already been produced, and that *Sprott who gave it sealed it with his blood.* The following proof is also given of the authenticity of these letters.—Mr Alexander Watson, minister of Coldingham, deposed, That on his conscience, he believed the five letters produced, to be written by the late Robert Logan of Restalrig, with his own hand, not only  
because

\* Ticklish, in allusion to a horse that kicks and winces while he is shoed.

because the character resembled perfectly his hand-write every way, but also agreed with the fashion of spelling, which the deponent remembered in sundry specialties which he stated in his evidence. And, in confirmation of this, he produced three letters holograph of Restalrig, to show their conformity with the letters produced. 1600

Mr Alexander Smith minister of Chirnside, deposed, That he was well acquainted with the late Logan of Restalrig, and also with his hand-write, having been preceptor to his children for many years. He swore that he firmly believed these five letters, and every word of them, to be the proper hand-write of the Laird of Restalrig, both on account of the resemblance of character, and of the peculiarity of Restalrig's spelling, which was different from the mode commonly used, in many particulars, as specified at length by the preceding witnesses.

Sir John Arnot \*, Provost of Edinburgh, deposed, that he was well acquainted with Restalrig's hand of write; having seen many of his writings, and received various letters from him. He deposed, that, having considered the five letters produced by the Lord Advocate, he, on his conscience, believed the whole of them to be written by Restalrig, because the character agreed every way with the shape of Restalrig's hand-write, and also the spelling in many particulars, in which Restalrig differed from other mens form of writing. And, in confirmation of this, he produced four deeds, all of the proper hand-write of Restalrig, agree-

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ing

\* Sir John Arnot was appointed treasurer-depute of Scotland about the year 1604. The General Register still shows the great estate he possessed in the counties of Edinburgh, Fife, Berwick, and Orkney.

1600 ing perfectly in spelling and character with the missives produced.

The sheriff-clerk of Berwickshire, the minister at Aytoun, and two other witnesses, confirm the preceding evidence.

A sentence similar to that passed upon Gowry was pronounced upon Restalrig; a sentence, in *one* respect, as illegal as it was severe; for the treason-laws only admitted of trial after death against the heirs of such persons as were known in their lifetime to have committed treason, as Dr Robertson \* excellently argues. The statute, however, was *not violated in any other particular*; for the summons against Restalrig's heirs was executed *within three years* after his death. Such, however, was then the state of the country, that, in a capital trial, no man could build his security on the precepts of law, the principles of justice, and the feelings of humanity.

I dismiss this investigation with submitting the following proposition: 'Whether, if the evidence I have presented of the  
' state of parties in Scotland, and of their outrageous attempts;  
' of what passed before such a multitude of witnesses at St John-  
' ston on the important day; of Sprott's foreknowledge of the  
' conspiracy, which he testified and *sealed with his blood*; and  
' of the authenticity of Logan's letters; I say, if these united tes-  
' timonies collected into one focus do not ascertain the reality of  
' Gowry's conspiracy, I submit, whether there be such a thing  
' as historical or legal evidence.'

*Francis*

\* Robertson's Hist. of Scotland, vol. 2. p. 260.

*Francis Tennent, Merchant-Burgefs of Edinburgh, for Writing a Seditious Pasquinade against the King.*

**T**HE prifoner was indicted at the instance of Thomas Hamilton \*, his Majesty's Advocate, for writing and difper- 1600  
 fing flanderous letters, reproachful of the King, his progenitors, and council. ~~~~~

No counfel appeared for the prifoner; but he gave in defences in writing †, which muft have been drawn by a lawyer. His defences were:—That he was not apprehended nor profecuted on account of a recent crime, but for a fact alledged to have been committed three years before: That he was not allowed the legal *induciae*, or warning of fifteen days, provided by ftatute for prifoners to prepare their defences: That no copy of the indictment was given him; but that he was *fummarily prefented in pannell without any citation preceding*: That ‘*ſpeaking generally, without curſing, is no lawful cauſe for taking a man's life,*’ according to the liberal and humane reſcript of the Roman Emperors, *Si quis Imperatori maledixerit ‡*. ‘*Quoniam ſi id ex levitate proceſſerit, contemnendum eſt: Si ex inſania, miſeratione digniſſimum: Si ab injuria, remittendum.*’

The Lord Advocate answered, That the prifoner's pleas of the diſtance of time at which the offence was committed, of his being furniſhed with no copy of the indictment, and being denied the

\* Afterwards Earl of Hadington, and Secretary of State. † Records of Juſticiary, October 8. 1600.

‡ Codicis lib. 9. tit. 7. l. unic.

1600 the usual time for preparing his defences, ought to be repelled, because the crime libelled was *sedition against the Prince*: That the defence which he founded on the Imperial Code ought also to be repelled by reason of the statute, James VI. parl. 14. c. 205. A statute, in which it must be confessed, that King James exceeded the tyranny of his predecessors, as it extended the pain of death to those who even read, or heard, any slanderous writings or speeches against the King, without lodging informations against the offenders.—The court repelled the prisoner's defences, and found the libel relevant.

The Lord Advocate produced before the Court, and the Jury, which consisted of merchants and tradesmen of Edinburgh, two letters. These the prisoner acknowledged to be of his handwriting; and the Jury, in respect of the act of parliament cited above, and of the letters produced, unanimously found the prisoner guilty.

It may, perhaps, appear surprising that the prisoner should have confessed; but, I apprehend it was both the most natural and most prudent conduct he could pursue: For it is probable the letters could have been proved against him; and he was threatened with the torture in the course of the process.

A royal warrant, dated at Linlithgow, September 23. was then produced, ordaining the Court to pronounce the following sentence: That the prisoner be taken to the cross of Edinburgh, and his tongue cut out at the root; that a paper be fixed on his brow, denoting him to be the author of *wild and seditious pasquils*\*, and that he then be taken to a gallows, and hanged till he be dead.

But,

\* Pasquinades.

But, as the King affected the vain boast of clemency, a second 1600  
royal warrant was produced, in which the torturing and cutting  
out the tongue were dispensed with; and his Majesty was *graci-*  
*ously pleased* to declare, he was content that the prisoner should  
—*only be hanged*: A sentence which was accordingly pronoun-  
ced.

Immediately upon the prisoner's being sentenced, the Lord  
Advocate took away the letters upon which he was convicted,  
declaring, that he would not have them entered upon the record.

*Archibald Cornwall Town-officer in Edinburgh, for attempt-*  
*ing to hang up the King's Picture on the Gallows.*

AS this trial is a nonpareil, I present it neat. ' Archibald  
Cornwall town-officer, *dilaited*\* of the ignominiously  
' dishonouring and defaming of his Majesty, in taking off his  
' portrait, and laying of the same, and setting thereof to the  
' stools and upbearers of the gibbet, pressing to fix up the same  
' thereupon.'

' Pursuer Mr Thomas Hamilton † advocate to our Sovereigne  
' Lord.'

Then follow the names of the affize; they are mostly taylors;  
two of them are designed *Fruitmen*.

' The

\* *i. e.* accused.

† Rec. of Just. 25th April 1601.

1600 ' The affize, by plurality of voices, choose John Ranken (taylor burges of Edinburgh) chancellor.

' The affize, *for the most part, file and convict* Archibald Cornwall, officer, of the *treasonable* setting of his Majesty's portrait to the stoops of the gibbet, and putting of the same to be hung forth upon an nail infixt in the said gibbet.

' The justice-depute, by the mouth of Robert Galbraith dempster \* of the said Court, decerned and ordained the said Archibald Cornwall to forfeit life, lands, and goods, and to be taken to the said gibbet, whereupon he *pressed* to hang his Majesty's portrait, and there to be hanged *quhill* † he be dead, and to hang thereupon by the space of twenty-four hours, with an paper on his forehead, containing that vile crime committed by him, which was pronounced for doom! — A man hanged for attempting to fix up a paultry daubing, or a halfpenny print upon the gallows, or even a halfpenny itself; for it also bears ' the image and superscription of Caesar.' *Dii boni!*

But this, bad as it is, is not the worst point of light in which this trial must be viewed. For to hang a man on account of transgressing a law, annexing a capital punishment to the knotting of straws, is not so repugnant to liberty and justice, as the hanging him upon no law at all, but merely at the caprice of a tyrant. Now, there is nothing in the Scottish statutes upon which this indictment could have been founded. The idea, indeed, must have been borrowed from the Roman law; yet, even upon the Imperial edicts, this man could not have been legally convicted:

\* Executioner, from the word doom; or perhaps from the Latin verb *demo*, *dempsi*.

† until.

convicted: For there is hardly an analogy between the images 1603  
of the Roman Emperors and a modern picture; Emperors, who  
themselves were deified, and whose consecrated statues were the  
objects of religious adoration. Nay, were the analogy complete  
between the Imperial images, and the pictures of a modern  
prince; and, were the sanguinary edicts that guarded the ma-  
jesty of Rome, suitable to a limited monarchy, still the prisoner  
must, by law, have been acquitted; for 'Non videri contra ma-  
jestatem fieri ob imagines\* Caesaris nondum consecratas venditas.'

*Doom pronounced over the Dead Body of Francis Mowbray,  
a prisoner, who was killed in his attempt to escape from E-  
dinburgh Castle.*

A Royal warrant was directed to Sir William Hart, and the  
other Judges of the Court of Justiciary, setting forth, in  
the usual bombast stile of treasonable indictments, that the de-  
ceased had been † guilty of *most high, horrible, and detestable*  
*points of treason*: That the same was verified by *two or three*  
witnesses; but that the deceased obstinately persisted to deny the  
charge: That he attempted to make his escape from Edinburgh  
Castle, which rendered his guilt the more manifest; and that,  
in the attempt, he had brought about his own miserable and  
shameful death. The warrant, therefore, required the Court to  
pronounce sentence on the deceased 'Francis Mowbray, now  
'presented on pannel' (*i. e.* produced at the bar) to be dismember-  
ed as a traitor; his body to be hanged on a gibbet, and afterwards  
quartered; his head and limbs stuck up on conspicuous places in  
I the

\* Digest. Lib. 48. Tit. 4. Lex 5. § 2.

† Rec. of Just. ult. Jan. 1603.

1603 the city of Edinburgh ; and his whole estate to be forfeited. The warrant is dated at Holyroodhouse, 31st January 1603, and is subscribed James Rex, Montrose Cancellar, Marr, Herreis, Halyrudhouse. Doom was pronounced accordingly.

This, perhaps, exceeds every act of King James's tyranny. For, *1st*, this sentence of forfeiture, pronounced after death, was not adjudged by Parliament, but by the Court of Justiciary, in consequence of a royal edict. *2d*, No summons of treason was executed against the heirs of the deceased, nor any defender cited, unless the corpse, which was produced at the bar, can be called a defender. *3d*, No specific charge was exhibited against the deceased ; nor any thing but a general accusation of treason and *laese-Majesty*, which, in those days, was so far from conveying any precise and definite idea, that it might have been any thing which occurred to the whim of the King's Advocate, or that of his Royal Master. *4th*, No proof was adduced in Court, no jury called, nor verdict returned, establishing the charge upon which the sentence of forfeiture was pronounced.

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Nothing can impress us with a worse opinion of those times, than to behold the people stupid, yet whimsical, abject, yet insolent. When aroused by the clergy, on the score of speculative doctrines, or even forms of religion, they would break forth into the wildest outrages against their governours ; yet they would remain supinely indifferent to the wanton invasion of the most established principles of law, and of the most sacred rights of mankind.

*Trial*

*Trial of Mr Andrew Crichton for Declining the Authority of  
the King and Privy Council.*

THE prisoner, who was brother to the Laird of Innernytie; 1610  
was prosecuted at the instance of Sir Thomas Hamilton, his Majesty's Advocate, for *treasonably*\* declining the jurisdiction of the King and Privy Council. The indictment set forth, that the prisoner being brought before the Privy Council, 'to be examined upon such matters concerning his Majesty and the estates of this his kingdom, and required by their Lordships to give your oath to them, that you should faithfully and truly answer to them, and declare the verity of such things as should be demanded of you: Ye treasonably refused to acknowledge his Majesty, and the saids Lords of his most honourable Privy Council, to be your judges; but most treasonably declined their judgment.'

The act of Parliament, A. D. 1584, c. 129. confirming the authority of the King and Privy Council, in all cases, and over all persons, and annexing the pain of treason to the denial of the same, was then read over to the prisoner: But he persisted in declining the jurisdiction of the King and Privy Council, and judicially ratified his *declinature*.

The Court sentenced him to be taken to the Cross of Edinburgh, and to be hanged, his body to be dismembered as a traitor, and his whole estate to be forfeited. But, after remaining

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fix.

\* Rec. of Just. 29th August 1610.

1610 six months in prison, under sentence\* of death, the King was  
 pleased to change the sentence to perpetual banishment.

In reading the judicial proceeding of those wretched times, our surprize is divided between the mulish conceit of individuals in declining the royal authority, and the tyranny of government in the exercise of that authority. This mode of calling people before the Privy Council, and requiring them to make oath that they should answer every question which might be put to them, is as high a stretch of tyranny, as any tribunal on earth, I presume ever attained. That no rude breath might pollute the Majesty of the Throne, a capital punishment had been annexed, even to the hearing of slanderous speeches against the King, without informing upon the authors; and the unsocial † spirit of the reformed religion had guarded its *monopoly of the mind*, by annexing the like penalty to those who gave food or lodging to a Popish priest. To call then people before the Council, and oblige them to give an oath that they should answer every question which might be put to them, was laying them under the necessity of becoming public informers, in a case where the pain of death was annexed to the exercise of an act perhaps of hospitality or charity.

I presume it must have been some motive of religion which induced the prisoner, Crichton, to decline the authority of the King and Privy Council. So nearly do extremes meet ‡, that  
 Black,

\* Rec. of Just. 27th February 1611. † It is strange that *the true religion*, which is the only *direct* road to salvation, will not content itself with the endless spiritual consequences it presents to mankind, but that it will also deal out fire and faggot, to those who are so far mistaken, as to pursue their course to heaven by any other road. ‡ Spottiswood's Hist. p. 419. See the trial of Ogilvie *infra*.

Black, the Presbyterian minister at St Andrews, declined their 1615 authority in the year 1596, when cited before the Privy Council to answer for an offence which he had committed; and Ogilvie the Jesuit declined the same jurisdiction, A. D. 1615, when required to answer every interrogatory that might be put to him. Black received a censure, but Ogilvie was hanged.

*John Fleming for Slanderous Speeches against the King.*

THE prisoner was pursued at the instance of Sir William Oliphant of Newton, King's Advocate, on account of 'treasonable, blasphemous, and damnable speeches, uttered by him to John Lauder minister at Cockburnspath.' The prisoner most humbly threw himself in his Majesty's will, *i. e.* \* submitted to his Majesty's pleasure.

The indictment set forth, that this Lauder, the minister, 'having reprehended and found fault with the said John Fleming, because his son repaired not to the communion; saying to the said John, that *albeit* (although) he contemned the order and discipline of the Kirk, yet the King's most gracious Majesty, who is a most religious and Godly Prince, and *under whose blessed government the true religion* and discipline of the Kirk is established, and advanced, would not suffer such contempt and disobedience to pass unpunished! The said John Fleming, upon deliverance of the said speeches, shaking off all fear of God, and that reverend respect which in conscience before

God,

\* Records of Justiciary, May 17. 1615.

1615 *w* ‘ God, and in his duty and allegiance he owed to his Majesty,  
 ‘ most treasonably, blasphemously, and *mischantlie* \*, replied to  
 ‘ the said minister in these words: Feind † nor the King shoot  
 ‘ to dead or the morn, and that he die of the falling sickness.—  
 ‘ And it being demanded of the said John, what moved him to  
 ‘ utter such blasphemous and horrible speeches against his Ma-  
 ‘ jesty? made this scornful and disdainful answer, Were not ‡  
 ‘ the King and his laws, he had not wanted his lands; and  
 ‘ therefore he cared not for the King, *for hanging would be the*  
 ‘ *worst of it.*’

The prisoner was not far mistaken in his prediction. He was sentenced to be hanged at the cross of Edinburgh, and his moveable goods to be forfeited.

*Thomas Rois ||; son of the late John Rois of Craigie, for writing and publishing at Oxford, a Pasquinade against the Scots.*

1618 *w* **T**HE prisoner was prosecuted before Mr Alexander Colville Justice-depute, at the instance of Sir William Oliphant of Newton, his Majesty's Advocate, who produced in Court an act of Privy Council, authorising the prosecution.

The

\* From an obsolete French word, *meschantment*, wickedly, maliciously. † An oath, a mode of swearing.

‡ The cause of offence which this poor man had received was the loss of a law-suit.

|| I know not if the family of *Rois*, or *Rofs*, of Craigie, be still extant; but their armorial bearings are described by Sir James Balfour, Lyon King at Arms in the reign of Charles I.; Nisbet's Heraldry, vol. 1. p. 416.

The prisoner was charged in the indictment with ' the devil- 1618  
 ' ish and detestable firing, feigning, *blasphemous* uttering, and ~~~~~  
 ' by writ publicly exposing, of an villainous \*, infamous, and  
 ' devilish writ,' &c. In this pasquinade, which was in the  
 form of a thesis, the prisoner had maintained, that all Scotsmen,  
 except the King, his sons, and a very few others, ought to be  
 debarred from the Court of England. He expressed his surprise,  
 that the English, who in other respects were quick enough  
 fighted, should suffer such an unprofitable and pernicious mul-  
 titude, the very offscourings of the people, to domineer within  
 their territories. He laid down his thesis in ten propositions,  
 or articles, composed in Latin, and written with his own hand.  
 He affixed it to the door of St Mary's church, in Oxford, and  
 publicly offered to defend his thesis, at the Universities of  
 Paris, Cambridge, or Oxford. From all these seditious and in-  
 flammatory articles, the indictment concluded, that the prisoner  
 had acted a most unnatural part towards his own countrymen,  
 had endeavoured to stir up the English to murder them, and  
 had transgressed sundry acts of Parliament, viz. James I. Par-  
 liament 2. act 43.; James II. Black acts †, act 100.; James VI.  
 Parliament 8. act 134.; Parliament 10. act 10.; Parliament 14.  
 act 205.

However criminal the prisoner might be in exciting jealousies  
 and dissentions between the English and Scots, it was truly ab-  
 surd to charge him with having transgressed these statutes; for  
 they related to the sowing dissention between the King and his  
 people; and they were enacted before the union of the Crowns,  
 at a time when the former of these nations was described in the  
 statute-

\* Records of Justiciary, August 20. September 10. 1618.  
 in Saxon character.

† *i. e.* printed

1618 statute-book, as '*our ancient enemies of England.*' Not only was the prisoner innocent of transgressing these statutes, but the Court of Justiciary had surely no jurisdiction over him, in an offence which consisted in having published a '*detestable, firing, blasphemous thesis,*' at the University of Oxford.—In those times, however, it was sufficient, if some attention was paid to the forms, without the smallest regard to the principles of law and justice. King James knew, that, even armed with the terrors of the Star-chamber, he could not, in England, overwhelm the prisoner with that destruction which he meditated; he therefore embraced the illegal resolution of sending the prisoner to be tried in his own country; a country where the transient gleams of fanaticism served only to cast a gloomy light athwart the region of tyranny and slavery.

The indictment being read over, the prisoner judicially confessed his guilt, but declared, at the same time, that he committed this offence, while he was in a state of insanity. He craved pardon of God, the King, and his countrymen, and *came in the King's will, i. e.* submitted to his Majesty's pleasure. He expressed his hope, that his Majesty, being a gracious Prince, would incline to *mercy, which is God's right hand, rather than to justice, which is but his left.* And he entreated the Court to intercede in his behalf.

Being found guilty by the jury, the Court ordained him to be taken back to prison, and to be kept in irons till the King should be informed of his conviction, and till he should suffer an exemplary punishment.—The Court met again on the 10th of September, when a warrant from his Majesty, directed to Lord Binning, Secretary of State, was produced, conform to which, sentence was pronounced on the prisoner, that he be taken to  
the

the cross of Edinburgh, and his right hand struck off; and there- 1618  
 after his head to be struck from his body, his hand to be put up-  
 on the West Port, and his head on the Netherbow.

*James Skene for Treasonable Opinions and Declarations.*

**T**HE prisoner, who was brother to the Laird of Skene, was 1680  
 prosecuted at the instance of his Majesty's Advocate \* for  
 high treason. He was charged in the indictment with being ac-  
 cessory to the rebellion headed by Balfour of Kinloch, and Hack-  
 ston of Rathillet, at Air's Moss and Bothwellbridge; with having  
 maintained the lawfulness of that rebellion, even in presence of  
 the Duke of York, and of the Lords of Privy Council, and those  
 of Justiciary; with having justified the excommunication of the  
 King, and having maintained it was lawful to kill him, &c.

The proof adduced against the prisoner was his own confes-  
 sion, emitted before the Duke of York and Privy Council on  
 the 13th November 1680, of which the tenor follows:

He said, he did not know who were rebels, but denied that he  
 was present at the battles of Bothwellbridge and of Air's Moss.  
 He thought the persons engaged in those insurrections were not  
 rebels, for they were in defence of God's cause. He was not at  
 the Torwood conventicle when the King was excommunicated,  
 nor did he know who contrived it, but he thought the reasons  
 of the excommunication just. He acknowledged the burning the

K

Acts

\* Records of Justiciary, November 22. 1680.

1680 Acts of Parliament, because they were *against the Covenant*; and would not admit the authority of the King or Parliament in things that were against the Covenant. He did not know if any new insurrection was plotted; *but he believed that God's people were always ready to take arms in defence of themselves and of the gospel; that he was one of God's people, and had resolved to give an testimony for the cause.*—He thought the killing of the Archbishop of St Andrews was not murder: That there is a declared war between those who serve the Lord, and those who serve the King against the Covenant; and that it is lawful to kill such in defence of the gospel: *That the King being excommunicated, and there being now a lawful declared war against him on account of the breach of the Covenant, it is lawful to kill him, and all those who are in opposition to the Covenant.*

He renewed his confession before the Court and Jury. He was desired to deliberate before he should sign it: He answered, he had resolved to sign it; he thought it his honour to do so; and he did it accordingly.

The Jury unanimously found the prisoner '*guilty* of the treasonable crimes and expressions mentioned in his dittay, and 'that by his own confession.' The Court sentenced him to be taken to the Cross of Edinburgh on the 24th of November instant, to be hanged on a gibbet till he be dead, his head to be separated from his body, and fixed on the Netherbow, and his whole estate, real and personal, to be forfeited.

*Charles*

*Charles Lord Frazer \* for High Treason, in proclaiming the late King James to be Righteous and Lawful Sovereign of this Realm, &c.*

**I**T was charged against the prisoner, that, contrary to his al- 1693.  
 legiance, he, in the month of June or July 1692, went with  
 his accomplices to the market-crofs of Fraferburgh, stepped  
 upon the crofs, and, after three † several *O yes's*, did three several  
 times proclaim the late King James, and the pretended Prince of  
 Wales, to be righteous and lawful King of this kingdom, and  
 fucceffor to the fame, and that they cursed all who would fay the  
 contrary: Then they drank, and caufed to be drank, King James's  
 good health, and that of the Prince of Wales, and cursed King  
 William and all his adherents; drank to his confufion; uttered  
 reproachful fpeeches of him, calling him *Burgar*, and Burgar-  
 Mafter of the Hague, and faying that he was only Prince of O-  
 range: That, for the greater folemnity, they fired guns and pistols  
 from the Crofs on the occafion, and forced fome of his Majesty's  
 fubjects to drink treasonable healths: By all which the prisoner  
 testified his rebellion againft his Majesty's perfon and authority,  
 and his treasonable intentions to depofe the King; and did difown  
 the King's title to the crown, and did all that in him lay to in-  
 cite the people to take arms: For which contempts and treafons  
 he ought to be punifhed with death, and the forfeiture of his  
 eftate.

K. 2

After

\* This family was raifed to the peerage by Charles. I. A. D. 1633. The title became extinct by the prisoner's dying without iffue; Douglafs's Peerage, page 273. † Records of Jufticiary, March 29. 1693.

1693 After a prolix argument, the Court found the indictment relevant to infer the pains libelled.

The following persons composed the affize: Lord Forrester, Lord Bargeny, the Master of Forbefs, James Ofwald of Singletoun, James Baird of Saughtonhall, Patrick Murray of Livingstone, Mr George Scot of Giblestone, William Dick of Grange, Sir Alexander Gilmour of Craigmillar, James Eleis of Southfyde, Sir Robert Milne of Binnie, Hugh Wallace of Ingliftoun, Alexander Nisbet of Craigintinnie, William Biggar of Woolmet, and Sir Wiliam Binning of Wallyfoord.

#### T H E P R O O F.

Thomas Pyper, weaver, saw Lord Frafer come from the house of John Hay vintner, and go to the Crofs, and step upon it: He heard one in the company cry three O yes's, and proclaim the late King James and the Prince of Wales, and this was after some person had bid him proclaim, '*to whom he answered, what shall I proclaim, my Lord?*' After these proclamations, the witnesses heard King James's name mentioned, saw the people on the crofs have drink with them, and heard the shooting of pistols. Adds, that Lord Frafer was on the Crofs at the same time with the man who proclaimed King James.

John Wood saw Lord Frafer and others go to the Crofs, saw his Lordship on the Crofs, heard a servant belonging to the company cry three several O yes's, and then proclaim the late King James and the Prince of Wales; and after the proclamation he heard two shots of a pistol. The witness carried wine to the company at the Crofs.

Henry

Henry Finlayson saw Lord Frazer and others on the Cross 1693  
 drinking healths; their servants told him it was the late King James,  
 and Prince of Wales's health: Lord Frazer and another  
 gentleman held drawn swords to the deponent's breast, and for-  
 ced him to drink some healths.

John Hay, vintner, deposed, that Lord Frazer went out of his  
 house to the Cross, and the deponent went there also, and heard  
 his Lordship drink King James's and the Prince of Wales's health.  
 He heard also the firing of pistols.

Alexander Robertson heard a noise at the Cross, opened his  
 window, and saw and heard a person cloathed in red cry three  
 O yes's, and proclaim King James *as our righteous King*. The  
 deponent, at the same time, saw the prisoner on the Cross, and  
 heard the company drinking healths. He did not distinctly hear  
 whose health, but hears the words, '*Burgar, the Hague, and*  
 '*Orange,*' come from the company.

James Hardie, servant to John Hay vintner, saw Lord Frazer,  
 and several others, go to the Cross, and the witness was employ-  
 ed to hold some of their horses. He heard and saw a footman  
 make three O Yes's off the Cross, and begin a health to King  
 James and the Prince of Wales, 'and bid *the ill man*\* take all  
 'that refused to pledge it.' He saw the prisoner, and others,  
 drink the health, and heard some shots of a pistol.

James Scot saw Lord Frazer, and others, at the Cross; he saw  
 and heard them drink King James's, and the Prince of Wales's  
 healths, and heard Lord Frazer curse those present who refused  
 the toast. He heard four shots.

\* A fanatical term for the Devil.

The

1693 The Lord Advocate protested for an affize of willfull error, if the jury should acquit the prisoner. The prisoner protested in the contrary; because the Committee of Estates which declared King James to have *forfaulted* the Crown, and bestowed the same on William and Mary, solemnly enacted and declared, ' *That affizes of error\* are a grievance.*'

Seven Peers and eight gentlemen of distinction who were summoned to be upon the jury, were fined a hundred merks each, for not obeying the citation. The jury, of which Lord Bargeny was Chancellor, all in one voice found it not proved that the prisoner either actually proclaimed, or caused proclaim, the late King James, and the pretended Prince of Wales; but found it proved that he was present at the proclamation. Found, by a plurality of voices, that a proclamation was made at the Cross of Frazerburgh, of the late King James and the Prince of Wales; *but not in terms of the indictment, viz. as being righteous and lawful King of this kingdom, and lawful successor therein.* The affize, all in one voice, found it not proved, that the prisoner and his accomplices cursed all those who would say to the contrary. They found it proved, that the prisoner drank King James's † health, and that of the Prince of Wales: But found his cursing King William, and drinking to his confusion, and uttering reproachful

\* Act of Estates, No. 18. April 13th 1689. † In the reign of George I. Alexander Crawford was fined L. 50 Sterling, for drinking the health of King James VIII. and to his happy restoration. Rec. of Just. 21st Feb. 1715. And a Highland minister was turned out of his meeting-house for three years, for not praying for King George by name, but for the ' *Supreme in authority who sits upon the royal throne;*' and this at a time when there was no statute for praying for the King by name, except that which ordained the clergy to pray for *Queen Ann, and the Princess Sophia*: Nor any law for it, but a proclamation of the Lords of the Regency. Rec. of Just. 11th, 14th, 18th, 19th, 25th July 1715.

proachful speeches of him, and forcing people to drink treason- 16  
able healths, not proved. They found that pistols were fired; ~  
but did not find that it was by the prisoner's order.—The Master  
of Forbess, the Lairds of Craigmillar, Livingstone, and South-  
fyde, desired it to be marked in the record, that they found the  
proclamation proved in terms of the libel. On the 16th of May  
the Court pronounced sentence on Lord Fraser, fining him in  
L. 200 Sterling.

*Captain Simon\* Fraser of Beaufort, and many other persons  
mostly of the Clan Fraser, for High Treason, in forming un-  
lawful associations, collecting an armed force, occupying and  
fortifying houses and garrisons, imprisoning and ravishing  
persons of distinguished rank, and continuing in arms after  
being charged by a Herald to lay them down.*

**T**HIS is the only case I know of since the revolution in 1698  
which a person was tried in absence before the Court of ~  
Justiciary; a proof led, a jury inclosed, a verdict returned, and  
sentence pronounced, forfeiting life and estate, honours, fame  
and posterity. The first instance of this tyrannical mode of pro-  
ceeding was the illegal sentence upon the Rebel Covenanters af-  
ter the battle of Pentland, which was afterwards rescinded by act  
of Parliament. The Rebels of Bothwellbridge met with the same  
treatment; and the like was repeated after the defeat of Mon-  
mouth.

The following is one of the most singular prosecutions in our  
criminal record: Whether we respect the stretch of law that was  
made

\* The celebrated Simon Lord Lovat.

1698 made to convict the absentee, or the savageness of his conduct, or the absolute dominion that he possessed over his followers, and directed to purposes the most shocking to human nature.

By the law of Scotland, outlawry, even for treason, inferred the forfeiture only of personal estate. It was sanctioned by statute, that trials for treason could not be taken in absence; but that the whole accusation\*, argument, and evidence, should be led in presence of the accused, and no otherwise. So anxiously did the professional lawyers adhere to this form, that, as our jurisprudence admitted, under certain limitations, of trial after death †, for this heinous offence, on such occasions, the bones of the deceased were dug out of the grave and formally presented in Court.

When the Covenanters were defeated in the battle of Pentland, a desire to arm insulted majesty with additional terrors, or to enrich the servants of the Crown with unlawful spoil, induced the Ministers of Charles to attempt, in absence of the accused, the trial of those rebels, and the forfeiture of their estates. And, although the complaisant disposition of Parliament gave every reason to conclude that they would not have hesitated to pass a law to this effect; yet it suited better the views of a tyrannical administration to operate this innovation in law, by the decree of Judges who were appointed, and might be removed at pleasure, than by the authority of the Great Council of the Nation.

Before

\* Bankton's Inst. vol. 2. p. 251.; Erskine's Fol. Inst. p. 733.; James VI. Parl. 11th, c. 90.; Mackenzie's Crim. Tit. Treason, § 22. 23. † See trial of the Earl of Gowry, p. 20. of Logan of Restalrig, p. 46.

\* Before the Court of Justiciary proceeded to such an important innovation, so little idea *was then entertained* of its supremacy and infallibility †, that the Court of Session was consulted upon the occasion. After tampering with the Judges, a memorial and queries were laid before them by Sir John Nisbet, King's Advocate, and Lord Bellenden Treasurer-depute, stating a variety of arguments, by inference and analogy, to show, that, if the Parliament could proceed to forfeit after death, why not the Court of Justiciary; and, if either could try after death, why not also in absence, since 'what is just before Parliament, is just and warrantable before other judicatories.' Upon this and the like notable arguments, the Lords of Session delivered an opinion, declaring, that, upon sufficient proof being taken before the judges and assize, they might proceed in absence to sentence, and to forfeit persons guilty of high treason. Thus fortified, his Majesty's Advocate prosecuted, in absence, Colonel Wallace, William Muir of Caldwell, and some other gentlemen; and a verdict being found against them by the jury, the Court sentenced them to be put to death as traitors, when they should be apprehended, and their whole estates, real and personal ‡, to be forfeited. From a consciousness of the illegality of the sentence, it was solemnly ratified in Parliament; trial in absence was adopted as a part of our law; and, in consequence, two of the most distinguished personages in the nation, the Duke of Monmouth, and  
L Fletcher

\* Mackenzie's Criminals, p. 30. Wodrow's History of the sufferings of the Church, vol. 1. p. 267.; Appendix, No. 14. 15. 16. 18. vol. 2. p. 115. 586.; Charles II. Parliament 2. c. 11. † It is now alledged, that no appeal lies from the Court of Justiciary to the House of Lords; and a judgment, indeed, to that effect, has been pronounced. As no man can command his faith or his judgment, I have never been able to discover *either the legality or propriety of this decree.* ‡ Muir of Caldwell's estate was gifted to General Dalziel, commander of the forces at the battle of Pentland.

1698 Fletcher of Saltoun, were condemned and forfeited, the former *when dead*, the latter, when out of the kingdom.

Had the torrent which overwhelmed the lineal succession of our Sovereigns issued pure from the fountain of liberty, and in its wide and rapid course been contaminated by no foul stream, *trial in absence* would have been enumerated in the list of those illegal and grievous assumptions of power upon which the estates of Scotland declared King James to have forfeited his right to the crown. And the opinion of the Lords of Session on this head, as well as on the two other cases stated in '*the Claim of Right*,' would have been declared to be contrary to law. But it was deemed prudent to preserve this statute as a security for the good behaviour of the numerous exiles who followed their Prince to the court of St Germain's. A law was accordingly passed\*, rescinding the act 1669. c. 11. in so far as it ratified the forfeiture of the Covenanters; but not repealing the act itself, which might now be turned as an engine of oppression upon the party which contrived it. It must be acknowledged, however, that King William's ministers made no rigorous exercise of this law. The Earls of Melfort, Middleton, and Lauderdale, and *ninety gentlemen*†, were summoned before the Court of Justiciary, in one day, to stand trial for various points of treason; in particular, for entering into the French service when that state was at war with his Majesty, and for rising in arms against the King. They failed to appear, and sentence of outlawry only was pronounced against them.

Tyrannical

\* William and Mary, Parl. 1. Sess. 2. c. 31. The most approved commentator on the Scottish law, has so far misunderstood this act, as to say, that the act 1669 was repealed by it. Erskine's Fol. Inst. p. 733. † Rec. of Just. 23d July 1694.

Tyrannical as this statute was, Captain Frazer could not have 1698  
 been convicted upon it but by an obvious wresting of the law ; for  
 it authorised trial in absence, only in 'cases of treasonable rising  
 ' in arms, and open and manifest rebellion.' Now, it is altoget-  
 her absurd, to construe the collecting of 'an armed force for the  
 purpose of *private rapine* \*, into *treasonable rising in arms, and  
 open and manifest rebellion.*

It will be proper to state the motives which induced Captain  
 Frazer to perpetrate the barbarity and villainy which gave occa-  
 sion to this trial. On the death of Hugh, tenth Lord Lovat,  
 the titles and estate of Lovat were disputed between his Lord-  
 ship's daughter, heir of line, and Thomas Frazer of Beaufort,  
 the Captain's father, heir-male. The Captain wisely proposed  
 to do away the contest, by uniting their persons and pretensions,  
 and there was not a disparity of years to render such marriage any-  
 ways absurd. With this view, he privately paid his addresses to  
 the young lady, and one Frazer of Tenecheil was made the con-  
 fidant of the amour. The Captain obtained her consent, and  
 she actually eloped from her mother's house of Castle Downie,  
 under the conduct of the mutual confidant ; but the person whose  
 finesse was employed to accomplish the intrigue, from whatever  
 motive of fear or of venality, of caprice or of remorse, blasted  
 it at the moment, when it was sure of success. He forced the  
 lady to return to her mother, to whom he disclosed the intrigue.

It was no longer thought safe for the Lady to remain at Castle  
 Downie, as this seat was in the domains of the clan Frazer, over  
 whom the Captain possessed great influence. She was therefore

L 2

conducted

\* Records of Justiciary, 27th June, 12th July, 5th and 6th September, 1692.

1698 conducted under a proper escorte to Dunkeld, a house of her  
 ~~~~~ uncle's, the Marquis of Athole, and this Lord prevailed on his  
 niece to accept as a husband *the Master of Salton*. The intend-  
 ed bridegroom set out for Dunkeld to celebrate the espousals,  
 accompanied by Lord Mungo Murray. As the Captain foresaw  
 in this match the ruin of his hopes, he embraced the resolution  
 of preventing the marriage by force; and (if he could not pos-  
 sess himself of the heiress) of compelling a marriage with the *Dow-  
 ager*, who, in virtue of her jointure, was in possession of a con-  
 siderable part of the estate of Lovat: And this wild enterprize  
 was to be accomplished by such deeds, that the stern contri-  
 vance of the principal actor is less shocking than the abject sub-  
 mission of his accomplices.

The substance of the indictment against Captain Frazer was,  
 That he and his associates came to a house belonging to Mr Fra-  
 zer of Strichen, and there entered into an unlawful bond of as-  
 sociation for the prosecution of certain wicked designs: That  
 they raised a body of four or five hundred men in arms, in or-  
 der to support Captain Frazer's pretensions to the estate of Lo-  
 vat: That they seized the persons of Lord Salton and Lord  
 Mungo Murray, and made them close prisoners for six or seven  
 days in the house of Finallen; erected gallowses before their  
 windows, and afterwards carried them by force to islands and  
 mountains, and treated them very harshly: That Captain Frazer  
 and his associates marched in form of war to the house of Castle  
 Downie, the seat of Lady Dowager Lovat, garrisoned the house,  
 plundered the effects, and put armed guards upon the different  
 apartments, and attempted to compel her Ladyship to agree to  
 certain deeds which they endeavoured to extort from her; but  
 she remaining resolute, the Captain all of a sudden took up the  
 mad

mad and villainous resolution of forcing her to marry him: 1698  
 That, accordingly, one of his associates, Mr Robert Monro minister of Abertarfe, pronounced the marriage ceremony: That the Captain, by the aid of his associates, did commit rape and forcible abduction upon the person of Lady Lovat, attended with circumstances of excessive barbarity: And that they continued in arms, after having been charged by a herald to lay down their arms, set the Lady at liberty, and surrender themselves prisoners.

His Majesty's Advocate represented to the Court, that by an act of Parliament of King James VI. summonses at his Majesty's instance, 'against \* islandmen, highlandmen, or borderers, ' *ubi non patet tutus accessus*, be made at the mercat cross of the ' head burghs of the next shires in the Lowlands:' That Captain Frazer and his followers continued in arms and open rebellion, and therefore craved their Lordships to grant warrant for an *edictal citation* being executed against the defenders, which was accordingly granted.

On the 5th of September, his Majesty's Advocate proceeded in the trial, declaring that he insisted for *forfaulture* in absence against Captain Frazer, and nineteen other gentlemen specially named; and that he restricted the libel against the defenders to treasonable rising in arms, and open rebellion, with all the aggravations charged in the indictment. The Court found the indictment thus restricted, and thus presented, relevant to infer the pains of treason.

T H E

\* James VI. Parliament 11th, act. 66.

## T H E P R O O F.

1698

Alexander Frazer, younger of Balnain, deposed, That at the time specified in the indictment, he saw a paper subscribed by some of the accused, and delivered to Lord Frazer, of the tenor of the bond of association now read in court. He was at Finallen when Lord Salton and Lord Mungo \* Murray were brought prisoners, and were there committed to close custody, and gallowses erected before the windows of the apartments where these Lords were confined. He saw then at Finallen, about two or three hundred men in arms, under the command of Captain Frazer, and different parties of armed men were sent to and fro, between the houses of Finallen and Castle Downie. He was also at the latter of these houses, where he saw Lady Lovat and also Captain Frazer, and a number of armed men standing sentry in the house, and even on the threshold of my Lady's apartment. He went to my Lady's chamber door, whom he heard sighing; but the bagpipes were playing in the next room; this was about day-break, and my Lady's women were in another room weeping, and sentinels standing over them.

Thomas Frazer of Gartlobeg, in September preceding, saw Captain Frazer, &c. &c. to the amount of about sixty or seventy men in arms, horse and foot; the Captain thanked them for assembling so readily, and desired them to be ready at a call. In October, Captain Frazer and the deponent coming from Inverness, met in the wood of Bonchreive Lord Salton and Lord Mungo

\* Son to John 1st Marquis of Athole, by Lady Amelia Stanley, daughter of James Earl of Derby, and brother to the Lady Dowager Lovat, mentioned in this trial.

Mungo Murray, who were returning from Castle Downie. The 1698  
 Captain gave orders to his followers to seize Lord Salton *dead*   
*or alive*; went close up to them with cocked pistols, and com-  
 manded them to yield themselves prisoners. Lord Salton asked,  
 For what cause? to which the Captain replied, '*because it*  
*'was his pleasure.'* These Lords were dismounted from their  
 own horses, disarmed, put upon mean ponies, surrounded by  
 guards, with their muskets levelled, and durks drawn, and thus  
 conducted to the house of Finallen, where they were kept prison-  
 ers for several nights, in separate apartments, under a strict  
 guard. The deponent *saw the Fiery Cross* \*, and heard the *Co-*  
*ronoch* sent through the country; upon which between three and  
 four hundred armed men assembled at Finallen under command  
 of Captain Frazer, who detached a party to the house of Castle  
 Downie,

\* This mode, by which the Highland chieftains convoked their clans to arms,  
 is, I apprehend, of greater antiquity than their conversion to Christianity; with the  
 difference only of change of *symbol*. Anciently, when the chief desired to assemble  
 his clan, he killed a goat with his own sword, and dipped a half burned stick in  
 the blood. This he gave to one of his vassals, who bore it with all despatch to the  
 next village, where the first person he met was obliged, by the feudal customs, to  
 relieve him, and carry forward this summons to arms; and thus it was carried from  
 village to village through the chieftain's domains.—Upon their conversion to Chris-  
 tianity, the Priests would no doubt discover in the killing of a goat a species of  
 heathen sacrifice. It was proper that a symbol should be adopted more analogous  
 to their new religion; and what so suitable as the cross, which, under the splendid  
 name of the *Labarum*, blazed in the heavens, conducting the Christian Emperor to  
 victory and glory. A flight pole, with a bit of stick infix'd in the figure of a cross,  
 burned at the ends, was substituted in the place of that dipped in goats blood: And  
 this ceremony was performed even in the late rebellion.—There were two sorts of  
*coronoch*; that properly so called was the dirge which accompanied the deceased to  
 their grave; the other, which is here alluded to, was a sort of war song, or dismal  
 howl, which the women set up on seeing the *fiery cross*, from the anxiety they en-  
 tertained about the safety of their husbands and friends in the approaching hour of  
 battle.

1698 Downie, where sentinels were put upon the rooms, particularly my Lady's chamber, for seven or eight days.—He heard the Captain *'demanding oaths of fidelity of such of the gentlemen of his name as he suspected; and such as he did not suspect he only took their promises; and some of them did swear, and some promise.'*

Robert Spence saw Lord Salton and Lord Mungo Murray carried prisoners by Captain Frazer to the house of Finallen, where they were confined about a week in separate apartments, and sentinels put over them. Lord Salton and Lord Mungo Murray were then carried to Castle Downie; and the force commanded by Captain Frazer, at this time, consisted of about five hundred armed men, marching with two pair of colours. The men were sworn upon their durks to be faithful to the Captain, and never to desert him. They kept Lady Lovat prisoner for some time at Castle Downie, and afterwards carried her along with them. When the Captain heard that Lord James Murray, with some gentlemen, and *a party of redcoats*, were coming to rescue my Lady, he again sent the fiery cross to summon the country to rise in his defence; and he continued in arms till about Christmas.

John Monro, late footman to Captain Frazer, saw the Captain, and the whole other persons now insisted against (for forfeiture), and about three hundred more, with colours displayed, and pipes playing, under the Captain's command, at Finallen, the night Lord Salton and Lord Mungo Murray were made prisoners. He saw the men *drawn round the colours, and sworn upon them, and upon the points of their durks*, to adhere to the Captain. He heard the coronach the night Lady Lovat was carried from Castle Downie. About Martinmas the herald left his charge against the  
 Captain,

Captain, &c. *'in a cloven stick at the river side, opposite to the* 1698  
*'Isle of Eagles;'* and, after that, the Captain and others continued  
 for some time in arms. 

Amelia Reoch, late servant to Lady Lovat, deposed, that Captain Frazer, with a party of armed men, came to Castle Downie. He put sentinels with drawn swords upon and within Lady Lovat's chamber, made her three waiting maids be carried by force out of the room, and detained prisoners. About two in the morning, two armed men carried the deponent back to my Lady's apartment, whom she found sitting on the floor, her hair dishevelled, her head reclining backwards on the bed, Donald Beaton pulling off my Lady's shoes, and the Captain holding burned feathers and aquavitaë to her nose, her Ladyship being in a swoon. They commanded the deponent to take off my Lady's clothes; but she spurned at the deponent with her feet, shewing the greatest reluctance; upon which, Frazer of Kinmonavie held up my Lady in his arms; the Captain pulled down her petticoats, and sought a knife from Hugh Monro to cut off her stays; but, he having none, the Captain ordered Kinmonavie to cut them off with his durk, which was done accordingly. The deponent was put out of the room; and, when she was going *'over the close \*,'* she heard *'my Lady's cries, although the bagpipes were playing all the time in the room next to her Ladyship's.'* In the morning, when the deponent returned, she saw my Lady's head hanging over the bed-stock, her face swoln, and her Ladyship to all appearance out of her judgment; she spoke none, but gave the deponent a broad stare; even some days after, she did not know her own brother, Lord Mungo Murray; and, when Dumballoch's Lady came into the room, and called Lady Lovat *'Madam,'* she answered, *'call me not Madam, but the most miserable wretch alive.'*

M

Janet

\* The Court-Yard.

1698 Janet Frazer deposed, that Lady Lovat's waiting maids were forcibly turned out of her room by Captain Frazer, about twelve o'clock at night. My Lady clung by the deponent, and, when she was torn from her Ladyship, fell on her face on the floor. Next morning, when the deponent saw my Lady, her head was hanging over the bed, and she was out of her judgment, mistaking the deponent for Lady Catharine Murray, Lady Lovat's sister, who had been dead several years.

Christian Maclean deposed, That, on the night of the '*Sham-marriage,*' she was in the next room to Lady Lovat, and, notwithstanding the bag-pipes were blowing all the while, she heard my Lady crying and sobbing, and praying, 'Lord have mercy 'on her soul.'

The jury returned a verdict finding the indictment proved; and the court adjudged Captain Frazer, and the other persons against whom the verdict was found, to be executed as traitors, at such time, place, and manner, as their Lordships should appoint, to undergo the punishment ordained by law for traitors, 'their name, fame, memory, and honours to be extinct, and 'their arms to be riven furth and deleted out of the books of 'arms; so that their posterity may never have place, nor be able 'hereafter to bruik or enjoy any honours, offices, titles, or dignities,' and to have *forfaulted* all their lands, heritages, and possessions whatever\*.

This sentence, which was severer even than that commonly pronounced on traitors, seems to be copied from the sentence pronounced

\* Captain Frazer was also prosecuted before the Court of Justiciary for a rape by the party injured, Lady Dowager Lovat, and was outlawed for not appearing to stand trial. Rec. of Just. 17th Feb. 1701.

pronounced by Parliament, after death, on Logan of Restalrig and the Earl of Gowry. As Captain Frazer, in the rebellion 1698  1715, although supposed to be a keen Jacobite, supported the House of Hanover, King George I. granted him a pardon and remission of this sentence\*: And he claimed and obtained the contested title and estate of Lovat. He joined the next rebellion against the family that pardoned and restored him; and his house of Castle Downie, which had witnessed his foul crimes, was burned by the royal army before his eyes, and those of three hundred of his clan, a few days after the battle of Culloden.—How he lost his titles, and estate, and his life also, is known to every one; so perhaps he is the only person upon record who was twice condemned, twice forfeited, and whose estate was twice restored.

*Mr John Thomson and Charles Auchmouty, servants to the African Company, for Treason and Leasing-making, by designing and causing to be engraved a Political Print.*

**T**HIS trial, with the facts which gave rise to it, presents us 1701  with a remarkable picture of liberty and fortitude in Parliament, of expiring struggles for tyranny in the Sovereign, and of the final victory of secret influence over parliamentary independence.

M 2

In

\* Paper Register of Chancery, B. 16. No. 134. Remissio et rehabilitatio Simonis Frazer de Beaufort, Domini Lovat, de crimine perduellionis aliisque infrascript. St James's, 10th March 1716.

1701 In the year 1695, an Indian and African Company was established in Scotland. L. 400,000 Sterling were subscribed by such proprietors as were natives and residents. The Company fitted out six ships of force and burthen\*, laden with various commodities, which sailed from the Forth. They planted, by the name of *Caledonia*, a colony on the Isthmus of Darien; and, from the establishment of this Company, and its colony, the nation universally flattered itself with the eager and unbounded prospect of extended trade and empire. From the jealousy the English, Dutch, and Spaniards, entertained of this colony, it may be presumed that the prospects which this nation derived from it, were at least plausible.

But, besides the opposition of rival powers, *Caledonia* experienced that of her Sovereign, whose political views, or personal attachments, led him to embrace the hostile spirit of his other dominions. The colony was attacked, was abandoned; the vessels were captured, the adventurers were killed in battle, were executed as pirates, or died of famine; and the company was ruined. When the fatal tidings were received at Edinburgh, the sense of injury and disappointment was so strong as to burst forth with a fury which threatened immediate rebellion; and the great officers of state had to retire for a time to screen themselves from popular resentment.

When the Parliament met, the first symptom of their displeasure, at the enemies of the African Company, was to pass an order for burning, by the hands of the hangman, a pamphlet, entitled, 'A Defence of the Scots abdicating Darien,' and requiring

\* Act of Scottish Parl. 26th June 1695.; Lockhart's Mem. p. 29.; De Foe's Hist. of Union.; Scott's Hist. p. 710.; Edinburgh Gazette, No. 8. No. 36.

ring the Lords of the Treafury to pay a reward of L. 6000 Scots\* 1701  
 to any perfon who would apprehend William Herreis, the al-  
 ledged author, and bring him before a magiftrate. Soon after,  
 they paffed a refolution, declaring, that the votes and addrefs of  
 the Parliament of England in December 1695, and the addrefs  
 of the Houfe of Lords in February laft, *were undue intermed-*  
*dlings † in the affairs of this kingdom, and an invafion of the fo-*  
*vereignty and independence of our King and Parliament.* They  
 next refolved, ‘ That the memorial prefented in his Majefty’s  
 ‘ name, as King of Great Britain, to the Senate of Hamburgh, 7th  
 ‘ April 1697, by Sir Paul Rycant, then refident in that city, and  
 ‘ Mr Groffet, his Majefty’s Envoy Extraordinary at the court of  
 ‘ Lunenburgh, *was moft unwarrantable, containing manifef false-*  
*hoods, and contrary to the law of nations, injurious to his Majefty,*  
 ‘ *an open encroachment* upon the fovereignty of this Crown and  
 ‘ kingdom, the occafion of great loffes and difappointments to  
 ‘ the faid Company, and of moft dangerous confequence to the  
 ‘ trade of this nation.’ Moved, ‘ That, whoever advifed his  
 ‘ Majefty’s answer to the addrefs of the Parliament of England a-  
 ‘ gainft our Indian and African Company, are enemies to this  
 ‘ kingdom,

\* L. 500 Sterling. Rec. of Scottifh Parl. 16th Nov. 1700. 9th, 10th, 13th, 14th,  
 15th, 17th, Jan. 1701.

† The *intermeddlings* complained of were, that both  
 Houfes of Parliament had addreffed the King, representing, That the act to which  
 he had given the royal affent in Scotland, for erecting a Company trading to Afri-  
 ca and the Indies, granting them an exemption from public burdens for twenty-  
 one years, would make Scotland a free port for *East-India commodities*, enable her  
 to underfell England at foreign markets, and be of great prejudice to the trade and  
 revenue of the latter kingdom; efppecially when Scotland fhall have fettled planta-  
 tions in America. The King returned the following answer: ‘ *I have been ill fer-*  
 ‘ *ved in Scotland; but I hope fome remedies may be found to prevent the inconveniencies*  
 ‘ *which may arife from this act.*’ Journal of Houfe of Lords, 13th December 1695;  
 8th February 1699. Houfe of Commons, 14th, 18th December 1695.

1701 ' kingdom, and, if subjects thereof, are traitors to their King  
 ' and country, and be prosecuted accordingly.' After a debate,  
 the motion was withdrawn.

They also resolved, that the proclamations issued by the English plantations against the African Company, particularly that against furnishing any provisions or necessaries whatever to their colony, directly or indirectly, and even debarring them wood, water, and anchorage, were injurious to the Company, barbarous to the adventurers, contrary to the law of nations, and a great occasion of the loss of the colony. Resolved, that this colony was a legal and rightful settlement holding of the Crown of Scotland; and *moved*, that the conduct of the Spaniards to the said colony was an open hostility against the Crown of Britain, and that satisfaction ought to be demanded. All the resolutions were passed *nemine contradicente*, and the motion was delayed.

These formidable resolutions, however, by the dexterity of William's ministers, vanished in smoke; for the Court party moved an *address* to the King on the resolution, asserting the company's right to the colony; while the country party contended, that, in the present circumstances, *an act of parliament* was requisite for securing the company's rights, as well as for regulating the conduct of the persons engaged in the prosecution of them. A debate and division on this question taking place, it carried for an *address* by a hundred and eight against eighty-four\*. And the whole of the minority entered a formal dissent.

This

\* The Peers and Commons of Scotland formed but one house. Those who

This address recapitulates the grievances of the African Company, and the resolutions of parliament mentioned above, omitting entirely however that for demanding satisfaction of the Spaniards; it concludes with praying his Majesty's protection and countenance against the violence of Spaniards, and of English ministers abroad.

It was the parliamentary division upon this address, which was the subject of the political print that gave occasion to this trial.

The print represented Scotland in the figure of a woman wearing a crown, having the name of *Scotia* over her head, and supported by the *eighty-four dissentient members*. These were entitled, '*Caledonia's supporters*.' They were distinguished with the following motto, encircled with wreaths of laurel, '*patriac fautoribus*;' and the woman addressed them \* in these words: '*Take courage, and act as men that hold their liberty, as well as their glory, dear*.' Below, an angel spoke thus to a multitude of little figures which he was driving with thunderbolts to hell, '*Procul, o procul esto profani*.' (These figures were charged in the indictment as representing the majority in parliament.) And, in

|   |       |   |       |
|---|-------|---|-------|
| who voted for an <i>address</i> , were,       |       | Those who voted for an <i>act of parliament</i> , |       |
| Peers   | 41    | were, Peers                                       | 20    |
| Commissioners for Barons, <i>i.e.</i> Knights |       | Knights of the shire,                             | 43    |
| of the shire.                                 | 32    |   |       |
| Commissioners for boroughs.                   | 35    | Representatives of boroughs,                      | 21    |
|   | <hr/> |   | <hr/> |
|   | 108   |   | 84    |

It is perhaps superfluous in me to add, that all the officers of state were in this list.

\* Rec. of Just. 14th, 21st, April; 23d, 24th, May, 1701.

1701 in the midst of the flames, lay a person who was tormented by a fiend, that addressed him in these words: '*Vendidit hic auro patriam.*'

His Majesty's Advocate produced before the Court of Justiciary an act of the Privy Council, authorising him to prosecute the prisoners on account of this engraving, '*for such crimes, and upon such laws, as his Lordship shall think fit to libel.*'

Thus authorised, his Lordship mustered up against the prisoners *seven pages folio of indictment*, charging them with the breach of sundry acts of parliament \* against *leasing-makers*, and those who presume 'publicly to declaim, or privately to speak or write any purpose of reproach or slander of his Majesty's person, estate, or government, or to deprave his laws, or misconstrue his proceedings, whereby any dislike may be moved betwixt his Highness and his nobility and loving subjects, in time coming, *under the pain of death.*' Also, charging the prisoners as transgressing the acts against those who dispute the authority of the Estates of Parliament; and, likewise, as transgressing the statutes against those who conspire to levy war against the King. *Nevertheless*, (the indictment concludes), the prisoners, by designing the said print, are guilty of the said crimes.—A description of the print, and an application of it to the laws, then follow. Turgidity of stile, and strained conceit, are substituted in the vacant places of law and reason. And the conclusion of the libel, which is *worthy* of the premises, is, that these crimes being found proved, the prisoners are thereby guilty of *leasing-making and treason, and subject to the pain of death.*

The

\* The acts libelled against the prisoner were, James I. parl. 2. c. 43.; James V. parl. 6. c. 83.; James VI. parl. 8. c. 130. & 134. and parl. 10. c. 10.; Charles II. parl. 1. sess. 2. c. 2.

The prisoners were heard by counsel, and *informations* \* were lodged on either side. The information for his Majesty's Advocate is one of the most prolix and inconclusive pieces of composition that I recollect in judicial procedure. The information for the prisoners maintains, *imo*, That the statutes against *leasing-making*, &c. are obsolete, and are specially declared to be so in the *Claim of Rights*, as being in the number of those upon which the Earl of Argyle was convicted. *2do*, That, to extend criminal laws, and capital punishments, by parity of reasoning; —to infer leasing-making, and sedition, and treason, from a hieroglyphic, a print, especially the print libelled on, is contrary to those general principles of law which have been established by the wisdom of the learned, as requisite for the security of the governed.—In opposition to these, it was maintained by his Majesty's Advocate, that, although the forfeiting the Earl of Argyle upon *stretches* of obsolete laws, was declared contrary to law, it did not thence follow that those against leasing-making were obsolete, because the Earl was indicted upon acts not founded on against the prisoners; and it was not declared in the *Claim of Rights*, that *all the acts* upon which the Earl was indicted were obsolete. *2do*, With regard to the print, it was argued, if the intention of leasing-making and misconstruing was plainly discernible in it, this 'subtle manner of conveying the poison doth render 'it rather more wicked and dangerous than the most direct and 'blunt calumny.'—The other parts of these voluminous informations require no notice.

The Lords pronounced the following interlocutor: Find the indictment, and qualifications thereof, do not infer the crime of  
 N treason,

\* So law papers, in Scotland, which contain a state of the fact and argument, are sometimes called.

1701 treason, or the pain of death, but sustain the same *relevant to infer an arbitrary punishment.*

*T H E P R O O F.*

Alexander Kennedy of Glenure deposed, that the prisoner, Thomson, came to his house one evening, in company with the other prisoner, Auchmouty, and brought with him the copper-plate now produced in court, desiring the deponent to cast off impressions of it, which he refused, unless a warrant from authority was produced, as he suspected it might relate to affairs of state. Next day, he observed the prisoner, Auchmouty, go up to his printing-house; and the deponent following him, saw the copper-plate in the press, and one of his servants casting off copies. He snatched up one of them, and carried it straight to the Lord Advocate. One of the maces\* of council then came to the deponent's house, and required him to bring the copper-plate, and all the copies, before the Lords of Privy Council, then met, which was done accordingly; and Auchmouty was present when they were seized.

George Burgon, servant to the preceding witness, deposed, that the two prisoners, and Robert Wood engraver, brought the said copper-plate to him, and came once and again requesting the deponent to cast off impressions of it, which he as often refused till they should obtain his master's order. At length, his mistress sent for him, and the two prisoners were then with her, and she desired him to cast off the impressions required, and now produced in court, which he did accordingly. The prisoners at this time engaged to stand between him and all hazard that he might incur

\* Mace-bearers.

incur through casting off the impressions.—Deposed, that Auchmouty furnished him with the paper. 1701

Robert Wood engraver, swore, that the two prisoners brought the drawing to him from which the copper-plate was done, and desired him to engrave it. This he did accordingly, and was paid by them for it, at the agreed price of L. 6 : 10 : 0 Scots\*. Deposed, That the prisoner, Thomson, said the drawing was done by him. The deponent heard both prisoners desire Burgon, the printer's servant, to cast off the impressions.

### THE VERDICT.

The assize, by the mouth of Sir James Dick of Priestfield, their chancellor; all in one voice found the indictment and qualifications—*not proved*.

I presume the reader will agree with me, that the proof of the fact, I mean, of the prisoner's having caused the engraving to be executed, is complete. It must, therefore, have proceeded from their conviction of the prisoners having done nothing declared criminal by law, that the jury found *not proved*. They had no other way of acquitting the prisoners; for juries had not then † recovered their privilege of finding *guilty* or *not guilty*.

N 2

Archibald

\* L. 0 : 10 : 10 Sterling.  
Cumming, and Carnegie of Finhaven.

† See *infra* Tit. Murder. Cases of George

*Archibald Macdonald, son to Coll Macdonald of Barisdale,  
as attainted of High Treason.*

1754 THE prisoner was not served with any indictment or summons of treason ; but received intimation from the Crown lawyers, that he was to be brought before the Court of Justiciary on the 11th of March, in order to have execution awarded against him ; or to show cause why execution should not be awarded. The Lord Advocate, in a petition to their Lordships, on the 5th instant, prayed for a warrant to cite witnesses to prove, that the prisoner was the identical person designed in the act of attainder, *son to Coll Macdonald of Barisdale* ; and their Lordships granted warrant accordingly.

His Majesty's Advocate-depute represented to the Court, that, by an act of attainder against Alexander Earl of Kellie, and others, passed in the reign of his present Majesty (George II.) the prisoner stood attainted of High Treason : That the Crown lawyers had received his Majesty's orders to insist with their Lordships for an *award of execution* against the prisoner, which, in the counsel's opinion, the printed act of Parliament, being a public law, sufficiently authorised : But, to remove all doubt, they had procured, and lodged with the clerk of Court, an *exemplification* of the act of attainder under the Great Seal of England. The Advocate-depute, therefore, craved that their Lordships would order the prisoner to be brought to the bar, and would appoint a day for his execution. He was brought to the bar accordingly, the act of attainder and exemplification thereof were read

read over to him \*, the motion for his execution was renewed. 1754  
 The Lord Justice Clerk then asked the prisoner, If he had any  
 cause to show why execution should not be awarded against him  
 in terms of the act? he replied to the following purpose:—That  
 he did not understand himself to be the person attainted by this  
 act. He was then a boy recently from school, and under the  
 influence of a father unfortunately engaged in the late rebellion.  
 Had not his father been able to justify or atone for his conduct  
 and the prisoner's, could it be supposed that the father would  
 pass unattainted, and his son, a minor, be devoted to punish-  
 ment. His special defences then were: That there was no suf-  
 ficient evidence of the act of attainder on which execution was  
 craved: That he was none of the persons named in the act now  
 read; for his name was *Macdonnell*, and his father was design-  
 ed not of *Barisdale*, but *Inverie*. And that the condition under  
 which the act of attainder could alone take place, never existed;  
 for the prisoner surrendered himself to a justice of peace before  
 the 12th of July 1746.

Counsel were then heard for the prisoner, who enlarged on  
 the defences he had stated, offered to instruct them by evidence,  
 and requested that the Court would remit the facts undertaken to  
 be proved, to the cognifance of a jury.

The lawyers for the Crown began by refuting the idle cavil-  
 ling of the prisoner's counsel, at the evidence of the act of Par-  
 liament upon which the prisoner was said to be attainted. They  
 next are successful in obviating the prisoner's objections of a mis-  
 nomer. As to his plea of a surrender in terms of the act, they  
 alledged it was surprifing a defence so valid, if true, should, du-  
 ring

\* Rec. of Just. 2d, 5th, 11th, 13th, 20th, 22d March 1754:

1754 ring his tedious imprisonment of eight months, be kept a profound secret, and now for the first time be urged in his behalf. But a surrender to a justice of peace, who, though nominated in the commission, had not taken the oaths to Government, nor officiated in that capacity, or a surrender made at an improper time, when the justice of peace could not commit such person to prison, would not be held good, as not having been made according to the intent of the act. Further, no testimony of the fact was admissible, but the record of surrender; and it could not be proved by *parole* evidence. They argued, that the prisoner's plea of a surrender was contradictory to his other plea of a denial, that he was the person meant to be attainted by the act. *Lastly*, They alledged it was not necessary, in this case, to try the prisoner's defences by jury; for, although trials by indictment must be by jury, yet incidental questions, such as the *lunacy of the prisoner*, or the identity of a criminal, who had made his escape after sentence of death had been pronounced upon him, are, by the law of Scotland, tried and judged by the Court, without any intervention of a jury: Nor is the case altered by the statute 7th of Queen Ann, chap. 21. declaring, that trials for treason in Scotland should be the same as in England; for this was *not a trial* for treason, the prisoner being already 'tried, convicted, and attainted by act of Parliament;' and that nothing now remained but to award execution of the sentence which the law had pronounced. And although, in England, the prisoner's exceptions at execution being awarded against him, would have been tried by a jury *de circumstantibus*, 'that can have no effect here, as the Court is not tied to the *forms* of England in *the trial for treason.*'

The counsel for the prisoner replied, that the act of attainder is not absolute, but conditional; and he offered to prove, that the  
condition

condition under which alone the attainder was to take place, viz. 1754  
the prisoner's not surrendering himself before a day certain, never  
existed, for the prisoner did actually surrender himself to a justice  
of peace within the time prescribed by the act. They argued, it  
was not necessary to prove that the justice of peace had taken the  
oaths, or officiated in that capacity, for these are not mentioned  
as requisites in the statute: That the prisoner had fairly submit-  
ted to justice; and Sir Alexander M'Donald, to whom he sur-  
rendered himself, was a gentleman of known affection to his  
Majesty's government, who at that very time was at the head of  
a considerable body of militia employed in his Majesty's service:  
That his not being committed to jail did not affect the validity  
of the surrender; for, even supposing it to have been Sir Alex-  
ander's duty to have committed him, it was absurd, that, by rea-  
son of Sir Alexander's ignorance, or neglect of duty imposed on  
him by the statute, the prisoner should incur the pains of trea-  
son: That the prisoner must be held as having been under the  
protection of government, not only from his surrender to a jus-  
tice of peace, but likewise from his having received a pass from  
the Earl of Albemarle, commander of his Majesty's forces, by  
virtue of which he remained unmolested; but, in the month of  
August 1746, he and his father, then in the country of Moidart,  
out of private pique, were seized by certain of the Clan Came-  
ron, put on board a vessel, carried to France, and there kept in  
close custody for a twelvemonth: On their escape from France,  
and return to Scotland, both father and son were apprehended  
by a party of his Majesty's forces; the father died in confine-  
ment; but the prisoner, upon a just representation of these facts,  
was immediately set at liberty, and remained peaceably and open-  
ly at Inverie till July last: That, as to no testimony of the sur-  
render being admissible but written record, no such requisite was  
prescribed by the statute; and it were strange if *parole* evidence  
could

1754 could only be received in support of the prisoner's guilt, and not in vindication of his innocence.—*Lastly*, That trial by jury was the grand bulwark of our lives and liberties; and if, in any case, this mode is more specially requisite, it is in accusations of a direct offence committed against the crown.—Anciently, attainders in absence were unknown, both in England and Scotland; but now, that the wisdom of the law had thought proper to introduce such attainders, various defences might yet be stated against awarding execution, especially where the attainer is not absolute, but conditional.—By act 7th of Queen Ann, c. 21. the Scots treason-laws are totally abolished; and it is therein provided, that the court of Justiciary, in cases of Treason, shall proceed and determine in such manner as the Court of King's Bench may do by the laws of England: Therefore, as it is not disputed that every defence, against awarding execution, proposed by the prisoner, before the Court of King's Bench, must be tried by jury, the like rule must be observed in the Court of Justiciary. This is made still clearer by act 22d George II. c. 48. which provides, that all defendants outlawed for high treason, or misprision of high treason, in Scotland, shall, *as near as can be, have such and the like methods, remedies, or advantages, for avoiding, falsifying, or reversing, such outlawry as may be had by the law and usage of England.*

The Lords found the act of attainder sufficiently instructed by the Statute-book, and exemplification of the act produced in court, and repelled the objections to its authenticity. They also repelled the objection of a misnomer of Maedonald for Maedonnell.—With respect to the defence of a surrender, they ordained the prisoner to give in a more special *condescence*\* of the time, place,

\* A state of facts.

place, and manner, of his submitting himself to justice; also, a list of the witnesses by whom he was to prove the same; and found 'no necessity of proceeding in this matter by a jury.' 1754

Conform to this judgment, the prisoner gave in a *condescendence* of facts relative to his surrender, as already stated, and a long list of witnesses by whom it was to be proved; and the crown lawyers disputed the relevancy of the *condescendence*, by repeating, at great length, the objections to the surrender which they had already set forth.—The Court having considered the import of the *condescendence*, and heard the debates, found the prisoner's plea of surrender, as therein set forth, not relevant, nor sufficiently qualified in terms of the act of attainder, *repelled the defence founded upon it, and refused the prisoner any proof of the fact.*

An objection was then moved by the prisoner's counsel to the whole witnesses cited for the prosecutor, as the executions of summons against them had been returned to the clerk of court only that morning. It was answered by the crown lawyers, that the witnesses summoned upon a more early citation had absconded; it therefore became necessary to call this additional list.—The Court repelled the objection; but adjourned the trial till Friday next, that the prisoner might have opportunity to see the list, and propose any legal objections to the witnesses adduced.

The prisoner being again brought to the bar on the 22d of March, gave in a declaration to the Court equivalent to an acknowledgment of his identity. The prosecutor, however, thought proper to lead a proof by witnesses of his identity. This being done, the Court pronounced judgment upon the prisoner, find-

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ing,

1754 ing, ' That the said Archibald Macdonald is the same person  
 ' who stands attainted of High Treason by the act of parliament  
 ' above mentioned, by the name and designation of Archibald  
 ' Macdonald, son of Coll Macdonald of Baifdale; and, therefore,  
 ' and in respect thereof,' adjudging the prisoner to be taken to  
 the Grass-market of Edinburgh, on the 22d of May next, and  
 hanged on a gibbet, to be cut down alive, his entrails torn out  
 and burnt, his head cut off \*, his body quartered, and his head  
 and quarters to be at the King's disposal.

This

\* A petition of appeal to the House of Lords, against this sentence, was drawn; but, while the prisoner's friends were adjusting some difficulty about the mode of presenting it, the necessity of a petition was superseded by a reprieve, and afterwards by a pardon. Since that, various petitions of appeal have been presented, particularly in the cases of Ogilvie 1765, Mungo Campbell 1770, Miller and Mordison 1773; and, *lastly*, in the case of Bywater, A. D. 1781. And a solemn judgment of the House of Lords was pronounced, finding, that *no appeal lies from the Court of Justiciary to their Lordships*.—The most mature consideration of this important subject that I am capable to bestow,—the laborious search that I have made into our criminal records from A. D. 1536 to the present times, have completely rivetted my opinion, that this judgment requires again to be considered,—that law and expediency both require it.—While I am reluctantly obliged to deliver my sentiments, it affords me considerable satisfaction, that I am laid under no necessity of canvassing the arguments delivered on this topic before their Lordships, by the truly venerable Peer who presides in the Court of King's Bench.—I have not to combat that noble Lord's opinion, but the report sent from this country to his Lordship, upon which, I apprehend, his opinion was founded.—I did intend to publish an argument to show, ' *That an Appeal lies from the Court of Justiciary to the House of Lords;*' but, as I am at this minute doubtful if I shall be able to accomplish my original purpose, of presenting my argument in the form of an Appendix to this work, I trouble the reader with this note, expressive of my zealous wish, that if, upon a future occasion, a prisoner shall be advised of a sentence pronounced by the Court of Justiciary, affecting his life or liberty, being *contrary to law*; I say, that the prisoner implore relief from the House of Lords, by petition of appeal, craving their Lordships once more to admit this question to a solemn discussion;

This sentence, and the interlocutors preceding, appear contrary to law in three respects, as they refuse to sustain the prisoner's defence of a surrender, and to allow a proof of the same; as they only find that the prisoner was the identical person pointed out in the act of attainder, but do not also find that he did not surrender himself in terms of the act; and as they refuse to admit the prisoner to trial by jury.

*The judgments are illegal, as they refuse to sustain the prisoner's defence of a surrender.*

Penal laws are, in general, prohibitory regulations designed for the order and security of civil society, discharging the people at large from certain actions, such as theft, murder, and the like. In the case of actual or meditated rebellion, a conditional act of attainder is provided for the security of the state, by ordaining, that suspected individuals pointed out in the act, shall perform certain conditions therein prescribed. In the *first* of these, the law is *general*, and the crime consists in *perpetrating things prohibited*. In the *second*, the law is *special*, and the offence consists in *omitting things commanded*. If one of the public is brought to trial for transgressing the former of these laws, it is the most valid of all defences, that *he did not commit the deed prohibited*. If an individual pointed out in the latter of these laws is accused of not having done what was therein required, it is an equally valid defence, that *he did perform the condition prescribed*.—Therefore, to doom a man to the scaffold

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on.

discussion; and to appoint a *complete and accurate report* to be laid before their Lordships, of the cases which have been brought from the Court of Justiciary, before the Scottish Privy Council, *his Majesty*, and the *Estates of Parliament of Scotland*, and the British House of Lords, from A. D. 1641 to the present times.

1754 on the former of these laws, who had not committed any theft, murder, or the like, is not more to *condemn without guilt*, than to consign to punishment, on the latter of these laws, one, who had absolved himself from the imputation of guilt, by surrendering his person, or performing the other conditions required.

*The sentence is illegal, or inefficacious, and null; as it only finds, that the prisoner was the identical person pointed out in the act of attainder, but does not also find that he did not surrender himself in terms of the act.*

The persons whose names were engrossed in the act of attainder could incur the *declared presumption* of guilt, could become criminal, and amenable to punishment, only *by not performing* the conditions of the act. Therefore, the Court, in finding an undoubted, indeed notorious truth, that the prisoner was the person described in the act, and sentencing him to death on that account; without also finding that he did not surrender in terms of the statute, did condemn him to death without any statutory guilt upon the part of the prisoner, or any statutory authority upon the part of the Court. This may be further elucidated by observing, that, by changing the words, 'Archibald Macdonald,' into 'Alexander Earl of Kelly,' the like judgment might with truth have been pronounced, viz. that his Lordship was the person described in the act of attainder, and the like sentence of death been therefore passed upon that Lord, although he did publicly surrender himself to government, and consequently was never challenged on account of the act.

*The sentence is illegal, because the prisoner was denied the benefit of trial by jury.*

It has already been observed, that penal laws are for the most part *general and prohibitory*; but that, in the case of conditional acts of attainder, they are *special and mandatory*. If, then, the mode of trial by jury is the established law of a country, as that to which the life of a citizen can most safely be trusted; the same reason holds for adopting this mode, whether the prisoner be accused of *committing* what was *prohibited* by a general law, or *omitting* what was *required* by an act of attainder. Further, had the prisoner been brought to trial in England, he would, beyond dispute, have been entitled to have had his defences tried by jury: But, by statutes of Queen Ann, and of King George II. the treason laws of England are extended to this country, and the same mode of trial (as near as may be) is prescribed; consequently, the prisoner was equally entitled to trial by jury, when brought before the Court of Justiciary, as if he had been brought before the Court of King's Bench.

But it is by no means surprising, that the Court of Justiciary should have pronounced this judgment, refusing the prisoner a trial by jury, when we reflect upon the disposition which our Courts of law have manifested to encroach upon, to annihilate this invaluable privilege. It appears, that, by the old law of Scotland, trial by jury took place in matters both civil and criminal. Our civil judges have long since exalted their own dominion, by shaking themselves loose of the intervention of a jury; and I confess, in questions merely of property, I do not wish to see this mode of trial restored: For, so tedious are our forms of proceeding, that it would be impossible to decide matters of property by a jury, without effecting so great an innovation in our system of jurisprudence, as must be productive of inconveniencies and perplexities which could not be removed but  
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1754 in a long course of practice.—Nor do I think there is danger in trusting questions of right between man and man, to the sole decision of our judges; for, besides that redress may be sued for to the Supreme Court of the nation, it can but rarely happen that partiality towards a party or a cause, will, in civil matters, influence any of their Lordships. But, in a criminal Court, when judges are actuated by a laudable zeal for the checking of enormous crimes, for bringing an obnoxious criminal to justice, it is less safe to trust the life of a prisoner in the hands of judges appointed by the crown, than in those of a jury chosen promiscuously from the prisoner's equals. Much less in accusations of treason or others of direct offence, by a subject against the Sovereign; for in such, I apprehend, it must necessarily happen, that judges will, for the most part, lean towards the crown.

On a late occasion the Lords of Justiciary delivered a solemn opinion \*, that, in criminal actions before inferior courts, in cases short of capital punishment, trial by jury is not requisite.

But,

\* Records of Justiciary; Procurator Fiscal of the City of Edinburgh against Young and Weemyss, 19th March 1783.—When this cause was argued before their Lordships, Ilay Campbell, the present Lord Advocate, then Solicitor General, appeared as counsel for the prosecutor. He maintained, that the lesser trespasses, which were to be punished by fine and imprisonment, might be tried without jury, but did not plead, that the severer punishments of pillory and banishment could be inflicted but after trial by jury. But their Lordships, in giving their opinions, said they were not bound to regard Mr Solicitor's admissions. The Honourable Henry Erskine, who was counsel for Young and Weemyss, contended; that no corporal punishment whatever could take place but after trial by jury.—As the nature of this work lays me under the necessity of presuming to give my own opinion, I must observe, that it coincides entirely with the plea maintained by the Solicitor General, viz. That such offences as fall to be punished by fine and imprisonment may be tried without jury, but that crimes *which are to involve a deeper consequence* may not.

But, unless their Lordships shall be disposed to pay more respect to this opinion than they sometimes do to precedent, we may entertain a rational hope, that, in future practice, they will alter their judgment. Before delivering their solemn opinions, their Lordships heard counsel on this point, whether the various degrees of corporal punishment, short of death, could be inflicted, but after trial by jury; and a report was, upon their order, made to them of the practice before the inferior judicatories, as well as the supreme tribunal of Justiciary. From the report made to them, it appears, that never were a set of judges, never a set of benches, more impartial, if an uniform discrepancy, and contradiction of practice, can be stiled *impartiality*. The practice before the magistrates of royal boroughs, and that before the sheriffs, were diametrically repugnant to each other; and that of the Court of Justiciary fluctuated from the one side to the other like the ebbing and flowing of the tide.

By the report made of the practice before the magistrates of royal boroughs, in the trial of crimes not capital, it appeared, that, in the whole of these boroughs, *except one*, (the borough of Ayr), the magistrates were in use to proceed without jury. The proceedings again, in the different counties, evinced, that, in all of them, *except one*, (the county of Edinburgh), the sheriffs were *not* in use to inflict any corporal punishment without the verdict of a jury, imprisonment excepted. Upon these opposite modes of procedure, I must observe, that the magistrates of royal boroughs, in this country, cannot, in general, be supposed either to have studied the science of the law, or to have enjoyed the benefit of an academical education; and that, in many of the decayed boroughs, it cannot be presumed that the magistrates are men of liberal ideas, or independent sentiment and situation in life: That the sheriffs again must be chosen from the bar. Thus,  
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1754 this opposite practice in sheriffs and magistrates, justifies the proverb, that the greater the ignorance, the greater the presumption.

It appeared from an examination into the records of Justiciary, that one Dow, and his accomplices, in the year 1739, had been tried before the justices of peace of Linlithgow, for breaking into the brew-house and cellars of Mr Hope of Craigiehall, and stealing quantities of wine, brandy, and ale: That they *confessed their guilt*, and were sentenced by the justices to be imprisoned, whipt, burnt on the back, and banished the county. Dow brought this sentence under review of the Court of Justiciary, alledging, that so severe a punishment could not be inflicted by any judge, unless the prisoner had been found guilty by the verdict of a jury; and the Court suspended the sentence, except as to the whipping.

In A. D. 1747, Robert Drummond printer, was prosecuted before the magistrates of Edinburgh, for a defamatory libel against a person of the highest rank \*. He admitted that the ballad libelled on was printed in his printing-house; but denied any knowledge that the blanks in it were meant to be filled up with those names and characters which the prosecutor applied to them. The magistrates ordained the ballad to be burnt, the prisoner to stand an hour on the pillory, and to be banished the city, and deprived of his freedom as a burges ¶, for a twelve-month. Mr Drummond brought the cause before the Court of Justiciary

\* His Royal Highness William Duke of Cumberland.

† The intelligent reader is requested to think, whether the most arbitrary judge in England, since the accession of the House of Hanover, would have dared to try such an offence without jury.

Justiciary by *bill of suspension*\*. He maintained, that the prosecutor had filled up the blanks from his own conjecture, and that he the prisoner was altogether ignorant how they should be supplied: That, supposing him to be guilty, the sentence was unmeasurably harsh; and further, that, in a matter of such consequence, he was entitled to trial by jury. The Court *refused the bill without answers.* 1754.

In A. D. 1757, John Falconer was tried before the sheriff of Edinburgh for using of false keys, and stealing of victual. He was ordained to be kept in prison till payment of the expences of his prosecution, which amounted to L. 1 : 10 : 0, and to be banished the county for life. He complained to the Court of Justiciary, that he had been tried without jury, and they dismissed his complaint.

Alexander Flight was prosecuted before the bailies of Cupar in June 1767, for insulting the Provost, and was sentenced to a month's imprisonment, and banishment from the town for three years: But their Lordships suspended the sentence as to the banishment.

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\* There are two forms of *writs* by which causes may be brought from inferior judicatories under review of the Courts of Session or Justiciary. The one is by *bill of suspension*, which may be presented after a judgment of the inferior court is passed, and the decree extracted; the other, by *bill of advocation*, which may be presented to their Lordships any time between the party being served with a summons to appear before the inferior court, and the decree of that court being extracted. Both these writs pass the signet, and are signed by a writer to the signet: And, upon their being presented to one or more of their Lordships, they either *pass or refuse the bill.*

1754 An action was brought before the sheriff of Edinburgh, by John Simpson copper-smith, against Leonardo Piscatorie, teacher of music, (A. D. 1771.) It charged the defender with firing a gun or pistol, loaded with small shot, at the prosecutor, and maiming him so severely as to render him unable, in future, to earn his bread: And it concluded for L. 500 of damages to the private prosecutor; and also, that the defender should be punished by pillory, whipping, or otherwise. Piscatorie claimed to be tried by jury; because the libel concluded for a corporal punishment. The sheriff refused his claim; upon which the defender brought the cause before the Lords of Justiciary, who pronounced the following judgment: 'Having considered the said bill, and answers, with the criminal complaint before the sheriff, find the libel referred to in the bill ought to have been tried by a jury,' &c.; and, therefore, ordained the sheriff to dismiss the libel; but reserve power to the pursuer to insist in a new indictment according to law.

The author who last travelled over the gloomy field of criminal prosecutions\*, bestows a hearty and generous applause on this judgment. To me is left the unpleasing *piece of duty* to acquaint the public, that the next time this point was debated before their Lordships, they pronounced a judgment considerably different; and, soon after, they gave a solemn opinion directly opposite. For Archibald Tait overseer (*i. e.* bailiff) to the Earl of Roseberrie, being convicted, in July 1775, by the justices of peace of Linlithgow, of embezzling oats, hay, and straw, belonging to the Earl, and *under the defender's trust*; and being sentenced to be pilloried and banished the county for life, brought this judgment under review of the Lords of Justiciary. The following points were argued before their Lordships, both in pleadings at the bar, and

\* Maclaurin's Criminal Cases, p. 723.

and in printed informations, *imo*, Whether justices of the peace had a jurisdiction to try this crime? *2do*, Whether they could proceed in such trial without jury? And their Lordships, upon advising the cause, suspended the sentence as to the pillorying; but affirmed it in other respects.

In the case of the procurator-fiscal of Edinburgh against Young and Weemyss, when the preceding report was laid before their Lordships, the indictment concluded, 'That they ought not only to be punished in their persons, *by whipping, banishment, pillory, imprisonment, or otherwise*, as to the magistrates shall seem to meet,' &c. but ought also to be fined in the sum of L. 50 Sterling each, payable to the complainer. Among other pleas which the defenders urged, why trial could not proceed against them, upon the libel raised before the magistrates, they maintained, that no sentence of corporal punishment could be pronounced, but after verdict of a jury. The indictment was, in various respects, so illegal and absurd, that their Lordships would not sustain it: But they omitted not to express the special reasons why they ordained the magistrates to dismiss the libel. Lest an opinion should prevail, that trial by jury was necessary in prosecutions for a corporal punishment, each of their Lordships, in rotation, except Lord Gardenston, who was absent, delivered an opinion, that the lesser crimes could be tried, and the punishments of whipping, pillory, and banishment, inflicted, without trial by jury. It is not easy, however, for the mind to renounce, at once, doctrines which have long been respected, to *conquer prejudices* which have long been entertained. Of this the Court seems to afford a pregnant instance; for, on the same day, their Lordships gave judgment upon a bill of advocacy from the sheriff of Edinburgh, at the instance of one Ballentine, finding that the libel or complaint 'referred to in the bill of advocacy, which contains a

1754 ' charge of different acts of assaulting, wounding, and maiming,  
 ' whereby the persons therein named were in danger of being  
 ' murdered; and also charging, that, in pursuance of these af-  
 ' faults, the defenders forcibly seized, and theftuously carried off  
 ' certain effects belonging to the persons assaulted, *and conclu-*  
 ' *ding for punishment, by whipping, pillory, banishment, or other-*  
 ' *wise, as to the judge shall seem meet,* ought to have been tried  
 ' by a jury.'

This judgment, however, in so far as it is opposite to the one immediately preceding, is, in my humble opinion, a distinction without a difference, or rather a manifest absurdity.—This will be rendered the more apparent by stating the ground of this judgment, and the gradation of our criminal punishments.

*Ground of this Judgment.*

The ground upon which it proceeded was, that trespasses which are reckoned *inter leviora delicta*, may be tried without jury; but that the crimes which are reckoned *inter graviora delicta* cannot.

*Gradation of our Criminal Punishments.*

Imprisonment, whipping, pillory, and banishment, are almost the only corporal punishments in use with us, short of death.—These, and pecuniary mulcts, are applied both to offenders who are guilty of the *leviora*, and the *graviora delicta*, according to the discretion of the judge.

To allot an exact gradation of punishment to the scale of guilt, even with the most accurate system of legislature, is perhaps im-  
 possible,

possible,—but to expect it from that *image* of jurisprudence which has been erected in the days of tyranny; from an image to which poetical fiction would attribute a leaden head, and hands of iron, is absurd.—The tribunals of Fame, of Conscience, and of a Future State, may indeed apply a more exact dispensation of justice; but, if the punishment prescribed by law be the same, it is alike to the prisoner, as to *personal suffering*, whether he be convicted of a statutory trespass, or an atrocious crime. Therefore, in so far as personal safety is concerned, if there is to be any difference in the mode of trying crimes, the more solemn, the more guarded mode of trial, ought to be adopted, *rather in relation to the severity of punishment than to the atrocity of the crime.*—But, in these bills of advocacy by Young and Weemyss from the magistrates, and by Ballentine from the Sheriff, the degrees of guilt charged were different, the punishment concluded for was the same \*, the judgments of the Court of Justiciary were opposite; the distinction, therefore, which is made by these two judgments amounts precisely to this—*That a man may, without jury, be pilloried and banished for a peccadillo, but cannot, without jury, be pilloried or banished for an atrocious crime.*

The instances in which the court affirmed or reversed the sentences of the inferior judicatories, inflicting corporal punishment without trial by jury, have been just recapitulated: And, besides the case of Macdonald of Barrisdale, the court took upon them, in another capital offence, to decide without jury. It was in the trial of John Caldwell for robbery †. The plea of madness was urged in his defence; but, instead of remitting this plea, along

\* Except that, in the libel against Young and Weemyss, there was, besides other punishments, a conclusion for a fine of L. 50 Sterling each, which was not in the libel against Ballentine.

† Records of Justiciary, July 13. 1737.

1754 with the indictment, to the cognifance of a jury, their Lordfhips were pleafed to tear afunder the infeparable concomitants, *charge* and *exculpation*.—The charge, viz. the accusation of robbery, and the proof thereof, they remitted to the knowledge of an affize; but the exculpation they themfelves took previous trial of, examined witneffes upon the point, pronounced the madnefs affected, and then remitted the accusation of robbery to a jury.

After fuch violent and repeated blows at the right of trial by jury, I cannot help expreffing my apprehenfion, that the Court has already fapped the foundation, and that, unlefs prevented by the aroused fufpicion, by the jealous eye of their country, it only remains for judges who may be poffeffed of more courage, or more temerity, totally to overturn the fabrick.

I cannot, without fome farther remarks, difmifs this momentous fubject in a country where the fhades of fuperftition retreat before the light of fcience;—where the liberties of mankind have been eftablifhed at a vaft expence of blood and treasure;—liberties which, perhaps, totter on the axis, and which, like the twilight, may accompany in its fall the fetting glory of Britain.—It is the eftablifhed law of this country, that no prifoner can be tried by the whole Lords of Jufticiary without jury. Is it not then contrary to all reafon, that each magiftrate of royal boroughs, many of which do not contain a fingle inhabitant poffeffed of wealth, of fcience, or of independence, fhall enjoy a power which the law has denied to the collective body of the fupreme judges of the nation?—Shall it be faid, that, becaufe it is only the lower clafs of mankind which are commonly tried for petty crimes, that their liberties are not worth protecting? Or, will it be alledged, that fcourging, pillory, and banifhment, are not terrible punifhments? Befides, the mean ideas of thofe

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*self-elected* men, who, in the decayed boroughs, fill the offices of magistracy, may often lead them to pass over heinous crimes, and to punish the lesser offences with unmeasurable rigour. In the month of September 1784, one of the bailies of Edinburgh sentenced a woman, whom he had convicted of selling butter short of weight, to stand on the pillory, with a label on her forehead denoting her offence, on a market day, at nine in the morning, an hour when the streets swarm with labourers and apprentices, dismissed from their work to breakfast.—No formality of a jury had been used; the bailie had not so much as consulted the city's assessors, whose opinion it was his duty to have taken even in every civil case of the smallest difficulty or importance.—What was the consequence? The rabble, in their rage at being cheated of an ounce of butter, attacked the unhappy woman with such fury, that, had she not been immediately taken from the pillory, they would have murdered her.—*Yet the mob*, so enraged at a culprit for cheating in a few ounces of butter, in the month of June preceding, burnt a distillery worth L. 7000, and would have done infinitely more mischief, had they not been prevented by the repeated interposition of a military force:—*Yet the magistrates*, equally rigorous and informal in punishing the fraud of a silly woman, and dastardly in permitting the outrages of a vile rabble, suffered, without the smallest interruption, a puny mob to beat a drum through the principal streets of the city, nay, before the very door of the city-guard, for the professed purposes of tumult and conflagration.

These opinions, this practice of the Scottish judges, become the more alarming, when we behold the legislative body of the nation introducing a mode of trying offenders distinct from that of jury. In the southern part of the united kingdoms, civil liberty has, for a long period of years, been more respected than in Scotland.

1754 land. An author who has simplified the complex and cumbersome mass of English jurisprudence; whose *writings* have acquired the applause of his countrymen, not only as delivering a clear and comprehensive system of law, but as breathing a generous spirit of liberty, expresses himself with a noble ardour in favour of trial by jury\*. He says, 'It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals; a constitution that I may venture to affirm has, under Providence, secured the just liberties of this nation for a long succession of ages; and, therefore, a celebrated French writer, who concludes, that, because Rome, Sparta, and Carthage have lost their liberties, therefore those of England, in time, must perish, should have recollected, *that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.*' And again, 'The liberties of England† cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make,) but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial,' &c. &c. I submit whether it may not excite a just alarm to see a statute, enacting, 'new and arbitrary methods' of trying the delinquents of the East‡. I submit whether this may not be one of those '*secret machinations which may sap and undermine trial by jury.*'

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\* Blackstone's Commentaries, vol. 3. p. 379.

† Vol. 4. p. 343.

‡ Act for the better regulation, and management of the affairs of the East-India Company, George III. An. 24. c.

## OF LEASING-MAKING.

*Trial of Mr John Stewart Commissary of Dunkeld, son to Mr James Stewart of Ladywell, for Leasing-Making against the Earl of Argyle, and fabricating and uttering lies and calumnies contrary to Law.*

**L** *Leasing-Making* was a statutory crime, the invention of ty- 1641  
 ranny. It meant originally 'the making, or uttering  
 'of lies, tending to breed discord between the King and his  
 'people.' So early as the reign of James I. of Scotland, it in-  
 ferred a capital punishment, and the offence was the same, whe-  
 ther the calumnies were uttered of the King to his people, or  
 of the people to their King. In succeeding reigns new meshes  
 were added to this snare for life and liberty. Every one who  
*misconstrued* the King's proceedings, or \* who failed to inform  
 upon those guilty of leasing-making, were caught within the  
 net. And it was not till after the death of King William, that  
 the penalty of transgressing these laws was restricted to an arbi-  
 trary punishment.

In the year 1641, the Earl of Argyle, with *concurrence* of his  
 Majesty's advocate, brought a criminal indictment against the  
 prisoner for leasing-making, committed by the inventing and  
 uttering.

\* Statute law abridged, *in voce* Leasing-making.

1641 uttering of calumnious reports, charging that noble Lord with  
 ~~~~~ slanderous speeches and disloyal pursuits.

The origin of this trial is thus described by a contemporary writer of good authority. One Graham, a minister \*, was challenged before the committee of parliament, which met on the 26th of May 1641, for uttering speeches defamatory of the Earl of Argyle. On being challenged, he named as his informer another minister of the name of Murray. Murray declared that he had the report from the Earl of Montrose. Montrose acknowledged it; declared the report to be, 'that the Earl of Argyle had got some young lawyers, and others in his name, 'to present bonds to sundry classes of men, obliging themselves 'to follow the Earl of Argyle as their leader, without any reservation of the King or of the state; and that the Earl of Argyle had said, that the parliament, at their last meeting, had consulted lawyers and divines about deposing the King; that 'they had intended to have done it at the last session of parliament, and would do it on the next.' The indictment added, that the prisoner had sent an account of the whole to Lord Traquair, to be laid before the King. Montrose declared, that Lord Argyle made those speeches in his own tent at the Ford of Lyon, in presence of the Earl of Athole, and eight gentlemen, whom he had made prisoners: That one of these gentlemen was the prisoner, Stewart, and he offered to produce him as his authority.

Immediately on this declaration, Montrose dreading that the prisoner might be tampered with to retract what he had said, to exculpate Argyle, and leave Montrose in the lurch, sent some gentlemen

\* Guthrie's Memoirs, p. 79.

gentlemen for him. They brought him to Edinburgh on the 30th of May, and next morning he appeared before the committee of estates, and subscribed a declaration, asserting all that Montrose had affirmed in his name. Argyle, with many oaths, and much passion, denied the whole; and the prisoner was committed to custody in Edinburgh castle. 1641

In a few days, Lord Balmerino, and Lord Dury, one of the Lords of Session, were deputed by the committee to examine the prisoner; and, whatever may have passed at this examination, the prisoner next day wrote a letter to Argyle, exculpating him from the slanderous speeches alledged to have been made at the Ford of Lyon, acknowledging the whole to have been a malicious fabrication of his, the prisoner's, and declaring further, that, by advice of Montrose, Lord Napier, and others, he had transmitted an account of it to the King. And to this he adhered, in a declaration before the committee of estates. On the 11th of June, Montrose, Napier, &c. were imprisoned in Edinburgh castle, and, on the 21st of July, the prisoner, at the instance of the Earl of Argyle, was tried for his life.

Argyle's counsel produced in Court an order of parliament requiring the justices to proceed in the trial, notwithstanding it was contrary to form for \* the Court to sit during the meeting of parliament. They produced also a commission from parliament, appointing Lord Elphinstone, the Laird of Aithernie, John Semple, and Sir James Learmonth of Balcomie, assessors to the justices.

The indictment charged the prisoner with the slanderous speeches against Argyle, mentioned above. It also set forth,

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that

\* Records of Justiciary, July 21. 1641.

1641 that for these offences he had been already called before a committee of parliament, and had not only acknowledged his having expressed these calumnies both by word and writing, but also that they were false and groundless inventions contrived by himself: That the committee had thereupon pronounced a decree, declaring these speeches to be false and scandalous: That the prisoner was author of them: That he had thereby committed the crime of leasing-making; and, therefore, the committee of parliament remitted him to the Justice Court to be punished accordingly.

The first plea which the prisoner urged was, 'that the crime of leasing-making consisted in defaming the King, not in slandering the subject;' but this, like his other defences, was false, or frivolous, for the tyrannical statutes extend it to both cases. He pleaded, *2dly*, That it behoved the King's advocate to have a special warrant from his Majesty, before he could grant his concurrence to a prosecution raised by an individual on account of his private injuries—a position altogether repugnant to law and practice. And, *lastly*, he alledged, That it was not the committee, but the parliament, that had power to pronounce a decree, an argument altogether frivolous, seeing that the Justice Court were competent to pronounce a judgment in the case, although no guilt had been found either by committee, or by parliament. The prisoner was much more decisive in the steps he took against himself. He repeated before the jury his former confession; and he humbly implored the Earl of Argyle's pardon, and offered to make every acknowledgement.

The jury found the libel proved, and the Court sentenced him to be beheaded at the cross of Edinburgh on the 28th of that month, and the sentence was executed accordingly.

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As the prisoner's arguments during the trial were frivolous, so his behaviour between the sentence and its execution betrayed great irresolution. It was alledged that he had been induced to take the guilt upon himself, upon promise of indemnity \*, in order to screen Argyle from the odious imputation in the speech which Montrose had repeated before the committee of estates: That Sir Thomas Hope advised Argyle, that, if the prisoner was screened from punishment, the world would believe he had been bribed to retract his declaration before the parliament; and, therefore, the prisoner's life was a sacrifice requisite to Argyle's vindication; and that the prisoner underwent the most violent conflict of passions, upon finding, that, by his own false testimony, he had been outwitted of his life. Be this as it may, it certainly shocks us to find a person who took such an active part in the civil wars of Charles I. which terminated in the murder of the King, and overthrow of the state, prosecuting unto death a man for reporting traitorous speeches of him; and it ought no less to warn us against the establishing or countenancing iniquitous precedent, since we little know how soon it may be converted into an engine for our own destruction. For the son of this very † prosecutor fell by an iniquitous sentence on this very charge of *leasing-making*.

*John*

\* Guthrie's Memoirs, p. 80.

† In the state trials, there are three prosecutions to be found for this statutory crime. Those of Lord Ochiltree, Lord Balmerino, and the Marquis of Argyle.

*John Niven, Captain of the Ship Fortune of London, for  
Leasing-making against James Duke of Albany and York.*

1680 W THE prisoner was served with a criminal indictment at the instance of his Majesty's Advocate, setting forth, that, by the statutory law, and the practice of this realm, *leasing-making*, the engendering of discord between the King and his people, and the uttering slanderous speeches to the disturbance of government, are crimes of a capital nature, yet the prisoner had been guilty of them \*, by railing against the Duke of Albany and York, the King's brother; by charging him with being in a plot to take the King's life; with combining with the French King to invade England; and with coming to Scotland on purpose to make a party to introduce Popery.—Fivolous objections to the relevancy of the indictment were urged for the prisoner, and repelled by the court †.

William

\* Records of Justiciary, July 15. 1680. † A very unjust account of this trial is given by Lord Fountainhall, in his Decisions, vol. 1. p. 108. The prisoner indisputably fell within the tyrannical statutes against leasing-making, and there seems no doubt of his having been guilty of the fact. Fountainhall is deemed a writer of authority. He was upon the side of law and liberty; but any one who is conversant in the affairs of that period, and who compares the result of his knowledge with the cases in Fountainhall, must be sensible of the extreme partiality of that writer; a propensity which, in times such as those, it was very difficult to resist.—His partiality is the less surprising, as he appears not to have been untinged with fanaticism; and those who have occasion to compare *his Journals* with the original Records of Justiciary, will see little reason to compliment him upon his accuracy.

William Eccles, writer in Edinburgh, deposed, that, being in 1680 Dyfart on the day libelled, in company with the prisoner, and some others, the prisoner inquired at the deponent, and the rest of the company, what stile of reception the Duke of York had met in Scotland? To this the deponent answered, ' he had been ' received according to his great quality and merit, *and that he ' was a fine Prince;*' and the prisoner replied, there was not one of ten thousand in England who would say so. He added, that the Duke of York was in a plot to take the King's life, and had combined with the French King to invade England; but the deponent cannot say whether the prisoner expressed these words as his own opinion, or that of the people of England. The prisoner at the same time said, no man had a greater regard than him for the Duke; that, under his Royal Highness's conduct, he had lost part of his blood in his Majesty's cause; and that he would be ready to hazard his life in the Duke's service.

The prisoner objected to William Tarbett, a waiter, being received as a witness; but his objections were repelled. Tarbett deposed, that he was accidentally in Burntisland, in the house of Captain Seaton, where he fell in company with the prisoner, and two Englishmen, a shipmaster and his mate, and frequently overheard discourses between them relating to government; and heard the prisoner say, that the Duke had come into Scotland to make a party for introducing popery, ' but our good old English ' hearts would not suffer that.'

Michael Seaton, against whom also the prisoner urged objections which were over-ruled, deposed, that, in his own house in Burntisland, upon a Sunday in April last, he was sent for into the room where the prisoner, two English seamen, and William Tarbett, were drinking. He heard Niven and the other Englishmen

1680 men speaking *extravagant commonwealth language*, and particularly concerning the Duke of York. He could not be positive that the words were those charged in the indictment, viz. that he had come to make a party to introduce Popery, but thinks they were to that purpose.

The jury, by a *plurality of voices*, found the prisoner guilty of *leasing-making against the Duke of York*.

On the 4th of August, the Court sentenced the prisoner to be hanged at the Cross of Edinburgh on the 18th; but, on the 6th of that month, the Court, in consequence of an act of Privy Council, proceeding upon a letter from the King, suspended the execution till his Majesty's further pleasure should be declared; and it does not appear that the sentence ever was executed.

## O F P A R R I C I D E .

*John Dickson for the Murder of his Father.*

**T**HE prisoner, who was son and heir to John Dickson of 1591  
Bellchester, on the 30th of April 1591, was tried for the  
the murder of his father, committed in the month of July 1588.  
The criminal record \* contains neither the particulars of the  
murder, nor the evidence against the prisoner, but only that he  
was convicted by a jury, and sentenced to be broke upon  
the wheel at the cross of Edinburgh. At this period, and long  
after, the sentences of the Court of Justiciary frequently express  
no time for their being carried into execution; it being custo-  
mary to take the convict directly from the Court to the scaf-  
fold.

R

O F

\* Records of Justiciary, April 30. 1591. Philip Stansfield was tried for the  
murder of his father, Sir James Stansfield, 1688. See Salmon's state trials,  
p. 610.

## O F M U R D E R.

*Thomas Armstrong for the Murder of Sir John Carmichael  
of that Ilk, Warden of the West Marches.*

1601 THE uncertain and fluctuating limits of two neighbouring nations, which were always jealous of each other, and often hostile, afforded ample field for the depredations of robbers. We find, accordingly, the Scottish borders infested by clans of banditti, who transmitted their predatory pursuits from father to son, like a common profession. The minute and troublesome regulations established by the warden of the English marches, appointing a relief of sentinels, at every pass, by night and day \*, within a large district, evince, that the confines of England were no less infested with thieves and robbers.

Their depredations were carried on upon so extensive a scale, and exercised by such numerous bands, as enabled their leaders to live in power and affluence; and sometimes required the whole executive force of the state to crush those robbers. From a statutory prohibition † against persons bringing *Scottish or English thieves in their company to his Majesty's Court*, or to the city of Edinburgh, it appears, that as little discredit had attended their profession, as if they had been plunderers of the East. In the reign of James V. their robberies had arisen to so daring a height,

\* Bishop of Carlisle's Border Laws, p. 147. *et seq.*  
11th, chap. 101.

† James VI. Parl.

height, that the King, with a military force of about 8000 men, 1601 pitched his camp on the banks of the river Esk, in order to check these depredations\*. Even this mighty force was not thought sufficient, without the aid of stratagem, nay of fraud, to the apprehending of those robbers, whose extirpation could alone restore peace to the borders. *Johnnie Armstrang*, the captain of this lawless band, kept his residence at Gilnockie †, on the river Esk, between Langholm and Carlisle, where he lived the terror of the neighbourhood: And the English borders, for many miles, paid him tribute. Being seduced by the spies of the Court, on the pledge of public faith, he appeared before the King, attended by fifty horsemen, who had laid aside their hostile armour for the splendid array of a tournament. They were thrown into prison; forty-seven of them finished a life of rapine and bloodshed upon growing trees; and one of them atoned for his signal cruelties in the flames. Thus, by one act, public faith was broken, and public peace was restored.

In the minority of Queen Mary, and of her son, and amidst the convulsions of the reformation, the weeds which had taken such deep root in the borders, and which James V. had endeavoured to eradicate, must necessarily have sprung up afresh. When Queen Mary held a Justice-eyre ‡ at Jedburgh, the ravages of a troop of banditti in Liddisdale made it requisite for her to despatch the Earl of Bothwell, with a military force, to suppress these disorders. The robbers gave the Earl battle,  
R 2 wounded

\* Buchanani opera Ruddimanni, v. 1. p. 272.; Leslie de Reb. Gest. Scot. Romae 1578, p. 432. Ballad of Johnnie Armstrang, Scottish Songs, Edin. 1776. v. 1. p. 13.

† The ruins of Gilnockie are still to be seen about three miles south of Langholm; the lands are now the property of the Duke of Buccleugh.  
‡ Buchanani, op. v. 1. p. 348.; Scott's Hist. of Scotland, p. 204.

1601 wounded him dangerously, and repulsed his followers: And the attention which the Queen showed him upon this occasion, excited the jealousy of her husband, and attracted the obloquy of her people.

Thomas Armstrong, the prisoner, was tried before the Court of Justiciary, at Edinburgh, on the 14th of November 1601, for the murder of Sir John Carmichael of *that ilk*\*, warden of the west marches. In the indictment which was raised against him by Thomas Carmichael of Eddrem, the prosecutor, brother to the deceased, it was set forth, that the prisoner, his father, and many border-thieves and traitors, had assembled, of a Sunday, in the month of June 1600, *for the purpose of playing at foot-ball*. That, being informed Sir John Carmichael was to hold a Court next day at Lochmaben, they devised his murder. Accordingly, the prisoner, and twenty accomplices all completely armed, way-laid the deceased next morning, and murdered him as he was going to the Court, by shooting him through the body.

The prisoner being convicted by a jury, was sentenced to be taken to the cross of Edinburgh, his right hand to be struck from his arm, then to be hanged on a gibbet till he be dead, and his body to be taken to the gallows on the Borough muir, and hung in iron-chains. This is the first instance I know of in Scotland, of the body of a malefactor being hung in chains. *Adie Scot* †, one of the prisoner's accomplices, was at the same time condemned to be hanged.

*Alister*

\* Rec. of Just. 14th Nov. 1601.  
famous *Johnnie Armstrong*, one of his accomplices, *Adam Scot of Tushielaw*, commonly called, *King of the Borders*.

† There was hanged along with the

*Alister Macgregor of Glenstra, Laird of Macgregor, for Slaying the Laird of Lufs's friends, and plundering his lands\*.*

THIS trial, and the subsequent proceedings, relating to the 1604  
 clan Gregor, afford the most characteristic evidence of the  
 barbarous state of the Highlands in those times, of the lawless  
 manners of the people, and despicable imbecillity of the execu-  
 tive arm.

The crimes with which the prisoner was charged, resemble more the outrage and desolation of war, than the guilt of a felon. He was accused of having conspired the destruction of the name of Colquhoun, its friends and allies, and the plunder of the lands of Lufs: Of having, on the 7th of February preceding, invaded the lands of Sir Alexander Colquhoun of Lufs, with a body of 400 men, composed partly of his own clan, and of the clan Cameron, and of lawless thieves and robbers, equipped in arms, and drawn up on the *field of Lennox*, in battle array: Of having fought with Sir Alexander, who, being authorised by a warrant from the Privy Council, had convoked his friends and followers to resist this lawless host: Of having killed about 140 of Sir Alexander's men †, most of them in cold blood after they were made prisoners: Of having carried off 80 horses,

600

\* Rec. of Just. 20th January 1604.; Faculty MSS. vol. 1. p. 214. 215. 369. 503.; Cockburne's MSS. p. 78. 346.

† There is mentioned among the slain, *Tobias Smollet*, bailie of Dumbarton, who must have been of the family of his namesake the celebrated author.

1604 600 cows, and 800 sheep; and of burning houses, corn yards\*,  
 &c.

A jury of landed gentlemen of most respectable family sat upon the prisoner. They were, Sir Thomas Stewart of Gairntullie, Colin Campbell of Glenurchie, Alexander Menzies of Weyme, Robert Robertson of Strowan, John Napier *fiar* of Merchistone, *Thomas Fallusdaill burges of Dumbarton*, John Hering of Lethendie, William Stewart captain of Dumbarton, Harie Drummond of Blair, Charles Blair of that ilk elder, Chancellor of the jury, John Blair younger of that ilk, John Graham of Knockdo-naine, Moyfes Wallace burges of Edinburgh, Sir Robert Crichton of Cluny †, Robert Robertson of Faskallie. One of these persons, indeed, *Thomas Fallusdaill, burges of Dumbarton*, ought to have been kept far aloof from this jury. He was the special confident and adviser of the Laird of Lufs; and it was in consequence of his suggestion that the Laird made the parade before his Majesty, at Stirling, with the bloody shirts, stained with the gore of his followers. The jury unanimously convicted the prisoner, who, in consequence of the verdict, was condemned to be hanged and quartered at the cross of Edinburgh, his limbs to

\* This was not the first time that the Laird of Lufs had suffered from the barbarous depredations of the Macgregors. It appears, that, when the King was at Stirling, on the 21st of December 1602, the Laird of Lufs presented himself before his Majesty, and implored his assistance. The Laird was attended by a number of women, corresponding to that of his followers who had been killed or wounded, each displaying as a banner, one of the bloody shirts which his men had on, when killed or wounded by the Macgregors. This was about six weeks before the engagement on the *Field of Lennox*. Letter by *Thomas Fallusdaill burges of Dumbarton*, dated 19th December 1602, and addressed to the Right Honourable Alexander Colquhoun of Lufs, in the archives of that family.

† The *Admirable Crichton* was of this family, and, as he was born A. D. 1551, this gentleman probably was his brother.

be stuck up in the chief towns, and his whole estate, heritable and moveable\*, to be forfeited. Four of the Laird of Macgregor's followers, who stood trial along with him, were convicted and condemned to the same punishment, eleven on the 17th of February, and six on the 1st of March; and many pages of the criminal record are engrossed with the trials of the Macgregors. It became the object of national attention to break this lawless confederacy, of which the object was pointed revenge and indiscriminate plunder, supported by uniform contempt of the laws, and resistance to the magistrates. A statute was passed in the year 1633 †, ordaining, that the whole of the Clan Macgregor which should be within the realm on the 15th of March thereafter, should appear before the Privy Council, and give surety for their good behaviour: That each of the clan on arriving at the sixteenth year of his age, should appear before the Privy Council on the 24th of July, and find surety as above required:—That the surname of Macgregor should be abolished, and the individuals adopt some other:—That no minister should baptize a child, or clerk or notary subscribe a bond, or other security, under the name of Macgregor, under pain of deprivation.

This act was rescinded at the restoration: But it seems probable that the Macgregors had aggravated the outrages of a disorderly life by the unpardonable crime of Jacobitism.—The act rescissory was annulled, and that against the Macgregors revived, in the first parliament of William and Mary.—Within these few years, however, the state of manners and of government rendered it proper that this act of proscription should be abolished forever.—The Highlanders, about the same period, were gratified in

\* Real and personal.

† Charles I. Parl. 1.; Act 30. Charles II. Parl. 1. Sess. 1.; Unprinted Acts, William and Mary, Parl. 1. Sess. 4.; Act 39. George III. An.

1604 in certain other trifles for entering with zeal into the service of the state when others conspired its ruin. Finally, the forfeited estates were restored to the heirs of the persons who were attainted for being concerned in the rebellion 1745; a measure which would have been still more generally grateful, could government have bestowed a like degree of favour on the representatives of those noble families, the descendants of those illustrious ancestors, who undoubtedly were much more innocent, much more excusable, in being concerned in the rebellion 1715.

*Patrick Roy Macgregor for Theft, Sorning\*, wilful Fire-Raising, Robbery, and Murder.*

1667 IT necessarily resulted from the proscriptive law mentioned in the former trial, and enforced with severe penalties, that such of the clan Gregor as did not yield obedience, became outlaws; became a desperate banditti, who had no other livelihood than the booty acquired by the most criminal outrages. The profligate and rapacious habits increased by this act survived the statute itself, and gave occasion to the trial of the prisoner.

Patrick Roy Macgregor, by his activity, courage, and cruelty, had rendered himself the most celebrated of a formidable band of robbers, that long infested the Highlands †. It consisted of about

\* *Sorning* was a very common crime in the uncivilized parts of the Highlands, and well known in our criminal law: It consisted in exacting free quarters by force.

† Faculty MSS. vol. 1st, p. 499. 503. vol. 2d, p. 222. 325. 18th January 1666, 25th March 1667.

about forty persons, whose file of life had nourished a strength 1667  
and activity of body, and a cruelty of disposition, displayed in  
wanton outrages against the feeling of others, yet accompanied  
with a fortitude that bore, without shrinking, the pinching of  
cold and hunger, and the torture of the executioner. Lachlan  
Macintosh, the Captain of this band, about a year preceding,  
had finished his course in the hands of justice. The prisoner,  
who succeeded to the command, was a man of robust make,  
but diminutive stature. The red hair which grew thick over all  
his body, indicated his strength, while it added to his ugliness,  
and got him the name of *Roy*. His stern features bespoke fero-  
city; his keen red eyes, and nose, like the eagle's beak, heigh-  
tened the terrors of his countenance. And both at his exami-  
nation, and execution, he bore an uncommon severity of torture,  
with a patience and fortitude which excited astonishment.

This banditti had committed violent depredations on the lands  
of John Lyon of Muirek, for which Mackintosh the Captain  
had been apprehended and executed, and the prisoner declared  
an outlaw; and a *commission of fire and sword* issued out against  
him. In resentment of these proceedings, the prisoner and his  
associates plundered the lands of Bellchirries, the property of  
Lyon of Muirek. Lyon defended his house of Bellchirries, a-  
gainst the assaults of these robbers, till the 30th of April 1666,  
when they surrounded the house, brought straw and corn from  
the barnyard, piled them around the mansion, and set the whole  
in flames. The proprietor and his son, a lad of about eighteen  
years of age, were glad to come out of the house, on a capitu-  
lation with the robbers, who promised them their lives. Having  
got possession of the house, the robbers carried off the furniture  
and arms, horses and cattle, belonging to Mr Lyon, to the hills  
of Abernethie, about sixteen miles distant. They also carried

1667 the gentleman and his son prisoners; and, regardless of the articles of capitulation, murdered both father and son, leaving their bodies in a field, pierced with redoubled wounds.

The prisoner and his banditti, to the number of forty, proceeded next to assault the borough of Keith, levied contributions on the town, and fought with all who opposed them. In this assault, however, *Roy* was so severely wounded as to be unable to make his escape. Next day he was apprehended, and was conducted, under a strong guard, to the tolbooth of Edinburgh.

On the 25th of March he was brought to trial; and a complete proof being led of his manifold crimes, he was sentenced to be taken, on the 27th of that month, to the cross of Edinburgh, his right hand to be cut off, and then to be hanged till he be dead, and his body to be hung in chains on the gallows between Leith and Edinburgh. The executioner mangled him so shockingly, in the discharge of his duty, that he was next day turned out of office. Patrick Drummond, the associate of the prisoner's guilt, was, at the same time, the companion of his sufferings.

*Agnes Johnston, for the Murder of — Lamb, a child.*

1674 **A**GNES JOHNSTON was prosecuted by Sir John Nisbet of Dirleton, Lord Advocate, for the murder of — Lamb, daughter of John Lamb in \* Airth, and grand-niece to the prisoner. It was charged, in the indictment, that, about three months

\* Records of Justiciary, 19th February 1674.

months preceding, the prisoner, who lived with the parents of the deceased, took an opportunity, when there was nobody in the house but herself and the child, to take the infant, who was about eight months old, out of its cradle, lay it in a bed, and cut its throat. 1674

The Lord Advocate produced against the prisoner her own confession, emitted before the Lords of Justiciary on the 6th of January preceding. She confessed that she killed the child about forty days before. She declared, that the parents had given her no provocation; but that, several times before she committed the murder, *there was a spirit within her that did draw her neck together.* When she was in these fits, it was sometimes alledged that she did but feign sickness; on which account the people threatened to turn her out of the house, and, in resentment thereof, she cut the child's throat: That, before committing the murder, *the spirit had frequently tempted her to make away with herself.* In particular, she once attempted to drown herself in a well at Clackmannan; but there being little water in it, she cried to a servant of the Laird of Clackmannan's, who helped her out. She declared, that she did not tell any body of her being thus tempted, *nor had she power to tell;* that she began to be troubled with the spirit about Fastren's-even preceding; that she was unmarried, and about fifty years of age. She adhered to this confession before the court and jury.

The jury, after *reasoning and voting,* found the prisoner guilty. She was sentenced to be hanged in the Grass-market on the 21st of February, that is, after an interval of one day; and her moveable goods to be forfeited.

1674 The conviction of this poor woman was an act of great inhumanity and injustice. The Court ought to have appointed counsel for her; the judges ought themselves to have been her counsel. As the only proof adduced against her was her own confession, it must be held to be true in all its parts; and, by the confession, it is obvious that the woman was greatly disordered in mind. She had been troubled with hysterical convulsions, which are often accompanied with deep melancholy, and this she called *the spirit*. And, in her, the melancholy was so great as to deprive her of the use of her judgment; which is plain from her having, without any other motive, been frequently inclined, and once having actually attempted to put herself to death. It was not her crime to have killed the child; it was her misfortune to have lost her judgment.

*Andrew Rutherfoord of Townhead, for the Murder of James Douglass, brother to Sir William Douglass of Cavers.*

THE prisoner was accused of having conceived deadly malice against the deceased: That, having dined together in a farmer's house on the 9th of July preceding, in company with several gentlemen, the prisoner, urged by this malevolent passion, on their way home \* from dinner, within half-a-mile of the town of Jedburgh, did murder the deceased, by giving him a mortal wound with a small sword through the arm, and through the body under the right pap, of which wounds he died within four hours: That the prisoner immediately fled to England, and would

\* Records of Justiciary, 6th and 10th November 1674.

would have embarked at South Shiells for Holland, had he not been apprehended. The prisoner pleaded self-defence. 1674

Robert Scott of Horsehill deposed, That, about ten at night of the 9th of July, the deponent, Charles Ker of Abbotrule, William Ker of Newton, and their servants, the prisoner, and the deceased, after dining at Swanfide, called in the evening at the house of John Ker at Berchope, in their way to Jedburgh. The deceased was riding a little way before the deponent; and the prisoner, who was at a distance behind, galloped up beyond the deponent to the deceased. They rode a little way together, then alighted and drew their swords. The deponent knew not which of them drew first; but, on galloping up, he saw them pushing at each other, and called to them to desist; but, before he could alight, they were in each other's arms. The witness asked, if there was any hurt done? to which the prisoner answered, none that he knew of; but, at the same time the deceased held out his right hand, and said, he had got blood. The witness demanded their swords, which they immediately delivered to him: Instantly thereafter the deceased sunk down, and the prisoner fled. A surgeon was sent for from Jedburgh, they being but a quarter of a mile from the town. By his order, the deceased was put on a horse, a man sitting behind, and one walking on each side. When they arrived at Jedburgh, the deceased was laid on a bed, the surgeon probed the wound in his arm, and also that in his breast behind the right pap. The deceased died within two hours after receiving the wounds. Both in the field, and when laid in bed, the deceased exclaimed, 'Fie! fie! that I should be affronted by such a base man!' The witness did not hear the deceased say he was wounded before he drew; as little did he hear him urge any thing before his death in vindication

of:

1674 of the prisoner. The witness returned the prisoner his sword.  
 ~~~~~ All the company had drank freely.

The surgeon deposed, that he thought the wound in the breast slight, and that the deceased died of the wound five inches long in his arm, an artery being pricked.—Three witnesses were adduced for the prisoner, who deposed *nihil novit in causa*. A woman was then cited on his behalf, but the King's Advocate *objected to a woman being admitted a witness*; and the Court *refused to receive her*, as there was 'no *penuria testium* \* *tempore mortis*.'

The jury returned their verdict on the 12th of November, unanimously finding the prisoner guilty; and, on the 16th, the Court passed sentence of death upon him, ordaining him to be beheaded on the 25th, at the Cross of Edinburgh.

*George Clerk and John Ramsay, for the Murder of John Anderson, Merchant in Edinburgh.*

1676 **J**OHNS RAMSAY, servant to the deceased John Anderson, and George Clerk, late servant to Mr John Clerk of Pennycuik, were prosecuted for the murder of John Anderson merchant in Edinburgh, at the instance of Mr John Clerk of Pennycuik, and James Clerk merchant in Edinburgh, nephews to the deceased, and of Sir John Nisbet of Dirleton, his Majesty's advocate.

The

\* No scarcity of witnesses at the time the deceased expired.—This offspring of ignorance and barbarism, the refusing to admit women as witnesses, unless none other were to be had, was a rule of the law of Scotland previous to this century.

The indictment sets forth, that the prisoners lived in the house with the deceased\*, and waited on him at the time of his death, and for some months preceding. The deceased was an unmarried person, and had nobody living in the house with him but the prisoners, who perfidiously abused the trust reposed in them. When their master was counting his money, having the room door shut upon him, they were in use to rap at the door, and, when he opened it, they slipped in and stole part of his money. The season was very sickly: A flux, in particular, raged with such violence, that many died of it daily; and it was deemed so contagious, that those who were not infected were afraid to approach the sick from the danger of infection. The prisoners conspired to bring this disease upon their master. They consulted one Kennedy, apprentice to Thomas Henryson apothecary in Edinburgh, in the month of October or November preceding, and got from him some purgative powders and drugs, which they administered to the deceased in his drink and otherwise. The first purging powder wrought slowly. They then got a white powder which operated to their wishes, so that the deceased had recourse to Hugh Brown apothecary, his ordinary medical adviser. The prisoners took advantage of the sickness they had brought on him, by combining to steal his money and jewels, which he kept in an iron chest. That they might steal with the greater security, they also applied to Kennedy for intoxicating, or soporiferous draughts; obtained from him a medicine which he called syrup of poppy, and gave it to their master when he was bad, and keeping the house, without his knowledge, or that of Brown his apothecary. It was mixed in his drink, and he fell in a deep sleep. They took out his keys, opened his chest, carried off a large gold chain, gold bracelets, a gold

\* Records of Justiciary, January 17. 1676.

1676 gold ring with a blue stone, two pieces of gold, twelve of silver, and five *purse-pennies*, silver buttons, broaches, and various other articles. They then got from Kennedy several drugs, which he called powder of jalap, and crystal of tartar, which they gave to their master. Clerk told Kennedy, that their master being ill, they had stole several pieces of coin from him, and that there were three bags of money in his chest; that they were resolved to take some of it, and would give Kennedy a part.—They gave the jalap and the tartar to their master to counteract the effect of Brown's prescriptions.

On the Wednesday preceding their master's death, which happened on Monday the 15th of November 1674, Anderson's friends visited him, and he told them he was greatly better. On this, the prisoners fearing his recovery, and that he should discover their practices, came to a positive resolution to murder him, communicated it to Kennedy, and sought poison from him to effect their purpose. But Kennedy would not give poison, saying the body would swell, and so they would be discovered; but he would give a powder which would do the business slowly, and which he would engage would kill their master in a month. They got a powder accordingly, which Kennedy called powder of jalap, but which, either in quality, quantity, or frequency of being administered, was truly poison. On the five days immediately preceding his death, the prisoners, and their associate Kennedy, held frequent consultations in the shop of Kennedy's master, in the house of the deceased, and in the King's park. They gave Kennedy part of what they had already stolen, and promised him an equal share of their future plunder. On Saturday night, the deceased was so well, that his apothecary said he would not visit him next day. On Sunday he was not thought near death, but rose, dressed himself, and  
supped

M U R D E R.

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supped in his usual stile. On Sunday night, the prisoners mixed 1676  
 some drugs in conserve of roses that had been prescribed for him  
 by his own apothecary. These were so poisonous that he died  
 on Monday morning at ten o'clock.—At five o'clock, their ma-  
 ster called for the bed-pan, which they gave him. They then  
 ran to the iron chest, filled their hands with jewels, goods, and  
 money belonging to their dying master, and did not look near  
 him till about eight o'clock, when they found him speechless,  
 the white of his eyes turned up, and the bed swimming around  
 him. They then called in the neighbours to see him die.

Both the prisoners emitted confessions corresponding in general  
 to the charge in the indictment. They added, that, before they  
 conceived the idea of giving their master drugs to bereave him  
 of life, they had frequently been in use to infuse powders in his  
 drink, which made him outrageously drunk, that they might  
 make sport of him in his drunkenness: A dreadful lesson to be-  
 ware of the first steps in vice. Had they not infused powders  
 to make their master drunk, in order to gratify a barbarous, and  
 disrespectful mirth, the idea of taking away his life by similar  
 means would not have occurred to them. They were convicted,  
 and sentenced, on the 8th of February, to be hanged at the cross  
 of Edinburgh on the 1st of March, and their moveable goods to  
 be forfeited.

The trial of Kennedy, the apothecary's prentice, for furnish-  
 ing the medicines, was brought on upon the 22d of February  
 1676, and, after various adjournments, and a tedious confine-  
 ment of eighteen months, he, on his own petition, on the 30th  
 of July 1677, was banished for life.

T

*James*

*James Gray lister\* in Dalkeith, for the Murder of Archibald Murray, Gentleman of his Majesty's Troop of Guards.*

1678 **T**HE prisoner, by profession a dyer, was a Lieutenant in the Duke of Lauderdale's regiment of Lothian militia. It happened that this corps, and the troop of guards to which the deceased belonged, were quartered at Glasgow. The prisoner was prosecuted at the instance of Sir William Murray of Newton, father to the deceased †. The indictment set forth, that the prisoner and the deceased, in company with some others, were drinking in the house of James Brown bookseller in Glasgow. The deceased retired, the prisoner followed, and, conceiving deadly malice against him, killed him with a small sword.

Mr John Ellies appeared as counsel for the prisoner. He said that, deadly malice being charged against the prisoner, it was incumbent on the pursuer to prove that quality in the indictment. That, if any homicide was committed, which, however, he denied, it was done in self-defence. The prisoner and the deceased had no previous quarrel; they had not even the most distant acquaintance till the night on which the deceased expired; and the inferior station of the prisoner made it presumable that the deceased was the aggressor. He offered to prove, that the prisoner had received provoking language from the deceased: That, after the death, the prisoner, far from denoting guilt by flight, came back to the company, and sat with them for two hours; and

\* Dyer.  
vol. 1. p. 1.

† Rec. of Just. 10th June 1678.; Fountainhall's Decisions,

and that another person was present at the scuffle, with a drawn sword, by whom the wound might be given. He insisted, that *jurymen were unfit judges to determine upon circumstantial evidence*: That the Privy Council were wont, in matters of this sort, to take previous cognition; and they did so, particularly in the case of Thomas Menzies; and he prayed the Lords of Justiciary to make previous inquiry into the circumstances. 1678

Sir Robert Sinclair, counsel for the pursuer, answered, that it being libelled that the prisoner did kill the deceased, was in itself relevant, if proved, to convict the prisoner, without any proof of malice, *'that being no necessary qualification of the libel, but the words of stile.'* And in our law there is no difference as to the crime, or the punishment of death, and confiscation of moveables, whether the killing proceeded from malice preconceived, or upon sudden rencounter or chaudmell; for a slaughter being committed, it must be presumed to be done out of malice: That, as to drawing a conclusion of self-defence from the circumstances of this case, these circumstances were altogether frivolous; for, although the act 1661, chap. 22. sustained the plea of self-defence, yet it could only be admitted *salvo moderamine inculpatae tutelae*.

Mr Ellies, in his reply for the prisoner, persisted that a jury was very unfit to judge on a circumstantial proof, and requested the Lords to appoint a precognition to be taken.

The Lords found the indictment relevant, and that there was no necessity to lead a separate proof to establish forethought malice.

1678 The following circumstance gave rise to the quarrel: The parties being heated with wine, the quarrel arose from the prisoner's saying, 'That a lieutenant to the Duke of Lauderdale was as good as to ride in the King's guard.' On this the deceased stormed, called the prisoner base fellow, to compare himself with gentlemen, and gave him the lie.

#### T H E P R O O F.

George Murray, gentleman of his Majesty's troop of guards, deposed, he was drinking in the house of James Brown, in company with the prisoner, the deceased, and others. The deceased gave the prisoner the lie. Within half an hour thereafter, the prisoner and the deceased left the room, and the deponent sent one Thomas Hamilton to inquire after them. Instantly Hamilton and the prisoner returned, and the prisoner, wiping his sword, said, '*He had given him it.*'

James Hamilton of Little Preston deposed in terms of the preceding witness, with this variation, that the prisoner said, '*He was afraid he had done it.*'—Edward Watson saw the prisoner and the deceased fighting with drawn swords; the deceased went to a bookfeller's shop to look at his wound, staggered, and fell on the street.—Lieutenant Joseph Douglass heard the prisoner, on being taken into the guard, say, he had parried two or three thrusts made at him by the deceased.—John Bain heard the prisoner say, the deceased had made three or four thrusts at him.—John Paterson, gentleman of the guards, heard the prisoner acknowledge he had killed the deceased, and declare, that, if it were to do, he would do it again.—Ensign George Murray heard the prisoner say, the deceased and he had been combating, and that he was sorry the wound was not through the deceased's heart.

heart.—Thomas Hamilton deposed, that, after words had passed 1678  
between the prisoner and the deceased, they went down stairs  
together, and drew: He heard the prisoner say, he was afraid  
he had killed the deceased.—Hall the surgeon deposed, that the  
wound and the prisoner's sword tallied; the wound was ten  
inches deep, and the deceased died of it in forty-eight hours.  
The prisoner sent for the deponent the day after the combat, and  
desired him to use all means under heaven for the deceased's  
cure.

The jury pronounced the following verdict: ' Find the pri-  
' soner did commit the said slaughter upon the deceased Archi-  
' bald Murray, and that with one vote. As to the second part,  
' relating to the pannel's self-defence, the assize finds no such  
' thing proven; but, on the contrary, that the pannel and the  
' deceased came both out from the company, most likely upon  
' one and the same design.' He was sentenced to be beheaded  
at the Grass-market on the 3d of July, and his moveables to be  
forfeited. Much interest was used to obtain him a pardon: The  
Privy Council granted him a short respite; but, as the Duke of  
Lauderdale declined to interfere in obtaining him a pardon, the  
sentence was executed on the 19th of July, and he suffered with  
great resolution.

*John*

*John Chislie of Dalry, for the Murder of the Right Hon. Sir George Lockhart of Carnwath, Lord President of the Court of Session, and Member of his Majesty's Privy Council.*

1689 **T**HE prisoner was brought to trial before Sir Magnus Prince, Lord Provost of Edinburgh, as high sheriff within the city, and James Graham, John Charteris, Thomas Young, and William Paton, bailies; the murder having been committed within the city.

The prisoner was brought before the Lord Provost on the 1st of April 1689, to be examined concerning the murder of Sir George Lockhart, committed on the day preceding. Sir John Lockhart of Castlehill, brother, and Cromwell Lockhart of Lee, nephew of the deceased, appeared in Court, and, in their own name, and in that of the children of the deceased, gave in an act of the meeting of estates of Parliament, passed that very day, of the following purport: That the Estates having considered the supplication of the friends of the deceased Sir George Lockhart, for granting warrant to the magistrates of Edinburgh to torture John Chislie of Dalry, perpetrator of the murder, and William Calderwood writer in Edinburgh, an accomplice; therefore, *in respect of the notoriety of the murder*, and of the extraordinary circumstances attending it, the Estates appoint and authorise the Provost and two of the bailies of Edinburgh, and likewise the Earl of Errol, Lord High Constable, and his deputies, not only to judge of the murder, but to proceed to torture

ture \* Chiffie, to discover if he had any accomplices in the crime. 1689  
 And they appoint two of each bench †, viz. the Earls of Glen-  
 cairn and Eglintone, Sir Patrick Ogilvie of Boyne, Sir Archi-  
 bald Murray of Blackbarony, Sir John Dalrymple, younger of  
 Stair, and Mr William Hamilton, advocate, assessors to these  
 judges. The Estates, at the same time, declare, that this extra-  
 ordinary case shall be no precedent to warrant torture in time  
 coming, nor argument to ratify it as to the time past.

The Lord Provost then entered a protest, that this act of the  
 Estates of Parliament should not infringe the ancient liberties of  
 the city; and Mr David Drummond advocate, one of the Earl  
 of Errol's deputies, protested, that the Lord High Constable's ab-  
 sence should not affect his right to judge in the like cases, the  
 murder having been committed during the meeting of the Estates.  
 Being desired to concur with the magistrates in sitting on this  
 trial, he refused to sit, unless the Earl of Errol, or his deputies,  
 were sole judges.

The prisoner was then put to the torture, and declared that he  
 was not advised to the assassination of Sir George Lockhart by  
 any person whatever: That, when at London, he told James  
 Stewart advocate, that, if he got no satisfaction from the Presi-  
 dent, he would assassinate him; and told the same to a person  
 there

\* By the act and declaration which the Estates of Parliament passed, just ten  
 days after this trial, declaring King James to have *forfaulted* the crown, by ille-  
 gal assumption and exercise of power, they declared, 'That the use of torture,  
 ' without evidence, and in ordinary crimes, is contrary to law.' Act of Estates,  
 11th April 1684.

† The Scottish Parliament composed but *one house*.  
 It consisted, after the Revolution, of three classes, the Temporal Peers, the Ba-  
 rons, i. e. knights of the shire, and the Burgeses, or representatives of the royal  
 boroughs.

1689 there of the name of Callender, and to Mr William Chislie his uncle. He confessed that he charged his pistol on Sunday morning, and went to the New Kirk, and having seen the President coming from the church, he went to the close where the President lodged, followed him, and, when just behind his back, shot him: That he was satisfied when he heard of the President's being dead; and, on hearing it, he said, '*he was not used to do things by halves.*' He also confessed, that, when at London, he walked up and down Pall-Mall with a Pistol beneath his coat, lying in wait for the President.

The indictment against the prisoner was raised at the instance of John Gibson, procurator-fiscal of the city of Edinburgh, of Sir John Lockhart of Castlehill, and Cromwell Lockhart of Lee. It set forth, that assassination, murder, and man-slaughter, were contrary to the laws of God, Nature, nations, and the laws and acts of Parliament of this kingdom: That, nevertheless, the prisoner had, of forethought felony, without the least provocation, murdered Sir George Lockhart in the manner already mentioned: That the prisoner was caught *red-hand* \* by a multitude of witnesses, before whom he boasted of what he had done, as if it had been some grand exploit: By all which he was guilty of murder, or at least was *art and part* accessory to the same; for which he ought to be punished with death, and his moveables confiscated.

The jury consisted of ten landed gentlemen and five merchants of Edinburgh.

The

\* *Red-hand* is a term in the Scottish law, signifying a criminal's being caught in the fact. *Art and part* is also a term in our law, denoting that the person to whom it is applied is aiding and abetting in the case. *Art and part* is a translation of *ope et consilio*.

The prisoner judicially confessed the crime libelled, and declared, that he committed the murder because he thought the deceased had given an unjust sentence against him. Being asked, 'If it was not a sentence pronounced in favour of his wife and children for their aliment? he declared he would not answer to that point, nor give any account thereof.' 1689

Witnesses were then adduced, who deposed as follows:

James Stewart advocate deposed, that, in the month of September or October preceding, the prisoner discoursing with him concerning the injustice done to the prisoner in a decreet-arbitral pronounced by Sir George Lockhart and Lord Kemney, in favour of his wife and children, for an aliment, said, he was resolved to go to Scotland before Candlemas and kill the President; to which the witness answered, it was the suggestion of the Devil, and the very imagination of it a sin before God. To this the prisoner replied, '*Let God and me alone; we have many things to reckon betwixt us, and we will reckon this too.*' The witness told this to many, and understood that the President was informed of the prisoner's menaces, but despised them.

Mr William Chislie writer to the signet deposed, That he had not seen the prisoner since April 1688, who then expressed his resentment against Sir George Lockart, threatening to assassinate him for having decreed an aliment of 1700 \* merks yearly to the prisoner's wife and ten children. The witness told the President of it, but he despised the threat.

Mr Daniel Lockhart advocate, and Mr Alexander Walker student of divinity, saw the prisoner shoot the deceased. They

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feized

\* About L. 93 Sterling.

1601 seized him, and the latter of these witnesses assisted in carrying  
 him to the guard. When seized, the prisoner said, ' he had  
 ' done the deed, and would not fly, and that was to learn the  
 ' President to justice.'

Sir David Hay Doctor of medicine, was going to visit the  
 President's Lady. As he entered the close \*, he saw the President  
 stagger and fall to the ground. He bled at the mouth, was car-  
 ried into his house, laid upon some chairs, and immediately ex-  
 pired. He saw John Baillie surgeon probe the wound. The  
 ball went in at the back, and out at the right breast.

The jury all in one voice, by the mouth of Sir John Foulis of  
 Ravelstoun, their chancellor, (*i. e.* foreman), found, by the pri-  
 soner's judicial confession, that he was guilty of the murder of  
 Sir George Lockhart, &c. &c.; and by the deposition of wit-  
 nesses, that he was guilty of '*murder, out of forethought felony.*'  
 —The verdict was subscribed by the whole jury.

The Lord Provost and Bailies of Edinburgh sentenced the  
 prisoner to be carried on a hurdle from the tolbooth of Edin-  
 burgh, to the market cross, on Wednesday the 3d of April in-  
 stant; and there, between the hours of two and four of the af-  
 ternoon, to have his right hand cut off alive, and then to be  
 hanged upon a gibbet, with the pistol about his neck, with  
 which he committed the murder. His body to be hung in chains  
 between Leith and Edinburgh; his right hand fixed on the  
 West-port, and his moveable goods to be confiscated.

Besides

\* It was the close in the south side of the Lawn-market, now called *the Bank close*, from the Bank of Scotland being there.

Besides Sir George Lockhart, two other of the supreme judges 1689 in Scotland have been murdered: All of them on account of causes to which they were either party or judge. Robert Galbraith, parson of Spot, one of the Senators of the College of Justice, on the 13th of February 1543, was murdered by John Carkeitill, and his accomplices, on account of some favour shown to Sir William Sinclair of Herdmanstoun\*. As the records of Justiciary for that year are missing, I know not whether the murderers were brought to punishment.—John Graham, parson of Killearn, and one of the supreme criminal judges, married the widow of Sandilands of Calder, who was amply endowed by her former husband. Graham commenced and carried a distressing lawsuit against young Sandilands, his step-son; and Sir James Sandilands, uncle and tutor to the young gentleman, assisted by a body of his friends and followers, in revenge murdered Graham in Leithwynd, one of the principal avenues to the City of Edinburgh, on the first of February 1592. The perpetrators were neither brought to trial nor punishment. But seven years after, the grand-father, or grand-uncle of the great Montrose, attacked Sir James Sandilands, with an armed force, as he was going into the Court of Session; and, after obstinate resistance, left him desperately, and, as the assailants thought, mortally wounded. By a late statute, to kill any of the Lords of Session, or Justiciary, when in the exercise of their office, is declared to be high treason.

U 2

*John*

\* Books of federunt, 13th February 1543. MSS. Memoirs of the family of Herdmanstoun. *Johnstoni Historia Rerum Britannicarum*, p. 172. 253. Annae, An. 7. cap. 22.

*John Master of Tarbet, Ensign Andrew Mowat, and James Sinclair Writer in Edinburgh, for the Murder of Elias Poiret Sieur de la Roche.*

1691 **T**HE prisoners were indicted at the instance of George and Isaac Poirets, Sieurs de la Roche, Frenchmen, Protestant refugees, and gentlemen of his Majesty's troop of guards, and of Sir William Lockhart Solicitor General. The indictment contained a charge against the prisoners, of entering, on the eighth of the preceding month of March, about twelve at night, into the bed-chamber of George Poiret \*, one of the pursuers, while he lay sleeping in bed, in the house of John Brown vintner, Leith, in which house he was quartered, and giving him wounds to the effusion of his blood: That, upon their being removed out of the room, they returned, and endeavoured to break open the door. On this George rapped on the ceiling of his room for his two brothers, who slept in the room above, to come to his assistance. They came accordingly, half clothed, and totally unarmed; and the prisoners, all of whom were armed, did violently assault them, gave them many wounds, and run the deceased Elias Poiret through the body with a sword, of which he instantly died.

The prisoners recriminated, by presenting an indictment, at their instance, charging the Sieurs de la Roche with assassination and murder. It set forth, that the Master of Tarbett, Mowat and Sinclair, on the night libelled, were obliged, by a heavy storm,

\* Records of Justiciary, 18th August 1691.

storm, to take shelter in Brown the vintner's house. While they 1691  
 were sitting quietly at the fire-side in the hall, drinking some ale,   
 till beds should be got ready for them, George, Isaac, and Elias  
 Poirets, and James de la Maffie, another Frenchman, having  
 formed a conspiracy to murder them, entered the hall with cock-  
 ed pistols in their hands, and swords under their arms; the Ma-  
 ster of Tarbet, and his companions, being then totally unarmed.  
 They fired two pistols loaded with ball, at the Master of Tarbett,  
 and then, with drawn swords, attacked the company, who were  
 much wounded, by parrying the thrusts with their hands; and,  
 in the scuffle, there being but little light in the room, the Sieurs  
 de la Roche did murder the deceased Elias Poiret, their own  
 brother.

After long arguments, which it is unnecessary to transcribe or  
 abridge, the Court sustained the libel against the Master of Tar-  
 bett, Mowat, and Sinclair; and found the defences offered for  
 the Frenchmen relevant to set aside the indictment against the  
 latter.

The jury were Lord Bargenie, William Baillie of Laming-  
 ton, James Nicolson of Trabroun, Sir Robert Gordon of Gordon-  
 stoun, Thomas Hay of Balhouffie, Sir George Suttie of Balgony,  
 Sir William Ker of Greenhead, John Keirie of Gogar, John Scot  
 of Rhynolds-burn, William Calderwood of Pittedy, Sir William  
 Binning of Wallyfoord, Sir James Fleming of Rathobyres, James  
 Scot of Bowhill, Sir James Dick of Priestfield, and Peter Wed-  
 derburn of Gofsford.

The prisoners objected to the receiving of James de la Maffie  
 as a witness, on account of intemperate expressions of malice  
 and

1691 and resentment; and the fact being proved, the witness was repelled.

Christian Erskine, late servant to John Brown vintner, Kirk-gate, Leith, deposed, that the Master of Tarbett went into George Poiret's chamber after twelve at night, and the deponent hearing a little noise in the chamber, went in with a candle, and saw the Master of Tarbett standing at George Poiret's bedside, and the said George sitting up naked in his bed, the bed-clothes at his feet, his night cap off, and a little drop of blood on his cheek. They were speaking French together angry like; the deponent called for Ensign Mowat, who was sitting at the fire-side in the hall, for she thought him the soberest of the company; at the same time, she could not pronounce any of them drunk. Upon Mowat and another person's coming into the room, the Frenchman took down his sword, which these two and the Master of Tarbett forced out of his hand. She saw no blows at that time, but entreated Mowat to take the Master of Tarbett and the other person out of the room, which was done accordingly; and the other person, *who was none of the prisoners*, carried the Frenchman's sword with him out of the room into the hall. Mowat desired the witness to keep the door close, and none of them should come back again. None of them had arms when they were in the Frenchman's room, except the sword which they had wrested from him, as mentioned above. Soon after, the Master of Tarbett (as the deponent supposed) came back, and rapped once or twice at the door, saying, he would be in, to which she made no answer. But, before the Master of Tarbett came again to the door and rapped, George Poiret got out of his bed, and rapped with the tongs on the roof of the room; and, in as short space as the Frenchmen could put on a few clothes, they came to George Poiret's chamber door, and spoke French to him, but did not

not enter his room, and then went to the hall. The deponent 1691  
then heard a noise in the hall, and some folk speaking Scots, and  
immediately after heard the shot of a pistol, and saw the  
smoak, but knew none of the people where the pistol was fired  
save Isaac Poiret, whom she thereupon pulled back, and found  
him with a drawn sword in his hand, his hand streaming with  
blood, and his little finger almost cut off. As she was coming  
back with Isaac in order to get him into his brother's chamber,  
she found a man under her feet in the floor, which turned out  
to be Elias Poiret lying dead. She saw a drawn sword or two in  
the company, but cannot specify who held them. She did not  
see the prisoners wound any of the Frenchmen, or kill the deca-  
sed; and the deceased's sword was not drawn: Nor did she see  
the prisoners in the room after the deceased was killed. When  
Ensign Mowat was brought into the room where the dead body  
lay, he did not wax pale, as charged in the indictment, but look-  
ed very well upon it, desired to see the body, and asked the de-  
ponent, If she knew who killed him? The deponent added, that  
the Master of Tarbett had seen a coach at the door, and asked  
her if it was to hire, and to whom it belonged? and she answered,  
it was hired by the Laird of Mey, who was in the house; upon  
which the Master of Tarbett said, he would see him; and she  
showed him into the room accordingly. The witness farther  
added, that the occasion of the Master of Tarbett's leaving the  
fire side where he sat, and going into George Poiret's room, was  
to follow Jean Thomson, whom he supposed to have gone into  
that room. The prisoners had laid aside their swords in the  
room where they were to lodge, as had the Master of Tarbett  
his periwig, before they entered Poiret's room; and Sinclair,  
the other prisoner, was asleep in Mey's room an hour before the  
disturbance happened.

Jean

1691 Jean Thomson, late servant to John Brown vintner, aged nineteen, deposed, That, on the night libelled, between twelve and one, the Master of Tarbett being in her master's house, and calling for a drink of ale, desired the deponent to sit down by him, which she refused, but afterwards she sat down. Being called to draw ale, she went to the cellar and drew the ale; when she came up, she did not go into the room where the Master was, but sat down on a chest at a bed-side, where the Master came and sat down beside her; upon which she rose, went into a room where she used to lie, and bolted the door: But hearing a noise in George Poiret's room, she came to the door of that chamber, where she found Ensign Mowat, the other servant having before that carried in a light, on account of the noise. Mowat carried the Master of Tarbett and another person out of the room in his arms; and, when Mowat was thus taking them out, the Master of Tarbett said to him, *he would go back and crave the gentleman's pardon.* Soon after, the Frenchmen came down stairs, armed with swords and pistols; their swords not drawn at that time. They spoke to their brother George, and then went through the hall, Isaac Poiret having his sword drawn. The Master of Tarbett and Mowat were then in the hall; she did not see them have any arms, nor assault the Frenchmen. At the sight of a drawn sword, and the command of her master, who by this time was in the hall, she went out to call the guard, and, as she went down stairs, heard a shot. This witness concurred with the former in deposing, that, long before any disturbance happened, Sinclair, one of the prisoners, was asleep in another room; and that the Master of Tarbett and Mowat, on their coming into the house, laid aside their swords in the room where they were to sleep.

John

John Brown vintner deposed, That, on the night libelled, he was in bed in a little room off the hall, and knew nothing of the disturbance in his house till Jean Thomson rapped at his door. On this he rose hastily, and heard a great noise and crying in the hall; and, when he came there, he found Elias Poirer lying dead, and nobody in the room beside him but Christian Erskine. He went instantly to call the guard; and, on his return, when they were removing the body, he found a pistol in the floor, snapped and charged, and a sword in the scabbard. As he returned from calling the guard, he raised several of the neighbours; one of them, Robert Aitchison, told him he had seen one of the murderers pass. Upon this the witness took a candle and lanthorn to a fore-stair, where Aitchison said the murderer was, and there he found Ensign Mowat, standing behind a deal, on a knocking-stone \* under the fore-stair. He was desired to come out, but made no reply for a good space. The company and constables then presented muskets to him, upon which he came out, and the company and constables took a sword from him, which they delivered to the deponent, who, however, did not see the sword taken from him, he being surrounded by the people. The sword was naked, much bent, and bloody both in blade and hilt. The witness ordered the constables to carry Mowat straight to prison; and, next day, when he went with the magistrates to the prison, he saw Mowat's right hand with a wound on it. He was also present when the surgeon compared this sword with the hole in the deceased's coat, and the orifice of the wound: It corresponded with the hole in the coat, and the surgeon said it did the same with the wound. The witness added, that the Master of Tarbett came to his house, on hearing

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that

\* A knocking-stone is a stone mortar, formerly much used by the common people for beating the husk off barley ere they put it in the pot.

1691 that the Laird of Mey and Mowat were there; that the coach being gone and the night rainy, he resolved to stay and lie with Mey, the deponent having no other bed for him. The Master of Tarbett ordered his servant to go to his lodgings, and tell that he was not to be at home, and to bring him clean linens next morning.

Andrew Fairbairn deposed, he was with the constables when Mowat was seized; he came not out till the muskets were presented. He said he was an unarmed man, but on searching him they found a drawn sword under his coat. The sword was bloody from hilt to point, and was much bent, and there was blood on Mowat's sleeves. When Mowat heard that a man was killed, he desired to see the body, for what cause the deponent knows not. On seeing it, Mowat said, 'God knows who has done it,' and there was no emotion or paleness visible in his countenance. When the Master of Tarbett was carried prisoner before the commandant, he was so apprehensive of bodily harm from the Frenchmen, that a stronger guard was sent for, to protect him from their fury.

Robert Aitchison saw the prisoner Mowat come out below the forestair when desired, did not hear him say he was an unarmed man, but saw the bloody sword taken from him. The witness supposed the blood to proceed from a wound in his hand.— James Johnston saw the bloody sword taken from Mowat, and imputed the blood to the same cause.

Robert Brown surgeon deposed, he was called by the magistrates of Leith, on the morning after the murder, to inspect the wound. The hole in the coat corresponded with the sword produced;

duced; but as for the wound he could only say, that the di- 1691  
 mension and figure of wounds alter and contract after ten or ~  
 twelve hours.

The jury, by the mouth of Sir William Kerr chancellor, *found none of the crimes proved.*

Although I am persuaded that an intelligent jury in these days would acquit the prisoners, yet the verdict in those times was very uncommon, and I am by no means certain upon what principle it proceeded. The jury could hardly refuse a clear assent to this proposition, that it was Mowat who killed Elias Poiret. The master of Tarbett was the first aggressor in the scuffle, and his assault on George Poiret was such as would have excused any *immediate* act of violence with which Poiret could have repelled it. But the situation of the Frenchmen, and that of the prisoners, came to be reversed the moment that they sallied forth of George Poiret's room, entered the hall, and assaulted the prisoners with sword and pistol.—As the prisoners were then in actual, and imminent peril of their lives, I apprehend, that, supposing the killing to be established in the clearest manner, the prisoners were entitled to an acquittal, on the plea of *self-defence.*

*John Gillespie Merchant in Glasgow, John Anderson of Dovehill, and Robert Stevenson Glazier in Glasgow, for the murder of Major James Menzies.*

THE prisoners were prosecuted at the instance of Henry 1694  
 Fletcher, brother to the Laird of Salton, nearest of kin ~  
 to the deceased, of Lieutenant Colonel Hume, for the interest

1694 of his Majesty's forces, and of his Majesty's advocate. It was charged in the indictment\*, that the prisoners having conceived mortal hatred at the deceased, did, on the 19th of October preceding, enter a garden upon the lands of Rainfield, where they understood the deceased was walking, and upon seeing him, they, or one or other of them, did discharge guns and pistols at him, and also struck him a blow on the head, which fractured his scull, of one or other of which wounds he instantly expired.—Or, at least, that they were guilty, *art and part* of this murder.

The defence stated for the prisoners was, that, in October last, in absence of the Colonel and Lieutenant Colonel; Lord Lindsay's regiment, then quartered at Glasgow, was commanded by the deceased Major Menzies: That the Major summarily apprehended several inhabitants, burghesses of Glasgow, and kept them in custody of the military on pretence of their being deserters, but who really were not such: That complaint having been made to the magistrates by the persons confined; they desired the Major to bring these persons before them, that the complaint might be tried conform to the act of Privy Council, 16th December 1692, but the Major absolutely refused to comply with their desire. The magistrates issued a formal edict, requiring him to produce the complainers, but this also he treated with the most pointed contempt. Proceeding then with the utmost gentleness, they demanded a conference, to which the Major having consented, the provost, two of the bailies, and Mr Robert Park town-clerk, met with Major Menzies and three Captains of his regiment, in the town-clerk's chamber. The conference began with the provost's desiring of the Major that the prisoners

\* Records of Justiciary, 24th, 27th, 31st December 1694. 2d January 1695.

prisoners might be brought before them, and Mr Park, the town-clerk, in a very civil manner, joined in the request. Upon this, an altercation between the Major and the town-clerk took place; the Major gave him bad language, and struck him with a cane, he, the town-clerk, having no weapon in his hand. On this they wrestled, and being separated by the company, and while the town-clerk was held by Captain Jarvais of Lord Lindsay's regiment, the Major drew his sword, and run the town-clerk through the body, of which he died instantly. The Major marched off sword in hand, repaired to the guard-house, ordered his men to charge their muskets, drew them up across the street three file deep, and set them to guard passes in order to favour his escape, mounted horse and fled.

Upon this, Mr Francis Montgomery, one of the Lords of Privy Council, ordered such of the inhabitants as could be soonest got ready, to pursue and apprehend the murderer. In obedience to this order, the prisoners went in pursuit of the Major, came to a garden at Rainfield, where they were informed he skulked. On coming up to him, they charged him with the murder of the town-clerk, and desired him to yield himself prisoner; but this he refused, and opposed them with a drawn sword, upon which he was killed. Various arguments in point of law were also offered for the prisoners, and much casuistry was likewise advanced for the prosecutors. These debates occupy fifty pages folio of the criminal record; but it were superfluous, or improper, to state them here.

The Court sustained the indictment against the prisoners, as relevant to infer the pain of death: But they also sustained this defence as sufficient entirely to cast the indictment, viz. that they pursued the Major by order of a Privy Counsellor, or of the magistrates

1694 gistrates of Glasgow, proceeding upon the notoriety of the murder; unless the prosecutors should prove that the Major offered to surrender himself before attacked by the prisoners. This again they sustained relevant to set aside the defence, in respect to such of the prisoners only, as did actually kill, or give command to kill the Major; but by no means to infer *art and part* against any of the other prisoners, they being *versantes in licito*.

#### T H E P R O O F.

Robert Pollock younger of Milnbourne deposed, he was at Rainfield on the 19th of October last, where he saw the three prisoners, but none of them had arms except Dovehill, who had a carbine, but it was not he who killed the Major, for the former was standing with the witnesses at the garden door when they heard the shot. Upon going up to the place, they saw the Major lying on his back dead, his face bleeding, and a drawn sword in his hand across his breast. Afterwards, when they came to Renfrew, he heard the prisoner, Gillespie, acknowledge he shot the Major; but the witnesses did not see him have any fire arms in his hand, nor did he see Gillespie either receive from, or return any arms to Dovehill. When Gillespie first acknowledged that he shot the Major, he did not speak of the latter's having made any resistance; but, after he was taken into custody, he declared, that, if he had not done the thing he did, the Major would have run him through the body.

Peter Paterfon, late bailie of Renfrew, went with the three prisoners into the garden of Rainfield the night Major Menzies was killed; is uncertain whether all of the prisoners had arms, only that Dovehill had one or two pistols. He did not see Dovehill

Bill give a pistol to Gillespie, but, after the Major was killed, saw 1694  
 Gillespie deliver a pistol to Dovehill, saying, 'there is your pistol.'           
 Dovehill and young Milnbourne, a former witness, stood at the  
 garden door, while the deponent going forward with the  
 two other prisoners, Gillespie and Stevenson, came up with the  
 Major, and one of them said to the deponent, 'Baillie, here is a  
 'man.' The man called out, 'What is the matter, Sir?' to which  
 the witness answered, there was a man slain in Glasgow; that the  
 slayer was supposed to be skulking hereabout, 'and if you be the  
 'man, God Almighty forgive you.' The person replied, 'it is  
 'none of your business.' One of the prisoners then called out,  
 'Dovehill, here is the man.' The Major cried with an oath,  
 'What have the rascals ado with me;' immediately drew his  
 sword, and advanced upon them in great rage; the deponent and  
 the prisoners retreated; he then heard a shot, but knows not  
 whether it came from Gillespie or Stevenson. When he return-  
 ed, he saw the Major lying on his back dead, and his sword in  
 his hand, lying across his breast.

Captain Jarvais of Lord Lindefay's regiment, a witness adduced  
 for the prisoners, was present at the conference between the Provost  
 of Glasgow and Major Menzies. He heard the Major called the  
 town-clerk 'a fool, and the clerk answered him, 'he was but an  
 'ass.' Upon this the Major struck the clerk over the head with  
 his cane, and the clerk returned a very severe blow with his fist.  
 The company separated them, and the Major drew his sword,  
 made a thrust at the clerk, who immediately cried out he was  
 wounded, and clapped his hand on the wound; and, as he was  
 going to another room, the deponent saw the clerk fall, and lie  
 on the floor. The witness went to the guard house, but found  
 the Major was fled. The clerk had no arms.

Simon

1694 Simon Tennent, one of the bailies of Glasgow, heard the Major call the town-clerk a fool, and the town-clerk call the Major an afs; saw the Major strike the former with his cane. The parties then grappled, and were separated, when the deponent saw the glance of a sword pointed towards the clerk, who immediately cried out, 'a surgeon,' and died in about seven minutes. He was told by all the company it was the Major who killed the clerk; and the latter, at the time of his death, had no arms, not even a staff, in his hand. James Gemmill, junior, merchant in Glasgow, on the day Mr Park was killed, saw the Major come out of his, the town-clerk's chamber, in haste, wanting his wig, and his sword drawn; saw him wipe his sword with the lap of his coat, and return it into its scabbard. Before the Major could arrive at the guard-house, whither he was going, the deponent heard that the clerk was wounded, and then was told he was dead.

Captain Lindesay, of Lord Lindesay's regiment, was present at the scuffle between Major Menzies and the town-clerk; saw the Major's arm in the attitude of pushing with a sword; and, immediately after the lounge, the clerk cried he was wounded. The former left the room without his wig; the deponent took up the wig and followed, accompanying the Major to the Gorbals, where he took horse and fled.

William Napier, provost of Glasgow, was in the town-clerk's chamber the day he was killed. Upon the notoriety of the murder and flight, he gave orders to the three prisoners to pursue and apprehend the Major.—Mr Francis Montgomery, one of the Lords of Privy Council, deposed, that, on the day of the murder, he was applied to by the Provost and Magistrates of Glasgow, to concur with them in securing the peace of the city, which was  
in

in an uproar. The deponent went to the town-clerk's chamber, 1694  
 whose dead body he found lying on the floor, and every body  
 crying that Major Menzies was the murderer. The deponent  
 concurred with the Magistrates, in ordering Dovehill, then in the  
 room, to take some of the honest town's-folk along with him,  
 and to pursue and apprehend the murderer; upon which the  
 people dispersed peaceably.

The jury unanimously found the indictment not proved;  
 found the prisoner's defence in terms of the interlocutor proved;  
 and found it not proved that the Major offered to surrender him-  
 self; upon which the prisoners were dismissed from the bar.—  
 They had little regard for the Major's memory who raised so  
 absurd a prosecution.

*George Cumming Writer in Edinburgh, for the Murder of  
 Patrick Falconer, Soldier in Lord Lindefay's Regiment.*

**T**HE indictment set forth, that the prisoner, being upon the 1695  
 street of Portsburgh, a suburb of Edinburgh, on the 5th of  
 the preceding month of September, between nine and ten at  
 night, the deceased Patrick Falconer, and other two soldiers of  
 Lord Lindefay's regiment, walked peaceably by him in the way  
 to their quarters; when the prisoner gave the soldiers opprobri-  
 ous language, and, without any just provocation, drew his sword,  
 with which he maliciously run the deceased through the body,  
 of which he died within twenty-four hours.

1695 The parties were pretty much agreed as to the facts which gave rise to this prosecution: That the prisoner, entertaining a notion that the soldiers had made a rude answer to his companions, who inquired of them what o'clock it was, gave the soldiers abusive language, upon which they went up to him, and attacked him with their drawn bayonets\*: That the prisoner received them with a drawn sword, and, after some skirmishing, killed the deceased.

Defences were made by the prisoner's counsel, and answers by the public prosecutor; but as, in a subsequent trial †, I shall have occasion to treat as fully as the nature of this work will admit, of the distinction between murder and manslaughter by the law of Scotland, of culpable and casual homicide, of killing upon provocation, or in self-defence, I shall here state only the heads of the defences, and answers that were made in the course of this trial.—It was alledged for the prisoner, *1mo*, That he entertained no malice prepense against the deceased; and that this was but an accidental rencounter; *2do*, That he killed the deceased in self-defence; *3tio*, Whereas, it was argued, that, when the deceased and his fellow soldiers advanced upon the prisoner with drawn bayonets, he should not have received them with a drawn sword, but should have endeavoured to appease their fury, or should have fled; it was answered, that argument and entreaty were very unequal weapons to contend with pointed steel; and that there was no obligation on the prisoner to fly.—It was replied by his Majesty's Advocate, that there was no necessity for charging the murder to have been premeditated; for manslaughter, in the eye of the law, did in itself imply guile and malice, unless

\* Rec. of Just. 11th, 18th, 20th, 21st, Nov. 1695.

† Trial of Car-

regie of Finhaven, for the murder of the Earl of Strathmore.

unless the contrary was proved. *2do*, That the plea of self-  
 defence was only competent to him who sustained a wanton at- 1695  
 tack, not to one who, by provoking language, had drawn the  
 attack upon himself: That the prisoner was the cause of the  
 quarrel, had given rise to the injury, and was thereby debarred  
 from pleading self-defence against an assault instigated by his own  
 insolence.

*T H E P R O O F.*

James Porteous, apothecary in Edinburgh, deposed, that, in  
 the beginning of September last, he was one evening in the  
 street of Portsburgh, between nine and ten o'clock, in company  
 with three other persons, of whom the prisoner was one. The  
 prisoner went to a house to call for his cloak, and the deceased,  
 with two other soldiers, came up with the deponent and his  
 companions, who asked at them ' what o'clock it was ?' He  
 cannot be positive what answer they made ; but the prisoner,  
 who was a little way behind them, called the soldiers sons of  
 whores and sons of bitches. The soldiers asked what he said,  
 and he repeated the words, calling, at the same time, to his  
 companions to beat the soldiers. The soldiers then drew their  
 bayonets, passed by the deponent and his companions, and went  
 up to the prisoner, who advanced to them, and, when he was  
 within sword's length of them, drew it ; and, within a quarter  
 of an hour, the deponent heard one cry, Murder ! That same  
 evening he called at the prisoner's lodging, whom he found in  
 deep concern, declaring he had given the soldier a stab, and he  
 was afraid it would prove mortal : At the same time he drew his  
 sword, and spit upon it, endeavouring to wipe the blood off it.  
 The prisoner came next morning to the deponent's chamber,

1695 told him he had been at Laurieston, and there was very bad news ; the soldier was dead.

John Hall writer in Edinburgh was returning from the country one evening in the beginning of September, with the prisoner and other two comrades. When they came nigh the West Port, the prisoner went to a house for his cloak. In the meantime three soldiers came up with the deponent and his companions. He cannot be sure what answer the soldiers made, when asked what o'clock it was ; but the prisoner called out to them, ' Ye sons of whores, what answer is that to give to gentlemen ? ' On this the soldiers drew their bayonets, passed the witness, and went up to the prisoner. In a little he heard the clashing and saw the glancing of swords ; upon which he went up to the combatants, and relieved the prisoner of one of the soldiers with whom he was engaged ; and, very soon after, he heard one cry Murder ! He then went off ; and, in his way, he called at the house of one Widow Lindefay, who told him that the prisoner had been there with his sword drawn, and had left word, that he had gone home, whither the witness followed him. He found him sitting pensive and exceeding sorrowful, expressing his fears that the soldier had got a mortal wound. The deponent saw blood on his sword, went with him next day to Laurieston, and, when they heard that the soldier was dead, the prisoner clapped his hand on his thigh, and was greatly agitated.

Two surgeons swore, that, upon being called to the deceased, they found him run through the body with a small sword ; that the wound was mortal, and he died of it next day.

The jury returned this verdict : ' They, all in one voice, find  
' proven, that some words falling out between George Cum-  
' ming

‘ ming the pannel \* and three foldiers, in the West Port, in the 1695  
 ‘ month of September last, *the soldiers drew their bayonets, and*  
 ‘ *advanced to the said George, who, when the soldiers were with-*  
 ‘ *in the length of his sword, drew the same, and, defending him-*  
 ‘ *self, Patrick Falconer, one of the three soldiers, was killed ;*  
 ‘ whereby the affize finds the pannel guilty of manslaughter.’  
 The Court sentenced *THE PRISONER TO BE HANGED,*  
*AND HIS PERSONAL ESTATE TO BE FORFEITED.*

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To condemn an innocent man to death, by the sentence, and forms of law, has ever been looked upon as one of the greatest moral evils. From the general averfion of mankind to inflict undeservedly the pain, and, what is infinitely worfe, the ignominy of a public death, I hope it is a case which has rarely happened, except through the bloody ministers of clerical superstition, and imperial power ; the last of which makes a sport of life and liberty ; while the first claims a still wider dominion, over life, liberty, and understanding ; over liberty not only of *action*, but of *thought*.

To maintain that there is no difference, in the degree of moral turpitude, between a deliberate murder, and a rencounter originating from sudden provocation and terminating in death, is to contradict the perceptions of the understanding, and the feelings of the heart : And it does not appear that, in this article, the old law of Scotland was repugnant to our judgment or our feelings. The absurd proposition, that there is no distinction between murder and manslaughter, between deliberate assassination and killing of a suddenty, appears to be of no older date than the Restoration. At that period our courts of law be-

came

\* Prisoner.

1695 came highly tyrannical; and those which possessed a criminal jurisdiction displayed what, indeed, was no novelty in this country, a very sanguinary spirit. A celebrated lawyer \*, who scrupled not to sacrifice abilities and principle at the shrine of despotism, has left a specimen of his attempt entirely to set aside trial † by jury. The mode of proceedings in our criminal courts, in the tyrannical and turbulent reign of Charles II. by the address of the King's counsel, underwent a material innovation. In our records previous to this aera, juries are found to have returned a general verdict of *guilty*, or *not guilty*; the words of stile were, '*fylit culpable and convict*,' or, '*clean and acquit*.' But, after the Restoration, prosecutions became so frequent against rebels, covenanters, and attendants upon conventicles, that it was matter of difficulty to get a jury to find a verdict against a state criminal, particularly an attendant upon conventicles. His Majesty's Advocate, to evade this reluctance, fell upon a device which almost totally annihilated the powers and purposes of a jury. It was, to introduce a doctrine, that, in no case whatever, the jury had a right to exercise their judgment upon any point, except the evidence relating to the different facts charged in the indictment: That, in every case, they were to decide merely upon the fact; and that it was the province of the judges to determine the import of their verdict, in the scale of guilt, from a capital crime down to pure innocence: That, therefore, it was the business of the jury not to find *guilty* or *not guilty*, but *proved*, or *not proved*; and to apply such findings to the different charges, trifling or important, exhibited in the indictment.

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\* Sir George Mackenzie. Arnot's Hist. of Edinburgh, p. 149.  
kenzie's Criminals, tit. *Affizers*.

† Mac-

The lawyers for the Crown devised another expedient which degraded jurymen from the *palladium* of liberty, to a senseless instrument of tyranny; an expedient which vested the power of convicting in the judges, when the jury doubted not only of the *criminality of the fact*, but even of the *fact itself*. For this purpose they drew up their indictments very circumstantially, not only stating the crime, but also the minute facts, trifling or important, from which they inferred the prisoners guilt; and, upon these indictments, the Court used to pronounce an interlocutor, finding either the crime in general, or the facts and circumstances specially libelled, relevant to infer the pains of law. When it was suspected that a jury would scruple to find a crime in general proved, they were required to return a *special verdict*. Accordingly, they were often weak enough to return a verdict finding proved a long chain of circumstances specified in the indictment, leaving it entirely in the breast of the judges to determine whether these circumstances did establish the fact libelled.

Thus, in the trial of Robert Carmichael schoolmaster, for the murder of one of his scholars, a son of Douglas of Dornock, it was proved that the boy was in perfect health at two in the afternoon, when he went to school, and that before three he was carried out of it dead. It was found by the jury that the prisoner did three times successively make the deceased be held up, and severely lashed him on the back and hips, 'and in rage and fury, did drag him from his desk, and did beat him with his hand upon the head and back, with heavy and fore strokes; and after he was out of his hands he immediately died.' That, after the boy's death, the side of his head was swelled, and there were livid marks on it; and the mark of many stripes on his back and thighs.—Although these circumstances, as well as

1695 a rattling noise in his breast upon the third beating, and a good quantity of blood being found under his body after death, (which had issued from the stripes on his back), afford complete conviction\* that he died of the beating; yet the lenity of the Court in this instance seemed to increase with the barbarity of the criminal, for they only sentenced him—to receive seven stripes, and to be banished Scotland for life †.

It is obvious, that, from the moment these iniquitous doctrines were acquiesced in, the *palladium of liberty* was gone. *Facts* might be charged, of which the guilt, or degree of guilt, depended solely upon the *intention* which directed them. A fact might be indisputable; yet the intention of the accused might be justifiable, or at least might not amount to the degree of criminality charged in the indictment; yet by this doctrine the jury would be mere cyphers, the Court alone would decide.—Facts of the most criminal nature, circumstances trifling or indifferent, might be blended in one indictment; and, in such case, a *special verdict* would leave the prisoner at the mercy of the Court, which it is the grand purpose of trial by jury to prevent.—I have discovered an instance of the Court's actually taking advantage of a circumstance of this sort. In the trial of Captain Douglas, and two other men, for committing a rape on Christian Davidson ‡, the jury found 'the violent ravishing Christian Davidson, 'or being art and part thereof, not proven.' But found, that, on the night libelled, Captain Douglas left, for three quarters of an hour, a company with which he was drinking; and that, on his return, he told the company, when challenged for his absence,

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\* The body of the deceased was not opened.  
January 15. 16. 19. 1700.

† Records of Justiciary,

‡ Ibid. 8. 22. 23. Feb. 1697.

*ut virginem deflorasset*, and showed his knee dirtied with mud. 1695  
 —The Court fined him in 300 merks.—There is another case in which the jury made an absolute surrender of their privileges. In the trial of Marion Lawton for child-murder, they found the prisoner *not guilty, in respect of no probation\**; but, in respect of the *presumptions, remit the prisoner to the consideration of the Court*.—The Court sentenced her to be whipped and banished.

In this case of Cumming, there were no circumstances to entitle the Court to pronounce upon the prisoner the *poena ordinaria*, the ordinary penalty of murder. The verdict of the jury set forth, that some words fell out between the prisoner and the soldiers; but did not find who gave rise to the verbal injury. But, supposing the opprobrious expressions used by the prisoner to have proceeded from mere wantonness, I apprehend it did not entitle three men, with drawn swords or bayonets, to assault one. And it cannot be maintained, without the height of absurdity, that this one, even after having used insolent language, was to stand tamely and have his throat cut for his impertinence. The jury found that the prisoner, *in defending himself, killed the deceased*: The Court condemned the prisoner; *therefore, the Court condemned a man to be hanged for defending himself*. The same judges who sat on this trial † pronounced the dreadful doom on the youth, who atoned with his blood, for entertaining, on religious matters, opinions dissonant from those of the times.

How juries came to recover their dignity and importance, will be seen in the subsequent trial of Carnegie of Finhaven.

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James

\* Rec. of Just. 1st Aug. 1662.

† With the exception of James Falconer, Lord Phefdo, who sat not on the trial of Aikenhead. See *infra* Blasphemy, Aikenhead.

*James Carnegie of Finhaven, for the Murder of Charles Earl of Strathmore\*.*

*Counsel for the Prosecutors, Duncan Forbess of Culloden, Esq; his Majesty's Advocate, &c.*      *Counsel for the Prisoner, Robert Dundas of Arniston, Esq; &c.*

1728 **T**HE prisoner was prosecuted at the instance of Susanna Countess of Strathmore, relict of the deceased, of the Honourable James Lyon his brother, and nearest lawful heir, and of his Majesty's advocate, for the murder of the Earl of Strathmore. It was charged against the prisoner in the indictment †, that, having a causeless ill-will at the deceased Earl of Strathmore, and conceiving deadly malice against him, he, on the 9th day of May preceding, between the hours of eight and nine at night, without the least provocation then given by the Earl, did assault him with a drawn sword, and feloniously murder him, by giving him a thrust with the sword into the belly, and through the intestines, till it came out at his back, whereof he died on the Saturday after; or, at least, that he was guilty art and part of murder, or manslaughter, or one or other of them.

Long, learned, and ingenious pleadings were made on the conclusion of the indictment; the counsel for the pursuers maintaining, that it inferred the pains of death; and those for the prisoner contending, that it inferred but an arbitrary punishment. The Court appointed informations in writing to be lodged on both sides.

*Substance*

\* Records of Justiciary, 10th July, 1st, 2d, 3d, August 1728. † This case is published at large in the State Trials, vol. 9. p. 26. It occupies 35 pages folio. It is also published separately in 131 pages octavo.

*Substance of the Pursuer's Information.*

The information for the pursuer relates to the defences stated, *viva voce*, for the prisoner, and its purpose is to obviate them. It is there contended, that, by the Mosaick law, 'whoso sheddeth man's blood, by man shall his blood be shed:' That the benefit of the cities of refuge was only granted where the killing was merely accidental, since it was declared, that 'he who smites with a throwing stone, or with a hand-weapon of wood wherewith a person may die, and he dies, the murderer is surely to be put to death:' Although the argument is conclusive, that wherever, by the law of Moses, capital punishments are allowed, such punishments are lawful; it is not equally clear, that in those cases where the powers of the law are suspended by the *ius asyli*, afforded in the cities of refuge, which was established by positive precept, that, in similar cases, in countries where no such privilege is allowed, no such precept established, the punishment should not be capital.

That, by the civil law, slaughter, in an affray, was punishable by death, from which neither passion nor provocation exempted, which is clear from it being stated to the Emperor, whether a husband, who, urged by the vehemence of his grief, should kill his wife caught in adultery, be punishable as a murderer, a case which could not have needed a reference, if passion and provocation had mitigated the punishment.

There next follows an elaborate and very lame argument, to prove, that, by the old statute law of Scotland, little distinction was made between *premeditated murder, culpable homicide\**, and

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\* I embrace with great satisfaction this opportunity to mention, that the Court of Justiciary has now solemnly repudiated this absurd and iniquitous doctrine. In the libel at the instance of John and William Stewarts, against Lieutenant George Storey,

1728 *manslaughter*. It is argued, that, by the practice of our criminal Courts, still less distinction is made between these degrees of guilt. Indeed, that, to make any distinction at all, is directly repugnant to act 22d Charles II. A. D. 1661, and to the uniform decisions of the Court of Justiciary from that period to the present. And a variety of criminal cases in support of this doctrine are adduced, which confirm it in a wide latitude of absurdity and cruelty.—From all these, the following conclusion is drawn: ‘ That neither the drunkenness of the pannel, (*i. e.* prisoner) nor provocation given him, nor the suddenty upon which the fact was committed, can afford a defence to the pannel to exculpate the slaughter, or lessen the ordinary punishment.’

That the only defence urged for the prisoner which was at all plausible, was, that intending to kill one man, he had killed another; instead of Lyon of Bridgetown, against whom the blow was directed, he had killed the Earl of Strathmore. On this branch of the argument, the information justly concluded on the authority of the civil law, and of common sense, that, if the intention be murder, it makes not the least difference that another person than he at whom it was directed shall receive the mortal blow.

It is next contended, that, by the law of England, killing of a suddenty, in many cases, is deemed murder; that, in such cases, malice prepense is often presumed; and that the facts, as stated

by Storey, for the murder of William Stewart surgeon in Paisley, the jury, conform to the recommendation of the court, returned the following verdict: ‘ All in one voice find the pannel, George Storey, *not guilty of the murder* libelled; but, at the same time, find him *guilty of culpable homicide*.’—The Court sentenced the prisoner, Storey, to pay 1000 merks of *assythement*, *i. e.* *solatium*, damages, to the private prosecutor, and to undergo eight months imprisonment; Records of Justiciary, January 24. 25. 29. 1785.

by the prisoner, would be sufficient warrant for a verdict of murder by the law and practice of England. 1728

*Substance of the Information for the Prisoner.*

It sets out with the declaration made by the prisoner at the bar, when asked by the Lords if *guilty or not?* in these words:  
 ‘ My Lords. I find myself accused by this indictment of maliciously murdering the Earl of Strathmore; but, as to any ill-will, malice, or design to hurt the Earl, God is my witness I had none: On the contrary, I had all the due regard, respect, and kindness, for his Lordship, that I ever had for any man. I had the misfortune that day to be mortally drunk, for which I beg God’s pardon; so that, as I must answer at God’s great tribunal, I do not remember what happened after I got the affront your Lordships will hear of from my lawyers. One thing I am sure of, if it shall appear that I was the unlucky person who wounded the Earl, I protest before God, I would much rather that a sword had been sheathed in my own bowels. And, further, I declare, that I do not so much as remember that I saw the Earl after I came out of the kennel, and even not so much as the drawing of my sword; and, therefore, I cannot acknowledge the libel as it is libelled.’

The facts are then stated which gave rise to this trial, viz. that, on Thursday the 9th of May, the Earl of Strathmore, the prisoner, and others, dined at the house of a gentleman, whose daughter’s funeral they had been invited to witness, and drank pretty freely: That, after the funeral, they went to a tavern in Forfar, where they again drank plentifully, and the prisoner was much overtaken with liquor, and Mr Lyon of Bridgeton treated the prisoner with insulting and impertinent language: That the Earl of Strathmore went to visit the Lady Auchter-house, a sister of  
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1728 the prisoner's, who accompanied his Lordship. Bridgeton followed them, renewed his impertinent language, prescribed to the prisoner how he should dispose of his daughters in marriage, and settle his estate, having no sons; upbraided him with being in debt; insulted the Lady in whose house they were, griping her arm rudely, so that Lord Strathmore thought proper to break off the visit. The prisoner and Bridgeton followed the Earl, and, when they came to the street, some words passed; and Bridgeton, speaking of the prisoner, said, '*God damn him,*' then took him by the breast, and pushed him over head and ears into a dirty kennel two feet deep, where, in his drunken condition, he might have been suffocated, had not a servant of the Earl's helped him out, which servant expressed, at the same time, his indignation at Bridgeton in these words, '*Sir, though you be a gentleman, you are uncivil.*' That Bridgeton walked off, turned about to the prisoner, and folding his arms across his breast, laughed him to scorn. The prisoner then, being recovered out of the kennel, drew his sword, and with a staggering pace advanced to Bridgeton, and made a push at him, when the Earl hastily turning about, and pushing Bridgeton aside, received the fatal wound.

From this state of facts, the counsel for the prisoner proposed this defence, *1mo*, That killing is not murder, unless forethought malice against the person killed be either proved or presumed: That neither of these was the present case, for no antecedent malice was charged against the prisoner in the indictment, so could not be *proved*, and the circumstances of the fact excluded malice from being *presumed*; for it was charged that the push was aimed at Bridgeton, not at the deceased; consequently no malice could be presumed to be entertained by the prisoner, towards a person against whom the blow was not directed. *2do*, That the prisoner could not be more guilty in killing the Earl of Strathmore, by the thrust directed at Bridgeton, than in killing  
Bridgeton

Bridgeton himself; yet such was the provocation given by him to the prisoner, that had Bridgeton been killed, 'it would have been constructed only as casual, or culpable homicide.'

It was then contended for the prisoner, that killing in such circumstances was not capital by the divine law. The divine law was branched into two parts, the law of nature, and the law of Moses. By the law of nature, it was argued, every action must be construed according to the intention of the actor; and that the deed of a man, if not proceeding from his will, was not different in point of merit or demerit, from the act of an irrational creature, or from an effect produced by inanimate matter: That the prisoner obviously had no intention to kill the Earl of Strathmore, consequently he could have no criminality in having occasioned his death.—According to the Moisaick law, it was contended in a very prolix argument, that it was immaterial whether the mode of exempting from punishment be in form of absolving from trial, or of flying into a city of refuge, or other sanctuary; and that, by the law of Moses, the benefit of a city of refuge was hardly necessary in such a case as the prisoner's. By this law, the cities of refuge were appointed as an asylum to such as had killed a man without malice prepense, or, in the language of scripture, without hating him in time past, *i. e.* a hatred of three days standing. But that the act of killing *one*, when the *purpose* was to kill *another*, was a case not stated in holy writ.

Upon the *civil* or *common* law, various positions were maintained, *1mo*, That culpable homicide was not capitally punished; *2do*, That homicide committed upon such high provocation as was here given by Bridgeton to the prisoner, would, by that celebrated system, have been deemed only culpable homicide; *3tio*, That the prisoner's intention to kill not being pointed at the

1728 the Earl of Strathmore, but the assault, of whatever nature, being directed against another, the death of the Earl occasioned by such assault could amount only to casual, or at most culpable homicide.

The counsel for the prisoner then successfully maintains, that, by the old statute law of Scotland, and particularly by James I. Parliament 3d, act 51. distinction is made between premeditated murder and killing of a sudden upon provocation, in the latter of which cases, the benefit of the sanctuary, which the church had obviously founded upon the asylum of the cities of refuge, was allowed to the manslayer. And if, with the abolition of Popery, the privilege of the sanctuary was also abrogated, that to alter thereby, and to aggravate the civil punishment of crimes, must either have proceeded from an omission of the legislature, or the over great zeal of the times.

An ingenious but more doubtful argument follows to show, that, by the act Charles II. Parliament 1. c. 22. 'for removing  
' of all question and doubt that may hereafter arise in criminal  
' pursuits for slaughter,' the *casual* homicide which was thereby declared to be exempted from capital punishment, did truly imply slaughter *not merely accidental*, but that which was *in some degree culpable*. It must indeed be confessed, that, considering the infinite importance of this statute to our lives and safeties, it is expressed in a scandalous degree of inaccuracy, obscurity, or absurdity; and that, with the rest of our penal laws, it requires a revival and explanation.

The information next endeavours to obviate the cases in point adduced by the pursuer, to prove that no distinction was made by the Court between murder and manslaughter: And states on the  
the

the other hand certain decisions to show, that a capital punishment was not applied in some cases which were 'neither merely *casual nor in self-defence.*' 1728

Finally, it is maintained on behalf of the prisoner, 'that man-slaughter is *in effect* not punishable at all in England,' and that culpable homicide only inferred an arbitrary punishment.

*The Lords pronounced the following judgment:—* 'Find, That the pannel having, *by premeditation and forethought felony,* with a sword or other mortal weapon, wounded the deceased Charles Earl of Strathmore, of which wound, he the said Earl soon thereafter died; or, that he the pannel was art and part thereof, relevant to infer the pains of law; but allow the pannel to prove all facts and circumstances he can, for taking off the aggravating circumstances of forethought and premeditation: Also find, that the pannel, time and place foresaid, *having, with a sword or other weapon, wounded the said Earl, of which wound his Lordship soon died, or that the pannel was art and part thereof, separatim relevant to infer the pains of law; and repel the defences proposed for the pannel; and remit him and the indictment, as found relevant, to the knowledge of an affize.*'

#### T H E P R O O F.

John Ferrier \* deposed, that, at the time and place libelled, he heard Bridgeton ask the prisoner if he would give his daughter

A a . to

\* The first witness who was examined in this cause, was Robert Hepburn smith in Forfar. So little regard did the Court pay to the rules of law in receiving of evidence;

1728 to Lord Rosehill? to which he answered, No. Bridgeton then asked him if he would drink a bottle of wine, and drink *the King's* health? and upon the prisoner's refusing, Bridgeton took hold of him by the breast, and violently pushed him into the kennel, saying, 'Go and be damned, and your King George whom you love so well.' The kennel was deep and dirty, the prisoner was immersed into it, but not entirely covered; his face, however, when he came out of it, was almost as black as his coat. He was helped out of the gutter by a servant of Lord Strathmore's. Whenever he got upon the street, he drew his sword and run towards Bridgeton, who, upon seeing this, laid hold of Lord Strathmore's sword and endeavoured to pull it out. Lord Strathmore then turning about, pushed off Bridgeton, at whom in the mean time the prisoner made a thrust with his sword; Lord Strathmore at that instant was pushing Bridgeton aside and advancing to the prisoner, and the prisoner staggering forward, followed the thrust upon Lord Strathmore; then the company became so intermixed, that the deponent did not see where the thrust landed. Soon after he saw Mr Thomas Lyon, his Lordship's brother, with his sword beat the prisoner's sword out of his hand, who run off staggering towards the Lady Auchterhouse's lodging, and had almost fallen before he got in at the gate, and about the same time the deponent saw the Earl fall down upon the street, and afterwards carried off.

William Douglass saw the prisoner falling backwards into a kennel, while nobody was near him but Bridgeton. When he got

evidence; so much did they seem bent against the prisoner, that they admitted this man a witness, although it was objected to him, and the objection clearly proved in Court, that, since his citation to be a witness, he said, '*That he thanked God he now had an opportunity to hang him, (the prisoner), and would do it if he could.*'

got out of it, he drew his sword and approached to the groupe, 1728  
of which Lord Strathmore and Bridgeton were part. At this  
time Bridgeton was standing between the Earl and the prisoner,  
‘ but all of a sudden and a clap, the Earl came to be interposed  
‘ between Bridgeton and the pannel ;’ and at this time the pri-  
soner was within sword’s length of the place where Bridgeton  
had been standing. The deponent saw the prisoner make a  
thrust with his sword, and the Earl was then standing next the  
prisoner with his face towards him. His Lordship received a  
wound in his belly, and when he was carried into a house and  
dressed, the deponent heard him say, that, after the sword en-  
tered his belly, the prisoner gave it a second thrust.

James Barrie, servant to the prisoner, saw his master and  
Bridgeton conversing together, but did not well hear what his  
master said. Bridgeton looked and spoke angrily, and with both  
his hands pushed his master into the gutter, who fell upon his  
back, and was covered near over the belly. The deponent in-  
stantly quitted his horses and ran to his master’s relief ; but a ser-  
vant of Lord Strathmore’s helped him out before he came up.  
The prisoner then drew his sword, and with his face all bespat-  
tered with dirt, and the mire running out at the top of his boots,  
went pretty fast forward, staggering and saying, ‘ this can not  
‘ be suffered.’ On coming up to the Company, he made a push  
at Bridgeton, who ere this had attempted to draw Lord Strath-  
more’s sword ; and, ‘ when his master made the push, he seem-  
‘ ed as if he had been falling, and saw him close upon Lord  
‘ Strathmore.’ But his Lordship had put Bridgeton aside, and  
advanced half a step towards the prisoner, and, after this, they  
were so intermingled in a crowd that the deponent did not see  
what passed ; only he saw his master’s sword struck out of his  
hand by another sword, who thereupon withdrew to his sister’s

1728 lodging. Deposed, that his master was very drunk : That, about a month before, he heard the Earl invite the prisoner to his house, and the invitation was accepted ; and, about eight days before this unlucky accident, the prisoner bid the deponent desire the taylor to get his clothes ready, for he intended to wait upon his Lordship at Glammis, as soon as he had got his chaise home.

Margaret Carnegie, a witness cited for the prisoner, whose sister she was, deposed, that, on the afternoon of the day libelled, Lord Strathmore, Bridgeton, and the prisoner, paid her a visit. She observed no sort of difference between his Lordship and the prisoner ; on the contrary, the latter, and the rest of the company, drank Lady Strathmore's health twice, and the prisoner tossed up his glass. Deposed, that Bridgeton was very rude to the prisoner, seized the deponent by the wrist, ' squeezed it hard, ' and said it would be no difficulty to break it.' At the same time he took the prisoner by the arm, struck his hand down to the table, and said, ' Will ye not agree to give one of your ' daughters to Rosehill \*?' and shook his hand over him.

Three witnesses swore, that, about two years ago, there had been some misunderstanding between the deceased Earl and the prisoner ; but that they never heard him express a grudge or resentment against his Lordship. And a variety of witnesses deposed, that, on several recent occasions, they had heard the prisoner express great respect for the Earl ; had seen nothing but mutual civilities passing between them ; and that the prisoner was a good tempered man, nowise quarrelsome.

David

\* Lord Rosehill, eldest son to the Earl of Northesk.

David Cauty, bailie of Forfar, deposed, that, on the night li- 1728  
 belled, when he visited Finhaven in prison, he found him ' cry-  
 ' ing to a great extremity, as if he had been distracted, saying, it  
 ' was the greatest misfortune that could happen him, and that he  
 ' deserved to be hanged for wounding such a worthy Earl.'  
 Deposed, that the prisoner was drunk; but regretted his misfor-  
 tune as if he had been sober; and that, he said, his design was  
 against Bridgeton.

Two physicians and two surgeons swore, that Lord Strath-  
 more died of the wound about forty-nine hours after receiving  
 it. Two of them deposed, that his Lordship told them he did  
 not believe the prisoner intended the wound for him; yet there  
 was one circumstance he could not account for, viz. that, after  
 the sword ' had entered his body, Finhaven pressed it forward  
 ' till their bodies were close together.

*The Prisoner's Counsel change their ground.*

The defence hitherto proposed for the prisoner was, that the  
 circumstances of the case considered, he was not guilty of mur-  
 der, but of manslaughter. The Court over-ruled the defence;  
 for they found, *that the prisoner having, time and place foresaid,*  
*wounded the said Earl, of which wound his Lordship died, sepa-*  
*ratim relevant to infer the pains of law, and repelled the defences*  
*proposed.* Now the killing was indisputable; therefore, if some  
 other mode of defence was not adopted, the prisoner was gone.

Happily for the prisoner, and happily for the country, his  
 counsel possessed spirit and abilities equal to the important task.  
 Sprung of a family that seems to give to its descendants an he-  
 reditary title to great talents, he had the twofold merit of saving  
 his

1728 his client, and wrenching the rights of jurymen from the grasp  
 of tyranny.

He repeated and enforced to the jury the arguments stated to the Court, to show that the excessive provocation the prisoner had received, the suddenness of the fact, and the certainty of his having entertained no design to harm the Earl of Strathmore, rendered him excusable in having been the cause of his Lordship's death.—He told them with a manly confidence, which conscious right inspired, that they must not be startled at the interlocutor of the Court. He unfolded the purpose and powers of a jury, which was simply, that no person should be subjected to a criminal sentence unless convicted by his peers; and that a jury which *convicted, without being satisfied of the prisoner's guilt,* were themselves guilty of treachery and murder. He explained how the King's counsel, in the reigns of the royal brothers, by a mixture of imperious dictate, and sophistical argument, wrenched from weak jurymen, trembling under the rod of power, the privileges vested in them by the constitution: And the acrimony of his remark on those tools of despotism who undermined the privileges of assize, was in part directed at those timid jurymen who had afforded the repeated precedents which were now grounded upon, as forming a change in the law itself. He told them, that, by the stile of verdicts which had lately crept in, a jury by finding *proved,* instead of *guilty,* or *not guilty,* might surrender into the hands of the Court, perhaps also of the executioner, the life of a fellow citizen, who they were convinced had killed the deceased in self-defence: And, in the most pathetic language, he deplored the fate of *Cumming,* who suffered by the hands of the executioner for a deed which the *jury found had been done in self-defence.* He maintained, that the judges, by finding *the killing at the time libelled relevant,* had manifested  
 their

their opinion upon the point at issue, had testified their resolution, to condemn the prisoner, unless the jury should pronounce a verdict putting it out of their power: That the only object for their deliberation was, whether, in their own mind, the prisoner had committed *murder*, or whether his guilt was diminished or annihilated by the circumstances of the case.—He insisted, that this was the critical moment which was either to rivet the prerogative of the Court over the privileges of a jury, or to emancipate them from the subordination and insignificance into which they had been degraded by a government, which finally was overturned on account of its reiterated attempts to overthrow every species of liberty civil and religious: And that the liberties of their country, the blood of the innocent, and their future peace of mind, depended upon the degree of justice and resolution which they should display in the verdict they were about to pronounce \*.

The jury, by plurality of voices †, found the prisoner *NOT GUILTY*.

*James*

\* The late Lord Arniston, counsel for the prisoner, seldom prepared notes for his pleadings. Those which he made out in this cause are preserved; they are extremely short, consisting of but a few sentences, containing the heads of his argument. The substance, however, of his speech to the jury in defence of the prisoner, is in some measure extant in the memory of his son, the Lord President, who has honoured me with the most useful and obliging communications in the course of this work.

† The jury divided twelve to three. The following persons found *not guilty*: Sir Robert Dickson of Inveresk, chancellor of the jury, George Loch of Drylaw, Walter Riddel of Granton, George Warrander of Bruntsfield, Thomas Brown of Bonnington, James Balfour of Pilrig, Robert Dundas, David Inglis, David Baird, Alexander Blackwood, and John Steven, merchants, and James Kerr goldsmith Edinburgh. The three who dissented, and protested against the verdict, were, John Watson of Muirhouse, George Haliburton of Fordel, clerk to the jury, and John Coutts merchant Edinburgh.

*James Stewart in Aucharn for the Murder of Colin Campbell of Glenure.*

1752 THE prisoner was natural brother to Mr Stewart of Ardsheil, whose estate was forfeited on account of his being engaged in the late rebellion. He was brought to trial before the Circuit Court of Justiciary at Inverary, upon the 21st of September 1752, for the murder of Colin Campbell of Glenure, factor appointed by the Barons of Exchequer upon the forfeited estate of Ardsheil. The murder was perpetrated upon Thursday the 14th of May preceding. Mr Stewart was apprehended upon Saturday the 16th, committed prisoner to Fort-William, and kept there till the day of his trial in such rigorous confinement, that his friends, his wife, and children, his agents, and counsel, were for the most part denied access to him. In the precognition that was taken concerning Glenure's murder, the prisoner's wife and children, contrary to the dictates of humanity, and rules of law, were repeatedly examined, upon oath, on every circumstance relative to the murder alledged to have been perpetrated by their husband and father, and their depositions were adduced in evidence against him when he stood trial for his life. Archibald Duke of Argyle, Lord Justice General, with the Lords Elchies and Kilkerran, sat as judges: And in this case alone did a Lord Justice General, and a Lord Advocate, ever make their appearance at a circuit.

The indictment, which is very long, was raised at the instance of Mr Grant of Prestongrange, his Majesty's Advocate, and of the widow and children of the deceased. Both the prisoner and

Allan

Allan Breck Stewart were charged in it as guilty of the murder ; 1752  
 Allan Breck as the actual murderer, and the prisoner as being art and part, or an accomplice. The former not appearing, sentence of outlawry was pronounced against him; the trial went on against the latter.—The indictment endeavoured, by a very long chain of circumstances, to fix down the guilt upon the prisoner. It set forth his having conceived a resentment against the deceased on account of his having, in quality of factor upon the forfeited estate of Ardsheil, turned the prisoner and other tenants out of their possessions: That the prisoner, in repeated expressions, threatened vengeance against the deceased: That he conspired to murder him; and instigated Allan Breck Stewart, a man of desperate fortune, to this bloody enterprise: That Allan Breck did accordingly waylay the deceased, and murder him in the wood of Lettermore, in the afternoon of Thursday the 14th of May last, by shooting him through the body, so that he died upon the spot: That Allan Breck immediately absconded; and that the prisoner applied to his friends, and procured a little money, which he sent to Allan Breck at a place appointed, to enable him to make his escape.

The trial began by long pleadings upon the *relevancy of the indictment, i. e.* whether, upon such indictment, the prisoner could be brought to trial for his life. These pleadings, on the part of the prisoner, were extremely ill-judged; for the only objection which they urged to the procedure of the trial, which in the least consisted with law or common sense, was, that Allan Breck Stewart, the alledged actual murderer, ought to be tried and convicted ere the prisoner could be tried as his accomplice. And the pleadings were attended with this bad consequence, that they afforded an opportunity to the counsel for the prosecutor to pre-judge the jury, by dressing up a tale of guilt; by making an ar-

1752            tificial arrangement of circumstances tending to criminate the prisoner, which, without such artful display, could not have impressed a conviction of his guilt upon simple and impartial men; so that in a country where the minds of men were exasperated against each other by political resentments, family feuds, and a long train of mutual injuries, the jury \* might naturally confound the declamations of a lawyer with the testimonies of a witness.

The harangues of the prosecutors counsel were indeed remarkably violent and inflammatory. A chieftain, who has since relinquished the emoluments of the bar for the laurels of the field; who was reclaimed from the paths of rebellion (the error of his juvenile days) to the service of his country, was deterred by no motives of delicacy from appearing in this cause, and expiating his former offences against government by the zeal of his newborn affection. After expatiating on the danger to individuals, if the crime of assassination was to go unpunished, he proceeded thus: ‘ But what, I hope, my Lord, we all hold of greater importance than the safety of individuals; the interest, the honour, of this country is very nearly concerned, not to suffer the most daring and bare-faced insult to be offered to his Majesty’s authority and government; and offered at a time when we, in common with his Majesty’s other subjects, are reaping the fruits of his most benign reign. I say, my Lord, our interest, our honour,

\* The following persons sat upon the jury: Colin Campbell of Carwhin, Dougal Macdougall of Gallanah, Alexander Duncanson of Kiles, Duncan Campbell of South-hall, Hector Macneil of Ardmeanish, James Campbell late bailie of Inverary, James Campbell of Rasheilly, James Campbell of Rudale, Colin Gillespie of Balimore, Colin Campbell of Skipnish, chancellor of the jury, Duncan Campbell of Glendaroul, Colin Campbell of Ederline, Niel Campbell of Duntroon, Archibald Campbell of Dale, and Niel Campbell of Dunstaffnish.

‘nour, is concerned, not to suffer this, without endeavouring to  
 ‘wipe off the stain from the country, to shew the King, and to  
 ‘shew the world, that this is the bloody deed of one or two  
 ‘wicked and desperate men; a deed which the country abhors,  
 ‘and which it will not suffer to go unpunished.’

A counsel who followed upon the same side, spoke out yet  
 more explicitly the motives to this prosecution. He treats of the  
 prisoner’s character in these words: ‘I will not say that his cha-  
 ‘racter in private life concurs against him; I have no authority  
 ‘from my employers to assert it; nor will I assert what is not  
 ‘supported by evidence: But I must say, that *his family and con-*  
 ‘*nections, his character and conduct in public life, are so many*  
 ‘*circumstances forming a presumption almost equal to a proof, in*  
 ‘*support of the charge brought against him: These are the most*  
 ‘*powerful adversaries he has to struggle with, and from them*  
 ‘that general opinion of his guilt has taken its rise.’

The argument on the relevancy being finished, the Court pro-  
 nounced the only interlocutor which I apprehend they could do  
 according to law: ‘Repel the objections to the libel, and find  
 ‘the libel relevant to infer the pains of law: That, time and  
 ‘place libelled, the deceased Colin Campbell of Glenure was  
 ‘murdered, and that the pannel, James Stewart, was guilty ac-  
 ‘tor, or art and part thereof; but allow the pannel to prove all  
 ‘facts and circumstances that may tend to exculpate him; and  
 ‘remit the pannel, with the libel, as found relevant, to the  
 ‘knowledge of an assize.’

## T H E P R O O F.

1752 Mungo Campbell, writer in Edinburgh, deposed, that he set out from Edinburgh on the 7th of May last, in company with the deceased Mr Campbell of Glenure, to assist him in ejecting some of the tenants upon the forfeited estates of Ardsheil and Lochiel, over which the deceased was factor; which tenants, it was apprehended, would not remove till legally ejected: That they went to Fort-William; and, in their return, they arrived on Thursday the 14th of May at the ferry of Ballachelish, purposing next day to eject some of the tenants of Ardsheil. The deceased, after waiting about an hour, and communing with some of the tenants, crossed the ferry between four and five in the afternoon. Glenure and the deponent entered the wood of Lettermore, and coming to a part where the wood was pretty thick upon both sides, so that the murderer could have easily concealed himself in the bushes, and where the road was so rough and narrow that they could not ride conveniently two horses a-breast, the deponent went foremost, and might have been about twice the length of the court-room before the deceased, when he heard a shot behind him, and heard Glenure repeatedly cry out, 'Oh! I am dead.' The deponent immediately returned to Glenure, alighted from his horse, and also took the deceased off his horse; then run up the hill from the road to see who had shot him. He saw, at some distance, 'a man with a short dark coloured coat, and a gun in his hand, going away from him;' and there was so great a distance between them, that the deponent thinks he could not have known him although he had seen his face. As the deponent came nearer, he mended his pace, and disappeared, by high ground being interjected between them. After Glenure was taken from his horse, he leaned a while upon the deponent's

deponent's shoulder, endeavoured to open his breast to see where the bullets with which he was shot came out of his body, and was not able; but there were two holes in his waistcoat, over the belly, where the bullets had come out. After continuing upwards of half an hour in agonies, Glenure expired. Deposed, That there are places in the wood so situated, that a person standing there might see most part of the road from the ferry to the wood, and even part of the road from the ferry to Fort-William, some of which places are not a musket shot from the spot where Glenure was murdered.

John Mackenzie, servant to Glenure, deposed, that, on the 14th of May last, when he was riding about a gun shot behind his master in the wood of Lettermore, he heard a shot, which he took to be the report of a musket. It neither alarmed him, nor did he know whence it came; but, when he came up, he saw the preceding witness wringing his hands, and his master lying on the ground with a great deal of blood about him, just breathing, and not able to speak. The deponent was desired by the preceding witness to go in quest of Mr Campbell of Ballieveolan and his sons, inform them of what had happened, and entreat them to come immediately to the spot where the deceased lay. He was directed by a neighbouring tenant to go to the house of James Stewart, the prisoner, in expectation that he would learn from him where Ballieveolan was. The prisoner seeing the deponent weeping, inquired what the matter was? the deponent told him his master was killed; upon which the prisoner asked him by whom, and how it was done? to which he answered, he did not know by whom, and believed it to be by a shot from a gun or pistol. The prisoner wrung his hands, expressed great concern at what had happened, as it might bring innocent people to trouble, which he prayed might not be the case. Deposed,

1752 sed, That, when his master and he were about three miles on their way coming from Fort-William, the day of the murder, they met John Beg Maccoll, a servant of the prisoner's, going there, and that Maccoll had performed his journey, and returned to the ferry of Ballachelish about the same time with the deponent, his master and he having stopped about an hour and a half, or two hours, on the road: That Maccoll was impatient to be ferryped over, and did cross the ferry about half an hour before Glenure.

Donald Kennedy, sheriff-officer, deposed, That, when Glenure and his company were at the ferry of Ballachelish, the deponent saw John Maccoll, the prisoner's servant, who seemed to be in a hurry to cross the ferry, Glenure said to him, 'Sir, you travel better than I do.' To which he answered, 'I am in a haste;' and so went over the ferry about an hour before Glenure crossed it. The deponent, who was in company with Glenure, for the purpose of executing the warrant of ejection, crossed the ferry along with him, and went on before. When he had got about half a mile into the wood of Lettermorc, he heard a shot, which he did not regard, till hearing Mungo Campbell make a great noise, like one weeping, he returned, and Mungo said to him, 'The villain has killed my dear uncle; adding, *that he had only seen one man*; and that he, the deponent, asked no questions, being in confusion, and dreading the same fate *himself*.' Deposed, That, some time after, when the people were gathered about the corpse, John Maccoll was among them.

John Roy Livingstone deposed, That, on Thursday the 14th of May last, he saw Allan Breck Stewart in Ballachelish in the forenoon, dressed in a dun coloured great coat. In the evening, he saw John Maccoll, the prisoner's servant, travelling at a good  
rate

rate from the ferry of Ballachelish to his master's house. The deponent joined him, asked where he had been? and got for answer, at Maryburgh (the village of Fort-William) for Charles Stewart, notary public. Maccoll farther told him, that Glenure was to be that night at Kintalline. About two hours after, the deponent, who was then in the wood of Lettermore, heard a shot, and on going up found that Glenure was murdered. 1752

Duncan Campbell *change-keeper*\* at Annat deposed, That one day in April last, when Allan Breck Stewart was in his house, Allan said, that he *bated all the name of Campbell*; and bid the deponent, if he had any respect for his friends, tell them, that, if they offered to turn out the possessors of Ardsheil's estate, he would make black cocks of them; which the deponent understood to mean, that he would shoot them. Allan Breck said, that he had another quarrel with Glenure besides his turning the people of Ardsheil out of their possessions, viz. his writing to Colonel Crawford, informing that Allan Breck was come from France †, but that he was too cunning for Glenure; for that, when at Edinburgh, he had made up his peace with General Churchill, and got a pass. Deposed, That Allan Breck said twenty times he would be upsides with Glenure; and wanted nothing more than to meet him at a convenient place: That Allan Breck was not drunk, *for he could walk and talk as well as any man*; but it could easily be observed he had been drinking.

Robert

\* Keeper of an Ale-house.

† Allan Breck Stewart had deserted from one of the British regiments of foot after the battle of Preston, joined the rebels, and afterwards enlisted in the French service.

1752 Robert Stewart deposed, That, some time in April last, he was in company with Allan Breck and the preceding witness. Allan complained much of Glenure's and Mr Campbell of Ballievolan's conduct towards him, and particularly of Glenure's sending notice to Fort-William of his being in the country, so that he might be apprehended: But he would be upside with him; and take an opportunity to despatch either him or Ballievolan before leaving the country.—Allan Breck was much in drink when he uttered these expressions.

Malcolm Bane Maccoll change-keeper at Portnacrosk, deposed, That, in April last, Allan Breck Stewart, and John Stewart in Auchnacuan, sat up all night in his house drinking. Next morning, John Maccoll, servant to the deponent, came into the room in a shabby condition. Allan Breck asked who he was? John Stewart answered, an honest poor man with a numerous family of children, and it would be great charity in any body to assist him:—Upon this Allan Breck desired John Stewart to give him a stone of meal and he would pay for it. He then gave Maccoll a dram, and said, *'if he would fetch him the red fox's skin, he would give him what was much better;* to which the said John Maccoll answered, that *he was no sportsman, and that he was much better skilled in ploughing or delving.* The deponent took little notice of these expressions at the time; but, after hearing of Glenure's murder, he believed that Allan Breck meant Glenure, as he was commonly called *Colin Roy, i. e. Red Colin.*

John Stewart of Fasnacloch deposed, That he told Allan Breck that Glenure was come from Edinburgh to remove the tenants; to which Allan Breck answered, if he had a warrant, there was no more to be said; but, if he had not a warrant, he would not be allowed to remove them.

John

John Stewart, son to the preceding witness, deposed, That Allan Breck, after a visit of three days at his father's house, left it on the morning of Monday the 11th of May. He was then dressed in a long blue coat, red waistcoat, and black breeches, and had a feather in his hat; but, when the deponent met him next day at Ballachelish, he was dressed in a black short coat, with round white buttons, with a dark great coat over it; and he had on trousers and a blue bonnet. The deponent observed to Allan, that he had changed his dress, who answered, he did it because the day was warm.—John Stewart younger of Ballachelish swore, That he saw Allan Breck at the deponent's father's house on Tuesday the 12th of May last, and heard him ask questions about Glenure's travelling to Lochaber.

Catharine Maccoll, servant to the prisoner, deposed, That, on the afternoon of Monday the 11th of May, Allan Breck Stewart came to the prisoner's house dressed in a long blue coat, red waistcoat, and black breeches; but the prisoner was from home, having gone to Keels to meet Mr Campbell of Airds, and it was late at night before he returned: The family waited supper on him; and he supped in company with the said Allan Breck, a daughter and a nephew of the laird of Fasnaclloch, and the prisoner's own family. Allan Breck did not lie all night in the house, but in a barn\*; and next morning left her master's house. Allan Breck, when he left the house, had on a dun coloured  
C c great

\* This was nothing uncommon among the yeomanry in the Highlands of Scotland. In that hospitable country, such troops of visitors are entertained as would derange the oeconomy of a more polished people. When they go to rest, they are never incommoded for want of lodging; as sheets and blankets spread on heath, in a barn, form supplementary beds for such of the guests as the house cannot contain.

1752 great coat. On the evening of Friday the 15th of May, she saw Mrs Stewart, the prisoner's wife, put into a sack a long blue coat and a red waistcoat, which she took to be Allan Breck's clothes, and was desired by her to hide them without the house, which was done accordingly. On Saturday evening her mistress desired her to go for what she had hid, and leave it at the back of the brewhouse; she did this also; and has not seen the clothes since.

Archibald Cameron deposed, That, on Monday the 11th of May, he came to the house of the prisoner, who was not then at home, but arrived before night-fall. Allan Breck came there a little after the deponent. The prisoner and his family, Allan Breck, and the deponent, sat in one room, and supped together; and he did not observe Allan Breck and the prisoner speak in private that night. The deponent, and Allan Stewart, a son of the prisoner's, lay in one bed, and Allan Breck and Charles Stewart, also a son of the prisoner's, lay in another bed in the same barn. They all went to bed much about one time, and rose together next morning; and the deponent did not see the prisoner about the house.

Alexander Stewart of Ballachelish deposed, That Allan Breck came to his house in the afternoon of Wednesday the 13th of May, and staid with him till next day between eleven and twelve o'clock, when he went a-fishing in a neighbouring rivulet, and did not take leave of the deponent, since which time he has not seen him. As the murder happened that night, and as Allan Breck did not return to the deponent's house, he next morning 'really thought that Allan Breck Stewart might be *the actor* \*  
' in

\* This expression appears to me equivocal and suspicious. It must here be observed,

ces whis murder.' Allan Breck was dressed in a great coat, and under it a short black coat with white buttons. 1752

Donald Stewart in Ballachelish deposed, That, on Friday the 15th of May, he met the prisoner, and, upon expressing his regret at Glenure's murder, the prisoner joined with him; and added, that one Serjeant More, who, to the deponent's knowledge, had not been in the country these ten years, had threatened harm to Glenure in France. On the preceding evening, the deponent received a message, that a person at a little distance from the house wished to see him. He went, and found it to be Allan Breck Stewart, dressed in a great coat, and a dark short coat under it, with white metal buttons. The deponent challenged him as guilty of the murder; he said he had no concern in it, but believed he would be suspected; and on this account, and being a deserter, it was necessary for him to leave the kingdom: Therefore, as he was very scarce of money, he requested the deponent to go to the prisoner, *and acquaint him, that he Allan Breck was gone to Koalifnacoan, and desire him, if possible, to send him money there.* The deponent promised to deliver the message, and did deliver it to the prisoner, who, without saying whether he was to send the money or not, asked why Allan Breck himself did

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not

served, that the common method of taking down written evidence in this country, is not to express the actual words of the witness, but for the judge, or commissioner, to clothe the witness's ideas in the most suitable language that occurs to him. Thus the witness's idea, when committed to paper by the judge, is sometimes very different from that which he delivered.—The judge who dictated to the clerk of court Mr Stewart of Ballachelish's evidence was the Duke of Argyle himself. I apprehend the deponent meant only, that he really thought Allan Breck might be *guilty* of this murder; yet his evidence is so worded as to imply, that the actual *perpetrator* was not without *conspirators*, who were joined with him in contriving this murder.

1752 not come for money if he wanted it? to which the depo.  
 answered, that Allan told him he would be suspected of the  
 murder, and was a deserter. The prisoner replied, he hoped in  
 God Allan Breck was not guilty of the murder. On the Sun-  
 day after, the deponent met Alexander Bane Stewart packman \*,  
 who told him he had been at the prisoner's house of Aucharn,  
 and had got either three or five guineas, to be left with John  
 Breck Maccoll in Koalifnacoan, for Allan Breck's use, if he cal-  
 led there.

John Macdonald of Glenco deposed, That, on Friday the 15th  
 of May, Allan Breck came to the deponent's house between three  
 and four in the morning, when the family were all in bed, knock-  
 ed at the window, and did not stay above a quarter of an hour,  
 and gave him the first notice of Glenure's being murdered the  
 evening before in the wood of Lettermore. Allan Breck said he  
 was going to leave the country, and had come to bid him fare-  
 well.

Mary Macdonald deposed, That, on Sunday the 17th of May,  
 a little before sun-set, she saw Allan Breck sitting in the wood  
 of Koalifnacoan. On her approach he started to his feet; the  
 common salutation passed between them; but she was alarmed at  
 meeting a man in a place so remote.

Allan Beg Cameron deposed, That, about the 18th of May last,  
 Allan Breck Stewart, his nephew, having come to his house, the  
 deponent said, he supposed Allan would be suspected of the mur-  
 der, who answered, he thought so too. The deponent pressing  
 him earnestly to 'make a clean breast,' he declared he never had  
 seen Glenure dead or alive. The deponent repeated his instan-  
 ces

\* Pedlar.

ces with him to tell what he knew of the murder, till at last he became angry. Allan Breck added, that his only fear was to be apprehended by the Military, which might prove fatal to him, as he had been a deserter; and that Glenure's friends were at present in such rage and fury, that he was very sure, were he apprehended, he would be hanged. 1752

Alexander Stewart of Innernahyle deposed, That the prisoner was many years tenant to his brother, the Laird of Ardsheil, upon the farm of Glenduror: That he was removed from his possession by Glenure, factor upon this forfeited estate, and the lands given to Mr Campbell of Ballieveolan. The deponent being a near neighbour of the prisoner's, had frequent opportunities of conversing with him on the subject of his removal. The prisoner seemed dissatisfied with it; adding, however, that he did not think Glenure would have removed him, if Mr Campbell of Ballieveolan had not sought these lands from him. Deposed, That the chief regret which the prisoner expressed for being turned out of his farm, was, that the children of the family of Ardsheil would thereby be deprived of the gratuity he was wont to transmit them. Deposed, *That the prisoner removed voluntarily from the farm of Glenduror, without process at law.*

Donald Campbell of Airds deposed, That he was employed by Glenure as his sub-factor upon the estate of Ardsheil. The prisoner told the deponent, that whatever was made of these rents over what was paid into the Exchequer, was accounted for to the children of Ardsheil; and, when the prisoner removed from the farm of Glenduror, he said to the deponent, he had reason to believe the excrescence of the rents of that farm would still be accounted for to them; *and, in that case, he would be easy as to his own removal.*

Charles

1752 Charles Stewart, writer and notary deposed, That the prisoner wrote him a letter, desiring him to go along with the tenants of Ardsheil, and intimate to Glenure a sist which had been obtained upon a bill of suspension against their removing. The deponent accordingly went to Aucharn that night; and next day, which was the first of May, he went along with the tenants to Glenure's house, intimated the sist, and took a protest. The prisoner did not go along with him. On the 14th of May he got a second letter from the prisoner, desiring him to attend next day at the *ejection of the tenants*, but he declined going, because he did not choose to disoblige Glenure. When the deponent was at Aucharn on the 1st of May, he saw Allan Breck Stewart there, who was dressed in a *short black Highland coat, with white buttons and trowsers*. He then heard Allan Breck say, that he thought it hard in Glenure to remove the tenants of Ardsheil, when he did not remove those of Mamore.

John M'Corquodale in Ballachelish deposed, That, on the last night of December, he was present at Kintalline when Glenure, the prisoner, and some other company, met together: High words passed between them; and it being apprehended a quarrel would ensue, the deponent and some others took the prisoner out of the room. The prisoner was disobliged at being separated from Glenure, as he expected he would have gone home with him that night to the prisoner's house; and said, if nobody had interfered, *Glenure and he would have been good friends before they parted*.

Alexander Campbell in Teynaluib deposed, That, in the end of April, the prisoner stopped at his house to get his horse fed. He called for a dram; and one Maclaren, a merchant in Stirling, asked the prisoner to help the deponent to a dram; to which the  
prisoner

prisoner answered, ' *he did not know any thing he would help the deponent, or any of his name, to, if it was not to the gibbet.*' <sup>1752</sup> The deponent replied, saying, it seems if any of the Campbells were at the gallows, the prisoner would draw down their feet; to which the latter rejoined, those ' *of some of them he would, and of some of them he would not.*' The deponent then said, he supposed Glenure was the man of the name with whom the prisoner had the greatest quarrel, but he had no good cause for it; to which the prisoner answered, if Glenure had used the deponent as ill as him, by turning the deponent out of his possession, he would have had no less quarrel with Glenure than the prisoner had. Being interrogated for the prisoner, deposed, That the prisoner was perfectly sober, and the deponent thought these expressions proceeded from malice.

Colin Maclaren merchant in Stirling deposed, That, upon his desiring the prisoner to help their landlord, the preceding witness, to a dram, the prisoner said, he did not think he would help the landlord, or any of his name, to any thing but the gallows. The landlord then said, ' that it seemed if they were on the gibbet the *pannel* would draw down their feet; and he supposed it was on Glenure's account;' to this the prisoner answered, he could not say but it was; upon which an altercation took place between the preceding witness and the prisoner concerning the justice of the latter's being removed from his farm. The deponent and the prisoner rode on together from the house of the preceding witness; the conversation was renewed, the prisoner seeming to have much at heart the removal from his possessions. He said, he did not know what business either the Barons of Exchequer, or factors upon the forfeited estates, had to turn out tenants while they paid their rent: That he was going to Edinburgh to apply for a bill of suspension against the removing;

1752 moving; if he failed in his suspension, he would carry it to the  
 British parliament; and if he failed there . . . (after a little pause,  
 and with an emphasis) . . . ‘*he behoved to take the only other re-  
 medy that remained.*’ Being interrogated for the prisoner, de-  
 posed, That, when the conversation began in the house of the pre-  
 ceding witness, he thought the prisoner in jest; but it was like  
 to turn out very serious, as the prisoner and the landlord came  
 to high words. The witness did not think the prisoner drunk  
 while in the preceding witness’s house, but some drains were  
 drank upon the road, and the deponent thought the prisoner  
 much the worse of drink when he used the above expressions  
 about the British Parliament, and the only other remedy. De-  
 posed, That the conversation turning upon an officer who was  
 broke for cowardice, the deponent said it surpris’d him much,  
 for he knew that this officer accepted of a challenge to fight from  
 Glenure. The prisoner said, he esteem’d that officer a better  
 man than Glenure; one Murray who was in company having  
 contradicted the officer’s being so good a man as Glenure, the  
 prisoner said, ‘he knew the contrary; for that he himself had  
 given Glenure a challenge to fight him, which Glenure de-  
 clined;’ and he desired Mr Murray to tell Glenure, ‘*he would  
 fight him when he would;*’ but Mr Murray declined to carry  
 such a message.

Ewan Murray vintner, deposed, that the prisoner, and Mr  
 Maclaren, the preceding witness, having stopp’d at his house, the  
 conversation turned upon an officer in the army who was brand-  
 ed with cowardice, and the prisoner said, Glenure was as great a  
 coward as that officer, for the prisoner had challenged him to  
 fight, which Glenure declined; and he desired the deponent to  
 tell Glenure so; but the witness said, he would not carry any  
 such

such message from one gentleman to another.—At that time he thought the prisoner the worse of drink. 1752

John More Maccoll, late servant to the prisoner, deposed, That, about Christmas last, as the deponent, and other servants of the prisoner's, were distilling some whisky in their master's brew-house, after some previous conversation concerning Glenure, the prisoner said, 'the tenants, or commoners, were likely to be very ill off; for, if Glenure went on in the way he then did, it was likely he would be laird of Appin in a very short time; and that he (the deponent) *knew once a set of commoners in Appin who would not allow Glenure to go on at such a rate; to which the deponent and the rest answered, that they knew no commoners in the country that could strive or contend with Glenure.*' Deposed, That, on the day the prisoner went last for Edinburgh, Allan Breck Stewart said to the deponent and Dugald Maccoll, that 'if they, the commoners, were worth themselves, they could keep out Glenure, and hinder him from oppressing the tenants, in which case they would not be banished from their natural possessions.' Allan Breck added, that 'he had it in his power to save or protect any body that would put Glenure from trampling upon the country in the manner he then did.'

Dugald Maccoll, servant to the prisoner, deposed, That one morning last winter, when the deponent and other servants were in the prisoner's brewhouse, he said to them, that Glenure was like to hurt him, the prisoner, as much as in his power; but that was not the worst of it; for, if Glenure proceeded in his present stile, it was probable he would be laird of Appin in five years: The deponent and the other servants said it was so; upon which the prisoner observed, 'that was the fault of the com-

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'moners;'

1752 'moners;' and added, 'that he once knew commoners in Appin who would not allow Glenure to go on at such a rate.' Deposed, That, on the last night of December, Glenure, Mr Campbell of Ballieveolan, the prisoner, his uncle James Stewart in Ardnamurchan, and John Stewart younger of Ballachelish, were in company together at a public house at Kintalline: The deponent, by desire of his mistress, went there to attend his master home. The company continued drinking till it was late at night: They began to speak very loud, and got upon their feet; but, as they spoke in English, the deponent did not understand what they said: He, and several '*other commoners*' who were in the house, apprehending that the forementioned company were about to quarrel, went into the room in order to prevent it. As the company still spoke loud, and in English, the deponent and his assistants carried the prisoner, and his uncle, Mr Stewart, out of the room. They insisted on going back to the company; and the prisoner would not move from the place where he stood till a message was brought him from the company, signifying whether Glenure would wait upon him at his house next day. Being informed by Mr Stewart of Ballachelish that Glenure would wait upon him, the prisoner asked, 'if Glenure had promised so upon his honour,' and was answered in the affirmative; and Glenure and Ballieveolan did accordingly dine at the prisoner's house next day. Deposed, That the deponent and his assistants then carried the prisoner over a rivulet which lay between the house where they had been drinking and the prisoner's house at Aucharn. He asked at them 'what kept them there so late, and why they did not go home in proper time of night?' and they answering that they were there waiting upon him, the pannel replied, that *it was not waiting upon him they were but upon Glenure, to see what they could get by him.* Deposed, That both the prisoner and his uncle were very drunk.

Deposed,

Deposed, That, in March last, when the deponent and John More Maccoll were harrowing one of the prisoner's fields, Allan Breck Stewart and they fell into conversation about their exiled friends in France: Allan Breck said, it was a particular misfortune that the management of any concerns they left behind them should have fallen into the hands of Glenure, who was about to show them no manner of favour. He said, 'the commoners of Appin were little worth when they did not take him out of the way before now;' and upon their saying nobody would run that risque, Allan answered, that he knew how to convey out of the way any body who would do so, in such manner that they should never be caught. He added, that they and the tribe of Maccoll were not like to be the least sufferers by Glenure's proceedings. He was then dressed in a long blue coat, red waistcoat, and black breeches, with a hat and feather; but, when he went from the prisoner's house to Rannoch, he was dressed in a black short coat with silver buttons, belonging to the prisoner, blue and white striped trowsers, and a dun great coat, which the deponent thinks belonged to Allan Stewart, the prisoner's son. Allan Breck had on the same dress when he came back from Rannoch; and the deponent does not remember to have seen him in that garb at any other time, except on the 11th and 12th of May last. Deposed, That, on Friday the 15th of May, the deponent saw Catharine Maccoll, servant to the prisoner, have something in a bag under her arm, which she said was Allan Breck's clothes, and that she was going to hide them. Deposed, 'That upon Thursday evening, the 14th of May, after notice of Glenure's murder came to Aucharn, Allan Stewart, son to the pannel, desired the deponent, and John Beg Maccoll, to hide a large Spanish gun that used to stand in the brewhouse; and told them that he himself had concealed a lesser gun that used to stand at the end of

1752 ‘ the *girnel*\* in the barn, under the said *girnel*, where he thought  
 { ‘ it would be safe.’ They did so accordingly; but next day the  
 prisoner, not thinking the place where the arms were concealed  
 sufficiently secret †, ordered the deponent and John Beg Maccoll  
 to carry them from the place where they were hid, and hide  
 them in the moor; and they accordingly lodged them in the  
 cleft of a rock. Deposed, That the arms so hid were a large  
 Spanish gun loaded with powder and *small shot*, which Allan  
 Breck was in use to carry in order to shoot black cocks; a small  
 gun not loaded, which Allan Stewart, the prisoner’s son, was in  
 use to carry in the morning for the same purpose, and four swords.  
 Deposed, That, before the arms were thus hid, it was reported  
 at Aucharn that soldiers were coming into the country.

John Beg Maccoll, servant to the prisoner, deposed in substance  
 conform to the two preceding witnesses, as to the prisoner’s com-  
 plaining to them that Glenure was no friend of his, and that he  
 once knew a set of commoners in Appin who would not allow  
 Glenure to carry matters with so high a hand. Deposed, That  
 the deponent and Dugald Maccoll communed together on the  
 import of their master’s expressions, revolving whether it was  
 an encouragement to destroy Glenure, or a complaint against the  
 commoners of Appin, as not being so faithful to the prisoner as  
 he expected. Deposed, That Allan Breck came to the prisoner’s  
 house in March last, staid there for some days, made little excu-  
 sions in the neighbourhood, and came frequently back again. In  
 particular,

\* A meal ark, or corn chest.

† The statute of King George I. for  
 disarming the northern counties, had been lately renewed with additional severities.  
 Arms being found in the possession of persons of a certain description, subjected  
 the possessors to heavy penalties; Stat. Geo. I. ann. 1mo cap. 54.; Geo. 2di. ann.  
 19no, cap. 39.

particular, he came to Aucharn on Monday the 11th of May about mid-day, dressed in a long blue coat, red waistcoat, black plush brecches, hat and feather; but in the evening he was dressed in a black short coat and silver buttons, belonging either to the prisoner or his son; and he, Allan Breck, thus dressed, came and assisted the deponent, and his fellow servants, *in covering potatoes*. When Allan Breck arrived at Aucharn on the 11th of May, the prisoner was seeing the deponent and his other servants covering potatoes. Allan Breck seated himself beside the prisoner, and they had some conversation in English, which the deponent does not understand. Deposed, That, on Thursday the 14th of May, the prisoner gave the deponent a letter to be delivered to Charles Stewart notary public at Maryburgh, and told him that the purpose of the letter was to desire Charles Stewart to come and take a protest against Glenure, in case he had no sufficient warrant to remove the tenants of Ardsziel. The prisoner desired the deponent to make all possible despatch, and to go by the ferry of Kintalline, being a shorter way than by the ferry of Ballachelish. The prisoner also told him to get some money from William Stewart merchant Maryburgh, to pay for milk cows which were bought for him, and that, if the money was not sent, he would not get the cows. The deponent set out from Aucharn between seven and eight in the morning. He met Glenure at the three mile water, knew his servant, had some conversation with him, and told him, that he, the deponent, was going to Fort-William; and he arrived there about twelve o'clock. He delivered the letter he got from the prisoner to William Stewart merchant in Maryburgh, who told him, that Charles Stewart, the notary, was from home, having gone to the Braes of Lochaber; but that Glenure had a notary with him, which would answer the purpose of both. The deponent got no money from William Stewart, staid a very little while at Fort-William, returned by the  
short.

1752 short road to the ferry of Ballachelish, and found Glenure arrived at the ferry before him. The deponent wanted to cross immediately; the ferryman bid him wait till he should be taken over with Glenure's horses; but the deponent observing that the time of the tide, and the rapidity of the stream, would occasion a considerable delay ere the horses could be taken over, made the ferryman cross with him immediately; and this was about four o'clock. The deponent proceeded in his journey, passed through the wood of Lettermore, and neither met nor saw any body; and when he went that day to Fort-William with the letter to the notary, *he had no orders from his master to inquire after Glenure's motions, or to acquaint any body of them.* An hour was hardly elapsed after the deponent's arrival at his master's house, ere Glenure's servant came to the door calling for the prisoner; and being asked what news? he answered, 'the worst I ever had; my master is murdered in the wood of Lettermore; upon which James Stewart said, Lord bless me, was he shot? to which the servant answered, that he was shot; and said the pannel ought to go and take care of his corpse.' But neither the prisoner, nor any of his family, went near the corpse; for he said, 'that, as he and Glenure were not in good terms, and some of the people who were to meet Glenure had arms, he did not incline to go near them, not knowing what might happen. The prisoner said, 'this was a dreadful accident, and he was afraid would bring trouble on the country;' and appeared to be sorry for what had happened. Deposed, That late on Thursday evening, after the news of Glenure's murder had arrived at Aucharn, the prisoner's wife ordered Dugald Maccoll and the deponent to hide all the arms that were about the house, as it was probable that a party of soldiers would be ordered into the country. They accordingly took a large loaded gun out of the brewhouse, and hid it under the

the thatch of the sheep-house. They inquired, at the same time, 1752  
 for the little gun that used to lie in the barn, and were told by           
 Allan Stewart, the prisoner's son, that he had hid it under the  
 large *girnel*; and they concealed four swords under a parcel of  
 thatch. Next day they were desired by their mistress to hide  
 the arms better; and they took the large loaded gun and the  
 swords from the places where they had concealed them, and the  
 little gun, which was not loaded, from under the girnel, where  
 Allan Stewart said the night before he had laid it, and hid all of  
 them at some distance from the house. Deposed, That he saw the  
 little gun either on the Tuesday or the Wednesday preceding the  
 murder, and gave as the cause of his not seeing it on Thursday,  
 'that he was from home almost all that day.' He did not see  
 the little gun loaded since the month of March, when the black  
 cocks were crowding. At that time he saw Allan Breck carry  
 it out one morning loaded with small shot, who told the depo-  
 nent that it missed fire thrice when he presented it at a black  
 cock, and went off the fourth time without killing the bird. De-  
 posed, That neither of the guns were in good order; for the large  
 one, when the trigger was drawn, used to stand at half cock, and  
 the little one had an old worn flint, and was in use to miss fire.

Captain David Chapeau of General Pultney's regiment deposed,  
 That, upon information given by Mr Campbell of Barcaldine,  
 that there were some arms hid among the rocks near the prison-  
 er's house, he went thither with a party of his men, and found  
 the arms above described. The large gun was loaded with small  
 shot; the little gun was not loaded, and appeared to have been  
 lately fired; for he put his finger into the muzzle, and it came  
 out black. Being interrogated by the prisoner, whether a mus-  
 ket laid by foul will not give that appearance to the finger a  
 month after it has been discharged? deposed, he cannot tell, not  
 being.

1752 being accustomed to see arms used so. Deposed, That the lock of the unloaded piece had but one screw nail, and the other end of the lock was tied to the stock with a string: That a gun in such a situation may be fit enough to be 'fired with:' That he took the fuzees along with him to Fort-William, and delivered them to the adjutant; and the deponent does not know by what means the lock now missing, which belonged to the little gun, was lost, but believes it to have been by accident.

William Stewart merchant in Maryburgh deposed, That he did not send to the prisoner the L. 8 to pay for the cows, which John Beg Maccoll fought in the prisoner's name on Thursday the 14th of May; but, on Friday the 15th, he got a second message by Alexander Stewart *packman* \*, who told the deponent that he was going to Glenevis to get payment of a horse bought from the deponent, and that he must also get from the deponent L. 5 towards payment of some cows which the prisoner had bought for him at Ardsziel, as the cows were not to be delivered till payment of the money. The deponent, however, was not in cash; but next day, as the pedlar returned from Glenevis, the deponent's wife, who was anxious to have the cows, sent three guineas by the pedlar to the prisoner, and, accordingly, in about eight days, she got two of the cows, but she never got the other two. Deposed, That he saw Allan Breck at the prisoner's on the 1st of May, dressed in a short black coat and clear buttons. Allan Breck told the deponent he had been a soldier in the King's troops at the battle of Preston, and afterwards was in the rebellion; and he seemed to be on the watch lest he should be searched for.

Alexander Stewart, travelling packman, deposed, That, upon Friday the 15th of May, about mid-day, the prisoner desired the deponent to go to Fort-William to William Stewart merchant, and

\* Pedlar.

and get L. 5 from him ; for the prisoner's friend, Allan Breck, 1752 was about to leave the country, as troops were coming into it, and he might be suspected of Glenure's murder. The prisoner said it was incumbent upon himself to supply his friend, Allan Breck, with cash ; and, therefore, he bid the deponent tell William Stewart he must send the money, although he should borrow it from twenty purses ; and that he must also advance L. 5 to John Breck Maccoll bouman at Koalifnacoon, if he came to demand such a sum. The prisoner desired the deponent to seek L. 4 more from him, being the price of two milk cows. In consequence of these messages, the deponent went to Fort-William, and asked from William Stewart the two sums mentioned. Stewart said he had not the money, and desired the deponent to proceed with his message to Glenevis, and he would see him tomorrow and give him the money. The deponent accordingly called next day in his return ; but all he got was three guineas. With this he went back immediately to Aucharn, where he arrived in the evening. Mr Stewart was not at home:—*But, in a quarter of an hour, intelligence arrived, that both Mr Stewart and his son Allan were made prisoners.* Mrs Stewart went immediately to the place where her husband and son were apprehended, and the deponent accompanied her. They found Mr Stewart a prisoner. The deponent having opportunity to converse with him apart, told him he had brought three guineas. Upon this the prisoner pulled out a green purse, out of which he took two guineas and gave them to his wife, who immediately delivered them to the deponent ; and the prisoner desired ' that the five ' guineas should be sent to that unhappy man (meaning Allan ' Breck) to see if he could make his escape ; and pitched upon ' the deponent as a person that should go with the money.' Soon after the prisoner was carried off by a party of soldiers to Fort-William, his wife and the deponent returned to Aucharn ; and

1752 the soldiers, with their prisoner, stopped there by the way and drank a dram. After the deponent had supped, Mrs Stewart told him that he must go immediately to Allan Breck with the five guineas and his clothes, who would be found at Koalifnacooan; that, if the deponent should not meet him, he might deliver the money and clothes to John Breck Maccoll, the bouman; but by no means to take the clothes to Maccoll's house, lest any body might see them. The deponent, with great reluctance, after being much entreated by Mrs Stewart, undertook the commission; he arrived at Koalifnacooan on Sunday morning, a little after day-light, and left the clothes at the root of a fir tree at some distance from the houses. He then met John Breck Maccoll the bouman, delivered him the five guineas, and pointed out where the clothes lay. The bouman told him, that Allan Breck was at Corrynakeigh, a little above the house of Koalifnacooan: The deponent then went to sleep in the bouman's house, dined with him, and returned to Aucharn in the evening, where he found the prisoner's wife perfectly satisfied, upon being informed that the deponent had consigned the money and clothes to the care of the bouman.

John Breck Maccoll deposed, That, on the afternoon of Saturday the 16th of May, as he was in a fir bush in Koalifnacooan, he heard a whistle. Upon looking up, he saw Allan Breck at a little distance, beckoning to the deponent to come towards him. After mutual salutations, the deponent told him, he was afraid it was no good action that occasioned his being in so remote a place; and the deponent charged him with being guilty of Glenure's murder. Allan Breck asked the deponent what he had heard about the murder? He answered, that two poor women told that Glenure was murdered on Thursday evening in the wood of Lettermore; that two persons were seen going from the place

place where the murder was committed, and that Allan Breck was said to be one of them. Allan Breck answered, he had no concern in it; and, if his information was right, there was but one person about the murder; but, as he was idle in the country, he was sure he would be suspected of it. This, he said, would give him little concern if he had not been a deserter, which would bear harder upon him, in case of his being apprehended, than any thing which could be proved against him about the murder. He said, he did not doubt but the family of Ardshiel would be suspected of the murder; and it was probable the prisoner and his son Allan might be taken into custody about it; and he 'was afraid Allan Stewart, the pannel's son's tongue was 'not so good as his father's; by which words the deponent understood, that Allan was easier to be entrapped than the pannel.' Allan Breck told the deponent, he must remain in that neighbourhood till some necessaries which he expected were brought to him; and that, unless some money came to him before next morning, the deponent must at all events go to Fort-William with a letter. This the deponent refused; but Allan Breck, notwithstanding, picked up a wood pigeon's quill, made a pen of it, made some ink of powder which he took out of a powder horn that was in his pocket, and wrote a letter to be delivered by the deponent to William Stewart merchant in Maryburgh. The deponent objected, that every body who went to Fort-William was searched. Allan Breck answered, it was an easy matter to hide a letter; but, if he was apprehended, it must by no means be found upon him;—*he must eat it, rather than that it should be found.* At this time Allan Breck was dressed in a dun coloured great coat, black short coat, and blue trowsers, striped with white. Early next morning, being Sunday the 17th, the deponent met Alexander Stewart, the preceding witness, who inquired for Allan. Being worn out with fatigue, and two

1752 nights want of sleep, he went to rest in the deponent's house, and gave him five guineas, and Allan Breck's own clothes, to be delivered to Allan. At night, after the deponent had gone to bed, he heard somebody rapping at the window. He got up, went out of the house in his shirt, and saw Allan Breck at a little distance, who inquired if any message had come for him. The deponent answered, that his uncle's son had come with five guineas and some clothes to him. The deponent expressed his fears that Allan Breck would starve among the heath; and regretted that he was unable to help him. Allan said, he had no occasion for victuals, but wanted a drink very much. Upon this the deponent went back to his house and fetched a dish of whey, and the five guineas, and delivered them to him, and also gave him his clothes. He told Allan, that the prisoner and his son were apprehended on account of Glenure's murder; Allan answered, 'that was no more than he expected; but it would not signify much, as there could be no proof against them; but expressed some apprehension lest Allan Stewart, son to the pannel, might be betrayed by his own tongue \*.' Next morning the deponent found Allan Breck's borrowed clothes, and the dish which held the whey, lying together at the place where they had parted the night before; and since that he has not seen him. Deposed, That, about two years ago, a conversation passed between the deponent and the prisoner about Glenure's being to take the management of the estate of Ardsziel from him, which would disable him from being of any service to Ardsziel's children; and the prisoner then said, '*he would be willing to spend a shot upon Glenure; though he went upon his knees to his window to fire it.*'

Hugh

\* This witness, and another of the prisoner's servants, as well as their master, and his son Allan, were committed close prisoners in separate apartments at Fort-William.

Hugh Maclean, barber in Maryburgh, deposed, That he was sent for to the prison by Mr Stewart to shave him. He asked what news? The deponent answered, he heard that the prisoner was to be carried to Edinburgh on the Monday following. The prisoner replied, that was a matter which gave him no concern; he 'wished it had happened sooner; and was afraid of nothing; but that his servants might take money, and turn against him; and desired the deponent, as from him, to tell his servants to say nothing but truth, to keep their minds to themselves, and he would take care of them.' He gave the deponent a shilling. The deponent delivered the message to the prisoner's servants, and also told his son of the message he carried from his father to the servants, and the son gave him half-a-crown. 1752

Hugh Stewart in Edinburgh, a witness cited for the prisoner, deposed, That Allan Breck was in use frequently to pass between France and Scotland; that he lodged, when at Edinburgh, in the deponent's house; and that he used only to go abroad under cloud of night, being afraid to be seen, as he was a deserter.

Catherine Macinnes deposed, That, on the evening of Glenure's murder, she saw Allan Breck in the moor of Ballachelish. He asked what was the occasion of the stir in the town? She answered, Glenure was murdered. He inquired who committed the murder? and she said she did not know. He then requested the deponent 'to tell Donald Stewart in Ballachelish to go to the pannel and desire him to send the said Allan money; and that she delivered this message to Donald Stewart that same night.' She told the said Donald Stewart where she had seen Allan Breck.

John Stewart younger of Ballachelish deposed, That, on the day after Glenure's murder, the deponent was in the prisoner's house,

1752 house, who told him of his having got a message from Allan Breck that morning, by Donald Stewart, to send him money, which the prisoner said he was resolved to do.

Several witnesses deposed to their having seen Allan Breck dressed occasionally in a black short coat and white buttons;—and John Cameron of Strone, and Ewan Cameron his servant, deposed, That they heard one Serjeant More threaten to shoot Glenure, on account of his hard usage of the tenants of Ardshiel.

*Verdict of the Jury.*

They found, ‘*unanimously*, the pannel, James Stewart, guilty, ‘art and part, of the murder of Colin Campbell of Glenure.’

*Sentence of the Court.*

They adjudged the prisoner to be taken, on Wednesday the 8th of November, to the south side of the ferry of Ballachelish, to be hanged on a gibbet till he be dead, his body to be hung in chains, and his personal estate to be forfeited.

The Duke of Argyle, Lord Justice General, then addressed the prisoner in a speech of considerable length; a speech upon which I decline to preoccupy the reader’s remarks by any of my observations. The Duke began by telling the prisoner that he had a ‘most impartial trial,’ and that he had been prosecuted ‘with all the moderation consistent with the crime’ of which he stood accused. His Grace then speaking of the murder of Glenure, whose oppressions appear to have so deeply affected the family of Ardshiel, and their dependents, told the prisoner, ‘it may  
‘be

' be said of you, that you first eat his bread, and then shed his  
' blood.' 1752

After descanting upon the different rebellions raised by the partisans of the house of Stuart, and particularly that of 1745, the Duke proceeded: ' If you had been successful in that rebellion, you had been now triumphant with your confederates, trampling upon the laws of your country, the liberties of your fellow subjects, and on the Protestant religion: You might have been giving the law where you now have received the judgment of it; and we, who are this day your judges, might have been tried before one of your mock courts of judicature, *and then you might have been satiated with the blood of any name or clan to which you had an aversion.*'

' Though you don't now stand accused as a rebel, nor am I permitted to call you a traitor, because his Majesty's undeserved mercy to you did several years ago restore you to the state of an innocent man; yet I may say, with great force of truth, that this murder has been visibly the effect and consequence of the late rebellion.'

The prisoner then addressed the Court in these words: ' My Lords, I tamely submit to my hard sentence. I forgive the jury, and the witnesses, who have sworn several things falsely against me: And I declare before the great God, and this auditory, that I had no previous knowledge of the murder of Colin Campbell of Glenure, and am as innocent of it as a child unborn. I am not afraid to die; but what grieves me, is my character, that after ages should think me capable of such a horrid and barbarous murder.'

1752 On the fatal day, the prisoner was escorted by a strong military guard to the place of execution. He produced three copies of a paper containing his dying speech; one of these he delivered to the civil magistrate, another to the commander of the troops which guarded him, and the third he read with a distinct voice to a great multitude of spectators which had come to witness his execution. And in his speech \*, which was very minute, he denied all accession to, or previous knowledge of, Glenure's murder.—The minds of the spectators, already engaged with the circumstances of this extraordinary trial, and the awful scene which was before them, were struck with superstitious terror at the tempest which raged during the time of the execution.—And the prisoner went through the last act of this tragedy with composure unalloyed with meanness, and fortitude not tinged with arrogance.

A criticism upon the nature and amount of the minute detail of circumstantial evidence led in this prosecution would fatigue the reader, and swell this trial to a size unsuitable to this work. I shall therefore briefly call the reader's attention to the leading circumstances tending to the conviction or acquittal of the prisoner.

The

\* Scots Magazine, vol. 14. p. 509. 525. 555. The speech is printed in this Magazine. Mr Stewart complains in it of the harsh and unfair treatment he suffered from the prosecutors, from the 16th of May, that he was apprehended without any written warrant, and carried prisoner, under cloud of night, to Fort-William, till the end of his trial.

The guilt charged against him is, that he was accessary to, and *art and part* in conspiring the murder of Glcnure, which was perpetrated by Allan Breck Stewart. Therefore, if there be not legal evidence that Allan Breck was the murderer, the charge of guilt vanishes, and it becomes perfectly unnecessary to consider the second proposition, viz. the prisoner's accession to the murder alledged to have been committed by Allan Breck. 1752

The only positive evidence relative to the perpetrator of this murder, is, that it was committed by 'a man with a short dark coloured coat,' and this is, in some respect, applicable to Allan Breck, as he was seen on the day of the murder, not far from the place where it was committed, dressed in a dun coloured great coat, and dark short coat. Allan Breck did frequently use threatening expressions against the deceased, and he did display the most indubitable signs of fear and guilt. But it is certain that his guilt, as a deserter, was heightened by his having been in the rebellion, and that his life was thus forfeited to his country; and the reader must determine with himself whether Allan Breck's fear of being apprehended proceeded from the desertion, of which he was notoriously guilty; or from this recent murder, of which, even independent of guilt, he had reason to conclude he would be suspected, on account of his connection with the family of Ardsziel, and of his fugitive and wandering life.

The circumstances from which the prosecutors inferred the prisoner's accession to this murder, may perhaps be fit enough to excite a suspicion of guilt in the speculations of the closet, but I apprehend them to be in the highest degree improper and dangerous, to be produced as evidence to affect the life or fortune of a prisoner in the tribunal of justice.

1752 The circumstances were shortly these: That Allan Breck, a kinsman of the prisoners, paid him a visit three days preceding the murder, sat with him and other company at supper, and slept in a barn: That Allan Breck put off his French clothes, dressed himself in a short coat belonging to the prisoner, or his son, ere he went to work in a field of potatoes; and next morning, when he left the house, went off dressed in the short clothes, and left his own; which, by the bye, he had done upon former occasions: That the prisoner, upon the search which was to be made for the murderer of Glenure, supplied with money, for the purpose of making an escape, his kinsman, Allan Breck, a fugitive, and a deserter: That the guns about the prisoner's house were hid, in a country where it was a crime to be possessed of arms: That the prisoner had used repeated expressions of resentment and of vengeance against Glenure; and that, after the murder, Allan Breck expressed his apprehension lest the prisoner or his son should be betrayed by their own tongue.

These are the amount of the evidence against the prisoner, which resulted from a scrutiny, by no means warrantable, into his life and conduct. The rigorous durance in which he himself was confined, and his son and servants being kept close prisoners in separate apartments, have been already mentioned. His repositories were thrice searched by the prosecutors relations\* without legal warrant, and attended by a military force: And every circumstance of his life and conversation, for a period of two years, was raked into with the most invidious industry. But this last mode of extracting evidence, and the result which flowed from it, require to be particularly considered.

Where

\* Trial of James Stewart, p. 34. Edinburgh, printed for Hamilton and Balfour, 1753. This publication, which contains the speeches of the Lord Justice General, and of the counsel, as well as the whole of the recorded trial, swells to the enormous bulk of 437 pages 8vo.

Where there is no positive evidence demonstrating the author of a mischief which an individual has sustained, menacing expressions may be justly admitted, along with other circumstances, as a link of the chain of circumstantial evidence against a prisoner. But, to lay much stress upon general expressions of resentment, and even of vengeance, such as, 'I wish he were hanged;' 'he is unworthy to live;' 'I will cause him to repent it,' or the like, would lead to a conclusion equally false and fatal. In social intercourse, the energy of our expressions of applause or of censure, of gratitude or of resentment, is often proportioned to the strength rather of our language than of our feelings. But, if a deep and mortal blow be meditated, I apprehend the deviser, instead of suiting his expressions to his purpose, would endeavour, by the smiles of his countenance, and the smoothness of his language, to conceal the rancour of his heart.

Let any person who has laboured under embarrassed circumstances, who has felt for the distress, for the impending ruin of his family; who has been chastised by the rod of power, reflect upon the expressions of resentment and of anguish which may have escaped him when his heart was open to a friend, when his passions were inflamed by liquor; and then let him condemn (if he can) the prisoner as a murderer, on account of the expressions of vengeance which are proved against him in the course of this trial.

The only part of the evidence affecting the prisoner which makes a serious impression upon me, is what fell from Allan Breck in the wood of Koalifnacoan, that he was afraid lest the prisoner's son 'might be betrayed by his own tongue \*.' The following reasons,

F f 2

however,

\* Unless that rule in the scriptures, of visiting the sins of the father upon the children.

1752 however, lead me to doubt the safety and propriety of making such an expression as this the foundation of taking away the life and fame of a prisoner: *1mo*, The witness who deposed to it trembled under the rod of power; he had been confined to close custody in Fort-William, and perhaps dreaded that he himself might be brought to trial for this murder. *2do*, The smallest variation from Allan Breck's expression, proceeding from misconception, or want of memory in the witness, or from the mistake of the interpreter who translated the evidence, might make an important difference in the conclusion to be drawn from Allan Breck's words. For instance, if Allan Breck, instead of saying he was afraid the prisoner's son 'might be betrayed by his own tongue,' did say, he was afraid the prisoner's son 'might fall a victim to his own tongue;' in this case, Allan Breck would have said no more than what was notoriously just and true, viz. that the resentful expressions used by the prisoner and his son against Glenure would bear hard upon them.

This trial, upon the whole, points out the propriety of two alterations being adopted in the criminal law of Scotland: *1mo*, That the prisoner should here, as in England, have a power of challenging a certain number of the jurors, without cause assigned. *2do*, That, in the Highlands of Scotland, where the districts

children is to be *inverted* by our law, and the sins of the children are to be visited upon the father, I entertain a faint suspicion that a mistake has been committed in the course of this trial, and that (if any of the family was guilty) the prisoner has been hanged instead of his son Allan. The circumstances of the little gun in the depositions of Dugald and John Beg Maccoll's, and Allan Breck's fear lest the prisoner's son's tongue should betray him, afford a more pointed evidence against the son than any which is adduced against the father. Besides, it is worthy of remark, that the prisoner's son had a coat precisely of the same make and colour with that which Allan Breck wore on the day Glenure was murdered.

districts are peopled by tribes or clans, between many of which in- 1752  
 veterate feuds did subsist, a prisoner should have it in his power to  
 say, 'I who am a Stewart will not be tried by a jury of Camp-  
 bells, for the murder of a Campbell;' or, 'I who am an offi-  
 cer of excise, will not be tried for the murder of a smuggler, in  
 a country where all the merchants, farmers, &c. are smugglers.'  
 And, as the lawyers for the crown have it in their power to  
 bring a prisoner from the district where he lives, or where a  
 crime has been committed, to stand trial before the High Court  
 of Justiciary at Edinburgh, so a prisoner likewise should have it  
 in his power to avoid the prejudices which may be entertained  
 of him in a particular district, and to claim being tried at Edin-  
 burgh.

*Malcolm M'Gregor, alias John Grant, for the Murder of John  
 Stewart, both of the Parish of Glengairn, in Aberdeenshire.  
 —Doctrine of Prescription of Crimes Established.*

THE prisoner was brought to trial before the Circuit Court 1773  
 of Justiciary, at Aberdeen, in Spring 1773; but, as he  
 pleaded in bar of the action, a general point of law of great im-  
 portance, his Majesty's Advocate-depute *deserted the diet*\*, re-  
 committed the prisoner upon a new warrant, and served him  
 with a new indictment; upon which he was tried before the  
 High Court of Justiciary, at Edinburgh, on the 26th of July  
 1773. He was charged with enticing John Stewart tenant in  
 Abergairn, on the evening of Christmas day 1747, to a remote  
 place, and there, from premeditated malice, striking him from  
 behind

\* *i. e.* dropped the prosecution.

1773 behind with a stick, and then stabbing him in the left side with a durk, so that he died that same night \*; and that, before his death, he declared it was the prisoner who had thus assaulted and wounded him: That the prisoner immediately fled, changed his name from Malcolm M'Gregor to John Grant, and had not since been seen in that part of the country, except to a few persons privately, and under cloud of night.—And that a warrant for apprehending him was issued by the late Lord Minto, on the 21st of January 1748; but, by reason of the prisoner's changing his name and place of abode, he never could be found till lately, that he was discovered and apprehended by the sheriff of Edinburgh.

The celebrated Alexander Lockhart, counsel for the prisoner, represented to the Court, that no action could lie upon this indictment; because the crime charged in it was said to have been committed in the year 1747, and consequently *was prescribed by the lapse of more than twenty years*. Counsel were heard at great length. The Court then ordered both parties to lodge *informations* †, in order to their being recorded in the books of adjournal.

In the information upon the part of the Lord Advocate, it was argued, *1mo*, That the vicennial prescription of crimes in the Roman law, which the prisoner made the foundation of his plea, did not extend to every species of crime; but that, in those of a deeper die, such as parricide, and some others *inter graviora delicta*, no prescription took place. *2do*, That the civil law

\* Records of Justiciary, 26th July, 9th August 1773.

† A law case in Scotland, which contains both the fact and the argument, is sometimes entitled an *information*, and sometimes a *memorial*.

law was no part of the common law of Scotland, although its rules were often adopted, and its principles much respected, in such cases as did not fall within the enactment of our statutes, the decisions of our Courts, or the opinions delivered in approved systems of our law. His Lordship next maintained, that, in the common law of Scotland, there was no vestige of a prescription in crimes; for the punishment of murder was a part of the most ancient common law of Scotland; but our old treatises made no mention of the doctrine of prescription; nay, the word prescription was not to be found till the year 1469, when it was introduced in a statute; and, even then, it related to civil obligations, and not to crimes.— His Lordship maintained, that the opinions of our commentators upon this head, which were urged in behalf of the prisoner, viz. those of Sir George Mackenzie, Mr Forbels, and Mr Erskine, were neither sufficiently explicit, nor of sufficient authority, to make the prescription of crimes be deemed a part of our law; and, on the other hand, Lord Fountainhall laid down this doctrine, that the vicennial prescription of crimes had no place with us. And that, in the whole of our records, no judgment could be found sustaining this plea in bar of action, while there were many instances of persons being tried for crimes more than twenty years after their commission. Farther, it was contended, that, by *the law of God, which is a part of our law*, there is no prescription of murder. And, *lastly*, That it would be highly inexpedient to establish a defence in bar of prosecution against a murderer; because nothing contributes more to check murder, and other atrocious crimes, than an impression upon the minds of the people, that, when once committed, no lapse of time will expiate the offence in this world, or prevent the punishment. There was also subjoined to the information for the prosecutor, a list of cases from the books of adjournal, where prisoners were  
 tried

1773 tried at the distance of more than twenty years from the commission of the crime. They were mostly in trials for witchcraft, and one of them for incest committed thirty-five years before.

It was stated in the information for the prisoner, that, although conscious of innocence, and certain that he could not be convicted by a fair proof of the crimes laid to his charge, his counsel had thought it their duty to plead the obvious defence of prescription, in bar of this prosecution:—That, in a period of twenty-five years, which had elapsed between the death of John Stewart, whom the prisoner was accused of having murdered, and his commitment, in order to stand trial, he had resided constantly in Scotland, and chiefly in Aberdeenshire, the theatre of the alledged crime; that he had publicly carried on business, in an honest and industrious manner, and with an unexceptionable character; and that the change of his name, and place of abode, was owing to the attempts of a recruiting officer to trepan him as a soldier, which induced him to lay aside the name of Macgregor, which was proscribed by law, and to assume that of Grant.

Upon the point of law, it was argued, that a vicennial prescription of crimes was an established doctrine of the Roman law; and, in support of it, several texts from the *Corpus Juris Civilis*, and other authorities, were quoted; particularly, *Cod. lib. 9. tit. 22. l. 12.*; *lib. 1. tit. 7. l. 4. digest.*; *lib. 44. tit. 3. l. 13.*; *lib. 49. tit. 14. l. 1. § 4.*; *lib. 48. tit. 17. l. 3.*; *lib. 48. tit. 16. l. 11*; and *Mattheus, Tit. de Praescriptione Temporis*; *Voet. Tit. de Diversis et Temporalibus Praescriptionibus, § 6.*; *Cujacius, vol. 4. col. 1338.*; *Heinccius ad Pandectas, lib. 44. tit. 3. § 370. &c. &c.* It was maintained that the civil law was one of the fountains of our jurisprudence, and, in reality, a part  
of

of it \*, where our own statutes, customs, and the decisions of our judges, are silent. And the authority of our commentators on the Scots law, particularly of Sir George Mackenzie, and of Mr Erskine, was quoted in support of the prescription of crimes. The opinion of Fountainhall was said to refer to a case of murder which had happened only eighteen years before, where, consequently, the vicennial prescription could not take place; and that even Fountainhall admitted, that lapse of years might in some measure expiate a crime. 1773

As to the list of cases given in by the Lord Advocate, where prisoners were prosecuted at the distance of more than twenty years from their offence, it was observed, that most of these were for witchcraft, which, like apostacy, is a *crimen continuum*; for it was held,—*once a witch, always a witch*. Besides, that, in the prescription of crimes, the same rule must take place as in the prescription of accompts, viz. that it runs not from the first, but from the last article. As to the case of incest quoted for the prosecutor, where a man was hanged, at the distance of thirty-five years, for lying with his wife's daughter †, it was answered, that no counsel appeared for the prisoner; that no defence was offered for him; and that it happened in times worthy of such a  
G g. sentence,

\* To see this publicly contradicted must excite a smile in a person who has undergone a professional education for the Scottish bar, or who is in the least acquainted with the proceedings of our courts of justice. Before a young gentleman is admitted to the bar, he undergoes a strict examination upon the civil law: And it is only within these forty years, or thereabout, that it was thought necessary to ordain a candidate for the profession of a lawyer to undergo an examination upon the Scots law, properly so called.—The information for his Majesty's Advocate against the Glasgow rioters, A. D. 1725, has these words: 'By the Roman law, which is the common law of this kingdom;' Records of Justiciary, 25th September, 1725; † See Index, article *Incest*.

1773        sentence, viz. those of fanaticism and usurpation. The counsel for the prisoner also referred to the case of Macleod \* of Affint as a precedent in support of the prescription of crimes. The case was this; Macleod was tried on the 2d of February 1674, upon an indictment charging him with several treasonable crimes; viz. 1<sup>st</sup>, With betraying, under trust, the late Marquis of Montrose, his Majesty's Commissioner, and Lieutenant-General, and delivering him a prisoner to the rebels in A. D. 1649, who murdered him; for which the said Macleod of Affint received a reward of 400 bolls of meal. 2<sup>d</sup>, With having, in A. D. 1654, assisted the English rebels commanded by General Morgan in burning and plundering the north. 3<sup>d</sup>, With having, in A. D. 1669, exacted arbitrary taxations upon all shipping that came to anchor in any of the creeks belonging to the prisoner. And, 4<sup>to</sup>, With having, in A. D. 1670, fortified and garrisoned his house of Ardbreck, and defended the same against the sheriff of Sutherland, who had his Majesty's warrant to eject him. Now, although the two first articles in the indictment are by much the deepest of the crimes with which Macleod of Affint was charged, his Majesty's Advocate declared, 'he did not insist upon the two first crimes 'libelled *but only as aggravations.*' Which the prisoner's counsel alledged could proceed alone from the crimes being prescribed.

The counsel for the prisoner likewise argued, that the admitting of a perpetual right of actions for crimes was inexpedient in every country; and, considering the nature of our criminal law, was peculiarly so in Scotland. It was alledged, that the design of punishments respected either the criminal or the public. With respect to the criminal, the purpose is to produce an amendment in his life and manners, or to cut him off from society, if  
the

\* Records of Justiciary, February 2. 1674.

the enormity of his crime indicates such depravity that he may be looked on as incorrigible. But this cannot be answered by prosecuting a criminal after the years of prescription; for, if the seeds of guilt had not been eradicated from the mind, the various agitations to which a man is exposed from the occurrences of twenty years, must have made them sprout forth into fresh outrages against society. And, if the revenge of a private prosecutor demanded an expiation of guilt, what more terrible punishment, than that a criminal should live under the continual apprehensions of an ignominious death for a period of twenty years?—To drag a man thus situated to the scaffold, after a regular, industrious, and exemplary life, would as little suit the end of punishment which respected the public, as that which respected the criminal: For, with regard to the public, the end of punishment is to deter others from committing the like offence; but no good impression can be stamped upon the public, when their compassion for the criminal exceeds their horror at his crime, which must be the case when the memory of an offence is obliterated \*, while, at the same time, the inoffensive, perhaps exemplary, conduct of the sufferer, is consistent with the know-

G g 2

ledge

\* Within these four or five years, a person returned to this country with an affluent fortune and respectable character, who, in an early period of life, absconded on account of his being concerned in the mob which hanged Porteous, A. D. 1736. What good purpose could it serve to indict this man capitally upon his return? (For an account of the Porteous mob, see Arnot's History of Edinburgh, p. 206.) Or what good purpose could it *now serve* to bring a prosecution against the rioters who, in A. D. 1779, burned the Popish chapel, committed house-breaking and robbery upon the priest, and assaulted the houses of many respectable citizens whom they supposed to befriend the Popish bill? Yet, had not the public prosecutor, from whatever motives of lenity or timidity, omitted to raise a prosecution for hanging the ring-leaders in this scene of tumult and devastation, *I firmly believe that the burning of London, A. D. 1780, would not have happened.* At least it is certain, that a popular orator, in haranguing his friends previous to this dreadful event, would not have had such cause to boast of *the gallant example of the Scots.*

1773 ledge of those who behold his sufferings. The laws which relate to property, wisely regarding the security of our fortune against obsolete and endless claims, have established a prescription of every species of *civil action*; much more ought the laws to secure the peace of mankind, by limiting the right of *criminal action*, which at one blow may complete the threefold ruin of fortune, of life, and of fame. Besides, a person suspected of an offence may lie under great disadvantages by the prosecutor's having an unlimited power of choosing his time of action. He may bring it at a period when there is such a spirit of violence in a country against a man, a party, or a crime, that, in the ferment of peoples minds, accusation may be equal to conviction: And, besides, in a long lapse of time, the death or absence of witnesses may deprive a prisoner of his plea of *alibi*, provocation, self-defence, that the deceased died a natural death, &c. &c.

If prescription of crimes be expedient in general, it is so in a special manner in Scotland, whether we regard the powers of the prosecutors, or the nature of our laws. As to the former, the Lord Advocate may prosecute any person for any crime he chooses: His Lordship is not restrained by the necessity of a grand jury's finding a bill; nor is a coroners inquest called upon the body of a person deceased to ascertain the cause of a sudden and suspicious death.—It is wretched argument indeed, to alledge that this power is not dangerous, if restrained by no limits of prescription, because of the benignity of the Prince, or the personal character of the gentlemen who are appointed to the important office of Lord Advocate.—Salutary laws are not made in tyrannical times, but in a mild and equitable reign. Thus the opportunity of guarding against oppression, in general, occurs, when there is the least prospect of oppression being at hand.—But, however safe we may be from oppressive prosecutions at the instance

instance of his Majesty's Advocate, what security have we but 1773  
the lapse of time, against the invidious actions of private prose-  
cutors, who, instigated by malice, or with a view to extortion,         
might call upon a man to answer for the *sins of his youth*, after  
he had become a grave and respectable citizen, and the father of  
a numerous family? For prosecution is granted, in its utmost  
latitude, either to the party injured, or to his nearest heirs; nor  
can the Lord Advocate with-hold his *concurrance* \*.—Should  
connubial love be turned into deadly rancour, either the husband  
or the wife may prosecute the other for adultery *to the effect of a*  
*capital punishment* †.

The healing hand of prescription is no less expedient in rela-  
tion to the nature of our laws. To say what is a capital crime  
by the law of Scotland, and what not; or, at least, what has  
been, or has not been so, within these hundred years, is no easy  
matter ‡. Our indictments are laid sometimes on the statute, some-  
times on the common, and sometimes on the Mosaick law alone.  
Many of our penal statutes are wild, tyrannical, and incorrect;  
and in few of them anterior to the present century, is there a li-  
mitation of the time of raising prosecutions upon them.—Hap-  
pily the Scottish treason laws are now abolished, and those of  
England substituted in their room. Prosecutions for witchcraft  
too are driven to the realms of night. But still the laws against  
Popery, blasphemy, duelling, adultery, and suicide §, may be  
used

\* Consent to the prosecution.

† See a remarkable trial of this sort

*infra*. Index, Adultery, Haily against Frazer.

‡ If the reader is already

satisfied of this from some of the trials for treason and murder presented above,  
he will not see occasion to alter his opinion, from a perusal of the subsequent part  
of this work.

§ As the penal consequences of this crime can only take place  
after death, if the right of prosecuting for the personal estate of the deceased be  
not limited by prescription, it must *continue for ever*.

1773 used as ample engines of oppression.—Besides, there truly is no reason why either the public or private prosecutor should be indulged with an unlimited time of bringing his action. If the accused absconds, his flight will not cut off the right of prosecution; for, if he does not appear in Court to answer to the indictment which may be brought against him, the sentence of outlawry, which passes of course, will preserve to the prosecutor a perpetual right of action; therefore, the prosecutor may blame his own negligence, if he has lost his right of prosecution, by omitting to obtain a sentence of outlawry against the accused. And, if no symptoms, no suspicion of guilt, have been discovered in a period of *twenty years*, or what is the same, none that can justify the raising a prosecution, it is better that the prosecutor should then be deprived of his right of action, than that a person should be called upon to defend himself against a capital indictment, at any distance of time, however so remote.

The Lords having considered the informations for his Majesty's Advocate, and for the prisoner, pronounced this interlocutor: 'In respect it does not appear that any sentence of fugitation passed against the pannel, they therefore sustain the defence, and dismiss the indictment and the pannel from the bar.'

I remember to have listened with attention to the pleadings in this cause, and to have looked with anxiety for their Lordships judgment. The satisfaction I felt when it was pronounced, is not abated upon reflection. This judgment, indeed, is of a very different cast from the general stile of the decisions of this Court in the last century.—It is a just, but trite remark, that a wise system of laws tends to humanize manners; but it is no less true, that liberality of sentiment, and gentleness of manners, humanize the rigorous doctrines and discipline of the law.

## OF TUMULT WITHIN BURGH.

*David Morwbray shoemaker, for exciting a tumult in the city of Edinburgh, and rescuing a baker whom the hangman was whipping through the Canongate, by order of the Magistrates.*

THE preamble to one of our old statutes emphatically de- 1686  
scribes the disorders which prevailed in this country from  
one of the worst of political evils, *the relaxed arm of the civil  
magistrate.* ‘ Forfameikle (says the statute) as the oversight and  
‘ negligence of the civil magistrates, and judges ordinar within  
‘ this realm, in putting of decreets to execution, punishing of  
‘ malefactours and rebels, and utherwise using of their offices,  
‘ as becummis, partelie for regard, and feare of strang pairties,  
‘ and hazard of their own lives; and pairtly throw want of suf-  
‘ ficient preparation for that effect, is the original and principale  
‘ cause quhair fra \* the great confusion and disordour of this  
‘ lande in all estaites proceedis †.’ Therefore by this, and other  
acts of parliament, it is statuted, that the raising or assembling  
within borough, conventions of the people, without special li-  
cense of the Sovereign, or authority from the magistrates of the  
borough; especially, if such people should presume to arm them-  
selves,

\* From which.  
c. 184. Parl. 18. c. 17.

† Mary, Parl. 9. c. 83.; James VI. Parl. 13.

1686 selves, to display banners, *to beat the drum*, or sound the trumpet, or to make use of other warlike instruments whatever, it is statuted, that persons thus offending shall suffer the pain of death. It is further enacted, that, whoever shall disobey and resist the authority of the *Magistrates of Edinburgh*, or their officers, in the execution of their duty, shall suffer the like penalty.

The prisoner was tried on these statutes.—On Sunday the 31st of January 1686, a rabble of journeymen and apprentices in Edinburgh, leagued with some students at the University, among whom fanatical principles had of late made an alarming progress †, assembled for the purpose of insulting and interrupting those of the Popish persuasion in the exercise of their religion. Their indignities were directed at the Chancellor's Lady, and other persons of that faith, when dismissing from their place of worship. The mob, many of which were armed, pelted the members of that congregation with stones and dirt, rifled some of them of their clothes, and maltreated them in their persons; and then proceeded to the High Street of Edinburgh, where, with iron-bars, and other instruments, they attempted to break open the houses of several of the inhabitants, and did resist the Magistrates of Edinburgh, and the

† Upon Christmas-day, A. D. 1680, the Magistrates of Edinburgh, from that decent respect which was due to the Duke of York, who was then in the city, interrupted the students in their solemn procession of a Pope-burning; so that they were fain to burn him post-haste in an obscure part of the town. On the 11th of the ensuing month of January, the house of Priestfield, the seat of Sir James Dick, Lord Provost of Edinburgh, was willfully set on fire, and with all the furniture, burnt to the ground, not without the most pregnant suspicion that it was set on fire by some students at the University. Arnot's Hist. of Edinburgh, p. 392.

the Commander in Chief of his Majesty's forces, and the troops under their command, and wounded several of the soldiers who were assembled in order to disperse the mob. 1686

The military having dispersed the mob, and several of the rioters being apprehended, the magistrates, next forenoon, ordained one Grieve, a baker, an active person in the tumult, to be instantly whipped through the city by the common executioner. To save the delinquent from undergoing the punishment awarded by the magistrates, the prisoner, Mowbray, and his associates, collected a mob afresh, rescued the baker from the town officers and the executioner, and carried him off in triumph.

The prisoner was served with an indictment, charging him with having transgressed the statutes already specified, by being engaged in this tumult; and his Majesty's Advocate declared, that he restricted the libel against the prisoner to his 'accession to the tumult on Monday in the forenoon, in rescuing the baker from the execution of justice.' The Lords found the libel, as restricted, relevant to infer the pain of death.

#### T H E P R O O F.

The prisoner judicially declared, that he was present at the tumult libelled, and assisted in rescuing the baker from the town-officers. He craved God and the King's pardon for his offence, declared that he was heartily sorry for it, and came in the King's will.

George Macfarlane, one of the town-officers of Edinburgh, deposed, That, on Monday last, as he was employed by the magistrates to execute the sentence against Grieve, the prisoner was

H h one

1686 one of the mob which rescued him. The deponent called out to the prisoner to be gone; but this he refused, saying, 'he would take part with the *trades*;' and, upon Grieve's being rescued from the town officers, the deponent saw the prisoner take Grieve by the hand, and march off with him amidst the mob.

John Thomson, town-officer, deposed, That, on Monday last, he saw the prisoner amidst the mob which threw down the town officers, and rescued the baker, and heard him declare he would stand by the *trades*.—Two more witnesses swore to the same purpose.

The jury unanimously found the prisoner's accession to the tumult, in rescuing the baker from the execution of justice, proved by his judicial confession.—The Court adjudged the prisoner \* to be taken to the Cross of Edinburgh on Wednesday next, the 10th of February, and to be hanged on a gibbet till he be dead. It appears that the Privy Council granted the prisoner a reprieve till a short day. Whether he got any farther respite, or was then hanged, is uncertain, as the records of Privy Council for A. D. 1686 are missing. One Keith, a fencing-master, was tried on the 26th of that month for accession to the same tumult, was convicted, and was hanged at the Cross of Edinburgh on the 5th of March.

The discipline manifested in this trial, conviction, and execution,

\* Fountainhall says two persons were tried this day for being concerned in this tumult; but he does not mention their names. The records of justiciary testify, that no person was tried or outlawed on account of this tumult, at this time, except Mowbray, nor at any other time that I know of, except on the 26th of that same month, when Keith, whose trial is also mentioned by Fountainhall, was tried and convicted. See Fountainhall's Decisions, vol. 1. p. 401. 407.

tion, when compared with a recent occurrence, impresses us with 1686  
no very favourable idea of the present times.         

The tumultuous disposition of the rabble \*, impatient at the price of grain after a succession of bad crops, had broke forth in a variety of outrage that required an exemplary and decisive check. William Spence, a matts in the second battallion of artillery, was prosecuted by his Majesty's Advocate before the High Court of Justiciary at Edinburgh, on the 13th of December 1784. He was charged in the indictment with being an active person in assembling a mob, on the 7th of June preceding, at the village of Ford, about ten miles from Edinburgh, for the declared purpose of demolishing a distillery †;—with exciting a number of colliers to join the mob;—with breaking into the distillery, and actually setting fire to one or more of the buildings with his own hands ‡.—As the evidence in this trial is not recorded, I have it not in my power to speak from my own knowledge as to the evidence of Spence's guilt: But, notwithstanding that the crime was *willful fire-raising*; notwithstanding I have been informed by every person I have conversed with who was present at the trial, that the evidence of his guilt was complete, 'the jury, by a great plurality of voices, found the pannel *Not Guilty*.'

H h 2

The

\* In the prospectus of this work which I published, I proposed to lay before the public the trial of the malt-tax rioters for pillaging and demolishing the house of Mr Campbell of Shawfield, A. D. 1725; but, upon fully examining and considering the charge against the prisoners, the informations for his Majesty's Advocate, and them, the interlocutors of the Court of Justiciary upon the defences stated for the prisoners, the proof led in the cause, the verdict of the jury, and the judgment of the Court; I say, upon a consideration of the whole circumstances, this trial, according to my ideas, is in many respects improper for publication. † This distillery was burnt to the ground. The damage was estimated at L. 7000. ‡ Records of Justiciary, December 13. 1784.

1686 The consequences to a country, if juries will be so preposterous as to acquit a prisoner contrary to evidence, for a crime so dangerous to society, are too obvious to require to be enlarged upon. I must, however, take the liberty to observe, that it appears requisite that the mode of summoning juries in this city should undergo some alterations. The number of trials by jury in Edinburgh, before the Courts of Justiciary, Exchequer, &c. is considerable, and the jurymen are generally chosen from among the merchants, shopkeepers, and tradesmen. Those who follow the profession of the law\* are never called. The landed gentlemen, or freeholders, of the three Lothians, are seldom or never summoned, except in the trial of a *landed* man. The inhabitants of the town of Leith, although men of consequence in the mercantile line, are seldom called but in trials which have some relation to maritime affairs. A practice has also crept in of not summoning upon a jury, gentlemen who have preferred a residence in Edinburgh to living at their estates in the country, and who, consequently, cannot be called to attend the circuits in their respective districts. By these means, the rotation of duty of sitting upon jury comes very frequent upon that class of people which are in use to be called, and the duty imposed upon them is therefore *heavy and unequal*. By these means, also, *improper persons* are sometimes summoned to sit in jury upon a prisoner: For this important article in the administration of justice is generally left to inferior clerks.—It is perfectly well known that there is a description of men in this city, of whom it could not be expected that any power of testimony would lead them to convict a prisoner of certain crimes †, yet who (it is believed) would listen with gloomy

\* The Faculty of Advocates claim an exemption; and those who practise at the bar are undoubtedly entitled to it.

† I humbly think, that, in trials of difficulty.

gloomy joy to criminal accusations of a nature that no Lord Ad- 1686  
 vocate would now dream of raising. By extending, therefore,   
 the classes of people from which our jurymen are to be chosen,  
 the burthen will become the easier upon those who discharge  
 this important trust, and the danger will be avoided of having  
 crimes of the most pernicious tendency tried by a jury of men  
 illiberal in their sentiments, and violent in their prejudices, who,  
 in the trial of a prisoner, consider more *the nature of the crime,*  
*than the strength of the evidence.*

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I have heard it urged as an apology for the jury who sat upon  
 Spence, in having given such a verdict, that they would have  
 pronounced a different one, had it not been, *that, of late, too*  
*little respect has been paid to the opinions of jurymen when recom-*  
*mending a convict to mercy.* This, I know, alludes to the case of  
 James Andrew, who was convicted of robbery, and condemned;  
 and who, notwithstanding that the jury unanimously recom-  
 mended him to mercy, was executed in terms of the sentence,  
 upon the 4th of February 1784. As this has been a topic of  
 conversation, and with some, of animadversion, I shall state what *I*  
*know* concerning it.—The jury gave a recommendation in favour  
 of the prisoner, setting forth their reasons for so doing: The Court  
 made a report of a very different nature. As I have only seen the  
 former,

difficulty and importance, the proper officer should have it in his power to send up  
 to the Court a list of forty-five men whom he thinks intelligent and independent;  
 and that, when the judges name the fifteen who are to sit upon the jury, the prison-  
 er should have it in his power to challenge a third of them without any cause as-  
 signed.

1686 former, I cannot form, far less can I presume to deliver an opinion between these opposite sentiments of the Court and jury. My purpose then is but to show, that the case was accurately and fairly laid before his Majesty. It appears from Lord Sydney's letter to the Lord Advocate, of the 21st January 1784, that Lord Kennet's 'report upon the case, the minutes of the trial, and the evidence given thereupon, together with the commendation of the jury,' were laid before the King, who 'having maturely considered the case of the convict, does not see sufficient grounds for extending his royal mercy to him.' And Mr Chalmers, the solicitor at London who corresponded with Mr Bruce, the agent for the convict, writes to him thus: The under secretary '*shewed me all the papers that had been transmitted from Scotland, and laid before the King.* Lord Kennet's report states very accurately the circumstances of the case, and mentions the recommendation of the jury, and the grounds they went upon; but adds, that he and his brethren did not think Andrew a proper object of the royal mercy; giving the reasons, and *shewing, that the arguments of the jury were not solid, in very distinct clear terms.*'—As the jury had a right to give a recommendation, so the judges were entitled to make a report; and no ground of complaint can arise from this case, unless it shall please jurymen to alledge that his Majesty is not at liberty to act according to his own judgment, in the exercise of the most sublime part of his prerogative.

But, even supposing that improper means had been used to withhold the royal mercy from Andrew, I cannot admit that this is any apology for the jury which sat upon Spence the matross, having pronounced a verdict finding him *not guilty*; for I consider him to have been a most unfit object of mercy; because, from the recent and repeated outrages of the rabble,  
and

and instances of timidity in the civil magistrate, none of the crimes which arise from the avarice or malignity of *an individual*, are so hurtful to society as this *contagious* spirit of fire-raising and tumult. And this prisoner, Spence, was not only reckoned by the *spectators* of his trial, to have been proved guilty as a ringleader in the tumult, but also as having set fire to the distillery with his own hands.—Lord Kennet made the above report, relative to Andrew, as President of the Court of Justiciary, in absence of the Lord Justice Clerk. His acuteness of apprehension, his solidity of judgment, and his accuracy in business, were acknowledged when he was alive; and are now *sealed* by the united regret of the Bench, the Bar, and the Public.

1686

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OF

## O F P I R A C Y.

*Trial of Captain Thomas Green, Commander of the Worcester, a ship belonging to the English East-India Company, and of fourteen of his crew, for Piracy and Murder, committed on a ship and its crew on the coast of Malabar.*

1705 **T**HE opposite lights in which the parliaments of England and Scotland viewed the institution of the Indian and African Company, in the latter of these kingdoms, and the ferment which arose in Scotland upon the ruin of this Company, and the loss of its settlements, have already been mentioned\*. The contests between the English and Scottish Companies, trading to the East-Indies, excited further animosities between these nations. The Annandale, a ship belonging to the African Company, had been seized in the Downs by the English East India Company, and the pressing instances with which the former solicited its restitution being disregarded, they procured an order from Government in Scotland, for seizing, by way of reprisal, this vessel the Worcester, which had arrived in the Forth. The vessel was conducted to the harbour of Burntisland. She was detained there in virtue of a precept from the Scottish Court of Admiralty; and an action was brought before that Court, at the instance of the African Company, for having the ship declared a lawful prize, on account of the East India Company's unjustly seizing and confiscating the Annandale.

While

\* See the Trial of Thomson and Auchmouty, p. 91.

While the Worcester lay thus under an embargo, the un-<sup>1705</sup> guarded speeches of the crew, in their cups or their quarrels, led them to be suspected of the crimes of piracy and murder committed upon a vessel and its crew in the East Indies, belonging, as was supposed, to one Drummond a Scotsman\*. The suspicions thus entertained were the cause of a precognition being taken of the affair, and the presumptions of guilt arising from this precognition, were so strong as to give occasion to the following trial.

On the 13th of February 1705, an act of the Scottish Privy Council was passed, authorising a prosecution against Captain Green and his crew, before the Court of Admiralty, and ordaining the Lord Chancellor to make application to her Majesty for a pardon to Charles May surgeon, Antonio Ferdinando cook's-mate, Antonio Francisco the Captain's man, George Haines steward, George Glen quarter-master, and Alexander Taylor foremast man.—The Privy Council, at the same time, appointed the Earl of Loudon, Lord Belhaven, Sir Robert Dundas Lord Arnhiston, Sir John Home of Blackadder, and John Cockburn younger of Ormeiston, assessors to Mr Graham the Judge Admiral.

The prisoners were brought to the bar on the 5th of March 1705. It was charged against them in the indictment, that, in the months of February, March, April, or May 1703, they did meet with another ship bearing a red flag, and manned with Englishmen, or Scotsmen, on the coast of Malabar, nigh Cal-

I i

licut :

\* Records of Admiralty, 5th, 13th, 14th, 16th, 21st March 1705. De Foe's Hist. of the Union, p. 46. Trial of Captain Thomas Green, Edinburgh, printed by Thomas Anderson, A. D. 1705.

1705 licut:—That they did, without any lawful warrant, or just  
 cause, attack the said ship in a hostile manner, with guns and  
 otherwise, boarded her, killed the men, and threw them over-  
 board, took the goods from on board of her, and lodged them  
 in the Worcester; and then disposed of the vessel thus piratical-  
 ly captured to one *Coge Commodo*. The indictment also contains  
 a minute narrative of the circumstances from which the prison-  
 er's guilt was inferred. But it were superfluous to insert them  
 here, as they will appear with greater propriety in the evidence  
 led in support of this prosecution.

A formidable band of counsel appeared both for the prosecu-  
 tor and the prisoners; and the following objections to the rele-  
 vancy of the indictment were stated, partly in written informa-  
 tions, and partly in pleadings at the bar.

It was pled for the prisoners, that the crimes libelled being al-  
 leged to have been committed by Englishmen on the coast of  
 Malabar, this Court had no jurisdiction; and the prisoners ought  
 to be remitted for trial to the proper courts of law in England.  
*2do*, That Henry Keigle, the ship's carpenter, and certain others  
 of the crew who were indicted along with him, being part of  
 Captain Green's crew, and under his command, could not be  
 put upon their trial, till the Captain himself was previously tried.  
*3dly*, That Captain Green could not be tried till John Reynolds,  
 and certain others of the prisoners who had received an indict-  
 ment, should have undergone a previous trial; because he the  
 Captain had cited them as exculpatory witnesses; and, in case of  
 their acquittal, was entitled to their evidence in his behalf: O-  
 therwise the author of a groundless and invidious prosecution,  
 while he raised an indictment against the principal offender, by  
 also comprehending, in the indictment, the whole exculpatory  
 witnesses.

witnesses as accomplices, might deprive a prisoner of the evidence in his defence. 4to, That the libel was too general and indefinite, as it did not specify the name of the ship alledged to have been pirated, the designation of the Captain, the names of the persons said to have been murdered, nor any circumstances by which the ship in question might be specially distinguished: Yet it is requisite that all these be set forth in a criminal indictment, not only in point of form, but of material justice; for otherwise a prisoner might be precluded of many solid defences, such as, that the ship said to have been pirated, was in an opposite quarter of the globe; that she still remained in possession of her lawful owners; that the persons alledged to have been murdered were still alive, &c. That it was the more necessary that the prosecutor should be obliged to specify the ship particularly, as the prisoner, Captain Green, having a commission under the Great Seal of England, empowering him to act in hostility against pirates, might actually have taken or destroyed a ship, and killed the men, without having done any thing contrary to law. 5to, That the indictment was laid in such manner, as to show that the prosecutor meant to establish the prisoner's guilt, not by positive testimony, but circumstantial evidence; and that the circumstances charged in the indictment were not such as necessarily to infer a conclusion of the prisoner's guilt. And, indeed, to hold a crime to be proved by circumstantial evidence, was extremely hazardous, and what many lawyers deemed illegal.

To these objections to the relevancy of the indictment, it was replied by the counsel for the prosecution, 1mo, That the jurisdiction of the Court was established by act 1681, cap. 16. which declares, that the High Court of Admiralty has the sole jurisdiction, in all maritime causes, civil and criminal, and against all

1705 persons foreign or domestic.—And, independent of this statute, this Court must possess a jurisdiction over the prisoners in the crime of piracy; for, if pirates are not liable to be tried in the country where they are apprehended, this class, the most lawless and desperate of men, would escape without punishment, or even trial, unless they happened to be apprehended in the country of which they were natives, or where the crime was committed. *2do*, and *3tio*, That the plea which had been urged in behalf of some of the prisoners, that they could not be tried till their Captain had undergone a previous trial; and the Captain's plea, on the other hand, that he could not be tried before certain of his crew, was a notable example of arguing in a circle; and, by admitting such objections as this, where more than one person was accused in an indictment, criminal process might be altogether stopped: That such of the prisoners as were of Captain Green's crew, could not plead the authority of their Captain, to exculpate them from the charge in this indictment, for no warrant could authorise piracy; and the prisoners were all indicted as *socii criminis*.—And although, if a prosecutor should adopt a measure so extraordinary, so villainous, as to comprehend both the alledged perpetrators, and the exculpatory witnesses, in one indictment, with a view to preclude the accused of their defences, this might entitle the alledged perpetrators to insist upon those of the defenders whom they were to summon as witnesses being previously tried; yet it behoved the perpetrators to specify a probable ground of the innocence of these intended witnesses; but the prisoner, Captain Green, had set forth no such ground of the innocence of those of his crew whom he proposed to adduce as evidence. *4to*, As to the objection of the libel being too general and indefinite, it was laid as specially as the circumstances of this remote crime would admit.—Piracy and murder were equally such, and alike punishable

able by the laws, whatever might be the names of the vessel pirated, and the persons murdered, or whatever nation they might belong to.—By admitting an opposite doctrine, it might be maintained, that a ship might be attacked and sunk, and her crew murdered, in the *Road*\* of Leith, before thousands of spectators on the opposite shores; and yet, although the evidence of this act of violence was so notorious, it could not be the foundation of a trial, if the perpetrators should have accomplished their villany so completely, as to have utterly destroyed the ship and her crew, and to have sent them both to the bottom of the deep. Neither was it requisite that the libel should be more minute as to time and place. In a piracy committed in the Indian ocean, where the total destruction of the sufferers rendered the proof of guilt extremely difficult, it was impossible to specify the precise latitude of the ship, or the day of the month when the crime was committed. Indeed, the day and place of the commission of a crime were not necessary to be specified in an indictment, unless they were charged as aggravations of the guilt; such as, that the crime was committed on a Sunday, or against a person in his own house; and, if a defender should require that day and place be specified, because he means to prove an *alibi*, it must be upon condition that he admit the crime charged in the indictment to have been actually committed, although he, by reason of the *alibi*, can instruct, that he was not the perpetrator. And the commission under the Great Seal of England, which Captain Green possessed, far from rendering a more special *condescendence* necessary, would, in the course of the trial, afford a strong presumption of the prisoner's guilt; for the commission required, that the Captain should keep a particular journal of any hostile attack he should make upon any vessel; and,  
by

\* The place where vessels ride at anchor off Leith harbour.

1705 by the journal produced by the prisoners, it did not appear that he had made any such attack.

The Court repelled the objections to their jurisdiction, and also the whole objections stated against the relevancy of the indictment; and found, that the same being proved, ‘*by clear and plain evidence*, relevant to infer the pains of death and confiscation of moveables.’

#### T H E P R O O F.

- Antonio Ferdinando, cook's-mate of the Worcester, a Black, deposed, that he believed in God, was born of Christian parents, and was himself a Christian:—That, about two years and a half ago, he came aboard the sloop belonging to Captain Green, the prisoner's ship, then on the Malabar coast, and entered into the service of Mr Loveday the purser. When sailing on that coast, he saw an engagement between the Worcester, her sloop on board of which the deponent was, and a ship manned with white men, speaking English, and bearing English colours; that is to say, colours of white, red, and black, such as the Worcester did bear.—Captain Green, Captain Madder the first mate, James Simpson the gunner, and others, to the number of about twenty men, manned the sloop. The sloop engaged the strange ship first, and the Worcester joined the engagement afterwards. It was a running fight of three days, and happened between Telli-cherry and Callicut. On the third day, those in the sloop boarded the strange ship, took her crew from under the deck, killed them with hatchets, and threw them overboard; and the said prisoners, Green, Madder, and Simpson, were among those who boarded the strange ship and killed the men. The deponent believes, that the men so killed, and thrown over-board, were about

bout ten in number. There were but few goods in her; these were carried aboard the Worcester, and consisted partly of China-root; and the vessel thus captured was manned by some of the Worcester's crew, carried to Callicoilan, and there sold for the service of a Malabar King, to a man bearing a Malabar name, and whose servant was called *Coge Commodo*.—He knew not what men, or whether any belonging to the Worcester or her sloop were killed; but he the deponent was wounded in the arm, and now shows the wound in Court.—Captain Madder said to the deponent, that, if ever he told any man, either white or black, of this engagement, he would throw the deponent over-board.—Deposed, That, during the engagement, Reynolds, the second mate, was ashore at Callicoilan, as the deponent believes.—This deposition is subscribed by the deponent in the Malabar character, and by Captain George Yeoman merchant in Dundee, his sworn interpreter.

Charles May surgeon to the Worcester deposed, That he sailed with this ship from England. When the vessel was on the Malabar coast, he was set ashore at Ibeck, and went some miles up the country to Callicoilan. About a fournight after, he heard firing at sea; and meeting with Coge Commodo merchant, and Francisco de Olivera interpreter to the Worcester, who had come that day from Ibeck, he asked them what meant the shooting? and they said, that the Worcester had gone out to sea, and was fighting with another ship. Next morning the deponent went to the shore, where he saw the Worcester riding at her former birth about four miles from the shore, and another vessel riding at her stern. Soon after, the Worcester's long boat came ashore in great haste; the deponent asked the boats crew what had brought them ashore, it not being usual for boats to come over the bar, on account of the greatness of the surge? and they answered,

1752 swered, that Captain Madder had sent them for a *pingueta*\* with  
 water, *because all their water had been spilled or staved the night  
 before.* The men told him they had brought in a ship with them,  
 but he did not speak to them in relation to any fight, for he  
 made no slay, but returned immediately to Callicoiloan, where  
 his patients were. About five or six days after, he went aboard  
 the Worcester for some medicines, and saw the deck lumbered  
 with goods in chests and bales. He said to Mr Madder, 'What  
 'have you got there; you are full of business?' upon which Mr  
 Madder cursed him, 'and bid him go mind his plaster box.'  
 There was a ship then riding at the Worcester's stern, which the  
 deponent was afterwards informed was sold to Coge Commodo:  
 Some time after this the Worcester's sloop came down the coast,  
 and Antonio Ferdinando, the preceding witness, was sent ashore  
 to the deponent at Ibeck. He was wounded in the arm; the  
 deponent took off the dressings; and the wound was a fracture,  
 which appeared to have been occasioned by a gun-shot. He  
 asked at Antonio who had dressed the wound and set his arm?  
 and Antonio said, that he had been set ashore at Cochin, and  
 dressed by a Dutch surgeon. Some time after, he went aboard  
 the Worcester and visited Antonio, and the other persons in the  
 ship who stood in need of his assistance. A wounded man, cal-  
 led Mackay, and another called Cumming, came to him at the  
 medicine chest. He asked them how they came by their wounds?  
 and Mr Madder hearing this, desired the deponent to ask no  
 questions; and forbad the patients to answer him upon their  
 peril. An altercation immediately took place between Mr Mad-  
 der and the deponent, who told him, he had no command over  
 the deponent. Madder replied, he would make his complaint to  
 one who had; and an order was speedily given for carrying the  
 deponent

\* A sort of little boat.

deponent ashore, and as speedily executed. Deposed, That this 1705  
happened in the months of January or February 1703.         

Antonio Francisco a Black, servant to the prisoner, Captain Green, deposed, That when he was aboard the Worcester on the Malabar coast, he heard the firing of guns from on board the Worcester, to the number of six, or thereabout. The deponent was at this time chained and nailed to the floor of the fore-castle; he had been so for about ten days; and continued thus confined in all about two months. Two days after he heard the firing, he saw some goods brought aboard, which Antonio Ferdinando, a preceding witness, told him had been brought out of a ship they had taken. Ferdinando told him also, that ten of the crew of the taken ship were killed; and showed the deponent a plaster on his arm, saying, he had been wounded aboard the Worcester's sloop when she took the other vessel.

John Brown shipmaster in Leith deposed, That he went on board the Worcester, by order of the Lords of Privy Council, when the ship was unloaded, and saw the hatches, which were fast and sealed, opened. Few or none of the packed goods were numbered or marked, although it is customary for goods to be so; and he, the deponent, never received any goods but what were marked, so that he might know to whom they belonged. Being interrogated for the prisoners, he deposed, That this is customary whether there be a supercargo aboard or not; and whether the goods belong to ten men, or one man. Being farther interrogated for the prisoners, Whether it might be owing to the pepper being spoiled and heated, and the goods much damaged, that they wanted the mark? deposed, That, where the goods were damaged, the bales were rotten to pieces, but, where

1705 the goods were entire, the bales and packages wanted both number and mark.

Archibald Hodge, shipmaster in Leith, deposed, he was on board the Worcester, when she was rummaged by order of the Privy Council, and saw the goods unloaded. Most part of them wanted both number and mark, which is nowise common or regular in any ship the deponent has ever seen; but he never saw an East India ship unloaded before.

John Glen goldsmith, deposed, That last summer, the second day after the Worcester came into Leith Road, he went aboard that ship.—When in the cabin with Captain Madder and one Hammond, who is now in England, Madder took a seal out of his pocket, and asked the deponent what he thought of the *Scots African and Indian Company's arms*, and put the seal in his hand. It was about the size of a half-crown piece, had a handle of *lignum vitæ*; and there were engraved on it a St Andrews cross, a dromedary, with a castle on its back, a ship, with a rising sun above the helmet, and two wild men for supporters.

James Wilkie taylor, deposed, That, in October last, after Captain Green's ship was brought into Burntisland harbour, the deponent went there with his mother, with a view to get intelligence concerning his brother, who had gone with Captain Drummond to the East-Indies. The deponent fell in company with the prisoner George Haines, at the house of Mrs Seton, and asked him, Whether he had seen Captain Drummond in the course of his voyage? Haines fell in a passion, and said, '*Damn me, what have I to do with Captain Drummond.*' The deponent dropped the conversation; but, after they had drank a while, and he thought Haines in better humour, he asked him,

If

If he had not heard of, or seen any Scottish ship in the East-Indies? Haines answered, *that, when they were upon the Malabar coast*, they were informed by a Dutch vessel, that one Captain Drummond, commander of a Scots ship, had turned pirate, upon which they had manned their sloop, and made themselves ready in case of an attack; but they did not see Captain Drummond. Deposed, That Haines added, he had in his custody when the Worcester was seized in Leith Road, what he would not have had to fall in the seizers hand for twice the value of the ship\*; and that he had thrown it over-board after the ship was seized, adding, 'Let them seek it now at the bottom of the sea.'

William Wood, a gunner of her Majesty's artillery, deposed, That the prisoner George Haines, John Henderson writer in Edinburgh, and the deponent, were in company together at Burntisland, and had drunk hard.—Haines fell into a melancholy fit, and Henderson inquiring the reason of it, Haines said, 'It is a wonder, that, since we did not sink at sea, that God does not make the ground open and swallow us up when we are come ashore, for the wickedness that has been committed during this last voyage on board of that old bitch,'—pointing to Captain Green's ship. After this, he went a walking in Burntisland Links with Haines; and the deponent happening to mention to him, that Captain Madder's uncle was burned in oil for attempting to burn the Dutch ships at Amsterdam, Haines answered, 'If what Captain Madder had done, during this last voyage, were as well known, he deserved as much as his uncle

K k 2

' had

\* By a confession and declaration which Haines afterwards emitted, it appears, that this which he was so anxious left it should fall in the prosecutors hands, was a private journal he had kept of the ship's proceedings.

1705 'had met with.'—John Henderson writer in Edinburgh, deposed conform to the preceding witness, in every thing save the conversation that passed between the said witness, and Haines the prisoner, in Burntisland Links.—Ann Seton, in Burntisland, confirmed the preceding conversation, except that which happened between Haines and Wood in the Links.

Besides these depositions, the prosecutor produced in Court Captain Green's journals, from which it appeared, that the most anxious and minute instructions had been given to Captain Green by his owners, that no letters should pass between them but in cypher, and that even these should be addressed to a third person; and that, during the voyage, no letters whatever should be sent by any of his crew to England.

The jury returned the following verdict: 'They, by plurality of votes, find, That there is one clear witness as to the piracy, robbery, and murder, libelled, and that there are accumulative and concurring presumptions proven for the piracy and robbery so libelled: But find, that John Reynolds, second mate of the said ship, was ashore at the time of the action.' The Court, on the 21st of March, sentenced Captain Green, and four of his crew, to be taken to the sands of Leith on the 4th of April, and hanged till they be dead; four more of the crew to suffer in the same place on the 11th of April; and five more to meet the like fate on the 18th of that month; and they dismissed John Reynolds from the bar.

As the factions into which Scotland was then divided about the depending treaty of Union, did each of them take up this cause as a matter of party, the faction which favoured the Union maintained

maintained the prisoners innocence, and on this ground solicited a pardon for them. The party, again, that opposed the Union, which was much more numerous, and fully more violent, held the evidence of the prisoners guilt as equal to demonstration, and resented the attempt to obtain a pardon for the prisoners with the highest indignation. Three of the convicts, Captain Green, Madder his first mate, and Simpson the gunner, suffered on the day appointed. The rest were reprimanded from time to time, and finally pardoned. Green and Madder, some days before their execution, published a paper which they called their last speech. In this they maintained their innocence, a circumstance which makes no impression upon me, when I consider, that not only the Queen could pardon, but the Scottish Privy Council could reprove them, and that they entertained hopes of pardon till the last hour of their lives.—On the other hand, three of the convicts, Linstead, Haines, and Bruckly, emitted, after sentence of death had passed upon them, judicial confessions and declarations, acknowledging that Captain Green and his crew were guilty of the piracy and murder libelled. And I must acknowledge, that I look upon this confession as entitled almost to as little credit as Captain Green's denial of guilt: For, as the latter built his hopes of pardon from the English faction, upon the declaration of his innocence, so the former might ground their expectations of mercy from the Scottish faction, upon flattering them, by confirming the guilt of Captain Green and his crew.

1705

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*John*

*John Maciver and Archibald Macallum, merchants in Greenock, for sinking and casting away of ships, and piratically relanding and selling their cargoes, after entry in the Customhouse, for the purpose of defrauding the underwriters and the revenue.*

1784 **T**HE prisoners were prosecuted before the High Court of Admiralty, at the instance of Ilay Campbell, Esq; his Majesty's Advocate, and John Monro, Esq; procurator-fiscal of that court. The indictment sets forth, That, by the common and statute law of this realm, the willfully casting away, sinking, or otherwise destroying of ships, for the purpose of defrauding the underwriters, or the revenue, and piratically relanding and selling, or otherwise disposing upon the cargoes of such ships, after these had been entered in the Customhouse for exportation, are crimes of a heinous nature, and severely punishable \*. Farther, That, by an act of King George I. an. 4to, cap. 12. and by Geo. I. an. 11mo, cap. 29. it is declared, that whoever shall destroy, or procure to be destroyed, the ship of which he is an owner, officer, or mariner, to the prejudice of any person who may have insured the goods with which she was loaded, or of any merchant who may have goods aboard, or that of any owner of such ship, shall suffer, as in cases of felony, without benefit of clergy: Yet, that the prisoners, upon one or other of the days of April, May, or June, 1781, being owners of the ship called the Endeavour, then in Greenock, did freight the vessel for Halifax in Nova Scotia, loaded her with a variety of goods for the said port, and insured them at London and Glasgow for a large sum

\* Records of Admiralty, 19th May, 14th, and 15th June 1784.

sum upon the said destined voyage: That the prisoners did form <sup>1784</sup> a design of relanding the said goods in whole or in part, with a view to defraud the underwriters and the revenue; and, accordingly, did reland part of the said goods before the vessel left the Clyde: That the prisoners also formed an intention of destroying the ship, gave directions for that purpose to James Robertson the master, and Neil Macallum the first mate; and prevailed upon them by money, good deeds, or promises, to accomplish their wicked purpose. In consequence of this combination, the master and mate bored holes in the bottom of the ship; and, upon her being taken by an American privateer in the course of the voyage, two holes were found in her bottom, the one plugged up, the other open, and every thing ready for the final completion of the prisoners purpose: Notwithstanding all which, they fought and recovered from the underwriters the sums insured on the ship, to the amount of several thousand pounds.—The indictment also charged the prisoner, Archibald Macallum, with crimes of a similar nature, in relation to a vessel called the New York, bound for the ports of New York and Philadelphia. And, farther, that he did receive drawbacks and bounties upon certain goods which he had entered in the Customhouse, as part of the cargo of the said ship, for exportation, but which goods he did fraudulently reland, and dispose of for his own use.

Counsel were heard at great length, and informations also were ordered upon the relevancy of the indictment.

It was contended in the information for the prisoners, that the acts 4th and 11th George I. upon which the indictment was laid, did not extend to Scotland.—Many acts of parliament, it was said, have been passed since the Union, which neither were meant to extend, nor could be construed to extend to this part of the united

1784 united kingdom. This must be the case where an act is grafted upon statutes passed in England before the Union, and where a mode of procedure was prescribed inconsistent with the forms observed in Scotland. Such, however, is the case of the statutes libelled on. They are a confirmation of sundry acts passed in England, respecting the destruction of ships, from the act Charles II. an. 22. cap. 11. downwards; all of which acts relate to each other, and form a progressive chain of the statutory law of that country. Further, the mode of trying offences against these laws prescribed by act 11th, George I. cap. 29. is totally inconsistent with the forms established in our Courts, which demonstrates, that these laws were never meant to extend to Scotland.—Accordingly, in the case of Lampro, A. D. 1751, a solemn decision was pronounced by the Judge Admiral, after the most mature deliberation, finding, that the statutes 4th and 11th of George I. did not extend to Scotland: And the justice and propriety of this decision is confirmed by a subsequent act of Parliament, viz. George II. an. 26. cap. 19. ‘for enforcing the laws against persons who shall steal or detain ship-wrecked goods.’ In this statute, which relates to the 4th of George I. founded upon in this indictment, it is enacted, that the same shall, in all things, remain in full force, save only in so far as it is altered by the present act, *‘provided, that nothing in this act contained, shall extend, or be construed, to that part of Great Britain called Scotland.’*—The prisoners further maintained, that, supposing these statutes of 4th and 11th of George I. to extend to Scotland, the Judge Admiral has no jurisdiction to try any offence against them; for that such must be tried by commission of oyer and terminer here, in the same manner as in England.

It

It was next argued, that the facts charged against the prisoners, relative to the brigantine the Endeavour, were not relevant to infer even an arbitrary punishment against them. The libel itself did only charge the prisoners with an intention to cast away the ship; it was admitted, that the ship was not cast away; and an intention to commit iniquity is not a crime at common law, according to the well known brocard, '*Cogitationis poenam in foro nemo patitur.*' 1784

In the information for his Majesty's Advocate, it was observed, that it would be matter of just regret, if the law of this country were so defective, that the perpetrators of such dangerous and foul crimes as those charged against the prisoners, could not be brought to punishment. By this alone, it was maintained, a repetition of such crimes could be prevented, and the honest merchant be established in the benefit of insurance; which he was in no small hazard of losing, by reason of the reiterated frauds of the prisoners and their associates, having excited a general suspicion and alarm in the underwriters, as to the fate of every vessel navigated from the Clyde.

Many statutes, no doubt, had been enacted since the Union, which did not extend to Scotland. But it was the province of judges to determine whether an act founded upon before them was general, or confined to a particular part of the united kingdom, by attending, *1mo*, To the purpose of the statute; *2do*, To the words in the enacting clauses.—The purpose, then, of this statute, is to prevent the willful destroying of ships, to the prejudice of underwriters or merchants. This surely is no less immoral, no less pernicious on the north than the south of the Tweed. To say that the Legislature meant only to protect England against this crime, is to accuse the counsels of Parliament

1784 of the extremity of caprice.—But the caprice of so partial a law would be no less remarkable than its blindness and absurdity; for the English are truly alike exposed to the consequences of this crime, whether committed in the Clyde, or in the Severne. Of this no stronger testimony can be afforded, than the facts which gave rise to this trial; the number of vessels which have been fraudulently destroyed by the prisoners and their associates\* were indiscriminately insured at Glasgow and Edinburgh, at Liverpool and London.

As to the words of the statute, they are altogether repugnant to the prisoners plea of its being limited to England. It is intitled, ‘An act for enforcing and making perpetual an act of the twelfth year of her late Majesty, intitled, An act for the preserving of all such ships and goods thereof, which shall happen to be forced ashore, or stranded upon the coasts of this kingdom,—or any other of her Majesty’s dominions; and for inflicting the punishment of death on such as shall willfully burn or destroy ships.’ Now, as this statute was enacted posterior to the Union, the words, ‘upon the coast of this kingdom,’ undoubtedly comprehend the shores of either England or Scotland. But vain as a criminal’s plea might be deemed, who would urge that he did not fall under this statute, because the ship he had pillaged or destroyed was forced ashore not at the Coquet Island, but Eyemouth, the prisoners have not even this to urge in their behalf; for it is excluded by the subsequent part of the same paragraph in the statute, viz. ‘or any other of her Majesty’s dominions.’ Thus, by the words of the act, it is evident,

\* The prisoners, with Herdman, who was convicted of the same crimes on the 20th of June 1784, and others, their associates, in this villanous traffic, are estimated to have defrauded the underwriters to the amount of L. 80,000.

evident, that, before the prisoners can establish their argument as to the limitation of this statute, they must show, *that Scotland is no part of the British dominions.*—And by the said act of the fourth of George I. it is declared, that this statute of the 12th of Queen Ann, for preserving of stranded vessels, and preventing the willful destruction of ships, ‘ hath been found, by experience, to be of great use and benefit to the sea-faring men ‘ and merchants *of this kingdom, and other his Majesty’s dominions.*’ 1784

Further, the whole words of the act, 4th of George I. are dictated in the most general terms.—*If any owner of any ships shall destroy the same, to the prejudice of any person, he shall suffer death.*—Indeed, when it is intended that a British statute should not extend to Scotland, its expressions are not ambiguous or slovenly; for there is a clause declaring, either that it is only to have effect in England, Wales, or Berwick upon Tweed; or, that nothing contained in the act shall extend to Scotland. But no such restrictive clause is to be found in the statute libelled on.—As to the case of Lampro quoted for the prisoners, it was answered, that this was but a single decision of a single judge: A decision so much unlooked for, that even Lampro’s counsel had not pleaded that these acts did not extend to Scotland; but only that trial could not proceed upon them, except by commission of oyer and terminer.—And that the Judge Admiral’s jurisdiction to try offences against these acts, was established by Charles II. A. D. 1681, chap. 16. which vests in this judge a jurisdiction in all maritime causes, over all persons foreign or domestic.

The prisoners had also objected to the relevancy of the indictment against them, upon the common law, so far as respected the brigantine the Endeavour; for they pleaded, that all which

1784 had been charged against them, was an intention to destroy the vessel, which was never carried into execution. But this argument would not avail them; for, *1mo*, The guilt in them was completed, as far as it lay in them to accomplish it, by the instructions given by them to the master and mate to destroy the ship in the course of the voyage, so that she might not come to the hands of the persons to whom she had been consigned; and consequently the prisoners embezzlements of her cargo might not be detected; a purpose equally accomplished, by the Endeavour's being captured by an American privateer. *2do*, Their purpose was accomplished, in so far as holes were bored in the bottom of the ship, by the prisoners associates, the master and mate of the vessel, although they were not mad enough to let in the gulf, at a distance from shore, to the certainty of their being drowned. *3tio*, Their guilt was not bare intention, but was actually accomplished in so far, as the libel charged them with piratically and fraudulently relanding part of the cargo of the Endeavour, before she left the Clyde.

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The Judge Admiral pronounced a very long and minute interlocutor, sustaining the jurisdiction of the Court, and finding, that the clauses libelled on, in the 4th and 11th acts of George I. did extend to Scotland: But, as the Endeavour was taken before the alledged intention of destroying her was carried into execution, finding, that this article of the indictment does not fall within either of the statutes; but that the offences charged in the indictment are relevant at common law to infer an arbitrary punishment: And finding the prisoner, Macallum's, destroying the New York, relevant to infer a capital punishment in terms of the acts.—His Majesty's Solicitor General then declared,

clared, that he restricted the whole of the libel to an arbitrary punishment. 1784

T H E P R O O F.

The counsel for the prosecutor proposed to produce in evidence the declaration which the prisoner, Macallum, had emitted in a civil action which was instituted against him by certain underwriters. The counsel for the prisoners objected, that this declaration could not be brought against him in a criminal process. The Judge Admiral repelled this objection. The declaration related solely to the New York.

John Carmalt, merchant in Greenock, deposed, That he heard the prisoners acknowledge they were in part owners of the Endeavour. In a few days after the proclamation was issued, offering a pardon to any person who would discover those concerned in casting away certain vessels, the deponent met the prisoner, Maciver, who asked him if he had seen the proclamation? and added, he was sorry he had not left the country five or six months before; for he had seen a cloud gathering, which would soon burst; and he was afraid that if Robertson, the master of the Endeavour, should come home, he would discover things not fit to be known. The prisoner, Macallum, informed the deponent he was in part owner of the New York. After advice came of this vessel's being lost, the deponent asked Macallum if he had sent his vouchers, in order to recover the insurance? but was answered he had not. In a fortnight he repeated the question, and got the same answer; upon which the deponent said, 'it did not look so well that he had not forwarded his vouchers, as the protest was come to hand.' Macallum told the deponent,

1784 nent; that a box of books had been carried away from his warehouse, which increased the deponent's suspicions. He asked if that box was included in the bill of loading and general invoice, and if it was entered in the Customhouse? to which Macallum answered in the negative, saying, that, when Mr Hunter should receive the accounts of what had happened, he would be surprised to find that no such box was mentioned in the invoice. The deponent desired Macallum to show him the bill of loading, as it would give him satisfaction to see whether this box was included in it or not. Macallum gave it to him; and, upon examining it, 'he found the box of books was included in it.' The deponent then said to Macallum, 'What will you do now; you will be utterly undone?' to which Macallum replied, he would find out a way to remedy that; upon which he took out of his desk a blank bill of loading, signed by Forlay the master of the New York; and he, and David Thomson merchant in Greenock, in the deponent's presence, filled up the blank bill of loading; and Thomson deleted the articles from the copy of the Customhouse entries, and general invoice of the goods said to be shipped on board the New York. Then Macallum, with his own hand, filled up the articles, and omitted the box of books mentioned above; also four boxes of linens, and some other things which the deponent does not remember, all of which were included in the original bill of loading and general invoice, and also in a letter addressed to the merchants at New York, specifying the particulars of the cargo.—When this operation was performed upon the bill of loading, the prisoner, Macallum, wrote a letter to his correspondents at New York, desiring them to pay no regard to the first letter, which bore that the box of books, &c. were shipped for them, as they had not been shipped. But the second and last letter neither was sent, nor was ever meant to be sent, to New York, but was preserved, in case the first mentioned letter and  
 invoice

invoice should be produced in evidence against Macallum. De- 1784  
 posed, That he heard Macallum say he had produced the false bill  
 bill of loading when examined before the Judge Admiral.—Mac-  
 allum told the deponent he had sent the boxes of linens to one  
 Miller at London.

William Horn, late mariner on board the Endeavour, deposed,  
 That he went as a sailer in this ship from Greenock to Hallifax.  
 About two days after they left Greenock they put into Kinfale;  
 and the vessel was taken in the course of the voyage by the *Swift*,  
 an American privateer. The deponent heard John Mount, one  
 of the crew, say, he knew this would be the case, for Captain  
 Robertson had put into Kinfale to see whether it was 'a pine  
 ' plug or an oak plug *that was put into the ship.*' She lay at  
 Kinfale a fortnight, and no repairs were made on her during  
 this time, *save paying her sides and tarring her wales.* De-  
 posed, That the vessel became leaky three days before she was  
 taken. The deponent and Alexander Barber were upon the  
 watch about four in the morning; the weather was fine; Neil  
 Macallum, the mate, came upon deck, threw himself upon the  
 hencoop, and ordered the deponent and Barber to *rigg* the pump:  
 They remonstrated, that it was uncommon to *rigg* the pump at  
 that hour, and the vessel had been pumped at twelve at night,  
 and was then dry. The mate, notwithstanding, insisted that the  
 pump should be tried; and Barber and the deponent went and  
 pumped for about three quarters of an hour ere they overcame  
 the water. During this, the Captain and the mate took their  
 turn in working at the pump; for the Captain, who was in bed  
 when they fell to work, rose as soon as he heard the pump go-  
 ing: And from this time till the ship was taken, one pump was  
 kept constantly going, and another occasionally, to assist it when  
 it blew hard.—On the morning on which it was discovered that  
 the

1784 the ship was making water, before day light, when all was quiet, the deponent went down into the cabin, and 'thought he heard ' like the noise of water rushing in under the *scuttle* \* in the ' cabin.' He immediately told the mate, and offered to go down and look at it, but the mate forbade him, saying, he would go himself. He went down, and speedily returned, and called the deponent a damned rascal, for there was no water coming in under the *scuttle*. The deponent then went over the *quarter* on a rope, to see if he could discover the leak from the outside, but could not. Then the deponent and another of the sailors called Barber, went again into the cabin, and heard the gurgling noise which the deponent had done before; and from this they went to the pump, where they saw the water running into the pump-well abaft; but they minded the matter no more. The deponent and Barber informed the crew of what they had observed, and they were uneasy at the information. They went round the vessel on the outside, trying to discover the leak, but could not; then they expressed their fears to the Captain, and their wish that the vessel should be examined at the place where the deponent and Barber had heard the noise: But the Captain bid them look at the bow; and both he, and Neil Macallum the mate, said, 'that, if the vessel should sink, the boat was large enough to ' carry them all to land.' The ship being captured by the Swift, an American privateer, both Robertson and Neil Macallum told the sailing-master of the Swift, that the leak was abaft in the *runn* of the Endeavour. Her crew were put on board the privateer; and the carpenter's mate of the latter was sent to examine the leak. Upon his return to the privateer, 'he told the ' Endeavour's people that they were all a parcel of damned rascals, for they had been boring holes in the vessel.' And, upon the

\* Scupper, I suppose.

on the crew's asking what kind of holes they were, he answered, 1784  
 that they had been made by an inch and half oggar, or a small <sup>w</sup>  
 bung borer. Deposed, That one day when he was 'making fun'  
 with the second mate, he run off with his knife, and was going  
 to hide it in the pump-well, when he observed a line fastened to  
 one of the stanchels of the pump-well, and was going to take  
 hold of it, but instantly Neil Macallum called to him to let it  
 alone, asking him, what had he to do there? After the Endeavour  
 was carried into Penobscot, he heard several of the crew,  
 and in particular John Riddell, say, that *they had seen a plug in  
 the pump-well*: And one day when he was drinking in Halifax  
 with John Mount, he told the deponent, 'it was lucky he did  
 'not pull the line he saw at the stanchell in the pump-well, for  
 'that John Riddell told him it was fastened to the plug.' De-  
 posed, That, before they left Greenock, the prisoner Maciver,  
 and Neil Macallum, came aboard the Endeavour one day about  
 twelve o'clock, and brought a box with them, when there was  
 nobody in the ship except the deponent and Murdoch Macleod.  
 The prisoner desired them to go ashore, and get their dinner, and  
 to return at three o'clock. They did so; and when they came  
 back, the prisoner and Neil Macallum were gone. Thinking  
 that they might have brought something on board to drink, the  
 deponent and Macleod went into the cabin, and opened the box  
 which the prisoner and Neil Macallum had brought on board,  
 and found it empty: But, upon looking into the locker of the  
 cabin, *they saw in it a large bung-borer, a small one, a gouge, and  
 a chissel, and observed that part of the cargo abast the pump had  
 been moved to a greater distance from it, and other parts of the  
 cargo brought nearer it.*—After the Endeavour was taken by the  
 privateer, the deponent being sent for some things from the lat-  
 ter ship to the former, saw the carpenters stopping up the holes  
 in the *runn* of the vessel, 'which brought to the deponent's mind

1784 ' some suspicions as to the use that had been intended by the  
 ' bung-borer, &c. he saw in the locker of the cabin at Greenock.'  
 When he returned on board the privateer, he understood that  
 some conversation had passed between Captain Robertson and his  
 crew respecting these holes, and that he had given a draught to  
 John Mount for L. 20, and to Alexander Barber for L. 10, up-  
 on John Maciver and Company. On this the deponent went to  
 Robertson, said he would expose him as soon as he got home,  
 ' and asked him why he had not given the deponent money as well  
 ' as the others?' Robertson answered, ' he should certainly see  
 ' him put to rights when he arrived at Greenock;' and added,  
 if the deponent ' was to expose him, he Robertson might hang for  
 ' it.'—After the deponent's return to Greenock, he went to Ro-  
 bertson, and asked him to fullfil his promise; upon which Ro-  
 bertson went with him to the prisoner Archibald Macallum, who  
 gave the deponent L. 6. He insisted upon getting as much as  
 the rest; but was at first offered only L. 5, and when the offer  
 was raised to L. 6 he accepted of it.—Deposed, That when the  
 Endeavour lay in the Fairly, off the coast of Ayrshire, a large  
 new boat came to her from Greenock, and masts and sails were  
 made for it on the Banks of Newfoundland.

James Mackinnon, late mariner on board the Endeavour, de-  
 posed, That she sprung a leak four days before she was captured  
 by an American privateer. The deponent and the rest of the  
 crew made search for it in the fore part of the vessel, but the  
 Captain would not allow them to look for it abaft, saying, he  
 had looked there himself. They set two pumps agoing; one of  
 them they wrought constantly, the other occasionally. When  
 the ship was taken, the crew were carried on board the privateer  
 which captured them, and the Captain of the privateer sent his  
 own carpenter into the Endeavour to search for the leak. After

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he had discovered it, and returned to the privateer, he said to Captain Robertson 'that he had intended to sink the vessel the Endeavour, as two holes of an inch and half wumble-bore had been found in the after-peak of the Endeavour, which he had plugged up.' But Robertson said, 'that he had never bored any holes in the vessel.' Deposed, That the deponent was sent again on board the Endeavour; and after the holes were thus plugged up, she was as tight as ever. They were not within sight of land when the ship began to leak, but the weather was fine, the pumps kept the water at under, and the crew entertained no apprehensions. Deposed, That the prisoners were owners of the Endeavour.

1784

James Horn, father to William Horn a preceding witness, deposed, he 'understood that the money given to his son was for wages, or for time lost by him when he was away.'

I am not able to discover the relation which the evidence given by the following witnesses bears to the trial of the prisoners for their fraudulent and criminal practices respecting the Endeavour, of which alone they were convicted by the jury, or the tendency it could have towards their conviction of that crime.

William Macintosh deposed, That he saw James Robertson, Captain of the Endeavour, have an acceptance of James Herdman's for L. 94 : 10 : 0.—Malcolm Jamieson deposed, That he was desired by Charles Munn to get L. 200 insured for James Robertson upon the ship the Albion, which he got done accordingly; and he got from Robertson an indorsation to Herdman's bill for about L. 94.—Charles Munn deposed, That he was desired by James Robertson to go to Herdman, and get money from him to pay the premium upon the insurance of goods

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which

1784 which he was to export in the Albion, and Herdman gave Robertson his bill for L. 94.—Archibald Campbell deposed, That Archibald Paterson, supercargo of the New York, in July last, sent him a promissory note for L. 100, signed by Archibald Macallum, and a receipt for L. 250, signed by Archibald Macallum and James Herdman.—Deposed, That insurances were made upon the New York and her cargo, at London and other places; *'but that none of the sums insured on the New York were recovered from the underwriters, that he knows of.'*—John Campbell, Esq; Justice of Peace for the county of Renfrew, emitted a deposition relative to a box of books found in the possession of the prisoner, Macallum; which box was brought before him as Justice of Peace, in an action at the instance of certain underwriters in London, against the owners of the New York.—Deposed, That *sailors wages are not due, if the ship be lost or taken, unless as much of the wreck be saved as is sufficient to pay them.*—William Paton bookseller deposed, That he sold the above box of books to Archibald Macallum and Co.—Jean Forlay, sister to William Forlay, master of the New York, deposed, That, from some words which dropped from her brother when he was the worse of drink, she suspected the New York was *'not going out upon a proper footing,'* and she advised him to have no concern with the voyage.—Alexander Stevens, a passenger on board the New York, emitted a deposition relative to that vessel, and to goods which had been relanded from her; but, upon a motion by the prisoner's counsel, the judge ordered that this deposition, as to the relanding of goods from the New York, should be deemed no part of the evidence, seeing that this branch of the indictment was not found relevant; because no part of the money insured upon this vessel was received from the underwriters. Stevens also deposed as to the manner in which the New York was lost or cast away.—Angus Maclean,  
late

late mariner on board the New York, deposed, That this ship struck on a sand bank, on a fine clear evening, about eight o'clock; and that he heard William Moore the mate say, 'He knew well enough that the vessel was to be lost.' 1784

The jury unanimously found the prisoners, Maciver and Macallum 'guilty as far as regards the brigantine the Endeavour; and they all, in one voice, find the charge not proved against the pannel, Archibald Macallum, as far as regards the brigantine New York.'

The Solicitor General craved judgment upon this verdict. The counsel for the prisoners objected, that no judgment could pass upon it, as one of the jurymen had gone out of Court, and may have had conversations with various persons during his absence; and, therefore, the prisoners ought to be immediately acquitted, and dismissed from the bar.—It was replied for the prosecutor, that, during the necessary absence of this jurymen, on account of his health, the taking of the evidence was stopped, and that he had no conversation with any person when out of Court. This being verified by the macers\* who attended him, the Court repelled the objection.

Judgment was then passed upon the prisoners, declaring them infamous persons; ordaining them to stand an hour on the pillory, in the city of Glasgow, on the eighth day of July, with a label on their breast, denoting, that they had procured holes to be bored in the Endeavour to defraud the underwriters; and then to be banished Scotland for life.

Against

\* Mace-bearers.

1784 Against this sentence the prisoners presented a bill of suspension to the Court of Justiciary. The reasons of suspension were those which have been already stated against the relevancy of the indictment, and which were over-ruled by the Judge Admiral. Other objections were also urged against this judgment, viz. the allowing of Macallum's declaration, emitted in an action merely civil, to be received as part of the evidence, which ought by no means to have been laid before the jury, *the generality of whose verdict, in finding the prisoners ' guilty, as far as regards ' the brigantine the Endeavour,' was highly improper*—The circumstance of one of the jurymen being out of Court while the trial was going on, which the prisoners contended did nullify the whole proceedings—The Judge Admiral's having pronounced a sentence ordaining them to be pilloried at Glasgow; for he had no jurisdiction but within flood-mark—And, *lastly*, That, even supposing the prisoners guilty, the sentence was by much too severe; for, considering the temper of the times, it would probably be productive of their violent and inhuman deaths.

To these the following answers were made by the prosecutor: To the objections against the relevancy of the indictment, the arguments in support of it, which had been already stated to the Judge Admiral, were submitted to the Court of Justiciary.—As to the iniquity of admitting Macallum's declaration as a part of the evidence, it was answered, that extrajudicial and private conversations might legally be brought in evidence against a prisoner; therefore, much more might Macallum's guarded declaration which he had emitted before a respectable judge be received in proof against him. But, even supposing this to be improper, the prisoners can have sustained no injury by it; for Macallum's declaration related solely to the New York, and the jury had acquitted him of the charge respecting that vessel.—As to one of the

the jurymen's having retired for a while out of Court, the same answer was made which had been urged before the Court of Admiralty.—It was observed, that the plea of the Judge Admiral's having no jurisdiction to pronounce any sentence but what was to be executed within flood-mark, was, indeed, a curious one. The statute of Charles II. A. D. 1681. chap. 16. bestowed on the Court of Admiralty an ample jurisdiction; and the practice of the Court, as exemplified in the case of Lampro, justified this mode of pronouncing sentence.—As well might the suspenders have alledged, that the Judge Admiral could hold no Court but within flood-mark, and issue no warrant for apprehending a prisoner, unless he should be found within flood-mark.—*Lastly*, That the sentence was by no means too severe for those who could form such a profound scheme of pernicious villany; and, as to the prisoners falling a sacrifice to the rage of a mob, the magistrates of Glasgow would, no doubt, 'take care that no improper excesses should be committed.'

The Court of Justiciary pronounced the following judgment :  
 ' Find, That the statutes of the 4th and 11th of George I. libelled  
 ' on, do not extend to Scotland; but find, that the libel, as laid  
 ' upon the common law, was rightly found, by the interlocutor of  
 ' the Judge Admiral, relevant to infer an arbitrary punishment\*;  
 ' and find, that the verdict of the jury, as applied to that inter-  
 ' locutor, does warrant the judgment of the Judge Admiral  
 ' which passed upon it: And, upon considering the atrocity and  
 ' dangerous nature of the crime so charged and proved against  
 ' the complainers, find there is no just ground for mitigating  
 ' that judgment; and repel the whole reasons of suspension, and  
 ' refuse the bill.'

\* Records of Justiciary, July 14. 1784.

1784 I am happy to observe, that this distinction which their Lordships thought themselves obliged by law to make between the commission of so atrocious and dangerous a crime in England, and in Scotland, is about to be done away: For, by a bill for regulating the jurisdiction of the Court of Admiralty in Scotland, which I am informed just passed the House of Commons, and which will probably receive the sanction of the other branches of the legislature; the statutes libelled on, relative to the destroying ships, are declared to extend over both parts of the United Kingdom.

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When I formed, and had in part executed, the plan of this work, I was not aware that I should have so frequent occasion to exercise the presumptuous and irksome duty of delivering my own remarks; but consistency with the general purport of this work, and perhaps propriety also, require me to make an observation upon this verdict of the jury, in which I suppose the reader has preoccupied me. The indictment charged the prisoners not only with procuring holes to be bored in the Endeavour, in order that she might be destroyed, -but also with fraudulently relanding part of her cargo before she left the Clyde. The jury found the prisoners guilty, *in as far as regards the Endeavour.*—*Now, in the whole of this trial, there is not a word of evidence relative to the relanding of goods from that ship.*—I mention this with the less reluctance, as, from the respectable character of the persons who composed this jury, it is impossible that any blame can lie upon them, except merely that of inaccuracy.--In this country, which is a land both of liberty and of law, juries cannot too cautiously attend to the nature of their important, their *sacred trust:*

*trust* : For they are equally distant from the discharge of their <sup>1784</sup> duty when they acquit a criminal in contempt of law and of evidence, and when they indiscriminately find a prisoner guilty of the charge in the indictment, although the proof applies but to part of the charge.

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## O F F O R G E R Y.

*Mr George Henderson merchant in Edinburgh, and Margaret Nisbet, wife of Alexander Macleod wigmaker in Leith, for forging a bill upon the Duchess of Gordon.*

1726 **T**HE time which according to the forms of our law, and the occult nature of this crime, is consumed in proving of a forgery, has occasioned trials for this offence generally to be taken before the Court of Session; because, in the Court of Justiciary, after the jury is appointed, and the evidence begun to be led, the whole must be completed, and a verdict pronounced, ere the jury are suffered to dismiss.

As the criminal jurisdiction of the Court of Session does not amount to the power of awarding sentence of death, the following mode of procedure is observed. When the forgery appears to the Court to be of so deep a nature as to deserve a capital punishment, they declare the deed in question to be reduced, as being false and forged; and remit the prisoner to the Court of Justiciary: This sentence is called a '*Decreet of Reduction and Improbation, and Act and Remit.*' The prisoner is then served with an indictment, setting forth, that he had committed forgery; that he had been found guilty of the same by sentence of the Court of Session; and that, upon this being found proved by a jury, the prisoner should be condemned to suffer death, and confiscation of personal estate. The decree of the Court of Session, declaring the forgery, is then read over before the jury; it

it is held complete legal evidence, or what is called *probatio probata*, against the prisoner, who is thereupon convicted and condemned. 1726

In the beginning of May 1726, it was discovered \* that one Petrie, a town-officer in Leith, held the Duchefs of Gordon's bill for L. 58, which had been delivered to him, blank indorsed, by Mrs Macleod, as a security for L. 6, for which sum her husband had been laid in prison. The bill was drawn by George Henderson, accepted by her Grace, indorsed by Henderson the drawer, to Mrs Macleod, and blank indorsed by Mrs Macleod; and in virtue of this blank indorsation Petrie the town-officer held it. The holder of the bill was apprehended and brought before the magistrates of Edinburgh: In a few days after, Mrs Macleod and Mr Henderson were also brought before them. It was manifest that the Duchefs of Gordon's acceptance was a forgery; but the point in dispute was, whether this forgery was contrived by Mr Henderson the drawer and indorser, or Mrs Macleod the indorsee.

Upon the 5th of May Petrie was brought before the magistrates, and told the manner in which he came by the bill. Henderson was at the same time brought before them, who denied all knowledge concerning it. Mrs Macleod was apprehended on the 7th, and examined; and she and Henderson being confronted with each other, the former did judicially declare, that the bill, and other deeds challenged, were written by Henderson; who judicially denied all knowledge concerning them. Upon which, both Mr Henderson and Mrs Macleod were committed close prisoners.

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\* Extracted Decree of the Lords of Session, in the archives of the Court of Justiciary. Records of Justiciary, January 23. and February 4. 1727.

1726 A complaint against Mr Henderson was presented to the Court of Session by Duncan Forbes of Culloden, Esq; his Majesty's Advocate, setting forth, that the prisoner, Henderson, had counterfeited the Duchess of Gordon's acceptance to a bill drawn by himself for L. 58: That, upon being informed, on the 3d of May, of the bill's being intimated to her Grace, he struck himself upon the breast, and exclaimed, 'All would be ruined!' And that, upon his being told of the Duchess of Gordon's declaring she had no concern with the bill, he granted a fresh obligation for the sum, and subscribed the same before witnesses. And, therefore, craving their Lordships to take trial of these facts; and, upon their being proved, to inflict upon Mr Henderson an adequate punishment.

A complaint also against Mrs Macleod was presented to the Court, at the instance of Mr Henderson, setting forth, that she had counterfeited the above acceptance of the Duchess of Gordon, had deposited in the hands of William Petrie the bill so accepted in security for L. 6; and that, when the bill came to be challenged as forged, she counterfeited an obligation, bearing to be subscribed by Henderson before two witnesses, for L. 58, being the amount of the said bill.—It was not without great reluctance that his Majesty's Solicitor General, in absence of the Lord Advocate, did grant his concurrence to this complaint.—Mr Henderson also raised a summons of *Reduction and Improbation* of the deeds produced, said to be written by him.

Mr Henderson, in his complaint against Mrs Macleod, alleged, that the bill was not fabricated by him; for, *1mo*, The name of the drawer adhibited to it was not of his hand-writing, nor did it bear any resemblance to it. *2do*, He had no acquaintance nor dealings with the Duchess of Gordon, so as to give a plausible colour

colour to a forgery upon her Grace. *3tio*, He had no acquaintance nor dealings with Mrs Macleod, to whom the bill is indorsed, nor did he ever see her save once, about three years ago; although Mrs Macleod, with an effrontery acquired by '*proper habits*,' has been pleased judicially to declare, in presence of their Lordships and of himself, that it was he who indorsed to her this bill. *4to*, That he did not grant her an obligation to pay the sum of L. 58, when it came to be discovered that the bill was a forgery. And, *ultimo*, That, on the 3d of May last, when he is said to have subscribed that obligation in a house in the Canongate, in presence of witnesses, he was not without the *Ports* of Edinburgh during the whole day; and at the hour of the evening at which it is alledged the obligation was subscribed, he was engaged with company in his own house.

On the other hand, the Lord Advocate, in his complaint against Mr Henderson, and Mrs Macleod, in her answers to the complaint at Mr Henderson's instance against her, set forth, *1mo*, That the bill produced in process was a forgery, which, indeed, was acknowledged on all hands; and so clumsily was it executed, in so far as respected the acceptor, that it had but the half of her name, the first part being entirely wanting: For it was signed *Gordon*, without the Christian name *Eliza*, which was neither the usual manner of her Grace's subscription, nor that of any Peeres, except of those which are such in their own right, and not in right of their husband. *2do*, Mr Henderson did *use this forged bill*, by delivering the same to Mrs Macleod, drawn, accepted, and indorsed, as it now stands. *3tio*, That, when Mr Henderson was told of the bill being intimated to her Grace, he struck himself on the breast, and said, 'All would be ruined!' *4to*, He denied his having been in company with Mrs Macleod for some years; whereas it would be proved, that, on the night  
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1726 of his granting her the obligation for L. 58, they were in company together in the house of John Gibson wright in the Canon-gate, in presence of several witnesses. 5<sup>to</sup>, That, when the bill was discovered to be a forgery, he wrote a letter, now produced, to William Petrie holder of the bill, requesting him to delay seeking payment till Saturday, when he the prisoner, Henderson, should take up the same. 6<sup>to</sup>, That he granted his obligation to Mrs Macleod, the indorsee, for the amount of the said bill. 7<sup>mo</sup>, That the cause of the bill's being indorsed to Mrs Macleod was as follows: She and her husband had taken a large house in Leith as a tavern, furnished it suitably, laid in a stock of liquors, and given the charge of them to Helen Nimmo as housekeeper. Mrs Macleod having occasion last harvest to be a considerable time absent from her own house, upon her return, and settling accompts with Helen Nimmo the housekeeper, she found that Nimmo, by deficiency in the cash which she should have delivered to the prisoner Mrs Macleod, and by embezzlement of her liquors and linens, had incurred a debt to her of L. 58. She threatened to take out a warrant against her, but desisted, upon *Nimmo's declaring that she would get Mr George Henderson to satisfy and pay Mrs Macleod.* Accordingly, Mr Henderson came to Mrs Macleod's house, and offered her his bill for the amount; but she declared that he must find somebody who would be conjunct with him in the bill. Soon after, Mrs Macleod discovered that Nimmo the housekeeper was with child, and she threatened *to inform the kirk session* \*, upon which Mr Henderson came to Mrs Macleod the very next day, and indorsed to her the bill now lying in process; then took away Nimmo

\* As Ghosts were formerly the bugbear which was made use of to frighten children, so the kirk session was the bugbear to frighten grown persons. The one was to be terrified on account of the *flesh*, the other on account of the *spirit*.

mo out of Mrs Macleod's service, and sent her to England (as was supposed) to be delivered of her child. 1726  
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Both Mr Henderfon and Mrs Macleod emitted judicial declarations before the Lords of Session; and, upon the 30th of June, a signed information being given in to the Court by Mr Henderfon, that one David Household, *alias* Cameron, was the actual forger of the deeds produced, their Lordships granted warrant for apprehending him wherever he could be found. The Lords ordained both complaints to be conjoined; and the examination of witnesses began upon the eighth of July.

## T H E P R O O F.

John Gibson wright in the Canongate of Edinburgh deposed, That he knew Mr Henderfon presently at the bar, having seen him several times, and been once in company with him. Deposed, That, on the 3d of May last, about nine at night, as he was going down the Canongate, he met Mr Henderfon and Mrs Macleod, who went along with him to the deponent's house; he there saw Mr Henderfon sign the obligation to Mrs Macleod now exhibited; the deponent read it over, and signed as witness to Mr Henderfon's subscription; and the deponent's two daughters and Archibald Dempster were present. Part of this deed was written before the deponent saw it; but the last part of it, viz. from the following words, 'before these witnesses,' downwards, was written with Mr Henderfon's own hand in the deponent's presence. They staid in his house almost an hour; and, during this time, Mr Henderfon repeatedly desired of Mrs Macleod '*that she should delay and keep herself quiet till Saturday, and she should have her money;* which she refused to do unless '*he signed the obligation.*' Mr Henderfon, Mrs Macleod, and  
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1726 the deponent, then went down the Canongate together. When they were before Deacon Lauchlan's house, ' Mrs Macleod told ' Mr Henderfon she had intimated the bill to the Duchefs's ' gentleman; whereupon he Henderfon clapped upon his breast, ' and said, O, good God, that is all wrong; why have you done ' so?' and upon this he immediately left them. Depofed, That Mr Henderfon had on dark coloured clothes and a black wig, fuch as he now wore. And being interrogated, If he knew one David Household, *alias* Cameron? depofed, He knew no fuch perfon.

Archibald Dempfter, fervant to James Aitkin wright, depofed, That, on the 3d of May laft, after nine at night, he was fent for by John Gibfon, the preceding witness, to his houfe. He found there Mr Henderfon, Mrs Macleod, Gibfon, his wife, and two daughters. Henderfon was then writing a paper which the deponent faw him fubfcribe; Gibfon figned as witness to the deed, and defired the deponent to do the fame. He hesitated, left it might be the caufe of his afterwards being taken from his work, or of otherwife being brought to trouble. But ' Mr Gibfon faid, it was no more but *an obligation which Mr Henderfon was giving Mrs Macleod for fome money, and that he would pay againft Saturday*, and the deponent would get no trouble ' about it;' upon which he figned as witness, and then went immediately to his mafter's houfe. Being interrogated, depofed, That he never faw Mr Henderfon before that night, nor fince, except once about three weeks after, when he, Mr Henderfon, was brought before the magiftrates of Edinburgh. And depofed, That he thought Mr Henderfon, prefently at their Lordfhips bar, was the fame perfon whom he faw in Mr Gibfon's, and afterwards before the magiftrates. Depofed, That Mrs Macleod did

not

not speak to him, farther than asking his name, and bidding him take a drink. 1726

Christian Gibson, daughter of John Gibson wright, deposed, That, on Tuesday the 3d of May last, between nine and ten at night, she saw ' Mr George Henderson, the same person that is ' at present in the bar, in her father's house, and did see him furnish a paper, by adding two lines thereto, and saw him subscribe the same;' and her father and Archibald Dempster signed as witnesses. There were also present in the room when the deed was signed, Mrs Macleod and the deponent's sister; but her mother was not present, having gone out to see a sick child. Deposed, She heard Mr Henderson say, ' that the money should be ' paid against Saturday,' and saw him deliver the deed to Mrs Macleod, who put it in her breast. The deponent never saw Mr Henderson but at that time, and when he was brought before the magistrates.

Catherine Gray, servant to Alexander Hope taylor in Canongate, deposed, ' That she had frequent occasions of seeing and ' knowing George Henderson at the bar; and, particularly, on ' the third day of May last, on which the Deacons of the Corporations of the Canongate were chosen, she did see the said ' George Henderson prisoner, about nine o'clock at night, coming ' up the Canongate in company with Mrs Macleod the other ' prisoner; and, a little above the Canongate Cross, she did see ' them meet with John Gibson; and the deponent having asked ' Mrs Macleod, If she had got payment of her money due to her ' by Mr Henderson? the said Mrs Macleod answered, that she ' was just going to get security for it. Being interrogated for Mr Henderson, deposed, ' That she did not know, and, to her ' knowledge,

1726 ' knowledge, did never see, the person named David House-  
 hold.'

Catherine Falconer *indweller*\* in Edinburgh deposed, ' That,  
 ' upon the third day of May last, being the day on which the  
 ' Trades of Canongate elected their Deacons, she, on the even-  
 ' ing of that day, after nine at night, did see Mrs Macleod  
 ' prisoner walking up the Canongate, and, before her, she saw  
 ' walking George Henderson prisoner at the bar, and John Gib-  
 ' son. Deponed, That, upon her meeting Mrs Macleod, as said  
 ' is, she the deponent asked her where she was going ? to which,  
 ' Mrs Macleod answered, that she was going to John Gibson's  
 ' house to receive security for a debt due to her by George Hen-  
 ' derson.'

Janet Lyle *indweller* in Edinburgh deposed, That she knew  
 one Helen Nimmo who was servant to Mrs Macleod ; ' and she  
 ' did hear Mrs Macleod, particularly about the end of last year,  
 ' say to Helen Nimmo she was much in arrear to her ; to which  
 ' Helen replied, that *the mistress might be easy, for she knew of a*  
 ' *paymaster, to wit Mr Henderson.* Deponed, That, towards the  
 ' end of the last year, the deponent having frequent occasion to  
 ' be in Mrs Macleod's house, she did sometimes see in the cellar  
 ' with the said Helen Nimmo, a gentleman like to Mr Hender-  
 ' son at the bar ; but cannot be positive it was he, having no  
 ' particular acquaintanee of him.'

William Petrie, town-officer in Leith, deposed, That, on the  
 5th of February last, Mrs Macleod delivered a bill to him for  
 L. 58, which was drawn by Mr Henderson, and accepted by the  
 Ducheſs of Gordon, indorſed by Mr Henderson to Mrs Macleod,  
 and blank indorſed by her. She gave this bill to the deponent

\* Inhabitant of, householder in.

*in security for L. 6: 1: 0, which he advanced to her in order to* 1726  
 'relieve her husband, Mr Macleod, out of prison. Deposed, he knew nothing as to the verity of the subscriptions, farther than that Mrs Macleod said it was a true bill. 'To the best of his remembrance, she said the cause of her getting that bill was 'tea and other goods she had furnished Mr Henderson.' Deposed, That, about three years ago, Mrs Macleod delivered to him (in security of a debt she owed him) a bill for L. 38, or L. 40, drawn in the same manner by George Henderson, and accepted by the Dukes of Gordon, and that Mrs Macleod paid him punctually the sum she had borrowed upon the pledge of this bill, and got up the same; and she made use of this as an argument for the deponent's advancing her the L. 6 upon the bill produced in process. The deponent did not demand payment of the bill from the Dukes of Gordon, for he was prevented from doing so during the whole month of April, by Mrs Macleod's telling him, that the Dukes was then occupied with her devotions, and that her gentleman, Mr Gordon, was in the North, upon whose return the bill would be paid. She added, that she had been to wait upon her Grace, had been kindly entreated, and had got a glass of some liquor out of the Dukes's hand. At last, the deponent became suspicious about the verity of the bill; and he told Mrs Macleod, that, unless she got a letter from Mr Henderson, declaring the verity of the bill, he would protest it; upon which she brought him the missive-letter from Mr Henderson now produced in process; but the deponent desired her to get an obligation from Mr Henderson for the amount, signed before witnesses: She accordingly called on him, and showed him the obligation now produced in process. This he thought happened a day or two before the deponent was apprehended by order of the magistrates; which to the best of his recollection, was upon the fourth day of May last. It was about

1726 ten o'clock at night when she called and showed him the obligation.

Alexander Nicolson taylor in Edinburgh, being specially interrogated, Whether Mrs Macleod at any time promised him any thing to be a witness in this cause, deposed, That, about eight days after he was examined before the magistrates, the deponent having occasion to be in the tolbooth of Edinburgh, Mrs Macleod whispered to him, that it should be better than L. 4 Sterling to him, if he would depose that he had carried a message from Mrs Macleod to Mr Henderson to come to her; that he came accordingly, and the deponent saw him deliver to Mrs Macleod *an accepted bill by the Duchess of Gordon*: But the deponent answered, 'his conscience would not allow him to declare any such thing.' Deposed, That he afterwards 'got a letter from Mrs Macleod, threatening him, that, in case he should declare any thing contrary to what he said before the magistrates, the King's Advocate would put him in prison; and that he did show said letter to severals, and *particularly to Mr Henderson's doer (agent), Mr Donaldson, and that the deponent had since lost said letter out of his pocket.*' Deposed, That, in February last, when he was working in Mrs Macleod's house, he heard her railing upon a maid servant 'for want of some money, and that a man came into the room whom the deponent did not know, nor remember any thing of; and that, when the said man was gone, Mrs Macleod came to him, and said she had got a bill from said man, but named no person; and said, it would be good money to her. And Mr Henderson at the bar being pointed (out) to the deponent, and asked if it was the man that was in Mrs Macleod's house the time deponed upon? deponed, He had not seen said man (now) pointed (out) to him, in Mrs Macleod's house, either that or any other time.' Deposed,

posed, He thought the man who came into Mrs Macleod's had on a dark coloured wig. 1726

Captain Neil Macleod deposed, That he had a servant, one David Household, a lad about seventeen years of age, who left his service at Martinmas last, and whom he has frequently seen write. The missive letter from Henderson to Petrie, and the obligation by Henderson to Mrs Macleod being shewn to him, deposed, ' That he could not say any thing to the missive letter; ' but, as to the other obligation, deponed, That, to the best of ' his knowledge, it was the hand-writing of the said David ' Household.' Deposed, That Household was not of a slender make; that he wore his own black hair, and was about the head lower than Mr Henderson; but he has seen him since wearing a *light coloured wig*.

Robert Davidson, tutor to the Laird of Renton's children, deposed, That, upon the third of May last, to the best of the deponent's knowledge, he went to Mr George Henderson's house a little after seven at night, and staid there till about eleven o'clock, and, during all that time, Mr Henderson, the deponent, Mr Home, and Mr Kerr were in company together, except that Mr Henderson went occasionally out of the room; and the deponent thinks he was not absent above a quarter of an hour at a time.

William Kerr teacher of French, deposed, That, on the 3d of May last, he was in Mr Henderson's house from eight till ten at night, in company with Mr Davidson, Mr Home, and Mr Henderson. The latter went once out of the room; but the deponent is uncertain whether he went out a second time, and he was not absent above a quarter of an hour at a time.—They drank.

1726 drank three bottles of liquor; Henderson brought in two of  
 them, perhaps all the three.

Alexander Home writer in Edinburgh, deposed, That, on the 3d of May last, he was in Mr Henderson's house, in company with Mr Davidson and Mr Ker. The deponent staid there from about eight, till about eleven at night. Mr Henderson was coming and going to and from the room during this whole time; and the deponent did not think that Mr Henderson was absent above a quarter of an hour at any one time.—This witness, and the two preceding ones, assigned as their cause for remembering, that it was on the 3d of May last they were in Mr Henderson's house, that he, Ker, and Davidson, had a previous appointment to meet there, in order to his going to learn French with Mr Ker.

Patrick Innes writer in Edinburgh, deposed, That Mrs M'Leod having shown the deponent the obligation subscribed by Mr Henderson, and produced in process, told him, that the motive of Mr Henderson indorsing the Duchefs of Gordon's bill to her was, that he might conceal an unlawful correspondence which he kept with one Helen Moody, a servant of hers, and carry the said Helen out of the country. Mrs M'Leod told the deponent this in the house of John Gibson, on the 4th or 5th of May. Being interrogated, If he knew that Mrs M'Leod did keep out of the way on account of this bill? deposed, That Mrs M'Leod absconded for three days, and told the deponent, that the reason of her doing so was, ' That Petrie had a warrant to apprehend  
 ' her, and that she expected payment against eight o'clock at night,  
 ' on Saturday, from Mr Henderson; and that then she would give  
 ' them all the tail of a long tow \*.'—The deponent went along  
 with

\* The swing of a rope.

with Mrs M'Leod to one Doctor Smith, who was well acquainted with the Duchess of Gordon, and requested him to intercede with her Grace, that she would pass from any ground she had for challenging the bill; but this 'the Doctor positively refused; upon which Mrs M'Leod said she was undone.'

Mary M'Aulay, widow of Alexander M'Lellan barber in Leith deposed, That some few days after Mrs M'Leod was made prisoner, the deponent saw in her house one David Household, who told her, that, a few days before Mrs M'Leod was apprehended, he, at her desire, did put on a coat of her husband's, and went along with her to the Canongate; and in some house there, did assume the name of Henderson, and under that name, did subscribe a paper, in presence of two witnesses, one of them a married man, and the other a young lad: And he said it was on account of this paper that Mrs M'Leod was put in prison. He added, that the reason she gave for his putting on her husband's coat was, that he might appear like Henderson.—Household expressed his sorrow for what he had done; said he was not aware of his hazard; but now he was in danger of his life, and was resolved to fly the country: That he was afraid to cross at Leith, lest he should be apprehended, and would cross at Queensferry.—And the deponent believed that he fled accordingly.

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Thus far had the trial proceeded, neither party being able to produce more witnesses to support their mutual recrimination and defence, when the Lord Advocate, on the last day but one of

1726 of the *Summer Session*\*, represented to the Court, that, as the evidence given must have established with their Lordships a conviction of Mr Henderson's guilt, the duty of his office required it of him, to ask their Lordships to pronounce a decree, finding the bill drawn upon the Ducheſs of Gordon, to be forged by the prisoner Henderson; and therefore remitting him to the Court of Juſticiary, that he might ſuffer a capital puniſhment.

The counſel for Mr Henderson urged † in his defence, that notwithstanding the direct teſtimony which was given by ſeveral witneſſes, of his having granted the obligation relative to the forged bill; yet, having viſited him in priſon, and repeatedly examined him in private, in the moſt ſolemn manner, the ſimplicity, uniformity, and ſteadineſs of his answers to the counſel's interrogatories, gave the latter, if not a perfect conviction, at leaſt a ſtrong belief, that Henderson was truly innocent.—The counſel therefore requeſted of their Lordships, that they would not be haſty to embrace, nor reſolute to conclude, a decided opinion of Henderson's guilt; for that even procraftination was not a fault, when the life of a man was at ſtake. And he entreated their Lordships to ſpare his feelings of the pain it would give them, to ſee a ſentence pronounced on almoſt the laſt day of a *Session*, which was to be the foundation of a capital puniſhment being adjudged to a man, of whoſe innocence he ſtill entertained

\* The terms of the Courts of Juſtice in Scotland, are called *Sessions*. There are two of them in the year, the *Summer and the Winter Sessions*. † Mr Dundas of Arncliffe, afterwards Lord Preſident of the Court of Session; the ſame who is mentioned above in the trial of Carnegie of Finhaven.—The circumſtances of this trial which do not appear upon record, were communicated to me by his ſon the Lord Preſident, of whoſe faithful memory I have more than once had occaſion to ſee the moſt unequivocal proof. He learned thoſe circumſtances in repeated converſations with his father, and the Lord Preſident Forbeſs.

tertain'd a strong persuasion.—The solemn and animated address of the counsel made a forcible impression upon the Court, and their Lordships delayed the cause till the Winter Session: 1726

During the vacation, a singular coincidence of circumstances occurred, which was the means of vindicating Henderson's innocence, and of detecting a profound scheme of fraud, no less ingeniously contrived, than dexterously executed: And this discovery, his Majesty's Advocate and Solicitor General, in their pleadings before the Court, publicly attributed to Providence.

The Lord Advocate, when going north to his house of Cullo-den, paid a visit to Mr Rose of Kilravock.—Mr Rose showed his Lordship a house he was building; and, happening to miss one of the carpenters whom he thought an expert workman, he asked the overseer, What was become of him? The overseer taking Mr Rose aside, bid him take no further notice of this; for the young man, upon hearing that the Lord Advocate was to be at Kilravock, declared it was high time for him to leave the country; and that he would immediately go to Aberdeen, and take shipping for London.—This Mr Rose communicated to his Lordship, who asked the overseer the carpenter's name, and, if he knew of any crime that the carpenter had committed? The overseer answered, *that the man's name was David Household, and he suspected the crime was being accessory to some forgery.* The Lord Advocate immediately despatched a messenger to Aberdeen, who apprehended Household, and carried him prisoner to Edinburgh.

Upon the commencement of the Winter Session, Household being brought before their Lordships, and examined, deposed,

P p

That:

1726 That in the beginning of the year, he, at the desire of Mrs M'Leod, wrote the bill produced in process\*, which she dictated to him; and he in particular, did write the name of George Henderfon, both as drawer and indorfer; but the word '*Gordon*' he did not write. At another time Mrs M'Leod carried him to a gardener's house without the Water-gate, at the foot of the Canongate; but, before taking him there, she put on him a coat belonging to her husband, and a black knotted periwig, and told him, that she was to bring him into the company of *two honest men, before whom he must personate George Henderfon.* The deponent did as she desired; and, in the gardener's house at the Water-gate, she dictated to him a part of the obligation produced in process.—Thereafter, she took him to a wright's house in the Canongate, on the south side of the street, a little below the Earl of Moray's, and there, in presence of the wright, and of a boy called Dempster, Mrs M'Leod dictated, and the deponent wrote the remaining part of the obligation, and subscribed it with the name of George Henderfon, in presence of the wright, and of Dempster, who subscribed as witnesses. The letter produced in process from George Henderfon to William Petrie, being likewise shown to the deponent, he deposed, That he wrote it also at the desire of Mrs M'Leod, who dictated the same to him; and this happened before he wrote the obligation mentioned above. Deposed, That, after Mrs M'Leod was put in prison, a Highlandman came to him, and said, that he was sent by Mr M'Leod, Mrs M'Leod's husband, to persuade him to abscond on account of those papers he had written. This he thought unnecessary, as he wrote them at the desire of another, and

\* The Lord Advocate has often been heard to say, That had his rash desire been complied with, and Henderfon executed, and his Lordship had learned the facts which afterwards appeared, he should have looked upon himself as guilty of murder.

and was 'altogether ignorant of the import of said writings.' 1726  
 But upon advising with some friends, he was convinced of his danger, and he absconded and fled.

John Wincheſter, clerk to the comptroller of the cuſtoms at Leith, depoſed, That he was\* intimately acquainted with David Houſehold : That ſome time in May laſt, the deponent went to ſee Houſehold, who was then working aboard Captain Marſham's ſhip, which was lying in Leith harbour ; but was told that Houſehold was not to be found. He called a ſecond time, and the mate of the ſhip brought Houſehold to him. The deponent aſked, What was the matter with him ? He answered, That he was obliged to hide himſelf ; for Mrs M'Leod had induced him one day to go to a houſe in the Canongate with her, and there to write out a bill for her for about L. 50, or L. 60, in preſence of two witneſſes ; but the deponent does not remember what he ſaid about ſubſcribing the bill. Depoſed, That he ſaid to Houſehold, " He would be hanged for ſo doing ;" to which Houſehold answered, He was reſolved to fly ; and added, that he had got a meſſage from Mrs M'Leod's huſband to abſcond. The deponent aſked him, If it was on account of this bill that Mrs M'Leod was put in priſon ? ' To which he answered, That it was the very ſame.'—The bill, letter, and obligation in proceſs, being ſhown to the deponent, depoſed, That he was well acquainted with Houſehold's hand-writing ; and he believed the ſaid deeds to be written by him.

Archibald Dempſter, a preceding witneſs, being re-examined, and his former depoſition read over to him, depoſed, That nobody inſtructed him as to what he was to ſay in that depoſition, nor promiſed him any reward on that account.—*Being confronted*

1726 *ted with Henderson* \* *at the bar, and with David Household, and*  
 being desired to look narrowly upon the said David, and upon  
 George Henderson at the bar, in order to declare upon oath  
 which of the said two was the person who wrote and subscri-  
 bed the obligation in the house of John Gibson, mentioned by  
 the deponent in his former oath, deponed, *That he did believe*  
*that the said person was said David Household, and not George*  
*Henderson.*

The second part of this profound plot being performed, and the 'plot detected,' it remained now but for public justice to bring the matter to a catastrophe.—Upon the eighth of December, the Lord Advocate represented to the Court, that it was manifest that the Duchess of Gordon's bill was a forgery: That it was evident from the proof that Henderson was *innocent of the forgery*, who therefore ought to be acquitted; and that Mrs Macleod was guilty, *art and part*, of the same, as well as of counterfeiting the letter and obligation produced in process. This, his Lordship said, was established by Household, who, at the desire, and by the contrivance of Mrs Macleod, actually forged the deeds;—by Dempster, who, in his second deposition, ingenuously and satisfactorily accounted for the mistake into which he was led in his first, by the artful contrivance of Mrs Macleod;—by comparing the deeds produced with the hand-writing of Household taken down in their presence;—and by the evidence which Henderson had led of an *alibi*. He added, that she had formed a malicious intention to hang her neighbour, and it was but just she should fall into her own snare.—Upon the whole, his Lordship

\* The Lord Advocate made the great black knotted wig be taken off Henderson and put upon Household, to refresh his perceptive as well as recollective faculties. He also made Household take a pen and write Henderson's name before them, to establish, *ex comparatione literarum*, whose hand-writing the deeds really were.

ship observed, that, by her artful and horrid contrivance, Mrs Macleod had well nigh made 'an innocent man suffer death. 1726  
 ' That this contrivance was, by the good providence of God, ~~~~~  
 ' discovered: And concluded, that therefore, the said Mrs Mac-  
 ' leod was guilty, *art and part*, of forgery, and ought to suffer  
 ' the pains of death.' The Solicitor General \* added, ' that  
 ' there was such a horrid design, and so artfully laid, *that, at*  
 ' *first, he did firmly believe Henderson guilty, nay, and could appeal*  
 ' *to all, if by good providence, Household had not been apprehended,*  
 ' *they had not condemned Henderson.*'

The defences which Mrs Macleod's counsel † urged in her behalf respected the nature of the crime and the evidence of her guilt. The nature of her crime, it was alledged, was not an intent to defraud the Duchess of Gordon of any money; neither, in fact, was her Grace, or any other person, defrauded. The sole purpose was to use the deed as a fund of credit for raising a pittance of money, which she applied to the most pious of purposes, the relieving her husband from a prison. And, as to the subsequent part of her alledged conduct after it came to be discovered that the bill was forged; whatever might be the *result*, the *intention* was not *malice* against Henderson, but a desire to save her own life, and therefore was a species of self-defence, which greatly alleviated her supposed guilt, according to the brocard, '*licet uni- cuique sanguinem suum redimere qualiter qualiter.*' The evidence of her guilt, again, was the testimony of but one witness, which, although it might be entitled to some credit in a civil cause, could be no ground for proceeding upon in a matter of life and death. And how far this witness was deserving of any credit with their  
 Lordships,

\* Mr Charles Erskine, afterwards Lord Justice Clerk.

† Mr Robert Craigie, afterwards Lord President of the Court of Session.

1726 Lordships, let his public infamy, of which he himself stood recorder, determine; for he had placed himself in so singular and unequivocal a point of guilt, that whether his testimony was true or false, it branded him with equal infamy. Neither was Dempster's evidence to be regarded, as his first and his second depositions were repugnant to each other. As for the argument of Henderson's *alibi*, which was now had recourse to, it had grown the better for the keeping; for at the end of the Summer session, it surely had no weight with the Lord Advocate, when, notwithstanding of it, his Lordship moved, that *Decreet of Reduction and Improbation* should be pronounced, and Henderson as the guilty person, remitted to the Court of Justiciary. Farther, the witnesses who deposed to what is pleaded on as an *alibi*, admit that Henderson was frequently out of the room, and that perhaps, for a quarter of an hour together; and how natural it was for comrades over a bottle to think *a whole hour but a quarter*, would readily be admitted. Upon the whole, as the testimony of such a person as Household was so little worthy of making faith in judgment; and as there was no precise punishment by our law annexed to the crime of forgery, but it remained with their Lordships to adapt the extent of penalty to the degree of guilt, he hoped they would either acquit Mrs Macleod, or at farthest subject her to an arbitrary punishment.

The Court found that Mrs Macleod was 'guilty, *art and part*, of the said forgeries.' They reduced the deeds, remitted Mrs Macleod to the Court of Justiciary, acquitted Mr Henderson, and dismissed him from the bar.

Mrs Macleod was then served with a criminal indictment at the instance of his Majesty's Advocate, setting forth, that, by the law and practice of this kingdom, the crime of forgery, or the being

being *art and part* thereof, or the using of forged deeds, was 1726  
punishable with 'death, and confiscation of moveables, and other  
'pains of law:' That nevertheless, Mrs Macleod had been guilty  
of all, or one, or other, of these crimes, in so far as she had  
forged a bill upon the Duchess of Gordon, &c. &c. That the  
Court of Session had pronounced a sentence, declaring the bill,  
&c. to be forgeries, and that the prisoner was *guilty, art and part*,  
of the same, and therefore remitting her to the Court of Justiciary:  
And that the extracted, *i. e.* authenticated, decree of the  
Court of Session, was lodged with the clerk of the Court of Justiciary.  
'All which, or any part thereof, being found proven  
'against her,' she ought to be punished with the pains of death.

The prisoner and the public prosecutor were heard by counsel.  
It was objected for her, that forgery, by the law of Scotland,  
did not infer a capital punishment: That she was not accused of  
having actually committed the forgery, but only of being *art and part*:  
That she had not used the bill with an intent to defraud,  
but merely as a fund of credit for a small sum of money, which  
she meant honestly to repay; and that the decree of the Court  
of Session was neither to be held as determining the relevancy of  
the indictment, nor as *probatio probata*, or evidence not to be  
controverted of the prisoner's guilt. Informations for both parties  
were also lodged by order of the Court. But as the defences  
stated for the prisoner were over-ruled; and as these general  
points of law, and of form, are now established by the subsequent  
practice of more than half a century, it is needless for me to  
state the arguments which they contained.

The Lords pronounced an interlocutor, repelling the defences  
stated for the prisoner, and finding her being guilty of forging  
any of those deeds, or that 'she was art and part thereof, relevant

' to

1726 ' to infer the pains of death.' The Solicitor General then produced the ' Decreet of Improbation obtained before the Lords of ' Seffion, and craved that the same might be read openly,' which was done accordingly. The decree being read, the Court ordered the affize instantly to inclose. The jury returned a verdict, unanimously finding the indictment proved, and the prisoner ' guilty, art and part, of the crimes libelled.' The Court adjudged the prisoner to be hanged on the eighth of March.

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If Mrs Macleod showed art in the contrivance, and dexterity in the execution of this fraud, she displayed no less fortitude in undergoing the punishment, which resulted from a perverted application of so much ingenuity. She went to the place of execution dressed in a black robe and petticoat, with a large hoop, a white fan in her hand, and white sarfenet hood on her head, according to the fashion of the times. When she came upon the scaffold, she put off the ornamental parts of her attire, pinned a handkerchief over her breast, and put the fatal cord about her neck with her own hands. She persisted to the last moment in the denial of her guilt, and died with the greatest intrepidity.

## OF BREAKING OF GARDENS.

*John Rait and Alexander Dean for breaking of Gardens.*

**T**HE prisoners were indicted at the instance of his Majesty's 1623  
 Advocate for breaking into the gardens of Barnton \*, <sup>w</sup>  
 Pilton, Barnbogle, Greycrook, Craigie-hall, and Carlowry, and  
 stealing thence herbs, artichock plants, *sybows*, *i. e.* young onions,  
 and bee-hives. They had formerly been convicted before an in-  
 ferior judicature, for breaking gardens in the neighbourhood of  
 Musselburgh; and by warrant of the Privy Council, which was  
 produced in Court, they were sentenced to be taken to the Bur-  
 row-Muir of Edinburgh, and there hanged.

Q 9

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\* Records of Justiciary, July 11. 1625.

## OF INCEST.

*Alexander Blair taylor in Currie.*

1630 **A**LLEXANDER BLAIR, taylor in Currie, was criminally prosecuted by his Majesty's Advocate for incest\*. The fact charged against him was, that he had carnal knowledge of one Catherine Windrahame, *his first wife's half brother's daughter*. And being admonished by the kirk to abstain from this connection, instead of yielding obedience, he fled to England with the woman, and there married her. The jury unanimously found him guilty, and the court ordained him to be beheaded.

*James Wilson coal-grieve at Bonhard.*

1649 **T**HE prisoner was tried before Mr Alexander Colvil Justice-depute, at the instance of Mr Thomas Nicolson, his Majesty's Advocate. The indictment accused him of having committed incest with Janet Carse, daughter of Agnes Brown his wife †, *about thirty five years since, or thereabout*, his wife being then alive; also, of having committed adultery with Jean Walker during the lifetime of his said wife.

The

\* Records of Justiciary, September 9. 1630.  
December 20. 1649.

† Records of Justiciary,

The prisoner with great penitence confessed his guilt before 1649  
the Court and jury; and a verdict being returned against him, ~  
the Court ordained him to be taken on the next day to the Castle-  
hill and beheaded, and his personal estate to be forfeited.

*William Drysdale and Barbara Tannahill.*

**W**ILLIAM DRYSDALE and Barbara Tannahill were served 1705  
with separate indictments, accusing them of having committed ~  
incest with each other. The crime libelled was, that the  
prisoner William Drysdale, a widower, (whose wife, a sister of  
the other prisoner, had been dead for two years), had layen with  
the said prisoner, Barbara Tannahill \*: And that, by an act pas-  
sed in the reign of King James VI. parl. 1. chap. 14. and by the  
18th chapter of Leviticus, this crime inferred the pain of death.  
—The charge against Barbara Tannahill was the same, *mutatis*  
*mutandis*.

Informations, neither ingenious nor elaborate, were lodged  
for and against the prisoner, Drysdale. The Court repelled the  
defences, and found the libel relevant.

*T H E P R O O F.*

Barbara Tannahill judicially confessed that she had layen one  
time only with the other prisoner, Drysdale, and that she was  
now with child by him.

Q q 2

Mr

\* Records of Justiciary, 8. 22. January, March 12. June 11. 1705.

1705 Mr Samuel Semple minister at Liberton depofed, That Barbara Tannahill *confessed her guilt before him and the kirk-feflion*; and that he interrogated the other prifoner Dryfdale, who exprefly difavowed the charge.

Robert Hardie depofed, That one evening going by the houfe where the prifoners lived, he heard Barbara Tannahill's voice calling out, once and again, '*O dear!*' and did hear the other prifoner using expreffions of entreaty, or rather of violence, towards her. And that the prifoners lived in a houfe by themfelves.—Two other witneffes fwore to Tannahill's confeffion, and Dryfdale's denial, of guilt: That Dryfdale's wife had been dead for two years; and that the prifoner, Tannahill, was her fifter.

The jury found the indictment proved againft Tannahill, but found nothing proved againft Dryfdale but the woman's '*judicial confeffion*, which is a great prefumption of his guilt.'—The Court adjudged Tannahill to be hanged, and Dryfdale to be banifhed for life.

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Even according to the Mofaick law thefe unfortunate perfons could not have been legally convicted, and the Scottifh ftatute \* declares the Mofaic law, as laid down in the 18th chapter of Leviticus, to be the rule for determining inceft. In the information for his Majefty's Advocate againft the prifoner Dryfdale, an unwarrantable and abfurd extenfion of this crime was attempted.—That as it is there commanded, Thou fhalt not lie with *thy brother's wife*, fo from the degrees of affinity being the fame, the command muft likewise be *underftood* to be, Thou fhalt

\* James VI. parl. 1. c. 14.

shalt not lie with *thy wife's sister*. To this it may be answered, 1705  
 —1<sup>mo</sup>, That to suppose a penal law reaching life not to be *express* but *implied*, is to deem us to be governed not by law but  
 by despotism. 2<sup>do</sup>, To lie with a brother's wife occasions an  
 uncertainty as to the progeny. 3<sup>tio</sup>, To do so is not only  
 incest but adultery. 4<sup>to</sup>, It is not commanded—Thou shalt  
 not lie with thy brother's *widow*. 5<sup>to</sup>, This connection by  
 affinity is dissolved, and the survivor is loosed by the death ei-  
 ther of husband or wife. 6<sup>to</sup>, This argument is completely il-  
 lustrated by the command in a subsequent verse of the same  
 chapter,—Thou shalt not *vex* thy wife\* by lying with her sister  
 in her . . . . *lifetime*. 7<sup>mo</sup>, To marry a brother's widow was  
 an express injunction of the law of Moses; and if the surviving  
 brother declined the match, the widow was entitled by that ele-  
gant and dignified system of jurisprudence to—*spit in his face* †.—  
 These arguments however were either omitted or over-ruled.

A rancorous detestation of irregular commerce between the  
 sexes, has distinguished those religious sects which pretend to an  
 uncommon degree of spiritual purity, and in a peculiar manner  
 the rigid disciples of Calvin. Indeed, the Apostle † to whose  
 mysterious doctrines they are peculiarly attached, has barely to-  
 lerated the giving obedience to that impulse, with which nature  
 has directed every animal to the propagation of its species.

## The

\* The words are still more distinct and forcible in the *vulgate*, or St Jerome's  
 translation, than in the English edition of the Bible. 'Sororem uxoris tuae in pel-  
 licatum illius non accipies, nec revalebis turpitudinem ejus, adhuc illa vivente.'  
 Biblia Parisiis ex officina Stephani e regione Scholae Decretorum, MDXX. Leviti-  
 cus, c. 18. Here the words truly express the sense 'in pellicatum illius,' being a-  
 dultery against her.

† Deuteronomy, c. 25. v. 9.

‡ 1st Corinthians,

1705 The instructive page of history, and the fatal warnings recorded in criminal courts, sufficiently evince what public mischief, what private conflict, what dark and atrocious crimes have proceeded from a mistaken notion of religion, inculcating a perpetual warfare with the dictates of nature.

The preservation of morals, by debarring a union between persons whose frequent opportunities pave the way to debauchery.—The preventing a perplexity in the degrees of kindred—Perhaps also, the preserving a strong and healthy breed, have induced civilized nations to prohibit as incestuous, commerce between persons nearly connected by *consanguinity*. It does not appear that the same reasons apply to the debarring such union between those who are connected by *affinity*.—After the husband is dead, the wife surely is not guilty of adultery by entering into a second marriage; for, ‘*if the husband be dead*’, she ‘*is loosen’d from the law of her husband.*’ If so, I do not perceive how the connection thus dissolved by death, can imply against the survivor, the crime of *incest*, any more than that of *adultery*.

A more rigid degree of Calvinism than what now prevails, was established in the reign of William. The judicatories of the church possessed a jurisdiction. The slightest informalities between the sexes excited zealous abhorrence. To avoid the disgrace of the *repenting-stool*, many a miserable wretch dared a guilt which was to be expiated by the pain and ignominy of the *gallows*. The Presbyterian † clergy, in matters of scandal and of witchcraft,

\* Romans, c. 7. v. 2. † Original precognition taken before the sheriff-depute of Ross, June 23. 1720, against Helen Bowie and Janet Thomson for witchcraft, at the instance of ‘Mr David Ross minister of the gospel at Farnhill,’

witchcraft, arrogated to themselves the office of public prosecutors, of inquisitors general; and so late as the 1720, the ministers, *in behalf of themselves and their kirk-sessions*, publickly exercised this office in our courts of justice. Their busy zeal in hunting out after young women whom they suspected of being with child, and after old women who lay under the imputation of witchcraft, was productive of the most dismal consequences. In the one case, their persecution was directed at unhappy women who *had obeyed the impulse of nature*; in the other, at those who incurred the imputation of doing what *nature rendered it impossible for them to do*. In both, the pains and the piety of the clergy were productive of the same issue, the driving miserable creatures to the gallows.—And the recorded convictions before the Court of Justiciary at Edinburgh, of *twenty-one women for child-murder*, and three men *pro venere nefanda cum brutis animalibus*, in the space of seven years\*, afford a melancholy proof that the insulted dictates of nature, when checked in their regular course, will burst forth in a torrent that will sweep away every feeling of humanity, and every sentiment of virtue.

## O F

‘batt, *in behalf of the session of the said parish*,’ in possession of the Right Honorable Robert Dundas of Arncliffe, Lord President of the Court of Session.

\* From A. D. 1700 to 1706, inclusive.—See Rec. of Just.

## O F A D U L T E R Y .

*John Guthrie for notour, i. e. notorious Adultery.*

1617 **A**DULTERY was first made capital in Scotland by act of Parl. 1563. chap. 74. The thunder of the law in the statute immediately preceding, had been hurled against witchcraft; and an act passed in the present century, 'ratifies and revives all former laws and acts against drunkenness, Sabbath-breaking, swearing, fornication, adultery, and all manner of uncleanness;' and it specially and expressly revives \* the act above mentioned against adultery. Notorious, or *notour* adultery, is, *1mo*, When children are procreated between adulterers; *2do*, When they are publicly known to sleep with each other; or, *3tio*, When being suspected of adultery, and admonished by the Kirk to refrain from the vice, and to do penance for the scandal; yet refusing obedience, they are excommunicated for the same. James VI. Parl. 7. chap. 105.

John Guthrie was prosecuted for the crime of notorious adultery. He was accused of having married a wife in the shire of Forfar, and deserted her †; of having afterwards come to Leith; of having laid aside the name of Laird, which he bore in Forfar, and assumed that of Guthrie, and there marrying another wife, with whom he cohabited for several years; and also, of committing adultery with another woman. *These facts he acknowledged.*

\* William, Parl. 1. Sef. 8. c. 11. *It is a fortunate maxim in our jurisprudence, that statute law prescribes.*

† Rec. of Just. 14th March, 16th April 1617.

*ledged before the Kirk-session* of Kirkliston, and did penance in sackcloth for his impurities.—Being thus detected and stigmatized by the church, the secular arm was next stretched forth against him. A warrant under the royal sign manual, dated at Whitehall, 26th of January 1617, was directed to the Lord Justice General, and the other Justices. It set forth, that the King's Advocate, by his Majesty's express command, was about to prosecute the prisoner for the crime of notorious adultery, and required the Justices instantly, on his conviction, to condemn him to death. The Court had the humanity not to enter this warrant upon record till about a month after the prisoner's conviction, when it sentenced him to be taken to the Cross of Edinburgh, and hanged on a gibbet till he be dead; and he appears to have been carried to immediate execution.

Two other persons, Alexander Thomson and Janet Cuthbert, were also, by royal warrant, tried for adultery on the same day, with the prisoner, and were convicted. But the King was pleased to direct, that out of his *princely clemency*, they should not be put to death, but banished.

*Patrick Robertson and Marion Kempt for Adultery.*

THE prisoners were accused of adulterous commerce with each other; the fruits of which were, Marion Kempt's bearing three children to the said Patrick\*. —They were also charged with the said Marion's having, with Patrick's knowledge and  
R r consent,

\* Records of Justiciary, 18th, 20th, December 1627.

1627 consent, taken poisonous drugs, by which her first child was killed in the womb. They were convicted on their own confession; and, on the 20th of the same month, were sentenced to be hanged on a gibbet at the Castle-hill.

*John Frazer Writer in Edinburgh, for Adultery.*

*Counsel for the prosecutor,  
Sir George Mackenzie.*

*Counsel for the prisoner, Sir  
George Lockhart, &c.*

1673 **T**HE prisoner was tried capitally for the crime of adultery, at the instance of his wife, and of Sir John Nisbet of Dirleton, his Majesty's Advocate. The fact libelled against him was simply, that, in absence of the private prosecutor, he had married another woman.

The prisoner's counsel urged in his behalf, that although the private prosecutor had a right of action to annul the second marriage, and to compel the adherence of the prisoner\*; yet she had no title to prosecute him criminally, *ad vindictam publicam*, in a suit, in which if she prevailed, the husband whom she claimed must be bereft of his life.—That if any irregularity, or offence, has been committed by the prisoner, it was owing allentarily to the snares laid for him by his wife, the insidiousness of whose malice could only be paralleled by the effrontery of her prostitution.—The prosecutor having been equally public and promiscuous in her debaucheries, the prisoner had several years before been obliged to sue, before the Commissaries of Edinburgh, for a divorce from her; but, conscious of guilt and infamy, she had embarked

\* Rec. of Just. 17th Nov. 1673. 12th Jan. 20th July 1674.

embarked on board a ship destined to carry felon's to Virginia, 1673 and the prosecution was suffered to drop. After having been absent for a considerable time, a report of her death was circulated and believed, and what was at first *rumour*, became afterwards *evidence*; the shipmaster, one of the seamen, and a passenger on board the ship, in which the prosecutor embarked, having given a testificate on oath, of her having died in Virginia. This testificate was laid before the Presbytery of Edinburgh; and the clerk of the Kirk-session was ordered to examine into the same. Having done so, he was satisfied by the granters, that the certificate was true, as well as authentic. This report being laid before the presbytery, they authorized the proclamation of banns, which was regularly performed; yet no interruption was made to, no question brought of the marriage, for upwards of four years.—And, at the end of this period, the prosecutor starts up as from the dead, with a halter in her hand, menacing the prisoner.

It now appears that she had lurked for great part of that time in Aberdeen, Dundee, &c. under the name of Mrs Gerard; *that she had circulated the report of her own death*:—That, since her assumption of a feigned name, her life had been as profligate as before her embarking for Virginia. And that she had brought forth three adulterous children, the unequivocal testimony of her shame and guilt; one of them, not six months preceding this very trial, which she has brought in order to get her husband hanged on a charge of adultery.—It was argued, that the prosecutor's *infidelity* to the marriage vows had given occasion to the suit for a divorce, which the prisoner had brought against her before the Commissaries; and authorized the process of recrimination before this Court, which the prisoner was immediately to institute: *That this infidelity* would exclude the civil effects of a divorce, and much more ought to debar his wife from prosecuting

1673 cutting the husband capitally for the very offence she had committed against him.—That she had laid a snare for him, by propagating rumours of her own death, and by lurking under a feigned name. Besides these defences, it was argued for the prisoner, that adultery could not be committed without consciousness, ‘nam voluntas et propositum distinguunt maleficia.’ And the probable rumour, nay the direct certificate of the prosecutor’s death, exempts from the suspicion of consciousness, and consequently from the crime of adultery, according to the case in the civil law, ‘Mulier cum audisset absentem virum defunctum \* esse, alii se junxit, et falsis rumoribus inducta, et quia verisimile est eam deceptam fuisse, nihil vindicta dignum videri potest.’

It was answered for the prosecutor, That *he* is an adulterer who lies with another woman while his wife lives; and, as rumour could not dissolve marriage, so neither could it defend against adultery; otherwise it were easy for any man who grew weary of his wife, to propagate reports of her death, and then to take advantage of the rumours he himself had fabricated. That even, if rumours were sufficient; yet these ought to be constant and universal; whereas, in this case, there was but one certificate, and it bore only, that *Margaret Haitly* died in Virginia, not that *Margaret Haitly, wife of John Fraser*, died in Virginia: That it was not *probable*, but *invincible* ignorance alone which could be excusable: That the prisoner had not made sufficient inquiry concerning his wife at her relations, and his ignorance was affected: That a long lapse of time must intervene; whereas here, there was but an absence of three years: That the prisoner ought to have executed a summons of adherence against his wife, which would have entitled him to a di-

vorce:.

\* Digest. L. 11. § 12. de adulteriis.

voice : That the presbytery of Edinburgh had not a jurisdiction 1673  
competent to the dissolution of marriage ; consequently their  
warrant was altogether insignificant.

To this sophisticated reasoning the Court gave the sanction of its judgment, repelling the argument urged in behalf of the prisoner.

Nothing now remained but to lead a proof of the fact. The proof amounted solely to the prisoner's having married Helen Guthrie his second wife, and lived under the same roof with her as married persons. Even the consummation of the marriage is not proved, but is only matter of presumption. The jury by plurality of voices, viz. *nine to six*, found the prisoner guilty.

*Margaret Haitly for Adultery.*

**I**T was now Mrs Haitly's turn to stand trial for her life. On the same day with her husband she was prosecuted at his instance, and that of the Lord Advocate, on a charge of adultery with ten different persons specified in the indictment ; and of having born three children, the fruit of her unlawful amours, the last of them not six months preceding.

The evidence of her criminal correspondence, and of the bearing three children in adultery, was complete ; yet the jury, from what reason or motive I cannot conjecture, were not unanimous ; but by a plurality of *eleven to four* found the prisoner guilty. It

was

1673 was not however '*the feet of them which buried her husband that*  
 ~~~~~ '*carried her out.*'

The Court delayed from time to time pronouncing sentence upon the prisoners. On the 20th of July after, John Frazer was set at liberty, in consequence of having obtained his Majesty's pardon. The other convict Haitly still remained a prisoner; but after a minute and painful examination of the records, I have not been able to discover whether she was kept prisoner for life, or what became of her.

*John Murdoch and Janet Douglass for Adultery.*

1699 **J**OHAN MURDOCH and Janet Douglass, both of them married persons, inhabitants of Edinburgh, were tried capitally at the instance of his Majesty's Advocate, not for *notour* \*, but for simple adultery, *i. e.* for one act of adultery. Informations were lodged for the prosecutor and the prisoners. The King's Advocate restricted the libel to an arbitrary punishment. The prisoners threw themselves upon the King's will, and were banished for life, never to return under pain of death.

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If the frequency, variety, and severity, of criminal prosecutions can establish the purity of statesmen and judges, this surely was an age in which persons in public office could boast of a  
 very

\* Records of Justiciary, September 14. November 6. 1699.

very uncommon degree of purity and virtue. In this case, such 1699  
 was the zealous detestation of vice, that persons were indicted  
 capitally for simple adultery, although neither by the statutory  
 law, nor the judgments of the criminal courts, was simple adul-  
 tery ever deemed capital. A few months preceding this trial,  
 the Court of Justiciary entered on its journals \* a recommenda-  
 tion to the King's Advocate to prosecute witches. About the  
 close of that century too, a man was hanged for murder, al-  
 though the jury found that the prisoner in defending himself had  
 killed the deceased. Another was hanged for expressing in conver-  
 sation, opinions on religion and philosophy opposite to those of  
 the times. A third was tried for high treason, for engraving a  
 political print, but acquitted by the jury. Others suffered death  
 also, when perhaps their trials had better been omitted.

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\* Records of Justiciary, March 27. 1699.; November 21. 1695; December 24.  
 1696.; July 10. 1699.; April 14. & 22.; May 24. 1701.; July 10. 1699.

## O F F O R N I C A T I O N .

*Christopher Little and Margaret Jameson for fornication, and theft, charged against them in one indictment.*

1653 **A**FTER the abolition of Popery, and establishment of the Confession of Faith by authority of parliament, one of the first acts of the legislature was to annex a punishment to 'the filthy vice of fornication.' The punishment was for the first offence, to pay a fine of L. 40 Scots, (and upon failure of payment \* to undergo eight days imprisonment, and to be fed upon bread and water), and to stand two hours upon the pillory. For the second offence the fine was raised to 100 merks; and besides being put upon the pillory, the convict was to have *his or her* head shaved. And for the third offence the pecuniary mulct was augmented to L. 100 Scots, and the convict was ordained to be thrice ducked in the deepest and foulest pool in the parish, and then to be banished from the same for ever. And this zealous act has been renewed so late as A. D. 1696.

On the 16th of October 1652, a commission was produced in the Parliament house at Edinburgh, from the commissioners of the Parliament of the Commonwealth of England, and recorded in the books of Justiciary, appointing George Smith, John March, Andrew Owen, and Edward Mosley, Esquires, or any two of them, commissioners for the administration of justice to the people of Scotland in causes criminal.

On

\* James VI. parl. 1. chap. 13.; William, parl. 1. sess. 6. chap. 31.

On the 21st of June 1653, Henry Whallie, Advocate General \*, prosecuted Jean Hamilton, Christopher Little, and Margaret Jameson, before the Honourable George Smith and Edward Mosley, two of those commissioners. The prisoners were charged in the indictment with ' being all three accessory, art and ' part, of stealing shirts and sheets forth of the house of Elifabeth Potter widow in Newhaven, after the said Jean Hamilton ' her theftuous upbreaking thereof, committed on the 6th day ' of May last: And the said Christopher Little and Margaret ' Jameson for the crime of fornication committed by them with ' each other.'

The prisoners, Little and Jameson, denied the theft, but acknowledged the fornication, and submitted themselves to the mercy of the Court.

The jury, after hearing evidence, unanimously found the prisoners Hamilton and Jameson, guilty of stealing the sheets and shirts, and acquitted the prisoner Little of the same. They also unanimously found the prisoners Little and Jameson guilty of fornication. The Court sentenced Jean Hamilton to be scourged for theft from the Castlehill to the Netherbow, and then to be put into the Correction-house till farther orders; and ordained Little and Jameson for fornication instantly to pay L. 40 Scots, and in case of refusal to be kept prisoners for eight days, and fed on bread and *small drink*, and next market day to stand an hour bare headed on the pillory; the prisoner Little then to be set at liberty, but Jameson for the theft to be put in the Correction-house.

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\* Records of Justiciary, October 16. 1652. June 24. 1653.

## O F B L A S P H E M Y.

*Thomas Aikenhead for denying the Trinity, and the authority of the Scriptures, and for maintaining the eternity of the World.*

1696 **T**HE pious Charles II. being restored to the throne of his ancestors, He and his *upright* \* administration set themselves about the great works of religion and morality.

A Parliament worthy of such a King and such a ministry having accordingly, in contradiction to, and contempt of, the principles of a great body of the people, vested the King with a power of establishing any form of Church government he chose †, it proceeded next to enact statutes against Sabbath-breaking, swearing, drinking, and other profanities and immoralities.— These pious laws being made, another immediately followed, annexing the pain of death to the railing against God, or any of the persons of the Trinity, or denying them, and obstinately persisting therein.

I have hitherto discovered but three prosecutions for the crime of blasphemy. The first was that of a woman who was tried before the Circuit Court of Justiciary at Dumfries, A. D. 1671.  
But,

\* See an instance of the *recorded perjuries* of the great officers of state to rob a man of his life; Arnot's History of Edinburgh, p. 14. † Charles II. parl. 1. sess. 1. acts 16. 18. 19. 21.

But, as the records of the circuit courts previous to this century <sup>1696</sup> are lost, all I can say of the matter is, that the act \* of blasphemy charged against the prisoner was her drinking the Devil's health; that the Court did not find it relevant to infer the crime of blasphemy, but fined the woman in the sum of 500 merks for the offence. The second prosecution was against Francis Borthwick.

Francis Borthwick, second son to James Borthwick of Harelaw, was served with a criminal indictment for blasphemy, at the instance of his Majesty's Advocate, and of James Cockburne in Dudingstone, *informer against him*. As he did not choose to run the risk of a trial, sentence of outlawry was pronounced against him for his contempt and disobedience. It set forth, That he had been often cited to appear that day before the Court of Justiciary to answer to a charge of blasphemy: That he was born of Christian parents, baptised and educated in the Christian Church, and continued in the profession of Christianity, and in communion of the *Christian Catholick Church* till the fourteenth year of his age: That he then went abroad to follow the business of a merchant, and was seduced to a shameful apostacy from the most holy faith, and to profess himself openly *to be a Jew, and that he was circumcised*: That upon his return to Scotland, he at Edinburgh, and in the neighbourhood thereof, did rail against our Lord and Saviour Jesus Christ †, denying him to be God, and affirming  
S f 2
him

\* Mackenzie's Criminal Trials, tit. 6. § ult. Our Scandinavian ancestors used to pour forth immoderate libations to the health of their Gods; hence, when the Pagan religion yielded to the doctrines of the Gospel, in Germany, and several northern nations, the Church found it prudent to indulge the people with a bumper to the health of our Saviour, the apostles, and the saints; Mallet's Northern Antiquities, vol. 1. p. 137. † Records of Justiciary, June 15. 1681.

1696 him to be mere man, and a false prophet, and outrageously reviling him by such other blasphemies as were not fit to be uttered; renouncing and cursing the holy sacrament of his baptism, and imprecating vengeance upon himself if ever he should return to the Christian religion.—If the accused was truly mad enough to undergo circumcision, he was at least not so mad as to appear before the Court of Justiciary; and sentence of outlawry was therefore pronounced against him.—The last trial for blasphemy was that of Thomas Aikenhead.

Thomas Aikenhead appears to have been about twenty years of age; his father \*, who had been a surgeon in Edinburgh, was dead. Sir James Stewart, his Majesty's Advocate, by special order of the Privy Council, served him with a criminal indictment † before the Court of Justiciary for blasphemy. The libel sets forth, that blasphemy against God, or any of the persons of the blessed Trinity, *or against the holy scriptures, or our holy religion*, is a crime of the highest nature, and severely punishable by the laws of God, by those of this and every well governed realm, and particularly by acts of parliament, Charles II. parl. 1. sess. 1. chap. 21.; and by William, parliament A. D. 1696, sess. 5. c. 11.

That notwithstanding, the prisoner had repeatedly maintained, in conversation, that theology was a rhapsody of ill invented nonsense,

\* I have discovered an anecdote concerning the prisoner's father. He was cited before the Privy Council on the 20th April 1682, for selling amorous and provocative drugs, by which it was alledged that a woman would have lost her life, had not one Doctor Irvine given her an antidote. The Privy Council referred the case to the College of Physicians, and the College sagaciously reported, *that it was unsafe to use such medicines without first taking their advice*; Fountainhall, vol. 1. p. 183.

† Records of Justiciary, December 23. 1696.

nonsense, patched up partly of the moral doctrines of philosophers, and partly of poetical fictions and extravagant chimeras: That he ridiculed the holy scriptures, calling the Old Testament Ezra's fables, in profane allusion to Esop's fables: That he rail'd on Christ, saying, he had learned magick in Egypt, which enabled him to perform those *pranks* which were called miracles: That he called the New Testament the history of the impostor Christ: That he said Moses was the better artist and the better politician; and he preferred Mahomet to Christ: *That the Holy Scriptures were stuffed with such madness, nonsense, and contradictions. that he admired the stupidity of the world in being so long deluded by them:* That he rejected the mystery of the Trinity as unworthy of refutation; and scoffed at the incarnation of Christ, saying, that a *Theanthropos*, or God-man, was as great a contradiction as a *hirco-cervus*, or goat-stag, or that a *quadratum* was a *rotundum*: That he laugh'd at the doctrine of redemption: That he said the notion of a spirit was a contradiction: That he curs'd Christ, and argued against the being of God, maintaining, *that God, the World, and Nature, are all one thing;* and that the World exist'd from all eternity: That he said the inventors of the scriptural doctrines would be damn'd, *if there was such a thing as rewards or punishments after this life;* and that Christianity itself would soon be extirpated: That his impiety was so audacious, that, as he pass'd by the Trone Church in a cold night, he said to a companion, he could wish to warm himself in the place Ezra call'd Hell: And, *lastly,* That he often utter'd these or the like speeches within the last twelvemonth, without provocation, and merely from malice against God and Christ.

The

1696 The Court found the railing against, or cursing any of the persons of the Trinity, relevant to infer the pains of death; and the other crimes relevant to infer an arbitrary punishment.

No counsel appeared for the prisoner; nor does it seem that one word was urged in his behalf during the course of the trial. Four or five witnesses were examined, one of them a writer in Edinburgh, the rest students at the University, lads from eighteen to twenty, or twenty-one years of age. They proved most of the articles of the libel, with this addition, that the prisoner said he was confident Christianity would be utterly extirpated by the year 1800. There was however a material defect in the evidence. The article most highly criminal, viz. the railing against God, and cursing our Saviour, was not proved at all, but was an inference drawn by the jury from the prisoner's cursing Ezra, and saying that the inventors of the scriptural doctrines would be damned, if there be such a thing as damnation.

The jury \* unanimously found the prisoner guilty of railing against God, railing at and cursing Christ, and of the whole other articles in the libel. This verdict the jury, *even by the statute, were not warranted to pronounce.*—The railing against God, and cursing Christ, ought to have been facts directly proved, and not inferences drawn from cursing the inventors of scriptural

\* The following men composed the jury: James Bouden late bailie of Edinburgh, George Clerk (chancellor, *i. e.* foreman of the jury) late bailie there, Michael Allan late dean-of-guild, Charles Chartres late bailie, Robert Forester late *kirk-treasurer*, Adam Brown (clerk) late bailie, Alexander Thomson late deacon-conveener, Jerom Robertson *periwig-maker*, James Maclurg late dean-of-guild, Patrick Thomson late treasurer, William Pattoune late bailie, Robert Elphinstoune of Lofsness, George Mofsman stationer, George Fullertoun. Five persons summoned on the jury refused to attend, and were fined 100 merks each.

scriptural doctrines; and as for denying any of the persons of the Holy Trinity, it was not the denial, but obstinately persisting therein, which by the statute subjected the offender to a capital punishment. 1696

Besides these defences, had the Court been endued with the humanity to appoint counsel for the prisoner, it would undoubtedly have been pled for him, that these were rash words, drawn from him in the heat of controversy, which by no means coincided with his serious notions; and that he heartily repented of the warmth which betrayed him into expressions so dissonant from his own sentiments, and so offensive to the feelings of others.—Had these defences been offered for him, the jury could not, without being guilty of perjury, have convicted him of *obstinately persisting to deny the Trinity*, which the statute required.

The verdict was returned, and sentence pronounced against the prisoner on *Christmas Eve*, ‘ To be taken to the Gallow-lee  
‘ on the eighth of January, between the hours of two and four  
‘ in the afternoon, and to be hanged; his body to be buried at  
‘ the foot of the gallows, and his moveable estate to be forfeit-  
‘ ed.’—Mercy was asleep\*, as well as Justice and Science; so the dreadful sentence was executed!

OF

\* Two men were found guilty of house-breaking and robbery, attended with very aggravating circumstances, some days before the prisoner. They were indulged in four weeks longer than him as to day of execution. Records of Justiciary, December 22. 1696, January 4. 1697.

OF OTHER CRIMES AGAINST RE-  
LIGION AND THE STATE.

*Trial of John Ogilvie Jesuit, for saying of Mass, acknowledging the Pope to be Judge in Controversies of Religion, and declining to answer certain questions put by his Majesty's Commissioners, concerning the Pope's power to excommunicate Kings, the murder of a King excommunicated and deposed by the Pope, and a Subject's being absolved from the allegiance due to such a King.*

1615 **J**OHAN OGILVIE, a Jesuit, was tried before the Magistrates of Glasgow; judges specially appointed for the trial by the Lords of Privy Council\*. He was a priest equally devoid of the hypocrisy which characterises the most infamous, and the liberality which adorns the most enlightened of the clerical order. He possessed a considerable share of *acumen ingenii*; but his strong and clear intellect was strangely warped with bigotry. The prisoner was born in the north of Scotland. He had been out of the kingdom for upwards of twenty years, and had returned

\* A true relation of the proceedings against John Ogilvie, a Jesuit, &c. Edinburgh, printed by Andro Hart, A. D. 1615.--This account differs little in point of fact from that published at Douay, the same year, from a manuscript written by the prisoner, and continued by his fellow captives; except that the one, perhaps, suppresses, and the other may exaggerate his sufferings.

returned in the month of June preceding his trial. The public offence which he gave by the statutory crimes of saying mass, and of endeavouring to make converts to the Catholic religion, was aggravated by intemperate expressions of religious zeal; and as the prisoner had been lately in England, his indiscreet language, joined to the recent conspiracy of the gun powder treason, and the general odium which Papists laboured under, afforded a pretext to the abettors of kingly tyranny and of reformed zeal to insinuate, that the prisoner might be embarked in some desperate enterprize.

Many priests had, of late, smarted under the rod of justice\*; but the crown of martyrdom was reserved for the prisoner. William Murdoch, in particular, for the *crime of saying mass*, had been sentenced to stand on the pillory, at Edinburgh, two hours, in his pontifical robes; then a fire to be kindled, and his robes and instruments of worship to be burned; and the priest to be transported and banished his Majesty's whole dominions for life, never to return under pain of death.

The prisoner was apprehended by order of the Archbishop of Glasgow, (for in that city he chiefly sculked) on the 4th of October 1614, and was next day examined before his Grace and the Bishop of Argyle, and six other persons of note.—He was required to take an oath, that he should tell nothing but the truth, in so far as should be demanded of him. He replied, that he would take it, with an exception to any articles that should affect his own life and fortune, or tend to criminate others.—Being answered, that every question which could be proposed to him, must concern some of these articles. He took the oath, with this reservation, that, when he found a question imperti-

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\* Records of Justiciary, 25th September 1607.

1615 went, he either would say nothing, or declare simply, that *he would not tell*. He was interrogated accordingly; but nothing material could be drawn from him: For, whatever indiscretions escaped him, he resisted with a fortitude which does him infinite honour, every menace with which his inquisitors endeavoured to extort from him a discovery of the persons who had incurred a penalty by harbouring him. He was remanded to prison, and loaded with heavy irons.

He was afterwards brought to Edinburgh, and examined afresh before a new set of commissioners; but, as either his innocence, or his caution, screened him from a declaration of a criminal tendency, he was threatened with the torture; and he declared his readiness to suffer whatever torments they should be pleased to inflict. But some person whom (I suppose) long practice had taught to tread with caution the paths of iniquity, advised, that instead of affailing the prisoner with acute torments, they should keep him for some nights without sleep, as being the surest means, if not of staggering his resolution, at least of undermining his judgment. This *happy device* was followed to such an extent, that according to the prisoner's account \*, he was kept from sleep for eight days and nine whole nights, by the thrusting of needles and pins into his flesh; which had such an effect upon him, that he hardly knew what he either said or did, and often could not recollect so much as what town he was in. He relaxed so far as to name some of the persons who harboured him; and the commissioners flattered themselves he would become sufficiently pliable. In the mean time, upon the approach of the Christmas holydays, the Archbishop of Glasgow returned to his diocese, and took his prisoner along with him,  
lodged

\* Relatio Incarcerationis et Martyrii P. Joannis Ogilbei, &c. &c. Duaci, typis viduae Laurentii Kellami sub signo Agni Paschalis, 1615.

lodged him in his house, and entertained him well \*. In the <sup>1615</sup> beginning of January, new commissioners were appointed to take the prisoner's opinion on certain special interrogatories propounded by his Majesty. To these he answered in substance, declaring, ' That he thought the Pope had a right of jurisdiction over the King in spiritual affairs ; but that the prisoner was not bound to declare his opinion as to temporal, except to the Pope, or those authorized by him : That the Pope had authority to excommunicate the King, or any person who had been initiated into Christianity by baptism : That, as to the Pope's having a right to depose an excommunicated Prince, or to absolve his subjects from their allegiance, or whether it were lawful to kill such a Prince, he was not bound to declare his opinion.'—As if this declaration was not sufficiently disgusting to the dainty palate of the British Solomon, the prisoner volunteered in adding, that he condemned the oaths of supremacy and allegiance, as put in England, insisted that this should be inserted as part of his declaration, and subscribed the whole, '*Johannes Ogilveus Societatis Jesu.*'

Nothing more was wanting to accomplish his destruction. The virtuous and learned Sir Thomas More had fallen a sacrifice *about eighty years before*, to a capricious tyrant, by saying, that a question relating to the supremacy was like a two edged sword ; if one answered the one way, it confounded the soul ; if the other, it destroyed the body. The prisoner went much further ; he vehemently persisted in his declaration, notwithstanding the endeavours of the King's commissioners to prevail on him to soften it ; and an order from his Majesty to the Lords of the Privy Council was received, commanding them to bring him to trial.

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\* Relatio Incarcerationis, &amp;c.

1615 He was accordingly indicted upon three statutes, viz. James I. Parl. 3. chap. 48. ; James VI. Parl. 8. c. 129. and Parl. 18. c. 1. But although the indictment set forth, with manifest falsehood, that the first of these acts was guarded with the pains of treason; and, although the last of them contains *the unparalleled absurdity of ' annulling and rescinding every thing done, or hereafter to be done, in prejudice of the royal prerogative, in any time bygone or to come ;'* yet neither of them could have served to condemn the prisoner, they being declaratory, but not penal acts; for, although they declared the King's power in all cases, and over all persons, they had no penal sanction whatever annexed to the breach. The statute James VI. Parl. 8. c. 129. was not so favourable for the prisoner. It confirms the royal power over all persons, and in all cases, spiritual and temporal; and declares the King and his Privy Council to be competent judges to all persons, in all matters, ' concerning which they should be apprehended, or charged to answer such things as should be inquired of them. And that none apprehended or charged to that effect should decline the authority of the King or his Council under pain of treason.' This statute, broad as it is, could not have affected the prisoner's life, had not a false construction been put upon it; by comprehending under it not only those who, when called before the King and Council, *declined their jurisdiction, but also those who declined to answer every impertinent or insidious question that possibly might have involved themselves in the acknowledgment of a capital crime.* This construction the King's Counsel does indeed put upon the statute, in the course of this trial. I apprehend that the words of the act, which it must be confessed, are obscure and ambiguous, do not warrant it. If they do, I have only to observe, that to oblige a person to *answer, under pain of death, to an interrogatory which*

*which may affect his own life*, is perhaps, the greatest pitch of 1615  
tyranny and iniquity that any legislative body ever attained.         

The indictment proceeds to charge, that, notwithstanding these statutes, the prisoner had renounced his natural allegiance, and had endeavoured, by conferences, enticements, *mass-saying*, and other crafty means, not only to corrupt his Majesty's subjects in religion, but also to pervert them from their duty to their Prince, till he had been discovered and apprehended by the Archbishop of Glasgow.—His declaration of the 18th of January is then founded on; and many big sounding words follow, 'That the prisoner was guilty of *most damnable high treason*, in not answering, acknowledging,' &c. &c. Towards the conclusion, the libel sets forth his Majesty's great reluctance to apply the severities of the law to the sayers and hearers of *mass*, and his gentleness towards such offenders, in only punishing them by imprisonment and banishment, of which the prisoner had experience in the fate of his own accomplices; but that he, *by the three last articles in his declaration*, showed a professed purpose to effect the destruction of his Majesty's person and government; by all which, he had committed heinous and unpardonable treason.

The Archbishop of Glasgow, James Marquis of Hamilton, Robert Earl of Lothian, William Lord Sanquhar, John Lord Fleming, Robert Lord Boyd, and Sir Walter Stewart, were assessors to the Court; and Sir George Elphinstone of Blytheswood was the Chancellor of a very respectable jury. The indictment, the statutes, and the prisoner's declaration, being read over, the Advocate-depute addressed him in a speech, telling him, that he was not prosecuted for saying *mass*, nor for seducing the people to Popery, *nor for any thing that concerned his conscience*, but for declining

1615 declining the King's authority, and maintaining treasonable opinions, as '*the statutes libelled on made it treason not to answer the King or his council in any matter which should be demanded* \*.'

This *conscientious* harangue being finished, the prisoner was allowed to state objections, if he had any, why the persons named should not pass upon his jury. To this he made answer, that 'the jurymen were either friends to his cause, or enemies; *if enemies, they could not be admitted upon his trial; if friends, they should stand prisoners at the bar with him.*' This ridiculous objection being over-ruled, and the indictment, the statutes, and the prisoner's signed declaration upon the interrogatories propounded by the King, being again read over, the prisoner, who had no counsel, was desired to say what he could in his own behalf. This the unhappy man performed to a title, in a speech replete with imprudence, extravagance, and bigotry, declaring, 'that he repented of nothing but not having been busy enough in making converts; and *that if all the hairs in his head were priests they should all come into the kingdom.*' The Archbishop then addressed the jury; and the King's counsel finished the whole, by protesting for an *assize of willful error* if they should acquit the prisoner.

The prisoner was served with his indictment in the last week, and was brought to trial on the last day of February.—The jury being

\* It is somewhat remarkable that the son or grandson of Edmonston of Dunfreath, one of the jurymen who convicted the prisoner, was fined by the Privy Council in 9000 merks, for refusing to answer upon oath whether he had harboured one Forester a field preacher, who was under sentence of banishment, &c.; June 30. 1681.; Fountainhall's Decisions, p. 145. Now, refusing to answer upon oath was the only crime which was proved against the prisoner Ogilvie.

being inclosed, returned to the Court, which continued sitting, a speedy and unanimous verdict, finding the prisoner guilty of the whole treasons libelled. He was sentenced *to be taken immediately from the Court to the place of execution, and there to be hanged and quartered.*—He then cried out, ‘God have mercy upon me! If there be here any hidden Catholicks, let them pray for me; but the prayers of hereticks I will not have.’ 1615

After a short interval allowed for penitence and prayer, (perhaps also for erecting the scaffold), he was hanged that same afternoon, but the quartering was dispensed with.

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A few months after, William Sinclair advocate, Robert Wilkie brewer, and Robert Cruikshanks stabler in Edinburgh, were tried before the Court of Justiciary for *resetting* \*, that is, giving meat and lodging to the above John Ogilvie and another Jesuit Priest. They were convicted; and by express warrant of his Majesty were sentenced to be hanged: But by a posterior warrant the sentence was changed into perpetual banishment.

*Mr John Wallace for saying of Mass, being habit and repute a Popish Priest, and refusing to take the formula.*

THE penal laws against Papists had amounted to a most sanguinary pitch of persecution; but, as in most cases where the punishment bears no proportion to the offence, the humanity 1722

\* Records of Justiciary, July 14. August 15. & 30. 1615.

1722. ty of mankind is unwilling to furnish the public prosecutor with evidence, so, in the *crime of Popery*, the state had to enact a law for ascertaining a proof of the offence. By this law it was declared, that any person who was *habit and repute* \*, that is, generally holden and deemed to be a Popish Priest, and who should refuse to take a formula therein prescribed, should be banished for life, never to return under pain of death. By the same law, the being found in a chapel where there were altar and mass-book, &c. subjected the person so found to perpetual banishment. Papists, or those refusing to take the formula, by this statute, are likewise declared incapable of all succession whatever; the same to devolve upon the *next Protestant heir*. And those who *apostatize from 'the true Protestant religion'*, by professing the Popish, are also declared to forfeit their whole heritable estate to their next Protestant heir.

Upon this law Mr Wallace was indicted †. It was charged against him, that the magistrates ‡ of the Canongate, a suburb of Edinburgh, had *sent a parcel of soldiers into the house of Elizabeth Duchess Dowager of Gordon* on the 29th of April last, which, by the bye, was a Sunday; that the soldiers there apprehended the prisoner when he was about to say mass; and that he refused to take the formula when tendered to him. He and his surety had granted a bail-bond of a thousand merks Scots to stand trial; but, as he failed to appear, the bail-bond was forfeited ||, and sentence of outlawry was pronounced against him.

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\* William, parliament 1st, sess. 8. c. 3. A. D. 1700.  
 † Records of  
 Justiciary August 23. 1722.

‡ These magistrates were entitled to a reward of 500 merks Scots for seizing a Priest.  
 || So late as April 25. 1755, Alexander McDonald, a Popish Priest, *by the way of favour and clemency*, was banished Scotland for life, having refused to take the formula.

It aggravates not a little that contempt, mixed with horror, 1722  
 which ought to be entertained of certain parts of our penal         
 law, that by the *unrepealed* statute upon which the prisoner was  
 condemned, no parent can put his child to an eminent master in  
 riding, fencing, musick, French, or Italian, (for such are mostly  
 Papists), but he must incur a penalty of 500 merks for each of-  
 fence, which 'may be pursued for *by any Protestant subject*, and  
 'upon conviction shall pertain to the pursuer for his reward.'  
 What heightens the absurdity is, that one of those masters thus  
 forbidden by *statute* to teach, has a *royal* bounty of L. 200 a  
 year for teaching.—The trumpet of sedition and fanaticism,  
 blown by the foul breath of ignorance against the repeals of  
 those penal laws; the dismal consequences of the blast; the guilt  
 which those *trumpeters* incurred; and the disgrace which they  
 have brought upon this country, will not be purified by many  
*lustrums* of liberal science. I shall make no farther commentary  
 upon this statute, and this prosecution, but that it should teach a  
 little moderation of language to that class of people which upon  
 every occasion launches forth its undistinguishing applause, upon  
 the principles of liberty which flowed from the glorious Revolution;  
 and the principles of toleration, so congenial to the meek  
 spirit of the Reformed Religion.

*Sir James Ker for celebrating clandestine and irregular mar-  
 riage.*

SIR JAMES KER in Old Roxburgh was deposed from the of- 1590  
 fice of a clergyman on account of misbehaviour, in Novem-         
 ber 1583, and was excommunicated on the 26th of May after\*.

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\* Records of Justiciary, June 18. 1590.

1590 He continued notwithstanding to celebrate marriage and the sacrament of baptism. For these offences he was tried on the 18th of June 1590, on an indictment, 'for lying under the horrible sentence of excommunication, separate from the suffrage and prayer of the Kirk, and merit of the blood of Christ, *to the damnation of his soul, continually from the 26th day of March 1584*: That although he, for misbehaviour, had been deprived of the clerical function in the month of November 1583, he continued notwithstanding *to abuse the sacraments, by marrying\* sundry persons, and baptising of children.*'

The prisoner *came in the King's will, i. e.* submitted to his Majesty's pleasure, which the King's Advocate declared to be, that the prisoner should stand two hours at the Cross with a paper in his hat denoting his crime; and that he should not commit the like transgression again under pain of death.—Let us compare this sentence with that which was pronounced in the following trial, in a more enlightened age, and under a more free government.

John

† The Advocate was here a little out in his divinity. It is an apt illustration of the nicety of the dispute between the Romish and Reformed Churches concerning the number of the sacraments, and of the iniquity of annexing rigorous punishment to a difference of religious opinion, that the King's Advocate, in a criminal libel, should fall into the mistake of stating the celebration of irregular marriage as the abuse of a sacrament.

*John Connochar for celebrating clandestine and irregular marriage.*

**J**OHN CONNOCHAR was a nonjuring clergyman of the Episcopal Church of Scotland. His residence in a wild district of the Highlands, where there was not within many miles a man of his knowledge and learning, gave him a degree of consequence to which his irreproachable morals and unaffected piety added singular importance: But his virtues were poisoned by his attachment to an unfortunate family; and the eminence of his situation and character, which in better times would have commanded felicity, served only to attract the fire of political vengeance. He was marked out as a victim whose ruin was to confound the remains of a vanquished party. 1755

The gentry in the North of Scotland professed almost universally the Episcopal or Popish religion; and meeting-houses were tolerated where public worship was performed according to the liturgy of the Church of England. But, on the extinction of the rebellion 1745, Government thought proper to make an indirect acknowledgement of the King's title to the throne, in the most solemn addresses to God, an indispensable part of the formula. It commanded all Episcopal clergymen, at every time they celebrated public worship \*before more than five persons, to pray for the King and royal family by name. As the gentlemen in that part of Scotland, for the most part, were attached to

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\* George II. an. 19. cap. 38.

1755 the house of Stuart, the act met with no other obedience than by many peoples absenting themselves entirely from Church. Still however many devout persons performed a duty which they thought acceptable to God, at the risk of incurring the vengeance of their temporal sovereign. Various prosecutions were accordingly instituted for this offence; and of these, the most remarkable was that against the prisoner.

At the distance of nine years after the extinction of the rebellion, he was apprehended in his own house by a party of soldiers, on a day (30th of January) upon which it was to be expected that he and his hearers would be engaged in their forbidden worship\*. The warrant for his commitment proceeded upon a petition from his Majesty's Advocate to the Lords of Justiciary, setting forth, that Mr Connochar without having letters of orders in terms of law, and without having taken the oaths to government, had presumed to officiate as a minister, by praying and preaching, and administering the sacraments; also, that his sermons were calculated to sow sedition, and to excite disaffection.

The prisoner having applied to the Lord Justice Clerk to be admitted to bail, his request was granted: But, in the mean time, he was detained in virtue of a new warrant of the Court of Justiciary, proceeding upon a new petition from the Lord Advocate, setting forth, that besides the offences for which the prisoner was at first incarcerated, he was also to be tried on the statute of Charles II. against celebrating clandestine or irregular marriage.—It must be observed, that, by the former of these acts, the prisoner for the first offence could only be subjected to six months imprisonment,

\* January 30. 1755. Scots Magazine, vol. 17. p. 207.

imprisonment, but by the latter he might be condemned to perpetual banishment. 1755

A fresh bail-bond being offered, the prisoner was released on the 27th of February; and, on the 10th of April, he was brought to trial before the Circuit Court of Justiciary at Inverary: A district, where the attachments of the people, and the fate of Stewart of Aucharn, who was capitally convicted some time preceding, left no reason to dread that the jury would make any great stretch to acquit the prisoner. He was charged with two offences; the celebrating of marriage without being lawfully authorized by the established Church of Scotland, or by any other legal authority; and celebrating of it in a clandestine and disorderly way, contrary to act Charles II. Parl. Sess. 1. c. 34.

It was pled for the prisoner, that the statute libelled on \* had been established directly with a view to support Episcopacy against sectaries; therefore, to turn it as an engine of destruction against that religion which it was meant to protect, was totally to invert its purpose:—That all the acts in favour of Episcopacy had been abolished by William and Mary, Parl. 1. Sess. 1. c. 5. That it behoved Episcopacy either to be the established religion or not. If it was the established religion, the Priest could not be condemned as unqualified to celebrate marriage. If it was not the established religion, it must be ranked among the sects of nonconformity; and even in that case, the clergyman was equally safe; for all laws against nonconformists were repealed by act 1690, c. 27.—This construction of the statutes was confirmed by the universal sense of the nation; for, although  
thousands

\* Records of Western Circuit Court of Justiciary, April 10. 1755. Scots Magazine, vol. 17. p. 207.

1755 thousands of marriages had been celebrated, not only by Episcopal clergymen, but by dissenters of all sorts, no prosecution had ever been brought on this branch of the statute alone: Nay, so little was our law scrupulous as to a clergyman, the celebrator of a marriage being ordained by the established church, that a valid marriage might be pronounced by any civil magistrate: Indeed, the ceremony of marriage is totally unessential to its validity.

As to the second offence charged against him, the celebration of marriage, in a clandestine and disorderly way, it was proved on behalf of the prisoner, that the parish-church in which he lived, as well as the next parish, had been for some time vacant; so that in the district where he lived, there was no clergyman but himself, in a space of twenty miles:—That he had been scrupulously anxious to celebrate marriage in the most regular manner, both as to the *essential* and *ceremonial* parts of the contract: That when, by the want of public worship in the parish-church, the *ceremonial* part, viz. the publication of the banns, could not be performed, he made the beadle proclaim them before witnesses at the church-door; and, as to the *essential*, he instructed, that when he celebrated marriage, it was always with the consent of the friends of both parties. Nay, that he had refused to celebrate a marriage in a clandestine manner, although ten guineas had been offered as an inducement.

Notwithstanding these arguments, the Court found the first, as well as the second article of the indictment, relevant to infer the pains of law.

The counsel for the prisoner reminded the jury, that notwithstanding the interlocutor of the Court, they were entitled, if they thought

thought proper, to acquit the prisoner of both charges. But lest 1755  
 the fountain of justice should purify the stream of political ven-  
 geance, it was observed from the bench, that the jury could have  
 no room for doubt; and that nonjuring Episcopal clergymen of  
 the prisoner's activity, were dangerous to the present happy esta-  
 blishment. The jury found the prisoner guilty; but, in respect  
 of certain alleviating circumstances, recommended him to mercy.  
 —He was condemned to perpetual banishment, never to return  
 under pain of death.

*Mr Daniel Taylor, and twenty-four other preachers of the  
 Episcopal communion in Edinburgh, Mr Arthur Miller  
 preacher in Leith, and Mr Robert Colt, and Mr James  
 Hunter, Musselburgh, for preaching to an Episcopal con-  
 gregation, without letters of orders from a Protestant Bi-  
 shop; and without praying for King George by name.*

**H**IS Majesty wrote a letter \* to the Lords of Justiciary on the 1716  
 12th of May 1716, setting forth, that he understood  
 there were meeting-houses in Edinburgh, and other parts of  
 Scotland, where divine service was performed without praying  
 for the King and Royal Family; and requiring their Lordships†  
 'to give strict orders for shutting up all such meeting-houses,  
 and for proceeding against offenders in time coming.'

The

\* The letter is superscribed 'GEORGE R.' and countersigned by Mr Secretary Stanhope.  
 † Records of Justiciary, May 18. & 21. June 11. 18. & 28. December 31. 1716; February 13. June 19. 1717.

1716 The Lords sent an answer to Mr Secretary Stanhope, representing their alacrity in ordering prosecutions against such offenders; but, as to shutting up such meeting-houses, they observed, 'We are humbly of opinion, that our forms do not allow such summary procedure till after trial and conviction by due course of law.' Even then, their Lordships suspected they were authorised only to exact the penalties prescribed by law; but not to shut up the meeting-houses. The Lords, at the same time, ordered the Crown lawyers, with all diligence, to prepare indictments against all Episcopal ministers guilty of this offence.

The prisoners were accordingly served with an indictment, setting forth, that a statute of Queen Anne was enacted for preventing disturbance to those of the Episcopal communion in Scotland: That this statute specially provided, that no person should presume to officiate as a pastor in such congregations, without having previously lodged with the justices of peace letters of orders from a Protestant Bishop; and without also praying in express words, some time during the service, for '*her most sacred Majesty Queen Anne, and the most excellent Princess Sophia, Electress and Duchess-Dowager of Hanover, while living* \*.' That notwithstanding the demise of the late Queen, these clauses remained perpetual conditions; and that by an order of the Regency, August 1. 1714, the clergy were required to pray in express words for his most sacred 'Majesty King George:.' That nevertheless the prisoners had presumed to celebrate the Episcopal worship without letters of orders, which was contrary to the establishment of the Church of Scotland, as settled by act of parliament, and ratified by the Union; and that they had also neglected to pray for King George: For which transgressions the prisoners ought to be punished in terms of the act.

Informations

\* Statute 10th Anne, cap. 7.

Informations were lodged for both parties; but, as the argu- 1716  
ments for the prisoners were over-ruled, most of them to save  
trouble to the Court confessed both charges. The whole of the  
prisoners, *except one who had produced letters of orders from an*  
*exauſtorated \* Scottish Biſhop*, were debarred from preaching till  
they ſhould produce letters of orders in terms of the act; and twenty-  
one of them were fined L. 20 Sterling each, half to the informer,  
and half to the poor of the pariſh; a ſentence palpably illegal;  
for, as this penal ſtatute annexed the penalty of L. 20 to the not  
praying for *Queen Anne, while living*, it was repugnant to every  
rule of law, to every principle of liberty, to extend the penalty to  
the not praying for *King George after ſhe was dead*. As the Court  
had omitted to grant *letters of horning †*, his Majeſty's Advocate,  
about ſix months after, prayed the Court for letters of horning,  
ſeeing *no informer would apply*; and they were granted accor-  
dingly for L. 10 againſt each of theſe perſons, *to be paid to his*  
*Lordſhip as informer.*

About the ſame time, a petition was preſented to the Court by  
the magiſtrates of Edinburgh, ſetting forth, that their Lordſhips,  
by their ſentence of the 28th of June, had commanded all ſhe-  
riffs and magiſtrates of boroughs to prevent thoſe clergymen from  
officiating within their diſtricts; that however they had now  
produced their orders, which were regiſtered as the ſtatute di-  
rects; that the Lord Advocate had delivered a meſſage to the  
magiſtrates from his royal highneſs the Regent, ſignifying his

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opinion

\* An objection was ſtated before the magiſtrates of Edinburgh to the letters of  
orders of Mr Greenshield's, as granted by an exauſtorated Biſhop. The objection  
was ſuſtained by the magiſtrates, and afterwards by the Lords of Seſſion; but the  
decree was reverſed on appeal. Journal of the Houſe of Lords, March 1. 1710.

† A form of the law of Scotland, neceſſary for diſtraining the perſon and goods  
of a debtor.

1716 opinion that they had been remiss in executing the sentence of  
Justiciary, and his expectation that they would pay more zealous  
attention to carry it into execution: And the magistrates being  
at a loss how to proceed, in respect of the letters of orders being  
produced, craved the directions of the Court. Their Lordships  
returned an answer to the petition of the magistrates, dark and  
equivocal as the Sybilline Oracles, importing that the process  
was ended; that they could not alter their own sentence; 'and  
' the saids Lords looked on the said sentence as containing a full  
' warrant for the execution of the same.'—I apprehend that the  
Lords of Justiciary and the magistrates of Edinburgh had reci-  
procally endeavoured to devolve on each other the odium of the  
*people for executing* of the sentence, or the indignation of the  
*Prince for not executing of it*. It appears that the shutting up of  
meeting-houses was by no means rigorously enforced; for I find  
several of those very clergymen within a few months again con-  
victed for the same offence. Indeed, the criminal records, for  
some years after this, are in a manner engrossed with prosecu-  
tions against Episcopal Nonjurors.

## OF WITCHCRAFT.

WITCHCRAFT first made its appearance in our criminal <sup>1588</sup> code, at a time when the broaching of a new set of religious notions excited a passionate desire for the attainment at extraordinary purity and strictness in doctrine and in morals. Shortly before the Reformation was established by law, an act was passed, annexing a capital punishment to the practising of forcery \*, or consulting with witches. From the words of this act, which are not a little ambiguous, there is reason to suspect that the Legislature did not believe in forcery; and that the punishment provided by the statute was annexed not to the crime of witchcraft, but to the impiety and blasphemy of pretending to, or believing in such supernatural powers.

*Alison Pearson.*

Alison Pearson in Byre-hills, Fifeshire †, was convicted of practising forcery, and of invoking the Devil. She confessed that she had associated with the Queen of the Fairies for many years ‡, and that she had friends in the Court of *Elfland*, who were of her own blood. She said that William Simpson, late the King's smith, was, in the eighth year of his age, carried off by an Egyptian to Egypt, where he remained twelve years; and that this Egyptian was a giant: That the Devil appeared to her in the

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form

\* Mary, Parl. 9. c. 73. A. D. 1563.

† Rec. of Just. 18th May 1588.

‡ In the original it is Queen of Elfland.

1588 form of this William Simpson, who was a great scholar, and a doctor of medicine, who cured her diseases: That he has appeared to her, accompanied with many men and women, who made merry with bag-pipes, good cheer, and wine: That the *good neighbours*\* attended, and prepared their charms in pans over the fire; that the herbs of which they composed their charms, were gathered before sunrise; and that with these they cured the Bishop of St Andrews of a fever and flux.—She underwent all the legal forms customary in cases of witchcraft, *i. e.* she was convicted and condemned, strangled and burned.

*Janet Grant and Janet Clerk.*

1590 Janet Grant and Janet Clerk † were convicted of bewitching several persons to death, of taking away the privy members from some folks, and bestowing them on others; and of raising the devil.

*John Cunninghame.*

It was proved against John Cunninghame, that the Devil appeared to him in white raiment ‡, and promised, that, if he would become his servant, he should never want, and should be revenged of all his enemies: That he was carried *in an ecstasy* to the kirk of North Berwick, where the Devil preached to him, and many others, bidding them not spare to do evil, but to eat, drink, and be merry; for *he should raise them all up gloriously at the Last Day*: That the Devil made him do homage, by kissing his \* \* \* \*. That he (the prisoner) raised the wind on the King's passage

\* *Good Neighbours* was a term for witches. People were afraid to speak of them opprobriously, lest they should provoke their resentment. † Records of Justiciary, 7th August 1590. ‡ Ibid, 26th December 1590.

passage to Denmark : That he met with Satan on the King's return from Denmark ; and Satan promised to raise a mist by which his Majesty should be thrown upon the *coast of England* ; and thereupon threw something like a football into the sea, which raised a vapour.

*Agnes Sampson.*

Agnes Sampson in Keith \*, a grave matron-like woman, of a rank and comprehension above the vulgar, was accused of having renounced her baptism, and of having received the devil's mark ; of raising storms to prevent the Queen's coming from Denmark ; of being at the *famous meeting* at North Berwick, where six men, and ninety women, witches, were present, dancing to one of their number, who played to them on a Jew's-harp. It was charged in the indictment, that the Devil was present at this meeting ; and started up in the pulpit, which was hung round with black candles : That he called them all by their names, asked them, If they had kept their promises, and been good servants, and what they had done since the last meeting : That they opened up three graves, and cut off the joints from the dead bodies fingers, *and that the prisoner got for her share two joints and a winding sheet, to make powder of to do mischief* : That the Devil was dressed in a black gown and hat ; and that he ordered them to keep his commandments, which were to do all the ill they could, and to kiss his \*\*\*\*.

*Euphan*

\* Rec. of Just. Jan. 27. 1590. A story is told of this woman in Spottiswood's Hist. p. 383. which is nowise confirmed by the record. His fable is absurd ; and seems to have been invented by some zealous believer in the *divine right of Kings*.

*Euphan M'Calzeane.*

1591 *w* Euphan M'Calzeane was a lady possessed of a considerable estate in her own right. She was the daughter of Thomas M'Calzeane Lord Cliftonhall, one of the Senators of the College of Justice, whose death in the year 1581, spared him the disgrace and misery of seeing his daughter fall by the hands of the executioner. She was married to a gentleman of her own name, by whom she had three children. She was accused of treasonably conspiring the King's death by enchantments\*; particularly by framing a waxen picture of the King; of raising storms to hinder his return from Denmark; and of various other articles of witchcraft. She was heard by counsel in her defence; was found guilty by the jury, which consisted of landed gentlemen of note; and her punishment was still severer than that commonly inflicted on the Weyward Sisters,—She was *burned alive*, and her estate confiscated. Her children, however, after being thus barbarously robbed of their mother, were † restored by act of Parliament against the forfeiture. The act does not say that the sentence was unjust; but that the King was *touched in honour and conscience* to restore the children. But *to move the wheels of his Majesty's conscience*, the children had *to greafe them*, by a payment of five thousand merks to the *donator of escheat* ‡, and by relinquishing the estate of Clifton-hall, which the King gave to Sir James Sandilands of Slamanno.

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\* Rec. of Just. 8th May 1591.

† Unprinted Acts, A. D. 1592. No. 70.

‡ He who obtains a gift of the forfeiture.

As a striking picture of the state of justice, humanity, and science in those times\*, it may be remarked, that this Sir James Sandilands, a favourite of the King's, ('*ex interiore principis familiaritate,*') who got this estate, which the daughter of one Lord of Session forfeited, on account of being a witch, did that very year murder another Lord of Session in the suburbs of Edinburgh, in the public street, without undergoing either trial or punishment. 1591

*Patrick Lawrie.*

Among many acts of witchcraft for which Patrick Lawrie was committed to the flames, there were his consulting with, and receiving from the Devil a hand belt †; in one end of which 'appeared the similitude of four fingers and a thumb, not far different from the claws of the Devil;'—His bewitching Bessie Sands's corns, and taking the whole strength and substance out of them for ten years successively;—His enchanting certain milk-cows, which thereby, instead of milk, yielded nothing but blood and matter;—And his curing Elizabeth Crawford's child, which, for eight or nine years, had been afflicted with an *incurable disease*. 1605

*Margaret Wallace.*

Margaret Wallace ‡ was tried before the Court of Justiciary. The Duke of Lennox, the Archbishop of Glasgow, and Sir George Erskine of Innerteil, sat as assessors to the judges, and an eminent counsel was heard in behalf of the prisoner. She was accused of inflicting and of curing diseases by inchantment; but it. 1620

\* *Johnstoni Historia Rerum Britannicarum*, p. 172. See also p. 155. of this work.

† Records of Justiciary, July 23. 1605.

‡ Records of Justiciary, March 20. 1620.

1620 it was not specified what spells she employed. It was *libelled* against her, that on being taken suddenly ill she sent for one Christian Graham, a notorious witch, who afterwards suffered a capital punishment, and that this witch transferred the disease from the prisoner to a young girl: That the girl being thus taken ill, her mother was advised by the prisoner to send for Christian Graham, who answered, that her confidence was in God, and she would have nothing to do with the Devil or his instruments: The prisoner replied, *that in a case of this sort Christian Graham could do as much as God himself; and that without her aid there was no remedy for the child*: But the mother not consenting, the prisoner without her knowledge sent for Christian, who muttered words, and expressed signs, by which she restored the child to health, &c. Her counsel urged, that the indictment was by much too general: That it ought to have been specified, not simply that she did enchant, but also by what kind of spells she performed her incantations: That supposing Christian Graham to have been a witch, and that the prisoner when taken ill consulted her, still he was entitled to plead that the prisoner consulted her on account of her medical knowledge, and not for her skill in forcery: That as to the blasphemous expressions, however well they might found a trial for blasphemy, they by no means inferred the crime of witchcraft; and he quoted many authorities from the Civil and Canon laws. He farther challenged one of the affizers, because one of the articles charged against the prisoner was her having done an injury to his brother-in-law.—The whole defences were repelled by the judges; and the jury found the prisoner guilty.

*Isobel Young.*

Isobel Young in East Barns \* was accused of having stopped by 1629  
 enchantment George Sandie's mill *twenty-nine years before*; of   
 having prevented his boat from catching fish while all the other  
 boats at the *herring-drawe*, or herring fishery, were successful;  
 and that she was the cause of his failing in his circumstances, and  
 of nothing prospering with him in the world: That she threaten-  
 ed mischief against one Kerse, who thereupon lost the power of  
 his leg and arm: That she entertained several witches in her  
 house, one of whom went out at the roof in likeness of a cat, and  
 then resumed her own shape: That she *took a disease off her hus-*  
*band, laid it under the barn floor, and transferred it to his nephew,*  
*who when he came into the barn saw the firlot hopping up and*  
*down the floor*: That she used the following charm to preserve  
 herself and her cattle from an infectious distemper, viz. to  
 bury a white ox and a cat alive, throwing in a quantity of salt  
 along with them: That she had *the Devil's mark*, &c.

Y y

Mr

\* Records of Justiciary, February 4. 1629. In this trial mention is made  
 of the proprietor of the cattle having applied to Lockhart of Lee for the  
 use of his *curing stone* to cure the cattle, and that he graciously condescended to  
 give them some water in which it had been dipped; and the water having (I sup-  
 pose) derived virtue *from the stone*, as the Pool of Bethseyda *from the angel*, the cat-  
 tle were thought to be a good deal the better.—This famous instrument of super-  
 stition has maintained its reputation for many centuries. It is said to have been  
 brought home by Lockhart of Lee, who accompanied the Earl of Douglas in car-  
 rying King Robert the Bruce's heart to the Holy Land. It is called the *Lee Penny*.  
 Besides its curing of cattle, it has another virtue, that *it can never be lost*. It is still  
 in the possession of that ancient family; and people from various parts of Scotland,  
 and even of England, whose cattle were infected, have made application within  
 these few years for water in which *the stone* had been dipped.

1629 Mr Laurence Macgill and Mr David Primrose appeared as counsel for the prisoner. They pleaded, that the mill might have stopped, the boat caught no fish, and the man not prospered in the world, from—*natural causes*; and it was not *libelled* by what spells she had accomplished them: That as to the man who had lost the power of his leg and arm, *first*, she never had the least acquaintance with him; *secondly*, she offered to prove that he was lame previous to the threatening expressions which she was said to have used: That the charge of *laying a disease under a barn floor* was a ridiculous fable, taken probably from a similar story in Ariosto; and that two years had elapsed between her husband's illness and his nephew's: That what the prosecutor called *the Devil's mark*, was nothing else than the scar of an old ulcer; and that the charge of her burying the white ox and the cat was false.

The celebrated Sir Thomas Hope, who was counsel for the prosecution, replied, that these defences ought to be repelled, and no proof allowed of them, because *contrary to the libel*; that is to say, in other words, *because what was urged by the prisoner in her defences contradicted what was charged by the public prosecutor in his indictment*.—The defences for the prisoner were overruled.—Is it needful for me to add that she was convicted, strangled, and burned?

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This most incredibly absurd and iniquitous doctrine, of repelling defences because contrary to the libel; this system of *legal murder*, was till the present century a received maxim of criminal jurisprudence in Scotland. Thus, besides in the present, and sundry other trials for witchcraft, when John Young was accused of the murder of Archibald Reid, by a wound with a  
hanger

hanger on the *shakle-bone*, *i. e.* the wrist, given *about four or five* 1629  
*months preceding his death*, he pleaded, that the wrist was not one  
of the noble parts where a mortal wound could be inflicted :—  
That the indictment set forth the wound to have been given about  
four or five months preceding the death of the deceased ; and it  
was an established maxim of law, that if a person survived a  
wound forty days, his death must be imputed to some other cause :  
—That the deceased had a complete reconvalescence, wrought  
at his usual trade of a smith, reaped his own corn, and gathered  
it in. The counsel for the prosecution insisted that these defences  
should be repelled, *in respect of dittay*, (*i. e.* as being contrary  
to the libel), and the Court over-ruled them \*.—When a person  
of the name of Mowat was prosecuted for mutilation by two  
gentlemen of the name of Cheyne, he pleaded that the wounds  
he gave were in self-defence. Sir Thomas Hope, Lord Advocate,  
who in the course of that month was appointed Lord Justice  
General for life, opposed the defence, and insisted it should be  
repelled, *as being contrary to the libel*. To exclude the prisoner  
from the benefit of his *exculpatory* evidence, he added another  
argument equally founded in good sense and equity, 'that the  
pursuer's witnesses were examined upon all proper interrogatories  
offered by the prisoner, *therefore there was no necessity for his  
leading other witnesses.*' The Court repelled the prisoner's  
defence, and refused to allow him *to adduce witnesses* to prove  
the fact †.—When Mr William Somerville was tried for the  
murder of Elisabeth Renton, he offered in his defence to prove  
that the wound given the deceased ‡ was not mortal ; that she  
walked on the night she was wounded to her brother's house,  
three miles distant ; that she did not take her bed, but continued  
to work as a servant in her usual employments for three months.  
At last, having gone to attend in his illness her

Y y 2

brother

\* Rec. of Just July 30. 1630.

† Rec. of Just. July 15. 1642.

‡ McKenzie's Criminals, tit. 22. sect. 2.

1629 brother who died of a spotted fever, she caught the infection, and died of that disease.—These defences however were over-ruled, were not admitted to proof, because contrary to the indictment, wherein it was expressly libelled that he gave her a mortal wound.

When William Mackie was tried for killing James Murray in a duel, he pleaded it was in self-defence, for Murray had assaulted him with a drawn sword: To which it was replied, that the defence could not be sustained, because the libel expressly charged that they fought in consequence of previous mutual provocation, and the defence was over-ruled.—According to the same doctrine, the defence of *alibi* must have been rejected by this dreadful tribunal\*.

*Alexander Hamilton.*

1630 Alexander Hamilton (if we may trust his judicial confession,) met the Devil in the likeness of a black man riding on a black horse †. Hamilton renounced his baptism, and engaged to become the Devil's servant, from whom he received four shillings Sterling. When he wanted an audience of his Infernal Majesty, he was instructed to beat the ground thrice with a fir-stick, and say, '*Rise up Foul Thief,*' and accordingly the Devil used to obey the summons, and appeared in the shape of a raven, a cat, or a dog, and gave responses.—The Devil instructed him how to be revenged of his enemies; also how to cure and transfer diseases; and further, gave him a spell, by which he killed the Lady Ormestone

\* See the perplexity with which Sir George Mackenzie expresses himself upon the head of *alibi*. Mackenzie's Criminal Trials, tit. 22. sect. 3. † Records of Justiciary, January 22. 1630.

stone and her daughter, in revenge of the Lady's having refused 1630  
 him the loan of a mare, and having called him nicknames. *Lastly,*   
 He declared, that he had many meetings with the Devil, *from*  
*whom he once got a severe drubbing for not keeping an appointment.*

*John Neil.*

John Neil was charged with taking off and laying on diseases, 1631   
 the former of which he sometimes effected by making the sick  
 persons shirt be washed in a south-running water.—With giving  
 responses concerning the time and manner of people's death.—  
 With holding consultation with the Devil\*, and Witches, on Col-  
 dingham Law, how to compass the death of Sir George Home of  
 Manderston. That the result of their deliberation was the get-  
 ting *an enchanted dead foal* and putting it in Sir George's stable,  
 under his stoned-horses manger; also *a dead hand enchanted by*  
*the Devil*, which they put in Sir George's garden; and that by  
 these means he contracted a grievous disease, of which he could  
 not be recovered, till the dead foal and dead hand were discover-  
 ed and burned. No pleading, no deposition of witnesses, no  
 confession of the prisoner is recorded; but the jury found the u-  
 sual verdict, and the usual sentence was pronounced by the Court.

*Janet Brown, and others.*

An act and commission of parliament was passed on the 12th of 1649   
 July, and another on the 7th of August 1649, constituting Sir  
 James Melville of Raith, Alexander Orrock of Orrock, Robert  
 Aytoun of Inchdarnie, and certain bailies of Burntisland, judges,  
 with

\* Rec. of Just. March 26. 1631.

1649 with powers to try certain persons for the crime of witchcraft. — Janet Brown was first brought before them. She was charged in the indictment with having held ‘ a meeting with the Devil ‘ appearing as a man, at the back of Broomhills, who was *at a wanton play* with Isobel Gairdner elder, and Janet Thomson ; ‘ and he vanished away like a whirlwind\*.’ — With having there renounced her baptism, upon which the Devil *sealed her as one of his*, by a mark on the right arm, into which *Mr James Wilson minister of Dysart, in presence of Mr John Chalmers † minister at Auchterderran, thrust a long pin of wire into the head, and she was insensible of it.* And the like experiment was tried in presence of Mr James Dalgliesh minister at Cramond, &c. — The prisoner, and two other women, were convicted, condemned, and executed, in one day.

Within a few days after, other three miserable women arrived at the last stage of a common journey in those days of superstitious ignorance †, viz. from the parson of the parish to the criminal judges, and from the criminal judges to the executioner. They were arraigned before the same tribunal, on the hacknied charge of meeting with the Devil. One of them, Isobel Bairdie, was accused of having taken up a *stoup*, i. e. a flaggon, and drank, ‘ and the devil drank to her, and she pledging him, ‘ drank back again to him, and he pledged her, saying, *Gracie, you are very welcome*’ — In each of the three indictments, it is added, that the prisoner had confessed, in presence of several ministers, bailies, and elders. And it appears from the

\* Original MSS. in possession of Major Melville of Murdochcairn.

† Two of these reverend inquisitors, Wilson and Dalgliesh, were turned out of their churches, A. D. 1663, for not submitting to the act of parliament re-establishing Prelacy.

‡ Wodrow's History of the Sufferings of the Church, vol. 1. Appendix, No. 37.

the verdict of the jury, that these inquisitors were produced before the court, to prove the *extrajudicial confessions* of the miserable prisoners, who had already been harrassed, perhaps out of their senses, or rendered weary of life, by the persecutions of brutish ignorance, and diabolical cruelty. 1649

The jury found the prisoners 'guilty of the said crime of witchcraft, and that they deserve to die therefor: *But referring the manner of their death, and time and place of their execution to the said judges their determination* \*.' The judges ordained them to be taken that same afternoon to the place of execution, at the \_\_\_\_\_ and there to be strangled at a stake and burned.

*Major Weir.*

The noted Major Weir, who was accused of having exceeded the common depravity of mankind, was dreaded for his forceries, and admired for his gift of prayer. He *confessed crimes that it was possible for him to have committed*, as well as the absurd imputation of witchcraft. Yet he qualified his confession by answering to the articles of the indictment, 'that he thought himself *guilty of the foresaid crimes, and could not deny them* †.' The Lord Advocate then led a distinct proof of his extrajudicial confession, which was marked with circumstances that convince me he was in many respects acknowledging the truth. Indeed his sister swears to his guilt in one of the articles *libelled*.—I must observe, at the same time, that one of the witnesses to his confession was the 1670

\* In these trials mention is made of several wizards and witches who had lately suffered at Aberdour.

† Rec. of Just. April 9. 1670.

1670 the minister of Ormestone, who swore that the Major had sent  
 for the witnesses to prison, *in order to confess his sins to him, which  
 confession the minister gave in evidence \* against him when tried  
 for his life*: And that I am convinced of the prisoner's having  
 been delirious at the time of his trial. I decline publishing the  
 particulars of this case †.

*Isobel Elliot and nine other women.*

1678 Isobel Elliot and nine other women were tried for witchcraft  
 in one day. The articles of indictment against all of them were  
 pretty much the same. Those exhibited against Isobel Elliot  
 were as follow †: That about two years ago she staid at home  
 from *the kirk* at the desire of her mistress, who was a witch,  
 when the Devil had a meeting with the prisoner, her mistress,  
 and two other witches; that he kissed the prisoner, baptised her  
 on the face *with an waff of his hand like a dewing*, and offered  
 to lie with her, but forbore because she was with child; that af-  
 ter she was *kirked* the Devil often met her, and had *carnal copu-  
 lation*

\* In countries where the Roman Catholick religion is professed, the priest who  
 betrays what is communicated to him in confession is (I am told) burned alive. When  
 the Reformed clergy renounced the *errors of Popery*, they were too wise to reject, *in  
 practice*, so powerful an instrument in the hands of the priesthood, as auricular  
 confession. I leave it to casuists in religion to determine as to the efficacy of au-  
 ricular confession in the *salvation of the soul*; but I cannot help thinking, that for  
 a priest to reveal this confession in a criminal court, to the *destruction of the body*,  
 deserves to be placed nigh the top of the scale of human depravity.

† So great was the horror entertained for Major Weir, so general was the belief that  
 his house was possessed by Devils, that almost for a hundred years no person would  
 inhabit it. At this minute it is not occupied as a dwelling-house, but as a smith  
 and woolcomber's shops.

‡ Rec. of Just. Sept. 13. 1678.

*lation* with her. The prisoner and the other nine miserable women underwent all the legal forms incident to their unhappy situation among that deluded and barbarous people. They had been prosecuted by his Majesty's Advocate; they judicially acknowledged their guilt, were convicted by the jury, condemned by the judges, and burned by the executioner, — *for having had carnal copulation with the Devil.* 1678

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*Impostor of Bargarran.*

Some years after, an impostor appeared, in the character of a person tormented by witches, Christian Shaw, daughter of John Shaw of Bargarran, a gentleman of some note in the county of Renfrew. She is said to have been but eleven years of age. And although it is probable that hysterical affections may in part have occasioned her rhapsodies to proceed from real illusion, as well as accounted for the contortions which agitated her body; yet she seems to have displayed an artifice above her years, an address superior to her situation, and to have been aided by accomplices, which dulness of apprehension, or violence of prejudice, forbade the bystanders to discover. 1697

This actress was abundantly pert and lively; and her challenging one of the house-maids for drinking, perhaps for stealing, a little milk, which drew on her an angry retort, was the simple prelude to a complicated and wonderful scene of artifice and delusion, of fanaticism and barbarity.

1697 In the month of August 1696 \*, within a few days after her quarrel with the house-maid, the girl was seized with hysterical convulsions, which in repeated fits displayed that variety of symptoms which characterise this capricious disease. To these, other appearances were speedily added, which could only be attributed to supernatural influence, or to fraud and imposition. She put out of her month quantities of egg-shells, orange-pill, feathers of wild, and bones of tame fowl, hair of various colours, hot coal-cinders, straws, crooked pins, &c.

Having by those sensible objects impressed the publick with the most complete and fearful conviction of her being 'grievously vexed † with a Devil,' she found herself capable to command the implicit assent of the spectators, in matters that were repugnant to the evidence of their own senses. For this purpose, she fell upon the device of seeming to possess the faculties of seeing and hearing, in a manner opposite to that of the rest of mankind. She would address some invisible beings as if actually present; at other times, in her conversations with those invisible beings, she would rail at them for telling her that persons actually present were in the room; protesting that she did not see them, yet at the same time minutely describing their dress. For instance, she spake as follows to the chief of her alledged tormentors, Catherine Campbell, with whom she had the quarrel, and who, to use the language of those times, was not *discernibly* present: 'Thou fittest with a stick in thy hand to put into my mouth, but thorough God's strength thou shalt not get leave: Thou art permitted to torment me, but I trust in God thou shalt never get my life. I'll let thee see, *Katie*, there is no repentance in hell. O what ailed thee to be a witch! Thou sayest it is but three nights since thou wast a  
witch.

\* True narrative of the sufferings and relief of a young girl. Edinburgh, printed by James Watson, 1698.

† St Matthew, c. 15. v. 22.

‘witch. O, if thou would’st repent, it may be God might give thee repentance, if thou would’st seek it, and *confess*; if thou would desire me, I would do what I could; for the Devil is an ill master to serve,’ &c. &c. After that, she took up her Bible, read passages, and expounded them; and, upon one’s offering to take it from her, she shrieked horribly, exclaiming, ‘She would keep her Bible in spite of all the Devils in hell!’ Then she fought, and kicked, and writhed herself, as if struggling with some invisible tormentor. When the sheriff-depute of the county, accompanied by a macer of Justiciary, came to apprehend some of the persons whom her diabolical malice had accused, and were actually in her presence, she addressed an imaginary and invisible correspondent thus: ‘Is the sheriff come? Is he near me?’ (Then stretching forth her hand, as if to grope, and the sheriff putting his hand into her’s, she proceeded :) ‘*I cannot feel the sheriff.* How can he be present here? or how can I have him by the hand, as thou sayest, seeing I feel it not? Thou sayest he has brown coloured cloaths, red plush breeches, with black stripes, flowered muslin cravat, and an embroidered sword-belt: Thou sayest there is an old gray haired man with him, having a ring upon his hand; but I can neither see nor feel any of them. What, *are they come to apprehend the gentlewoman?* Is this their errand indeed?’

These reiterated and awful exercises of the dominion of Satan (for such they were universally deemed,) impressed all ranks with amazement and terror. The clergy, as was their duty, were the foremost to embrace the cause of a disciple that was engaged *in more than spiritual warfare* with the grand enemy. Clergymen, by rotation, attended the afflicted damsel, to assist the minister of the parish, the family of Bargarran, and other pious Christians, in the expiatory offices of fasting and prayer. A publick

1697 fast was ordained by authority of the presbytery. Three popular clergymen successively harangued the trembling audience; and one of them chose for his theme this awful text, 'Woe to the inhabitants of the earth and of the sea, for the Devil is come down unto you, having great wrath, because he knoweth that he hath but a short time. *And when the dragon saw that he was cast down unto the earth, he persecuted the woman* \*.'—And the prayers and exhortations of the church were speedily seconded with the weight of the secular arm.

On the 19th of January, a warrant of Privy Council was issued †, which set forth, that there were pregnant grounds of suspicion of witchcraft in the shire of Renfrew, especially from the afflicted and extraordinary condition of Christian Shaw, daughter of John Shaw of Bargarran. It therefore granted commission to Alexander Lord Blantyre, Sir John Maxwell of Pollock, Sir John Shaw of Greenock, William Cunnyngnam of Craigen, Alexander Porterfield of Duchall, ——— Caldwell of Glanderstoun, Gavin Cochrane of Thornlymuir, Alexander Porterfield of Fullwood, and Robert Semple sheriff-depute of Renfrew, or any five of them, to interrogate and imprison persons suspected of witchcraft, to examine witnesses, &c. but not upon oath, and to transmit their report before the 10th of March. The act of Privy Council is subscribed thus, 'Polwarth *Cancellor*. Argyle, Leven, Forfar, Raith, Belhaven, Ja. Steuart, J. Hope, W. Anstruther, J. Maxwell, Ro. Sinclair.'

In the report which was presented on the 9th of March, the commissioners represented that there were *twent-four persons male*

\* Revelations, chap. 12.  
March 9. April 5. 1697.

† Records of Privy Council, January 19.

*male and female suspected and accused of witchcraft*, and that further inquiry ought to be made into this crime. Among these unhappy objects of suspicion, it is to be remarked, that there was *a girl of fourteen, and a boy not twelve years of age*. Agreeable to this report, a new warrant was issued by the Privy Council to most of the commissioners formerly named, with the addition of Lord Hallcraig, Mr Francis Montgomery of Giffin, Sir John Houston of that ilk, Mr John Kincaid of Corsbasket, Advocate, and Mr John Stewart younger of Blinkhall, Advocate, or any five of them, to meet at Renfrew, Paisley, or Glasgow, to take trial of, *judge, and do justice* upon the foresaid persons; and to sentence the guilty *to be burned or otherwise executed to death*, as the commissioners should incline. It further ordained the commissioners to transmit to the Court of Justiciary an authentick extract of their proceedings; to be entered upon its records; and contained a recommendation to the Lords of the Treasury to defray the expences of the trial. The act is subscribed, 'Polwarth  
' *Cancellar. Douglafs, Lauderdale, Annandale, Yester, Kintore,*  
' *Carmichael, W. Anstruther, Arch. Mure.*'

The commissioners, thus empowered, were not remiss in acting under the authority delegated to them. After twenty hours were spent in the examination of witnesses, who *gave testimony* that the *malefics* \* libelled could not have proceeded from natural causes, and that the prisoners were the authors of these malefics.—After five of the unhappy prisoners confessed their own guilt, and criminated their alledged associates—after counsel had been heard on both sides, and the counsel for the prosecution had declared, that 'he would not press the jury with the *ordinary severity* of threatening an *assize of error* †.' But recommended to them

\* *Malefice* in the Scots law signifies an act or effect of witchcraft. † This was an oblique and most scandalous menace. *Assizes of Error* were declared a grievance by the Estates of Parliament at the Revolution.

1697 them to proceed according to the evidence; and loudly declared to them, that although they ought to beware of condemning the innocent, yet if they should acquit the prisoners, in opposition to legal evidence, '*they would be accessary to all the blasphemies, apostacies, murders, tortures, and seductions, whereof these enemies of heaven and earth should hereafter be guilty.*' After the jury had spent six hours in deliberation, seven of those miserable persons were condemned to the flames\*.

These instances afford a sufficient specimen of the mode of prosecution against the multitude of miserable persons who were sacrificed at the altar of the Fatal Sisters,—Ignorance,—Superstition,—and Cruelty. But it is impossible to form an estimate of the number of the victims. For not only the Lords of Justiciary, but bailies of regalities, sheriffs of counties, and the endless tribe of commissioners appointed by the Privy Council †, and sometimes by Parliament, officiated as the Priests who dragged the victims to the altar.

The time however fast approached, when these human sacrifices were to be abolished. The last person who was prosecuted before the Lords of Justiciary for witchcraft was *Elspeth Rule*, who was tried before Lord Anstruther at the Dumfries circuit, on the 3d of May 1709 ‡. No special act of witchcraft was charged against her; the indictment was of a very general nature, that

\* The order of Privy Council for recording the Commissioners proceedings in the books of Justiciary was not complied with. I am therefore unable to give any further particulars of the catastrophe of these miserable persons, or of the criminal absurdity of those who committed them to the flames.

† For some time after the restoration, the records of Privy Council are in a manner engrossed with commissions to take trial of witches. There is an instance of the Council, at one sederunt, granting *fourteen separate commissions to take trial of witches.* Records of Privy Council, November 7. 1661. January 23. 1662.

‡ Records of Circuit Court of Justiciary, holden at Dumfries, May 3. 1709.

that the prisoner was *habit and repute* \* (that is, generally holden and deemed) a witch; and that she had used threatening expressions against persons at enmity with her, who were afterwards visited with the loss of cattle, or the death of friends, and one of whom run mad.—The jury, by a majority of voices, found these articles proved, and the Judge ordained the prisoner to be burned on the cheek, and to be banished Scotland for life.—The last person who was brought to the stake in Scotland for the crime of witchcraft was condemned by Captain David Ross of Little Daan † sheriff-depute of Sutherland, A. D. 1722.

1709

Besides in the sufferings, and tragical end of the persons already specified, human ingenuity seems to have been exhausted in devising variety of torment, against other persons who lay under the suspicion of witchcraft, and who persisted with astonishing fortitude, in denying the absurd imputation, even when urged with the sharpest tortures.

From the universal and excessive abhorrence entertained at a witch, a suspicion of that crime, independent of judicial severities,

\* *Habit and repute* is a very dangerous doctrine of the law of Scotland, at this minute in full force, by which a man may be hanged altho' hardly any charge be exhibited against him, but that he has a bad character.—For instance, if a man is charged with stealing a pair of old shoes, value threepence, and with being *habit and repute* a thief, if the jury find such indictment proved, or such prisoner guilty, the Court would by law be bound to sentence the prisoner to be hanged;—if my temerity may be pardoned, for supposing that any such thing exists as a precise established rule of criminal law in Scotland.

† It is no small disappointment to me that I cannot lay this trial before the reader. The Sheriff Court books of the county of Sutherland were carried off by the Sheriff Clerk about fifty years ago. I am somewhat however consoled for my disappointment, by the politeness shown me by James Traill, Esq; of Hobbister, Advocate, Sheriff-depute of Caithness and Sutherland, who was so obliging as to make a laborious but ineffectual search to recover the books.

1709 ties\*, was sufficient to render the unhappy object anxious for death.—Thrusting of pins into the flesh, and keeping the accused from sleep, were the *ordinary* treatment of a witch. But if the prisoner was endued with uncommon fortitude, other methods were used to extort confession. *The boots, the caspie-claws, and the pilniewinks*, engines for torturing the legs, the arms, and the fingers, were applied to either sex; and that with such violence, that sometimes the blood would have spouted from the limbs. Loading with heavy irons, and whipping with cords, till the skin and flesh were torn from the bones, have also been the adopted methods of torment.

The bloody zeal of those inquisitors attained to a refinement in cruelty so shocking to humanity †, and so repugnant to justice, as to be almost incredible. Not satisfied with torturing *the person* of the accused, their ingenious malice assailed the more delicate feelings, and ardent affections of *the mind*. An aged husband, an infant daughter, would have been tortured in presence of the accused, in order to subdue her resolution.—Nay, death itself ‡ did not screen the remains of those miserable persons from the malice of their prosecutors. If an unfortunate woman, trembling at a citation for witchcraft, ended her sufferings by her own

\* Mackenzie's Criminal Trials, tit. *Witchcraft*. † Records of Justiciary, June 24. 1596. When Alison Balfour was accused of witchcraft, she was put in the caspie-claws, where she was kept forty-eight hours; her husband was put in heavy irons, *her son put in the boots, where he suffered fifty-seven strokes*, and her little daughter, of about seven years of age, put in the pilniewinks, in her presence, in order to make her confess.—She did confess.—She retracted her confession in the course of the trial; and publickly, at her execution, declared that the confession was extorted from her by the torments.—The mode of tormenting and executing those miserable women is further illustrated by the authentic account of the expence of burning a witch at Burncastle, near Lauder, A. D. 1649, an original paper, published in Appendix, No. 6. ‡ Fountainhall's Decisions, vol. 1. p. 60. October 9. 1679.

own hands, she was dragged from her house at a horse's tail, and buried under the gallows. 1709

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Locke had written upon government, Fletcher had been a patriot statesman, Bolingbroke had been a Minister in the Augustan age of Queen Anne, ere this system of legal murder and torture was abolished.—This was an honour which the tardy humanity of their countrymen reserved, *almost to the middle of the present century* \*, for Mr CONDUIT, ALDERMAN HEATHCOTE, and Mr CROSSE. These gentlemen brought a bill into the House of Commons, which was passed into a law, repealing the former statutes against witchcraft, Scots as well as English, and discharging prosecutions for that crime, or for accusing others of that offence †.—On the enactment of this statute vanished all those imaginary powers, so absurdly attributed to women oppressed with age and poverty.

While we reflect upon the blind and barbarous superstition of our ancestors, while we bestow the tribute of applause on those humane and liberal senators who introduced this law, we cannot help lamenting that a sect among us looks upon the abolition of the penal statutes against witchcraft, not only as an evil, but a sin.—The *Seceders* published an act of their associate presbytery at Edinburgh, A. D. 1743. This act, which is full of the most illiberal and absurd doctrines, the most seditious and intolerant spirit, was reprinted at Glasgow so late as the year

A a a

1766.

\* Till A. D. 1735.  
1735. Geo. II. an. 9no, c. 5to.

† Journals of the House of Commons, Jan. 22.

1709 1766. In it there is contained *the annual confession of sins*, which to this day they read from the pulpit.—Among the *sins national and personal* there confessed, are the act of Queen Anne's parliament for tolerating the Episcopal religion in Scotland, the act for adjourning the Court of Session during the Christmas holydays; 'as also the penal statutes against witches have been repealed by parliament, contrary to the express law of God \*.'—The *Seceders* comprehend a very large body of the populace in Scotland. Their zeal for the renewal of the Covenant, their tolerant spirit, are either not attended to by those who have been exerting their endeavours to arm our populace; or those advocates for a militia little know to what important and dangerous purposes religious zeal may be applied.

It is well deserving of remark, that the same sect which is railing at patronages, and preaching up the renewal of *the Solemn League and Covenant*, should display the most rancorous spirit of opposition, to the repeal of the penal laws *against Popery and against witchcraft*.

These

\* Act for renewing the Covenants, p. 26. 27. 34.

\* \* \* \* \*

These pages, while they state facts deeply interesting, they at the same time give a melancholy display of human nature: If they present us with the *outrageous crimes of the prisoners*, they also exhibit what is much more shocking, the *legal murders of the Court*.—Let us inquire whence proceeded a system of penal law, so repugnant to justice, humanity, and policy; and draw the important conclusion.

*The want of Science, and of Civil Liberty*, is the fundamental source of those proceedings, where Tyranny and Superstition, masked in the solemn garb of Law and Justice, stride horrible with all their ghastly train, of confiscation, torture, and murder. On the want of Science has been erected the monstrous fabrick of Superstition. The want of Civil Liberty has enabled Tyrants to sport with the most sacred rights,—the most tender feelings of mankind. Tyranny and Superstition dictated the barbarous laws, which have brought so many innocent persons to an ignominious death. And the same want of Science, and of Liberty, which gave occasion to the enactment of sanguinary laws, introduced carelessness into the forms of judicial proceedings, and injustice in the measure of legal evidence.

Beyond all her other qualifications, then, let Science be revered as an antidote to Superstition, as a friend to Civil Liberty, and as *the true Philosopher's Stone*, which in an arbitrary Government transmutes the iron rod of a Tyrant into the golden sceptre of a King, the Father of his People.

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Second block of faint, illegible text, possibly a concluding paragraph or signature area.

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# A P P E N D I X.

No. I.

*Superfedere, or personal protection from arrest* \*, granted to  
*John Earl of Gowrie, June 20. 1600.*

**R**EGE presente.—Sederunt Domini Sessiois, Montros Cancellarius, Secretarius, Tungland, Halyrudhous, Cranstoun Ridell, Kinlos Edzall, Clericus Registri, Clericus Justiciarii, Advocatus, Quhittinghame, Maircairny, Privie Seill, Fyvie preses, Dunkeld, Thesaurarius, Blantyre, Fenton Barnis una cum, &c.

Our Sovereign Lord understanding that the time of the exercise of the office of Thesaurary by umquhille William Earl of Gowrie, Lord Ruthven and Dirleton, he was forced for the honourable defray of his Highness maist necessary affairs touching the weal of this realm, and honour of his Highness crown, to burthen himself and his house with great summs of money; and that at the fitting of his last accounts made of his intromissions with the said office of Thesaurary upon the 10th day of May, the year of God 1583 years, he was found super-expended in the summ of L. 48,063 : 4 : 8, as the said compt bears; and that albeit at the end and conclusion of the said compt, his Highness specially ordained that the said umquhile Earl should noways have been troubled, or charged with the payment of any allowances taken by him in his said compts, unto the time he had been first compleatly paid of the saids allowances and super-expences

by.

\* Till the Union, the Scots Peers were liable to be arrested for debt.

by his Highness, yet our sovereign Lord understanding that since his decease, John, now Earl of Gowrie, Lord Ruthven and Dirleton, his son, has already payed many summs of money to the persons whom for his said umquhile father took the saids allowances, albeit our sovereign Lord as yet has made no payment to him, nor to his said umquhile father, of the saids super-expences, and that it is not possible to the said Earl of Gowrie to make any further payment to his said umquhile father's creditors, whom for he took the saids allowances, except an certain space and time be granted to him to that effect; therefor, our said sovereign Lord, with exprefs advice, counsal, and deliberation, of the Lords and Senators of his Highness's Session and College of Justice, by these presents, decerns, declares, and ordains, that the said John, now Earl of Gowrie, shall nowise be called, pursued, charged, nor burthened, with the payment of whatsoever his umquhil father's debts, whereof he took allowance in any of his compts of Thefaury, for the space of an year next to come after the date hereof; that in the mean time his Highness may see the said Earl satisfied of the said super-expences resting by his Majesty to his said umquhile father; and to this effect discharges the Clerk of Register, and his deputes, of all extracting, or giving furth of any extracts of the saids allowances taken by the said umquhille Earl during his said office of Thefaury to whatsoever persons. And also, the saids Lords and Senators of the College of Justice declares that they will nowise grant nor direct any letters nor charges whatsoever, at the instance of whatsoever party, against the said John, now Earl of Gowrie, his cautioners or tenants, upon whatsoever decreets, already recovered, or to be recovered against them, for payment of any of the saids allowances for the said space of an year next to come; and in the mean time suspends all letters of horning, poinding, caption, inhibition, and others whatsoever letters, with all arrestments, effect and execution thereof, used  
or

or to be used against the said John, now Earl of Gowrie, his cautioners or tenants, during the foresaid space; and ordains letters to be direct foresaid in form, as effects\*.

## No. II.

*Excerpts from the 'Summondis of Treassoun' against Robert Logane, eldest sone to Robert Logane, sumtyme of Restalrig, and his tutors and curators, on account of the said deceast Robert Logane's accession to the E. of Gowrie's conspiracy.*

Cujus proditiōnis quamvis nos dictum quondam Robertum Logane de Restalrig reum esse ignoraremus, ipse tamen sua damnatus conscientia, ac semper timens ne dictus quondam Jacobus Bour dicte conjurationis conscius rem omnem detegeret, sepius cum dicto Jacobo egit, ut fidem sibi de ea proditiōne celanda obstringeret, tandemque per dictum Jacobum certior factus quondam Georgium Sprott notarium in Aymouth, tum visis ipsius quondam Roberti ad dictum quond. Comitem de Gowrie, ea de re literis scriptis apud Gwnisgrene, priusquam clausae fuissent pluribus diebus ante patratum scelus, et post detectam conjurationem quod dictus quond. Jacobus Boure literarum prorsus ignarus dicti quondam Georgii opera in legendis scriptis omnibus ad eum missis vel pertinentibus utebatur) quasdam etiam dicti quond. Roberti literis super ea conjuratione apud dictum Jacobum Boure fortuito vidisse, quas a dicto quondam Comite de Gowrie, postquam eas legisset ad dictum Robertum Logane reportandas, dictus quondam Jacobus Boure retinuerat, sicque conjurationis perfectam notitiam habere ejusdem dictum quondam Robertum conscium esse, et participem intelligere Dictus quondam Robertus Logane de Restalrig, cum utroque diligentissime egit, multisque unicuique eorum datis muneribus.

\* MS. Acts of Sederunt, vol. 4. June 20. 1600.

muneribus persuasit, ut dictam prodicionem pro perpetuo celarent, obtinuitque, ut se vivo nunquam revelaretur, neque prius horrendum illud dicti Roberti Majestatis crimen detectum fuit, quam dictus quondam Georgius Sprott divino, ut apparuit, inspirante numine, ad vindicandam nostram ab improborum calumniis famam, predictam proditoriam conjurationem et dicti quondam Roberti Logane ejusdem reatum multis constantissime confessionibus ultro patefecit, et dicti quondam Roberti literis quas a dicto quondam Jacobo Boure acceperat, prolatis, manifestavit, ac constanti pia et penitenti \* ob tam horrendum facinus tam diu celatum morte feliciter confirmavit, &c.

## No. III.

*Trial of Thomas Scott, Henry Yair, &c. for treasonably rising in arms, and keeping her Majesty a prisoner, on the night that Riccio was murdered.*

I discovered the papers in this appendix, and in the two following numbers, after this work was mostly printed. They are not originals; but there is every reason to believe that they are authentick copies; and, as the original Records of Justiciary for the periods to which these papers relate are missing, I have thought them entitled to a place in this work. They are taken from a volume of manuscripts in the Advocates Library collected by Sir Lewis Stewart of Kirkhill. Sir Lewis was a lawyer of the first eminence in the reign of Charles I. and a man of elegant and cultivated genius. Robert Burnet, Lord Crimond, who was appointed one of the Senators of the College of Justice at the Restoration, in his preface to *Craig de Feudis*, expresses himself thus of Sir Lewis: 'Quo, nemo acutius, tersius, concinnius, et majore cum fide unquam actitavit causas.' Sir Lewis Stewart's daughter and heiress was married to Henry third Lord Cardross; and

\* Register of Parliament, June 24. 1609.

and of this marriage the present Earl of Buchan and his brothers are descended.

Curia tenet primo Aprilis 1566, per Magistrum Thomam <sup>1566</sup>  
 Craig Justiciarium-deputatum, nobilis et potentis Dni Archibaldi  
 Comitis Ergadie, Dni Campbell et Lorne, Justiciarii Generalis,  
 S. D. N. regis, et Regine prescript. sectis vocatis et curia affir-  
 mata.

Intran.

Thomas Scott \* of Cambusmichael, sheriff-depute of Perth.

William Harlaw, }  
 John Mowbray, } Burgeses of Edinburgh.

## A S S Y S E.

The Laird of Langtoun, the Laird of Whytelaw, Andro Hamiltoun of Cochua, the Laird of Skirling, Alexander Stewart tutor of Castlemilk, Alexander Home burges of Edinburgh, William Forrester in Leith, Walter Cant ther, Cuthbert Ramsay burges of Edinburgh, William Fouller baillie, James Nicoll baillie, John Hamiltoun merchant, the Laird of Cambusnethan, Alexander Bruce burges of Edinburgh.

William Fouller and James Nicoll baillies protestit, that their passing upon this assyse be na wayes prejudiciall to them nor ther offices in tyme cuning.

B b b

The

\* This Thomas Scott and Henry Yair were the only persons who suffered for the murder of Riccio. Keith's Hist. p. 334.

1566. The qlke day the said Thomas Scott, W<sup>m</sup> Harlaw, and  
 John Mowbray, wer convict and fyllit be the said affyse of  
 airt and pairt of the unlesum and treasonable waching, ward-  
 ing, and halding in captivitie, with convocacione of our sove-  
 ran Ladyes leiges, bodin in feir of weir, als weill in secreit ar-  
 mour as with jaks, steill bonnetts, gunes, pistolets, swords,  
 bucklers, Jedburgh staffis, halberts, and others wapins inva-  
 sive, be themselvis, and others in yr names, of yr causeing  
 command, assistance, devysing, sending, and ratihabitone of  
 our said soveran Ladyes maist nobill persone within hir maist  
 secreit chamber of hir pallace of Hallyrudhowse, immediatelic  
 and continuallie fra the comitting of the crewall and treasonable  
 slaughter of umqll secretar David Rizew, qlk wes upon the  
 nynth day of March last, bypast, to the space 48 hours nixt  
 yrafter, treafonablie and maist awfullie stoping hir Hienes to use  
 hir libertie in the mean tyme: Lykas, also, she hade bin hal-  
 din be them in prison as yit, maist treafonablie and wickitlie,  
 had not bein that be the provisioun of God, she yrafter fred  
 and delyverit hirselve furth of yr hands in maist sober and  
 quiet maner under silence of nyt, and with greyte hafart of  
 hir lyfe past to her castell of Dumbar for saissetie thereof; and  
 this they did upon set purpose, provisioun, and foirthowght  
 felony, and therfor dome wes given and pronouncit be the  
 mouthe of the Dempster of the sd court, at comand of the  
 sd Justice-depute, that the sd Thomas sould be hangit while  
 he were deid, drawin, quarterit, and demaneit, as ane traitour,  
 and all his guids, moveable and unmoveable, lands, heretages,  
 a-rents, takis, offices, steidings, possessiones, and uthers what-  
 somever, to be forfaultit and escheat to our soverane Ladyes use,  
 at her pleasure \*.

*Henrie.*

\* 'Sir Ludovick Steuart of Kirkhill, Advocate, his Collectiones, &c. ex manu-  
 scriptis Roberti Mylne.' MS. Advocates Library, p. 74. There is another MS.  
 copy

*Henrie Yair \* delaittit of Treasone following.*

## A S S Y S E.

Lawrence Symfon burges of Edinburgh, John Gilbert goldsmith, Thomas Ewing goldsmyth, Gilbert Scougall, Capt. Robert Lawder, Robert Ker mert. in Edinburgh, Alexander Haiftie ther, John Watfon mert. ther, James Forret ther, Edward Litle mert. ther, William Anderfone candlemaker, Alex<sup>r</sup> Bruce in Edinburgh, Allan Dickiefone ther, W<sup>m</sup> Rae cutler, Robert Eviot in Mrtoun. 1566

The qlke day the said Henry Yair was convict and fyllit be ane affyse, of airt and part assistance, fortifieing, supplying, rathabitone, and concealling of the treasonable conspiracie, convocatione, and gadding of our soveranes leigis, to the number of fyve hundreth persones, boddin in fear of wear, alfeweill in secreit armour as with jacks, steill bonnetes, gunes, pistolets, swords, buklers, Jedburgh staves, halberts, and others waipons invasive, and entering therewith treasonable w<sup>th</sup>in yr Majesties pallee of Hallyruidhous, purposlie to have put violent hands in our soverane Ladyes maist nobill persone, halden and demaneit the famyne at yr pleasure; and sicklyke, to have flane or otherwise demaneit as they thowght expedient, the Lords of hir Hienes Secret Counfall and Sessione, and others hir ministers

B b b 2

and

copy of Sir L. Steuart's Collection in the Advocates Library, but this is by far the most correct.—The Records of Justiciary, from 10th May 1559, to 2d March 1568, are missing.

\* Henry Yair had been a priest who had renounced the Catholick religion, and been admitted a retainer of Lord Ruthven's. Keith's History, p. 334.

1566 and officers being within hir pallace, and in her service for the tyme, and that upon the nynth day of March last bypast, under silence of night, at aught houres at even, or yrby, it being the tyme of parliat current; and for performing this yr maist wicked and ungodlie purpose, they then maist treasonable rushit and enterit within yr said pallace, tuike the sament at yr own hand, rest the keys theirow fra the porters, closet the yetis, and made themselves as principalls and maisters yrintill, our soverane Lady being for the tyme in her maist secreit chamber yrow att hir quietnes, having na feir nor dreidow of hir subjects, to whom hir Grace at all tymes had been maist beneficiall, guid, and merciful, and yr maist crewallie, with drawin swords, whingers, bended pistolls, and others wapones invasive, persewit and invadit umqll secretar David Riccio, hir Hienes familliar servand, yn in companie within hir Hienes chalmer forsaid, and slew him treasonable and unmercifullie, in presence of our said soverane, and pat violent hands in our soverane Ladyes maist nobill persone, in defence and saistie off the said umqll David, held, detainit, and pressit, the sament maist awfullie and treasonable, till they had comittit ye said slaughter in hir presence, as said is, hir Majestie being then great with chyld, givean to hir Hienes occasioun, throw dreadow and displeasure she consaveit be the sight of the said crewall slaughter, and maner yrow, and be the detaining and thristing of hir awn persone in violent manner, as sd is, to part with hir birth, and immediatelie thereafter seirchit and fought the sds Lords, ministers, and officers, being within the said pallace, to have slaine them, and swa had done, had not bein the pleasure of God they escapit, and swa seeing themselves disapoyntit in yt behalfe through yr evasioun, at yr pleasure, in treasonable maner detainit and held captive the remanent Lords, ministers, and officers within the said pallice, fra the said hour  
at

at aught while tua hours after midnight y<sup>t</sup> samen night, continually, upon set purpose, provisioun, and foirthowght felony. 1566

*Item,* For airt and pairt of the unlesum and treasonable warding and halding in captivitie, with convocation foresaid, boding in feir of weir, as said is, be himselfe, and uthers his complices, of our soverane Ladyes maist noble persone, within her said chalmer of hir pallice of Halyrudhous forsaid, immediatellie and continuallie frae the committing of the said crewall treasonable slaughter qlke wes at the tyme forsaid, to the space of fourty-aught hours nixt therafter, treasonablie and maist aufullie stoping hir Hienes to use hir libertie in the meanetyme; lykeas alsoe, she had bein halden be them in prisone as yit, had not bein that, be the provision of God, she therfor fled and delyverit hirselve furth of ther hands, in maist sober and quyet maner, under silence of night, and with great hazart of hir lyfe, past to the castell of Dumbar for saistie of hir lyfe, upon set purpose, provisioun, and foirthought felony: And theirfore dome was given and pronuncit be the mouth of the Dempster of the sd court, att command of the sd Justice Deput, that the sd Hendrie sould be hangit while he were deid, drawin, quarterit, and demaineit, as ane traitor, and all his moveable and unmoveable, lands, heretadges, a-rents, tacks, offices, steidings, possessiouns, and uthers whatsoever, to be forfaltit and escheat to our Soverane, to be used and disponed be hir Majestie at hir pleasure\*.

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In the Appendix to Keith's Historical Collection, the following circumstance is mentioned relative to the murder of Riccio.

When:

\* S. L. Steuart's Collection, p. 75.

1566 When Mary reproached Darnley with the audacious insult which had been offered to her, he justified himself by saying, that, since Riccio grew into favour with her Majesty, he (Darnley) was neither regarded, nor entertained, nor trusted by her, in the wonted manner; for before that, she used to come into his chamber, and pass the time with him, which now she had not done of a long while: That when he went in to her Majesty's chamber, she generally had Riccio there as a third person, and with whom she used to play at cards, after supper, till one or two in the morning. And he asked what fault he had committed, *what failing had come upon him*, that she treated him with such disdain? The Queen replied, 'That it was not a gentlewoman's duty to come to her husband's chamber, but rather the husband to come to the wife's.' And that for this outrage which he had committed, she should be his wife no longer, nor lie with him any more: Nor would she rest contented till he had as sorrowful a heart as she felt at that moment.

On the next night, however, which was Sunday the 10th, the Queen being still a close prisoner in her own palace, had occasion to cajole Darnley; and after long reasoning between them, she consented that he should come to her chamber, and pass the night. When he went down stairs, he told the Earl of Morton and Lord Ruthven of what had passed between the Queen and him; he then went to his chamber for a while, and . . . . *fell fast asleep!* One of his attendants endeavoured, but in vain, to awake him, and he enjoyed his repose till six in the morning. When Darnley awaked, Lord Ruthven, who had slept in an adjoining chamber, sneeringly asked him, Why he did not keep his promise with the Queen? and understanding that the former meant still to go up to her Majesty's chamber, he said, 'I trust she

' she shall serve you \* in the morning, as you did her at night.' 1566  
 Darnley went up however, and being asked by the Queen, What  
 became of him last night? he answered, He had fallen *dead a-*  
*sleep*. He then offered to lie down beside her, but she declared,  
 that, if he lay down, she would instantly get out of bed.

## No. IV.

*Confession of the Laird of Ormiston, who was executed for  
 the Murder of Darnley †.*

*At the Castell of Edinburgh, the 13th of December 1573.*

The qlke day John Brand minister at Hallyruidhous-being send 1573  
 to John Ormiston to give him comfort be the promiss of God's  
 word offerit to sinners, and als wa to requyre the said laird to glo-  
 rifie God in shawing of the trewth, &c. ; after lang conference, and  
 prayers made, aboue the space of ane hour, or theirby, the said  
 John Brand minister said unto him, Sir, Though I am trewlie per-  
 swadit that the haill trewth ye have shawen me of this matter,  
 yit, because diverse and greater doubts are passit of you, and als  
 the memorie of men are bot weak, theirfor, gif ye thought guid;  
 I wald certane of they things breifeley that you have spoken were  
 wrytten; wha answerit meiklie, For God's saike doe the samen;  
 wreit even as I shall srike. As I shall answer unto God, with  
 whom I hope this night to supe, I shall declaire unto you the haill,  
 from the begining unto the end of my pairt. *First*, I confes that  
 the Earle Bothwell shew the samen wickit deid unto me, in his  
 awn

\* Keith's Hist. Appendix, p. 123. 128. † Ormiston's trial is not  
 to be found in the Records of Justiciary. His trial and execution are mentioned  
 in Spottiswood's Hist. p. 271. The particulars of his confession coincide with those  
 of John Hay of Talla, and John Hepburn, which are published in Anderson's col-  
 lections, vol. 2. p. 177. 178.

1573 awn chalmer in the Abbey, on Fryday before the deid wes  
 done, and requyred me to take pairt with him therein, because  
 as he alleaged I wes ane man of activenes, (alae theirfor!) qre  
 I utterly refusit, and said, God forbid! bot, gif it were up-  
 on the field, to fight with your Lo. unto the death, I sould  
 not feir my skinn cutting. Then the said Earle said unto  
 me, Tuishe, Ormistoune, ye need not take feir of this, for the  
 haill Lords has concludit the samen in Craigmiller, all that wes  
 ther with the Quein, and nane darr find falt with it when it  
 shall be done. After the qlk I departit hame to Kaitie's,  
 Thomes being some part seik, I lay down in my bed, and lay  
 all Saturday therafter for that cause, beleivand that way to have  
 put aff that evil hour; and swa I knew na farder of it untill  
 Sonday at night, qr I being in chamber in the Blackfrier-  
 wynd, gangand in ane beltit gown, John Hepburne and John  
 Hay of Talla come unto me, and said the Quein's (g.) and  
 Lords are past upe to sie the King, and my Lord is standand  
 at the Blackfrier-wynd-fute, and bids you eume to him in-  
 continent; where I layd my gown from me, and tuik ane  
 ryding clock, because I belcivit all had bein weill anewehe  
 now agreit, seing they had pasit up to visit him; and euming  
 at the first, I mist the said Earle, for he had come in upe an-  
 uther cloffe to seik me himselfe, in my awn chamber, and yr he  
 fand my cousing Hob, qm he brought with him, and yraf-  
 ter met togidder in the mids of the wynd, wha tuike me againe,  
 and we all pasit upe to the Freier yaird, through the slape, whair  
 Pareis and Archie Betoun comit and met us, and said all wes  
 ready preparit for the setting of the lunt; and they all inquy-  
 rit how it sould be set to; and, after diverse speakings, I said,  
 Take ane piece of lunt of thrie or four inch lang, and kindle  
 the ane end of it, and lay to the cauld end, and it wald burn  
 syne to the train, and swa will blaw up; after the qlk, the

(Q.)

(Q.) grace pasit hame to. The Earle Bothwell said, Speid, 1573  
 and close all the doores, for they had 13 fals keys of the lodg-  
 ing maide, and givin, as they said to me, be him that aught  
 the house; after the qlke I departit incontinent, and came not  
 nearer, as I shall answer before God, nor the doore; and as I  
 was cuming hame it strake ten hours, wher then I pasit to  
 Jaimes Kaitie's hous, to avoid suspitioun, y<sup>t</sup> na man sould say  
 I was at the deid doing, for I was an hour and mair in my  
 bed or the blast and crack was. Being inquiryt be the said  
 minister, gif he knew not y<sup>t</sup> the King was utherwayes handlit  
 be mens handes, for it is comonlie spoken he was brought furth  
 and weirreit? Wha anserit, As I fall answer to my God, I  
 knew nothing but he was blawin upe; and did inquirye the  
 samyn maist dilligentlie at John Hepburne and John Hay, and  
 all that tarreit behind me, wha swore unto me, they never knew  
 nae uther thing bot he was blawin up; and swa I think it was  
 ane work done be God for the punishment of money wickit  
 men, whair of I am ane, and ane great finer before God, for the  
 qlke I ask God mercy.

*Thirdly*, Being requyrit, gif he knew na farder hereafter?  
 ansrit, At the patche y<sup>a</sup>fter, when the brute begane to ryse  
 upon us, and all cryit, ane vengeance upon them that slew  
 the king! It prickit my conscience, and I come to the Earle  
 Bothwell in his chamber, and said to him, What devill is  
 this now, my Lord, y<sup>t</sup> every body suspectis you of this deid,  
 and cryes, ane vengeance for the samen! and few or no uther  
 spoken of bot yow? Aneuther thing yow said to me: Wha  
 ansrit, I fall let you sie sume thing that I had for me; wha  
 then let me sie ane contract subscryvit be four or fyve hand-  
 writtis whilke he affirmit to me was the subscription of the  
 Earle Huntlie, Argyll secretar, and Sr James Balfour, and

1573 alleaged mony mae promisit, wha wald assist, or he were put  
 at; and y<sup>r</sup>after read the said contract, q<sup>l</sup>k, as I remember, con-  
 teinit thir words, in effect, That, for samikle it was thought ex-  
 pedient and maist profitable for the commoun wealth, be the haill  
 Nobilitie and Lords undersubscryvand, that sick ane young fooll  
 and proud tirrane sould not reigne nor bear rule over them; and  
 that for diverse causes, and theirfor, that the haill had concludit  
 that he sould be put off by ane way or uther, and whosoever  
 sould take the deid in hand, or do it, they sould defend and for-  
 tifie as themselves, for it sould be every ane's action, recknit and  
 halden done be themselves; whilk writting, as the said Earle  
 shew unto me, was devylit be Sr James Balfour, subscryvit be  
 them all ane quartur of ane year before the deid was done;  
 after the whilk I never spake to the said Earle of it whill the  
 day he gate his affyse, whaire the said Earle standing at the barr,  
 luiking doun sad lyke, I plukit on him and said, Fye, my Lord!  
 what deivell is this yee are doeand? Your face shows what ye  
 are: hald up yowr face, for God's saike, and luike blythlie; ye  
 might luike swa and you were gangand to the deid: Alace! and  
 wo worth them that ever devyfit it! I trow it fall garr us all  
 murne!—wha ansrit me, Had your tongue; I wald not yet it  
 wer toe do: I have ane airt gait fra it, came as it may, and yt  
 ye will knaw belyve, &c.

Forder, the tyme when my brother was hurt be the Laird of  
 Sefford, word came to me first that they wes slane, and then y<sup>r</sup>  
 came ane bill from them, and said they wer onley hurt, and  
 wald not die; but ane thing did them more evill then their  
 hurting, to witt, that ane commoun brute was risen, that  
 I was at the King's slaughter, and theirfor disirit me to get  
 sume guid way to purge myselfe; let it pass na farder, or else  
 ye

ye have done with it; qlk bill I tuike and gave to the Earle Bothwell, wha tuike it and gave it to the Quein, and she tuike it and read it, and gave it to the Earle Huntlie, yr present, wha read it, and yrafter turnit unto me, and turnit her back and gave creinge with hir shoulder, and pasit away and spake nothing to me. This is the haill thing that I know, either befor or theirafter, as I shall ansuer to my God, with whom I hope to supe. After the qlk being inquiryed, Gife ever the Quein spake to me of it at any tyme, or gif he knew what wes the Queens mynd into it? ansrit, As I shall ansuer to God shoe never spake to me nor I to hir of it, nor I know nathing of hir part but as my Lord Bothwell shew me; for I will not speike bot the trewth for all the gold of the earth, qlk I desyre yow, guid minister, bear record hearof as ye have written, qlk I pray yow read over to me: Let me also see it; qlk I did before Archd Dowglafs constabill of the castell, and George Towers of Bristo, with uthers divers gentlemen and servants being in the chamber; qlk being done, he said, for God's sake, sit down and pray for me, for I have bein ane greit sinner utherwyse, for the qlk my God this day punishes me; for of all men one the earth I have bein ane of the proudest and high myndit, and maist filthie of my body, abusying the same dyvers wayes, but specially I have shed innocent blood of ane Michael Hunter with my own hands: Allace theirfor! because the said Michael having me lyeing upon my back, haveing ane fork in his hand, myght have slayne me gif he pleasit, and did it not, qlk of all things maist greives my conscience: Alswa in a raige I hangit a poor man for ane horse; with mony uther wickit deids; for the qlk I aske my God mercy, for its not mervell I have bein wickit, for the wickit companie that ever I have bein in, bot speciallic within thir seven years bypast, qlk I never saw twa guid men or ane guid deid, bot all kind

1573 of wickedness; and yit my God wald not suffer me to be lost, and hes drawn me from them as out of hell, and hes given me leasur and space, with guid companie, to repent, for the qlk I thank him, *and is assurit that I am one of his elect, &c.*

Thir words, with mony mae, cryand continually unto his God even to the very end, cryand, My Lord Jesus! Sweit Jesus, have mercy upon me, as you have had upon uther finners! in sick fort, yt he was, to the appearance of man, ane of the maist penitent finners that hes bein sein this lang tyme, and may be comptit ane example of God's mercies to all penitent finners\*.

The authentick coppie of this I receaved fram Mr Rid Skene, sone to umq<sup>ll</sup> Mr John Skene, sune tyme cleik of counfall, whilke wes amang his umq<sup>ll</sup> father's papers.'

## No. V.

*Trial of the Earl of Mortoun for the Murder of Darnley.*

\* Mortoun his forfaltrie.

1581 Curia justiciarie S. D. N. regis tenta et inchoata in pretorio burgi de Edinburgh, primo die mensis Junii, anno Dni millesimo quingentesimo octuagesimo primo, per honorabiles et discretos viros Jacobum Striviling de Keir militem, et magistrum Joannem Grahame justiciarios in hac parte per commissionem S. D. N. regis, ac Dnorum ejus secreti concilii specialiter constitut.

\* S. L. Steuart's Coll. p. 72.

stitut. ad effectum subscriptum sectis vocatis, et curia legitime affirmata, &c. 1581

Jacobus Comes de Mortoun, Dns de Dalkeith, &c. accusatus callumniatus de arte, parte, prescientia, conselatione, et non releuatione proditorie murthure quondam nobilissimi et charissimi Henrici regis Scotorum, patris S. D. N. Regis Jacobi sexti.

Nomina affisae elect jurat et admifs super prefato Jacobo Comite de Mortoun, &c. viz.

Colinus Comes Ergadie, Joannes Comes de Montrois, Andreas Comes de Rothas, Jacobus Comes de Glencairne, Hugo Comes de Eglintoun, Alexander Comes de Sutherland, Joannes Dns de Maxwell, Georgius Dns de Seytoun, Jacobus Dns Ogilvie, Jacobus Dns Innermaithe, Hugo Dns Somervell, Alexander Magister de Levingstoun, Alexander Mr de Elphingstoun, Joannes Gordoun de Lochinvar, Miles, Patricius Hepburne de Wachtoun, Patricius Learmonth de Derfie, Miles, Willielmus Livingstoun de Kilsyth, Miles.

The whilk day the said James Earle of Mortoun being indyttit and accusit, that, in the moneths of Januarii and Febrii, in the yeir of God 1566 yeiris, he, accompaniit with James, some tyme Earle Bothwell, James Ormistoun some tyme of that Ilke, Robert, *alias* Hob Ormistoun, his father brother, John Hay some tyme of Tallo, younger, John Hepburne, callit John of Bowtoun, and divers others his complices, craftelie and fecretlie conspirit among them selves, consultit, treatit, devyfit, and maliciously concludit the maist shameful, detestable, and unnatural murther and patricide of our soverane Lords unquall dearest

1581 dearest father, Henry King of Scotts, lawfull spouse for the  
 tyme to his Hienes's dearest mother, Mary, then Quein of  
 Scotland, and that within the burgh of Edr, pallice of Hally-  
 ruidhouse, and uthers places therabout; and to the end he myght  
 bring his wicked, filthie, and execrabil attempt at better to pass,  
 he with the remanent persons afoirnamed, be themselves, yr  
 servants, complices, and others, in yr names, of their causing  
 command, hounding, sending, partaking, assistance and ratihabi-  
 tione, upon the tenth day of the sd moneth of Feberwar 1566  
 years, at twa hours after midnight, or therby, come to the lodge-  
 ing besyde the Kirk of Feild, within the said burgh of Edr, wher  
 our sd soverane Lords umqll dearest father was lodgit for the  
 tyme, and ther be way of hamesukin, brigancie, and foir-  
 thought felonie, maist vylelie, unmercifullie, and treasonable,  
 slew and murtherit him, with Wm Tayliour and Andro Ma-  
 kage, his cubicularis, when as they, buriet in slep, were  
 takeand the nyghts rest, brunt his haill lodgeing forsaid, and  
 raised the samen in the aire be force of gun poulder, qlke a lytle  
 afore was placit and imput be him and his forsaids under the  
 grund, and angular stands, and within the voltis, laich and  
 derne pairts and places yrof, to that effect, and richt, swa he  
 with the remanent persons afoirnamit, marrowis of his mis-  
 cheife, be themselves, yr servants, complices, and uthers, in yr  
 names, of their causing, command, hunding, sending, and airt  
 and pertaking, assistance, and ratihabition, at the tymes for-  
 saids, respectiue, gave their favor, counfall, and help to the per-  
 petration of the said horrible crymes, and ay sinfyne hes simulate,  
 hid, and conceillit the samen, in maist treasonable and secreit  
 maner, and theirthrow had incurrit the paines of leismagestie,  
 and sould have bein punishit theirfor with all rigour, be  
 tinsall of life, lands, and guidis, and be extinctioun of fame,  
 honour, titles, and memorie, conform to the lawis of this re-  
 alme; lykeas the remanent persons afoirnamed, his complices  
 and

and conspirators with him in their treasonable impieties, were 1581  
 already tryed and forfaitit for the self same hynous and de-  
 testable crymes, and for the maist part, as they could be ap-  
 prehendit, had sufferit maist shameful deid theirfor, according  
 to y<sup>r</sup> deserving, as at mair lenth is contained in the dittay given  
 in anent the premiffes, with the taikins and probatiouns pro-  
 ducit and usit theirwith; qlkes being read, the said James  
 Earle of Mortoun, and he anserand y<sup>r</sup>to, denyit the samen, be  
 reafoun wherof the said Justice-deputis referrit the samen to the  
 knowledge of the inqueist and assyse above written, wha wes  
 refavit and admittit in presence of the said Earle, and they  
 being furth of court removed, and ryple advisit with the said  
 dittay, taikins infallible and maist evident, with the probatiouns  
 producit and usit for verifieing their of, and y<sup>r</sup>after inenterand  
 againe in court, they all in ane voyce, be the pronunceing of the  
 mouth of John Earle of Montrose, chancellor choisen be the sd  
 assyse, fyllit the said James Earle of Mortoun of airt, pairt,  
 foirknowledge, and conceiling of the treasonable and unnatu-  
 ral murders forsaids; after the qlke conviction, the saids Justice-  
 deputis, be pronunciatioun of Andro Lindsay, Demster of the  
 said court, adjudgit, and for dome \* gave, that the said James  
 Earle of Mortoun sould be had to ane gibbet besyde the mer-  
 cat-crofe of the sd burgh of Edr, and ther be hangit while he  
 be deid, and y<sup>r</sup>after drawin, quarterit, and demaneit, as ane  
 traitour; and that all his lands, heretage, offices, possessiones,  
 tackes, steadings, cornes, cattell, actiounes, debtes, obligations,  
 guidis moveable and unmoveable, and uthers whatfomever  
 whilkis pertentit to him, sould and aught appertaine to our  
 soverane Lord, and to be applyit to his Hienes use, be rea-  
 sone of escheat of forfaitour, to be uptaken, usit, and disponit,  
 be his Hienes at his pleasur; upon the qlkes premiffes, Mr Ro-  
 bert

\* The sentence was changed to beheading, and he was privately buried. Spet-  
 tiswood's Hist. p. 314.

1581 bert Crichtoun of Eliot \*, Advocat to our soverane Lord,  
 asked instruments, and acts of Court.—Extractum ex actis † curie Justiciarie antedictæ, per me Wm Stewart juniorem, notarium publicum et clericum dicte curie per commissionem S. D. N. regis antedicti. specialiter electum et juratum, &c. sub meis signo et subscriptione manualibus.

## No. VI.

*Expence of burning a Witch, A. D. 1649.*

1649 I am indebted for this curious paper to the polite and obliging  
 communication of Mr William Henderson of the Glasshouse, Glasgow, a descendant of Mr Logan of Burncastle, on whose lands the unhappy sufferer lived. The accompt is a voucher of a payment made by Alexander Louddon, factor on the estate of Burncastle, the proprietor being then a minor and infant. It is entered in the factor's books thus :

' Mair for Margarit Dunhome the time sche was in prifon, and  
 ' was put to death, ob 5 : 14 : 4.'

*Count gifn out be Alexander Louddon in Lylstoun, in ye yeir of  
 God 1649 yeiris, for Margrit Dollmoune in Burncastell.*

Item, in ye first, to Wm. Currie and Andrew  
 Gray for the watching of hir ye space of  
 30 days, inde ilk day, xxx sh. inde . xlv lib Scotts  
 Item

\* Mr Robert Crichton of *Ellicock* (for so it should have been expressed) and Cluny, was father to the Admirable Crichton, and to Sir Robert Crichton of Cluny, who is mentioned above in the trial of the Laird of M'Gregor.

† S. L. Stewart's Collection, p. 69.

|                                                                                                            |                   |      |
|------------------------------------------------------------------------------------------------------------|-------------------|------|
| Item mair to Jon Kinked for brodding of her                                                                | vi lib Scotts     | 1649 |
| Mair for meat and drink and wyne to him<br>and his man . . . . .                                           | iiij lib Scotts   |      |
| Mair for cloth to hir . . . . .                                                                            | ij lib Scotts     |      |
| Mair for twa tare treis . . . . .                                                                          | xl sh Scotts      |      |
| Item mair for twa treis, and ye making of<br>them, to ye warkmen . . . . .                                 | ij lib Scotts     |      |
| Item to ye hangman in Hadingtoun, and<br>fetchin of him, thrie dollores for his pens,<br>is . . . . .      | iiij lib xiiii sh |      |
| Item mair for meit and drink and wyne for his<br>intertinge . . . . .                                      | iii lib Scotts    |      |
| Item mair fer ane man and twa hors, for ye<br>fetccheing of him, and taking of him hame<br>agane . . . . . | xl sh. Scotts     |      |
| Mair to hir for meit and drink ilk ane day,<br>iiij sh the space of xxx dayes, is                          | vi lib Scotts     |      |
| Item mair to ye twa officers for yr fie ilk day<br>sex shilline aught pennes, is . . . . .                 | x lib Scotts      |      |

Summa is iiij scoir xii lib xiiij sh

*Ghilbert Lauder.*

*Um. Lauder Bilzuars.*

Takin of this above written soume twentie-feaven pundis Scotis  
qlk the faid umq<sup>l</sup> Margrit Dinham had of her ain.

92 : 14 : —

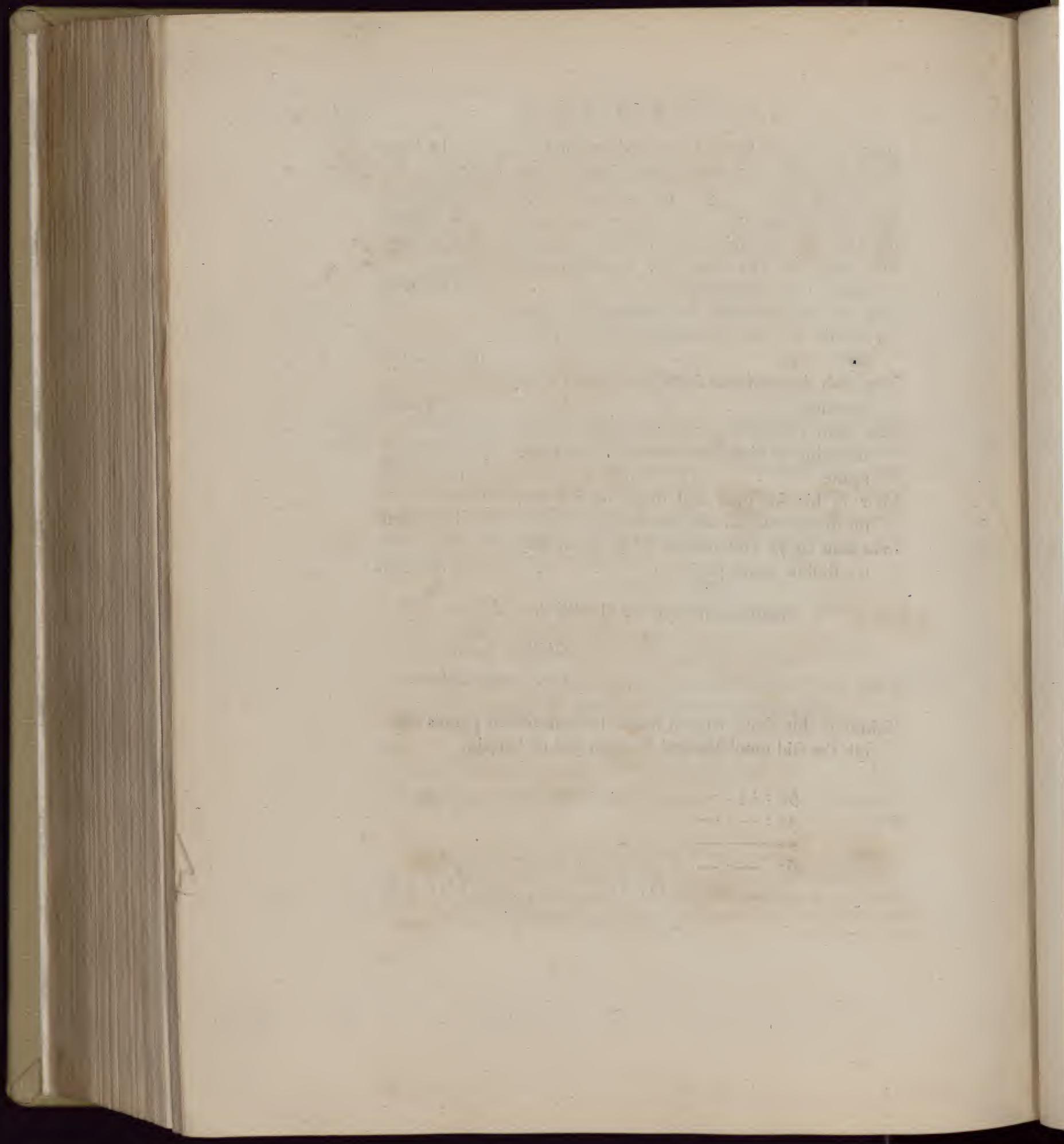
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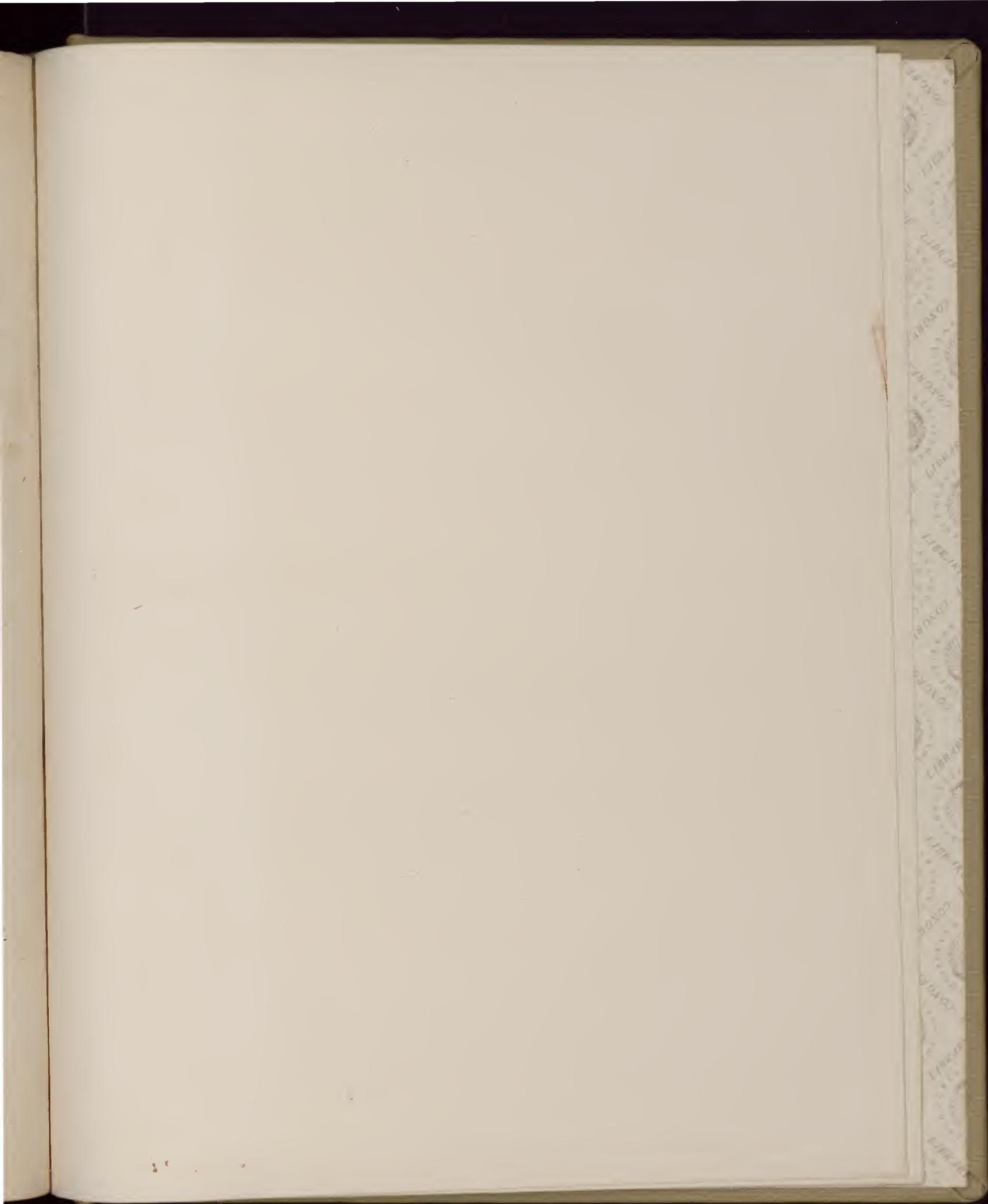
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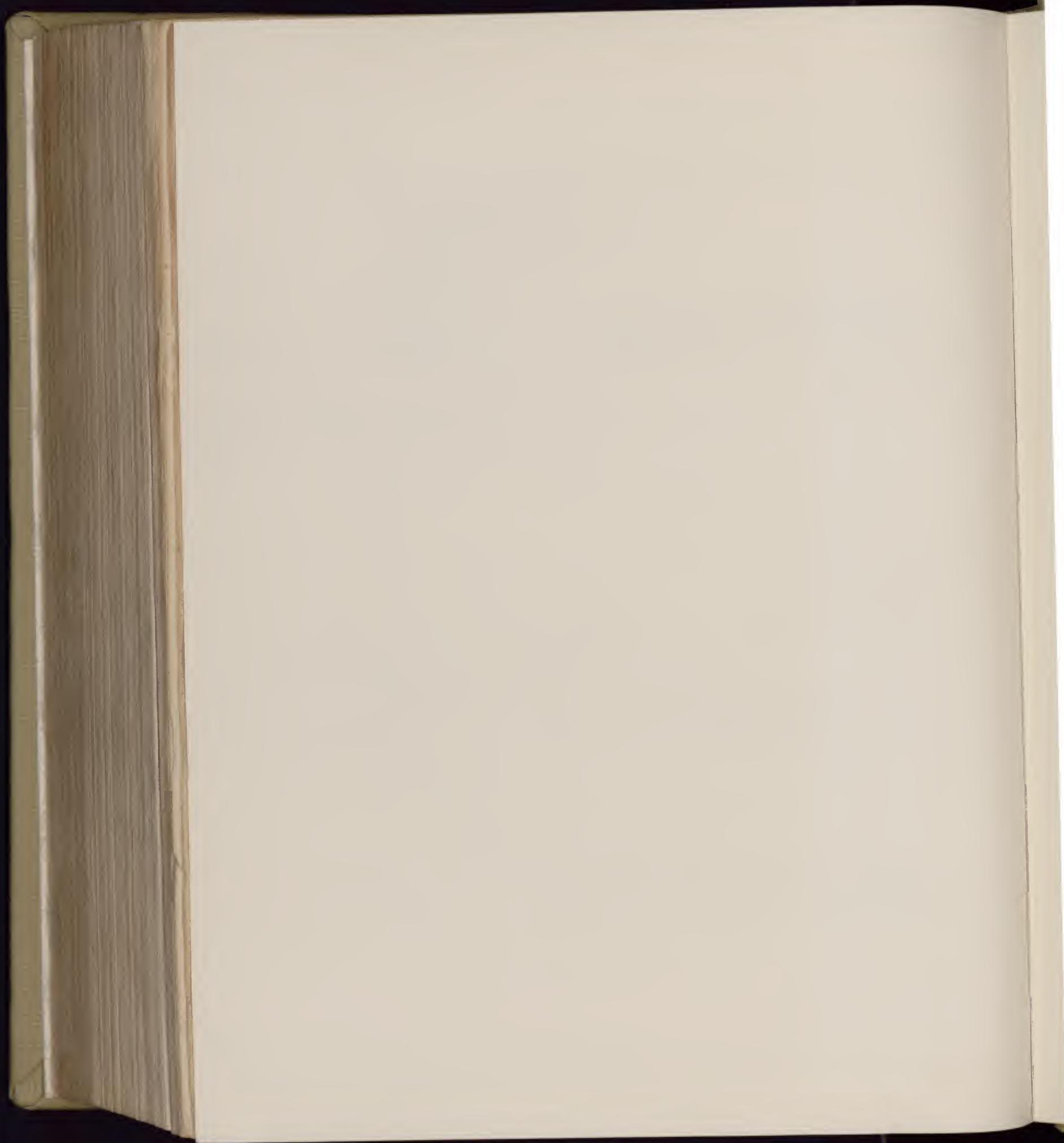
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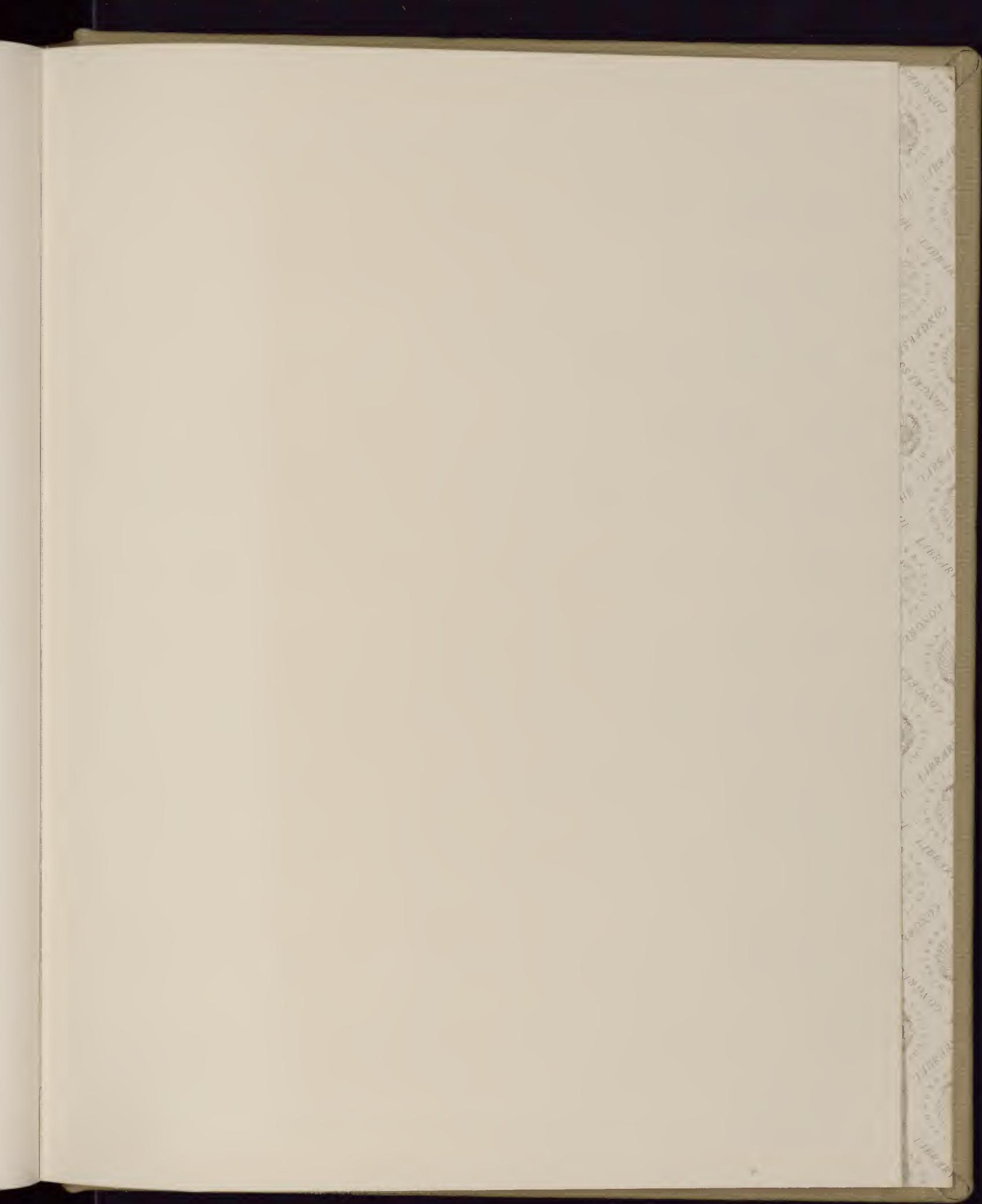
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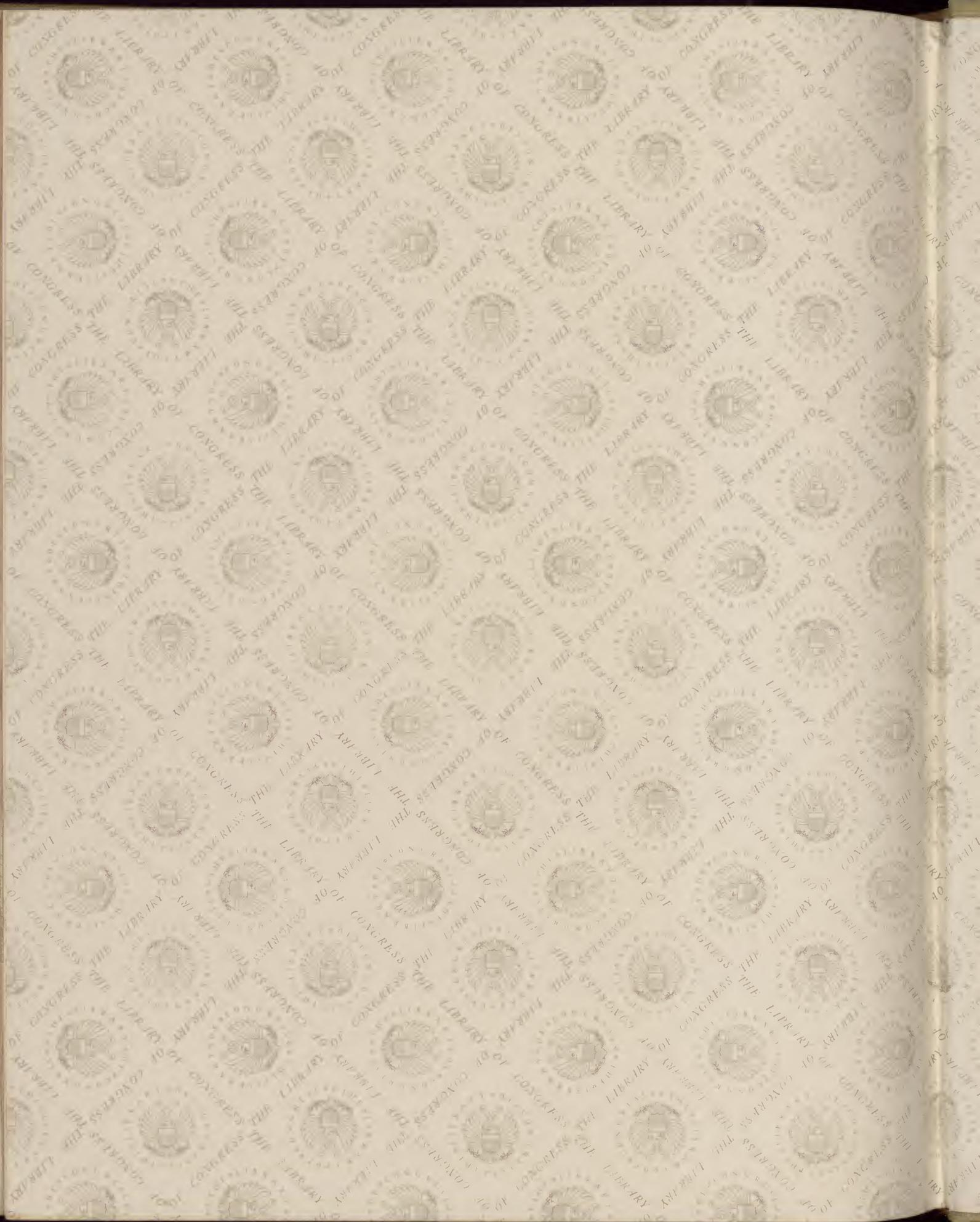
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