

## S E C T. VI.

## Criminal Jurisdiction of the Court of Session.

1638. *July 14.*DUNBAR *against* DUNBAR.

## No 132.

Found that the Court of Session could inflict corporal punishment for forgery; but that forgery could be capitally punished only by the Court of Justiciary.

IN an improbation which was pursued at the instance of — Dunbar of Asleisk, against the chaunter of Murray and Thomas Tulloch, one Spence of Alves, and some others, for improving a charter, alleged made by umquhile Mr James Dunbar, in favour of his daughters, of certain of his lands; in which cause, after long trial, the charter being found false and feigned, and William Forsyth, who was notary and writer of the charter, and Thomas Tulloch, being found contrivers of the falsehood, they were remitted to the Justices to be punished, as the law ordains in falsehoods; and the sentence being so pronounced, and given out against these two defenders, the Justices proceeded against them, and the charter was cancelled in presence of the Lords, by their command; notwithstanding of the which sentence so pronounced and executed against the said two of the defenders, the rest of the defenders, who were not fully tried, the LORDS found, seeing there were some presumptions against them, which they found gave occasion to make further search against them, so that they could neither altogether assoilzie nor decern against them, while they were further tried; and seeing they were not all present to be now tried, the LORDS ordained letters to be directed at the King's Advocate's instance, to summon the said parties to compear to be further tried; and the LORDS found, That the giving of sentence against the other two, and the Justices executing of law against them, was no cause to hinder the prosecuting of the process against the rest, who were neither assoilzied, nor found guilty of their proceeding; wherein the LORDS found the said sentence ought to make no impediment, and therefore did so proceed therein; and because the great help of the discovery of the falsehood proceeded from the notary, who confessed his own falsehood, and discovered the actors, viz. Thomas Tulloch; therefore the LORDS remitted Thomas Tulloch to be proceeded against, according to the course of law, which inflicts death; and for Forsyth, they desired that the Justices should take such order to punish him, as his life might be safe, and to inflict any other punishment which in law they might, his life being preserved; seeing they found he ought to have more favour than the other, he being found to confess ingenuously at the first, and to have contributed greatly to the trial, by declaring all the circumstances thereof, which Tulloch ever denied, until in the end, by the force of verity, and with great time and pains, the same was extorted from him; and so in this process, the LORDS found, (as has been also done before of old), that

in the trial of falshood, the Lords may inflict the particular punishment themselves, where they found, that it was within the pain of death, without remitting the party, in that and such like cases, to the Justices, where the crime was found not to be punishable by death; and where they found the same deserved death, they ought not to intermeddle therewith, but committed the party so found guilty to the Justices, to be proceeded against by them in law, conform to the laws of the kingdom; but because the LORDS did doubt, if they might do this before the sentence was pronounced (albeit truly they might do the same, and have done so of before, as said is), therefore they remitted also the notary to the Justices process, and signified to the Justice General, that they found that the notary's life ought to be spared, and recommended to him to have a care thereof.

Act. *Advocatus et Baird.*

Alt. *Nicolson et Gibson.*

Clerk, *Hay.*

*Fol. Dic. v. 1. p. 498. Durie, p. 857.*

1669. July 6.

The HEIRS of LINE of TOWIE *against* BARCLAY of Auchredy.

IN the improbation pursued against Barclay, the LORDS having examined *in præsentia*, one Thomas Ogilvy, who had served Barclay four years, and finding him prevaricate, and being confronted with Barclay's son-in-law, did confess that he had carried a letter and verbal order from Barclay, which immediately before he had denied upon oath; THE LORDS, after consideration of their own power to punish in such cases, and former practices of the Lords of Session, ordained him to be laid in the irons in the tolbooth all night, and next day to be taken to the pillory, and stand with a paper on his face, with an inscription bearing his fault.

*Fol. Dic. v. 1. p. 498. Gosford, MS. No 158. p. 62.*

\* \* \* Stair reports this case :

BARCLAY of Towy having but one daughter, and his estate tailzied to heirs-male, his nearest heir-male being the old tutor of Towy, above 80 years of age, and having also but one daughter, and neither father nor daughter being persons of much discretion, Captain Barclay, his next heir-male, having also but daughters, he disposes his estate in favour of his own daughter; and it being rumoured that Captain Barclay pretended a bond of an hundred and three thousand pounds, granted by Towy to him, that thereby he might prefer him to the tutor, and that the tutor, as heir-male, had also granted several dispositions to Captain Barclay of that estate; Towie's daughter being an infant, her friends did also procure a disposition from the tutor to her, and she pursues a reduction and improbation against Captain Barclay of the aforesaid bond, and dispositions

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No 133.

The Court of Session inflicted corporal punishment upon a witness who prevaricated.