

1666. *July 4.* JEAN CUNINGHAM *against* CUNINGHAM of ROBERTLAND.

JEAN Cuningham, as donatrix to the escheat of umquhile Sir David Cuningham of Robertland, pursued general declarator against his son: who alleged absolvitor, because the horning was null, seeing the charge and denunciation was only at the market-cross of Edinburgh, whereas, by the Act of Parliament 1597, c. 294, all hornings executed against persons within the realm, dwelling within bailiaries or stewardries, should be executed at the head burgh thereof. *Ita est* umquhile Robertland had his dwelling-house at Robertland, within the bailiary of Cuningham, albeit for a time he was out of the country and was a prisoner of war for the king. The Lords repelled the defence, and sustained the horning, and found that the Act of Parliament met it not; seeing neither the person denounced was within the realm, nor dwelt within the bailiary at that time, but had remained several years in England.

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1667. *February 23.* ————— *against* —————.

THIS day there being a query formerly given by the Lord Treasurer, Whether or not there should be a process of forfaulture intended against those who rose in the late rebellion, before the Justice-General, so that the Justice might proceed against them, though absent, by putting the dittay to the trial of an assize, and taking witnesses thereupon; and, upon probation, to proceed to the sentence of forfaulture: or whether probation in absence could not be admitted but before the Parliament:—There were reasons given with the query for the affirmative, *viz.* that there was a special statute for forfaulture of persons after their death, in which case they were absent,—*multo magis* when they were living and contumacious. *2dly.* Because, by the civil law, albeit probation, especially in criminals, cannot proceed unless the defender be present, yet the chief criminal doctors except the case of lese-majesty, as *Clarus Farenatius* and *Bartolus*. *3dly.* That the Parliament proceeds to the forfaulture in absence, not by their legislative authority, but as a judicature; and what is just by them, it is just also by the Justice. The Lords demurred long to give their answer, upon thir considerations, That, by Act of Parliament, it is statuted that probation shall be only led in presence of the party; and that there had never been such a practice for the Justices to forfault absents, but only to declare them fugitives; whereupon, being denounced, their escheat fell, and after their liferent: and that it was not proper to the Lords, especially in cases criminal, to give advice in that which might predetermine the Justice-General and the Justice-Clerk and Advocate, who had been desired to peruse the books of adjournal, and they reported, that they had not found a forfaulture by the Justices in absence; but that they had found that a party accused for treason in holding out a house against the king, was declared fugitive, but they did not find that it was proponed to the Justices to put an absent to an inquest for treason, and that it was repelled. The matter being resumed this day, the plurality resolved for the