

1693. November 24. Row against Dick.

No. 111.

The Lords advised James Row's petition again Grange Dick's two daughters, as heirs to Lessly of Newton; and inclined once to examine his prentices *ex officio* before answer, and the women-witness, and to have considered his count-books, and taken his oath in supplement on the verity of them: But considering this was offered in the act extracted by himself, and repelled, they would not introduce such a dangerous preparative as to encourage merchants to furnish prodigal minors lavishly; and that our count-books had not the faith and credit of the Mercatorian books abroad, which were kept with that exactness, that they were almost equal to public registers: And they found a holograph letter, bearing date in his majority, could not prove its own date.

Fountainhall, v. 1. p. 571.

1696. November 21.

NICOLSON OF TILlicOUTRIE against SIR PATRICK NISBET.

No. 112.

Sir Thomas Nicolson of Tillicoutrie gives in a petition against Sir Patrick Nisbet of Dean, complaining he had raised an inhibition against him on a patched-up debt, and had prevailed with one Mr. William Robertson, an old messenger in Edinburgh, to give him an execution, as if it had been published at the market-crosses of Stirling and Clackmannan, within which two shires Tillicoutrie's lands lie, and got it signed by one Blair and Wat, two of the Privy Council posts as witnesses; whereas the execution was altogether false, and none of them had been one foot out of the Town of Edinburgh, and yet Sir Patrick had given in this execution to George Robertson, and got it registered. This being a recent forgery, the Lords sent for the messenger, and, upon examination, he acknowledged, that at Sir Patrick Nisbet's desire, and promise to warrant him, he signed the execution as done at these market-crosses, though it was not so, and that he got only three 14 shilling pieces; and, after some further trial, they sent the messenger and one of the witnesses (who was not so ingenuous) to prison, and delayed till Tuesday the consideration, if they might summarily proceed against Sir Patrick, by citing him to answer on this complaint, there being no summons of improbation yet raised, and who will allege ignorance in the whole affair, and that the messenger's knavery cannot be imputed to him; and that he received the execution from him as a true deed, and he was not bound to think otherwise.

Whether a *socius criminis* can be admitted as a witness to prove forgery?

1696. December 17.

The complaint, mentioned 21st November 1696, at Tillicoutrie's instance, anent the false execution of the inhibition, and which Sir Patrick consented to have discussed summarily, *per modum simplicis quærelæ*, dispensing with the for-

No. 112. malities of a process, was debated. The King's Advocate insisting in his indictment and libel against Sir Patrick, as actor, art and part, it was alleged he behoved to condescend on the particular qualifications of his accession, that the relevancy of the same might be determined. The Advocate opposed the 152d act of Parliament 1592, whereby it was sufficient for him to libel, art and part, which is ordained as relevant to sustain his libel; and, in trials of falsehood before the Lords, they do not permit the determination of the relevancy to the probation, but allow the improver to give in his articles of improbation, and the user his articles of approbation and instruction; and after expiscation by witnesses on both sides they determine the whole, as was followed in the famous trial between Sir Robert Crichton and Richard Murray of Brughton, and in many other cases. The Lords found the King's Advocate was not bound to condescend more particularly in respect of the act of Parliament sustaining art and part. Then it was alleged, that the principal delinquents behoved to be tried, before they could insist against him as accessory, it being evident that the messenger was principally guilty. Answered, They were all equally criminal, and the degrees of the accession would arise from the probation; 2do, That of convicting the principals before the accessories held only in theft and reseters of theft; it being reasonable that the *corpus delicti* be first proved against the principal thief before the reseters can be convicted, as appears from the old Statuta Roberti. The Lords found no need of discussing the principals first in the case; 3tio, Alleged, There was no false writ here, because the execution was cancelled, and both the messenger's and witnesses names were obliterated and blotted out, and so the writ was indeed null and *nemini nocivum*, but was not false. Answered, the cancelling a false deed after it comes to be discovered, does not liberate a *pœna falsi*, and here the *corpus delicti* is plain and evident; for though it was a true deed as to its subscription, it was directly false as to the matter therein asserted, that they had published and executed that inhibition at the market crosses of Clackmanan and Stirling. The Lords repelled this third defence in respect of the answer. Then it was objected against the messenger and instrumentary witnesses to the execution, that they could not be adduced as witnesses against Sir Patrick Nisbet, because they were both *conscii et socii criminis*, and had also confessed their own guilt and villainy, and were inhabile witnesses in law, being deprived by the Lyon, and so infamous both *infamia juris et facti*; and though such were receivable in perduellion and lese-majesty ob atrocitatem criminis, yet regulariter they were rejected. Answered, In such occult and latent crimes, either they must remain for ever undiscovered, and so unpunished, or else the *socii* must be admitted; for to such works of darkness none are admitted but partners, who are put upon the secret; and in the trial of the robbery of Sir John Clerk of Pennycuick's house, some of the robbers were received as witnesses against the rest; and so in the trial of false coin against Lag: But to bring it home to the case in hand, 26th January 1670, in the Lady Towie's case against Captain Barclay, No. 69. p. 16669. Steill, Ferguson, and Ross, were admitted to prove the forgery, though this very objection was made against them, that *confessi ha-*

bentur pro convictis, and being infamous they were not to be credited ; for to extenuate their own guilt they might load innocent men, and say they did it by their instigation and order. Replied, This was only in order to discover the falsehood of the writ, but not to punish Barclay the principal forger. The Lords demurred on this objection, considering the witnesses had acknowledged their own guilt, and so, if remitted to the Lords of Justiciary, could not but be condemned, and being under the terror, impression, and fear of death, were not habile witnesses, unless the same were removed by a remission, as was practised in Salton's forfeiture. Upon which scruple of the Lords, the King's Advocate superseded to insist for some time. Mascardus thinks, that *socii criminis* are habile in criminibus occultis ubi est penuria testium. As to the degrees of accession in falsehood, and that where the *pena* is *infra mortem*, the Lords inflict it themselves, without remitting to the criminal court, see 14th July 1638, Dunbar, No. 132. p. 7416.

Fountainhall, v. 2. pp. 735, & 744.

1698. June 15. DUCHESS of GORDON against The DUKE.

No. 113.

In a process of aliment at the instance of a wife against her husband, she having separated on alleged maltreatment, women were found habile witnesses in such cases.

Fountainhall.

* * This case is No. . p. . voce HUSBAND AND WIFE.

1698. November 23. FLETCHER against KENNEDY.

No. 114.

Rankeilor reported an objection against a woman-witnesses, adduced in the process pursued by Fletcher of Aberlady against Hugh Kennedy of Beltersan, for repayment of 13,000 merks as the price of his wife's liferent in the lands of Aberlady, on this ground, that he *dolose* induced the curators to the bargain, by concealing his wife's condition, who had then a cancer in her breast, whereof she died in nine or ten months after the transaction : And the Lords having allowed a probation, before answer, as to her condition, the Lady Kilshire was adduced as a witness ; and they objecting, that women were inhabile in law, except in some special circumstantiate cases, and are expressly rejected by the statute of King Robert, and there is no *penuria testium* here, the whole town of Ayr, where she died, seeing her during that ten months ordinarily at kirk and market ; answered, This was a latent fraud and concealment of a cancer in her breast, that could not be so well known to any as to women ; and lately, in domestic cases, women have been admitted, as between the Duke and Dutchess of Gordon, and between Tolquhoun and Lentush, and in acts before answer, all witnesses use to be received. Some were for taking her *cum nota* ; but the Lords admitted her simply without any exception.

Women receiveable as witnesses *ubi est penuria.*

Fountainhall, v. 2. p. 17.