

No 2.  
the indemnity, although for reparation of an injury to an individual; because the suit had been in name of the procurator-fiscal.

‘trary or pecunial punishment.’—It was *duplied*, That it could not reach to the private interest of parties, which the King could not discharge; and in effect this was to the behoof of the person injured as an assythment for her affront; for though it be in the name of the procurator-fiscal, it is assigned to her.

THE LORDS found, That the decret being taken in the name of the procurator-fiscal, and not in the name, or for the interest, of the person injured, the same fell within the proclamation, without prejudice to her to pursue for her interest as accords.

*Stair, v. 2. p. 375.*

\* \* \* Gosford reports this case:

IN a suspension raised at Dumbarne’s instance, of a decret pronounced by the Sheriff-depute of Fife, whereby he was fined in the sum of L. 40 Scots, for a riot committed on Sibella Grant, in putting violent hands upon her on the Sabbath day, and pulling her hood off her head, upon these reasons, *imo*, That the decret was null, because it doth not bear any particular day assigned to the witnesses to compear and depone, so that the suspender was not obliged to be present to interrogate the witnesses, or to make objections, *2do*, That by the late proclamation, the King had discharged all penalties incurred by virtue of all penal statutes, unless the same were paid, or bond given therefor; and before the alleged riot, having been libelled to have been before the said day, and being pursued at the instance of the procurator-fiscal, who is answerable therefor to the King’s Treasury, the suspender was free, neither having given bond nor made payment.—It was *answered* to the *first*, That decreets of inferior judges, bearing that they were given upon full probation of the libel, against parties compearing by their procurators, needed not bear a particular day assigned for the probation, which should only be set down in the minutes of process.—It was *answered* to the *second*, That albeit the action was pursued at the instance of the procurator-fiscal, yet it was to the behoof of the party injured, like-as she was assigned thereto by the procurator-fiscal.—THE LORDS did repel the first reason, and found that the decret was not null; but as to the second, they did sustain the same, the process and decret being only in name of the procurator-fiscal, and so fell within the King’s late act of grace; but they reserved to the party injured to pursue *de novo* in her own name before any competent judge.

*Gosford, MS. N<sup>o</sup> 811. p. 510.*

No 3.  
An act of indemnity was sustained to

1704. *January 26.* JOHN BLAIR *against* MERCHANTS, &c. of KILMARNOCK.

JOHN BLAIR, Bailie-depute of the bailiery of Cunningham, pursues the merchants and other inhabitants of the town of Kilmarnock, for using false and

double weights, and on other penal statutes; and on their contumacy in not appearing, he fines each of them in L. 50 Scots; and then for their light weights he americiates them in great sums, extending to 40 or 50,000 merks. They suspended on these reasons, That the magistrates had preveued his jurisdiction, and sentenced them for the same crime; and so there was no room for his convening or sentencing them. *2do*, It being criminal, they neither got a full double of their libel, nor of the assissers and witnesses names, as ought to be in such trials. *3tio*, His fine was most exorbitant, (*esto* they were guilty,) for absence cannot exceed L. 10 Scots, as was found 6th December 1628, Crichton against Wilson, *voce* JURISDICTION, (Inferior Court); and 22d July 1631, Douglas against Kellie, *IBIDEM*; neither did he seek to adjust their weights and measures to the standard of Lanark, but to that of Irvine, which is no rule at all.—*Answered* to the *first*, The Bailie's procedure with their neighbours was a mere contrivance and collusion to palliate their guilt, and should never defend them; and to the *second*, he did not proceed *modo criminali*, but *civiliter*, for rectifying the abuse in their measures; and to the *third*, he remitted the modification to the Lords.—*Replied*, He could not repel the Bailie's *res judicata*, for one inferior judge cannot reduce the sentence of another, except only the Commissaries of Edinburgh, and the Admiral; for *par in parem non habet imperium*.—THE LORDS found the procedure exorbitant, and therefore turned the decret into a libel.—Then the defenders *alleged* absolvitor, for all transgressions preceding March 1702, because remitted by the Queen's indemnity then published, being neither paid nor transacted before that time.—*Answered*, No crimes are pardoned, but such as need a remission under the Great Seal. *2do*, Thefts, robberies, and immoralities are expressly excepted from the indemnity; and false weights and measures are theft in the sense and meaning of the eighth command; and the Scriptures declare diverse weights and measures to be an abomination to the Lord. *3tio*, He is the Earl of Eglinton's depute, who being heritable Bailie, these emoluments are his property, for which he makes an *aque* in Exchequer yearly; so that indemnities can never be extended to take away private parties' rights.—*Replied*, The indemnity makes no such distinction whether the crime need a special remission or not; and if crimes be brought under the notion of immoralities, and so be excepted from the indemnity, then all crimes are immoral, and against some law of God; but the indemnity is most comprehensive, and to be favourably interpreted, *et rapienda est occasio* to stop the covetous oppression of these inferior judges; and even the fines upon importers of prohibited goods, when pursued by the managers of the manufactories, were found pardoned by the indemnity; because their private interest being only consequential to the public law, the principal being discharged and pardoned, made the accessory to run the same fate; that power being necessary in the regulations and measures of government for quieting the minds of the people.—THE LORDS inclined to think this case fell under the indemnity, especially the decret for the fines being now turned to a libel; but they did not determine it, but gave their opinion to the Ordinary in the cause to

No 3.  
assoilzie from  
fines imposed  
by the heri-  
table bailie  
of a bailiary,  
though such  
fines were his  
property and  
private right.

No 3. hear them farther thereupon ; and the indemnity was afterwards sustained to assoilzie from the fines.

*Fol. Dic. v. 1. p. 461. Fountainball, v. 2. p. 215.*

No 4. 1706. June 27. M'MICKEN against KENNEDY.

FOUND, That acts of usury were comprehended under the Sovereign's subsequent indemnity.

*Fol. Dic. v. 1. p. 461. Forbes.*

\* \* \* This case is No 62. p. 524. *voce* ANNUALRENT.

1707. November 19.

SIR ALEXANDER CUMING of Culter against SIR ANDREW KENNEDY.

No 5.

An act of indemnity was found to exculpate the Conservator of the Scots privileges in the United Provinces from any malversations in his office preceding the date of the act, although he was called in question for the same before that act.

IN the reduction and declarator at the instance of Sir Alexander Cuming against Sir Andrew Kennedy, for reducing Sir Andrew's liferent right to the office of Conservator of the Scots privileges in the United Provinces, upon this ground, That he had neglected his duty at the Staple Port, and omitted to put the laws in execution against transgressors of the Staple, and been guilty of other malversations, the defender founded on the Queen's indemnity, dated 16th March 1703, to exculpate him from any malversations preceding that time. " In respect the said indemnity pardons, remits, and acquits all her Majesty's subjects of all breaches or abuses of, or malversations in public trusts, with all other crimes, delinquencies, or transgressions incurred by word, writ, or any other act, either of omission or commission, preceding the date, which directly or indirectly are, or may import the contravention of any law, custom, or constitution of Scotland ; and that in so far as the same may infer any pain or punishment, either in their lives, fortunes, estates, fame, or reputation.

*Alleged* for Sir Alexander Cuming. The Queen's indemnity cannot exoner Sir Andrew as to preceding malversations : Because, *imo*, Sir Andrew was prosecuted and complained on before the indemnity : And a person attainted of felony is not understood to be pardoned, without a special clause, remitting the prosecution and attainder, *Cromp. 115. N. 1. Lamb. 502. Dalton 245.*, and Julius Clarus gives an instance of one who was executed 1558, albeit *obtinuerat literas impunitatis a principe*, which bore not that *tempore impetrationis erat in carcere detentus. 2do*, Sir Andrew continued not innocent after the indemnity, but re-acted the malversations complained of ; and the breaker of the peace after pardon, forfeits the same, and may be hanged notwithstanding, *Crom. ibid. Dalt. 247. 3.* The civil prosecution of deprivation falls not