1768. *July* 6. MAJOR-GENERAL IRVINE *against* JOHN ADAMS.

MEMBER OF PARLIAMENT.

By 2d Geo. II. cap. 24, sect. 9, *junct.* sect. 2,—Any person guilty of Bribery, by accepting money, or other reward, for his own vote, or by corrupting others, shall, for each offence, forfeit the sum of L.500 sterling; "To be recovered, with full costs of suit, by Summary Action or Complaint, or by Prosecution before the Court of Justiciary." *Found*, That, in a complaint to the Court of Session upon this clause, the Respondents were not entitled to insist that a list of witnesses, to be adduced, should be exhibited, or the writings to be founded on produced with the complaint, as would have been the case had they been prosecuted before the Court of Justiciary.

[*Dictionary*, 8884.]

PITFOUR. By the statute, every Court is left to determine in its own form. In criminal cases, a list of witnesses is necessary; because diets are peremptory, and because parties may *in initio* take a precognition, and so have it in their power to come prepared to say by what witnesses they can prove.

COALSTON. When crimes are tried before the Court of Session, it is expedient that witnesses be named, in order to prevent frivolous complaints or vexatious inquisitions. In the case of forgery, the practice is to give in a list. At the same time, what is pleaded for Mr Adams, ought not to be held as dilatory: The cause may go on whenever the list is given in.

AUCHINLECK. The complaint directly charges a contract in writing, for the purpose of bribery: this is the best of all proofs. To what purpose, then, give in a list of witnesses? Why go out of our common road in a case of this kind?

PRESIDENT. It may be expedient to give a list of witnesses after the answers appear; but there is no occasion for serving the complaint and a list of witnesses *simul et semel.*

ALEMORE. This complaint is not a criminal action; it is an action for penalties. The statute, speaking of the method of proceeding in England, mentions *bill of debt.* This shows that the action is not in the criminal form. The Act 1621 says, that the granter of certain deeds shall be infamous; and yet, in a prosecution on the Act 1621, a list of witnesses is not required to be given in. The practice, in the trial of forgery, does not apply; for forgery is directly a crime, and the punishment may be capital.

BARJARG. I incline for a list of witnesses, because a fine is concluded for, and because a man's fame may be affected by the issue of the prosecution.

KAIMES. Shall we oblige the pursuer to give in his list of witnesses before the other party opens his mouth, or says that he is not guilty?

JUSTICE-CLERK. It is not necessary to inquire into the nature of this action, whether criminal or not. It may be understood as criminal, because triable before the Court of Justiciary, and as civil, because triable before the Court of Session: it must be tried according to the form of each Court. As

to the analogy from the case of forgery,—forgery was tried, of old, in the form of an action of improbation, and then no list was necessary. It might still be tried in the same form; but the practice is for the advocate, out of humanity, to insist, *per modum simplicis querelæ*, and to give out a list.

GARDENSTON. I am against a list; for I am against all innovations: Specious reasons may be assigned for innovations; but we cannot foresee their consequences. We are allowed to try, by summary complaint: why not try it like other summary complaints? If forgery trial is to be the rule, we ought to examine the witnesses in presence, and we ought to oblige the parties to attend.

On the 6th July, 1768, the Lords repelled the defence, and ordained both dilatory and peremptory defences to be given in, this day seven-night.

Act. D. Rae. *Alt.* A. Crosbie.

Diss. Barjarg, Coalston.

1769. *January* 17. ANGUS SINCLAIR *against* JAMES HAMILTON, JOHN MACFARLANE, and OTHERS.

PUBLIC OFFICER—REPARATION.

Malversation of Justices—Poinding by an officer of excise, in virtue of their decreet.

[*Faculty Collection, IV. p.* 194; *Dictionary*, 13,130.]

PITFOUR. If the decreet is in terms of law, it is not liable to reduction: but then the question is, Whether the justices acted in terms of law? We ought not to catch at every irregularity committed by justices of the peace, if, however, they act within some bounds of law. They are judges appointed, *ex vicineto*, for the benefit of the subject, who would otherwise have been judged by the Court of Exchequer. They ought to be favoured whenever they can be favoured: but here their whole conduct is irregular. I will state some of the most striking particulars: There was no proof in writing, which is always necessary when a judgment is subject to review. If custom can sanctify this, still the party must be allowed to prove that the evidence was other than what the justices suppose it was. *2d*, There is a difference in the manner of stating the fact; from whence it cannot with certainty be known whether the offence was prescribed or not.

GARDENSTON. I am not much moved with objections in point of form. When there are hundreds of little causes before the justices of peace, it is impossible to take down, in writing, the evidence, and every thing that passes. I see nothing against the justices; but I see great irregularity charged against the officers,—that they beat Sinclair, and that they made irregular distress. It is said that the officers had a writ of assistance, and thereby got into the house. I do not know how far a writ of assistance does go; but I know how