No 268. to be put. The ground of this opinion seemed to be the following argument: Whether a witness deposes to his knowledge, his belief, or his suspicion, the consideration of the Judge is more directed to the things themselves which fell under his senses, than to their influence on his understanding. In the present instance, a witness has testified that her suspicion, being a mere chimera, had arisen from no such circumstance; and thus has already given a full negative answer to the interrogatory.

The Lord Ordinary, however, having pronounced this interlocutor: "Remits the cause to the Commissaries, with this instruction, that they interrogate the witness in question, as to whether or not she knows or believes that the letter or cover, mentioned in the interrogatory, was written by the private pursuers, any of their family, or any other person immediately under their direction or influence;"

To that judgment the Court adhered, with this difference only, that, instead of the phrase, "knows or believes," that of "knows or suspects," was substituted.

Lord Ordinary, *Alva.* Act. *Lord Advocate Campbell, Solicitor-General Dundas, Maclaurin.* Alt. *Crosbie, Buchan Hepburn, Cullen, H. Erskine.* Clerk, *Home.*

S. *Fol. Dic. v.* 4. *p.* 163. *Fac. Col. No* 199. *p.* 312.

1787. *June* 27.

The Procurator-Fiscal of the County of Edinburgh *against* David Wilson.

No 269.
Transgression of the act 1707, against shooting hares, may be proved by the oath of the offender.

David Wilson was sued before the Sheriff of Edinburgh, by the Procurator-fiscal of the County, upon the act 1707, c. 13. whereby persons shooting hares are subjected to a penalty of L. 20 Scots, *toties quoties*. The fact being offered to be proved by his oath, he

Pleaded; The transgression of a prohibitory statute, even when it is attended only with a pecuniary penalty, infers such a degree of ignominy as must preclude the reference to the oath of party, agreeably to the rule, Quod nemo tenetur jurare in suam turpitudinem; 4th December 1762, Stirling *contra* Chrystie, No 20. p. 9403. But the punishments annexed to the offence in question are not merely of a pecuniary nature. The shooting of hares was, in ancient times, a point of dittay, and punishable with death. Even by the statute of 1707, persons guilty of any of the offences to which it relates, may be sent abroad as recruits. To admit a reference to oath, in circumstances such as these, would be a great inlet to perjury.

Answered; Where the facts alleged against a defender are of such a nature as to render him infamous, if proved, or where the prosecution has been brought in order to the infliction of a corporal punishment, it may be acknowledged, that, by our customs, agreeably to the civil law, a reference to oath has not

No 270.

been allowed. But this restriction is nowise applicable to an action like the present, instituted for the recovery of a very moderate fine. Without such a mode of proof, indeed, many of the slighter offences, which infest society, could not be brought to punishment. The decision referred to, which is quite contrary to the established practice, as well as to many former precedents, appears from the records to have been erroneously collected. As the question there turned on the statute of 1698, whereby tenants are made liable for trees cut on their farms, unless they are able to fix the guilt on third parties, the point here in dispute could not occur for determination.

The defender separately *contended*, That the statute 1707 was in desuetude. This argument, however, was entirely disregarded.

The Sheriff-depute found, that the reference to oath was competent. A bill of advocation, preferred for the defender, was refused by the Ordinary on the Bills.

The question was afterwards considered by the Court, in a reclaiming petition and answers, in which the pursuer restricted his claim to one sum of L. 20 Scots. One of the Judges expressed a doubt, whether such a judicial transaction, as is implied in a reference to oath, could be validly entered into by a Procurator-fiscal.

"The Lords adhered to the judgments of the Sheriff and of the Lord Ordinary."

Lord Ordinary, *Braxfield.* Act. *Solicitor-General.* Alt. *Dean of Faculty, Patison.* Clerk, *Menzies.*

C. *Fol. Dic. v.* 4. *p.* 162. *Fac. Col. No* 336. *p.* 516.

1804. *January* 24. STEIN *against* MARSHALL.

No 271.
The condescendence on the part of the pursuer of an action for scandal, must be pointed and special. Private conversations between men of business, in relation to causes depending in Court, not relevant to be proved.

James Stein, distiller at Kilbagie, had, in the year 1788, been obliged to stop payment.

Having afterwards obtained a discharge from his Creditors, he brought an action against James Marshall, Writer to the Signet, before the Commissaries, on the narrative, that 'having conceived a groundless ill-will and malice against 'the pursuer, for the purpose of disappointing the pursuer in obtaining the a-'foresaid discharge, by prejudicing his creditors against him, or, at least, with 'an intention to injure his good name and character, on various occasions, both 'by word and writing, did represent the pursuer as a fraudulent bankrupt: 'And, more particularly, the said James Marshall, in a conversation which he 'held with Robert Jamieson, senior, Clerk to the Signet, in the course of the 'present year 1801, did aver that the pursuer was a fraudulent bankrupt, and 'solemnly assured the said Robert Jamieson, that he was in possession of docu-'ments which fully established such fraud; and the said James Marshall fur-