

Pleaded, Supposing it were true, that the pannel had tampered with the witnesses, yet, as they have never been brought forward to swear a second time, it is impossible she can be guilty of subornation of perjury, Hawkin's Pleas of the Crown, vol. 1. p. 172., Blackstone, b. 4. c. 10. § 16. The charge against her amounts at most only to an attempt to commit that crime, by which attempt Sir William Jardine has not been injured, either in his person, property, or reputation. This prosecution, therefore, is only competent at the instance of the public prosecutor; popular actions being extremely dangerous, and indeed unknown in our law, except in a few instances, where they are allowed by special statute, Spirit of the Laws, b. 6. t. 8.; Kames Hist. Law Tracts, p. 60.; Maclaurin's Criminal Cases, No 75, February 1767, Robb against Halladay; No. 79. November 1767, Mackintosh, &c. against Dempster; Hawkin's Pleas of the Crown, p. 181, 182.

Answered, Although the pannel has not been able to carry her intentions into full effect, the law will hold the pursuer to have suffered in his character, by her malicious attempts to hold out that he obtained the divorce by subornation of perjury, See Maclaurin, No 95, Haggart against Hogg; 2d July 1786, Penrose Cuming against Leslie. He has certainly a more immediate interest to prosecute than any other individual in the community; and unless it were competent to him, crimes of this sort would pass unpunished, for it is impossible the public prosecutor can watch over all the mal-practices committed in the course of law-suits between individuals.

The Court, after advising informations, and additional informations on the relevancy, "found, That the charge contained in the libel did not amount to the crime of subornation of perjury, but an attempt to commit such a crime: Found, That the private prosecutor has no interest or title to bring this prosecution against the pannel, upon the facts so charged, the said prosecution being only with concurrence, and not at all at the instance of his Majesty's Advocate; and, therefore, dismissed the said criminal libel, and the pannel from the bar.

Act. Lord Advocate Dundas, Dean of Faculty Erskine, Solicitor General Blair, Geo. Ferguson.

Act. Cullen, Macleod Bannatyne, Rae.

R. D.

Fac. Col. (APPENDIX) No 3. p. 2.

1796. February 10. HEW DARBY against JAMES LOVE.

HEW DARBY, trustee on the sequestrated estate of James Love, and himself claiming as a creditor, presented a petition and complaint, in which he accused Love of fraudulent bankruptcy, and craved that he might be punished accordingly; 1621, c. 18.; 1696, c. 5.; 33d Geo III. c. 74. § 27, 28.

No 18.

The trustee for the creditors of a bankrupt is not entitled to bring a charge of

No 18.
fraudulent
bankruptcy
against him
without the
concurrence
of his Majes-
ty's Advoca-
cate.

The facts charged were alleged to have happened during the dependence of the sequestration.

This complaint being brought without concurrence of His Majesty's Advocate, the defender, *inter alia*, objected to its competency on that account, 10th August 1765, Syme, *voce* SUMMARY APPLICATION; 1777, Blacklaw. See APPENDIX.

The pursuer, on the other hand, stated, that it was the practice of the Court to exercise their criminal jurisdiction incidentally, without that concurrence, where the crime occurs in the course of actions depending before them, Acts of Sederunt, 13th June 1561, Stevinston; 8th January 1736, Blackadder; 14th June 1782, Brown. That the sequestration in the present case must be considered as a depending action; and that the concurrence of his Majesty's Advocate was not necessary to complaints of fraudulent bankruptcy, even where there was not a previous dependence, Acts of Sederunt, July 26. 1748, Mackenzie and others; 4th February 1757, Wauchope.

Observed by the Bench, It is usual for the Court to punish incidentally perjury or prevarication committed in the course of a process depending before them, these crimes being of the nature of a contempt of Court. When any other matter of criminal charge, such as fraudulent bankruptcy, comes under their observation in the course of a civil action, it is the duty of the Court to take notice of it; but the proper mode of proceeding is, to recommend to his Majesty's Advocate to inquire into the matter, and, as he shall see cause, give his instance or concurrence to a prosecution brought in proper form. And a formal complaint at the instance of an individual, without concurrence of his Majesty's Advocate for the public interest, is, in such cases, wholly incompetent.

Upon advising the complaint, answers, replies, and duplies, (27th June 1795,) "the LORDS dismissed the complaint;" and, upon advising a reclaiming petition, answers, &c. "adhered."

Act. Greenshiels.

Alt. Tait.

Clerk, Colquhoun.

Fac. Col. No 202. p. 483.

See APPENDIX.