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REPORTS OF CASES

BEFORE

THE HIGH COURT

AND

CIRCUIT COURTS OF JUSTICIARY IN SCOTLAND,

DURING

THE YEARS 1848, 1849, 1850, 1851, 1852.

BY

JOHN SHAW, ESQ.

ADVOCATE.

EDINBURGH:

T. & T. CLARK, LAW-BOOKSELLERS.

LONDON: BENNING & CO.

MDCCLIII.

MA 3758

J U D G E S
OF THE
C O U R T O F J U S T I C I A R Y
DURING THE PERIOD OF THESE REPORTS.

LORD JUSTICE-GENERAL.

1841. THE RIGHT HONOURABLE DAVID BOYLE.

LORD JUSTICE-CLERK.

1841. THE RIGHT HONOURABLE JOHN HOPE.

LORDS COMMISSIONERS OF JUSTICIARY.

1824. JOSHUA HENRY MACKENZIE, LORD MACKENZIE.
1829. SIR JAMES WELLWOOD MONCREIFF, LORD MONCREIFF.
1830. JOHN HAY FORBES, LORD MEDWYN.
1837. HENRY COCKBURN, LORD COCKBURN.
1843. ALEXANDER WOOD, LORD WOOD.
1849. JAMES IVORY, LORD IVORY.
1850. DUNCAN M'NEILL, LORD COLONSAY.
1851. JOHN COWAN, LORD COWAN.
1852. ADAM ANDERSON, LORD ANDERSON.

LORD ADVOCATE.

1846. ANDREW RUTHERFURD.
1851. JAMES MONCREIFF.
1842. DUNCAN M'NEILL.
1852. ADAM ANDERSON.
1852. JOHN INGLIS.

SOLICITOR-GENERAL.

1846. THOMAS MAITLAND.
1850. JAMES MONCREIFF.
1851. JOHN COWAN.
1851. GEORGE DEAS.
1842. ADAM ANDERSON.
1852. JOHN INGLIS.
1852. CHARLES NEAVES.

ADVOCATES DEPUTE.

1841. DAVID MILNE.
 1843. DAVID MURE.
 1845. CHARLES BAILLIE.
 1846. GEORGE DEAS.
 1846. JAMES CRAUFURD.
 1847. E. F. MAITLAND.

1847. J. M. BELL.
 1849. GEORGE YOUNG.
 1850. THOMAS CLEGHORN.
 1851. G. DINGWALL FORDYCE.
 1851. ANDREW R. CLARK.

CROWN AGENT.

1841. JAMES TYTLER, W. S.
 1847. JOHN CLERK BRODIE, W. S.

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WEST CIRCUIT.

STIRLING.

Autumn 1848.

Judges—LORDS MONCREIFF AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Deas A.D.*

AGAINST

JOHN PATERSON and DAVID RITCHIE—*Grahams.*

INDICTMENT—LOCUS—VARIANCE.—Held that there is no land in Scotland truly extra-parochial, and that in the case of a peculiar jurisdiction it is sufficient to libel the offence alternatively, as having been committed within one or other of the adjacent parishes. Question, whether it is a fatal objection when a wrong parish is named in the libel, if it be shewn in proof, that the locus mentioned is situate in another parish.

JOHN PATERSON and DAVID RITCHIE were charged with Robbery; as also Assault; as also with Theft:

IN SO FAR AS (1.), on the 10th day of March 1848, or on one or other of the days of that month, or of February immediately preceding, or of April immediately following, on or near the public road leading from Stirling to Dumbarton, and at or near a part of the said public road situated in the parish of Saint Ninians, or parish of Stirling, and county of Stirling, and about one hundred and fifty yards, or thereby, east from the bye-road leading from the said public road to the King's Park Quarry, or at or near some other part of the said public road situated in the said parishes, or one or other of them, to the prosecutor unknown, you the said John Paterson and David Ritchie did, both and each, or one or other of you, wickedly and feloniously, attack and as-

No. 1.
John Paterson and
David Ritchie.

Stirling.
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Robbery.

No. 1.
John Paterson and
David Ritchie.

Stirling.
Sept. 7.
1848.

Robbery.

assault John Johnstone, a shoemaker, then and now or lately residing at or near Touch, in the parish of Saint Ninians, and county aforesaid, and did seize hold of him by the shoulders, and did kick him upon or near the feet and legs, and did thereby, or otherwise, bring him down upon his back to the ground, and did lie above him, and did place your hand or hands upon his mouth, and did rifle his pockets; and you did, both and each, or one or other of you, then and there, wickedly and feloniously, and by force and violence, take from his pockets or person, and did rob him of, a halfpenny copper piece, the property, or in the lawful possession, of the said John Johnstone: LIKEAS (2.) on the 14th day of April 1848, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, on or near the public road leading between Stirling and Callander, and at or near a part of the said road situated in the parish of Saint Ninians, and county aforesaid, and one hundred and sixty-eight yards or thereby to the eastward of Kildean Toll-Bar, in the parish of Saint Ninians, and county aforesaid, now or lately occupied by John Johnston, toll-keeper, now or lately residing there, or at or near some other part of the said public road situated in the said parish and county, to the prosecutor unknown, you the said John Paterson and David Ritchie did, both and each, or one or other of you, wickedly and feloniously, attack and assault Thomas Bilsland, a brick-moulder, then and now or lately residing in or near Cowan Street, in or near Stirling, and did, with your fist or fists, strike him a blow or blows on or near his face, and did throw or force him down upon his face to the ground, and did repeatedly strike him on or near the back part of his head while he was lying on the ground, and did seize him by the neck or throat, and endeavour to choke him, and did thrust your hand or hands, or part thereof, into his mouth, and did tear open his coat or great-coat, and did search one or more of his pockets, and did otherwise maltreat and abuse him; and all this, both and each, or one or other of you, did, with intent to rob the said Thomas Bilsland: LIKEAS (3.) on the night of the 14th, or morning of the 15th, day of April 1848, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, on or near Broad Street of Stirling, and at or near that part of said street which is in front of, or near to, the shop in said street then and now or lately occupied by William Peddie, then and now or lately bookseller there, you the said David Ritchie did, wickedly and feloniously, attack and assault Margaret Clark, then or lately residing with James Roberts, in or near Jail Wynd of Stirling, and now or lately residing in or near High Street of Linlithgow, with her father, James Clark, shoemaker, and did throw or force her down upon her back on the ground, and did forcibly thrust your hand into the breast or front part of her dress; and you the said David Ritchie did, then and there, wickedly and feloniously, and by force and violence, take from her person, and did rob her of,

a small bag or purse, sevenpence sterling, or thereby, in silver money, and fourpence sterling, or thereby, in copper money, the property, or in the lawful possession, of the said Margaret Clark : OR OTHERWISE, time and place last above libelled, you the said David Ritchie did, wickedly and feloniously, steal and theftuously away take from, or from near the person of the said Margaret Clark, the aforesaid bag or purse, sevenpence sterling, or thereby, in silver money, and fourpence sterling, or thereby, in copper money, the property, or in the lawful possession, of the said Margaret Clark.

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In the course of the trial, it appeared that the *locus* stated in the libel, was situated neither in the parish of St Ninians, nor in that of Stirling, but within the extra-parochial jurisdiction or district of the constabulary of Stirling Castle.

In respect of the second charge, it appeared that the *locus*, although correctly described otherwise, was situate not in the parish of St Ninians, but in that of Stirling.

GRAHAME for the pannels, in addressing the Jury, argued in respect of the first and second charges, there was a misdescription of the *locus* in the indictment. He admitted that it would have been unnecessary for the prosecutor to have named the parish, but contended, that where a parish was mentioned, it was a fatal objection if it was shewn in proof that the *locus* set forth was not within its boundaries. Alison, vol. ii. p. 262-3, and cases there cited, particularly those of *Peter Gordon*, Perth, Sept. 28. 1812, *Robert Henning*, Aberdeen, Sept. 1821, and *Thomas M'Pherson*, Inverness, Spring 1824.

LORD MONCREIFF charged the Jury, that, in point of law, there was no land in Scotland that was extra-parochial. All land whatever was situated in some parish, *Ross v. Earl of Haddington*, 3 Shaw, 115 (N. E. 76), and therefore in describing the *locus* of the first robbery as in the parish of St Ninians or parish of Stirling, he had given the correct description, and there were no grounds for sustaining the objection stated to that charge. In regard to the argument maintained relative to the second charge, the Jury would judge whether the evidence sup-

No. 1.
John Paterson and
David Ritchie.

Stirling.
Sept. 7.
1848.

Robbery.

ported the pannel's contention, that the crime, if committed by the pannel, of which they would also judge, was perpetrated at a spot in Stirling parish, instead of St Ninians, as libelled. As to the law which had been quoted, he had long been of opinion that it was erroneous, and it was seriously doubted by some of the most eminent lawyers at the time when the leading cases were decided. It would be best for the Jury to return a verdict with a special finding relative to this point.

The Jury returned the following verdict:—‘The Jury
‘unanimously find both the pannels guilty as libelled,
‘of the charges of robbery under the first and third
‘charges in the indictment, and of the assault with in-
‘tent to rob in the second charge, and are satisfied as
‘to the accuracy of the *locus* mentioned in the indict-
‘ment where the second charge was committed, but are
‘not prepared to say in what parish.’

Whereupon it was objected, that this amounted to a verdict of acquittal on the second charge, and the Advocate-Depute declined to move for sentence on that part of the case, confining himself to the first charge.

LORD MONCREIFF said, he would have certified the point had the Public Prosecutor moved for sentence. He was not now required to do so, but he would intimate that his own opinion was contrary to the view taken by Mr Alison, and pressed by the pannels' counsel.

In respect of which verdict of assize, so far as regarded the first and third charges, the pannels were sentenced to be transported for the period of ten years.

GLASGOW.

Judges—LORDS MONCREIFF AND COCKBURN.Sept. 23.
1848.HER MAJESTY'S ADVOCATE—*Deas A.D.*

AGAINST

DENNIS CONNOR and EDWARD MORRISON.—*W. H. Thomson.*

RAPE—LOCUS—INSUFFICIENT DESCRIPTION.—Question, 1st, Whether, in the particular circumstances, the *locus*, where a rape was said to have been committed, was described with sufficient accuracy. 2d, Whether the description of the party said to have been injured was not too vague.

DENNIS CONNOR and EDWARD MORRISON were charged with Rape; as also, Assault, committed with, Intent to Ravish, and to the effusion of blood and injury of the person :

No. 2.
Dennis
Connor and
Edward
Morrison.Glasgow.
Sept. 23.
1848.Rape, and
Assault.

IN SO FAR AS (1.), on the 25th day of August 1848, or on one or other of the days of that month, or of July immediately preceeding, on or near the public or parish road commonly called or known by the name of the Craig Road, leading from the farm-steading of the lands or farm of South Medrox, in the parish of New Monkland aforesaid, then and now or lately occupied by William M'Lean senior, then and now or lately residing there, to or in the direction of Cumbernauld, in the parish of Cumbernauld, and county of Dumbarton, and at or near a part of the said road situated in the parish of New Monkland aforesaid, which is distant 246 yards, or thereby, from the farm-offices of South Medrox aforesaid, or at or near a gate or entrance into a park or field upon the lands or farm of South Medrox aforesaid, commonly called the Killknowe Park, situated in the parish of New Monkland aforesaid, or at or near some other part of the said road, or of the said lands or farm, situated in the parish of New Monkland aforesaid, to the prosecutor unknown, you the said Dennis Connor did, wickedly and feloniously, attack and assault Mary Houston, then and now or lately servant to, and residing with, the said James M'Lean senior, and did seize hold of her, and did, with a stick, or with some other weapon to the prosecutor unknown, strike her two more blows on or

No. 2.
Dennis
Connor and
Edward
Morrison.

Glasgow.
Sept. 23.
1848.

Rape, and
Assault.

near her breast and stomach, or other part or parts of her person, and did put your hand under her petticoats, and upon her naked person, and did seize her by the throat to prevent her crying for assistance, and did throw or force her down to the ground; and the said Mary Houston having succeeded in rising from the ground, you the said Dennis Connor did drag or pull her some short distance, and did again throw or force her down to the ground, and did grasp her by the throat in order to stifle her cries, and did raise her petticoats, and did lie upon her, and did have carnal knowledge of her person, forcibly and against her will, and did ravish her: OR OTHERWISE, time and place last above libelled, you the said Dennis Connor did wickedly attack and assault the said Mary Houston, and did seize hold of her, and did, with a stick, or with some other weapon to the prosecutor unknown, strike her two or more blows on or near her breast and stomach, or other part or parts of her person, and did put your hand under her petticoats, and upon her naked person, and did seize her by the throat to prevent her crying for assistance, and did throw or force her down to the ground; and the said Mary Houston having succeeded in rising from the ground, you the said Dennis Connor did drag or pull her some short distance, and did again throw or force her down to the ground, and did grasp her by the throat to stifle her cries, and did raise her petticoats, and did lie upon her, and did attempt to have carnal knowledge of her person, forcibly and against her will; and this you the said Dennis Connor did, with intent to ravish the said Mary Houston, and to the injury of her person: LIKEAS (2.), time above libelled, at or near a part of the said road, situated in the parish of New Monkland aforesaid, and distant 236, or thereby, yards from the farm-offices aforesaid, or at or near some other part of the said road, or of the said farm, situated in the said parish of New Monkland, to the prosecutor unknown, you the said Edward Morrison did, wickedly and feloniously, attack and assault Agnes M'Callum or James, a widow, then and now or lately residing with Malcolm M'Callum, a weaver, then and now or lately residing at or near Annathill, in the parish of New Monkland aforesaid, and did seize hold of her, and did throw her down to the ground, and did fall or throw yourself upon her; and she having succeeded in getting up from the ground, you the said Edward Morrison did again seize hold of her, and did carry her to some short distance, and did again throw her down to the ground, and did lie upon her, and did raise or attempt to raise her petticoats, and did put your hand on her mouth, and did wrap a shawl around her head and mouth to stifle her cries for assistance, and did attempt to have carnal knowledge of her person, forcibly and against her will; and this you the said Edward Morrison did with intent to ravish the said Agnes M'Callum or James, and to the injury of her person: LIKEAS (3.), time above libelled, at or near the dwelling-house, situated at or near South Medrox aforesaid, then and now or lately occupied by the said

William M'Lean senior, or at some other place or places at or near South Medrox aforesaid, and in the said parish of New Monkland, to the prosecutor unknown, you the said Dennis Connor and Edward Morrison did, both and each, or one or other of you, wickedly and feloniously, attack and assault William M'Lean junior, son of, and then and now or lately residing with, the said James M'Lean senior, and did, with your hands and feet, or with one or more of them, and with a stick or bludgeon, or with some other weapon or weapons to the prosecutor unknown, inflict several severe blows on or near his forehead and other parts of his person, and did wrestle with him, and did throw or force him down to the ground, and did otherwise maltreat and abuse him; by all which, or part thereof, he was cut and wounded, to the effusion of his blood and the injury of his person: FARTHER, James M'Leau junior, then and now or lately farm-servant to, and residing with, the said James M'Lean senior, having gone to the assistance of the said William M'Lean junior, you the said Dennis Connor and Edward Morrison did, both and each, or one or other of you, time and place or places last above libelled, wickedly and feloniously attack and assault the said James M'Lean junior, and did seize hold of him, and did struggle with him, and did throw or force him down to the ground, and did fall above him, and did, with your fists, repeatedly strike him on several parts of his person, and did otherwise maltreat and abuse him; by all which, or part thereof, his face and eyes, or one or more of them, were scratched and wounded, all to the injury of his person: And you the said Edward Morrison being conscious of your guilt in the premises, did abscond and flee from justice.

No. 2.
Dennis
Connor and
Edward
Morrison.

Glasgow.
Sept. 23.
1848.

Rape, and
Assault.

The pannel Morrison having been fugitated for non-appearance, on the diet being called against Connor,

W. H. THOMSON objected to the relevancy of the indictment, on two grounds, 1st, in respect of the vagueness with which the prosecutor described the *locus* where the rape was said to have been committed, in so far as it is stated that it was 'at or near a gate or entrance into a park or field upon the lands or farm of South Medrox aforesaid, commonly called the Kilknowe Park, situated in the Parish of New Monkland aforesaid, or at or near some other part of the said road, or of the said lands or farm, situated in the parish of New Monkland aforesaid, to the prosecutor unknown.' In detailing the alternative charge of assault, with intent to commit rape, the words 'or otherwise, place last above libelled,' were used; this implied more than one

No. 2.
Dennis
Connor and
Edward
Morrison.

Glasgow.
Sept. 23.
1848.

Rape, and
Assault.

locus had been previously libelled, which was the more objectionable, inasmuch as, on looking back, the place last above libelled was the place on said farm 'to the prosecutor unknown.' Either, therefore, the alternative charge was libelled with an undue degree of uncertainty, or there was more than one place intended to be described in the charge of rape, in which case the libel was deficient in not giving more precise notice to the pannel.

Farther, the party alleged to have been injured was described to have been a servant 'of said James M'Lean senior, residing with him,' without any farther description of her. There had not been any James M'Lean previously mentioned in the indictment, the only M'Lean named as the occupier of the farm being designated '*William*.' This was too uncertain a description of the party injured, inasmuch as, the word 'said' being superfluous, the insertion of it was calculated to mislead, and this the more especially, as the prisoner being entitled to assume his innocence of a charge of this nature, he would thereby be misled as to the nature of the proof necessary to adduce in exculpation. Indeed, if so great a latitude were allowed, the prosecutor might adduce in support of his charge any Mary Houston, who was servant to some James M'Lean, living any where within the kingdom of Scotland.

DEAS, for the prosecution, replied, that the words objected to, 'place last above libelled,' were in the common form used in such charges. In respect to the other objection, he wished time to consider it, and moved the Court to postpone the case till next day.

At the next calling, DEAS stated that he would not press this indictment farther; and on his motion, the Court deserted the diet against the pannel, *pro loco et tempore*.

NORTH CIRCUIT.

PERTH.

Judges—The LORD JUSTICE-CLERK AND LORD WOOD.

Oct. 12.
1848.

HER MAJESTY'S ADVOCATE—*J. M. Bell A. D.*

AGAINST

JAMES FLINN AND MARGARET M'DONALD OR BRENNAN—*Broun.*

CULPABLE HOMICIDE—ASSAULT WITH AGGRAVATIONS.—Circumstances, in which the Court directed the Jury that, after the prosecutor had withdrawn the charge of Culpable Homicide, they were not entitled to find the pannels guilty of assault, to the danger of life.

JAMES FLINN and MARGARET M'DONALD OR BRENNAN, were accused of Culpable Homicide; as also, Assault, aggravated by being to the serious injury of the person, and to the danger of life:

No. 3.
James
Flinn and
Margaret
M'Donald.

Perth.
Oct. 12.
1848.

Culpable
Homicide,
&c.

IN SO FAR AS, upon the 8th day of April 1848, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, in or near Guthrie's Close, in or near Overgate Street of Dundee, you the said James Flinn and Margaret M'Donald or Brennan did, both and each, or one or other of you, wickedly and feloniously, attack and assault William M'Donald, then or lately before labourer or fish-dealer, residing at or near Hawkhill of Dundee, and did strike him with your fists on the head or other parts of his person, and did knock or force him to the ground, and did kick him on the belly, or other parts of his person; and you the said Margaret M'Donald or Brennan did strike the said William M'Donald with an iron tray or server or other instrument to the prosecutor unknown, one or more blows on the head or other parts of his person; and you the said James Flinn did, one or more times press your knees or limbs forcibly and severely on the back, or on the belly or other parts of the person of the said William M'Donald; and you the said James Flinn and Margaret M'Donald or Brennan did, both and each,

No. 3.
James
Flinn and
Margaret
M'Donald.

Perth.
Oct. 12.
1848.

Culpable
Homicide,
&c.

or one or other of you, otherwise maltreat and abuse the said William M'Donald; by all which, or part thereof, the said-William M'Donald was seriously injured in his person, to the danger of his life, and in consequence thereof died, on or about the night of the 9th, or morning of the 10th day of April foresaid, and was thus culpably bereaved of life by you the said James Flinn and Margaret M'Donald or Brennan, or one or other of you.

It appeared from the evidence, that after the scuffle which was shewn to have taken place amongst the parties, in the course of which it was proved, that the pannel Flinn had thrown the deceased, and fallen upon him with his knees on the stomach; and also, that the female prisoner had dealt him a blow over the head with an iron tray,—that he had gone to a public house and partaken rather freely of whisky. The medical witnesses who had examined the body, on cross-examination admitted, that drinking ardent spirits after receiving such injuries as those spoken to by the witnesses, would be calculated to excite inflammation, and occasion death, even in cases where otherwise no such result might have followed.

Upon this the Advocate-depute abandoned the charge of Culpable Homicide, and addressed the jury in support of the charge of Assault, as laid, with the aggravations.

BROWN, for the pannels, contended, that as the public prosecutor had abandoned the charge of culpable homicide, the aggravations to the charge of assault that it was to the danger of life, must also be abandoned, inasmuch, as the circumstance that death had followed within twenty-four hours, most clearly shewed either that the death was the result of the injuries received, or that it had resulted altogether from the state of intoxication in which it was shewn the deceased was, after the time of the alleged injuries.

The LORD JUSTICE-CLERK in summing up to the jury, said, that, since the charge of culpable homicide had been given up, so he thought must the aggravation to the charge of assault, that it was to the danger of life. It did not seem possible to sustain such an aggravation in

a case where death had unquestionably resulted within twenty-four hours after the injuries alleged, after the public prosecutor had, by abandoning the charge of culpable homicide, confessed that the death had not been the result of the outrages charged. In such a case, it must either be culpable homicide, or common assault, because, where the death followed the injuries so speedily, the principal charge ought to have been insisted in if the death could have been traced to the violence charged against the pannels; and if it could not, then there was equally no evidence in support of the aggravation. His Lordship added, that the Advocate-depute had done quite right in withdrawing the principal charge; and that in these remarks he was not stating any general rule, but merely making observations on the particular evidence in this case, in which the aggravation of danger to life could not consistently be insisted in if the charge of culpable homicide was actually given up.

The Jury, by a large majority, found the pannels guilty of assault, to the serious injury of the person.

In respect of which verdict of assize, the pannels were sentenced to be imprisoned in the prison of Dundee for four calendar months.

No. 3.
James
Flinn and
Margaret
M'Donald.

Perth.
Oct. 12.
1848.

Culpable
Homicide.
&c.

Oct. 13.
1848.

Judge—The LORD JUSTICE-CLERK.

JOHN BRUCE, Appellant—*P. Fraser.*

AGAINST

THOMAS DUNCAN AND JOHN M'LEAN, Respondents—*G. Young.*

APPEAL—PROCEDURE.—Held that the Sheriff might competently pronounce sentence in a suit, at the instance of the Procurator-fiscal, to have a vicious dog destroyed, although no record was kept of the proceedings, and the sentence was pronounced in the absence of the defender.

No. 4.
Bruce v.
Duncan &
M'Lean.
Perth.
Oct. 13.
1848.

On the 13th of August 1846, the following Petition and Complaint was presented to the Sheriff of Perthshire, by the respondents, as joint procurators-fiscal for the public interest, shewing—

Appeal.

‘ That the petitioners have received information that John Bruce, farmer at Rosemount, has in his possession a large dog of a black or dark colour, which is vicious and dangerous to the lieges. That the said dog has been in the general practice of attacking and biting people who happened to be passing by the said farm of Rosemount; and in particular, that the said dog did, upon the evening of Tuesday the twenty-third day of June last, or about that time, attack and bite, to the effusion of their blood, and dangerous injury of their persons, Thomas Reid, forester at St Martin’s, William Wallace Johnston, gardener at St Martin’s, and James M’Laren, servant to the Rev. John Park of St Martin’s, and that upon the public road called the Den road, and about midway between the farm of St Martin’s and Rosemount, while the said persons were going home. That the dog received no provocation to occasion such attack. That the said John Bruce has been frequently desired and required either to chain up the said dog, or to destroy it for the safety of the lieges, but he refuses so to do. That the petitioners, in consequence of the many complaints made to them regarding the viciousness of the said dog, and the public danger incurred by allowing it to go at large, did, on

‘ the twenty-seventh day of June last, by letter addressed to the said John Bruce, require him to get the dog destroyed, but to this application no attention was given. That it is therefore necessary for the safety of the public that the said dog be destroyed, under your Lordship’s authority.’ And therefore praying, that it might please his Lordship ‘ to grant warrant for citing the said John Bruce to appear before you, to answer to this complaint, and on the facts therein stated being admitted or proved, to grant warrant to officers of court to destroy the said dog, and to find the said John Bruce liable in the expenses of this application, and consequent procedure.’

No. 4.
Bruce v.
Duncan &
McLean.

Perth,
Oct. 13.
1848.

Appeal.

Thereafter, on the 17th of August 1846, in obedience to the deliverance of the Sheriff-substitute on the foregoing petition and complaint, the appellant appeared in court, and verbally pleaded not guilty. After which, without any record, the Sheriff-substitute ordered proof of the facts alleged in the petition and complaint, and on the 24th March 1848, decerned against the appellant, in terms of the prayer of the petition. To which interlocutor the Sheriff adhered on appeal.

Against this decision, the appellant appealed to the Circuit Court, when,

FRASER argued on his behalf, that the whole proceedings before the Sheriff were inept, in respect (1.), if the case was to be regarded as a criminal one, at the instance of the Procurator-fiscal, then the judgment was incompetent, it having been pronounced in the absence of the appellant; and (2.), if the judgment was to be regarded as having been pronounced in a civil case, it was equally void, inasmuch as no record had been made up and closed therein, and the acts of sederunt regulating civil causes in Sheriff Courts, had been altogether disregarded.

YOUNG, for the Respondents, answered,—This was a proceeding *sui generis*. It was an application to the Sheriff, as chief magistrate of the county, at the instance of the Procurator-fiscal, as conservator of the public safety. The Procurator-fiscal was not in the position of a party prosecuting a civil claim or vindicating a patri-

No. 4.
Bruce v.
Duncan &
M'Lean.
Oct. 13,
1848.
Appeal.

monial right, and therefore the Act of Sederunt had no application. On the other hand, the personal presence of the appellant during the proceedings was unnecessary, there being no conclusion for punishment or censure against him.

The LORD JUSTICE-CLERK pronounced the following interlocutor :—

Perth, 13th October 1848.—The Lord Justice-Clerk
 ‘ having heard counsel for the parties, affirms the
 ‘ judgments of the Sheriff complained of ; dismisses
 ‘ the appeal : Finds the respondents entitled to the
 ‘ expenses of the appeal, as the same shall be taxed
 ‘ by the Clerk, and for which and the dues of extract,
 ‘ decerns.’

JOHN KEMP, Writer, Perth, DUNCAN and M'LEAN, Writers, Perth—Agents.

Judge—THE LORD JUSTICE-CLERK.

DUNDEE AND UNION WHALE FISHING COMPANY, Dundee, Appellants
—*P. Fraser.*

AGAINST

ROSSLYN MAVOUR AND ALEXANDER PATON, Mariners in Dundee,
Respondents—*Millar—Ogilvy.*

APPEAL—COMPETENCY—EXPENSES.—Held (overruling *Wilson v. Cameron*, Broun, vol. ii., 284) that an appeal from the Sheriff is competent to the Circuit Court, before decerniture for the taxed expenses in the original suit.

THIS was an appeal against the judgment of the Sheriff of Forfarshire.

MILLAR, for the Respondents, objected to the competency of the appeal, inasmuch as, although the Sheriff had pronounced a final interlocutor on the merits, thereby finding expenses due, and remitting to the auditor to tax the same and report, the appeal had been brought before the expenses had been taxed and decerned for. The Act of Sederunt of 11th July 1839,¹ according to the judicial construction put thereon in numerous cases, is decisive of the question, (*Wilson and Matheson v. Cameron*, Inverness, Sept. 20. 1844, Broun, vol. ii. p. 284, and cases there cited.) Indeed, to adopt any other construction, would tend unduly to multiply appeals, inas-

No. 5.
Dundee &
Union
Whale
Fishing Co.
v. Mavour.
Perth.
Oct. 13.
1848.
Appeal.

¹ This act, which was passed for regulating forms of process in Sheriff Courts, declares, § 131, That, 'in civil causes, appeals to the next Circuit Court, in terms of the Act 20th Geo. II. chapter 43; 31st Geo. II. c. 42; 54th Geo. III. c. 67, are competent only after a final judgment has been pronounced, and the matter of expenses has been disposed of, and where the subject-matter in the suit does not exceed in value Twenty-five pounds sterling.

No. 5.
Dundee &
Union
Whale
Fishing Co.
v. Mavour.

Perth.
Oct. 13.
1848.

Appeal.

much as questions might arise on the auditor's report, which might form a separate ground of appeal, and so hang up the case for six months, which questions would be heard and determined along with the merits of the suit, if the construction hitherto adopted was adhered to.

The LORD JUSTICE-CLERK said he was extremely anxious to do nothing which would have the effect of discouraging appeals to the Circuit Court; and after consulting with Lord Wood, who was presiding in the criminal Court, repelled the objection to the competency of the appeal, and pronounced the following interlocutor, after the appeal had been discussed on the merits:—

Perth, 13th October 1848.—The Lord Justice-Clerk
‘ having heard counsel for the parties, dismisses the ap-
‘ peal: Finds the respondents Mavour and Alexander
‘ Paton entitled to their expenses in this appeal, as the
‘ same shall be taxed by the Clerk, and for which ex-
‘ penses, and the dues of extract, decerns.’

For the Appellants, — FLOWERDEW—For Paton, SHAW, M'LAUCHLAN & REID,
Writers, Dundee.—For Mavour, — GALLOWAY, Writer, Dundee.

HIGH COURT.

Present,

Nov. 7.
1848.

THE LORD JUSTICE-CLERK.

LORDS MACKENZIE AND MEDWYN.

HER MAJESTY'S ADVOCATE—*The Lord Advocate Rutherford.*—
Craufurd A.D.—Deas A.D.—J. M. Bell A.D.

AGAINST

JAMES CUMMING—*Logan—A. Grahame.*HENRY RANKEN—*Moncreiff—A. Grahame.*JOHN GRANT AND ROBERT HAMILTON—*Logan—Lorimer.*

INDICTMENT—STATUTE—CONSPIRACY—SEDITION—RELEVANCY.—

Held, 1st, That it is not objectionable in an indictment under the Act 11th and 12th Vict. c. 12, to libel a previous design as evidenced by subsequent overt acts. 2d, That it is enough, in charging a conspiracy, to state that the pannel had presided over a body 'formed for the illegal purposes libelled,' without charging him to have done so in pursuance of the common intent laid in the major. 3d, That the statute 11th and 12th Vict. c. 36, does not exclude the common law, and that it is competent to libel the same *species facti* as sedition at common law, as well as a contravention of the statute. 4th, That a conspiracy, to effect an alteration of the Constitution by force, is only an aggravated form of sedition at common law.

EVIDENCE.—1st, When it was proposed to shew a witness a pamphlet said to have been published by an association of which the pannels were members,—ruled that this was competent without first proving that the prisoners were present at the meeting where the matter was discussed, reserving to them the right of shewing they were not concerned therewith. 2d, Question whether language indicative of a conspiracy could be proved against a pannel, as having been used by

him on an occasion not mentioned in the libel. 3d, Held that it was competent to prove other expressions of a seditious nature, besides those charged in the libel, in support of the charge of sedition. 4th, Held that a letter could not be read in support of the charge of conspiracy, libelled as commencing at a date subsequent to that of the letter. 5th, Held, that where a letter relating to the alleged common design had been directed to one of the pannels, and found in the possession of another, it was competent evidence against both, although it was not shewn that the writer was a conspirator, or that the contents were true, or that it was ever seen by the party to whom it was addressed.

VERDICT.—Held, 1st, That it is unnecessary to libel *intention* in a charge of sedition; and 2d, That when the Jury found the pannels guilty of sedition, in so far as they had used language ‘calculated to excite popular disaffection, and resistance to lawful authority,’ and explained that they had purposely omitted the word intended, which was also charged in the minor, that the verdict was good, and sentence might competently follow thereon.

No. 6.
James
Cumming,
John Grant
and Others.

JAMES CUMMING, shoemaker, residing in Duncan Street, Drummond Place, Edinburgh, was charged on Criminal Letters :

High Court.
Nov. 7.
1848.

Conspiracy
& Sedition.

THAT ALBEIT, by an Act passed in the eleventh year of Our reign, chapter twelve, intituled ‘An Act for the better Security of the Crown and Government of the United Kingdom,’¹ it is by section

¹ The 11th Vict. cap. 12, after reciting, that ‘by an act of the Parliament of Great Britain passed in the thirty-sixth year of the reign of His late Majesty King George the Third, intituled ‘An act for the safety and preservation of His Majesty’s person and Government against treasonable and seditious practices and attempts,’ it was among other things enacted, that if any person or persons whatsoever, after the day of the passing of that act, during the natural life of His said Majesty, and until the end of the next session of Parliament after the demise of the crown, should, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of His said Majesty, his heirs or successors, or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm or of any other of His said Majesty’s dominions or countries, or to levy war against His said Majesty, his heirs and successors,

third of the said Act enacted, 'That, if any person whatsoever, after
 ' the passing of this Act, shall, within the United Kingdom or
 ' without, compass, imagine, invent, devise, or intend to deprive or de-
 ' pose Our Most Gracious Lady the Queen, Her heirs and successors,

No. 6.
 James
 Cumming,
 John Grant
 and Others.

High Court.
 Nov. 7.
 1848.

' within this realm, in order, by force or constraint, to compel him or
 ' them to change his or their measures or counsels, or in order to put
 ' any force or constraint upon or to intimidate or overawe both houses
 ' or either house of Parliament, or to move or stir any foreigner or
 ' stranger with force to invade this realm or any other of His said
 ' Majesty's dominions or countries under the obeisance of His said
 ' Majesty, his heirs and successors, and such compassings, imaginations,
 ' inventions, devices, or intentions, or any of them, should express,
 ' utter, or declare, by publishing any printing or writing, or by any
 ' overt act or deed, being legally convicted thereof, upon the oaths of
 ' two lawful and credible witnesses, upon trial, or otherwise convicted
 ' or attainted by due course of law, then every such person or persons
 ' so as aforesaid offending should be deemed, declared, and adjudged
 ' to be a traitor and traitors, and should suffer pains of death, and also
 ' lose and forfeit as in cases of high treason: And whereas by an act
 ' of Parliament passed in the fifty-seventh year of the same reign,
 ' entitled ' An act to make perpetual certain parts of an act of the
 ' thirty-sixth year of His present Majesty, for the safety and preser-
 ' vation of His Majesty's person and Government against treasonable
 ' and seditious practices and attempts, and for the safety and preser-
 ' vation of the person of His Royal Highness the Prince Regent
 ' against treasonable practices and attempts,' all the herein-before re-
 ' cited provisions of the said act of the thirty-sixth year of His said
 ' Majesty's reign, which relate to the heirs and successors of his said
 ' Majesty, the sovereigns of these realms, were made perpetual: And
 ' whereas doubts are entertained whether the provisions so made per-
 ' petual were by the last-recited act extended to Ireland: And where-
 ' as it is expedient to repeal all such of the provisions made perpetual
 ' by the last-recited act as do not relate to offences against the person
 ' of the sovereign, and to enact other provisions instead thereof ap-
 ' plicable to all parts of the United Kingdom, and to extend to Ireland
 ' such of the provisions of the said acts as are not hereby repealed: '
 —enacts, Sect. 1, ' That from and after the passing of this act the pro-
 ' visions of the said act of the thirty-sixth year of the reign of King
 ' George the Third, made perpetual by the said act of the fifty-seventh
 ' year of the same reign, and all the provisions of the last-mentioned
 ' act in relation thereto, save such of the same respectively as relate
 ' to the compassing, imagining, inventing, devising, or intending death
 ' or destruction, or any bodily harm tending to death or destruction,

Conspiracy
 & Sedition.

No. 6.
James
Cumming,
John Grant
and Others.

High Court.
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1848.

Conspiracy
& Sedition.

‘ from the style, honour, or royal name of the Imperial Crown of
‘ the United Kingdom, or of any other of Her Majesty’s dominions
‘ and countries, or to levy war against Her Majesty, Her heirs, or
‘ successors, within any part of the United Kingdom, in order, by

‘ maim or wounding, imprisonment or restraint of the person of the
‘ heirs and successors of His said Majesty King George the Third, and
‘ the expressing, uttering, or declaring of such compassings, imagina-
‘ tions, inventions, devices, or intentions, or any of them, shall be and
‘ the same are hereby repealed.’—Sect. 2, ‘ That such of the said recited
‘ provisions made perpetual by the said act of the fifty-seventh year of
‘ the reign of King George the Third as are not hereby repealed, shall ex-
‘ tend to and be in force in that part of the United Kingdom called Ire-
‘ land.’—Sect. 3, ‘ That if any person whatsoever, after the passing of this
‘ act shall, within the United Kingdom or without, compass, imagine,
‘ invent, devise, or intend to deprive or depose our most gracious lady
‘ the Queen, her heirs or successors, from the style, honour, or royal
‘ name of the imperial crown of the United Kingdom, or of any other
‘ of Her Majesty’s dominions and countries, or to levy war against
‘ Her Majesty, her heirs or successors, within any part of the United
‘ Kingdom, in order by force or constraint to compel her or them to
‘ change her or their measures or counsels, or in order to put any
‘ force or constraint upon or in order to intimidate or overawe both
‘ houses or either house of Parliament, or to move or stir any
‘ foreigner or stranger with force to invade the United Kingdom or
‘ any other Her Majesty’s dominions or countries under the obedience
‘ of Her Majesty, her heirs or successors, and such compassings, ima-
‘ ginations, inventions, devices, or intentions, or any of them, shall
‘ express, utter, or declare, by publishing any printing or writing, or
‘ by open and advised speaking, or by any overt act or deed, every
‘ person so offending shall be guilty of felony, and being convicted
‘ thereof shall be liable, at the discretion of the court, to be trans-
‘ ported beyond the seas for the term of his or her natural life, or for
‘ any term not less than seven years, or to be imprisoned for any term
‘ not exceeding two years, with or without hard labour, as the court
‘ shall direct.’—Sect. 4, ‘ That no person shall be prosecuted for any
‘ felony by virtue of this act in respect of such compassings, imagina-
‘ tions, inventions, devices, or intentions as aforesaid, in so far as the
‘ same are expressed, uttered, or declared by open and advised speak-
‘ ing only, unless information of such compassings, imaginations, in-
‘ ventions, devices, and intentions, and of the words by which the
‘ same were expressed, uttered, or declared, shall be given upon oath
‘ to one or more Justice or Justices of the Peace, or to any Sheriff or
‘ Steward, or Sheriff Substitute or Steward Substitute, in Scotland,

‘ force or constraint, to compel Her or them to change Her or their
 ‘ measures or counsels; or in order to put any force or constraint upon,
 ‘ or in order to intimidate or overawe, both Houses or either House of
 ‘ Parliament, or to move or stir any foreigner or stranger with force
 ‘ to invade the United Kingdom, or any other Her Majesty’s domi-

No. 6.
 James
 Cumming,
 John Grant
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‘ within six days after such words shall have been spoken, and unless
 ‘ a warrant for the apprehension of the person by whom such words
 ‘ shall have been spoken shall be issued within ten days next after
 ‘ such information shall have been given as aforesaid, and unless such
 ‘ warrant shall be issued within two years next after the passing of
 ‘ this act; and that no person shall be convicted of any such compass-
 ‘ passings, imaginations, inventions, devices, or intentions as aforesaid,
 ‘ in so far as the same are expressed, uttered, or declared by open or
 ‘ advised speaking as aforesaid, except upon his own confession in
 ‘ open court, or unless the words so spoken shall be proved by two
 ‘ credible witnesses.’—Sect. 5, ‘ That it shall be lawful, in any in-
 ‘ dictment for any felony under this act, to charge against the offender
 ‘ any number of the matters, acts, or deeds by which such compass-
 ‘ ings, imaginations, inventions, devices, or intentions as aforesaid, or
 ‘ any of them, shall have been expressed, uttered, or declared.’—
 ‘ Sect. 7, ‘ That if the facts or matters alleged in an indictment for any
 ‘ felony under this act shall amount in law to treason, such indictment
 ‘ shall not by reason thereof be deemed void, erroneous, or defective;
 ‘ and if the facts or matters proved on the trial of any person indicted
 ‘ for any felony under this act shall amount in law to treason, such
 ‘ person shall not by reason thereof be entitled to be acquitted of such
 ‘ felony; but no person tried for such felony shall be afterwards pro-
 ‘ secuted for treason upon the same facts.’—Sect. 9, ‘ That no person
 ‘ committed for trial in Scotland for any offence under this act shall
 ‘ be entitled to insist on liberation on bail, unless with consent of the
 ‘ public prosecutor, or by warrant of the High Court or Circuit Court
 ‘ of Justiciary, in such and the like manner and to the same effect as
 ‘ is provided by an act passed in the session of Parliament holden in
 ‘ the fifth and sixth years of the reign of His Majesty King George
 ‘ the Fourth, intituled ‘ An act to provide that persons accused of
 ‘ forgery in Scotland shall not be entitled to bail, unless in certain
 ‘ cases;’ but the trial of any person so committed, and whether libe-
 ‘ rated on bail or not, shall in all cases be proceeded with and brought
 ‘ to a conclusion under the like certification and conditions as if inti-
 ‘ mation to fix a diet for trial had been made to the public prosecutor
 ‘ in terms of an act passed in the Scottish Parliament in the year one
 ‘ thousand seven hundred and one, intituled ‘ An act for preventing
 ‘ wrongous imprisonment, and against undue delays in trials.’’

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‘ nions, or countries under the obeisance of Her Majesty, Her heirs
‘ and successors, and such compassings, imaginations, inventions, de-
‘ vices or intentions, or any of them, shall express, utter, and declare,
‘ by publishing any printing or writing, or by open and advised speak-
‘ ing, or by any overt act or deed, every person so offending shall be
‘ guilty of felony, and, being convicted thereof, shall be liable, at the
‘ discretion of the court, to be transported beyond the seas for the
‘ term of his or her natural life, or for any term not less than seven
‘ years, or to be imprisoned for any term not exceeding two years,
‘ with or without hard labour, as the Court shall direct :’ AND ALBEIT,
by the laws of this and of every other well-governed realm, the
wickedly and feloniously Conspiring to Effect an Alteration of the
Laws and Constitution of the Realm by force and violence, or by
armed resistance to lawful authority ; As also Sedition, are crimes of
an heinous nature, and severely punishable : YET TRUE IT IS AND OF
VERITY, that the said James Cumming is guilty of the statutory crime
and felony above libelled, and of the crime of conspiracy at common
law above libelled, and of the crime of sedition above libelled, or of one
or more of the said crimes, actor, or art and part : IN SO FAR AS, in the
months of April, May, June, and July, 1848, or on one or other of
them, the particular time being to the prosecutor unknown, the said
James Cumming did, wickedly and feloniously, compass, imagine, in-
vent, devise, or intend to levy war against Us, within that part of the
United Kingdom called Scotland, in order by force or constraint to
compel Us to change Our measures or counsels, or in order to put
force and constraint upon, or in order to intimidate or overawe, both
Houses or either House of Parliament ; and such compassing, imagina-
tion, invention, device, or intention, or one or more of them, the said
James Cumming did, on or about the 28th day of June 1848, or on
one or other of the days of that month, or of May immediately pre-
ceding, or of July immediately following, and within or near a room
or hall situated in or near Infirmary Street, in or near Edinburgh,
commonly called the Trades’ Hall, wickedly and feloniously, express,
utter, and declare, by circulating or distributing, and thereby publish-
ing, or causing to be circulated or distributed, and thereby published,
a printed or written placard in the following or similar terms :—

‘ NATIONAL GUARD.

‘ A Nation to be free, requires but Arms and a knowledge of
‘ their use.’

‘ A Public Meeting of the NATIONAL GUARD will be held in the
‘ Trades’ Hall, Infirmary Street, on Wednesday, June 28, 1848, For
‘ the transaction of important business. Doors open at Eight, Chair
‘ to be taken at Half-past Eight. The various Clubs are respectfully

‘ invited to attend. An opportunity will be given to those desirous of
‘ joining.

“ It is the duty of all men to have arms.”—FORTESCUE.

“ It is the right and duty of all Freemen to have Arms of De-
fence and Peace.”—BRACTON.

“ I request you to take care that the people be well Armed and
in readiness upon all occasions.”—QUEEN ELIZABETH.

“ To attack the lowest among the people is to attack the whole
people.”—DE LOLME.

“ He is a fool who knows not that Swords were given to men
that none might be Slaves but such as know not how to use
them.”—ALGERNON SIDNEY.

‘ One Penny will be charged at the Door to defray expenses.

‘ ALEX. ELDER, Printer, 243 High Street.’

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and by then and there openly reading the said placard, or causing the same to be openly read in the presence and hearing of a great number of persons, all or many of them calling themselves Chartists, then and there convened and assembled as members of a body calling itself a National Guard, or for the formation or enrolment of such National Guard; and the said James Cumming did, then and there, his said compassing, imagination, invention, device, or intention, or one or more of them, wickedly and feloniously, farther express, utter, and declare, by taking the chair and presiding over the proceedings of the said meeting of persons convened and assembled as aforesaid, being members of, or met for the formation or enrolment of the said National Guard; and by then and there, or at some other time within the period above libelled, and at some other place to the prosecutor unknown, joining the said National Guard, and enrolling himself as a member, or otherwise becoming a member thereof; the said body calling itself a National Guard being, and by him known to be, an illegal and disloyal body, formed or enrolled for the illegal and disloyal purposes of subverting by force and violence the laws and government of the realm, and of compelling by force and violence an alteration of the laws and constitution of the realm, and of procuring and using guns and pikes or other arms for the levying of war against Us within the realm, as aforesaid, in order by force or constraint to compel Us to change Our measures or counsels, and in order to put force or constraint upon, and in order to intimidate or overawe, both Houses or either House of Parliament, or for one or more of the said illegal and disloyal purposes; and it was within the said room or hall, and by all, or one or more, of the said persons convened and assembled as aforesaid, then and there, openly proposed or resolved in presence and hearing of the said James Cumming, and with his sanction as chair-

No. 6. man, that the members of the said body calling itself the National
 James Guard should provide themselves with guns and pikes or other arms,
 Cumming, and it was intended, and by him known to be intended, to use the said
 John Grant and Others. guns and pikes or other arms, for the illegal and disloyal purposes
 High Court. aforesaid, or one or more of them; and an individual then and there
 Nov. 7. present, whose name is to the prosecutor unknown, did, then and there,
 1848. and in presence and hearing of the said James Cumming, and with his
 Conspiracy sanction as chairman, propose and undertake to furnish or supply
 & Sedition. guns, or guns and bayonets, to those who desired them; and the said
 James Cumming did, as chairman aforesaid, express or indicate his
 approval and recommendation of such proposal and undertaking, and
 did state from the chair of the said meeting, that pikes would be sup-
 plied to those who preferred them; and the said James Cumming did,
 on or about the 22d day of July 1848, or on one or other of the days
 of that month, and within or near the house in Duncan Street, Drum-
 mond Place, Edinburgh, then and now or lately occupied by him, or
 at some other time and place to the prosecutor unknown, his said com-
 passing, imagination, invention, device, or intention, or one or more of
 them, wickedly and feloniously, farther express, utter, and declare, by
 writing, subscribing, and addressing, to 'Mr James Smith 27 Bruns-
 wick Street Glasgow,' a letter in the following or similar terms:—

' Edinburgh, July 22, 1848,

' 14 Duncan St. Drummond Place.

' DEAR SMITH,

' I am in receipt of yours of the 13th, and take the earliest oppor-
 tunity of communicating the information desired. Although I might
 have informed you generally as to the state and spirit abroad imme-
 diately, I deferred writing until I could procure correct accounts
 from the members and officers of the various clubs and political
 bodies intending to arm. There are a great many clubs, in fact they
 are springing up nightly, there is a sort of club mania. The follow-
 ing are the names and numbers of the clubs which are increasing
 weekly: Mitchell Club, 56. Burn's Club, 25. Muir Club, 200.
 Baird and Hardie Club, 20. Gerald Club, 26. O'Connor Club, 12.
 Washington Club, 25. Emmet Club, I have not yet ascertained the
 number. Besides the Clubs there is the National Guard which
 numbers 500, making a total of 864 men besides the Emmet Club.
 The National Guard have given an order for 30 muskets with bay-
 onets, but a great many have provided themselves with arms; those
 ordered are for those who pay in weekly contributions for that pur-
 pose. Some of the Clubs have purchased a few muskets at £1 each,
 which have been shewn at the meetings. I do not know of more
 than 8 as yet; but there is an arms fund in most of the Clubs, for
 those who are not able to purchase them at once. When the Guard

are supplied with the arms ordered, I may say safely there will be a 100 armed. As to the feeling which pervades the town, it is decidedly warlike at the present time; the general topic of conversation is arming, street fighting, &c. The Irish papers, the Felon particularly, is read with avidity, and hailed with rapture and enthusiasm. Never since I took any part in the movement, which is now nearly 20 years, was there such a strong feeling of resistance to the government. In 39 I was connected a defensive means association, but the spirit evaporated before a single gun was subscribed for. It is very different now. The desire to procure and possess arms is gaining strength every day; whether they would fight or not it is difficult to answer. I know that an Edinburgh mob generally fly if they are attacked; but having arms and some idea how to make use of them inspire confidence. I shall be glad to hear how matters stand in Liverpool and Glasgow as soon as convenient. In the meantime,

I am, Dear Sir,

Your's sincerely,

J. CUMMING.

Mr James Smith,
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and on the day, or soon after the day above libelled, as the date of the said letter, putting the said letter addressed as aforesaid, or causing the same to be put, into the Post-Office, Edinburgh, or into one or other of the Receiving-Offices of the Post-Office, Edinburgh, intending the said letter to be transmitted to, and to be received by, James Smith, now or lately residing in or near Rotten Row Street, Glasgow, and now or lately a porter or servant in the employment of Messrs Campbell and Cruden, now or lately commission-agents in or near Brunswick Street of Glasgow, or to be transmitted to, and received by, some other person of the name of James Smith to the prosecutor unknown; and the said letter having been transmitted through the Post-Office to Glasgow, was, on or about the 24th day of July 1848, delivered by mistake to James Smyth, writer, or writer's clerk, son of, and now or lately residing with, William Smyth, writer in Glasgow, and now or lately carrying on business at or near No. 29 Brunswick Place or Brunswick Street, Glasgow, and now or lately residing in or near Abbotsford Place, in or near Glasgow, instead of being delivered to the person for whom it was by the said James Cumming intended; and the said James Cumming did write, subscribe, address, and transmit, through the Post-Office as aforesaid, the said letter, with intent thereby to serve or promote the said illegal and disloyal purposes above libelled, or one or more of them, of himself and his associates in the said illegal and disloyal body calling itself a National Guard: LIKEAS, in the

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months of April, May, June, and July, 1848, above libelled, or one or more of them, the particular time being to the prosecutor unknown, and within or near the room or hall situated in or near Carrubber's Close, High Street, Edinburgh, commonly called Painters' Hall, formerly occupied as a place of meeting by the Edinburgh Branch of the National Chartist Association, and within or near the premises situated in or near the High Street of Edinburgh, then and now or lately occupied as the office of the North British Express newspaper, and within or near the room or hall above libelled in or near Infirmary Street aforesaid, and within the house in Duncan Street, Drummond Place, Edinburgh, then and now or lately occupied by him, or in one or more of the said places, or at some other time within the period above libelled, and at some other place, to the prosecutor unknown, the said James Cumming did, wickedly and feloniously, combine and conspire with Henry Ranken, now or lately residing in or near Bishop's Close, High Street of Edinburgh; Robert Hamilton, now or lately residing in or near Gilmore Street, Simon Square, Edinburgh; John Grant, printer, now or lately residing in or near Munro's Close, Cannongate of Edinburgh; Archibald Walker, now or lately residing in or near Bread Street, Edinburgh; Peter Duncan, a mason, now or lately working in or near Dalkeith, in the county of Edinburgh, and now or lately residing in or near Edinburgh; the said James Smith, now or lately residing in or near Rotten Row Street, Glasgow, or with one or more of them, and with other persons to the prosecutor unknown, calling themselves Chartists, to effect an alteration of the laws and constitution of the realm, and particularly of the constitution of the Commons' House of Parliament, the qualification for the franchise required by law in the election of members of Parliament, the duration of Parliaments, and other such changes in the laws and constitution of the realm, desired and aimed at by him and his associates, and generally by the persons calling themselves Chartists; and the said alterations of the laws and constitution of the realm he and his said associates did combine and conspire to effect, not peaceably, lawfully, and loyally, but by force and violence, or by armed resistance to lawful authority; and the said James Cumming did, on or about the 28th day of June 1848, and within or near the room or hall above libelled, situated in or near Infirmary Street aforesaid, wickedly, feloniously, and seditiously, attend and take the chair, and preside over the proceedings of the meeting above libelled of a great number of persons convened and assembled as above libelled, as members of or for the formation and enrolment of the said body calling itself a National Guard, the same being, and by him known to be, an illegal and disloyal body, formed or enrolled for the illegal and disloyal purposes above libelled, or one or more of them; and he did, then and there, circulate or distribute, or cause to be circulated or distributed, and did

openly read, or cause to be read, in the presence and hearing of the said meeting, the printed or written placard above libelled; and he did, then and there, while in the chair of said meeting, hear, permit, and sanction, a proposal or resolution to the effect, that the members of the said National Guard should provide themselves with guns and pikes or other arms, which were intended, and by him known to be intended, to be used for the illegal and disloyal purposes above libelled, or one or more of them; and he did, then and there, hear, permit, and sanction, a proposal and undertaking to furnish or supply guns, or guns and bayonets, to those who desired them; and the said James Cumming, in the presence and hearing of the said meeting, and in answer to a remark or question by some person to the prosecutor unknown, then and there present, whether those who wished pikes would be supplied with pikes, did, then and there, openly and seditiously, state or declare from the chair, that pikes would be supplied to those who preferred them, or he did, then and there, use words of the same meaning and effect: AND FARTHER, the said James Cumming did, on or about the 22d day of July 1848, or on one or other of the days of that month, and within or near the house in Duncan Street above libelled, occupied by him, or at some other time and place to the prosecutor unknown, wickedly, feloniously, and seditiously, write, subscribe, address, and transmit, through the Post-Office as above libelled, the letter above libelled, intending the same to be transmitted to, and received by, James Smith, porter or servant aforesaid, or some other person of the name of James Smith to the prosecutor unknown; and the said letter was transmitted through the Post-Office, and delivered by mistake as aforesaid, to the said James Smyth, writer, or writer's clerk aforesaid.

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JOHN GRANT, Printer, HENRY RANKEN, Editor, or Joint Editor of the North British Express Newspaper, and ROBERT HAMILTON, Tailor, were charged:

THAT ALBEIT, by the laws of this and of every other well-governed realm, the wickedly and feloniously Conspiring to Effect an Alteration of the Laws and Constitution of the Realm, by force and violence, or by armed resistance to lawful authority; as also, Sedition, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said John Grant, Henry Ranken, and Robert Hamilton are, all and each, or one or more of you, guilty of the crimes above libelled, or of one or other of them, actors or actor, or art and part: IN SO FAR AS, in the months of March, April, May, June, and July, 1848; or one or more of them, the particular date being to the prosecutor unknown, and within or near a room or hall in or near Carrubber's close, High street of Edinburgh, commonly called 'Pain-

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ter's Hall,' formerly occupied as a place of meeting by the Edinburgh Branch of the National Chartist Association, and within or near the premises in or near the High street of Edinburgh, now or lately occupied by the publishers of the North British Express newspaper, and within or near the room or hall commonly called the Trades' Hall, in or near Infirmary street, Edinburgh, and within or near a room or hall in or near Adam square, Edinburgh, and on or near the Calton Hill, Edinburgh, or at one or more of the said places, or at some other place in or near Edinburgh to the prosecutor unknown, you the said John Grant, Henry Ranken, and Robert Hamilton did, all and each, or one or more of you, wickedly and feloniously, combine or conspire with each other, and with Archibald Walker, now or lately residing in or near Bread street of Edinburgh; Peter Duncan, a mason, now or lately working at or near Dalkeith, in the county of Edinburgh, now or lately residing in or near Edinburgh; James Cumming, shoemaker, now or lately residing in or near Duncan street, Drummond place of Edinburgh; or with one or more of them, and with other persons to the prosecutor unknown, calling themselves Chartists, to effect an alteration of the laws and constitution of the realm, and particularly of the constitution of the Commons' House of Parliament, the qualification for the franchise required by law in the election of members of Parliament, the duration of Parliaments, and other such changes in the laws and constitution of the realm, desired and aimed at by you and your associates, and generally by the persons calling themselves Chartists; and the said alterations of the laws and constitution of the realm you and your said associates did combine and conspire to effect, not peaceably, lawfully, and loyally, but by force and violence, or by armed resistance to lawful authority; and you the said John Grant, Henry Ranken, and Robert Hamilton did, all and each, or one or more of you, on or about the 25th day of April 1848, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, and within or near the premises aforesaid, occupied by the publishers of the North British Express, or at one or other of the places above libelled; and again on or about the 28th day of April 1848, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, and within or near the room or hall situated in Adam Square aforesaid, or at one or other of the places above libelled, wickedly, feloniously, and seditiously, resolve and agree to form, or cause and procure to be formed, a body, to be called a National Guard, and to be provided with arms, to be used for the illegal and seditious purpose of effecting, by force and violence, or by armed resistance to lawful authority, the said alterations of the laws and constitution of the realm, or one or more of them; and you did, all and each, or one or more of you, become a member of the said body calling

itself the National Guard, knowing the same to be an illegal body, formed for the said illegal and seditious purposes: FURTHER, you the said John Grant, Henry Ranken, and Robert Hamilton did, on or about the 12th day of June 1848, or on one or other of the days of that month, or of May immediately preceding, or of July immediately following, attend a public meeting of a great number of persons convened and assembled on Bruntsfield Links, near Edinburgh, by or in consequence of a printed placard, headed 'Great Demonstration of the Trades of Edinburgh and Leith to refute the statement of Lord John Russell, that the people were not wanting any reform, and to express their determination not to rest satisfied until the principles of the people's Charter become the Law of the Land.' And you, the said John Grant did, then and there, take the chair of, and preside over, the proceedings of the said meeting, and you did, then and there, advise and exhort the persons there convened and assembled as aforesaid to organise themselves into Clubs and Sections for the more effectual prosecution of the objects of the Chartist body: And you the said Henry Ranken did, then and there, address the said meeting convened and assembled as aforesaid, and you did, then and there, openly and seditiously, move a resolution, in the following or similar terms:—

'We the inhabitants of Edinburgh and Leith, in public meeting assembled, are satisfied of the lamentable ignorance, or wicked, malicious falsehood of Lord John Russell, in stating that the people of this country do not want reform of any sort whatever; and we therefore declare, that it is our intention not to rest satisfied, nor to cease agitating, until the people's Charter is the law of the land, being fully convinced that justice can neither be obtained nor preserved unless the people are put in possession of their rights, which are clearly laid down in that document: We are farther resolved to exert ourselves to the utmost of our power to promulgate our principles in every quarter of the land, and thereby create a feeling that will ultimately compel our oppressors to relinquish their grasp, which we are satisfied will be ere long; for we are determined that while there is misery for the inmates of the cottage, there shall be no peace for the inmates of the hall;' and in support of the said resolution, you the said Henry Ranken did, then and there, openly and seditiously, and in presence of the said meeting, say, that 'it was a well-known fact that the police, the special constables, and the military, were tainted with the principles of the Chartists; but although these men were true, they would not forget the advance of enlightenment among the working classes, that the science of chemistry had entered the workshop, and that working men could provide themselves with as deadly weapons as Warner's long range; and if it was to be a struggle for life and death, if it was to be destruction, then you hoped and trusted that the working men would only be true to themselves,

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‘ and only abstain from all acts of aggression until they were roused by the oppression of their oppressors, and when they began the work, ‘ may they do it well ;’ and you the said Henry Ranken did, then and there, urge and advise the persons convened and assembled as aforesaid at the said meeting, to organise themselves into clubs and sections for the more effectual prosecution of the objects of the Chartist body ; and you did, further, openly and seditiously, and in presence of the said meeting, say, ‘ If the leaders of the people are to be incarcerated, if the people are to suffer this tamely, if those who have an interest in keeping you down feel that you will quietly submit, then they are secure ; but if the working men look to themselves, and if they look to those who place themselves in the front of the fray, if they look to those who are willing to brave every danger, then I say the working men ought to consider what means should be taken to protect these men : Let the property of the country be hostages in the hands of the people for the safety of the leaders of the people ;’ and again you did further say, ‘ It has been said that the French are inventive, but that the British have this faculty, that upon all the French inventions they improve. Should the authorities drive the people into a revolution, then I hope the people will improve upon the French invention of a republic ;’ or you did, on the occasion above libelled, use words of the import and effect above set forth : And you the said Robert Hamilton did, time and place last above libelled, address the said meeting, and you did, then and there, openly and seditiously, and in the presence of the said meeting, urge and advise the persons then and there convened and assembled as aforesaid, ‘ to organise themselves into clubs and sections, and to provide themselves with guns and bayonets,’ in order to carry into effect the said objects of yourself and your associates ; and you did then and there say, ‘ For the love of God prepare yourselves with guns and bayonets, as the day is not far distant when you may require them ;’ or you did, then and there, use words of the import and effect above set forth : And you the said John Grant did, then and there, as Chairman of the said meeting, sanction the said resolution, and did put the same to the meeting and did declare it to be passed or adopted ; And you did, as Chairman aforesaid, hear, permit, and sanction the seditious speeches above libelled of the said Henry Ranken and Robert Hamilton, and you did not call them to order, or stop or attempt to stop them, or express any dissent from, or disapprobation of, the said speeches : And your conduct and speech as aforesaid in the Chair of the said meeting were seditious, and were intended and calculated to excite popular disaffection, commotion, and violence, and resistance to lawful authority : FURTHER, on or about the 19th day of June 1848, or on one or other of the days of that month, or of May immediately preceding, or of July immediately following, and within or near Waterloo Rooms,

near the Regent Bridge, Edinburgh, you the said Henry Ranken did, openly and seditiously, and in the presence of a large number of persons, all or many of them calling themselves Chartists, then and there assembled, urge and recommend the meeting to 'organise into clubs' and sections, for the more effectual prosecution of the objects of the Chartist body, and 'to provide themselves with arms in case they might require to use them;' or you did, then and there, use words of the import and effect above set forth: FURTHER, on or about the 24th day of July 1848, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, and on or near the Calton Hill, Edinburgh, you the said Henry Ranken and Robert Hamilton did, both and each, or one or other of you, attend a public meeting of persons then and there convened and assembled; and you the said Henry Ranken did, then and there, address the said meeting, and you did, then and there, openly and seditiously, and in presence of the said meeting, say, in reference to the illegal and criminal proceedings of certain evil-disposed persons in Ireland, that you considered that 'the people of Ireland were justified in their determination to resist to the death the oligarchy who ruled them,' and you did express your hope or prayer that 'the God of battles would smile' on the oppressed, and enable them to improve the victory they were 'sure to win;' and you the said Henry Ranken did further, then and there, say, that 'If the power of Great Britain was brought to bear against the people of Ireland, then the people of Scotland must endeavour to distract the attention of the Government;' and you did, then and there, recommend the organisation of clubs and sections, for the more effectual prosecution of the objects of the Chartist body, and you did state that certain clubs had been already formed in Edinburgh, for the promotion of the objects desired by the Chartist body, and you did name certain of these clubs, as the 'Washington Club,' the 'Mitchell Club,' the 'Fagh-a-Balloch Club,' the 'Muir Club,' the 'Wallace Club,' the 'William Tell Club,' and others; and you did urge the meeting to join one or other of the said clubs, or you did, then and there, use language of the import and effect above set forth: And you the said Robert Hamilton did, time and place last above libelled, address the said meeting, and you did, then and there, openly and seditiously, and in presence of the said meeting, say, that the Irish people would require help,—that pikes were easily made,—and that the young and spirited men of Scotland should go to Ireland and help the Irish people; and that at one time you would have been satisfied with the Charter as the law of the land, but that now you would accept of nothing else than a republic, and that they would soon obtain one, or you did, then and there, use words of the import and effect above set forth; and the whole or part of the language above set forth as

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No. 6. used by you the said John Grant, Henry Ranken, and Robert Hamilton respectively, as above libelled, was intended and calculated to excite popular disaffection, commotion, and violence, and resistance to lawful authority.

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On the diet against Cumming being called, LOGAN objected to the relevancy, on two grounds, 1st, In respect to the statutory offence, that no overt acts were sufficiently set forth. The object of the late statute was twofold,—1st, To subject a party, in respect of certain acts, to a charge of felony only, instead of treason; and, 2d, To constitute advised speaking sufficient to complete the offence. The acts charged against the pannel were high treason under 36th Geo. III. c. 7, which was repealed by the late statute. Treason could only be proved by overt acts (Hume, vol. i. p. 514), and there was a necessity in all cases of treason to libel the overt acts specifically in connection with the alleged treasonable intent. That had not been done in the case before the Court. It might be conceded, for argument's sake, that sufficient had been stated for constituting an offence under the statute, if properly laid; but the prosecutor, after alleging a substantive antecedent design, as far back as the month of April, proceeded, in libelling the overt acts, at once to 28th June, without alleging that this was done in pursuance of the intent before mentioned.

The LORD JUSTICE-CLERK quoted the indictment in Thistlewood's case, to show that such strictness as was contended for on behalf of the pannel was unknown in English practice.

LOGAN departed from the objection, which was accordingly repelled.

He then objected to the first charge as laid at common law for Conspiracy. The mode adopted was too vague. It ought to have been alleged in the minor that the various acts set forth in support of the charge, had been done or said in pursuance of the common design charged in the major.

The LORD JUSTICE-CLERK—It would have been better had the mode you now suggest been adopted; but on the seventh page of this indictment, it is stated that the body calling itself the National Guard, and over a meeting of which the pannel is said to have presided, ‘was known by him to be an illegal and disloyal body, formed and enrolled for the illegal and disloyal purposes above libelled, or one or more of them.’ Surely that is sufficient. The objection was repelled.

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He then objected that the common law charges were incompetent. But for the late statute, the acts charged against the pannel would have amounted to high treason; and that statute having reduced the offence to one of felony, it must now be tried exclusively as a contravention of the act.

The COURT thought this objection so important, that, on the suggestion of the Lord Advocate, with the concurrence of the prisoner’s Counsel, they delayed the case for two days, in order that the case might, together with those of Grant, Ranken, and Hamilton, be heard before the whole Bench. The LORD JUSTICE-CLERK in the meantime directed the attention of the Crown to the mode in which it was stated that Cumming had incurred guilt, by wickedly and feloniously expressing, uttering, and declaring by ‘writing, subscribing, and addressing’ to ‘Mr James Smith, 27 Brunswick Street, Glasgow, a letter,’ &c. He wished to know whether this was intended to be a charge of publishing under the late statute, or whether it was only intended as an overt act of sedition. If intended to support a charge under the statute, could such charge be supported without averring publication expressly? Was the letter merely intended as a narrative of the compassings charged, or was it intended to be proved as an overt act? He also inquired whether the Crown considered the charge of conspiracy, as laid at common law, to be anything different from sedition. If it was not different, the Crown could have no interest to

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press it. If different, doubts might arise as to its competency, inasmuch as if such compassings and imaginings as those charged against the pannels should be sufficiently proved by overt acts, the charge might amount to high treason, notwithstanding the recent statute. There was no precedent for any indictment in such a form for sedition merely. In all previous indictments it was merely alleged that the acts done had been calculated and intended to alienate the minds of the subjects or produce disaffection, &c. ; but the present charge went a great deal further, in charging a compassing to effect an alteration of the laws and constitution of the realm by force and violence. The question became very important in considering the application of Sir William Rae's Act, whereby the punishment of transportation was abolished in cases of sedition, inasmuch as, if this was held to be something different, the Crown might ask for a sentence of transportation ?

The following Minute was then given in by the pannel :

MINUTE FOR JAMES CUMMING.

The pannel, and the counsel for the pannel, request the Court to delay the diet for this trial till Thursday, the 9th of November 1848, inclusive, and consent that the intervening period shall not be reckoned within the days of running letters of intimation under the Act 1701, chap. 6.

(Signed) JAMES CUMMING.
A. S. LOGAN.
ARCH. GRAHAME.

Present,

THE LORD JUSTICE-CLERK,

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LORDS MACKENZIE, MONCREIFF, MEDWYN, COCKBURN, AND WOOD.

The diet having been again called against the pannel Cumming, and the other pannels having also surrendered,

LOGAN argued, that it was incompetent to try the offences charged against the pannels, except under the recent statute. It was important to observe what were the charges made against them. It was alleged that they had conspired to effect an alteration of the law and constitution by force and violence, to intimidate and overawe Parliament; that they had assisted to combine, and abetted an illegal force, called the National Guard; the substance of the whole being, that the object was to effect a change of the government by force. The minor was the same, with one exception, on both of the common law and statutory charges, the only difference being that under the common law it was not charged that Cumming had joined the National Guard. That was not material to the present discussion, as the other offences alleged against the pannels were relevant to have constituted treason under the common law of Scotland, under the 36th Geo. III.; and were also relevant to constitute felony under the late act. Erskine, B. 4, tit. 4, sect. 20; Mackenzie on Criminal Law, High Treason, tit. 6; Act 1st Parl. Car. II., chap. 5, vol. ii., p. 138, small edition. These were also identical with the treasonable offence in the law of England, under the statute of Edward III. Lunders on High Treason, p. 137; State Trials, vol. vii., p. 961. The meaning of compassing is there defined as being 'to attempt war.'

LORD JUSTICE-CLERK.—Attempting was doubtless treason in Scotland. Is compassing, conspiring, and attempting in any way different from compassing or conspiring?

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LOGAN.—The difference was, that before the Union compassing and conspiring would in Scotland have been high treason, but in England could only have been proved by overt act, done in pursuance thereof. Under the 1st section, 7th Anne, c. 21, the jurisdiction of the Court of Justiciary was ousted, and the tribunal of the Grand Jury was established, and the right of peremptory challenge given; but it could not be pretended that, because of that statute, compassing ceased to be *per se* a treason in the law of Scotland. It was incompetent to try it as evidenced by overt acts, as an offence of sedition at common law; Hume, vol. i., 553. There was no instance between 1709 and 1795 in which it had been held that *species facti*, such as here set forth, had been punishable otherwise than as treason. This would meet the objection which might be stated from the 6th section of 36th Geo. III., inasmuch as before that statute passed, it must have been considered that the law of treason, introduced by the 7th of Anne, had merged all subordinate charges.

LORD JUSTICE-CLERK.—Do you state that this would not have been a seditious offence in England before the passing of 36th Geo. III?—And referred to the case of Walker.

LOGAN.—In the case of Walker, which led to the passing of that act, the words used were similar to those in the present indictment, State Trials, vol. xxiii. p. 1062. This, however, was no proof that the common law of Scotland would have regarded it in the same light, as that was altogether dissimilar to the common law of England.

Further, it was necessary that each offence should be tried under its appropriate *nomen juris*; if it was treason, it was nothing else. The statute 36th Geo. III. did not alter the character of the offence, it only created that which was before merely evidence of treason into a substantive treason; East's Pleas of the Crown, pp. 62, 63; case of Hardie, p. 278. The second section of the late statute had no such reservation as was contained in the 6th section of 6th Geo. III., and that statute being repealed

the reservation therein contained was repealed also. But, farther, the statute of Victoria contains provisions for the benefit of parties accused under it. Under the 4th section information must have been given within six days after the offence was committed, and a warrant issued within ten days thereafter, otherwise the party could not be tried under the act; besides which, the party was entitled to the benefit of criminal letters, as though intimation had been given under the Act 1701. This was not an auxiliary act, but a direct and positive declaration of the legislature, as to what the offence should be considered; how and when it should be tried, and to what privileges the pannels would be entitled.

It was not, however, in the present case necessary to push the argument so far. Under the reservation of 36th Geo. III. the prosecutor would not have been entitled to try both under the statute and the common law. He must have made his election: and it was equally incompetent to try in both ways under this statute.

The LORD ADVOCATE AND MR CRAUFURD.—The case must be considered under three heads:—

1. The common law of Scotland.
2. As affected by the English Treason Acts; and,
3. Under the present statute.

1. The charge of conspiring, as here laid, would have been an offence at common law. The common law reaches all criminal acts falling within the range of precedent or known principle. They were quite willing, for the sake of argument, but to that extent only, to assume that, in Scotland as in England, all felonies merged in treason. This, however, was in truth an intermediate crime, not amounting to the statutory offence on the one hand, but yet properly distinguishable from sedition on the other. The compassing, which was now no longer treason, was the act of an individual mind, and was complete so soon as the intent was formed. To constitute the crime of conspiracy there must be a common intent, a combination by a plurality of persons, and it must,

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therefore, be considered as different, both from the compassing which, under the late act, was made felony, and from sedition as an individual act.

The LORD JUSTICE-CLERK.—Do you maintain that under a charge of sedition, it would be incompetent to libel a combining for seditious purposes?

CRAUFURD.—It is not necessary to push the argument that length. The charge here is not so laid, but yet it is well laid, and if the combination is proved as stated, that is more than mere personal sedition. There never yet was a period when such conspiracy would not *per se* have been a crime at common law.

2. The Act 36th Geo. III. made no difference. Under it the common law was specially reserved; but suppose the common law to have been excluded under that act, and suppose that the act had not been made perpetual, but had expired, as was originally contemplated, within a year, it could not then be contended that the common law, which had been in abeyance during that period, would not have revived. Nothing can exclude the common law but special statute, or identity between the crime charged and an existing treason. If the act charged be no longer treason, then, even admitting the doctrine of merging, that would not help the argument of the pannel, inasmuch as it must be a living treason, not a dead one, which could have that effect.

3. The recent statute repeals the 36th Geo. III., and, by such repeal, restored the common law, as to all compassings not made substantive treasons under the statute of Her present Majesty. There is, therefore, no longer need for any reservation of the common law, which reaches this crime, and all such crimes by its own native vigour. The common law was never excluded, except by positive words; Hume, vol. ii. p. 37. This has been acted upon in many cases under Lord Ellenborough's Act; case of *Alexander Mackenzie*, High Court, Dec. 31. 1843, Broun, vol. i., 495. The result of adopting the view urged on the other side would be, that between the

act of Anne and the act of Geo. III. such conspiracy, as then charged against the pannel, would have been no offence at all, inasmuch as the pannel says that the statute of Anne prevented it being indicted at common law, and yet he admits that it was not treason under the statute of Edward III. There could be no doubt that it might have been so tried as well before as after the 36th Geo. III. How then could it be contended, that there was anything in the present statute to prevent the Public Prosecutor from libelling the offence at common law, which, as he had shewn, had been always in force, when the crime was not treason, and when no special statute excluded it?

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THE LORD JUSTICE-CLERK.—Is it not a strong thing to say that you are entitled to disregard all the privileges given to the pannel under the 4th and 9th sections, as to the time within which the information must be given—the warrant for apprehension issued—and the party brought to trial?

CRAUFURD.—If I am right that the crime of conspiracy is not identical with the statutory offence, then the pannel can suffer no injury. More especially, as we do not seek to enforce against him, in respect of this charge, the high penalties imposed by the statute.

LORD JUSTICE-CLERK.—Do you say you do not intend to prove the compassing charged, as a contravention of the statute by means of conspiracy?

LORD WOOD.—Under the 3d section, the compassings, imaginations, &c. which are declared to be felony under the act, are said to be completed if the party shall express, utter, or declare the same by publishing any printing or writing, or by open advised speaking, or by any overt act or deed; do you contend that the privileges given in the 4th section, as contradistinguished from that given in the 9th, is confined to cases where the party is alleged to have contravened the act by open and advised speaking only? Is not the fair construction of the act, that as every mode of committing the offence is declared

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to be a felony, and to be punished with the same penalty, that the protection in the 4th section should equally extend to all cases, more especially as this is the plain construction of the privilege given in the 9th section.

The LORD ADVOCATE.—There are two answers; the first, that if I do not prosecute under the statute, I am not bound to give the privileges conferred by the statute; and, secondly, that on the plain construction of the statute, these privileges are only given where it is alleged that the statute has been contravened by ‘open and advised speaking’ only. And there was good reason for this, inasmuch as a prisoner might not be enabled to make a proper defence, in respect of words uttered at a public meeting, if the charge had been allowed to remain over his head until the circumstances under which they were uttered were forgot by parties who might otherwise have shewn them to have been innocently used.

MONCREIFF replied—The points are few, but important. Our position is, that the charge of conspiring to effect an alteration of the laws and constitution of the realm, by reason of the statute, merges in the felony, just as before the late enactment it would have merged in treason, except for the reservation under the 36th Geo. III. which, whatever the object might otherwise have been, is equivalent to a statutory declaration that, but for the reservation, the common law would have been ousted. By the 18th section of the Treaty of Union, recited in the statute of Anne, it was provided, ‘That the laws which concern public right, policy and civil government, may be made the same throughout the whole united kingdom.’ And by the subsequent statute, it was enacted, ‘That such crimes and offences which are high treason or misprision of high treason within England, shall be construed, adjudged and taken to be high treason and misprision of high treason within Scotland; and that from henceforth, no crimes or offences shall be high treason or misprision of high treason within Scotland, but those that are high treason or misprision of high treason in England.’

The statute overruled the common law, in so far as it was inconsistent therewith.—Lord Holt, in Sir John Friend's case, *State Trials*, vol. x. p. 599.

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There was no instance of a party having been indicted for conspiracy to levy war as a separate offence before the 36th Geo. III.; it must therefore have been considered prior to that statute, if proved by overt acts, as treason, or, if it could not be so proved, as sedition only. Notwithstanding the rebellions, Hume makes no mention of any common law charges of this kind, and it was fair to assume that nothing of the kind was ever considered competent at that time.

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The doctrine of merger goes much farther than seems to have been supposed. In the case of Mackinlay, the point was not decided as applicable to the law of Scotland, although on a fair import of the opinions delivered, it must be assumed that the doctrine was allowed in cases of treason. It extends to cases, however, other than those of treason, the principle being that where particular *species facti* are, by means of a statute, raised into a higher offence, it is incompetent to prove them under a lower charge. The Act of Victoria was a British Statute: it had used English terms unknown to the law of Scotland, and we must go to English law for an interpretation of their meaning. By that law conspiracy would be misdemeanour only, and even conceding the argument on the other side that the common law had revived in consequence of the repeal of the 36th Geo. III., the only effect would be that, inasmuch as under the present act it was declared to be a felony, and as it was an undoubted principle of English law, that if an act amounted to felony, it could not be charged as a misdemeanour, the common law charges were incompetent here. Mr Justice Buller's direction to the Jury in Isaac's case, *Russell on Crimes*, vol. ii. p. 550.

The question was, was the statute exclusive to any extent—if so, it was exclusive to every extent. There were provisions in favour of the pannels, and the Lord

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Advocate could not neutralize the enactments of the Legislature in their favour, under pretence that he did not seek to have a high penalty imposed upon them, as the pannel might prefer those protections which might enable him to prove his innocence, or exempt him from trial altogether, rather than be charged with a subordinate offence inferring a minor punishment,—in respect of which, those privileges were not accorded to him.

LORD JUSTICE-CLERK.—It would have been very desirable to have had more time to deliberate, before giving judgment in this very important case; but, as the pannel is entitled to all the privileges of the act 1701, under the 9th section of the late statute, the Court cannot delay giving their decision upon the points which have been urged in his favour.

I feel the greatest difficulty in supporting the relevancy of the charges objected to, and but for the great difference of my opinion from the rest of the Court, I should have expressed myself more decidedly against the relevancy of the two charges laid at common law.

I think the Lord Advocate made a great mistake as to the purport of the argument on behalf of the pannel, and this mistake consisted, in my opinion, in not observing that the minor of all the charges were essentially the same. It is true, that at first the argument which has now been submitted to the Court, was confined to the charge of sedition only, but on my suggestion, it has to-day been extended to both the charges at common law.

I wish to guard myself against agreeing in the doctrine which, it has been said, has been involved in this argument, that the offences here charged were not cognizable by the common law before the 36th of Geo. III., I have no doubt before the passing of that act they were illegal. That statute made them treason, but in a criminal charge, the nature of the facts alleged against the prisoner is alone important. No doubt compass-

ing to levy war against the Queen was made treason by 36th Geo. III., as made perpetual in the subsequent year; but this shews that, at common law, the rule was as I have stated it, namely, that intention must be shewn by overt acts in all criminal offences, and that according to the criminality of the overt acts proved, the law would infer a criminal intention. The act of Geo. III. contains a clause which expressly enables the prosecutor to try at common law for the overt acts, which were always illegal, as well as for the intention then first made a crime under the statute. This is easily understood. It was natural, under the circumstances, to find such a reservation, inasmuch as on the one hand it would have been extremely difficult to have proved intention without overt acts, so, on the other, it might appear on the evidence, that the only intention the law could ascribe to the prisoner was a treasonable one, whereby an indictment for a less offence might have been rendered abortive. It is however conceded, that no such reservation exists in the late statute, nor could it be expected, for as the intentions dealt with by the statute are now no longer substantive treasons, the reason for such reservation no longer exists.

The late statute is entitled, 'an act for the better security of the Crown and Government of the United Kingdom,' and I think that the safe rule is to consider it as the whole code of law, applicable to the offences of which it treats. The general declaration of the statute of Union, the nature of the Union itself, and the whole scope and object of legislation since that period, shew that such an act, defining the criminality of political offences, containing provisions as to the mode of prosecution, must be taken as a legislative declaration of what shall be the full and only remedy at both ends of the island. This statute, after a recital of previous statutes, and after repealing the same, in so far as they relate to compassing, proceeds, in the third section, to declare that such compassing shall be felony. I can-

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not separate these two provisions, more especially as this section is identical, with the single difference of adding the words, 'on her or royal name,' with the words employed in the 36th of Geo. III. The statute then prescribes how the offences contemplated shall be punished, and restricts the powers of the prosecutor as to the time within which he is to prefer his instance, and thereafter restricts the competency of trial within the period allowed to persons after intimation has been given under the act 1701.

In the face of such provisions, tending so materially to the benefit of the pannel, I cannot bring myself to believe, that when the legislature enacted this statute, it was ever contemplated that it was competent to the Public Prosecutor to evade all these advantages, by proceeding as for a different offence at common law.

If I could, looking at the whole scope of this indictment, find the charge of conspiracy or sedition different in substance or matter of charge from the alleged statutory offence, my difficulties would not arise; but surely a charge of compassing to levy war against the Queen would be supported by proof of a conspiracy so to do. There never was such a conspiracy, however abortive, without a compassing. The same acts which would shew conspiracy, if they proved anything, would also establish the compassing. In the first charge it is stated that the pannel was 'convened as member,' &c. of the alleged illegal body, associated for the illegal purposes therein set forth. Now, what does that charge import? It has not been disputed, that, with the exception, not the variance, that a joining of the national guard is not charged in the minor under the common law charge, the charges are otherwise identical. It is manifest that one minor would have done for both. I have the greatest difficulty, then, in holding that any different offence can be ascribed in the major. If it was so, I must tell the Jury, when I come to sum up, that although they shall say that the parties are innocent of

the facts charged against them under the statute, they may yet be guilty of the same facts under the charge at common law. To my mind such a state of things is impossible. It is plainly no difference that others were with him (the pannel), inasmuch as he is alleged to have acted in concert with others in the contravention of the statute; and perhaps the worst acts set forth against him, in respect thereof, are his approval and adoption of the illegal conduct of others with whom he was associated.

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A point has been raised during the discussion, on which I am anxious to have the assistance of the Court, namely, that the conspiracy here set forth is not sedition. To that doctrine I entirely demur. I think it sedition of the worst kind, but still sedition. I have never for one moment thought, since the passing of Sir William Rae's act, that transportation is still competent for acts like those charged in the present indictment. Here the Public Prosecutor ought to have charged 'sedition, especially when committed by compassing,' &c. In 1793, under the general charge of sedition, the pannels had sentence, after proof, for seditious conspiring; but should the jury return a verdict of not guilty of sedition, but guilty of conspiracy, if we pronounce our interlocutor sustaining the relevancy of both charges, we must hold this to be a good and consistent verdict. I should like, for my assistance in directing the jury, to hear your Lordships' sentiments on this point.

It is for these reasons that I am for sustaining the objections which have been made to the relevancy of the present indictment. In so doing, I wish it to be understood, that I by no means go on any general notion that the intervention of a statute abrogates the common law in every case. I go upon the peculiarities of *this* statute itself, the object for which it was framed, and the circumstances under which it passed; and giving due regard to these, I am of opinion that the Legislature has thereby definitively declared, that wherever the acts

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charged against a pannel, in fair construction of law, amount to a contravention of the statute, the only competent proceedings are those prescribed by the statute, with all the privileges it gives to the parties accused.

LORD MACKENZIE.—There are two charges objected to, conspiracy and sedition, both charges at common law. It is not said that these are not crimes at common law themselves. But it is said that they are excluded by the statute of Victoria, as containing matter that is in the statutory charge. Now, I think it does contain such matter. But does that warrant the exclusion of the common law charges? It is said to do so. Why? Because, it comes in place of 36th Geo. III., which would have excluded it. Now, to this I see two answers:—

First, the act 36th of Geo. III. did not exclude the common law: it had a clause expressly reserving it.

Secondly, if the act of George Third did exclude the common law, yet the mention of it in the act of Victoria, as coming in place of that of George Third, did not mean that it was to keep up this effect of that statute. It repealed, in the proper enacting clause, the act of George the Third, and without any qualification. It therefore took away the treasons of the act of George Third, and substituted a felony. Now, supposing that the treasons of the statute of George the Third excluded the common law, why should this exclusion remain, when they were taken away, and a statutory felony substituted, felony having no such quality of exclusion as treason has? The one is taken away with its qualities; the other substituted with its qualities. If the accessory qualities of treason had been continued, it would have greatly defeated the purposes of the act, one of which was to facilitate the trial of these things. I therefore set aside that expression. Secondly, but it is further said, that the statute of Victoria in itself has provisions inferring the exclusion of the common law. I am not satisfied with that argument. The act Victoria is an act which imposes severe pains on certain acts, which, at common law, were, as sedition,

punishable only by two years imprisonment at most. This statute makes them liable to transportation for life. It also brings in accessories after the fact, not liable at common law, and takes away the right of bail from the accused. On the other hand, it gives certain privileges to those prosecuted under it. The chief of these, which relates to the charge of advised speaking, is of value, and there are some other privileges of less moment. But I cannot see why these may not be given to persons prosecuted under the statute, without inferring that the common law is excluded in prosecutions of all the acts of crime stated in the statute. I think the statute free from any absurdity, in the view that the common law was open, as before, with its lighter pains, and less severe procedure; but that if the statute is insisted in, the privileges thereby given must be granted. I cannot therefore supply the place of a clause of exclusion in the statute. And, on the whole, I feel bound to repel the objections.

LORD MONCREIFF.—I could have wished for more time. This indictment contains three charges—one is for contravention of the statute, founded on the third section. That is a high and penal statute, and there is no objection to the charge founded thereon. But the indictment goes on to state second and third charges. The second charge I think different in some respects from the first. The question we have to decide is, whether this second charge is relevant as the law stands. No one doubts, that, apart from the statute, it would have been good. It is admitted that the *species facti* set forth constituted a crime before the Union. By that act, no doubt, the law of Scotland, so far as respects treasonable offences, was overruled. The 36th Geo. III. makes acts similar to those now charged a substantive treason, and contains a special clause, reserving the competency of a common law charge, thereby preventing any merger. That statute is now repealed, and with it the reservation also. But it is important, in considering the questions which have been raised, to remember, that

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when they were treason, the common law was preserved. In the recent statute there are substituted provisions. But there was no necessity for any reservation of the common law, inasmuch as there was no treason which was to have the effects of creating a merger. I never heard that because a statute applies, the common law is thereby necessarily ousted. The act of Victoria is a highly penal one. The common law charge does not lead to the same inference as the statutory one, and I think the second charge different from the first. Conspiring is not necessarily the same thing with compassing and imagining. I think the law contemplates a special case, and, inasmuch as this libel contains no statement of open and advised speaking, I think the protections therein given cannot legally be claimed by the pannels as of right.

LORD MEDWYN.—The indictment contains three charges; the objection is to the second and third. I agree with Lord Moncreiff that the charges are somewhat different. There may be compassing without conspiracy. There may also be conspiracy without sedition, though in this case I think it sedition of an aggravated kind; the question is, Can the common law be excluded? I do not think the implication from the statute is sufficiently strong to have that effect. It is, no doubt, now a common law offence. By 36th George Third, the common law right is preserved. By the present act, the repeal of 36th George Third was effected, as there was no longer any treason into which the sedition could merge. It has been said that the statute is the whole code of law applicable to the offence. The clause by advised speaking, although somewhat difficult to separate from the rest of the statute, still does not appear to me sufficient to exclude the common law on a charge like the present, when that is not charged. It may be proper, where the statute is founded on, to give the protection it affords, but that, to my mind, is not enough to exclude a common law charge like the present.

LORD COCKBURN.—There are two questions for our

decision,—the one is, whether treason absorbs all subordinate charges; conceding that to be so, it has no application to the present case, inasmuch as this is not said to be treason. The other is on 36th George Third, as construed *in pari materia* with the recent statute. There is no question that a conspiracy like this is a crime. I cannot doubt this. The point for determination is, has the common law been taken away by the late statute, so that the only competent punishment must be under the statute, and under the privileges given to the pannel therein, so that he has a right to insist on being tried under the statute, and within the statutory period. Now, there is here no express abrogation of the common law. It is said to be abolished by implication. It must, however, be an unavoidable and necessary implication, to have such an effect, and I cannot see whence this arises. Nothing is more common than alternatively charging a contravention of a statute along with a common law charge, and if one minor will serve several majors, the prosecutor is entitled so to frame his indictment. Even if the charges were identical, I should not think exclusion of the common law necessarily followed; but, inasmuch as these facts are not entirely the same, and the charges are not the same, I do not think the latter made a crime under the statute (*reads statute*). There must, under the statute, be a levying of war, which is not said here. There is not, therefore, any necessary implication to exclude the common law, and as I can guess the intention from words only, I do not think they have so expressed themselves as to justify us in rejecting this charge. In answer to the question of privilege, it is sufficient to say that he will be exempted from the pains of the statute if found guilty of the common law charge only.

LORD WOOD.—I feel great difficulty in giving an opinion. There are three charges. The one statutory, one conspiracy, which I think the same as sedition, and a third sedition. I think there may be many charges

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of those acts set forth so drawn as not to infer a contravention of the statute. I think the charges in substance is the same, notwithstanding the variation in major. I have no doubt, therefore, that it is a relevant case under the statute. If I am asked to hold that the charges conspiracy and sedition are to be sustained because they are different, I should say the objection would be good, because I conceive them to be substantially one with the statutory offence. But the question is, can you have both? Up to 36th Geo. III. these acts were indictable by common law, then they were created into treason, and the less offence merged, but the common law was preserved even by that statute. These could not otherwise have been prosecuted at common law, on account of the merger. But the statute preserved the common law. Then came the present statute. If the 36th Geo. III. had merely expired the common law would have revived; and the same consequence follows from its repeal. They are now no longer treason, but felony under the recent statute, and, but for other and special considerations, I would have had no difficulty in saying they might still be prosecuted as at common law, when the reservation was no longer necessary, in consequence of the repeal of the statute. But the difficulty is in respect of the special provision in the recent enactment, that it is to enact other penalties in lieu of treason, and which at first sight seems to constitute it the only code of law on the subject. But I incline to hold that the only meaning of this is to say they are not to be treason but felony. I am not sure that this is enough, by way of inference, to abrogate the common law; although we are pressed with the fourth section, containing so many and valuable protections for the benefit of the pannel.

But I think with Lord Mackenzie that the protection is given only to the case of prosecution for open and advised speaking, now made a felony under the statute. But if you proceed under common law offence, I do not

think that the inference is sufficient to exclude us from sustaining the relevancy in that form, although, no doubt, the effect is to deprive the accused of those protections. On these grounds I concur with the majority of the Court.

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THE LORD JUSTICE-CLERK,

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During the trial of the pannels Grant, Ranken, and Hamilton, Peter Anderson, one of the witnesses, for the Crown, deponed,—That, at a meeting of the Edinburgh Chartist Association, a letter was received from a person named M'Kay, applying for aid to publish a pamphlet, a draft of which was enclosed. On a printed pamphlet being shewn to him, for the purpose of identification, it was objected on behalf of the pannels, that before this could be done, the Crown must prove that the prisoners were present on the occasion referred to.

The COURT held, that as the object was to prove publication of a pamphlet, under the sanction of an association, of which the prisoners had been shewn to be members, the evidence could not be objected to at that stage of the proceedings. It would be open to the prisoners to shew that it had no application as against them, by proving that they were not concerned in it.

John Eikings, another witness, was asked whether he had heard Hamilton advocate the use of arms at the meeting held on the Calton Hill, whereupon

LOGAN, for the pannel, objected that this evidence was incompetent, the special occasion when the words were said to have been uttered not having been libelled. There was no analogy between the latitude allowed to a

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prisoner in conducting his defence, and the strictness required to be observed by the Crown. To support an indictment, the prosecutor was bound to prove particular facts, and that they took place on the occasions specified. The object of serving the indictment before-hand, and the requisitions of criminal pleading, were all intended to guard the pannel against surprise on the trial. Here the general statement was, that the pannels had unlawfully conspired, and in support of that allegation, particular *species facti* were set forth. The prosecutor, not content with proving what he had alleged, sought to establish words used on an occasion of which he had given no warning.

CRAUFURD said, it was proposed to lead this evidence, not with reference to a particular charge of sedition by spoken words, but to support the general charge of conspiracy. It was competent to prove that the prisoner used any words within the period libelled, indicating his knowledge of the nature of the institution, its intention, and objects. It would be relevant to prove that these words were addressed to an individual, and it can be no less relevant to prove them when uttered at a public meeting. He was also entitled, he maintained, to anticipate a remark which might be made in defence, that the prisoner did not know the objects for which the institution was formed.

MONCREIFF answered, there were certain public meetings specifically libelled, at which seditious words were alleged to have been uttered. The pannels were entitled to hold that the occasions and words set forth in the indictment, were those alone on which the prosecutor intended to rely. It might lead to the greatest injustice if it was allowed that other meetings and other words than those libelled might be proved. It was incompetent to prove intention of conspiracy, without giving notice of the occasion in respect of which the proof was offered.

The question was not farther pressed.

The COURT, however, stated that it must not be considered as a ruling by them, that language intimating an intention of conspiracy could not be proved, though the specific occasion on which it was used was not stated in the libel.

James Brownlee, a sergeant of police, having deponed to having been present at the meeting at Bruntsfield Links, at which Ranken spoke and moved the first resolution, was asked whether he had advised the people to get arms, in order to procure the charter; whereupon,

MONCREIFF objected, that when an indictment for sedition libelled particular expressions in proof of the crime, it was incompetent to prove any general statement not included in the libel.

CRAUFURD argued that the expressions in the libel formed a distinct charge. It was not sought to adduce this evidence to prove any other act of sedition than those set forth. It was, however, a proper and competent proceeding that evidence of other expressions in the same speech should be laid before the jury, in support of the charge of sedition, or deduced from the particular expressions mentioned in the indictment.

The Court ruled that the evidence was admissible.

It was proposed to ask Andrew Oliver Smith, clerk in the County Police Office, to read a printed placard, No. 3 of Process, purporting to be headed 'National Guard,' and intimating a meeting of the National Guard on 28th June 1848; whereupon it was objected by the counsel for the pannels, that this was not evidence against any of the prisoners, until it had been previously shewn that they were in some way connected with the National Guard.

The LORD JUSTICE-CLERK.—You may be able to disconnect yourselves from the National Guard, but, inasmuch as it is proved that the subject of a National Guard was discussed at the meeting of the Chartist Association, on the 25th and 28th of April, at both of

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which Ranken and Hamilton were present, and inasmuch as it is clearly shewn that they were connected with the Association on the 28th of June, it is clearly competent that the placard should be read as evidence against them.

Thereafter it was proposed to read a letter, bearing to be dated, 'Glasgow, April' 30. 1845,' and subscribed 'James Smith, Sub. Sec.'

LOGAN objected to the document being read. It could only be produced with a view to make out conspiracy, but, inasmuch as the conspiracy libelled was not alleged to extend farther back than March 1848, it was clearly incompetent to adduce evidence of what took place three years before in support of the charge.

The Court held that the letter could not be read.

It was proposed to read a letter, No. 6, bearing to be dated 'Edinburgh, 2 Causewayside, Thursday morning, '11th May 1848,' and to be subscribed 'John Ferguson, 'Archibald Walker.' It appeared that the letter was put into the Post Office directed to Ranken, and that it contained a request that it should be communicated to Cumming afterwards, and that it was found in the hands of Cumming open.

MONCRIEFF, for Ranken, objected, that this letter could not be read, inasmuch as it was not shown that it had ever come into Ranken's hands.

The LORD JUSTICE-CLERK—If it did go to Cumming by mistake, and never reached the party to whom it was directed, it would be competent for you to prove the fact; but as this letter was put into the Post-office directed to Ranken, the Court cannot presume that there was a miscarriage in the Post Office, more especially as the letter itself bears that it was to be communicated to Cumming, in whose hands it was found.

MONCRIEFF—It was necessary to prove Ranken's knowledge of the letter. The writer was not accused as a co-conspirator, and, therefore, without farther evidence, it was impossible to allow it to be read as evidence of a

conspiracy in which Ranken was said to be involved, although the writer was not. Besides which, the letter was clearly private; and it could not be evidence that a party had written a private letter, until it was shewn that the prisoner had seen it. Put the case that the letter had contained a disclosure of some nefarious design, altogether unconnected with the alleged Chartist conspiracy, that clearly would not be evidence. Erskine, in the case of *Hardy*, 1794, State Trials, vol. xxiv. p. 448, properly drew the distinction between what an agent does, and what he says has been done. This letter only professed to be a narrative of what others had done, and the writer was not shown to have been a co-conspirator. Had he been so, according to the principle stated by Erskine in the case referred to, the letter would not have been evidence against the party to whom it was addressed.

The LORD ADVOCATE replied, that although it had not been shown that Ferguson, the writer of the letter, was in any way connected with the conspiracy, it had been shown that Walker, who also subscribed it, and Cumming, to whom it was communicated, were both members of the Chartist Committee, and it could not be supposed that it would reach Cumming's hands, except through the medium of the prisoner Ranken. This circumstance caused the case to differ essentially from that of *Hardy*, where the writer only was said to have been a conspirator, and not the receiver. He also quoted Lord Moncreiff's opinion in the case of the Cotton Spinners.

LORD MEDWYN.—The document in *Hardy's* case contained only the relation that certain songs were sung, written by one person to another, who was unconcerned with the crime charged. It was not a letter written from one conspirator to another. Here Walker is proved to have been a conspirator as much as Ranken. The important point is, that at the end of the letter there is a statement that the letter is to be handed to Cumming, and the letter is found in Cumming's hands

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open. The presumption is, that it came to the person entitled to open it, was opened, and shown to Cumming. Even if Ranken had never seen the letter, I think it is good evidence. I consider this case greatly different from that of Hardy.

LORD MONCREIFF.—My impression as to the case of Hardy was different. I suspect yet it was the case of a letter from one conspirator to another, and that it was admitted. I see no objection to this letter. It is signed by Walker, and may be considered his as much as Ferguson's. It is addressed to Ranken, and to be communicated to another alleged conspirator. It is said for the pannel that he did not see the letter. This may be in the first instance supposed. But, suppose he did not see it at first, he might afterwards see it, therefore it is not to be assumed that he never saw it. It is said that it contains a narrative only. But it is put in as proving a conspiracy, and a narrative of things said to have been done may be a most important item of evidence.

LORD JUSTICE-CLERK.—It is always satisfactory when, in giving a decision, we find the opinions of other Judges coinciding with our own. But when there has been great difference in the decisions delivered, we are better situated to decide after the lapse of fifty years, than when the point rose suddenly, and two of the most eminent of the English Judges differed from the majority of the Court. I have often considered the case of Hardy, and I find it often alluded to by others. Giving due weight to the opinion of the majority, I think it went on a misapprehension. In conspiracy, the purpose and intention is what is to be proved. The acts of those concerned, though unknown to the prisoners, may be good evidence of the design. Thus, in the case of Brandreth, it was permitted to prove acts done in one part of England, to establish the design entertained in common with those in another. In the same way a statement of the particulars at a meeting is evidence to prove the intention; also (as in this case) a letter expressing approbation of

the procedure. The narrative of the progress of the National Guard, of the feeling in its favour, all go to show the purpose as much as if the facts were true. It is part of the folly of such means that people delude themselves. But, does a statement that may be false, avowing what the purpose is, less prove that purpose because it occurs in a pretended narrative of what has not happened? Therefore, I think it was a misapprehension to say that the document in Hardy's case was not evidence because it was not proved that the songs were sung. The fact of making the narrative (though false) may prove the purpose of the conspirators. As to the objection that the letter was not received, I lay that aside as of no importance. It is good evidence, just as statements made by the conspirators here would affect him when in London. He may take away the effect by subsequent explanation, but in the mean time, it must be received. A person once joining in a conspiracy may be answerable for much which he did not intend. Assuming then that the letter was not seen by Ranken, I think it good evidence. My brother, Lord Moncreiff, is under a mistake in supposing that the document was *admitted* in the discussion in Hardy's case, to which reference has been made. Another document was received, as to which the facts were thought to be different.

LORD MONCREIFF.—I see it was so. But I concur on principle in receiving this document.

The **LORD JUSTICE-CLERK** in proceeding to charge the Jury, said—There were three remarks which, in the outset, he felt himself bound to make. The first was, that it had been urged by the Crown, and not the less strongly, from the intention having been disclaimed that it was of great importance from the character of the times to put down the doctrine that, under any circumstances, any body of men for the attainment of any political object, were entitled to use violence. Whatever may be the importance at any particular juncture of repress-

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ing such a doctrine, it must be remembered that such a consideration cannot weigh in determining as to the guilt or innocence of the pannels. Though the consequences of a verdict of not guilty might be fearful, from a misapprehension of the grounds on which that verdict proceeded, yet if you cannot, from the evidence laid before you, find the pannels guilty, you are bound to declare them innocent. The second remark applies to an argument yet more illegitimate, and very mischievous, which was pressed on the part of the pannels, that you should hesitate to deliver a verdict of guilty, although such might be your conviction on your oaths, from the notion that such a verdict would create discontent in some portion of the community; or, that it might have the effect of elevating the accused into the importance of political martyrs. If the crimes should be proved to your satisfaction, you will be violating your oaths if you fail to give a conscientious verdict, because you anticipate inexpedient results. The Jury must, from the facts laid before them, say whether the pannels are guilty. And I may add, that I never knew a verdict returned after conscientious deliberation, that did not carry its due weight. Neither have I found, that when the prosecution is just, that a verdict of guilty was attended with the results pointed to by one of the counsel. It was urged upon you, that great allowance was to be made for the feelings of men, who, unable to raise themselves above the burdens and privations of daily toil, could not submit to the sight of greater means being in the possession of the upper classes, whom they might think not more worthy than themselves, and that great indulgence on *that* score was to be made for any violence of language which may be proved against the pannels. Now, while I quite concur in the feeling that great latitude may be taken in the free discussion of public events and of political changes, yet I know no more mischievous doctrine than to claim toleration for violence as to the differences in the social conditions of mankind. Such violence is, in

truth, the outbreaks of the evil heart of man, rebelling against the decrees of Providence as to his lot and situation in life, which lead him, instead of bearing such dispensations with Christian resignation, to attempt to involve all society in confusion and misery, in the vain hope that he may benefit by the spoil of others, whom, from such selfish feelings, he is ready to plunge into distress. This is the plain truth as to all such topics as I was sorry to hear descanted upon by one of the counsel. But, really such declamation was quite beside the present case. We have fortunately no evidence that the pannel, for whom such mischievous views were urged, had been actuated by any such dangerous and wicked and unchristian feelings. All that is alleged against him, or can be collected from the case as insisted in by the Crown, is simply seditious language and proceedings, in the course of advocating and attempting ordinary seditious objects, tending to create insurrection. I am one very ready to make the utmost allowance for the language used by men at political meetings, who know very little, from their previous pursuits, of the import of what they are uttering, and have no definite objects in view. But, while great freedom may be claimed in such a case, that is a very different thing indeed from the attempt to justify, or palliate, or excuse, violence of language and incendiary declamation, because, forsooth, those who, by the decrees of Providence, must labour for their bread, cannot submit to the inequalities of human society, and cannot refrain from incitements to general confusion, in the hope of bettering their own condition. The latter feeling is, I again say, the rebellion of the evil heart of man against the dispensations of Providence, and is the very wickedness which the spirit of evil excites, as the most prolific sources of fearful crime. Fortunately we have no such case here. Nor can I believe that the case of the pannel, if he is found by you to be guilty, will be viewed by his own class (for I have a better opinion of their religious and moral feelings), as an instance of a man unjustly

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punished for trying to better his own condition and that of his associates: The lower orders in this country know well that anarchy, and general confusion and disorder, would only add to their privations. I have adverted to these topics, because I think they ought to be banished altogether from courts of justice.

The third remark I have to make is, that in judging of such offences as these, while it is on the one hand true, that the extravagance, the folly, and the absurdity of the language used, may be of great importance in enabling you to come to the conclusion, whether the speeches were used with such a deliberate purpose—a seditious purpose, as is imputed in the indictment; yet, on the other hand, it is dangerous to hold that because they are silly, they may not also be mischievous. It would be hazardous, if you should think the pannels guilty of forming the National Guard, yet because you think the project extravagant, that therefore it is to be treated only as folly, and a verdict of acquittal returned on that ground. Such a course is not reconcileable with law, or with the experience of man, as to the results which may follow from many extravagant and very silly proceedings.

Whatever difficulties might have been expected to arise in point of law, he was happy to say that none really existed in the case before the Court. The whole question was, were the charges made against the pannels proved? If they were, there could be no doubt they amounted to the crimes of conspiracy and sedition, subject to the determination of the Court upon the construction of the charge of conspiracy, as to whether it was in fact any thing else than sedition. His Lordship then went over the whole proof, commenting upon it and explaining its bearing as he went along.

The Jury, after deliberating for half an hour, returned the following verdict:—

‘ The Jury unanimously find the charge of conspiracy against the three panels, as libelled, not proven.

‘ The Jury also unanimously find John Grant not
 guilty of sedition, as libelled.

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‘ The Jury further unanimously find Robert Hamilton
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‘ And, by a majority of one, find Henry Ranken guilty
 of using similar language.’

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The LORD JUSTICE-CLERK.—Gentlemen, be good enough to observe, in regard to that part of the verdict which contains the specialty finding Hamilton and Ranken guilty of using language calculated to excite popular disaffection and resistance to lawful authority, that this is the description of sedition libelled. Now, to make your verdict correct, you should determine whether they are guilty, or not guilty, of sedition, to any extent you please. You may say, for example, that they are guilty of sedition, in so far as they used language calculated to excite popular disaffection and resistance to lawful authority.

The Chancellor of the Jury.—That is what we mean, my Lord.

LORD JUSTICE-CLERK.—In using the word ‘calculated,’ do you mean to leave out the word ‘intended;’ or, does your verdict mean to embrace both?

The Chancellor.—We meant purposely to leave out the word ‘intended.’

The Verdict was then recorded as follows:—‘The Jury unanimously find Robert Hamilton guilty of sedition, in so far as that he used language calculated to excite popular disaffection and resistance to lawful authority; and, by a majority of one, find Henry Ranken guilty of sedition in the same terms.’

LOGAN thereupon objected, that this verdict as returned, was insufficient to support a sentence.—In respect of which objection, the Court continued the diet until the 18th of November.

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On the motion of the LORD ADVOCATE, the Court deserted the diet against the pannel James Cumming, *simpliciter*, and dismissed him from the bar.

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Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE, MONCREIFF, MEDWYN, COCKBURN, AND WOOD.

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The pannels, Ranken and Hamilton, having been placed at the bar, the Lord Advocate moved for sentence against them in the usual form.

Whereupon LOGAN, in support of the objection to the verdict, urged, that in page six of the indictment there was an allegation of intention, which overrode the whole charge. In a conversation which occurred between the Justice-Clerk and the Jury, the latter explained their meaning. Their attention having been called to the particular charge, and it having been pointed out to them that the indictment charged that the language used was intended, as well as calculated, to produce the effect charged, the Jury stated that they purposely omitted the word intended; the verdict was defective, in respect that the terms used by the Jury did not amount to sedition, and were defective in an essential quality of the crime.

Without going into the general question, that dole is necessary in every crime, intention was undoubtedly necessary to constitute sedition. It was necessary also to charge it in an indictment; though it was not necessary to prove what actually passed in the mind of the pannel, yet, where the Jury negatived intention, the verdict was not for the prosecutor, but for the pannel; Hume, vol. i. p. 351. He more expressly sets forth necessity of intention, vol. i. p. 553. It was not contended that calculated might not sometimes comprehend intended. The plans of a surveyor are said to be calculated to promote his work, and they are also intended so to do. But it was necessary that the words should be not only intended, but in themselves suited and fitted

to promote the object in this case. When the intention was brought before the Jury they found the words calculated, and negatived the inference of intention.

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The LORD JUSTICE-CLERK.—What I want to know is, what Mr Hume means by *suited*.

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LOGAN.—He means fitted. Suited and calculated mean the same.

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LORD MACKENZIE.—You mean the words are capable of that interpretation.

LOGAN, in illustration, referred to cases, Hume, vol. ii. p. 457, to show the converse of his proposition, cases in which a special verdict was held good. In vol. xxiii., State Trials, there were several indictments shewing the necessity of libelling intention.

LORD JUSTICE-CLERK.—There are at least a dozen other indictments in that volume.

LOGAN.—Yes, but they all more or less explicitly set forth the necessity of intention.

LORD JUSTICE-CLERK.—Not as I read them. You need not refer to those containing charges of convention and conspiracy; I allude to those confined to sedition.

LOGAN.—It was clear, on the authority of Hume, that *malus animus* was of the essence of sedition; and from indictments extending over twenty years, in which wicked intention was charged in as many words, or necessarily implied by the way in which facts were set forth therein, that it had always been so considered. In analogous cases, where the verdict negatived the essence of the crime, it was not a verdict on which sentence could follow. Take theft, for example, where the *animus furandi* was negatived. In many old cases the pannels were found guilty of carrying away, but no sentence followed; Hume, vol. i. p. 73. Again, in fire-raising, it was held to be no verdict unless, by necessary implication, it appeared that the fire was applied with felonious purpose.

LORD JUSTICE-CLERK.—That crime bears the wilful nature in the major.

LOGAN.—But here the major sets forth that words

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calculated and intended to produce a certain effect (the Jury have found they were not intended), and the analogy of the cases referred to was applicable. Take deforcement, and suppose the crime being set forth by *nomen juris* only, the Jury find guilty of deforcement, but not proven that the party on whom it was committed was an officer of the law.

LORD JUSTICE-CLERK.—There is no analogy.

LOGAN.—In *hamesucken*, suppose it found that the party did not enter the house with the purpose of committing the assault. The case of *Stein, Hume*, vol. ii. p. 459, was directly in point. The major set forth sedition, and the prosecutor was bound to set forth in the minor facts relevant in law as amounting to that crime, having thought it necessary, not only to set forth that the words charged were seditiously spoken, but libelled and undertaken also to prove the intention with which they were used. Had the indictment not contained this, there would have been an objection to its relevancy, as might be seen from the cases and the analogy quoted. The Court, however, were not dealing with relevancy, but with the finding of the Jury on the facts; and it must be observed, that the words 'guilty of sedition' were not in the original verdict, and the second part of it was clearly intended to negative the allegation that the words were used with the intention libelled. It is not a good answer that the Jury have returned a verdict on which a presumption of guilt might follow. The Court are bound to deal with the verdict, and, as it stood in connection with the charge; if it did not amount to the offence charged it was irrelevant; *Hume*, vol. ii. p. 448. The Jury had not found guilty of sedition merely, but guilty 'in so far as,' &c. The question whether this was a sufficient finding, must depend on the determination whether intention, either express or implied, was of the essence of the crime.

MONCREIFF.—The primary question was, what did the Jury signify? *Hume*, vol. ii. p. 456. If under an in-

dictment, charging calculated and intended, the Jury find the words calculated, but purposely omit intended, they must have meant that it was not intended to produce the result. It could not be doubted that intention was of the essence of the crime. It might not be necessary to libel, or to find it in the verdict in terms, as it might be deduced. But the condition of the argument was, that it was negatived. If the pannels were tried for using reckless language, that was no crime *per se*; if the indictment had libelled calculated, but not intended, that would not have amounted to sedition. Here the verdict negatived the terms of the indictment.

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CRAUFURD.—In the major, the charge was simply sedition, which required no explanation in either the indictment or the verdict. The pannels put their statement incorrectly, when they said that the charge was, that words were used, calculated and intended to produce a certain effect. The charge was, that they openly and seditiously used words, and the rest is descriptive, and intention was implied in the charge. Starkie on Libel, 2. 331. And at p. 344, Starkie draws the distinction between doing things in their own nature lawful, and those by nature unlawful. On this principle there was no criminal intention to be stated, or found, or proved as a separate matter. Where the words were unlawful, unless want of intention be clearly and positively found, the verdict was a conviction. The cases occurring at end of last century and beginning of this, were of two classes. The one, where the prisoners, though not actually accused of conspiracy, were yet connected with a convention, and the intention to conspire was necessarily set forth. In the other cases, where there was no conspiracy, the word intended is not introduced. But the case of *M'Laren and Baird*, State Trials, vol. xxxiii., is still more explicit. In particular, the opinion of the Justice-Clerk, p. 127. Every crime in which will was involved, implies such an amount of intention as to make it criminal.

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An explanation was made by the Jury, of which I give the pannels the full benefit. If this was an explanation discharging from the offence the general intention involved in sedition, he could not ask for sentence. But the Jury had purposely remained silent as to such implied intention, in so far as it was legally involved in the crime of sedition. They had in general terms found guilty of sedition, and that finding must have its legal effect.

LORD-ADVOCATE.—The pannels were charged with sedition, and with speaking on certain occasions certain words, characterised in a particular manner. The Jury returned the verdict now under consideration. The indictment says intended and calculated. The point to be made out on the other side is, that it was necessary for the prosecutor to libel intention as distinct from calculated. Looking at the indictment on one hand, and the verdict on the the other, he found nothing to stop him from saying that the verdict was good, and that it must have its legal effect. The pannels said he was not to stop at the record. An explanation was made by the Jury. Though he was thus going to extraneous matter, he would not object, as the proceeding which took place between the Court and the Jury was cotemporaneous with the verdict. It would be strange if the explanation was to nullify the verdict. The Jury find guilty of sedition, and then proceeded to say, in so far as he used words calculated to produce that which is sedition; they simply abstain from saying anything of intention. Had they refused to specify intention where it was necessary to state it specifically, it would have been a different matter. That is not the case here. They found all the criminal intent necessary for them to find to be averred, when they found guilty of sedition; and if they had not found with respect to the specific intention, neither have they negated the intention.

MONCREIFF.—It is important to be cautious, lest persons not convicted by the jury should be punished. The verdict must be clear, and the prisoners have the benefit of any doubt. He did not concede that it was enough

for the prosecutor to put down words, and simply charge them as seditious. In whatever way the intent was libelled, it must be done either inferentially or directly. If this was true, the next proposition was certain, that intention was not only of the essence of the crime, but a fact to be proved. Not a separate intent apart from the words; but it was as necessary to prove the intent as the words. If the prosecutor undertook to prove to the Jury that the words were calculated and intended to produce a particular result, and then said one meant the other, he contradicted his indictment. Two things were to be proved under such an indictment, viz., both the fitness and the intention. Whether intent was to be inferred from words, or from facts, it must be proved. 4. *Barnewell and Alderson*, 430; *King v. Burdett*; *McLaren and Baird* supported this proposition. Wickedly and feloniously was there set forth, which implied intent. The question came to be, had they done this? Nor would the verdict imply it; but were the Jury satisfied thereof. The pannels were entitled to assume, that when the Jury refused to find intention, they found intention not proved. They were not to construe the verdict to the effect of leaving the Jury to find on matters of law. If they find guilty of sedition, coupled with an explanation showing that they did not find what in law was sedition, the verdict was a verdict of acquittal. The question was, what did the Jury mean by sedition? They have explained guilty of sedition, if speaking those words is sedition, but not otherwise. The Jury were not satisfied of the criminal intent; they have negatived it by implication, and there is nothing to shew that if they had been sent back, they would not have acquitted. The Jury might have been satisfied that the words were spoken without the intention libelled, and may have meant to have said so; and if so, the pannels are not guilty of sedition.

The Court being divided in opinion, adjourned the diet until the 25th of November.

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The LORD JUSTICE-CLERK,

LORDS MACKENZIE, MONCREIFF, MEDWYN, COCKBURN, AND WOOD.

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Their Lordships then delivered the following opinions:—

The LORD JUSTICE-CLERK.—In every view which has been presented against this verdict, there are, in my opinion, either unwarranted assumptions in point of fact, or very grave misconceptions in point of law.

The jury stated, in answer to a question from myself, that they purposely left out the word *intended* in reference to the averment at the close of the indictment, descriptive of the character of the language used by the pannels. This, therefore, was matter of deliberation *before* they settled the terms of their verdict; and the effect of this, in their minds, must also have been well considered, because, against one of the pannels, the verdict was only returned by a majority of one. Then, after this resolution, they proceed, as they ultimately explained their verdict, and stated what was their purpose throughout, to find the pannels *guilty of sedition, in so far as that they used language calculated to excite popular disaffection and resistance to lawful authority.* This is the result arrived at, then, *after* their deliberation on the word '*intended*,' and that such a result should be equivalent to a verdict of not guilty, is a conclusion opposed, in my apprehension, to every sound legal principle and to the plainest suggestions of common sense. Had the point not occurred on a verdict in a criminal case, I do not believe that such a notion would have occurred to any mind.

Indictments for sedition, as framed according to the law and practice of Scotland, generally set forth in the *minor*, that the accused—'wickedly and feloniously used,' or 'seditiously used' certain language, which is there described as being of a certain character, generally said

to be '*calculated*,' sometimes, but not so often, '*intended*
' *and calculated*,' sometimes '*tending*,'—sometimes is not
so described at all, but left to the construction of the
Court and Jury, and merely said to be '*seditions*.'

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Now, two remarks arise on this the settled style of
the indictments.

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1. That the real and proper averment in the minor, of
the guilt of the pannels, is in the allegation that they
seditionously used the language imputed to them. This is
truly the proper allegation of guilt: The appropriate
place for it: The proper form of it. The description of
the character of the language used is a *different* allega-
tion,—not, in truth, necessary at all,—and when used,
going not so much to the general guilt as to a particular
quality attached to the particular words, in addition to
their plain import, in so far as it is *also* said, that the pre-
cise effects which they are calculated to produce *were in*
the actual intention of the party in the *choice* of them.
Now, this particular averment may be established in
whole or in part, when it is set forth in the indictment.
But the failure to prove part of that particular averment
—*e. g.* the failure to prove that the words were *intended*
to produce the exact effect which it is proved they are
calculated to produce,—does not necessarily, either in
legal principle, or by the style of indictments, or by the
reason of the thing, negative the general averment,
that the pannel used such language, not innocently, but
seditionously, looking to the place, the occasion, the num-
bers present, the circumstances of the time, the wilful
recklessness of all consequences, the violation of his duty
of allegiance, and the general purpose of mischief which
the averment of '*seditionously speaking*' them imports.

If the language is not in itself *calculated* to produce
any impression tending to evil results on the minds of
the auditors—if the language is indifferent, or bears a
meaning apparently foreign to a seditious meaning, but
was intended to import something different, and to be so
understood and applied, then the *particular* INTENT with

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which the words *were actually* in that case *spoken*, and not their tendency, comes to be *the averment* which must be made out; *e. g.* If the words were, 'God save the Queen'—but this was meant and understood in some cant language of seditious orators, to mean, 'Let us depose the Queen,' and were spoken in truth as an exhortation to that effect, it would be necessary to aver and prove the special *intent* with which *such words were spoken*, for their *tendency* would not apparently produce any evil result: And hence, in addition to averring that such words were 'seditiously spoken,' the actual and special meaning or intent with which these particular words were spoken, must be libelled and proved. So also in another class of seditious, such as was also charged in this indictment—a conspiracy to effect a change in the Constitution by force and violence; that particular intent is, then, of the essence of the crime, and the acts, however seditious in themselves, would not prove the charge, if such was not made out to be directly the design and purpose of the conspiracy.

When, on the other hand, the plain and direct tendency of the words or writing is, in the opinion of the jury, to produce evil results, because so calculated, then the particular intent in the mind of the speaker as to the effect of these words, provided he spoke or published them, not innocently, but looking to all the circumstances, unlawfully, comes to be immaterial to the offence of sedition and to the averment of guilt in the indictment.

2. The second remark I have to make is, that when a verdict on such an indictment as this, or on any indictment for any other offence in Scotland is returned, finding pannels guilty, it is never of the offence in the abstract stated in the major. It applies to the facts in the minor. Hence, a verdict, guilty of sedition, in so far as he used language calculated, &c., need not repeat, and such verdicts never do repeat, in so far as he *seditiously* used, &c. This is quite a clear and fixed point. In a case of theft, if the pannels stole only some of the articles, or did not steal

them from a lockfast place as libelled, or under trust as libelled, as aggravations, if the jury return a verdict *guilty of theft, in so far as that he took the watch, leaving out money, or took them from an open drawer, or in a way which excludes the trust, it is not necessary for them to say further, in so far as that he *theftuously* took them.* The words *guilty of theft*, completely establishes the character of the act of taking. Just so, *guilty of sedition*, establishes the character of the act of using the language, else the party could not have been found *guilty of sedition*. This is a point so thoroughly fixed, settled, and plain, that although I alluded to it in the course of Mr Craufurd's address, it was not *attempted to be contested* by Mr Moncreiff in reply. It is a point, however, extremely important in the consideration of this verdict, and of its application to the indictment. In my apprehension decisive, unless the whole averment in this indictment is necessary to the crime of sedition.

In all such questions, the *practice* of the Court—that is the style and structure of indictments in a variety of cases, all of which have been under the notice of the Court and found relevant—comes to be the *law* of the Court. This proposition has received the full assent of the whole Bench on many occasions, and especially on one late occasion, (*Janet Campbell*, Nov. 4. 1846), when only one judge dissented from this rule of law, on a very important matter, so deduced from the practice of the Court as often acted upon.

Indeed, in criminal law, I know nothing truly more dangerous, and if any question as to the privileges of the subject can be supposed to be involved, however indirectly, in this case, more likely, I should say, to be prejudicial to the interests of the subject, than loose, unauthorized, and hasty departure from settled practice, because in one case a pannel or the prosecutor may have accidentally an interest to try to free himself from the rules of such practice.

Attaching, then, great importance to practice, the first

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question I address myself to is this—was it necessary in an indictment for sedition, for the public prosecutor, who has averred that the words were ‘seditiously used,’ to set forth that the words were *intended* as well as *calculated*, to produce the results ascribed to them? If left out, is the offence complete—is the indictment charging the offence equally good? And if, when purposely left out by the prosecutor, the indictment is good, is it necessary that the jury should find what the prosecutor might thus competently leave out as immaterial? If the indictment charging sedition is good, when it says the words ‘seditiously used’ were calculated to produce the results involved, but *ex proposito* leaves out the allegation that they were *intended*, can a verdict be bad which finds guilty of sedition, in so far as, that he used words calculated to produce the evil results, but omits purposely the further and separate averment that they were used with *that* particular intent?

Distinctly, and in terms, the pannels’ counsel did not plead that an indictment would be bad, unless it was said that the words were *intended* to produce the particular results ascribed to them. It was said the proposition was not admitted, but that they would waive arguing the point. But the point is, in my judgment, at the foundation of the whole matter—and no opinion can be sound or satisfactory which is not based on the consideration of the rule and practice of the Court on that leading point.

Let us see how the practice stands,—and this is the more important, because in nearly all the cases to be referred to, the pannels were aided by counsel of the greatest eminence and talent.

1. *Berry and Robertson*, 1793. Here, the question, if doubtful, arose even on the major proposition, which set forth, ‘the wickedly and feloniously printing any seditious writing or pamphlet, containing false, wicked, and ‘seditious assertions, *calculated*,’ &c., and then the publishing of *any such*. Then the minor merely said that they printed and published, wickedly and feloniously, a

' seditious' pamphlet. The counsel were Mr Wight and Mr Fletcher—both zealous constitutional lawyers. But no objection was stated to the relevancy, though remarks were made as to the object of the pannels being only to make gain by the sale—a purpose perfectly consistent with the seditiously publishing; for, I believe, in nine cases out of ten, gain, celebrity, collection of tribute, and so forth, are the real motives, and that the parties speaking or publishing the sedition, know that their trade would be destroyed by any actual commotion; and often exhort to peace, at the very same time they use the most inflammatory and seditious language. The jury found that the one printed and published,—the other published only,—*the pamphlet* libelled on. This verdict was objected to by Mr Wight, and afterwards also by Mr Henry Erskine. The argument is most instructive. Mr Wight contended that the allegation that the pamphlet was *seditious*, or *calculated* to do so and so, was not affirmed by the verdict. In that argument, the *tendency* of the writing is taken to be the point to be established in a case of sedition. Then he argued the criminal purpose or illegality of the act, was averred in the indictment, in the words 'wickedly and feloniously;' and that this, the proper averment of the purpose or intention, was not affirmed by the verdict. In that debate, the illegality of the act is properly taken on both sides to be averred in that part of the indictment; but it is not supposed that the particular intent which might be ascribed to any particular words, was of the essence of the crime. As Mr Henry Erskine well sums up his argument against the verdict—The libel says, 1. That the pannels printed and published the pamphlet; 2. That they did this wickedly and feloniously; and 3. That the pamphlet was seditious, and these facts must be found. The judgment on the verdict might also be referred to in support of the view I take of this verdict as a very important authority. But I pass over that as of less direct application.

2. *Smith and Memmons, 1793.*—Major,—wickedly and

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feloniously publishing any seditious writing, TENDING to create a spirit of disaffection, and to excite tumult, &c.

3. *Skirving*.—Major, sedition—Minor, Whereas a seditious or inflammatory writing, *calculated* so and so, was sent to Skirving to be circulated, he did circulate the same. This part of the indictment was distinct and apart from the after charge as to the Convention.

Mr Blair—who alone conducted that prosecution—thought it necessary to state his views on the 2d part of that indictment at considerable length,—the more so, as we all know, because, from his absence at the other trials (an absence not peculiar to them) a very false report had been raised that he disapproved of the prosecutions; but, on the first part of the indictment, he simply said he held the crime to be completely and well laid in the libel.

4. *Morton, Anderson and Craig*—the major sets forth only, ‘uttering seditious speeches, tending to create,’ &c.

I think the minor comes to the very same thing, as no intent as to the particular words set forth is annexed to them, different from the seditiously or wickedly uttering them. This was the first case, I believe, in point of time, and an argument was stated, though hardly amounting to an objection. The Judges gave their opinions *seriatim* on the indictment. Lord Henderland particularly gives his opinion on the major I have quoted. I think the rule of law is well stated by Lord Justice-Clerk Braxfield, vol. xxiii. p. 15, especially in his reference to the case of blasphemy as analogous. He observed, ‘that it was no good defence to say, that the words here spoken were mere *verba jactantia*. They were obviously of a most wicked and seditious import; and no plea of rashness, wantonness, or conviviality, could be admitted as an excuse. His Lordship illustrated this by referring to the horrid crime of blasphemy, where, though the words uttered could be nothing else than wind, or foolish in the extreme, still they were impious and wicked, and might, in certain cir-

' cumstances be cognisable and severely punishable by a
' criminal court.'

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5. *Muir*—the major there described the publications as *calculated*—as of such and such a tendency—as tending to produce, &c.

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In the minor a specific *intention* is in some cases distinctly ascribed to the pannel—in others not—according to the nature and import of the words and publications.

A great deal is said of this, and some of the more noted cases at this time, by persons who, I firmly believe, never read the indictments, and confound the acts and publications with their opinion of the punishment. I refer to them as unquestionably relevant indictments for sedition—whether parties might have concurred in the verdict returned by such men as Mr Horner or not.

6. *Alex. Leslie*.—*Major*, sedition; as also the wickedly and feloniously circulating any seditious publication, or any publication *tending* to vilify, &c. the established religion.

Minor—averred the wickedly and feloniously circulating seditious publications; also writings *tending* to vilify: the seditious publications are also stated in another place as *tending* to alienate, &c. Then the blasphemous work is again described as *tending*, &c.

7. *T. F. Palmer*.—*Major*, wickedly and feloniously writing any seditious or inflammatory writing, *calculated*, &c.; also wickedly and feloniously publishing any such sedition.

Minor—described the writing as of a *wicked and seditious import*. To that indictment elaborate objections were stated, at extraordinary length, by Mr Hagart; but limited to this, viz., that the writings set forth even as matter for the Court in the first instance, not *calculated*, on sound construction, to produce the effects ascribed, and were not of the *import* and *tendency* stated, but that the *scope and burden* (as Mr Hagart put it) were different. In a very long, zealous, and elaborate argument, that is the only objection taken.

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Mr M'Conochie, first Lord Meadowbank, puts his answer on the ground of the *import* of the writing.

The opinion of the Court assumes the import to be *the* matter for decision. Indeed, if special intention had been ascribed to any particular words, or had been necessary in law, the short answer would have been,—the import of the publication we need not consider, and is immaterial, since the particular intention with which special words were written, must be averred and is to be proved, and has not been averred although essential. No such view occurred to any one. In that case, the pannel was assisted also by Mr Clerk.

The case went to the Jury.

I am not sure that there is to be found any where, on the whole, a better practical exposition of the law of sedition than in Mr Clerk's speech to the Jury for Palmer. We have it revised in the State Trials by himself, and it is a beautiful instance of that great power of discrimination, and masterly precision of language which he possessed in so eminent a degree, along with the highest order of legal talent. In the whole of that speech he admits that the import and tendency of the writing is the point in sedition, *unless the party has a legal object in view.*

After explaining the general right of the subject to discuss such important objects as reform, with fervour and zeal, he says—'He who speaks or writes to raise discontent or disturbance, or to bring the Government into hatred or contempt, is seditious, and he whose speeches or writings have that tendency is seditious, unless in either case the speaker or writer has a legal object in view.'

Then, when he comes, after a long general argument as to the latitude belonging to the subjects of this country to comment on the terms of the publication in question, his argument is not whether such and such effect are intended; but very specially and particularly he says—'Gentlemen,—I will not contend that a writing,

' malicious,—seditious in itself, and calculated to raise
 ' sedition among the people—can be excused by the fact
 ' that no sedition was raised. In general, it is true in
 ' criminal cases, that intention is not sufficient to crimi-
 ' nate, unless the crime be perpetrated. But, in cases
 ' of sedition, I am disposed to admit that the intention
 ' is carried into effect, and the crime is committed by the
 ' act of publishing the seditious writing. But, gentle-
 ' men, what are the circumstances here? It is not
 ' proved that the purposes of this society went any far-
 ' ther than a moderate and a national reform. The
 ' hand-bill complained of the very grievances which are
 ' always enumerated by reformers; and it was not either
 ' intended or calculated to raise sedition. It is true,
 ' indeed, that every publication against the measures
 ' of Government must necessarily raise discontents in
 ' the minds of the people; for no such writing ever was
 ' published with any other intention than to shew the
 ' people what their true intent was, and that it had not
 ' been consulted by Government. Discontent is un-
 ' avoidable where public measures are wrong or thought
 ' to be so. But discontent is very different from sedi-
 ' tion. The people may be perfectly quiet amidst the
 ' greatest discontents. To render a writing seditious, it
 ' must be intended or calculated to urge the people to
 ' actual violence, and how can it be said that the hand-
 ' bill is of that description? Where is the excitement
 ' to illegal acts of any sort?'

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In the charge to the jury, Lord Abercromby, in a most temperate, lucid, and fair charge, puts the question exactly as Mr Clerk put it—whether the writing libelled on be of a *seditious tendency*.

8. *Stewart and Elder*.—Major, wickedly and feloniously writing and printing any seditious libel: *Minor* described it as seditious; also which inscriptions were obviously *calculated*.

9. *Alexander Scott*.—Major sedition, as also wickedly and feloniously circulating and printing any writing of a

No. 6. seditious import, and tending, calculated, &c. Minor
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High Court. Other cases of the same sort might be cited from that
Nov. 25. period, but there are others of a later date. It is suffi-
1848. cient to refer to one, the most noted in recent times.

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10. *M'Laren and Baird*, 1817,—which attracted great attention. Major, sedition. Minor, states that they wickedly and feloniously delivered seditious speeches, *calculated*, &c.; the same is said of the publication.

These pannels were very ably assisted, and I know from my friend Mr Campbell, of counsel for M'Laren, that Mr Clerk, who conducted for M'Laren, bent his whole mind to the case, as zealously as he could have done in younger life, and directed anxiously the statement which Mr Campbell made on the indictment before trial. Mr Campbell says the passages will be a matter for sound construction for the jury. The relevancy was not objected to. For the other pannel, Mr Jeffrey ended his explanatory statement to the Court with stating, after a short explanation, that the object of the publication was to get money; 'that as to relevancy, much will depend on the interpretation to be given to the words 'libelled on.' And that indictment went to the jury without any expression whatever, annexing to the particular words any special intention, or implying that, in addition to being seditiously spoken, the words were *intended*, as well as *calculated*.

Intended was left out in the indictment. The conviction was in terms of the indictment, and a good verdict. Intended is in this indictment; was it necessary to the charge? I hold not. The jury leave it out. Then, if not necessary to the *charge* in any form, how shall the *verdict* fall, or be equivalent to one of not guilty?

This indictment charges sedition in the major.

The minor sets forth that Ranken did openly and '*seditiously*,' at a public meeting on Burntsfield Links and other occasions, utter certain language, and the same is averred as to Hamilton; and the indictment closes with

the general statement, that the whole or part of the language above set forth, was *intended* and *calculated*.

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Now, that the whole of the averments in an indictment need not be proved and affirmed by the jury, if what is of itself clearly relevant is found, is in the general case admitted to be clear law. That this indictment was perfectly relevant without the words *intended*, and with *calculated* alone, I apprehend to be a point fixed by authorities, and clear on principle. That that which was unnecessary, need not be found, is a point also quite clear in our criminal law and practice. Hence, in the abstract, and in any other case, this verdict is unimpeachable. But then, it is said that the omission, purposely by the jury of 'intended,' negatives the *whole averment of guilt* in the minor, and renders the verdict one of not guilty in the case of sedition. How that should be, if 'intended' need not be in the indictment at all, I have not been able to comprehend. But the whole argument is founded on a complete misapprehension, both of the legal principles applicable to our indictments, as also to the crime of sedition.

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I have already adverted to the misapprehension of the principles on which our indictments are framed.

1. The proper averment of guilt in the minor in this charge of sedition, is in the allegation that the pannel did openly and 'seditiously,' and in presence of great numbers, utter the language imputed to him; the averment which follows is properly descriptive of the *character* of the language so seditiously used. To add *intended* to *calculated* in that description is really, when carefully considered, an allegation quite *misplaced*, as well as *unnecessary* to complete the *full averment of guilt*. It may be true that the exact effects which the language is *calculated* to produce, were also *intended*. But that is not the necessary or proper averment of guilt in a case of sedition in the minor. The averment of guilt in the minor is in this, viz., that the party did seditiously utter language *calculated*.

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2. The second misapprehension is in assuming that this, the proper averment of guilt, is not affirmed by the verdict when the Jury, combining, as every verdict does, the major and minor, with the latter of which the jury have particularly to do, find the pannels *guilty of sedition*, in so far as that they used language *calculated* to excite popular disaffection and resistance to lawful authority.

3. But the main misapprehension is in regard to the law of sedition; and, in my opinion, it is a very great and serious misapprehension.

The crime of sedition consists in wilfully, unlawfully, mischievously, and in violation of the party's allegiance, and in breach of the peace, and to the public danger, uttering language calculated to produce popular disaffection, disloyalty, resistance to lawful authority, or, in more aggravated cases, violence and insurrection. The party must be made out not to be exercising his right of free discussion for legitimate objects, but to be purposely, mischievously, without regard to his allegiance, and to the public danger, scattering burning firebrands, calculated to stimulate and excite such effects as I have mentioned—reckless of all consequences. As Mr Clerk said in Palmer's case, 'He, whose speeches or writings have 'that tendency, is seditious, unless, in either case, the 'speaker or writer has a legal object in view.

Now, in this case, I apprehend that the law does not look for or require, besides this illegal spirit, this general dole or legal malice, the additional and special element of the intention, or *purpose*, with reference to the precise *effects* which the words are *calculated* to produce. If such purpose is also proved, the case will be one of more deliberate, more dangerous, and more aggravated sedition. But very often the precise *effects* which the words are calculated to produce, are not at all what the party *intends*, and still more, not what he has brought his own mind up to, just because they point to immediate violence. The party guilty of sedition in uttering such language is often only playing the part of a

field orator, hallooed on by shouts from an excited and turbulent crowd—often of the worst characters: He has to sustain his part as a leader; has to outbid in exaggeration and violence the man who spoke before him; has got so familiarized to violent and dangerous language, that he does not think how they may affect others; has to secure a liberty for bold language, and often to secure pay for such achievements: He is aiming, perhaps, at being chosen as a delegate; thinks, perhaps, that by *intimidation* he may concuss and frighten others into an exaggerated notion of the numbers and power of those who venture to utter such language: He is reckless as to what he says; thinks and cares little about it, if it answers the object at the time; but all the while he may not desire or intend the precise effects which his words are calculated to produce—it may be of instant violence. Yet of sedition he is clearly guilty, if these reckless words are calculated to produce such results.

I take what appeared in another part of this case as a very apt illustration of how little the intent to produce the actual effects which the words are calculated to produce, enters into the guilt of sedition, in point of law, as a necessary element. Your Lordships, who sat with me, will recollect that, in reference to the part of the case charging conspiracy, and the purpose of forming a National Guard, for effecting changes in the constitution by force—as to which the jury very correctly found the charge not proved, but only not proved—we heard a great deal of the language and proposals of a person, whose warlike language (for it is lamentable to think how commonly and frequently the purpose of arming seemed to be talked of) obtained for him the nickname of Brigadier-General. Now, at a public meeting, in a hall in Edinburgh, before 600 or 700, at which one of the pannels was not present at all, this individual—I am assuming the facts for the sake of illustration, of course not as true—openly and distinctly purposed and exhorted the meet-

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ing to form a national guard of 1600 men, in companies of 400, two of which were to be armed as musketeers, and the other two as lancemen, and enlarged on the necessity of chartists and all others resorting to arms; which seditious proposal was prefaced, one of the witnesses who opposed it, stated, 'with a great rhodomontade of poetry;' and Mr Logan, whose object was to shew that his clients had always discountenanced this individual, told us, as a proof of the extravagant pitch of heroism to which he worked himself up (though that part of the speech was not in evidence,) that he, at last, declared that he was ready, and hoped, to head this body against Her Majesty's troops, and that he had no doubt he would rout all whom he might encounter, and out-general the Duke of Wellington himself. Now, if an indictment had been preferred against this party, who was said to have left the country, charging sedition, and, in the minor, setting forth that he openly and seditiously, at a public meeting, made this proposal, and used such language, and had further averred that the language was *intended* and calculated to stir up the people to immediate insurrection under him, and to array themselves under him as a leader against Her Majesty's troops; and if such proposal and language had been proved, I suppose no Jury of reasonable men (unless the defence of insanity had been established,) could have hesitated to say that such a party was guilty of sedition in using language of such import and tendency. But it would have been very difficult, probably, to satisfy them, at least it would have been very difficult to satisfy me, that this most redoubtable personage did really *intend, or desire*, to lead any attack against Her Majesty's troops, or to encounter, I do not say, the Duke of Wellington, but even to stand the steady fire of a serjeant's party of the very oldest pensioners on the list. That would have been about the last thing that I should have believed, that he had any intention of doing. Yet, of sedition, such a proposal, and language so calculated, would justly convict a party. This is just

the distinction applicable to this case and verdict, and a practical illustration, which shews the principle of the law, and the principle of our indictments. The exact effect which the words are calculated to produce, is one thing that may or may not be intended. The orators, on such occasions, often know very little, and think very little, of the effects which their words are calculated to produce. But the wilfully and mischievously using such language against their allegiance, and against the peace of the country, and the rule of law and order, makes them guilty of sedition.

This wilful, disloyal, and mischievous spirit in the use of such language, whereby popular disaffection and resistance to lawful authority is directly encouraged and excited, makes the crime of sedition, even although the language used may not have been *intended* to produce the exact effects which it is calculated to do.

Besides the general, unlawful, wilful, and disloyal spirit, which is the illegal purpose charged by the word '*seditionally*,' to require that the precise *intention* to produce the exact effects which the words are calculated to produce, should be proved over and above a finding that the party was seditious in using the language, would, in truth, surround much most mischievous and dangerous sedition with complete impunity; for 1. such additional intention it may be very difficult to prove; 2. The whole appearance, and manner, and conduct of the party, of his associates, and of the meeting, may really satisfy all that the exact effects which his words were calculated to produce, were not really and solely designed by him. The man may have been too excited to have any such deliberate cool design as instant insurrection before him, although his words were directly calculated to produce that result. Nay, one might be quite satisfied of the reverse,—that his object was to keep up great and alarming discontent and agitation for his own base purposes, to secure weekly or yearly contributions, as a reward for his trade; and that he well knew that any actual outbreak would at once

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lead to the extermination of his calling, and that such results were what he most dreaded, though he was using language well calculated to produce these effects, unless he at the same time cunningly kept under, by his influence, the spirit he was trying to rouse. But though a Jury shall be satisfied upon that point, is the crime not that of sedition, if the language is calculated to produce the results, and if the party is acting unlawfully, contrary to his allegiance, and to the peace of the realm, in using such language in the circumstances, and on the occasion in question, having no justification in object or occasion?

Hence, then, the proper guilt of sedition (of that kind, I mean, which is here prosecuted,) consists in the unlawful and disloyal spirit in which, contrary to the subject's allegiance, and in violation of the peace and order of society, and of the rule of law, language or publications are used and circulated, calculated to produce, as here found, 'popular disaffection and resistance to lawful authority.' And it is a misconception of the law to suppose that the effects which the language is so calculated to produce must further be specifically *intended*, so that the Jury must find that the words were *intended* as well as calculated to produce these results. If such had been the law, every conviction on an indictment not containing that additional averment in the minor, has been a bad verdict. But I hold the law to be fixed by the cases in point of principle and practice.

If the view of the law I have now stated meets with the concurrence of the Court, then, most clearly, the objection to this verdict wholly fails.

I have carefully reviewed the authorities, and I am satisfied that this view is the sound result to be derived from them all.

It is part of the very misconception I have adverted to, to take the general passages descriptive of sedition, and in the words therein employed, relative to the unlawful purpose and spirit of the party, necessary for the crime of sedition, to be applicable to the construction of an in-

dictment framed like the present, and to the particular and unnecessary averment contained in the present, over and above the averment that the language was openly and seditiously spoken, viz. that the same was intended, as well as calculated, to produce such and such results. I do not so understand the passages in Hume at all. I do not think they have the least application to the very special question as to this particular and specific averment, that the words were intended to produce the results mentioned.

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At the same time, I am not prepared to adopt the general description of Hume as to sedition, as of perfect accuracy or precision, even as a general exposition of the law. And I cannot state, consistently, the grounds of my opinion, without meeting directly the passage founded on. I should say that his doctrine is too unqualified and too abstract on both sides, that it restricts too much, in words at least, the subject's right of discussion and speech, and in what is to be proved, requires more to be established on the part of the prosecution than the nature of the offence, the general principles of the law, and the peace and welfare of society, prescribe as essential elements of the case. He seems to put the crime of murder and sedition on the same footing; in that I differ; and he does not seem to me to draw the distinction fully between sedition and those treasons in which a *special intent is the offence*. Indeed some of his expressions seem more applicable to such treasons than to sedition.

In his chapter on Sedition, Hume refers back to the part of his work on Leasing-making, for his explanation of the '*general notion* of the offence of sedition,' as he terms it, that he need not further describe it; and says, p. 352:—'It is further to be observed concerning lease-making, that it always has relation to the King, or (if that is not abolished by the long disuse) to some eminent individual connected with the Court, and can only be committed by means of false speeches, or reproachful and contemptuous words thrown out against him,

No. 6. ' But sedition is a crime of a far wider and a more various
 John Grant ' description, as well as of a deeper character, and may
 and Others, ' equally be committed in relation to any of the other
 High Court, ' parts of our frame of government, or to any class or
 Nov. 25. ' order of our society, and though no special calumny is
 1848. ' circulated against the King or any other individual,—
 Conspiracy ' as by forming combinations, taking resolutions, spread-
 & Sedition. ' ing doctrines and opinions, or, in general, pursuing any
 ' such *course of measures and actions* as tends directly to
 ' the resistance of the legislature or established govern-
 ' ment, or to the new modelling of the state without the
 ' authority of law. No invective, therefore, how violent
 ' soever, against monarchy in general—no abuse, the most
 ' outrageous, of the British Constitution—no proceedings,
 ' though tending ever so plainly to abolish that venerable
 ' system, and set up a new form of government in its
 ' room,—would justify the charge of leasemaking. Be-
 ' cause, though involving the state and office of the King,
 ' as a part of the constitution, such projects are levelled
 ' against the whole system, and are not moved out of
 ' personal grudge to the prince upon the throne, but
 ' spring from a deeper and more malignant principle, and
 ' employ also more direct means and more extensive,
 ' than the mere slander of the character and conduct of
 ' the King. Thus sedition is a crime against the state,
 ' and holds the next place after treason, to which it is
 ' nearly allied, and which it very often, but by a short
 ' interval, precede. The other is a personal offence or
 ' verbal injury offered to the King, and is considered by
 ' the law in so much a more serious light than other
 ' wrongs of this class, partly on account of the peculiar
 ' regard it has to his peace and tranquillity, and partly
 ' by reason of the possible evil influence of such an ex-
 ' ample on the affections and dispositions of his subjects.'

This explanation, to which Hume himself refers, as his proper description of the offence, certainly gives no countenance to the argument against this verdict. And it was an occasion, in which, as he himself says, great

discrimination and precision was necessary, viz. in drawing the distinction between leasing-making against the sovereign, and sedition. Whether, after the Union, any such distinction can be recognised, or whether the instances he gives of the former are not proper cases of seditious libels, I need not consider. The remark as to sedition being nearly *allied* to treason, and which it may often, but by a very short interval, precede, may be correct to the limited extent, that parties guilty of the one may be led into the other. But if it imports, as it seems to do, as matter of doctrine, that the two crimes are nearly allied, in the elements, which are essential to the several crimes, I dissent wholly from the opinion. Such constructive treasons as were attempted to be made out in the case of Hardy and Tooke, were indeed allied to sedition, or rather were nothing but sedition. But the distinction between the crimes is as broad as law and reason can make out any line of difference.

I notice this remark, because I trace the influence of this 'notion,' that sedition is nearly allied to treason, on the expressions and opinions which occur in the subsequent part of the work. And this tendency to view the two as so closely allied, might arise from the fact, that the same facts had been founded on in the prosecutions in Scotland for sedition, which were so strenuously urged in England, for the conviction of Hardy and Tooke of treason. The error is, however, a very grave one; it tends to make the law of treason too easy, the proof of sedition more difficult than law or the reason of the thing requires. There is no *alliance* in the law between them, to use Baron Hume's expression, or rather, to use a more correct legal expression, there is really no identity in the essential elements of the two offences. 1. The law of treason is wholly statutory; of sedition it is by common law, both in England and Scotland. 2. In treason, unless when war is actually levied, a certain specific *intent* is of the very essence of the crime, and unless that specific intent is proved, the general purpose of commotion,

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confusion, and a general disloyal mischievous spirit, leading to most dangerous evils, is not enough. Hence the specific *intent* of the mind is, in most cases, of the essence of the crime of treason. I hold this to be the turning point of the case, and in sedition there is no such special and limited law.

Baron Hume does, however, while he refers back to his former description of sedition, as his explanation of the general notion of the crime, go on in the chapter on Sedition with a general sentence, not very consistent, I admit, in expression, or, perhaps, purport, with the passages to which he thus refers as his proper text on the subject: He says, p. 553:—‘ I had formerly, in drawing the line between sedition and leasemaking, a proper occasion to explain the general notion of this offence. And I shall not now attempt any further to describe it (being of so various and comprehensive a nature) than by saying, that it reaches all those practices, whether by deed, word, or writing, or of whatsoever kind, which are suited and *intended* to disturb the tranquillity of the state—for the purpose of producing public trouble or commotion, and moving his Majesty’s subjects to the dislike, resistance, or subversion of the established government and laws, or settled frame and order of things.’

Now, if this is to be taken as a practical rule, according to which indictments are to be framed, and juries to be directed, and as referring to anything beyond the general malice and illegal purpose, which is involved in any man uttering seditious words without a legal excuse, I must very distinctly say that I cannot acquiesce in that as a correct definition of the law, or leave the protection of society to rest on the requisites there stated as necessary to constitute sedition—if the learned author meant more than what is stated in Starkie, in a passage I shall afterwards refer to, as to legal and technical malice or purpose.

But is the author consistent as an exponent of consti-

tutional law, when in the next sentence he says:—‘ Under
 ‘ this description would fall a work, such as it has been
 ‘ reserved for the wickedness of the present age to pro-
 ‘ duce, which should teach that all monarchy and heredi-
 ‘ tary rank, or all clerical dignities and establishments of
 ‘ religion, are an abuse and usurpation, contrary to reason
 ‘ and justice; and unfit to be any longer suffered. Or,
 ‘ though the piece should not set out on so broad a prin-
 ‘ ciple as this; if it argue, like many compositions which
 ‘ have lately been offered to the public, that the power
 ‘ of the King is overgrown, and ought *at any hazard* to be
 ‘ retrenched; or that the Commons are a mere nominal
 ‘ and pretended representation of the people, and entitled
 ‘ to no manner of regard; or that the whole state is full
 ‘ of corruption; and that the people ought to take the
 ‘ office of reforming it on themselves. All exhortations
 ‘ of this kind, whether any commotion follow on them or
 ‘ not (for if any do follow, it will not depend on the
 ‘ degree, fashion, and immediate occasion of that disturb-
 ‘ ance, whether it is not treason in those who partake of
 ‘ it), are undoubted acts of sedition; being calculated and
 ‘ employed for the direct purpose of loosening the hold
 ‘ which the Government has of the opinions and affec-
 ‘ tions of the people, and thus preparing them for acts of
 ‘ resistance or aggression.’

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On such publications I should say that the question for the jury is practically very different,—are they really abstract discussions, or are they calculated to alienate the people of *this* country from their allegiance, and to produce insurrection *here*, as a result clearly following from the way the questions are treated? If so, then, whether intended or not, it is enough that they are so calculated—and so not very consistently the author holds: for he even includes within the crime of sedition, treatises, although only general, and only indirectly calculated to lead to such ends.

Now I require less than his general paragraph here requires, and much more to make out sedition, than his

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illustration states to be necessary. Every other illustration and case he gives, is stated in terms directly inconsistent with the general passage on p. 553, if it is to be construed in the way the pannels contend for.

E. g.—Speaking of the Scottish statutes which made some acts of sedition treasons, which were repealed by the 7th Anne, c. 21, and the words of all of which are against the strain of that passage on p. 553. He says, p. 555:—‘ Now, each of these enactments, in its order, is an acknowledgment and a confirmation of the doctrine of the common law; proceeding, as they all do, on the notion of the wickedness of all such practices as tend to impugn the principles, and shake the security of the established government, or to draw from it the reverence and affections of the people; and raising such offences from their natural rank of sedition to that of treason, by reason of the exigency of the times. Being now again lowered from that degree by the statute 7th Anne c. 21, which abolishes the peculiar treasons of the law of Scotland, these, and all other instances of transgression in the like sort, as *mala in se*, and evils, too, of a very high order, retain, of course, their proper place and quality as acts of sedition at common law; whereby the offenders are justly exposed to the highest arbitrary punishment. On *these grounds*, many convictions have of late years been obtained.’ And in a note, the case of M'Laren and Baird, among others, is quoted as an illustration of ‘ *these grounds*.’

Again—in distinguishing between a publication exciting to riot, and one seditious, he says, p. 558:—‘ But if any one print and publish a discourse, wherein he describes the Legislature as corrupt and incompetent to its functions, and advises to hold a convention of the people, who shall reform the government after their own fancy, or on a new and more popular system, proposed in this discourse—then is the author *guilty of real sedition*; for he has taken a most matured *step or measure* towards disturbing the tranquillity of the State.’

But that same page illustrates how much his views were influenced by the notion that the law of sedition and of treason were nearly allied in principle; for he says, p. 558:—‘ The crime of sedition lies, therefore, in ‘ the stirring of such humours as naturally tend to ‘ change and commotion in the state. So near, indeed, ‘ is the alliance between sedition and treason, that, if, instead of sowing the seeds of a hostile disposition to the ‘ government, or preparing such materials as in time may ‘ kindle into a flame, the offender shall seek the same object more immediately, by a direct and definite exhortation to the people to rise at that particular season, as ‘ advantageous for gaining these ends; this measure, like ‘ a consultation to levy war, seems to be nothing less ‘ than an act of compassing the death of the King; being ‘ a decided and a material step towards the doing of that, ‘ which cannot be done without the plain danger of the ‘ Sovereign’s life.’

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Now, on this passage I must observe, that no two offences seem to be more directly contrasted in the elements necessary to constitute guilt, than sedition and treason, here said to be allied—I should say, even here contrasted—the one consisting in the *tendency* to produce general disaffection, which may never lead to actual outbreak; the other, in the direct object or intent of immediate insurrection. The former may be far more mischievous; for open treason is easily dealt with—is easily put down—often puts itself down, and generally expires and burns out in the act of kindling it. But in the latter there is direct, immediate design; in the former, the effect which the act is calculated to produce, is what is looked to, and for that the party is justly amenable if he has no legal object—for the effect is most dangerous, and the speech calculated to produce that effect, is, as Mr Clerk says, seditious. The distinction between sedition and treason is then as broad as the necessity in the latter offence of positive design of an immediate insurrection can mark any such difference.

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It is not agreeable, nor is it often necessary, to make these comments on passages of any institutional writer, especially of one whose authority is so great, and whose services to the law are so incomparably beyond that of any writer on any branch of the Law of Scotland, except Lord Stair. But when we are required to lay down the public law of the realm on matters so important to the peace and good order of society, and in reference to the rules which must restrain within the duty of allegiance, the right of free speech and of constitutional agitation of all questions in which any classes of the subjects are interested, we are bound very carefully to consider the authority quoted to us, and not to surrender our superior and higher province of Judges to the opinions of any private author, however eminent.

If the passage in Hume, founded on by the pannels, really bears the construction they put on it, or rather, I should say, is applicable practically in such questions as the present technical point, then I am constrained, but without any hesitation whatever, to deny that it is an accurate exposition of law.

I shall not pursue the subject further. I will only observe, in conclusion, on this subject—that when Hume puts murder and sedition as crimes analogous in principle, I think he brings out very prominently the error which pervades the general passage on sedition founded on by the pannels. So far from holding that any such analogy exists, so as to restrain within corresponding limits the two offences, I desire to say decidedly, that I should hold the crime of sedition in its analogy or corresponding principle (if such is at all a safe principle of judgment), to answer to the analogy of all charges of culpable homicide, of more or less aggravated character, as well as to, the more direct intent which is in cases of murder, and may be also in sedition.

A party is legally answerable for the death of another, caused by his unlawful act, calculated to produce such results, although he may not have intended any such

catastrophe, if he acted recklessly, and without regard to the safety of others. Yet he is not in all cases guilty of murder, but of culpable homicide.

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And this is the corresponding case in analogy to sedition, if such analogies are not most unsafe grounds for legal reasoning. In sedition, the effect of resistance to lawful authority, as an actual result to follow from the words used, may not have been intended by the party; but if the language is calculated to produce that result, is seditiously uttered, contrary to the subject's allegiance, and to the danger of the peace of the realm, I hold, without doubt, that the crime of sedition is completed.

Still the authority of Hume cannot be used against this verdict, except by mistaking and confounding the question as to the general doctrine with the application of the doctrine to our indictments.

I think the law is more correctly stated by Mr Clerk, in the defence for Palmer, which I have already adverted to.

Neither do I think a correct use has been made of one passage, or rather of one word in a passage, in the charge of my venerable predecessor to the Jury, in the case of *McLaren and Baird*. In the first place, on turning to the original edition of that report, from which the copy in the state trials is printed, I do not find the least trace that that charge was afterwards revised by his Lordship. On the contrary, in the preface, Mr Dow, who certainly had not attained to the accuracy of modern reporters, not only does not state any such authority and sanction, but apologizes for the great difficulty of preparing a correct report. And the report of the charge is introduced in the following somewhat apologetical manner,—
'The Lord Justice-Clerk addressed the Jury in the following manner,' different from the reports of the speeches of counsel, and certainly implying that it is but an imperfect report. The Lord Justice-General informs me that he has not the slightest recollection of having revised his speech; that he is sure Mr Dow never applied to him

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for any such purpose, in any case at all, and, therefore, that the verbal accuracy of that report of his charge ought not to be relied on as any expression of any advised opinion of his.

Then, again, Mr Jeffrey's argument as to intention, on which he asked for a direction, wholly related to the general unlawful purpose which the words *wickedly and feloniously* in that indictment implied, or which '*sedition*' '*ly*' implies in this, and did not relate to the intent to produce the exact results which the language was calculated to produce. This, I think plain, on reading his speech, which looks as if it had been corrected. It is to that general doctrine, in the law of sedition, that a part of the charge is directed. But, I own, I can the less rely on the verbal accuracy of that report, for criminal *tendency* and criminal *intention* are used as exactly equivalent expressions in the sentence in question, and, therefore, in this argument, that report really cannot give us correctly what was stated, or clearly would be an authority against the pannel's argument.

As I read the charge, I do not think it had any reference to the special point here raised, even indirectly.

Looking to all other practical expositions of the law, I find the law stated exactly according to my apprehension of it. I say practical expositions, for I value a direction to a Jury, by Judges of authority, intended to guide them, or the collection of the law therefrom deducible in works having direct reference to the way a Jury is to be directed, as far more useful than mere general definitions of the crime in the abstract.

I concur entirely in the way the law is stated for practical objects, in Starkie on Libel, in the Criminal Division of his book, 2, 129, 130; Blasphemy, 140, 141, 147, 151-2; 2 Starkie, 175: By Lord Ellenborough, at p. 177; again at 182-3—which very important—as to the distinction between the unlawful purpose and the sort of intent which in this indictment is superadded very erroneously and superfluously, as to the special results which

the words are calculated to produce. So Lord Holt put the matter in a case of great note, 188. See also Lord Ellenborough, 193; again p. 207 and 216. On this I observe, that there is nodistinction in principle as to the offence of sedition, whether it is committed by language or by publications—very great difference, indeed, as to the sufficiency of the proof, as to the allowance to be made for the inexperience and temperament of the speaker—the extent of the mischief, and such like considerations, but none as to what constitutes the offence, 217.

As to intention, again, at 240, 244, 258, the passages are most material, and directly applicable to this case. 'It is, however, important to observe, in respect of this class of cases, where the intention of the publisher is the test of civil or of penal liability, that with a view to exemption from criminal as well as civil responsibility, the mere abstract intention of the party cannot protect him in the absence of facts, which constitute an occasion recognised by the law. The law allows no man to defend himself by saying, 'I did an act, in itself injurious, mischievous, and illegal, but I did it with an excellent intention.' And it must also be remarked, that a publication not warranted by the nature and exigency of the occasion, cannot be justified in a criminal any more than a civil proceeding; for if the occasion does not justify or excuse the act, neither, on the principle just adverted to, can mere abstract good intention supply a sufficient defence.'

Such is, as I understand, the purport of the proposed definition by the Criminal Commissioners in England, when the whole of their passage is taken:—'Whosoever shall maliciously compose, print, or publish any seditious libel, expressing or signifying any matter or meaning tending to bring into hatred or contempt the person of Her Majesty, or her government, or the constitution of the united kingdom as by law established, or both Houses or either House of Parliament, or to excite Her

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 and Others. ' wise than by lawful means, shall incur the penalties of
 High Court. ' the eleventh class.' Here, the word '*intended*' is equi-
 Nov. 25. ' valent in reasoning and legal import to ' wickedly and
 1848. ' feloniously' or ' seditiously.' It is not used with refer-
 Conspiracy ' ence to any *intent* directly to produce the precise results
 & Sedition. ' which the language of the libel *tends* to produce. The
 8th article of the same section also shows this to be their
 meaning; and the above definition distinctly comprehends
 and supports this verdict as sufficient when applied to
 the indictment.

Concurring in the view of the law as thus explained, it appears to me to be very clear, that a verdict finding the parties guilty of sedition, in so far as that they used language calculated to excite popular disaffection and resistance to lawful authority, on this indictment, is a good conviction in point of law, and that, on the motion of Her Majesty's Advocate, sentence must be pronounced on this verdict. But I must add, in conclusion, that it is matter of satisfaction to me, that the Jury did leave out the word *intended*, in the special way in which it was inserted in this indictment—not only because the case is thereby presented to us in a much less aggravated light, but also because if I had been on the Jury, as the more serious charge had not been proved, I believe that I should have returned the same verdict with that which is recorded.

LORD MACKENZIE.—I concur. I think the crime of sedition is sufficiently constituted by using, whether in printing, or writing, or orally, language calculated (which, of course, means plainly calculated) to excite popular disaffection, and resistance to lawful authority, provided this be done wickedly or seditiously, *i. e.* without lawful justification or excuse. I do not think that to constitute sedition, it is essential that there shall be in the delinquent a desire or intention to excite this disaffection and insurrection, or resistance, provided he intends to use

the words, plainly calculated to excite these, and uses them ; and that without justification or excuse. It seems to me clear, that this last, *i. e.* using the words, is enough to cause the evil of the crime, *i. e.* danger to the public, and that the want of justification or excuse is sufficient to make the committer of it answerable criminally. And if such an act be a crime at all, if it be not lawful, it can be no other crime than *sedition*. We never could say, that it was a crime, but not *sedition*, and so not falling under the recent statute, which limits the punishment of *sedition*, but does not limit the punishment of any other crime. Can we then hold such conduct not to be criminal at all ? I think that impossible.

Put the case, for instance, that a man, without any justification, or excuse, prints and publishes a pamphlet, containing words plainly calculated to excite popular disaffection and insurrection, or resistance to lawful authority ; and that this is proved against him ; but that he proves, *per contra*, that his previous conduct was highly and zealously loyal ; that accordingly, he had at first refused to print the pamphlet, and had at last reluctantly yielded to do it, only for a large bribe, and afterwards done his best to counteract its effect—still he would be guilty of *sedition*. True, his desire and intention would appear to be only to get money. But, with that desire and intention, he acted without justification or excuse, and in disregard of law, and printed and published what was in itself manifestly dangerous to the public. He therefore was not innocent but criminal, *i. e.* *sedition*ous.

Or say, that a man did the same thing, moved by threats and fear, but not such fear as amounted to a legal justification—he might say he had no intention to raise disaffection, or resistance to lawful authority—but that would not sufficiently defend him from a charge of *sedition*.

Or, say he did it only to shew his eloquence and ingenuity as Rousseau is said to have written against the existing institutions of society, after at first intending to

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display his talents on the other side, and being advised by a friend that the side of innovation was best for shewing off talent.

Or, suppose he did it only to frighten Government or Parliament into some measure which he favoured, not truly desiring or expecting actual insurrection or disaffection to take place.

In all these cases, and many others that may be imagined, the person must be guilty of sedition, by doing wilfully, and without justification or excuse, an act of a seditious tendency.

It is said, Mr Hume defines sedition to be, not only calculated, but intended to excite disaffection and trouble in the State. But the passage cited for the pannels has not itself the appearance of precise or accurate definition; nor can I believe, that Baron Hume in it at all contemplated the question, whether the intention to excite disaffection or trouble was essential. For if he had, he would have followed it up by a commentary on that branch of the definition, of which I see no appearance whatever. On the contrary, he says, vol. i. p. 354:—
‘ The treason in all these cases is the same, in all measures of this description, by exasperating the multitude, and infecting them with jealousy and dislike of the established order of the state, tend directly to a breach between sovereign and subject, and to fill the realm with trouble and dissension. To prepare which miserable calamity, can no more be doubted to be a cognoscible crime, and one too of a high degree, than that it is a crime to partake of the very measures of resistance and violence, if such follow, to which these exhortations have induced.

‘ The characteristic of sedition lies in the forwarding, preparing, and producing such a state of things as may naturally issue in public trouble and commotion.

‘ The crime of sedition lies in the stirring of such humours as naturally tend to change and commotion in the state.’

And all his reasoning is applicable to sedition of the nature I have stated.

Erskine speaks in the same way, though, no doubt he does not sufficiently discriminate sedition from leasing-making. (Tit. iv. B. iv. § 29.) He says,—‘ Verbal sedition, which in our statutes gets the name of leasing-making, is inferred from the uttering of words tending to sedition, or the breeding of hatred and discord between the king and his people.’ He says nothing of intention.

But our practice is what affords the most important authority in aid of what is in itself reasonable. On that I need not go over what your Lordship has fully treated already.

Then, if such be the nature of sedition in our law, how stands the present case ?

The indictment sets forth that the pannels *seditionously* used language, which is recited, and which appears to be very plainly in itself of a seditious nature. And then it proceeds :—‘ And the whole or part of the language above set forth, as used by you the said John Grant, Henry Ranken, and Robert Hamilton respectively as above libelled, was intended and calculated to excite popular disaffection, commotion, and violence, and resistance to lawful authority.’

Now here, in the view of the law I have given, the statement of that language, and the statement that it was used *seditionously*, and calculated to excite popular disaffection, and resistance to lawful authority, was itself a sufficient charge of sedition. The statement of its being ‘ intended ’ to excite these was not essential, but intensive, meant to *aggravate* the charge, not to constitute it. So stands the charge. The verdict is—(*Reads verdict*), and a finding, in like terms, by a majority, is added against the other pannel. And the jury explained, that they omitted the word ‘ intended,’ not meaning to find that.

Now, I can regard this as nothing else than a finding

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of the pannels guilty of the sedition libelled, in so far as charged with seditiously using words calculated to excite disaffection and resistance to lawful authority, though not with the aggravation of intention to excite these. And if that was, as I have said, a sufficient charge of sedition, the conviction of it must be a sufficient conviction of sedition. It is a conviction of guilt and of sedition under this libel. It implies, therefore, that the words were used, not justifiably, or excusably, but seditiously, calculated to excite disaffection and unlawful resistance, and so is a conviction of legal sedition. The limitation of the finding makes the sedition less aggravated, and must lighten the sentence. But it cannot warrant *absolvitor*.

The finding in this case is not ambiguous. It cannot mean, that the pannels used the words justifiably or excusably, for then they would not have been found guilty of sedition, or guilty at all; but not guilty. It must mean, that they were guilty of the sedition libelled, as far as they used the words.

I need say nothing of the competency of a jury finding part only of what is libelled. It is not disputed, and is warranted by the ordinary style of our indictments—'all which, or part thereof, being found proven, 'you ought to be punished with the pains of law,' &c.

LORD MONCREIFF.—I paid all the attention in my power to the argument on the nature and effect of this verdict, and I have since considered very carefully the whole matter, and examined all the cases on the subject as I find them variously reported.

It is undoubtedly a *mitigated verdict*, with reference to the charges in the indictment. It finds the very serious charge of *conspiracy* libelled *not proven*. It also finds John Grant, who was indicted along with Ranken and Hamilton, not guilty of the remaining charge of *sedition*. But it finds the parties now at the bar *guilty of sedition* in the particular terms expressed in the verdict:—'Unanimously find the panel Robert

‘ Hamilton guilty of sedition, in so far as, that he used
 ‘ language calculated to excite popular disaffection and
 ‘ resistance to lawful authority; and, by a majority of
 ‘ one, find the panel Henry Ranken also guilty of
 ‘ sedition, in so far as, that he used language calculated
 ‘ to excite popular disaffection and resistance to lawful
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Looking at the verdict, as it *so stands recorded*, and expressly approved of by the Jury when it was read to them, I was of opinion, at the time, that it was a good and effectual verdict, to make these panels stand convicted of the crime of sedition libelled in the major proposition of the indictment, *to a certain extent and effect*. And after attending to all the circumstances and considerations, on which difficulties and doubts have been raised on this, I am still of opinion that it is a good verdict, on which some sentence ought to pass, as moved for by the Public Prosecutor.

The indictment in this case libels sedition simply in the major proposition (clearly a good form, according to the case of *Sinclair* and later cases), and then, in the minor proposition, it states the facts on which these panels were accused of having committed that crime; and it libels particularly, that each of the prisoners did, in the meetings set forth, ‘*openly and seditiously*’ deliver certain speeches, some of the material words of which are quoted in the indictment, and the whole terms or substance of which were more fully proved in evidence. And it certainly bears, that the conduct and speeches of the panels ‘*were seditious, and were intended and calculated to excite popular disaffection, commotion, and violence, and resistance to lawful authority.*’

The Jury have not found the prisoners simply guilty of sedition as libelled; and they have not found them guilty of sedition under *all* the qualities expressed in that clause of the minor proposition. But they have found them guilty of *sedition*: in so far as that (with reference to the *particular facts* laid in the indictment as

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to each, and the averment that what he did, he did *openly and seditiously*) he used language '*calculated to excite popular disaffection and resistance to lawful authority.*' In this finding, they have left out the word '*intended,*' and left the matter to stand simply on this, that the language used *openly and seditiously* was '*calculated to excite popular disaffection and resistance to lawful authority.*' The matter, therefore, stands thus; that the Jury have not found, and I take it, have left out *ex proposito* that word '*intended,*' *not being prepared,* as I understand their explanation, to find that the language was *not only calculated* to produce the effect libelled, but that it was *actually intended* to operate in that manner. I do not understand the verdict as having *negated the existence of such intention.* But such intention not being found, we can only take the verdict *on that which is found.* If the jury had supposed or meant that they were finding the prisoners *not guilty,* they would no doubt have said so, as they did in the case of Grant.

Now the question appears to me to be, Whether, when the verdict finds the parties guilty of sedition, defining the nature and extent of that sedition, in the terms employed, the facts set forth in those terms *do or do not by law amount to sedition?*

But if the law be, as I think it is, that, under a charge of sedition, if the acts or speeches libelled, are *in their own nature* seditious, and *calculated* to excite disaffection and resistance to lawful authority, that is sedition; and that it is not necessary or essential to libel or to prove an *actual intention* in the speakers, writers, or actors; then as the word *intended* in the indictment was not necessary to the charge, the verdict finding the parties guilty of sedition, in terms sufficient to satisfy the principle of law, must be effectual as a conviction of the accused, and sufficient to warrant a sentence by the Court.

I do not think it is necessary now to go through the various cases which have occurred, in the practice of the Court on indictments for sedition, though I have made

notes, I believe, of nearly all of them. That has been already done, in my judgment, very fully and effectually. The indictments do in general bear, as all indictments do, that the things charged were done *wickedly and feloniously*, or, in the particular case of sedition, sometimes *openly and seditiously*, which has been found relevant in the present case, as well as in other cases; and in a few instances the word *intended*, or some similar word, has been applied to the character of the speeches or writings libelled. But in the general course of such indictments, the terms most commonly used, are '*calculated*,' or '*tending*,' or some such word, applied to the words or writings specified. Sometimes the words are '*of a seditious tendency*,' or '*obviously calculated to stir up a spirit of disaffection*,' &c. Sometimes writing and printing a seditious pamphlet '*calculated to degrade and to bring into contempt our present happy system of government*,' &c.; sometimes (as in *M'Laren and Baird*) '*wickedly and feloniously deliver a speech containing a number of seditious and inflammatory remarks and assertions CALCULATED to degrade and bring into contempt the government and legislature, and to withdraw therefrom the confidence and affection of the people, and fill the realm with trouble and dissension.*'

I gather from all the cases, that the essence of the crime of sedition consists in the *character and plain meaning and import of the words spoken or written*, as being *calculated* or as *tending* to excite disaffection, to bring the laws and constitution into contempt, or to excite to resistance to lawful authority. And when this is clear in any particular case, provided the words had been *deliberately and by the free will of the party* spoken or written, the crime of sedition has been committed. No doubt, there must be *intention* to this effect, that the party did *intend to speak* or to *write* the things laid to his charge, bearing the character of being so *calculated to excite* disaffection. And if the words do not in their natural and obvious meaning import that which is alleged, it may sometimes

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be necessary to assign and to prove an entirely different meaning as attached to the words,—as in the case of Daniel Isaac Eaton, in which it was alleged that King George the third was represented under the figure of a *game cock*. But where the meaning and import of the words is not at all in dispute, the only question is, after it has been proved that they were used advisedly by the parties, whether they are of the *sedition import libelled*, in so far as they are *calculated* or have a *tendency* to excite disaffection and resistance to lawful authority.

Without thinking it necessary to go into further detail, after the full explanation already given, I would only say, that my attention has been most particularly fixed on the whole proceedings which took place in the remarkable case of Robertson and Berry, who were tried in March 1793, on an indictment charging them with the crime of sedition, in so far as they were guilty of printing and publishing a seditious pamphlet, 'containing false, wicked, and *sedition assertions*, CALCULATED to *degrade and bring into contempt* our present happy system of government, and withdraw therefrom the confidence and affection of our subjects.' They were charged with wickedly and seditiously printing and publishing the pamphlet so designated. Upon that charge, a verdict was returned, by which the jury, 'all in one voice find it *proven* that the said James Robertson *did print and publish*, and that the said Walter Berry *did publish ONLY* 'the pamphlet libelled on.' That was a *special verdict*, as the verdict in the present case is. It did not find either of the prisoners guilty of sedition *as libelled*, or of the *crime libelled*, but it found, in specific terms, a certain thing as to *each* of the prisoners, *without one word as to the intention of either of them*, and not saying specially that they did those things *wickedly and feloniously*, or with any such quality. This is the more important, because it gave rise to a great deal of discussion, in which the accused had the aid of the very eminent counsel, Mr Wight, and Dean of Faculty the Honourable Henry

Erskine; and after long argument, and after taking time to consider, the Court were *unanimous*, that the verdict was effectual as to *Robertson*; but they were divided in opinion on the case of *Berry*. Yet it was decided by a majority (*Eskgrove, Abercromby, Justice-Clerk Braxfield* against *Henderland* and *Dunsinnan*) that it was a good verdict as to *Berry* also. The objection was precisely that the verdict *did not find the intention*. But it was decidedly held that that was *not necessary*.

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And, indeed, if it were necessary that that should be *specially found* by the jury, wherever they do not find a simple verdict of guilty as libelled, it would be difficult to see how any man should be found guilty, upon the act of *printing* or *publishing* the most seditious and inflammatory libel which can be supposed. And yet I take it to be clear law, that every man is answerable to the law for what he *prints* and *publishes* to the world of a *seditious tendency*. He may sometimes prove a case, to relieve himself wholly or partially. But in the absence of all such proof, the case is clear on the act done.

I do also think it very striking, that in that very able address which Mr John Clerk, whose zeal for the interest of his clients, as well as for the liberty of the subject, and whose great knowledge of law, and extraordinary acuteness of discrimination, never were exceeded in any bar, made for Mr Fysche Palmer, he nowhere maintained (and neither did even Mr John Haggart, in objecting to the relevancy of the indictment) that the jury must be satisfied of the *actual intention* of Mr Palmer in the matter. But, on the contrary, Mr Clerk says, in emphatic terms, 'To render a writing seditious, it must be intended or *calculated* to urge the people to actual violence;' and the charge of Lord Abercromby in that case was entirely on the question, whether the paper was of a seditious *import* or *tendency*, and whether Palmer was the writer or *art and part in writing*, printing, and publishing it.

In connection with that case, and as very important in the question, I beg leave further to observe, that in all

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the indictments to which I have been alluding, there is what used to be called the '*at least*' clause, on which the accused might be found guilty *as art and part*, though not proved to be the direct author or actor in the writing, printing, or publishing. And so the verdict in the case of Palmer finds 'the address mentioned in the libel to be '*a seditious writing, TENDING to inflame the minds of the people : Find that the panel was art and part guilty in writing the said address, and that he is guilty of causing the said address to be printed, and that he is guilty of distributing, and causing to be distributed, the said seditious and inflammatory writing.*' This is another example of a *special verdict, bearing not a word of INTENTION* and an important part of it *depending on the at least clause*, in which no intention is set forth, except what might be implied in the *nature of the writing itself*.

I shall not go farther into this matter, excepting only to observe, with all manner of diffidence, that, as far as I am informed, it would be quite clear in England that, if the *libel* set forth in the *indictment* or *information* is in its nature *seditious*, it is *not material* whether an *actual intention* be found or not. Thus, Lord Ellenborough said, in the case of the King against Cobbet, 'that if a publication be *calculated* to alienate the affections of the people, by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the *writer, publisher, &c.*, are punishable; and *whether the defendant really intended by his publication to alienate the affections of the people from the government or not, is NOT MATERIAL.* If the publication be *calculated to have that effect*, it is a *seditious libel*.' And see *Rex v. Burdett, &c.*

I am therefore of opinion, that, in this case, the verdict is sufficient, to infer a sentence as for sedition. But, as I have said before, it is a verdict finding the prisoners guilty of a charge of sedition *considerably mitigated*.

LORD MEDWYN.—The indictment in this case contains a distinct charge of sedition, and the Jury have found,

by their verdict, that the two pannels are guilty of 'sedition, in so far as, that they used language calculated to excite popular disaffection, and resistance to lawful authority.' This was in answer to the facts constitutive of the charge, that they openly and seditiously used the language there set forth. This is a distinct finding of the offence charged; and in the explanation which occurred with the Jury when they returned their verdict, they pointedly told us that it was their meaning to find them guilty of sedition, in so far as they did what is there expressed. Now, is there anything which neutralizes or nullifies this distinct finding? nothing certainly in the verdict, for it contains nothing more than the words already quoted; but it is said that the charge which the Jury had to try was, whether language was used, 'intended and calculated to excite disaffection,' and that the Jury have not found anything with regard to the intention of the speakers, and as the Jury explained to the Court, this was not an oversight, but omitted *ex proposito*: then, it is argued, that the intention to excite disaffection not being found, but the reverse inferred, that this verdict does not support the charge and the crime of sedition, although the Jury may have thought that what they found was sufficient to do so. No doubt there is some difficulty here, and a good deal of plausibility in the objection, but after some wavering in my opinion, I have now come back to my original impression, that the objection cannot be sustained. The doubt in my mind arose from the description of the crime of sedition given by Baron Hume, 'that it reaches all practices which are suited and intended to disturb the tranquillity of the State,' and the sanction which seemed to be given to this statement by the present indictment, as if it was a necessary element in the charge that the words openly and seditiously spoken were intended as well as calculated to excite disaffection, so as to call upon the Jury expressly to find the intent as well as the fact of uttering seditious expressions. But I am now satisfied that

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the crime of sedition requires neither the intent to be set forth in the indictment, nor to be found by the Jury. It is not one of those offences where we look to the intent so much as to the consequences, or the effects produced, or calculated to be produced, by the words uttered, the meaning of which is plain. It is the danger to the tranquillity of the State from seditious harangues addressed to a multitude of people, rather than to the intention of the speaker, that the law looks to. Some crimes consist in intent, and then this must be specially set forth in the charge, and must be found by the Jury. That branch of the law of treason which consists in compassing and imagining the death of the king, rests on the intent, and the overt acts are only to prove this intent. The intent must be charged and must be found. In a more ordinary department of law, there may be a charge to stab any one, with intent to murder, rob, or maim, or disfigure; there the essence of the crime is the intent. But sedition is not a crime of this character: its essence is using seditious language, calculated to excite disaffection in the minds of the hearers. Accordingly, indictments have been well laid, and held relevant, without any thing about intention being stated in them. Indeed, I do not know that an indictment for sedition was ever objected to, because nothing was said as to the intention of the speaker, but only the tendency of his language stated. Thus, in the case of *Morton & Others*, in 1793, the charge was, that they were guilty of sedition, by uttering seditious speeches, *tending* to excite a spirit of disloyalty and disaffection to the king and established government. I think, in all the many cases for sedition tried at that time, the same phraseology was adopted. In the case of *Berry and Robertson*, the statement was, it was *calculated* to degrade and bring into contempt the Government: in *Fysche Palmer*, the same term is used, and in *Skirving's*, and in others. We must never forget that these prosecutions were conducted by the able Crown counsel of the day, including Solicitor-

General Blair and Mr Burnett, and the pannels were often defended by the greatest lawyers at the Bar, including Mr Wight, Mr Clerk, and Mr Gillies among others. Again, at a later period, in the case of *M^r Laven and Baird*, in 1817, sedition was charged, in so far as the pannels had spoken words *tending* to bring the government and legislature into contempt. The eminent counsel who defended the accused, distinctly admitted that this was a relevant charge of sedition; that it was not necessary specifically to set forth intention in the charge, and on this they were convicted and punished. One cannot, however, wonder that an express assertion of intention in a charge of using seditious language, especially to an unlawful assembly, should be introduced into an indictment as an important aggravation of the charge, as was done in some portions of the indictment in *Muir's* case; for, when any one at a large public meeting of the lower classes, addresses them in inflammatory language, as men unjustly oppressed by their rulers, and inciting them to redress their wrongs, and to provide guns and bayonets, for the purpose of resistance, it must be presumed that the speaker intends that his views should be adopted, and his advice followed: it is the only supposable motive for his having addressed such language to such an audience. The intention is, in short, implied in the mere use of the words, and proved by it. If the accused can shew that he had no such motive, but a different one, and that an innocent one, not plainly calculated to create dissatisfaction, this may possibly be a defence for him, and save him from what the law implies in his having seditiously uttered words calculated to excite disaffection. But it will not do merely to allege and prove another motive than the intention to excite disaffection—it must be some innocent motive, and not calculated to have any other than the intended effect, if such can be found; such only would justify his conduct. For instance, suppose this case,—a very improbable one, no doubt,—that a speaker, vain of

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his oratory, conceited enough to think he could regulate and restrain the feelings and conduct of a mob, should, with no other motive but a display of his oratorical powers, and speaking even against his own feelings and convictions, address a public meeting, and use seditious language to them, surely this would be sedition for which the speaker would be responsible, as calculated to excite disaffection, although he had not the most remote intention that this should be the effect of his oratory. Again, suppose a hired orator were procured for the purpose : would his having no other intention in what he did, except to pocket the sum for which he had undertaken the task, be any defence to him? If any one uses inflammatory language to an excitable crowd of people, though without the most remote intention to excite them, he must be responsible for sedition, just as much as a man will be answerable to the law, if he fires a pistol in a street and some one is injured by the shot, although he had not the slightest intention of injuring any one, and did not even observe any one in the way. The act was calculated to do mischief, and it has done mischief. He ought to have been aware of such a possibility, and is held to be guilty, because he did not attend to this. So also, the seditious speaker cannot be allowed to use inflammatory language to a mob, and say he had no intention to excite them. I think it clear, then, that the charge would have been good without stating that the seditious words were intended, and that it is sufficient if calculated, to produce the effect stated. A jury need not find all the facts and circumstances stated in the minor, provided they find what are sufficient to support the charge in the major, and I think this is amply done here. The terms of the verdict shew that it was a well considered one ; while they do not find any thing as to intention, observe they do not even find that the words used were calculated to excite ‘ commotion ‘ and violence,’ which is also in the charge, plainly meaning to characterize the sedition which they do find

proved, as of a less dangerous kind than if they had found the whole allegation ; in like manner they only find it calculated to excite popular disaffection and resistance to lawful authority, and I think that they declined to find any thing as to intention with the same view : they held this to be an aggravation of the offence of which they found the pannels guilty, as the other would have been also, and omitted it with the same view of lowering the character of the sedition, for which they held the pannels must be answerable. The omission of any finding as to intention, does not then nullify, but only characterises, the sedition, which is expressly and substantively found.

LORD COCKBURN.—I have no idea of a crime without guilt in the mind of the criminal. No crime can be committed by any mere act, abstracted from all consideration of motive. *Actus non facit reum nisi mens sit rea.* In the great majority of cases, the mental criminality consists in the intention to do the particular thing charged ; and hence the wickedness of that intention is commonly, though perhaps loosely, given as descriptive of the only sort of guilt, that exists. But it is not to the precise case of a deliberate intention to commit the exact crime, that the principle can even be meant to be applied. One crime may obviously be committed while another was meant ; there may be criminality in a good motive, such as in the love of applause or of gain ; and there may be a culpable indifference to consequences, which implies wickedness, and is itself a crime. What the principle means, is, that there must be *malus animus*. But there are so few cases in which this *animus* means anything except *guilty intention*, that this last expression is usually given as denoting the general meaning. The inward guilt, whatever it may be, may be inferred from the tendency of the act, but it is never in *the mere tendency*, apart from *malus animus*, that the guilt consists.

There is no case to which this principle applies so strongly as to sedition. And this for a plain reason. In a country like this, where everything public is managed

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by free discussion, and the free action of parties, opinions and projects are propounded daily by one set of people as necessary for the immediate maintenance of authority, which are denounced by other sets as involving its immediate prostration. Upon vital questions there are few honest politicians, or conscientious sectarians, who do not think their opponents views dangerous. It is the fact of their being supposed to be dangerous that makes the schism. If, in such a state of things, the mere conviction by one party that what his adversary wished, led to disorder and trouble, justified a conviction of sedition, it would just depend on who the jury were, whether an accused person was guilty or innocent. How many public measures and principles have been advocated within these twenty years, as to which one faction has honestly thought, not merely that the general expediency, but that the direct and instant tendency to disaffection and insubordination, lay one way, and another faction that it lay in the opposite way. If it depends merely on the *tendency* of the schemes, principles, or language, most ardent party men are necessarily seditious in the sight of their opponents. But the law interposes between all parties, and saves every man against whom neither criminality of design, nor a blameful disregard of results, can be proved. This principle gives no protection to the wilful, though conscientious despiser of the law; because his case includes the general intention to *violate the law*, which implies wickedness of design.

Accordingly, I know nothing that is more unequivocally laid down by all authorities, or more deeply implied in all sedition trials, than that the guilt of sedition is not contracted, where the intention,—in the sense in which I use this expression,—was innocent. This, as I read them, is the doctrine of all institutional writers, of all courts, and of all public prosecutors since the Revolution. It is so necessary for the practical exercise of the constitutional privilege of free discussion, that it is one of the principles of which the law is proud.

I have been surprised to be told, that this principle is not recognised in the law of England. I believe that it is. And I believe this with as much confidence as it is ever proper to feel in regard to anything in another legal system, and that is contested. There is no subject on which English light could be more relevantly borrowed; and therefore, since we differ about the law of that country, I wish that we had protected ourselves by taking the usual course for having it ascertained. The only conclusion that I can form without this aid, is, there can be no sedition there without some direct or indirect guiltiness of intention. Hence, every English indictment for this offence sets forth (as I understand) that the words were spoken *wickedly and maliciously*; or charges the specific fact that the mischief expressed by them *was intended*. Or, they are sometimes said to have been used *seditionously*,—which includes everything necessary for the composition of the offence, and among other things wickedness of design. The term suggested by the Criminal Law Commissioners,—who, I respect as most sagacious and enlightened expounders both of what the law is, and of what it ought to be,—is *malicious*. But the precise term is immaterial. In one way or other a charge of criminal design, or of criminal indifference, is expressed in all charges for sedition; and I suspect that no example can be exhibited of judgment following on any verdict which *excluded* this quality.

I am perfectly aware of the cases and passages in which it is said that the use of words of a dangerous *tendency* is sufficient; but, I think that these authorities are misunderstood. All that I understand them to mean is, that atrocity of language is, of itself, *competent evidence* of the intention, or of the wickedness of its user; and that, if not rebutted, it is conclusive evidence. This I agree with. But, instead of implying that the intention is immaterial, it implies exactly the reverse. It implies that it is material, but that it may be estab-

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lished by a particular sort of proof. All the length that *Chief-Justice Best* goes, in the case of *Burdett*, is, that 'It is enough if it (the criminal intention) be highly probable; particularly if the opposite party has it in his power to rebut it by evidence, yet offers none; for then we have something like an admission that the presumption is just.' *Mr Justice Bayley* says, in *Harvey's* case, 'I take the law to be, that where a particular consequence necessarily results from any act, the party doing that act is to be held, *prima facie*, as intending the necessary consequences of that act.' No doubt. But still (in the first place) this only means that the act, if unexplained, is good evidence of the intention; and (in the second place), this is a presumption to be judged of *by the jury*. If the intention had not been deemed a part of the offence, what occasion had these learned persons to speak of it? They had simply to say that the dangerousness of the language being ascertained, the enquiry was over. I should like to see what an English court ever did with a case where the jury, after condemning the words, instead of drawing the inference of guilty intention, *acquitted* the prisoner of this part of the charge.

However, I do not believe that any of us are safe in groping our own way, by our own threads, through the intricacies of any foreign system. We are more in the open air with our own law. As to which, had it not been for the state of the court on the present occasion, I should not have had the very shadow of a doubt.

In considering the punishment that ought to be inflicted on *Joseph Gerald*, in 1794, two Judges take occasion to dispose of the alleged purity of his intentions. One of their Lordships says, that *perfect innocence of intention* is not a ground even for *mitigation of punishment*; and the others goes the length of holding this circumstance as a *positive aggravation*. These are the only two passages in the legal proceedings of Scotland that I am waare of, where intention has been struck out as an

element of sedition. I do not suppose that they will be copied in modern times.

Baron Hume was engaged, I believe, in the composition of his work while these old proceedings were going on. But instead of seeing anything of this kind in them, the principle which he extracts from them is, that it requires a combination of intention with tendency to constitute the offence. 'The offence reaches all the practices, &c. which are suited and *intended* to disturb the tranquillity of the state.' These are the deliberate words of a cautious writer, giving to posterity the lesson furnished by recent proceedings, and I see no abandonment, or abatement, of the doctrine in any other part of his Commentaries.

Burnet was professionally engaged for the prosecution in almost all these cases, and all his feelings were on that side. Yet, when he comes to describe them as an institutional instructor, he too holds them to import evil intention as indispensable. After giving examples of seditious words, he adds, that they are seditious, 'If such invectives are uttered and published in such a form as is calculated to excite the people to violence and tumult, and *proceed obviously from that intent.*'

In the case of *Baird and Maclaren*, bad intention was not charged by the use of this expression; nevertheless, the words were said to have been employed wickedly, and the *Lord Justice-Clerk (Boyle)* instructed the Jury that '*criminal intent is of the very essence of the crime.*' I do not rely merely on these detached expressions, but on the whole scope, and object, and spirit of the charge. It relates to little else than to the sufficiency or insufficiency of the evidence of the moral criminality of the accused.

I cannot abandon authorities so express, and that coincide so correctly with the general principle. But I rest less even on these authorities than on the undeviating authority of our libels. I have not observed a *single one* where wickedness of mind in the accused has not been

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charged. No matter how it is meant to be *proved*, it has always been *charged*. No doubt the charges have not always been made *in one way*; nor is this necessary. It has sometimes been made by setting forth that the language 'was calculated and *'intended'* to effect a certain species of mischief. At other times it has been made by saying it was done, *wickedly and feloniously*.' But, whatever the form has been, my statement after all I have heard to-day, is, that *not one sustained indictment has been, or can be, referred to, where nothing was charged beyond the bare fact that dangerous words were published*. It seems to be thought that the imputation of its being wickedly and feloniously meant is immaterial; and this merely because it is common. These are called words of style. And so they are; just because they are so necessary that they are never omitted. I cannot hold words in a criminal charge to have no meaning,

Accordingly, what is it that the greater part of all trials for sedition are about? According to the prosecutor's view, most of them ought to be at an end as soon as the import of the words is settled. But the struggle of almost all such trials is, to establish, or to refute, the imputation of the prisoner's guilty mind, as a thing not necessarily involved in the mere tendency of his act. If what I have heard in this discussion be sound, nearly the whole evidence, the whole labour, and the whole eloquence of such proceedings might have been saved, *and indeed of this very case*.

But really the whole of this discussion is superseded by the special terms of the particular libel before us. Whatever it might have done without, it does contain not only the *general charge of wickedness*, but a specification of what the wickedness consisted in, viz. an *intention to produce disaffection and disorder*. This is the case that these prisoners were warned to meet. This, alone, is the accusation that was found relevant. The use of these words shows what the prosecutor understood to be necessary. And certainly the intention thus in-

troduced, as descriptive of what the general imputation of wickedness meant, into the libel, was not left out of the trial. I was not present; but the communication between the Court and the Jury implies that the intention had been discussed, and was meant to be dealt with by the assize as a matter of relevancy and importance. Yet the substance of the prosecutor's argument now is, that this was entirely immaterial, and need not have been in the case at all.

If it be true that wickedness, particularly of intention, is no necessary part of the legal crime, then it *must* be true that an indictment, or a verdict, may be good, though this part of the charge or of the conviction be left out. Anything may be omitted that is useless. And, if it may be omitted at all, it may be omitted *purposely and openly*. Now, suppose an indictment to set forth, or a verdict to find, or a prisoner to plead, that the publication was calculated to provoke disaffection, but that he did not mean this, and that this being *the only criminal object charged*, he had no criminal feeling whatever. I do not believe that such an indictment, or verdict, or plea, would be thought sufficient.

Assuming, therefore, that guiltiness, and in this case guiltiness of intention, is essential to the offence, and that, though proveable by the mere force of the words, it is the Jury that must find it proved, the question is, whether they have done so here. This brings us to the construction of the verdict.

No verdict ought ever to be strained in order to give it a meaning which it does not plainly express; least of all should it ever be strained *against a prisoner*. On the contrary, every possible benefit ought to be given to a prisoner that the words admit of. In particular, wherever a circumstance, essential for his conviction, is not found, he is entitled to have the verdict considered as a verdict of acquittal.

The verdict before us does not find the prisoners simply *guilty*; nor guilty *as libelled*; nor guilty simply of

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sedition. Any of these would have done, because under these general terms would have been included whatever was in the charges. The words '*guilty of sedition,*' no doubt, are in the verdict; and a great portion of the reasoning I have heard seems to me to imply that no other words are to be cared for. But I cannot stop there. Because the finding of guilty of sedition is connected with an explanation, or rather with a limitation; and I must take this into view also.

The prisoners were *not* charged with the abstract use of improper language. They were charged with using this language *wickedly*; and the species of wickedness was described as consisting of *an intention* to produce the mischief for which the words were *calculated*. Now, the jury find them guilty of the abstract fact but not of the guilty quality. They find each guilty of sedition, '*In so far as that he used language calculated to excite popular disaffection and resistance to lawful authority.*' A lunatic might have done this. As I read this, it means, when legally construed, that they are acquitted of everything else, particularly of all *malus animus*. They are guilty *in so far*. In so far as what? As that they used words of a specified *tendency*. This is not a virtual, but a *positive exclusion* of everything charged, but not found; and among other things, it is an exclusion not only of the *wicked intention* with which the words were connected in the accusation; but of all the other guilt, if there be any, in the indictment. It does not appear to me that the verdict would have been at all more favourable for the prisoners if it had, in express *terms*, found the prisoners *not guilty* of those parts of the libel which imputed wickedness or intended mischief to them. It is in vain to refer to the words as proving the guilt, because admitting, as I do, both the competency and the sufficiency of this proof, it was the province of the jury alone to apply it, and this they have not done. We have no right to speculate about their probable meaning. I think I can ascribe the first part

of their verdict to a rational ground enough, consistently with an intention in the second part to acquit the prisoners. But if they really meant to convict, I have great difficulty in conceiving how they could limit the conviction to the bare use of the words. Looking therefore at the terms of the verdict, I hold it to contain a finding of guilty of sedition,—*with a limitation which, in law, makes no sedition.* It seems to come very near the celebrated English case, where the jury were satisfied that the words had been published (no matter whether by speaking or by printing), but were not satisfied about anything else, and therefore found the prisoner guilty ‘of publishing only.’ No sentence followed on this verdict. The correct translation of the present verdict is, ‘Find the prisoners guilty of whatever sedition there is in the mere use of dangerous language, but acquit them of personal blame.’ In short, we condemn the language, but not the men; at least, whatever we may think of their intemperance, we do not think them seditious, unless the *mere uttering of the words constitutes sedition.* The bare utterance might, *as evidence,* have warranted the Jury in inferring *malus animus*; but they not having inferred this, but having restricted their finding to the abstract fact of the use of the words, the Court has no right to make the inference for them.

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But we are not now entitled to confine our attention merely to the terms of the verdict. Whether the communication that took place between the Jury and the Court ought to have been introduced as connected with the verdict, I do not say. But it was introduced; authoritatively, on the motion of the prisoner, and without objection by the Prosecutor. Its import was that, on its being put to them, the Jury stated that they unanimously meant to leave the word *intended* out of their verdict. I hold the meaning of this to be, that they meant to acquit; or not to convict, of wickedness of intention.

Now, what is the substance of the prosecutor's claim?

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It is, that wickedness of intention is to be inferred from the use of the language; and that, therefore, though the Jury has not only not drawn, but has unanimously disclaimed the inference, still this very inference is to be extracted, by ingenious interpretation, out of the very words by which the disclamation was followed. I do not presume to dictate, or to suggest, to any one else; but, for myself, I must say that I recoil from this construction. I could not go into it without a consciousness that I was absolutely reversing what it was judicially explained that the Jury intended. It is this feeling that makes the whole discussion to me so painful. I think that we are not giving effect to that of which the Jury unquestionably meant to acquit; and that we abstain from doing so, by an interpretation, which is at the least not necessary, of the very words which the Court took from the Jury as consistent with that acquittal.

It may possibly result in there having been a miscarriage at the trial. But this is a misfortune of which the prisoners are entitled to the benefit.

LORD WOOD.—The opinion I had formed, upon considering the argument which was submitted to us, and the authorities cited, was—that the verdict is good; and I am confirmed in it by those delivered by your Lordships, who have taken the same view.

After the whole subject has been so fully exhausted, it could serve no purpose, and indeed would only be a useless consumption of time to go over it again in detail. I shall therefore only say, that when I consider the charge of sedition in the indictment, which is now alone in question,—the manner in which it is there laid, all the acts and conduct libelled being averred to have been done and uttered seditiously,—and the law and practice relative to the offence, and to the form and style of the libel, of which there are numerous instances where no special intention is set forth,—and when, with reference to these things, I read the verdict as it stands—but giving, at the same time the utmost effect to which, as I think, the ex-

planation accompanying it is entitled, and *after* which explanation the verdict as it is worded was deliberately adhered to,—I am of opinion that it is a good and unobjectionable verdict of guilty of sedition ; that is, guilty of the acts of sedition libelled, to the extent mentioned in the verdict, although the verdict omits to find a part of what is libelled, viz., the special intention libelled, which, I apprehend, has only an intensive meaning, and is laid merely as descriptive of one specific quality of the crime charged, but not as an essential element in the crime, which by law it does not require to be, and which specific intention, therefore, it was not necessary to establish by proof, or consequently to have found by the verdict of the jury, in order to render the verdict sufficient to warrant a sentence being competently and effectually passed upon it.

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Thereafter LORDS MACKENZIE, COCKBURN, and WOOD, withdrew, leaving the LORDS JUSTICE-CLERK, MONCREIFF, and MEDWYN, before whom the case had been tried, to pronounce sentence.

LORD MONCREIFF.—My Lords, I am happy to have it to say, that, having sat on this Criminal Bench for nineteen years, I have not been called on to take any part in a trial of sedition until this time. But the case has occurred now ; and it is impossible, in the circumstances under which this indictment was framed, not to see that there was an absolute necessity laid on the authorities to bring the matter under the consideration of the Court, considering that the indictment contained very serious charges against the prisoners. The charge of conspiracy, in the terms libelled, is of a very serious character. It has, however, fortunately for the prisoners at the bar, according to the view of the case I take, turned out that the charge of conspiracy has not been proved against them ; and, that being the case, it is laid aside. But we come to the charge of sedition ; and the Jury have found the prisoners guilty of sedition in the particular terms

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expressed in their verdict. No doubt, unquestionably, the finding them guilty of that charge of sedition, even in the modified terms in which it appears, implies a certain criminal intention, the intention of speaking these words, which, in the opinion of the Court and the Jury, are seditious ; and, without going into any of the particulars, I must say, that it is impossible for any man to read these speeches, and particularly to read the whole of them as given to the Jury, it is impossible, I say, for any man of sober and calm mind, looking to the interests of the country, not to see that they are seditious in the character which the Jury have given them, namely, that they were calculated to excite popular disaffection to the Government, and to excite resistance to the lawful authorities. If they had any meaning at all, they have that meaning and import. I am not speaking of the intention of the parties, but certainly they have that character and import, as has been found by the Jury. It would be a sad matter indeed, if the delivery of such speeches, in large assemblies of persons, one of these assemblies in a room consisting of six, seven, or eight hundred persons, and another in the open field of Bruntsfield Links, where some thousands were present, were to be allowed, where the language of these speeches was of dangerous tendency to the best interests of the country. I will not allow myself to enter into the matter on which these speeches are founded, nor to enter into the views of these prisoners, or of the Association to which they belonged ; but I will only say, if these views were to be accomplished in the manner the speakers seem to suggest, they were of the most dangerous character for the best interests of this country. But when I say this, I have to say, that it is with great pain that I am called upon to propose sentence in the case. I wish I could have been saved this pain. Undoubtedly it is very painful to move a sentence against such persons as the pannels at the Bar, who appear in other respects to have been respectable individuals. But we must discharge our duty to the country.

The law must be put in force; and the Court cannot permit such things to go on without punishment; and when the Jury have found the prisoners guilty of seditious speeches, it is the duty of the Court to pronounce such a sentence as to shew to others that similar practices cannot be permitted with impunity.

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It is a great consolation for me to think, that now, as the case stands before us, it is undoubtedly a very mitigated case of sedition. I give all weight to the judgment of the Jury in disavowing the intentions of the parties, namely, that their speeches were intended to produce what is stated in the libel. I take all this into consideration; and I take into consideration the finding of the Jury, that the serious charge of conspiracy is out of the case. We are called upon, therefore, to consider what sentence we ought to pronounce, with all possible leniency to the prisoners; and the sentence which I have to propose cannot be thought by any portion of the community to be a severe punishment in such a case; and I am willing to believe that it must appear to every person of sober understanding, to be as lenient as the Court can pronounce. The sentence which I propose is, imprisonment for each of the prisoners for a period of Four Calendar Months.

LORD MEDWYN.—I concur in the proposition of my Lord Moncreiff.

The LORD JUSTICE-CLERK.—Henry Ranken and Robert Hamilton, if, after the period of reflection which you have had, you entertain and cherish the sentiments and opinions which have been proved in evidence to have been delivered by you, it would be unnecessary for me to say one word more in pronouncing the sentence of the Court, than this, that the object of the punishment is to deter you and others from committing a like offence in time to come. I have to say, that in regard to you, in particular, the repetition of a similar offence, after punishment has been once inflicted by this Court, must operate most prejudicially against you in the event of further

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conviction. But I would fain hope and trust, and I express it with sincerity, that, from your demeanour,—I have gathered it in one way or another, I cannot tell how,—but I have gathered throughout the course of this trial, from your whole manner and demeanour, that it is not likely that you will again rush wantonly and recklessly into the use of such language as you did upon the occasions libelled. From the situation which I hold, I think it also my duty to say, that I do not think the authorities of this place interfered one day too soon to prevent and stop the meetings at which such language had been openly and constantly used.

The sentence of the Court is, that you, Henry Ranken and Robert Hamilton, be imprisoned for Four Calendar Months.

Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE AND MEDWYN.

HER MAJESTY'S ADVOCATE.—*Craufurd A.D.*—*J. M. Bell A.D.*

AGAINST

JAMES PURVES—*W. H. Thomson.*

BIGAMY—RELEVANCY—PROOF.—Held, 1st, That in an indictment for Bigamy, it is sufficient in a question of relevancy to aver that the pannel was lawfully married to the first wife, although the circumstances set forth in the libel shew that such marriage must have been an irregular one. 2d, That the proper time to object to the validity of such marriage, is on the proof, if it be shewn that in truth the marriage is open to challenge.

No. 7.
James
Purves.

High Court.
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Bigamy.

JAMES PURVES was charged with Bigamy :

IN SO FAR AS, you the said James Purves having, on the 18th day of August 1845, or on one or other of the days of that month, or of

July immediately preceding, or of September immediately following, and at or near Paxton Toll-bar, in the parish of Hatton, and county of Berwick, been lawfully married to Margaret Leith, daughter of, and then and now or lately residing with, Elizabeth Laing or Leith, a widow, now or lately residing in or near Narrow Lane of Berwick-upon-Tweed, a form or ceremony of marriage having, then and there, been performed by Henry Collins, designing himself celebrator of marriages in Scotland, and you and the said Margaret Leith having, then and there, mutually accepted each other as spouses, in presence of the said Henry Collins and witnesses, and you having lived and cohabited with the said Margaret Leith as your lawful wife, you the said James Purves did, on the 14th September 1848, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, within or near the public-house or tavern, situated at or near Lamberton Toll, in the parish of Mornington, and county of Berwick, wickedly and feloniously enter into an irregular matrimonial connection with Catherine Fyfe, daughter of, and now or lately residing with, Ann Matthew or Fyfe, a widow, now or lately residing in Haddington, a form or ceremony of marriage having been, then and there, performed by Robert Luggate, designing himself celebrator of border marriages, then and now or lately residing in or near Berwick-upon-Tweed, and you and the said Catherine Fyfe having, then and there, accepted of each other as spouses, in presence of the said Robert Luggate and witnesses, and you did afterwards cohabit with the said Catherine Fyfe as your wife: And further, you the said James Purves did, on the 18th day of September 1848, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, and within or near the house in or near Haddington, then and now or lately occupied by the said Ann Matthew or Fyfe, enter into a matrimonial connection with the said Catherine Fyfe, after proclamation of banns, the marriage ceremony having, then and there, been performed by the Reverend William Hogg, then and now or lately minister of the West Congregation, Haddington, in connection with the United Presbyterian Church, and residing in or near Haddington, and you did thereafter live and cohabit with the said Catherine Fyfe as your wife; and this you did, you well knowing that the said Margaret Leith, your wife, was still alive, and your said marriage with her still subsisting.

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James
Purves.

High Court.
Nov. 20.
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Bigamy.

W. H. THOMSON objected to the relevancy of the indictment. The first marriage libelled, was plainly an irregular one, celebrated at a toll-bar, by a person not entitled to marry. The second was also an irregular one. Hume, vol. i. p. 459, expressed great doubts of the relevancy of a charge of Bigamy under such circum-

No. 7. James Purves. High Court. Nov. 20. 1848. Bigamy.

stances, and his authority had been adopted in the case of *Armstrong*, High Court, July 15. 1844, Broun, vol. ii. p. 257. Bell's Notes, p. 112. There was no authority to show that this indictment was relevant.

The LORD JUSTICE-CLERK.—The Court have not the slightest difficulty in sustaining the relevancy of this indictment. As observed, in the case of *Brown*, High Court, Dec. 24. 1846, Arkley, p. 205, which was the last case on the subject, the allegation in the indictment that the pannel was lawfully married, is quite sufficient in a question of relevancy. No doubt the Public Prosecutor must establish by evidence a lawful marriage, and it will be open to the prisoner to redargue that evidence if he can. But at present we are quite clear, that the principle laid down in the case of *Brown* is the correct one, and that this objection must be repelled.

A variety of evidence was led, conclusively establishing both marriages, under circumstances of considerable aggravation; and the Jury having unanimously found the prisoner guilty,—

LORD MACKENZIE, in proposing sentence, said—That in respect of the aggravated circumstances of the case, he could not propose a less sentence than that of transportation. It was no doubt a very unusual one for the offence of bigamy, but he thought it fully warranted in the case before them.

The other Judges concurring, the said James Purves, was accordingly sentenced to be transported for the period of seven years.

Present,

THE LORD JUSTICE-CLERK.

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LORDS MONCREIFF AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Maitland—Craufurd A.D.*

AGAINST

ALEXANDER MATSON—*Lorimer.*

RELEVANCY.—Circumstances in which the Public Prosecutor was held entitled to libel inconsistent modes of death in a charge of Murder.

ALEXANDER MATSON, was charged with Murder :

IN SO FAR AS, ON ONE OR OTHER OF THE DAYS BETWEEN THE 26th AND 30th DAYS OF MAY 1848, BOTH INCLUSIVE, THE PARTICULAR DAY BEING TO THE PROSECUTOR UNKNOWN, OR ON ONE OR OTHER OF THE DAYS OF SAID MONTH, OR OF APRIL IMMEDIATELY PRECEDING, OR OF JUNE IMMEDIATELY FOLLOWING, AND WITHIN OR NEAR THE HOUSE IN OR NEAR HILLHOUSEFIELD, NORTH LEITH, IN THE COUNTY OF EDINBURGH, THEN AND NOW OR LATELY OCCUPIED BY YOU, OR AT OR NEAR THAT PART OF THE BEACH OR SHORE, AT OR NEAR GRANTON QUARRY, SITUATED TO THE WEST OF THE PIER OF GRANTON, IN THE COUNTY OF EDINBURGH, OR AT SOME PLACE OR PLACES BETWEEN YOUR SAID HOUSE AND THE SAID PART OF SAID BEACH OR SHORE, AT OR NEAR GRANTON QUARRY AFORESAID, AT SOME PLACE IN OR NEAR LEITH, OR IN OR NEAR THE CITY OF EDINBURGH, THE PARTICULAR PLACE BEING TO THE PROSECUTOR UNKNOWN, YOU THE SAID ALEXANDER MATSON DID, WICKEDLY AND FELONIOUSLY, ATTACK AND ASSAULT JOHN MATSON YOUR SON, OR REPUTED SON, A CHILD AGED TWO YEARS OR THEREBY, AND YOU DID, WITH A HAMMER, OR SOME OTHER INSTRUMENT TO THE PROSECUTOR UNKNOWN, OR WITH YOUR FISTS, STRIKE THE SAID JOHN MATSON, ONE OR MORE VIOLENT BLOWS ON THE HEAD, OR OTHER PART OR PARTS OF HIS PERSON, OR YOU DID KICK HIM ON THE HEAD WITH YOUR FEET, OR YOU DID SEIZE HOLD OF THE SAID CHILD, AND DID DASH HIS HEAD AGAINST A STONE OR THE GROUND OR SOME OTHER HARD SUBSTANCE, OR YOU DID, AT OR NEAR GRANTON QUARRY AFORESAID, THROW THE SAID JOHN MATSON, OR CAUSE HIM TO BE THROWN, INTO THE SEA, AND DID LEAVE HIM THEREIN, BY ALL WHICH OR PART THEREOF, OR BY SOME OTHER MEANS TO THE PROSECUTOR UNKNOWN, THE SAID JOHN MATSON WAS BY YOU MORTALLY INJURED, AND IMMEDIATELY OR SOON THEREAFTER DIED; AND WAS THUS MURDERED BY YOU THE SAID ALEXANDER MATSON.

No. 8.
Alexander
Matson.High Court.
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Murder.

LORIMER, for the pannel, objected to the relevancy of the indictment, in respect that an undue degree of latitude had been taken in libelling the mode in which the

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Murder.

crime was said to have been committed. Nothing could be more diverse, or require more distinct lines of defence, than the violence ascribed of striking with a hammer, and the drowning, said to have been caused by throwing into the sea. This was contrary to the authorities, Hume, vol. ii. p. 190. It was not pretended that the body was found in a state of decay, or that it was otherwise so changed that the mode of death was not discoverable, so as to bring the case within the exceptions which were noticed in the note to Hume, vol. ii. p. 193.

The SOLICITOR-GENERAL, on the part of the Crown, urged, that he had libelled with as much precision as the circumstances would admit. The body having been found in the sea, bearing marks of external violence, which might have been sustained either before or after, or at the time of submersion, it was impossible for him to be more precise; and he was entitled, therefore, to state the charge so broadly, in order that the evidence might support the libel.

The COURT held, on the grounds stated by the Solicitor-General, that the objection must be repelled, and observed, that the degree of latitude to be allowed to the Public Prosecutor, was always a question of circumstances to be determined by the Court in each case.

The pannel pleaded Not Guilty; and after evidence on both sides, the Jury returned a verdict of Not Proven.

In respect of which verdict of assize, the said Alexander Matson was assoilzied *simpliciter*, and dismissed from the bar.

Present,

The LORD JUSTICE-CLERK,

LORDS COCKBURN AND WOOD.

Dec. 4.
1848.HER MAJESTY'S ADVOCATE—*Craufurd A.D.—Deas A.D.*

AGAINST

JOHN THOMSON—*Broun—Mackonochie.*

EVIDENCE—PRODUCTION.—Circumstances in which the Court refused to allow the Jury to inspect the head of the pannel, in support of a plea of insanity, as to a mark said to have been occasioned by an injury, it not having been previously shewn in evidence that this mark was there before the pannel committed the act for which he was tried.

JOHN THOMSON, auctioneer, Greenock, was charged,—

No. 9.
John
Thomson.

THAT ALBEIT, by an Act passed in the tenth year of the reign of His late Majesty George the Fourth, chapter thirty-eight, intituled 'An Act for the more effectual punishment of attempts to Murder in certain cases in Scotland,' it is enacted by section second, 'That from and after the passing of this Act, if any person shall, within Scotland, wilfully, maliciously, and unlawfully, shoot at any of His Majesty's subjects, or shall, wilfully, maliciously, and unlawfully, present, point, or level, any kind of loaded fire-arms at any of His Majesty's subjects, and attempt, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons, or shall, wilfully, maliciously, and unlawfully, stab or cut any of His Majesty's subjects, with intent in so doing, or by means thereof, to murder or to maim, disfigure or disable, such His Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such His Majesty's subject or subjects, or shall, wilfully, maliciously, and unlawfully, administer to, or cause to be administered to, or taken by, any of His Majesty's subjects, any deadly poison, or other noxious and destructive substance or thing, with intent thereby, or by means thereof, to murder or disable such His Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such His Majesty's subject or subjects, or shall, wilfully, maliciously, and unlawfully, attempt to suffocate, or to strangle, or to drown, any of His Majesty's subject or subjects, with the intent thereby, or by means thereof, to murder or disable such His Majesty's subject or

High Court.
Dec. 4.
1848.Con. 10th
Geo. IV.
c. 38.

No. 9.
John
Thomson.
High Court.
Dec. 4.
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Con. 10th
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c. 38.

‘ subjects, or with intent to do some other grievous bodily harm to such
 ‘ His Majesty’s subject or subjects, such persons so offending, and
 ‘ being lawfully found guilty, actor, or art and part, of any one or
 ‘ more of the several offences hereinbefore enumerated, shall be held
 ‘ guilty of a capital crime, and shall receive sentence of death accord-
 ‘ ingly;’ AND ALBEIT, by the laws of this and of every other well-
 governed realm, Assault, especially when committed by shooting at
 and wounding any of Her Majesty’s subjects, and to the effusion of
 blood, the serious injury of the person, and danger of life, is a crime
 of an heinous nature, and severely punishable: YET TRUE IT IS AND
 OF VERITY, that you the said John Thomson are guilty of the statutory
 crime of shooting above libelled, and of the crime of assault above
 libelled, aggravated as aforesaid, or of one or ether of them, actor, or
 art and part: IN SO FAR AS, on the 20th day of July 1848, or on one
 or other of the days of that month, or of June immediately preceding,
 or of August immediately following, on or near Hamilton Street, in or
 near Greenock, and at or near a part of the said street which is op-
 posite or nearly opposite the shop situated in or near the said street,
 then and now or lately occupied by William M’Ilwraith, then and now
 or lately a hosier there, and then and now or lately residing in or near
 West Stewart Street, in or near Greenock, you the said John
 Thomson did, wickedly and feloniously, attack and assault John
 Kerr Gray, then and now or lately town-clerk of Greenock, and
 then and now or lately residing in or near Kilblain Street, in or
 near Greenock, and did present, aim, and discharge, at the said
 John Kerr Gray, a pistol or other fire-arm loaded with powder
 and ball, or loaded with powder and some hard and lethal substance
 or substances, and did, wilfully, maliciously, and unlawfully, shoot at
 the said John Kerr Gray with the said pistol or other fire-arm loaded
 as aforesaid, and a ball or some other hard and lethal substance or
 substances, being part of the said shot, did strike and wound the said
 John Kerr Gray on or near his right breast or right side, or on some
 other part of his person, whereby he was severely wounded, to the
 effusion of his blood, the serious injury of his person, and the danger
 of his life; and this you the said John Thomson did, with intent in so
 doing, or by means thereof, to murder or to maim, disfigure or disable,
 the said John Kerr Gray, or with intent to do him some other grievous
 bodily harm.

The prisoner pleaded insanity as a special defence.

The evidence on the part of the Crown conclusively established that the pannel had fired at, and very dangerously wounded Gray, as charged, and also went to rebut the plea of insanity.

The prisoner also adduced evidence to shew that he

was subject to fits of derangement, especially after drinking, and also that this had been especially the case since the pannel had received an injury on the head in America some years before. None of the witnesses, however, spoke to the existence of any mark on his head prior to the time when he was in prison.

No. 9.
John
Thomson.
High Court.
Dec. 4.
1848.
Con. 10th
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c. 38.

BROUN, in addressing the Jury, on behalf of the pannel, proposed, that he should uncover his head, in order that the Jury might see the mark which was said to have been occasioned by the injury in America, spoken to by the witnesses in exculpation.

The LORD JUSTICE-CLERK.—That cannot be allowed. You have not shewn the existence of any such mark prior to the time of the offence. The first mention we have of it is when he was in prison. How then can it be exhibited for the purpose you propose?

BROUN.—The pannel is a production, and as such may be looked at by the Jury.

The LORD JUSTICE-CLERK.—Not for such a purpose and in such a way as you propose. You should have laid a foundation, by shewing the prior existence of such a mark, if you intended to ask us to allow this.

The Jury unanimously found the pannel guilty of the statutory charge as libelled, but recommended him to mercy.

In respect of which verdict of Assize, the said John Thomson was sentenced to be hanged at Greenock on the 23d December 1848.¹

¹ The sentence was afterwards commuted to transportation for life.

Present,

Dec. 4.
1848.

THE LORD JUSTICE-CLERK,

LORDS MONCREIFF, MEDWYN, AND COCKBURN.

ALEXANDER MACKEAN, Suspendor—*A. Carnegie Ritchie*.ARCHIBALD WILSON, Respondent—*Neaves*.

SUSPENSION.—Held, 1st, that it is not necessary, in a summary case in the Police Court, that the pannel should have served upon him a written copy of the complaint before trial; and, 2d, that it is no ground of suspension that he was not allowed forty-eight hours to prepare his defence, he not having asked delay at the time.

No. 10.
Mackean v.
Wilson.
High Court.
Dec. 9.
1848.
Suspension.

THIS was a suspension of a sentence pronounced by the Bailies of the City of Glasgow, whereby the suspendor was sentenced to sixty days imprisonment, as having been guilty of 'fraud and imposition,' in obtaining a shilling from the Inspector of Poor for the Gorbals Parish of Glasgow.

The circumstances of the case were as follows:—

The suspendor, who was by trade a spinner, and who had been, shortly before the date of the alleged wrongful imprisonment, in the Glasgow Infirmary for fever, was unable, on his dismissal from the hospital, to resume his employment, in consequence of boils on his hands. He accordingly took employment as a 'piecer' or tyer up of threads, being the work usually assigned to girls. Having carried on this work for some time, at which he could not earn sufficient for the support of himself and family, he voluntarily gave it up, assigning the state of his health as a reason to his master, and obtaining leave to substitute a girl until he should be able to return. On the same morning on which he thus left his employment he applied for relief to the inspector, and declared that he was out of employment. His application was refused, as was also a second. Having made a third application,

relief was given to the extent of one shilling. Three hours afterwards he was apprehended, and taken the following morning before the Bailies, who sentenced him to sixty days imprisonment, as having obtained the shilling by fraud.

No. 10.
Mackean v.
Wilson.

High Court.
Dec. 9.
1848.

Suspension.

Mackean presented his note, which came on this day to be heard.

CARNEY RITCHIE, for suspender. — Although the crime of falsehood, fraud, and wilful imposition, was competent to be tried summarily before a Police Court, yet, inasmuch as the legislature, by providing in certain Police and other Acts of Parliament for the trial of cases *summarily*, had thereby deprived the lieges, in these cases, of the common law privilege of having the evidence taken down in writing, it had, in lieu thereof, provided certain *equivalents*; one of these was that a written copy of the charge or complaint must be served on the accused a sufficient time before the trial, in order to enable him to prepare his defence; and another, that he should be allowed *at least forty-eight* hours to prepare his defence. In the suspender's case, no written copy of the charge was served on him; so far from that being the case, no written copy of the complaint or charge existed at the time of trial, for on its being applied for some days after the trial by an agent who was then taking an interest in the suspender, it was not and could not be produced, and it was only after a threat of a suspension before the Justiciary Court that a written copy was at length prepared. The accused was not allowed *forty-eight* hours wherein to prepare his defence; and, being locked up a prisoner in the Police-Office, he could not get access to any friends who might have advised and assisted him; and he was a simple ignorant man, who could not be presumed to know his legal rights.

The Court, without calling for a reply, refused the suspension, and decided that it was not necessary that a written copy of the charge or complaint should be served on the accused in order to summary trial; and, in regard

No. 10.
Mackean v.
Wilson.
High Court.
Dec. 9.
1848.

to what was urged for the suspender, that he was entitled to have had *forty-eight* hours wherein to prepare his defence, that this was contingent on the pannel requesting it at the time.

Suspension.

C. SPENCE, S.S.C., Suspenders Agent.— WEBSTER, W.S., Respondent's Agent.

Present,

THE LORD JUSTICE-CLERK,

Dec. 11.
1848.

LORDS MONCRIEFF AND MEDWYN.

HER MAJESTY'S ADVOCATE—*Craufurd A.D.—Deaz A.D.*

AGAINST

JAMES HOYES—*Lorimer.*

THEFT—AMOTIO.—Circumstances in which it was held that the *amotio* was not sufficient to constitute the crime of theft.

JAMES HOYES was charged with Theft, committed by means of Housebreaking; as also with Housebreaking with Intent to Steal.

No. 11.
James
Hoyes.

High Court.
Dec. 11.
1848.

Theft, &c.

IN SO FAR AS, on the night of the 25th, or morning of the 26th, day of September 1848, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, you the said James Hoyes, did, wickedly and feloniously, break into and enter a store-room, situated in or near Dickson's close, in or near the Cowgate of Edinburgh, then and now or lately occupied by Richard Sandilands, cowfeeder, then and now or lately residing there, and this you did by opening the door thereof, by means of a false key or pick-lock, or forcing open the door by some means to the prosecutor unknown, and entering thereby; and having thus, or by some other means to the prosecutor unknown, obtained entrance into said store-room, you the said James Hoyes did, then and there, wickedly and feloniously, steal and theftuously away take, a cheese, weighing twenty pounds, or thereby, the property, or in the lawful possession, of the said Richard Sandilands: OR OTHERWISE, time above libelled, you the said James Hoyes did, wickedly and feloniously, break into and enter the said store-room in manner above mentioned; and this you did with intent to steal.

The evidence against the pannel was, that he had broken into a store, adjoining the house of Sandilands, containing cheeses, which had been carefully left shortly before placed in pairs, one upon the other. The pannel was taken in the room by a policeman, and one cheese was found to have been removed half off the one under it.

No. 11.
James
Hoyes.
High Court.
Dec. 11.
1848.
Theft, &c.

LORIMER, for the pannel, contended, that the *species facti* proved did not amount to the crime of theft, as there had not been any sufficient *amotio* to shew an actual taking, which was always required in a case of theft.

The LORD JUSTICE-CLERK, said, that the *amotio* here proved was not, in the opinion of the Court, sufficient to justify a conviction for theft, as it might easily have occurred by displacement, when the pannel was skulking about to avoid detection; and they directed the Jury to acquit on that charge. Even the proof of any displacement was very unsatisfactory, as it all depended on every row of the cheeses having been placed regularly above the other, and each cheese on the centre of the one below. This was too hard a presumption.

On the charge of housebreaking with intent to steal, the Jury unanimously found the prisoner guilty.

In respect of which verdict of Assize, the pannel was sentenced to be imprisoned for eighteen months.

HER MAJESTY'S ADVOCATE.—*Craufurd A.D.—J. M. Bell A.D.*

AGAINST

MARY SUTHERLAND AND ISABELLA GIBSON OR MURRAY.—*Lorimer.*

COUNTERFEIT COIN—GUILTY KNOWLEDGE—STAT. 2d AND 3d WILL. IV., c. 34.—Where two pannels were charged, *inter alia*, with having base coin in their possession at the time of uttering

No. 12.
Mary
Sutherland
& Isabella
Gibson.
High Court.
Dec. 11.
1848.
Con. 2d &
3d Will. IV.
c. 36.

other base coin : 1st, Held that it was sufficient to establish the offence under the statute against both prisoners, to shew that they were acting under a common design in uttering, although one of them only had possession of the base coin. 2d, Direction to the Jury, that, in judging of the sufficiency of the proof of a charge of uttering base money, the Jury were entitled to take into consideration that the pannel had been previously convicted of an offence against the coinage acts, as an evidence of guilty knowledge.

MARY SUTHERLAND and ISABELLA GIBSON or MURRAY
were charged,—

THAT ALBEIT, by an Act passed in the second year of the reign of His late Majesty King William the Fourth, chapter thirty-four, intituled ' An Act for consolidating and amending the Laws against offences relating to the Coin,' it is enacted, by section seventh, ' That if any person shall tender, utter, or put off, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off, any more or other false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding two years; and if any person who shall have been convicted of any of the misdemeanours, or crimes and offences, hereinbefore mentioned, shall afterwards commit any of the said misdemeanours, or crimes and offences, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or

to be imprisoned for any term not exceeding four years; YET TRUE IT IS AND OF VERITY, that you the said Mary Sutherland are guilty of the crimes and offences set forth in the above-quoted section of the statute above libelled, or of one or more of them, actor, or art and part; and you the said Isabella Gibson or Murray are guilty of the crimes and offences, and high crime and offence, set forth in the said section of the said statute, or of one or more of them, actor, or art and part: IN SO FAR AS on the 18th day of September 1848, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, in or near the shop situated in or near Adam Square, in or near Edinburgh, then and now or lately occupied by Daniel White, then and now or lately spirit-merchant there, you the said Mary Sutherland and Isabella Gibson or Murray did, both and each, or one or other of you, wickedly and feloniously, tender, utter, or put off, as genuine, a false or counterfeit coin, resembling, or apparently intended to resemble, or pass for, a sixpence piece of the Queen's current silver coin, you knowing the same to be false or counterfeit; and this you did, by then and there delivering the same as genuine to Samuel Bates, then and now or lately shopman in the employment of the said Daniel White, then and now or lately residing in or near Murdoch's Close, High Street, Edinburgh, in payment of a bottle or a pint bottle of ale, then and there purchased, or proposed to be purchased, by you, you proposing to receive the balance in change: LIKEAS (2.), time above libelled, and within or near the shop or premises above libelled, you the said Mary Sutherland and Isabella Gibson or Murray, both and each, or one or other of you, had in your possession besides the false or counterfeit coin so tendered, uttered, or put off, as above libelled, a false or counterfeit coin, resembling, or apparently intended to resemble, or pass for, a sixpence piece of the Queen's current silver coin: And you the said Isabella Gibson or Murray have been previously convicted of the crimes and offences set forth in the seventh section of the statute above libelled, or one or other of them.

No. 12.
Mary
Sutherland
& Isabella
Gibson.
High Court.
Dec. 11.
1848.
Con. 2d &
3d Will. IV.
c. 36.

The pannel Sutherland pleaded guilty. The other pannel went to trial.

It appeared from the evidence, that the two pannels had gone together into a spirit shop for a dram, which was mutually partaken of; that Sutherland had tendered a bad sixpence in payment, and that on being apprehended, another piece of base coin was found upon her. There was no evidence against the other pannel, except that she was in the company of Sutherland, and that she

No. 12. Mary Sutherland & Isabella Gibson. partook of the dram for which the bad sixpence was tendered.

High Court. Dec. 11. 1848. LORIMER, for Murray, contended, that there was no proof to connect the pannel Gibson with the offences to which Sutherland had pleaded guilty.

Con. 2d & 3d Will. IV. c. 36. The LORD JUSTICE-CLERK, in charging the Jury, said, that if they considered that Murray was art and part with Sutherland in the proceedings which formed the subject of the present enquiry, then, although Sutherland alone was the utterer of the base coin, and though no bad money was found on Murray, they would be entitled to find both guilty of the offences libelled, both having gone on a common design.

His Lordship also directed them, that in respect of the two previous convictions for the same offence, which had been proved against the prisoner Murray, that they were entitled to take them into calculation, as evidence of guilty knowledge on the part of Murray (if they were satisfied that the two pannels were acting in concert), for they tended to shew that Murray was a trader in base coin. At the same time he directed the Jury, that in determining the weight to be given to such evidence, they would have regard to the lapse of time since the date of the last conviction, which, in the present instance, was considerable, as diminishing the effect such evidence might otherwise have had.

The Jury unanimously found the libel against the pannel Gibson or Murray not proven.

In respect of which verdict of Assize, the said Isabella Gibson or Murray was assoilzed *simpliciter*.

In respect of the judicial confession of the pannel Mary Sutherland, she was sentenced to be imprisoned for eighteen months.

Present,

THE LORD JUSTICE-CLERK,

Dec. 20.
1848.

LORDS MONCREIFF, MEDWYN, COCKBURN, AND WOOD.

PETER PHILLIPS and WILLIAM FORD, Suspenders—*Moncreiff*.

AGAINST

JOHN CROSS, Respondent—*Neaves*.

POLICE COURT—INFORMALITY.—Circumstances in which a sentence of a Police Court was set aside in consequence of the evidence not having been reduced to writing.

THIS was a suspension of a sentence pronounced by one of the bailies of the Burgh Court of Airdrie, proceeding on the following petition and complaint:—

No. 13.
Peter
Phillips &
William
Ford v.
John Cross.

‘ Unto the Honourable the Magistrates of Airdrie, or any of
‘ them officiating as Judge in the Police Court of Airdrie,—
‘ The Complaint of John Cross, writer in Airdrie, Procura-
‘ tor-fiscal of Court for the Public interest.

High Court.
Dec. 20.
1848.
Suspension.

‘ The Complainer charges Peter Phillips, miner, Airdrie; John Gilmour, miner, Airdrie; John Gray, miner, Airdrie; and William Ford, miner or collier, Airdrie, with disorderly conduct and breach of the peace, actors or actor, or art and part: In so far as, on or about Wednesday, the 5th day of July 1848, and at or near the garden ground attached to Mavisbank Cottage, occupied by John Cross, writer in Airdrie, situated at or near Commonsides, Airdrie, they all and each, or one or more of them, did wantonly and maliciously attack, molest, annoy, and use violent, threatening, abusive, and obscene language towards Isabella Copland, servant to the said John Cross, and others; and also, did then and there, otherwise conduct themselves in a riotous and disorderly manner, to the annoyance of the lieges, and in breach of the peace.

(Signed) ‘ JOHN CROSS, *Procurator-fiscal*.’

The circumstances out of which the complaint arose were as follows:—The respondent is proprietor of a small

No. 13.
Peter
Phillips &
William
Ford v.
John Cross.
High Court,
Dec. 20.
1848.
Suspension

cottage and garden, situated in Airdrie. Adjoining his fence was a well, situated on ground belonging to his superior, with whose consent all parties in the neighbourhood had been in the practice of supplying themselves with water therefrom. The respondent, wishing to appropriate the well to himself, caused a lid, secured by a padlock, to be placed on the top thereof, which was removed by order of the superior. The respondent afterwards, in order to drive away the people who were accustomed to resort there for water, allowed his family and servants to cast clay and rubbish into the well, and thereby to render the water unfit for use. On the 5th of July 1848, the complainers went to the well for water. When there, they found the respondent's maid-servant casting rubbish over a wall from his garden, part of which fell into the well, and rendered the water unfit for use. Whereupon an altercation ensued, in the midst of which the respondent appeared, and having charged the complainers with a breach of the peace, he thereafter presented the preceding petition to the Police Court. On the same day, a warrant to apprehend the complainers, and others mentioned in the petition, was granted by one of the bailies. This warrant was never formally served upon or intimated to the complainers; but, on the 10th of July, they appeared before another bailie, who, having partially heard the case, at the request of the respondent, committed them to the prison of Airdrie for farther examination,—the respondent positively objecting to their being liberated on bail. On the 13th, the case was heard in the Police Office, with closed doors, before a single judge, and was taken up without any adjournment,—no agent being allowed to be present on behalf of the complainers. After hearing evidence on both sides,—no note or record of which was reduced to writing, the judge pronounced sentence, decerning the complainers to pay respectively a fine of 30s., or, failing payment, to be imprisoned in the prison of Airdrie for twenty days. The fine not

being paid, they were afterwards, on the same evening, taken to prison, under the following warrant :—

‘ *At Airdrie, the 13th day of July 1848 years.*—Sitting in judgment, Charles Robertson, Esquire, one of the magistrates of Airdrie.—The cause being called, the defenders appeared, and the bailie having heard them in answer to the complaint, and examined on oath, in their presence, the witnesses adduced, Finds the defenders guilty of the offences charged in the within complaint ; and, in respect thereof, decerns and adjudges the said defenders, Peter Phillips, John Gilmour, John Gray, and William Ford, to be imprisoned in the prison of Airdrie, and detained therein, subject to the rules and regulations thereof, for the period of twenty days from this date.

(Signed) ‘ CHARLES ROBERTSON, *Bailie.*’

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Phillips &
William
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John Cross.
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1848.
Suspension.

Phillips and Ford suspended, and their cases were this day heard.

MONCREIFF, for the suspenders,—The whole proceedings were irregular and informal, inasmuch as there was no proof reduced to writing, on which the sentence had proceeded (*Penman v. Watts*, High Court, Nov. 24. 1845, Broun, vol. ii. 586.) He was then stopped.

NEAVES, for the respondent—The case is not competently here. By the 72d section of 1st and 2d Geo. IV. c. 60 (the Airdrie Police Act), it is provided that any aggrieved person may appeal to the Circuit Court, and that was the remedy which the complainers should have taken.

LORD MEDWYN.—Surely a man in jail is not to endure his full imprisonment before he appeals. He would then be met with another objection, that there was nothing to suspend. In this case the whole proceedings are plainly inept, and I think we ought to suspend, with expenses.

The other Judges concurred.

JOHN RITCHIE, Suspende—*Deas*.

AGAINST

DAVID PILMER, Respondent—*Neaves*.

SUSPENSION—INFORMALITY OF CITATION.—Held, that where a person has been cited as a witness, and precognosed as such, he cannot, on his attendance in obedience to his citation, be summarily put to the bar, and tried as being guilty of the offence, in respect of which he had been required to attend as a witness.

No. 14.
Ritchie v.
Pilmer.

This Suspension originated in the following circumstances :—

High Court.
Dec. 20.
1848.

Suspension.

The Suspende who was master of the schooner ' Jules ' of Dundee, had bought at Revel three pork hams, and other articles of diet, as he alleged, for his own use ; as also, some beef at a small price for the use of the vessel. During the voyage home, having some ladies as passengers, he had used for their accommodation two of the pork hams he had bought for himself. He had also cured as hams two portions of the beef which he had bought for the use of the vessel. The value of the beef hams so cured, was much less than that of the pork hams which had been consumed.

On the arrival of the vessel at Dundee, and before any adjustment of accounts between the suspende and the shipowners, the suspende, in the presence of the ship's agent, ordered the cook to take two beef hams which he had cured on board out of the vessel, and carry them on shore for his own use.

The ship's agent having given information against the cook, a criminal complaint of theft was preferred against him at the instance of the respondent, and the morning when the same was coming on to be heard, the suspende was cited as a witness in the following terms :—

' I, Joseph Hanna, Constable of the Harbour Police Court of Dundee, and surrounding bounds, over which the powers and regulations of the Dundee Police Act and Dundee Harbour Acts extend, sum-

‘ mon you, John Ritchie, now or lately Shipmaster, residing in Broughty Ferry, to appear before the Judge of said Harbour Police, in a Court to be held in the Burgh Police Court-Room, Dundee, upon the 5th day of October 1848, in the hour of cause, half-past nine o’clock forenoon, to bear evidence for the Complainer, in the complaint at the instance of David Pilmer, Superintendent of Harbour Police, against Charles Jameson, sailor, accused with the crime of theft, with certification: This I do upon the 5th day of October 1848.

No. 14.
Ritchie v.
Pilmer.
High Court
Dec. 20.
1848.
Suspension.

JOSEPH HANNA, *H. P. Constable.*’

This citation was served upon the suspender at half-past six in the morning, at Broughty Ferry, a distance of four miles from Dundee.

On the suspender’s arrival in Dundee, shortly before the time of hearing the complaint, he was precognosed by the respondent, and told to wait in a private room. Shortly afterwards, he was informed that he would be jointly prosecuted along with Jameson the cook; and was accordingly, after the lapse of half an hour, placed at the bar, together with him, on the following complaint, which had been prepared in the mean time:—

‘ Unto the Honourable the Judges acting in the Police Court for the Burgh of Dundee, and also for the Harbour and those parts of the River or Frith of Tay which are within the limits and precincts of the Port and Harbour of Dundee, and over which the powers and regulations of the Dundee Police Act and Dundee Harbour Act extends; Humbly complains David Pilmer, Superintendent of the Dundee Harbour Police, and Procurator-Fiscal of Court for the public interest, against John Ritchie, shipmaster, residing in Broughty Ferry, and Charles Jameson, sailor or sailmaker, residing at Hawkhill, Dundee, defenders, for being guilty of the crime of theft, actors or art and part: In so far as, on Wednesday the 4th of October 1848 years, from the schooner ‘ Jules’ of Dundee, then lying in Earl Grey’s Dock, at the Harbour of Dundee, said defenders did, both and each, or one or other of them, wicked and feloniously steal, and theftuously away take, two beef hams, weighing 40 lbs. or thereby, the property or in the lawful possession of Baxter Brothers and Company, merchants and shipowners in Dundee, and which property, stolen as aforesaid, does not exceed in value £10 sterling. It is therefore craved, that warrant be granted for apprehending and carrying the said defenders into Court, to answer to this complaint, and for citing witnesses for both parties; and that said defenders be

No. 14. ' thereafter punished according to law, or such other judgment as the
 Ritchie v. ' case may require.—According to Justice,
 Pilmer. ' DAVID PILMER, *Superintendent.*'

High Court.
 Dec. 20.
 1848

Suspension. On this complaint, the Judge granted the following
 deliverance forthwith :—

' *Dundee, 5th October 1848.*—The Judge grants warrant to officers
 ' of police for apprehending and bringing the said defenders, John
 ' Ritchie and Charles Jameson, into Court, and for citing witnesses
 ' for both parties. PETER HEAN, *Bailie.*'

When placed at the bar, the suspender, as alleged by
 him, repeated what he had said to the respondent, that
 the hams had been taken out of the vessel by his orders,
 under the circumstances above set forth. This was
 treated as a plea of guilty by the Police Judge, who
 thereupon pronounced the following sentence :—

' *Dundee, 5th October 1848.*—Having considered the foregoing
 ' complaint, examined the defenders, and the defender John Ritchie
 ' having confessed that he is guilty as libelled, Finds him guilty in
 ' terms of his own confession ; and having heard evidence adduced
 ' against the defender Charles Jameson, Finds the complaint proven
 ' against the said Charles Jameson : Therefore, adjudges and ordains
 ' the defenders to be imprisoned in the Jail or Tolbooth of Dundee,
 ' in *modum poenæ*, for the space after mentioned,—*viz.*, the defender
 ' John Ritchie, for sixty days, and the defender Charles Jameson, for
 ' thirty days, both from this date ; and, during the period of imprison-
 ' ment, to be kept at hard and continued labour in the Bridewell de-
 ' partment of said Jail or Tolbooth, subject to the rules and regula-
 ' tions of the Establishment, and grants warrant accordingly : Or-
 ' dains the stolen property to be restored to the true owners, designed
 ' in the complaint. PETER HEAN, *Bailie.*'

This sentence was immediately carried into effect ;
 whereupon Ritchie suspended, on the ground that, hav-
 ing been cited as a witness, and precognosced as such, it
 was incompetent afterwards to put him to the bar as a
 criminal, and proceed to convict him on the statement
 he had made, whilst considering himself a witness.

Pleaded for the suspender, that this was an irregular
 and illegal proceeding. No person who had been cited as

a witness could competently be precognosced in that character, and afterwards be put into the dock on a few minutes notice, and tried forthwith, without opportunity to obtain advice, and get that assistance which was necessary to enable him to refute so serious a charge; case of *Robertson v. Mackay*, High Court, July 21. 1846, (Arkley, p. 114).

No. 14.
Ritchie v.
Pilmer.

High Court.
Dec. 20.
1848.

Suspension.

2. The alleged plea of guilty on which the sentence professedly proceeded, was altogether a mistake. In point of fact, it was a plea of not guilty, inasmuch as the facts shewed that the taking was lawful.

Pleaded for the respondent—The Judge found that the suspender confessed his guilt, and he was the proper judge to say whether he had done so or not. It was impossible to ascertain what were the words used by the suspender at the time, and consequently the Court could not enquire whether the inference which the Judge drew was well founded, or otherwise.

2. There was no illegality or irregularity. The police had acted honestly throughout; they treated him as a witness, so long as they thought him innocent of the crime; and when they had discovered him to be art and part, there was no necessity for serving upon him any complaint, or citing him to appear, as he was already in custody. Besides, it was not averred that he had requested time to prepare a defence when the case was heard.

The COURT, without entering on the question, whether the statement of the suspender warranted the Bailie to consider it as a plea of guilty, unanimously sustained the suspension, on the ground that the citing a person as a witness so short a time before the trial of the party against whom he was to have been adduced—precognoscing him as such, and then turning round and charging him on his own evidence, so procured, was an irregularity so flagrant, that no sentence could be sustained which had followed thereon; and observed, that

No. 14. the case of *Robertson v. Mackay* entirely governed the
 Ritchie v. present.
 Pilmer.

High Court.
 Dec. 20
 1848.

Suspension.

The sentence was accordingly suspended, with ex-
 penses.

WOTHERSPOON & MACK—LOCKHART, HUNTER, & WHITEHEAD.—Agents.

METHVEN, Suspender.—*P. Fraser.*

AGAINST

GLASS, Respondent.—*Neaves.*

SUSPENSION—MASTER AND SERVANT—STATUTE 4th GEO. IV. c. 34.

—Held, that a judgment of the Quarter Sessions both discharging
 the servant and abating the wages, was unwarranted by the statute.

No. 15.
 Methven v.
 Glass.

High Court.
 Dec. 20.
 1848.

Suspension.

This was a suspension of a decision of the Quarter-
 Sessions of the county of Fife, reversing the decision
 of the Justices on a complaint against the suspender,
 that he had absented himself from his master's service
 before the period of his engagement had expired. On
 the original hearing before the Justices, they found in
 favour of the suspender, and dismissed the complaint,
 whereupon the respondent having appealed to the Quar-
 ter-Sessions, that judgment was reversed, and it was
 decerned that the suspender should be discharged from
 service, and should also abate all wages.

FRASER, for the suspender, argued, that this decerni-
 ture was more than the statute authorised. The third
 section of 4th Geo. IV. cap. 34. only authorised alterna-
 tive penalties. Quarter-Sessions might either discharge,
 or abate the wages which had been earned, but could
 not do both, as those penalties were not cumulative
 under the statute.

NEAVES.—The sentence was not objectionable on the

ground alleged. The punishment inflicted was merely that the wages for the whole term should be abated, and the discharge from service followed as a necessary consequence.

No. 15.
Methven v.
Glass.

High Court.
Dec. 20.
1848.

LORD JUSTICE-CLERK.—How can you abate what is not yet due.

NEAVES.—Take it that it discharges him from the service, it follows that he would get no wages.

LORD JUSTICE-CLERK.—Yes, he would get wages up to the period when he was discharged. The principle is to prevent desertion in search of better wages, but the penalty imposed is either dismissal from service, or forfeiture of wages already earned. These are in the alternative, whereas you have proceeded to impose both. That is clearly beyond the statute.

LORD MONCREIFF.—If you make the sentence extend to wages not due at the period of dismissal, then it is repugnant and insensible. If it had been your object to mulct the suspender of his wages for the whole term, instead of dismissing him from the service, you should have ordained him to serve the whole time without wages.

The other Judges concurred.

The note was accordingly passed, with £5, 5s. of modified expenses.

ANDREW MURRAY, W.S.—JOHN MURDOCH, S.S.C.—Agents.

ROBERT CRAIG, Suspender.—*Neaves*.

AGAINST

JOHN MURE STEEL.—*Deas*.

POLICE COURT—IRREGULARITY OF CITATION.—Held, that it was incompetent to proceed in a Police Court against a pannel who had been cited on the previous day to that on which the case was heard, to answer a different charge.

No. 16.
Craig v.
Steel.
High Court.
Dec. 20.
1848.
Suspension.

THIS suspension arose in the following manner. On the 12th of December 1848, the respondent presented a petition to the Justices of the Peace for the county of Lanark, for citation of the suspender, on a charge of theft, and on that day the suspender found bail for his appearance on the 14th. On the 13th a citation was regularly served, requiring him to appear on the 14th, to answer to the charge of theft for which he had given bail. When the case came on he was charged with theft or breach of trust alternatively. He was attended by his agent, and made no objection to the regularity of the charge, and was thereupon afterwards convicted by the presiding Justices.

Having presented his bill of suspension, which came on this day to be heard, the Court, without hearing *Neaves* for the suspender, called on

DEAS, for the respondent, who urged that there was no ground for suspending the conviction, as the party, who acted under advice at the time when the original complaint was heard, took no objection to the regularity of the proceedings, and thereby homologated any mistake which might have been made. It was as if the party, having been present in the Police-office, had been charged on a regular complaint for theft or breach of trust, without ever having been cited at all. If, in such circumstances, he chose to go to issue, without objecting that he had not been cited, he could not afterwards object when a conviction followed. No doubt the citation, which was actually served in this case, was inapplicable,

and must be held to be out of the case, which must be considered as if it commenced when the parties came to the bar on the 14th.

The LORD JUSTICE-CLERK.—There is no extremity of time in this case, requiring us to hold the proceedings good in respect thereof. There was a regular complaint made on the 12th, and bail was taken on that day for the appearance of the suspender on the 14th, to answer to a charge of theft. Then on the 13th there is a citation to answer to the same charge. When the case is called on the 14th, the party is charged with theft or breach of trust alternatively. This, I conceive, to be an incompetent proceeding. I cannot think in these summary cases that it is competent to cite a party to answer for one offence, then, without notice, on his appearance in obedience to the citation, to charge him with another. I think this objection is insuperable, and that the conviction ought to be suspended, with expenses.

The other Judges concurred.

WOTHERSPOON & MACK, W.S.—JOHN LEISHMAN, W.S.—Agents.

Present,

THE LORD JUSTICE-CLERK.

LORDS MACKENZIE AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. T. Maitland—Craufurd A.D.*

AGAINST

JOHN HAMILTON AND MARY GARDEN OR HAMILTON.—*Moncreiff.*

RESET OF THEFT—MARRIED WOMAN.—Rule stated, that it was not enough to warrant conviction of a married woman of reset of theft, that she had endeavoured to conceal some of the articles from the police; the Jury being satisfied that she did this, not because she had been concerned in the reset, but merely to screen her husband.

No. 16.
Craig v.
Steel.

High Court.
Dec. 20.
1848.

Suspension.

Jan. 2.
1849.

No. 17.
John
Hamilton
and Mary
Hamilton.
High Court.
Jan. 2.
1849.
Reset of
Theft.

JOHN HAMILTON and MARY GARDEN OF HAMILTON,
were charged with Reset of Theft :

IN SO FAR AS (1.), on one or other of the days of the month of April 1846, or of March immediately preceding, or of May immediately following, the particular day being to the prosecutor unknown, some person or persons to the prosecutor unknown, having wickedly and feloniously stolen and theftuously carried away from the house or premises in or near Nicolson Street of Edinburgh, then and now or lately occupied by John Crichton, tailor and clothier, then and now or lately residing there, a silver watch, the property, or in the lawful possession, of the said John Crichton : AS ALSO (2.), on one or other of the days of the month of June 1848, or of May immediately preceding, or of July immediately following, the particular day being to the prosecutor unknown, some person or persons to the prosecutor unknown, having, within or near a house in or near the Canongate of Edinburgh, the occupant or occupants of said house being to the prosecutor unknown, wickedly and feloniously, stolen and theftuously carried away from the pocket or person of Emanuel Burton, a cabinet-maker, then and now or lately residing in Heriot Mount, in or near Edinburgh, a silver watch, and a guard-chain, the property, or in the lawful possession, of the said Emanuel Burton : AS ALSO (3.), on the 8th day of June 1848, or on one or other of the days of that month, or of May immediately preceding, or of July immediately following, some person or persons to the prosecutor unknown, having wickedly and feloniously stolen and theftuously carried away from the house or premises in Broxburn, parish of Uphall, and county of Linlithgow, then and now or lately occupied by John Bruce, merchant, then and now or lately residing there, a gold watch, the property, or in the lawful possession, of the said John Bruce : AS ALSO (4.), on the night of the 19th, or morning of the 20th, day of June 1848, or on one or other of the days of that month, or of May immediately preceding, or of July immediately following, some person or persons to the prosecutor unknown, having, within or near a house in or near the Leith Wynd of Edinburgh, occupied by Janet Shaw, or by some other person to the prosecutor unknown, wickedly and feloniously, stolen and theftuously carried away from the pocket or person of David Blaikie, mason, then and now or lately residing in or near the Links of Burntisland, in the parish of Burntisland, and county of Fife, a silver watch, the property, or in the lawful possession, of the said David Blaikie : AS ALSO (5.), on the night of the 22d, or morning of the 23d, day of June 1848, or on one or other of the days of that month, or of May immediately preceding, or of July immediately following, some person or persons to the prosecutor unknown, having, within or near a house in or near the Leith Wynd of Edinburgh, then or recently occupied by Ann Laurie, then or recently before residing there, or by some other person or persons

to the prosecutor unknown, wickedly and feloniously, stolen and theftuously taken away from the pocket or person of Hugh Norris, surgeon, then residing in Union Place, in or near Edinburgh, and now or lately at South Petherton, in the county of Somerset, in England, a silver watch, and a pencil-case, the property, or in the lawful possession, of the said Hugh Norris: As ALSO (6.), on the night of the 23d, or morning of the 24th, day of June 1848, or on one or other of the days of that month, or of May immediately preceding, or of July immediately following, some person or persons to the prosecutor unknown, having, within or near a house in or near the Leith Wynd of Edinburgh, the occupant or occupants of said house being to the prosecutor unknown, wickedly and feloniously, stolen and theftuously taken away from the pocket or person of James Cairns, a mason, then and now or lately residing in Home Street of Edinburgh, a silver watch, the property, or in the lawful possession, of the said James Cairns: As ALSO (7.), on the night of the 7th, or morning of the 8th, day of July 1848, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, some person or persons to the prosecutor unknown, having, within or near a house in or near the Leith Wynd of Edinburgh, the occupant or occupants of said house being to the prosecutor unknown, wickedly and feloniously, stolen from George Simpson, then and now or lately a servant in the employment of Thomas Macdougall Brisbane, Esquire, and then and now or lately residing at Brisbane, in the parish of Largs, and county of Ayr, a silver watch, the property, or in the lawful possession, of the said George Simpson: As ALSO (8.), on the 2d day of August 1848, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, some person or persons to the prosecutor unknown, having, within or near a house in or near the Leith Wynd of Edinburgh, the occupant or occupants of said house being to the prosecutor unknown, wickedly and feloniously, stolen and theftuously taken away from the pocket or person of Roderick M'Kenzie, plate-layer, then and now or lately residing with John Jenkinson, farm-servant, at Ballencrieff, in the parish of Aberlady, and county of Haddington, a silver watch, the property, or in the lawful possession, of the said Roderick M'Kenzie: As ALSO (9.), on the 22d day of August 1848, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, Alexander M'Kay and Thomas Ogilvie, both now or lately prisoners in the prison of Edinburgh, or some other person or persons to the prosecutor unknown, having wickedly and feloniously stolen and theftuously carried away from the house in Hanover Street, in or near Edinburgh, then and now or lately occupied by James Gravett, flesher, then and now or lately residing there, a brooch, the property, or in the lawful possession, of the said James Gravett: As ALSO (10.), on the 30th day of August 1848, or on one or other of the days of that month, or of

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John
Hamilton
and Mary
Hamilton.

High Court.
Jan. 2.
1849.

Reset of
Theft.

No. 17.
John
Hamilton
and Mary
Hamilton.
High Court.
Jan. 2.
1849.
Reset of
Theft.

July immediately preceding, or of September immediately following, some person or persons to the prosecutor unknown, having, at some places within or near Edinburgh, the particular place being to the prosecutor unknown, wickedly and feloniously, stolen and theftuously taken away from the pocket or person of William Clark, spirit-dealer in the Low Calton, in or near Edinburgh, then and now or lately residing there, a gold watch, a gold chain, and a key, the property, or in the lawful possession, of the said William Clark; you the said John Hamilton and Mary Garden or Hamilton did, both and each, or one or other of you, within the period between the dates respectively above libelled, as the dates of the thefts respectively above libelled, and the 7th day of September 1848, and within or near the house or premises in the Canongate above libelled, then and now or lately occupied by you, or one or other of you, or at some other place or places to the prosecutor unknown, the particular time and place being to the prosecutor unknown, wickedly and feloniously, reset and receive the several articles above libelled, or part thereof, the same having been respectively stolen as above libelled, you well knowing the same to have been stolen:

The evidence against the pannels consisted of the persons who had been robbed of the various articles libelled, and the police, who had found the articles concealed in a secret hole in the wall of Hamilton's house, with the exception of one watch, which was found on the person of the female prisoner, by the female searcher at the police station.

It was not shewn when or where any of the articles had been resetted.

The occupation of the male prisoner was that of a hawker, and his wife usually took charge of the shop and premises in Edinburgh, where the police found the articles.

MONCREIFF, for the female prisoner, contended that there was no evidence against her. The fact of the watch having been concealed on her, was perfectly consistent with her innocence, as she might have secreted it during the search, in order to screen her husband, and as to the other articles, it had not been shewn that they were ever in her separate possession, so as to infer any guilt against her.

The LORD JUSTICE-CLERK directed the Jury, that if they thought the woman had merely concealed the watch to screen her husband, and had had no concern in the resetting of it, whether as managing the shop or otherwise, they must acquit her. No doubt, a married woman was answerable criminally for any act of reset of theft of which she was guilty, whether as sole actor or art and part therein. But it would not be enough to infer that she was so guilty, if, after the offence had been committed, she endeavoured to assist her husband in avoiding detection by concealing the article. Every such case, however, depended on the actual facts, of which the Jury were to judge.

The Jury found John Hamilton guilty, and the libel not proven against the woman.

In respect of which verdict of assize, the said John Hamilton was sentenced to be transported for ten years, and the said Mary Garden or Hamilton was assoilzied *simpliciter*, and dismissed from the bar.

Present,

The LORD JUSTICE-CLERK,

LORDS MONCREIFF AND COCKBURN.

Feb. 5.
1849.

HER MAJESTY'S ADVOCATE—*Craufurd A.D.—E. F. Maitland A.D.*

AGAINST

ALEXANDER JAMES PETTY MENZIES.—*Moncreiff*.

FALSEHOOD, FRAUD, AND WILFUL IMPOSITION—FORGERY.—1. Direction to the Jury as to what was necessary to support a charge of Falsehood, Fraud, and Wilful Imposition. Held, 2d, That it was sufficient, in the absence of counter proof, to establish that the Christian name of the prisoner was different from that which he had used on the forged instrument, that he had given another name to the Sheriff, and answered to the indictment framed conform thereto. 3d, That the crime of forgery is committed by the use of a false Christian name, if that be used with the intention to mislead.

No. 18.
Alexander
J. P.
Menzies.

High Court.
Feb. 5.
1848.

Forgery,
&c.

ALEXANDER JAMES PETTY MENZIES, was charged with Falsehood, Fraud, and Wilful Imposition; as also, with Forgery; and also, with Uttering Forged Writings:

IN SO FAR AS (1.) on several occasions between the 23d day of July and 3d day of September 1848, the particular day or days being to the prosecutor unknown, and within or near the shop or premises in West Register Street of Edinburgh, then and now or lately occupied by George Vallance, breeches-maker and glover there, you the said Alexander James Petty Menzies did, wickedly, falsely, fraudulently, and feloniously, represent and pretend to the said George Vallance, and to Walter Vallance and George Vallance junior, sons of, and then and now or lately residing with, the said George Vallance, or to one or more of them, that you were Mr Lockhart Menzies, a member or relative of the family of Menzies of Castle-Menzies, in Perthshire, and an officer of the Third Light Dragoons, and you did by these and the like false representations and pretences, wilfully and wickedly impose upon the said George Vallance, Walter Vallance, and George Vallance junior, or one or more of them, and did thereby prevail upon and induce the said George Vallance to advance on credit to you from time to time, during the period above libelled, clothes and other furnishings to the amount of £27, 19s. 6d., sterling, or thereby, which you did not pay or account for to the said George Vallance, but appropriated to your own uses and purposes, whereby the said George Vallance was defrauded and wilfully imposed upon by you the said Alexander James Petty Menzies: LIKEAS (2.), on several occasions between the 23d day of August and 14th day of September 1848, the particular days being to the prosecutor unknown, and within or near the shop or premises in or near George Street, Edinburgh, then and now or lately occupied by the Company or firm of Meyer and Mortimer, then and now or lately army and navy contractors and clothiers there, you the said Alexander James Petty Menzies did, wickedly, falsely, fraudulently, and feloniously, represent and pretend to John Mortimer, then and now or lately a partner of the said company or firm, and then and now or lately residing in or near George Street aforesaid, and to Donald Munro, then and now or lately clerk to the said company or firm, and then and now or lately residing in or near Castle Street, Edinburgh, or to one or other of them, that your name was Lockhart, and that you were a lieutenant or other officer in the Seventy-Eight Regiment, and did thereby prevail upon and induce the said John Mortimer and Donald Monro, or one or other of them, or other person or persons acting for the said company or firm, to advance on credit to you, from time to time, during the period last above libelled, clothes and other furnishings, and lent cash, to the amount of £9, 11s. sterling, or thereby, which you did not pay or account for to the said John Mortimer, or to any other person for behoof of the said

company or firm, but appropriated to your own uses and purposes, whereby the said John Mortimer, and the said company or firm, were defrauded and wilfully imposed upon by you the said Alexander James Petty Menzies: LIKEAS (3.), on the 23d day of August 1848, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, you the said Alexander James Petty Menzies having written or procured to be written, a bill of exchange or other similar writing for £30 sterling, bearing to be dated 'Edinburgh 23^d August 1848,' and to be payable two months after date, and to be drawn by Moritz Cohnert, and to be addressed, 'To Grenville A Lockhart Esq^r., 78 Highlanders at Tait's Hotel 'Edinburgh,' you the said Alexander James Petty Menzies did, time last above libelled, and in or near the shop or premises in or near Leith Street, in or near Edinburgh, then and now or lately occupied by Moritz Cohnert, then and now or lately jeweller there, and then and now or lately residing in or near St James' Square, in or near Edinburgh, or at some other place in or near Edinburgh, to the prosecutor unknown, wickedly and feloniously, forge and adhibit, or cause and procure to be forged and adhibited, upon the said bill of exchange or other similar writing, the subscription 'G. A. Lockhart Lt 78th Regt^t,' as acceptor, intending the same to pass for and to be received as the genuine subscription of Græme Alexander Lockhart, then and now or lately lieutenant in Her Majesty's 78th Regiment of Foot, then and now or lately in India, or elsewhere to the prosecutor unknown, or of some other person of the name of Lockhart to the prosecutor unknown, or the same being a fictitious subscription: FARTHER, time last above libelled, and within or near the shop or premises aforesaid, then and now or lately occupied by the said Moritz Cohnert, you the said Alexander James Petty Menzies did, wickedly and feloniously, use and utter as genuine, the foresaid forged bill of exchange or other similar writing, having thereon the said forged subscription, you well knowing the same to be forged, by then and there delivering the same as a genuine bill to the said Moritz Cohnert, in payment of the price of various articles of jewellery, and in repayment of various advances of cash to you by the said Moritz Cohnert: LIKEAS (4.), on the 13th day of September 1848, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, you the said Alexander James Petty Menzies having written, or procured to be written, a bill of exchange or other similar writing, for £49 sterling, bearing to be dated 'Edinburgh 13 Sep^t 1848,' and to be payable one month after date, and to be addressed, 'To 'Mess Cox & Co. Craig's Court Charing Cross London,' did, time last above libelled, and in or near the hotel or premises in or near Princes Street, Edinburgh, then and now or lately occupied by James Tait, then and now or lately hotel-keeper, residing there, wickedly and feloniously, forge and adhibit, or and cause procure to be forged

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&c.

and adhibited, upon the said bill of exchange or other similar writing last above libelled, the subscription 'Lockhart Menzies,' or other similar subscription, as drawer and indorser, intending the same to pass for and to be received as the genuine subscription of some person of the name of Lockhart Menzies to the prosecutor unknown, or the same being a fictitious subscription: FARTHER, time last above libelled, and in or near the hotel or premises aforesaid, then and now or lately occupied by the said James Tait, you the said Alexander James Petty Menzies did, wickedly and feloniously, use and utter as genuine the forged bill of exchange or other similar writing last above libelled, having thereon the said forged subscriptions, you well knowing the same to be forged, by then and there delivering the same, or causing or procuring the same to be then and there delivered to the said James Tait, in payment of an account for board and lodging incurred by you to the said James Tait.

The pannel was indicted under the name he gave to the Sheriff when he emitted his declaration; and the Public Prosecutor did not adduce any other evidence to show that his name was not Lockhart Menzies, as subscribed by him on the bills.

The evidence of the first charge was as follows:—

WALTER VALLANCE.—One of our shopmen was sent for on 24th July, to measure a gentlemen at Tait's Hotel for trowsers. The prisoner came to the shop a few days after; he was then wearing the trowsers made on account of this order. He said we might as well take his address in the country, which was Lockhart Menzies, Esq., Rannoch Lodge, Perthshire. This was all that took place. He ordered more clothes at that time. I often saw him after. Shortly before the Agricultural Ball, he said he thought of going to the ball in the uniform of his regiment. I said what regiment? he said, Third Light Dragoons. He did not get a uniform, but afterwards came and ordered a dress suit. He ordered a coat of the uniform of a racing club. The account shown, £27:19:6, is ours. During his dealings, we believed him Mr Lockhart Menzies, and an officer of the Third. We made furnishings in consequence. We knew Rannoch Lodge belonged to Sir Robert Menzies, and believed him a relation. We began to suspect, because a brother tradesman said he had received the name of Lockhart from him.

GEORGE VALLANCE corroborated the above, and deponed that the prisoner in August said he was in the Third Light Dragoons, and it would cost him £300 to exchange into a regiment at home.

MONCREIFF.—It was a point of law, calling for direc-

tion by the Court, whether, when a person signed his own surname, but used a prefix which was not his own, that was forgery. The question was not whether he was christened by a particular name, but whether he committed the act with the intention of forgery. It was not the case of a fictitious signature, but that of assuming a prefix which he thought better than his own. This was often done most innocently; and in order to establish the prisoner's guilt, the Jury must believe that it was done by him in circumstances where, if he had signed his own christian name, credit would not have been given him. But farther, the prosecutor had failed to show, except by the prisoner's declaration, which alone was not proof, that the prisoner's name was not Lockhart Menzies.

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Alexander
J. P.
Menzies.

High Court,
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&c.

The LORD JUSTICE-CLERK, in summing up, said—It is contended there is no proof that the prisoner is not Lockhart Menzies. This is not the question in issue. He is indicted under a particular name, and answers to it. When examined, he says that is his name; and it is clear, if a person gives a name to the Sheriff as his name, the prosecutor is entitled to indict him under that name. If the defence is, that that is not his name, it was his business to have proved it, supposing that it could have availed him.

The next observation I have to make to you is, that the most successful means of making a false representation, is not to volunteer such a statement as "I am Mr Lockhart Menzies, a relation of Sir Robert, and an officer in the Third Light Dragoons." It is by the way and manner in which circumstances are conveyed to the mind, incorrect in themselves, but which the party knows will have weight with the persons interested. It is sufficient, therefore, that the representation is conveyed to the mind in an indirect manner, by conduct calculated to leave the impression that the person is what he holds himself out to be. No doubt, it must be proved that some person was thereby imposed upon and trusted on

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that account. In this case, though the witnesses were not directly asked whether they trusted in consequence of this representation, you will consider if this may be sufficiently inferred, as, except the first two items in the account of Vallance, all the particulars of the account are incurred after the 3d August when the statements were made. That is the evidence on the first charge, and you who understand business, will say whether the representation was intended to mislead the tradesman. It is not necessary that the account should be commenced, if it is continued on the credit that the prisoner is Mr Lockhart Menzies, and an officer of Third Light Dragoons.

In regard to the question of forgery, I must tell you, it is not a question about the credit given in the hotel. It is a question about forging a name to a bill, and uttering the same as genuine. The charge is of forging a name that he knows to be fictitious. It is said, that in signing Lockhart Menzies, whether he took a wrong Christian name or not, he signed his own surname, and this is not a fictitious signature, and so the crime of forgery is not made out. But this bill is written and addressed by him; he giving as the place of payment the office of Cox & Co. He signed Lockhart Menzies, and if you believe that the object of that was to convey to Tait and his clerk the impression that he was Mr Lockhart Menzies, who had funds at Cox's, that is the crime of forgery. For forgery and uttering are completed by subscribing a name of a person supposed to have money at a banker's, and uttering it as such. Therefore, in point of law, if you are satisfied that the name subscribed to the bill was intended to be that of another person than himself, and who was supposed to have money at Cox's, then the crime of forgery is complete.

The Jury unanimously found the pannel guilty as libelled.

In respect of which verdict of assize, he was sentenced to be transported for seven years.

Present,

THE LORD JUSTICE-CLERK,

LORDS MONCREIFF, MEDWYN, COCKBURN, AND WOOD.

Feb. 15.
1849.JOHN MEEKISON and TUTOR, Suspenders—*Deas*.

AGAINST

DONALD MACKAY, Respondent—*Neaves*.*(Sequel of Case reported, Arkley, p. 503.*

POLICE COURT—SUSPENSION.—Circumstances in which it was held to be incompetent to try children, of the ages of ten and twelve, in the Police Court, in the absence of their parents, whose residences were well known.

THIS case came to be disposed of on the commissioner's report of the proof.

DEAS, for the suspenders, contended,—1. That it was established by the proof, that the parents of the child were excluded at the time the original complaint was heard. 2. That, whether that was established or not, it was incompetent to proceed to convict a child at the age of ten years of such an offence, summarily, and in the absence of his parents, whose residence was well known to the police.

LORD MEDWYN.—This is a very painful case. The question for us to determine is, whether the complainer's parents were excluded from the police office at the time he was convicted. If this had been done, no doubt it would have been enough to justify a suspension. I, however, do not think it was. It was the duty of his parents to be present at the first hour when the magistrates sat, and to continue in attendance until the case was brought on. It is not shewn that there was any irregularity in the way of bringing on the case, and I cannot say that there was any duty on the part of the police, either to advise her to remain until the case was called, or to give her

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any particular introduction into the office when she came back with her witness. On the whole, I cannot think she was improperly excluded.

LORD COCKBURN.—The proof, no doubt, is insufficient to establish an *exclusion* of the complainer's parent. So far the grounds of suspension are not only not proved, but disproved. But it is my duty to say, that this is not a case which ought to have been sent to the Police Court. Suppose, for argument, that the hour at which what is styled the offence was committed, was half-past three, during public worship, what does that matter? Here are two children, or creatures, only about ten years old, found playing at marbles, and rejoicing at the skill they shewed in shooting into a hole. They are taken hold of by the police, and although he knew the parents, instead of seeking them, he takes the children and locks them up till next morning, amongst the worst vagabonds of the town. I feel it incumbent upon me as a judge to say, that I protest against such a proceeding. It was an abuse to take and lock up two such children when their parents were well known. It was an outrage on all proper feeling, and especially on all those feelings on which it professed to proceed, in reference to the due observance of the Sabbath. The crime committed by the officers was infinitely greater than the one imputed to the infants; and I hope never again to see Sunday protected by such unchristian proceedings. On these grounds, I am for sustaining the suspension.

LORD WOOD.—The proof establishes that the complainer's mother was not refused admittance to the office; but I concur with Lord Cockburn, on the general point of the impropriety of the whole proceedings. No doubt, cases might be supposed where the interference of the police was absolutely necessary, even against children of their age; but, in my opinion, it was exceedingly improper to take these children to the police office for such an offence, lock them up the whole of Sunday evening, and try them on the following morning, in the absence of

their parents, whose residence was well known. I entirely disapprove of such a mode of proceeding, and all that followed thereon.

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The LORD JUSTICE-CLERK.—I think the proof establishes that the mother applied for access and was refused. I think this established by the real and positive testimony in the case. I also agree in quashing the sentence, as an illegal and oppressive proceeding, on the grounds stated by Lords Cockburn and Wood. I consider it extremely wrong on the part of the police to have proceeded to try and convict these children in the absence of their parents. These Inferior Courts must be restrained when they proceed to punish such young children, in such a way. It is right to make it known that we shall quash all convictions so obtained. I sustain the complaint, on the ground of the express terms in which it was prepared; but no conviction ought ever to have followed on the evidence which was adduced, and no magistrate ought ever to have encouraged any policeman to prefer such a complaint.

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LORD MEDWYN.—I also concur in condemning the proceedings. The police, knowing the parents of the children, ought to have gone to them, and not have taken the children to the office, or tried them at all.

The COURT passed the note of suspension.

WOTHERSPOON & MACK, S.S.C.—LOCKHART, HUNTER & WHITEHEAD, Agents.

JOHN LOCKIE, Suspender—*Deas*.

AGAINST

JOHN M'WHIRTER, Respondent—*Neaves—Aytoun*.

STATUTE.—Held, that under the 203d section of the Glasgow Police Act, that it was necessary to libel that the coals had been sold and delivered within the limits of the act, and a sentence proceeding on an alternative libel suspended.

No. 20.
 Lockie v.
 McWhirter.
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This was a certified Appeal from the Circuit Court at Glasgow. It arose under the following circumstances:—
 By the Glasgow Police Act,¹ the Commissioners of Police

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¹ By the Act 6th & 7th Vict. c. 99, § 203, it is enacted, ‘ That
 ‘ it shall not be lawful to any person to sell or dispose of coals within
 ‘ the limits of this act, except by weight ; and the said Board of Com-
 ‘ missioners shall be, and they are hereby empowered and authorized
 ‘ to erect, so far as not already done, and to maintain steel-yards,
 ‘ scales, or other weighing-machines, upon, or adjacent to the different
 ‘ roads or streets, within, or leading to the said limits, or at any other
 ‘ convenient place, for the purposes hereinafter mentioned, or to grant
 ‘ powers to others to that effect, and to appoint proper persons to at-
 ‘ tend the same, with suitable allowances for their trouble ; and to
 ‘ order and appoint every cart or waggon employed for the carriage
 ‘ of coals for sale within the said limits, to be numbered and weighed,
 ‘ and recorded in a book to be kept for that purpose within the said
 ‘ limits, under the direction of the said Board of Commissioners, and
 ‘ the number and tare to be painted or inscribed on a conspicuous part
 ‘ of such cart or waggon, and in such manner as the said Board shall
 ‘ direct ; and no cart or waggon shall be used in the carriage of coals
 ‘ for sale, until the weight or tare of such cart or waggon shall be as-
 ‘ certained, recorded, and inscribed as aforesaid ; nor be afterwards
 ‘ altered in the weight or tare thereof, further than may be occasioned
 ‘ by wet roads, under a penalty not exceeding twenty shillings ; and
 ‘ every such cart or waggon loaded with coals for sale or delivery,
 ‘ (except for shipment at the Droonielaw) within the said limits shall
 ‘ be weighed at the said steel-yards, or weighing-machines, and the
 ‘ weight of the coals, and of the cart or waggon, and also the time of
 ‘ such weighing, shall be marked on a ticket to be delivered to the
 ‘ driver ; and the person having the charge of such steel-yards, or
 ‘ weighing-machines, shall exact from the driver the sums following,
 ‘ viz., for each cart not exceeding twelve hundred weight, one penny :
 ‘ for each cart and a half, not exceeding eighteen hundred weight, three
 ‘ halfpence ; and for each waggon, not exceeding twenty-four hundred
 ‘ weight, twopence, for weighing the coals, and delivering tickets as
 ‘ aforesaid, and for erecting and keeping in repair the said steel-yards
 ‘ and weighing-machines ; which sums shall be repaid to the drivers
 ‘ by the purchasers of the coals, or persons to whom the same are de-
 ‘ livered, on the ticket thereof being produced ; and the property of
 ‘ such steel-yards or weighing-machines, shall be, and is hereby vested
 ‘ in the said Board of Commissioners : And if any carter or other
 ‘ person shall bring within the limits of this Act any cart or waggon
 ‘ with coals, exceeding five hundred pounds weight, and shall sell or
 ‘ deliver, or attempt to sell such coals, without first having the same

are authorized to erect and maintain steel-yards for the weighing of coals, and every person attempting to sell or deliver, within the limits of the act, coals in quantities

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weighed, and a ticket procured as aforesaid, such carts or waggons may be seized, and the coals therein may be declared forfeited, and the proceeds applied in the same manner as the penalties under this Act, but the carts or waggons shall be returned to the owner or driver; and if such coals shall have been sold and delivered, without having been weighed, and a ticket procured as aforesaid, such driver may be subjected in a penalty not exceeding forty shillings, besides having the coals confiscated; and it shall be lawful to the Superintendent and officers of police to seize any cart or waggon with coals, which have not been weighed, and a ticket procured, as aforesaid, and to detain the same until the penalty and the expenses attending the proceedings shall be paid.' (§ 204), 'That it shall be lawful to the said Board of Commissioners, to provide, furnish, and maintain, such a number of portable or moveable machines for weighing coals as they may deem necessary, to be kept in convenient places within the said limits, in order that the inhabitants may have access to them for the purpose of reweighing their coals, at their own expense, if they shall be so inclined; and to employ proper persons to attend such machines, and to establish the rates to be payable for such reweighing; and it shall be lawful to the Superintendent of police, or Inspector of weighing-machines, or any other officer, to cause coals offered for sale, or for delivery, to be reweighed, and to require the carter to produce the ticket thereof, as a check on the conduct of carters and others—such reweighing being always done free of expense.' (§ 279), 'That no order, judgment, record of conviction, or other proceeding whatsoever, concerning any prosecution by virtue of this Act, or of any Act herein recited, shall be quashed or vacated for any misnomer or informality; and that all judgments and sentences pronounced by the said Magistrates, or any of them, under this Act, shall be final and conclusive, unless appealed from in manner hereinafter provided.' (§ 280), 'That if any person shall feel aggrieved by any sentence pronounced by the Magistrates, under this Act, it shall be lawful for such person to appeal to the Court of Justiciary, at the next Circuit Court to be held at Glasgow, or elsewhere, for the Western Circuit, in the manner and under the rules, limitations, and conditions contained in an Act passed in the twentieth year of the reign of His Majesty King George the Second, intituled, 'An Act for taking away and abolishing Heritable Jurisdictions in Scotland;' and it shall not be competent to appeal from, or to bring the judgment of the Magistrates under this Act, under review, by advocacy, suspension, suspension and liberation, or re-

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exceeding 5 cwt., is required to have them weighed at a steel-yard, and to pay twopence for the ticket which is given him of the weight.

The suspender was a person regularly employed to fetch coals (which had been previously bought) from the coal-hill, by one of the manufacturers of Glasgow, within the limits of the act. The Commissioners insisted that as the place to which the coals were brought was within the limits, they must be weighed and paid for at twopence per load. The suspender having refused to comply with their requirements, the following complaint was presented against him by the respondent:—

Police Court, Glasgow, Central District, 1st February 1848.

' Unto the Honourable the Magistrates of Glasgow, the com-
' plaint of John M'Whirter, Interim Procurator-Fiscal of
' Court, for the public interest,

' Charges John Lockie, carter, Parkhead, near Glasgow, with hav-
' ing contravened the 201st section of the Act entituled, 'The Glas-
' gow Police and Statute Labour Act,' 6th and 7th Vict. c. 99: In
' so far as, on Saturday the 22d January last, the said John Lockie
' did bring within the limits of the said act four carts or waggons
' with coals—the coals in each of the said carts or waggons exceeding
' 500 pounds weight, and did on the said date, in or near Lancefield
' Street, Anderston of Glasgow, and within the said limits, sell or
' deliver the said coals to Messrs Fulton and Neilson, founders,
' &c., in said Street, without having first had the same weighed at
' one or other of the public weighing-machines provided for the pur-
' pose, and without having procured a ticket with the weight of the
' coals, and of the carts or waggons, and also the time of such weighing
' marked thereon, as required by the foresaid section of the said act; for
' which contravention, the defender, on being legally convicted, ought

' duction, or in any way whatever, other than is hereby provided for,
' saving always any right of appeal, or other mode of review autho-
' rized by any other Act, under which it is by this Act made lawful
' for the said Magistrates, or any of them, to try crimes or offences:
' Provided always, That no such appeal shall operate as a stay of
' execution in cases where the sentence or decree awards imprison-
' ment, unless on sufficient caution for the appearance of the party, in
' such manner as the Judge shall direct, and that without prejudice in
' either case to the caution or security required by the said recited
' Act.'

' to be punished in terms of law, to deter others from committing the
' like contraventions in time coming.

' JOHN M'WHIRTER.'

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When this complaint was heard, the following sentence was pronounced :—

' The Bailies find unanimously, from the admission of the defender,
' and the proof adduced, that the defender has contravened the 201st
' section of the Statute, and is liable in the penalty thereby imposed ;
' modify the same to ten shillings, and decern.

(Signed)

' ROBT. STEWART.

' ROBERT SMITH.

' DAVID SMITH.

' JOHN GILMOUR.'

Lockie appealed to the Circuit Court; when it was objected that the act having dispensed with any record in the inferior Court, it was impossible to ascertain whether the conviction was rightful or otherwise; inasmuch as that must be determined, not by the evidence which might competently be adduced, but by what was adduced when the case was heard.

LORD MACKENZIE certified the case, which was now heard.

DEAS, for suspender, contended, that as the terms of the statute only rendered it imperative on the carters to have the coals weighed when the sale or delivery was within Glasgow, it had no application to the suspender's case, who was a special servant sent out to receive coals which had been previously bought, and of which he received delivery beyond the boundaries. The coals were his employers, and so he told the bailies, but they misconstrued his statement of having been sent to bring coals previously bought, into a confession of guilt. It was then said the Court could not get at the facts, as no record was kept. That would render review nugatory. Everything necessary to give effect to review was included in the right of appeal; Lord Moncreiff's opinion in *M'Phail's* case, Nov. 20. 1837, Swinton, vol. i. p. 583.

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In this case, the question was, had not the Magistrates fined in a case where they had no jurisdiction; and where no offence was committed, as both the sale and delivery took place beyond the limits?

NEAVES, for respondent—The case was important. If any person convicted could, under the 280th section, appeal on the merits, and have an enquiry into what took place at the trial, it was difficult to understand why a record of the evidence was dispensed with by the statute. The legislature, by dispensing with all record of evidence, practically excluded review on the merits. There was no means whereby it could be effected, as the enquiry must be limited to what took place at the original hearing. No doubt insulated facts, such as improper admission or rejection of a witness might be enquired into, but no case had said that all the merits could be gone into again. The only effect of the appeal given by the statute was to put the Court of appeal in the same position as the Bailies, and not to enable them to lead a fresh proof.

THE LORD JUSTICE-CLERK.—Do you contend we cannot enquire into the evidence, when an allegation is made that, on the merits, the inferior Court had no jurisdiction?

NEAVES.—I contend that all carters are subject to the tax, and that having been convicted in part on his own confession, the Court cannot enquire into the terms in which the confession was made.

DEAS, in reply—The words of the complaint are different from the clause of the statute on which it proceeds. The words applicable to completed transactions are, ‘if such coals shall have been sold *and* delivered;’ whilst the complaint on which the conviction proceeded is, that the suspender did ‘sell *or* deliver the coals.’ That is an alternative not warranted by the statute.

LORD MONCREIFF.—That is enough, the prosecutor was not entitled to insert in his complaint an alternative not contained in the statute.

The LORD JUSTICE-CLERK.—I concur; that objection is insuperable. At the same time, I think with Lord Mackenzie, that the statute having given a power of appeal, has by implication given everything which is necessary to enable the Appeal Court to explicate its jurisdiction. It does not follow that we are confined to any particular mode of making the enquiry. We might remit to the Magistrates to pronounce a special interlocutor, on which we could afterwards proceed. In the present instance, I think we should pronounce an interlocutor, which will indicate our opinion that the respondent cannot prosecute, except where the sale and delivery are both within the limits, and to this I think the suspender entitled.

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The following interlocutor was pronounced:—

‘ Find that the complaint is not laid in conformity
 ‘ with the statute, inasmuch as it states that the appel-
 ‘ lant did contravene the statute, in so far as he did sell
 ‘ or deliver coals within the limits of the city of Glas-
 ‘ gow, and is liable to the statutory penalty in respect
 ‘ thereof, while the penalty is imposed only in the case
 ‘ of coals being sold and delivered within the said limits;
 ‘ therefore sustains the appeal.’

JOHN LEISHMAN, W.S.—CHARLES FISHER, S.S.C.—Agents.

Present,

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THE LORD JUSTICE-GENERAL,

LORD JUSTICE-CLERK,

LORDS MACKENZIE, MONCREIFF, MEDWYN, COCKBURN, AND WOOD.

WILLIAM GRAHAM, Suspendor—*The Lord Advocate (Rutherford)—
Moncreiff—Inglis.*

AGAINST

RICHARD JOHN MOXEY, Respondent—*Dean of Faculty (M'Neill)—
Neaves.*

STATUTE—SUSPENSION.—Circumstances in which it was held, that the decision of the Police Magistrate was final, and that suspension of his decree was incompetent.

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Graham v.
Moxey.
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THIS was a suspension of a sentence pronounced in the Police Court of Edinburgh on the 19th of January 1849, proceeding on the following complaint.

‘ Unto the Honourable the Magistrates of Edinburgh, or any
‘ of them officiating as Judge in the Police Court, Edinburgh,—The Complaint of Richard John Moxey, Superintendent of Police, and Procurator-fiscal of Court for the
‘ Public Interest.

‘ *Humbly Sheweth*—That William Graham, now or lately residing
‘ in High Street, in or near Edinburgh, who is licensed to sell ale,
‘ beer, or exciseable liquors, did, in contravention of the Edinburgh
‘ Police Act, 1848,¹ upon the 13th day of January 1849 years, or

¹ This statute enacts by § 84, ‘ Whereas it is expedient that in cases
‘ arising under this Act the proceedings shall be attended with as little
‘ expense and delay as possible, be it enacted, That all actions, pro-
‘ secutions, and proceedings before the said Police Court, shall com-
‘ mence by a complaint, written or printed, or partly written and
‘ partly printed, at the instance of one or other of the said Procura-

about that time, after the hour of eleven o'clock at night, within the premises occupied by the said accused, situated in High Street, in or near Edinburgh, the same as then used and occupied by him, being a spirit shop, cellar, vault, or other similar place, suffer drinking or tipping.

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tors-fiscal, or at the instance of persons duly authorized to act for them, in which latter case such proceedings, though subscribed by any such persons, shall be commenced and conducted throughout in name of the said Procurators-fiscal respectively; and (with the exception of complaints against Chain-droppers, Thimblers, loaded Dice-players, and offenders of that description) such complaint, in all cases of theft, or of reset of theft, or of falsehood, fraud, and wilful imposition, or of breach of trust and embezzlement, and the conviction following thereon shall bear that the sum of money or the value of the article stolen, resetted, obtained by falsehood, fraud, and wilful imposition, or embezzled, does not exceed ten pounds; and it shall not be competent thereafter to the person accused, (except where an offer shall be made at the time,) to prove that the money or article stolen, resetted, obtained, or embezzled exceeded in value the sum of ten pounds; and the whole other procedure in the said Court shall be conducted summarily *vidé voce*, and without written pleadings; and no other record shall be kept of the proceedings of the said Court except the complaint and the judgment pronounced thereon; and it shall not be competent to any party who shall appear at the bar of the said Police Court to answer to any complaint, to plead want of due citation or informality in the warrant or execution.' (§ 80), 'That if it shall appear either in the preliminary investigation of the charges against any person accused of having committed any crime, delinquency, or offence within the limits of this Act, or during his trial in the said Police Court, that such person has been guilty of, or is charged with any of the crimes denominated the pleas of the Crown; (*videlicet*,) murder, robbery, rape, and wilful fire-raising, or with the crimes of stouthrief, or of theft by housebreaking, or of housebreaking with intent to steal, or of simple theft to an amount exceeding ten pounds, or of theft by opening lockfast places, or of theft aggravated by being habit and repute a common thief, or by having been twice previously convicted of theft, or of reset of theft to an amount exceeding ten pounds, or of reset of theft aggravated by having been twice previously convicted of that crime, or of falsehood, fraud, and wilful imposition to an amount exceeding ten pounds, or of falsehood, fraud, and wilful imposition, aggravated by having been twice previously convicted of that crime, or of breach of trust and embezzlement to an amount exceeding ten pounds, or of breach of trust and embezzlement, aggravated by having been twice previously convicted of that crime, or of assault to the danger of life, or of

No. 21. ' And the said accused has been previously convicted of the above
 Graham v. ' offence, conform to sentence of this Court, dated the 22d day of
 Moxey. ' December 1848.

High Court, ' It is, therefore, craved that warrant be granted for summoning
 Feb. 17. ' the said accused to answer to this complaint, and for citing witnesses
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' assault whereby any limb has been fractured, or of assault with any
 ' knife or other lethal instrument, where effusion of blood has followed,
 ' or of assault aggravated by two previous convictions for that crime,
 ' or of assault with intent to ravish, or of attempt at wilful fire-raising,
 ' or of culpable homicide, or of forgery, or of uttering forged bank or
 ' bankers' notes, it shall not be competent for the Procurator-fiscal, or
 ' those acting under or for him, to insist in a prosecution against such
 ' person in the said Police Court, but the Judge shall commit the per-
 ' son accused to the Prison of Edinburgh for examination; and the
 ' Procurator-fiscal shall forthwith give notice of such commitment to
 ' the Procurator-fiscal of the county of Edinburgh, or, in the event of
 ' the offence charged having been committed within the city of Edin-
 ' burgh, or liberties of the same, to the Procurator-fiscal of the said
 ' city, in order that such person may be proceeded against conformably
 ' to law: Provided always, that the aforesaid provision shall not
 ' apply to chain-droppers, thinblers, loaded dice-players, and offenders
 ' of that description, whom the Judge is hereby specially empowered
 ' to try and sentence, whatever may be the amount of the sum
 ' specified in the charge against them, or however often they may
 ' have been previously convicted.' (§ 107), ' That no order, judgment,
 ' record of conviction, or other proceeding whatsoever, concerning any
 ' prosecution instituted in the said Police Court, by virtue of this Act,
 ' shall be quashed or vacated for any misnomer or informality; and
 ' all judgments and sentences pronounced by the Judge shall be final
 ' and conclusive, and not subject to suspension, or advocacy, or ap-
 ' peal, or any other form of review, or stay of execution, unless on the
 ' ground of corruption, malice, or oppression on the part of the Judge,
 ' or of such deviations in point of form from the statutory enactments
 ' as the Court of Review shall think took place wilfully, or of incom-
 ' petency, including defect of jurisdiction of the Judge, and which
 ' suspension, or advocacy, or appeal, or review, or stay of execution,
 ' must be presented to the High Court of Judiciary within fourteen
 ' days after the date of the sentence complained of.' (§ 135), ' That
 ' if any person who is licensed to sell ale, beer, or exciseable liquors,
 ' shall, within any shop, house, office, or other premises occupied by
 ' him suffer riotous or disorderly conduct; or shall harbour thieves,
 ' prostitutes, or disorderly persons, or shall suffer men or women of
 ' notoriously bad fame, or dissolute boys or girls, to meet or assemble
 ' therein; or shall permit or suffer any unlawful games therein, where-
 ' by the lieges may be cozened and cheated; or shall, within the shop

‘ for both parties ; and that the said accused be thereafter punished according to law, or that such other judgment be given as the case may require.

‘ According to Justice,’

(Signed) ‘ R. J. MOXEY, Superintendent.’

‘ Edinburgh, 15th January 1849.’

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‘ house, office, or other premises occupied by him, suffer any drinking or tipping at any hour earlier than one o’clock in the afternoon or during the hours of divine service on Sabbath days, or on other days set apart for public worship by lawful authority, (except in inns and hotels licensed, and at railway refreshment rooms licensed and open for the accommodation of passengers only,) such person, on being convicted of any of the above offences, shall be liable to a penalty not exceeding five pounds ; and the Judge may further ordain such person to find security for good behaviour for such length of time, not exceeding twelve months, and to such extent, not being less than ten pounds, and not exceeding fifty pounds, as he shall see meet ; and in the event of such caution not being found within a reasonable time, to be specified in the order, it shall be lawful to the Judge to deprive such person of his licence ; and if any such person shall be convicted more than once of any of the said offences, the Judge shall in like manner, either award the said fine, and order renewed security, or deprive such person of his licence, as he may judge proper : saving and reserving the rights of all persons to enforce the due observance, and to prevent the profanation of the Sabbath day, otherwise, according to the laws and practice of Scotland.’ (§ 136). ‘ That if any person licensed as aforesaid shall suffer drinking or tipping within the premises occupied by him, or sell ale, beer, or exciseable liquors on any day after eleven o’clock at night, or before six o’clock in the morning, or on Sabbath days or on any other day set apart for public worship by lawful authority, at any hour earlier than one o’clock in the afternoon, or during the hours of divine service, in the case of a spirit shop, cellar, vault, or other similar place, such person, on being convicted thereof before the Judge, shall for each offence be liable to a penalty not exceeding five pounds, and may besides, in the case of a second or other subsequent conviction, be deprived of his licence : Provided always, that nothing contained in this enactment shall apply to railway refreshment-rooms licensed and open for the accommodation of passengers only.’ (§ 137). ‘ That if any person licensed as aforesaid shall supply any sort of exciseable liquors to any boy or girl apparently under fourteen years of age, to be consumed by such boy or girl within his shop or cellar, or any other premises occupied by him, such person shall be liable, on being convicted of a first offence, to a penalty not exceeding twenty shillings ; upon conviction of a second offence, to a penalty not ex-

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On advising this complaint the presiding Magistrate pronounced the following sentence:—

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‘ *Edinburgh, 13th January 1849.*—The Judge finds this complaint proved against the accused by evidence adduced, and finds said accused guilty accordingly; therefore fines and amerciates said accused in the sum of £5 sterling, payable to the Clerk of Court; sentences and adjudges said accused to be incarcerated in the prison of Edinburgh, therein to be detained until said fine be paid, but not exceeding twenty days from this date; and grants warrant to officers of Police to incarcerate the said accused in said prison, therein to be detained accordingly.’

(Signed) ‘ J. H. STOTT.’

Graham suspended, and, along with the note of suspension, produced, as an appendix, the grounds of decision as read from the bench at the time of pronouncing sentence, which are here printed, as fully explaining the case.

‘ The accused in this case is charged with having, in contravention of the Edinburgh Police Act, 1848, upon the 13th January cur-

‘ ceeding forty shillings; and upon conviction of a third or other subsequent offence, to a penalty not exceeding five pounds, besides deprivation of his licence.’ (§ 138), ‘ That if any person licensed as aforesaid shall, within the premises occupied by him, knowingly harbour, entertain, or suffer to remain therein, any officer, constable, or other person belonging to the said police force during any part of the time appointed for his being on duty (unless such officer, constable, or other person shall be there for the purpose of quelling disturbance, or otherwise in the discharge of his duty,) or if any person shall supply any such officer, constable, or other person with liquor when upon his station, or in any shop, cellar, house, or other place, during his time of duty, such person so offending shall for each such offence be liable to a penalty not exceeding five pounds.’ (§ 162), ‘ Whereas encouragement is given to dissolute persons to remain in and loiter about the streets at late and unseasonable hours, by keepers of shops, in which dressed provisions are sold, keeping or having the same open at late hours in the night, and early hours in the morning; be it enacted, That no keeper of any such shop shall open, or have open, his shop at an earlier hour than five o’clock in the morning, or a later hour than twelve o’clock at night, and if any person shall offend herein, he shall, upon conviction before the Judge, for every such offence be liable to a penalty not exceeding forty shillings.’

‘ rent, after the hour of eleven at night, within the premises occupied by him, situated in High Street, the same as then used and occupied by him, being a spirit shop, cellar, vault, or other similar place, suffered drinking or tippling. He is further charged with the aggravation of a previous conviction for the same offence.

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‘ It has been proved, that the house for which Graham obtained his license is the third flat from the ground, consists of six apartments, and contains three beds, two of which are occupied by the tenant and his family, the third being kept for the use of any person who may apply, such as commercial men, who sometimes frequent the house. In addition to the third (the licensed) flat, Mr Graham occupies a lower storey, which, though belonging to a different proprietor, communicates with the former by a door connecting the two, and contains two apartments,—namely, a double-bedded room and a single one, with a laundry, all passing through each other, which are used by visitors. On Saturday last, there were seventy-four persons in the licensed house, engaged in drinking or tippling, after the hour of eleven at night, of whom three were in the act of being supplied with viands, the remaining seventy-one being engaged in drinking or tippling only. They were distributed through the house, there being *thirty-one* in one apartment, *twenty-five* in another, *seven* in a third, *eight* in a fourth, and the *three* engaged in eating, were appropriately enough found seated in the kitchen. They were proved to have been a mixed company, and had not met for any common object, except that in which they were engaged for the moment. The aggravation of the offence charged was admitted.

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‘ On the part of the accused, it has been proved that the house bears the name of ‘Graham’s Anchor Hotel,’—a name, however, which is only of recent origin—that it is respectably conducted on the same principle as an ordinary tavern or hotel—that dinners and suppers are occasionally supplied, and that on the day in question, a party of individuals, consisting of from sixteen to eighteen, whom the witness adduced designated as a supper-party, had assembled in the house about half-past five, and left about half-past eight; although a few might have been there and mingled with those who were found after eleven.

‘ It was contended on the part of Mr Graham, that his house being neither ‘a spirit shop, cellar, vault, or any other similar place,’ is excluded from the operation of the statute, and that the Magistrates had no right of jurisdiction.

‘ The duty imposed on the Magistrates, is to carry into effect the objects intended by the Legislature, as these are expressed in the statute. Now, the object expressed and intended by the 136th clause of the Act, is to prevent tippling or drinking and the sale of exciseable liquors in licensed houses after the hour of eleven at night on week days, and earlier than one o’clock on Sabbath-days, &c.

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' The clause at its outset is quite general in its terms as to the places where the offence may be committed, to which its provisions are intended to apply, the words being ' within the premises occupied by him ;' namely, the party licensed. So general are its terms, that, in order to take from beyond its operation railway refreshment rooms, a special clause of exemption is inserted, shewing the general application of the clause, even to premises like these, had they not been specially selected for exemption.

' But it is contended, that the general terms of the clause are qualified by the words, ' spirit shop, cellar, vault, or other similar place,' which occur in a subsequent part of the enactment. It is argued, that these words must be construed literally, and that no house whose general description does not fall within the category enumerated, can be held subject to the provisions of the statute.

' It appears to the Magistrates, that a house or other premises are to be known and described by what is done within their precincts. The meaning of the word shop is, ' a place where anything is sold,' and a spirit shop is a place where spirits are sold. If the keeper of a licensed house, used in general, wholly or partially for any purpose, say for holding public meetings, shall, on any particular occasion, devote it to the sale of exciseable liquors, and suffer large numbers to assemble and engage in drinking, he brings himself within the provisions of the statute, and will not be excluded by the fact that generally his premises are not used for the purpose of tipping or drinking. By such an act, the keeper of the house changes its character, converts it into a spirit shop for the time, and brings himself within the provisions of the statute. The same remark applies to a house used generally as a lodging-house, a tavern, or a hotel, the general character of which may be changed by adapting it to a special purpose, differing from that to which it is generally applied.

' A case of this nature has already occurred. A house said to be used for the accommodation of travellers, and consisting of seven apartments, was found one evening after eleven o'clock to contain seventy-five persons, who were engaged in drinking and tipping. Six out of the seven rooms were fitted up with beds, and were occasionally occupied by visitors at the house, where commercial travellers were in the habit of residing when in town. Of the seventy-five individuals, three slept in the house that evening, the remaining seventy-two having been there for the purpose of drinking, in which they were proved to have been engaged. In that case the presiding Magistrate, acting on the principle already mentioned, found that the house having been used as a spirit shop for the time, came under the provisions of the statute, and decided accordingly.

' In the case above referred to, the circumstances were rather more favourable to the accused than those which have been proved in the

present case. Here the averment that the house is properly designated as a hotel, in conformity with its recently assumed name, has not been proved. But even although such proof had been adduced, it would not have affected the principle on which the decision proceeded, and which it appears to the Magistrates applies also to the present case. It cannot be pretended that on the evening of Saturday the 13th, the parties found in Mr Graham's house used it as a hotel. They used it as a spirit shop for the purpose of tipping or drinking the exciseable liquors which he supplied, and in doing which it appears to the Magistrates he used his premises as a spirit shop in the sense intended by the statute, and for purposes which the statute was passed in order to prevent.

Although much weight cannot be attached to the words 'or other similar place,' following the descriptive portion of the clause in the statute, still they cannot surely be held to have no meaning at all. If the word spirit shop be a local phrase, importing a place entering from the street (which has been contended for), these general words may fairly be construed as conferring a latitude of interpretation which otherwise the Magistrates would not have possessed. According to the view contended for, the prohibition is intended to be limited to tipping or drinking within places on a level with the street, in cellars and in vaults. But it cannot be supposed to have been the intention of the Legislature to prevent the sale of exciseable liquors in the lower stories, and admit the same act to be carried on without interruption in the attics of the same tenement. Such a doctrine leads to a manifest absurdity, and is therefore untenable.

Pleaded for the Suspender—This suspension was brought on the ground that the Judge in the Inferior Court had exceeded the jurisdiction, given him by the statute. It was not denied that the premises were in truth an hotel. It was only said that the use of the premises on a particular occasion, made it a spirit shop. The first question was, whether the Court had jurisdiction to review under the statute. The 107th section, which precluded review, except in certain cases, left it open to the Court to enquire whether the particular case brought before them fell within the exceptions or not. Thus, for instance, it might be enquired, whether the premises, in respect of which the complaint was presented, were within the limits of the police bounds. Again, it might be enquired under the 86th section, whether the magistrates had

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convicted in respect of any offence which was therein specially excluded from his jurisdiction. This was precisely analogous to the present case. It was not sought to have a review on the merits, as to whether tippling took place after eleven o'clock at night or not, but only whether the premises were in fact a 'spirit shop, vault, or cellar, or other similar place.' The 135th section dealt with all houses licensed in the same terms, except in so far that in licensed inns and hotels, and railway refreshment rooms, no limitation was imposed in respect of Sabbath days. The 136th section commenced, 'If any person licensed as aforesaid' (and under the licensing act, hotels, taverns, and spirit shops, had precisely the same license,) and could not be construed, so as to be in opposition to the preceding section, to which it referred. Yet this must be, if hotels which were excluded from the 135th section, were to be held as included in the 136th, inasmuch as that would lead to inconsistent provisions in respect of the Sabbath.

This went farther than the mere question of construction of a particular section, as it shewed that drinking alone could not make any premises a spirit shop; otherwise, the supplying a bottle of wine, without food, on Sabbath morning, would make the best hotel in Edinburgh liable to the penalties of the act, notwithstanding the express exception in the 135th section. The first question for the Judge to have determined was, whether the premises were of such a character that he had jurisdiction to enquire to what use they were appropriated, and unless he had such jurisdiction, the sentence was a nullity, and ought to be set aside.

Pleaded for the Respondent—This suspension was incompetent. Section 107 of the act excluded all review, except for certain specified causes, none of which were alleged here. The alleged want of jurisdiction was a fallacy. It was of the essence of the offence whether the suspender contravened the act, by the use to which he appropriated his house. All that was said on the other

side, merely amounted to a denial of the offence. It was admitted, that if the complaint had shewn a want of jurisdiction *ex facie*, then there would have been a power to review. But that was not shewn here. The charge was before the proper judge, and he affirmed it. Had he been of opinion that the premises were not a spirit shop, ought he to have dismissed the case as incompetent, or to have said not guilty? clearly the latter. Yet, if he had jurisdiction to say not guilty, he had also power to say guilty if he found the offence proved. This shewed that the *locus* was part of the offence, and not a question of jurisdiction, as argued on the other side. The use to which the premises were appropriated determined their character, and that was for the Judge to determine.

The LORD JUSTICE-CLERK.—Do you say that an hotel-keeper would be liable under this section, if he supplied a pint of wine to a casual visitor in his coffee-room after eleven at night?

That would be for the Judge to determine, and his judgment was made final by the statute.

The LORD JUSTICE-CLERK.—The question is one of great importance, and the duty which the Court has to discharge is, in my opinion, to ascertain whether the Police Magistrate has exceeded the jurisdiction given him by the statute. This, in my view, is not a review on the merits—it is not an enquiry into the propriety of the sentence, or the sufficiency of the evidence on which it proceeded, but whether the magistrate had power to enter on the enquiry. The distinction is clearly marked in the 84th section, in regard to the value of articles stolen. By that section, if the person accused offers at the time to prove that the value of the articles which form the subject of the charge exceed £10, he is entitled to enter upon the proof, and so oust the magistrate's jurisdiction. But suppose the magistrate to determine erroneously that the value did not exceed £10, could he thereby give himself jurisdiction, and exclude review on

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this matter. Yet all the difficulties which have been suggested, as to no record and finality of judgment in the present case would exist in the case supposed.

I do not think those difficulties insurmountable either on principle or authority. The inherent jurisdiction of this Court, to confine inferior courts within their functions—a jurisdiction which is not disputed, must be capable of explication. Accordingly, in several decided cases where similar difficulties have existed, the Court have sustained the competency of a suspension, and directed enquiry into the facts. Thus, in the case of *Robertson*, High Court, Dec. 24. 1842, (Broun, vol. i. p. 468), we held it competent to make enquiry, and made a special remit for the purpose of ascertaining the facts. In the case of *Anderson*, High Court, Feb. 15. 1836, (Swinton, vol. i. p. 35), the Court held the whole proceedings incompetent under the £10 clause in the former Police Act. Again, in the case of *Bowie*, High Court, Jan. 25. 1845, (Broun, vol. ii. p. 377), we directed an enquiry as to whether the *locus* was within the limits of the burgh. And in the case of *Lockie*, the other day (ante, p. 161), I was prepared, had it been necessary, to have remitted to the magistrates to pronounce a special interlocutor finding the facts. There is then no doubt that the Court can ascertain all matter of fact which goes to the jurisdiction of the inferior tribunal.

But the 86th section of the present act makes the matter plain, in my apprehension. It is thereby enacted, that in certain cases the police magistrate shall have no jurisdiction. Is it conceivable that, if the magistrate disregarded this enactment, and proceeded to convict in one of the excepted cases, the party could not suspend on a relevant allegation? or would it be any answer to say that the complaint and conviction are all that we could look at, in order to determine the case? Clearly not. This makes it clear to me, that ascertainment of the fact is our duty, if the fact is disputed, and

that suspension is competent if, upon admitted facts, we see that the magistrate has committed an error in law, and exceeded his functions.

Premising this, how stands this case? The 135th section is general, and comprehends all houses. It uses the words 'other premises.' There was plainly no reason why the jurisdiction in the case of riotous and disorderly persons should be limited. Inns and hotels are, however, specially excepted, in so far as the clause is directed against tipping on Sundays and Fast-days. I think the broad import of the word exciseable liquors, must be noticed in both the 135th and 136th. This plainly comprehends more than spirits. Then, when the place is described in the 136th, to which the prohibition is intended to apply, it is said to be 'in the case of a spirit shop,' &c. a word not before used. This means, therefore, in the case of premises of a special character, and the words must receive a broad, popular, and intelligible interpretation. Again, observe the effect of the construction contended for, that the use to which the premises are applied, is to determine whether they are to be considered as a spirit shop. The words as to the period of divine service are the same in both the 135th and 136th, and hotels are specially exempted in the former. But, if use is to determine, then the exemption is virtually repealed under the 136th.

We are told that the decision of the judge is final as to the use on that night. If that is so, then every place may, at the discretion of a police magistrate, be put in this category. I cannot take this, and do not think this was ever intended. The 137th and 138th sections are general where a general evil is sought to be prevented, thus broadly drawing a distinction which has been overlooked in the present case. Nor can I think the 162d section is intended to apply to coffee-rooms at an inn, yet this would follow if the argument of use was sound.

There is another ground on which I think this suspension competent, viz., that there is here a plain deviation

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from the accustomed form in the complaint. It charges that the accused did, within his premises, 'the same as *then used and occupied by him, being a spirit shop,*' &c. Can any one doubt that this is a deviation in form, and for a wilful purpose, to give jurisdiction, and exclude review. I am of opinion that the device is ineffectual, and that we can competently ascertain the facts otherwise, although I am also of opinion that the complaint is invalid.

LORD MACKENZIE.—I think we have no jurisdiction to entertain this suspension. It is not alleged that there was any corruption on the part of the judge. It is only said that he assumed an excessive jurisdiction, and this is the point for us to consider. I agree that the judge cannot give himself jurisdiction by framing the complaint and sentence so as to be unexceptionable *ex facie*. However troublesome it may be, I think there are cases in which we are empowered, and consequently obliged, to enquire into the facts, to see if this has been done. But does this arise here? I think not. I doubt whether the 136th clause has any limitation as to jurisdiction. It seems to define crime, and not to restrict jurisdiction as to place or time. Now, could not the judge have competently assailed when the case was heard? Could he not have assailed if the time was wrong? I think he could, and consequently, I think the expressions as to time and place are definitions of the offence, and not limitations of the jurisdiction. If this is so, then we have no power of review, as by the act the decisions of the judge are made final. In respect of the form of the complaint, I do not think there is such a deviation as entitles us to interfere. The use to which a party appropriates his premises seems to me very important, if not conclusive, in determining whether the offence was committed. Consequently, I think that any person whatever, who mainly uses his premises for the purpose of supplying spirits, will be guilty of an offence under the act, if he continue to sell them after 11 at night.

LORD MONCREIFF.—I entirely concur with the Lord Justice-Clerk. If we refuse to enquire into the facts, I think we shall set a very dangerous precedent. We are not called on at present to do more than sustain the competency of the suspension. We must judge of the case afterwards. The question of competency depends on the statute and the complaint. This is founded on the 136th section, and the question is, Does this section apply to inns and hotels, to prohibit drinking after 11 at night? It seems to me impossible to say it does; inasmuch as that construction would operate as a repeal of the exemption as to the Sabbath, which is made in the 135th. It seems impossible, therefore, to read this as a general clause, notwithstanding the vague terms used at the commencement. I think that the sound interpretation is, that the penalties are limited to offences by keepers of spirit shops, and that that term must be understood in its broad and popular meaning. It is argued that this is not a question of jurisdiction. To my mind it is a question of jurisdiction, and nothing else. The Legislature has said, that a man who commits a certain act in a specified place, is guilty of an offence. Is not the limitation of the place a limitation of the jurisdiction? If, then, the police magistrate exceeded his jurisdiction, by proceeding to convict, in respect of excepted premises, I think not only that he thereby exceeded his jurisdiction, but that it is our duty to tell him so. Jurisdiction is dependent upon a crime having been committed. But the offence here charged is, in my view, no crime cognizable by the police magistrates, except in certain places, in like manner as in the 86th, certain offences are excepted from his adjudication. Besides, I take it to be clear that the libel should in all cases explicitly set forth a plain violation of the statute. But is that done here? Quite the reverse. There is no description of the premises as they are. It is only said they were, on a particular occasion, used as a spirit shop. This is not enough, in my opinion. It seems to me an intentional device, resorted

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to in order to give a jurisdiction the statute had not conferred, and to render the decision final. I think it will be eminently dangerous to allow any encouragement to such an attempt, and I am for sustaining this suspension, to the extent of directing an enquiry into the facts of the case. The case of a person occupying an hotel, having systematically perverted it to the purpose of tipping, does not arise here, and I give no opinion thereon.

LORD MEDWYN.—I concur generally with Lord Mackenzie. Review is admitted in certain cases only under the 107th section. It is alleged that the suspender committed no offence, and that the magistrate exceeded his jurisdiction in convicting him. There is no doubt that we may enquire into the facts as respects the jurisdiction. But here, to my mind, it is a question of crime. Use is the important matter in a case like the present, otherwise the act would be constantly evaded. I do not think the peculiarity of the form of complaint such a deviation as was contemplated by the statute in the 107th. The not citing of the party, refusal to hear witnesses, &c., seem to me to be the points of form mentioned. The description of the premises was no doubt introduced advisedly, to meet the case, and I am of opinion that the judge, having affirmed the complaint, has thereby conclusively established the fact, and excluded all further enquiry.

LORD COCKBURN.—I am of opinion that this appeal is incompetent. And, under the excluding clause of this statute, I am of this opinion, even on the assumption that the magistrate was wrong, both on the facts and on the law.

The act makes every judgment of the Police Court '*final and conclusive*,' unless there was *intentional iniquity* on the part of the magistrate, or a *wilful violation of form*; or *incompetency* in the original complaint. There is no intentional iniquity alleged here; nor any original incompetency, except what depends on an unwarranted adoption of the appellant's account of the facts. He

says that, *de facto*, his premises were not a spirit shop ; and, on this assumption of his innocence, he argues that the magistrate had no jurisdiction over him. If this reasoning were sound, it is difficult to see how finality could ever be secured. It is perfectly plain (to my mind at least), that whenever the disputed fact *is of the essence of the crime*, it would be a mere mockery of such an excluding clause, to pretend to defeat or evade it by first beginning by reviewing the sentence on its merits, but without the evidence ; and then, after thus fancying that the inferior judge was wrong on the facts, to infer legally that he had never had any jurisdiction in the matter. A statute directs a magistrate to deal in a particular way with a man found drunk on the street, and excludes all review. I cannot conceive how this exclusion can be set aside, by the convicted person asserting, and offering to prove, that he was not drunk, and that therefore the magistrate had no jurisdiction. Whether the Judge of Police was right or wrong as to the appellant's premises having been a spirit shop, I cannot say ; because this was a matter of proof, and the statute prohibits the evidence from being preserved. But his being wrong as to the facts is certainly no ground of appeal.

It has been objected, that what the statute condemns is, night tipping in what *actually are* vaults, cellars, spirit shops, or other similar places, but that this complaint only set forth the appellant's premises to be so, *as then used by him*. I humbly think this frivolous ; the complaint does assert that the premises came within the statutory description. No doubt it adds that this was, *as then used* ; but this addition, though it explains, does not vitiate the charge. I should be very sorry to see the punctilious nicety of regular indictments introduced into police complaints. But, at any rate,—let the complaint be defective,—still, the magistrate, in sustaining it, only erred in law, and mere legal error will not warrant an appeal to this court ; especially on a point of form. It is said that this deviation from form was *wilful* ; but this is

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No. 21. a supposition for which there is not a vestige of evidence,
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High Court. Being of opinion that the appeal is incompetent, we
 Feb. 17. have, properly, nothing to do with the merits. But as
 1849. it has been maintained that these two run into each
 Suspension. other, I shall merely say that, in my opinion, it can
 never be determined what is a spirit shop, merely or
 materially by a consideration of its position or structure.
 It depends mainly, if not entirely, upon the *use* of the
 place. A building originally erected, and long used, and
 still in its form, a mere church, if it be employed as a
 gin palace, is a spirit shop. And a place which is used
 solely as a storehouse, or a school-room, is not a spirit
 shop, because its sign as such, and its counters, and
 shelves, and desks, and tills, all remain unchanged. The
 use necessary to make any place a spirit shop is always a
 matter of degree, of which it is the magistrate's duty to
 judge, according to the circumstances of each particular
 case. Now this place was complained of, and, *upon evi-*
dence, was condemned as a spirit shop or other similar
 place, *as used*. Whether the evidence warranted this I,
 who have not the evidence, cannot say, and do not con-
 jecture. It was referred by Parliament to the magis-
 trate. It seems to be supposed that this is a dangerous
 power to confer on a magistrate. Parliament did not
 think so; and I have no idea that there would be less
 danger, or even practicability, in making such facts com-
 petent to be reviewed in the Supreme Courts.

LORD WOOD.—There is under the statute no general,
 but only a special power of review under the 107th section,
 including deviation of form, and want of jurisdiction.
 Now, there is no form or schedule of complaint given in
 this statute. The objection, therefore, resolves into this,
 that the complaint does not state a statutory offence. I
 do not think the limitation implied by the use of the phrase
 spirit shop, was intended to involve a question of jurisdic-
 tion, but to secure a fair disclosure of the facts. I think
 it is the use which makes the offence. This involves the

jurisdiction. The Judge must do more than enquire into the outward mark or name of the premises; he must ascertain the nature of the use which is made of them, and then his decision is final. People may call their house what they choose. But if the Judge is to enquire into use, his judgment is final. The difficulty of the question will not give us the power of review; and although the decision is erroneous we cannot alter it.

LORD JUSTICE-GENERAL.—I coincide with the Lord Justice-Clerk and Lord Moncreiff on both points. I think there was no jurisdiction. I am also struck with the mode of drawing the complaint. If meant to raise the question, it ought to have to set it out in clear terms. But I think it clear from the whole that the charge was made so as to avoid the question, and this shews that they meant to hold that mere use was enough. It appears to me that whilst there is a precise definition of an offence in the statute, that is distinct from the *locus delicti*; first the offence, then the place, and that limited so as to raise the question of jurisdiction. If not committed within the *locus* this raises the question. Conceding the question as to excess of territory, to my mind, decides this. There are many cases in which an allegation of no jurisdiction has been made, and an enquiry has been directed, and I cannot disregard those authorities.

I think the words *spirit shop* ought to be determined in the plain common sense meaning of the phrase. Exciseable liquors are sold in hotels. The magistrate convicts, and we are told that we cannot review because he has done so, and misapprehended the statute. To this I entirely demur. There is no question of a mask here. When that arises it will be time enough to determine it; but we are not to commit an injustice in a case where the facts are ascertained, from a fear that other persons may pervert our judgment, by using the sign of an hotel, whilst in fact they are mere spirit dealers.

The Court refused the bill of suspension, with expenses.

Present,

THE LORD JUSTICE-CLERK,

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LORDS MONCREIFF AND MEDWYN,

HER MAJESTY'S ADVOCATE—*Craufurd A. D.*—*J. M. Bell A. D.*

AGAINST

JOHN GORDON ROBERTSON—*Inglis*—*J. A. Wood.*

EVIDENCE.—Held, that where a Procurator-fiscal, who had been employed as an agent in the Sheriff Court in a civil suit, out of which the prosecution arose, had been present when the pannel emitted two declarations, and had also acted on behalf of the Crown otherwise, he could not be examined as a witness on behalf of the Crown.

PRODUCTION.—Held, that the Jury are not entitled in a *criminal case* to inspect the documents libelled on, and compare them with other productions, it being the part of the Crown to establish the case by evidence given in the box.

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Theft, &c.

JOHN GORDON ROBERTSON, surgeon at Dingwall, was charged with Theft; as also Forgery, with Using and Uttering as genuine a Forged Writing:

IN SO FAR AS, the late Arthur Robertson, sometime of the Ceylon Civil Service, and thereafter residing in Dingwall, brother of you the said John Gordon Robertson, having been possessed, at the time of his death, of certain jewels or other precious or ornamental stones or gems, amounting in number to 1680, or thereby, or to some other number to the prosecutor unknown, some of which were set in gold, which were kept by him deposited in a wooden or other box within his dwelling-house at Dingwall; and the said Arthur Robertson having died at his said dwelling-house, on or about the 22d day of February 1848, and having left a trust-disposition and deed of settlement, dated 2d November 1846, and codicil thereto annexed, dated 17th February 1848, including his whole estate, heritable and moveable, whereby John Macrobin, now or lately professor of medicine in Marischal College, Aberdeen, the Reverend John Robertson Mackenzie, now or lately residing in West Wing Crescent, Birmingham, nephew of the said Arthur Robertson, and you the said John Gordon Robertson were appointed trustees and executors of the said Arthur Robertson, and whereby the free moveable means and estate of the said Arthur Robertson were bequeathed in two equal shares to the said Reverend John Robertson Mackenzie and you the said John Gordon Robertson;

and you the said John Gordon Robertson having been resident, or at least repeatedly present, in the said dwelling-house of the said Arthur Robertson, during the said 22d day of February 1848, and several days immediately prior and subsequent thereto, and having been repeatedly resident for various periods, or at least repeatedly present, in said dwelling-house during the months of January, February, and March 1848, and you not having taken the charge of the said box and jewels or other precious and ornamental stones or gems, as trustee and executor foresaid, you did, on one or other of the days of the said month of February, or of the month of January immediately preceding, or of the month of March immediately following, the particular day being to the prosecutor unknown, in or near the said dwelling-house, wickedly and feloniously, steal and theftuously away take, the said Box and the said Jewels or other Precious or Ornamental Stones or gems, or part thereof, the property, or in the lawful possession, of the said Arthur Robertson, or of his trustees and executors foresaid: LIKEAS (2.), on one or other of the days of the months of January, February, and March foresaid, or of the first twenty-four days of the month of April 1848, the particular day being to the prosecutor unknown, and within the dwelling-house aforesaid, or within the house which was occupied by you the said John Gordon Robertson, in the burgh of Elgin, at the time of the decease of the said Arthur Robertson, or in some other place in the counties of Elgin or Ross, or elsewhere, to the prosecutor unknown, you the said John Gordon Robertson having resolved to assert a pretended right to the said box and jewels, or other precious or ornamental stones or gems, on the false allegation that the same had been made over to you, as a gift, by the said Arthur Robertson during his lifetime, did, wickedly and feloniously, forge and fabricate, or cause or procure to be forged and fabricated, a missive or other writing, purporting to be addressed by the said Arthur Robertson to you the said John Gordon Robertson, and to be of the following or similar tenor:—‘ Dingwall 25th Jan^y 1848
 ‘ My Dear John, I am sorry to say that I have been much worse than
 ‘ you have seen me since my return from Inv^{as}, and I wish you to
 ‘ come here immediately. I fear the worst, and have forwarded the
 ‘ Box with Jewels, which I present as a compliment to you. I there-
 ‘ fore entreat that you come to my immediate aid and pray try and
 ‘ prevail on M^rs Robertson to come along with you for I need all the
 ‘ comfort you can afford me at this time. With kindest regards I re-
 ‘ main my Dear John your aff^o Brother,’ and time and place last above
 libelled, you the said John Gordon Robertson did, wickedly and feloniously, forge and adhibit, or cause or procure to be forged and adhibited, to the said missive or other writing, the following words and subscription, ‘ Arthur Robertson,’ intending the said subscription to pass for, and to be received as, the genuine subscription of the said Arthur Robertson: FARTHER, on the 17th day of the said month of

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April, or on one or other of the first twenty-four days of the said month of April, the particular day, if not the said 17th day of April, being to the prosecutor unknown, you the said John Gordon Robertson did, wickedly and feloniously, use and utter, as genuine, the said false, forged, and fabricated missive, or other writing, having thereon the said forged subscription, you well knowing the same to be forged, by putting the same, or causing or procuring some person to the prosecutor unknown to put the same into the Post-Office at Dingwall, or into some other post-office in Scotland to the prosecutor unknown, under a cover or envelope, addressed to Donald Stewart, now or lately writer in Tain, or by delivering the same, or causing or procuring some person to the prosecutor unknown, to deliver the same to the said Donald Stewart at Tain, or at some other place to the prosecutor unknown, with intent that the said Donald Stewart, receiving the said missive, or other writing, as genuine, should hold or use the same for your behoof in defending you against any claim made, or to be made, against you by the said John Macrobin and the said Reverend John Robertson Mackenzie, or either of them, your co-executors and co-trustees foresaid, for obtaining delivery of the said box and jewels or other precious or ornamental stones or gems, which had been traced to your possession, or with some other fraudulent intent to the prosecutor unknown; as also, farther, a petition having been presented against you the said John Gordon Robertson, by the said John Macrobin, and the said Reverend John Robertson Mackenzie, and his mandatory, to the sheriff of Ross and Cromarty shires, or his substitute, praying, *inter alia*, to have you decerned and ordained to deliver up the foresaid box, and the foresaid jewels or other precious or ornamental stones or gems, and you the said John Gordon Robertson having opposed said petition, and certain procedure having been had, in the process following thereon, you the said John Gordon Robertson did, in support of your said opposition, on the 1st day of June 1848, or on one or other of the days of that month, or of May immediately preceding, or of July immediately following, at or near the General Post-Office in Waterloo Place, in or near Edinburgh, or at or near one or other of the receiving-houses in or near Edinburgh, where letters are received or posted for the said General Post-Office, the particular receiving-house being to the prosecutor unknown, wickedly and feloniously, use and utter, as genuine, the said false, forged, and fabricated missive, or other writing, having thereon the said forged subscription, you well knowing the same to be forged, by putting the same, or causing or procuring the said Donald Stewart, your agent in the process foresaid, or some other person to the prosecutor unknown, to put the same into the said General Post-Office, or into one or other of the said receiving-houses, enclosed within an envelope addressed to William Ross, then and now or lately sheriff-clerk-depute of Ross-shire, at Dingwall, in which envelope you also enclosed, or caused or procured the said

Donald Stewart, or other person to the prosecutor unknown, to enclose, a letter from the said Donald Stewart, addressed to the said William Ross, and on behalf of you the said John Gordon Robertson, requesting the said William Ross to put the said false, forged, and fabricated missive, or other writing, into the foresaid process; as also, requesting the said William Ross to put into said process a relative minute, consisting of three pages, or thereby, which was signed, on behalf of you the said John Gordon Robertson, by the said Donald Stewart, and which was likewise enclosed in said envelope; and the said William Ross having, on or about the 2d day of the month of June foresaid, received the said envelope, and the said false, forged, and fabricated missive, or other writing, having thereon the said forged subscription, and the said relative minute, and the said letter, did, at Dingwall, and on or about the 2d and 3d days of the said month of June, or one or other of said days, affix his process mark to the said false, forged, and fabricated missive or other writing, as also to the said relative minute, or did otherwise put the said false, forged, and fabricated missive or other writing, as also the said relative minute, into the said process, and did use the same as forming part of the said process, and did then or thereafter give out the same to the opposite parties in said process, as papers lodged or documents produced by you the said John Gordon Robertson.

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Before this prosecution was instituted, there had been a civil suit before the Sheriff of Ross and Cromarty, respecting the box of jewels said to have been stolen by the prisoner. In the course of that litigation, the letter said to have been forged was lodged in process by him as genuine. In the course of the trial, Mr John Mackenzie, writer in Dingwall, was called on the part of the Crown, who being examined *in initialibus*, deponed—

I am Procurator-fiscal in Dingwall. I took charge of the case against the prisoner, before the Sheriff, on behalf of the executors of the late Arthur Robertson. I afterwards took up the matter as Procurator-fiscal. I presented two applications, and took a considerable part of the precognitions. I was present when the pannel emitted two declarations. I had the charge of the case as agent up to the period when it was reported to the Crown agent.

INGLIS thereupon objected that the witness was incompetent, on the ground of agency and partial counsel.

CRAUFURD said—he did not purpose to examine him generally, but merely as to a fact and a conversation which

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occurred before he took up the case in his public capacity. There was no other person who could depone to these matters; cases of *Hagan*, Dec. 26. 1838, Bell's Notes, p. 248; *Stephens*, April 20. 1839, Swinton, vol. ii. p. 348. This case was stronger than those, as it was not sought to ask any question as to facts which had come to the witness's knowledge whilst acting in his public capacity.

INGLIS replied—it was immaterial when the agency and partial counsel began, or when it ended. The only question was, had the witness been so mixed up in the preparation of the case as that the objection applied. In this case it plainly did, and consequently, it went to disqualify the witness from giving any testimony whatsoever in the case.

LORD MONCREIFF.—If we had time to examine the cases, perhaps ground might be found for the admission of this witness; but, at present, I think it safer to sustain the objection. It is not any matter, in my mind, that, at the time of the interview, he was merely an opposing agent. He afterwards acted as Fiscal, not merely in presenting two applications to the Sheriff, which might not have been any disqualification, but he was present at the emission of two declarations, and went on to precognosce the witnesses. At present, I am not prepared to hold that the witness is admissable after that.

LORD WOOD concurred.

The LORD JUSTICE-CLERK.—I concur also. There is no blame attributable to Mr Mackenzie, but it would have been much better if, after presenting his application, he had mentioned the fact to the Sheriff, that he would be required as a witness, so that another person might have conducted the case. The taking precognitions is the important thing, and that on which we proceed. It must not, however, be taken that the Court has decided any general point. The judgment must be taken with reference to this particular case only.

The objection was sustained.

CRAUFURD, in addressing the jury, *inter alia*, informed

them that they would have an opportunity of inspecting the document which was libelled as being forged, and comparing it with the other productions, which were admitted to be the genuine writing of the deceased.

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The LORD JUSTICE-CLERK, in summing up, informed the jury that the Court did not think it right to allow them to see the documents, so as to make a comparison in the box. The Crown was bound to have proved the case against the prisoner, by evidence on which his counsel could animadvert. Whatever might be the rule in civil cases, the inspection of documents by fifteen gentlemen, none of whom could be examined as to the ground of his opinion, was not a satisfactory mode of establishing guilt in a criminal court, and the jury would accordingly assume, that unless the evidence which had been given was conclusive as to the prisoner's guilt, that the prosecution had failed.

The Jury, by a majority of one, found the charge not proven.

In respect of which verdict of assize, the said John Gordon Robertson was assolizied *simpliciter* and dismissed from the bar.

Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE AND MEDWYN.

HER MAJESTY'S ADVOCATE—*Craufurd A.D.—J. M. Bell A.D.*

AGAINST

JAMES GIBSON AND MALCOLM M'MILLAN—*Logan.*

INDICTMENT—RELEVANCY.—Objection, that where two rooms had been mentioned in the indictment, and the charge was that the panels had broken open a lockfast place 'therein,' without saying in which room, sustained, as too vague.

No. 23.
James
Gibson and
Malcolm
M'Millan.

JAMES GIBSON and MALCOLM M'MILLAN were indicted for Theft, by means of Housebreaking, and by Opening Lockfast Places :

High Court.
March 12.
1849.

Theft, &c.

IN SO FAR AS, on the night of the 27th, or morning of the 28th, day of November 1848, or on one or other of the days of that month, or of October immediately preceding, or of December immediately following, you the said James Gibson and Malcolm M'Millan, did, both and each, or one or other of you, wickedly and feloniously, break into and enter the vestry of, or other apartment connected with, Saint Mary's Episcopal Chapel, situated in or near Dalkeith Park, in the parish of Dalkeith, and county of Edinburgh, by breaking the glass and framework, or part thereof, of a window of said vestry or other apartment, and entering thereby to the said vestry or other apartment, and to the said chapel, or by some other means and in some other way to the prosecutor unknown ; and having thus, or otherwise to the prosecutor unknown, obtained entrance into the said vestry or other apartment and chapel, you the said James Gibson and Malcolm M'Millan did, both and each, or one or other of you, then and there wickedly and feloniously, steal and theftuously away take from a lockfast escritoire or writing desk, which you then and there, wickedly and feloniously, opened by forcing the lid or top thereof with a chisel or other instrument to the prosecutor unknown, seven, or thereby, bank or banker's notes for one pound sterling each, one pound nine shillings and sixpence sterling, or thereby, in silver and copper money, a bracelet, a brooch ; as also, a pocket communion service, consisting of a small silver patten, a small silver cup, and a glass bottle with a silver top ; as also, a small paper box containing several postage stamps or labels ; as also, from a lockfast box in said vestry or other apartment, which box you then and there, wickedly and feloniously, forced open by means of a chisel, or otherwise to the prosecutor unknown, a communion cup, silver gilt or other metal, a patten or salver, silver gilt or other metal, a salver or alm's dish, silver gilt or other metal ; as also, from the said vestry, two silver or plated candlesticks ; as also, from the said chapel, two ink bottles, two altar cloths, four, or thereby, napkins, a pen-knife, a pair of scissors, a bread-knife, several surplices, several pieces of chamois leather, a button hook, a small piece of brass from the eagle lectern of said chapel, and a small piece of brass from an altar candlestick, the property, or in the lawful possession, of the vestrymen or congregation of the said chapel or of his Grace the Duke of Buccleugh, or of the Reverend William Bird Bushby, now or lately clerk-chaplain of said chapel, and now or lately residing at Parsonage of Saint Mary's, Lugton, and parish of Dalkeith, and county of Edinburgh.

LOGAN, for the pannels, objected to the relevancy of the indictment, in so far as that, having charged an entrance by a window of the vestry or other apartment, and the chapel, it proceeded to charge that they did, then and there, forcibly open the escritoire or writing-desk, and take therefrom the articles mentioned. This was not sufficiently stated, as it left it uncertain whether the desk was in the chapel or in the vestry, and yet was not stated in the alternative.

CRAUFURD replied, that it was uncertain in what portion of the building the desk was placed at the time of the theft.

The LORD JUSTICE-CLERK.—If the words ‘ then and there,’ apply to both the chapel and the vestry, it may do, but I much doubt if this indictment will bear that construction. It would clearly have been better to have stated it as it is charged farther on in the indictment, alternatively.

The first part of the indictment, relating to the articles stolen from the desk, was thereupon struck out.

Evidence having been led on both sides, the Jury found the pannels guilty under the libel as restricted.

In respect of which verdict of assize, the said James Gibson and Malcolm M’Millan were sentenced to be transported for the respective periods of ten and seven years.

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James
Gibson and
Malcolm
M’Millan.
High Court.
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Theft, &c.

Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE AND WOOD.

March 13.
1849.HER MAJESTY'S ADVOCATE.—*Craufurd A.D.*—*J. M. Bell A.D.*

AGAINST

WILLIAM M'GALL.—*Moncreiff.*

INDICTMENT—RELEVANCY.—Circumstances in which a portion of a minor was struck out, as being uncertain to which of the two majors it was applicable.

JURISDICTION.—Circumstances in which an objection to the jurisdiction of the Court was repelled.

PRODUCTIONS.—Circumstances in which the Court refused to allow the Jury to see the documents produced, in accordance with the rule stated in Robertson, *ante* p. 186.

WILLIAM M'GALL was indicted for Breach of Trust and Embezzlement :

No. 24.
William
M'Gall.High Court.
March 13.
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Trust.

IN SO FAR AS, James Jeffreys Oswald of Edrington Castle, in the parish of Mordington, and shire of Berwick, and now or lately residing there, being engaged in grinding grain at Edrington Mills, in the parish of Mordington aforesaid, and in disposing of meal, flour, and similar articles, to hakers and others his customers who inhabited Dunse, Coldingham, Eyemouth, and other places in the said shire, and carried on business there, and the said James Jeffreys Oswald having employed or intrusted you the said William M'Gall as his clerk or agent, or otherwise acting on his behalf, to make successive calls, at certain periodical intervals, upon his said customers, for the purpose of your procuring orders for goods from them, and of your uplifting and receiving payments of accounts due by them for goods furnished, and of your granting discharges to the customers therefor, and of your paying to the said James Jeffreys Oswald the sums of money so uplifting and received by you the said William M'Gall, or of your truly accounting to the said James Jeffreys Oswald for the same; and, pursuant thereto, you the said William M'Gall having, on numerous occasions between the first day of the month of May 1847 and the last day of the month of August 1848, the date of each or most of said particular occasions being to the prosecutor unknown, at or near the several and respective places of business or dwelling-houses of the several and respective customers aforesaid, uplifting and received, for behoof of the said James Jeffreys Oswald, from the several and respective customers foresaid, sums of money, extending in all to a great amount, in payment of accounts due

by the said several and respective customers to the said James Jeffreys Oswald; and it being the duty of you the said William M'Gall, and in accordance with the trust committed to you as aforesaid by the said James Jeffreys Oswald, to account truly to the James Jeffreys Oswald for all the sums of money uplifted and received by you as aforesaid, and without delay to pay over the same or the amount thereof to him, or to such party as he should direct, you retaining no part of said sums in your own hands; yet nevertheless, in the course of your said transactions, between the first day of the said month of May 1847 and the last day of the said month of August 1848, the particular dates being to the prosecutor unknown, and at or near the several and respective places of business or dwelling-houses of some of the several and respective customers foresaid, or at or near Edrington Castle or Edrington Mills aforesaid, or at or near some other place or places within or near the said shire of Berwick to the prosecutor unknown, you the said William M'Gall did, wickedly and feloniously, and in breach of the trust committed to you as aforesaid, embezzle and appropriate to your own uses and purposes, various sums of money, consisting of bank or banker's notes, and of gold, silver, and copper coin, or one or more of the said species of coin, the proportions of each being to the prosecutor unknown, extending in all to a large amount, being part of the money uplifted and received by you the said William M'Gall as aforesaid, and did fraudulently fail to pay or account for the said various sums of money to the said James Jeffreys Oswald: IN PARTICULAR, Catherine Allanshaw, now or lately baker and innkeeper at Eyemouth, in the parish of Eyemouth, and shire aforesaid, and now or lately residing there, being one of the foresaid customers of the said James Jeffreys Oswald, and you the said William M'Gall, between the first day of the said month of May 1847 and the last day of the said month of August 1848, at or near the inn or shop in Eyemouth of the said Catherine Allanshaw, or at some other place near Eyemouth to the prosecutor unknown, having uplifted and received from the said Catherine Allanshaw, or from Agnes Allan, niece of, and now or lately residing with, the said Catherine Allanshaw, or from some other person to the prosecutor unknown, acting for behoof of the said Catherine Allanshaw, on eleven different occasions, or thereby, sums of money due by the said Catherine Allanshaw to the said James Jeffreys Oswald, amounting to £328 sterling, or thereby, conform to eleven, or thereby, discharges or settled accounts, enumerated or set forth in inventory No. I. hereto annexed; or you having, place last above libelled, uplifted and received as aforesaid, or some other number of occasions, within the period last above libelled, to the prosecutor unknown, sums of money due by the said Catherine Allanshaw to the said James Jeffreys Oswald, amounting to £328 sterling, or thereby, for behoof of the said James Jeffreys Oswald, you the said William M'Gall did, wickedly and feloniously, and in breach of the trust com

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mitted to you as aforesaid by the said James Jeffreys Oswald, within the period of time last above libelled, and shortly after all and each or some of the several and respective occasions foresaid, on which you uplifted and received money as aforesaid, due by the said Catherine Allanshaw to the said James Jeffreys Oswald, or at some other times within the said period to the prosecutor unknown, and at or near the inn or shop foresaid of the said Catherine Allanshaw or at or near Edrington Castle or Edrington Mills aforesaid, or at some other place or places in or near the shire of Berwick to the prosecutor unknown, embezzle and appropriate, to your own uses and purposes, various sums of money, amounting to £81 sterling, or thereby, being part of the money uplifted and received by you as aforesaid, for behoof of the said James Jeffreys Oswald, and did fraudulently fail to pay or account for the said various sums of money, amounting to £81 sterling, or thereby, to the said James Jeffreys Oswald: LIKEAS (2.), George Greenfield, now or lately baker at Coldingham, in the parish of Coldingham, and shire aforesaid, and now or lately residing there, being one of the foresaid customers of the said James Jeffreys Oswald, and you the said William M^cGall, between the first day of the said month of May 1847 and the last day of the said month of August 1848, at or near the shop or dwelling-house in Coldingham of the said George Greenfield, or at some other place in or near Coldingham to the prosecutor unknown, having uplifted and received from the said George Greenfield, or from some other person to the prosecutor unknown, acting for behoof of the said George Greenfield, on fourteen different occasions, or thereby, sums of money due by the said George Greenfield to the said James Jeffreys Oswald, amounting to £317 sterling, or thereby, conform to fourteen, or thereby, discharges or settled accounts, enumerated or set forth in inventory No. II. hereto annexed; or you having place last above libelled, uplifted and received as aforesaid, or some other number of occasions, within the period last above libelled, to the prosecutor unknown, sums of money due by the said George Greenfield to the said James Jeffreys Oswald, amounting to £317 sterling, or thereby, for behoof of the said James Jeffreys Oswald, you the said William M^cGall did, wickedly and feloniously, and in breach of the trust committed to you as aforesaid by the said James Jeffreys Oswald, within the period of time last above libelled, and at or shortly after all and each or some of the several and respective occasions foresaid, on which you received money as aforesaid, due by the said George Greenfield to the said James Jeffreys Oswald, or at some other times within the said period to the prosecutor unknown, and at or near the dwelling-house or shop foresaid of the said George Greenfield, or at or near Edrington Castle or Edrington Mills aforesaid, or at some other place or places in or near the shire of Berwick to the prosecutor unknown, embezzle and appropriate, to your own uses and purposes, various sums of money, amounting to £85 sterling,

or thereby, being part of the money uplifted by as aforesaid for behoof of the said James Jeffreys Oswald, and did fraudulently fail to pay or account for the various sums of money, amounting to £85 sterling, or thereby, to the said James Jeffreys Oswald: LIKEAS (3.), John Cockburn, now or lately baker in Dunse, in the parish of Dunse, and shire aforesaid, and now or lately residing there, being one of the foresaid customers of the said James Jeffreys Oswald, and you the said William M'Gall, between the first day of the said month of May 1847 and the last day of the said month of August 1848, at or near the dwelling-house or shop in Dunse of the said John Cockburn, or at some other place in or near Dunse to the prosecutor unknown, having uplifted and received from the said John Cockburn or from some other person to the prosecutor unknown, acting for behoof of the said John Cockburn, on twenty-eight different occasions, or thereby, sums of money due by the said John Cockburn to the said James Jeffreys Oswald, amounting to £561 sterling, or thereby, conform to twenty-eight, or thereby, discharges or settled accounts, enumerated or set forth in inventory No. III. hereto annexed; or you having, place last above libelled, uplifted and received as aforesaid, on some other number of occasions, within the period last above libelled, to the prosecutor unknown, sums of money, amounting to £561 sterling, or thereby, for behoof of the said James Jeffreys Oswald, you the said William M'Gall did, wickedly and feloniously, and in breach of the trust committed to you as aforesaid by the said James Jeffreys Oswald, within the period of time last above libelled, and at or shortly after all and each or some of the several and respective occasions foresaid, on which you uplifted and received money as aforesaid, due by the said John Cockburn to the said James Jeffreys Oswald, or at some other times within the said period to the prosecutor unknown, and at or near the dwelling-house or shop foresaid of the said John Cockburn, or at or near Edrington Castle or Edrington Mills foresaid, or at some other place or places in or near the shire of Berwick to the prosecutor unknown, embezzle and appropriate, to your own uses and purposes, various sums of money, amounting to £61 sterling, or thereby, being part of the money uplifted and received by you as aforesaid for behoof of the said James Jeffreys Oswald, and did fraudulently fail to pay or account for the said various sums of money, amounting to £81 sterling, or thereby, to the said James Jeffreys Oswald: LIKEAS (4.), Robert Wilsou, now or lately baker in Dunse aforesaid, and now or lately residing there, being one of the foresaid customers of the said James Jeffreys Oswald, and you the said William M'Gall, between the first day of the month of December 1847 and the last day of the said month of August 1848, at or near the dwelling-house or shop in Dunse of the said Robert Wilson, having uplifted and received from the said Robert Wilson, or from some other person to the prosecutor unknown, acting for behoof of the said Robert Wilson, on twelve different occa-

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sions, or thereby, sums of money due by the said Robert Wilson to the said James Jeffreys Oswald, amounting to £140 sterling, or thereby, conform to twelve, or thereby, discharges or settled accounts, enumerated or set forth in inventory No. IV. hereto annexed; or you having, place last above libelled, uplifted and received as aforesaid, on some other number of occasions, within the period last above libelled, to the prosecutor unknown, sums of money, amounting to £140 sterling, or thereby, for behoof of the said James Jeffreys Oswald, you the said William M'Gall did, wickedly and feloniously, and in breach of the trust committed to you as aforesaid by the said James Jeffreys Oswald, within the period of time last above libelled, and at or shortly after all and each or some of the several and respective occasions foresaid, on which you uplifted and received money as aforesaid, due by the said Robert Wilson to the said James Jeffreys Oswald, or at some other times within the period last above libelled to the prosecutor unknown, and at or near the dwelling-house or shop foresaid of the said Robert Wilson, or at or near Edrington Castle or Edrington Mills aforesaid, or at some other place or places in or near the shire of Berwick to the prosecutor unknown, embezzle and appropriate, to your own uses and purposes, various sums of money, amounting to £27 sterling, or thereby, being part of the money uplifted and received by you as aforesaid for behoof of the said James Jeffreys Oswald, and did fraudulently fail to pay or account for the said various sums of money, amounting to £27 sterling, or thereby, to the said James Jeffreys Oswald: LIKEAS (5.), Robert Keldie, now or lately baker in Dunse aforesaid, and now or lately residing there, being one of the foresaid customers of the said James Jeffreys Oswald, and you the said William M'Gall, between the first day of April 1848 and last day of the said month of August 1848, at or near the dwelling-house or shop of the said Robert Keldie, or at or near the dwelling-house or inn of William Jack, now or lately innkeeper at Dunse aforesaid, and now or lately residing there, having uplifted and received from the said Robert Keldie, or from the said William Jack, or from some other person to the prosecutor unknown, acting for behoof of the said Robert Keldie, on eight different occasions or thereby, sums of money due by the said Robert Keldie to the said James Jeffreys Oswald, amounting to £80 sterling, or thereby, conform to seven, or thereby, discharges or settled accounts, enumerated or set forth in inventory No. V. hereto annexed; or you having, place last above libelled, uplifted and received as aforesaid, on some other number of occasions within the period last above libelled to the prosecutor unknown, sums of money due by the said Robert Keldie to the said James Jeffreys Oswald, amounting to £80 sterling, or thereby, for behoof of the said James Jeffreys Oswald, you the said William M'Gall did, wickedly and feloniously, and in breach of the trust committed to you as aforesaid by the said James Jeffreys Oswald, within the period of time last above libelled, and at or shortly

after all and each or some of the several and respective occasions foresaid, on which you uplifted and received money as aforesaid, due by the said Robert Keldie to the said James Jeffreys Oswald, at or near the respective dwelling-houses or shop or inn foresaid of the said Robert Keldie, or of the said William Jack, or at or near Edrington Castle or Edrington Mills aforesaid, or at some other place or places in or near the shire of Berwick to the prosecutor unknown, embezzle and appropriate, to your own uses and purposes, various sums of money, amounting to £20 sterling, or thereby, being part of the money uplifted and received by you as aforesaid for behoof of the said James Jeffreys Oswald, and did fraudulently fail to pay or account for the said various sums of money, amounting to £20 sterling, or thereby, to the said James Jeffreys Oswald.

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William
M'Gall.
High Court.
March 13.
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Embezzle-
ment and
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Trust.

MONCREIFF, for the pannel, objected to the relevancy of the indictment, in so far as respected the third charge. It was too ambiguous. The major charged, as well breach of trust, as also embezzlement, whilst the minor set forth that at the place specified in the third charge, the pannel 'did embezzle and appropriate to his own uses and purposes various sums of money, amounting to £61 sterling, or thereby, being part of the money uplifted and received by him as aforesaid, for behoof of the said James Jeffreys Oswald, and did fraudulently fail to pay or account for the said various sums of money, amounting to the sum of £81 or thereby, to the said James Jeffreys Oswald.' This left it uncertain whether it was intended to charge embezzlement or breach of trust, by fraudulently failing to pay or account to the extent of £61 sterling.

The LORD JUSTICE-CLERK.—The objection must be sustained, and that portion of the charge must be struck out.

MONCREIFF then objected, that the *locus* of the offence was not sufficiently described. No doubt, it was not necessary to be very strict in describing a place where an offence was committed, provided it was sufficient to shew that it was within the jurisdiction of the Court. But there was no precedent to sustain an indictment where the *locus* was set forth in such an indefinite manner as

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that it was 'at or near Edrington Castle or Edrington Mills, aforesaid, or at or near some other place or places, in or near the shire of Berwick, to the prosecutor unknown.' For aught that appeared in the libel it might have been over the border, and consequently, beyond the jurisdiction of the Court. This was too ambiguous, as the Court must take judicial notice that the county of Berwick bordered on an adjoining country, to the courts of which the pannel would be amenable if the offence was committed beyond the bounds of Scotland.

BELL, *A. D.*—It was matter of form to describe the *locus* in the manner set forth in this indictment, and the Court could not presume against their own jurisdiction.

The LORD JUSTICE-CLERK.—The Court have no doubt on the question. In strictness, no particular place is in this peculiar case necessary to be set forth in the indictment, and the more general words 'at or near,' are only stated for technical purposes. In the present case, it seems very evident that sufficient is set forth to give the Court jurisdiction over the alleged offence. It is said that he received the money in Scotland, and failed to account to his employer therein. It is impossible to say where the guilty intention of retaining the money which he had received on behalf of his employer was first adopted, but it would be presumed, in the absence of opposing evidence, that he had all along had the intention on which he acted.

The prisoner having pleaded Not Guilty, and a long proof having been led, consisting in part of receipts given by the pannel to persons from whom he had received money on behalf of Mr Oswald, one of the jurors, after the Lord Justice-Clerk had explained their import in the course of his charge, requested to see these documents.

LORD JUSTICE-CLERK.—Gentlemen,—You had better not have them. The Crown must prove their case by evidence which can be tested by cross-examination, and you are to judge on such evidence, so tested, and such only. If you do not think that the case for the prosecution has been proved in this way, you will assume that it

has failed. The mere inspection of documents by fifteen gentlemen in a jury-box, is not a satisfactory mode of establishing guilt against any party, and it is better that you should proceed to acquit than to convict on any conjecture which you could so form, and which the prisoner has had no opportunity of explaining. Jurymen might by such comparison easily mislead themselves, and different Jurymen might go on different conjectures as to handwriting, or as to the accuracy or inaccuracy of entries in the accounts; while, if these had been stated and known to the parties, they might be shewn to be all erroneous and unsatisfactory. If the evidence given does satisfy you respecting the documents, it is better to acquit.

The Jury, by a majority, found the pannel guilty of the first and fourth charges as libelled, under deduction of £20 from the first charge and of £10 from the fourth charge.

In respect of which verdict of Assize, the Court adjudged the pannel to be imprisoned in the prison of Perth for the period of twelve calendar months.

Present,

THE LORD JUSTICE-CLERK,

LORDS MONCREIFF, MEDWYN, COCKBURN, AND WOOD.

JOHN ETCH and ALFRED GOLF, Suspenders—*Deas*.

AGAINST

JOHN BURNETT, Respondent—*Aytoun*.

SUSPENSION—ATTEMPT TO STEAL—ROGUE AND VAGABOND.—Held, refusing a Note of Suspension, that it was an offence cognisable in a Police Court, to put a hand into a passenger's pocket with intent to steal, and that a party would be properly convicted as a rogue and vagabond in respect thereof.

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Etch and
Golf v.
Burnett.
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Suspension.

ON the 5th day of March 1849, the suspenders were sentenced to be imprisoned in the prison of Glasgow, by one of the bailies of the Police Court there, in virtue of a complaint presented to him at the instance of the respondent, charging the suspender 'with having, on Saturday last, in or near Queen Street, and in or near St Vincent's Place, Glasgow, actors or actor, or art and part, feloniously attempted to pick the pockets of several of the lieges, whose names and places of abode were to the prosecutor unknown, and with being rogues and vagabonds, following no lawful employment.'

It appeared that one of the suspenders had been seen by a policeman with his hand in the pocket of a passenger in the street, and that they were followed by him, together with an assistant whom he found, and apprehended at the distance of a mile from the place where the alleged offence was committed. Having been taken before the presiding bailie, the charge of being rogues and vagabonds was abandoned, but the case was proceeded with on the charge of attempting to pick pockets, and a conviction ensued.

DEAS, for the suspenders,—The only charge which went to proof was that of an attempt to pick the pocket of some persons unknown. This was not an offence. Except in certain very great crimes, the law did not take cognizance of abortive attempts. An attempt to steal had never been found relevant in the Court of Justiciary, *multo magis* it was not an offence in a Police Court, where the parties were summarily tried, and the means of disproving such a charge were obviously very difficult, if not impossible, from the want of notice and other advantages given in the Court of Justiciary.

The LORD JUSTICE-CLERK.—This may not be a petty offence. The other day a party came down to Edinburgh with £8000, which he had been afraid to trust to a London banker to transmit to this city. It surely would not have been a petty offence to have endeavoured to pick that gentleman's pocket, and there is no doubt

that the police having seen the hand in the pocket, was quite sufficient to warrant a conviction, without calling the party whose pockets were attempted to be rifled. All *locus pœnitentiæ* must be considered to have been gone when the hand was inserted in the pocket. Practically, however, I consider this a proceeding against the suspenders as rogues and vagabonds, of which their conduct was the best and most satisfactory proof that could be desired.

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The rest of the Judges concurred, and the note of suspension was accordingly refused, with expenses.

JOHN LEISHMAN, W.S.—Agent.

HENRY WILLIAM GILES, Suspender—*Craufurd*.

AGAINST

EDMUND BAXTER, Respondent—*Deas*.

SUSPENSION—INTERLOCUTOR—JURISDICTION.—Held, (1.) That all interlocutors in a cause in an Inferior Court, must be properly signed as required by law, and that the Court will suspend if any material stage of the proceedings is left unauthenticated. (2.) That where the Court has original jurisdiction over the subject matter, they have also the power of review, although the proceedings are of a civil nature.

This was a Suspension of a decree of the Justices of the Peace for the county of Forfar, pronounced on a summary complaint, at the instance of the respondent against the complainer, as having contravened the provisions of the 6th and 7th Vict. c. 68,¹ in so far as he

No. 26.
Giles v.
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¹ By the statute 6th and 7th Vict., cap. 68, sect. 2, it is enacted, 'That, except as aforesaid, it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain for the public performance of stage plays without authority, by virtue of letters-patent from her Majesty, her heirs and successors, or predecessors, or without license from the Lord Chamberlain of her Majesty's household for the time being, or from the justices

No. 26. ' had for sometime back been in the practice of keeping
 Giles v. ' open an erection or booth, in or adjoining to the Sea-
 Baxter. ' gate Street of Dundee, or upon a yard or piece of
 High Court- ' ground adjoining said Street, and on the north side
 March 15. ' thereof, in the parish of Dundee, and county of Forfar ;
 1849. ' which erection was formed or composed partly of wood
 Suspension. ' of the peace, as hereinafter provided ; and every person who shall
 ' offend against this enactment shall be liable to forfeit such sum as
 ' shall be awarded by the court in which, or the justices by whom, he
 ' shall be convicted, not exceeding £20, for every day on which such
 ' house or place shall have been so kept open by him for the purpose
 ' aforesaid without legal authority.'—Sect. 11, ' That every person
 ' who for hire shall act or represent, or cause, permit, or suffer to be
 ' acted or represented, any part in any stage-play in any place not
 ' being a patent theatre, or duly licensed as a theatre, shall forfeit
 ' such sum as shall be awarded by the court in which, or the justices
 ' by whom, he shall be convicted, not exceeding £10 for every day
 ' on which he shall so offend.'—Sect. 19, ' That all the pecuniary penal-
 ' ties imposed by this act for offences committed in England may be
 ' recovered in any of her Majesty's Courts of Record at Westminster,
 ' and for offences committed in Scotland by action or summary com-
 ' plaint before the Court of Session or Justiciary there ; or for offences
 ' committed in any part of Great Britain in a summary way before
 ' two justices of the peace for any county, riding, division, liberty,
 ' city, or burgh where any such offence shall be committed, by the
 ' oath or oaths of one or more credible witness or witnesses, or by the
 ' confession of the offender ; and in default of payment of such penalty,
 ' together with the costs, the same may be levied by distress and sale
 ' of the offender's goods and chattels, rendering the overplus to such of-
 ' fender, if any there be, above the penalty, costs, and charge of dis-
 ' tress ; and for want of sufficient distress the offender may be impris-
 ' oned in the common gaol or house of correction of any such county,
 ' riding, division, liberty, city, or burgh, for any time not exceeding
 ' six calendar months.'—Sect. 20, ' That it shall be lawful for any
 ' person who shall think himself aggrieved by any order of such jus-
 ' tices of the peace, to appeal therefrom to the next general or quarter
 ' sessions of the peace to be holden for the said county, riding, division,
 ' liberty, city, or burgh, whose order therein shall be final.'—Sect. 21,
 ' That the said penalties for any offence against this act shall be paid
 ' and applied in the first instance toward defraying the expenses in-
 ' curred by the prosecutor, and the residue thereof (if any) shall be paid
 ' to the use of her Majesty, her heirs and successors.'

' or canvass, and was partly rested against stone walls,
 ' and was called the ' Sanspareil Theatre,' or by some
 ' other name similar thereto; and that the complainer
 ' had been in the habit nightly or frequently performing
 ' or causing to be performed, stage plays therein, with-
 ' out any license or other legal authority being granted
 ' to him for that purpose, in terms of the provisions of
 ' the said Act of Parliament; and particularly, that the
 ' complainer did, on the evening of Tuesday, the 30th
 ' day of January 1849, contravene the said recited
 ' Act of Parliament, by performing, or causing to be
 ' performed, without any license or other legal authority
 ' in said erection or booth, a stage play or other enter-
 ' tainment of the stage called the ' Innkeeper of Abbe-
 ' ville,' and that bills or programmes thereof, as well as
 ' of other such representations, given and performed in
 ' said theatre, were circulated throughout the town of
 ' Dundee, but without the name and place of abode of
 ' the manager, as required by the said statute; and
 ' generally, that the complainer had carried on and con-
 ' ducted the said theatre without a license, and had
 ' performed stage plays therein, in a manner contrary
 ' to law, and in violation of the provisions of the said
 ' Act of Parliament.'

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The prayer of the complaint was, that the Justices
 should grant warrant for summoning the complainer to
 appear before any two of their number, at a time and
 place to be fixed by them, and failing his so appearing,
 to grant warrant for apprehending him, and bringing
 him before the Justices for examination, and likewise to
 grant warrant for summoning witnesses, to be examined
 regarding their knowledge of the premises; and on proof
 thereof, or part thereof by confession, or otherwise, to
 find him the said Henry William Giles guilty of con-
 travening the foresaid statute; and to decern against
 him for such penalties in respect of such acts of con-
 travention, and in terms of the provisions of said sta-
 tute as they might consider proper, to be recovered and

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applied as authorised and directed by said statute, and with the whole costs of procedure and recovery, and to do farther and otherwise in the premises as by the said statute their Honours were authorised and empowered to do, and as to their Honours might seem meet.

Upon advising this complaint, the following deliverance was pronounced :—

‘ *Dundee, 31st January 1849.*—The Justices subscribing having considered the foregoing Petition and Complaint, grant warrant to Constables of the Peace and other officers of the law, to serve a copy of the said complaint, and of this deliverance, on the said Henry William Giles, or Henry Giles complained upon ; and ordain him to appear personally before us, or any two or more of Her Majesty’s Justices of the Peace for the county of Forfar, within the Town Hall of Dundee, on Friday the second day of February next, at twelve o’clock noon, to answer to the said complaint, with certification : Also grant warrant for summoning witnesses.

‘ ALEX. LAWSON, J. P.

‘ WILLIAM THOMS, J. P.

No copy of this complaint was served on the complainer until the evening of the day before that on which he was cited to appear before the Justices, at twelve o’clock noon. He lodged, however, a short answer to the complaint, denying generally the statement contained in it, and urging several pleas, amongst others, that the person Robert Geikie, who served the complaint, was not a constable or admitted officer of Court, in which character he had acted, and that, therefore, and upon other grounds, the complaint must be dismissed.

The Justices, at once and without proof, repelled all the pleas urged, and refused any prorogation to allow time to precognosce witnesses against the complainer, or to adduce witnesses to rebut the charge made against him. Whereupon the complainer and his agent immediately left the Court, and without any request or order that the complainer should remain, the Justices went on with the case in his absence, and pronounced the following sentence or conviction :—

' The Justices having considered the complaint, with the proof ad-
 ' duced, and the whole procedure, find it proved that the said Henry
 ' William Giles or Henry Giles, complained upon, on the evening
 ' of Tuesday last, the 30th day of January last, did keep open a house
 ' or erection of public resort, situated in the Seagate Street of Dundee,
 ' for the public performance of stage plays, and designed by the name
 ' of the "Sanspareil," and that there was performed in the said house
 ' or erection, or theatre, on the evening aforesaid, a play or drama en-
 ' titled "The Innkeeper of Abbeville," and that without any license in
 ' favour of the said Henry William Giles, and in contravention of the
 ' Act of Parliament libelled on : The Justices therefore find, that the
 ' said Henry William Giles or Henry Giles has, in terms of the said
 ' Act of Parliament, incurred for the said offence a penalty not exceed-
 ' ing £20, but which the Justices hereby modify to £10, and decern
 ' and adjudge the said Henry William Giles or Henry Giles instantly
 ' to make payment to the complainer of the said mitigated penalty of
 ' £10, hereby awarded, to be accounted for and applied, in the first
 ' place, towards defraying the expenses incurred by the prosecutor, and
 ' the remainder thereof to be paid to the use of Her Majesty, or her
 ' heirs or successors ; and, *failing payment*, grant warrant for levying
 ' the said penalty by distress and sale of the said Henry William
 ' Giles's or Henry Giles's goods and chattels, all in terms of the pro-
 ' visions of the said Act of Parliament, and decern. Five words de-
 ' leted.

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' JOHN OGILVY.
 ' WM. THOMS, J.P.
 ' JAS. BROWN, J.P.
 ' JOHN THOMSON, J.P.
 ' ALEX. LAWSON, J.P.

Amongst the reasons of suspension was the following :
 That ' It was illegal and incompetent for the Justices to
 ' repel all the complainer's defences or pleas *without*
 ' *proof*, and *before* having proceeded to the consideration
 ' of the case on the merits, as it is proved they did by
 ' the minutes of their sederunt, which run, *inter alia*, in
 ' these terms :—" The cause being called, and the de-
 ' fender having failed to appear, Mr William Allen
 ' Flowerdew, writer in Dundee, appeared for the defen-
 ' der, and gave in written answers to the complaint,
 ' which were verbally answered by the Procurator-fiscal ;
 ' and the Justices having considered the objections
 ' stated on the said answers, and the answers made to

No. 26. “ these objections by the Procurator-fiscal, the Justices
 Giles v. “ unanimously repelled the whole of these objections.’
 Baxter.
 High Court. ‘ This minute or interlocutor, or whatever else it may
 March 15. ‘ be called, was not signed by two Justices, as required,
 1849. ‘ nor was it signed even by one. The defences or pleas,
 Suspension. ‘ therefore, which were to exclude the complaint alto-
 ‘ gether, have not yet been legally or competently dis-
 ‘ posed of.’

The respondent answered, that the interlocutor repelling the suspender's objections, which had been pleaded *in limine*, as a bar to farther procedure, was pronounced only to the effect of allowing the case to proceed, and the proof to be led, and was signed by the preses of the Justices in presence, and with the sanction of a full bench. Besides, the procedure would have been unobjectionable, even if there had been no formal interlocutor repelling the objections which had been thus urged as preliminary pleas, these objections being sufficiently disposed of, by going on to consider and to give judgment upon the merits. There was no necessity, in a case like this, that the suspender should be present at the proof and subsequent procedure. The suspender could have no right, after appearing along with his agent, and joining issue in the cause, to withdraw himself from the Court, to the effect of creating an objection to the proceedings, as having been continued and brought to a close in his absence. He had barred himself, *personali exceptione*, by appearing in Court and pleading to the complaint, from maintaining any such objection, even if the statute had contemplated his personal presence. But there was not a word in the statute to countenance such a plea; and it was in no view necessary to enlarge upon this objection.

The Court having inspected the interlocutor repelling the objections requesting delay, and finding that it was not signed, called upon Deas, for the respondent, to sustain the proceedings sought to be suspended, in respect that the objections thus repelled were directed against the

title to pursue—the relevancy of the offence—the competency of the Court—and the regularity of the citation, observing that it was plainly incompetent to repel such objections by an unsigned interlocutor.

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DEAS.—These were mere minutes of procedure, which ultimately resulted in a conviction, which was signed. It was not necessary that the narrative of what took place before the conviction should be signed at each stage of the proceedings. The conviction was right and regular, and what took place before might be signed by the the preses as an authentication.

LORD JUSTICE-CLERK.—I do not think so. I never heard that the preses could so sign. Two Justices are required for every stage of the procedure. I do not say how it would have been had there been no interlocutor repelling these preliminary defences; but, however technical the objection may be, I think the statutory requirement must be complied with, and that the signature of two justices is absolutely necessary to the validity of each deliverance in the procedure. It is of no consequence that the objection is a technical one. Were I not to sign 'I. P. D.' the objection would be technical, but would nevertheless be fatal.

DEAS.—The question then came to be, was the suspension competent in the Justiciary Court. He ought to have gone to the Civil Court, according to decisions pronounced in both Courts. This must undoubtedly have been the case but for the 19th section of the statute, which gave original jurisdiction to the Court of Justiciary. That, however, did not necessarily comprehend the power to review proceedings of an inferior Court, which proceedings were in themselves essentially of a civil nature. There was no doubt that a suspension was competent in the Court of Session, as there was nothing to deprive that Court of its inherent jurisdiction in all civil causes; and it having been decided that in all such cases the subject-matter of the proceedings was

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essentially of a civil nature, it followed that the Court of Session had exclusive jurisdiction in cases of suspension.

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Farther, by the 20th section of the act, an appeal was given to the Quarter Sessions from the decision of the Justices, and the party seeking to set aside their decision ought to have gone there before coming to any superior tribunal to set aside the conviction.

The LORD JUSTICE-CLERK.—That section is only permissive. No doubt you are thereby enabled to go to the Quarter Sessions, but there is nothing therein to shew that you are compelled to go there before coming here. The 19th section gives us jurisdiction over the subject-matter, and I take it that we have thereby full power of reviewing the decision of all inferior judicatories. I think the non-signing of the interlocutor repelling the preliminary pleas fatal to the whole proceedings. I do not go on the absence of the complainer, because he voluntarily left the Court; but I proceed on the ground that the proceedings in Courts of Justice must be regularly authenticated, which, in my opinion, has not been done in this case.

The other Judges concurred, and the note of suspension was accordingly passed, with expenses.

WEST CIRCUIT.

GLASGOW.

Present,

LORDS MACKENZIE AND MONCREIFF.

March 23,
1849.HER MAJESTY'S ADVOCATE—*E. F. Maitland, A.D.*

AGAINST

ROBERT VANCE.—*W. E. Aytou.*

CULPABLE HOMICIDE.—Circumstances in which the Jury, under the advice of the presiding Judge, found a pannel not guilty of culpable homicide as libelled, it being charged that the act, whereby death was occasioned, was done wickedly and feloniously.

ROBERT VANCE, calico printer, was charged with Culpable Homicide.

No. 27.
Robert
Vance.

IN SO FAR AS, on the 9th or 10th day of September 1848, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, on or near the public road or street opposite or near to the house situated in or near Dovesland, at or near Paisley, in the Abbey Parish of Paisley, and shire of Renfrew, then and now or lately occupied by Matthew Sim, weaver, then and now or lately residing there, you the said Robert Vance, did, wickedly and feloniously, attack and assault the now deceased David Deans, then a wheeler, and then residing in or near High Carriagehill, at or near Paisley, and did, with your fist, strike him a severe blow on or about the head, and did knock him down, and did cause his head to come violently in contact with the ground; by all which, or part thereof, the said David Deans was mortally injured, so that, after lingering till the 11th day of September 1848, he then died in consequence of the injuries thus received, and was thereby culpably bereaved of life by you the said Robert Vance.

Glasgow.
March 23.
1849.Culpable
Homicide.

The evidence in the case was as follows:—

MATTHEW SIM, *weaver*.—I live at Dovesland, Paisley. On 29th September, my brother and some women came to visit me, travelling in a gig, and put up their horse. The gig stood in front of my house. I know the prisoner. He was of the party in my house, but did not

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come by the gig. The party prepared to get the gig yoked. This was rather past eleven. An alarm was given that some person had taken it away. I saw that it was gone. I followed it, seeing it at a distance going away. There was no horse in it, but it was drawn by a man. I found it standing on the street. It was brought back to the front of my house. Vance was there. He went into the gig to protect it, and said they that would meddle with it would meddle with him. Three men, strangers to me, were standing on the opposite side of the street. They came across and asked Vance 'what do you want there.' They had talk rather in the way of quarrelling. The three had not been at my party. Vance came out of the gig. I was anxious to secure the gig, but saw Vance and one of the three commence to fight. I paid no attention to them after that, as I was looking for a place to put the gig in. I went away with it. When I came back I found Vance in my house. He was much agitated, and said that if it was true he had struck Deans he was very sorry for it, as he was the last he would strike. There was blood on Vance's cheek. I went out again to see if the three people were gone. They were still there. I did not know Deans even by sight. I advised the men to go away before I got Vance to go away from my house.

Cross-examined.—The three men were strangers to me. When the gig was brought back I saw a man, John Cherry, standing on the pavement. I thought he had taken the gig away. I have known Vance four years. For any thing I have seen, I consider him a very quiet inoffensive man.

JAMES DEANS.—I am son of the late David Deans. I heard a noise on Carriagehill on the night of the 9th of September. I went to see what it was. I know Vance, and saw him there. He was fighting. I did not know the man he was fighting with. For all I saw just one man only. I saw my father there. He was standing behind him. He had been before a little way off. He said when he went forward, 'stick in Vance.' I thought my father was on the same side as Vance. Vance then threw back his hand behind him. He did not turn round. His hand struck my father and he fell backwards. He was not able to rise, and was carried into a house. In an hour he was taken home and put to bed. I never saw him rise afterwards. This was on a Saturday and he died on the Monday morning following. I never heard him speak after the injury. Vance and my father were acquainted—were engaged in the same work, and good friends. I saw nothing to shew that Vance knew that it was my father who was behind him.

Cross-examined.—Vance visited my father on the Sabbath day between the injury and his death.

MATTHEW SIM junior.—I am the son of Matthew Sim, a previous witness. I remember of the gig being taken away and brought back. Vance was there after it was brought back. Vance stepped into the gig, and said 'he that meddles with the gig meddles with me.' I went

into the house. I heard the noise of a battle, about ten minutes after Vance went into the gig. I went out. I saw Vance and another man fighting. I knew David Deans. I saw him coming running up the road behind Vance. He said, 'man, Bob, pelt into him.' Vance turned and saw Deans sparring. He then struck Deans on the side of the head. Deans fell flat on his back. He did not rise. Vance said, now 'there's one of your men down.' Deans was carried to a house close by Sim's. Vance then went into our house. Vance had got spirits, and Deans also. I saw no blood on Vance.

Cross-examined.—I think Deans was sparring at the man fighting with Vance. There was one fighting with Vance, and afterwards stripped, keeping the ring as second to the man fighting with Vance. Vance's fist was closed. After Deans fell he lay about five minutes. There was a crowd. This was about eleven at night, and it was pitch dark. The crowd were trampling round where Deans lay. I did not keep my eye on him all the time he was lying there.

By the COURT.—I don't know if Deans, in coming forward, meant to be second to Vance.

AGNES WHITE OF GARYAN.—I live in Paisley. I know Sim's house. I saw a disturbance there on the 9th of September. I saw Vance there. He was fighting with a man I did not know. I saw Deans come up. He and I came up together. He said, with an oath, 'Vance, stick in, d——n him.' We were behind Vance. Deans was beside me. Vance did nothing when Deans said so, except that he gave a kind of back lick with the back of his hand. He hit Deans. I was next him, but crouched or I should have got it. Deans fell and the back of his head came on a stone like the shot of a gun. I ran away as soon as he fell, but soon came back again. I looked in his face but he made no motion. He was the worse of spirits, and I thought it was that that made him stupid.

Cross-examined.—When Vance threw back his hand the crowd were pressing on him, both before and behind, so much so that he could not stir. I thought in throwing back his hand he wished to make way.

EXCULPATORY EVIDENCE.

ANN M'ALPINE.—I knew Deans. I remember an affray when Deans received an injury. I did not see the beginning of the battle. When I first saw Deans two men were supporting him. One said to the other, 'they are killing one another,' and then they let Deans fall quite carelessly. He fell towards the side, and the back of his head struck the ground. The men went forward and let him lie. I did not see Vance there at this time.

AYTON, in addressing the Jury, on behalf of the pan-

No. 27.
Robert
Vance.

Glasgow.
March 23.
1849.

Culpable
Homicide.

No. 27.
Robert
Vance.

Glasgow.
March 23,
1849.

Culpable
Homicide.

nel, contended that the facts proved did not support the charge libelled. Had the blow been originally directed against an opponent the case might have been different, but as it at present stood, it was clear not only that Vance had not intended to strike any person seriously, but that he certainly never intended to strike a supporter. The accident did not, in truth, occur during the fight, it was in preparation for renewing it, by driving away persons pressing on himself; and however the pannel might have been criminally responsible for a chance blow struck at another in the course of fighting his opponent, it could not be held that what was done in the way of clearing the ring was equally culpable as if the blow had been given by mistake in the course of the affray.

LORD MONCREIFF, after conferring with Lord Mackenzie, told the Jury, that although it was evidently a very light case of culpable homicide, and although, in so far as the misfortune which befell Deans was concerned, it was clear that it was undesigned on the part of the pannel, yet, in the opinion of the Court, it could not be said that the pannel was free from blame, inasmuch as he was engaged in an illegal act at the time, and the blow was given in the course of the fight; but as the case had turned out, though it must be held to be culpable homicide, yet it could not be said, in the terms of the libel, that it was done *wickedly and feloniously*.

The Jury unanimously found the pannel not guilty as libelled.

In respect of which verdict of Assize, the pannel was assoilzed *simpliciter*, and dismissed from the bar.

WEST CIRCUIT.

STIRLING.

*Spring, 1849.**Judges*—The LORD JUSTICE-CLERK AND LORD WOOD.April 17.
1849.WILLIAM DINWIDIE, Appellant—*E. F. Maitland,*

AGAINST

WILLIAM KNOX, Respondent—*Logan.*

POOR LAW SETTLEMENT.—Held that a mother cannot acquire a settlement for her child by a former husband, by means of a joint industrial settlement with a second husband.

THIS was an Appeal against a sentence of the Sheriff of Stirlingshire. It arose in the following manner:—The appellant raised an action before the Sheriff of Stirling for the sum of £4:0:9, as the amount of certain relief advanced by him as inspector of the poor of the parish of Dumfries, on account of Elizabeth Forsyth Wilson. It appeared that her parents had obtained a settlement in the parish of Dumfries; and that in 1831, when the pauper, in respect of whom the dispute arose, was five years of age, her father died. In 1832, the widow married a person of the name of Innes, who, in the following year, removed with his family, including Elizabeth Wilson, to the parish of St Ninians, and resided there till 1842, when they all returned to the parish of Dumfries. Shortly after which, and without acquiring any settlement, the said Robert Innes died. In 1846, application for interim relief, on behalf as well of Elizabeth Wilson as of the children of Innes and their mother, was made to the appellant, who gave the usual statutory notices to the respondent. The amount expended on behalf of the widow and children of Innes was repaid by the respondent, who refused to pay the sum advanced for the child of the former marriage.

The Sheriff-substitute decerned in favour of the re-

No. 28.
Dinwiddie v.
Knox.
—
Stirling.
April 17.
1849.
—
Appeal.

No. 28.
Dinwiddie v.
Knox.

spondent; and on appeal, the Sheriff pronounced the following interlocutor:—

Stirling.
April 17.
1849.

Appeal.

‘ *Stirling, 21st July 1848.*—Having advised with the Sheriff, who
 ‘ had considered the appeal for the pursuer; Finds, that the pauper
 ‘ Elizabeth Forsyth Wilson was born in Dumfries of married parents,
 ‘ and that her father had then acquired a settlement in the parish of
 ‘ Dumfries, or at least had a settlement elsewhere than in the parish
 ‘ of St Ninians: Finds, that while the pauper was a pupil, her mother
 ‘ contracted a second marriage with Robert Innes; and that her hus-
 ‘ band, accompanied by her and her child, the said Elizabeth Forsyth
 ‘ Wilson, removed to the parish of St Ninians, where he acquired a
 ‘ settlement; Finds, that the present action is for repayment of cer-
 ‘ tain sums granted in way of relief to the said Elizabeth Forsyth
 ‘ Wilson, by the inspector of the poor of the parish of Dumfries, and is
 ‘ brought against the inspector of the poor of the parish of St Ninians,
 ‘ on the assumed liability of the latter parish to relieve the pauper,
 ‘ in respect that a woman who marries a second time acquires the
 ‘ settlement which belongs to her second husband, and communicates
 ‘ the settlement so acquired to a child of the first marriage incapable
 ‘ of acquiring a settlement in its own right: Finds, that a widow,
 ‘ acquiring a new settlement by marriage with a second husband, does
 ‘ not communicate the settlement so acquired by her to the children
 ‘ of her former marriage, and that the settlement of the children con-
 ‘ tinues as it existed before the second marriage of their mother;
 ‘ Dismisses therefore the appeal, affirms the interlocutor appealed
 ‘ from, and decerns. (Signed) ‘ JOH. HAY.’

‘ *Note.*—The case of the Parish of Crieff against the Parish of
 ‘ Fowlis Wester, July 19. 1842, has fixed that a *widow* may, by in-
 ‘ dustrial residence, acquire a settlement for her infant children; but
 ‘ if she marries again, the question arises, whether that will affect the
 ‘ settlement of her children previously acquired, whether through her,
 ‘ under her industrial residence as a widow, or through their deceased
 ‘ father, if his settlement still continue to be his children’s at the time
 ‘ of their mother’s second marriage. The case of Crieff does not, it is
 ‘ thought, solve the last at least of these cases, which is the one which
 ‘ has now occurred. For, in the present instance, the widow married
 ‘ a year after her first husband’s death, and, in the following year,
 ‘ removed with her second husband from the parish of the settlement
 ‘ of her first. It is conceived to be clear, that the mother’s residence
 ‘ in St Ninians could not directly acquire a settlement for the chil-
 ‘ dren of her first marriage, because such residence could not acquire
 ‘ a settlement for herself, it being her husband’s residence which
 ‘ would give her a settlement in that parish. If then the mother

‘ cannot acquire a settlement for a child by a former marriage when she
 ‘ is not acquiring a settlement for herself, except derivatively through
 ‘ her husband, it would seem to follow, that her children must retain
 ‘ the settlement they had acquired previous to their mother’s second
 ‘ marriage. It is difficult to understand on what principle a married
 ‘ woman can communicate her second husband’s settlement to her
 ‘ children of a former marriage. (Initialed) J. H.

No. 28.
 Dinwiddie v.
 Knox.
 Stirling.
 April 17.
 1849.
 Appeal.

E. F. MAITLAND for the Appellant.—This appeal was brought to decide the question, whether a married woman, having obtained a settlement by means of industrial residence, could communicate a right of settlement to a daughter by a former marriage. The case of the heritors of Crieff against Fowlis Wester had decided that a widow could do so to her children, and it followed, that the same result would ensue in respect of children of a former marriage, if the widow married again. Assuming that the mother had a proper settlement at St Ninians, it followed that the parish in which she was settled, was bound to fulfil the obligation which previously fell upon her to support her child. This obligation was not in any way affected by means of the subsequent marriage. Farther, the mother took part in the industrial occupation; and the parish of St Ninians which had the benefit of that, could not repudiate any obligation ensuing therefrom, especially as this child was part of the family of the stepfather.

LOGAN was not called upon to reply.

LORD WOOD.—In this case there is no room for doubt. Where the parties were settled before 1832, does not seem clear, but it certainly was not in the parish of St Ninians. In the year 1831, Wilson the former husband died, leaving a widow and child, both of whom had then an undoubted claim of relief against the parish in which he was settled. In 1832, having married again, the family, including the child, come to the parish of St Ninians, where they lived till 1842; and in that period acquired a settlement by means of an industrial residence. It has been settled, since the case of Crieff, that a widow

No. 28.
Dunwidie v.
Knox.

Stirling,
April 17,
1849.

Appeal.

may, by industrial residence, acquire a settlement for her child, just as a father may; but in the case of a second marriage, it seems altogether different. A settlement acquired by means of industrial residence, is altogether derivative to her. In truth, she seems to fall into it, rather than to acquire it. There is no ground, therefore, for the child to claim relief against the parish in which her stepfather has resided. Such residence would not take away the child's right of relief against the parish of the father's settlement, and I accordingly move that the sentence of the Sheriff be affirmed.

The LORD JUSTICE-CLERK.—I entirely concur. I assume that at the death of Wilson he had a settlement in Dumfries, against which parish his child also had a right. It is quite clear, that no act of the mother could destroy this right of the child, unless she was able to acquire for it another settlement. The Crieff case was altogether different. A widow stands in some respects in the position of a father, but here the mother married again. By that act her settlement was changed at once. Suppose that the child became chargeable the day after the marriage of her mother, could it be said that she had thereby lost her right against the parish of her father? or could it be pretended that she had, by her mother's marriage, obtained a right against the parish to which her father-in-law belonged? The argument, that the parish of St Ninians had gained by the industry of the wife, was altogether futile, when pleaded as a ground on which a settlement therein could be obtained for a child by a former marriage, as the law could only regard the husband in such a case.

The Appeal was refused, with expenses.

GLASGOW.

Judge—THE LORD JUSTICE-CLERK,

April 26,
1849.P. E. HENDERSON, Appellant.—*Monro.*

AGAINST

M'AULAY & Co., Respondents.—*D. Mackenzie.*

APPEAL.—Objection to the competency of an appeal sustained, in respect it was not lodged within ten days after judgment, disposing of the merits and matter of expenses, although there was a subsequent interlocutor in the case.

THIS action was instituted by the defenders M'Aulay & Co., provision merchants, Glasgow, against Thomas and Peter E. Henderson for payment of an account of £12: 12: 8, incurred to the pursuers. Decree in absence was obtained against both defenders, and extracted. Thereafter, on the petition of one of the defenders, P. E. Henderson, he was reponed on consignment of the previous expenses, and a litigation ensued between the pursuers and P. E. Henderson, in regard to the liability of the latter. In the meantime, the other defender, Thomas Henderson, was charged under the decree obtained against him, and the principal sum recovered from him. On advising the proofs, the Sheriff-substitute (Mr Skene) pronounced the following interlocutor:—

No. 32.
Henderson
v. M'Aulay
& Co.
—
Glasgow.
April 26.
1849.
—
Appeal.

' Glasgow, 8th November 1848.—Having resumed consideration of this process, in respect, while the pursuers' proof sufficiently instructs the defender Peter E. Henderson's liability for the whole sum sued for, it appears from the close of the said proof that the principal sum sued for has been recovered from the other defender; finds the said Peter E. Henderson liable to the pursuers in payment of interest thereon merely, and finds him also liable to the pursuers in expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report, and decerns.

' GEORGE SKENE.'

No. 32.
Henderson
v. M^rAulay
& Co.

Glasgow.
April 26.
1849

Appeal.

The defender reclaimed, and thereafter appealed to the Sheriff, who adhered, with the variation on the point of expenses, that these were to be allowed subject to large modification. The expenses were taxed and modified on the 14th of February 1849, by the Sheriff-substitute, to £6. This interlocutor was acquiesced in, and an extract of the decree ordered. When the Sheriff-clerk was making out the extract, it was found that the sum consigned by the defender when he was reponed had never been uplifted, and a motion was lodged by the pursuers for authority to receive this sum in payment *pro tanto* of the modified expenses, which was granted on the 21st February 1849.

An appeal was taken against the judgment at the next Court of Justiciary, and the appeal was lodged and intimated on the 3d of March, ten days after the last interlocutor of 21st February 1849.

MONRO, for the appellant, contended, that the final interlocutor in the action was that of 21st February, and that the appeal having been lodged within ten days after that interlocutor was pronounced it was regular and competent.

MACKENZIE, for the respondent, objected to the competency of the appeal, in respect that it was not lodged within ten days of the final judgment or decree in the cause. By the act 20th Geo. II. c. 43, § 34, an appeal to the Circuit Court must be taken either at the time of pronouncing 'final decree and sentence or judgment,' or within ten days thereafter, by lodging the appeal in the hands of the clerk of Court. So also, by the Act of Sederunt of 12th July 1839, appeals are declared 'competent only after a final judgment has been pronounced, and the matter of expenses has been disposed of;' and the appeal must be taken either at the time of pronouncing such final judgment, or within ten days thereafter. Now, here the merits of the action were disposed of by the interlocutor of the Sheriff-depute adhering to that of the Sheriff-substitute of 8th November 1848, with

the variation, that he held the pursuers entitled to expenses, but subject to modification. That was the final judgment or decree on the merits, and the matter of expenses was disposed of, and decree given therefor on the 14th February 1849. The appeal was not lodged with the clerk of Court within ten days of this decree, and therefore was incompetent, both under the act of Parliament and act of Sederunt. The interlocutor of the 24th February merely authorised the pursuers to uplift the consigned sum, and to apply them towards payment of the amount of the modified expenses, and was neither the final judgment or decree on the merits, nor the judgment disposing of the matter of expenses.

Held by the LORD JUSTICE-CLERK—That, as by the act of Parliament and act of Sederunt, the appeal must be taken within ten days of the final judgment in the cause, and of the decree disposing of the matter of expenses; and as the decree here disposing of the expenses was that of the 14th February 1849, approving of the auditor's report, modifying the expenses to £6, and discerning therefor, the whole merits having been then disposed of, and as the appeal was not taken within ten days of such interlocutor, it was incompetent. The interlocutor of the 21st February 1849 was a mere interlocutor following on the previous final judgment, and caused by the defender having incurred an award by being reponed against a decree in absence.

The appeal was dismissed.

MONRO, for the appellants, moved that his Lordship should modify the expenses.

LORD JUSTICE-CLERK.—I do not in general modify the expenses in an appeal, but allow the whole expenses which have been incurred in consequence of the appeal, subject to proper taxation. Some cases may occur in which one can safely modify expenses. But the principle on which I act is, that the successful party in the appeal, whether appellants or respondents, should not lose in point of expenses when he gains the appeal.

No. 32.
Henderson
v. M'Aulay
& Co.

Glasgow,
April 26,
1849.

Appeal.

MARSHALL, Appellant.—*Monro.*

AGAINST

TURNER, Respondent.—*Logan.*

APPEAL—CAUTION.—Held, 1. That there is no statutory provision requiring a certificate that caution has been found in an appeal to the Circuit Court. 2. Circumstances in which, on an allegation that caution had not been found, the Court offered time to allow the necessary evidence to be produced.

No. 33.
Marshall v.
Turner.
Glasgow.
April 26,
1849.
Appeal.

THIS was an appeal from the Sheriff of Lanarkshire. On the appeal being called, it was objected by the respondent, that there did not appear to have been any caution found, as required by the statute. It was usual to certify on the back of the appeal that caution had been duly given; but not only was this certificate wanting in this case, but there was no certificate of any kind to shew that caution had been found.

Answered, for the appellant, that caution had in fact been found, and that the appellant's agent was his cautioner.

THE LORD JUSTICE-CLERK.—The statute does not contain any directions as to the production of a certificate in any form, it only directs caution to be found, which it is alleged has been done in the present case. If, therefore, the respondent disputes this, the case must be delayed, in order to afford the appellant time to produce the necessary evidence of the facts. *Prima facie*, the objection is not good, as it is very unlikely that the Sheriff-clerk would have transmitted the appeal, if caution had not been duly given.

LOGAN hereupon departed from the objection, and the case proceeded.

SOUTH CIRCUIT.

Spring, 1849.

DUMFRIES.

Present,

April 19,
1849.

LORDS MONCRIEFF AND COCKBURN.

JANE M'KICHEN OR CHARTERS—*Cleghorn.*

AGAINST

HELEN MUIR—*Welsh.*

APPEAL—INNKEEPER—LIEN.—Held that an Innkeeper had a right to detain the wearing apparel of a guest who neglected to pay his bill when demanded, even though payment was refused on the ground that the charges therein exceeded what had been agreed on.

THIS was an appeal from the Stewart of Kirkcudbright, against a decision refusing to recognize a lien claimed by the appellant, under the following circumstances:—The respondent's husband, who is a dancing-master, having periodically given lessons in the village where the appellant lives and keeps an inn, was in the habit of staying at her house, and had incurred a bill of a few shillings, when he determined to give a ball to his scholars, and for that purpose sent for his wife (the respondent in this appeal), together with his daughter, to assist at the entertainment. They accordingly came, bringing with them no other clothes than those they were wearing, save their ball dresses, and took up their abode at the appellant's house, where they partook of refreshments, and were furnished with a room in which they dressed for the ball, and left their ordinary clothes lying. On their return from the ball, and before leaving, the husband of the respondent called for the bill, but refused to pay the whole sum, as he alleged that certain items were charged higher than had been agreed

No. 29.
M'Kichen
v. Muir.
Dumfries.
April. 19.
1849.
Appeal.

No. 29.
M'Kichen
v. Muir.

Dumfries.
April 19.
1849.

Appeal.

on; whereupon the appellant detained the ordinary wearing apparel of the whole party, leaving them to go home, a distance of eight or nine miles, in their ball dresses. The respondent thereupon presented a petition to the Stewart of Kirkeudbright, praying for restoration of her wearing apparel, to which answers were given in, and a proof afterwards allowed by the Stewart-substitute, as to whether the respondent had any other ordinary wearing apparel than those detained by the appellant on the occasion in question. On advising the whole case, the Stewart-substitute ordained the clothes to be delivered up, founding his judgment on the fact that the respondent had no other clothes in which to go home.

Against this judgment an appeal was taken to the Circuit Court.

CLEGHORN, for the Appellant, pleaded—It was undoubted law that an innkeeper had a right of retention over the luggage of his guests, in security of the debts incurred by them in that character, and accordingly, if his bill was not settled, had a right to detain it. This right was universal, extending to all possible luggage, and any inconvenience alleged to arise to the respondent in this case, only shewed the efficacy of the right of retention in forcing a settlement. The proof allowed by the Stewart-substitute was therefore quite irrelevant, and his judgment ill founded.

WELSH, for the Respondent, answered—The right claimed by the appellant amounted substantially to a right to incarcerate within her inn such customers as refused to pay any bill, however exorbitant; for, to leave persons no alternative but that of being either detained, or walking home several miles in a rainy night in thin shoes and light muslin dresses, and without bonnets, was equivalent to a power of incarceration. But here there had not even been a refusal to pay the bill, but objection was made to certain charges, as being contrary to express agreement.

The respondent was entitled to prevail on another ground, for the debt incurred was a debt of the husband's, and therefore no separate property of the wife, especially if that property was of a paraphernal character, as in the present case, could be retained in security for it.

No. 29.
M'Kichen
v. Mair.

Dumfries.
April 19.
1849.

Appeal.

LORD COCKBURN.—We cannot hear you upon that point. There is not a word about it in the judgment of the Inferior Court.

The COURT were of opinion that the innkeeper's right of retention extended to articles of dress retained by her from the respondent. They therefore altered the judgment of the Stewart-substitute.

NORTH CIRCUIT.

ABERDEEN.

Present,

LORDS MACKENZIE AND MEDWYN.

April 24.
1849.

HER MAJESTY'S ADVOCATE *Deas A.D.*

AGAINST

CHRISTIAN DUNCAN—*Burnett.*

INDICTMENT—RELEVANCY—THEFT BY HOUSEBREAKING.—Circumstances which were held sufficient to support a charge of theft by housebreaking, although the pannel was not charged with using any other violence than opening the attic door by means of false keys.

CHRISTIAN DUNCAN was charged with Theft, by means of Housebreaking :

No. 30.
Christian
Duncan.

Aberdeen.
April 24.
1849.

IN SO FAR AS, on the 14th day of October 1848, or on one or other of the days of that month, or of September immediately preceding, or November immediately following, you the said Christian Duncan did, wickedly and feloniously, break into and enter an attic-room of a dwelling-house situated in or near Long Acre, in or near Aberdeen,

Theft by
House-
breaking.

No. 30.
Christian
Duncan.

Aberdeen.
April 24.
1849.

Theft by
House-
breaking.

the said attic-room being then and now or lately possessed or occupied by James Reid, a baker, now or lately residing or lodging with William Largue, a spirit-dealer, now or lately residing in or near Hutcheon Street, in or near Aberdeen, by opening the lockfast door of the said attic-room by means of a false key or picklock; and having thus, or in some other way or by some means to the prosecutor unknown, obtained entrance into the said attic-room, you the said Christian Duncan did, then and there, wickedly and feloniously, steal and theftuously away take, a book titled 'The Self-Interpreting Bible, with an Evangelical Commentary by the late Rev. John Brown, Minister of the Gospel at Haddington,' or bearing some similar title, the property, or in the lawful possession, of the said William Largue, or in the lawful possession of the said James Reid; as also, two hearth-rugs, two crystal cruets, and a piece of wax-cloth, the property, or in the lawful possession, of the said James Reid.

BURNETT objected to the relevancy of the libel, in so far as it charged housebreaking. It was necessary to constitute the aggravation of housebreaking, that the external security of the dwelling should be violated, whilst the charge preferred against the pannel was not only destitute of any allegation to that effect, but plainly indicated that it was an inner door which she was accused of having opened, on the security of which the inmates could not be taken to have relied.

DEAS.—It was set forth in the indictment, that Reid, from whom the articles mentioned were taken, was a lodger. The attic door was therefore to him an outer door, as it formed the entrance to his habitation, and constituted its only safeguard.

The COURT sustained the relevancy of the indictment, Lord Mackenzie remarking, that he had known a case where the Court sustained an aggravation of housebreaking, the party having broken out of a house which he entered for the purpose of committing a theft.

The pannel afterwards pled guilty to the charge of theft, without the aggravation of housebreaking.

In respect of which judicial confession, she was sentenced to be transported for the period of seven years.

HER MAJESTY'S ADVOCATE—*Deas A.D.*

AGAINST

ANN DUTHIE—*Burnett.*

INDICTMENT—RELEVANCY—WANTON AND MALICIOUS MISCHIEF.—
Circumstances in which the Crown, on the recommendation of the Court, withdrew a charge of Wanton and Malicious Mischief, it peering that in fact the prisoner's attempt had been abortive.

ANN DUTHIE was charged with Malicious Mischief;
as also Wanton Mischief:

No. 31.
Ann Du-
thie.

Aberdeen.
April 24.
1849.

IN SO FAR AS, (1.), on the night of the 8th, or morning of the 9th, day of October 1848, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, at or near the house situated in or near King Street, in or near Aberdeen, then and now or lately occupied by John Duncan, then and now or lately residing there, you the said Ann Duthie did, wickedly, wantonly, and mischievously, throw two or more stones or other hard missiles at one or more of the windows in the said house, with the intent and for the purpose of breaking the glass of the said windows, or of one or more of them, the property, or in the lawful possession, of the said John Duncan; and which stones, or one or more of them, struck forcibly against a wire frame, which, unknown to you the said Ann Duthie, had been recently before put up on the outside of the glass of the said windows, or of one or more of them, for their or its protection, and but for which protection the glass of the said windows, or of one or more of them, would have been broken by the stones thrown by you as aforesaid, or by one or more of them; and this you the said Ann Duthie did, while the said windows were, and were well known to you to be, watched by and under the charge of the police authorities of Aberdeen, for the express purpose of preventing you from breaking the said windows, as you had previously done, or from throwing stones or other hard missiles thereat, which you nevertheless did as aforesaid, in open defiance of the law and of the said authorities: LIKEAS (2.), on the 9th day of October 1848, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, at or near the house or premises situated in or near Huxter Row, in or near Aberdeen, then and now or lately occupied as the town-house of Aberdeen, you the said Ann Duthie did, with your hand or hands, or by some other means to the prosecutor unknown, wickedly, wantonly, maliciously, and mischievously, break or destroy six, or thereby, panes of glass of

Wanton and
Malicious
Mischief.

No. 31.
Ann Du-
thie.

Aberdeen.
April 24.
1849.

Wanton and
Malicious
Mischief.

one of the windows of the said last-mentioned house or premises, the property, or in the lawful possession, of the Burgh of Aberdeen, or of the Magistrates and Town Council of Aberdeen, for behoof of or as representing the community of Aberdeen.

BURNETT objected to the relevancy of the first charge contained in the indictment. It plainly appeared that the attempts made by the pannel had proved abortive, and consequently, could not found a relevant minor to a charge of malicious or wanton mischief, when no mischief in fact ensued. It was immaterial by what means, or by whose precautions, her attempts had been defeated.

DEAS.—But for the strong wire frame which protected the window, the attempt would have succeeded, and the law would regard her repeated attempts, if defeated, as equivalent to the completed offence.

The COURT having conferred, Lord Mackenzie recommended that the first charge should be withdrawn. His Lordship added, that in so doing the Court did not intend to give any opinion on the validity of the objection, much less to determine the point.

The pannel pleaded guilty to the second charge as libelled.

In respect of which judicial confession, she was sentenced to be imprisoned for one year, Lord Mackenzie remarking, that, had there been any precedent to that effect, he would have passed a sentence of transportation, in consequence of the number of previous convictions, nine in number, which had been proved against her.

PERTH.

Present,

LORDS MACKENZIE AND MEDWYN.

May 2.
1849.HER MAJESTY'S ADVOCATE—*Deas, A.D.*

AGAINST

JOHN ELDER MURDOCH.—*W. G. Dickson.*

INDICTMENT—RELEVANCY.—Objection to the indictment, that the minor did not answer to the major, repelled.

JOHN ELDER MURDOCH was charged with Wilfully, Unlawfully, and Maliciously, or the Wilfully, Unlawfully, and Recklessly, placing or rolling, and leaving a stone upon or between or near the rails of a line of railway, used for conveying passengers and goods by locomotive trains or carriages, in a manner calculated and intended, or in a manner calculated to obstruct such trains or carriages, and to endanger the lives or safety of the passengers and other persons travelling thereby; As also, with contravention of the statute 3d and 4th Vict. c. 97 sect. 15.

No. 34.
John Elder
Murdoch.

Perth.
May 2.
1849.

Wilful
Damage.

IN SO FAR AS, on the 4th day of March 1849, or on one or other of the days of that month, or of February immediately preceding, or of the bypast part of April immediately following, you the said John Elder Murdoch did, wilfully, unlawfully, and maliciously, or wilfully, unlawfully, and recklessly, place or roll and leave a large stone, weighing six hundredweight, or thereby, upon or between or near the rails of the line of the railway, then and now or lately called the Edinburgh and Northern Railway, then and now or lately the property, or in the lawful possession, of the company incorporated by Act of Parliament, under the name or title of the Edinburgh and Northern Railway Company, or under some similar or other name or title, and at or near that part of the said line of railway, situated 226 yards, or thereby, to the south-eastward of a bridge which crosses the said line of railway at or near the farm of Braeside, in or near the parish of Abdie, and county of Fife, then and now or lately occupied by Andrew Dingwall, a farmer, then and now or lately residing there, and which bridge is situated 1640 yards, or thereby, to the north-westward of the Collessie

No. 34.
John Elder
Murdoch.

Perth.
May 2.
1849.

Wilful
Damage.

Station of the said railway; and which line of railway was then used, and was well known to you to be used, for conveying passengers and goods by locomotive trains or carriages; and this you did, in a manner calculated, and by you intended, or in a manner calculated to obstruct the said trains or carriages, and to endanger the lives or safety of the passengers and other persons travelling thereby; and more particularly in a manner calculated, and by you intended, or in a manner calculated to obstruct a locomotive train or set of carriages driven by locomotive power, and carrying passengers, which you expected or had reason to believe would shortly thereafter pass from Perth, or the direction of Perth, to or towards Burntisland, along that part of the said line of railway upon or near to which you had placed or rolled and left the said stone as aforesaid; and the said stone was so placed or rolled and left by you as aforesaid, in such manner as to obstruct the said locomotive train or set of carriages; and the said locomotive train or set of carriages, having a number of passengers and other persons therein or thereupon, did, shortly after the said stone had been so placed or rolled and left by you as aforesaid, pass along that part of the said line of railway upon or near to which you had so placed or rolled and left the said stone, and the engine and carriages propelling and forming the said locomotive train, or one or more of them, did come violently in contact with the said stone, and were thereby obstructed, damaged, and injured, and the passengers and others conveyed in or upon the said engine and carriages were thereby put in bodily fear, and their lives or safety endangered.

DICKSON, for the panel, objected to the relevancy of the common law charges as libelled. The offences set forth in the major were both described as crimes of intention, inasmuch as the word wilfully was contained in each, whilst in the minor it was said, 'and this you did in a manner calculated, and by you intended, or in a manner calculated to obstruct the said trains or carriages, and to endanger the lives or safety of the passengers and other persons travelling thereby,' &c. According to the major, intention was essential to the commission of the offence; but in the minor, by libelling merely that the act was 'calculated' in the alternative, the libel became illogical and repugnant; the law recognised a difference between crimes of recklessness and criminal design (case of *Macbean*, 15th April 1847, Inverness, Arkley, p. 262.) The Crown having charged intent in the major, could not be allowed to set forth a charge

from which design was excluded, which was manifestly the case in this indictment, from being placed in the alternative to the intended act.

DEAS.—The libel was relevant, had it charged simply the ‘wilfully, unlawfully, and recklessly placing,’ &c. a stone ‘in a manner calculated’ to produce the injury apprehended, it would doubtless have been sufficient, and it was not the less so from that charge being interwoven with another relevant charge. The wilful and reckless act was clearly an offence, though a less heinous one than the wilful and malicious.

The objection was repelled.

After evidence led, the Jury found the pannel guilty of wilfully, unlawfully, and recklessly placing, or rolling and leaving a stone, &c., and unanimously recommended him to the mercy of the Court.

In respect of which verdict of Assize, the Court sentenced the pannel to six months imprisonment.

No. 34.
John Elder
Murdoch.

Porth.
May 2.
1849.

Wilful
Damage.

HIGH COURT.

Present,

THE LORD JUSTICE-GENERAL,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE, MONCREIFF, COCKBURN, WOOD, and IVORY.

WILLIAM TELFER, Suspendor—*Moncreiff*.

AGAINST

RICHARD JOHN MOXEY, Respondent—*Neaves*.

SUSPENSION—RELEVANCY.—Held that it was sufficient, in a police complaint, to aver that the suspendor had resisted or molested officers of police in the execution of their duty, without setting forth what was the particular duty they were engaged in discharging.

June 2.
1849.

No. 35.
Telfer v.
Moxey.

High Court.

June 2.
1849.

Suspension.

This was a suspension of a judgment of the Police Court of Edinburgh, arising out of the following circumstances :—

By the 136th section of the Edinburgh Police Act, 11th and 12th Victoria, cap. 113, all publicans are prohibited from selling ale, beer, or exciseable liquors, after eleven o'clock at night. The respondent had been in the habit of causing officers from time to time to search the suspender's premises after eleven at night, with the view of ascertaining whether he allowed drinking in his establishment after that hour. On the evening of Saturday, the 24th of March 1849, the suspender having heard a loud knocking at the door between eleven and twelve, inquired who was there, and was answered "police." He then unbarred his door, when two persons presented themselves in plain clothes, wearing shooting jackets, and one of them with a cap on, and proceeded, without the exhibition of any warrant, to search the suspender's premises. In the course of their search, the suspender interfered, and refused to allow them to proceed farther through his house without an exhibition of some authority, whereupon the persons went away.

Three days thereafter, a complaint was served upon the suspender, at the instance of the respondent, wherein he was accused of 'resisting or molesting officers of police in the execution of their duty.' On this complaint evidence was adduced by both parties, in relation to the facts of the case. On the 30th of March 1849, the presiding Judge found the complaint proved against the suspender by evidence adduced, and sentenced him to pay a fine of Two Pounds sterling, or otherwise to be imprisoned for a period of ten days. The complainer, with a view to suspension, made consignment of the fine in the hands of the clerk of the police, and presented the present note of suspension.

The respondent, in his answers, set forth that the complainer, when he refused to allow the officers to search his premises, knew that they were policemen, and

also that no order, judgment, or conviction could be set aside, under the 107th section of the Edinburgh Police Act.

No. 35.
Telfer v.
Moxey.

High Court.
June 2.
1849.

Suspension.

MONCREIFF, for the Suspender.—The complaint was bad, in respect it did not set forth that the police were in the execution of their duty at the time the alleged resistance offered by the complainer was made. It ought also to have shewn what the particular duty was which they professed to discharge. That would have enabled the party to defend himself against the complaint, by shewing that the police were not in the exercise of any legitimate function. This was necessary to be averred, as otherwise policemen might assume to enter any private house without warrant, or other lawful cause, and if they were resisted, might proceed to draw a complaint, such as that now sought to be suspended, and obtain conviction on a simple proof that he had been resisted, although the resistance was justifiable in the circumstances.

NEAVES, for the Respondent.—It was set forth in the complaint, that the party well knew the persons whom he resisted to be constables, and this must be held to have been proved by the finding of the Judge. No special warrant was necessary for the protection of a policeman in the execution of his duty, and there was quite sufficiency of averment here to sustain conviction; and cited the precedent of Devitt and Davidson, 12th June 1843, where a similar objection to that now taken was repelled.¹

¹ Michael Devitt and Rose Davidson, both now or lately private soldiers in the 53d Regiment of Foot, and now or lately prisoners in the prison of Edinburgh, were charged with rioting and breach of the peace, as also assault: In so far as, on the 1st day of April 1843, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, on or near that part of the High Street of Edinburgh called the Castle Hill, or Castle Hill Street, you the said Michael Devitt and Rose Davidson did, both and each, or one or other of you, along with a number of evil disposed persons, to the prosecutor unknown, your companions armed

No. 35.
Telfer v.
Moxey.

High Court.
June 2.
1849.

Suspension.

The LORD JUSTICE-GENERAL.—The case quoted by Mr Neaves is sufficient authority for our refusing this suspension, on the ground of any radical defect in the form of the complaint. And, on the merits, I see no reason whatsoever to interfere with the judgment, apart from the section of the act prohibiting review. In truth, it would put an end to the whole police business, were we to sustain objections like this.

The other Judges concurred, and the Court accordingly refused the suspension, with expenses.

JOHN KEEGAN, S.S.C.—JOHN RICHARDSON, W.S., Agents.

‘ the whole, or greater part of you, with sticks or bludgeons, or other
 ‘ similar weapons, wickedly and feloniously conduct yourselves in a
 ‘ riotous and disorderly manner, assaulting and obstructing the patrols
 ‘ of the police, and other officers of the law, when engaged in the dis-
 ‘ charge of their duty on the public street, to the great terror and
 ‘ alarm of the lieges, and in breach of the public peace ; and, in parti-
 ‘ cular, you the said Michael Devitt and Rose Davidson did, both and
 ‘ each, or one or other of you, then and there, in a riotous and disor-
 ‘ derly manner, and in breach of the public peace, wickedly and felo-
 ‘ niously attack and assault James M’Ginnes, now or lately day patrol
 ‘ of the Edinburgh Police, and then engaged in the discharge of his
 ‘ duty as an officer of the law, and did, with sticks, or bludgeons, or
 ‘ some other similar weapons, or with your fists, knock or fell him to
 ‘ the ground, and when he was lying there, did repeatedly kick him,
 ‘ and did with the said weapons inflict many severe blows on his head,
 ‘ and other parts of his person, by all which he was severely and
 ‘ cruelly wounded, to the effusion of his blood, serious injury of his
 ‘ person, and imminent danger of his life ; and you did, in like man-
 ‘ ner, then and there, wickedly and feloniously attack and assault John
 ‘ Ross and James Simpson, both now or lately night patrols of the
 ‘ Edinburgh Police, and then engaged as officers of the law in the dis-
 ‘ charge of their duty, and did, in a riotous and disorderly manner, and
 ‘ in breach of the public peace, resist and obstruct them, and did strike
 ‘ or knock the said James Simpson to the ground, to the injury of his
 ‘ person ; and all this you did, well knowing that the said James
 ‘ M’Ginnes, John Ross, and James Simpson were, all and each, or one
 ‘ or more of them, officers of the law, then and there engaged in the
 ‘ execution of their duty.’

JAMES VEITCH and Others, Suspenders.—*A. Anderson—G. H. Pattison.*

AGAINST

WILLIAM REID, Respondent—*Deas.*

SUSPENSION—STATUTE.—Held, that where a complaint in the Inferior Court alleged contravention of bye-laws under a statute which were invalid, it was no answer to a suspension to allege that the alleged offence was penal at common law.

THIS was a Suspension of a conviction of the Burgh-Court of Jedburgh, whereby the complainers were fined in the sum of 10s. each, or failing instant payment, to be detained in the Castle of Jedburgh for the space of six days respectively, unless the said respective penalties be sooner paid.

No. 36.
Veitch and
Others v.
Reid.
High Court-
June 2.
1849.
Suspension.

The matter out of which the complaint arose was as follows:—It appeared to have been the custom in Jedburgh to play a game at ball—a somewhat violent game, which was played, not by throwing or kicking the ball, but by two parties, one of whom was in possession of the ball, pushing against each other, until one of the parties could succeed in carrying the ball to the goals respectively at the other end of the town. This game was played as usual on the 2d February 1849, previous to which the Magistrates of the burgh, in consideration of the then prevalence of cholera, had interdicted the playing of the game. By the statute of 3d and 4th William IV., c. 46, entitled ‘an act to enable burghs in Scotland to establish a general system of police,’ provision is made ‘for the voluntary adoption of that act in said burghs respectively in manner pointed out, and in case of its adoption, full power and authority is given’ to make all necessary rules relative to the watching, lighting of gas, and otherwise paving and cleansing the streets, &c., and, generally, for the due and effectual performance thereof, for the prevention of infectious diseases, and putting

No. 36.
Veitch and
Others v.
Reid.

down and removing such nuisances as may affect the health of the inhabitants, &c.

High Court.
June 2.
1849.

The parties who were authorised under this act to carry it into execution, were denominated Commissioners of Police.

Suspension. This act was not adopted in the burgh of Jedburgh.

By the act 10th and 11th Vict., c. 39, it was, *inter alia*, enacted, that where in a Royal Burgh intending to adopt in whole or in part the act of William IV., it should be lawful for the Magistrates of such burghs or towns, without any previous application of householders, as by the said act required, to convene the occupiers of premises of the yearly value of £10, in manner by the said act directed, to consider and determine whether the provisions of the said act should be wholly or in part adopted; and it was also enacted, that where the said act should be in whole or in part adopted in any Royal Burgh, all the powers and provisions so adopted, should, instead of being put into execution by commissioners elected as by said act is prescribed, be put into execution by the Magistrates and Council of said burghs.

The burgh of Jedburgh is a Royal Burgh, and acting under the powers of 10th and 11th Vict., c. 39, the Magistrates convened a meeting of the inhabitants having the statutory qualification, at which it was resolved to adopt the said act.

It appeared that certain bye-laws were passed in pursuance thereof, which were embodied in a paper having the following title:—‘By order of the *Commissioners of Police*, the following regulations shall be strictly observed as bye-laws within the bounds of police of the burgh of Jedburgh,’ which included a prohibition of the customary game of ball.

It was for an alleged violation of these bye-laws that the complainers were summoned in the court below.

The complaint recited the act of Parliament 3d and 4th William IV., c. 46 only, and libelled that the parties had respectively contravened the bye-laws which had been

made by the Commissioners of Police, acting under and by virtue of said statute.

At the hearing before the Chief Magistrate, the parties objected to the relevancy of the libel, which objection was repelled, and the sentence pronounced now sought to be suspended.

Pleaded for the Suspenders—The sentence was invalid, in respect that the first statute of William IV. had never been acted upon in the burgh of Jedburgh; and, consequently, that there was no such persons as Commissioners of Police entitled to make any bye-law under that act; the act of Victoria, which was adopted in Jedburgh, having conferred the power upon the Magistrates and Town-Council only, consequently the bye-law was bad, and as the substantial charge against the complainers was a violation of this bye-law, and not of any independent breach of peace, the conviction could not be sustained.

Pleaded for the Respondents—The Magistrates were *ex officio* Commissioners of Police at common law, as well as under the statute; and as the game sought to be prohibited was eminently dangerous in the time of pestilence, and was moreover an obstruction to the business of the town, they had power to prevent the same by giving due warning, and to punish a violation of their order.

The LORD JUSTICE-CLERK.—The charge is one under the statute. Nothing is said as to the violation of the common law.

DEAS.—All that was done was competent under the general powers of police vested in the Magistrates and Town-Council.

The LORD JUSTICE-CLERK.—We are not here to consider the general powers of the Magistrates and Town-Council, but to examine the validity of a complaint under a particular statute.

LORD WOOD.—Under the act of Victoria, the parties entitled to make bye-laws are Magistrates, and not Commissioners of Police. You libel a contravention of cer-

No. 36.
Veitch and
Others v.
Reid.

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No. 36.
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Others v.
Reid.

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1849.

Suspension.

tain bye-laws made by the Commissioners of Police, a body who never existed in the burgh. That goes to the whole case.

DEAS.—That was only a misnomer, which would not vitiate a criminal complaint, especially as the parties who enacted the bye-laws were entitled, *ex officio*, to exercise their functions as Commissioners of Police.

The LORD JUSTICE-CLERK.—It is impossible not to suspend in this case. It is expressly alleged on the face of the complaint, that the parties enacting the bye-laws were Commissioners of Police acting under the statute of William IV., whereas that act was never adopted in the burgh, except under the provisions of the act of Victoria, which abolished the statutory functions of the Commissioners of Police created by the former statute. Whether or not they could have prohibited the game by virtue of their common law powers, it is not necessary to determine—perhaps they might, though I, for one, should hesitate to encourage the abolition of an old and customary game, which from time immemorial had been enjoyed by the community.

The rest of the Court concurred, and the Note of Suspension was accordingly passed, with expenses.

CHARLES JAMESON, Suspender—*Deus*.

AGAINST

DAVID PILMER, Respondent—*Neaves*.

SUSPENSION—INFORMALITY.—Circumstances in which it was held, that, where a man had been summarily apprehended without warrant or other intimation of the charge against him before trial, the conviction could not be sustained.

No. 37.
Jameson v.
Pilmer.

High Court.
June 2.
1849.

Suspension.

THIS was a suspension on the part of Jameson, arising out of the same transaction narrated in the case of Ritchie against Pilmer (*ante*, p. 142.)

In addition to the circumstances referred to in the previous report, the suspender alleged, that ' while he ' was assiduously discharging his duty in the vessel, his ' farther services were very speedily and abruptly interrupted, and put an end to, by the respondent, Mr Pilmer, as Superintendent of the Harbour Police, ordering a policeman, at the instigation, it is believed, of the ship's agent, Mr Jack, to carry off the complainer to Bridewell. This was immediately done, without the slightest explanation being made to the complainer, and without any warrant whatever against him being in existence. No accusation or charge even was at this time made against the complainer by any one.'

No. 37.
Jameson v.
Pilmer.
High Court.
June 2.
1848.
Suspension.

DEAS.—The conviction could not be sustained, not only on the ground of the irregular way in which Jameson was apprehended, but also on the ground, that having expected to have had the benefit of his master's evidence, who had been called as a witness, and whose testimony would have exonerated him, the Bailie deprived him of that right by the wrongful proceedings against Ritchie. Circumstances had prevented him from suspending sooner, but he had presented his note the earliest moment he was able.

NEAVES.—This suspension was too late, being many months after the expiry of the sentence, and that undue delay must be considered in dealing with the case.

The LORD JUSTICE-CLERK.—We think he is entitled to have his note of suspension entertained, in order to get free of the conviction now standing against him.

NEAVES.—The suspension by the Captain, on the ground of the informality of the proceedings against him, had no application. The Court sustained the objection in his case, on the ground, that having been cited as a witness, he could not afterwards be summarily charged as a pannel. Jameson had no interest to complain of the proceedings adopted against Ritchie. Had he wished Ritchie as an evidence, he should have moved the Court to have the cases tried separately; but no such motion

No. 37.
Jameson v.
Pilmer.
High Court.
June 2.
1849.
Suspension.

was made at the trial, and it was too late to complain of any injury that he sustained from the trial, as, in the absence of any objection, it must be held that he concurred in the course adopted. In respect of the apprehension, there was nothing incompetent in the way that was effected. The general powers of the police to apprehend a person, said to have stolen goods in his possession, could not be doubted; and it was quite enough if a regular complaint was preferred against him at the time of trial.

The LORD JUSTICE-GENERAL.—I am decidedly of opinion that there is nothing to warrant the procedure complained of, which seems to me to be contrary to the first principles of justice. The process is far too summary, and seems as if intended to try a man without giving him notice of the charge he is to answer. Having been apprehended without a warrant over night, and consigned to jail, he hears the charge read to him, for the first time, when placed at the bar on the following morning, and he is then deprived of the evidence of his Captain, by the respondent putting both their names in the complaint. I do not think this a case where any emergency arose, calling for an extraordinary exercise of the powers of the police. On the contrary, I think it utterly unjustifiable to proceed to try a person on such a charge, without due and proper notice of the offence intended to be charged against him.

The LORD JUSTICE-CLERK.—I am of the same opinion. The Dundee Harbour Act requires, in summary cases, that the procedure shall either commence by warrant or by summons; and, according to the law of Scotland, either of these instruments must bear the cause of apprehension or citation. There is no allegation, in this case, that the suspender was about to escape, so as to render it necessary to apprehend him, except in the regular way; and I am of opinion, that, in that respect, the procedure cannot be sustained; and I am also farther of opinion, that on the broad ground of natural justice we

ought to suspend the present conviction. The depriving the man of the evidence of his Captain, which, they knew, would exonerate him from the charge, was a most discreditable proceeding, and entitles the suspender to our judgment.

No. 37.
Jameson v.
Pilmer.
High Court.
June 2.
1849.
Suspension.

LORD MACKENZIE.—I am not quite so clear as the rest of the Court, but I concur in the judgment about to be pronounced, on the ground that the whole proceedings were too summary, and that the suspender had not sufficient time or notice to prepare his defence.

LORDS MONCREIFF, COCKBURN, WOOD, and IVORY concurred.

The COURT accordingly suspended the charge, with costs.

WOTHERSPOON and MACK—LOCKHART, HUNTER, and WHITEHEAD, Agents.

Present,

THE LORD JUSTICE-CLERK,

LORDS WOOD and IVORY.

July 9.
1849.

HER MAJESTY'S ADVOCATE—*Deas A.D.*

AGAINST

JAMES CHISHOLM—*W. H. Thomson.*

INDICTMENT—THEFT—FALSEHOOD, FRAUD AND WILFUL IMPOSITION—RELEVANCY.—Circumstances in which a cumulative charge of falsehood, fraud, &c., together with theft, was sustained as relevant on the same *species facti*.

JAMES CHISHOLM was charged with Falsehood, Fraud, and Wilful Imposition, as also Theft.

No. 38.
James
Chisholm.

IN SO FAR AS, on the 1st day of January 1849, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, on or near the farm of Sheriffhall

High Court.
July 9.
1849.
Falsehood.
Fraud, &c.

No. 33.
James
Chisholm.
High Court.
July 9.
1849.
Falsehood,
Fraud, &c.

Mains, situated in or near the parish of Newton, and county of Edinburgh, then and now or lately occupied by George Seton, then and now or lately tenant of the said farm, and then and now or lately residing there, you the said James Chisholm did, wilfully, wickedly, falsely, fraudulently, and feloniously, represent and pretend to the said George Seton that if he would agree to sell to you five, or thereby, bolls of potatoes, to be delivered by him or by his servant on the following day, at the shop or premises in or near Stockbridge, then occupied by Mr Robb, a victual-dealer, meaning thereby the shop or premises then occupied by Walter Robb, then and now or lately a victual-dealer in or near Baker's Place, Stockbridge, in or near Edinburgh, or meaning thereby the shop or premises then occupied by some person of the name of Robb to the prosecutor unknown, you the said James Chisholm would await the arrival of the said potatoes at the said shop or premises, and pay the price thereof on delivery; or you did make some other and similar false and fraudulent representation or representations to the said George Seton; and the said George Seton was, by the false and fraudulent representation or representations made by you to him as aforesaid, or part thereof, induced to agree to sell to you five, or thereby, bolls of potatoes, at the price of 14s. sterling, or thereby, per boll, and to send the same on the following day for delivery at the shop or premises in or near Baker's Place aforesaid, then and now or lately occupied by the said Walter Robb, under the charge of James Denny, then and now or lately farm-servant to the said George Seton, and then and now or lately residing at Sheriffhall Mains aforesaid; and the said James Denny having, by directions of the said George Seton, accordingly, on the following day conveyed the foresaid quantity of potatoes to Edinburgh, for the purpose of being delivered as aforesaid, and of receiving payment of the price as aforesaid, and you having joined the said James Denny at or near Newington, near Edinburgh, while on his way to Edinburgh as aforesaid, you did prevail upon the said James Denny to accompany you to the shop or premises in or near Baker's Place aforesaid, then and now or lately occupied by the said Walter Robb, and to the shop or premises situated in or near High Street, in or near Edinburgh, then and now or lately occupied by Thomas Hope, then and now or lately a grocer there, and to the shop or premises situated in or near Huntly Street, in or near Edinburgh, then and now or lately occupied by Alexander Mitchell Dick, a wine-merchant and grocer, then and now or lately residing there, and to the shop or premises situated in or near India Place, in or near Edinburgh, then and now or lately occupied by William Thomson, a victual-dealer, then and now or lately residing there, or to one or more of these places, or to some other place or places in or near Edinburgh to the prosecutor unknown, and you did farther prevail upon the said James Denny to deliver to the said Walter Robb, Thomas Hope, Alexander Mitchell Dick, William Thomson, and others aforesaid, or

to some of them, either for your behoof or for their own behoof, as alleged purchasers from you, or otherwise, the said five, or thereby bolls of potatoes, in various quantities or proportions; and all this or part thereof, you so prevailed on the said James Denny to do, upon your false and fraudulent representation and promise to him, that you would, immediately after the said delivery of the said potatoes, pay to him, for behoof of the said George Seton, the foresaid agreed-on price thereof, which you wilfully, wickedly, and fraudulently failed to do, and you did wickedly, fraudulently, and feloniously appropriate the said potatoes, or part thereof, to your own uses and purposes; and you did, at or near the shop or premises in or near Baker's Place aforesaid, and at or near the shop or premises in or near High Street aforesaid, and at or near the shop or premises in or near Huntly Street aforesaid, and at or near the shop or premises in or near India Place aforesaid, all respectively occupied as aforesaid, or at or near one or more of them, or at or near some place or places in or near Edinburgh to the proecutor unknown, wickedly and feloniously, steal and theftuously away take, in various quantities or proportions as aforesaid, the foresaid five, or thereby, bolls of potatoes, the property, or in the lawful possession, of the said George Seton, or in the lawful possession of the said James Denny; And you the said James Chisholm have been previously convicted of falsehood, fraud, and wilful imposition, and you have been previously convicted of theft.

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Fraud, &c.

THOMSON objected to the relevancy of the indictment, in respect that it charged the pannel with two distinct crimes, whilst only one overt act was set forth. The theft was nothing more than the successful completion of the falsehood, fraud, and wilful imposition previously libelled, the appropriation of the goods being set forth as the substantive portion of such crime. Case of *Robertson*, 25th May 1835; Bell's Notes, p. 18.

DEAS referred to the case of *Grahame*, Glasgow Christmas Circuit 1847, where swindling and theft were charged cumulatively on the same act, and which, although not objected to by the prisoner, had been adverted upon, and sustained as competent by the Court.¹

¹ ' MARGARET GRAHAME, now or lately prisoner in the prison of Glasgow, you are indicted and accused, at the instance of Andrew Rutherford, Esquire, Her Majesty's Advocate for Her Majesty's interest: THAT ALBEIT, by the laws of this and of every other well-governed realm, Falsehood, Fraud, and Wilful Imposition, especially

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The LORD JUSTICE-CLERK.—The indictment, in the case of Grahame, differs from the present in this respect, that the taking possession of the goods was not twice

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‘ when committed by a person who has been previously convicted
‘ thereof; As also, Theft, are crimes of a heinous nature, and severely
‘ punishable: YET TRUE IT IS AND OF VERITY, that you the said Mar-
‘ garet Grahame are guilty of the said crime of falsehood, fraud, and
‘ and wilful imposition, aggravated as aforesaid, and of the said crime
‘ of theft, or of one or other of them, actor, or art and part: IN SO FAR
‘ AS (1.), upon the 24th day of July 1847, or on one or other of the
‘ days of that month, or of June immediately preceding, or of August
‘ immediately following, in or near the shop or warehouse situated in
‘ or near Buchanan Street, in or near Glasgow, then and now or lately
‘ occupied by Robertson Buchanan Stewart and John MacDonald,
‘ then and now or lately carrying on business there as drapers, under
‘ the firm of Stewart and MacDonald, you the said Margaret Grahame
‘ did, wickedly and feloniously, falsely, fraudulently, and wilfully, re-
‘ present to Benjamin West, then and now or lately salesman to the said
‘ Stewart and Macdonald, or to some other person to the prosecutor
‘ unknown, acting on account of the said Stewart and MacDonald,
‘ that you had been sent by Miss Paton, residing at No. 8 Newton
‘ Place, in or near Glasgow, to look at, for her, some merinos or simi-
‘ lar goods, and to order the same to be sent to her at No. 8 Newton
‘ Place aforesaid, for inspection, with a view to purchase; and the said
‘ Benjamin West, or other person to the prosecutor unknown, was
‘ thereby, or by some similar false and fraudulent representation made
‘ by you as aforesaid, imposed upon and induced to send to No. 8
‘ Newton Place aforesaid, then and now or lately occupied by William
‘ Patrick Paton, then and now or lately merchant in Glasgow, thirty-
‘ eight yards, or thereby, of merino, and lining for two dresses, or
‘ thereby, which you the said Margaret Grahame received and appro-
‘ priated as after libelled: FARTHER, time above libelled, at or near
‘ the house No. 8 Newton Place aforesaid, you the said Margaret
‘ Grahame did, wickedly and feloniously, falsely, fraudulently, and
‘ wilfully, represent to Agnes Lyon, then and now or lately servant
‘ to the said William Patrick Paton, or in the said house, that a parcel
‘ containing the articles above libelled, which was then in the said
‘ house, had been left there by mistake, and that it was intended
‘ for a Mrs James Paton, or for some other person whom you then
‘ named, but whose name is to the prosecutor unknown; and having
‘ thereby, or by some similar false and fraudulent representation, im-
‘ posed upon the said Agnes Lyon, and induced her to deliver to you
‘ the said parcel containing the articles above libelled, or part thereof,
‘ you did, then and there, wickedly and feloniously, steal and theftu-

libelled as a crime, but was only charged as constituting the theft. The facts constituting the swindling being the various deceptions by which the prisoner had been

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ously away take, the said parcel containing the articles above libelled, or part thereof, the property, or in the lawful possession, of the said Robertson Buchanan Stewart and John MacDonald, or one or other of them, or in the lawful possession of the said Agnes Lyon : OR OTHERWISE, time and place last above libelled, you the said Margaret Grahame did, wickedly and feloniously, steal and theftuously away take, a parcel, containing the articles above libelled, or part thereof, the property, or in the lawful possession, of the said Robertson Buchanan Stewart and John MacDonald, or one or other of them, or in the lawful possession of the said Agnes Lyon : LIKEAS (2.), upon the 7th day of August 1847, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, within or near the shop situated in or near Argyle Street of Glasgow, then and now or lately occupied by John M'Intosh, Ninian Scouller, and James Donaldson, then and now or lately carrying on business there as drapers, under the firm of M'Intosh, Scouller, and Donaldson, you the said Margaret Grahame did, wickedly and feloniously, falsely, fraudulently, and wilfully, represent to the said Ninian Scouller, and to John Fulton, then and now or lately salesman to the said M'Intosh, Scouller, and Donaldson, or to one or other of them, or to some other person to the prosecutor unknown, acting on account of the said M'Intosh, Scouller, and Donaldson, that you had been sent by Mr John Young, residing at N. 1 Blytheswood Square, in or near Glasgow, or by one or more ladies, members of his family, or residing in his house, to look at, for him or them, some tartans or similar goods, and to order the same to be sent to No. 1 Blytheswood Square aforesaid, for inspection, with a view to purchase ; and the said Ninian Scouller and John Fulton, or one or other of them, or other person to the prosecutor unknown, was thereby, or by some similar false and fraudulent representation made by you as aforesaid, imposed upon and induced to send to the house No. 1 Blytheswood Square aforesaid, then and now or lately occupied by John Young, merchant, then and now or lately residing there, twenty-four, or thereby, yards of tartan cloth, which you the said Margaret Grahame received and appropriated as after libelled : FARTHER, time above libelled, at or near the house No. 1 Blytheswood Square aforesaid, you the said Margaret Grahame did, wickedly and feloniously, falsely, fraudulently, and wilfully, represent to Margaret Struthers, or to Janet Cochrane, both then and now or lately servants to the said John Young, or in the said house, that a parcel containing the tartan cloth above libelled, which was then in

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enabled to get the goods into his possession. That case, therefore, affords no precedent for the present indictment, and the objection must therefore be sustained.

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‘ the said house, had been left there by mistake, and that it was intended for a Mr John Young, No. 21 George Square, or for some other person whom you then named, but whose name is to the prosecutor unknown; and having thereby, or by some similar false and fraudulent representation, imposed upon the said Margaret Struthers or Janet Cochrane, and induced her to deliver to you the said parcel containing the tartan cloth above libelled, or part thereof, you did, then and there, wickedly and feloniously, steal and theftuously away take, the said parcel, containing the tartan cloth above libelled, or part thereof, the property, or in the lawful possession, of the said John M’Intosh, Ninian Scouller, and James Donaldson, or one or other of them, or in the lawful possession of the said Margaret Struthers and Janet Cochrane, or one or other of them: OR OTHERWISE, time and place last above libelled, you the said Margaret Grahame did, wickedly and feloniously, steal and theftuously away take a parcel containing the said tartan cloth above libelled, or part thereof, the property, or in the lawful possession, of the said John M’Intosh, Ninian Scouller, and James Donaldson, or one or other of them, or in the lawful possession of the said Margaret Struthers and Janet Cochrane, or one or other of them: LIKEAS (3.), upon the 19th day of August 1847, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, within or near the shop situated in or near Argyle Street of Glasgow, then and now or lately occupied by John Handley, now or lately trunkmaker there, you the said Margaret Grahame did, wickedly and feloniously, falsely, fraudulently, and wilfully, represent to the said John Handley, or to David Lister, then and now or lately apprentice to the said John Handley, that you had been sent by Mr Campbell, No. 305 Saint Vincent Street, in or near Glasgow, to look at, for him, or to order some carpet or other bags to be sent to his house, No. 305 Saint Vincent Street aforesaid, for inspection, with a view to purchase; and the said John Handley and David Lister, or one or other of them, were thereby, or by some similar false and fraudulent representation made by you as aforesaid, imposed upon and induced to send to No. 305 Saint Vincent Street aforesaid, then and now or lately occupied by John Campbell, merchant and shipbroker in Glasgow, a carpet bag, and a leather bag, which you the said Margaret Grahame received and appropriated as after libelled: FURTHER, upon the 20th day of August 1847, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, at or near the house No. 305 Saint

LORDS WOOD and IVORY concurred.

The charge of theft was then withdrawn.

THOMSON then objected to the relevancy of the indict-

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4 Vincent Street aforesaid, you the said Margaret Grahame, did, wick-
 4 edly and feloniously, falsely, fraudulently, and wilfully, represent to
 4 Margaret Ferguson, then and now or lately servant to, and residing
 4 with, Sarah Jane Forbes or Campbell, widow, or in the said house,
 4 that the bags above libelled, which were then in the house, had been
 4 left there by mistake, and that they were intended for a Mr Robert
 4 Campbell, or for some other person whom you then named, but whose
 4 name is to the prosecutor unknown; and having thereby, or by some
 4 similar false and fraudulent representation, imposed upon the said
 4 Margaret Ferguson, and induce her to deliver to you the said bags
 4 above libelled, you did, then and there, wickedly and feloniously,
 4 steal and theftuously away take the two bags above libelled, the
 4 property, or in the lawful possession, of the said John Handley, or
 4 in the lawful possession of the said Margaret Ferguson: OR OTHER-
 4 wise, time and place last above libelled, you the said Margaret
 4 Grahame did, wickedly and feloniously, steal and theftuously away
 4 take the two bags above libelled, the property, or in the lawful pos-
 4 session, of the said John Handley, or in the lawful possession of the
 4 said Margaret Ferguson: LIKEAS (4.), upon the 21st day of August
 4 1847, or on one or other of the days of that month, or of July im-
 4 mediately preceding, or of September immediately following, within
 4 or near the shop situated in or near Argyle Arcade, in or near Glas-
 4 gow, then and now or lately occupied by Andrew Watson, hosier
 4 and glover there, you the said Margaret Grahame did, wickedly and
 4 feloniously, fasely, fraudulently, and wilfully, represent to Agnes
 4 Reid, then and now or lately shopwoman to the said Andrew Wat-
 4 son, or to some other person to the prosecutor unknown, acting on his
 4 account, that you had been sent by Mr Wingate, No. 141 Bath
 4 Street, in or near Glasgow, to look at, for him, some travelling-bags,
 4 and to order the same to be sent to him at No. 141 Bath Street aforesaid
 4 for inspection, with a view to purchase; and the said Agnes
 4 Reid, or other person to the prosecutor unknown, was thereby, or by
 4 some similar false and fraudulent representation made by you as
 4 aforesaid, imposed upon and induced to send to No. 141 Bath Street
 4 aforesaid, then and now or lately occupied by Andrew Wingate, then
 4 and now or lately merchant in Glasgow, three, or thereby, travelling-
 4 bags, or to deliver the same to Ann M'Intosh, then and now or lately
 4 in his service as a message-girl, with instructions to carry the same
 4 to No. 141 Bath Street aforesaid; and you the said Margaret
 4 Grahame did receive and appropriate the same as after libelled:
 4 FARTHER, time last above libelled, at or near the house No. 141

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ment, in so far as it charged swindling, in respect that it did not contain either a statement that the prisoner assumed a false character, whereby he had obtained pos-

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Fraud, &c.

‘ Bath Street aforesaid, you the said Margaret Grahame did, wickedly
‘ and feloniously, falsely, fraudulently, and wilfully, represent to the
‘ said Ann M’Intosh, who was then in the possession of the bags above
‘ libelled, which had been delivered to her as aforesaid, that the said
‘ Andrew Wingate required the same to be taken to his office situated
‘ in or near Queen Street, in or near Glasgow; and the said Ann
‘ M’Intosh, being thereby imposed upon and induced to accompany
‘ you into Saint Vincent Lane, in or near Glasgow, or into a close in
‘ the neighbourhood thereof, you did, then and there, deceive and im-
‘ pose upon her, and induce her to deliver the said bags to you, by
‘ falsely, fraudulently, and wilfully, stating or representing to her,
‘ that you would yourself carry the same to the said Andrew Wingate
‘ at his office aforesaid, and you did, then and there, receive and ap-
‘ propriate, and did, wickedly and feloniously, steal and theftuously
‘ away take, the three travelling-bags above libelled, the property, or
‘ in the lawful possession, of the said Andrew Watson, or in the law-
‘ ful possession of the said Ann M’Intosh: OR OTHERWISE, time last
‘ above libelled, and in or near Saint Vincent Lane aforesaid, or in
‘ or near a close in the neighbourhood thereof, you the said Margaret
‘ Grahame did, wickedly and feloniously, steal and theftuously away
‘ take the three travelling bags above libelled, the property, or in the
‘ lawful possession, of the said Andrew Watson, or in the lawful pos-
‘ session of the said Ann M’Intosh: LIKEAS (5.), upon the 6th day of
‘ September 1847, or on one or other of the days of that month, or of
‘ August immediately preceding, or of October immediately following,
‘ within or near the shop situated in Argyle Street of Glasgow, then
‘ and now or lately occupied by Robert Forrester senior, Thomas
‘ M’Micken, and Robert Forrester junior, then and now or lately carry-
‘ ing on business there as drapers, under the firm of Forresters and
‘ Company, you the said Margaret Grahame did, wickedly and feloni-
‘ ously, falsely, fraudulently, and wilfully, represent to Thomas Mor-
‘ ton, then and now or lately salesman to the said Forrester and Com-
‘ pany, or to Thomas M’Miken, then and now or lately partner of the
‘ said firm, or to some other person to the prosecutor unknown, acting
‘ on their account, that you had been sent by Mrs Smith, residing at
‘ No. 163 West George Street, in or near Glasgow, to look at, for her,
‘ some plaids, shawls, and ribbons, or similar goods, and to order the
‘ same to be sent to her, at No. 163 West George Street aforesaid,
‘ for inspection, with a view to purchase; and the said Thomas Mor-
‘ ton or Thomas M’Miken, or other person to the prosecutor unknown,
‘ was thereby, or by some similar false and fraudulent representation

session of the goods, or that he had had, from the beginning of the transaction, a distinct intention of not paying for them. There were no data, from which it could be

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made by you as aforesaid, imposed upon and induced to send to No. 163 West George Street aforesaid, then and now or lately occupied by Isabella Ewing or Smith, widow of the deceased Archibald Smith of Jordanhill, three, or thereby, woollen plaids, one woollen shawl, and thirty-two yards, or thereby, of ribbou, which you the said Margaret Grahame received and appropriated as after libelled: FARTHER, time above libelled, at or near the house situated at No. 163 West George Street aforesaid, you the said Margaret Grahame did, wickedly and feloniously, falsely, fraudulently, and wilfully, represent to Ann Maltman or Cecilia Dawson, both then and now or lately servants to, and residing with, the said Isabella Ewing or Smith, that a parcel containing the articles last above libelled, which was then in the said house, had been left there by mistake, and that it was intended for some other person whom you then named, but whose name is to the prosecutor unknown; and having thereby, or by some similar false and fraudulent representation, imposed upon the said Ann Maltman or Cecilia Dawson, and induced her to deliver to you the said parcel containing the articles above libelled, or part thereof, you did, then and there, wickedly and feloniously, steal and theftuously away take the said parcel containing the articles last above libelled, or part thereof, the property, or in the lawful possession, of the said Robert Forrester senior, Thomas M'Micken, and Robert Forrester junior, or one or other of them, or in the lawful possession of the said Ann Maltman and Cecilia Dawson, or one or other of them: OR OTHERWISE, time and place last above libelled, you the said Margaret Grahame did, wickedly and feloniously, steal and theftuously away take, a parcel, containing the articles last above libelled, or part thereof, the property, or in the lawful possession, of the said Robert Forrester senior, Thomas M'Micken, and Robert Forrester junior, or one or other of them, or in the lawful possession of the said Ann Maltman and Cecilia Dawson, or one or other of them: LIKEAS (6.), upon the 20th day of September 1847, or one or other of the days of that month, or of August immediately preceding, or of October immediately following, within or near the shop situated in or near Buchanan Street, in or near Glasgow, then and now or lately occupied by Andrew Rutherglen, bookseller, and stationer there, you the said Margaret Grahame did, wickedly and feloniously, falsely, fraudulently, and wilfully, represent to the said Andrew Rutherglen, or to Robert Laird, then and now or lately shopman to the said Andrew Rutherglen, that you had been sent by your master, Mr William Corbet, No. 25 Bath Street, in or near

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inferred that he had committed any crime, all that it amounted to being, that he had not paid a civil debt.

The COURT recommended the libel to be amended, by the insertion of a statement, that the pursuer had entered upon the transaction with the intention of not paying for the goods, if the facts would warrant such a charge, and intimated that otherwise they would sustain the objection.

The ADVOCATE-DEPUTE thereupon withdrew the libel.

‘ Glasgow, to look at some Bibles, and order the same to be sent to
 ‘ him at No. 25 Bath Street aforesaid, for inspection, with a view to
 ‘ purchase the same; and the said Andrew Rutherglen or Robert
 ‘ Laird was thereby, or by some similar false and fraudulent repre-
 ‘ sentation made by you as aforesaid, imposed upon and induced to send
 ‘ to No. 25 Bath Street aforesaid, then and now or lately occupied by
 ‘ William Corbet, now or lately powerloom cloth-manufacturer, six,
 ‘ or thereby, copies of the Bible, each copy consisting of two volumes,
 ‘ or thereby, which you the said Margaret Grahame received and ap-
 ‘ propriated as after libelled: FARTHER, time above libelled, at or
 ‘ near the house No. 25 Bath Street aforesaid, you the said Margaret
 ‘ Grahame did, wickedly and feloniously, falsely, fraudulently, and
 ‘ wilfully, represent to Ann Syme and Christina Stewart, or one or
 ‘ other of them, both then and now or lately servants to the said William
 ‘ Corbet, or in the said house, that the Bibles above libelled, which
 ‘ were then in the said house, had been left there by mistake, and that
 ‘ it was intended for some person in Regent Street, or elsewhere in or
 ‘ near Glasgow, to the prosecutor unknown; and having thereby, or
 ‘ by some similar false and fraudulent representation, imposed upon
 ‘ the said Ann Syme and Christina Stewart, or one or other of them,
 ‘ and induced them, or one or other of them, to deliver to you the
 ‘ Bibles above libelled, or part thereof, you did, then and there, wick-
 ‘ edly and feloniously, steal and theftuously away take the Bibles
 ‘ above libelled, or part thereof, the property, or in the lawful posses-
 ‘ sion, of the said Andrew Rutherglen, or in the lawful possession of
 ‘ the said Ann Syme and Christina Stewart, or one or other of them :
 ‘ Or OTHERWISE, time and place last above libelled, you the said Mar-
 ‘ garet Grahame did, wicked and feloniously, steal and theftuously
 ‘ away take the Bibles above libelled, or part thereof, the property, or
 ‘ in the lawful possession, of the said Andrew Rutherglen, or in the
 ‘ lawful possession of the said Ann Syme or Christina Stewart, or one
 ‘ or other of them.’

Present as before.

The pannel was again charged on the following amended libel, charging—

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Your intention truly being all along fraudulently to appropriate the said potatoes to your own uses and purposes when obtained, without making payment for the same; and all this or part thereof, you so prevailed on the said James Denny to do, upon your false and fraudulent representation and promise to him, which you never at any time intended to fulfil, that you would, immediately after the said delivery of the said potatoes, pay to him, for behoof of the said George Seton, the foresaid agreed-on price thereof, which you wilfully, wickedly, and fraudulently failed to do; and you did appropriate the said potatoes, or part thereof, to your own uses and purposes, as after libelled.

Falsehood,
Fraud, &c.

After discussion, the Court sustained the amendment of the libel, it being framed after the model of the case of Grahame, Lord Ivory, however, stating that he entertained great doubt as to the competency of charging what was substantially one act, cumulatively as two distinct crimes. The other Judges also observed, that although not incompetent, the more seldom this was done the better.

THOMSON then objected to the relevancy of the charge of theft, in respect that although fraudulent representations were charged to have been made by the pannel, yet a regular contract of sale was set out in the indictment, under which the prisoner had obtained possession of the goods, consequently there had been a voluntary transference of the goods to him from the former owner. The charge of theft by persons appropriating goods already in their own possession (as servants, porters, hirers of horses, &c.) had been held relevant, on the theory that the goods were still constructively in the possession of their real owners, for whom the parties accused of stealing them were trustees or custodiers. Here there was no room for any such theory, as the actual property in the goods had passed under a regular contract.

No. 38. James Chisholm. DEAS.—The property must be held not to have been actually transferred, inasmuch as the bargain, as stated in the indictment, was only conditional, on payment being made *simul et semel* with the delivery.

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Falsehood, Fraud, &c. The Court, after consideration, repelled the objection on this ground.

The charge of theft having been withdrawn, the prisoner pled Guilty to the charge of swindling.

In respect of which judicial confession, the pannel James Chisholm was sentenced to be imprisoned for the period of fifteen months.

Present,

THE LORD JUSTICE-CLERK,

July 25,
1849.

LORDS MACKENZIE AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Maitland Sol.-Gen.—Deas A.D.*

AGAINST

AGNES CHAMBERS or M^cQUEEN and HELEN HENDERSON—
W. G. Dickson.

TRIAL.—Circumstances in which, on occasion of the illness of *one* pannel, the Court continued the case till a subsequent day, as against both herself and another party charged as an accomplice.

No. 39. Agnes Chambers and Helen Henderson. AGNES CHAMBERS or M^cQUEEN and HELEN HENDERSON were charged with Robbery; as also Theft:

High Court. July 25, 1849.

Robbery or Theft. IN SO FAR AS, on the morning of the 26th day of June 1849, or on one or other of the days of that month, or of May immediately preceding, or of the bypast part of July immediately following, in or near White Horse Close, otherwise called Boyd's Close, in or near Canon-gate aforesaid, you the said Agnes Chambers or M^cQueen and Helen Henderson did, both and each, or one and other of you, wickedly and feloniously, attack and assault Alexander Wilkie, a cart and wheelwright, then and now or lately residing with Angus M^cDonald, a gar-

dener, then and now or lately residing at or near Davidson's Mains, in or near the parish of Cramond, and county of Edinburgh, and did seize hold of him, and did violently push or force him within or near to the said close, and did struggle with him, and did tear his vest, or part thereof, and did by force or violence take from his pocket or person, and did rob him of, one shilling and sixpence, or thereby, in silver money, and a penny, or thereby, in copper money, the property, or in the lawful possession, of the said Alexander Wilkie: OR OTHERWISE, time above libelled, in or near White Horse Close, otherwise called Boyd's Close, aforesaid, in or near Canongate aforesaid, you the said Agnes Chambers or M'Queen and Helen Henderson did, both and each, or one or other of you, wickedly and feloniously, steal and theftuously away take, from or near the pocket or person of the said Alexander Wilkie, the silver and copper money above libelled, or part thereof, the property, or in the lawful possession, of the said Alexander Wilkie.

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and Helen
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1849.
Robbery or
Theft.

The pannels having respectively pleaded not guilty to the charges preferred against them, and been remitted to the knowledge of an assize, after the jury had been sworn, and when the examination of the first witness was commencing, the pannel M'Queen was taken unwell, and required to be removed from Court. The police surgeon having been directed by the Court to examine her, reported on oath, that although sufficiently recovered to return to the dock without injury to her health, she was not in so collected a state as to be able to suggest questions to her counsel, or otherwise to defend herself against the charge.

Under these circumstances the Court refused to allow the trial to proceed as regarded her. Some difficulty was thereupon expressed by the Crown counsel as to the effect of this contingency upon the case of the other prisoner, as they wished both to be tried together: in respect of which, the Lord Justice-Clerk said, that the Court had no doubt that the trial might be delayed in the case of both prisoners, if the Crown considered it expedient the cases should not be separated.

The SOLICITOR-GENERAL stated, that it was very desirable that the pannels should be tried together; where-

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Chambers
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upon the Court continued the diet against both until the next day, and the jury impannelled were discharged.

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Theft.

On the following day both pannels were tried before another jury from the same list of assize, and both convicted of robbery.

In respect of which verdict of assize, the said Agnes Chambers or M'Queen and Helen Henderson were sentenced to be transported for seven years.

Present,

THE LORD JUSTICE-CLERK.

LORDS MACKENZIE AND COCKBURN.

HER MAJESTY'S ADVOCATE—*T. Maitland Sol.-Gen.—Deas A. D.*

AGAINST

JAMES HALL, JOHN HOWIE, AND JOHN STEVENSON—*Pattison and Burnett.*

1. In a charge of ' Falsehood and Fraud, particularly the fraudulently
' and feloniously obtaining the goods of others upon false pretences
' and appropriating the same, without paying, or intending to pay
' therefor : ' Held, that it was not necessary to allege that the pannel
assumed any false character, or that he used any other false pretence
than that of undertaking to make a cash payment of the price of the
goods, ' he fraudulently and feloniously intending, nevertheless, that
' the said price should not be paid, and that he should appropriate
' the said goods to his own uses and purposes, without payment
' being made therefor ; ' and having so appropriated them.
2. A party had used, to a very small extent, the firm of ' J. Stevenson
and Co., ' in Glasgow, where he had attempted to carry on business ;
he was not in business anywhere else ; he fraudulently adhibited the
signature ' J. Stevenson and Co., ' as acceptors to a bill for £200,
dated at Manchester, in order that the bill might be used and uttered
as a bill accepted by a Manchester firm, and the bill was so used
and uttered ; there was no such Manchester firm : Held to be a for-
gery.

JAMES HALL, JOHN HOWIE, and JOHN STEVENSON were charged on criminal letters, That albeit, by the laws of this and of every other well-governed realm, Falsehood and Fraud, particularly the fraudulently and feloniously obtaining the goods of others upon false pretences, and appropriating the same, without paying or intending to pay therefor; as also, Forgery; as also, the wickedly and feloniously Using and Uttering, as genuine, any Forged Promissory-Note or other Writing, having thereon any forged subscription, knowing the same to be forged, are crimes of an heinous nature, and severely punishable:

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YET TRUE IT IS AND OF VERITY, that the said James Hall and John Howie are, both and each, or one or other of them, guilty of the said crimes, or of one or more of them; and the said John Stevenson is guilty of the said crimes of forgery and uttering, or one or other of them, actors or actor, or art and part: IN SO FAR AS (1.), the said James Hall having formed a fraudulent and felonious purpose of obtaining the goods of others upon false pretences, and appropriating the same to his own uses and purposes, without paying or intending to pay therefor, did, in prosecution of the said fraudulent and felonious purpose, on or about the 23d day of May 1848, call at the sale-room or premises situated in or near Exchange Square, Glasgow, then and now or lately occupied by Lewis Park and Charles Park, or one or other of them, carrying on business under the firm of Lewis and Charles Park, sewed muslin manufacturers there, and did request the said Lewis Park and Charles Park, or one or other of them, to sell goods to the amount of £300 sterling, or other considerable amount, to the order of him the said James Hall, or of the mercantile company or firm of Henry Hall and Company, for whom the said James Hall represented that he was acting, and did request the said Lewis Park and Charles Park, or one or other of them, to send the said goods to certain premises in or near Buchanan Court, Buchanan Street of Glasgow, as being the premises occupied by him, or by the said Henry Hall and Company; and in order to induce the said Lewis Park and Charles Park, or one or other of them, to sell the said goods, and to send the same to the premises in Buchanan Court as aforesaid, the said James Hall did, on or about the 23d day of May 1848, or on one or other of the days of the said month of May, or of April immediately preceding, or of June immediately following, and in or near the sale-room or premises situated in or near Exchange Square aforesaid, falsely, fraudulently, and feloniously pretend and agree with the said Lewis Park and Charles Park, or one or other of them, or cause it to be understood and relied on as between him and them, or one or other of them, that

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the price of the said goods was to be paid for either as in cash transactions, or on delivery of the goods, he the said James Hall fraudulently and feloniously intending nevertheless that the said price should not be paid, and that he should appropriate the said goods to his own uses and purposes, without payment being made therefor; and the said Lewis Park and Charles Park, or one or other of them, being induced by the said false and fraudulent pretence, did then and there sell goods to the said James Hall, consisting of sewed collars or similar goods, to the value of £93, 12s. sterling, or thereby, conform to invoice dated 23d May 1848, contained in an inventory hereunto annexed, and did, on the same day, or within one or two days thereafter, send the said goods to the premises in or near Buchanan Court aforesaid, to the address of the said Henry Hall and Company, or of the said James Hall; and the said James Hall feloniously appropriated the said goods to his own uses and purposes; and no part of the price of the said goods has been paid to the said Lewis Park and Charles Park, or either of them; and the said Lewis Park and Charles Park, or one or other of them, have been thereby falsely and feloniously cozened and defrauded by the said James Hall: LIKEAS (2.), the said James Hall and John Howie having, both and each, or one or other of them, formed a fraudulent and felonious purpose of obtaining the goods of others upon false pretences, and appropriating the same to their own uses and purposes, without paying or intending to pay therefor, did, both and each, or one or other of them, in prosecution of said fraudulent and felonious purpose, on various occasions, in the months of November and December 1848, call at the premises or warehouse situated in or near Priory Lane, of Dunfermline, then and now or lately occupied by Erskine Beveridge, then and now or lately manufacturer in Dunfermline, and give orders, and did also transmit written orders, to the said Erskine Beveridge, for goods to be sent to them, the said James Hall and John Howie, or one or other of them, at Glasgow, to the address of J. and J. Hall, or J. and J. Hall and Co., or to some similar address; and in order to induce the said Erskine Beveridge to send his goods to them, or one or other of them as aforesaid, the said James Hall, and John Howie, as acting with or on behalf of the said James Hall, on various occasions, in the months of November and December foresaid, more particularly, the said James Hall, on or about both and each or one or other of the 9th day of November and the 11th day of December foresaid, and the said John Howie, on or about both and each or one or other of the 30th day of November and the 20th day of December foresaid, or the said James Hall and John Howie respectively, on other days in the said months of November and December, the particular days being to the prosecutor unknown, and at or near the premises or warehouse aforesaid, occupied by the said Erskine Beveridge, and at or near the inn commonly called Hutton's Inn, situated in or near Bridge Street of Dunfermline, or at one or other of said places, did,

both and each, or one or other of them, falsely, fraudulently, and feloniously, represent and pretend to the said Erskine Beveridge and to Henry Meldrum, then and now or lately salesman to the said Erskine Beveridge, or to one or other of them, that the said James Hall was one of the Halls of New York, or was Mr Hall of New York, in the United States of America; and that he was a partner of, or agent for, three mercantile firms or companies, one at New York aforesaid, one at Manchester, and one at Glasgow, whereas it was well known to both and each, or one or other of the said James Hall and John Howie, that the said James Hall was not one of the Halls of New York, or Mr Hall of New York aforesaid, and that he was not a partner of, or agent for, three mercantile firms or companies, one at New York, one at Manchester, and one at Glasgow aforesaid; and in order, farther, to induce the said Erskine Beveridge and Henry Meldrum, or one or other of them, to send such goods as they the said James Hall and John Howie, or one or other of them, should order, the said James Hall and John Howie did, both and each, or one or other of them, always pretend and agree with the said Erskine Beveridge and Henry Meldrum, or one or other of them, or cause it to be understood and relied on as between them the said James Hall and John Howie, or one or other of them, on the one part, and the said Erskine Beveridge and Henry Meldrum, or one or other of them, on the other part, that the price of the said goods when sent was to be paid for either as in cash transactions, or on delivery of the goods; which said last-mentioned pretence, on the part of the said James Hall and John Howie, or one or other of them, was likewise false and fraudulent, they feloniously intending, nevertheless, that the price of said goods should not be paid, and that the said goods should be appropriated to the uses and purposes of them, or one or other of them, without payment being made therefor, or, at least, without payment being made except for a comparatively small amount of said goods at the commencement of their dealings with the said Erskine Beveridge and Henry Meldrum, or one or other of them; and by the foresaid or similar false and fraudulent representations and pretences, or part thereof, the said Erskine Beveridge and Henry Meldrum, or one or other of them, were induced to despatch and send, and did despatch and send, linen or other goods to Glasgow, to the said James Hall and John Howie, or one or other of them as aforesaid, to the address aforesaid, on various occasions in the month of December aforesaid; more particularly (1st), on or about the 12th day of December foresaid, the said Erskine Beveridge and Henry Meldrum, or one or other of them, so despatched from Dunfermline and sent to Glasgow, to the said James Hall and John Howie, or one or other of them, linen or other goods, conform to invoice of said last-mentioned date, contained in Inventory hereunto annexed, and amounting in value to the sum of £42 : 3 : 8½ sterling, or thereby; (2d), on or about the 13th day of December foresaid, the said Erskine Beveridge and Henry Meldrum, or one or other of them, so despatched

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from Dunfermline and sent to Glasgow, to the said James Hall and John Howie, or one or other of them, linen or other goods, conform to invoice of said last-mentioned date, contained in Inventory hereunto annexed, and amounting in value to the sum of £64 : 0 : 1 sterling, or thereby ; (3d), on or about the 21st day of December foresaid, the said Erskine Beveridge and Henry Meldrum, or one or other of them, so despatched from Dunfermline and sent to Glasgow to the said James Hall and John Howie, or one or other of them, linen or other goods, conform to invoice of said last-mentioned date, contained in Inventory hereunto annexed, and amounting in value to the sum of £64 : 15 : 2 sterling, or thereby ; and (4th), on or about the 27th day of December foresaid, the said Erskine Beveridge and Henry Meldrum, or one or other of them, so despatched from Dunfermline and sent to Glasgow to the said James Hall and John Howie, or one or other of them, linen or other goods, conform to invoice of said last-mentioned date, contained in Inventory hereunto annexed, amounting in value to the sum of £22 : 5 : 11 sterling, or thereby ; all which foresaid goods particularly above specified, or part thereof, were received in or near Glasgow by the said James Hall and John Howie, or one or other of them, and were appropriated by them, or one or other of them, to their own uses and purposes ; and no part of the price of the foresaid goods, particularly above specified, has been paid to the said Erskine Beveridge or Henry Meldrum ; and the said Erskine Beveridge has been thereby falsely and feloniously cozened and defrauded by the said James Hall and John Howie, or one or other of them : LIKEAS (3.), in order farther to deceive the said Erskine Beveridge, the said James Hall and John Howie, along with the said John Stevenson, whose estates had been sequestrated under the Bankrupt Act, 2d and 3d Vict., c. 41, on or about the 16th December 1845, and who was still undischarged, and was, time after libelled, in the employment of the said James Hall as his office-keeper, or was otherwise connected with the said James Hall, or one or more of them the said James Hall, John Howie, and John Stevenson, did, on the 1st day of January 1849, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, and in or near the office situated in or near Brunswick Street, in or near Glasgow, then and now or lately occupied by Alexander Dick junior, writer in Glasgow, or at some other place in or near Glasgow, to the prosecutor unknown, write, or cause or procure to be written, a promissory note in the following or similar terms :—

‘ £200 ,, 0 ,, 0.

‘ Manchester 1st Jan^y 1849.

‘ Two months after date we promise to pay to order of Mess^{rs} J. & J.

‘ Hall & Co two hundred pounds value received

‘ Payable at Mess^{rs} Smith,

‘ Payne & C^o

‘ Bankers,

‘ London.’

and time last above libelled, as also place last above libelled, or at or near the premises situated in or near Saint Vincent Place, in or near Glasgow, then occupied by the said James Hall, or by the mercantile firm or company of J. & J. Hall & Co., or at some other place in or near Glasgow to the prosecutor unknown, the subscription 'J. Stevenson & Co.,' was wickedly and feloniously adhibited by the said John Stevenson to the said promissory-note, at the desire or with the concurrence of both and each, or one or other of the said James Hall and John Howie; and the said subscription was false and forged, being intended by all and each, or one or more of the said James Hall, John Howie, and John Stevenson, to pass for, and to be received as, the genuine subscription of a mercantile firm or company in Manchester, carrying on business there under the firm or designation of J. Stevenson & Co., whereas there was no such mercantile firm or company in Manchester, carrying on business there, and the foresaid false and forged subscription was the subscription of a purely fictitious mercantile firm or company; or, at least, if there was any such firm or mercantile company in Manchester carrying on business there, neither the said James Hall, John Howie, nor John Stevenson had power or authority to use or adhibit the signature or subscription of any such mercantile firm or company: LIKEAS (A.), time and place last above libelled, the said James Hall, John Howie, and John Stevenson, all and each, or one or more of them, having caused or procured the said false and forged promissory-note, having thereon the said forged subscription, to be indorsed by one or other of them the said James Hall, John Howie, and John Stevenson, or by some other person to the prosecutor unknown, in the following or similar terms, 'Pay to order of E. Beveridge Esq^{re}, J. & J. Hall & Co' upon the false pretence of the same being a genuine obligation, available to the said Erskine Beveridge, for the debt due to him in respect of the goods obtained from him as aforesaid; and thereafter, the said James Hall, John Howie, and John Stevenson, all and each, or one or more of them, having caused or procured the same to be inclosed within a letter, bearing to be dated 'Jan^y 2^d, 1849,' and to be subscribed with the signature 'J. & J. Hall & Co.' and to be addressed to the foresaid Erskine Beveridge, the said James Hall, John Howie, and John Stevenson, did, all and each, or one or more of them, upon the 2d day of January 1849, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, and at or near the post-office situated in or near Glassford Street of Glasgow, or at or near one or other of the receiving-houses in or near Glasgow where letters are received or posted for the said post-office, the particular receiving-house being to the prosecutor unknown, or at or near some other post-office in Scotland to the prosecutor unknown, wickedly and feloniously, use and utter as genuine the said false and forged promissory-note, having thereon the said forged subscription, they well knowing the

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No. 40. same to be forged, by putting the foresaid letter, or causing or procur-
 James Hall ing some person to the prosecutor unknown to put the foresaid letter,
 & Others. containing the said false and forged promissory-note, having thereon
 High Court. the said forged subscription, into one or other of the post-offices or
 July 25. receiving-houses aforesaid, the particular post-office or receiving-house
 1848. being to the prosecutor unknown, in order that the said false and forged
 Falsehood, promissory-note, having thereon the said forged subscription, should
 Fraud, &c. be transmitted to the said Erskine Beveridge, and be received by him
 as genuine; and the same was accordingly so received by him in or
 near Dunfermline aforesaid, on or about the 3d day of January afore-
 said.

PATTISON objected to the relevancy of the first charge of falsehood and fraud. There was no statement in the minor that there was not a firm of the style of Hall and Co., nor any equivalent allegation that the pannel Hall had assumed a false name, character, or errand. Some such false pretence was requisite to constitute the offence libelled. (Hume, vol. i., p. 172.) Accordingly, in all previous cases, some false pretence had been held out, such as keeping a shop or otherwise, but this charge was totally destitute of any such allegation.

The LORD JUSTICE-CLERK.—What was found in Hall's case in 1788? (Hume, vol. i., p. 173.)

PATTISON.—In Hall's case a shop was hired, and the false pretence of being a dealer was kept up.

LORD COCKBURN.—It is not going into a shop and buying goods without paying for them that constitutes the crime; that it is often done innocently, for a man may be unable to pay. But the crime here is buying goods, and procuring delivery, with the intention of not paying for them at the time. It was the alleged dishonest intent charged which constituted the offence, and that, if proved, was enough.

LORD MACKENZIE concurred.

The LORD JUSTICE-CLERK.—There is no doubt as to the relevancy of the charge. It was long ago settled in Hall's case, which was argued on informations, and has been the rule ever since.

The objection was repelled.

It appeared in evidence that the bill libelled on was uttered by the pannels, and that there was no such firm in Manchester as John Stevenson & Co.

The LORD JUSTICE-CLERK, in summing up, told the Jury, that it was enough to constitute the crime of forgery, that the pannel falsely represented himself in his signature to a bill, as carrying on business as a member of a firm in another and distant place from the one where he uttered the bill. Any person taking a bill signed 'J. Stevenson & Co., Manchester,' would infer the existence of such a firm there, and consequently suppose himself possessed of double security.

The Jury found the pannels guilty.

In respect of which verdict of assize, the pannels Hall and Howie were sentenced to be transported for ten years, and the pannel Stevenson for seven years.

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WEST CIRCUIT.

Autumn 1849.

GLASGOW.

Present,

LORDS MACKENZIE AND IVORY.

Sept. 15.
1849.

HER MAJESTY'S ADVOCATE—*J. M. Bell A.D.—Cleghorn.*

AGAINST

ALEXANDER FEGAN AND ELIZABETH M'KENZIE OR HYDE—
Mackonochie.

HUSBAND AND WIFE—EVIDENCE—FORGERY.—Circumstances in which the question was raised, but not decided, whether a husband is admissible as a witness against his wife, accused of forging his name.

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Alexander
Fegan and
Elizabeth
M'Kenzie
or Hyde.

Glasgow.
Sept. 15.
1849.

ALEXANDER FEGAN and ELIZABETH M'KENZIE OR

Forgery.

No. 41.
Alexander
Fegan and
Elizabeth
M'Kenzie
or Hyde.

HYDE, were charged with Forgery; as also, the Using and Uttering as genuine a forged bank order or cheque or other writing, for payment of money, having thereon a forged subscription, knowing the same to be forged:

Glasgow,
Sept. 15.
1849.

Forgery.

IN SO FAR AS (1.), upon one or other of the days of the month of May 1849, the particular day being to the prosecutor unknown, or of the month of April immediately preceding, or of June immediately following, in or near the house situated in or near Spoutmouth, Gallowgate Street of Glasgow, then and now or lately occupied by Francis Hyde, now or lately labouring contractor, and now or lately residing there, and by you the said Elizabeth M'Kenzie or Hyde, wife of the said Francis Hyde, or one or other of you or at some other place in or near Glasgow to the prosecutor unknown, you the said Alexander Fegan and Elizabeth M'Kenzie or Hyde did, both and each, or one or other of you, wickedly and feloniously, write, or cause or procure to be written, a bank order or cheque, or other writing, in the following or similar terms:—

£16 : 10/s

' Pay to the Bearer Eliza Hyde the sum of Sixteen pound ten shillings on producing my deposit Book N^o 59306.

' To the Managers }
' of the Glasgow }
' Savings Bank.' }

and you did, then and there, both and each, or one and other of you, wickedly and feloniously, forge and adhibit, or cause or procure to be forged and adhibited, to said bank order or cheque, or other writing, the words or subscription ' Francis Hyde,' intending the same to pass for, and be received as, the genuine subscription of the said Francis Hyde: FARTHER, upon the 30th day of May 1849, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, in or near the house or premises situated in or near Hutcheson Street of Glasgow, then and now or lately occupied as a banking-office by the National Security Savings Bank of Glasgow, or by James Black senior, now or lately manufacturer in Glasgow, William Brown, now or lately merchant in Glasgow, and David Hope, now or lately merchant in Glasgow, and others, or one or more of them, trustees and managers of the said National Security Savings Bank of Glasgow, or by Donald Smith, now or lately manager of the Western Bank of Scotland, treasurer of the Savings Bank foresaid, Robert Watson, now or lately actuary of the Savings Bank foresaid, and William Meikle, now or lately accountant or actuary of the Savings Bank foresaid, or one or more of them, you the said Alexander Fegan and Elizabeth M'Kenzie or Hyde did, both and each, or one or other of you, wickedly and feloniously, use and utter, as genu-

ine, the said forged bank order or cheque, or other writing, having thereon the said forged subscription, you knowing the same to be forged, by then and there delivering the same, or causing or procuring the same to be delivered, to John Thomson, now or lately clerk in the said National Security Savings Bank, and now or lately residing in Abbotsford Place, Laurieston, in or near Glasgow, and William Meikle, now or lately accountant or actuary in the Savings Bank aforesaid, and now or lately residing in Grafton Street of Glasgow, or one or other of them, or to some other officer of the said Savings Bank to the prosecutor unknown, for the purpose of receiving the amount of money contained in the said bank order or cheque, or other writing, which you accordingly did receive, and applied to your own uses and purposes: LIKEAS (2.), upon one or other of the days of the month of May 1849, or of the month of April immediately preceding, or of June immediately following, the particular day being to the prosecutor unknown, in or near the house situated in or near Spoutmouth aforesaid, or at some other place in or near Glasgow to the prosecutor unknown, you the said Alexander Fegan and Elizabeth M'Kenzie or Hyde did, both and each, or one or other of you, wickedly and feloniously, write, or cause or procure to be written, a bank order or cheque, or other writing, in the following or similar terms:—

' £3: 6^s/6^d Pay to the Bearer Eliza Hyde three pounds six shillings and sixpence, with interest on producing my deposit Book N^o 59306 to the Managers of the Glasgow Savings Bank,'

and you did, then and there, both and each, or one or other of you, wickedly and feloniously, forge and adhibit, or cause or procure to be forged and adhibited, to said bank order or cheque, or other writing, the words or subscription 'Frances Hyde,' intending the same to pass for, and be received as, the genuine subscription of the said Francis Hyde: FARTHER, upon the 1st day of June 1849, or on one or other of the days of that month, or of May immediately preceding, or of July immediately following, in or near the house or premises situated in or near Hutcheson Street aforesaid, then and now or lately occupied as a banking-office by the said National Security Savings Bank of Glasgow, or by the foresaid James Black senior, William Brown, and David Hope, and others, or one or more of them, as trustees and managers foresaid, or by the foresaid Donald Smith, Robert Watson, and William Meikle, or one or more of them, you the said Alexander Fegan and Elizabeth M'Kenzie or Hyde did, both and each, or one or other of you, wickedly and feloniously, use and utter, as genuine, the said forged bank order or cheque, or other writing, last above libelled, having thereon the said forged subscription, you knowing the same to be forged, by then and there delivering the same, or causing or procuring the same to be delivered, as genuine, to the said John Thomson and to the said William Meikle, or to one or other of them, or to some other officer of the said Savings Bank to the

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prosecutor unknown, for the purpose of receiving the amount of money contained in the said bank order or cheque, or other writing, which you accordingly did receive, and applied to your own uses and purposes.

Glasgow.
Sept. 15.
1849.

Forgery.

The diet having been called, the first witness adduced was Francis Hyde, to whose admissibility it was objected, that being the husband of one of the pannels at the bar, he could not be examined.

It was answered, that as the husband was the party injured, he was necessarily admissible, and that otherwise, the forgeries of a husband's name by a wife would go unpunished.

The Court intimated that the point was of sufficient importance to make it desirable, if possible, that they should not be pressed to a decision of the question, at a time when it had emerged suddenly during the progress of a Circuit.

In these circumstances, and as the male pannel was the principal object of the prosecution, the Advocate-Depute gave up the case against the female pannel.

The Jury accordingly returned a verdict of Not Guilty against the female prisoner, who was dismissed from the bar.

The case thereafter proceeded against the male pannel, who was convicted, and sentenced to transportation for the period of fourteen years.

Present,

LORD MACKENZIE.

Sept. 17.
1849.JANE WYHER and Others, Appellants—*Broun*.

AGAINST

WILLIAM HENDRIE, Respondent—*W. E. Aytoun*.

APPEAL—COMPETENCY.—Held, that where a suit *ad factum præstandum*, concluded alternatively for payment of a less sum than £25, that appeal to the Circuit Court was competent.

THIS was an Appeal against the judgment of the Sheriff-substitute of Airdrie, refusing to allow a proof under a petition at the instance of the appellants, craving restitution of certain articles of household furniture which had been poinded by the respondent, and which it was alleged belonged, not to his debtor, George Wyher, husband of one of the appellants, but to her son by a former marriage.

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Others v.
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Appeal.

The articles in question had been part of the goods in communion in the first marriage, and, on second marriage, Mrs Wyher had removed with her son and her said furniture to her second husband's house. The poinding proceeded on the ground that the furniture passed under the *jus mariti* of her second husband, and was attempted to be set aside on the ground, that only one-third (*jure relictæ*) passed to the second husband, the other two-thirds being the son's, for whom, as administrator, her possession was separate and distinct, and could not warrant attachment by her own or her husband's creditors.

Appeal came to be heard before Lord Mackenzie.

AYTOUN, for the respondent, pleaded as a preliminary objection, that the conclusions of the summons being *ad factum præstandum*, the appeal was incompetent.

BROUN answered—The petition concluded alternatively for restitution of the articles, or, failing restitution, pay-

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ment of a sum below £25, as their value. There were thus proper pecuniary conclusions for an amount not exceeding the statutory sum, and the appeal was therefore competent.

LORD MACKENZIE had no difficulty in repelling the objection; and, after hearing counsel on the merits, he sustained the appeal, to the effect of allowing a proof.

JOHN MATHISON, Appellant—*Broun*.

AGAINST

THE MONKLAND IRON AND STEEL COMPANY, AND ALEXANDER W. BUTTERY, Respondents—*Logan*.

APPEAL—COMPETENCY.—Held, that in an action of multiplepointing, it is the amount admitted by the common debtor which determines whether an appeal is competent to the Circuit Court, and not the amount claimed by the respective appearers in the process.

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John
Mathison
v. The
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Iron and
Steel Co.,
and Alex.
W. But-
tery.
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Sept. 17.
1849.
Appeal.

THIS was an Appeal from the judgment of the Sheriff of Lanarkshire, to which—

LOGAN, for the respondents, took a preliminary objection, that as the summons in the court below was one of multiplepointing, and as the claims of each party exceeded £25, there were no proper pecuniary conclusions for bringing it within the limits of the statutes and relative Act of Sederunt.

BROUN, for the appellant—Though the debt set forth in the claims exceeded £25, the whole debt admitted by the raisers of the multiplepointing was below that sum; the amount admitted by the raisers must be considered the subject-matter of the suit, the process of multiplepointing being wholly irrespective of the amount of debt due to each party who claimed to be preferred.

LORD MACKENZIE, after consulting with LORD IVORY, repelled the objection to the competency of the appeal and the case proceeded on the merits.

NORTH CIRCUIT.

Autumn, 1849.

ABERDEEN.

Present,

LORDS MONCRIEFF AND COCKBURN.

Sept. 20.
1849.HER MAJESTY'S ADVOCATE.—*E. F. Maitland A.D.*

AGAINST

WILLIAM CLARK AND JANET GRAY OR THOMSON.—*C. F. Shand.*

INDICTMENT—MURDER—RELEVANCY.—Circumstances in which the Crown were held not entitled to libel, after describing the person alleged to have been murdered, 'or some other person to the prosecutor unknown.'

WILLIAM CLARK and JANET GRAY OR THOMSON were charged with Murder :

IN SO FAR AS, on the 5th day of July 1849, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, at or near a part of the public road leading from the village of Ellon, in the parish of Ellon, and shire of Aberdeen, towards Esslemont House, in the parish of Ellon aforesaid, then and now or lately occupied by Charles Napier Gordon, Esquire, of Esslemont, which part of said road is situated fifty yards, or there-by, or other short distance, westward from the house at or near Craighall, in the parish of Ellon aforesaid, then and now or lately occupied by George Scorgie, a labourer, then and now or lately residing there, or on the ground at the side of, or adjoining to, the said part of said road, or at some other place to the prosecutor unknown in the vicinity of said part of said road or of the said village of Ellon, you the said William Clark and Janet Gray or Thomson did, both and each, or one or other of you, wickedly and feloniously, attack and assault the now deceased Elizabeth or Bridget Conlie or Conolly or Clark, wife, or reputed wife of, and then or recently before travelling the country in company with, you the said William Clark, or some other woman, now deceased, whose name and abode are to the prosecutor unknown, and did knock or force her down, and did, with a knife, or a razor, or some other instrument to the prosecutor unknown, which you did introduce into her private part, or by a kick or kicks on or near her

No. 44.
William
Clark and
Janet Gray
or
Thomson.
Aberdeen.
Sept. 20.
1849.
Murder.

No. 44. private part or the lower part of her belly, or by some other means
 William to the prosecutor unknown, inflict two, or thereby, severe wounds
 Clark and within or near her vagina, to the great effusion of her blood, and did
 Janet Gray otherwise maltreat and abuse her; by all which, or part thereof, the
 or said Elizabeth or Briget Conlie or Conolly or Clark, or said other
 Thomson. woman whose name and abode are to the prosecutor unknown, was
 mortally injured, and in consequence thereof immediately, or soon
 Aberdeen. thereafter, died, and was thus murdered by you the said William
 Sept. 20. Clark and Janet Gray or Thomson, or by one or other of you.
 1849.
 Murder.

SHAND, for the pannels, objected to the relevancy of the indictment, in so far as, after libelling certain specific modes by which the deceased was alleged to have been murdered, it went on to say, 'or by some other means to the prosecutor unknown.' This was too vague. If intended to meet any case not covered by what preceded, it was much too loose; and if only intended to refer to the more specific charge before made, it was unnecessary. It was not pretended that the circumstances of the case rendered it necessary to take such a latitude, and it was impossible for a pannel to meet a charge preferred in so vague terms as those objected to.

MAITLAND replied, that the words objected to were words of style, and were used in almost every case of the like nature.

LORD MONCREIFF.—There is no doubt that the prisoner is entitled to know, as far as possible, the exact charge he is to meet; and I do not think that in this case the prosecutor will be entitled to prove any mode of death differing materially from that which is previously and more specially charged. The prisoners may rely upon the protection of the Court in that respect. At the same time, I am not for sustaining the objection, to the effect of instantly ordering the words to be deleted. Our decision would, doubtless, be founded on as a precedent, which, sitting in Circuit, I am unwilling to create in a matter of so much importance.

LORD COCKBURN concurred.

The objection was repelled.

SHAND then objected to the words, ' or some other woman now deceased, whose name and abode are to the prosecutor unknown. These words, following the description given of the deceased as the wife of the male prisoner, seemed to imply that the prosecutor had two women in view; but, if so, he ought to have libelled more specifically.

MAITLAND replied—The general words of description were not intended to denote any other woman than her whose name had been given, so far as known. All the information he possessed had been given, but he might be wrong in believing the deceased to have been the wife or reputed wife of the pannel; and it was to meet any difficulty of that kind which the pannel might occasion, that the general words were used. There was nothing incompetent in such a mode of libelling; for cases might be supposed where a murder was committed, and no one be able to say even to what country the deceased belonged.

LORD COCKBURN.—I have no doubt of the competency of prosecuting for the murder of a person who is utterly unknown; but can an indictment stand which simply charges a prisoner with the murder of a woman unknown, without giving any account whatsoever of her, when, and how found? I think not; and therefore I am for sustaining the objection, because, whatever the prosecutor may have intended in point of construction, the words objected to might be made to apply to any dead woman who ever lived in the world.

LORD MONCREIFF concurred.

The words objected to were struck out of the indictment.

The case went to trial; and after hearing counsel on both sides, the Jury found a verdict of Not Proven against both prisoners.

In respect of which verdict of assize, the said William Clark and Janet Gray or Thomson were assoilzed *simpliciter*, and dismissed from the bar.

No. 44.
William
Clark and
Janet Gray
or
Thomson.
Aberdeen.
Sept. 20.
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Murder.

PERTH.

Present,

LORDS MONCREIFF AND COCKBURN.

Sept. 26.
1849.HER MAJESTY'S ADVOCATE—*E. F. Maitland A. D.*—
W. H. Thomson A. D.

AGAINST

WALTER DUNCAN—*W. G. Dickson.*

EMBEZZLEMENT.—Circumstances in which the Court directed the jury to find the pannel guilty of embezzlement, notwithstanding his accounts had been passed, wherein was shewn the true balance due by him.

WALTER DUNCAN was charged with Breach of Trust and Embezzlement :

No. 45.
Walter
Duncan.Perth.
Sept. 26.
1849.Breach of
Trust and
Embezzle-
ment.

IN SO FAR AS, you the said Walter Duncan having been appointed treasurer of a friendly society, or other similar association, at or near Dundee, or carrying on its operations there, calling itself, or known as, the Prince's Street Yearly Society, or having some similar designation, of which John Fichet, now or lately a storekeeper in the employment of Gourlay, Mudie, and Company, engineers and founders in Dundee, and now or lately residing at or near Albert Street of Dundee, David Smith, a wright, now or lately residing at or near Ann Street, Maxwelltown of Dundee, Richard Mennie, a shoemaker, now or lately residing at or near Prince's Street of Dundee, and William Kidd, a mechanic, now or lately residing in or near Union Street, Maxwelltown of Dundee, or one or more of them, and others, were individual members, and you the said Walter Duncan having acted as treasurer aforesaid from the 2d day of November 1848 to at or about the 29th day of May 1849, both inclusive, and having, during the said period, been entrusted as treasurer aforesaid to collect and receive or hold the funds of the said society, and to receive or hold the sum of £123, or thereby, borrowed by the said society, or by you the said Walter Duncan, as treasurer aforesaid, and for behoof of said society, from the Eastern Bank of Scotland; and it being the duty of you the said Walter Duncan, as treasurer aforesaid, to apply the said funds and borrowed money, so far as requisite, to the purposes of the said society, and faithfully to account to the said society, or the individual members thereof, for the said funds and borrowed money so entrusted to you, you the said Walter Duncan, did, at one or more times, between the said 2d day of November 1848 and the

said 29th day of May 1849, both inclusive, the particular time or times being to the prosecutor unknown, in or near the house situated at or near Blackcroft of Dundee, then and lately occupied by you the said Walter Duncan, or elsewhere in or near Dundee to the prosecutor unknown, wickedly and feloniously, and in breach of the trust committed to you as aforesaid, embezzle and appropriate to your own use the sum of eighty pounds twelve shillings and threepence-halfpenny sterling, or thereby, or part thereof, part of said funds or borrowed money entrusted to you as aforesaid, and did fail to account therefor to the said society, and to the said John Fitchet, David Smith, Richard Mennie, and William Kidd, or one or more of them, and others, the individual members thereof.

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Walter
Duncan.

Perth.
Sept. 26.
1849.

Breach of
Trust and
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ment.

It appeared in evidence, that the society libelled on was a yearly sick and funeral society, which commenced in the November of one year, and lasted till that month in the year following, when it was wound up, and the funds, so far as not exhausted, were distributed among the members. A new society was constituted for the same purposes immediately afterwards by the members of the preceding one, and the requisite officers elected. The pannel had been treasurer of nine of these successive societies. His duty was to receive the society's funds, and to pay them to the individuals entitled by the rules to relief. According to the regulations (which were printed) the members paid their subscriptions every Saturday evening; and the pannel was required to put the sum so subscribed into bank on the following Monday, retaining only £8 in his hands to meet the weekly expenses.

The pannel's books were made up and balanced monthly, under the eye of a managing committee, when the balance in his hands was regularly stated against him, and carried forward to the next month. The books were open to the society, being produced at their several meetings.

From the monthly statements and relative documents, it appeared that the pannel, instead of putting into the bank the weekly subscriptions, retaining only £8 for current expenses, had allowed a balance to accumulate against

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Duncan.

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him for several successive months of £23, £34, £35, £54, £113 respectively, and lastly, the sum of £80 : 12 : 3 libelled. It also appeared, that when the immediately preceding society was wound up, there was a balance of £22 against him; notwithstanding which he was elected treasurer of the society libelled. It was proved that the managing committee had remonstrated verbally with him regarding his increasing balances, but without getting any satisfactory explanations. Until the date libelled, however, they had never become alarmed for the safety of their funds, or brought the matter formally before the society by a regular minute.

The pannels books were correctly kept, and he was not in arrear to any member for sick or funeral allowances. The declaration admitted, that the pannel was in arrear (but only for about half of the sum proved against him), and that he had applied the sum so in arrear to his private purposes.

Upon these facts, E. F. MAITLAND for the Crown, asked a verdict of guilty.

W. G. DICKSON, for the pannel, contended, that although the prosecutor had proved the pannel's retention of the sum libelled, he had failed to show that the retention was criminal. In order to make out a charge of embezzlement, the pannel's act must be proved both to have been fraudulent, and without the consent of his employers. But here, there was evidence of the society's consent for many successive months to the pannel retaining a large balance in his hands; and he was even re-elected to his office, notwithstanding his having been very considerably in arrear to the preceding society. Their consent was therefore proved; and the sum which the pannel owed them thereby became a loan from them, in place of being embezzled.

LORD COCKBURN, in summing up, said—That this was an important case in reference to the law, and to the criminal responsibility of persons entrusted with the money of others for special purposes. The Jury need

not feel any anxiety as to the facts; because none of the material ones seemed to be disputed, and they were perfectly simple. The sole point on which the parties differed, was as to the construction, with reference to guilt or innocence, which the circumstances ought to receive.

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Duncan.

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It would be a mistake to suppose that the charge was merely that the prisoner had fallen behind in his accounts. It was, that he had been guilty of *breach of trust or embezzlement*, or of a *wicked and felonious* appropriation. The fact of his having been the society's debtor is admitted. But the question was, did he become so *criminally*? This it was the province of the Jury to determine, on a review of the whole circumstances. Of these the principal were, that the prisoner was the officer of this charitable society. He was not entitled to act at all for himself. He was the holder of the funds of others; and these, arising from the contributions of persons in humble situations, for the relief of themselves and others when in distress, were entitled to his most scrupulous protection, and he had no discretion as to his application of them. By the 10th Rule of the Society, he was allowed to have £8 in his hands to answer current demands; and every farthing above this, he was expressly bound to deposit every Monday in the bank for his constituents. He held the money therefore *officially*,—and under a *special direction as to its custody and application*. He was in the same position as a servant, who had got cash from his master to carry to a particular place. It was certain that he violated this official duty. Instead of only owing the society £8, he at last owed it about £80. And what was the cause of this deficiency? No *mistake*,—no *dispute about the true amount of the balance*,—no *direction by the society*,—no *inadvertent confusion, or mixing of his own funds with theirs*. It was, that he *had taken the money to himself*. He says in his declaration, 'that the reason he is so deficient is, *that he has employed the money in his own private matters*, and he

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Duncan.

' is very sorry for having injured the society, who put
' confidence in him.'

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ment.

It was for the Jury to say whether they could put any construction on this proceeding consistent with the prisoner's innocence? It seemed to his Lordship very like the common case of an agent, or servant, getting cash for a special purpose, and making off with it, or spending it for his own behoof. It was no mere getting into debt. It was a getting into debt by a *direct and intended self appropriation*.

Some things had been urged for the prisoner,—which certainly deserved the Jury's attention.

One was, that the society had known of his regularly increasing deficiency without checking it. But, in the first place, the jury would consider whether their *knowledge* was proved. That they were *alarmed* is certain; for they had spoken to him on the subject. But the secretary swore that the prisoner put them off by what had since been found to be evasive pretences. However, in the second place, whatever effect this negligence of the society might have on account in awarding punishment, it was no legal defence. The prisoner himself admits that the society *confided* in him, and he says he is sorry for having abused their confidence. To urge this confidence on the part of the employer, as a defence for abusing it, seems rather an awkward topic for the abuser.

Another was, that the prisoner *intended to have replaced the money*. The Jury had better discard this utterly. Many enormous frauds were committed under the expectation that they may be concealed, or atoned for, by replacing the funds before their abstraction shall be detected. This was a common delusion, or pretence, with embezzlers. But it was no more a defence against fraud, than it would be against a charge of robbery.

The last was, that the prisoner had the *consent* of the society for what he did. If the Jury believed this to be the fact, they were bound to acquit. No party who consented to it, was either cheated or robbed. But they

must have clear evidence of it, before they could credit so extraordinary a fact, as that a charitable society agreed to let its treasurer appropriate its funds. His Lordship was not aware where the evidence was to be found here, or anything that could be mistaken for it.

On the whole, there were two opposite considerations, which the Jury ought to keep in view. On the one hand, it would be hard and unjust, if the prisoner were to be sacrificed to the feeling that he had injured a friendly society. And on the other hand, if he was guilty, it was important for the law, and as a warning to the holders of other men's funds, that his guilt should be declared.

The Jury, after retiring, returned to put a question to the Court. One of their number pointed out that there were periodical docquets in the books; in which a series of balances far beyond £8 were struck as against the prisoner, and the question was, whether each of these docquets was not *in law* a virtual consent by the society, that the prisoner might continue to hold the sums thus set down as due by him?

LORD COCKBURN, after consulting with Lord Moncreiff, answered,—That they were both of opinion that, *as a matter of law*, this was neither the effect nor the object of the docquets; but that if the Jury thought that, *as a matter of fact*, the docquets indicated consent by the society, they of course were entitled to put this construction upon the fact.

The Jury found the pannel guilty as libelled, but unanimously and strongly recommended him to mercy.

LORD COCKBURN, addressing the prisoner, said, that he thought the Jury had disposed of the case humanely towards him, but firmly towards the law. In the case that seemed to come nearest this, the Court had sentenced the prisoner to six month's imprisonment;—certainly a very lenient sentence. But here there were two circumstances which operated in the prisoner's fa-

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your. He had already been a considerable period in jail; and, to a certain extent, he had been led on by the society failing to check him effectually the instant it became alarmed. In this situation, the present sentence was that of imprisonment for three months.

Present,

Nov. 6.
1849.

THE LORD JUSTICE-CLERK.

LORDS MONCREIFF AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Deas A.D.*—*E. F. Maitland A.D.*

AGAINST

GEORGE KIPPEN—*Logan*—*A. T. Boyle.*

RELEVANCY—FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.—Circumstances in which an objection to the relevancy of an indictment, that it did not charge that the attempt to defraud had been successful, was repelled.

No. 46.
George
Kippen.

High Court.
Nov. 6.
1849.

Falsehood,
Fraud, &c.

GEORGE KIPPEN, writer in Glasgow, was indicted, That albeit, by the laws of this and of every other well-governed realm, Falsehood and Fraud, especially when committed in the form and under colour of legal proceedings, and for the purpose of obstructing or defeating the course of justice, and to the lesion, injury, and oppression, of the lieges, is a crime of an heinous nature, and severely punishable :

YET TRUE IT IS AND OF VERITY, that you the said George Kippen are guilty of the said crime of falsehood and fraud, aggravated as aforesaid, actor, or art and part : IN SO FAR AS (1.), the Company of Proprietors of the Glasgow Water-Works, and Daniel Mackain, now or lately secretary to the said company, and now or lately residing at or near Dalmarnock, in or near Glasgow, having, on the 29th day of February 1848, or about that time, obtained a warrant granted by Henry Glassford Bell, Esquire, advocate, sheriff-substitute of Lanark-

shire, against you the said George Kippen, and other persons referred to in the said warrant, by which, in respect of your having refused or delayed to pay to the said Company, or the said Daniel Mackain, as secretary aforesaid, the sum of £1 : 8 : 6, being water-rent or rate due by you to the said Company, authority was given to officers of court to enter the premises of you the said George Kippen, and to seize and take possession of your goods and effects, and by which warrant authority was also given to the said Daniel Mackain, as secretary aforesaid, if the said sum, together with the expense of procedure, should not be paid within three days after such goods and effects should be so seized and taken possession of; to sell or dispose of the said effects, or such part thereof as might be necessary, by public roup, and to apply the price thereof in payment of the said sum of water-rent or rate due by you the said George Kippen as aforesaid, with the expenses of procedure; and you the said George Kippen having formed the wicked and felonious purpose of obstructing or defeating execution of the said warrant, did, on the 19th day of April 1848, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, in or near the house or office at or near Fife Place aforesaid, then and now or lately occupied by you, or in or near the sheriff-clerk's office of Glasgow, or at some other place in or near Glasgow to the prosecutor unknown, falsely, fraudulently, and feloniously, devise, and raise, or cause or procure to be raised, a summons before the ordinary Sheriff-Court of Lanarkshire, at Glasgow, in name of James M'Gill, sometime provision-merchant in Melville Court, Trongate Street of Glasgow, and now or lately residing in or near Little Hamilton Street, Glasgow, or of some wholly fictitious person designed in the said summons as 'James M'Gill Provision Merchant' in Glasgow Pursuer,' against the said Daniel Mackain, as secretary to the said Company of Proprietors of the Glasgow Water-Works, and for behoof of said Company, setting forth, that the said Daniel Mackain, or an officer acting for him, had, on or about the 12th day of April 1848, proceeded to the said James M'Gill, pursuer's house in Adelphi Street, Hutchisontown, Glasgow, and, contrary to his wish, illegally executed a poinding of certain effects situated therein, for an arrear of water-rent said to be due to the said Daniel Mackain, defender, and that in carrying into effect the said poinding, the said Daniel Mackain, defender, or the person acting for him, assaulted and abused the said James M'Gill, pursuer, and repeatedly knocked him down, and that the said Daniel Mackain was therefore liable in damages to the said James M'Gill, pursuer, therefor, and concluding for payment of the sum of £10 sterling, in name of damages, with expenses of process, or having some similar narrative, allegations, and conclusions, and containing a warrant or precept of arrestment in common form, the said summons, in the narrative, allegations, and conclusions thereof, being, and you the said George Kippen well knowing it

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to be, entirely false, fraudulent, and fictitious, and intended for the purpose of fraudulently obstructing or defeating execution of the said warrant obtained against you by the said company and the said Daniel Mackain, their secretary, as aforesaid; and you the said George Kippen did, on the said 19th day of April 1848, or on a day, after and about that time, to the prosecutor unknown, in or near the said house or office at or near Fife Place aforesaid, or elsewhere in or near Glasgow to the prosecutor unknown, in virtue or on pretence of the warrant or precept of arrestment aforesaid, contained in the said false and fraudulent summons, wickedly, fraudulently, and feloniously, cause or procure to be served on yourself by John M'Kinlay, then and now or lately sheriff-officer in Glasgow, and now or lately residing in Maitland Street of Cowcaddens, in or near Glasgow, an arrestment, in name of the said James M'Gill, fencing and arresting, or pretending to fence and arrest, in the hands of you the said George Kippen, all moveable goods, debts, and effects, due by you to the said Company, or to the said Daniel Mackain for their behoof; and all this you the said George Kippen did, in pursuance of the wicked and felonious purpose, formed by you as aforesaid, of obstructing or defeating the execution of the said decree or warrant against you, obtained by the said Company of Proprietors of the Glasgow Water-Works, and by the said Daniel Mackain, as before libelled, and to the lesion, injury, and oppression of the said Company, and of the said Daniel Mackain, or of one or other of them: LIKEAS (2.), William M'Lean, a clerk, now or lately residing at Springvale, in or near Glasgow, having on the 13th day of April 1848, or about that time, obtained decree before the Sheriff Small-Debt Court of Glasgow, at his instance against you the said George Kippen, for the sum of £2 : 6 : 2 of principal, and 4s. 1d. of costs, you the said George Kippen, having formed the wicked and felonious purpose of obstructing or defeating execution of the said decree, did, on the 18th day of April 1848, or on one or other of the days of the said month of April, or of March immediately preceding, or of May immediately following, in or near said house or office in or near Fife Place aforesaid, then and now or lately occupied by you the said George Kippen, or in or near said Sheriff-clerk's office of Glasgow, or elsewhere in or near Glasgow to the prosecutor unknown, falsely, fraudulently, and feloniously, devise, and raise, or cause or procure to be raised, before the ordinary Sheriff-Court at Glasgow, a summons in name of James Begbie, now or lately residing in or near Great Dove Hill, in or near Glasgow, or of some wholly fictitious person, designed in the said summons as 'James Begbie Commission Agent Melville Court Glasgow, Pursuer,' against the said William M'Lean, setting forth that the said James Begbie, pursuer, had lent to the said William M'Lean, defender, on the 15th day of March 1848, the sum of £50 sterling, and that the said sum was wholly owing and unpaid, and concluding for payment of the same, with interest and expenses of pro-

cess, or having some similar narrative, allegations, and conclusions, and containing a warrant or precept of arrestment in common form, the said summons being, in its narrative, allegations, and conclusions, and you the said George Kippen well knowing it to be, entirely false, fraudulent, and fictitious, and intended for the purpose of fraudulently obstructing or defeating execution of the said decree obtained against you by the said William M'Lean as aforesaid; and you the said George Kippen did, on the said 18th day of April 1848, or on a day, after and about that time, to the prosecutor unknown, in or near the said house or office at or near Fife Place aforesaid, or elsewhere in or near Glasgow to the prosecutor unknown, in virtue or on pretence of the said warrant or precept of arrestment contained in said false and fraudulent summons last above libelled, wickedly, fraudulently, and feloniously, cause or procure to be served upon you by the foresaid John M'Kinlay, an arrestment in name of James Begbie, fencing and arresting, or pretending to fence and arrest, in your hands all moveable goods, debts, and effects due by you to the said William M'Lean; and all this you the said George Kippen did in pursuance of the wicked and felonious purpose, formed by you as aforesaid, of obstructing or defeating execution of the said decree against you obtained by the said William M'Lean, and to the lesion, injury, and oppression of the said William M'Lean: LIKEAS (3.), Walter Michael Oppenheim, now or lately looking-glass merchant in or near Miller Street of Glasgow, and now or lately residing in Stafford Place, New City Road, in or near Glasgow, having, in conjoined actions before the Sheriff-Court of Lanarkshire, at your instance against the said Walter Michael Oppenheim, which had been advocated to the Court of Session, and thereafter remitted back to the Sheriff of Lanarkshire, obtained, on the 4th day of February 1848, or about that time, decree in his favour by the said Henry Glassford Bell, Esquire, sheriff-substitute of Lanarkshire, against you the said George Kippen, for the sum of £33:9:9 of expenses of process, and for the sum of 8s. as the expense of extracting and recording said decree; and the said decree having been extracted, and you the said George Kippen having thereafter appealed certain interlocutors of the Court of Session in said advocacy to the House of Lords, and the Lords of Council and Session having, by interlocutor of the 5th day of July 1848, allowed interim execution, in terms of the statute 48th George III., chapter 151, of said decree last above libelled, you the said George Kippen having formed the wicked and felonious purpose of obstructing or defeating the execution of the said decree, did, on the 7th day of July 1848, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, in or near said house or office in or near Fife Place aforesaid, then and now or lately occupied by you the said George Kippen, or in or near said Sheriff-clerk's office of Glasgow, or elsewhere in or near Glasgow to the prosecutor unknown, falsely, frau-

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duleently, and feloniously, devise and raise, or cause to be raised, before the ordinary Sheriff-Court at Glasgow, a summons, in name of Robert Russell, now or lately a gas-surveyor, and now or lately residing in or near Gallowgate Street of Glasgow, or of some wholly fictitious person, designed in the said summons as 'Robert Russell, sometime brickmaker in Glasgow, and residing there, pursuer,' against the said Walter Michael Oppenheim, setting forth that the said Robert Russell, pursuer, had, on the 11th day of November 1847, lent the sum of £50 sterling to the said Walter Michael Oppenheim, defender, and that the said sum was wholly owing, and concluding for payment of the same with expenses, or having some similar narrative, allegations, and conclusions, and containing a warrant or precept of arrestment in common form, the said summons being, in its narrative, allegations, and conclusions, and you the said George Kippen well knowing it to be, entirely false, fraudulent, and fictitious, and intended for the purpose of fraudulently obstructing or defeating execution of the said decree obtained against you by the said Walter Michael Oppenheim as aforesaid; and you the said George Kippen did, on the said 7th day of July 1848, or on a day, after and about that time, to the prosecutor unknown, in or near the office or premises situated in or near Brunswick Place, in or near Glasgow, then and now or lately occupied by Robert Chalmers, an agent there, or elsewhere in or near Glasgow to the prosecutor unknown, in virtue or on pretence of the said warrant or precept of arrestment contained in said false and fraudulent summons last above libelled, wickedly, fraudulently, and feloniously, cause or procure to be served upon you by William Smith, now or lately sheriff-officer in Glasgow, and now or lately residing in Bell Street of Glasgow, an arrestment in name of said Robert Russell, fencing and arresting all goods, debts, or effects in your hands, belonging to the said Walter Michael Oppenheim; and all this you the said George Kippen did, in pursuance of the wicked and felonious purpose, formed by you as aforesaid, of obstructing or defeating execution of the said decree against you, obtained by the said Walter Michael Oppenheim, as before libelled, and to the lesion, injury, and oppression of the said Walter Michael Oppenheim; And you the said George Kippen, in further pursuance of the wicked and felonious purpose last above libelled, did, on the 7th day of July 1848, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, in or near said house or office in or near Fife Place aforesaid, then and now or lately occupied by you the said George Kippen, or in or near said sheriff-clerk's office of Glasgow, or elsewhere in or near Glasgow to the prosecutor unknown, falsely, fraudulently, and feloniously, devise and raise, or cause or procure to be raised, before the Sheriff Small-Debt Court of Glasgow, a summons or complaint in name of Robert Burnside, or Robert Allan Burnside, then and now or lately spirit-dealer in or near Howard Street of Glasgow, and now

or lately residing in or near Jamaica Street of Glasgow, or of some wholly fictitious person, designed in the said summons or complaint as 'Robert Burnside, spirit-dealer, Howard Street, Glasgow,' against the said Walter Michael Oppenheim, setting forth that the said defender was owing to the complainer the sum of £3 : 7 : 9 sterling, per account, and concluding for payment of the said sum with expenses, or with some similar narrative, allegations, and conclusions, and containing a warrant or precept of arrestment in common form, the said summons or complaint, in its narrative, allegations, and conclusions, being, and you the said George Kippen well knowing it to be, entirely false, fraudulent, and fictitious, and intended for the purpose of fraudulently obstructing or defeating execution of the said decree obtained against you by the said Walter Michael Oppenheim as aforesaid; and you the said George Kippen did, on said 7th day of July 1848, or on a day, after and about that time, to the prosecutor unknown, in or near the said office or premises situated in or near Brunswick Place aforesaid, then and now or lately occupied by the said Robert Chalmers, or elsewhere in or near Glasgow to the prosecutor unknown, in virtue or on pretence of the said warrant or precept of arrestment contained in the said false and fraudulent summons or complaint last above libelled, wickedly, fraudulently, and feloniously, cause or procure to be served upon you, by the said William Smith, an arrestment, in name of said Robert Burnside, or Robert Allan Burnside, fencing and arresting, or pretending to fence and arrest, in your hands, all goods, effects, debts, and sums of money belonging to the said Walter Michael Oppenheim, and that to an amount not exceeding £8 : 6 : 8; and all this you the said George Kippen did, in farther pursuance of the wicked and felonious purpose, formed by you as aforesaid, of obstructing or defeating the execution of the said decree obtained against you by the said Walter Michael Oppenheim, and to the lesion, injury, and oppression, of the said Walter Michael Oppenheim; and in further prosecution of your said wicked and felonious purpose of obstructing or defeating the execution of the said decree obtained against you by the said Walter Michael Oppenheim, you the said George Kippen did, on the 14th day of July 1848, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, in or near said house or office in or near Fife Place aforesaid, or in or near said sheriff-clerk's office, or elsewhere in or near Glasgow to the prosecutor unknown, falsely, fraudulently, and feloniously, raise, or cause or procure to be raised, before the ordinary Sheriff-Court at Glasgow, a summons of multiplepoinding at your instance, against the said Walter Michael Oppenheim, Robert Russell, and Robert Burnside or Robert Allan Burnside, setting forth that you were indebted to the said Walter Michael Oppenheim in a sum of money, the amount of which would be condeded on in the process to follow on said summons, and that you were not in safety to pay the same, in respect of the said arrest-

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Fraud, &c.

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 George you, in the names of the said Robert Russell and Robert Burnside or
 Kippen. Robert Allán Burnside respectively, as aforesaid, and concluding that
 High Court. you the said George Kippen should be held liable in once and single
 Nov. 6. payment only, and under deduction of the expenses of the said proces
 1849 of multiplepointing; and this also you did to the lesion, injury, and
 Falsehood, oppression of the said Walter Michael Oppenheim: LIKEAS (4.),
 Fraud, &c. Alexander Dick junior, writer in Glasgow, and now or lately residing
 in or near Brunswick Street, in or near Glasgow, having, on the 21st
 day of June 1848, or about that time, obtained decree at his instance
 before the ordinary Sheriff-Court at Glasgow, against you the said
 George Kippen, for the sum of £11 : 6 : 10, together with the sum of
 £1 : 16 : 3 of expenses, and 5s. as the dues of extract, and said decree
 having been extracted, and a charge of payment having been given
 thereon to you the said George Kippen, on the 4th day of July 1848,
 or about that time, you the said George Kippen having formed the
 wicked and felonious purpose of obstructing or defeating execution of
 the said decree, did, on the 17th day of July 1848, or on one or other
 of the days of that month, or of June immediately preceding, or of
 August immediately following, in or near the house or office at or near
 Fife Place aforesaid, then and now or lately occupied by you the said
 George Kippen, or in or near the said sheriff-clerk's office of Glasgow,
 or at some other place in or near Glasgow to the prosecutor unknown,
 falsely, fraudulently, and feloniously, devise and raise, or cause or pro-
 cure to be raised, before the Sheriff Small-Debt Court of Glasgow, a
 summons or complaint in name of William Colquhoun, carter, now or
 lately residing in or near Hunter Street, in or near Glasgow, or of
 some wholly fictitious person, designed in the said summons or com-
 plaint as 'William Colquhoun, carter 1 Graham Street Gallowgate
 'Glasgow,' against the said Alexander Dick junior, setting forth that
 the said Alexander Dick junior was owing to the said William Col-
 quhoun the sum of £5 sterling, per account, the said sum of £5 being
 stated in the account referred to in the said summons or complaint, as
 cash lent by the said William Colquhoun to the said Alexander Dick
 junior, and concluding for payment of the same with expenses, or hav-
 ing some similar narrative, allegations, and conclusions, and containing
 a precept of arrestment in common form, the said summons or com-
 plaint being, in the narrative, allegations, and conclusions thereof, and
 you the said George Kippen well knowing it to be, entirely false, frau-
 dulently, and fictitious, and intended for the purpose of fraudulently ob-
 structing or defeating execution of the said decree obtained against
 you by the said Alexander Dick junior as aforesaid; and you the said
 George Kippen did, on the said 17th day of July 1848, or on a day,
 after and about that time, to the prosecutor unknown, on or near
 Queen Street or Exchange Square of Glasgow, opposite or near to the
 Exchange of Glasgow, or elsewhere in or near Glasgow to the prose-

cutor unknown, in virtue or on pretence of the said warrant or precept of arrestment contained in the said false and fraudulent summons last above libelled, cause or procure to be served on you by James Christison, sheriff-officer, now or lately residing in or near Brunswick Place, in or near Glasgow, an arrestment, in name of said William Colquhoun, fencing and arresting, or pretending to fence and arrest, all sums of money, goods, and effects, in your hands, belonging to the said Alexander Dick junior, and that to an extent not exceeding £8 : 6 : 8 ; and all this you the said George Kippen did in pursuance of the wicked and felonious purpose, formed by you as aforesaid, of obstructing or defeating execution of the said decree obtained by the said Alexander Dick junior against you, and to the lesion, injury, and oppression, of the said Alexander Dick junior ; and in farther prosecution of the said wicked and felonious purpose, last above libelled, you the said George Kippen did, on the 18th day of July 1848, or about that time, in or near the said house or office in or near Fife Place aforesaid, or in or near the said sheriff-clerk's office, or elsewhere in or near Glasgow to the prosecutor unknown, wickedly, fraudulently, and feloniously, raise, or cause to be raised, before the ordinary Sheriff-Court of Glasgow, a summons of multiplepoinding at your instance, against the said Alexander Dick junior and the said William Colquhoun, and another person therein designed ' David Thomas carter and cowfeeder in Trades-ton of Glasgow,' setting forth the said decree at the instance of the said Alexander Dick junior, and said charge thereon, and that you were not in safety to make payment of the sums contained in said decree, in respect of an arrestment at the instance of the said David Thomas, designed as aforesaid, and of the said arrestment in name of the said William Colquhoun, and concluding that you the said George Kippen should be found liable in once and single payment only, and under the deduction of the expenses incurred by you in the process to follow thereon, which summons of multiplepoinding, last above libelled, in so far it is founded on the said arrestment, at the instance of the said William Colquhoun, was a fraudulent and felonious proceeding on the part of you the said George Kippen, and was to the lesion, injury, and oppression, of the said Alexander Dick junior : And you the said George Kippen, during the whole course of your said false and fraudulent proceedings above libelled, were a practitioner of the law, and a procurator of the Sheriff-Court of Lanarkshire, at Glasgow, and possessed thereby facilities, and did avail yourself of the same, for devising and carrying on the said frauds.

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LOGAN objected to the relevancy of the libel. The major charged falsehood and fraud, aggravated as described. The word especially applied to the aggravations. That was clear from the subsumptions of the libel ; and

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the objection was, that the charges in the minor did not answer to the principal crime alleged, but only to the aggravations.

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In the first charge, it was set forth, that ' you the said George Kippen having formed the wicked and felonious purpose of obstructing or defeating execution of the said warrant, did,' &c. It was not charged that this was fraudulently done ; nothing more followed than a mere detail of the *modus operandi* in which the pannel was said to have carried out his plan, which was not distinctly averred to have been either false or fraudulent. No doubt the minor answered to the alleged aggravation, but the objection was, it did not come up to the principal crime. At any rate, it amounted to falsehood only, and not to fraud. Falsehood *per se* was not a crime. In all cases fraud had been joined, and this shewed that the falsehood was no crime, unless it had taken effect. (*Gibb's case*, Bell's Notes, p. 64.) This was rendered still more apparent from the case of *M'Intyre* (Inverness, Sept. 14. 1837, Swinton, vol. i., p. 536), where it was held, that where imposition was charged in the major, it must be alleged in the minor that it took effect. Case of *Christie* (High Court, March 12. 1841, Swinton, vol. ii, p. 534.) The objection there went to the undue latitude taken by the prosecutor, but the principle of the case was the same as that of *M'Intyre*, and was moreover a precedent as to the form of libel necessary in a case of the kind. So also in the case of *Miller* (Jedburgh, Sept. 1847, Arkley, p. 355), where falsehood, fraud, and wilful imposition were charged, it was alleged that the imposition was effectual. The minor in this case did not allege any completed fraud, and consequently did not answer to the principal charge in the major, however it might correspond to the aggravations set forth, which could not be regarded unless the principal charge was relevantly laid.

LORD MONCREIFF.—The authorities do not come up to the point pressed upon us. The objection resolves it-

self into this, that the attempted fraud was not successful. In judging of the relevancy, however, we must attend to the special circumstances of each case, and examine the precedents in the same way. Now, here all the overt acts set forth are said to have been committed with a criminal intent, and for an unlawful design. This, in my opinion, is enough. No doubt, in the Jedburgh case, it was alleged that the fraud was effectual, but then the facts warranted the insertion of that allegation. But that case did not decide that it must in all cases be charged that success followed the criminal attempt, in order to render the party amenable to the law. I do not think it necessary; and, indeed, in the case of *M^r Intyre* we have quite sufficient to warrant us in so holding.

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LORD COCKBURN.—I concur in what has fallen from Lord Moncreiff, and think this objection must be repelled. I may add, however, that in this case there is enough set forth to meet the argument of the prisoner's counsel, even supposing it in all respects sound. It is alleged that he formed a fraudulent purpose of obstructing or defeating diligence, at the instance of various parties, and the modes by which he proceeded to carry his intention into effect are set forth. It is also said that the arrestment took effect, and thereby the obstruction, which was his object, was completed, which is said to have been to the lesion, injury, and oppression of the parties. I am of opinion, on this ground, as well as on those stated by Lord Moncreiff, that this objection must be repelled.

THE LORD JUSTICE-CLERK.—The objection only amounts to this, that in all cases of fraud it is necessary to allege that the attempt was successful. For the reasons given by Lord Moncreiff, I do not concur in that view. It is said that the minor answers only to the aggravations, but this proceeds on a mistake of the meaning of the word 'especially,' as used in the major. Formerly the word 'particularly' would have been used. But though 'especially' is now the word employed, yet that does not change the meaning of the libel. Practically, its mean-

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ing is to set forth and define the particular mode in which the crime was committed, the law taking cognizance that particular modes constitute substantive aggravations. Here, however, I think the fraud alleged is shewn to have been completed. The object was not to cheat any person, but to delay payment of a debt which was due from him, by means of an unlawful device. Everything necessary to this object is said to have been done by him fraudulently and feloniously; and as delay was the object he wished, so it is said that delay was obtained, as is alleged, to the injury and lesion of the creditors. In these circumstances, the objection must be repelled.

Thereafter the pannel pleaded guilty to the third charge, except in so far as related to the person of the name of Burnside, and to the fourth charge, as libelled.

LOGAN addressed the Court in mitigation of punishment, and asked their Lordships to impose a fine, either as the whole or part of the sentence.

The LORD JUSTICE-CLERK.—In such a case as this, it is altogether out of question to think of a fine; and it is of great importance that the public should know, that in all such cases the Court will imprison or transport, and not impose a fine. I remember that in the Glasgow case, when we imposed a fine, which we were assured would be paid, the pannel got himself declared bankrupt the day after.

In respect of the judicial confession above set forth, the said George Kippen was sentenced to nine months' imprisonment.

WINTER CIRCUIT.

GLASGOW.

Jan. 11,
1850.*Judges*—LORDS COCKBURN AND IVORY.HER MAJESTY'S ADVOCATE—*Young A.D.*

AGAINST

JOHN STEVENS—*W. H. Thomson—A. R. Clark.*

MURDER.—Held, that it was not a good plea in bar of trial, that the pannel had been tried and convicted of a simple assault in the Police Court, for striking the same blows in respect of which he was charged with murder.

JOHN STEVENS was charged with Murder :

IN SO FAR AS, on the 17th day of November 1849, or on one or other of the days of that month, or of October immediately preceding, or of December immediately following, in or near the house in or near Bishop Street of Anderston, in or near Glasgow, then and now or lately occupied by Alexander Robison, a bottle-blower or labourer, then and now or lately residing there, in which house you the said John Stevens and the since deceased Alice M'Donald or Stevens your wife, or with whom you cohabited, then lodged or resided, you the said John Stevens did, wickedly and feloniously, attack and assault the said Alice M'Donald or Stevens, and did, with a poker or some other weapon to the prosecutor unknown, strike her one or more severe blows on or near the head, whereby she was knocked down, and was mortally injured, and died on the 30th day of November 1849, or about that time; and was thus murdered by you the said John Stevens.

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Murder.

ON the diet being called it was objected in bar of trial, that the pannel had been tried and sentenced in the Police Court, in respect of striking the very blows which were said to have occasioned death in the present charge. That constituted a *res judicata*, and if the public authorities had been too precipitate in trying as a police offence what was ultimately found to be of a more serious character, they must abide the consequence, and not the prisoner, who had no control over their proceedings.

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John
Stevens.

Glasgow.
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Murder.

YOUNG A. D.—The objection stated could not be sustained after the judgment in the case of Cobb, High Court, Nov. 21. 1836, Swinton, vol. i., p. 354.

LORD COCKBURN repelled the objection on the authority of the case of Cobb.

The pannel thereafter pleaded Guilty of Culpable Homicide.

In respect of which judicial confession, he was sentenced to be transported for life.

HIGH COURT.

Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE AND MONCREIFF,

HER MAJESTY'S ADVOCATE—*Deas A.D.—G. Young A. D.*

AGAINST

ARCHIBALD MILLER and SUSAN BROWN of MILLER—*Logan—Shand.*

TRIAL, BAR OF.—Opinion intimated, that it was not a good objection in bar of trial, that the Procurator-fiscal had obtained information from the pannel under a pledge that she should not be tried.

OUTLAWRY.—Held, that an outlawry was recalled *de jure* by the Public Prosecutor arraiguing the pannel at the bar.

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ARCHIBALD MILLER, a flesher, and SUSAN BROWN of MILLER, were charged with Using and Uttering, as genuine, Forged or Counterfeit Bank Notes; as also Theft, also Reset of Theft, and contravention of the Statute 45th Geo. III. c. 89:

IN SO FAR AS (1.), on the 5th day of March 1849, or on one or other of the days of that month, or of February immediately preceding, or of

April immediately following, within or near the dwelling-house, shop, or premises situated in or near Canongate, in or near Edinburgh, then or lately before occupied by you the said Archibald Miller and Susan Brown or Miller, or by one or other of you, and within or near the dwelling-house, shop, or premises situated in or near High Street, in or near Edinburgh, then occupied by James Mackay, then a grocer and spirit-dealer there, and now or lately a prisoner in the prison of Edinburgh, or within or near one or other of the said dwelling-house, shop, or premises situated in or near Canongate aforesaid, and the said dwelling-house, shop, or premises situated in or near High Street aforesaid, or at some other place or places in or near Edinburgh to the prosecutor unknown, you the said Archibald Miller and Susan Brown or Miller, or one or other of you, knowingly or wittingly, had in your possession or custody, or in your dwelling-house, outhouse, lodgings, or apartments, situated in or near Canongate aforesaid, six, or thereby, forged or counterfeited Bank of England notes for £10 each, and each bearing to be dated 'London 4 Oct 1848,' and to be subscribed 'For the Gov^t and Comp^s of the Bank of England. J. Cann,' or one or more of them, knowing the same to be forged or counterfeited, without lawful excuse: LIKEAS (2.), time above libelled, within or near the shop or premises situated in or near Leith Street, in or near Edinburgh, then and now or lately occupied by William Rutherford, then and now or lately spirit-merchant there, and within or near the said dwelling-house, shop, or premises situated in or near Canongate aforesaid, then or lately before occupied by you the said Archibald Miller and the said Susan Brown or Miller, or by one or other of you, and within or near the office or premises situated in or near Parliament Square, in or near Edinburgh, then and now or lately occupied by the Union Bank of Scotland, or by the Banking Company carrying on business under that or some similar denomination, or within one or more of them, or at some other place or places in or near Edinburgh to the prosecutor unknown, you the said Archibald Miller, knowingly or wittingly, had in your possession or custody, or in your dwelling-house, outhouse, lodgings, or apartments, situated in or near Canongate aforesaid, two, or thereby, forged or counterfeited Bank of England notes for £10 each, and each bearing to be dated 'London 4 Oct^r 1848,' and to be subscribed 'For the Gov^t and Comp^s of the Bank of England. J. Cann,' and bearing to be numbered respectively 'V 46506,' and 'K 56045,' or one or more of them, knowing the same to be forged or counterfeited, without lawful excuse: LIKEAS (3.), time above libelled, within or near the said shop or premises situated in or near Leith Street aforesaid, then and now or lately occupied by the said William Rutherford, and within or near the said dwelling-house, shop, or premises, situated in or near Canongate aforesaid, then or lately before

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occupied by you the said Archibald Miller and the said Susan Brown or Miller, or by one or other of you, and within or near the office or premises situated in or near George Street, in or near Edinburgh, then and now or lately occupied by the Commercial Bank of Scotland, or by the banking company carrying on business under that or some similar denomination, or within or near one or more of them, or at some other place or places in or near Edinburgh to the prosecutor unknown, you the said Archibald Miller, knowingly or wittingly, had in your possession or custody, or in your dwelling-house, outhouse, lodgings, or apartments, situated in or near Canongate aforesaid, two, or thereby, forged or counterfeited Bank of England notes for £10 each, and each bearing to be dated 'London 4 Oct^r 1848,' and to be subscribed 'For the Gov and Comp^a of the Bank of England. J. Cann,' and to be numbered 'V
K 54064,' or one or more of them, knowing the same to be forged or counterfeited, without lawful excuse: LIKEAS (4), time above libelled, within or near the office or premises situated in or near Parliament Square aforesaid, then and now or lately occupied by the Union Bank of Scotland, or by the banking company carrying on business under that or some similar denomination, you the said Archibald Miller did, wickedly and feloniously, use and utter, as genuine, two forged or counterfeited Bank of England notes for £10 each, and each bearing to be dated 'London 4 Oct^r 1848,' and to be subscribed 'For the Gov^r and Comp^a of the Bank of England. J. Cann,' and bearing to be numbered respectively 'V
K 46506,' and 'V
K 56045,' you knowing the same to be forged or counterfeited, by then and there delivering the same, or causing the same to be delivered, to Robert Robertson Murray, then and now or lately a teller in the employment of the said Union Bank of Scotland, or banking company carrying on business under that or some similar denomination as aforesaid, and then and now or lately residing with Mrs Ann Gray or Murray, in or near Lauriston Place, in or near Edinburgh, or to some other person or persons to the prosecutor unknown, in the employment of the said last-mentioned bank or banking company, in order to be changed, you then and there received in exchange for the same twenty pounds sterling, or thereby, in notes of the said last-mentioned bank or banking company, or in other genuine money: LIKEAS (5.), time above libelled, within or near the office or premises situated in or near George Street aforesaid, then and now or lately occupied by the Commercial Bank of Scotland, or by the banking company carrying on business under that or some similar denomination, you the said Archibald Miller did, wickedly and feloniously, use and utter, as genuine, two forged or counterfeited Bank of England notes for £10 each, and each bearing to be dated 'London 4 Oct^r 1848,' and to be subscribed 'For the Gov^r and Comp^a of the Bank of England. J. Caun,' and to be numbered 'V
K 54064,' you

knowing the same to be forged or counterfeited, by then and there delivering or presenting the same, or causing the same to be delivered or presented, to William Leckie, then and now or lately a teller or cashier in the employment of the said Commercial Bank of Scotland, or banking company carrying on business under that or some similar denomination as aforesaid, and then or now and lately residing in or near Picardy Place, in or near Edinburgh, in order to be changed, and you proposing to receive in exchange therefor twenty pounds sterling, or thereby, in the notes of the last-mentioned bank or banking company, or other genuine money: LIKEAS (6.), on the night of the 11th, or morning of the 12th, day of September 1849, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, within or near the house situated in or near Blackfriars' Wynd, in or near Edinburgh, then occupied by some person or persons to the prosecutor unknown, and now or lately occupied by Walter Sawers or Sayers, now or lately residing there, or at some other place in or near Edinburgh, to the prosecutor unknown, you the said Archibald Miller by yourself, or aided and abetted by two or more females, or other persons to the prosecutor unknown, did, wickedly and feloniously, steal and theftuously away take, from or from near the pocket or person of the Reverend William Anderson, then and now or lately minister of the United Presbyterian Church at or near Blairlogie, in the parish of Logie, and county of Perth, and then and now or lately residing there, a gold watch, the property, or in the lawful possession, of the said Reverend William Anderson: Or OTHERWISE, the said watch having been, time and place above libelled, wickedly and feloniously, stolen by some person or persons to the prosecutor unknown, you the said Archibald Miller did, time last above libelled, within or near the house situated in or near Paul Street aforesaid, now or lately occupied by you the said Archibald Miller, or at some other time and place in or near Edinburgh, or elsewhere in or near the county of Edinburgh, to the prosecutor unknown, wickedly and feloniously, reset and receive the said stolen watch, you well knowing the same to have been stolen.

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SHAND, on behalf of the female prisoner, objected in bar of trial, that a pledge had been given to her by the Procurator-fiscal, that, in reward for her giving information, she should not be tried herself, and offered to prove the fact by the examination of the fiscal.

ROBERT DYMCK examined, deponed, I know the female prisoner. She was examined as to the case of Mackay, which related to the passing of the said bank-notes, which is the foundation of this charge. She was asked if she would speak out in that case. She came back

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again on the 10th of April, and said she could give no information. No declaration was taken from her as a witness.

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The LORD JUSTICE-CLERK.—In having allowed this examination, we wish it to be understood, that we by no means intend to countenance the notion that the Procurator-fiscal can, without authority, tie up the hands of the Public Prosecutor. It is not the policy of the law to give such a power to any inferior officer, and the parties giving information to the Procurator-fiscal, must take their risk as to any pledge he may be so ill-advised as to give.

After the examination of the first witness was closed, the Public Prosecutor stated, that the outlawry formerly pronounced against the pannel, Archibald Miller, remained unrecalled, and thereupon asked his counsel if he moved to have the outlawry recalled.

LOGAN declined to make any motion to that effect.

DEAS thereupon moved that the outlawry should be recalled, and mentioned the case of *Wilson*, Glasgow, 7th April 1830; Bell's Notes, p. 228.

The LORD JUSTICE-CLERK.—I am by no means satisfied with the decision in that case, and think we ought to pronounce a special interlocutor here. The pannel having known the objection all along, ought to have stated it at the commencement of the trial, and cannot take advantage of an objection now, which, if good at all, would be in bar of trial, and I propose therefore that we should pronounce a special interlocutor holding the outlawry recalled *de jure*, by the public prosecutor having put him at the bar, and allowed him to plead.

The other Judges concurred, and the following interlocutor was pronounced:—

‘The COURT held, that the sentence of outlawry referred to was *de jure* recalled, in consequence of the Public Prosecutor having allowed the pannel to plead to the indictment, and proceed with the trial, and found it recalled accordingly.’

The case having proceeded, the Jury found the charge against the female pannel not proven, and unanimously found Archibald Miller guilty of the 3d and 5th charges as libelled.

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Forgery,
&c.

In respect of which verdict of assize, the said Archibald Miller was sentenced to be transported for fourteen years, and the said Susan Brown or Miller was assoilzied *simpliciter*, and dismissed from the bar.

Present,

LORD JUSTICE-CLERK,

LORDS MONCREIFF and WOOD.

Jan. 4.
1850.

HER MAJESTY'S ADVOCATE—*Young A.D.*

AGAINST

HANNAH MITCHELL—*Boyle—Adam.*

EVIDENCE.—Held, distinguishing from the case of *Maclure*, Arkley, p. 448, that a witness who had been present at the examination of another witness, was not disqualified on the ground of partial counsel, in respect that it appears he had not thereby been made acquainted with any thing of which he was not previously aware.

HANNAH MITCHELL was charged with Child Murder, as also Concealment of Pregnancy :

No. 49.
Hannah
Mitchell.

High Court.
Jan. 4.
1850.

Murder,
&c.

IN SO FAR AS, upon the 21st day of August 1849, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, in or near the gig-house, situated near to the Manse of Rescobie, in the parish of Rescobie, and shire of Forfar, and now or lately occupied by the Reverend David Esdaile, now or lately minister of the parish of Rescobie foresaid, or at some other place to the prosecutor unknown, in or near the said manse of Rescobie, you the said Hannah Mitchell having been delivered of a living male child, did, immediately or shortly after the birth of said child, and place above libelled, wickedly and feloniously, strike the said child several blows with your fist, or with some hard substance to the prosecutor unknown, or did otherwise bruise the said child, by some means to the prosecutor unknown, on the head and face, to the severe injury

No. 49.
Hannah
Mitchell.
High Court.
Jan 4.
1850.
Murder,
&c.

of the said child, and did, in like manner, bruise or injure the neck of the said child, and did break one of its lower jaw-bones, and did thrust your fingers, or some other substance to the prosecutor unknown, within the mouth or throat of the said child to impede its respiration or stop its cries, and did thereafter leave the said child naked, and with the umbilical cord untied, in or near the gig-house aforesaid; by all which, or part thereof, the said child was immediately or speedily bereaved of life, and was thus murdered by you the said Hanuah Mitchell: OR OTHERWISE, time and place above-libelled, you the said Hannah Mitchell did bring forth a male child; and you did conceal your being with child during the whole period of your pregnancy, and did not call for and make use of help or assistance in the birth, and the said child was afterwards found dead in or near the said gig-house.

During the trial, a witness of the name of Steele was adduced in behalf of the Crown, who, being examined *in initialibus*, deponed:

‘ I am a surgeon. I know Mrs Aymouth, a midwife, but I am not her medical attendant. She was precognosed as to the facts discovered by her at the time the child was born in bed. This was on this day week. I was present at the time when she was examined by the Procurator-fiscal, and attended at his request. I heard the whole of her precognition. There was at that time apprehension of her being in danger. I was not present at a previous examination. She spoke to finding the after-birth and body in the gig-house, and their appearances. Can’t say if she said that she examined the prisoner. I think she advised her to go to bed. She said she found the child unwashed. I suggested no questions, and got no information at that time which I had not previously.’

BOYLE requested to see the deposition of Mrs Aymouth, which was allowed. He then objected that the witness was incompetent, on the ground of partial counsel, and submitted that the case was entirely governed by that of *Maclure*, High Court, March 15. 1848; Arkley, p. 448.

The LORD JUSTICE-CLERK.—I think this case differs from that of *Maclure* in this respect, that it appears, as well from the deposition of the witness that he did not learn anything from the midwife on that occasion, of which he was not previously aware, as also from the precognition then taken, that there was nothing spoken to more than what was necessary for him to have known, in order

to give a medical opinion. Now, in the case of *Cubitt*, what was put before him was the state of the bridge, and its relative strength to bear the velocity of the engine. He was therefore placed in the position of a jurymen, and had the whole facts before him. The rule that excludes witnesses on the ground of partial counsel is not a statutory one, which we are bound to enforce in all cases; and although there is no doubt this was a very incautious proceeding, there was nothing ultroneous on the part of the witness, as he went by order; and as we find that all he then heard was known to him before the time he made his medical report, to which he is called to speak, he could not have been biassed by what occurred on the occasion referred to, which was long thereafter.

LORD MONCREIFF and LORD WOOD concurred.

The case proceeded, and the jury found the pannel guilty of concealment of pregnancy.

In respect of which verdict of assize, the Court sentenced her to six months' imprisonment.

Present,

THE LORD JUSTICE-CLERK,

LORDS MONCREIFF, COCKBURN, and WOOD.

HER MAJESTY'S ADVOCATE—*Deas A.D.*—*Young A.D.*

AGAINST

JOHN CAMERON—*Dean of Faculty (M'Neill)*—*Naves.*

CRIMINAL LETTERS—DOUBLE OF LIST OF WITNESSES.—Held, 1st, That it was a fatal objection to criminal letters that the list of witnesses appended to the copy served, did not bear to be signed by the Advocate-depute. 2nd, That, after a pannel had been declared exempt from trial, on the above objection, he could not competently be detained until fresh criminal letters could be served.

JOHN CAMERON was charged on criminal letters with Murder:

IN SO FAR AS, on the night of the 11th, or morning of the 12th, day of August 1849, or on one or other of the days of that month, or of

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Hannah
Mitchell.

High Court.
Jan. 4.
1850.

Murder,
&c.

Jan. 31.
1850.

No. 50.
John
Cameron.

High Court.
Jan. 31.
1850.

Murder.

No. 59.
John
Cameron.
High Court.
Jan. 31.
1850.
Murder.

July immediately preceding, or of September immediately following, in or near Little Dovehill Street, in or near Glasgow, the said John Cameron did, wickedly and feloniously, attack and assault Peter M'Gill, since deceased, then or lately before a boot-closer, and then or lately before residing in or near Little Dovehill Street aforesaid, with his father, Thomas M'Gill, a shoemaker, then and now or lately residing there, and did, with a stick or some other weapon to the prosecutor unknown, strike him one or more severe blows on or about the head or other part or parts of his person, whereby he was knocked down, and did kick him when down, and did otherwise maltreat and abuse him; by all which, or part thereof, the said Peter M'Gill was mortally injured, and in consequence died on or about the 16th day of August 1849, and was thus murdered by you the said John Cameron.

NEAVES objected in bar of trial, on the ground that there was a discrepancy between the record and the copy served on the pannel. The list of witnesses did not bear to be signed by the public prosecutor, whilst the principal copy was so signed. It had been the immemorial practice to authenticate the list of witnesses and assize as part of the record; and by the act of adjournal 9th July 1821,¹ it was required that full doubles must be served

¹ ' That all parties accused shall be served with full doubles of their indictment on criminal letters to the will, of the list of witnesses' names and designations to be adduced against them, and of the list of the assizers' names and designations who are to pass upon their assize, with a short copy of charge subjoined thereto: That the aforesaid full doubles and copies of charge shall be subscribed by the officer executing the same on each page, and the execution returned by him shall bear that they were so subscribed, and declare that it shall be no objection to such doubles that they are written bookways: And the said Lords do further declare, that all objections founded upon the alleged omission in the said doubles of any part of the record, or upon any discrepancy between the said doubles and the record, must be proposed before the Jury is sworn to try the case, with certification that no such objection shall thereafter be entertained: And further, the said Lords direct and appoint that the Sheriff and Sheriff-clerks of the several counties respectively, shall take special care that the doubles of all criminal libels, lists of witnesses, and lists of assizers to be served on parties accused, be accurately compared with the record in all respects, and written out in a clear and legible hand, before delivery to the officer for execution; and shall further direct the said officer to subscribe each page of the said doubles, and to certify the same in the return of the execution of citation, in terms of this act; for the exact performance of which duty, the Sheriff and Sheriff-clerks are by law responsible.'

on the pannels. The same objection had been sustained in former cases; *Hume*, vol. ii., p. 247, and cases there cited; also p. 251, and cases there cited. It was the latter case that led to the passing of the 9th Geo. IV., ch. 22, the 15th section of which act now regulated the assize, but no alteration was thereby made in reference to the service copy. *Hume*, who published the last edition of his book after the passing of that act, and *Alison*, p. 320, both state that the list of witnesses served on the pannel must bear that the original was signed by the public prosecutor, and that it contains a correct copy of his signature.

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Cameron.
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YOUNG stated that the authorities quoted were all prior to the 9th Geo. IV., and that, except the case of *Sutherland*, they were all cases in the Circuit Court; and that there were no means of knowing on what ground the judgments were founded.

He admitted that the practice existed, but it was necessary to look into the origin of the practice, because there was room for drawing a sound distinction between the case where a practice established a real privilege and advantage in favour of the pannel, in which case it would be incompetent to inquire into its origin, and the case where the practice existed, not with regard to anything substantial, in which case it could give no right, because the public had no interest in its maintenance.

That in this case the practice existed with reference to a matter quite immaterial, and was not founded on any statute or act of adjournal.

The act 1672, c. 16, was the act by which the pannel was entitled to a list of witnesses, and of the assize; but there was not one word of a copy there. Immediately after the passing of that act, a number of objections were stated by pannels, that they had not got proper lists of witnesses, and three years afterwards another act of adjournal passed (1675), but in this act nothing was said of a 'copy' being required. Then the question arose, if the pannel was entitled to have more than the *names* of witnesses. It was held that he was not only entitled to

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Cameron.
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Murder.

the names, but also to the designations. This shewed that a double was not what was originally intended, because the question if it was sufficient to give the names only could not in that case have arisen. The same was the case under the acts of adjournal 1803, 1818. The act by which a copy was first ordered to be given, was the act of adjournal 9th July 1821.

Hume (p. 251), in referring to the case of *Hight*, gives as the reason for the objection being sustained in these cases, that the pannel was entitled to believe that witnesses were not properly cited. This argument would not hold now, as by the act 9th Geo. IV., c. 29, § 10, it was enacted that the objection must be before the jury are sworn.

The pannel had no interest to object to the list of witnesses not being signed. He had got a list of witnesses, and no one not there could be examined against him. If the prosecutor was willing to take the risk of witnesses attending, he might do so, but what was the pannel's interest? No witness could be added to the list of witnesses in the pannel's possession. The check was as complete as could be.

LORD JUSTICE-CLERK.—If it is material to list of witnesses that it be signed, is it not necessary to give copy of this to the pannel? In last act passed (1848), which has marked application, there is a provision dispensing with Judges' signature to the list of assize, but nothing is dispensed with at all as to list of witnesses.

YOUNG.—It was not essential that everything in the principal should be given in the copy. Many things material in principal need not be given in copy. It was material that the foot of each page should be signed, but it was not the practice to give the process copy of signature at each page. Nothing was more material than the will of criminal letters, but it was not necessary to give a copy of it. The question arose in the case of *Charteris* (Hume, p. 245), in which it was held not necessary to give the pannel a copy of it.

LORD JUSTICE-CLERK.—The will is the diligence, and

used to be separate from the body. It resembled the old precept of a charter.

YOUNG.—The will was a part of the letters. There could be no letters without a will. It was held in that case not necessary to give a copy, on the ground that it was pure matter of form. This shewed that what was material in the principal need not necessarily be given in the copy; and it could not be material for the pannel's interest, that he should get the information that the list of witnesses was signed by the prosecutor.

LORD MONCREIFF.—I do not see how we can go against what is admitted to be the practice.

LORD COCKBURN.—It is perfectly clear that the pannel is entitled to have served on him a copy of the list of witnesses with the prosecutor's signature.

LORD WOOD.—I think it unnecessary to say anything; the practice is quite conclusive.

LORD JUSTICE-CLERK.—I entirely concur. The argument went only to shew that one of the reasons assigned for the decisions quoted did not now apply. But there is another important point in this case. By the second branch of act of adjournal 1821, Sheriffs are responsible for this being done; and I think that the attention of the Sheriff of Lanark should be specially called to this case.

The COURT sustained the objection.

DEAS moved the Court, that the pannel might be detained until fresh criminal letters could be served. The statute 1701 did not prevent the prosecutor from again serving the same letters, except the will. The will was not incorporated as part of the letters. It was merely diligence, and might be renewed as a re-service of an indictment. It was an erroneous assumption that there was no difference between defects of service and of substance. Here the defect was one in service, rendering the process void.

The LORD JUSTICE-CLERK.—Then the worse executed the better for you.

DEAS.—No doubt. The question is one of process;

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Cameron.
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Murder.

and I contend that there is no process here at which the Court can look ; and as I propose to serve new letters within forty days after the expiry of the letters of intimation, I am entitled to do so, as there was no good citation before.

The LORD JUSTICE-CLERK.—The act 1701 was passed to prevent a long period of imprisonment before trial, and our duty is not to consider whether or not it is stringent in its terms, but to construe it fairly between the Crown and the subject. The point contended for on behalf of the Crown is, whether there shall not be twice forty days within which the pannel may be incarcerated on criminal letters. In this case the sixty days after intimation expired, and then criminal letters were used against the pannel, which, by the terms of the act, expressly require the prosecutor to prosecute the same to a final sentence within forty days, unless the delay be on the application, or at the desire of the prisoner. To adopt the construction contended for by the Crown would be to neutralise all the provisions of the statute ; for if that argument was correct, it would come to this, that having served a bad libel, they might on the thirty-ninth day serve a fresh one, and, by repeating the process, postpone indefinitely the trial of the party. This would defeat the purpose of the act, which was to prevent delay, and fix the period within which the trial must be prosecuted to a final sentence, which is declared to be forty days after the prisoner has been incarcerated on the criminal letters. The act did not give any presumption of innocence, but merely exempted from trial.

The other Judges concurred, Lord Cockburn remarking, that unless that point was fixed, there was nothing fixed in the law.

The application was refused.

In respect of which, the said John Cameron was declared for ever free from the charge made against him, and dismissed from the bar.

Present,

THE LORD JUSTICE-CLERK,

LORDS MONCREIFF, COCKBURN, WOOD, AND IVORY.

HER MAJESTY'S ADVOCATE—*Young A.D.*

AGAINST

CATHERINE CROSSGROVE OR BRADLEY—*Aytoun.*Feb. 6.
1850.

INDICTMENT—RELEVANCY—THEFT.—Held that it was not theft in a pawnbroker to appropriate the articles which had been pledged with her.

CATHERINE CROSSGROVE OR BRADLEY was charged with Theft :

No. 51.
Catherine
Crossgrove
or Bradley.

IN SO FAR AS, you the said Catherine Crossgrove or Bradley having, during the period between the 1st day of January 1849 and the 22d day of October 1849, or part thereof, carried on business in or near Hamilton as a pawnbroker; and various persons residing in or near Hamilton having, at various times during the said period, deposited, or caused to be deposited, with you there, sundry articles, their property, in pledge or pawn, for advances of money made by you thereon, and in particular (1.), John M'Culloch, weaver, now or lately residing in or near Grammar School Square of Hamilton, and Isabella Hamilton or M'Culloch, his wife, or one or other of them, having, within or near the house in or near Hamilton, then and now or lately occupied by you the said Catherine Crossgrove or Bradley, on one or more occasions during the period above libelled, deposited, or caused to be deposited, with you, in pledge or pawn, the articles specified in Inventory No. I., hereto annexed, the property, or in the lawful possession, of them, or one or other of them: And (2.), William Doolan, a pensioner, now or lately residing in or near Grammar School Square aforesaid, and Jean Hamilton or Doolan, his wife, or one or other of them, having, place above libelled, on one or more occasions during the period above libelled, deposited, or caused to be deposited, with you, in pledge or pawn, the articles specified in Inventory No. II., hereto annexed, the property, or in the lawful possession, of them, or one or other of them: And (3.), John M'Guire, now or lately residing in or near Grammar School Square aforesaid, and Margaret Neilson or M'Guire, his wife, or one or other of them, having, place above libelled, on one or more occasions during the period above libelled, deposited, or caused to be deposited, with you, in pledge or pawn, the articles specified in Inventory No. III., hereto annexed, the property,

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or in the lawful possession, of them, or one or other of them : And (4.), Alexander Cunningham, a chimney-sweep, then and now or lately residing at or near Old Cross, in or near Hamilton, and Jean M'Guire or Cunningham, his wife, or one or other of them, having, place above libelled, on one or more occasions during the period above libelled, deposited, or cause to be deposited, with you, in pledge or pawn, the articles specified in Inventory No. IV., hereto annexed, the property, or in the lawful possession, of them, or one or other of them : And (5.), Agnes M'Donald or Morrison, now or lately residing in or near Grammar School Square aforesaid, having, place above libelled, on one or more occasions during the period above libelled, deposited, or caused to be deposited, with you, in pledge or pawn, the articles specified in Inventory No. V., hereto annexed, her property, or in her lawful possession : And (6.), Agnes Mountain or Hendry, a widow, now or lately residing in or near Grammar School Square aforesaid, having, place above libelled, on one or more occasions during the period above libelled, deposited, or caused to be deposited, with you, in pledge or pawn, the articles specified in Inventory No. VI., hereto annexed, her property, or in her lawful possession : And (7.), Hugh Burns, now or lately a dancing-master, and now or lately residing with Peter M'Guirlick, in or near Muir Wynd of Hamilton, and Agnes Trevier or Burns, wife of the said Hugh Burns, or one or other of them, having, place above libelled, on an occasion during the period above libelled, deposited, or caused to be deposited, with you, in pledge or pawn, the article specified in Inventory No. VII., hereto annexed, the property, or in the lawful possession, of them, or one or other of them : And (8.), Janet Henderson, now or lately residing with John M'Kay, a labourer, in or near Church Street of Hamilton, having, place above libelled, on one or more occasions during the period above libelled, deposited, or caused to be deposited, with you, in pledge or pawn, the articles specified in Inventory No. VIII., hereto annexed, her property, or in her lawful possession : And (9.), Margaret Burns or Burgoyne, wife of John Burgoyne, an earthenware hawker, now or lately residing in or near New Wynd of Hamilton, and Margaret Burns or Burgoyne, his wife, or one or other of them, having, place above libelled, on one or more occasions during the period above libelled, deposited, or caused to be deposited, with you, in pledge or pawn, the articles specified in Inventory No. IX., hereto annexed, the property, or in the lawful possession of them, or one or other of them : And (10.), Arthur Jack, a labourer, now or lately residing in or near Castle Wynd of Hamilton, and Jean Jackson or Jack, his wife, or one or other of them, having, place above libelled, on one or more occasions during the period above libelled, deposited, or caused to be deposited, with you, in pledge or pawn, the articles specified in Inventory No. X., hereto annexed, the property, or in the lawful possession, of them, or one or other of them, you the said Catherine Crossgrove or Bradley

did, on the 20th, 21st, or 22d day of October 1849, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, the time not being more particularly known to the prosecutor, within or near the house in or near Hamilton, then occupied by you, or at some other place or places in or near Hamilton, or elsewhere in the county of Lanark to the prosecutor unknown, wickedly and feloniously, steal and theftuously away take, the various articles above libelled, specified in the ten inventories hereto annexed: **LIKEAS** (11.), on the 18th day of October 1849, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, within or near the shop in or near Church Street of Hamilton, then and now or lately occupied by James Hamilton, then and now or lately baker and grocer there, you the said Catherine Crossgrove or Bradley did, wickedly and feloniously, steal and theftuously away take, a bank or banker's note for one pound sterling, or twenty shillings sterling, or thereby, in silver, the property, or in the lawful possession, of the said James Hamilton: **LIKEAS** (12.), time last above libelled, in or near the shop or premises at or near the Port Well of Hamilton, then and now or lately occupied by John Prentice, then and now or lately publican there, you the said Catherine Crossgrove or Bradley did, wickedly and feloniously, steal and theftuously away take, fifteen shillings sterling, or thereby, in silver, the property, or in the lawful possession, of the said John Prentice, or Mary Hare or Prentice, his wife: **LIKEAS** (13), on the 20th day of October 1849, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, within or near the house in or near Church Street, in or near Hamilton, then and now or lately occupied by John Macpherson, bookbinder, then and now or lately residing there, you the said Catherine Crossgrove or Bradley did, wickedly and feloniously, steal and theftuously away take, a cloak, the property, or in the lawful possession, of the said John Macpherson, or of Elizabeth Rose or Macpherson, his wife: **LIKEAS** (14.), time last above libelled, in or near the shop or premises in or near New Wynd of Hamilton, then and now or lately occupied by William Dougherty, then and now or lately grocer there, you the said Catherine Crossgrove or Bradley did, wickedly and feloniously, steal and theftuously away take, two shillings and sixpence sterling, or thereby, in silver money, the property, or in the lawful possession, of the said William Dougherty.

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Theft.

The case was called for trial at the Glasgow Winter Circuit.

AYTOUN, for the pannel, having objected to the relevancy of the indictment, in so far as the first ten charges alleged that the crime committed by the pannel was

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that of theft, Lord Ivory certified the case, which came on to be argued of this date.

AYTOUN, for the pannel, objected to the first ten articles, as laid in the indictment. It appeared therefrom, that the property alleged to have been stolen had been pledged with the prisoner. This was different from cases where the mere custody was given for the purpose of work being done thereon for the party by whom it was delivered. There had been no decision holding it to be theft to appropriate an article, in which a special property had been given by the owner. The authority of Baron Hume, vol. i., p. 59, was altogether opposed to the present indictment.

Separately, the Pawnbroker act, 39th and 40th Geo. III., cap. 19, sec. 24, contained a definition of the offence, which was that of embezzlement, and that should have been taken as the appropriate *nomen juris* by the prosecutor in the present instance.

YOUNG, A.D.—There was no doubt as to the meaning of the indictment. The pure question was, whether the facts set forth justified the charge or not. No doubt the authority of Baron Hume was against its being a case of theft, but the answer to that was, that Baron Hume had been over-ruled in modern cases, more especially in reference to his doctrine, that in order to constitute theft, it was necessary that the first taking should be felonious. Case of *Brown*, High Court, July 3, 1839. Swinton, vol. ii., p. 394. In that case the question as to whether there was any difference between the bare custody and right of possession was discussed; and, as he understood the case, there was no distinction taken, particularly in the opinion of Lord Moncreiff, as there reported, who used the word possession throughout. The right given to the pawnbroker by the pledge was quite as qualified and conditional as the watchmaker, who had equally his right to retain the property for work done.

The LORD JUSTICE-CLERK.—A lien is not a pledge.

YOUNG, A.D.—There was no difference as to this ques-

tion, which must depend on the right of the party to vindicate the advance he had made, or his demand for repairs done, and in which his right would be equally large. The act referred to gave no right of appropriation to the pawnbroker, but only a right of sale. The question was, could a pawnbroker steal goods which had been pledged with him? If he could, then undoubtedly the present indictment must be sustained.

LORD MONCREIFF.—There is no doubt that this case must turn on somewhat nice distinctions; and the cases which have been already decided, as to whether any particular *species facti* amount to embezzlement or theft, are sufficiently puzzling; but it appears to me that this case differs from that of the watchmaker, which has been cited in argument, and the analogous one of money being entrusted to a messenger, to be carried to the bank, and appropriated by the party on his way. In the present case, the party who pledged the property, by that act not merely gave a right of possession, but a title to the goods themselves, which, by lapse of time, became absolute, and enabled the party to sell, and give a valid right to all the world. In this respect it was different from any of the former cases relied on by the Crown. Besides, the use of the word embezzlement in the statute seemed to denote that the Legislature did not view the case as one of theft; and as it would be going farther than any precedent, he was inclined to hold that the facts alleged in the first ten articles did not support the charge of theft.

LORD COCKBURN.—It is with some hesitation that I concur in the opinion just delivered.

LORD WOOD.—I concur. I think the facts set forth only justify a charge of breach of trust. If the argument for the Crown were sound, there could be no such offence as breach of trust, inasmuch as to constitute that crime there must have been an original lawful possession given to the guilty party by the true owner.

LORD IVORY.—I concur on the grounds stated by

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Lords Moncreiff and Wood. There is a great distinction between a lawful possession *de facto*, and a legal possession *proprio jure*. Here the latter was the right which the prisoner is alleged to have had, and it seems to me impossible to draw any distinction between the appropriation of the goods pledged, before the period when the sale might lawfully take place, or the proper title of the pawnbroker, and his unlawful retention of any surplus pence which might be realised thereby, over and above the amount advanced, together with interest thereon, at proper rates; yet no one would undertake to say that the latter case would be one of theft.

The LORD JUSTICE-CLERK.—I concur in the opinions which have been delivered. Looking to the legal import of the indictment, and the nature of the contract of pledge, I think embezzlement or breach of trust is the appropriate *nomen juris* in the circumstances. It is quite different from those former cases, where only a limited and temporary custody, unaccompanied with any title of property in the things themselves, had been given, for the purpose of having something done by the party who committed the offence. In this case a contract is set forth. It is for breach of that contract that the prisoner is charged; and I am of opinion that the criminal violation of a contract of trust constitutes the offence known by us as breach of trust or embezzlement, and not that of theft.

The objection to the relevancy of the first ten articles was thereupon sustained.

On the motion of the Advocate-Depute, the Court deserted the diet against the prisoner *pro loco et tempore*.

JOHN LOCK and PATRICK DOOLEN, Suspenders—*Logan*.

AGAINST

JOHN MUIR STEELE, Respondent—*Crawford*.

SUSPENSION—SENTENCE.—Held that it was necessary that every sentence should be signed by two Justices; and a Note of Suspension passed, in respect the sentence under review had been signed by one only, although two were present when it was pronounced.

THIS was a suspension of a sentence pronounced in the Burgh Court of Airdrie, whereby the complainer was sentenced to be imprisoned for a period of forty days, on a charge of having assaulted the police whilst in the execution of their duty.

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J. Lock &
P. Doolen
v. Steele.
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Suspension.

The sentence was in the following terms:—

‘ Having considered the charge, with the evidence adduced, and heard the parties *in voce*, find the charge proven, and that the said John Lock and Patrick Doolen are guilty as libelled; and in respect thereof, decern and adjudge the said John Lock to be imprisoned in the prison of Airdrie, or any other legal prison within the county of Lanark, for the period of forty days from this date; and the said Patrick Doolen to be imprisoned in the prison of Airdrie, or other legal prison foresaid, for the period of thirty days from this date.’

(Signed) ‘ ARCH. GERARD, J. P.

‘ ROBERT WATT, C. D.’

The process was instituted under the 3d and 4th Will. IV., ch. 108.¹

¹ By section 49. of this statute, it is enacted, ‘ That in all prosecutions against offenders for crimes committed within the Upper and Middle Wards of the said county, or within the said burghs of Lanark and Hamilton respectively, where the punishment shall not exceed sixty days imprisonment in either of the said jails, or imprisonment, accompanied with hard labour, for a period not exceeding sixty days, or the fine to be imposed shall not exceed £5 Sterling, the procedure against such offender may be of a summary nature, without any written pleadings; and the Sheriff or Justices of the Peace of the said county, or the Magistrates of the said burghs, within their respective jurisdictions, shall be authorised and empowered in all such

No. 52.
 J. Lock &
 P. Doolen
 v. Steel.
 High Court.
 Feb. 6.
 1850.
 Suspension.

Pleaded for the Suspender—The statute gave power both to the Justices of the Peace and the Sheriff to try the cause. No doubt the Sheriff alone might sign the conviction; but if the proceedings were heard before the Justices of the Peace, it required the two Justices to sign, according to the rule of the common law, whereas the sentence and warrant were only signed by one.

CRAWFORD, for Respondent.—It appeared by the record that two Justices were, in fact, present when the cause was heard; and it must be taken, from the terms in which the conviction was framed, that both concurred in the sentence.

The COURT unanimously held, that, as by the common law of Scotland it was necessary, not only that two Justices should be present at the hearing, but should also sign the sentence, in case of conviction; and in respect that the present sentence and warrant of imprisonment bear to be signed by one Magistrate only, the Court passed the note of suspension with expenses.

JOHN LEISHMAN, W.S.—WOTHERSPOON & MACK, W.S., Agents.

‘prosecutions to hear parties and witnesses *viva voce*, and to award such legal punishment as the crime requires, not exceeding that herein prescribed, or to remit the case for investigation and trial in any other legal form before a competent court; provided always, that in all such summary trials, a record shall be kept of the charge, and of the judgment pronounced against such offenders, by the Sheriff-clerk or his deputed, and by the Clerk of the Peace or his deputed, for the county, and by the respective Town-clerks for the said burghs, in a book to be kept in the form set forth in schedule (B) hereunto annexed; and the said Clerk of the Peace or his deputed, and the said Town-clerks, acting as legal assessors to the Justices and Magistrates respectively in such summary convictions; and an extract or duplicate of the entry in the said book, signed by the judge, and by the clerk acting for the time, shall be the authority to the Magistrates having charge of the said respective jails, and their officers and keepers of the said jails, for executing the sentence of each commitment.’

Present,

THE LORD JUSTICE-CLERK,

Jan. 6.
1850.

LORDS MONCREIFF AND WOOD.

HER MAJESTY'S ADVOCATE—*Deas A.D.*—*J. M. Bell A.D.*

AGAINST

ALEXANDER FRASER CRAWFORD—*Shand and Macconochie.*

INDICTMENT—RELEVANCY—THREATENING LETTERS.—Held, 1st, That it was not necessary, in an indictment charging the sending of threatening letters, to negative the truth of the charges therein contained. 2nd, That the *veritas* of the charges made could not be proved, either in justification or mitigation, by the pannel.

ALEXANDER FRASER CRAWFORD, clerk or writer, was indicted and accused, That albeit, by the laws of this and of every other well-governed realm, the wickedly, maliciously, and feloniously, Writing and Sending, or causing to be written and sent, any Threatening Letter, particularly for the purpose of extorting money, is a crime of an heinous nature, and severely punishable :

No. 53.
Alex. F.
Crawford
High Court,
Jan. 6. and
Feb. 11.
1850.
Threaten-
ing Letters.

YET TRUE IT IS AND OF VERITY, that you the said Alexander Fraser Crawford are guilty of the said crime, actor, or art and part : IN SO FAR AS, on the 30th day of August 1849, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, within or near the house situated in or near Potterrow, in or near Edinburgh, then and now or lately occupied by Angus M'Kay, a type-founder, then and now or lately residing there, or at some other time and place in or near Edinburgh or elsewhere to the prosecutor unknown, you the said Alexander Fraser Crawford did, wickedly and feloniously, write, or cause or procure to be written, maliciously, a threatening letter, conceived in the following or similar terms :—

' Mackays Lodgings

' 39 Potter Row 30th Aug^t 1849

' Sir,

' After the many years I have been in your employment,
' and during which time I served you as faithfully as if you had been

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High Court.
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ing Letters.

‘ my own father, I have been at a loss to account for your very ex-
 ‘ traordinary and unfeeling conduct towards me since I left you in
 ‘ January last, and can now only account for that conduct as indi-
 ‘ cating a wish on your part to withhold the £1000 you are due me
 ‘ in terms of your bargain with me on the Sea Shore of Ardrossan in
 ‘ the year 1835. I need hardly mention that that bargain (which I
 ‘ have again and again asked you to implement) was, that I should
 ‘ shew that the funds of John Crawford situated in Scotland were
 ‘ equal to the payment of his Scotch debts. This you know I con-
 ‘ vinced you of many years ago, and indeed had it not been for your
 ‘ own grasp-all disposition the whole of the Scotch debts might have
 ‘ been paid and settled during the year 1837, leaving a large reversion
 ‘ in favour of your father-in-laws family. For this acting on your
 ‘ part however I am not to blame and therefore I shall not submit to
 ‘ the reason you have oft assigned for withholding from me the pay-
 ‘ ment of this £1000. Namely that I was not only to make it clear
 ‘ that the Scotch funds would pay the Scotch debts, but was to remain
 ‘ perfectly teetotal during the time of my being occupied in bringing
 ‘ out such a result. You know well that no such condition as the
 ‘ second was ever mooted by you, and I have therefore now to state
 ‘ that with the view of saving further discussion between you and me
 ‘ I shall restrict my claim against you for this £1000 to £200, and
 ‘ an assignation to the £100 due you by my father, along with such a
 ‘ character as my unswerving exertions for the benefit of yourself and
 ‘ your father-in-law’s family merits. If these conditions are refused
 ‘ I shall then furnish a Copy of this Letter with the following infor-
 ‘ mation to Mess^{rs} Jollie, Mr Hill, Mr Ranken, Mr Balfour, Dr Ar-
 ‘ thur, and to Mess^{rs} Stephen Rowan Crawford and Jas Crawford
 ‘ through their agent here Mr Macrae, which will put your actings in
 ‘ various ways in their proper light:—

‘ 1st. *Debts against John Crawford’s Estate purchased by you.*

‘ In you whole correspondence and in the whole proceedings before
 ‘ the Court you have constantly affirmed that these debts were not
 ‘ purchased by you for the benefit of John Crawford’s family, or
 ‘ under any factory granted in your favor by your mother in law
 ‘ M^{rs} Crawford. Both of these statements you know to be utterly
 ‘ untrue as they were bought by you under and in virtue of a factory
 ‘ granted to you by M^{rs} Crawford in the year 1833. This factory
 ‘ tho’ unrecalled you have taken care to keep out of view. The money
 ‘ you drew and have still to account for on account of these debts will
 ‘ do much more than pay the £1000 & interest due to M^{rs} Mollison’s
 ‘ Trustees, as well as save some thousands to John Crawford’s Estate
 ‘ being the interest still payable upon these debts for which you have
 ‘ no claim against his funds.

‘ 2nd. *Vitiations made by you in the Bill Book, Day Books and
 ‘ Ledgers of John Crawford & Co. in the year 1835.*

' You are aware that after proceedings were adopted in Court by Mr George Boyd Hay, by Mrs Bonn, by Stephen Rowans Ex^{ors} and others, you founded on the alterations so made as if they had been done at or about the time of John Crawford & Co^s Bankruptcy in 1816. These you know I can easily point out. This conduct without any advice from me the Creditors referred to will know how to appreciate after these facts are made known to them.

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' 3rd. *John Crawford's Ledger.*

' You also know that the Accounts of Mr John Cumming and of Stephen Rowan in this Ledger were altered by you with the view of preventing these parties from getting payment of two promissory notes due to them by John Crawford, the one for £500, the other for £2500. In this attempt you have hitherto been successful, but will be so no longer after the facts now stated are made known to the parties interested.

' 4th. *Interlocutor of 7th March 1835.*

' You are aware that you altered this Interlocutor with the view of making it appear that the dividend which it ordered was a fixed one of 14/ per pound, instead of a general payment to account under certain conditions. The serious nature of this offence you know too well to require my dwelling upon it.

' 5th. *As to the £1000 guaranteed by you to Mrs Mollison's Trustees.*

' You are aware that in your examination in reference to this debt you gave your oath before the Commissioner that you did not know where the original agreement between these Trustees Mr Wilson and yourself was, altho' I had previously shewn you that it was in the hands of Mr Patrick W.S. You also swore that you had produced to the Commissioner every Letter connected with your liability for this £1000, knowing well that many of the most important Letters were kept back by you.

' 6th. *Bond for £2000 by Mr Charteris in favour of your mother in law Mrs Crawford.*

' You have alleged to her family that you uplifted this sum and interest with her consent, and that you afterwards accounted therefor to her, knowing both of these statements to be untrue. Neither Mrs Crawford nor Mr Wilson who you say got the money was aware of where it came from altho' you no doubt wrote Mr W. that you had to borrow money to oblige him, but from whom you have never yet stated in so far as know.

' 7th. *Factory granted to you by Mrs Crawford in 1836.*

' You have ever since Stephen Crawford's return in 1838, stated this factory to be the first,—knowing as already stated that this statement was untrue. This factory of 1836 was as you know a mere nominal matter, being executed to prevent John Crawford's

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ing Letters.

‘ Creditors from appointing a factor in the room of Mr M'Lachlan who died in that year.

‘ 8th. *Mrs Crawford's Trust Deed of 1833.*

‘ You know that in the whole proceedings which have taken place in Court in regard to this Deed, you have held it up as an existing document, notwithstanding the fact that you gave up every right you had under it, as well as Mr Wilson. This is proved by your Letter to that gentleman in 1839. In these proceedings you have also stated that the addition made to this Deed after your wife's death was suggested and prepared by Mr Patrick, while you know well that this is an utter untruth. They were suggested and prepared by the late Mr James Donaldson, as his Letter to you, but which you have hitherto concealed, will prove.

‘ 9th. *Chancery Money.*

‘ You know that in accounting for these funds you have brought against them upwards of £8000 for my labour from the year 1835 to 1843 for which you have no legal claim,—Altho' you promised to me that I was to receive a per centage on the amount of my said labour, which like your other promises I am of opinion you had no intention of keeping when you made it. But be this as it may, I contend you cannot bring against these funds more than you actually paid to me during the period stated, which will not amount to more than £800. You can farther have no claim for the £4000 odd you charge as commission for the drawing these funds. The mode in which you are bound to make your charges against this money is established by your account which Mr Wilson docketted in June 1835.

‘ 10. Your Manifold Writer.

‘ You have again and again all but affirmed that Mr Stephen Rowan Crawford had stolen this useful apparatus out of your writing room and had thereby become possessed of, and kept up Letters which you had written to your mother in law, giving her as you alleged States or Memoranda of how you had expended the money you drew from Chancery. Now the truth is that that manifold writer was in the hands of your own family—and that every Letter it ever contained were returned to you in the packet about which you made such a noise and incurred so much expense,—but still not one of these Letters gave any information to Mrs Crawford or to any one else as to how you had expended the Chancery money—Altho' I believe a part of it crossed the Atlantic and another part of it purchased a House in James Square, but as to which I shall, in the meantime, say no more,—though I beg of you not to suppose that such is not fully in my power.

‘ Before making any communication to third parties (except to your Agent Mr James Macknight) on the subject of this Letter I

‘ shall wait till the forenoon post of Monday first for your reply. If
 ‘ I do not hear from you by that time you will have yourself for my
 ‘ then following the line of conduct I have stated in a previous part of
 ‘ this Letter.

‘ I am Sir

‘ Your mo obed^t servant

‘ Alex. F. Crawford.’

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 ing Letters.

and you did, time and place aforesaid, address, or cause or procure to be addressed, the said letter, at the end thereof thus:—

‘ To W^m Crawford Esq^r }
 ‘ of Cartsburn’ }

which letter was meant and intended by you for William Crawford of Cartsburn, then and now or lately residing in or near Bellevue Crescent, in or near Edinburgh: FARTHER, time above libelled, within or near the house situated in or near Bellevue Crescent aforesaid, then and now or lately occupied by the said William Crawford, you the said Alexander Fraser Crawford did, wickedly, maliciously and feloniously, leave or deliver, or cause or procure to be left or delivered, the foresaid threatening letter, addressed as above, with some person or persons to the prosecutor unknown, then and now or lately in the service of, or residing with, the said William Crawford, for the purpose and with the intention of the said letter being delivered to the said William Crawford; and the said letter was, on or about the following day, or within some short period thereafter, received by the said William Crawford; and all this you the said Alexander Fraser Crawford did for the purpose of extorting money from the said William Crawford: LIKEAS (2.) on the 10th day of September 1849, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, within or near the foresaid house situated in or near Potterrow aforesaid, then and now or lately occupied by the said Angus Mackay, or at some other time and place in or near Edinburgh or elsewhere to the prosecutor unknown, you the said Alexander Fraser Crawford did, wickedly, maliciously, and feloniously, write, or cause or procure to be written, a threatening letter, conceived in the following or similar terms:—

‘ Mackays Lodgings 39 Potter Row

‘ September 10th 1849

‘ Sir

‘ I received your Letter of the 5th Instant the contents of
 ‘ which do not surprise me as any one who had been guilty of the de-
 ‘ ceipt and duplicity exposed in my communications to you can very
 ‘ well afford to deny and apparently reprobate any truth. In that
 ‘ Letter you state that my communications to you and to your Agent
 ‘ created surprise and indignation. That they may have surprised
 ‘ your Agent I can well believe, but that they surprised you I have

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' no hesitation in saying that this could only have arisen from your
' having thought I would never reveal under any circumstances what
' I state in my Letter to you ; or you must have laboured under a very
' strange misconception of the extent of my recollection.

' I shall now shew you that if what I state is calumnious, it is not
' the less true, and that it is in my power to prove these allegations.
' But before doing so I beg to premise that I am neither actuated by
' ingratitude, nor by anything dishonourable, altho' you negative my
' allegation as to your promise of £1000 to me God and your con-
' science best knows that you did make that promise, and the reason
' for your doing so was very plain, viz., that you wished to have the
' whole Chancery money for division among yourself and your Father-
' in-law's family. Mr Wilson as you know was willing to give up-
' wards of £8000 (Marryats dividends) to insure this result.

' The first of my allegations is that you under a factory of 1833
' purchased up the debts against Your Father-in-law's Estate. If
' you refuse to produce this factory I have a copy of it in my posses-
' sion. I presume you will hold this as sufficient evidence to substan-
' tiate the truth of this allegation.

' 2nd & 3rd. The Books referred to and the Report taken by
' Mess^{rs} Jollie on these Books, by two eminent Accountants will
' prove these.

' 4th. As to the Interlocutor of 7th March 1835, will be proven by
' that paper itself, and by what you will no doubt recollect of my
' having mentioned to you about it 18 months ago that Mr Henry
' (Jollies Clerk) threatened me with criminal proceedings as to this
' very alteration.

' 5th Is regarding the £1000 you guaranteed to Mollison's Trustees.
' that your Oath in this Case was inconsistent with truth I need only
' refer to your Deposition in which it will be seen that you distinctly
' *swore* that you did not know where the original agreement was,
' altho' as I again repeat, I pointed out to you in the copy Inventory
' of original papers handed over by you to Mr Patrick that that docu-
' ment was in his possession. That you kept back letters of the utmost
' consequence against yourself will in this Case be proven by the
' letters so retained

' 6th. As to Charteris' Bond. The Discharge you granted for this
' Bond will shew I have no doubt that you uplifted the money under
' M^{rs} Crawford's factory of 1833,—and I defy you to shew that
' M^{rs} Crawford was aware you did so, or that you ever accounted to
' her for a penny of the money. Every Shilling you gave her was
' under the Agreements between you and her. This is proved by the
' Agreements which were prepared by Mr Donaldson in the year
' 1833, and Copies of which were sent to Mr Wilson to London in
' that year. The various discussions between you and him on this
' Subject were too long for my here detailing them. They are fully

‘ detailed however in the Correspondence between him and you a large
 ‘ proportion of which has not even been seen as yet by your own
 ‘ Agents. I also defy you to produce a Discharge by Mr^s Crawford
 ‘ for this money, or the scrape of a pen that she was aware you had
 ‘ uplifted it much less that you had given her any account of it.

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‘ The 7th requires no proof further than what I have already stated
 ‘ and the Letters which were written to you by Mr^r M^cNaught and
 ‘ Mess^{rs} Jollie.

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 ing Letters

‘ 8th Is regarding Mr^s Crawford's Trust Deed of 1833. I have
 ‘ only again to refer to your Letter to Mr Wilson in Dec^r 1839 and
 ‘ to Mr Wilson's Letter to you brought to this Country by Mr Stephen
 ‘ Rowan Crawford in Nov^r 1838.

‘ 9th Is as to how you accounted for the Chancery money. My
 ‘ Proof on this subject is the Accounts for my labour made by you
 ‘ and your general Account against these funds, a copy of which is in
 ‘ the possession of Mr James MacKnight. I am now preparing and
 ‘ will soon have ready a State of what that Account should be. It
 ‘ will shew that Mr Stephen Rowan Crawford was not far wrong in
 ‘ the sum he held you to be due to his father's Estate.

‘ As to the 10th allegation, I beg to refer you to my own family
 ‘ who know something of the matter. As to the money that crossed
 ‘ the Atlantic I allude to a man in New York taking the name of
 ‘ Alex^r Watson though his proper name is Alex^r Waugh. This
 ‘ man as you well know left Edinburgh charged with embezzling a
 ‘ large proportion of the City funds, and hence the cause of his chang-
 ‘ ing his name even when he reached America. You have the merit
 ‘ of not only communicating with this man, but in trusting to his care
 ‘ a part of the Chancery funds, and as to the house you purchased in
 ‘ James Square, it was for the benefit of the sister of this very man,
 ‘ and who is still kept by you in East Broughton place, and in whose
 ‘ company you know you have spent nearly every night for many
 ‘ years past. I can add much to this when I choose, but have no wish
 ‘ to do so.

‘ I have now shewn you whether the statements I have made against
 ‘ you are calumnious or not, and as to your allegation that I wish to
 ‘ extort money from you, I, to use your own expression, utterly de-
 ‘ spise such an insinuation. I have only asked you to fulfil in part a
 ‘ promise solemnly given by you to me, and which I never thought
 ‘ you would deny, otherwise you may rest assured I would never have
 ‘ spent so many fruitless years in your employment. Ingratitude can-
 ‘ not therefore rest with me. You pocketed thousands while you paid
 ‘ me with hundreds. You are now only acting however in the way
 ‘ I have been told even by your own friends and relations you would
 ‘ if I had not black and white upon any bargain I had with you. In
 ‘ addition to the statements I have already made I have still one as
 ‘ grave as any of the rest—namely—that you in the year 1836 got

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‘ me to obtain for you a Notarial Copy of your Marriage Contract,
‘ which copy in place of being made from an original was made from
‘ one given to me by yourself—The Copy you so obtained as I believe
‘ you produced in the Court of Chancery. The proof of this is your
‘ own son Mr Thomas, Mr Swanston the Messenger in Edinburgh, and
‘ the Witnesses who signed the Notarys false Certificate.

‘ As I have now given you the proofs of my allegations, I again re-
‘ peat that I have no wish to expose these, nor will I do so, if you will
‘ do me anything like justice—if not you leave me no other alterna-
‘ tive but to seek redress as I best may.

‘ You charge me with innumerable irregularities, broken promises,
‘ and oaths, but had you had even a spark of honor you would have
‘ explained what you meant by these expressions. They merely
‘ amount to this that I sometimes got the worse of drink, and nothing
‘ more. When I made these promises they were made in good faith,
‘ and would have been kept had it not been for the dreadful life my
‘ wife and family made me live at home.

‘ If I do not hear from you either through a private channel or
‘ otherwise by Tuesday first (to morrow) I shall then make use of my
‘ information in whatever way I think fit.

‘ I am,

‘ Sir

‘ Your obed^t Serv^t

‘ Alex. F. Crawford.’

And you did, time and place last above libelled, address, or cause or procure to be addressed, the said last-quoted letter, at the end thereof, thus:—

‘ W^m Crawford Esq

‘ of Cartsburn

‘ 5 Bellevue Crescent,’

which said last-quoted letter was meant and intended by you for the said William Crawford: FARTHER, time last above libelled, within or near the said house, situated in or near Bellevue Crescent aforesaid, then and now or lately occupied by the said William Crawford, you the said Alexander Fraser Crawford did, wickedly, maliciously, and feloniously, leave or deliver, or cause or procure to be left or delivered, the foresaid threatening letter last above libelled, addressed as above, with some person or persons to the prosecutor unknown, then and now or lately in the service of, or then residing with, the said William Crawford, for the purpose and with the intention of the said letter last above libelled being delivered to the said William Crawford; and the said letter last above libelled was, on or about the said last-mentioned date, or within some short period thereafter, received by the said William Crawford; and all this you the said Alexander Fraser Crawford did for the purpose of extorting money from the said William Crawford.

The counsel for the pannel objected to the relevancy of the indictment. The major must be taken to be one substantive charge, and read altogether. The word particularly not being inserted for the purpose of charging an aggravation merely, the allegation was, that the pannel had been guilty of sending threatening letters for the purpose of extorting money.

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This was admitted on behalf of the Crown.

It was then objected, that the minor did not answer to the charge there made. It was said that the letters were written for the purpose of extortion, and the indictment was open to two objections. 1st, That it did not negative the truth of the charges made in the letters against the party to whom they were sent; and, 2dly, It did not deny that the alleged debt claimed therein was due. All the precedents of indictments for sending threatening letters, imputing offences, had negated the truth of the statements contained therein, by setting forth, at the end of the minor, that the pannel knew the statements in the letters to be false (case of *Ledingham*, Aberdeen, April 14. 1842; Broun, vol. i. p. 254.) Not having negated the truth of the charges contained in the letters, the pannel was entitled to assume that the allegations he had made therein, as to the conduct of the party to whom they were sent, were true, and that he would be able to substantiate their verity on the trial. But,

2dly, It was alleged that these charges were made for the purpose of extorting money, whilst the indictment did not negative the allegation of a just debt contained therein. Extortion could not be the obtaining of money due, by whatsoever means. As used in a criminal sense, it must signify an endeavour to obtain, by means of threats, money to which the party had no right. In the statute 7th and 8th Geo. IV. cap. 29, section 8,¹ which

¹ By the 7th & 8th Geo. IV. c. 29, § 8, it is enacted, ' That if any person shall knowingly send or deliver any letter or writing, de-

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formed the code of England applicable to the sending of threatening letters, it was required that the party should have done so without reasonable or probable cause; and in the case of the *Queen v. Mein* (1 Cox, Criminal Cases, p. 22, Tyndal, C. J.), held, that on the construction of the statute, the Jury must be satisfied, before they could convict, not only that the party had no reasonable or probable ground in law to make the demand, but that she believed that she had none such at the time of writing the letter. Such was the construction put thereon by the text writers on English law, Russell on Crimes, vol. ii. p. 709, et seq. This was analagous to what was required in Scotch law, in cases of reset of theft and otherwise, where guilty knowledge must be averred.

DEAS.—The last objection was sufficiently answered by all the precedents which were in the form which had been adopted in the present case, concluding that all was done for the purpose of extorting money. That was reasonable; for even should it be proved that there was a just debt owing to the party who sent the letters, the law would not allow such a mode of enforcing payment, as threatening to accuse the debtor of heinous or infamous offences, in case payment was not made by the time he appointed. It was the preferring of such

‘ manding of any person, with menaces, and without any reasonable
 ‘ or probable cause, any chattel, money, or valuable security; or if
 ‘ any person shall accuse or threaten to accuse, or shall knowingly
 ‘ send and deliver any letter or writing accusing or threatening to
 ‘ accuse, any person of any crime punishable by law with death, trans-
 ‘ portation, or pillory, or of any assault with intent to commit any
 ‘ rape, or of any attempt or endeavour to commit any rape, or of any
 ‘ infamous crime, as hereinafter defined, with a view or intent to ex-
 ‘ tort or gain from such person any chattel, money, or valuable security;
 ‘ every such offender shall be guilty of felony, and, being convicted
 ‘ thereof, shall be liable, at the discretion of the court, to be trans-
 ‘ ported beyond the seas for life, or for any term not less than seven
 ‘ years, or to be imprisoned for any term not exceed four years, and,
 ‘ if a male, to be once, twice, or thrice publicly or privately whipped,
 ‘ (if the court shall so think fit), in addition to such imprisonment.

charges that was the substantive matter of offence, and that was totally irrespective of the right to demand payment in a legal way. The matters of which the party was accused in the present case were of the most heinous description, not only sufficient to destroy character, but which would, if proved, subject him to heavy criminal penalties.

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The other objection, that the indictment did not negative the truth of the charges made, was important, and the present indictment had been drawn after grave consideration. There was no direct authority as to whether there was any necessity for so negating the truth of the charges, though he would admit that the precedents did negative the truth.

The LORD JUSTICE-CLERK.—Are we to assume that the charges are false, without your having stated them so to be? Take the charge of having altered an interlocutor. The pannel may prove that such alteration took place.

DEAS.—It is not the same thing to say that I must set forth that the charges were false, and that I must prove them to have been so.

The LORD JUSTICE-CLERK.—If it would be a good defence to prove the *veritas*, surely you must negative it in the charge.

DEAS.—The judgment to be pronounced will enter very deeply into the question, as to whether the pannel could lead evidence to support the truth of his accusation.

The LORD JUSTICE-CLERK.—It is very proper that you make that suggestion. I think that in giving you an interlocutor of relevancy we should absolutely decide the point, that the party could not lead evidence as to the truth of the charges he made. In the case of *Pater-son*, High Court, November 8. 1843; Broun, vol. i. p. 629, after an interlocutor of relevancy, to which the party made no objection, he wished, in his address to the Jury, to have demonstrated the untruth of several passages

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of the Bible, but the Court refused to allow him to do so after that interlocutor had been pronounced; and it is the great advantage of the interlocutor of relevancy in the law of Scotland, that what is alleged in the major is thereby fixed to constitute an offence which cannot thereafter be redargued.

DEAS.—It was not necessary to prove falsehood, and therefore it was not necessary to set it forth. And, 2dly, the truth or falsehood of the accusations made had nothing to do with the offence. The pannel had not said in his letter that he would inform the public authorities. All the parties named were private individuals. This was an attempt to compound justice, which was criminal in itself. If the pannel could enter into a proof of the *veritas* of his charges, every man would be liable to be put upon his trial for the most heinous offences, if any such should be imputed to him by parties who had threatened him with exposure. That would be contrary to the spirit of the law. It would also be inextricable in practice, as a counter-proof would then be necessary, and the effect would be, to place every person to whom a threatening letter was sent, in such a position that he would have no alternative but pay money rather than pass through so painful an ordeal. In so far as the English decisions on the statute referred to threw any light on the subject, they were in favour of the construction contended for on behalf of the Crown. In the case of the Queen v. Hamilton, 1 Carrington and Kirwan, p. 212, Rolfe B., held it to be immaterial whether the charge contained in the letter was true or not. This was an interpretation of a statute wherein to constitute guilt, want of reasonable and probable cause was required, and must be considered as having been adopted as being most in accordance with the common law, which interpreted the want of reasonable and probable cause to the obtaining of the money only, and not to the preferring of the charges contained in the letters.

The Court having considered for some time,

The LORD JUSTICE-CLERK said, it is unnecessary for us to deliver opinions in this case, as we think that the indictment might be much improved as regards one of the objections, namely, that it does not negative that the debt claimed in the letter was a just demand. We think this should be more distinctly set forth than in the present indictment, either by a distinct negative *in toto*, or by stating that the amount demanded was greater than any sum acknowledged by the party from whom it was claimed, or that it was not constituted, or that it was compensated by counter demands, or in any other similar manner shew that the party had no right to instant payment; but we don't decide that such an amendment would entirely remove the objection. As to the second objection we give no opinion whatever. If the Crown wish the question to be settled, they will consider whether they should frame any other indictment in a corresponding manner. If the question arises, probably the whole Court will consider the matter, when that judgment will be pronounced which seems most consistent with the general law of the land.

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On the motion of the Advocate-Depute, the Court deserted the diet against the pannel *pro loco et tempore*.

Thereafter, of this date, the pannel was again indicted on a libel containing the following addition to each charge:—

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' You well knowing that the money of which you demanded payment from the said William Crawford as aforesaid was not justly due by him to you, or was not admitted by the said William Crawford to be justly due by him to you.'

The arguments were substantially the same as on the former occasion.

The LORD JUSTICE-CLERK.—This case is most important, in respect of both the objections which have been taken to the indictment. I apprehend that those objec-

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tions are connected more than has been assumed in the course of the argument ; and I think the reasons which apply to the repelling of the first objection have equal application to the second, as to the necessity of averring the falsehood of the accusations threatened to be made.

The true question is, what is really the essence of the crime that is charged in the major, under the circumstances ? No objection is taken to the major in this case. On the contrary, it is admitted to be good, and both objections resolve themselves into this, that the minor does not come up to it. To my mind, the argument is fallacious. The act of *sending a threatening letter*, for the purpose of getting money, instead of resorting to due form of law in order to its recovery, is the crime. Every man has a right to make his answer in a court of law to all demands made against him, whether the Court thinks his case good or not ; and the only punishment that can be awarded against him, if his case be bad, is to subject him to costs, and, in special classes of cases, he may be liable in damages ; but before the case is tried in form of law, no assumption whatsoever can be made on the justice or injustice of his resisting a demand. If it were necessary, in the case of a threatening letter, to shew the *mala fides* of the party in making the demand, to convert which into payment is the object of the letter, it would exoner all persons in sending threatening letters ; for it would be scarcely possible to shew that such party did not entertain a strong belief that his demand was just. The more wrongheaded the party, the more would he believe that he was an injured man, and that his demand was just. To require it to be averred that he had no belief in the justice of his claim would therefore, in my opinion, be absurd. The crime consists in using the threat to concuss a person into paying a demand which he intends to resist ; and the crime, the use of the threat for that purpose, is the same, whether the party using the threat thinks his demand good or bad.

The second objection is, that the indictment does not aver that the accusations contained in the letter were false, and known to be false. The first point here is, whether there is any such practice in the style of indictments as to create a presumption in favour of the necessity of this averment in the indictment, as necessary for the relevancy of the indictment. In the case of *Ledinghame*, the circumstances perhaps might be thought to justify the prosecutor in disproving the charges contained in the letter; but the style adopted in that indictment, instead of being an ordinary one, is quite opposed to the common form, and was, I believe, now causelessly so. In the case of *Murray*, tried at Perth in 1820, where the party was transported for seven years, the indictment did not negative the truth of the charges contained in the letter. No doubt there were in that case threats of personal violence, which made it less important that the truth of the accusations should be denied; but in the case of *Millar*, in 1831, for demanding deeds from Lady Mar, and a threat of exposing certain mal-practices on her part, the indictment does not gainsay the truth of the allegation. The like observations apply to the cases of *Douglas*, 1837, and *Nelson*, 1839, where in neither case was there any allegation that the charges made were untrue. The case of *Ledinghame* is the first in which I have been able to find any allegation that the charges contained in the threatening letter were untrue; and I observe that in subsequent cases that the style adopted in that case has not been observed. In the case of *Buchanan*, 1842, *Ross*, 1844, *Balfour*, 1844, *Muir*, 1844, *Balfour*, 1844, *Smith*, 1845, there was not any negative of the demand claimed being due, or the truth of the accusations made.

These examples are sufficient to shew that there is no practice so commonly observed as to create any presumptive case in favour of the objection.

The question therefore arises, is there any principle which requires the public prosecutor to allege and prove

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the falsehood of the demand, and also of the accusations made ?

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In considering this, I must take into consideration the question, whether in defence or mitigation the *veritas* of the accusation can be proved in behalf of the pannel. It would be impossible, in my opinion, to separate the two points, and it would be very improvident to decide the one without looking forward to the other point, although that more directly will arise in the course of the trial. And it is much more convenient to consider the point now.

Now, as I have before said, the criminal offence is sending a threatening letter, with the view to extort money.

The first objection is, I think, utterly untenable, when the nature of the offence is considered. Take the case of a threat of personal violence. Can the crime of using such a threat depend on the justice of the debt? Is it to be contended, that if a man's debt can be shewn to rest on probable grounds, he is innocent of any crime when he uses a threat of taking life, if that debt is not immediately paid? That is absurd. Every man has a right to dispute the demand of his creditor in a court of justice, and it is no answer to a charge of threatening to burn his house, to say that the debt which the party sought by that threat to recover was really due. Now, there can be no difference as to the nature and essence of the crime from the character of the threat: The crime is the same, whether the threat is of personal violence or of the character of those contained in the present case. The crime charged against the pannel is, his having endeavoured to extort money, by means of threats, and that crime is equally committed, whether the party using the threat has a good or a bad debt, and whether he uses a threat of personal violence, or such threats as here. I think it could not be left to the jury to say whether he had a right to recover something from the party whom he threatened to expose, any more than when he threat-

ened personal violence ; and, in either case, if the threat is used, I think it could not be left to the jury, as any answer to the charge, to say whether the debt was just, or rested on probable grounds. Reference has been made to the English law, and to the necessity of proving by that law that the demand was without probable or reasonable cause ; but that law is altogether statutory, and it is not for us to construe an English statute. Moreover, under that law, in all the cases in which a prosecution has taken place, the party threatened has been the private prosecutor ; and I can readily conceive, that the conduct of the private party may have been considered as inseparable from the nature of the crime ; for, were any objection to be taken to the counsel for the pannel endeavouring to establish, by cross-examination, that the charges preferred in the letters were true, the jury would at once assume that they were so, and might perhaps act accordingly. The case assumes a totally different aspect here, where we have a public prosecutor, who has to look to the public interest only, and affords another illustration of the immense advantages our system affords over that observed in the other end of the island in criminal proceedings. When the statute is passed on such matters in criminal law, it is often very difficult to frame it so as to be adapted to the offence ; and these statutes are often passed with too little consideration. If the statements as to English law are correct, it seems to follow, that if a man's claim rests on probable grounds, he may, with impunity, use any threats well calculated to intimidate ; and that absurd result seems to follow from the ill considered terms of the statute. In Scotland the offence rests on common law, and therefore the *principle* of the case depends on the real essence of the crime.

The like observations apply to the second objection, namely, that the indictment does not aver that the charges were false, and known to the pannel to be false. Again, we must here consider what is truly the offence the party

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is alleged to have committed. Plainly that of having used threats for the purpose of obtaining money. That, and that alone, is the essence of the charge. Now, supposing the threat had been one of personal violence, at a particular time and place, would it be any answer to say, that the threat was an idle boast, and that the pannel did not intend to do any harm? Would he be permitted to shew this, viz. that he had arranged with his friends that they should be present, to be able to prove that he had remained within doors, and never proceeded to execute the violence he had threatened? Surely not, if the object of the threat was to extort money. The crime would be complete by using the threat. Here, indeed, the threat is different, but that surely makes no difference. It is equally no answer to the charge, that he undertakes to prove the accusation, which he threatens to make known to others. For himself, he has no interest to come forward as private prosecutor. His only right was to give information to the public authorities, in doing which, he was entitled to a large protection, on principles of public policy. Now, suppose a crime to be committed by a party abroad, in early life, when, after a period of thirty or forty years of correct conduct, he returns home with a well earned fortune, and that some one happens to know of this early delinquency, and threatens to expose him unless payment is made of a sum of money: Is the crime of sending a threatening letter not the same, whether the charge be true or false? Or is not the indictment equally relevant, whether the falsehood of the charge which forms the threat be alleged or not? And if the indictment would be relevant without alleging the falsehood, I cannot see how the truth of the charge of *veritas* would be relevant, or an answer to the charge, or could be allowed even in mitigation. It is no part of the charge, that the accusations in the letter were false. The charge is, that the pannel made a threat, in order to extort money; and that being so, I do not see how, in logic or in law, the *veritas* is

relevant as an answer to the indictment, or in alleviation.

The observation of the Lord Advocate, that the object of the threat would be completely secured if the pannel were allowed to enter into any investigation of the truth of his charges, either in justification or extenuation of his offence, seems to me most important. That would make the criminal law not a protection to the threatened party, but the means of injury, and would thereby secure to the party the most unlimited and public means of propagating his charge, without any answer. For observe, if it is not necessary to allege the falsehood, the public prosecutor's case would be proved by establishing the threat, with the intent with which it was made. He has no replication to the proof in defence. If the pannel were to be allowed a proof of the kind proposed, it would be in vain to talk of protection to the accused party. He would have no means of controlling the course of the trial; and if he had, it would not be allowed to him to bring affirmative evidence to answer the pannel's defence.

I also attach much importance to the necessary inconvenience which must arise if such a proof were to be held competent. I do not say that inconvenience is absolutely conclusive as to the course to be pursued, as in a civil case; but it is extremely important, either in civil or criminal cases, not to allow collateral issues; and unless we had some precedent to guide us, or some important principle of justice to be served in the present case, I am not disposed to allow an issue so plainly collateral to be raised on so important a matter, thinking, as I do, that every principle of justice is opposed to the course proposed.

In so far as a proof of the *veritas* is proposed to be led, by way of extenuation, I think it equally irrelevant, even assuming the charge contained in the threat to be true. The threat held out is the issue the jury have to try, and all that the Court would look on in determining the punish-

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ment. I wish to reserve my opinion on one point which might arise as to one part of this indictment. I am not prepared to say that a threat of making public that a party is living in an immoral and incorrect way, is sufficient to render the party making such threat amenable in a criminal court, though that be done to extort money. On this question I give no opinion, as it may be contended, with some plausibility, that public policy ought not to interfere to prevent such exposure, if parties choose, by their immoral life, to expose themselves to such threats; and I reserve myself until that point shall arise. It may arise in the trial, and the facts may affect the relevancy of the allegation, either as a defence or a mitigation. If a married man, for instance, is living in adultery with a woman, whom he visits in a house, though it may not be known to his family, I am not at present prepared to say, that, if a person gets that hold over him, and threatens to expose him, if he does not buy his silence, either such a threat ought to be subject of criminal trial, or the truth might not be proved. I reserve my opinion on both points.

LORD MACKENZIE.—I concur in the conclusion at which your Lordship has arrived, and in the reasons on which you have founded your judgment. I think the first objection, that the libel does not negative that there was a debt due, is not well founded, and that it is equally a crime, whether the sum demanded was a debt or otherwise.

No man is entitled to take the law into his own hand. If it was a relevant defence to prove that there was a good demand against the debtor, it would then be equally available, whatever was the nature of the threat used; consequently it would be no crime if the threat was one that the debt would be enforced by personal violence, or by holding a pistol to the head. It is said that that would be robbery; but what is robbery? There can be no doubt that that crime would be perfected if the money

were obtained by means of threats of personal violence. If such defence were admitted, it would overturn every principle of law.

As to the second objection, if it was good, it would apply equally whether the application for payment of a debt was good or not, and this I cannot hold. If a party has committed an offence, his creditor's right is either to inform the public prosecutor, or to make an application for payment of his demand, without any threat of informing other parties. To attempt to obtain payment of a civil debt by means of suppressing evidence of a criminal offence seems to me unwarrantable in law.

It only remains to be considered, whether proof of the *veritas* is admissible either in exculpation or alleviation. I do not think that it is; and for the reasons stated by your Lordship, on which I do not think it necessary further to enlarge.

LORD MONCREIFF.—I am of opinion that this indictment is relevant. I do not consider that it is necessary for the prosecutor to allege either, on the one hand, that the debt demanded was not due, or, on the other, that the accusations by means of which it was attempted to be enforced were untrue. It seems to me that the offence is complete so soon as the party attempts to enforce either legal or illegal demands by illegal means.

As to the second objection, I think that it would be far worse to hold that a criminal charge could not be sustained, unless the indictment negatived the truth of the accusations contained in the threats. As mentioned by your Lordship, it would be giving the accusing party the full opportunity of stating publicly in Court what he had promised otherwise to conceal, in case his demand were acceded to, that he be allowed to lead evidence of the *veritas*. It would be very dangerous if such were the law. In the main, I concur in what your Lordship has so well explained.

LORD COCKBURN.—I entirely agree, in so far as it is necessary, to repel the objections taken to the relevancy

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of the indictment. As to the other point, as to whether it is competent to the pannel to lead evidence either in justification or allevation, I feel some difficulty; but in consequence of the opinions I have now heard, I do not wish to do more than reserve my opinion, until the question shall distinctly arise.

LORD IVORY.—I agree with Lord Cockburn, as well in repelling the objection to the relevancy of this indictment, as also in reserving my opinion on the competency of any special questions, by way of defence, until the same shall distinctly arise.

The objection to the relevancy was thereupon repelled.

Thereafter the pannel pleaded guilty to the sending of the first letter, as libelled.

In respect of which judicial confession, the Court adjudged the pannel to be imprisoned for the space of four months.

Present,

LORD JUSTICE-CLERK,

LORDS MONCREIFF, COCKBURN, WOOD, and IVORY.

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DANIEL BURNS, Suspende—*Deas—Millar*.

AGAINST

RICHARD JOHN MOXEY, Respondent—*Neaves*.

SUSPENSION—VAGRANCY.—Circumstances in which the Court suspended a conviction in the Police Court, on the ground that the original complaint charged no cognizable offence.

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Burns v.
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Suspensi.on.

THIS was a Suspension of a conviction on a charge of vagrancy, proceeding on a complaint which narrated that the suspender and others 'did all and each, or one or more of them, in contravention of the Edinburgh Police

‘ Act 1848,¹ conduct themselves as vagrants, by being
 ‘ found on the 14th day of February 1850 years, or about
 ‘ that time, in the house situated in St James’ Square,
 ‘ in or near Edinburgh, occupied by Jane Marshall or
 ‘ Russel, and by Jane Brash or Shiells, or by one or other
 ‘ of them, or by some other person or persons to the
 ‘ complainer unknown, idle, and having no fixed places
 ‘ of residence, had no lawful means of gaining their live-
 ‘ lihood.’

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On the same date the Judge found the complaint proved against the accused, and sentenced him to forty days imprisonment.

Pleaded for the suspender—That he was a pawnbroker in Glasgow, and had only arrived in Edinburgh on the day in which he was apprehended, having come on occasion of business.

¹ By the Edinburgh Police Act, 11th & 12th Vict. c. 113, sect. 107, it is enacted, ‘ That no order, judgment, record of conviction, or other proceeding whatsoever, concerning any prosecution instituted in the said Police Court, by virtue of this Act, shall be quashed or vacated for any misnomer or informality; and all judgments and sentences pronounced by the Judge shall be final and conclusive, and not subject to suspension, or advocacy, or appeal, or any other form of review, or stay of execution, unless on the ground of corruption, malice, or oppression on the part of the Judge, or of such deviations in point of form from the statutory enactments as the Court of review shall think took place wilfully, or of incompetency, including defect of jurisdiction of the Judge, and which suspension, or advocacy, or appeal, or review, or stay of execution, must be presented to the High Court of Justiciary within fourteen days after the date of the sentence complained of.’ Sect. 157, ‘ That it shall be lawful for the said Superintendent of Police and other officers to apprehend and bring before the Judge all such beggars, vagrants, and idle poor persons, men, women, or children strolling or wandering, or seeking relief, or found lying in any outhouse, stair, close, or area, or other place within the said limits, and it shall be lawful for the Judge to direct and cause all such persons as he may not at the time convict of begging and vagrancy, as herein-before provided, to be handed over to the inspector of the poor or other official of the parish within which such persons shall have been found, in order that their claim, as paupers, may be investigated and disposed of according to law.’

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The 107th section of the Police Act shewed in what cases review was excluded, and where it was competent.

One of these cases was want of jurisdiction. The Police Act had not created a statutory crime of vagrancy, out of *species facti* which the common law declared innocent. This petition would not do if it had not come up to the common law offence designed in the statute. All that was alleged in the complaint was, that he conducted himself as a vagrant, by being found in the house mentioned. Nothing was said as to the character of the house. Section 157 of the act threw light on what was meant by the term vagrant, and none of the circumstances mentioned in that section were averred against the suspender in the complaint.

Pleaded for the respondent—The objection was merely want of specification in the libel. As to the jurisdiction there was no doubt, nor was there any doubt as to the competency of the complaint. The fact that the suspender was found in a house so well known as Jane Brash's, was quite sufficient to justify the police in apprehending and the Judge in convicting him.

LORD IVORY.—Jane Brash's house is not a *nomen juris* for vagrancy.

NEAVES.—Perhaps the libel might have been more specific, but the house was so well known, that his being found in it was quite sufficient to constitute the crime of vagrancy.

LORD IVORY.—The vagrancy here averred is being found in a house idle.

The LORD JUSTICE-CLERK.—It looks as if Jane Brash's house was taken to include every thing in the 157th section of the act.

NEAVES.—It was denied that he was a broker, or that he was there for any lawful purpose, and so the Judge had found.

LORD MONCREIFF.—I think there is a mistake in this complaint. It libels nothing here but being found in a house. Now, a gentlemen may be found in a house

very idle indeed, but he is not therefore a vagrant. If the fact be as stated, that this house was of such a notorious description, why was it not averred?

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LORD COCKBURN.—I demur to the competency of this appeal. It was competent for the Police Court to examine into a case of vagrancy. The answer made is, that this indictment is not relevant. But are we to review the objections to the relevancy of this charge in the Police Court? I do not think the defect in the libel is any good reason for appealing the case to us. Besides, I do not think the objection itself is well founded. It was competent under this libel to prove the state of this house.

Suspension.

LORD WOOD.—I see no difficulty as to this Court having a competency of review in this case. The police have only jurisdiction in certain cases. Then, if this be one where they have it not, it must be competent to bring it up here. If the charge, taking it as a whole, is not a police offence, then there is no jurisdiction given to the Police Court by the act.

As to the second point, I concur with Lord Moncreiff. I say nothing as to what would be the effect if the libel had stood merely on the words, conducting himself as a vagrant; but the specification here given is being found idle in a house. Why, every man may be, and is so, every day in his life. We have nothing here as to the character of the house.

LORD IVORY.—I concur entirely with Lord Wood.

The LORD JUSTICE-CLERK.—I concur in the view that the question of competency here does involve the merits; for if there is no statutory charge the conviction cannot stand, and I abstain from giving any opinion as to the general charge being sufficient or not. There is here given a specification of what the vagrancy is; but I do not think there is any sufficient description of vagrancy, for his being found idle merely is stated. Therefore it would be enough, under this complaint, that when the police officers enter a man's house he is found idle. Now, that would be very alarming, and cannot be tolerated, and it would have been

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very easy to have altered it; for you can combine the 157th section, and make out the character of the house. This suggests to me the great expediency of having the same review given over all police cases. In Glasgow every man may bring any thing under review. Here they cannot. Now, why should we not have the same review over those cases in the Edinburgh Police Courts that we have in those occurring in the Sheriff and Justice of Peace Courts? and, indeed, there are fewer appeals from those places, such as Glasgow, where the Court has the unlimited right of review, than from those like Edinburgh, where there is an attempt to exclude it. And the reason is plain. It is just because there is greater care taken in the former case than in the latter.

The Court passed the Note with expenses.

Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE AND WOOD.

HER MAJESTY'S ADVOCATE—*Sol. Gen. Moncreiff*—*Deas A.D.*—
J. M. Bell A.D.

AGAINST

WILLIAM DUNCAN—*Anderson*—*Gifford*.

ALEXANDER CUMMING—*Logan*.

INDICTMENT—RELEVANCY—FORGERY—JURISDICTION.—Held, 1st, That it was a relevant charge against two pannels to aver that they 'both and each, or one or other,' acting in pursuance of an unlawful concert, and for a fraudulent purpose, adhibited the signature of one of them to the document; 2d, That, under the circumstances, the words at and near Edinburgh, and elsewhere, was not too vague a specification of the *locus delicti*; and, 3d, That, in respect of the above words importing the commission of an offence in Scotland, the Jury could not convict one of the pannels, who had never left England, as art and part of an offence committed in Scotland.

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1850.

WILLIAM DUNCAN, practising as a surgeon at Amble, in the county of Northumberland, and ALEXANDER CUMMING, practising as a surgeon and druggist, in Broughton Street, Edinburgh, were charged with Forgery; As also, Using and Uttering, as genuine, a False and Forged Writing, knowing the same to be false and forged; As also, with Falsehood, Fraud, and Wilful Imposition; As also, Conspiring to Commit the above crimes, or one or more of of them:

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William
Duncan &
Alexander
Cumming.
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—
Forgery,
&c.

IN SO FAR AS, it being required by the Regulations of the Royal College of Surgeons of Edinburgh, in force in or about the year 1844, that every candidate for a diploma from that college should, before obtaining such diploma, have followed a certain prescribed course of study, and should have laid before or furnished to the President of the said College a tabular statement or schedule subscribed by the said candidate, exhibiting the full extent of his professional education, and a separate list of all classes, hospitals, and dispensaries which he had attended during each session of his studies respectively, and should thereupon obtain from the said president a letter or authority directing or authorising the examiners of the said college to take him the said candidate upon trial, and should thereafter appear before the examiners of the said college and undergo an examination, and should only be entitled to receive a diploma from the said college on being found by the said examiners to be duly qualified to practise surgery and pharmacy; and you the said William Duncan and Alexander Cumming having formed and concocted a false and fraudulent scheme, machination, and design, to procure a diploma from the said Royal College of Surgeons in name of you the said William Duncan, so as to enable you the said William Duncan to hold yourself out to the public as having been found duly qualified by the said Royal College to practise surgery and pharmacy, without you the said William Duncan actually appearing before the said examiners, or undergoing any examination, or being found qualified as aforesaid, you the said William Duncan and Alexander Cumming did, both and each, or one or other of you, some time or times in or about the months of October, November, and December 1844, or in or about one or more of these months, the particular time or times being to the prosecutor unknown, at or near Amble aforesaid, and at or near Edinburgh, or at or near one or other of these places, or at some time or times, and at some place or places, to the prosecutor unknown, wickedly and feloniously, conspire, confederate, and agree, that you the said Alexander Cumming should, falsely and fraudulently, personate and assume the character of you the said William Duncan, and should, in that character, apply for and

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obtain a diploma from the said Royal College of Surgeons, in name of you the said William Duncan, importing that you the said William Duncan had been found duly qualified to practice surgery and pharmacy, and should, falsely and fraudulently, represent and pretend to the office-bearers and examiners and others, acting for or on behalf of the said College, or to some of them, that the name of you the said Alexander Cumming was William Duncan, and that you the said Alexander Cumming should, under the name of William Duncan, undergo the aforesaid examination, prescribed by the foresaid regulations, and that upon you the said Alexander Cumming obtaining a diploma as aforesaid from the said Royal College of Surgeons, under the name of William Duncan, the same should be delivered to you the said William Duncan, and that you the said William Duncan should thereafter use and act upon the same, as in all respects a diploma properly and lawfully obtained by you the said William Duncan: And you the said Alexander Cumming did accordingly, in furtherance and pursuance of the object and purpose of the said conspiracy, and acting in concert with the said William Duncan, and in order to carry into effect and accomplish the object and purpose of the said conspiracy, some time betwixt the 1st day of October and the 5th day of December 1844, the particular time being to the prosecutor unknown, proceed from Amble aforesaid to Edinburgh, and did, in or near Surgeons' Hall, in or near Edinburgh, or at some other place in or near Edinburgh to the prosecutor unknown, procure or obtain from the conservator for the time being of the said Royal College, or from some other person or persons acting for the said Royal College, to the prosecutor unknown, a printed form of a tabular statement or schedule, required to be presented by candidates to the President of the said Royal College as aforesaid, for the purpose of the same being filled up and properly attested, with a view to the same being presented to the said president, in terms of the foresaid regulations: And you the said William Duncan and Alexander Cumming did, both and each, or one or other of you, acting in concert as aforesaid, time and place last above libelled, or at some other time and place in or near Edinburgh, to the prosecutor unknown, wickedly and feloniously, falsely and fraudulently, forge and adhibit, or cause or procure to be forged and adhibited to a certificate prefixed to the tabular statement or schedule so procured as aforesaid, in the following or some similar terms: 'I hereby certify that the subjoined summary contains a full and accurate account of the education which I have received, commencing session 1833, as I have more particularly specified in the annexed schedules, pages 2 and 3,' the words or subscription, 'William Duncan,' intending the same to pass for, and to be received as, the genuine subscription of you the said William Duncan, or of some wholly fictitious person: FARTHER, time and place last above libelled, or at some other time and place in or near Edinburgh to the prosecutor unknown, you

the said William Duncan and Alexander Cumming did, both and each, or one or other of you, acting in concert as aforesaid, wickedly and feloniously, falsely and fraudulently, use and utter, as genuine, the said false and forged tabular statement or schedule and certificate, or one or other of them, having the said false and forged subscription thereat, you, both and each, or one or other of you, knowing the same to be false and forged, by then and there delivering the same, or causing the same to be delivered, as a genuine document, to Dr James Simson, the then President of the said Royal College of Surgeons, or to some other office-bearer of the said college to the prosecutor unknown; and you did, both and each, or one or other of you, acting in concert as aforesaid, then and there, wickedly, wilfully, and feloniously, falsely and fraudulently, represent and pretend to the said president or other office-bearer of the said college, that you the said Alexander Cumming was the William Duncan therein referred to, and that the said signature 'William Duncan' at the said certificate, was the genuine subscription of you the said William Duncan; and you the said William Duncan and Alexander Cumming did, farther, both and each, or one or other of you, acting in concert as aforesaid, then and there deliver to the said president or other office-bearer of the said college, the tickets and certificates granted to you the said William Duncan, and referred to and founded on in the said tabular statement or schedule, as if the same applied to you the said Alexander Cumming, and on the footing that the name of you the said Alexander Cumming was William Duncan, and this you did, to verify or confirm the statements or entries contained in the said tabular statement or schedule; by all which, or part thereof, the said president and other office-bearers of the said Royal College of Surgeons, or one or more of them, were cozened, cheated, deceived, and imposed upon, by you the said William Duncan and Alexander Cumming, or by one or other of you, acting in concert as aforesaid; and the said president having directed or authorised an examination of you the said Alexander Cumming, in the belief that you were the William Duncan referred to in the said tabular statement or schedule, and in the said certificate to be taken by the examiners of the said Royal College, you the said Alexander Cumming, acting in concert as aforesaid, did attend for examination within or near Surgeons' Hall aforesaid, on or about the 4th day of December 1844, before and in presence of Doctor John M'Farlane, now or lately residing in or near Charlotte Square, in or near Edinburgh, Doctor Richard Huie, now or lately residing in or near George Square, in or near Edinburgh, Doctor Francis Farquharson, then residing in Edinburgh, and now or lately residing at or near Finzean, in Aberdeenshire, Doctor Robert Omond, now or lately residing in or near Charlotte Square aforesaid, and others, or one or more of them, examiners appointed by the said Royal College of Surgeons; and you the said Alexander Cumming, acting in concert as aforesaid, did,

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then and there, falsely, fraudulently, and wilfully, represent yourself to the said examiners, or to some of them, to be the said William Duncan, or falsely, fraudulently, and wilfully, lead or induce them to believe you were William Duncan, and the person mentioned and referred to in the foresaid certificate and tabular statement or schedule above libelled: And the said examiners did, consequently, time and place last above libelled, examine you the said Alexander Cumming, in terms of the said regulations, in the belief that you were the William Duncan referred to in the foresaid certificate and tabular statement or schedule, and found you to be duly qualified to practise surgery and pharmacy; and did deliver or cause or authorize to be delivered to you the said Alexander Cumming, a diploma in the usual form subscribed by the said examiners and their preses, or by some of them, bearing or importing that you the said William Duncan, or at least a person of the name of William Duncan, had been examined and found duly qualified to practise surgery and pharmacy; and you the said Alexander Cumming did immediately, or soon thereafter, deliver the said diploma to you the said William Duncan for the purpose of being acted on and used by you the said William Duncan as a diploma in your favour; and you the said William Duncan did accept and receive from the said Alexander Cumming the said diploma, in the full knowledge of the manner in which the same had been obtained by the said Alexander Cumming as aforesaid, and did, in or near Edinburgh and elsewhere, act upon, exhibit, and use the same as a diploma, properly and lawfully obtained by and in favour of you the said William Duncan; by all which, or part thereof, the said examiners and other office-bearers of the said Royal College of Surgeons, or one or more of them, were cozened, cheated, deceived, and imposed upon, by you the said William Duncan and Alexander Cumming, or by one or other of you; and all this, or part thereof, you the said William Duncan and Alexander Cumming did, wickedly and feloniously, in furtherance and pursuance of the foresaid conspiracy; and the object, purpose, and design, of the said conspiracy were thereby accomplished and carried into effect, or partially accomplished and carried into effect, by you the said William Duncan and Alexander Cumming.

GIFFORD objected to the relevancy of the indictment, in so far as it charged forgery. The conspiracy set forth was, that the prisoner Duncan should, by means of false representations, obtain a diploma, and the mode in which the conspiracy was carried out, was alleged to be that one or other of the pannels acting in concert, adhibited the word or subscription 'William Duncan' to the document libelled; it was thus left uncertain whether the subscription

of Duncan was his genuine signature ; and farther, even holding that the document had been signed by Cumming in Duncan's name, yet, as the indictment alleged them to be acting in concert, it must be presumed that he had Duncan's authority for so doing. All that was alleged therefore, amounted to falsehood, fraud, and wilful imposition libelled, and not to forgery. The indictment, moreover, was too vague both in time and place, all that was alleged was that the prisoner Cumming ' did, in or near Edinburgh, and elsewhere, act upon, exhibit, and use the same as a diploma,' &c. This left it uncertain whether or not the prosecutor intended to found on the prisoner Duncan having used the diploma in England. If so, there ought to be a more specific statement, and if not, he objected to the jurisdiction of the Court, inasmuch as he had never been in Scotland.

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DEAS—The argument was, that no one could forge his own signature ; that doctrine had been overruled in different cases where the object for which the signature was attached, was to deceive the person to whom the document was uttered, as to whom it was intended to denote. Here the object was alleged to be fraudulent, and that the fraud was carried into effect, and that deception was actually practised thereby, and the Crown undertook to prove this, and that all that took place was done in concert, which made it equally forgery whether Duncan signed the document or Cumming.

ANDERSON.—The question was not whether the crime of forgery had been committed, but whether that crime was sufficiently charged in the indictment ; it might be read as charging Duncan individually with using his own subscription.

LORD WOOD.—If Cumming forged the document, then his crime is complete ; and surely Duncan might be art and part in so doing.

ANDERSON.—If the indictment had been so laid, the objection would not have arisen ; but it is presently

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charging both and each with adding and adhibiting the subscription, and it was quite consistent therewith that the signature was genuine.

The words 'elsewhere' were also too vague, looking to the designation of the prisoner Duncan as set forth in the indictment, and the nature of the charge.

The LORD JUSTICE-CLERK.—They do not charge practising in England as a crime, here it can only be used as evidence to the conspiracy for obtaining a diploma; the finding of stolen goods in the hands of a man in Calcutta, may be good evidence against him in respect of a theft said to be committed in Edinburgh.

LORD MACKENZIE.—I cannot hold this document not to be forgery; it is said that if Duncan did not sign himself, that yet as the prisoners are alleged to have acted in concert, it must be presumed that Cumming had his authority to sign his name, but that will not in all cases be enough to protect the parties from the crime of forgery. Take the case of one man authorising the other to sign his name to drafts for money, under an agreement that as soon as he shall have got the same he shall abscond, and that thereafter the party whose name has been used should plead forgery as a protection against honouring the drafts, would not this be forgery by both parties? I cannot doubt that it would. So in this case the charge of fabrication and conspiracy runs throughout the whole, and whatever difficulty there might be in reducing to rule the definitions which have been usually given for forgery, that only shews that the ingenuity of bad men is greater than that of lawyers. I would, however, have had more difficulty if it had been expressly alleged that the signature was that of Duncan.

LORD WOOD.—If it had been necessary to give an opinion, as to whether there could be forgery in Duncan himself signing the document, I should have had some hesitation, but the point has not arrived.

The LORD JUSTICE-CLERK.—No doubt we have only to consider Mr Anderson's objection, and I have no

doubt that on the indictment as framed he will be discharged of that charge. That Cumming was to go to Edinburgh and present the document as the genuine subscription of himself, and thereby obtain a diploma in the name of William Duncan, is clearly charged, but whether it would make any difference that Duncan himself signed the document so intended to be used, and actually used for such a purpose, I doubt, but I reserve my opinion thereon.

It appeared in evidence that the prisoner Cumming on the 4th of December 1844, passed in the name of Duncan an examination required by the College of Surgeons, and thereafter received a diploma also in his name, under which the prisoner Duncan practised in England. There was no evidence that Duncan had ever been in Scotland, either at the time of getting the diploma, or afterwards, until brought for trial.

ANDERSON thereupon objected, that as the prosecutor had not proved that Duncan had done anything in Scotland, there was no case for the Jury. The case laid was that of conspiracy,—had anything been proved with reference to that in Scotland? The conspiracy, if made, was in England. The forgery again, if perpetrated was here. Duncan was not here on any one occasion. Suppose two or three men conspired in England to commit a theft in Scotland. One remained in England; two came to Scotland, and were caught in the act. Could it be said that this Court had jurisdiction to try the third, though he was never was out of London? If it could be shewn that this was a crime *in continuum*, part perpetrated in England, part in Scotland, the case might be different, but they had not shown anything of the sort.

SOLICITOR-GENERAL.—It was not an objection to the trial, in so far that the facts proved against Duncan were committed in England wholly, they having been committed by him with reference to a crime perpetrated in Scotland, in which we say he was art and part. The objection went to this, that the Court could not try the

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question whether he was art and part; it might be that it was not established in fact that he was guilty, but had not the Court jurisdiction to declare him innocent.

The whole of that would come to this, that whenever a crime was committed in Scotland in concert with a party residing in England, that you could not try the party here because of his residence there; and you could not try him there, because the crime was committed here. Suppose that rebellion had started in England, of which the first outbreak was to be in Scotland, could I not try all the parties concerned in the plot even although some of them had not left England?

The LORD JUSTICE-CLERK.—The case that you put is peculiar, because that amounts to high treason; but in a case of sedition like that of Horn Tooke, could you try it here?

The SOLICITOR-GENERAL.—The Court would have jurisdiction to try it. Take the case of the Cotton-spinners;—receipts were found on them from parties in England for money, which had been given to induce the commission of the offence. There was no authority to shew that they could not have been tried here, (Hume, vol. ii. p. 53). It did not signify how the crime or main act was committed, the whole question was, whether the Court was competent to try the crime? If it was a competent jurisdiction to try the crime, it necessarily followed that the Court had jurisdiction to try the crime of art and part. Suppose the Jury found it a fact, that Duncan was art and part in an offence committed here, had not the Court jurisdiction to punish?

The LORD JUSTICE-CLERK.—You put the trial on this indictment, that the diploma was exhibited here, or elsewhere.

The SOLICITOR-GENERAL.—The Crown was entitled to prove that, in order to shew imposition on the College here,—could he have been tried in England for fraud on the College here? surely not; for if it was a crime at all, it was committed here. The result

of holding that a party in England who was art and part in such an imposition would be, that if he could not be tried here, he could not be tried anywhere.

ANDERSON.—The case was not one depending merely on proof of art and part, but depended on a separate charge of conspiracy, which was libelled as a separate act. Suppose the words, ‘at or near Edinburgh, or ‘other place or places to the prosecutor unknown,’ were struck out of the indictment, and it had stood, ‘at or ‘near Amble aforesaid, conspired, confederated,’ &c., could there be a doubt that that was an English crime,—that was the present case as it came out in proof, for all that took place subsequently, which was charged against Duncan, referred back to the conspiracy, and was not libelled independently as art and part of the actual imposition; consequently, the crime alleged was one cognizable in the English courts, and if so, there was no jurisdiction here.

The LORD JUSTICE-CLERK.—This discussion has raised a question as large and important in principle as can be conceived, and it would be premature were we obliged now to decide so general a point. But we do not think this indictment framed so as to cover the case against Duncan, and the occurrence of the case which has occasioned the discussion, is matter of surprise, because it is stated ‘you Duncan did, in or near Edinburgh, act on.’ The whole of this indictment proceeds first, with an allegation of conspiracy. I do not mean that this is the indictment, or the whole of it. But there is an averment of conspiracy at or near Amble. It would have been easy to have framed an indictment, setting forth that Duncan furnished Cumming with the necessary documents, and Cumming, in possession of these for his behoof, and in concert, did so and so, and having received the diploma, committed the fraud you arranged he should perpetrate. We abstain from saying whether that would have been relevant. But the indictment, after stating that your acting in concert did proceed

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from Amble to Edinburgh, goes on to say,—you two, time and place last above libelled, did forge and adhibit, and then you did use and utter as genuine. So that the forgery and uttering is stated as in Scotland, and you did proceed to represent to the President of the College that Cumming was Duncan; then you or one or other did present certificates, so that what is done is said to be done by both or one or other in Scotland, and not by me as the agent of the other. And then, at the close, it is declared, ‘ which was delivered to you the said William Duncan, ‘ and you did use,’ &c., from all which it would have been impossible to suppose that William Duncan remained in England, and never came to Scotland. The prosecutor ought always to frame his indictment consistently with the case he means to prove; and if a different case was to be tried, the indictment should have raised it.

LORD MACKENZIE.—I concur on the special ground on which this judgment is viewed by your Lordship. When the objection was first stated by Mr Anderson, I thought it unimportant, or doubtful. I took the view that the crime was committed in Scotland, on employment by a person in England. Suppose a man in England hires an assassin in Scotland to shoot another, but never comes here himself, and the man shoots the person, would that not afford jurisdiction? The view your Lordship takes, makes it clear. The indictment states that both parties were in Scotland; the prosecutor is bound to prove this,—he has not done it. I agree in this view, and reserve the general question.

LORD WOOD concurred.

The Jury found the pannel Cumming guilty as libelled, and Duncan not guilty.

In respect of which verdict of assize, the said Alexander Cumming was sentenced to imprisonment for the space of twelve months, and the said William Duncan was assoilzied *simpliciter*.

NORTH CIRCUIT.

INVERNESS.

*Spring 1850.*April 19.
1850.*Judge*—The LORD JUSTICE-CLERK.WILLIAM WELSH, Appellant—*Millar*.

AGAINST

J. MACPHERSON, Respondent—*J. M. Bell*.

POLICE JURISDICTION.—Held that a Police Magistrate has no jurisdiction to try an alleged offence, except upon a regular complaint.

THIS was an appeal against a sentence pronounced in the Police Court of Inverness under the following circumstances:—

The appellant had sold to a flesher in Inverness a young Ayrshire bull, which had died at his farm. The flesher afterwards cut up the carcase, and portions of it were exposed to sale at his stall. On the allegation that the meat was diseased, and unfit for human food, the Procurator-fiscal presented a complaint against the flesher in the Police Court, and, upon that complaint, the flesher was cited to appear and answer to the charge. A warrant was granted on the complaint in common form to cite witnesses; and in virtue thereof the appellant was cited to appear as a witness at the trial of the case.

The appellant accordingly appeared under this citation; but, instead of being dealt with as a witness, he was arraigned at the bar as an offender along with the flesher.

The appellant objected to this course of procedure, upon which an offer of delay was made, but refused.

After evidence had been led, both the appellant and the flesher were found guilty of exposing unwholesome meat for sale, and the appellant was fined three guineas.

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Against this judgment the present appeal was taken. MILLAR, for the appellant, submitted, that the sentence was null, and that upon two grounds. In the first place, the Magistrate, in the circumstances, had no jurisdiction to entertain a complaint against the appellant. A citation, or a formal complaint, was requisite to give jurisdiction; but here there had been no such citation. The appellant appeared in Court as a witness; and the Magistrate had no more power to deal in the way he did with the appellant than with a person who happened to be a spectator in Court. It would arm magistrates with a very dangerous power if such procedure as that adopted against the appellant were to be sanctioned; the provisions of the Police Act were plainly inconsistent, but there was no occasion to argue that as a general question, because the provisions of the Inverness Police Act were plainly inconsistent with the right which the Magistrate had exercised. In the second place, the sentence complained of was invalid, because, even if the Magistrate could in any circumstances entertain a charge where the alleged offender had not been cited upon a regular complaint, he was here barred from dealing with the appellant as such, because the appellant had been cited by the Prosecutor, and actually appeared in Court as a witness. The authorities on this point were explicit, case of *Ritchie v. Pilmer*, High Court, Shaw, p. 142.

The Court had no difficulty in holding, that it was necessary to give validity to Police sentences in ordinary cases, that the party should have been brought before a Magistrate on a regular citation, proceeding on a proper complaint, and on that ground sustained the appeal with expenses.

PERTH.

Judge—LORD WOOD.April 24.
1850.PETER LAUNDERS, Appellant—*P. Fraser*.

AGAINST

GEORGE MANN & Co. Respondents—*Millar*.

APPEAL—COMPETENCY—FINAL INTERLOCUTOR.—Held that an appeal might be presented within ten days from the interlocutor approving of the taxation of expenses.

THIS was an appeal from a judgment of the Magistrates of Dundee, of date 31st October 1849, pronounced in the following terms:—‘ Having advised the report upon the pursuer’s account of expenses, approves of the report, and in terms thereof taxes these expenses at £7:12:2, and for this sum decerns at the pursuer’s instance against the defender.’

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Appeal.

The interlocutor disposing of the merits, and remitting to the Clerk of Court to tax the same, was pronounced on the 17th of October 1849.

The appeal was taken within ten days of the interlocutor of 31st October 1849, approving of the report of expenses.

MILLAR, for the respondent, objected to the competency of the appeal, in respect that it had not been taken within ten days from the date of the interlocutor disposing of the merits, and remitting to the clerk. It had been held in the case of the *Dundee Union Whale Fishing Company*, Perth, Oct. 13. 1848, *ante*, p. 15, that an appeal was competent after a final interlocutor on the merits finding expenses due, but before the same had been taxed. The Act of Sederunt regulating appeals to Circuit Courts only contemplated one time, within ten days of which the appeal must be taken, and it followed from the decision referred to, that as it might have been taken within ten days after the interlocutor

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of 17th October, so under the Act of Sederunt it must be dismissed.

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Appeal.

LORD WOOD.—It certainly was not the intention of the Court in that case to pronounce any decision which would have the effect contended for.

After consulting with the LORD JUSTICE-CLERK, his Lordship held that the objection stated could not be sustained, and allowed the case to proceed upon its merits.

Judges.—LORD JUSTICE-CLERK AND LORD WOOD.

April 25.
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HER MAJESTY'S ADVOCATE—*J. M. Bell A.D.*

AGAINST

DAVID BELL.—*W. G. Dickson.*

STATUTE—JURISDICTION.—Held, that where contravention of the 1st and 2d sections of 9th Geo. IV. c. 69, were not libelled cumulatively, that the Court of Justiciary had no jurisdiction in the absence of two previous convictions.

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DAVID BELL was charged with Contravention of the Statute 9th Geo. IV. cap. 69.¹

Night
Poaching.

¹ By § 1 it is enacted, that ' if any person shall, after the passing of this Act, by night, unlawfully take or destroy any game or rabbits in any land, whether open or enclosed, or shall by night, unlawfully enter or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, such offenders shall, upon conviction thereof before two Justices of the Peace, be committed, for the first offence, to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance, or in Scotland by bond of caution, himself in ten pounds, and two sureties in five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following, and in case of not finding such sureties, shall be farther imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a secon

IN SO FAR AS, you the said David Bell did, by night, that is to say, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, on the night of the 30th of November, or morning of the 1st of December 1849, or on some other night or morning of the said months of November, or December, or of October immediately preceding, unlawfully enter or were in the park at Largo

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‘ time, and shall be thereof convicted before two Justices of the Peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance or bond as aforesaid, himself in twenty pounds, and two sureties in ten pounds each, or one surety in twenty pounds, for his not so offending again for the space of two years next following, and in case of not finding such sureties, shall be farther imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case.’ By § 2, it is enacted, ‘ That where any person shall be found upon any land committing any such offence as is herein-before mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the Lord of the manor, or reputed manor, wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant to seize and apprehend such offender upon such land, or in case of pursuit being made in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace-officer, in order to his being conveyed before two Justices of the Peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland whenever any person shall so offend, he shall be liable to be punished in like manner.’

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House, belonging to or occupied by Mrs Lilius Dundas Calderwood Durham, of Largo, situated in the parish of Largo, and shire of Fife, and at or near a part of said park which is near to the highway from Largo, in the parish of Largo aforesaid, to Cupar-Fife, you being armed with a gun or other fire-arm for the purpose of taking or destroying game: And you the said David Bell have been previously convicted of the statutory offence of contravention of the first section of the said statute 9th Geo. IV., cap. 69: LIKEAS (2.), time and place above libelled, you the said David Bell did, wickedly and feloniously, attack and assault John M'Creath, then and now or lately gamekeeper to the said Mrs Lilius Dundas Calderwood Durham, a person lawfully authorised, then and there, to seize and apprehend you the said David Bell, and you did, wickedly and feloniously, strike the said John M'Creath one or more severe blows on the head or other parts of his person with your fists, and did, with your gun or other fire-arm aforesaid, or with some other instrument to the prosecutor unknown, strike the said John M'Creath one or more severe blows on the head or other parts of his person, and did fell him to the ground, and did kick him severely with your feet, and did otherwise maltreat and abuse him; by all which, or part thereof, the said John M'Creath was bruised or wounded to the effusion of his blood, and the injury of his person: And you the said David Bell have been previously convicted of assault: And you the said David Bell, being conscious of your guilt in the premises, did abscond and flee from justice.

DICKSON objected to the jurisdiction of the Court to try the case, so far as the libel charged a contravention of the first section of the act. The tribunal which was to try the different offences under the act was regulated by the eleventh section of the act, under which no trial was competent before the Justiciary Court, unless for a third offence, or where sentence of transportation might be pronounced. Here the libel only alleged one previous conviction, and transportation might not be imposed for a second offence. The point had already been decided in *Rowet*, Ayr, April 27. 1843, Broun, vol. i. p. 540; which decision was followed in *Robertson*, Dumfries, April 27. 1844, Broun, vol. ii., p. 176; and *M'Nab*, High Court, March 14. 1845, Broun, vol. ii., p. 416. This case differed from the last, as the charges were not connected in the way they were in that case.

The COURT sustained the objection, whereupon the

Advocate-Depute 'passed from the contravention of the
' first section of the statute as a substantive charge.'

No. 58.
David Bell.

Evidence having been adduced by the Crown, the
panel's counsel addressed the Jury, and they found the
panel guilty of the common law charge as libelled, but
without the aggravation of striking with the gun.

Perth.
April 26.
1850.
—
Night
Poaching.

In respect of which verdict, the panel was sentenced
to ten months imprisonment.

SOUTH CIRCUIT.

JEDBURGH.

Spring 1850.

Judges—LORDS MACKENZIE AND IVORY.

April 8.
1850.

HER MAJESTY'S ADVOCATE.—*E. F. Maitland A.D.*

AGAINST

GEORGE HOWDEN.—*J. Shaw.*

DECLARATION—WITNESS.—Held, that where a declaration is sworn to
have been freely and voluntarily emitted by two witnesses uncon-
nected with the fiscal's office, it may be read without calling the
Magistrate who took it, even though one of the witnesses said the
prisoner requested an alteration to be made, which did not appear
to have been done.

GEORGE HOWDEN was charged with Forgery, and also
as Using and Uttering as Genuine a Forged Bill of
Exchange or other Writing.

No. 59.
George
Howden.

Jedburgh.
April 8.
1850.

IN SO FAR AS, you the said George Howden being a member of, or
contributor to, a friendly society or other similar association at or near
Galashiels, in the parish of Galashiels, and shire of Selkirk, and in the
parish of Melrose, and shire of Roxburgh, or in one or other of said
parishes, or carrying on its operations there, calling itself or known as
The Friendly Yearly Society, or having some similar designation, and
you the said George Howden having applied to Walter Paterson, inn-
keeper, and then and now or lately residing in or near the Black Bull

Forgery.

No. 59.
George
Howden.
Jedburgh.
April 8.
1850.
Forgery.

Iun, situated in or near Galashiels, in the parish of Galashiels, and shire of Selkirk, then acting as box-master or treasurer of said society, or to some other person or persons acting for behoof of said society, for a loan from the funds of said society; and the said Walter Paterson, or some other person to the prosecutor unknown, having written a bill of exchange or other writing, in the following or similar terms:—

‘ £5 . 4 . Stg Galashiel 31st dec^r 1849.

‘ At one Two Three Four Five Six Seven eight and nine
‘ months after date pay to me or my order by usual instalments as
‘ Treasurer of the Galashiel Yearly Benfiet Society the sum of Five
‘ Pounds Four Shillings Sterling.
‘ To George Howden

‘ Weaver

‘ Galashiel;’

and the said Walter Paterson having signed the said bill of exchange or other writing, as drawer thereof, you the said George Howden did, on a day or days between the 25th and 31st days of December 1849 inclusive, the particular day or days being to the prosecutor unknown, or on one or more of the days of that month, or of November immediately preceding, or of January immediately following, and within or near the house situated in or near Stirling Street of Galashiels, in the parish of Melrose, and shire of Roxburgh, then and now or lately occupied by you the said George Howden, or at some other place or places in the shires of Roxburgh or Selkirk to the prosecutor unknown, wickedly and feloniously, forge and adhibit, or cause and procure to be forged and adhibited upon the said bill of exchange or other writing, the subscriptions ‘ Robert Howden,’ and ‘ Andrew Clapperton,’ or one or other of them, as the subscriptions of the joint acceptors with yourself of said bill of exchange or other writing, intending the said subscriptions to pass for, and to be received as, respectively, the genuine subscriptions of Robert Howden junior, a weaver, then and now or lately residing in or near Galashiels, in the parish of Galashiels, and shire of Selkirk, and of Andrew Clapperton, a spinner, then and now or lately residing in or near Galashiels, in the parish of Melrose aforesaid: FURTHER, having subscribed your own name to the said bill of exchange or other writing as a joint-acceptor thereof, you the said George Howden did, on the 31st day of December 1849, or on one or other of the days of that month, or of November immediately preceding, or of January immediately following, in or near the Black Bull Inn aforesaid, then and now or lately occupied by the said Walter Paterson, wickedly and feloniously, use and utter, as genuine, the said bill of exchange or other writing, having thereon the said forged subscriptions, you knowing the same to be forged, by then and there delivering the same, or causing the same to be delivered on your behalf, to the said Walter Paterson, and to Johu Newlands, then and now or lately foreman in the employment of William Roberts and Company,

manufacturers in or near Galashiels, and then and now or lately residing in or near Galashiels, in the parish of Galashiels aforesaid, and to William Bonnington, a joiner, then and now or lately residing in or near Galashiels, in the parish of Galashiels aforesaid, or to one or more of them, acting as a committee, or for behoof, of the said society, in order that you might receive the amount of said forged bill of exchange or other writing in loan from said society; and the amount thereof was accordingly then and there received by you in loan as aforesaid.

No. 59.
George
Howden.

Jedburgh.
April 8.
1850.

Forgery.

The declarations not having been admitted, the Public Prosecutor, for the purpose of substantiating them, called, besides the Procurator-fiscal, two witnesses to each, one of whom was clerk to the Sheriff-Clerk, and the other two, respectively, constables in Selkirk.

On cross-examination one of the constables deponed, that, at the time when the last declaration was taken, the prisoner had requested that an alteration might be made in his declaration. It appeared from the declarations themselves that no alteration had been made.

J. SHAW, for the prisoner, thereupon submitted, that the declarations could not be read, in the absence of the Magistrate before whom the declaration was made, case of *M'Gaven*, May 11. 1846, Arkley, p. 67, and case of *Vallance*, High Court, Nov. 30. 1846, Arkley, p. 181. The principle of those cases applied here most emphatically, as it had been deponed to by one of the witnesses that the party had requested an alteration, which was shewn not to have been made by the declarations themselves, and the presence of the Sheriff who took the declaration was important to the prisoner, in order that the circumstance might be explained.

E. F. MAITLAND.—There was no direct decision to the effect that the Magistrate who took the declaration was a necessary witness, in order that the declaration might be read, and in the present case the declarations were sworn to have been freely and voluntarily given by two parties besides the Procurator-fiscal.

LORD MACKENZIE said, that he thought the Court would not be warranted in rejecting the declarations on

No. 59.
George
Howden.
Jedburgh.
April 8.
1850.
Forgery.

the authority of the cases mentioned, as neither of those cases appeared to have been direct decisions. There was, moreover, this difference, that in this case there were two witnesses to each declaration, who were not connected with the fiscal's office, which was enough to distinguish it from the case of *Vallance*, the authority of which in the particular circumstances he did not mean to impeach.

LORD IVORY concurred.

The Jury, by a majority, found the prisoner guilty as libelled.

In respect of which verdict of Assize, the pannel was sentenced to be imprisoned for the period of two years.

DUMFRIES.

Judges—LORDS MACKENZIE AND IVORY.

HER MAJESTY'S ADVOCATE—*E. F. Maitland A. D.*

April 27.
1850.

AGAINST

HELEN DALY.—*J. M. Welsh.*

HELEN KIRK OR JAMES.—*J. Shaw.*

EVIDENCE—PROCURATOR-FISCAL.—Circumstances in which the clerk to the Procurator-Fiscal was held inadmissible as a witness, to matters out of his own department.

No. 60.
Helen Daly
and Helen
Kirk or
James.

HELEN DALY and HELEN KIRK OR JAMES, were accused respectively of Theft, and Reset of Theft :

Dumfries.
April 27.
1850.
Theft, &c.

IN SO FAR AS, on the 23d or 24th day of November 1849, or on one or other of the days of that month, or of October immediately preceding, or of December immediately following, in or near a close in or near High Street of Dumfries, leading to the house, situated in or near said close, then and now or lately occupied by William Smith, a perfumer, then and now or lately residing there, or on or near that part of the High Street aforesaid which is situated opposite or near to the entrance of said close, you the said Helen Daly did, wickedly and fe-

loniously, steal and theftuously away take, from the pocket or person of John Edgar, then and now or lately a draper in or near High Street aforesaid, a gold watch, and part of a gold guard-chain, the property, or in the lawful possession, of the said John Edgar: And you the said Helen Daly are habite and repute a thief, and you have been previously convicted of theft: LIKEAS, the said gold watch above libelled having been, time and place above libelled, stolen by you the said Helen Daly, or by some other person or persons to the prosecutor unknown, you the said Helen Kirk or James did, on the 24th day of November 1849, or on one or other of the days of the days of that month, or of October immediately preceding, or of December immediately following, or at some other time to the prosecutor unknown, in or near the house or premises situated in or near High Street of Dumfries aforesaid, then and now or lately occupied by John James, a publican, husband of you the said Helen Kirk or James, or elsewhere in or near Dumfries to the prosecutor unknown, wickedly and feloniously, reset and receive the stolen gold watch above libelled, you well knowing the same to have been stolen.

No. 60.
Helen Daly
and Helen
Kirk or
James.
Dumfries.
April 27.
1850.
Theft, &c.

In the course of trial, David Rae, constable, deponed—

To hearing the prisoner say, 'she would find the watch if allowed 'time.' She wished to go alone to find it. Mr M'Minn and witness went with her to her own house. Mr M'Minn went up stairs with her. I cannot say of my own knowledge what occurred there. They then went to another house.

GEORGE M'MINN, examined in *initialibus*.—I am clerk to Alexander Young, Procurator-fiscal. I know the charge against the prisoner. I have written some of the papers in the case, and may have read the whole of them. I have precognosed some of the witnesses. I have taken no part in the prosecution, except the recovery of the watch, and what I have before mentioned.

J. SHAW then submitted, that the witness was incompetent, on the ground of agency and partial counsel; case of *Gordon Robertson*, High Court, Feb. 19, 1849, *ante*, p. 186.

MAITLAND, A. D.—There was a distinction between the Fiscal and the Fiscal's clerk. In many cases the former might be incompetent, while the latter might be received.

LORD IVORY.—I would rather not be pressed to give a decision on circuit. I think there might have been

No. 60.
Helen Daly
and Helen
Kirk or
James.
Dumfries.
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1850.
Theft, &c.

more doubt had the witness been called to testify to points of procedure connected with his office; but as he appears to be produced for the purpose of corroborating and even supplementing the evidence of Rae, a primary witness in the cause, and would thereby become a witness to matters out of his proper department, there would be danger in admitting him, after he has admitted that he had read the declarations of the other witnesses, some of whom he had precognosed.

LORD MACKENZIE.—I concur; though I would not wish to go further than the Justice-Clerk in the case of *Robertson*, as to deciding any general point.

The Jury found the pannels guilty as libelled.

In respect of which verdict of assize, the pannel Daly was sentenced to seven years transportation, and the pannel James to be imprisoned for twelve months.

HER MAJESTY'S ADVOCATE—*E. F. Maitland A.D.*

April 28.
1850.

AGAINST

EBENEZER BEATTIE—*J. Shaw.*

STAMP—PRODUCTION.—Held, that an unstamped receipt was admissible to shew theft from an employer, although it was the only evidence against the employer that his claim was discharged against the debtor.

No. 61.
Ebenezer
Beattie.
Dumfries.
April 28.
1850.
Theft, &c.

EBENEZER BEATTIE, publican in Annan, was indicted for Theft; as also, Breach of Trust and Embezzlement:

IN SO FAR AS, you the said Ebenezer Beattie having been employed as a clerk or collector by Elizabeth Moon or Gass, a widow, then and now or lately a brewer in or near Annan, in the parish of Annan, and shire of Dumfries, and then and now or lately residing there, and you the said Ebenezer Beattie having, in the course of your said employment, collected and received payment, for behoof of the said Elizabeth Moon or Gass, of various accounts for ale and porter due to her; And MORE PARTICULARLY (1.), you the said Ebenezer Beattie having, in

the course of your said employment, on or about the 9th day of May 1848, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, in or near the house or inn or other premises situated in or near the village of Springfield, in the parish of Graitney, and shire of Dumfries, then and now or lately occupied by David Fulton, then and now or lately innkeeper there, received as aforesaid, for behoof of the said Elizabeth Moon or Gass, from the said David Fulton, the sum of £21 sterling, or thereby, in payment, or part payment, of an account for ale, or other furnishings, due by the said David Fulton to the said Elizabeth Moon or Gass, you the said Ebenezer Beattie did, at some time or times between the 8th day of May 1848 and the first day of April 1849, the particular time or times being to the prosecutor unknown, in or near the house in or near Annan, then and now or lately occupied by you the said Ebenezer Beattie, or at some other place or places in the shire of Dumfries to the prosecutor unknown, wickedly and feloniously, steal and theftously away take, £8, 13s. sterling, or thereby, part of the said sum of £21 sterling, or thereby, received by you as aforesaid from the said David Fulton: OR OTHERWISE, time or times and place or places last above libelled, you the said Ebenezer Beattie did, wickedly and feloniously, and in breach of the trust reposed in you in virtue of your said employment, embezzle and appropriate to your own uses and purposes the said sum of £8, 13s. sterling, or thereby: LIKEAS (2.), you the said Ebenezer Beattie having, in the course of your said employment, on or about the 5th day of September 1848, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, in or near the house situated at or near Stapleton Toll-Bar, in the parish of Dornock, and shire of Dumfries, then and now or lately occupied by David Byres, then and now or lately toll-keeper there, received as aforesaid, for behoof of the said Elizabeth Moon or Gass, from the said David Byres, the sum of £12 : 1 : 6 sterling, or thereby, in payment or part payment of an account for ale and porter, or other furnishings, due by the said David Byres to the said Elizabeth Moon or Gass, you the said Ebenezer Beattie did, at some time or times between the 4th day of September 1848 and the 1st day of April 1849, the particular time or times being to the prosecutor unknown, in or near the said house situated in or near Annan, then and now or lately occupied by you the said Ebenezer Beattie, or at some other place or places in the shire of Dumfries to the prosecutor unknown, wickedly and feloniously, steal and theftously away take, £4 : 6 : 6 sterling, or thereby, part of the said sum of £12 : 1 : 6 sterling, or thereby, received by you as aforesaid from the said David Byres: OR OTHERWISE, time or times and place or places last above libelled, you the said Ebenezer Beattie did, wickedly and feloniously, and in breach of the trust reposed in you in virtue of your said employment, embezzle and appropriate to your own

No. 61.
Ebenezer
Beattie.

Dumfries.
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Theft, &c.

No. 61.
Ebenezer
Beattie.
Dumfries,
April 28,
1850.
Theft, &c.

uses and purposes the said sum of £4 : 6 : 6 sterling, or thereby : LIKEAS (3.), you the said Ebenezer Beattie having, in the course of your said employment, on or about the 29th day of September 1848, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, in or near the shop or other premises situated in or near Queensberry Street of Dumfries, then and now or lately occupied by Robert Shanks, then and now or lately a painter, grocer, and spirit-dealer there, received as aforesaid, for behoof of the said Elizabeth Moon or Gass, from Isabella Sloan or Shanks, wife of, and then and now or lately residing with, the said Robert Shanks, in or near Queensberry Street aforesaid, the sum of £1 sterling, or thereby, in payment or part payment of an account for ale, or other furnishings, due by the said Robert Shanks to the said Elizabeth Moon or Gass, you the said Ebenezer Beattie did, at some time or times between the 28th day of September 1848 and the 1st day of April 1849, the particular time or times being to the prosecutor unknown, in or near the said house situated in or near Annan, then and now or lately occupied by you the said Ebenezer Beattie, or at some other place or places in the shire of Dumfries to the prosecutor unknown, wickedly and feloniously, steal and theftuously away take, the said sum of £1 sterling, or thereby, received by you as aforesaid from the said Isabella Sloan or Shanks : OR OTHERWISE, time or times and place or places last above libelled, you the said Ebenezer Beattie did, wickedly and feloniously, and in breach of the trust reposed in you in virtue of your said employment, embezzle and appropriate to your own uses and purposes the said sum of £1 sterling, or thereby : LIKEAS (4.), you the said Ebenezer Beattie having, in the course of your said employment, on or about the 6th day of January 1849, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, in or near the shop or other premises situated in or near Queensberry Street of Dumfries, then and now or lately occupied by David Johnston, then and now or lately a grocer and provision-dealer there, received as aforesaid, for behoof of the said Elizabeth Moon or Gass, from the said David Johnston, the sum of £3 : 10 : 6 sterling, or thereby, in payment or part payment of an account for ale, or other furnishings, due by the said David Johnston to the said Elizabeth Moon or Gass, you the said Ebenezer Beattie did, at some time or times between the 5th day of January 1849 and the 1st day of April 1849, the particular time or times being to the prosecutor unknown, in or near the said house situated in or near Annan, then and now or lately occupied by you the said Ebenezer Beattie, or at some other place or places in the shire of Dumfries to the prosecutor unknown, wickedly and feloniously, steal and theftuously away take the said sum of £3 : 10 : 6 sterling, or thereby, received by you as aforesaid from the said David Johnston : OR OTHERWISE, time or times and

place or places last above libelled, you the said Ebenezer Beattie did, wickedly and feloniously, and in breach of the trust reposed in you in virtue of your said employment, embezzle and appropriate to your own uses and purposes the said sum of £3 : 10 : 6 sterling, or thereby: LIKEAS (5.), you the said Ebenezer Beattie having, in the course of your said employment, on or about the 17th day of February 1849, or on one or other of the days of that month, or of January immediately preceding, or of March immediately following, in or near the house or inn or other premises called the Globe Inn, situated in or near the High Street of Dumfries, then and now or lately occupied by Mary Carruthers or Graham, a widow, then and now or lately a publican, residing there, received as aforesaid, for behoof of the said Elizabeth Moon or Gass, from the said Mary Carruthers or Graham, or from Elizabeth Graham, daughter of, and then and now or lately residing with, the said Mary Carruthers or Graham at the Globe Inn aforesaid, the sum of £9 sterling, or thereby, in payment or part-payment of the balance of an account for ale, or other furnishings, due by the said Mary Carruthers or Graham to the said Elizabeth Moon or Gass, you the said Ebenezer Beattie did, at some time or times between the 16th day of February 1849 and 1st day of April 1849, the particular time or times being to the prosecutor unknown, in or near the said house situated in or near Annan, then and now or lately occupied by you the said Ebenezer Beattie, or at some other place or places in the shire of Dumfries to the prosecutor unknown, wickedly and feloniously, steal and theftuously away take, £4 sterling, or thereby, part of the said sum of £9 sterling, or thereby, received by you as aforesaid from the said Mary Carruthers or Graham, or from the said Elizabeth Graham: OR OTHERWISE, time or times and place or places last above libelled, you the said Ebenezer Beattie did, wickedly and feloniously, and in breach of the trust reposed in you in virtue of your said employment, embezzle and appropriate to your own uses and purposes the said sum of £4 sterling, or thereby: LIKEAS (6.), you the said Ebenezer Beattie having, in the course of your said employment, on or about the 10th day of March 1849, or on one or other of the days of that month, or of February immediately preceding, or of April immediately following, in or near the house or inn or other premises, situated in or near Queensberry Street aforesaid, then and now or lately occupied by Thomas Gowanlock, then and now or lately an innkeeper, and then and now or lately residing there, received as aforesaid, for behoof of the said Elizabeth Moon or Gass from the said Thomas Gowanlock, the sum of £5 sterling, or thereby, in payment or part-payment of an account for ale and porter, or other furnishings, due by the said Thomas Gowanlock to the said Elizabeth Moon or Gass, you the said Ebenezer Beattie did, at some time or times between the 9th day of March 1849 and 1st day of April 1849, the particular time or times being to the prosecutor unknown, in or near the said house situated in

No. 61.
Ebenezer
Beattie.
Dumfries.
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Theft, &c.

No. 61. or near Annan, then and now or lately occupied by you the said
 Ebenezer Ebenezer Beattie, or at some other place or places in the shire of
 Beattie. Dumfries. to the prosecutor unknown, wickedly and feloniously, steal
 April 28. and theftuously away take, £2 sterling, or thereby, part of the said
 1850. sum of £5 sterling, or thereby, received by you as aforesaid from the
 Theft, &c. said Thomas Gowanlock : OR OTHERWISE, time or times and place or
 places last above libelled, you the said Ebenezer Beattie did, wickedly
 and feloniously, and in breach of the trust reposed in you in virtue of
 your said employment, embezzle and appropriate to your own uses
 and purposes the said sum of £2 sterling, or thereby ; the said several
 sums so stolen or embezzled and appropriated by you, as above li-
 belled, being the property or in the lawful possession of the said Eliza-
 beth Moon or Gass, or under the charge of you the said Ebenezer
 Beattie, and the same consisting of bank or banker's notes, and gold,
 silver, or copper coin, or one or more of them, the particular kind and
 description of notes or coin being to the prosecutor unknown ; and
 you did wilfully fail to enter the said sums stolen or embezzled by you
 as before libelled in the cash-book or other account-book kept by you
 for behoof of the said Elizabeth Moon or Gass, in the course of your
 said employment.

In the course of the proof, David Fulton, innkeeper, Springfield, having deponed—

That he knew the prisoner, and had dealt with Mrs Gass through him, who acted as her clerk, and received payment on her account. The prisoner came to his house on 9th May 1848, and got payment of an account being £21.

The ADVOCATE-DEPUTE was then about to put into the hands of the witness an unstamped paper, purporting to be a receipt by the pannel of the sum mentioned by the witness.

J. SHAW objected to the admissibility of this document. The indictment charged that the pannel had either stolen or embezzled certain monies, the property of Mrs Gass, and the document sought to be given in evidence, was for the purpose of shewing that the money which the prisoner was charged to have embezzled was her property. It would not, under the stamp act, be admissible as a discharge to her former debtor, and consequently could not be admitted to prove that the prisoner had abstracted the property of Mrs Gass, whose

right against her customer remained unaffected thereby. Had the prosecutor libelled the offence alternatively, as against either Mrs Gass or her customer, the objection would have been obviated; but as it then stood, it was part of the issue that it was Mrs Gass alone who had been defrauded, which could not be established by any improbative document. This case differed altogether from those where the offence committed lay in the creation of the instrument itself, as in the case of forged bills of exchange, or receipts on unstamped paper. In such cases, the pannel was not entitled to plead an evasion of the stamp law to screen him from his criminal act; but here the receipt was extrinsic to the offence itself, and it was only produced for the purpose of shewing a discharge of the obligation due to Mrs Gass from her customer.

No. 61.
Ebenezer
Beattie.
Dumfries,
April 29,
1850.
Theft, &c.

E. F. MAITLAND A.D.—The objection came too soon. Whether or no it being an improbative document would have any effect upon the cause as it came out in proof, would be for the Jury to determine, under the direction of the Court; but at present the document was admissible amongst other things, for the purpose of shewing that the pannel had been employed as clerk or collector by Mrs Gass, and had, in the course of his employment, given said receipt as her professed clerk.

LORD MACKENZIE.—I think this objection must be repelled. I think that it would have been a good libel to have alleged that the pannel had obtained money on behalf of another, although he only gave an unstamped receipt. And if I am right in that, it follows that an unstamped receipt may be given in evidence.

LORD IVORY.—It is also very important to observe, that the receipt may be very material to establish the capacity of clerk in which the pannel is said to have acted.

The prisoner subsequently pleaded guilty of embezzlement, under the 1st, 4th, 5th, and 6th charges.

In respect of which, the Court sentenced him to be imprisoned for the space of one year.

MAY 1.
1850.

A Y R.

LORDS MACKENZIE AND IVORY.

HER MAJESTY'S ADVOCATE—*E. F. Maitland A. D.*

AGAINST

JOHN BARR—*Boyle.*

EVIDENCE—PARTIAL COUNSEL.—Circumstances in which a witness was held admissible, notwithstanding he had precognosed some of the witnesses,

No. 62.
John Barr.

Ayr.
May 1.
1850.

Rape, &c.

JOHN BARR was charged with Rape; As also, with Assault with Intent to Ravish; As also, Assault, committed to the effusion of blood, serious injury of the person, and danger of life:

IN SO FAR AS, on the night of the 23d, or morning of the 24th, days of November 1849, or on one or other of said days, or on one or other of the days of said month, or of October immediately preceding, or of December immediately following, on or near that part of the public road from Kilwinning, in the parish of Kilwinning, to the village of Stevenston, in the parish of Stevenston, both in the shire of Ayr, which is at or near to, or in the vicinity of, the entrance leading from said road to the steading of the farm or lands of West Doura or Doura, in the parish of Kilwinning aforesaid, then and now or lately occupied or tenanted by Robert Blair, then and now or lately residing there, and on or near to that part of said road which is adjoining or near to the said farm or lands of West Doura or Doura, and in or near a field called or known as the East Laigh Park, or by some similar name, or of which the name is to the prosecutor unknown, which is situated on said farm or lands of West Doura or Doura, and is adjoining or near to the southern side of said road, or at or near one or more of said places, all in the parish of Kilwinning aforesaid, you the said John Barr did, wickedly and feloniously, attack and assault Mary Campbell or Donaldson, a widow, then and now or lately residing in or near the village of Stevenston aforesaid, and did drag or force her from said road into said field, and did, in or near said field, strike her with your fists, and with some iron or other instrument to the prosecutor un-

known, repeated severe blows on or about the face and head and other parts of her person, and did knock or force her down upon the ground, and did hold her down, and did take down or unloose your trowsers, and did raise her petticoats, and did lie upon her and struggle with her, and did have carnal knowledge of her person forcibly and against her will, and did ravish her; and you did thereafter, then and there, again strike her with your fists, and with some iron or other instrument to the prosecutor unknown, repeated severe blows on or about the face and head and other parts of the person; and you did otherwise maltreat and abuse her; by all which, or part thereof, the said Mary Campbell or Donaldson was severely cut and bruised, and was seriously injured in her person, to the effusion of her blood, and to the danger of her life: **ON OTHERWISE**, time and places or place above libelled, you the said John Barr did, wickedly and feloniously, attack and assault the said Mary Campbell or Donaldson, and did drag or force her from said road into said field, and did in or near said field, strike her with your fists, and with some iron or other instrument to the prosecutor unknown, repeated severe blows on or about the face and head and other parts of her person, and did knock or force her down upon the ground, and did hold her down, and did take down or unloose your trowsers, and did raise her petticoats, and did lie upon her and struggle with her, and did attempt to have carnal knowledge of her person forcibly and against her will; and this you the said John Barr did with intent to ravish the said Mary Campbell or Donaldson; and you did thereafter, then and there, again strike her with your fists, and with some iron or other instrument to the prosecutor unknown, repeated severe blows on or about the face and head and other parts of her person; and you did otherwise maltreat and abuse her; by all which, or part thereof, the said Mary Campbell or Donaldson was severely cut and bruised, and was seriously injured in her person, to the effusion of her blood, and to the danger of her life.

No. 62.
John Barr.
Ayr.
May 2.
1850.
Rape, &c.

In the course of the trial, a witness of the name of John Hutchinson, designed in the list of witnesses as a messenger-at-arms in Ayr, was adduced on behalf of the Crown, who deponed as follows:—

I am a messenger-at-arms. Went to Mrs D.'s house on Sunday, 25th November. She described the person who had injured her. She could not give his name, and said she knew nothing about him. I was present at pannel's apprehension. He answered exactly the description I had got. She told me of some scratches on his face. I found scratches on his face. Mrs D. described the field where the thing had happened. She afterwards shewed me the field when able to go out. I had in the meanwhile been on field from her description. It was the

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John Barr.

Ayr.
May 2.
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Rape, &c.

same. It was on same Sunday I first went to the field. I found a quantity of blood at two places, and at both the ground was very much torn. It was soft and in grass. I observed at one of the places cow dung. This was the furthest from the gate, and the greatest quantity of blood was there. Found a number of onions, a piece of orange half-sucked, a quantity of suet, at the place where the greatest quantity of blood was. The prisoner was apprehended next morning, Monday, at 7 A. M. I first took him to the inn at Dalry. I left him there with Peter Hutchison. I returned to his house, a few minutes after taking him to the inn. Eadie was with me. Pannel was in bed when I apprehended him. He dressed himself, and I took him away. When I returned to his house, I took possession of his clothes. Those on him are the same. I saw him put them on to-day. This bonnet I found in his house. He has now on a white shirt, which I also found in his house. I afterwards shewed those clothes to Dr Hutchison, and afterwards took them to Edinburgh, to Dr Douglas Maclagan. They were marked with sealed labels, so as to preserve evidence of identity. I had kept them in custody up to that time, when I delivered them to Dr Maclagan. They are in precisely the same state as when I found them. There were stains on outer clothes. They appeared to be blood. I found marks of cow-dung on the white shirt. Eadie was with me when Mrs D. shewed me the field. I know the road from Kilwinning to Dalry. Distance from Mrs M'Nish's to schoolhouse, about from 30 to 40 yards; may be a good deal more. I am not certain.

Cross-examined.—I occasionally act as clerk in Fiscal's office, and I take precognitions for him. I took two or three statements in this case, from parties at whose houses it had been said Mrs Donaldson had been drinking. I recollect of taking precognitions from three parties who have been examined to-day, and may have taken others, but I forget if I did so.

BOYLE thereupon objected to the witness being further examined, and requested the Judge to inform the jury that his evidence was inadmissible, on the ground of agency and partial counsel, and cited the cases of *Stephens*, April 20. 1839; *M'Clure*, March 15. 1848; *Robertson*, February 9. 1849.

MAITLAND.—Those cases do not apply, as in all of them the party sought to be adduced was in a different situation from that of the present witness. It could not be contended that the objection of partial counsel was to be applied with equal strictness in criminal as in civil cases. Were that so, it would exclude the evidence of

policemen, whose duty it was to get up all the evidence possible against a wrong-doer. In this case, the witness was not then employed by the fiscal, and it was quite competent for him to have taken all the steps he did, and without the fiscal's authority.

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The COURT, after considering the cases cited, repelled the objection to the admissibility of the witness, holding that, however indiscreet the fiscal had been in allowing the witness to take such important steps in the prosecution as he appeared to have done, there was not enough to exclude his testimony.

The witness was then recalled, and his examination proceeded with.

The jury unanimously found the pannel guilty as libelled.

In respect of which verdict of assize, the COURT sentenced the pannel to be transported for the period of his natural life.

HIGH COURT.

Present,

June 3,
1850.

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE AND MONCREIFF,

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Moncreiff—Deas A. D.*

AGAINST

DANIEL FRASER.—*Kinnear.*

INDICTMENT—RELEVANCY—DESCRIPTION.—Held that in modern practice it was sufficient to describe the article stolen by a generic name, under which the party injured could identify it.

THEFT.—Direction to the Jury, that if a party receive an article for the purpose of pledging it, he may be guilty of stealing the same, although he actually pledge it, if his purpose was all along to appropriate the advance thereon to himself.

No. 63.
Daniel
Fraser.

High Court.
June 3.
1850.

Theft.

DANIEL FRASER was charged with Theft, aggravated by being habit and repute a thief, and previously convicted of Theft :

IN SO FAR AS, on the 23d day of April 1850, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, within or near the house situated in or near Warriston's Close, High Street, in or near Edinburgh, then and now or lately occupied by Elizabeth M'Dougal or Fraser, then and now or lately residing there, you the said Daniel Fraser did, wickedly and feloniously, steal and theftuously away take, two gowns, the property, or in the lawful possession, of ANN FRASER or Blacklock, daughter of and then and now or lately residing with, the said Elizabeth M'Dougal or Fraser, or in the lawful possession of the said Elizabeth M'Dougal or Fraser.

KINNEAR objected to the relevancy of the indictment, on the ground that the articles stolen were not sufficiently described. The pannel was entitled to every information which the Public Prosecutor had, and in several cases the Court had animadverted upon the vagueness of indictments framed like the present; cases of *Henderson*, 6th November 1833, Bell's Notes, p. 205; *Campbell*, same date, *ubi supra*; *Blackwood*, 6th February 1837, Bell's Notes, p. 204; where the reasons on which the Court had proceeded in the various cases were given. The value and quality of the articles bearing a generic name might be totally different.

The LORD JUSTICE-CLERK.—I think the objection ought to be repelled. No doubt the old practice was more strict, but at present that strictness has been abandoned. The whole question is that of identification, and if the party who has sustained the injury is able to identify the articles, that is all that is required. Indeed, in so far as quality is concerned in such cases as the present, it would require the Public Prosecutor to have a mercer at his elbow to enable him to frame an indictment, were it necessary for him to describe the material of which the gown was made; and, in so far as value is sought to be made material, of what consequence can that be? We have every day instances of indictments

libelling thefts of hams, cheeses, &c., without any averment as to values, to which no one ever thought of objecting, the whole question being whether the party is able to identify them.

No. 63.
Daniel
Fraser.

High Court.
June 3.
1850.

Theft.

LORD MACKENZIE.—I remember noting long ago that there was a change in the practice respecting the strictness required in libelling the description of property alleged to have been stolen, and its value, and at that time I had some doubt as to the propriety of the change, but that has altogether disappeared, as I have never seen the pannel suffer any disadvantage from the change.

The objection was repelled.

It appeared in the course of the trial that the pannel had received one of the gowns for the purpose of pawning it, and that he had done so, and afterwards appropriated the money to himself.

KINNEAR objected, in his address to the Jury, that this did not amount to theft of that gown.

The **LORD JUSTICE-CLERK**, in summing up, told the Jury, in respect of the objection stated, that the facts did not support the charge of stealing the first gown. The Court could not say that if the pannel had taken possession of the gown with the express purpose of turning it into money, and then keeping it, it would not have been theft, but this was not alleged in the indictment, and, as the proof left the matter in doubt, the charge had better be withdrawn as to that gown.

The **SOLICITOR-GENERAL** withdrew the charge as to that gown.

The Jury unanimously found him guilty of the rest of the libel.

In respect of which verdict of Assize, the pannel was sentenced to be transported for the period of ten years.

Present,

THE LORD JUSTICE-CLERK.

June 11.
1850.

LORDS MONCREIFF AND COCKBURN.

FINNIE, Suspenders—*Neaves*.

AGAINST

GILMOUR, Respondent—*A. T. Boyle*.

JUSTICES—CLOSED DOORS.—Held, that it was a relevant ground of suspension that the Justices had tried and sentenced the complainer in a court from which the public were excluded.

No. 64.
Finnie v.
Gilmour.
High Court.
June 11.
1850.

THIS was a suspension of a sentence pronounced by the Justices of Irvine against the suspender, master and servants' act, 4th Geo. IV., for sentencing him to thirty-five days imprisonment.

Suspension.

This sentence was sought to be set aside on various grounds, the principal of which was, that the Magistrates had held their Court with closed doors at the time when the suspender was before them.

This was admitted on the part of the respondent, under this explanation, that the Magistrates had so acted under an apprehension that the public peace might be disturbed, and a rescue effected, were the populace able to obtain access to the Court.

The Court held, that, by the common law of Scotland, Police Courts were public, and that no sentence pronounced at a time when the public were excluded could be allowed to stand, there being no proof of the necessity for protecting the Court from violence, and accordingly passed the bill of suspension, with expenses.

Present,

THE LORD JUSTICE-CLERK,

June 12.
1850.

LORDS MONCREIFF, COCKBURN, WOOD, AND IVORY.

WILLIAM CAMPBELL SLEIGH, Esq. and THOMAS RUSSELL, Complainers.

—*G. G. Bell—Inglis.*

AGAINST

RICHARD JOHN MOXEY, Respondent—*Naves—Deas.*

SUSPENSION—POLICE OFFENCE—RELEVANCY.—Held, that it was a good charge in a Police complaint to allege that the party had been guilty of a breach of the public peace, by behaving in a disorderly manner at a public meeting, and interrupting and obstructing the proceedings.

THIS was a suspension of a sentence in the Police Court of Edinburgh, proceeding on the following complaint:—

‘ Unto the Honourable the Magistrates of Edinburgh, or any of
 ‘ them officiating as Judge in the Police Court of Edinburgh,
 ‘ the complaint of Richard John Moxey, Superintendent of
 ‘ Police, and Procurator-Fiscal of Court for the public
 ‘ interest ;

‘ Humbly Sheweth,—That William Campbell Sleigh, barrister-at-law, now or lately residing in Princes Street, Edinburgh, and Thomas Russell, an ironmonger, now or lately residing in Lauriston Place, near Edinburgh, have been guilty of the crime or offence of committing a breach of the public peace, actors or actor, or art and part, in so far as the Right Honourable William Johnston, Lord Provost of Edinburgh, having, upon the 1st day of April 1850 years, or about that time, called a public meeting of the inhabitants of Edinburgh and its vicinity, to be held within the hall situated in George Street, Edinburgh, known as the Music Hall, upon the 8th day of the said month of April, in compliance with a requisition, of date the said 1st day of April, subscribed by John Lee, Doctor of Divinity, Principal of the University of Edinburgh, and others, requesting the said William Johnston to call a public meeting of the inhabitants of Edinburgh and its vicinity opposed to the Bill presently before Parliament for legalizing the marriage of a husband

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Suspension

with his deceased wife's sister, with the view of petitioning against the Bill; and the said requisitionists, or some of them, and various other individuals, inhabitants of Edinburgh and its vicinity, opposed to the said Bill, being, upon the 8th day of the said month of April assembled within the said hall, and the said William Johnston having been appointed chairman of the said meeting, and having taken the chair accordingly, the said accused did, both and each, or one or other of them, place and time last above libelled, behave in a disorderly manner, and interrupt, obstruct, and disturb the proceedings of the said meeting, and did persist in so doing, though warned and admonished by the said William Johnston, and others, to desist therefrom, whereby the said William Johnston, as chairman, and the parties forming said meeting, or some of them, were annoyed and molested, and a breach of the public peace was committed.—It is therefore craved that warrant be granted for apprehending and bringing the said accused into Court to answer to this complaint; for citing witnesses for both parties; and that the said accused be thereafter punished according to law, or that such other judgment be given as the case may require.—According to Justice.'

(Signed) 'J. R. MOXEY, Sup.'

Which sentence was in the following terms:—

Edinburgh, 10th April 1850.—The Judge finds this complaint proved against the accused by evidence adduced, and finds them guilty accordingly; therefore fines and americiates the accused William Campbell Sleigh in the sum of two guineas sterling, payable to the clerk of Court; and ordains said accused to find sufficient caution, acted in the books of Court, under a penalty of ten pounds sterling, for good behaviour for six calendar months from and after the payment of said fine, or from the expiry of the term of imprisonment after mentioned, for non-payment thereof; and the said accused to be incarcerated in the prison of Edinburgh, therein to be detained until said fine be paid, and said caution be found; but for non-payment of the fine, not exceeding twenty days from this date, and for not finding caution, not exceeding twenty days further from payment of the fine, or from the expiry of the term of imprisonment for non-payment thereof; fines and americiates the accused Thomas Russell in the sum of one guinea sterling, payable to the clerk of Court; sentences and adjudges said accused to be incarcerated in said prison, therein to be detained until said fine be paid, but not exceeding ten days from this date.—One word deleted.'

(Signed) 'WILLIAM LAW.'

The respondent in his 4th and 5th statement of facts alleged as follows:—

‘ 4. After the first resolution had been proposed and seconded, the suspender, Mr Sleigh, rose to speak. It was seen and understood, as was indeed the fact, that he had come to oppose and obstruct the proceedings, and that, if allowed to proceed, this would be the effect. The chairman thereupon intimated to him that he would not be allowed to do so; and when this intimation was disregarded, a great deal of excitement and disturbance ensued. The suspender persisted in his attempts, in defiance of repeated admonitions, and against the manifest feeling of the meeting, and much irritation and commotion were occasioned. The respondent was then called on, in his official capacity, to take the suspender into custody; and the chairman having, on an appeal to him by the respondent, declared that the proceedings were obstructed, and the meeting disturbed by the suspender’s conduct, the respondent, who considered that a breach of the peace had been so committed, conceived that he had no alternative but to take the suspender into custody, as the only means of restoring order, and preventing more serious consequences.’

‘ 5. A similar scene was repeated afterwards, when the other suspender, Mr Russell, rose and insisted on being heard in favour of Mr Sleigh’s views, which he had previously intimated in writing to the Lord Provost that he meant to support. Mr Russell was also required to desist, but refused to do so, and was ultimately in like manner removed, in consequence of similar demands and complaints made to the respondent as to the effects of his conduct: after which the business of the meeting proceeded without interruption.’

INGLIS, for Suspender.—The complaint did not set forth any offence. All that was done was alleged to have taken place at a public meeting, at which the suspenders had a right to be present. And what was charged against them in the minor of the complaint was, that they behaved in a disorderly manner. This was too

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ambiguous, and was quite consistent that they were merely out of order, as in speaking to a resolution not then before the meeting, or in other ways not constituting a police offence. What was farther alleged, as to the obstruction of the meeting, did not carry the matter any farther, as, in all cases where a party was out of order, it necessarily happened that he created an interruption or obstruction to the meeting. This went to the whole case, and if the complaint was not so specific as to shew any offence, then the presiding Magistrate had no jurisdiction.

The LORD JUSTICE-CLERK.—It would be giving undue importance to this case to require any answer. The complaint sets forth, that the suspenders have been guilty of a breach of the public peace; and, after setting forth the place and circumstances where the offence was committed, alleges that, at the public meeting mentioned, the parties behaved in a disorderly manner, and interrupted and obstructed the meeting after admonition from the Lord Provost, who presided. That such a charge was proper for the Police Court no one can doubt; and as to what is said as to being disorderly, meaning that the parties were merely out of order, that was a matter for the Police Magistrate to adjudicate upon on hearing the evidence as to the conduct of the parties. By imposing the sentence, the Magistrate found that the parties had been criminally disorderly, and having so found, we have no jurisdiction to review his sentence.

The other Judges concurred, Lord Cockburn remarking, that he considered the complaint as a model for Police Courts in similar cases.

The note of suspension was accordingly refused, with expenses.

JAMES BURNS, Appellant—*Deas*.

AGAINST

JOHN BURNET, Respondent—*Young*.

APPEAL—JURISDICTION—PROCEDURE.—Held, 1st, that the Court of appeal would not direct enquiry in an appeal against a Police sentence, unless there was some irregularity patent on the proceedings, or an allegation that the Magistrate had exceeded his jurisdiction. 2d, That the Procurator-fiscal had equal privileges as the rest of the lieges in respect of offences where pecuniary penalties were alone sought to be recovered, and that a formal complaint was in such case unnecessary.

THIS was a certified appeal from the Glasgow Circuit Court of Justiciary under the following interlocutor:—

‘ In respect that it is maintained in this case that an appeal to the Circuit Court of Justiciary is competent in all cases from any sentence of the Magistrates of Glasgow sitting under the Police statute, and that, in virtue of the general clause of that statute, § 282,¹ and

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Appeal.

¹ By statute 6th and 7th Vic., cap. 99, entitled ‘ An act to consolidate, amend, and extend the provisions of several acts for the better paving, watching, lighting, and cleansing, and for regulating the Police of the City of Glasgow, and adjoining districts; and also for managing the statute labour of the said city; and for other purposes in relation thereto,’ it is enacted by section 282, ‘ That if any person shall be aggrieved by any sentence pronounced by the Magistrates under this act, it shall be lawful for such person to appeal to the Court of Justiciary at the next Circuit Court to be held at Glasgow, or elsewhere, for the Western Circuit, in the manner and under the rules, limitations, and conditions contained in an act passed in the twentieth year of the reign of His Majesty King George the Second, intituled *An act for taking away and abolishing Heritable Jurisdictions in Scotland*; and it shall not be competent to appeal from or to bring the judgment of the Magistrates under this act, under review, by advocacy, suspension, suspension and liberation, or reduction, or in any way whatever, other than is hereby provided for; saving always any right of appeal or other mode of review authorized by any other act, under which it is by this act made lawful for the said Magistrates or any of them to try crimes or offences: Provided always, that no such appeal shall operate as a stay of exe-

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 Appeal.

‘ in respect, that though this question has been agitated in various cases in the High Court of Justiciary, it is believed that the judgments in those cases have proceeded on special circumstances, so that the general question on the effect of the clause of the statute has not been definitely settled; certifies the case to the High Court of Justiciary, to be held in Edinburgh on Monday the 20th day of May next, or whatever other day may be appointed for hearing it.’
 (Signed) JAMES W. MONCREIFF.’

The appeal was presented against a conviction proceeding on the following citation:—

‘ CENTRAL DISTRICT POLICE OFFICE, Glasgow, 28th January 1850.
 ‘ To James Burns, auctioneer, 92 Trongate Street, you are hereby summoned to compare before the Sitting Magistrate, in the Police Court, Glasgow, on the twenty-ninth day of January current, at 10 o'clock forenoon, to answer to a complaint at the instance of the Procurator-Fiscal of Court, charging you with having on Saturday last, within or near the shop or premises occupied or rented by you, situated in or near Trongate Street, Glasgow, called or proclaimed, or caused to be called or proclaimed, a public sale or auction, to the disturbance and annoyance of the inhabitants in the neighbourhood, in contravention of the Police Act.

‘ COLIN CAMPBELL, Police Officer.’

The entry in the Police Court book was as follows:—

‘ POLICE COURT, GLASGOW, Tuesday, 29th January, 1850.

‘ Sitting in Judgment, JOHN GILMOUR, Esquire, Bailie.

‘ The Procurator-Fiscal of Court for the Public interest charges the Defenders after named and designed with the Crimes, Offences, and Contraventions after stated, and craves that on conviction thereof they be punished by Fine or Imprisonment, or otherwise disposed in terms of Law, viz.’ (Signed) ‘ JOHN BURNET, P.F.’

‘ 333 JAMES BURNS, Auctioneer, 92 Trongate Street. 10/6

‘ Charged with having, on Saturday last, within or near the Shop or premises occupied or rented by him, situated in or near Trongate Street, Glasgow, called or proclaimed, or caused to be called or proclaimed a Public Sale or Auction, to the disturbance and annoyance

‘ cution in cases where the sentence or decree awards the payment of any money and expenses, unless on consignation of such money and expenses, nor, in cases where the sentence or decree awards imprisonment, unless on sufficient caution for the appearance of the party in such manner as the Judge shall direct, and that without prejudice in either case to the caution or security required by the said recited act.’

of the Inhabitants in the neighbourhood, and in Contravention of the Police Act.

On defender's motion, continues the case, in order to his Procurator appearing. (Iuit^d) J. G.'

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High Court.
June 12.
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Appeal.

DEAS, for the appellant,—There were two questions involved in this appeal; 1st, one of jurisdiction of the Court of Appeal, to ascertain the facts as to whether there had been a contravention of the statute or not; and, 2d, as to the validity of the complaint on which the conviction proceeded.

As to the first point, after the case of *Lockie M'Whar-ter*, High Court, Feb. 15. 1849 (*ante*, p. 161), there could be no doubt that the court of appeal had authority to do everything which was necessary fully to review the sentence complained of, even though that should involve the renewed investigation of the facts.

The LORD JUSTICE-CLERK.—Do you contend that the court of appeal is to sit and hear the complaint anew.

DEAS.—That will depend on whether the Judge in the Superior Court deems such investigation necessary. After the case of *Lockie* he cannot decline to do so on the ground of inconvenience.

The LORD JUSTICE-CLERK.—The Court are unanimously of opinion that the case of *Lockie* is not an authority to the extent you put it. In that case, the objection stated against the conviction appeared on the face of the proceedings themselves, arose as to the correctness of the deduction the Magistrate drew from the terms in which the confession had been made. Nothing of that kind arises here, and it is proper that it should be at once understood, that, neither here, nor in the Circuit Court of appeal, do we sit to review the question of guilt or innocence on a relevant complaint, without some irregularity appearing on the proceedings themselves.

DEAS.—As set forth in the Police books, the charge was at the instance of the Procurator-fiscal, but there

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Appeal.

had been no previous complaint by him, although the citation bore that there had been such previous complaint.

The charge was under the 246th section, and the proceedings altogether differed from those contemplated in the 266th and 272d, where the proceedings were to be at the instance of the Procurator-fiscal. The 265th section, which contemplated the proceedings by private parties, and did not give the power of imprisonment, was altogether different; that section, applied against coachmen for excessive cab-hire, &c., and was altogether different from complaints at the instance of the fiscal, at whose instance, under the 266th, the punishment of imprisonment might be awarded. There ought to have been a formal complaint lodged before citation, and a copy thereof delivered at the time the party was cited.

YOUNG.—The proceedings were valid under the 278th section, the party having not objected *in limine*, either on the ground of a regular citation, misnomer, or informality.

The LORD JUSTICE-CLERK.—This case is clear; the entry in the Police book shews that the Procurator-fiscal was acting under the 265th section, and not under the 266th, and the reason why he so acted is obvious. The act charged was a mere Police offence, which might be fully punished by means of a fine, and accordingly a fine is imposed. I think this was quite competent.

LORD WOOD.—The argument of Mr Deas, if correct, would exclude the fiscal from acting at all under the 265th section. I see nothing in the statute to justify such a construction of the statute.

The other Judges concurred, and the note of suspension was refused, with expenses.

Present,

The LORD JUSTICE-GENERAL,

THE LORD JUSTICE-CLERK,

July 20.
1850.

LORDS MACKENZIE, MONCREIFF, COCKBURN, WOOD, AND IVORY.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Moncreiff*—*G. Young A.D.*

AGAINST

DAVID BALFOUR—*Paton.*

STATUTE 1701—BAIL—LETTERS OF INTIMATION—CRIMINAL LETTERS.—Held, that where a party in prison applies for and serves letters of intimation under the act 1701, and thereafter, before sixty days, is liberated on bail at his own request, he may be indicted anew after the expiration of sixty days, and that criminal letters are not necessary.

DAVID BALFOUR, porter and pointsman on the Edinburgh and Glasgow Railway, was indicted at the Glasgow Spring Circuit upon Culpable Neglect of Duty :

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David
Balfour.High Court.
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IN SO FAR AS, you the said David Balfour being, time hereinafter libelled, employed as a pointsman upon the Edinburgh and Glasgow Railway, and as such, or in some other capacity, being in charge of certain switches or points upon or connected with said railway at or Garngaber, in the parish of Kirkiuttiloch, and county of Dumbarton, where the Monklands Junction Railway joins the said Edinburgh and Glasgow Railway, and it being your duty to see and take care that everything about the switches or points under your charge was right and in working order, and to keep the same locked or shut, except when required to be opened to admit of the passage of engines or trains, you the said David Balfour did, on the 1st day of January 1850, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, in culpable neglect of your duty above libelled, fail and omit to shut or lock, or to keep shut or locked, a switch or point under your charge as aforesaid, upon or connected with said Edinburgh and Glasgow Railway, at or near Garngaber aforesaid, and upon or connected with a lye or line of rails leading into a siding at or near the place where the said Monklands Junction Railway joins the said Edinburgh and Glasgow Railway, and did leave the same open, or permit and allow the same to remain open,

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Neglect of
Duty.

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David
Balfour.

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at a time when it was not required to be open to admit of the passage of any engine or train, or for any other purpose, and when it was necessary or proper, for the safety of the lieges, that it should be locked or shut; in consequence whereof, a passenger train from Airdrie to Glasgow, drawn by a locomotive engine, was, time above libelled, prevented from passing from the said Monklands Junction Railway, on to the main line of the said Edinburgh and Glasgow Railway, at the junction of said railways, and was turned or had its course diverted into the said siding at or near Garngaber aforesaid, and at or near the place where the said Monklands Junction Railway joins the said Edinburgh and Glasgow Railway, and came violently in collision or contact with a train or number of trucks or other carriages then standing in said siding, and a great number of the lieges who were in or upon said passenger train, were thereby, and in consequence of the concussion occasioned by said collision, or contact, violently thrown or forced upon or against one another, and upon or against portions of the carriages in or upon which they were travelling, and were cut, bruised, and wounded, to the serious injury of their persons, and were put in danger of their lives: **IN PARTICULAR**, Robert M'Lachlan, then and now or lately a clerk to William Buist and Company, now or lately coal-merchants in Airdrie, and now or lately residing in Airdrie, was cut, bruised, and wounded, on or near the head and face, or other parts of his person, to the effusion of his blood, and the serious injury of his person; Ann M'Ilrevie or Boness, wife of Robert Boness, a contractor, now or lately residing in or near Airdrie, was rendered insensible, had one of her ribs fractured, and was otherwise bruised and wounded, to the serious injury of her person; Daniel M'Cormick, a collier's drawer, now or lately residing at or near Rawyards, in the parish of New Monkland, and county of Lanark, had his right hand sprained, and was otherwise bruised and wounded, to the serious injury of his person; Barnard M'Ilhone, a labourer, now or lately residing at or near Rawyards aforesaid, had two of his teeth fractured, and was bruised on or near the face, or other part of his person, to the serious injury of his person; Barnard Kean, a miner, now or lately residing in or near Bell Street of Airdrie, was bruised on or near the back, to the serious injury of his person; John Watt, a shoemaker, now or lately residing at or near Rawyards aforesaid, was rendered insensible, and was cut, bruised, and wounded on or near the head, and face, and side, or other parts of his person, to the effusion of his blood, and serious injury of his person; John Boyd, a labourer, now or lately residing in or near Rawyards aforesaid, was rendered insensible, had two of his teeth fractured, and was cut, bruised, and wounded on or near the head and face, or other parts of his person, to the effusion of his blood, and serious injury of his person; Margaret Campbell or Connoway, wife of John Connoway, a miner, now or lately residing in or near Bell Street of Airdrie, was rendered insensible, and was severely cut above or near the right eye, or other part

of her person, to the effusion of her blood, and the serious injury of her person; John Connoway aforesaid was severely cut or wounded across or near the brow, or other part of his person, to the effusion of his blood, and serious injury of his person; John Allan, a miner, now or lately residing at or near Rawyards aforesaid, was cut, bruised, and wounded on or near the leg, or other part of his person, to the effusion of his blood, and serious injury of his person; Sarah M^cWilliam or Delargy, wife of James Delargy, a mason, now or late residing in or near Bell Street of Airdrie, was rendered insensible, and was cut, bruised, and wounded on or near the head, face, and other parts of her person, to the effusion of her blood, and serious injury of her person; David Mitchell, now or lately a clerk to James Thomson Rankine, now or lately a writer in Airdrie, and now or lately residing in or near Chapel Street of Airdrie, was rendered insensible, and was cut, bruised, and wounded on the head, face, and side, and other parts of his person, to the effusion of his blood, and serious injury of his person; Ann M^cPherson or Sands, wife of James Sands, a waggon-driver, now or lately residing at or near Hall Craig, near Airdrie, was cut, bruised, and wounded, on the head, face, and other parts of her person, to the effusion of her blood, and serious injury of her person; and Robert Sands, collier's drawer, now or lately residing with his father, James Sands aforesaid, was cut, bruised, and wounded on the face, or other part of his person, to the effusion of his blood, and serious injury of his person; and the said persons, or some of them, by your culpable neglect of duty above libelled, were put in danger of their lives.

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On the case being called—

PATTON, on behalf of the pannel, presented an application under the act 1701 for instant liberation; and he further objected to the present trial proceeding under the indictment now called, and pleaded that the pannel could not be tried under the present indictment, and could only be tried under criminal letters; in respect that, while in custody with a view to trial for the offence now charged against him, he had obtained a precept for intimation to the Public Prosecutor under the act 1701, and had intimated his letters on the 11th of January last, conform to execution produced. The present indictment was not served until the 9th of April current, being more than sixty days from the date of the intimation; and further, that the Public Prosecutor had, upon 27th of February, served upon pannel an in-

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dictment with a view to trial before the High Court, but which indictment had not been followed out to a conclusion, in terms of the provisions of the said act.

The Court certified the foregoing objection, and it came on to be advised of this date.

PATTON, for the pannel, stated that he had been incarcerated on this charge on the 7th of January 1850. He raised letters of intimation on the 11th of January; and on the following day, the 12th, was liberated on bail. Thereafter he was served with an indictment, requiring him to appear on the 15th of March, on which day, however, the Public Prosecutor deserted the diet. Sixty days thus elapsed before fixing the diet after the service of intimation, after which he was again, on the 9th of April, served with an indictment, requiring him to appear on the 25th of April, and it was on an objection to this indictment that the present question arose. The objection was twofold:—

1st, That no diet was fixed within sixty days of the date of the letters of intimation; and,

2d, That the proceedings had not been brought to a close within a hundred days therefrom.

It was conceded by the Crown, that, had the pannel been in prison, no such course could be adopted; and the question was, whether, as the party was liberated on bail on the 12th of January, after the letters of intimation had been served at his own request, he was thereby deprived of the act 1701. That he was not so, was clear from this:—

1st, That the letters of intimation were competently raised and served.

2d, From the object and general scope of the enactments in the statute.

The statute had two objects in view.

1st, To prevent undue imprisonment; and,

2d, To prevent undue delay of trial. The latter being clearly as applicable to the case of parties liberated on bail, as to parties suffering imprisonment. The sub-

ject had been much considered in the case of *Macdonald* and *Young*, 18th June 1832, (Bell's Notes, p. 160,¹) where the decision was in favour of the pannel; and

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¹ The Opinions in this case, copied from the Notes of the Lord JUSTICE-GENERAL, are here inserted, on account of the importance of the question, they not having been before reported.

The LORD JUSTICE-CLERK.—In delivering our opinions upon this petition under the act 1701, it is indispensably necessary to keep correctly in view the facts under which the question to be determined has been raised.

These are, that *two* previous indictments, containing a charge of fraud and falsehood, having been raised against the pannel Charles Macdonald, and a person named Robert Young, the one containing a diet of compearance on the 14th February 1831, which was deserted *pro loco et tempore*, and the other for the 30th May following, when, on the pannels appearing, a discussion took place as to the citation of Young, the proceedings were delayed, and minates of debate ordered; and afterwards the indictment was abandoned, when a new indictment, somewhat varying from the others, was served on the 21st June, the day of compearance being fixed for the 11th July 1831.

On that day the pannel appeared; on the diet being called, the charge was pleaded to, and the indictment found relevant by an interlocutor, and remitting to the knowledge of an assize; but on motion of the prosecutor, the diet was continued till 20th July, and warrant granted for committing the pannel to prison (the crime no doubt being bailable as had been before acted on.)

The pannel went to prison, and on the day following, the 12th, he applied for letters of intimation under the act 1701, by the *petition annexed to prosecutor's information*.

On the 12th, Lord Medwyn granted the warrant for letters of intimation, also there annexed, which were duly served on the Advocate-Depute on the 13th July.

The pannel remained after this in prison till the 19th July, when the warrant of commitment was withdrawn, when he was liberated or walked out of gaol.

On the 20th, this *diet*, and all other diets in absence of the pannel, was continued till the 1st of August, and again continued with other diets till the 8th November, and again till the 10th November, when the pannel being then in court, presented his *petition*, which is also annexed to the prosecutor's information, craving, that as the indictment was not insisted in on the 1st Augnst, the diet fixed for his *trial*, nor for *forty* days thereafter, the petitioner should be liberated in terms of the statute.

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was so considered in the case of *Dick and Lawrie*, (Bell's Notes, p. 161). The case of *Dundas* referred to in the case of *Macdonald*, was to the like effect.

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It is under this state of facts we are now to decide whether the pannel is entitled to the benefit of this act.

As all questions touching the act 1701 are of importance, both to the law and the subject, I concurred in ordering this question to be argued in informations.

I am glad that course was followed, being free to admit that the discussion this point has undergone, and the time we have had to consider it, has been at least of use to myself in forming my opinion upon it.

I am ready to admit, that the object of this statute was not merely to prevent the evil of undue delays in trials, but also to secure the lieges against the evil of protracted imprisonment, accompanied with the delay of their prosecutors in instituting charges against them, and following them up by *trial*; and I am also not disposed to deny, that the case chiefly contemplated in the provisions of the act, was that of a prisoner for custody in order to trial, before any indictment was raised against him, and who was declared entitled to adopt the proceedings therein pointed out.

I am equally clear, that no person who is not a prisoner at the time of applying for letters of intimation is entitled to found upon the statute; and I agree also, in the opinion expressed both by Baron Hume and Mr Burnett, that in regard to the application of the provisions as to the last period of *forty days*, in regard to new criminal letters, *the party founding on the act must be in custody; and that one on bail cannot found on it.*

The question here however is, whether was the pannel, on the 12th of July last, when he applied for letters of intimation, 'a prisoner for custody in order to trial.' If he truly was so, it remains to be considered, whether he was not entitled to the protection of the act?

1. It appears to me that the first question must be answered in the affirmative.

The pannel was a prisoner by the act of the prosecutor, who, after the interlocutor of relevancy on the 11th July was pronounced, instead of going on with the trial moved a continuation of the diet, and a warrant of commitment to the 20th.

It will not do to say this was the act of the court, as the prosecutor could unquestionably have moved that the commitment should be dispensed with, and the pannel allowed to go at large.

Had this been done the pannel could not have set forth that he was a prisoner, either in fact or in law.

But having been sent to prison, was he not there 'for custody in order to trial.' He was so in the most direct meaning of the terms,

These cases explained the act, and evidenced the consistent practice from the date of the enactment to the present time, shewing that the act applied equally to the

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as the *prosecutor moved the continuance of the diet of the trial till the 20th*; and he was certainly imprisoned for no other purpose.

2. While, then, in this precise situation, and under the very words of the act, he, on the 12th, applied for and obtained warrant for letters of intimation, and on the 13th they were served.

On what grounds, then, is the pannel to be denied the benefit of the other provisions of the act?

Can the circumstance of the prosecutor, after having enforced the warrant of imprisonment till the 19th, then withdrawn it, and concurred in the pannel's liberation, and that he did not remain a prisoner all the time contemplated by the act, afford a bar to its application?

I am decidedly clear that it cannot if originally within the application of the direct words of the act. Mere relaxation of the imprisonment which he endured, when he sets its machinery in motion, cannot for one moment be listened to without a total subversion of the whole provisions of the act.

The prosecutor was too late in this indulgence. It should have been shewn at the moment the relevancy was found, and then it could have been stated with perfect truth, and in conformity with the whole scope of the act, the pannel was in no situation applicable to it.

It is no answer, therefore, in my opinion, to say, that neither on the 1st of August, whatever is held to be the diet prefixed, nor the 9th of September, when the forty days expired, was the pannel a prisoner, and therefore the act is inapplicable as throughout contemplating the party being all along in confinement. *The pannel's being at large having been by the subsequent act of the prosecutor alone.*

The prosecutor had at first placed him within the express predicament of the statute, and it was only after the pannel began to avail himself of its enactments, that he thrust him out of prison, and then turns round and denies that, in consequence of that proceeding, he can avail himself of the statutory protection.

If the 1st of August is held as the diet duly fixed for the trial under the Letters of Intimation, the fact of the pannel being then at large was occasioned by the prosecutor's turning him out of jail, and therefore he cannot offer that as a bar to the application of the statute.

On the other hand, if no diet on that or any other day is to be held as fixed, the pannel is easily protected, his liberation having only been granted by the prosecutor, after he had set the act in operation in his favour, and had become entitled to its full benefit.

But it has been further contended, that as, previous to the 12th of July, when the pannel obtained letters of intimation, a diet for his trial

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advantage of the accused, whether he was actually or constructively in custody. It was so assumed in the case of *Murray*, 1826; Bell, p. 161.

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had been fixed on the 11th, therefore the act does not at all apply to his case.

If it is to be held, as the *prosecutor* seems to maintain, that the *diet* was fixed for the 11th *July*, and previous to the letters of intimation, and consequently, that the act did not apply, why was that not judicially stated on the 20th, to which that diet had been continued?

No such course was followed, but the day *before* the pannel was liberated by the withdrawal of the warrant.

For, if this had been so stated, and the Court had decided that the act did not apply, then the pannel would have had an opportunity of applying directly for the interposition of the Court, instead of being left to rely on the efficacy of his letters of intimation.

But has it been established, either by authority or decision, that no prisoner can avail himself of the act 1701, against whom an indictment has been raised, and a diet of compearance fixed and called.

It must be admitted that one may have suffered much by confinement, and repeated charges raised and not followed up; and that, after another libel has been executed, he may have a great anxiety to have his trial no longer delayed; and in this case though there was little confinement, *there had been ample delay as to following up the charge.*

Now, I have certainly seen *no express dictum either in Baron Hume or Mr Burnett*, that the act does not apply to the precise case of the pannel, the observation quoted from the former p. 10, Information for Prosecutor, expressly referring to the other branch of the *statute*. Mr Burnett, again, in treating of the provisions as to the last forty days, p. 379 merely says: 'If no warrant of commitment be at all applied for, or executed against the accused, or if he be admitted to bail, he is not within the case provided for by the act, which is directed against wrongous imprisonment, and limits the imprisonment of those who are in custody in order to trial.'

But in another passage he expressly states, p. 363, 'That no continuation or delay by the Court, any more than that occasioned by the prosecutor, can prevent the prisoner from availing himself of the benefit of the act.'

There is, moreover, to be found in none of these authors any indication that any act of oppression arising out of attempts to evade the application of this act, are to be left to the protection of the Court in controlling a prosecutor. On the contrary, as the act was passed, not only for preventing wrongous imprisonment, but *against undus delays in trials*, the language of Baron Hume, as quoted by the pannel, is entitled to the greatest attention, and the propriety of *'rejecting such*

The two objects contemplated in the act could not be otherwise carried out; for if the party who used his lawful privilege of liberation on bail, was deprived of all privilege under the act 1701, he was left to the mere or-

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' a construction of it, as leaves everything almost as indefinite and as liable to abuse as before,' and nothing can more strongly illustrate this, than the case put by the *panel*, as following from the *prosecutor's* argument, that such only must be left to the Court, the discretion of a prosecutor, or the control of public opinion.

If there is no authority, then, for denying the *panel's* right to letters of intimation, has there been any *decision* in practice produced against it?

I cannot hold the case of Campbell, as noticed in the note at p. 110 of Baron Hume, as a decisive authority; for the reasons stated by the *panel*; it is not relied on by the prosecutor.

That note states, that after the case had been certified from the Circuit, he executed letters of intimation, and then applied by *petition* for liberation; that *forty days had elapsed from his serving his letters of intimation*. This was refused, and justly, as *incompetent*, as not sanctioned by the statute at all.

But the case of Dundas, as detailed by the *panel* in his Information, appears to me to be entitled to more regard than the prosecutor bestows on it.

Whatever may have led to that prosecution, the *time* when it depended, and the rank of the accused, independently of the nature of the offence, must have secured it *attention*.

We see then his *petition* (after indictment raised and diet called, when Mr Dundas was a prisoner), and warrant for the intimation granted, acted on by the *prosecutor*, and at length the charge given up, for the reasons assigned.

But considering this was only eleven years after the passing of the act, it is inconceivable that, if it had been supposed to be inapplicable to Mr Dundas's situation, the objection would not have been stated, either by prosecutor or the *Court*. On the contrary, *its being acted on*, while the nature of the enactments must have been fresh in recollection, and so well understood, is a strong authority for the *panel*.

Again, the case of Welsh, which is founded on as in other matters settling so many important points by Baron Hume, *originally arose by intimation being made after an indictment had been raised*.

The same course here, of serving a new indictment, might have been followed, after the intimation on the 13th July, if prosecutor chose.

The case of O'Neil seems also a case distinctly applicable to the point, as shewing not only the practice, but the application of the statute to it.

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dinary course of prescription in criminal cases of twenty years, and thus, that which is intended as a relief, was converted into a gross hardship, by allowing an indefinite postponement of trial.

And certainly, to such of us as are familiar with the case of Edgar, the course there followed, with the deliverance of the whole Court in granting the letters of intimation under the circumstances stated (though no discussion appears on the record), must be held as a proceeding which must have attracted notice by all concerned.

These *cases* are sufficient, in my mind, to establish the course of *practice*, and to shew that the pannel was not going out of the statute, when he prayed for and obtained the letters of intimation in this case.

Had the prosecutor chosen, it might have been perfectly competent to serve a new libel after this intimation, or he might, as in Dundas's case, have availed himself of the eighty-one, and moved *the Court to hold the diet as fixed*; but after either course of procedure the act must have its *operation*, and on the whole, as I see no repugnance to the statutory enactments, and no undue hardship imposed on the prosecutor by giving effect to them, while the *letters of intimation afford the pannel protection, both against wrongous imprisonment and undue delay in trial*, I am of opinion, that we cannot, on a fair construction of the statute, deny the pannel the benefit prayed for in his petition.

LORD GILLIES.—Every case on this act requires attention; but from the first, I have never entertained a doubt, and as I entirely concur with the opinion that has been delivered by the *Chair*, and for which the public is indebted, I shall add nothing.

LORD MEADOWBANK.—This is certainly a most important question; for if the interpretation put on the act is well founded, there would be an end of the liberty of the subject, founded on this most important and deliberately considered act of Parliament. If the mere serving an indictment deprives a party of its benefit, the safety of the public is at an end. I equally think that the second construction is antenable. I am in the same situation as Lord Gillies, in having never had a doubt upon the question. The rule of construction laid down by the pannel is just to advance the remedy, and abate the evil; and certainly, if any doubt arises, it must be given in favour of the subject, and against the Crown, and therefore, if the case is doubtful, as the prosecutor seems to feel, there is an end of the question. I don't add to what has been stated. But how is a fair interpretation of the 130 years custom to be arrived at, but by the opinion and practice of lawyers: The *point* now raised would render the act a dead letter.

The case of Dundas expressly refers to a depending process, and on hearing that, the whole Court grant the warrant for intimation, and

SOLICITOR-GENERAL and YOUNG.—The facts, as stated for the pannel, were admitted, and the question was, whether the accused would require, as matter of form,

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‘with certification as contained in the said act.’ Then came the case of *Edgar*. In it nothing was omitted on the part of the prisoner, and as to the prosecutor, I can say, that I was called on and stated the difficulty, but did not agree in it, and Court *causa cognitur* decided for the pannel.

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As in the case of Dundas, and no doubt has been stated down to present hour.

As to the second question, I trust there can be no doubt among us, that the liberation in question can't avail the prosecutor. The statement gives a *ius quassitum* to a prisoner to insist on all that the act confers, and he can't be affected by the acts of his adversary. I hold this to be by far the most important question that has occurred since the passing of this act.

LORD MACKENZIE.—As I concur in the opinion given by the Chair, I need say little. I can't say I never felt difficulties: I did feel them originally, though I thought the statute would be defective. But I am now able to concur in what was stated by the Chair, as to the liberal interpretation of the statute, and that a doubt, if it arises, is always to be interpreted in favour of the pannel. I must decline concurring on this, as the act contains most important penalties against Magistrates, and I can't say that such an act should receive every liberal interpretation.

LORD MONCREIFF.—As I concur in the opinions given, I shan't detail mine at very great length. I have always understood this act was looked at as the most important act for the liberties of the people, and I do hold we are bound to give it the most liberal construction, in advancing the remedies and averting the evils that were in view. I think the prosecutor's argument goes too much *on implication* in construing the act, in going on the case of persons all along in custody, and that the act does not apply to prevent undue delays of trial, see p. 5 of Information. This would destroy one of the main provisions in the act.

The first point is, the endeavour to shew that when a man is under indictment and a diet fixed, he is not within the act. Now the cases so fairly stated by the Chair, shew clearly the pannel was in custody ‘*in order to trial*.’ Now, does not the act say any ‘*prisoner for custody in order to trial*.’ He then applied for letters of intimation, and he got them, and their having been served, is his intimation to go for nothing because an indictment had been served? This would extinguish the act entirely. Is there a word in the act that says so? He is entitled to have a diet fixed, and trial concluded in forty days, and more, to enjoy the consequences.

I take it we should hold that diet was fixed by the adjournment to the 1st of August, but if not fixed then, no diet was fixed at all,

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criminal letters after sixty days from the date of letters of intimation, and whether liberation on bail, on the pannel's request, stopped the running of the letters. The

within the 60 days, and I can discover no doubt. But if any existed, the cases would remove it.

As to Dundas's case must we look to the whole procedure *in causa*. Had the prosecutor wanted pannel to escape, he would not have taken this course against the principles of his own act. After notice he proceeded *under the act*. I can attach no notice to any private history. This is evidence of practice eleven years after the act.

In the case of *Edgar*, the point was agitated, and was in the view of the Court. Other cases make the practice, and the negative evidence is important.

As to the second point, all the Court are clear; in the pannel's case, a distinction is made as to one in custody, and on bail. I wish to reserve my opinion on this, as Dundas was on bail. [Reads.] If on bail, he is in *legal custody*. I reserve my opinion and also as to the new criminal letters, in regard to what is stated by Baron Hume but it is not necessary in the present case.

LORD MEDWYN.—Concurred in the opinion given, as to propriety of course here taken, in having this question publicly decided. I wish it had been so before, as I regret unfeignedly to differ from the opinions given on one point. I could have wished my doubts had been removed, rather than rivetted. I should have wished to have withdrawn, but having formed my opinion I must deliver it.

Though as warm a friend of freedom as the rest of the Court, I have deliberately considered, and must give my opinion.

1. Can a prisoner, who has been indicted, serve intimation?
2. If in custody, can his liberation alter his rights?

On the *second*, if a prisoner in custody for trial, and having intimated, he can't be deprived of his benefit by the act of the prosecutor. I think the act is entitled to liberal construction, and can't be defeated by any act of the prosecutor in following out the statute. I don't differ on this point.

But, on the *first* point, I unfortunately differ, when the diet of trial has been fixed by a libel. I agree that the act originally contemplates a case of one in prison, and also provides against undue delays of *trial*.

I shan't stop to analyze the act. The intimation is to fix a diet, plainly] meaning, that none had been already fixed, as the fixing it would be nugatory, as being previously done. This also appears from subsequent clause, '*if no process be raised and executed*,' shewing that the *thing* was to be done after intimation. If I thought that this would make the statute a dead letter, I would stretch the act. But I think

provisions of the act require careful attention. The first provision relating to the first imprisonment, the second to the liberation on bail, the third to the forcing on of the trial.

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there was, at the date of the act, and is now, a remedy for the evils represented.

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I think it would be to construe the act against its fairness, if I applied it to these evils. I don't think the object of the act was what is supposed. The evils were not undue delays in all trials, but only when parties were in prison, as to an indictment raised, and diet fixed for six months after. The act would not remedy this, but the Court will supply the remedy against oppression at common law. I know of no such instance. There are many cases of persons imprisoned, and not brought to *trial*. These cases are noticed by Baron Hume.

No trace of such complaints among *regulations* before 1672 as short *inducias* was the evil complained of. In July 1672, found the regulation of the year before *applying*.

In February 1664, and Gordon 1682, libels were executed on bare fifteen days, and letters of exculpation applied for, *the Court* granted delay till the latter were ready, and therefore no need existed to provide a remedy for such an evil as this, as it was in power of Court to provide for it.

If no need for providing against long *inducias*, was there any need to remedy the *present* supposed *evil*?

The Court, and not the *prosecutor*, continues the diet, and on good cause would refuse it.

I refer to a case almost immediately after act 1701, viz., on 15th June 1703, case of *Purdie*, requesting Court to prefix a short day for the diet. The Court appointed the 28th instant for the *trial*, with certification.

The panel was served with indictment, and he did not apply under the *act*, and prayed for a shorter *diet* than the act required. The Court gave the remedy.

It is said prosecutor may change his libel, but still the prisoner has his remedy, as Court will refuse to recommit, or insist on that going on.

It is said this applies to every prisoner without exception; but looking at rest of the clause, I must see what is done to have a *diet* fixed for his trial. The letters for intimation should have been to go on with the trial begun, as the Court had the power, as in *Purdie's* case. It is not discretionary for the Court to do justice, the administration must be corrupt, or public feeling extinct. The Court can prevent all abuse of its forms.

As to case of *Dundas*, I wish the point had been decided in it, or any subsequent case. But I can't discover any decision *there*. Warrant

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The distinction between prisoners imprisoned and those liberated on bail, appeared very clearly in the preamble of the enactment relied on, which was, 'And to the effect that persons who are, or shall be, imprisoned or in custody, in order to trial, may not be longer delayed and detained, her Majesty, with advice and consent aforesaid, statutes and ordains that all crimes not inferring capital punishment shall be bailable.'

The third class of persons provided for by the statute, applied to cases where the parties were not entitled to, or did not find bail (Hume, vol. ii. p. 98), and proceeded on this narrative, 'And her Majesty, with advice and consent foresaid, further statutes and ordains, that upon application of any *prisoner* in custody, in order to trial,

of intimation was granted, but no objection made (as in this case by a single judge); whenever such application is made it will be granted, and prosecutor will either attend to it, or disregard it if not under the act, as in *Cameron* and *Spittal's* cases. I think this was all that was done in case of *Dundas*, though indicating a belief that act applied. I am not surprised the prosecutor tried to get quit of the prosecution, as he never raised criminal letters against him; the motion to desert diet came from the prosecutor.

It is said Burnett gives no intimation, but this is a mistake.

The case is decided there, that diet must be fixed *within* the 60 days, and *contrary* is now SETTLED. This shews the little effect due to *Dundas's case*.

As to recent cases, don't think they settle the *point*. As to private arrangements I know nothing.

This is the first time the question has been tried, and I am glad it has been settled.

No continuation of the Court will deprive the party of the benefit of the act, as found in case certified by Lord Meadowbank from *Perth*. I think the diet of 1st August was not *fixed* under the act, by process raised under it. I can't hold it an act by prosecutor, but of the Court.

LORD GILLIES.—A person in situation of this *pannel* is within the express words of the statute.

'Find that the petitioner being in custody, in order to trial at the date of raising and executing the letters of intimation, was entitled to the benefit of the said act; and in respect the Public Prosecutor has failed to bring the petitioner's trial to a final conclusion, within the time limited by the statute, desert the diet *simpliciter*, and dismiss the indictment and pannel from the bar.'

' whether for capital or bailable crimes,' &c. This shews that the enactment was intended to apply to cases where the party was suffering incarceration solely (Burnett, p. 354). The case of Dundas decided nothing, as all was of consent in that case, and there was no decision in the case of Dick. There was a material distinction between this case and that of Macdonald. In that case the pannel was not entitled to be liberated on bail. On the contrary, he was anxious to force on his trial, a privilege of which he could not be deprived, by means of the prosecutor withdrawing the warrant of incarceration or imprisonment. In this case, the pannel had sought to be liberated the next day, after serving his letters of intimation, and could not complain of any consequences resulting from his own act.

Farther, the certifications mentioned in the statute were inapplicable to cases where the party was liberated on bail. They were, first, that in case of failure, ' the prisoner shall be discharged and set at liberty without delay.'

Second, in case of delay, proceeding on the prisoner's request, the authorities ' shall then be obliged to deliver ' their *prisoner* to an efficient guard, to be provided by ' the Judge, her Majesty's Advocate, or Procurator-fiscal, ' that the *prisoner* may be sisted before the judge competent,' &c. ; and, with regard to criminal letters, the commencement of the provision relating thereto was, ' and the *prisoner*, immediately liberated from his imprisonment for that crime and offence,' &c.

All this shewed that the act was intended to apply to cases where the party was imprisoned during the whole time. In the present instance, the pannel was not and could not be apprehended on the desertion of the diet of the 15th of March, because bail had been accepted for his appearance within six months, and the certifications of the act were therefore inapplicable to the case.

It was not contended that a pannel was entitled to

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the benefit of the act unless he was imprisoned at the date of presenting his letters of intimation, and that admission necessarily implied that liberation on bail, on his own application, would operate as an avoidance of the letters of intimation.

In the course of the discussion, it was intimated by the Lord Justice-General, Lords Mackenzie and Moncreiff, that the decision in the case of Macdonald, was arrived at in reference to the particular circumstances of that case, and was not intended to decide any general construction of the act 1701, with reference to parties liberated on bail at their own request.

The LORD JUSTICE-CLERK.—We do not, as is observed by those of your Lordships who took part in the decision of the case of Macdonald, require to consider whether that decision was satisfactory. Here, however, it is quite different. The case under the statute arises purely, apart from any personal exception against the prosecutor. The pannel applied for and obtained letters of intimation to prevent undue delay of trial when suffering imprisonment. Had he not been in prison at the time, he could not have obtained them. His object is to avoid undue delay of trial, that is, undue imprisonment before trial. Now, if being imprisoned, not simply being accused, is the test of the competency of the application for letters of intimation; does it not necessarily follow that, when he avoids the imprisonment, by means of his application for liberation on bail, that he thereby avoids the application of the statute to his case. Further, the whole phraseology of the statute, particularly with reference to the certifications, are at variance with the double privilege claimed; and on this point I agree in the main with the argument so ably urged for the Crown. His Lordship then went over the clauses in the act 1701, in order to shew that imprisonment was the predicament contemplated in all the clauses.

LORD MACKENZIE.—I concur in thinking this case not ruled by the case of Macdonald.

LORD MONCREIFF.—I also concur in that; and on the more general point, I agree with the Lord Justice-Clerk.

LORD COCKBURN.—I concur. I think it impossible to read the statute otherwise than as applicable solely to the case of persons suffering not merely delay, but delay aggravated by actual imprisonment.

LORDS WOOD and IVORY concurred.

The LORD JUSTICE-GENERAL.—I am sorry to differ from the rest of the Court. No doubt the case of Macdonald was different; but I am by no means satisfied that the principle of interpretation adopted in that case, of largely and liberally construing the provisions of the statute in favour of the subject, do not apply. I am at a loss to see how the taking advantage of one beneficial enactment, is, by inference (for it is only by inference), to be construed as a bar to the distinct provisions contained in the other. There is no statutory declaration that it shall, and I see no reason why it should.

LORD MACKENZIE.—I also concur in the doubt expressed by the Lord Justice-General. I do not exactly see how it can be successfully contended these privileges are not cumulative. The privilege of bail is given without any condition attached, and must, I think, be held as meant to be applicable to persons who were entitled to sue out letters of intimation.

The following interlocutor was pronounced:—

‘ In respect the pannel appears to have been liberated
 ‘ on bail, on the 26th day of January last, being the day
 ‘ after that on which his letters of intimation were excu-
 ‘ cuted, and that in consequence of his own application,
 ‘ and has ever since remained at liberty, find the pro-
 ‘ visions of the act 1701 do not apply to that case;
 ‘ therefore, Repel the objection, and on the motion of
 ‘ the Public Prosecutor, desert the diet against the
 ‘ pannel *pro loco et tempore*.’

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Present,

THE LORD JUSTICE-CLERK,

LORDS WOOD AND IVORY.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Moncreiff*—*Deas A. D.*—
M. Bell A. D.

AGAINST

THOMAS HENDERSON, GEORGE LANGLANDS, AND JOHN WILLIAMS—
Craufurd, Logan, and Penney.

CULPABLE HOMICIDE—CULPABLE NEGLECT OF DUTY, AND LOSS OF LIFE.—Held, 1. That these were substantially one charge, whenever an accident happened which occasioned loss of life. 2. Direction to Jury, that when the Crown had proved an accident by loss of life in a vessel under the pannels' command, it lay on them to prove their innocence of all blame.

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THOMAS HENDERSON, shipmaster, GEORGE LANGLANDS mariner, and JOHN WILLIAMS, mariner, were charged with Culpable Homicide; As also the Culpable and Reckless Neglect of Duty by any officer or mariner employed or engaged on board of a ship, whereby the ship is wrecked, and any of the lieges are bereaved of life; As also, the Culpable and Reckless Neglect of Duty by any officer or mariner employed or engaged on board of a ship, whereby any of the lieges who have embarked on board of said ship are bereaved of life, or have their lives exposed to imminent danger:

IN SO FAR AS, the steam-ship *Orion*, of Glasgow, being engaged in plying between Liverpool and Glasgow for the purpose of conveying passengers between these places; and you the said Thomas Henderson being the master of the said steam-ship, and you the said George Langlands being the first mate of the said steam-ship, and you the said John Williams being the second mate of the said steam-ship; and the said steam-ship having left Liverpool on or about the 17th day of June 1850, on a voyage to Glasgow, with 200 persons or thereby, or some other large number of persons on board, of whom 160 persons, or thereby, or some other large number, were passengers, and the rest were the officers and men of the ship's company; and the said ship

having proceeded on her voyage until she had reached the coast of Scotland; and a watch having been set or placed on board the said ship, for the purpose of navigating her, and looking after her safety, for the period from at, or near, midnight of the said 17th day of June, to at, or near, 4 o'clock of the morning of the 18th day of June foresaid, or for some other short period of time after midnight foresaid; and you the said George Langlands, first mate aforesaid, having been relieved from attendance upon the deck of the said ship, when the said watch was set or placed as aforesaid; and you the said John Williams, second mate of the said ship, being an officer of the said watch, and for the period of the said watch, next in authority and charge to you the said Thomas Henderson; and it being the duty of both and each, or one or other of you the said Thomas Henderson, master of the said ship as aforesaid and charged with the care and navigation of the said ship, especially during the period of the said watch, and you the said John Williams, second mate of the said ship as aforesaid, and an officer of the said watch, and for the period of the said watch, next in authority and charge to the said Thomas Henderson, to see vigilantly to the safety and the navigation of the said ship and her passengers and crew, during the period of the said watch, and in particular to keep or cause to be kept a good lookout from at or near the bows of the said ship; and farther, to steer the said ship, or cause her to be steered, in a safe and proper course, and according to the rules of good seamanship, and in particular, with reference to the time of the night, and the great steam-power and swift movement of the said ship, to steer her, or cause her to be steered, at a safe distance from the coast along which she was proceeding, and neither to cause nor to allow her to be steered in a reckless or dangerous manner, or nearer to the said coast than such safe distance foresaid: YET NEVERTHELESS, during the period of the watch foresaid, and while the said steam-ship was proceeding with great rapidity on her said voyage along the coast of the shire of Wigtown, you the said Thomas Henderson and John Williams, did, both and each or one or other of you, in culpable and reckless neglect of your duty foresaid, negligently and recklessly, fail and omit to place, or cause to be placed, any sufficient look-out at or near the bows of the said ship, or any man stationed there for the purpose of keeping a good and vigilant look-out a-head, and giving timely notice of any obstruction or other source of danger which he might decriy: And farther, during the period of the said watch, and while the said steam-ship was rapidly proceeding as aforesaid along the coast of the said shire of Wigtown, you the said Thomas Henderson, in culpable and reckless neglect of your duty foresaid, did negligently and recklessly abandon and desert the care and navigation of the said ship for a time, and did retire to your own room or elsewhere to sleep, and were asleep, or had lain down to sleep, at or near the time when the said ship struck as after libelled; and you the said Thomas Henderson and John Williams,

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both and each, or one or other of you, in culpable and reckless neglect of your duty foresaid, did negligently and recklessly steer the said ship, or cause or allow the said ship to be steered, contrary to the rules of good seamanship, and did cause or allow her to deviate from her safe and proper course, and to approach too near the coast in a reckless and dangerous manner, inconsistent with the safety of the said ship; and through the said culpable negligence and recklessness of both and each, or one or other of you, the said Thomas Henderson and John Williams, the said steam-ship struck with great violence upon one or more rocks, particularly a rock commonly called or known as the Outer Ward Rock, and a rock commonly called the Barnoch Rock, or one or other of them, or upon some other rock or rocks, situated on or near the coast of the shire of Wigtown aforesaid, lying northwards from the outer Light-House on the south pier of the harbour of Port-Patrick, and within the distance of 650 yards, or thereby, or at some other short distance from the said Light-House, or upon some part of the said Harbour, or of the ground or shore at or near the said Harbour; in consequence of which the said steam-ship had a portion of her hull driven in, or otherwise sustained great injury in her hull, and rapidly filled with water, insomuch that, after falling a short way out towards the sea, or otherwise floating for a short space of time, the said ship sank, and went to the bottom, having a large number of persons, being part of the passengers and crew foresaid, on board of her when she went down; and while the said ship was rapidly filling with water as aforesaid, and was in a sinking condition, recourse being instantly necessary to the boats of the said ship, for saving the lives of as many of the persons on board the ship as the said boats could contain and convey to land; and there being four boats carried by the said ship, which were intended for the preservation of the lives of those on board the ship, in event of shipwreck or other sudden emergency; and it being the duty of all and each, or one or more of you, the said Thomas Henderson, master of the said ship as aforesaid, and you the said George Langlands, first mate of the said ship, and you the said John Williams, second mate of the said ship and an officer of the watch as aforesaid, to see that all and each of the said four boats were in a state of complete efficiency and equipment, so as to be ready for instant use if any emergency were to require them; and to see that all and each of the said four boats were fully and properly equipped and fitted for being immediately propelled and guided, with due dispatch through the water, as soon as they should respectively be lowered or set afloat in the sea, and for floating safely and securely when so lowered and set afloat in the sea, and for receiving and carrying to shore the full numbers of passengers which they were respectively capable of receiving and carrying; and to see that the tackle or apparatus used at lowering or setting afloat in the sea the said boats, was in good order and fit for immediate and effective working; and to see that all and each of the said four boats were so stowed or placed, in or about the said

ship, and were in such state and condition, as to admit of their being securely lowered or set afloat in the sea, alongside of the said ship, with the utmost expedition, and in complete readiness to receive their full respective numbers of passengers foresaid: YET NEVERTHELESS, in culpable and reckless neglect of your said duty, you the said Thomas Henderson, George Langlands, and John Williams, did, all and each, or one or more of you, negligently and recklessly fail or omit to duly stow, or cause to be duly stowed, inside of the said boats, or some of them, a sufficient supply of oars and other apparatus requisite for rowing and steering the said boats, so that the said boats, or some of them, were not fully or properly equipped and fitted for being immediately propelled and guided with due dispatch through the water; and the said boats, or some of them, did not proceed with passengers from the said sinking ship, to the shore, as often, before the ship sank as aforesaid, as they would have done if fully and properly equipped and fitted as aforesaid; and you the said Thomas Henderson, George Langlands, and John Williams, did, all and each, or one or more of you, negligently and recklessly cause or allow a hole, commonly called the plug-hole, to remain open or unplugged in the bottom of all and each, or one or more of the said boats, respectively, and the plug for each respective plug-hole to be neither in the said plug-hole nor fastened beside it, so that the said boats, or some of them, being lowered or set afloat in the sea after the said ship struck as aforesaid, began instantly to fill with water entering through the said plug-hole; and, in spite of every exertion to prevent it, admitted much water through the said plug-hole, tending to sink the said boats, and also unfitting them for carrying their full complement of passengers, inasmuch that the said boats, or some of them, did not carry their full complement of passengers from the said sinking ship to the shore; and by both and each, or one or other of the said acts of culpable and reckless neglect of duty, with reference to the boats aforesaid, the lives of the persons on board the said ship, or some of them, resorting to the said boats as a means of safety, were exposed to imminent danger, in respect that the preservation of the lives of the said last-mentioned persons, materially depended on the said boats being fully and properly equipped and fitted for being immediately propelled and guided, with due dispatch, through the water, and for carrying their full complement of passengers when proceeding from the said ship to the shore; and various persons, the particular individuals being to the prosecutor unknown, but their names and designations being contained among the names and designations hereinafter particularly set forth, or being to the prosecutor unknown, and the said last mentioned persons being part of the passengers and crew foresaid of the said ship, were left in the said ship, when she sank and went to the bottom as aforesaid, and were then drowned as after libelled, who would have been conveyed to shore in the said boats if the acts of culpable and reckless neglect of duty above libelled, with reference to the said boats, had not, both and each, or one or other of them, been

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committed as above libelled; and farther, in culpable and reckless neglect of your duty foresaid, you the said Thomas Henderson, George Langlands, and John Williams did, all and each, or one or more of you, negligently and recklessly, cause or allow the tackle or apparatus, used at lowering or setting afloat in the sea the said four boats, or some of them, to get out of order, or to be otherwise unfit for immediate and effective working; and you did, all and each, or one or more of you, negligently and recklessly cause or allow, both and each, or one or other of the two largest boats of the said ship, commonly called the life-boats, to be so stowed or placed in or about the said ship, or to be in such state and condition, as not to admit of their being securely, and with due expedition, lowered or set afloat in the sea, alongside of the said ship, in complete readiness to receive passengers, you having, all and each, or one of more of you, negligently and recklessly caused or allowed both and each, or one or other of the said life-boats to be fixed in their respective places by fastenings or supports, or to be attached to the ship by other apparatus, not susceptible of being loosed or disengaged, at least with due despatch, and to be covered with canvass or other covers, so fastened or attached to the said boats, that they were not susceptible of being removed with due despatch, and that it cost much labour and exertion on the part of the passengers and crew, or some of them, as well as loss of time, while the ship was fast sinking, to cut, or tear, or otherwise loosen or disengage or remove the said fastenings or supports, or other apparatus, or the said covers, or part of them, from the said boats, and so to prepare the said boats, or one or other of them, for being lowered or set afloat in the sea as aforesaid; and undue delay and difficulty were thus occasioned in lowering or setting afloat in the sea the said boats, particularly the said life-boats, or one or other of them; and an increased rush of passengers was thereby caused to the two other and smaller boats of the ship, commonly called the quarter-boats, or to one or other of them, by which acts of culpable and reckless neglect of duty, or part thereof, above libelled relative to the tackle or apparatus used at lowering or setting afloat in the sea the said four boats, or some of them, and relative to two of the said four boats, commonly called the life-boats, or one or other of them, the lives of the persons on board the said ship, or some of them, resorting to the said boats as a means of safety, were exposed to imminent danger, in respect that the preservation of the lives of the said persons materially depended on the said boats being securely lowered or set afloat in the sea with the utmost expedition, and in complete readiness to receive their full respective numbers of passengers; and one of the said quarter-boats when lowered or set afloat, or when being lowered or set afloat, in the sea, was capsized or swamped in consequence of the tackle or apparatus used for lowering or setting afloat the said boat as aforesaid being out of order, or unfit for immediate and effective working, or in consequence of the increased rush of passengers foresaid; and one of the

said life-boats was never got effectually or completely disengaged from the said ship until at or near the time when the ship went down as above libelled, when the said life-boat was turned over by the said ship in sinking, or was otherwise capsized or swamped, in consequence, wholly or partly, of her not having previously and timefully been effectually or completely disengaged from the said ship, or lowered or set afloat free in the sea, because of the undue delay and difficulty occasioned as above libelled; and by the capsizing or swamping foresaid of the said quarter-boat and life-boat respectively, various persons, the particular individuals being to the prosecutor unknown, but their names and designations being contained among the names and designations hereinafter particularly set forth, or being to the prosecutor unknown, and the said last-mentioned persons being part of the passengers and crew foresaid, who had got within the said quarter-boat and within the said life-boat respectively, in order to save their lives by means of each said respective boat, and whose lives could have been saved if the said boats, within which the said persons respectively were, had not been capsized or swamped, were thrown into the water and were drowned: And when the said ship sank and went to the bottom as aforesaid, various persons then on board of the said ship, the particular individuals being to the prosecutor unknown, but their names and designations being contained among the names and designations hereinafter particularly set forth, or being to the prosecutor unknown, and the said last-mentioned persons being part of the passengers and crew foresaid of the said ship, were drowned: By all which, or part thereof, a number of men, women, and children, amounting to forty-seven persons, or thereby, or to some other large number of persons, the full number being to the prosecutor unknown, but being part of the passengers and crew foresaid of the said ship, were drowned; in particular, Alexander M'Neill of Colonsay, in the shire of Argyll; Ann Caretairs or M'Neill, wife of the said Alexander M'Neill; Cecil Ann M'Neill, and Hester Mary M'Neill, daughters of the said Alexander M'Neill; John Burns, M. D., lately residing in or near Blytheswood Square, in or near Glasgow; Eliza Morris, niece of the said John Burns; Elizabeth Laskey or Splatt, wife of John Splatt, now or lately farmer, residing at Moor Farm, Souton, near Exeter; Mary Ann Splatt, and Anna Splatt, daughters of the said John Splatt; John Roby, lately residing at or near Great Malvern, Worcestershire; William Marchbank, commercial traveller for the firm of John Clapperton & Coy., of Glasgow, lately residing at or near Garnet Hill, Glasgow; James Houston and Mary Houston, children of James Houston, now or lately shipmaster, and now or lately residing in or near Port Glasgow; Harriet M'Kenzie Pughe, daughter of the Rev. Kenneth M'Kenzie Pughe, Episcopalian minister, Paisley; John Hume, wool-merchant, lately residing in or near Bedford Street, Laurieston, in or near Glasgow; James Dunn, apprentice on board of the said steam-ship Orion; Alexander Graham, steward on board of the said steam ship; Andrew

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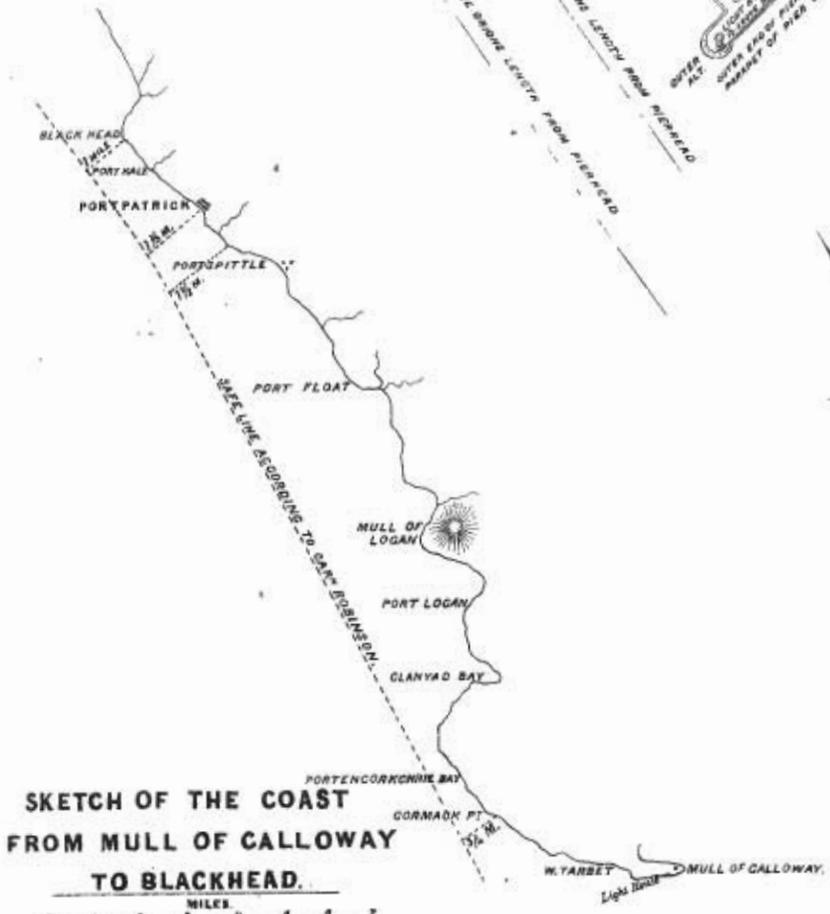
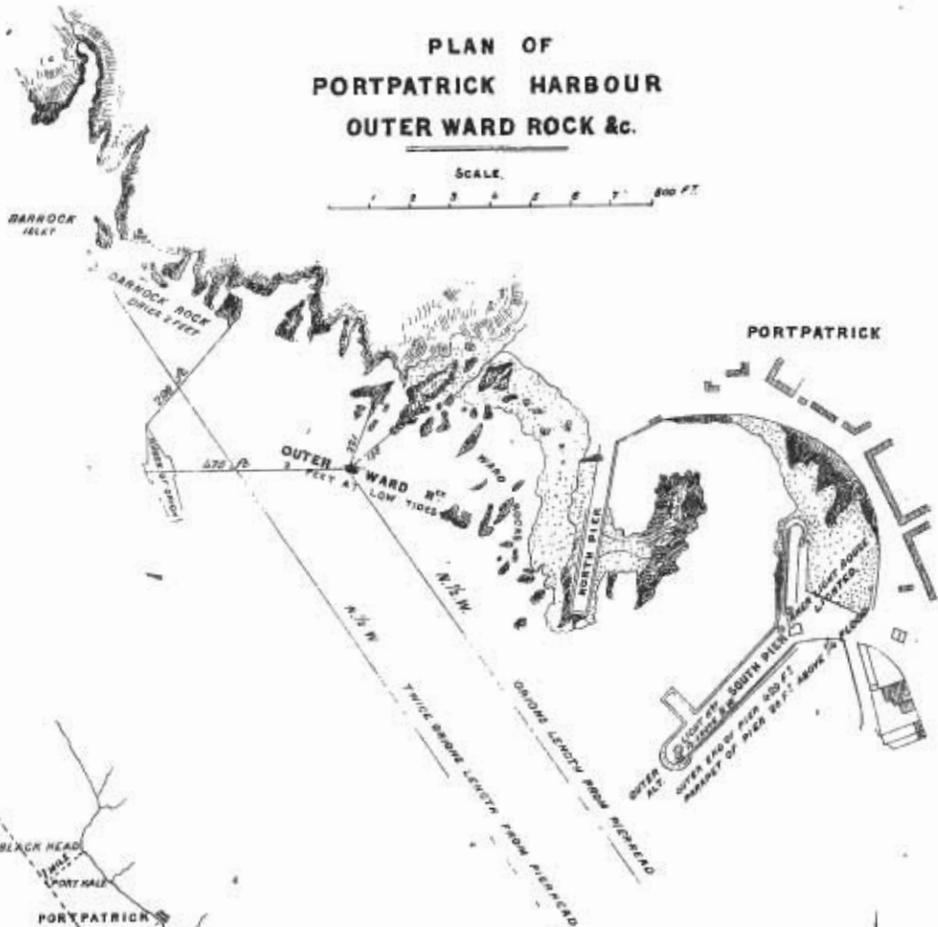
Walker, carpenter on board of the said steam-ship; Robert Haslem, dealer, at or near Bolton-le-moor; Mary Ann Adamson or Fraser, of New York, and her son David William Fraser; Thomas Jago, merchant or agent, lately residing in Brounlow Street, Liverpool; John Pearce, merchant or shipowner of Mevagissey, in the county of Cornwall; Thomas Bancroft Bennet, of the city of Chester; Francis M'Murrich, coppersmith, Liverpool; William Letham, manufacturer, of Gillstocks, Kay Street, Little Bolton; James Martin, son of Thomas Martin, of the firm of Martin, Burns, & Coy., Liverpool; Jessie Underwood or Cassin, wife of John Cassin, blacksmith, Walton, near Liverpool, and Robert Cassin, son of the said John Cassin, James Scott, merchant, Montreal, North America, Agnes Gladstone, daughter of Lawrence Gladstone, now or lately residing at Clifton Park, near Birkenhead, Cheshire, England, besides other persons who were on board the said steam-ship, but whose names are to the prosecutor unknown, or some of the said persons, were drowned, and were culpably bereaved of life in manner above libelled: And you the said Thomas Henderson and John Williams are, both and each, or one or other of you, guilty of the culpable bereavement of the lives of all and each or one or more of the said persons drowned in manner above libelled; and you the said George Langlands are guilty of the culpable bereavement of the lives of such of the said persons as were drowned in manner above libelled, when left in the sinking ship in consequence of the said boats, or some of them, not having proceeded with passengers from the said ship to the shore as often, before the said ship sank as aforesaid, as they would have done, if fully and properly equipped and fitted as above libelled, or in consequence of the said boats, or some of them, being unfitted to carry, and not having carried, their full complement of passengers to the shore as above libelled, or when thrown into the water by the capsizing or swamping of both and each or one or other of the two boats, the said quarter-boat and life-boat respectively, capsized or swamped in manner above libelled.

The pannels pled not guilty.

Defences were given in for Captain Henderson, in which he stated, that 'no man can lament more than he
' does the loss of the ship which he commanded, and of
' the lives of the passengers under his care. But he de-
' nies that the accident was caused by any neglect, reck-
' lessness, or culpability on his part; and while he can-
' not profess to explain the causes which may have led
' to the result, he alleges that when, for a short period,
' and according to known practice, he quitted the deck
' to take a little rest, he left the Orion in charge of a

PLAN OF
PORTPATRICK HARBOUR
OUTER WARD ROCK &c.

SCALE.



SKETCH OF THE COAST
FROM MULL OF CALLOWAY
TO BLACKHEAD.

‘ competent officer, and on a course which would have carried her safely on her voyage. Her wreck after that time must have been owing to causes which he could not have anticipated nor controlled. It is not truly charged against the pannel that he was neglectful of duty in regard to the equipments of the vessel or the boats.’

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Defences were also lodged for Williams, the mate, stating, that, ‘ after the time when the conduct of the vessel was given him in charge, when alone, he submits, that any responsibility in this matter can be held to attach to him, he caused the vessel to be steered in a proper course, according to the best of his judgment and discretion, and the information afforded by the steering compass of the vessel, which, however, he has reason to believe, was, or had become, inaccurate; and, in the circumstances of the case, no culpability, on his part, was the cause of the melancholy accident which took place. The pannel is not responsible for the condition of the boats; but these, he believes, were in a perfectly sufficient state.’

EVIDENCE FOR THE PROSECUTION.

C. GIFF ROBINSON, R.N.,—I am a captain in the navy, and have been employed for a considerable number of years making a hydrographic survey for the Admiralty, including the coast of Wigtonshire. The chart produced, which is on a scale of three inches to the mile, is an accurate delineation of the coast of Blackhead, near the Mull of Galloway. Blackhead is a mile and a-half to the north of Portpatrick, and Cromack Point is a distance of 12 miles. If a straight line be drawn between these two headlands, the land falls in considerably to the east, and makes a bay, on part of which Portpatrick is situated. I have noted the course of the tides, and indicated them on the chart, with the velocity at flood. I am familiar with that coast, and have marked the course of a steamer to follow between Cromack Point and Blackhead, by a dotted line, which at Cromack Point is three-fourths of a mile, and at Blackhead is one mile and a third off Portpatrick. I also prepared a chart of the harbour of Portpatrick, on a scale of one inch to a hundred feet, on which is noted the Barnoch Rock. There are three piers at the harbour, one called the South Pier, on which is a light-house unfinished and not lighted. There is a harbour light on

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the South Pier, next the shore, 429 feet from outer end. The height of the harbour light is 38 feet above high water. There is a parapet wall around the South Pier, 26 feet high. I have marked the houses of several parties near the end of the pier. The North Pier does not project so far as the South Pier. The Ward Bay lies to the north of the North Pier, and I had my attention particularly drawn to the Outer Ward Rock. It is a distance of 1,048 feet from the end of the South Pier. It is always covered at low water. It is distant from the shore 150 feet, and I have marked 5 feet 9 inches as the height of the water on it at quarter-flood. These rocks are well-known. I examined it on the 12th and 13th July. I had an opportunity of looking at it when the tide was extremely low, and observed several fragments of it scattered about. A little to the north is a rock called the Barnoch Rock. The Barnoch Rock is 30 feet from the Barnoch Island, and 1,850 feet from the outer end of the South Pier. The rock is dry when the tide is half-full, 8 feet being visible at low water, and 4 feet 3 inches at first quarter-flood. Two small heads project into the sea. There is deep water close up to the South Pier head and to the Outer Ward Rock and the Barnoch Rock. I have noted the position of the wreck of the ship. The port paddle of the ship is 475 feet from the Outer Ward Rock. She is lying in 36 feet at the stern, and 30 at the bow. If the Orion passed the pier-head at her own length from it, and going N. $\frac{1}{2}$ W., she would have been carried straight on the Outer Ward Rock. If she was twice her own length and on the same course, it would have taken her exactly on the Barnoch Rock. On this other chart there is a point called Castle Point, on which is situated Dunskey, in ruins. The distance of Castle Point from the South Pier is 2375 feet, and of Marroch Point 4055 feet. In flood-tide the course of the tide is very nearly southerly.

Cross-examined by Mr PENNEY—The course of the tide is what is denominated close on shore. When the stream of the tide is flowing south, it will more or less interfere with the course of a vessel going north. A vessel going from Cromack Point to Blackhead has a safe course laid down on the dotted line; but I don't mean to say that is the only safe course: it might go inside by daylight, or on a fine night. Portpatrick, on this chart, lies somewhat to the east and north. The land lies in betwixt these points considerably, but where it does there are soundings. Supposing the Orion twice her length off the pier, the course would carry her on the Barnoch Rock, and once her length on the Outer Ward Rock; but supposing she was half a point farther west, she would clear the rock. I am not aware of the course the Liverpool steamers generally take.

By Mr CRAUFURD.—There is deep water within the dotted line. Suppose a mile or half a mile from Cromack Point, within the line, a course of N. $\frac{1}{2}$ W., cleared her of everything; and so would a course of N. $\frac{1}{4}$ W., at that distance off. A direct north course at half a mile

from Cromack Point, would clear her of Portpatrick pier, taking magnetic north. A course from Portpatrick pier of N. by W. $\frac{1}{4}$ W., would just clear her of the Ward Rock. Supposing a vessel half a mile west of Cromack Point, a course direct north would clear her of the Barnoch Rock. Supposing it to be N. $\frac{1}{2}$ W., it would be a course which would not only clear her, but clear her with all safety.

By Mr BELL.—I am still of opinion the course laid down on the chart is a safe and proper course for a steamer at night, with a due regard to the safety of the lives on board. A vessel in a fine night might go nearer, but I do not think any one should have done so. 2d, I see a hill called Dunman Head, which is a well-known headland on the coast. Supposing a vessel passes half a mile free of Cromack Point, to N. $\frac{1}{2}$ W., it would take her fully a mile off Portpatrick pier.

By the LORD JUSTICE-CLERK.—If a vessel was half a mile from Cromack Point, a course direct north would clear her of Portpatrick pier by two-thirds of a mile, and would clear the Outer Ward Rock. If the Orion had been its own length off Portpatrick pier, steering north, it was in a wrong course to avoid the Outer Ward Rock; and if a change to N. $\frac{1}{2}$ W. had been made, it was not sufficient; N. by W. would clear the Outer Ward Rock, but not the Barnoch. Steering north within her own length of Portpatrick pier, it would depend on the extent of the change which was made on her course, and the vessel answering properly, if she cleared it. I do not think that any one with his eyes open would keep a vessel within its own length of Portpatrick pier. No course compatible with safety could by possibility be so near the pier; and no course consistent with safety could have allowed the vessel to be so near the coast as where she is now lying. The harbour light is a very indifferent light, but it is seen about four miles off in a reasonably fine night,—an ample distance to give warning if one happen to get too near. The current runs about two knots an hour. It increases towards Cromack Point, and going north it decreases. The effect is to sweep a vessel rather off Cromack Point than otherwise; and as it got nearer to Portpatrick, tends to take her rather inshore. Of course, it is a well known rule; and a person acquainted with the currents must make allowance. From the Isle of Man, you steer for the Mull of Galloway; and if that light is seen, that enables you to take a course that will clear you of all these rocks.

JOHN ROBERTSON.—I am manager to the firm of Cuird & Co., engineers and iron shipbuilders, Greenock. They built the Orion in the year 1846-7. She was an iron steam-ship of 805 tons o.m. I prepared a model of the Orion lately, with the starboard boat swung in the davits. There were four boats, two of which were life-boats. The latter were hung behind the paddles. To show their position, I have made a section model. The vessel was divided into five water-tight compartments. The pieces of iron produced are of the same kind used in the Orion.

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By Mr LOGAN.—The paddle boats on the model were put there from recollection. The section was made from a scale of the breadth of the boat, which might be incorrect. In regard to the steering apparatus, it was designed as an improvement on the ordinary mode. It was so constructed that, after two or three turns were given it, and after the steersman left, it was less apt to turn than the common wheel. The immediate object of the invention was to enable the steersman the better to resist the shock of a surge.

By the COURT.—In regard to the boats, there was nothing to hinder their being unhung, when wanted.

JOHN MACDONALD, *boatbuilder, Greenock.*—I made the boats of the Orion, and I have made a model of them, having got three of them again in my possession. I measured the life-boat lately, and found it could hold between seventy and eighty people.

By Mr LOGAN.—Captain Main commanded the Orion when the boats were fitted for it. When Captain Henderson was appointed, I made an alteration at his request. He put an eye bolt into the keel, so as to facilitate the unswinging of her. I hung the Oriental Steam Company's vessels the same way. In my judgment, I don't think that life-boats could be better hung than those of the Orion. After the wreck, I remember the holes of two nails in the lower part of the stern post near the keel of one of the life-boats. There was attached to them a cover as a spray cloth, and the stick produced was upon the boat when brought back to me.

By the COURT.—Unless something had been put there on purpose, the boat would not have rested on any part of the ship, notwithstanding the nails.

D. WALKER, *seaman, Glasgow.*—I was employed on board the Orion when she was lost, eighteen or nineteen months. Captain Henderson had been commander since August. We sailed from Liverpool on the 17th June last, between 3 and 4 o'clock. George Williams the Mersey pilot, navigated the vessel down the Mersey. I came on to steer in the course of the night, from 10 to 12. It was a fine night, but a little cloudy. There was a haze hanging over the land at the Mull of Galloway. We made the Mull of Galloway a little before 12. We saw the light through the fog. I left the helm near Dunman Head, between the Mull of Galloway and Portpatrick. We were then close in shore. I thought we were unusually near shore. It was George Langland's watch when I steered. When we are steering we cannot see in front of the vessel on account of obstructions on deck. There were on deck at the time C. Leslie, George Williams, James Donald, John Kerr, and myself, besides Langlands and the captain, Carpenter and Walker. When I was steering, there were two look-outs on the paddle bridge, but none at the bows. In steering, we steer by the compass when hazy, and take our courses from the officer in command. I was released at ten minutes past 12. Our course then was NN.W.,

when we rounded Dunman Head. I can't say how far we were off land. The land had been visible all the way from the Mull of Galloway. The next watch is the second mate's watch. I went below and fell asleep, when I was wakened by a crash. I ran on deck to see what was the matter. I saw a few passengers running about on deck, and that the vessel was going ahead on shore; she was not fast. I ran down to put on my boots; came up again, and ran aft to clear away the life-boat. The model gives a pretty good representation of how the life-boat was hung. I then ran to the other life-boat, and found them taking the cover off. They did not for some time succeed in lifting off the boat, on account of the stiffness of the tackles, or the weight of the passengers in the boat; more from the latter cause perhaps. She was got off at last, and lowered into the water. She got to land with several passengers. I went up the rigging, and was taken off by one of the boats afterwards. The Orion, I believe, was in Havre for a month or so during the spring. She had been about a month or six weeks back on the station, and I had not seen the boats lowered from the time she came back; but I think they had got new covers. The vessel was afloat for about ten minutes after I ran up. The boats came off from the shore. I don't know what became of the other life-boat. The carpenter tried to get the groove in which it was fixed knocked from under the boat. He gave me an axe to cut the outside part, and I did so.

By Mr CRAUFURD.—We were steering NN.W. There was a haze over the land, but the sea was lying calm enough. I gave the helm to John Kelly when he came up. I stopped on deck five minutes after he relieved me. I don't know who went to the look-out on the gangway. The bridge across the paddle-boxes is higher than in most vessels, and we have a clear view over the bows of the ship. I consider it a safe and good look-out. After I saw the larboard life-boat launched, the ship sunk in about five minutes. Captain Henderson sent me down on the mast to take charge of one of the fishing-boats, to take as many passengers as I could, which I did. While I was on the mast, Captain Henderson was giving directions, such as calling on the boats to come across to the ship, and pick up the passengers. For some time they hung about, but at last they did come. Captain Henderson remained clinging to the mast. I went out again, in about an hour and a half afterwards, when all was over.

By Mr LOGAN.—When I went on deck, I heard Mr Langlands calling on the crew to come up and launch the life-boats. He had seen them launched, by order of Mr Langlands, for giving exercise. This exercise took place some time before the wreck. This was all done to make the blocks and tackle work sweetly. Since coming from Havre, the life-boats got new covers. After coming on deck, I went from the larboard to the starboard life-boat. It was difficult to lift on account of the number of passengers in her. The boat is swung by means of a

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davit in which there is a block. The life-boats of the Orion were very heavy. The life-boat was supported by three uprights, called 'chocks.' I and the others who were attempting to launch the life-boat pulled at the tackle to lift her out of the 'chock,' the groove of which might be about an inch deep; so, if the boat had been empty, a very small pull at the tackle would have got her clear. After getting her clear, and she was lowered by the tackle, there appeared no defect in the tackle. Before she was altogether lowered, I left.

By the SOLICITOR-GENERAL.—When steering, I took the courses from Mr Langlands. I saw the captain about 11 o'clock, when he told me to go nothing to the northward, and I steered a quarter point further west. He looked at the compass to examine the course. We had not then seen the Mull of Galloway. I understood the order to be a hint rather to keep to the westward. The captain was on deck during my watch all the time. There were a large number of passengers. I saw the bows of the starboard quarter boat down in the water, and the other end hanging by the tackle, and one or two tumbling out of her. While the larboard life-boat was lowered, there were one or two tumbled out of her. I am quite sure, if there had been nobody in the boats there would be no difficulty in lowering them.

By the COURT.—I thought we were unusually near the land. After we made the light, I did not go farther to the west than the course laid down to me; it was before that I went a little to the west. If the course after we made the light had been followed, it would have carried us clear of where the vessel struck. When I went down, and gave up the helm to Kelly, I did not notice if the captain was on deck. The course was changed to run along the coast, after we rounded the Point, to NN.W. If that course had been followed, it would have cleared the rocks on which she struck. In that case, we would have passed the rocks about six or seven miles to seaward. I was steering N. by W. till I gave up the helm. When I left the watch, I remarked to George Williams, we were very close on the land. I made no remark to John Williams, and he did not communicate to me. He came and looked at the compass, when I surrendered to Kelly. I cannot say how long it was after I went down before the vessel struck. I could see the shore quite clearly when I went up. I did not notice the houses in Portpatrick. There was no wind; and the sea was calm. When I went up the vessel was going a little a-head, and I don't think she rebounded. She ran past the place she struck. I did not observe if she shoved off a little more to seaward; and I cannot say that she was farther off shore when she went down. But she appeared to run past what she struck on. I did not feel her strike a second time.

JOHN KELLY, seaman, Anderston, Glasgow.—Took the helm from Walker. It was a fine night, very calm, and no fog. The ship was to the south of Dunman Head. It was ten minutes past 12. We were close to land. We were particularly close; I never was so close

before. I have been four years on the station,—twenty months of which were in the Orion, with Captain Main, the former commander, and Captain Henderson. I cannot say if the captain was on deck. I got NN.W. as the course from Walker. The watch was changed; Langlands was on deck, but it was what I call the second mate's watch. It begins at 12 and lasts four hours. The second mate is an officer of the captain's watch, and remains on deck during that time. When I had the helm, the captain, who had come on deck the minute after I took the helm, came and examined the compasses. He stayed about five minutes. He gave me no course. The mate gave me none, but the second mate Williams did, after the captain went below. He had changed the course before. He first gave NN.W. $\frac{1}{2}$ W. He told me to go half a point more inshore not in captain's hearing. That was before the captain came up, and he changed it again before he came; he said, 'Keep her north by west, Jack.' That was still more in shore. He again changed it a third time to N. $\frac{1}{2}$ W., which was a half point still nearer shore. All that was before the captain came on deck. The captain came on deck, and said something to the second mate, and he went forward. I did not see him again before the vessel struck. I did not hear what was said. When the captain went forward, the second mate came and told me to go N. $\frac{1}{4}$ W., that is a quarter point still nearer shore. That was immediately after the captain left him. We were now pretty well over to the land, and might be about half-way between Dunman Head and Portpatrick. The next course I got from Williams was North, which also took us in shore, and the next was N. $\frac{1}{2}$ W., which was rather more out. The last order was N. $\frac{1}{2}$ W. At that time we might be opposite to Dunskey Castle, and I had not seen Portpatrick light. After I got the last course, Portpatrick light was reported by the look-out Wilson. He said 'A light on the star-board bow.' It struck me it was Portpatrick light. Between Dunman Head and this I had seen the land all the way, till the fog came on. It was sung out from the gangway. After I had seen the light, there was a light reported off the port-beam. That was from another vessel passing. After that Wilson came aft and said to the second mate, 'John, do you see no land there?' Williams said 'Yes.' I did not hear if he said anything else. He gave me no order, in consequence, and I was still steering N. $\frac{1}{2}$ W. The vessel was, by this time, abreast the high land to the south of Portpatrick. I think it was rather to the southward of Dunskey. After Wilson reported the land, there was sung out from the gangway, 'A vessel on the port-bow—no light.' After I had got the message, I saw the light, but we were very near abreast of her before I saw it. Before I came in sight of it myself, there was nothing again sung out from the gangway. The first thing I heard after seeing the light was, 'Starboard a little—keep her north by west.' This was from Williams. I had been at this time still steering N. $\frac{1}{2}$ W. Immediately after, there was called from amidship,

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'Hard starboard.' A sudden call as if from a man afraid. 'Land right ahead' was next called from another voice. At this time the second mate gave me the order, 'starboard a little.' He was standing near the mizen-rigging. The voice from the midship, I found on reflection, to be Duncan Campbell's. After 'hard starboard,' the second mate ran to the after skylight, in the direction of the captain's cabin, and then ran to me to help me to put her hard a-starboard. She was put hard a-starboard. The wheel was about hard over when she struck. She went over the rock, and there was a long loud crash. I did not let go the helm. One of the firemen came up. I asked him what was the matter. He said the engine-room was filling. I did not hear any motion of the engine after the crash. I went to the larboard quarter-boat, and commenced to lower it. Some passengers and firemen got into the boat before I went to the tackle fall. I got the boat lowered, and got into it. I could not find any plug in the boat to fill the hole which allows the water to run out. The water came in. There were no oars in the boat. When I went into the boat I used a knife to cut away the piece of cord fastening the cover, and the mate came and sung out to come round to the starboard quarter as a boat had capsized. I sung out for oars, and got them. The boat should have had five, but I cannot say how many we got. A gentleman stopt the plug-hole with his handkerchief, and we rowed ashore. The cry was 'There were plenty in the boat, and could not take any more in.' There were from fifteen to twenty; but, if she had been all right, she might have held about thirty. There was not much water in her. The passengers were not very turbulent after the plug was stopt. If we had had five oars the land would have been made sooner. We put the passengers ashore and went back to the wreck. I searched the boat for the plug, but could find none. I heard a cry—'Come under the starboard rigging;' but, as I saw boats there, I went into the larboard mizen rigging, and took all we could. After that we went to the main rigging, and took in some along with the captain and mate; who were the last to leave. The vessel had now settled down. When we were abreast Dunman Head, she might be 200 yards from shore, and about the same distance when off Dunskey. I can't say how close we were to the pier. The vessel struck about twenty or twenty-five minutes to two o'clock. We were alongside Portpatrick sooner than our usual passage. We had had a good run. Our passage might have been fifteen or sixteen hours to Greenock, enabling us to run the tide. By that I mean going up to Glasgow with the same tide. If the vessel had not been wrecked, we would have had plenty of time to run the tide. We might have been at Greenock about eight o'clock. The tide would turn about an hour after, but sometimes more. If we are not there by that time, we might lose the tide. There were two compasses—one on the bridge, and one aft. There was always a little variation between them. They had been in the vessel before I came.

These two compasses remained all the while I was on board. She was at Havre for six weeks, and I believe there was a third one then put on board. I observed there was a greater variation after her return. This was well known among the crew, and it was often a subject of conversation. We steered by the one aft. The captain examined the one on the bridge, and the one aft. The life-boats on board the vessel were lashed inside, according to the manner represented by the model. We were obliged to unscrew the ring bolt before it could have been lowered. I never saw a boat so fastened up in any other vessel. It was not there at all before Captain Henderson took the command of the vessel. The boats had been only twice lowered during the twenty months I was there. They might have been put out on the Havre station, but I can't say. They might have been lowered three or four months before she went to the Havre station. I can't say when she came back, but the boats were not lowered after she came back. The boat had never been lowered after that fastening of a new cloth was put on. I can't say how long it would take to lower the boats in the ordinary way; it would have been more than ten minutes at all events. But if there had been no cover, it would have taken ten or fifteen minutes, with these sort of davits and lockets. I have sailed in other steamers, and that is the only way I have ever seen it in use. It is not usual, however, to fasten it up in that way. I knew Dr Burns. I saw his dead body after the wreck. Mr Langlands, with other two men, and myself, found the body, and assisted in taking him in. There was also James Dunn, the apprentice, besides the steward and many others.

Cross-examined by Mr PENNEY.—I don't know the speed of the Orion exactly, but it might have been about 12 to 14 knots. The course I got when I first took the helm from Walker was NN.W. That was south of Dunman Head. The next course was NW $\frac{1}{2}$ W. Was abreast Dunman Head when we were falling in shore. I got the course of NW $\frac{1}{2}$ W. before I had got past Cromack Point. When opposite Dunman Head, I saw the land clearly. There was no fog on the water there. When we got from NW $\frac{1}{2}$ W. to N $\frac{1}{2}$ W. we were then going across the two headlands. The night was clear and calm; but when between Dunskey and Portpatrick, the fog came down; and when we were abreast, the second mate gave the order to starboard a little. The fog was just beginning to clear away when we were abreast Portpatrick. It came down suddenly, and cleared off very suddenly. I have had the helm in that quarter on former occasions; and the course of N $\frac{1}{2}$ W. was before Portpatrick light was reported, and that was the point kept. I never was a point east of north during the whole course.

By the COURT.—It was in the second mate's watch.

By Mr CRAUFURD.—I have served with Captain Main, also Captain M'Kellar, but they stopped longer on deck than Captain Hender-

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son. In all these vessels I do not recollect if the second mate kept the second watch. In the *Fire King* (Captain M'Kellar,) the captain took as much to do with the watch as the second mate. In the *Fire King* the captain left the watch sometimes, but I can't say to whom he left the command. The rule, in ships I have been in is, the second mate took charge of the captain's watch. It was the look-out of Wilson and Stewart; but whether they went up I can't say. Wilson was called River Pilot. He was on the starboard side of her. The captain's cabin was abaft the gangway, so as to be quite within call of the men on the gangway. There are steps from the gangway down. A man on the gangway could stamp on the roof of it and be heard. We were as far off the land at Dunskey as at Dunman Head, that is 200 yards. Between the two I had been steering for sometime in a northerly course. That brought us nearer the land.

By Mr LOGAN.—I have seen the boats twice lowered, but I thought that was more for cleaning them than for exercise. They were launched once at Glasgow and once at Liverpool—most of the crew were there. There were nine seamen and three boys on board. To launch a boat it would take more than that number of seamen at both falls. I have seen the life-boats launched in other steamers, but just for cleaning. They had covers likewise, as all sea steamers have who carry their boats on davits. In the *Viceroy*, there was no cover, but the keel was turned up. It is a general practice to have the life-boats covered. The *Orion's* had covers before Captain Henderson or Mr Langlands joined her. The keel of the boat rests in a sort of groove on three 'chops.' These were there when Captain Henderson and Mr Langlands shipped on board. There were also flat belts on either side, for steadying; which were in use before the captain joined. In other steamers, I have seen similar belts used. The use of the spray-cloth was to keep the spray coming in on the passengers through the space between the boat and the bulwarks. This cloth was tied with white twine to a small piece of stick that went along the bilge of the life-boat. Suppose the life-boat were cleared, and in the act of going down, I can't say whether the boat would carry the cloth down with her. The davits used in the *Orion* were similar to those in other boats. I could not say whether there was anything to prevent the boats being launched as quick as by any other. When the *Orion* came into the hands of Captain Henderson, she was not in the same good order and cleanliness, and Mr Langlands took every opportunity in cleaning her up. On the 17th June, before I sailed from Liverpool, I remember the quarter-boat oars were cleaned, and on the passage I saw some oars alongside the gangway. After the larboard quarter-boat was let down, the people on board would not let him go round to the starboard side, where the other boat had capsized. The iron stay, which joins the fore davit to the ship, was fastened to the gangway by a nut or screw.

By the SOLICITOR-GENERAL.—The Orion made three trips a fortnight.

ROBERT WILSON.—I was Clyde pilot of the Orion. I was on the out-look on the gangway, along with Stewart, when she was wrecked. The night was clear and calm. I remember when we came in sight of the Portpatrick light. I came on deck at a quarter past twelve, and had seen the land ever since. I left the gangway twice before the vessel struck, and asked him if he saw the land. I had seen it first rather to the southward of Dunskey Castle. He said he did, but nothing else. I went back to the look-out, and passed Portpatrick light about 150 yards. I made a remark to Stewart about our being so close, and he said he never remembered our being so close. I ran aft to the wheel for the purpose of putting her a-starboard. I heard somebody call out 'land ahead.' The helm was put hard a-starboard when she struck. She gave a small bit of a sally to port. I left immediately for the gangway, and looked to the land. I found her quite close. After doing that, I went to assist getting the boats out. I saw the starboard boat out, and the passengers in the water. I was saved by one of the funnel stays. I had been about two years and a half on board the Orion. When passing Portpatrick her speed might be about 13 knots an hour. She drew from 11½ to 12 feet, and I think she was 400 horse power.

By Mr PENNEY.—I belong to the second mate's watch, which changes at twelve o'clock. The vessel was then to the northward of Dunman Head. I can't say how far the vessel passed off at that time. I saw the dark loom of the land, and continued to see it till we reached Portpatrick. I reported Portpatrick light fifteen to twenty minutes before the vessel struck. I went to the mate, and when I returned she was going past the pier head. When the vessel struck the tide was right ahead.

By Mr CRAUFURD.—I was on the master and second mate's watch. I took the place on the watch of James Donald. The captain came to the gangway and spoke to me about one o'clock. He told me to keep a bright look-out. He crossed in the direction of Stewart. I saw him leave the gangway. I went out to the vessel after I got ashore. I saw the captain on the rigging. I proposed to bring him ashore, but he would not; he said he would go into his own pinnace. The vessel had then settled down.

By Mr LOGAN.—I was in the Orion before Captain Henderson or Mr Langlands. The covers on the boats were made a month before she went to Havre. These were fastened by white twine. Each life-boat rowed twelve oars. Instead of under the cover, these oars were always lying, kept together by means of a bit lashing round them. There was also, inside, a mast, a rudder, and the tiller. Besides this, under the life-boat there was a skid, so placed as to enable the boat to be launched more readily. That improvement was introduced by Mr

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Langlands. There was nothing in the position of the chops to prevent her being launched. When lifted out of the chops, the fore davit would be swung out, and the aft davit did not require it. Besides the four boats, there were a number of cork fenders. When I saw the boat swamped on the starboard side, I assisted the mate in getting out a large square fender, and lowering it to those in the water. I then saw the larboard boat, full of passengers, still hanging by the davits. By the master's orders, I cleared the passengers out of the boat, got in, and found the oars all right. Before I got her lowered, she was again full of passengers, and I could not lower the tackle on account of the weight in her. In regard to the spray-cloth, it would, when the boat was launched, fall off like a cobweb.

By the SOLICITOR-GENERAL.—The boat was upset by the vortex of the vessel filling and upsetting her, which would have happened whether she was clear or not. I had talked with Williams, the second mate, about the variation of the compass on the binnacle and on the bridge. It was more observable after her return from Havre. I looked now and then at the compass on the gangway. She was then steering north.

By the COURT.—The bridge compass pointed more to the north than the binnacle one—about a point to the eastward. When I saw the bridge compass they were steering north all but once. It was between twelve and one o'clock that I observed the deviation, and on that occasion they were steering north by west. When the captain came and spoke, the land was visible. The light had not been seen at that time, and I was aware that we had not passed Portpatrick. It would be about five or ten minutes past one when I left the gangway to speak to Williams. I did it because I was alarmed at our proximity to the shore; and by the time that I returned to the look-out, we were past the pier. According to my recollection, when I came up on deck, she was half a mile off the shore. She ran closer in-shore after that. When I spoke to Williams, and intimated the closeness of the land, he was walking, quite sober. I did not hear if he gave any order in consequence. I heard Stewart calling after me; but I did it of my own accord. I could not say about what time after this the captain came up. I could not say she was about that time closer on shore than usual. It was in the master's and second mate's watch. I cannot say that the master is responsible for the watch, and do not know why it is called his watch. The chief mate's watch ended at twelve. Till that he had no charge, unless he chose to regard the state of the weather, and so forth. The next watch the master had, by the understanding in the ship, to look after as well as the second mate. The watch before that was, on the contrary, the watch of the first mate alone. At that period of the year, we had a regular watch at four, which was taken by the chief mate. I have been in other vessels, and sailed with other captains. This second mate's watch is, I have

generally found, left to the second mate by the master, just as he thinks proper. The charge the second mate takes is, in truth, to relieve the captain.

JAMES STEWART, another of the seaman on board, said,—I was on the bridge with Wilson at the time the Orion struck. Wilson went to speak to the mate when we were about three-quarters of a mile from Portpatrick. When he came back I could not see land a-head. When a-breast of Portpatrick light he went back to the mate a second time. I then sung out that land was a-head. She struck soon afterwards, but not with any great crash. She got off the rocks and settled down headforemost. It took us about ten minutes before we could get the covers off the boats. I assisted at uncovering the one on the starboard side; and, on trying to get her out, found it was jammed in the chocks. She first went down a piece, and then the vessel careening over, she swamped. I then ran to the main rigging. I am satisfied that it was not the passengers in her that prevented her being lifted out of the chocks. There was no look-out at the bow.

By Mr CRAUFURD.—The gangway is the general place for the look-out, and we have a clear view from that place. Before we came to Portpatrick light, I spoke to the mate about our course. I came on deck about twelve o'clock; we were then off Dunman Head. The captain came subsequently on deck, when we were half-way between Dunman Head and Portpatrick. He spoke to Wilson first, and then to me. He told me to keep a bright look-out. I was on the larboard side. We might, at that time, be a quarter of a mile from the shore to the north of Port Nessock Bay.

By Mr LOGAN.—I had been four weeks on board the Orion before her loss. I remember seeing Mr Langlands after she struck. He told me to go and assist in lowering the boats. I had been on the gangway after the vessel struck, for only about a minute or so. I observed before I left it, that they were attempting to lower the larboard quarter-boat, after the life-boat was swamped and the vessel careened over. There was a deal of trouble in lowering it. They were chiefly passengers about the boat, and I did not see any of my shipmates at the tackle. There was a good deal of confusion. I saw Mr Langlands active, and doing all he could.

By the COURT.—I was bred a regular sailor, but have had some experience in steamers. When the captain came up the gangway the land was visible. I did not know whether he left the deck or not. I left him to judge himself as to what course should be steered. When Wilson went the first time to the mate, land was visible from the look-out, and I did not interfere until I thought there was actual danger. I expected him to steer off the coast sooner, and left him to do his own business, of course, until I thought he was running too close. I was on the bridge when she struck. I heard the captain's voice after she struck, ordering the boats to be cleared away. It was about

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ten minutes before she went down. She stuck for a short time, and then went a little forward to the northward. The engines stopped all of a sudden. I did not know the names of the rocks.

DUNCAN CAMPBELL, *Washington Street Glasgow*.—I was a seaman on board the *Orion*, and recollect passing Portpatrick pier; we were very close to it; I think not more than a ship and a-half's length distant. I was not thrown down by the concussion. Before she struck I called out 'starboard.' I saw the land a-head a little on the larboard bow. It might be less than a quarter of a mile, and called out 'hard a-starboard,' and did so in consequence of a feeling of danger.

By Mr BELL.—I did not try to lower the boat, but cut away the belts. I had no obstacle to my knife. I left the ship after she was sinking down.

By Mr LOGAN.—I entirely disengaged the spray cloth. At Liverpool, some of the oars were taken down to be cleaned, and some of them were lying on the gangway.

DAVID ADAIR, *fisherman, near Portpatrick*.—I recollect the night on which the *Orion* was lost. I live in a house near the end of the pier. I was in an upper room in my house, baiting lines. About one o'clock I heard the noise of a steamer; looked out, and saw her coming right past the South-pier head. She was very close; about a gun-shot from where I was, and very near to the end of the pier. I took alarm immediately on seeing her, and ran down instantly to see if she struck the Ward Rock. I found she had struck, and gave the alarm. I heard the crash, and saw she was fast. It was a fine calm morning. The boat I was going to fish in was lying afloat, and John Oake got into the boat with me, and we pushed off. It might have been five minutes after she struck that we reached her. She was then going down, bow foremost. Our boat was the first which got out. We took as many passengers as we could. A great many boats followed. I landed the passengers on the pier, and with a little boy and a fireman I returned. The *Orion* was then down under water. I picked up as many as the boat could hold. I never saw a steamer pass as close before except in coming in. I know the Barnoch Rock; it was quite visible. I could not say, however, whether it was on that she struck. She was sinking to the southward.

By Mr LOGAN.—On running back after seeing her strike, I lost sight of her.

By Mr PENNEY.—When I ran down, I saw the vessel a little to the north of the Ward Bay. She had struck then, and I got back immediately.

By the COURT.—I saw the vessel stopped with the strike. I was in too great a hurry to observe minutely; but when I came back she was to the south-east of the Barnoch Rock. In running down to Ward Bay, I expected to see her strike; and even if she had not struck, she could not have weathered the point of the coast. In run-

ning down, I was greatly alarmed. The morning was quite calm, but was a little thick at the Ward Head, the direction in which the steamer was steering. After passing the pier, her head appeared to be pointing inwards. When I first saw her, there was plenty of time at the speed she was then going, to have cleared the shore if her course had been altered. When I got to the Ward Bay, she did not appear to be turned outwards. The boat I used was of the ordinary fishing sort, 16 feet keel. His Lordship dismissed the witness by saying 'Well, my man, you seem to have acted with great presence of mind, and, I have no doubt, was instrumental in saving very many lives.'

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JOHN SAMSON OKE.—My house in Portpatrick is near the pier. Recollects the night the Orion was lost. I was sitting on my bed reading. I heard a steamer passing, and went to the window, and saw her coming from the south, with her lights. She was passing the pier with great velocity. I thought she was coming into the harbour, she was so near. I observed she did not come in, and it then struck me that all was not right. I hastened to finish dressing, on purpose to go out and see if there would be an accident. I heard a crash before I left the window; but I had previously lost sight of her. It was rather a long double crash. I called out 'Steamer a-shore,' and then ran out immediately to the Ward. I went out in a boat along with Adair. On going out of the harbour, I saw the steamer about where she is now. She appeared to be backing slightly off the shore—seaward. On reaching the ship, I saw some men in the water, and brought them and a number of others on shore. When I first saw her she was nearer the shore than she afterwards was. I have been in Portpatrick five years, and never recollect seeing a steamer pass as near before, not even when they were landing passengers.

By Mr PENNEY.—On running out and finding Adair, I looked out and could not see her, and he told me she was on the rocks.

DAVID ARMSTRONG, *fisherman*.—My house in Portpatrick is near the harbour. On the morning the Orion was lost, I was unwell, and walking about my room. I heard a steamboat's paddles, looked out, and saw a steamer coming from the southward. I saw her lights as soon as she passed. I could not say how near she was to the south pier, but I thought if I had been there I could have pitched a stone into her. Excepting once, I don't mind ever seeing one so near before. That was the Mazepa, which was lost at Dunman. I thought the Orion was coming into harbour, and I lay down on bed, when I heard the steam let off. My daughter came and said a steamer was ashore. I got out and roused other people. I ran to the Ward, and went off in a boat to the ship. The light in the inner lighthouse was burning quite distinct.

By Mr CRAUFURD.—I did not go out in the same boat as Adair. I gave the alarm. There were only five or six men in the rigging

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when I went out. I cannot say if the captain was one, for I could not tell one man from another.

JOHN M'HAFFEY.—I was second steward of the *Orion* on the night she was lost. She had 115 passengers on board. I had no list of steerage passengers. Her usual average number of steerage passengers was from forty to sixty; and, as near as I could say, she had that night about forty. The crew, engineer, and altogether, may be forty. Mr Marchbank, a commercial traveller from Glasgow, was on board. I saw his body next day; also, that of Mr Hume of Glasgow. It was got in a boat alongside the steamer. I saw a number of other dead bodies.

WILLIAM ROSS.—I am superintendent of police in Stranraer. On the morning of the 18th June, after the wreck of the *Orion*, I proceeded to Portpatrick, and found several dead bodies. I got an unoccupied house, to which they were removed; nineteen were brought in the first day, and subsequently, from forty to fifty in all. I got the use of a diver's dress, and went down and examined the Ward Rock. I found some pieces of iron (which are produced) among the broken stones. That was on the outside towards the sea. There were a great many fractures and fragments. I examined the Barnoch Rock, and found no fractures there. I measured the size of the plug-holes of the boats of the *Orion*; they were all $\frac{7}{8}$ inch. In the course of my examination, I made a model of the fracture on the rock. It is an accurate representation of it as I found it.

By the COURT.—It is a hard rock. It might be about 14 feet long, and the depth of it, as far as I could see, 12 or 13 feet. It was difficult to say how much had been newly exposed. The log of the steamer I obtained afterwards, from Mr. Langlands, on board the Duntroon Castle.

WILLIAM KNOTT.—I am a seaman and diver from Portsmouth. I went down lately to the Ward Rock, and found some pieces of iron there. I think there might have been about a ton, or a ton and a quarter, of rock fractured—evidently a recent fracture.

EDWARD HAWES, R.N.—I am a commander in the navy. I was general superintendent at Portpatrick, and had a charge for some time of the packets between Portpatrick and Donaghadee. I recollect the night the *Orion* was lost, and went out with a boat. It was the first quarter of neap tide. In the naval service, when a ship is running along the land, it is the rule that the captain be on the watch. I saw the boats of the *Orion*; and, in my opinion, it is a very improper practice for a steamer to have her boats covered. Looking to the object of a life-boat to be ready for so sudden an emergency, it is inconsistent with her use, I think, to have her so covered. I should think, also, it would be more safe to have the plugs in.

By Mr LOGAN.—It is the practice in the navy to have the plugs in the boats attached by a lanyard to the boats. That is the practice in

the navy, and also in other ships. In all cases, the boats must be secured in a handy position.

DUGALD TURNER.—I am commander of the steam-ship *Clarence*, from London to Leith. I have been a commander in about twenty-one vessels, and I have been a man before the mast before that, between Greenock and Liverpool. The time on board these vessels is divided into watches. The second mate's watch is generally termed the star-board watch. The captain has no watch; he ought always to be on deck at night. I never went to bed in any of my voyages at night. In my opinion, whatever was the weather, the captain, on such a station as that between Liverpool and Glasgow, ought always to be on deck.

By the COURT.—There are no rules laid down; but I consider that is what is proper for the safety of the passengers in coming along the coast.

By Mr DEAS.—The captain is responsible for the ship's course, and also for the boats. I consider the mate also responsible; but the captain should see the thing properly done. It is, in short, the duty of the whole three; but they are only responsible to the captain. I don't consider any of the mates are allowed to change the course. In sailing between Liverpool and Greenock, I became acquainted with the coast. I know the Barnoch Rock, and have seen the breakers on it. While on that station, I was in the practice of stopping off Portpatrick for passengers; but, to my knowledge, I never came nearer than a mile and a half. Such were the master's orders; but there was no particular reason for it, except a dread of going too far in. The coast is not considered rocky, except at the Barnoch. I know the plug in a boat. The usual practice is to fasten them by a chain. I never cover the boats. I consider the covering of boats a very improper practice, on account of the delay occasioned in getting them off.

By Mr CRAUFURD.—The captain's duty is to be always about; but the mates have different watches. I always take an anxious care of my vessel. I believe it is the practice of some commanders to retire for a short time. I generally take rest from nine to twelve in the forenoon. The coast at Portpatrick is not dangerous, unless you go close in.

By Mr LOGAN.—It is a very general practice to have the boats covered, both on the east and west coast. There are several other steamers from Leith to London, and other large sea boats. I am not aware that covers are allowed in our Company. I don't know whether in any other ships the boat's plugs are attached by chains. The practice was adopted some years ago, but before that it was never thought of. If not in the plug-hole, and unfastened, I would put it in the stern sheets or the lining.

JAMES MURRAY, *Glasgow.*—I am a first-class pilot on the Clyde, and was for some time a captain in the merchant service. There are

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 Thomas second mate is recognised as an officer in the captain's watch. In run-
 Henderson, ning along a coast, I should say the captain was bound to keep the
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By Mr CRAUFURD.—I was master of a ship of 400 tons from London to Quebec, besides several others. The last I commanded was the *James*, of 148 tons, plying to Leghorn. During the first mate's watch, the captain leaves the deck. It is in the second mate's watch I consider he should not leave the deck. During long voyages, he might leave instructions with the second mate.

By Mr LOGAN.—I never saw the boats' plugs attached by a lanyard.

By Mr BELL.—Supposing fog had come on, or had threatened to come on, I do not think the captain should have left the deck.

JAMES MORRISON.—I am a first-class licensed pilot on the Clyde, and was a captain for ten years in the merchant service. There are two watches, called the larboard and the starboard watch; or, the captain's watch, and the mate's watch. The second mate is an officer in the captain's watch. When the vessel is running close to the shore at night, he might have occasion to go below; and, in fine weather, the command is generally left to the second mate. If a fog threatened to come on, it would be the duty of the second mate to call the captain, and to keep the deck at that time. In many ships there are no second mates; and generally a man is chosen out of the ship's company to keep his watch.

By the COURT.—I refer to long voyages, of a fortnight or more.

By Mr LOGAN.—I never saw the plug fastened by a lanyard.

ABRAHAM PARKES.—I am a lieutenant in the Royal Navy, and commander of the steam-ship *Dasher* just now. I was stationed on the west coast for two years. I know Dunman Head. In navigating northwards, I do not think a distance of 200 yards from the shore would be at all improper. I should say, that, if from Cromack Point, the most projecting headland, you steered N. $\frac{1}{2}$ W., it would take you a mile off Portpatrick. I would consider it most assuredly right in keeping all that distance off shore, if navigating at night. I think 200 yards off Dunskey Castle is not at all a safe course. I consider, if Portpatrick was reported ten or fifteen minutes before coming to it, with any ordinary skill, a vessel should not be found close off Portpatrick pier. Certainly, it was not proper for the commander of a large steamer running along shore to be anywhere but on deck. If he had left for any short period, he was bound to have given instructions as to the course of the vessel, and he ought not to have left the mate to follow his own course. If a fog appeared off the Mull of Galloway, it was an additional reason for care on the part of the commander. I do not think it was right to have the life-boats laced up in canvass covers on such a voyage. I have never commanded a steam-ship with a life-boat.

By Mr CRAUFURD.—I think the second mate has no discretion. Supposing the captain deceived in giving instruction, he might be entitled to make an alteration.

By Mr LOGAN.—Prudence would have dictated that the boats should have been uncovered on leaving harbour. I don't recollect of being on board a ship in actual locomotion with the covers on.

By the COURT.—I do not refer to large steamers, and have been more accustomed to the steamboats in the navy. There is no particular reason, in the night time, from deviating from the direct course. In spring tides, they might keep a little inshore during the day time, but at neap tides, certainly not. In a strong spring tide, you would gain something by keeping near shore, thereby avoiding the strength of the tides; but in neap tide there is no advantage. In deviating from the direct course, what you would gain by the tide you would lose in the distance. The breadth of the channel is, I think, nineteen miles, all free for navigation. In taking the Mull of Galloway, if I had not seen the light, that would induce me to keep a good way off shore, and it would have made me the more cautious afterwards. My vessel is not an iron one. The variations in the compasses, either in wooden or iron vessels, is not great, after they are adjusted. But if the variation is known, it ought only to induce the captain to steer by the one most correct. The steersman, of course, goes by the binnacle compass; and if he is left to steer, it is known that he can go by no other. In one of the large steamers, I consider the bow the most proper place for the look-out; but if the steamer was high, I should place one on each paddle-box. The station there is better than on the bridge, because it is free of the rigging of the mast. I know the rocks well; and was never afraid of making the coast, because the breakers are seen in the thickest fog.

It being now seven o'clock, the LORD JUSTICE-CLERK intimated that they would adjourn the further hearing of the case till Friday morning at nine o'clock; and that the Jury would be conducted, by the officers of Court, to where accommodation had been provided for them.

The Court then adjourned.

The trial was resumed this morning at nine o'clock, the Lord Justice-Clerk, Lords Wood and Ivory presiding.

Evidence for the prosecution was resumed.

PATRICK HORNER, labourer, Portpatrick, recollected getting the alarm that the steamer was sinking. Heard some cries; and when he went down to the bay, he found the life-boat coming ashore. There

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were six or seven seafaring men, and about eighteen or twenty passengers. All went out of the boat but one boy. The boat was half full of water. Tried to bale it with a hat. After having plugged it, succeeded in baling it. The plug was out at the time. Then pushed it out from the shore for six or eight paces. Found something entangling her to the rocks. There was a rope fastened to the bottom of the boat, and a davit suspended to it, which impeded its progress.

LAWRENCE FERRIER, *assistant-keeper of the Mull of Galloway Lighthouse*, said, on the night of the wreck, a fog came on about twenty minutes past nine, and continued till about ten minutes or a quarter before twelve. Heard the sound of a steamer about a quarter of an hour or ten minutes before she passed. The steamer was about a quarter of a mile distant from the shore.

JAMES SCOTT BROWN, *keeper of the Lighthouse*, was examined in regard to the state of the weather. Was shown a book in which he was accustomed to record the state of the weather for the twenty-four hours at nine P.M. On the night of the 17th, as well as on that of the 18th, the entry was 'south, breeze, fog.'

JOHN GRAY, *nautical instrument maker, Liverpool*, supplied the Orion with compasses in July 1847. On March 20, 1850, adjusted the compasses of the Orion according to Professor Airy's. Had a conversation with Captian Henderson on the 30th May, at which witness asked how the compasses were; he replied, they were wrong. Went on board, and made a bet that the compasses were quite right. Examined them, and gained the bet.

By Mr PENNEY.—Was well aware of the influence of magnets on the compasses, and of the influence of iron. A small quantity of iron, in a particular position, will affect it at a certain distance. A point of an umbrella at a slight distance might affect it; and if it was magnetic, it might have a considerable effect. Iron exposed to hammering or friction becomes magnetised. In adjusting the compasses, the head of the vessel is placed due north, and place magnetic bars in such a way as to counteract local attraction, perhaps as many as eight bars for one compass. The compasses require readjustment from time to time. Found the compasses of the Orion to agree within 1 degree. In a particular course, there was a difference of $2\frac{1}{2}$ degrees; but that was the maximum. If witness found, on any particular voyage, the compasses went wrong, he could not attribute the error so much to local attraction as to vibration; but it might occur from local attraction. The course in which an error was most likely to occur would be west, where the vibration was $1\frac{1}{2}$ northerly; and north-west, $2\frac{1}{2}$ northerly.

By Mr BELL.—Sometimes the compasses will not require adjustment for seven years.

By the LORD JUSTICE-CLERK.—When he said that variation would occur from local attraction in one voyage, he referred to the introduction of iron near the binnacle. When the compasses were adjusted,

and no iron near the binnacle, the probability of disturbance would be less in an iron than in a wooden ship. There would be a difference against the iron, if the iron touched the hull of the vessel.

WILLIAM CARTER, *diver*.—Was employed on the wreck of the ORION. Examined the starboard bilge on the 25th June, and found a great hole. Might be four feet broad, and six feet high from the bottom. The rent might be twenty feet. Most of the iron belonging to the hole was hanging over like a flap. Found three dead bodies in the cabin. Mr Smith and Mr Hume were two of them.

Captain GIFF ROBINSON, R.N., was then re-examined as to the flow of the tides in the Channel and on the Portpatrick shore, and as to the probable course and position of the vessel when steering in prescribed directions for a certain length of time.

Miss ELIZABETH COLQUHOUN.—Was a passenger in the Orion, along with her cousin, Mrs Houston, of Glasgow. Mrs Houston had two children,—James, two years and eleven months, and Mary, younger. Was in bed when the ship struck. Found the water already in the cabin. When witness went on deck, there was great confusion, and the ship fell over on her broadside to seaward. She and her cousin fell into the water. Got hold of a rope, but lost it, and was under the water some time. Got hold of another rope, and held on till she was saved. Had the boy in her arms when the ship heeled over. Saw both the children next day dead at Portpatrick. Her cousin was saved, but was still indisposed.

JOHN ROBERTSON, of Messrs Caird and Co., builders of the Orion, re-examined.—The length of the keel of the Orion was 200 feet, 210 fore-reach; the depth of the hold 18 feet 6 inches, breadth, on the beam, 28 feet; the height of the mainmast, 44 feet 6 inches; and the maintopmast, from the heel, was 110 feet, and the other masts in proportion. The height of the main-crosstrees was 57 feet. The engines were 400 horse-power.

This closed the evidence for the prosecution.

The declaration of Captain Henderson, taken at Portpatrick, before A. M'NEEL CAIRD, Esq., Procurator-fiscal, Stranraer, on the 19th June, was read. It stated that on the evening of the wreck the weather was fine, with a north-west wind. The vessel passed the Mull of Galloway about midnight, when the watch changed, and the second mate was the officer of the watch. There were two look-outs, besides the man at the helm, and the officer of the watch. Saw them all at their posts before he retired to his own room. At the time the vessel struck he was lying on a sofa in his own cabin on deck, asleep. Did not consider it his duty, in the state of the weather and position of the ship, to be on deck at the time. He was in a state of fatigue, and required rest. Was aroused by the shock, and rushed on deck, and discovered that the vessel had struck on a rock. Saw the land, and knew

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where they were. Thought that the accident happened by the mis-calculation of the second officer of the distance of the ship from the land. After the accident, he exerted himself as much as possible to save the lives of the passengers, and as far as a man could do, thought he had done his duty. One of the boats—the starboard life-boat—on being let down, got under the paddle-wheel, and was swamped by the vessel sinking. Did not know how many boats reached the shore with passengers. There were some boats came from the shore, and in the grey of the morning it was difficult to distinguish between the shore-boats and their own. Considered the ship boats to be in proper order. Went up the rigging as the ship sunk, and remained there as long as the top of the masts remained above water, and till he saw all the passengers clear of the wreck. He was the last to leave the ship. The shore-boats were very cautious in approaching, for fear of a rush of passengers. He had left special instructions to call him if there was any change of weather. It was the usual practice of the commanders of the other vessels on the line to give such instructions in similar circumstances. He was not called, but was aroused by the shock of the vessel. When the ship struck, he stripped himself in order to swim ashore, and he was almost naked when taken off the wreck.

The declaration of John Williams, the second mate, taken also at Portpatrick, was then read. He stated that he was on the deck a few minutes after midnight, to take the turn of his watch. The master remained on deck till half-past twelve, and on leaving said, ‘John, if it becomes any way thick or hazy, mind give me a call.’ When the vessel was off the pier of Portpatrick, it suddenly became thick. Could see the pier quite distinctly at first, but when declarant saw the fog coming on, he gave orders to John Kelly, who was at the helm, to keep the vessel north by west, a half point off from the land. Was going to call the master, according to instructions, when the vessel struck. Could not understand how the accident occurred, unless the current had swept the vessel in-shore against the helm. It was not unusual, on this part of the coast, for the master to go to his room for an hour or so. Declarant kept the vessel near the shore for the purpose of shunning the tide. The master gave him no order to do so on this occasion. Remained on board till the ship went down, and was saved from the rigging.

The SOLICITOR-GENERAL then stated, that he had expected to be able to fix on the first mate, Langlands, an independent responsibility in regard to the state of the boats, and therefore he had been included in the indictment along with the captain and second mate. He thought it right to state, however, that the Crown had not found that separate responsibility to exist to the ex-

tent expected, and, under these circumstances, he thought it was consistent with his duty to withdraw the charge against the first mate.

Mr CRAWFURD said that he proposed to call the first mate as evidence for the captain, which was allowed.

The Jury having returned a verdict of not guilty against Langlands, he left the bar.

Mr CRAWFURD then called the following

EXCULPATORY EVIDENCE.

CAPTAIN JOHNSTON,—I am harbour-master in Glasgow, and have been a sea-going man since 1808. I was five or six years in the Glasgow and Liverpool trade. Knew the Orion well; a very fine vessel, and equipments were very complete, including her boats. She was, in point of fact, considered the best vessel that went out of the Clyde. I have known Captain Henderson since he was a boy. His character was unimpeachable, and he was a clever, active sailor. I knew him to be in several responsible charges before he went to the Orion. For twenty years he has come under my notice as harbour-master, and as captain of various vessels. I remember a schooner he had charge of in the Mediterranean trade. He is a very steady, sober man. The Orion had covers for her life-boats. That is pretty general. During the time Captain Henderson was the commander of the Orion, he was much approved of, and had the confidence of the public.

CAPTAIN JOHN BOYD,—I retired about a year ago from the command of the Admiral steamer, having been for sixteen years previously in the Liverpool steamers. Captain Henderson joined her when I left. I had no written instructions when in command. But I am not in the same company; I was in Thomson & M'Connell's. I, as captain, had no particular watch. In fine weather, the first and second mate took watch, with myself going backwards and forwards. The captain was always on deck going down the Mersey, and on deck going up the Clyde, and on deck off the point of Ayre, the Mull of Galloway, and generally the Cumraes. I was in the habit of retiring for rest occasionally for rest in good weather, after nearing the Mull of Galloway. I gave instructions to be called in a change or fog. I knew that was the practice in the service. When we got to Dunman Head, the general course was north, and when off the Point, a little easterly. We then went fully $\frac{1}{4}$ point west, to get out again. That change made it about equal to a due north course, equal off Blackhead. Supposing a course taken from Dunman head N. $\frac{1}{2}$ W., it would take her two miles off Portpatrick. If that course commenced half-a-mile off Dunman

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No. 68. Head, that would be quite a safe course. There is deep water up to
 Thomas Dunman Head, and, supposing the vessel were still nearer it, the course
 Henderson, would be still safe. If from the same point, N. $\frac{1}{4}$ W. I consider would
 and Others. be quite safe, as I used to steer north. I put the look-out—one on the
 High Court. gangway, and the other on the fore-castle head. Two men on the gang-
 Aug. 30. way did equally well. The life-boats were covered. Other vessels
 1850. had two high forecastles, and two life-boats, and two quarter-boats. We
 Culpable had plugs in all the boats; the hole is generally kept open, as the cover
 Homicide, &c. does not keep the rain out. The plugs were kept in the locker in the
 stern of the boat. They were not fastened to the plug-hole. Every
 sailor pays a particular regard to the plug. If they find it about they
 put it back. If I saw Portpatrick light on the starboard bow, I would,
 keeping north, consider myself quite safe.

By the COURT.—We might pass within a quarter or half a mile. If the light of Portpatrick was $2\frac{1}{2}$ points on the starboard bow, it would be quite safe to steer north.

By the SOLICITOR-GENERAL.—We generally passed Dunman Head at half-a-mile, and drew to within half-a-mile of Portpatrick as we proceeded. The captain, with the Liverpool pilot, has the responsibility of navigating the Mersey, and with the Clyde pilot, in the Clyde. He may interfere with the pilot. I consider myself entitled to go to sleep during the mate's watch, or during the second mate's watch. I considered myself entitled to four hours' sleep; during the whole watch in fact. We were generally out, however, in that time, being generally called when at the Cumbrays. I am responsible for the course of the vessel, not, of course, if altered without my orders. The second mate is entitled to alter it without my orders. In clear weather I don't consider myself responsible, for there is no danger whatever. If the vessel run straight by the land, a quarter of a mile off, there is no danger. He must have run closer, however; and if he did go nearer, I would say I was not responsible, because it would be beyond what I would expect from him, as a thing unreasonable and unsafe. If the Mull of Galloway was covered with fog, I would not go down to sleep. It is a very common thing for fogs of that kind to come and go. If I saw the fog at the Mull of Galloway, I would not have thought it unlikely that it should have again come down. The covers on the boats are laced underneath. The boats are hung on deck, inside. It was seldom we examined them. They might hang on the davits for eighteen months, without ever being taken down.

By the COURT.—In my ship there was a chief mate and a second—not a third; they took their watches alternately. The starboard, or second mate's watch, was generally called the captain's watch. I suppose it was so called because the captain was presumed to take particular charge of that watch. In point of fact, however, I took no more watch of the one than the other. I was generally in both, and I cannot tell whether I was responsible or not for them. I might look a

little more into the second mate's. In point of fact, it was my watch in which the second mate relieved me. If the second mate went wrong, I did not consider myself responsible, for I suppose the owners would be satisfied with the competency of the man. I very seldom go below during the first mate's watch; but after rounding the Mull of Galloway, we consider ourselves quite safe for two or three hours. The course from Dunman Head was a wrong course, unless changed in time, and it would depend on the time and extent of the change so taken, if the land can be cleared. In clear weather, we leave it to the second mate to do that; thinking that if a man sees the land too close, he will not run ashore. If at the Mull of Galloway it had been foggy, I would not, however, have left him to do so. If the harbour light at Portpatrick was made two miles off, there could be no difficulty in keeping a quarter of a mile off. We generally pass at about 10 to 11 knots in fine weather. That is the full speed. If the land is seen at Cromack Point all the way along, there can be no difficulty in keeping the course. If there was a haze at the Mull of Galloway, it should lead to greater caution. In keeping the watch, he went about all parts of the ship, often on the gangway. We made three runs a fortnight—six back and forward. The company gave us no instructions at all as to watches, or any thing else; but that just leads to greater responsibility on our part. They don't divide the navigation between the two mates of the vessel by any written orders. The departures are at various hours, to suit the tides. It took three tides with the Admiral; the Orion did it in two. The difference might be six hours. It was very close work for her to do it in that time. This running close to the coast was to endeavour to avoid the strength of the current, and get out of the way of vessels. We gained very little, indeed, by avoiding the tide; it would, I think, be a mile at the outside; but, then, in the Orion it might be greater than in the Admiral.

JOHN GILMOUR.—I am dockmaster of the Clarence Dock, Liverpool; and commanded an East Indiaman fourteen years. I had occasion frequently to observe the Orion. She was a very fine vessel, and her equipments were complete. There were covers to the life-boats; and among all the vessels he saw, he thought it was quite usual. I never kept the plug attached to the boat; it usually hung in the stern sheets. I know Captain Henderson well; and, in my opinion, he always handled his vessel well; he was a steady, well-behaved man. In the merchant-service, the captain never had a separate watch, but the second mate's watch was sometimes called the captain's watch. If I had confidence in the mates, I would go indifferently to bed during both watches. I know John Williams, the second mate of the Orion, and always considered him a steady man, and that he attended to his duties manfully.

CAPTAIN CRAWFORD.—I have been nearly forty years at sea. I am now in command of the Princess Royal, belonging to the Royal

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No. 68. *Thomas Henderson, and Others.* *High Court.* *Aug. 30, 1850.* *Culpable Homicide, &c.* Steam Packet Company. I have been in the Liverpool and Glasgow trade upwards of twenty years. I never had any written instructions. The Princess is a very swift vessel. I, as captain, keep no particular watch. The first and second mates do so. The second watch is sometimes called the captain's watch for distinction. I sometimes retire for rest for a little between Liverpool and Glasgow. The captain is always on deck in the Mersey, off the Isle of Man, and Mull of Galloway. We generally take about nine hours to reach the Mull of Galloway. The minimum passage of the Princess Royal is fifteen hours. She was the swiftest next to the Orion. We could do it to Glasgow in two tides. After passing the Mull of Galloway, I was in the practice of retiring to rest, under favourable circumstances. It requires great attention to take the vessel up the Clyde; and I think it reasonable we should get a little rest, where we can take it, before doing that duty. The captain is on deck from leaving Liverpool till past the Mull. On passing Dunman Head half-a-mile out, going north, I would take a course of north a little west. There is deep water to Dunman Head; and if nearer, the same course would be safe. A course of N. $\frac{1}{2}$ W. was, therefore, quite safe. In my opinion, it would give a wide berth to the land all the way. If a course of N. $\frac{1}{4}$ W. was taken, no change would be necessary to take us past Portpatrick, after clearing Dunman Head. As long as her head was kept straight, she was safe. If leaving Dunman Head on a course N. $\frac{1}{4}$ W., with fine weather, and leaving the vessel in the hands of a mate in whom I had confidence, I would have no hesitation in retiring. I would expect him to keep her on that course. If there was a little haze on the land, I would, with the same course, and if the sea was clear, have no hesitation in doing so, if I required it. In passing Dunman Head, if to escape the tide, we took a course a little to the eastward, we changed that course again, and we gave to Dunskey an offing of from a mile to two miles. By keeping a little more to the westward, we cleared Blackhead. That course a little to the eastward, and then to the westward, would have just brought us into the channel course, clear of the land.

By the SOLICITOR-GENERAL.—If, on the Mull of Galloway, I could not see the light for fog, I would not consider myself entitled to go below; and if the weather had been hazy throughout, that would render it still more improper. If the light is seen from the deck, it is a distance of twenty-one miles. When we go below, we leave orders what course is to be followed. The mate is entitled to alter that course. It is left entirely to the discretion of the mate his informing me thereof. Occasionally he informs me when he does so, and at other times tells me the time he did it when I come on deck. On the day of the accident, it was low water at half-past twelve, and high water at half-past six.

By MR PENNEY.—In speaking of change, I mean any small point

of variation ; but, supposing the course was changed from an in-shore to an off-shore course, I would not consider the mate bound to acquaint me with any small point of variation.

CAPTAIN M'KELLAR,—I have been in the Glasgow and Liverpool trade for some years ; and am now on the Glasgow and 'Derry Station. While in the Glasgow and Liverpool trade I had no particular watch. The watch was divided into two—the first and second mate's watch ; the latter being called the captain's. He had no more charge of the one than the other, and had sometimes fully as much confidence in the second as in the other. I always made a point of being on deck at the Isle of Man and the Mull of Galloway. After passing from the Mull of Galloway, that was the only part of the coast where I thought I could go down in safety. It is an anxious and fatiguing duty to go up the Clyde. I have had some experience, and I think it a good plan for the captain to retire and take a little rest ; of course, only when the weather admitted of it. It made no difference whether that was done during the first or second mate's watch. The direct course from Dunman Head is N. $\frac{1}{2}$ W. If sailing on that course, I would give a wide safe berth to the shore. It would require no alteration to clear Blackhead. It is deep water close to Dunman Head ; and if, on a fine calm night, we were 200 yards off, a course of N. $\frac{1}{2}$ W., it would take us clear of the whole Scottish coast. If left on that course, she would require to have nothing done to her except to keep her head straight. Unless there was a change made, there would be perfect safety ; and, if I had confidence in the second mate, I would have no hesitation in retiring for rest. If I did so, I would expect that the course was continued. The captain's cabin is on deck, right under where the look-out stands, and the latter could waken him instantly, by stamping with his foot. The look-out ought invariably to keep his post, not even to leave to communicate with the officer on the watch. He ought to have called, or sent a deputy. If I, as captain, had left two men on the gangway, I was entitled to expect they would have kept to their post, and that the mate would not alter the ship's course. If the ship was on her proper course, and the night was calm, I would retire with a clear mind. In our ship we have one life-boat ; and two other boats. The boats were of the same construction as those of the Orion, but proportionably smaller. If there was a crowd of passengers getting into them, it would impede the getting of them out very much. I think if the passengers had kept clear, there was nothing to prevent them being lowered in a very short time. Our boats are hung on davits, and confined in 'chocks,' as on board the Orion, with covers also. I have seen the Orion ; and there was no screw to fasten the boats to the vessel.

CAPTAIN HARDIE, of the *Admiral*.—I have been 16 years in the command of Glasgow and Liverpool steamers ; Captain Henderson had been about a year in command of the Orion. He was a steady,

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good seaman. On board the Admiral I have no watch. They are taken by the first and second mates. On a fine calm night I would have no hesitation in retiring for rest. The captain requires a few hours' rest to prepare him to take the vessel up the narrow channel of the Clyde. The bringing of her down the Mersey is a very anxious duty. A quarter of a mile is a good berth to Dunman Head. If there is a haze on the hills, and we saw the sea clear, we would be still safe in going on the usual course N. $\frac{1}{2}$ W. I would expect that course to be kept till two or three miles north of Portpatrick. I would expect the look-out on the gangway to keep his post, and I would expect to be informed if a change in the course was made.

By the SOLICITOR-GENERAL.—I would not go below in a thick night, even though the sea was calm and the land obscure. If there was a haze on the Mull of Galloway, it would not induce me to stay on deck. The light was a very poor light, and might not be seen. I would give instructions to the mate in the event of fog.

ALEXANDER CLARKE.—I have been first mate of the Princess Royal for five years, and have been engaged on Clyde steam-vessels for some years before. There are two watches—the mate and the captain's watch; the latter of which is always kept by the captain. In rounding the Mull, it is generally the second mate's watch if we had sailed the previous evening. The captain usually retires, if he considers he can be allowed. In passing Dunman Head, we steer generally north, which takes us clear of all the heads. If that course was continued when a quarter of a mile off Dunman Head all the way along to Blackhead, I have no doubt of the safety of the vessel. If hazy, I would keep the vessel a little off, and if there was more responsibility than that, I would call the captain. If left on a course of N. $\frac{1}{2}$ W., I would be disposed to change the course farther inland. We do not generally steer by compass, if the night is so very clear that we can see the land.

Captain WHEELER, of the *Fenella*, a *Fleetwood steamer*.—The passage is shorter than from Liverpool to Glasgow. On my passage north, after rounding the Mull of Galloway, and within a quarter of a mile of Cromack Point, I would steer N. $\frac{1}{2}$ W., which, in my opinion, would be a perfectly safe course. If passing the Mull of Galloway, and I left the mate in charge, and the night was fine, I would have no hesitation in retiring for rest; of course, I would expect to be called if any change took place. I also would expect that the course I left would not be altered without reason. The light on the Mull of Galloway is not a good light; it is too high. I have seen a haze round the light, and the sea below clear. I went to rest that morning at half-past two, when off the point of Ayre. I was going to Troon. I saw nothing alarming in the weather.

By the COURT.—It was not moonlight; but I think it was near the first or third quarter.

By Mr BELL.—It was broad day light at half-past two.

Captain DALZELL, *Agent for the Underwriters*.—I have long been a sea-faring man. The Orion was as fine a vessel as could possibly be. In boats, and other furnishings, she was remarkably well kept. I know Captain Henderson, and found him a very superior officer. I have frequently been between Liverpool and Glasgow, and when on deck, at night, I always found Captain Henderson most attentive. The steamers on this line are insured at the very lowest rate. I don't think we have any such class of risks as the Liverpool risks, the steamers were so superior and so well officered. There is no question that the captain might safely retire in passing the Mull of Galloway, and in the weather that was, as seen by me at Stranraer, I would have no hesitation whatever in going below myself. The course between Dunman Head and Blackhead is generally N. $\frac{1}{2}$ W., but straight north would keep her clear of all the rocks.

By Mr PENNEY.—The compasses must be adjusted before the vessel sails, but they may, for a short time afterwards, go slightly wrong, on account of the influence of local attraction. Wrecks have been sometimes the consequence. One I was in myself, that of an iron ship, called the Iron Duke, 330 tons, was wrecked on the coast of Norfolk. I have been on board a steamer when she missed the light in consequence of that deflection.

Captain KELLAND.—I am captain of a Liverpool merchantman. I have been a regular seaman for twenty-eight years. I never heard of the captain keeping any special watch. The second officer generally keeps the starboard watch. It might be called the captain's watch, but he never recognizes any such thing. I should have no hesitation in turning in, if I required it, during the watch of either of the mates.

JOHN HONEYMAN.—I live in Glasgow. I was one of the owners of the ship Glen Swilly, commanded by Captain Henderson. I had perfect confidence in him. In particular did I consider him a safe and cautious man.

ADAM DAWSON, *one of the officers of the Glen Swilly*, said, he considered Captain Henderson a first-rate seaman, and a cautious, steady, man.

Mr LANGLANDS, *the mate, was then called*.—I was the first mate of the Orion. We left Liverpool about thirty minutes past four. The captain was on deck going down the Mersey; also on deck passing the Ayre light and the Mull of Galloway. Saw the lights on both. There was a little haze on the Mull of Galloway. The latter light is very high up. We were about three quarters of a mile off, passing the shore. We saw the land quite clear. There was nothing in the night to cause the least apprehension. We were about two or three miles to the south of Dunman Head when I gave up the watch. The land was quite clear; the stars were shining. We were coasting within a mile to three-quarters of a mile off the shore. I left the deck at a quarter

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before one. I was on deck when we rounded Dunman Head. It was then clear. We passed it half a mile off. I am quite certain we were not as near as two hundred yards. We were not within half a mile. When I retired, John Williams, the second mate, released me. The captain was on deck. In my watch, he was on deck and below regularly, and I supposed also during the second mate's. We were then steering NN.W., a little to the south of Cromack Point. On rounding Cromack Point, I would have altered the course to north by west, and on clearing the point, I would have gone about north till I saw the land off Portpatrick. I consider N. $\frac{1}{2}$ W. a clear off-shore course. I have frequently seen vessels a long way inside of us in passing. It was Captain Henderson's practice never to put any east into his course after passing Cromack Point—always keeping, if any thing, to the west of north. We had rounded Dunman Head before I retired. I saw nothing in the weather or course to make me think there was any danger. I have sailed with Captain Henderson since he commanded, and always found him most attentive. His cabin is close to the gangway, and I never found him on the sofa with his clothes off. It was my opinion there was nothing to prevent the boats being launched, if the seamen had had their way; of course it was difficult, on account of the crowd of passengers. I was below when she struck; but was up on deck immediately. There was great confusion and alarm. The boats in the chocks were crowded. I saw Captain Henderson—he retained his composure, and did all he could, as far as I saw, to save the passengers. Captain Henderson and I were taken off the mast-head the last of all. I was in the navy for some time. I have been on board a great many ships in the navy, and I never saw the boats' plugs fastened. I was on an expedition in which there was a great deal of boating, and I never saw a plug fastened. If the plug had been in the boat, and people baling out water, there was nothing to prevent it being baled out, and, of course, it could not be found then. I was chief mate once between Hull and Hamburg. The captain took no watch. The boats' plugs were not fast there. I kept the log of the Orion, which is produced. It says, '17th June, calm and hazy; left Liverpool, 4.20 P.M.; Point of Ayre, 10.25 P.M.; Mull of Galloway, 12 midnight.' By calm and hazy, I mean that the horizon was not distinctly visible. We could see a long way notwithstanding. We saw the Isle of Man, I suppose seven or eight miles off. At Dunman Head, it was quite clear, and was as fine a night as I had seen on that passage.

By Mr PENNEY.—After passing Dunman Head, if we did not go to the east of north, we thought ourselves on our own proper course. If I, as mate, had, in the absence of the captain, not steered to the east of north, I would have thought I was going right. It was understood the mate had a discretion in giving any course he thought proper while on his watch, that is within the proper course generally. Variations

in such a coasting course are always necessary, and it is not thought necessary to report them. I always found Williams a trustworthy, steady man, thoroughly acquainted with the coast.

By the SOLICITOR-GENERAL.—He had sailed eleven months in the Orion. He was appointed by Captain Douglas. My appointment came also from the company. I was sent to my duties by Captain Henderson. The last part of the log was written on my retiring. I sat up the whole of our passage from Liverpool. I intended to express by it that the weather had been calm and hazy all that time. I afterwards extended the document, which bears to be the log of the Orion, from separate notes.

The SOLICITOR-GENERAL.—You said it was not a copy of the log; will you just read it, and see if you don't call it a copy, and what is your description of the weather there?

WITNESS.—Monday, 17th, calm, hazy throughout; 4. 20 P.M. sailed from Liverpool; passed the Point of Ayre 10.25 P.M.; Mull of Galloway 12 midnight; Portpatrick 1.35 A.M.; about 1.40 ship struck $\frac{1}{2}$ mile north-west of lighthouse. 'The only difference is hazy throughout.' I am quite sure we were not within half-a-mile of Dunman Head, nor to Cromack Point; but we were nearer than usual.

SOLICITOR-GENERAL.—Were you much nearer than usual?

WITNESS.—No, we were not much nearer.

SOLICITOR-GENERAL.—What is the usual distance?

WITNESS.—Well, I can't say, but I have passed within a mile frequently.

By the COURT.—Then I understand you to say a mile is the usual distance.

SOLICITOR-GENERAL.—200 yards would be a very unusual distance.

WITNESS.—I can't say I have passed that distance—it would be rather near.

SOLICITOR-GENERAL.—Answer my question.

WITNESS.—Yes, it would have been a very unusual distance. I did not hear any remarks about our proximity to the shore, and there was nothing whatever to excite apprehension. When I left the deck, we were steering NN.W. Before I went down, I was in the engine-room. On coming up to retire, I stood some time looking at the land. She had passed the point then, and was, according to compass, steering more to the eastward. I did not see Portpatrick light at that time.

DANIEL M'KELLAR, examined by Mr PENNEY.—I am the shipping clerk at Liverpool, and make a note or memorandum of the goods shipped, and it is from that note the manifest is afterwards made out. I superintended the loading of the Orion. The manifest was lost. The cargo was composed partly of light and partly of heavy goods. We stored the heavy goods in the after-hold running to the stern, un-

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der the saloon. The height of the saloon is eight feet. Lumpers are employed in the stowage; the captain and crew have nothing to do with it. There was shipped about eight tons of iron—sheet and plate—hardware, nails, machinery, and steel, and that was stowed in the after-hold. I am not aware if any rod iron was shipped on the occasion.

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WILLIAM FINLAY JOHNSTON, *clerk to the Messrs Burns, owners of the Orion*.—I was sent to Portpatrick after the loss, to superintend the recovery of the cargo. The divers employed brought up a quantity of iron from the after-hold. It was sheet iron; also, hardware, and some bags of nails. There was some rod iron brought from the starboard side of the deck. The sheets of iron were broad.

By Mr BELL.—The divers brought it up from the starboard side, their hose was not of sufficient length to admit of their going to the other side, when down.

ALEX. MOORE.—I am in the employment of Mr M'Lure, Portpatrick, who purchased the wreck of the Orion. I remember after that purchase, that a quantity of iron was brought up in sheets, 11 and 12 feet long, and 4 feet broad.

WM. HATCHARD.—I was engaged for some time with Mr Cooke, one of the inventors of the Electric Telegraph, and agent for the Electric Telegraph Company. I had occasion to make a good many magnetic experiments, and have become acquainted with disturbing influences on the needle; the effect of iron on the compass. I was requested to make certain experiments by parties connected with the owners of the Orion. I made these experiments along with Mr Edwin Clark. The greatest quantity of iron we used was between six and seven tons, and placed at distances from 12 to 20 feet from the compass in separate stores, the compasses being placed in the upper floor of the building and the iron in the lower. Everything else was removed. We used plate iron, and also a certain quantity of nails. The inference I formed as to the effect of 23 cwt. of iron was, that that quantity, placed at a distance of 12 feet, deflected that compass fully two degrees. We did not use bar iron, but I think it would have had a considerable effect in the same manner. A larger quantity would have produced a larger deflection.

By Mr BELL.—The house was not built of iron. I subsequently made experiments on iron steamers at sea, but the effect was the same. I placed a small pocket compass which I had with me, in proximity to a bar of iron, and found it was considerably affected. I did not protect that compass by magnets all round, as is usually done in iron steamers.

EDWIN CLARK.—I have been for several years engaged with Mr Stephenson in the operations of the Britannia Bridge, and am now engaged with Mr Cooke in the Electric Telegraph Company. I have

made certain experiments with Mr Hatchard. These experiments were conducted with the greatest possible care.

WALTER DOUGLAS, *examined by* Mr LOGAN.—I am marine superintendent of the Messrs Burns; in which capacity it is my duty to take a general superintendence of all the ships. Captain Henderson was appointed by Messrs Burns out of numerous candidates for the office. Before he was appointed, various inquiries were made—among others, of the owners of an East Indiaman, called the Glen Swilly. When he was appointed, it was my opinion he was decidedly the best man among the applicants. During the nine months he commanded the Orion, he completely confirmed my opinion. It struck me, besides conducting his vessel properly, he was a cautious person. On board the company's steamers, there were two mates. The watches were kept by the first and second mates. No watch was ever given to the captain. That system was observed in all the company's vessels besides the Orion. It was known and approved of by me as their superintendent. The life-boats of sea-going steamers are generally covered over in the same way as those of the Orion, to protect them from the weather and the sea. If struck heavily, she might be carried away in a heavy sea and lost. In the Cunard line the boats are covered in the same manner. I never heard of a life-boat covered when in harbour, and exposed when on the voyage. It would frustrate the object of covers, to expose her both to the sea and sun. The plugs in the boats I never saw fastened in the merchant service. They are kept in the locker or stern-sheets; and seamen have a particular fondness of seeing the plugs lying about. I approved of the spray cloth at the bottom of the boats to protect the steerage passengers. I don't think it would form any impediment to the launching of the boat. I was once sailing-master in the Gulnare Government steamer—Captain Bayfield. Observations were made as to the deflection of the magnetic needle, and from these I came to the conclusion that iron in the hold would influence the binnacle compasses, especially if upon deck. I remember the loss of a ship in the St Lawrence was attributed to an immense quantity of iron of which her cargo was formed.

By the Court.—The effect was to take the vessel out of her course, and bring it to an unexpected place.

ANDREW SMALL, *seilmaker.*—In February last I made the covers for the boats of the Orion, and also the spray cloth. I was applied to to make the model of the boats of the Orion, with their covers, but I made it by no scale. The cover on the model was as near as possible the same sort of stuff as the original. Before I was done with it, it was painted five or six times, which had the effect of stiffening it. When I was a commander at sea I made the covers for my own boats, and, since I became sailmaker, have been frequently employed to make covers for steamers. I studied to make the fastenings as easily re-

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movable as possible. Those of the Orion were made exactly as those of other steamers. I don't think the spray-cloth would form any impediment in launching.

By the SOLICITOR-GENERAL.—I would cut the fastenings of the canvass in an emergency. I don't think they can be made in a more suitable manner. Supposing a knife was not at hand at the time, I could, without assistance, take it off in a minute or a minute and a half.

By the COURT.—The Orion was supplied with covers before I supplied her.

By the SOLICITOR-GENERAL.—I have never unlaced those on board the Orion, but have done so in my own ship.

By Mr LOGAN.—A sailor without a knife would be like a sailor without a blue jacket, he would be of little use.

DAVID CROALL.—I was at one time a carpenter on board the Orion, and was so from the time she was launched till a fortnight before she was lost. The life-boats in this model are rather too deep and too broad, and being covered with stuff nearly as thick as the original, gives a false impression. The model ought to have been made to a scale. The Orion boats had covers from the first, and laced under the keel. They were so handed over to Captain Henderson. Some time after his appointment he gave me instructions to fasten a spray cloth. The fastening was kept well greased, to facilitate its removal. But supposing, in a hurry, it was not detached, it would have offered no impediment to the launching of the boats, as it would have torn it at once. The davits worked the same way in Captain Henderson's time as in Captain Main's. The screw nail in the bottom would be no impediment to her being swung out, for the first pull at the davits would have taken it away.

GEORGE AIRD.—Was a seaman on board the Orion when she was lost. I went ashore in the larboard quarter boat. No plug was found in her. On our way out we looked for the boat-plugs, and found two in the beltings of the boat. We afterwards took out a cork and put in the plug. I found it covered with paint of the same colour as the boat. Langlands was in the habit of having them regularly oiled.

By the SOLICITOR-GENERAL.—I was on deck when the vessel struck.

C. N'NEELY.—Was a seaman on board the Orion when lost. On getting ashore with the larboard boat, we baled her with bats. In doing so, we found two plugs in the usual place. No seaman would ever dream of taking them out of the boat. When at Liverpool, the oars had been scraped and cleaned, and were lying on the deck after we left. I heard the mate giving orders to have them put in the boats.

HUGH MAIN.—I have been a captain of Liverpool steamers for 20

years; and was some time master of the Orion. Williams was a good seaman, attentive and cautious.

By the COURT.—He was second mate $2\frac{1}{2}$ years.

By the SOLICITOR-GENERAL.—We kept in-shore according to the weather—sometimes at a distance of half a mile. The second watch is sometimes called the captain's watch; as in small vessels where there is no second mate, it is usual for the master to take the watch with the mate. If there had been a fog at the Mull of Galloway, I would not have gone below. In clear weather, I did sometimes. I was in the habit of sleeping during the second mate's watch in fine weather sometimes.

By Mr CRAWFORD.—I have known Captain Henderson, and think him a fine steady seaman. If you had a fine calm night, with a second mate in whom I had confidence in charge, I would, if it was a clear night, have no hesitation in taking a little rest. The course we generally took from Dunman Head was to steer N. $\frac{1}{2}$ E., and then to edge her off to N. $\frac{1}{2}$ W. We usually passed about a mile off Portpatrick and Blackhead.

Examination resumed by the COURT.—If the light is made two miles off in a fine night, and the vessel answer her helm, there is no reason whatever to suppose that the vessel could not be kept off the shore. I had no instructions from the owners; but I don't consider I am responsible for my officers when I am in bed.

This closed the case.

The SOLICITOR-GENERAL addressed the Jury on behalf of the Crown, and contended, that the facts proved established the guilt of the mate, who was in charge of the vessel at the time of the accident, and that the captain had been guilty of the charges laid against him, in respect of his having committed the vessel to the care of a subordinate officer, when near the shore, without any necessity for his so doing, and was, therefore, answerable for the unskilfulness of the officer to whom, under such circumstances, he had committed her.

The LORD JUSTICE-CLERK intimated to the counsel for the pannels, that the Court did not intend to direct the Jury that any case had been sufficiently made out with respect to the charge regarding the boats.

PENNEY, on behalf of the mate Williams, contended, that the accident appeared to have been occasioned by causes over which he had no control of, or which, at any

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rate, he was not criminally responsible. The deflection of the compass by which he steered was sufficient to account for the orders he gave, more especially as it did not appear that he received the ship's manifest, or was acquainted with the position of the iron, which was part of the cargo, and which accounted for the deflection which had been proved.

CRAUFURD, on behalf of the captain, said, it was settled law, that a party was not criminally responsible except for his own act, and it was sufficient to exonerate a person otherwise responsible, if, having delegated his own superintendence, he had done so to a competent person. Case of *Kirkpatrick*, Dumfries, Sept. 1840, Bell's Notes, p. 71; *Drysdale*, High Court, March 13, 1848, Arkley, p. 440. No doubt a person might be criminally responsible if he devolved his own duty on one who was not qualified for its due discharge, such devolution being criminal in itself. In this case there had been no such improper delegation of duty, as the mate was an officer selected by the Company for the express purpose of taking charge of the vessel in the absence of the captain, and was known by his employers to be in the habit of so doing. Again, there was nothing proved against the captain to show that at the time he left the deck the vessel was in circumstances of any danger. He was entitled to have believed that his directions to keep to the westward would be observed, and this the more especially as the coast was more or less visible. The greater the recklessness of the mate in disregarding the intimations of the nearness of the shore, went to exonerate the captain, who could not calculate on such disobedience to his own orders, and of such unskilful seamanship on the part of an officer chosen for that purpose by the Company, and who was not shewn to have evinced recklessness or unskilfulness on former occasions. It was quite certain, that, so far from giving directions which, being followed out, carried the vessel on the rock; that the master had given other directions, which would have

saved her, and he having done nothing which directly contributed to the accident, the Jury could not convict him for the crime charged, in respect of the lamentable result, which, if occasioned by the criminal act of any one, was so by the conduct of that of the mate, for whom, under the circumstances, he was not responsible.

The LORD JUSTICE-CLERK, in charging the Jury, observed, that, as had been remarked in many cases, there was really no difference between the crime of culpable homicide and culpable and reckless neglect of duty, which resulted in the loss of life, and the Jury must therefore, under either charge, consider the case as one of culpable homicide. Intention to do wrong was no part of the crime of culpable homicide; if intention was proved under such a charge, it would amount to murder. The crime of culpable homicide was committed whenever a person unintentionally committed an act whereby the life of another was lost, or where he failed to perform his duty when charged with the preservation of life, without having a sufficient excuse for such neglect, and life was lost in consequence; and it was the wish of the Court to express this the more strongly, as they were of opinion that the introduction of two charges, amounting, in law, to the same offence, under circumstances such as those which had been proved in the course of this investigation, was inexpedient, as tending to distract and confuse the minds of the Jury.

The principles of law the Court was bound to lay down to the Jury, had been much considered in recent cases, particularly that of *Paton and M'Nab*, November 1845, Broun, vol. ii., p. 515, and it consisted in this,—‘ any person placed in a situation in which his acts may affect the safety of others, must take all precautions to guard against the risk to them arising from what he is doing.’ That would also be found to be the principle adopted and enforced by the Court in the cases referred to by the counsel for the pannel Henderson,

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though, no doubt, exceptional expressions might be found in almost every case, occasioned by the peculiarity of the facts proved at the trial. The Jury thus must take into consideration the whole indictment, as forming one substantive charge; and on the proof which had been adduced, they would consider whether it was sufficient to establish the charge which had been preferred against the pannels respectively. It was unnecessary that the pannels should be guilty, to the same extent, of culpable neglect of duty, which occasioned loss of life. There might be innumerable degrees of guilt incurred under such a charge, occasioned not merely by the amount of recklessness displayed, but by the amount of duty and responsibility which the party had undertaken. The principle, however, being, as before stated, that a party charged with the care of life, was bound to exercise to the utmost extent all the caution and care within his power, such an occurrence as that before the Jury, where a vessel was shown to have been sailing for a long distance unusually near shore, and at length, immediately after seeing Portpatrick Harbour light, continuing the same course until the vessel was struck on a well-known rock, on a calm and comparatively clear night, threw on those on whom her management depended, the *onus* of shewing respectively that they had done everything within their power to prevent the occurrence of such a catastrophe. No doubt the guilt might arise from totally different circumstances—that of the captain—from improperly leaving his vessel in charge of the second mate; whilst that of the mate might arise from the manner in which he exercised the trust reposed in him; but though the circumstances which tended to establish the charge might be totally different, that would not affect the question as to whether both could be convicted under the indictment. It was not a relevant defence for the captain to say, that the mate had navigated the vessel in a more careless and reckless manner than usual, if he, the captain, was not justified in com-

mitting her to the care of the mate at all. On the other hand, it would equally be no defence to the mate to say, that the captain having improperly committed the vessel to his care, he had so completely neglected the charge he had undertaken, as, after repeated warnings, to run on shore by a course of reckless navigation, whereby the vessel was wrecked, and large loss of life occasioned. The Jury would consider the facts under reference to the libel, and see whether or no there was charged against the pannels neglect of duty of that distinct species which has been proved as affecting each, as it would not do to convict them on belief that there was some other duty, not charged in the libel, which had been neglected by either or both of them, the observance of which might have averted the catastrophe.

The duty of the party entrusted with the care of life must necessarily vary according to circumstances, and the capability of ordinary endurance for its discharge; thus, it could not be contended that a person in command of a ship sailing to a distant port, through open seas, was bound to exercise, or could by possibility exercise, the same amount of endurance and watchfulness in the management of the vessel which a captain on a short course, and especially on a coasting voyage, would be bound to exercise, any more than it could be contended that there was no difference in the amount of watchfulness required by the captain in a vessel at sea, whether the weather was calm or tempestuous. The responsibility of each voyage was much affected by the character of the voyage itself, the weather in which it was performed, and the ordinary physical capacity of a healthy man to perform the duties he undertook to discharge. It was a common remark, that persons circumstanced as Captain Henderson was would be sure to take every known precaution to avert danger from himself; and it had been strongly urged by his counsel that he had done nothing on the occasion of the accident different from what was done according to the practice of all captains on that navigation. If, how-

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ever, the Jury were of opinion that there was culpable neglect of duty in what he did, that it was not necessary for him to retire to rest at the period in question, and that there was culpable neglect of duty in leaving his post, it was no answer in law for him to say that others had been in the practice of committing the like wrong. Nothing could be more mischievous than such a doctrine, as it was the occasion of almost all like accidents. Men became accustomed to perils, and daily became more and more daring and rash in the exercise of their avocations; and it surely was no answer when at length the danger which had been so often run, resulted in the death of some fifty beings, to urge that hundreds daily before had been in danger by a course of like reckless conduct. It was much to be feared that captains often ran close to the shore to avoid currents and tides, in order to save time; and having escaped disasters on repeated occasions by such courses, they become over confident, and at length adopt a course which at first they would have thought it insane to attempt. That was the great occasion of accidents of all kinds; but the leading principle to be adopted in judging of such cases, was not how near the coast a captain might venture without danger, but how far off he ought to keep in order to avoid all risk whatsoever: and, as before mentioned, it was incumbent on the captain to shew that he had not authorised a course to be followed within which there was any risk; as also, that he had not improperly delegated his charge to the mate, before in law the Jury would be entitled to acquit him of blame for the accident which had occurred.

It was in evidence that there was no division of labour, or trust, by the employers, between the captain and the mate, and more especially there was none as between captain and second mate. There was thus a delegation of duty by the captain to an inferior officer, which if unwarranted in itself, could not be justified by any instructions in the service. This took place in a voyage which, on ordinary occasions, did not exceed 15 hours, and which,

on the occasion in question, commenced at Liverpool at 4 o'clock in the afternoon of a beautiful summer day, when the vessel was steered down the Mersey by the river pilot, thus, for that portion of the voyage, lessening the captain's responsibility. Could it be said, then, that the captain was not bound to have started fresh from Liverpool, so as to have enabled him to remain on watch during so short and easy a voyage. It was quite different, as before stated, from the case of captains out at sea. It was not pretended that the captain's duties required him to superintend the loading of the vessel, and this still farther left him without excuse on the score of physical inability to maintain the watch throughout the night.

It had been urged that the course kept by the *Orion* from the Mull of Galloway northwards, on the night of the accident, was pretty much the same as that observed usually by steamers trading between Liverpool and Glasgow. No doubt companies were anxious to make quick voyages for the sake of profit, and captains were anxious to please their employers by performing the passage as quickly as possible. The evidence as to this was somewhat contradictory (which his Lordship read), but the fair import of the whole seemed to be, that they were much nearer the coast during the whole course than usual.

If the Jury thought that such was the case, it bore upon the captain in two ways, *first*, in respect of having sanctioned a course so near the shore, as he was shewn to have been on deck long after passing the Mull of Galloway. And, *second*, in having committed, under such circumstances, the charge of the vessel to another. It had been said that there was nothing more than error in judgment attributable to him. That he did err in judgment was undoubted, as, before mentioned, had his conduct been intentional, to produce the disaster which occurred, his crime would have been that of murder. The question was, did he, charged with the care of a vessel containing so many passengers, culpably leave her to the care of another, by whose mismanagement

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the wreck was occasioned? Honesty of intention, and anxiety to serve the interests of his employers, did not form a justification even for directing or sanctioning a course so near in-shore. His primary duty, and one which no commands from the Company could absolve him from, although it might render them guilty in respect of having issued them, in case of their directing so unsafe a passage, was to preserve the lives of the passengers who sailed in his ship; and on the whole matter the Jury would have to say, as regarded the captain, whether or not he had been guilty of the culpable and reckless neglect of duty charged, either by directing or sanctioning an unsafe course, or by having unnecessarily and culpably delegated his duty to the mate.

As before mentioned, the Crown having proved the accident to have occurred under his command, it fell on him to prove that he was entirely innocent in both respects. If the Jury thought he was culpable in *any* degree, in respect of the matters charged in the indictment, they were bound to find him guilty, leaving the question of punishment for the determination of the Court, who would consider the amount of guilt. As regarded the case of the mate, the case that had been principally made for him, as to the deflection of the binnacle compass, entirely failed. It was proved, beyond doubt, that the land was visible the whole way from the Mull of Galloway northwards. It was in vain, therefore, to talk of a deflection of the compass on a coast so well known as that of Wigtonshire; and the Jury would consider whether or not it was consistent with innocence that he did not keep farther out at sea, when the land within sight was a rocky shore, more especially after receiving warnings from the seamen who were on the watch, and who admonished him of the fact; and more especially after passing so close to Portpatrick harbour, the light of which was seen and recognised. Had he called the captain, when he perceived himself so near the shore, and had the latter sanctioned the course which the mate was then following, the mate

might have been as much relieved as was the steersman, who obeyed his, Williams', orders. Nothing of the kind, however, was shewn to have been done by him, and the Jury would say, having regard to the doctrines of law laid down in the case of the captain, whether the mate could be held entirely innocent of the neglect of duty charged, so as to enable them to acquit him.

His Lordship also remarked, in reference to the case of the boats, that although the Court thought that there was not enough to warrant the Jury in convicting, in respect of neglect of duty as to them, yet the facts proved, and the lamentable results which had happened from the state in which the boats were at the time of the accident, and their original construction, was most important, as shewing the consequences of inefficient boats in the case of accidents. Should it be found, on any future occasion, that life was lost in consequence of inability to launch or navigate the boats, arising from such impediments as the coverings which had been spoken to in this case, or any other device resorted to for the purposes of economy, either of the boats themselves or the vessel to which they belonged, grave criminal responsibility would arise, as well to the captain who neglected to use all appliances in his power to keep them in proper order, or the proprietor who should fail to have supplied sufficient boats in the first instance, or refused proper allowance to have them maintained.

His Lordship then recapitulated the evidence, after which the Jury retired for half-an-hour, and, by a majority, found the captain guilty of culpable, but not reckless neglect of duty; and unanimously found the pannel Williams guilty of culpable and reckless neglect of duty as libelled; and unanimously found both pannels not guilty of the first and third charges as libelled.

LORD WOOD then proposed sentence. He said,—My Lord Justice-Clerk, we have now arrived at that stage of the proceedings of this most interesting and anxious trial, when it becomes our duty, and a most painful duty it

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is, to consider and determine what sentence it is for us to pass on the verdict that has been returned by the Jury. Your Lordship has already explained that, in truth, the two first charges are one and the same, the words of the verdict applying more strictly, perhaps, to the second charge than to the first—namely, ‘culpable and reckless neglect of duty by any officer or mariner employed in the navigation of a ship, whereby the ship is wrecked, and many of the lieges are bereaved of life.’ That is a statement of a particular description of culpable homicide which is charged in the indictment, and what follows is a statement of the special case of the circumstances under which the vessel, the *Orion*, was wrecked. The *Orion* left Liverpool on the 17th of the month of June, a fine vessel, one of the finest in the trade, a vessel fully equipped for the voyage, having on board, at the time, a valuable cargo, and no less than 200 people, consisting of crew and passengers; and she was a vessel with a steam-engine of great power, and capable of being propelled at the rate of fourteen or fifteen knots an hour. When such a vessel, with such a cargo, and with so many persons on board, left the port of Liverpool, it appears to me, that every man who had any charge in the navigation of her, should have left it with the thought indelibly impressed on his mind, that no vigilance, no care, and no anxiety which he could bestow in the navigating of the vessel to her port of destination, should be wanting.

Your Lordship emphatically stated that it was the paramount duty of every one navigating such vessels, to consider, first, the safety of the ship and passengers. The contrary course appears to have been followed here. The captain chose a coasting course, apparently trying what peril the vessel could be put into, and yet bring her safe to her port of destination, instead of his thinking only how he could carry her there in safety. And carried in safety she might have been, for it was a clear course—a known course—it

was an accustomed voyage—and she was under the charge of those who knew every part of the voyage. Now, my Lords, in these circumstances, the Jury have found, by a majority, Henderson, the master, guilty of culpable neglect of duty, as libelled, under the second charge; and they have unanimously found Williams guilty under the second charge as libelled; and both prisoners not guilty, as libelled, on the third charge. The prisoner, John Williams, has been found guilty of culpable and reckless neglect of duty in navigating this vessel, by which neglect the vessel was wrecked, and that melancholy loss of life charged in the indictment occasioned. I am sorry to say, that I feel it impossible, with such a verdict, in such a case, to propose any other sentence than one of seven year's transportation. Any other sentence would be an inadequate one, and would neither satisfy the law nor the great interests at stake. But we are enabled, and I am most happy, by the verdict, to make a distinction, in the amount of punishment, between the mate, Williams, and the master, Henderson, because the Jury, in his case, have found him only guilty of culpable neglect of duty, and not of reckless, as well as culpable neglect of duty; and, certainly, it is a very material difference in the verdict with regard to him. If the verdict had included in it recklessness on his part, of course there could have been no other sentence than one of transportation; but I feel, as every one must feel, that, in dealing with the case of a person such as the master of this vessel, no sentence which the law could pronounce would make any impression unless it was one that would bear severely on him.

In these circumstances, making every allowance for the distinction which the verdict admits of in the case of the parties, and by every consideration which I have been able to bring to mind, and I have every desire to make such a distinction in the case as is consistent with the ends of justice, I have, after much consideration, come to the conclusion, that the sentence may

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be mitigated to one of imprisonment, although it must be one of time, and such a sentence, as those in charge of such vessels must feel that, for the very slightest neglect of duty, which is followed by so disastrous results as occurred in this case, and even far less, they must answer to the law. I therefore propose a sentence of imprisonment for eighteen calendar months.

LORD IVORY and the LORD JUSTICE-CLERK concurred.

In respect of the before mentioned verdict of assize, the pannel Henderson was sentenced to eighteen months' imprisonment, and the pannel Williams to be transported for the period of seven years.

NORTH CIRCUIT.

(From the late Lord Moncreiff's MS.)

PERTH.

*Judges—LORDS MONCRIEFF AND COCKBURN.*July 28,
1850.HER MAJESTY'S ADVOCATE—*E. F. Maitland, A.D.*

AGAINST

JAMES ROBERTSON—*Miller.*

DECLARATION—EVIDENCE.—Circumstances in which it was held competent to prove by parole, that the actual date of a declaration was different from that which was inserted in the preamble or title as the date at which it had been emitted.

JAMES ROBERTSON was accused of Murder :

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Murder.

IN SO FAR AS, Jean Duguid, now or lately residing with Charles Duguid, labourer, now or lately residing at or near Woodside of Inglismaldy, in the parish of Marykirk, and shire of Kincardine, having boon, on or about the 3d day of December 1847, delivered of a female child, of which you the said James Robertson was the father, or reputed father, and you the said James Robertson having, on the 24th day of December 1847, or on one or other of the days of that month, or of November immediately preceding, or of January immediately following, in or near the house on or near the farm of Unthank, in the parish of Brechin, and shire of Forfar, then and now or lately occupied by William Norie, then and now or lately farm-servant in the employment of James Deuchar, farmer, then and now or lately residing at or near the farm of Unthank aforesaid, got possession of the said child, or received the same into your charge and custody, the said child having no name, or some name to the prosecutor unknown, you the said James Robertson, time last above libelled, at or near the said house on or near the farm of Unthank aforesaid, then and now or lately occupied by the said William Norie, and on or near the said farm of Unthank, in the parish of Brechin, and shire of Forfar, then and now or lately occupied by the said James Deuchar, and on or near the farm of Cookston, in the parish of Brechin, and shire of Forfar, then and now or lately occupied by Walter Brodie, farmer there, and then and now or lately residing there, and on or near that part of the public road

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leading from the town of Brechin, in the shire of Forfar, towards Little Brechin, in the parish of Brechin, and shire of Forfar, which passes through or near to the said farm of Cookston, and on or near the farm of Masondieu, in the parish of Brechin, and shire of Forfar, then and now or lately occupied by Alexander Guthrie, farmer there, and then and now or lately residing there, and on or near the farm of East Pittendriech, in the parish of Brechin, and shire of Forfar, then and now or lately occupied by Robert Scott, farmer there, and then and now or lately residing there, and on or near the farm of West Pittendriech, in the parish of Brechin, and shire of Forfar, then and now or lately occupied by George Duncan, farmer there, and then and now or lately residing there, and on or near the farm of Broomfield, in the parish of Brechin, and shire of Forfar, then and now or lately occupied by Walter Ogilvy, farmer, then and now or lately residing in or near Brechin aforesaid, and on or near the farm of Findowrie, in the parish of Brechin, and shire of Forfar, then and now or lately occupied by James Thomson, farmer, then and now or lately residing there, and on or near that part of the accommodation or other road which leads from at or near the farm-houses upon the said farms of East Pittendriech and West Pittendriech, towards the Trinity Muir, in the parish of Brechin, and shire of Forfar, which is adjoining or near to the said farms of Cookston, Masondieu, and East Pittendriech, or one or more of them, and on or near that part of the accommodation or other road leading from at or near the said farm-houses upon the said farms of East Pittendriech and West Pittendriech, towards a school-house at or near Little Brechin aforesaid, which is adjoining or near to the said farms of East Pittendriech and West Pittendriech, and on or near that part of the public road leading from the town of Brechin aforesaid, towards the parishes of Menmuir and Fearn, in the shire of Forfar, which is adjoining or near to the said farms of West Pittendriech, Broomfield, and Findowrie, or at or near one or more of said places, the particular place or places being to the prosecutor unknown, or at some other time and place or places in or near the parish of Brechin, and in the shire of Forfar, to the prosecutor unknown, did, wickedly and feloniously, attack and assault the said child, and did roll or put the clothes, or part of them, which were then upon or about the person of the said child, over her head or face, in order to prevent her from breathing, and with intent thereby to suffocate her, and did keep the head or face of the said child so covered by the said clothes, and did thereby prevent her from breathing, until she was thus, or in some other way to the prosecutor unknown, suffocated by you the said James Robertson; and, in consequence thereof, the said child, immediately or soon thereafter died, and the said child was thus murdered by you the said James Robertson.

This was a case of Child Murder, and the indictment,

after the usual narrative of the circumstances in which the offence was alleged to have been committed, referred to the prisoner's declarations in the following terms:—

And you the said James Robertson having been apprehended and taken before William Duncan, Esquire, senior bailie of Brechin, and one of Her Majesty's Justices of the Peace for the shire of Forfar, did, in his presence at Brechin, on the 6th day of March 1848, emit and subscribe a declaration: And you the said James Robertson having been thereafter taken before Andrew Robertson, Esquire, sheriff-substitute of the shire of Forfar, did, in his presence at Forfar, on the 10th day of March 1848, emit and subscribe a declaration, which, by a clerical error, bears at its commencement the date 'At Forfar the tenth day of March Eighteen hundred and forty-seven:' Which Declarations; As also, a shawl, a frock, a shift, a cap, a piece of plaiding cloth, and three pieces of cotton cloth, to which a sealed label is attached; As also, a petticoat, a swaddling band, a shift or barry, two pieces of plaiding cloth, a shift, three caps, a slip, a piece of cotton cloth and a frock, to which a sealed label is attached; As also, a shawl, to which a sealed label is attached; As also, a tartan shawl, to which a sealed label is attached; As also, a letter, bearing to be dated 'Findowrie December 19th 1847,' and to be signed 'James Robertson,' with an envelope, bearing to be addressed 'Mr Charles Duguid Inglesmaldy By North water Bridge,' to which a sealed label is attached; As also, a letter, bearing to be dated 'Findoury Feb 18th 1848,' and to be signed 'J. Robertson,' with an envelope, bearing to be addressed 'Alexander Duiguid Louthermuir By Inglesmaldy,' to which a sealed label is attached; As also, a letter, bearing to be dated 'Brechin 24 February 1848,' and to be signed 'R. Mathers,' and to be addressed 'Mr James Robertson Farm Servant Findowry;' As also, a letter, bearing to be dated 'Findoury Feb 28th 1848,' and to be signed 'James Robertson,' with an envelope bearing to be addressed 'Jean Duguid Inglesmaldy By Montrose,' or having some similar address, to which a sealed label is attached; As also, a medical report or certificate, bearing to be dated 'Brechin 7th March 1848,' and to be signed 'Alex Smith M.D.,' 'John Mackie Surgeon,' being to be used in evidence against you the said James Robertson at your trial, will, for that purpose, be in due time lodged in the hands of the Clerk of the Circuit-court of Justiciary before which you are to be tried, that you may have an opportunity of seeing the same.

MILLAR, before the interlocutor of relevancy was pronounced, objected to the indictment, on the ground that the prosecutor there disclosed an intention to controvert the tenor of a written instrument by parole proof, a course which it was incompetent to pursue.

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James
Robertson.

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He was aware that the objection might have been reserved till a later stage of the proceedings, but the present was, on the whole, the most convenient time for the discussion, because it would be in the power of the Court, in case they should think further enquiry necessary, to certify the case to the High Court upon the point. There were precedents for the statement of such an objection at the outset. *Williamson*, 2 Broun, p. 501; and *Gorrie*, 1 Swinton, p. 175.

The objection to the course the prosecutor meant to pursue, was important, not to the prisoner only, but to the law; for it involved the general question, whether the tenor of a written instrument could be redargued by parole? A declaration is the authentic record of a particular procedure, which the prosecutor conducts for the ends of justice; and the prisoner is invited to depone, upon the implied assurance that what is written shall remain the evidence of all which occurs at his examination. This could hardly be controverted. Here, the proposition applied to the portion of the instrument which embodies the answers of the prisoner to the questions put to him; and accordingly, the distinction which is made is, that the preamble or title, in which the date of a declaration is mentioned, is not an essential portion of the instrument, but merely a preliminary narrative, which is prefixed for the sake of conveniency. For this view of the matter, however, there was not authority; and it was one which the Court would be loath to countenance. The declaration was a *unum quid*; it could not be divided into parts, one of which was to be regarded as material, and the other as unimportant. In its character it was an *actus legitimus*, and must, to be effectual, embody every particular, the mention of which was essential to authenticity. Of these, surely the date was one of the most obvious. Could it be said that the time when a declaration was emitted was immaterial? The fact that every declaration opens with a statement of the time it was emitted, proves the contrary. But, if the

date is material, if it is an essential part of the instrument, why should it be liable to be controverted more than any other portion? There is a plain reason why parole should be excluded from conflict with the written record of the date. Memory as to time is proverbially treacherous; and were oral testimony to be permitted to overbear a solemn written attestation upon such a point, the effect would be to blot out the best evidence, in order to introduce the worst.

These views were not only reasonable in themselves, but were supported by different authorities in the law. He quoted Burnet, p. 493; Hume, vol. ii. p. 332. The execution of charge in case of *Ogilvie*, July 6, 1807; *Smith*, Murray's Reports, vol. iv. p. 404; *Alison*, vol. ii. p. 566 *et seq.*; *White et Thomson*, Bell's Notes, p. 326.

E. F. MAITLAND, A.D.—The present was not the proper time for an objection of this kind. We undertake to shew it is the genuine declaration of the prisoner, and that the preliminary date is merely a clerical error, and so the indictment bears. Moreover, it was not necessary to have inserted any date. Besides, the docquet proves the true date, and, in similar circumstances, similar irregularities have occurred, and the libel been drawn in the present style. Again, could a medical certificate be rejected from a like clerical error? The authorities quoted do not apply. The declarations, taken together, shew that the error was clerical, and all that can be gathered from what has been quoted, is, that the libel was wrongly dated in the cases quoted.

MILLAR, in reply.—The prosecutor had failed to shew that the preamble which sets forth the date was not a part of the declaration; and if it was, then the question remained where it was, Can written evidence be overborne by parole? True it is, no doubt, that there is a docquet appended to the declaration, which also contains a date. But the prosecutor is not entitled to avail himself of that, because, *first*, the objection urged relates to *parole*. If he thinks he can make good his point as to

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the true date by means of the docquet alone, good and well, let him make the attempt. But he must not refer to the docquet, as a pretence on which to introduce oral testimony. Farther, the docquet is no part of the declaration, and cannot be permitted to qualify the tenor of the instrument, inasmuch as it is not signed by the prisoner. The officials are the only persons who authenticate it, and there is nothing to shew that it was not written behind the prisoner's back, and at a time when the date was a matter of uncertain recollection. Even, however, were the docquet to be read as part of the declaration, the effect would be only to prove the whole inconsistent in an important particular. The prosecutor could not be entitled to set the one off against the other; and to call in witnesses to decide on the one which was correct. Sasines, for example, have two dates; the year of our Lord, and the year of the king's reign. But, a discrepancy between them is a fatal flaw. Parole proof is inadmissible to allay the conflict, and the same rule ought to be applied here. The declaration was either good or bad as it was authenticated by the prisoner. If it was good (which was not pretended), there was no need of the parole proof to correct it; but if bad, then it ought to be cast aside; for, to permit emendation, would be to sanction something as evidence which truly did not deserve the character.

The Lords consulted, and without further intimation of opinion, directed the trial to proceed, reserving their decision upon the question raised, until the declaration objected to was tendered in evidence.

The following witnesses identified the declaration objected to, and swore to the same having been emitted in the usual way, and twice read over in common form:—

William Duncan, Senior Bailie, Brechin, and J.P.

Alex. Strachan, Writer in Brechin, and Joint Procurator-fiscal.

Andrew Robertson, Sheriff-substitute, Forfar.

Mr ROBERTSON.—I cannot state date from memory. It was soon after man was taken to Brechin. Quite sure it was in 1848. At the

same time I saw another declaration by him. A docquet was put on at the same time. Identifies. There is a docquet on second, signed by me and the prisoner; seeing that, I can state with certainty that the date of declaration before me was 10th March 1848.

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MILLAR here renewed his objection to the reception of the second declaration, on the grounds formerly stated.

LORD COCKBURN.—As I am convinced that the proof establishes that the wrong date was a mere clerical error, I am of opinion the objection must be repelled.

LORD MONCREIFF.—I entirely concur. I cannot see how we can reject this declaration, on the ground proposed, after the parole evidence we have had, and the docquet.

The pannel was unanimously found Guilty, but recommended to mercy.

In respect of which verdict of assize, he was sentenced to death, which was carried into execution accordingly.

HIGH COURT.

Present,

THE LORD JUSTICE-CLERK,

Aug. 1.
1850.

LORDS MONCREIFF AND IVORY.

HER MAJESTY'S ADVOCATE—*Moncreiff, Sol.-Gen.—Deas, A.D.*

AGAINST

WILLIAM BENNISON—*Craufurd.*

BIGAMY—FOREIGN LAW.—Held, that evidence of foreign law, deponed to by a skilled witness, was binding upon a Scotch Court, where the subject-matter related to the validity of a foreign contract.

No. 70.
William
Bennison.

WILLIAM BENNISON was accused of Bigamy and Murder :

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IN SO FAR AS, you the said William Bennison having, on or about the 5th day of November 1838, or on one or other of the days of that month, or of October immediately preceding, or of December immediately following, within the house situated at or near Tavanagh, or Tavanagh, or at or near Clounagh, both at or near Portadown, all in the parish of Drumcree, and county of Armagh, in Ireland, then occupied by Elizabeth M'Lean or Scott, then residing there, and now or lately residing with Jane Scott or Lutton, at or near Clannacle, in the parish of Tarlaraghau, and county of Armagh aforesaid, or at some other place in or near the county of Armagh aforesaid to the prosecutor unknown, been lawfully married by the Reverend Alexander Kerr, then minister of the Presbyterian Church, at or near Portadown, in the parish of Drumcree aforesaid, and who is now deceased, or whose place of residence, if he be alive, is to the prosecutor unknown, to Mary Mullen or M'Mullen, then or recently before in the service of, or residing with, the now deceased John Mays, pawnbroker, then residing in or near Portadown aforesaid, and having thereafter lived and cohabited for some time with the said Mary Mullen or M'Mullen as your lawful wife, in or near the parish of Drumcree aforesaid, and elsewhere in Ireland, you the said William Bennison did, at the lapse of several months or some other short time after your said marriage, desert or leave the society of the said Mary Mullen or M'Mullen, and did proceed to and take up your residence at or near Paisley, in the county of Renfrew, or elsewhere, in Scotland, and you the said William Bennison did, on the 5th day of December 1839, or on one or other of the days of that month, of November immediately preceding, or of January immediately following, and while the said Mary Mullen or M'Mullen was still alive, and the said marriage still subsisting, within the house situated in or near Storey Street, in or near Paisley aforesaid, then occupied by the now deceased Helen Kenny or Hamilton, then residing there, wickedly and feloniously, enter into a matrimonial connection with the now deceased Jane or Jean Hamilton, daughter of, and then or recently before residing with, the said Helen Kenny or Hamilton, the marriage ceremony having been, time and place last above libelled, performed by the Reverend Joseph Hudson, Wesleyan minister, then residing in or near Paisley aforesaid, and now deceased, or whose place of residence, if he be alive, is to the prosecutor unknown, and you did thereafter live and cohabit with the said Jane or Jean Hamilton as your wife, in or near Paisley aforesaid, for several weeks or for some other or longer period, the particular period being to the prosecutor unknown, and this you did, you well knowing that the said Mary Mullen or M'Mullen was then alive; and at the lapse of the said several weeks or other period last above libelled, you the said William Bennison did desert or leave the society of the said Jane or Jean Hamilton

for several weeks or some other short period, and did return to Ireland, and did live and cohabit during this last-mentioned period with the said Mary Mullen or M'Mullen in or near Lurgan, in the parish of Shankir, in the county of Armagh, or elsewhere, in Ireland, and did at the lapse of the said last-mentioned period, leave Ireland along with the said Mary Mullen or M'Mullen, whose subsequent or present place of residence, if she be still alive, is to the prosecutor unknown: And you the said William Bennison did, immediately or shortly after leaving Ireland as last above libelled, return to Paisley aforesaid, and did thereafter live and cohabit with the said Jane or Jean Hamilton as your wife at Paisley aforesaid, and elsewhere, till her death as after libelled: FARTHER, on the 12th or 13th day of April 1850, or on one or other of the days of that month, or of March immediately preceding or of May immediately following, within or near the house situated in or near Stead's Place, in or near Leith Walk, in or near Edinburgh, then occupied by you the said William Bennison, you the said William Bennison did, wilfully, wickedly, and feloniously, and with intent to murder, or grievously to injure, the said Jane or Jean Hamilton, then residing in the said last-mentioned house, mix, or cause or procure to be mixed, with a quantity of porridge, or of oatmeal, or other meal, or with some article of food or drink to the prosecutor unknown, which you expected to be used, gave or partaken of by the said Jane or Jean Hamilton, or which you gave to her to be used or partaken of by her, a quantity of arsenic, or other deadly poison to the prosecutor unknown; and the said Jane or Jean Hamilton having accordingly, time and place last above libelled, used or partaken of the said porridge, or oatmeal, or other meal, or other article of food or drink aforesaid, or part thereof, the said Jane or Jean Hamilton did, immediately or soon thereafter, become seriously ill, and did, after lingering in a state of great suffering, die on or about the second or third day thereafter, in consequence or from the effects of the said quantity of arsenic or other deadly poison, or part thereof, so administered by you to her, or caused to be taken by her as aforesaid; and the said Jane or Jean Hamilton was thus murdered by you the said William Bennison.

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Mrs Mary Long, Sarah Johnstone, Rachel Ford, and Elizabeth Hollingwood, proved that the prisoner, in 1838, in Ireland, by a now deceased Presbyterian minister of the name of Kerr, in the house of a Mrs Scott, was married to one Mary Mullen: That she was a Methodist; and that he had been seen in Methodist chapels, though whether he ever communicated anywhere, was not proved by them; and they could not say whether or not he communicated with the Church of England.

No. 70. JAMES GIBSON.—I am a barrister in Belfast. A marriage celebrated by a dissenting clergyman, between two dissenters, without publication of banns, in 1838, would be a good and valid marriage as the law stood. Not so if they were Roman Catholics, but certainly so if Protestant Dissenters,—*e. g.* among Methodists.

High Court. William Bennisson. Aug. 1. 1850. *Bigamy & Murder.* *Cross-examined.*—If either party had belonged to the Episcopalian Church, it would not have been a valid marriage? Under the authority of the *Queen v. Mellis*, thought to be good at the time. Protestant Dissenters include all Protestants not of Episcopalian Church? I cannot speak as to Primitive Methodists. If explained to me, a man had been baptized in the Church of England, and never had joined another body, what would be the result? I should say, in the absence of all proof to the contrary, I should hold baptism to be taken as shewing that he was of the Episcopal Church. If the true design of Primitive Methodism is that it shall be a society, and shall not create itself into a sect or church, then, would persons baptized in Church of England necessarily remain so in the eye of the law? So far as that goes, he would remain of the Church of England. I speak merely as to this passage.

By the Court.—I speak solely as to this proposition in the book. In determining the point, in Ireland, we would enquire into the man's whole conduct, to see whether he had thrown off connection with the Church of England. I never heard of such a case as the pure and abstract case of baptism alone, without more being known of the party. There are three acts, all retrospective, 5th and 6th Will. IV., c. 113, that declared marriage to be good if no lawful marriage intervened. They had been believed to be good marriages. The majority of Irish judges held otherwise. There was a special verdict. The Court divided equally, and it went to the House of Lords.

The second marriage was clearly proved, and a vast extent of evidence led, which would be too long to give here, the object being to render it probable that he was the occasion of his first wife's death after the second marriage.

A great amount of circumstantial evidence was then adduced, to prove that the deceased, in respect of whose death the present trial took place, died from poison, and that it was the prisoner who had administered it.

The following exculpatory evidence on the part of the pannel was then led :—

The Rev. JOHN M'INNELY.—I am a Presbyterian minister at Ballymacarrat. I knew the late Mr Kerr. He has been dead ten years.

The book now shewn, I cannot swear to be in his handwriting, but I believe it to be. I see an entry—

*W. Bennison, Novr. 5. 1838,
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Where no religious profession entered, it is considered that the parties are Episcopalian; but I am unable to say from what information the columns are filled up.

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MARY BENNISON.—I am sister to defendant. I live in Irvine. My father was a member of the Church of England. I cannot say that he was very religious, but all the family were baptized in the parish church. I do not know that my brother William attended the Primitive Methodists. He married in Ireland.

CRAUFURD, in addressing the jury, argued, that on this evidence they must hold the offence of bigamy as disproved. It was clear law, that a marriage in Ireland, in 1838, by a Presbyterian minister, between an Episcopalian and a dissenter, was a bad marriage. That being so, if the evidence shewed that Bennison was, at the time of his marriage, in 1838, with Mullen, an Episcopalian, or even if it rendered it probable he was, they could not find him guilty of bigamy by marrying again. In this case, he maintained it was shewn that he was an Episcopalian. The entry in the book of Mr Kerr rendered this probable, as that was the usual way of entering marriage certificates when the parties were of the Episcopal persuasion. Besides, in addition to the proof from his sister that he was baptized in church, it would seem he was not in the habit of attending the Methodist Chapel, except occasionally probably to oblige Mary Mullen. In these circumstances, therefore, he argued, that the jury must throw overboard all that had been said concerning the first wife. He then addressed himself to the general evidence of the case, and concluded by asking a verdict of acquittal.

The LORD JUSTICE-CLERK, in charging the Jury, remarked, that it was important that the charges should be considered together, inasmuch as if being married, he had deserted his first wife in the heartless manner proved, it would form a very serious introduction to the

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evidence against him in the present case. It was no excuse for a man to say, that at the time of the second marriage, he was unaware that his first wife was still alive. He was bound to make due enquiry, and to have ascertained the fact, before he represented himself a free man fit to marry again.

With regard to the validity of the first marriage, in that matter they must be guided by the foreign law, as expounded by Mr Gibson, and as applicable to the facts. It lay on the prisoner, who is now a Methodist, to prove, that in 1838 he was an Episcopalian, before he could gain the exemption given by that law. It was not to be matter of guess or speculation, but clear proof, as Mr Gibson remarked. The mere fact of baptism was not enough. They would enter into his history, and see whether he was, at the time of marriage, an avowed Episcopalian. Nothing would be more dangerous than to hold, that, because thirty years before, when an infant, a man was baptized by an Episcopal clergyman, he could therefore avoid a marriage honestly contracted before a Presbyterian minister, and thereby disown his wife, and bastardise his children. It lay on the prisoner, therefore, to have proved his connection with the Church of England at the time, before he could upset his first marriage. In his, the Lord Justice-Clerk's, opinion, he had failed to do this, but the Jury would judge.

His Lordship then went over the whole case, and explained it to the Jury, with his usual clearness.

The Jury unanimously found the pannel Guilty, as libelled.

In respect of which verdict of assize, he received the sentence of death, and was hanged accordingly.

WEST CIRCUIT.

INVERARAY.

Judge—THE LORD JUSTICE-CLERK.Sept. 18.
1850.HER MAJESTY'S ADVOCATE—*E. F. Maitland, A.D.*

AGAINST

HUGH M'NEILLAGE.—*Maconochie.*

INDICTMENT—COMPETENCY.—Held, that where an indictment omitted the usual words of style referring to conviction by a jury, but only referred to his judicial confession as the ground of punishment, it was competent to object, after the jury were sworn, to the trial proceeding, and that such objection was fatal.

HUGH M'NEILLAGE was accused of Cattle Stealing :

IN SO FAR AS (1.), upon the 27th or 28th day of May 1850, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, from or from near the drovance of King's House, or open ground, in the parish of Ardochattan, or united parishes of Ardochattan and Muckairn, and shire of Argyll, which is situated adjoining or near to the eastern side of that part of the public road leading from King's House Inn, in said parish or united parishes, then and now or lately occupied by Malcolm Christie, then and now or lately innkeeper there, to the top of the Black Mount, in the shire of Argyll, which extends from said Inn to a distance of three miles, or thereby, or from or from near said part of said road, or elsewhere adjacent thereto, to the prosecutor unknown, you the said Hugh M'Neillage did, wickedly and feloniously, steal and theftuously away take, six, or thereby, stots, the property, or in the lawful possession, of Donald Cameron, then and now or lately tenant of and residing at or near the farm of Erracht, in the parish of Kilmallie, and shire of Inverness, and of Archibald Cameron, then and now or lately tenant of and residing at or near the farm of Glenshealloch, in the parish of Kilmallie aforesaid, or of one or other of them : LIKEAS (2.), on the 17th or 18th day of June 1850, or on one or other of the days of that month, or of May immediately preceding, or of July immediately following, from or from near a tract of ground or field, called or known as Tomnaha or Achnaha, situated on or near the farm of

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No. 71. Achnashellach, then and now or lately occupied by Hugh M'Lachlan, then and now or lately tenant of and residing at or near Achnashellach aforesaid, or from or from near some other part of the said farm of Glassary, and shire of Argyll, you the said Hugh M'Neillage did, wickedly and feloniously, steal and theftuously away take, a horse, the property, or in the lawful possession, of John Blair, a cottar, then and now or lately residing at or near Dunamaraig, in the parish of Glassary aforesaid : LIKEAS (3.), time last above libelled, on or near that part of the farm road or entrance, commonly called, or known as, the Upper Road, leading from the public road between Ford and Kilchrenan, both in the shire of Argyll, to the farm of Inverliverbeg, in the parish of Kilmartin, and shire of Argyll, then and now or lately occupied by Robert M'Kechnie, farmer, then and now or lately residing there, which is distant twenty yards, or thereby, or other short distance from the said public road, and is in the parish of Kilmartin aforesaid, or on or near a field or piece of ground, part of said farm of Inverliverbeg, situated adjoining or near to said part of said farm road or entrance, you the said Hugh M'Neillage did, wickedly and feloniously, steal and theftuously away take, a saddle, and bridle, the property, or in the lawful possession, of Duncan M'Tavish, then and now or lately tenant of and residing on or near the farm of Arichamish, in the parish of Kilmartin aforesaid, or in the lawful possession of the said Robert M'Kechnie ; and you the said Hugh M'Neillage have been previously convicted of theft : And you the said Hugh M'Neillage having been apprehended and taken before Sir John Hay, Baronet, advocate, sheriff-substitute of Stirlingshire, you did, in his presence at Stirling, emit a declaration, dated the 22d day of June 1850, which was subscribed by him in your presence, you having declared you could not write : And you the said Hugh M'Neillage having been thereafter taken before John Maclaurin, Esquire, sheriff-substitute of the shire of Argyll, you did, in his presence at Inveraray, emit two several declarations, dated respectively the 4th day of July 1850, and 18th day of July 1850, which were severally subscribed by the said John Maclaurin in your presence, you having declared you could not write : Which Declarations ; As also, a saddle ; As also, a bridle ; As also, an extract or certified copy of a conviction of the crime of theft, obtained against you the said Hugh M'Neillage, before the Sheriff-court of Stirlingshire, at Stirling, dated the 7th day of January 1850, being to be used in evidence against you the said Hugh M'Neillage at your trial, will, for that purpose, be in due time lodged in the hands of the Clerk of the Circuit-court of Justiciary before which you are to be tried, that you may have an opportunity of seeing the same : ALL WHICH, or part thereof, being found proven by the judicial confession of you the said Hugh M'Neillage, before the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, in a Circuit-court of Justiciary

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to be holden by them, or by any one or more of their number, within the burgh of Inveraray, in the month of September, in this present year 1850, you the said Hugh M'Neillage OUGHT to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

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The pannel pleaded Not Guilty, and was remitted to an assize.

After the Jury had been sworn, MACONOCHIE objected to the competency of the Jury taking cognizance of the offence, in respect of the terms in which the indictment was framed, the usual words of style, 'all which, or part thereof, being found proven by the verdict of an assize,' being omitted; the words, 'being found proven by the judicial confession of you the said Hugh M'Neillage,' &c. being alone there.

The LORD JUSTICE-CLERK.—Why was not this taken to relevancy?

MACONOCHIE.—In that case the prosecutor would have withdrawn his indictment, whereas, if the objection is a competent one, which it is submitted it is, it is good now after the Jury are sworn.

MATTLAND.—The objection comes too late. If it was competent to have stated it to relevancy, that was the only competent time; and, by waiving all objection, the Court has admitted the libel to be good. He did not farther object to the usual interlocutor remitting him to the assize, which he now says is incompetent to try him.

The LORD JUSTICE-CLERK held the objection to be good, and that it was not stated too late.

In respect whereof, the pannel was assoilzed *simpliciter*, and dismissed from the bar.

HIGH COURT.

Present,

THE LORD JUSTICE-CLERK,

LORDS MONCREIFF AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol. Gen. Moncreiff*—*Deas A.D.*—
J. M. Bell A.D.

AGAINST

PETER PEANVER—*R. Robertson.*INSANITY—BAR OF TRIAL.—Circumstances in which the Court
thought insanity sufficiently proved to bar trial.

PETER PEANVER was indicted for Murder.

R. ROBERTSON, for pannel, pleaded insanity in bar of
trial.

A proof was allowed.

PROFESSOR MILLER.—I examined prisoner in March last, at the
request of the authorities. I found him thoroughly insane. I have
seen him since. I saw him yesterday; he was entirely insane.*Cross-examined.*—I think him totally insane, and incapable of in-
structing counsel for his defence. He was manacled by my direction.
It is insanity increased by excitement; and a very little would make
him dangerous.Dr R. SPITTAL.—I have been employed to visit prisoner. I saw
him two or three days after confinement. I saw him to-day. At first
he was in a melancholy state; there was an occasional scowl on his
face. He appeared then decidedly insane. He is now rather more
depressed, but still decidedly insane.*To the COURT.*—He could by no means instruct counsel intelligently.
I concurred in his being manacled. He is, in my opinion, a dangerous
madman.The COURT found the pannel not in a fit state to un-
dergo trial, and ordained him to be detained in Perth
jail, subject to the orders of the Court.Nov. 16.
1850.No. 72.
Peter
Peanver.High Court.
Nov. 16.
1850.

Murder.

Present,

LORD JUSTICE-CLERK,

Dec. 14.
1850.

LORDS MONCREIFF AND IVORY.

THE RIGHT HON. THE EARL OF SELKIRK, Advocate—*Cook*,

AGAINST

ALEXANDER KENNEDY, Respondent—*Tytler*.

STATUTE 2d and 3d WILL. IV. CAP. 68.—TRESPASS.—Held, that a farm-servant in pursuit of game, on lands occupied by his master, was a trespasser under the provisions of the statute.

THIS was an advocacy of a deliverance by the Justices of the stewartry of Kirkcudbright, sustaining a defence proponed on behalf of the respondent in the following terms:—

No. 73.
Earl of
Selkirk v.
Kennedy.

High Court.
Dec. 14.
1850.

Advocation.

‘ That the defender, being a farm-servant in the service and employment of John Muir jun., tenant and occupier of the lands of Lochfergus, mentioned in the complaint, and, in such service and employment, on the 12th day of October last, was legally upon the said lands of Lochfergus, and cannot be proceeded against under the statute.’

After hearing parties, the Justices pronounced the following interlocutor:—

‘ The Justice having considered the petition and complaint, and the objections and answers thereto, sustains the objection, and dismisses the complaint, and decerns.’

This interlocutor the Earl of Selkirk advocated, praying the Court to adjudicate that the respondent was liable as a trespasser under the statute,¹ although he was seeking game on lands occupied by his master.

¹ By statute 2d and 3d Will. IV. c. 68, it is enacted (§ 1.) ‘ That if any person whatsoever shall commit any trespass, by entering, or

No. 72.
Earl of
Selkirk v.
Kennedy.

High Court.
Dec. 14.
1850.

Advocation.

COOK, for the advocator, stated, that the statute afforded no protection to a farm-servant on lands for an unlawful purpose, and unconnected with agricultural pur-

‘ being, in the day time, upon any land, without leave of the proprietor, in search or pursuit of game, &c., such person shall, on being summarily convicted thereof before a Justice of the Peace, on proof or oath by one or more credible witness or witnesses, or confession of the offence, or upon other legal evidence, forfeit and pay such sum of money, not exceeding £2, as to the Justice shall seem meet, together with the costs of the conviction.’ (§ 3.) ‘ That, for the purposes of this act, the day time shall be deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset.’ (§ 7.) ‘ That every penalty and forfeiture for any offence against this act shall be paid to the moderator, or other officer of the kirk-session of the parish where the offence was committed, for the use and benefit of the poor of such parish.’ (§ 8.) ‘ That the Justice or Justices of the Peace by whom any person shall be summarily convicted and adjudged to pay any sum of money, for any offence against this act, together with expenses, may adjudge that such person shall pay the same either immediately or within such period as the said Justice or Justices shall think fit, and that, in default of payment at the time appointed, such person shall be imprisoned in the common jail or house of correction (with or without hard labour), as to the Justice or Justices shall seem meet, for any term, not exceeding two calendar months, the imprisonment to cease upon payment of the amount and costs.’ (§ 11.) ‘ That the prosecution for every offence punishable by virtue of this act shall be commenced within three calendar months after the commission of the offence; and that where any person shall be charged, on the oath of a credible witness, with any such offence before a Justice of the Peace, the Justice may summon the party charged to appear before himself, or any one or two Justices of the Peace, as the case may require, at any time and place, to be named in such summons; and if such party shall not appear accordingly, then (upon proof of the due service of the summons, by delivering a copy thereof to the party, or by delivering such copy at the party’s usual place of abode, to some inmate thereof, and explaining the purport thereof to such inmate) the Justice or Justices may either proceed to hear and determine the case in the absence of the party, or may issue his or their warrant for apprehending and bringing such party before him or them, as the case may be; or the Justice before whom the charge shall be made, may, if he shall have reason to suspect from information upon oath, that the party is likely to abscond, issue such warrant in the first instance without any previous summons.’

poses. Besides, the words of the statute were, 'without leave of the proprietor,' and this drew a clear distinction between the rights of the landlord to the game, and the mere right of occupancy of the tenant.

TYTLER, for the respondent,—The case was governed by that of *Smellie*; Broun, vol. ii. p. 194. This was a statutory offence, and the statute must receive a strict construction. It was said that the consent of the proprietor must be had; but, in a question of trespass, the whole matter was, had the party accused a good title to be on the lands. The servant was just as much protected as the tenant would be; and the judgment of the Court must go the length of holding the latter liable to be prosecuted under the statute in case they advocated the judgment under review.

LORD MONCREIFF.—I think there is a clear distinction between the case of servants hired for a special purpose and farm-servants generally. The case of *Smellie* came to this, that, in that case, there was a clear title to be upon the ground, and incidentally using the power with which he was invested for the purpose of killing game. An ordinary farm-servant had no right to be upon the ground, except as servant to his master, and for agricultural purposes, for which purposes alone the landlord had let the farm, reserving the rights of game to himself. It would indeed be strange if the law made the landlord answerable for an undue excess of game to his tenant, and yet not count the latter a trespasser if he destroyed it when not in excess, either by himself or his servants. I think, therefore, the Justices erred in finding the defence here proponed a relevant one. On the contrary, I think, under the circumstances, a clearer case of contravention of the policy and plain import of a public statute can scarcely be conceived.

LORD IVORY concurred.

The LORD JUSTICE-CLERK.—Unless we are to hold that the granting of a lease, *ipso facto*, gives an unqualified right to the tenant to the game on the subjects let,

No. 73.
Earl of
Selkirk v.
Kennedy.

High Court.
Dec. 14.
1850.

Advocation.

No. 73. as against the landlord, I own I am unable to see how
 Earl of we can sustain the deliverance of the Justices.
 Selkirk v. Kennedy. The Court pronounced the following interlocutor:—
 High Court. ‘Edinburgh, 14th December 1850.—The Lord Justice-
 Dec. 14. Clerk and Lords Commissioners of Justiciary having
 1850. ‘heard parties’ procurators, refuse the bill: But, in re-
 Advocation. ‘spect that the defence or objection stated for the re-
 ‘spondent to the competency of proceeding against him
 ‘as a trespasser, under the statute libelled on, is ill
 ‘founded, remit to the Justices to recal the sentence
 ‘complained of, to repel the objection stated to the
 ‘relevancy of the complaint, and thereafter to proceed
 ‘therein as accords of law.’

(Signed) ‘J. HOPE, I.P.D.’

CHARLOTTE SCOTT or CHAPMAN, Suspender—*Craufurd*,

AGAINST

JOHN COLVILLE, Respondent—*G. Young*.

SENTENCE.—Circumstances in which a conviction was sustained, although the parties accused were not furnished with a list of witnesses, nor were allowed time to prepare defences, and no record was kept.

No. 74. THIS was a suspension of a sentence by the Justices of
 Scott or Banff, proceeding upon the following statement:—
 Chapman v. Colville.

High Court. ‘The complainers were not informed with what crime they were
 Dec. 14. charged, and had in point of fact been guilty of no crime whatever.
 1850. ‘No copy of any libel, complaint, or petition against them was served
 Suspension. ‘upon them, nor any list of witnesses; and none such, at least no list
 ‘of witnesses, existed. No agent was allowed them, and no interval
 ‘between the time of their being brought before the Justices and con-
 ‘viction. They now understand that they were charged with being
 ‘drunk and disorderly, fighting, and making a great noise in Carme-

“ lite Street of Banff, and also in the house situated there, known as
 “ the Beed House, and that they did collect a great crowd in the street,
 “ and the lieges were much disturbed and alarmed ;’ but this charge
 ‘ was not established against them, and there was no examination of
 ‘ the parties present, nor does it appear on what evidence the Justices
 ‘ proceeded, and there is no proper record which will enable the com-
 ‘ plainers to bring the sentence under review.’

No. 73.
 Scott or
 Chapman v.
 Colville.
 High Court.
 Dec. 14.
 1850.
 Suspension.

The respondent, the Procurator-fiscal, answered, that the suspenders had been apprehended whilst engaged in a drunken quarrel ; that they were taken to the office in a drunken state ; that they were informed of the charge against them, and severally pleaded not guilty thereto ; and further, that the first named suspender was an incorrigible pest, and had been repeatedly convicted.

CRAUFURD, for Suspenders.—It was unnecessary to say much. The suspenders had had no proper opportunity of meeting the charge, but were, *de plano*, taken before the Justices, and received the sentences complained of, without any warning and without any opportunity of obtaining assistance. No doubt, they did not ask delay ; but the proceeding was too summary as against ignorant women. There was no authority in a Justice of Peace to act in so summary a manner, without complaint first made and regularly served.

LORD MONCREIFF.—This is a case of two women having been taken up for fighting and brawling in the streets of Banff, perfectly drunk. The complaint was written out and read over to them. The women being drunk, what could the Justices do ? Seeing them in that state, they pronounced a sentence of imprisonment. The imprisonment being so long must be ascribed to the fact of their being known characters.

LORD IVORY.—I am of the same opinion.

The LORD JUSTICE-CLERK.—I quite concur in the opinions which have been delivered, and move your Lordships to refuse the note of suspension, with expenses.

Present,

LORDS MONCREIFF, COCKBURN, and IVORY,

Jan. 6.
1851.HER MAJESTY'S ADVOCATE—*Sol.-Gen. Moncreiff—Deas, A.D.*

AGAINST

MARGARET M'MILLAN OF SHEARER.—*Burnet.*

CULPABLE HOMICIDE—ASSAULT.—Held, that where death ensues from an unlawful blow, if it ensue therefrom in an ordinary and natural way, although, with proper management, the injury might have been cured, it is properly charged as Culpable Homicide.

No. 75.
Margaret
M'Millan
or Shearer.

High Court.
Jan. 6.
1851.

Culpable
Homicide,
&c.

MARGARET M'MILLAN OF SHEARER was charged with Culpable Homicide; as also, Assault, to the effusion of blood, injury of the person, and danger of life :

IN SO FAR AS, on the 31st day of August 1850, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, in or near the house situated at or near Carnbeg, in the parish of Kilmalmonell, and county of Argyll, then occupied by Elizabeth Layburn, then residing there, and now deceased, you the said Margaret M'Millan or Shearer did, wickedly and feloniously, attack and assault the said Elizabeth Layburn, and did, with a stool or creepie, strike her one or more violent blows on the head, and did otherwise maltreat and abuse her, whereby she was severely cut and wounded to the injury of her person, and the effusion of her blood, and in consequence of the said injury or injuries so inflicted by you, or in consequence thereof and of lock-jaw or erysipelas, or some other disease to the prosecutor unknown, resulting from the said injury or injuries, the said Elizabeth Layburn died on or about the 7th day of September 1850, and was thus culpably bereaved of life by you the said Margaret M'Millan or Shearer : OR OTHERWISE, time and place above libelled, you the said Margaret M'Millan or Shearer did, wickedly and feloniously, attack and assault the said Elizabeth Layburn, and did, with a stool or creepie, strike her one or more violent blows on the head, whereby she was severely cut and wounded to the injury of her person, the effusion of her blood, and the danger of her life.

The evidence in the case shewed that the prisoner, along with the deceased and two other women, lived in

the same house. That on the night before the quarrel, the deceased and four others had drunk two bottles of whisky. One witness said, 'All were well enough, but 'not drunk.' In the morning a quarrel took place between the prisoner and the deceased, first in the kitchen, and then in the garden. In the latter place the prisoner lifted a stool and struck the deceased on the head, who lifted it up and said she has done for me. It bled very much. She was carried into the house, and received no medical treatment. She was seized, six days after the blow, with lock-jaw, and died next day. The medical men who were examined, deponed to finding her in a state of lock-jaw, from the injury inflicted by the prisoner. They said, that had aid been sought in time, the lock-jaw might not have followed, thought it might, even under the most skilful treatment. This was the exclusive occasion of death. There was no appearance of drink about her when they saw her. She was of a good constitution. Had she taken drink before, that would aggravate the evil.

The SOLICITOR-GENERAL asked a verdict of Culpable Homicide.

BURNET urged, that it only amounted to an assault, to effusion of blood, injury to person, and danger of life, inasmuch as death might not have ensued, except for her previous habits, and the subsequent want of proper aid.

LORD MONCREIFF told the Jury in his summing up, that they must determine whether the blow struck was a culpable blow; that if they thought it was, then the pannel would have no justification for any consequence which might result therefrom in a *usual and natural* way. If, therefore, the death ensued in a usual and natural way from the blow so culpably given, the pannel was guilty of culpable homicide, although it might have been averted by scientific and proper treatment.

The Jury unanimously found the pannel guilty of Culpable Homicide as libelled, but recommended her to mercy.

No. 75.
Margaret
McMillan
or Shearer.
High Court.
Jan. 6.
1851.
Culpable
Homicide,
&c.

In respect of which verdict of assize, she was sentenced to one month additional imprisonment to the four she had undergone before her trial.

Present,

Feb. 24.
1851.

THE LORD JUSTICE-CLERK,

LORDS WOOD AND IVORY.

HER MAJESTY'S ADVOCATE.—*Sol. Gen. Moncreiff*—*J. M. Bell, A.D.*

AGAINST

PETER GALLOWAY—*J. Shaw.*

INDICTMENT—RELEVANCY—CULPABLE HOMICIDE.—Terms of an Indictment which was withdrawn, on the recommendation of the Court, as not being sufficiently precise.

No. 76.
Peter
Galloway.

PETER GALLOWAY was accused of Culpable Homicide in terms of the following indictment:—

High Court.
Feb. 24.
1851.
Culpable
Homicide.

IN SO FAR AS, you the said Peter Galloway occupying premises, particularly a shop and dwelling-house, situated in or near Alexander Street of Airdrie, in the parish of New Monkland, and shire of Lanark, and your said premises being surrounded by other houses and shops, in the populous town or burgh of Airdrie foresaid; and being locally situated within the limits set forth as the boundaries of the said burgh of Airdrie, in the statute 12 and 13 Vict. cap. 89, commonly called 'The Airdrie Police and Municipal Act 1849,' within which boundaries the provisions of the said Act were to be in force; and for the further preservation of life and property within the foresaid limits or boundaries, against the risk and danger of the explosion of gunpowder therein, it having been enacted by section 55 of the foresaid Act, 'That it shall not be lawful for any person to have or keep any quantity of gunpowder exceeding ten pounds in weight in any house, shop, or other premises within the limits of this Act; and if any person shall contravene this enactment, such person shall be liable in a penalty not exceeding twenty pounds for every hundred pounds weight of gunpowder so had or kept, and so in proportion for any greater or less quantity; and all such gunpowder shall be seized and forfeited;' and it having been farther enacted by section 56 of the foresaid Act, 'That all gunpowder which may be kept in any shop, house, or other premises, within the limits of this Act, shall be kept in stone jugs or canisters, properly covered, and having the word 'gunpowder' legibly

' inscribed thereon, or on a label thereto properly attached, and shall
 ' also be kept separate from all other goods or commodities, and
 ' secured by lock and key, under a penalty not exceeding five pounds
 ' for every such offence, to be paid by the owner, or by the person in
 ' whose possession any gunpowder not so kept and secured shall be
 ' found; and such gunpowder shall be seized and forfeited; and more-
 over, you the said Peter Galloway being bound at common law, in the
 event of your having in your possession or keeping, in or near the pre-
 mises aforesaid, so large a quantity of gunpowder as was sufficient, upon
 explosion, to destroy or greatly endanger the lives of yourself and your
 neighbours, or any of them, or to destroy or greatly injure the dwell-
 ing-houses of yourself and your neighbours, or any of them, to employ
 all due care and caution in the manner of keeping, or handling, or in
 any way using or intromitting with the said gunpowder, so as to guard
 against causing undue risk of its being suddenly exploded, to the de-
 struction, or to the great danger of life, or to the destruction or great
 injury of property: YET, NEVERTHELESS, TRUE IT IS AND OF VERITY,
 that on the 4th day of September 1850, or on one or other of the days
 of that month, or of August immediately preceding, or of October im-
 mediately following, in or near your said premises situated in or near
 Alexander Street of Airdrie aforesaid, in contravention of the statu-
 tory provisions above recited, or of one or more of them, and in viola-
 tion of the obligation incumbent on you at common law as aforesaid,
 you the said Peter Galloway, culpably and recklessly, had in your
 possession or keeping, in or near a kitchen or other room forming part
 of your said premises, a cask or keg, or other vessel, the same not
 being a stone jug or canister, nor kept secured by lock and key, nor
 otherwise kept in conformity with the statutory provisions before re-
 cited, and the same containing twenty-five pounds weight of gunpowder,
 or thereby, or containing some other quantity of gunpowder above the
 weight of ten pounds, but the particular quantity being to the prose-
 cutor unknown; as also, another cask or keg, or other vessel, the same
 not being a stone jug or canister, nor kept secured by lock and key,
 nor otherwise kept in conformity with the statutory provisions before
 recited, and the same containing gunpowder, part of the original con-
 tents of which last-mentioned cask or keg, or other vessel, had been
 removed, but about twelve pounds weight of gunpowder, or thereby,
 or some other quantity of gunpowder to the prosecutor unknown, still
 remained in the last-mentioned cask or keg or other vessel; and the
 gunpowder in both and each, or one or other, of said casks, kegs, or
 other vessels, being of such amount or quantity as was sufficient, upon
 explosion, to destroy or greatly endanger the lives of any persons who
 were near, or to destroy or greatly injure the premises foresaid of you
 the said Peter Galloway, and the houses occupied by your neighbours,
 or part thereof; and there being then, in or near the foresaid room or
 kitchen, you the said Peter Galloway, and John M'Dongall, now or

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No. 76.
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Homicide.

lately collier or shanker, and now or lately residing with John Finnie, now or lately collier, and now or lately residing in or near Clark Street of Airdrie aforesaid, the said John M'Dougall being then or lately in your employment; and there being also then several other persons in or near the said room or kitchen, or otherwise in or near the premises foresaid of you the said Peter Galloway, particularly William Jaevons, a boy of about seven years of age, or otherwise of tender years, then or lately before residing with James Mattocks or Maddox, now or lately furnace-man, and now or lately residing in or near Dundyvan Road, at or near Dundyvan, in the parish of Old Monkland, and shire aforesaid; and the said John M'Dougall, then or lately in your employment as aforesaid, having desired to have a flask or other vessel which was fitted to contain about six pounds weight of gunpowder, or thereby, or otherwise, some considerable quantity of gunpowder, filled with gunpowder, or you the said Peter Galloway being otherwise desirous to put a quantity of gunpowder out of one of the casks or kegs or other vessel above mentioned, into the said flask or other vessel, you the said Peter Galloway did, culpably and recklessly, omit the due precautions obviously required for the safe keeping or handling or intronitting with the said gunpowder, and did pour out a quantity of gunpowder from the said cask or keg or other vessel, from which a part of the original contents had been previously taken, as aforesaid, into or upon or near the mouth of the foresaid flask or other vessel, without employing any filler or other instrument adapted to convey the said gunpowder into the said flask or other vessel, free of spilling, and without spreading any cloth or other apparatus on the floor, in order to keep spilt gunpowder off the said floor; and this you culpably and recklessly did, although the floor of the said room or kitchen, or part thereof, where you were, was of stone, and both the said John M'Dougall, who was standing or sitting beside you, holding the flask or other vessel, or was otherwise near you, and you the said Peter Galloway, or one or other of you, and him, as you well knew, had iron heels, iron toe-plates, and iron nails, or part of the said iron, in or upon your shoes, or otherwise had your shoes shod with iron in some manner to the prosecutor unknown; and although the risk of a spark of fire being struck from a stone floor by the pressure or friction of iron thereon, in consequence of the movement of the feet of one or other of the said John M'Dougall and you the said Peter Galloway, and said spark of fire causing the explosion of any gunpowder which might be lying near, upon the said floor, was a plain and evident cause of danger; and although the risk of some other source of casual ignition reaching to gunpowder if lying loose upon the floor, and so causing its explosion, was a plain and evident cause of danger; both and each or one or other of which causes of danger were obvious to men of common apprehension and ordinary prudence, when keeping or handling or intronitting with gunpowder, and such as any one using due care and cau-

tion in the manner of keeping or handling or intromitting with said gunpowder was bound to avoid ; and some of the foresaid gunpowder, poured out as aforesaid, having fallen down upon the said stone floor, at or near the feet of you the said Peter Galloway, and the said John M'Dougall, or one or other of you, and him ; and some spark of fire or other ignition being communicated to the said gunpowder, on or near the said stone floor, by the friction of the foresaid iron, which was in or upon one or more of the shoes aforesaid, against the said stone floor, or by some other source of casual ignition to the prosecutor unknown, the said gunpowder, lying on or near the floor, caught fire and exploded, and therethrough, also the gunpowder in or near the flask or other vessel foresaid, as also, in or near the cask or keg or other vessel last above mentioned, as also, in the cask or keg or other vessel first above libelled, or part thereof, exploded with great flame, heat, and violence, and either by their own explosion or by communicating with and causing also to explode in like manner, another cask or keg or other vessel, containing twenty-five pounds weight of gunpowder, or thereby, which was lying in or near the adjoining premises, then occupied by John Shanks, then grocer, in or near Alexander Street of Airdrie aforesaid, and now or lately residing in or near Drumgray or Watstown, in the parish of New Monkland aforesaid, did so severely burn and scorch or injure the said William Jaevons in his head and body and limbs, that he died in consequence thereof, on the day following, or in some other short time thereafter, and was thus culpably bereaved of life by you the said Peter Galloway ; and farther, did likewise severely burn and scorch or injure several of the persons foresaid who were in or near the said room or kitchen, or otherwise in or near the premises foresaid of you the said Peter Galloway, and did greatly endanger the lives of all and each, or one or more of said persons, particularly the said James Mattocks or Maddox and the said Peter Galloway, or one or other of them ; and moreover, the force and violence of the explosion of the gunpowder foresaid, did rend and injure the front wall next the street of the foresaid tenement, part of the foresaid premises of you the said Peter Galloway ; and did beat down or rend and injure one or more of the internal partition walls, and roofs or floors of the rooms within said tenement, and of the walls between your said premises, and the adjoining, or nearly adjoining, shop or premises of the said John Shanks.

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J. SHAW, for the pannel, objected to the relevancy of the indictment as charged. The setting forth of the provisions of the Police Act was plainly intended to be relied on by the prosecutor as an aggravation of the offence, charged on common law, but it did not appear from the statements made, and the subsequent portions of the minor, that the statute had been violated, other-

No. 76.
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Galloway.
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Homicide.

wise than in keeping a larger quantity of gunpowder than the statute prescribed, which was punishable by fine. Besides which, it was expressed to be the duty of the pannel at common law, in the event of his having so large a quantity of gunpowder as was sufficient, on explosion, to destroy or greatly endanger the lives of himself or neighbours, or any of them, or to destroy or greatly injure the dwelling-houses of himself or neighbours, or any of them, to use due care and caution. And, in so far as this duty was stated in respect to the dwelling-houses, and in so far as it was said to have been contravened, in regard to the statute, and results had issued therefrom, there was nothing in the major to cover the same as laid. Moreover, it was not alleged that ten pounds weight of gunpowder would not have been sufficient to produce all the consequences which ensued from the explosion, especially, seeing that the quantity ignited by the pannel was not the *causa causans* of death. The gist of the case seemed to be, that the gunpowder had been transferred from one vessel to another on a stone floor, the pannel or his assistant having nails in their shoes at the time, and thereby occasioning explosion in a keg, which in its turn ignited a still larger quantity, in the shop of Shanks, being on *his* part an aggravated breach of the statute, but for which, on this libel, it might be assumed no bad consequences would have happened. But that was irreconcilable with the notion of casual ignition, as charged, reaching gunpowder lying close upon the floor, a phrase which would comprehend matters not criminal, and over which the pannel had no control. Besides, how could want of caution in respect of the dwelling-houses of neighbours be covered by a major charging culpable homicide only, the charge as set forth in the minor appearing to relate to injury of the fabric only, or, at least, being capable of that construction?

The LORD JUSTICE-CLERK asked the Crown if they intended to persist in the present indictment, which seemed to the Court to be so anxiously framed as to comprehend

more than was necessary, even should the Court be of opinion that the acts alleged against the pannel constituted a good indictment. A simple recital of the facts on which the Crown intended to rely, shewing how the common law had thereby been violated, would be quite sufficient to enable the Court to say whether or not there had been such recklessness on behalf of the pannel as to render him an object of criminal justice.

The SOLICITOR-GENERAL withdrew the indictment.¹

No. 76.
Peter
Galloway.

High Court.
Feb. 24.
1851.

Culpable
Homicide.

SOUTH CIRCUIT.

JEDBURGH.

April 16.
1851.

Judge—THE LORD JUSTICE-CLERK.

HER MAJESTY'S ADVOCATE—*G. Young A.D.*

AGAINST

JACOB TAIT, AND JOHN TAYLOR—*Aytoun—J. Shaw.*

STATUTE—FOREIGN SUMMONS—SERVICE.—Held that an English Summons, directed against a Scotchman, for an alleged English offence, must be executed by a Scotch officer, to justify any after proceedings had thereon in Scotland, by way of apprehension.

JACOB TAIT, labourer or mugger, now or lately residing in Kirk-Yetholm, in the parish of Yetholm, and shire of Roxburgh; and JOHN TAYLOR, labourer, now or lately residing in Kirk-Yetholm aforesaid, was charged with Deforcement; as also, the Violently Resisting and Obstructing officers of the law in the execution of their duty:—

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IN SO FAR AS, you the said Jacob Tait having, on or about the 2d day of January 1851, at Wooler, in the county of Northumberland,

¹ No farther proceedings have taken place in this case.

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been duly convicted before Richard Hodgson, and George Huges, two of Her Majesty's Justices of Peace in and for the said county of Northumberland, for that you, the said Jacob Tait did, on the 27th day of December, in the year of our Lord, One thousand eight hundred and fifty, in the day time, that is to say, about one o'clock in the afternoon, at the township of Mindrum, in the parish of Carham, in the county aforesaid, unlawfully commit a certain trespass, on a certain piece of land situate in the township aforesaid, in the occupation of one George Thomson, by unlawfully entering, and being on the said land, in the search and pursuit of game, without the license and consent of the owner of the said land so trespassed upon, or of any person having the right of killing game upon such land, or of any other person having any right to authorize you, the said Jacob Tait, to be upon such land, for the purpose aforesaid, contrary to the force or form of the statute made and provided; and it having been then and there adjudged and ordered by the said Justices of the Peace, that you the said Jacob Tait, for your said offence, should forfeit and pay the sum of two pounds, and should pay to Robert Nevins the sum of one pound twelve shillings and sixpence, for his costs in that behalf; and it having been further, then and there, adjudged and ordered, by the said Justices of the Peace, that if the said several sums should not be paid forthwith, you the said Jacob Tait should be imprisoned in the House of Correction at Morpeth, in the said county of Northumberland, and there kept to hard labour for the space of two calendar months, unless the said several sums, and the costs and charges of conveying you the said Jacob Tait to the said House of Correction, amounting to the sum of two pounds one shilling, should be sooner paid; and you the said Jacob Tait having failed to pay the said several sums, and the said Justices of the Peace having in consequence issued their warrant of commitment, given under their hands and seals, on the 2d day of January, in the year of our Lord 1851, at Wooler, in the said county of Northumberland, commanding the constable of the parish of Carham, in the said county of Northumberland, to whom the same was directed, to take you the said Jacob Tait, and you safely to convey to the said House of Correction at Morpeth aforesaid, and there to deliver you to the keeper thereof, and also commanding the keeper of the said House of Correction, to whom the warrant of commitment was also directed to receive you the said Jacob Tait, into his custody in the said House of Correction, there to imprison you and keep you to hard labour for the space of two calendar months, unless the said several sums and the costs and charges of conveying you to the said House of Correction, amounting as aforesaid to the farther sum of two pounds one shilling, should be sooner paid; and you the said Jacob Tait, having escaped or gone to, or being resident at, Kirk-Yetholm, in the parish of Yetholm, in the county of Roxburgh in Scotland, and John Johnson, then constable of the parish of Carham, in the said county of Northumberland,

or then and now or lately superintendent constable for Glendale Ward in said county, and now or lately residing at Wark, in the said parish of Carham, having brought the foresaid warrant of commitment to Robert Oliver, Esquire, of Lochside, one of her Majesty's Justices of the Peace of the said county of Roxburgh; and the same having been duly endorsed by him, on or about the 16th day of January 1851, to the effect of authorizing the said John Johnson, and all peace-officers of the said county of Roxburgh, to execute the same in the said county of Roxburgh; and the said John Johnson, accompanied by Archibald Anderson, constable, residing at or near Town-Yethoim, in the parish of Yetholm, and county of Roxburgh, and George Curle, constable, residing at or near Morebattle, in the parish of Morebattle and county of Roxburgh, both peace officers of the said county of Roxburgh, having on the 20th day of January 1851, or one or other of the days of that month, or of December immediately preceding, or of February immediately following, proceeded to the house at or near Kirk-Yetholm aforesaid, then and now or lately occupied by you, the said Jacob Tait, or in which you then resided, for the purpose of putting the foresaid warrant of commitment, endorsed as aforesaid, in execution against you, the said Jacob Tait: You the said Jacob Tait and John Taylor did, both, and each or one or other of you, then and there, wickedly and feloniously, attack and assault the said John Johnson, Archibald Anderson, and George Curle, and did seize hold of them, or one or more of them, and did, by menaces and threats of violence, and by threatening to beat them with a stool and with a poker, and with a bludgeon or pailing-stob, which you brandished at them in a threatening manner, and by threatening to shoot them, and by proceeding to get guns or other fire-arms ready for that purpose, or by some of these means and other the like violent procedure on your part, succeeded in driving the said John Johnson, Archibald Anderson, and George Curle, from the premises, and in forcibly preventing them from executing the foresaid warrant of commitment, endorsed as aforesaid; by all which, or part thereof, the said John Johnson, Archibald Anderson, and George Curle, were deforced, or at least violently resisted and obstructed in the execution of their duty; and all this you the said Jacob Tait and John Taylor did, well knowing that the said John Johnson, Archibald Anderson, and George Curle, were officers of the law engaged in the execution of their duty as above libelled.

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J. SHAW objected to the relevancy of the libel, in so far as the alleged offence, which consisted of a mere constructive assault, by means of words, was used against officers proceeding under a warrant granted by Justices of the Peace in Northumberland for an offence against the game laws. He maintained, that such a warrant

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was not indorsable in Scotland, and consequently being served out of the jurisdiction was a nullity. The principle was, that the power to indorse English warrants (which was entirely statutory) was applicable to cases of crimes or indictable offences only. The late statutes 11th and 12th Vict. c. 42, and 11th and 12th c. 43, had made no alteration in the matter.

YOUNG *A.D.*—Without entering on the old law, it is plain under the recent statutes 11th and 12th Vict. c. 42 and 43, § 13, that these proceedings are regular. These taken together, completely shewed that the Justices in Scotland had authority to indorse in cases like the present.

The objection was repelled.

The following evidence was then adduced :—

1. JOHN THOMSON, *Law Clerk to the Justices of the Peace of the East Ward of the County of Northumberland.*—I was present at Wooller on 2d January. The prisoner was convicted under the statute in absence. His mother appeared. This is the judgment and warrant of commitment. These are signatures of the Justices of the Peace. He was convicted under 1st and 2d Will. IV. § 30. The warrant of commitment was under 11th and 12th Vict. c. 43, Sir John Jarvis' act. It is a due and legal conviction under the law of England, and warrant of commitment also. John Johnstone was constable of the parish.

Cross-examined.—A summons was issued and served personally—at least constable swore to it at the hearing. It was served at Yetholm. Can't say date of service. Not on day of conviction—I should think a week before.

JOHN JOHNSTONE, *Superintendent constable of county of Northumberland.*—In January was in Carham. Got warrant of commitment libelled. I went to see the Justice, Mr Oliver of Lochside, 16th January. I see indorsation. On 20th January I got assistance and went to Kirk-Yetholm. Archibald Anderson and George Curle, Roxburgh constables—went to Tait's, quarter after seven in morning. He was in bed. I told Wife my errand. I read the warrant. I heard a great noise. Tait had a footstool in hand. Before a gun in his hand, wife spoke—she said, you—there are 5 loaded guns in house. You shall have advice from Jeffrey to shoot any one of you who resist. Taylor seized poker and waived it back and forwards before officer's face. Tait said he would split officer's head, called for aid, and wife called for Taylor to come down, and come down with guns. I heard great noise, and heard, I thought, ramrod working in gun. I know Tay-

lor's room—he was in that room alone. I then saw John Taylor, the prisoner, come down stairs. He came in shouting, 'murder them.' He had nothing at first in his hand; he had a piece of firewood in his hand; length and thickness of one's arm; raised as if to strike Anderson; this was when his back was to him. I shoved him back. Taylor swore at me to keep my hands off. Tait seized Anderson by the breast and tried to throw him down: There were several cries to murder, chiefly by Taylor's wife, and Taylor cried to call for more aid. I saw a gun in Taylor's house hanging by side of wall. Taylor's wife made a grasp. I had Taylor in custody. He struggled. I saw the gun capped. I let him go and took hold of her to prevent her taking the gun down. I heard like the snap of a gun on Taylor's stair. Still Taylor and his wife sang out to murder. I took out my staff, and said I would knock down the first who attacked Anderson. They were seizing hold of him. The violence was chiefly against Anderson, some others were in, eight, chiefly women. Anderson sang out to quit the house. I consulted both before leaving.

Cross-examined. I told Anderson to draw his baton when I pulled out mine. Anderson was at the door.

AYTOUN then objected, that inasmuch as it had come out in evidence that the original summons, on which all the proceedings rested, had been served in Scotland by an English officer, such service was bad, and being bad, all conviction following thereon was bad also. If that were so, the parties were justified in resisting men who came with the avowed purpose of carrying them to prison under an illegal warrant.

YOUNG.—The warrant has been proved to have been a good and regular warrant. It was good where issued, and must be held to have been indorsable; here it was indorsed, and it is for resistance to the execution of this warrant, that we bring the present charge. It was a warrant proceeding on a conviction irreversible in England, and it would place police officers in a very awkward position were they liable to be thus assaulted, in respect of a defect of which neither they nor the party assaulting had any knowledge.

The LORD JUSTICE-CLERK—Held, that the objection to the mode in which the summons was served was fatal. No one but an authorized Scotch officer was competent to serve process in Scotland. It would have been easy to have got the summons served by a Scotch officer. But

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that was not done. It followed therefore, that they never were duly summoned, and if so, no conviction in absence proceeding thereon could stand, or receive any legal effect. Most likely the pannels knew nothing of this at the time; but that did not at all interfere with the law. His Lordship therefore directed the Jury to acquit the prisoners on the grounds he had stated.

The Jury acquitted the pannels.

In respect of which verdict of assize, the pannels were assoilzied *simpliciter*, and dismissed from the bar.

DUMFRIES.

April 8.
1851.

Judges—THE LORD JUSTICE-CLERK AND LORD WOOD.

PROSECUTOR—PRACTICE.—Circumstances in which the Court swore in, *pro re nata*, the former Advocate-depute as Counsel for Her Majesty.

AFTER the usual procedure, at the opening of this Circuit, the record bears, that,—

‘ In respect that the Court has been informed that Mr Andrew Rutherford has resigned his office of Lord Advocate, and, considering that the indictments for trial at this Circuit Ayre have been duly raised and served at the instance of Mr Andrew Rutherford, when Her Majesty’s Advocate, for Her Majesty’s interest, and now stand for trial at this Circuit Ayre, the Lord Justice-Clerk and Lord Wood nominate and appoint Mr George Young, Advocate, who held the office of Advocate-Depute by commission from the said Mr Andrew Rutherford, as Counsel for the Crown, to conduct the said prosecutions for Her Majesty’s interest.’

‘ J. HOPE, *I.P.D.*

‘ And Mr Young having taken the oath *de fidelis*, he was admitted to the execution of his office.’

T. F. SMITH, Appellant—*J. Shaw.*

AGAINST

W. SKINNER, Respondent—*G. Young.*

APPEAL—LANDLORD AND TENANT—SEQUESTRATION—INTERDICT.—Circumstances in which an application by a tenant for interdict against a threatened sale of his effects, under a process of sequestration by the landlord, was held incompetent.

This was an appeal from a decision of the Steward-substitute of the stewartry of Kirkcudbright, dismissing a process of interdict at the appellant's instance.

The circumstances out of which the case arose were as follows :—

Smith was tenant of the respondent for a house of the value of £25 a-year. Prior to the Whitsunday term 1850, Smith being in arrear of rent, the landlord sequestered for the past as well as current half-year. On a partial payment, however, to the extent of £18 or thereby, Smith was allowed by the landlord to remove his furniture to another house, which he had taken at some distance from the former one, at Whitsunday 1850. The respondent some months afterwards advertised the appellant's goods for sale, on his new premises, for the purpose of enforcing payment of the balance due of his former rent. Smith presented an application for interdict, to prevent the sale being carried through. The Steward-substitute granted interim interdict, and allowed a proof of the allegations contained in the petition within fourteen days. In consequence, as was alleged by Smith, of the illness of a material witness, and other causes, he was unable to complete his proof within that time, whereupon the Steward-substitute, circumducing the term, recalled the interim interdict, and found Smith liable in expenses.

It was against this judgment that the present appeal was brought.

J. SHAW, for the appellant, contended, that the circumstances shewed that the appellant was entitled to a remit from the Court to the Steward, to give him time to enable him to complete his proof. *1st*, The petition for interdict was competent and relevant, inasmuch as the process of sequestration had been broken, with consent of the landlord, by the removal of the goods to the appellant's present premises. *2d*, It was incompetent for the landlord to advertise a sale on the premises then occupied by the appellant; and, *3d*, More than three months had been allowed to elapse after the goods had been removed to the appellant's new house. Bell's Prin. § 1277.

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YOUNG, for the respondent.—The whole process of interdict was inept and incompetent. If there was any irregularity in the mode in which the sequestration was sought to be carried into effect, the proper course was, to have applied in the process of sequestration for a stay of proceedings. The Steward had full power, when a diligence proceeded from his own court, and could at once have interfered, and prevented any irregularity. He could also have interfered in that process, and recalled the sequestration altogether, in case he had found that the respondent had effectually waived his right to insist farther therein. The process of interdict was therefore useless and incompetent.

The LORD JUSTICE-CLERK.—I think this appeal must be dismissed, without indicating any view as to whether or not sufficient time was allowed the appellant to prove his averments. I think in this case, there was no relevancy in the original application for interdict. It is admitted that the sequestration was originally well and regularly obtained; and that at the period of the attempted sale the landlord had not been fully paid. Whether or not he was entitled to proceed farther after the lapse of time, or whether he could have sold at the place advertised, it is unnecessary to consider, as all this would have been determined by the Steward on a proper application in the sequestration process, which was undoubtedly a competent one, had proper application been made therein.

LORD WOOD.—I concur. It is important to prevent undue multiplication of processes, and I can discover no reason in this case why the appellant could not have obtained everything he could have desired in the process of sequestration, though, at the same time, I would wish to guard myself against being held to lay it down distinctly, that in no case is a process of interdict competent to stop a sale under a sequestration. Such a case however must be a very special one, and I see nothing to justify that procedure here.

Their Lordships dismissed the appeal, with expenses.

HIGH COURT.

Present,

June 2.
1851.

THE LORD JUSTICE-CLERK,

LORDS COCKBURN AND IVORY,

HER MAJESTY'S ADVOCATE—*E. F. Maitland A.D.—Cleghorn A.D.*

AGAINST

JOHN O'NEILL—*Orr.*

INDICTMENT—PANNEL—IDENTITY.—Objection, that a pannel designed as present prisoner in the prison of Glasgow, could not be called on to plead to the indictment, in respect that there was another prisoner indicted for trial at the same Circuit, of the same name, and similarly designed—repelled.

AT the Glasgow Spring Circuit, 1851, John O'Neill, designed as 'prisoner in the prison of Glasgow,' was charged with the crime of Theft, aggravated by previous conviction.

No. 79.
John
O'Neill.High Court.
June 2.
1851.

Theft.

ORR objected to the pannel pleading to the present indictment, in respect that there was another prisoner indicted for trial at the Circuit, of the same name, and similarly designed.

LORD IVORY, in respect of the foregoing objection, certified the case to the High Court of Justiciary.

The diet having been called this day,—

ORR, in support of the objection, referred to Hume on Crimes, vol. ii. pp. 159, 160; *John Robertson*, April 1824, Shaw, p. 123; *John Carruthers*, Sept. 15, 1827, Shaw, p. 212; *Thomas Robertson*, Glasgow, Sept. 29, 1837, Swinton, vol. i. p. 547; Bell's Notes to Hume, p. 170.

The COURT pronounced this interlocutor:—

'On the report of Lord Ivory, and having heard the counsel for the pannel, the Lords repel the objection; and, on the motion of Her Majesty's Advocate, desert the diet against the pannel *pro loco et tempore.*'

Present,

June 9,
1851.

THE LORD JUSTICE-CLERK,

LORDS WOOD AND COLONSAY.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Cowan—G. Young A.D.*

AGAINST

THOMAS HOGG—*W. E. Aytoun—J. Shaw.*

MURDER—MEDICAL JURISPRUDENCE.—Circumstances in which a pannel was acquitted of Murder.

No. 80.
Thomas
Hogg.

THOMAS HOGG was accused of Murder :

High Court.
June 9,
1851.
Murder.

IN SO FAR AS on the 12th day of February 1851, or on one or other of the days of that month, or of January immediately preceding, or of March immediately following, in or near the house called the Boat-house, in the parish and county of Roxburgh, then occupied by you, or in which you then resided, you the said Thomas Hogg did wickedly and feloniously attack and assault the now deceased Agnes Laidlaw or Hogg, your wife, and did, with your hand or hands, or with some kind of ligature to the prosecutor unknown, violently compress or press upon her throat, or did violently press her throat against some piece of furniture, or other hard substance to the prosecutor unknown, and did thereby, or in some other manner to the prosecutor unknown, strangle or suffocate the said Agnes Laidlaw or Hogg, in consequence whereof she immediately or soon thereafter died, and was thus murdered by you the said Thomas Hogg.

The general evidence in the case was, that the deceased (who was the pannel's wife) had been seen going about in the morning, and was also seen on the bed, with her clothes on, along with the prisoner, about half-past ten, on the day of her death.

The witnesses who so saw her, being neighbours, heard of her death about eleven. The witnesses who were called in and saw her during the day, spoke to there be-

ing no protrusion of the eyes, or other of the ordinary symptoms of strangulation.

The prisoner, in his declaration, attributed her death to falling against a sharp-edged chair, from a blow by him. The main question was, had the prisoner strangled her manually, and so broken the larynx?

The medical evidence was as follows:—

CHARLES WILSON, M.D.—I have been twenty-two years a medical man in Kelso. I made a report. This is it. It is as follows:—

‘On the afternoon of the 14th February 1851, I proceeded to the cottage at Roxburgh Boats, by desire of the procurator-fiscal of the county of Roxburgh, in order to examine the body of Agnes Hogg, a woman who was reported to have died two days previously.

‘I found the body deposited in a coffin, which was opened in my presence. The grave clothes having been removed, the under shift, such as is usually worn by women, was observed to be extremely soiled with fæces at its lower and back part. The deceased seemed to have been about 30 years of age; and the body was in no respect emaciated, but generally of a plump and healthy appearance.

‘On proceeding to a more special examination, I remarked that both the ears, the whole of the right cheek, and the lower part of the neck, over the collar bones, were of a deeply livid colour, lightest, however, on the neck. The whole of the back was overspread with a paler lividity, such as is usually the result of gravitation of the blood in the dead body. The eyes presented a pale red suffusion. There was a contusion on the right side of the forehead, of a circular form, and about an inch in diameter. There was a yellowish-brown mark, hard and parchment-like, about an inch and a half in length, by half an inch in breadth on the left side of the chin, running along the lower margin of the jaw; and another similar mark, of nearly equal dimensions, the skin feeling thickened, hard, and corrugated, passed transversely across the throat, immediately over the larynx. To the right of this mark, and on the same line with it, there was a smaller detached spot of like appearance. The fingers were semi-contracted, and rigid; and there were traces of blood which had flowed from the right nostril.

‘On removing the integuments from the site of the oblong mark on the chin, there was observed a distinct extravasation of blood in the cellular tissue beneath; and there was also slight effusion under the bruise on the forehead. The skin on the front of the neck and the superficial muscle (*Platysma myoides*) having been reflected, the other muscles in the vicinity of the wind-pipe (*Sterno-hyoid*, *Sterno-thyroid*, and *Omo-hyoid*) especially those portions contiguous to the

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‘ larynx, and on the left side, were found of a much darker colour than
‘ natural, and darker than the adjacent muscles, as if their substance
‘ had been gorged with venous blood. There was an extravasation of
‘ blood into the substance of the left omo-hyoid muscle, a farther ex-
‘ travasation lower down on the same side, between the jugular vein and
‘ the wind-pipe, also in the left sterno-mastoid muscle, near its
‘ origin, and in the cellular substance beneath the platysma my-
‘ oides. On proceeding deeper, blood was also found effused over
‘ the cartilages of the larynx, still chiefly on the left side; the thyroid
‘ gland on the same side, was largely infiltrated, and the effusion here
‘ extended around and beneath, passing behind the wind-pipe and larynx
‘ to the gullet, so as to occupy a space, in the aggregate, of several square
‘ inches. A line of extravasated blood proceeded also upwards and
‘ backwards from the side of the larynx to the angle of the lower
‘ jaw.

‘ On dividing the wind-pipe, it was found to contain a quantity of
‘ frothy mucus. In the interior of the larynx, there was a consider-
‘ able extravasation of blood lying beneath the investing membrane;
‘ and passing up both sides and behind as far as the chink of the glottis,
‘ or orifice by which the air is admitted into the wind-pipe; and above
‘ that opening into the ventricles of the larynx. There was also a
‘ fracture of the right wing of the thyroid cartilage, by which its lower
‘ horn was wholly detached; and the cricoid cartilage was broken in
‘ two places, at opposite sides of its ring.

‘ The veins in the neck, both the smaller and larger ones, communi-
‘ cating more directly with the heart, were everywhere turgid with
‘ blood, in an entirely fluid state.

‘ On proceeding to lay open the cavity of the chest, there was dis-
‘ covered a thin layer of extravasated blood, occupying a considerable
‘ space, lying below the left mamma and the greater pectoral muscle,
‘ and passing forwards to near the sternum. No mark of contusion
‘ corresponding to this could be discovered externally. Within the
‘ cavity of the chest itself, there was no mark of disease or injury ob-
‘ servable, unless that the lungs, especially on the right side, appeared
‘ dark coloured, and much congested with blood. There was no effusion
‘ within either the pleura or pericardium, and the heart, with its valves,
‘ was in a healthy condition.

‘ In the brain, there appeared to be a considerable congestion of the
‘ vessels ramifying on its surface; and on cutting into its substance, the
‘ medullary part was found thickly studded with bloody points. There
‘ was neither fracture of the skull, nor appearance of extravasation of
‘ the blood within, or upon the brain. The ventricles contained about
‘ three drachms of clear serum; and at least double the quantity was
‘ afterwards observed at the base of the skull.

‘ In the abdomen, the intestines were found considerably inflated,
‘ and generally congested, especially the stomach, jejunum and ilium,

' the latter presenting also occasional livid patches. The stomach contained about 8 oz. of a gruel-like fluid. There was no effusion or adhesion, or other morbid appearance discernible, unless that the liver appeared slightly enlarged, and in parts of a somewhat paler colour than natural. The urinary bladder was empty.

' From a review of these details, it seems impossible to resist the inference that death in this instance has been produced, in some way or other, through means of a violent compression or constriction of the throat; the condition of the larynx and of the parts contiguous, evincing this directly, while the state of the system generally, and all other circumstances, appear fully consistent with such a conclusion. This I certify upon soul and conscience.'

(Signed) CHARLES WILSON, M. D.

' *Kelso 15th February 1851.*'

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I adhere to that report. I think the injuries on the throat were caused by external causes. External violence only could have caused them. Death might be caused thereby. I have seen cases of suicide by hanging. I cannot say if I ever examined the larynx. In this case they are greater than in other cases of strangulation. I can conceive the possibility of a fall causing these injuries to the larynx,—from external causes, very rarely. Injury to the extent described in this case, I think, cannot have happened from a single fall, nor from ordinary falls. Compressive force must have been continued until death. If the body had been in a sitting posture, she could not have inflicted such injuries as I have described on herself, by falling. It was not a case of suicide. I saw the pannel. He made a statement to me. I paid no particular attention to him. He said he had struck her. I repeated, Did you strike? He said, I did; and she fell in the kitchen.

Cross-examined.—This was about two on the Friday. The body would not have undergone any considerable change since the Wednesday. There was no putrid change. Any change which would take place at such a period is easily distinguished.

I never saw a case of fractured larynx, the cases are so extremely rare; they hardly ever take place. I cannot say if it could be produced by a fall; the muscles are close to it. There was congestion on the brain.

To the Court.—A case of fracture from external injury is very rare. There are only three or four cases known, and those occasioned by severe injuries. Ulceration might cause it. There could be fracture from internal causes. I cannot conceive a fall of the head of a drunk person hanging down to produce it; the injuries were very extensive. Breaking the neck could not cause fracture of the larynx. Compression alone, in my opinion, could fracture the larynx. Manual compression, I think, might. Congestion accompanies strangulation; slight, but distinct suffusion, often accompanies strangulation. I do not

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think that suffusion would take place after death. The eyes were not protruded, as usual in cases of strangulation. I would say, they were slightly suffused. I did not ask him when he struck her. I had heard a vague suspicion of a blow having been given. The mark on the head appeared recent and contemporaneous with the other injuries.

HENRY VOST, *Surgeon*.—I examined the body along with Dr Wilson, and concur in the report. There must have been very great violence required to produce the injuries. I think no fall could fracture the larynx; the external marks were not such as a fall could produce. The injury on the left breast was such as if a heavy weight had rested thereon,—not like a blow. This was not a case of suicide; no suicidal injuries would fracture the larynx. A person being drunk, and having a heavy fall, might produce the injury to the larynx.¹

¹ The general facts of the case have been as above indicated, and this case is reported partly in consequence of evidence which was expected to be led in defence, and as to which a list of witnesses had been given in, as to the impossibility of fracture of the larynx being occasioned by compression of the hand, unless there had been ossification. On the day previous to the trial, however, it was discovered this was possible, by means of experiments on young subjects, and consequently, no witnesses were called for the defence.

The Reporter has been favoured with the following note from Dr Keiller, Lecturer on Medical Jurisprudence, who, with Dr W. T. Gardner, Pathologist to the Infirmary, conducted the experiments:—

30 NORTHUMBERLAND STREET,
April 25, 1852.

MY DEAR SIR,

In answer to your queries respecting fracture of the larynx, I beg to state, that, with the view of determining, by actual experiment, the important question which was brought out on the occasion of the trial of Thomas Hogg before the High Court of Justiciary, in June last, I lost no time, on the matter being referred to me, in performing several experiments on the dead body, the results of which were to my mind perfectly conclusive, as to the possibility of fracturing the larynx by *mere manual force*.

The experiments on that occasion were three in number, and were performed on subjects of different ages, in all of which the thyroid and cricoid cartilages, together with the hyoid bone, were broken by violently grasping the throat, and forcibly compressing the larynx.

I have since then repeated these experiments, on two subjects, and with the same results,—the hyoid bone and cartilages of the larynx being, in one instance, readily enough fractured by the forcible application of *one hand only*; in the other, however, that of a large and powerfully developed man, the violent grasping of both hands was found to be necessary to produce the injuries inflicted.

The Jury found the prisoner Not Guilty.

In respect whereof, he was assoilzied *simpliciter*, and dismissed from the bar.

No. 80.
Thomas
Hogg.

High Court.
June 9.
1851.

Murder.

On carefully removing and examining the parts involved in one of these experiments, the injuries sustained by the osseous and cartilaginous structures of the throat, so completely corresponded with those reported by Drs Wilson and Vost, as having been observed in the *post-mortem* examination of the body of Mrs Hogg, that I took care to preserve the fractured larynx and appendages, for the purpose of illustrating my lectures in reference to this exceedingly important question.

The degree of violence used in the performance of these experiments was necessarily great, and that, too, applied in the direction most likely to produce the various fractures found; nevertheless, I cannot but entirely concur in the opinions expressed by Drs Wilson and Vost, as to *wilful forcible compression* being, in all cases, much more likely than *falls or other accidental injuries*, however severe, to cause fractures of the larynx, &c., such as were found in the case of Hogg.

As, however, the settling of this question may involve the most important and serious considerations, in regard to other charges of homicide by strangulation, I purpose availing myself of other opportunities of more fully testing the whole matter, with the view of ascertaining more accurately the actual kind and degree of manual force required to produce fractures of the larynx, and of determining whether similar lesions of that organ can be readily effected by external injuries otherwise applied.

So soon as I am in possession of facts, sufficiently abundant and important to justify me in giving them farther publicity, you may rely on my doing so; meantime, you are welcome to make any use of this communication that you may deem proper. Believe me, my dear Sir, yours faithfully,

ALEX. KEILLER.

J. Shaw, Esq., Advocate.

Present,

June 16.
1851.

THE LORD JUSTICE-CLERK,

LORDS COCKBURN AND COLONSAY,

HER MAJESTY'S ADVOCATE—*Lord Advocate Moncreiff—*
G. Young A.D.

AGAINST

GEORGE BLACK PYOTT.—*Craufurd.*

AND

W. B. PYOTT.—*Logan.*

FIRE-RAISING—PROOF—COMPLICITY—ART AND PART.—Direction to a Jury, that where two persons were indicted for a criminal act, it would not be enough to warrant a conviction against either, that the Jury should be satisfied that it was committed by one of the two, unless the Jury could say by which, or were prepared to affirm, by a verdict against both, that they were alike guilty.

No. 81.
G. B. Pyott
and W. B.
Pyott.

G. B. PYOTT and W. B. PYOTT were accused of Wilful Fire-raising :

High Court.
June 16.
1851.

Wilful
Fire-Rais-
ing.

IN SO FAR AS, you the said George Black Pyott and William Black Pyott being, time hereinafter libelled, tenants of a warehouse or other premises, situated in or near Saint Anthony's Court, at or near Saint Anthony's Street of Leith, in which warehouse or other premises you carried on business as commission-agents and merchants, or otherwise, and there kept certain goods in connection with your business foresaid, you the said George Black Pyott and William Black Pyott, on the 15th or 16th day of March 1851, or on one or other of the days of that month, or of February immediately preceding, or of April immediately following, did, both and each, or one or other of you, wilfully, wickedly, and feloniously, set fire to the said warehouse or other premises, by applying some lighted or ignited substance to the prosecutor unknown, to combustible materials, particularly paper, and straw, and some pieces of wood, and a wooden tray or box, and other combustible materials to the prosecutor unknown, or part thereof, collected or lying in four several places, or in one or more places, within said warehouse or other premises ; a part of said combustible materials being inside of

both and each, or one or other of two barrels; and castor oil, or some other oil to the prosecutor unknown, having previously been put upon or near the foresaid combustible materials, or part thereof; and the fire thus wilfully, wickedly, and feloniously, set or applied, did take effect, and did burn or destroy part of the door between two warerooms within the said warehouse, or other premises; As also, part of the lintel of said door; As also, part of the joists, and of the roof of both and each, or one or other of the said two warerooms; As also, part of a counter in one of the said warerooms, and part of some shelves and their supports, in both and each, or one or other of said warerooms; and the said fire was thereafter discovered, and by the exertions of well-disposed persons, was subdued and extinguished: OR OTHERWISE, time and place above libelled, and in manner above libelled, you the said George Black Pyott and William Black Pyott did, both and each, or one or other of you, wilfully, wickedly, and feloniously, attempt to set fire to the said warehouse or other premises.

No. 81.
G. B. Pyott
and W. B.
Pyott.

High Court.
June 16.
1851.

Wilful
Fire-Raising.

A great variety of evidence was led, tending to shew that the fire must have been occasioned by the wilful act of an incendiary; also to prove that the pannels had insured their stock and premises to far more than they were worth, and that they were left together in the warehouse. A plan of the premises was also produced. The following exculpatory evidence was led.

JAMES G. THALLON.—I live in Leith. I know the pannels; their character is good, nothing against it. I know they received orders for castor oil: they expected it. It was first filtered, and then bottled. I saw some in course of filtering on the Tuesday in the premises in Quality Street. They had formerly smaller premises by a great deal. I made a suggestion that they should insure to a larger amount, if they meant to have larger premises.

By the COURT.—I knew W. B. Pyott eighteen months ago. George joined the business about four months before the fire. W. B. Pyott was in business about four months before that.

DAVID A. PYOTT.—I am brother of the pannels. I am eighteen years of age. I assisted in my father's shop at the time of the fire. My father is a grocer. I remember the Saturday night my two brothers came home about seven, and left about half-past nine. They then went to go home. The house is close by. We shut about twelve. My brothers were then in bed. I went to bed. My brothers slept in the room between kitchen and parlour. The wall of my room is of lath and plaster. The outer door was locked. The lock makes a noise when opened. I heard no noise as if door opened. I saw my two brothers at breakfast, at half-past nine. There was nothing in their conduct or appearance pe-

No. 81.
G. B. Pyott
and W. B.
Pyott.

High Court.
June 16.
1851.

Wilful
Fire-Rais-
ing.

culiar, that I observed. There was an alarm given. A porter came. He got the keys. One of them gave the keys to the porter. He got up at once and gave them. My brothers expected an agency for rice from a house in Liverpool. I saw William writing out securing to get a large stock of that article. Both my brothers went to the warehouse, in a few minutes after the news of the fire came. I was up before them. They were dressing; one was shaving. The books were got. I took them to my aunt's, close to the premises. They were afterwards given to the officers.

Cross-examined by the LORD ADVOCATE.—They staid a quarter of an hour on the Saturday evening, when they first came in, and they told mother to send home something for supper. They got supper. We understood they were going home. They kept the keys of the premises in their own bed-room. There were two doors to the room they slept in. They kept the keys. William Pyott gave them when they were asked for.

By the COURT.—They did not mention where they were going at seven, nor did they mention at half-past nine where they had been.

EUPHEMIA CAMERON.—I lived in March last with Mr Pyott. I remember the Saturday evening of the fire. Both brothers came home about half-past nine. They got their supper and went to bed. I cleaned their boots, and took them out of the room. I had no reason to suspect that any one went out of the house during the night. The boots had not been used.

The LORD JUSTICE-CLERK, in charging the Jury, said, it had been, during a great part of the trial, matter of grave doubt to the Court, whether they should not have been bound to direct the Jury to acquit the pannels, on the ground that it was not distinctly disclosed in the evidence for the Crown (assuming that one of the pannels was guilty), which of the two pannels was guilty, or both. This raised a grave question, for, if committed by one only, and the Jury were uncertain which, it would have been their duty to have acquitted both, inasmuch as they could not have returned a certain verdict. All difficulty, however, seemed to be done away by the course the case had taken, as the two brothers were traced together, from the locking up on the Saturday evening, until the discovery of the fire on the Sunday morning. The Jury would therefore consider them as alike, either guilty or innocent.

The Jury, by a majority, found the pannels Guilty as libelled.

No. 81.
G. B. Pyott
and W. B.
Pyott.

In respect of which verdict of assize, they were sentenced to be transported for the period of fourteen years.

High Court.
June 16.
1851.

Wilful
Fire-Raising.

NORTH CIRCUIT.

PERTH.

Autumn 1851.

Judges—THE LORD JUSTICE CLERK AND LORD WOOD.

JOHN WILSON, Appellant—*Kinnear*.

AGAINST

ALEXANDER WATSON, Respondent—*Gifford*.

APPEAL—COMPETENCY—INTERDICT.—Held, that an appeal to the Circuit is competent against a judgment in an action of interdict. Opinion—That in all cases an appeal to the Circuit is competent, unless the party objecting can shew that the subject-matter at issue exceeds the sum of £25 sterling; and that the *onus* of proving this lies upon the objector.

THIS was an appeal from the judgment of the Sheriff of Fife, in an action of interdict, at the instance of an heritable creditor against a personal creditor, who attempted to carry off, by pointing, moveables on the ground of the property included in the heritable bond. The pointing was for the sum of £6, interest and expenses; but the pointed articles, it was said, greatly exceeded that amount in value.

No. 82.
Wilson v.
Watson.

Perth.
Oct. 1.
1851.

Appeal.

WATSON, the heritable creditor, applied for interdict against the pointing being carried out, and having obtained an interim interdict, immediately thereafter brought an action of pointing the ground; whereupon

No. 62.
Wilson v.
Watson.

Perth.
Oct. 1.
1851.

Appeal.

the Sheriff, in respect of the pointing of the ground, declared the interdict perpetual, and found the heritable creditor entitled to his expenses.

WILSON, the personal pointing creditor, appealed to the Circuit, and the case was argued before the Lord Justice-Clerk.

GIFFORD, for Watson, objected to the competency of the appeal, on the ground that the action was *ad factum præstandum*, and, as such, not one of the cases reviewable by the Circuit Court under the Jurisdiction Act. He submitted that the competency must be decided by a reference to the conclusion or prayer of the original petition, and that petition contained no conclusion for any specific sum, so as to shew that the subject-matter was under the value of £25, but merely a general conclusion for interdict against the pointing of certain moveable subjects. In support of this objection he referred to *Davidson v. Russell*, Nov. 21, 1812, F. C.; *Wilson v. Addison*, Perth, Oct. 11, 1845, Broun, vol. ii. p. 519.; *Glass v. Thou*, April 24, 1848, Arkley, p. 468, and cases there referred to. The case of *Glass*, was, he submitted, strictly analogous to the present, for there, that which in the schedule of pointing was valued at only £11, was claimed by a third party as his property. The Sheriff sustained the claim of the compeerer, and an appeal by the pointing creditor to the Circuit was found incompetent. Lord Moncreiff held that the claim of the third party for the goods must be viewed as the *summons*, and as its conclusions was not pecuniary, but for delivery of the *ipsa corpora* of the sheep, he was of opinion that the appeal was incompetent, and would have been so though only one sheep had been pointed. The interlocutor dismissing the case as incompetent in *Glass*' case, was pronounced after full argument, and after his Lordship had made *avizandum* to consider the question.

The LORD JUSTICE-CLERK, without calling on the counsel for the appellant, repelled the objection. He held that the Jurisdiction Act, by its terms, imposed no

restriction on the right of appeal, in respect of the nature of the action, provided only that the real value of the subject-matter in dispute did not exceed £25. Nor did the act require that the conclusions of the summons in the case appealed, should be pecuniary, or should bear on its face, or contain materials for shewing, that the value of the subject was under £25. An appeal lay in every case, except where the subject-matter in dispute exceeded £25 in value; and in every case where a party objected to the competency, the *onus* of proving that the value exceeded that sum, lay with the objector. In regard to the case of Glass, and similar cases, his Lordship observed, that he did not think they had been rightly decided, and although a decision by the Justiciary on a certified case would be binding on judges on Circuit, yet he did not think that the opinion of a single judge on Circuit would necessarily be binding on his successors. In the present case, he had no difficulty in repelling the objection.

The note by the Lord Justice-Clerk, annexed to his interlocutor, so far as the objection was concerned, is as follows:—‘It appears to the Lord Justice-Clerk that the objection to the competency proceeds on a mistake as to the question to be decided. Appeal is excluded if the value is above a certain sum. That cannot be shewn in the present or similar cases.’

Appeal sustained.

W. A. TAYLOR, Cupar,—R. WILSON, Cupar,—Agents.

No. 82.
Wilson v.
Watson.

Perth.
Oct. 1.
1851.

Appeal.

HIGH COURT.

Present,

THE LORD JUSTICE-CLERK,

LORDS COLONBAY AND COWAN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Deas*—*G. Young A.D.*

AGAINST

JOHN MOONEY—*Carnegy Ritchie*.

THEFT.—A pannel, from whom certain articles had been purchased, received from the purchaser a one-pound note, in order that he might retain the price, and return the balance. He appropriated the whole sum.—Held, that this was theft of the one-pound note, and not merely of the balance.

JOHN MOONEY was charged with the crime of Theft, especially when committed by a person who has been previously convicted of theft :

No. 83.
John
Mooney.
High Court.
Nov. 17.
1851.
Theft.

IN SO FAR AS, on the 4th day of October 1851, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, in or near the shop or other premises in or near Leith Wynd, Edinburgh, then and now or lately occupied by you the said John Mooney, you the said John Mooney did, wickedly and feloniously, steal and theftuously away take, a bank or banker's note for one pound sterling, the property or in the lawful possession of George Young, labourer, then and now or lately residing with John Leyden, labourer, in or near Leith Wynd, Edinburgh, which was then and there handed or delivered to you, for the purpose of procuring change therefor, and for the taking payment therefrom of twopence halfpenny, or thereby, as the price of a small quantity of potatoes, fish, and whisky, or other articles, which had been furnished by you, or in your said shop or premises, to the said George Young, and of delivering to him the balance, amounting to nineteen shillings and ninepence halfpenny sterling, or thereby : Or OTHERWISE, time and place above libelled, or time above libelled, and at some other place in or near Edinburgh to the prosecutor unknown, you the said John Mooney did, wickedly and feloniously, steal and

theftuously away take, the foresaid balance of nineteen shillings and ninepence halfpenny, or thereby, the property or in the lawful possession of the said George Young; and you the said John Mooney are habit and repute a thief, and have been previously convicted of theft.

No. 83.
John
Mooney.
High Court,
Nov. 17.
1851.
Theft.

The indictment was found relevant without objection.

The pannel pleaded Not Guilty.

Evidence having been led in support of the charge,

The LORD JUSTICE-CLERK, in charging the Jury, observed: 'You may lay aside altogether the second alternative of the indictment. If there was theft at all, it was theft of the one-pound note.'

The Jury unanimously found the pannel Guilty of the theft of the one-pound note, as libelled.

In respect of which verdict, the prisoner was sentenced to be Transported beyond seas for the period of seven years.

HER MAJESTY'S ADVOCATE—*Sol. Gen. Deas—G. Young A.D.*

AGAINST

ROBINA BURNET—*Broun.*

ELIZABETH FISHER—*Carnegy Ritchie.*

AND

WILLIAM MASTERTON.

THEFT—RESET—EVIDENCE—HEARSAY.—Two pannels were accused of stealing two £50 Bank of England notes, and a third was charged in the same indictment with resetting them. The alleged resetter was fugitated for non-appearance. Held, that statements made by him, and a letter written by him on his apprehension in London, in the act of passing one of the stolen notes, were admissible in evidence, to the effect of identifying him as a party whose house the two other pannels were proved to have frequented.

No. 84.
Robina
Burnet and
Others.

ROBINA BURNET and ELIZABETH FISHER were charged with the Theft of Two Fifty-Pound Bank of England Notes; and WILLIAM MASTERTON, designed in the in-

High Court,
Nov. 17.
1851.
Theft.

No. 84.
Robina
Burnet and
Others.

High Court.
Nov. 17.
1851.

Theft.

dictment as 'grocer and spirit-dealer, in or near Saint James Place, in or near Edinburgh,' was charged with Resetting the Notes.

The theft was alleged to have been committed on the Calton Hill, on the 17th or 18th of June 1851.

The pannel Masterton was outlawed for non-appearance. The pannels Burnet and Fisher pleaded Not Guilty.

In the course of the trial, it appeared, that one of the notes, of which the number was known, and payment of which had been stopped at the Bank of England, was presented by Masterton on the 5th July.

JAMES CAMBUS, Cashier of the Bank of England—Deponed, A note was presented at the Bank, on the 5th July. We had information of it as stolen, and stopped it. I put the man into the secretary's office. He gave his name William Masterton.

GEORGE RUSSELL, an Officer of the London Detective Police.—I was in the Bank of England on the 5th July. A man presented this note. I took him into custody; he was afterwards liberated on bail. I was told in his presence that he wrote a letter.

BROWN, for the pannel Burnet, objected, that neither the letter nor the statements of Masterton formed competent evidence against Burnet. Even had Masterton been at the bar, his declaration could not have been received against Burnet; still less could any letter alleged to have been written by him. Besides, the statements of Masterton were liable to the objection of being mere hearsay evidence.

The SOLICITOR-GENERAL, for the prosecution, explained, that his only object in producing the letter, and putting in evidence the statements of Masterton, was to identify Masterton as the party whose shop the pannels Burnet and Fisher frequented. He was quite entitled to prove whatever tended to trace the stolen note from the possession of the pannel to that of Masterton, in whose hands it was identified.

The LORD JUSTICE-CLERK.—The object of the prosecutor is not to make the letter and these statements direct evidence.

BROUN.—If they cannot be made evidence directly against Burnet, can they be made evidence indirectly?

LORD COLONSAY.—This is just evidence explaining how the person apprehended by Russell is identified with William Masterton, keeping a grocery and spirit shop in St James Place, Edinburgh.

The COURT therefore repelled the objection, but held that the prosecutor ought first to establish some connexion or communication between Masterton and Burnet.

The Counsel for the Crown then called—

CHARLES GREEN, *Sergeant of Police*, who deponed,—On the night of the 17th June, I saw the prisoners together at the end of Register Street, about twenty minutes to ten. They are companions. I know the shop of William Masterton, in James' Place. I have seen the pannels in that shop; Fisher oftener than Burnet. I have seen them both separately and together. It was some time before June that I saw them; two weeks or so before.

GEORGE RUSSELL, *recalled*.—Masterton admitted that he wrote that document—the letter in question. He said he was a shopkeeper in Edinburgh, in St James' Place; a grocery and spirit store; and that he had a brother in Edinburgh.

JOHN MASTERTON then identified the letter as being in his brother's handwriting.

The SOLICITOR-GENERAL addressed the Jury on the part of the Crown, and was followed by the Counsel for the pannels Burnet and Fisher respectively.

The LORD JUSTICE-CLERK charged the Jury, intimating an opinion that the case was not proved as against Fisher.

The Jury, by a majority of one, found the charge Not Proven.

In respect of which verdict, the pannels were assoilzied *simpliciter*, and dismissed from the bar.

No. 64.
Robina
Burnet and
Others.
High Court,
Nov. 17,
1851.
Theft.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Deas*—*G. Young A.D.*

AGAINST

WILLIAM RAIT—*Adam.*

INDICTMENT—RELEVANCY—AGGRAVATIONS.—Mode of libelling aggravations, which was found relevant, where the major proposition of the indictment included several charges, to all of which the aggravations did not apply.

WILLIAM RAIT was indicted and accused :

No. 85.
William
Rait.

High Court.
Nov. 17.
1851.

Falsehood,
Fraud, and
Wilful Im-
position; as
also Theft.

THAT ALBEIT, by the laws of this and of every other well-governed realm, Falsehood, Fraud, and Wilful Imposition, especially when committed by a person who has been previously convicted of Falsehood, Fraud, and Wilful Imposition; As also Forgery, especially when committed by a person who has been previously convicted of Forgery; As also, the wickedly and feloniously using and uttering, as genuine, a Forged order or writing, knowing the same to be forged, especially when committed by a person who has been previously convicted of using and uttering, as genuine, forged orders or writings, knowing the same to be forged; As also, Theft, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said William Rait are guilty of the said crimes, aggravated as aforesaid, or of one or more of them, actor, or art and part.

ADAM, for the pannel, objected—Certain crimes were set forth in the major proposition, as being aggravated, and also theft, without aggravations; whereas, the minor charged the panel with being 'guilty of the said crimes, 'aggravated as aforesaid,' and was thus applicable only to the crimes set forth as being aggravated, and not to the theft, which therefore was not relevantly libelled.

YOUNG.—Such is the invariable form in which indictments are drawn in similar cases. *M'Callum*, High Court, March 7, 1836; *Swinton*, vol. i. p. 64.

The COURT repelled the objection, but intimated an opinion, that the indictment might have borne that 'you 'the said William Rait are guilty of the said crimes, or 'of one or more of them, aggravated as aforesaid, in so 'far as, &c.'

Present,

THE LORD JUSTICE-CLERK,

Dec. 8.
1851.

LORDS WOOD, IVORY, COLONSAY, AND COWAN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. DEAS—Young A. D.*

AGAINST

JOSEPH KILGOUR—*Craufurd.*

RELEVANCY—THEFT—FRAUD—BREACH OF TRUST AND EMBEZZLEMENT—HUSBAND AND WIFE.—Held, 1. That it was criminal in a Husband, who, by antenuptial contract, had excluded his right of administration, to appropriate surreptitiously a sum of money, a portion of an heritable bond, forming part of the Wife's tocher.

2. That the Indictment was relevantly laid as a charge of Theft.

JOSEPH KILGOUR was charged with Theft, as also Fraud, as also Breach of Trust and Embezzlement, or one or more of the said crimes :

No. 86.
Joseph
Kilgour.High Court.
Dec. 8.
1851.Theft and
Breach of
Trust.

IN SO FAR AS, an antenuptial contract of marriage, dated on or about the 21st day of March 1849, having been entered into and executed between you the said Joseph Kilgour and Margaret M'Arthur or M'Arter or Jack, now Margaret Kilgour, your wife, whereby the said Margaret M'Arthur or M'Arter or Jack, disposed and conveyed to herself and the child or children of the marriage between you and her, if there should be any, and failing such child or children, to you the said Joseph Kilgour in the event of your surviving her, the whole heritable and moveable means and estate of every description then pertaining, or which should pertain thereafter to her, and which means and estate are described or mentioned in the said contract as then consisting in part of certain dwelling-houses situated in Broad Street, Alloa, the sum of £200, contained in a bond and disposition in security, by John Golder, watchmaker in Alloa, over the dwelling-house and grounds belonging to him, situated at the north-west end of Alloa, two shares in the Steam-Boat Company, a share in the Alloa Gas-Works, the sum of £80, contained in a bond by the Alloa Town Trustees, and a sum of money lying in the Western Bank upon a deposit receipt, but which disposition and conveyance contained in the said contract, is thereby declared to be subject to the conditions, provisions, and stipulations, expressed in the said contract in the following or some similar terms, viz : ' It is hereby agreed upon by both parties,

No. 86.
Joseph
Kilgour.
High Court.
Dec. 8.
1851.
Theft and
Breach of
Trust.

that the said heritable subjects and heritable dobt, and the shares in said Steam-Boat Company and Gas Company, and whole other means and estate presently pertaining to or which shall hereafter be acquired by her, shall, notwithstanding this conveyance, still remain the property of the said Margaret M'Arthur or Jack, and be at her disposal, and she hereby reserves to herself full power and liberty by herself alone, without consent of the said Joseph Kilgour, to assign and dis-
pone, by way of a *mortis causa* deed, testament, or otherwise, her said heritable and moveable means and estate, the shares in said companies and principal sums belonging to her generally and particularly before mentioned, and such means and estate as she may hereafter acquire; and the said Joseph Kilgour renounces, by these presents, all right, title, and interest, he has or might have to the rents or profits of the said heritable property, and of the said sum of £200, and the said shares, and sums of money, principal and interest, either in virtue of his *jus mariti* courtesy, or otherwise, it being farther declared, that the same shall neither be liable to his deeds nor subjected to the legal diligence of his creditors for payment of the debts already contracted, or which shall be contracted, by him, declaring that the said rents, profits, and interest of the said principal sums of money, shall be payable to the said Margaret M'Arthur or Jack, exclusive of the *jus mariti* of her said intended husband, without his consent, and upon her own receipt and discharge therefor; and, in the event of it being necessary to uplift the said sum of £200, and the said shares or sums of money above mentioned, or part thereof, the said Margaret M'Arthur or Jack hereby reserves full power to uplift the same, and to grant receipts and discharges therefor in her own name, which receipts shall be sufficient for the sums, principal and interest, or any part thereof; and she shall be entitled, without the consent of her said husband, to lend out and re-employ the same, and to take the bonds or other securities to be granted therefor, payable to herself: But it is hereby declared, on the other hand, that the whole of the property which shall pertain to the said Margaret M'Arthur or Jack at her decease, in the event of her predeceasing her said intended husband, and which shall remain undisposed of by her, and which shall not be conveyed by *mortis causa* deed or testament to any other party, shall belong, in conformity with the conveyance hereof already made, to the said Joseph Kilgour, her intended husband: And it having become necessary to uplift the foresaid sum of £200, and the said John Golder, watchmaker, the debtor in the said bond and disposition in security, now or lately residing at Douglas, in the parish of Douglas, and county of Lanark, or Janet Golder, his daughter, and now or lately residing with him, or some other person acting for him or on his behalf, having, on the 31st day of May 1851, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, within or near the house

or office in or near Mar Street of Alloa, in the county of Clackmannan, then and now or lately occupied by John Watson, writer there, paid to the said Margaret Kilgour, your wife, or to David Dunsyre Syme, then and now or lately clerk to William Spence, writer in Alloa, as acting for her, and on her behalf, the sum of £200 sterling, consisting of Five Bank or Banker's Notes for Twenty Pounds sterling each, and Twenty Bank or Banker's Notes for Five Pounds sterling each, or consisting of bank or banker's notes of some other description to the prosecutor unknown, to the amount of £200 sterling, being the sum contained in said bond and disposition in security; and the said bank or banker's notes having immediately thereafter, and within or near the said house or office, been delivered and entrusted to you the said Joseph Kilgour, by the said Margaret Kilgour, your wife, or by the said David Dunsyre Syme, in order that you might carry the same from the said house or office straightway to the office or business premises of the Western Bank of Scotland, in Alloa aforesaid, there to be deposited in name of your said wife, and for her exclusive behoof, or you having, then and there, wickedly and feloniously, taken possession of the said bank or banker's notes, upon the fraudulent pretence of counting and thereafter carrying the same for your said wife, straightway to the said office or business premises of the Western Bank of Scotland, there to be deposited as aforesaid, your real object and intention being, fraudulently and feloniously, to keep and appropriate the same to your own uses and purposes, you the said Joseph Kilgour did, time above libelled, in or near the said house or office occupied by the said John Watson, or at or near the said office or business premises of the Western Bank of Scotland, in Alloa aforesaid, or at some part of Alloa between said places, wickedly and feloniously, steal and theftuously away take, the Bank or Banker's Notes above libelled, to the amount of £200 sterling, the exclusive property, or in the lawful possession, of the said Margaret Kilgour, your wife; or otherwise, time and place aforesaid, you the said Joseph Kilgour did, fraudulently and feloniously, and in breach of the trust reposed in you, embezzle and appropriate to your own uses and purposes the Bank or Banker's Notes above libelled, to the amount of £200 sterling, the exclusive property, or in the lawful possession, of the said Margaret Kilgour, your wife.

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CRAUFURD objected to the relevancy of the libel, as charging the husband with having appropriated to himself property forming part of the goods in communion, and thereby having committed theft. The wife was in law *eadem persona* with the husband; and nothing was more certain than that a man could not steal from himself. He did not contend that a husband might not, under such circumstances as the indictment alleged, com-

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mit an innominate offence, or perhaps a charge of fraud might competently be preferred; but there was neither precedent nor authority for holding such *species facti* to amount to theft. It seemed to be settled law, that a wife could not *steal* from her husband; since, in the two cases which were alone known, the charge had been withdrawn, with concurrence of the Court. It was said that, in this case, the *jus mariti* was excluded; but that did not alter the legal principle, if he was right in assuming, that a wife could not steal from her husband. Marriage, in her case, excluded administration, except under the implied *prepositura*, limited and restrained by law. The husband, by his contract, merely renounced what he would otherwise have enjoyed *ex lege*; and it was all the stronger in his favour, that this was a contract of renunciation on his part, whilst, in the case of the wife, she could never have the right *proprio jure*. (Cases of *Becket*, April 26, 1831; Bell's Notes to Hume, p. 23; *M'Leod*, October 14, 1838, Swinton, vol. ii. p. 190; Roscoe's Criminal Digest, 3d edit. pp. 594-5; Russell on Crimes, vol. i. p. 22.) It was a separate question, as to whether the minor was relevantly framed to infer a charge of fraud. There was, however, an objection arising on the score of insufficiency, which applied to this charge, viz. that the minor, being distinct as to the mode in which the alleged theft was said to have been committed, merely used the words 'or otherwise' committed the said offence, without distinct reference to the *modus operandi*, as laid in the charge of theft, or any other specific description of the offence charged. Had it said in 'manner aforesaid,' or used any equivalent words, that might have done, but as a minor to the charge of fraud, as charged in the major, the present indictment was insufficient.

LORD WOOD.—I am of opinion this indictment is well drawn. The bond was, by valid and onerous contract, the property of the wife, notwithstanding the marriage. The money was uplifted, and the charge made is, that

the pannel feloniously stole it. That such an act constituted theft, and that it is properly and sufficiently charged in this libel, I am clear. The argument for the prisoner was twofold: 1st, From the analogy drawn from the case of a wife, who, it is said, cannot steal from her husband. This argument, however, proceeds upon a mistake. No decision to the effect stated has ever been pronounced. The question, no doubt, has been raised, and abandoned; but I by no means concur in holding, that, in no possible case, can a wife steal from her husband. Quite the reverse. Notwithstanding the *communio bonorum*, the property *inter vivos* is in the husband; and I can conceive various cases, wherein appropriation by the wife, for her exclusive use, would be theft. Here, however, the rights and obligations of the parties are defined by express contract; the husband expressly excluded his *jus mariti*. It is said he could not do so, so effectually as to make his own appropriation theft, the property still being, in the eye of law, goods in communion. But, as I have before said, I think this insufficient. If the wife *can* steal, notwithstanding her implied mandate, and there is no decision to the contrary, most clearly the husband can, when he has renounced every implied right, by an onerous obligation. But then, 2dly, It is said that the husband and wife must be regarded as *eadem persona*. But that argument is plainly fallacious. They are so in some things, not so in others. It can never be pretended that a husband cannot be guilty of assault, by striking his wife. This at once, therefore, disposes of that argument in criminal cases. But further: In this case the *object* of the contract was to secure a diversity of interest, notwithstanding the marriage; and this, the law says, may be competently effected, in the manner here adopted, *deliberately* and *knowingly*, on the pannel's part, by *ante-nuptial* contract. That being so, I cannot see how we can refuse to sustain this as a relevant charge of theft. As to the second and minor objection, that the minor is incompetently libelled as a case of fraud, I cannot accede

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thereto. It has been matter of repeated decision, that, in cases where the major is alternative, the minor need not have separate statements to support each proposition.

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LORD IVORY.—I am precisely of the same opinion. The instant that it is admitted, that the property alleged to have been appropriated by the pannel was the property of the wife, the case decides itself; for, if the law empowers a wife to secure to herself a separate right of property, independently of her husband, it follows, as a necessary consequence, that such right must be protected. It is said, however, that husband or wife, in contemplation of law, constitute one person; and that, as a man cannot steal from himself, so neither can he steal from his wife. This, however, is at once met by the provisions of the contract, in so far as the charge against the pannel is concerned; but the express object of that was to exclude the operation of common law in favour of the husband. Whether, in the absence of such contract, either of the goods falling properly within the ordinary operation of law, as goods in communion between the spouses, appropriation by one or either would be theft as against the other, I do not wish to determine; and on that point I reserve my opinion. But nothing has ever been laid down decisive on the doctrine propounded by Mr Craufurd, that, in no case, can the wife steal from the husband. The true question is, In whom did the right of property of the subject-matter of this charge exist? Plainly in the wife; and it would have been theft as against her, and not as against the husband, that the charge would have been preferred, had the crime been committed by a third party. If so, is it less a crime that the husband is the criminal? and can his relation to the party injured alter the character of the offence? I think not; and I therefore agree with Lord Wood, in holding this indictment to contain a good charge, and that it is relevantly framed.

LORD COLONSAY.—The crime charged in this indict-

ment is that of theft, and, I think, competently and relevantly preferred. The property in question was legally vested in the wife. The abstraction of property, in the manner libelled, is plainly theftuous; and I cannot see, assuming the party to be guilty of any criminality, that the party is less a thief because he is a husband, when it plainly appears that he had no right of property in the goods. I am very averse to make new law; but, on the other hand, I am equally averse to restrict the vigour of the common law from reaching new modes of committing old offences. As to the English cases which have been quoted, and the remark made thereon, that we should be slow to run counter thereto, I think such remark should be confined to apposite cases, such as the construction of statute common to both ends of the island. But, with regard to the exposition of common law, no such rule holds; and I care not, in the extrication of any case, arising under our own law, to inquire what is the common law of England relative thereto. If we are satisfied our own law is right, we must adhere to it; and if there be any inconvenience arising from the difference, it is for them to change their law, and not us ours.

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LORD COWAN.—I am entirely of the same opinion; but, after the luminous exposition of the law which has been given by your Lordships, it is unnecessary for me to add anything.

The LORD JUSTICE-CLERK.—I entirely concur. I altogether lay aside the cases which have occurred, of a wife stealing from her husband, inasmuch as the specific facts of each of those cases may raise a very different one from that now before us. In the case of Becket, the indictment was disproved by the evidence of the wife; that of M'Leod was, I think, a clear case of theft. But every case must be judged on its own merits. Mr Craufurd asked, if a wife pawned her husband's clothes for drink, if it would be theft? I do not think it necessary to determine this. The ordinary case of pawning by a third party, to whom goods have been

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entrusted for a specific purpose, is different from that of a wife who is entrusted with the care of them, and whose exigencies may depend as much on her husband's conduct as her own; not that I should hesitate, because the goods might be said to be within the *communio bonorum*; on the contrary, I think that principle comes into effect on the death of one of the spouses, and I remember Lord Moncreiff expressed an opinion to the same effect. This, however, is unnecessary to consider in the present case. Confessedly these goods were separate property in the wife, by means of an onerous deed, viz. an ante-nuptial contract of marriage, to which the law attaches its highest sanction and protection. Now, could the husband have stolen the deed itself? If so, why could he not steal the property thereby conveyed? It is admitted, that appropriation of such property might form the ground of a charge of fraud; but if so, why not of theft? The *nomen juris* depends altogether, and exclusively, on the *species facti*. As to the second point, I have always regretted that the Court should have allowed the practice to creep in, of having one minor only, where two charges are preferred in the major. But that practice has now become so inveterate, that we cannot attempt to alter it.

The Court therefore repelled the objection, and found the indictment relevant.

Jan. 10.
1852.

The diet having been again called this day, the pannel pleaded Not Guilty.

Jan. 24.

The Jury found the pannel Guilty of Theft, as libelled. Sentence was deferred until this day, when the Court sentenced the pannel to be imprisoned for the period of fifteen months.

HER MAJESTY'S ADVOCATE—*Sol. Gen. Deas*—*G. Young A.D.*
Clark A.D.

AGAINST

JOHN MOONEY—*Mackonochie*.

STATUTE 2D WILL. IV. c. 34—BASE COIN—UTTERING—RELEVANCY.

—A Counterfeit Coin was substituted for a genuine shilling, received in change, and another genuine shilling demanded in exchange for it,—Held, that this was sufficient uttering under the statute 2d Will. IV. c. 34.

Where there were two charges of contravention of this statute, the second of which was charged to have been committed 'time above libelled,' *observed*, that if the offence of repeated uttering within the space of ten days, was intended to be charged, the time of the second uttering should have been more distinctly stated—and that charge accordingly withdrawn.

At the Glasgow Autumn Circuit, 1851, John Mooney was indicted and accused—

THAT ALBEIT, by an act passed in the second year of the reign of his late Majesty King William the Fourth, Chapter thirty-four, intituled 'An act for consolidating and amending the laws against offences relating to the Coin,' it is enacted, by section seventh of the said act, 'That if any person shall tender, utter, or put off, any false or counterfeit Coin, resembling, or apparently intended to resemble or pass for any of the King's current gold or silver Coin, knowing the same to be false and counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off, any false or counterfeit Coin, resembling or apparently intended to resemble or pass for, any of the King's current gold or silver Coin, knowing the same to be false and counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit Coin, so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit Coin, resembling or apparently intended to resemble or pass for, any of the King's current gold or silver Coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off, any more or other false or counterfeit Coin, resembling or apparently intended to resemble, or pass for, any of the King's current gold or silver Coin, every such offender shall,

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in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding one year :—AND ALBEIT, by the laws of this and every other well governed realm, Falsehood, Fraud, and Wilful Imposition ; as also Falsehood and Fraud, are crimes of an heinous nature, and severely punishable : YET TRUE IT IS AND OF VERITY, That you the said John Mooney are guilty of the crimes and offences set forth in the said section of the statute above recited, or of one or more of them, actor, or art and part, and of the crimes at common law above libelled, or of one or other of them, actor, or art and part : IN SO FAR AS, (1.), on the 3d day of August 1851, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, in or near the shop or premises, in or near Main Street of Rutherglen, in the parish of Rutherglen, and County of Lanark, then and now or lately occupied by John Dunn, then and now or lately a spirit dealer, residing there, you the said John Mooney did, wickedly and feloniously, tender, utter, or put off, a false or counterfeit Coin, resembling, or apparently intended to resemble or pass for, a shilling piece of the Queen's current silver Coin, you knowing the same to be false and counterfeit ; and this you did, by then and there delivering or tendering the same to Margaret Turnbull or Dunn, wife of, and then and now or lately residing with, the said John Dunn, and then and there, wickedly and feloniously, falsely, fraudulently, and wilfully, representing and pretending to the said Margaret Turnbull or Dunn that she had, then and there, delivered to you the said false and counterfeit Coin, instead of a genuine shilling piece, as part of the change which you were entitled to receive from her out of a half-crown piece or other coin, which you then and there delivered to her in payment of a gill or other small quantity of whisky, which had been then and there purchased by you, she having paid or given to you your change aforesaid, amounting to two shillings and threepence sterling or thereby, in good or genuine money, as you well knew, and then and there demanding, upon the false and fraudulent pretence aforesaid, a genuine shilling piece, or some other coin or coins equivalent in value thereto, from the said Margaret Turnbull or Dunn in exchange for the said false or counterfeit coin, by all which, or part thereof, the said Margaret Turnbull or Dunn was deceived and imposed upon, and induced, then and there, to deliver to you in exchange for the said false and counterfeit coin, a genuine shilling piece, the property, or in the lawful possession of the said Margaret Turnbull or Dunn, or of the said John Dunn, which genuine shilling piece you did, then and there, fraudulently receive and appropriate to your own use and purposes : LIKEAS, (2.) time above libelled, in or near the shop or premises, in or near Main Street of Rutherglen aforesaid, then and now or lately occupied by Elizabeth Jobbs or M'Gurk, a widow, then and now or lately a spirit dealer there, you the said John Mooney

did, wickedly and feloniously, tender, utter, or put off, a false or counterfeit Coin, resembling, or apparently intended to resemble or pass for a shilling piece of the Queen's current silver Coin, you knowing the same to be false and counterfeit, by then and there delivering, or tendering the same to the said Elizabeth Jobbs or M'Gurk, and then and there wickedly and feloniously, falsely, fraudulently, and wilfully, representing and pretending to the said Elizabeth Jobbs or M'Gurk, that she had then and there delivered to you the said false or counterfeit Coin, instead of a genuine shilling piece, as part of the change which you were entitled to receive from her out of a half-crown piece or other Coin, which you had, then and there, delivered to her in payment of a gill or other small quantity of whisky, which had been then and there purchased by you, she having paid or given to you your change aforesaid, amounting to two shillings and threepence sterling or thereby, in good or genuine money, as you well knew, and then and there demanding, upon the false and fraudulent representations and pretences aforesaid, from the said Elizabeth Jobbs or M'Gurk, a shilling piece or some other Coin or Coins equal in value thereto, in exchange for the said false or counterfeit Coin; and this you did with intent to cheat and defraud the said Elizabeth Jobbs or M'Gurk, and in order to induce her to give you a shilling piece, or other Coin or Coins equal in value thereto, in exchange for the said false and counterfeit Coin, and defraud her thereby.

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MACKONOCHE, for the pannel, objected that the crime set forth in the minor proposition, did not amount to the charge of uttering in the major, in so far as the coin was not said to have been uttered as genuine; but to have been issued with an acknowledgment of its base and counterfeit character.

LORDS COLONSAY and COWAN certified the case to the High Court of Justiciary.

The diet having been called this day,—

MACKONOCHE, in support of the objection, referred to the analogous case of forgery, where the statutes expressly provide, that in order to constitute the crime, the forged document must be passed as genuine, and contended, that the same principle must hold in such cases as the present. To the rule stated as to forgery, there was only one exception, viz.—where coin or notes are transferred as false from one accomplice to another; but this exception had no analogy to the present case, as there was here no

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deliberate intention to defraud the revenue. The party to whom the coin was issued was warned of its counterfeit character, and bound therefore to destroy it.

The SOLICITOR-GENERAL and CLARK, for the prosecution,—It is not necessary that the base coin should be uttered as genuine. It is sufficient to constitute the crime charged if the resemblance of the counterfeit to the genuine coin is made use of to defraud the lieges.—*John Alchorne*, March 12. 1830, Bell's Notes, p. 58; *William Cooke*, January 7. 1833, *ibid*.

LORD COWAN.—I scarcely think the case of Alchorne rules the present. It does not appear that any objection was stated to the indictment in that case—and that being so, I do not see that the Court is thereby foreclosed from considering the objection when it is stated, more especially under an important statute like this. At present, I rather think, looking to the words of the act, that it is of the essence of the crime that the false coin be passed off as genuine.

The LORD JUSTICE-CLERK.—I do not see any difficulty. In the *first* place, the words of the act contain no declaration that the base money shall be passed off as genuine; and, *secondly*, the object in every one of these cases is to get the value of the real coin in return for the counterfeit; and in whatever form, or by whatever means, you do pass off the counterfeit, if you get the value, you commit the crime. The word *resembling* does not apply to the object with which the coin is passed, but is merely descriptive. Here the object of putting off the false coin was to get the value of the real coin, by pretending that the former was one which the pannel had got from the other party. As to the objection, that this was not putting off, I shall only say, that I have tried many cases of a similar nature without objection; and if in any other such an objection had been stated, I should have held, as I do now, that it must be repelled. It is important to observe, that the case of Cooke was decided in 1833, one year after the passing of this act, when that statute was

most carefully considered, with a view to the right construction of it. As to the other statutes, I only say that we cannot import the construction of other statutes by implication into this act, and hold that here the words *putting off*, mean putting off as genuine, because that is specially mentioned in the forgery acts, and is necessary under these acts to the commission of that crime. We cannot apply these statutes to the present case.

LORD WOOD.—I am of the same opinion. I do not hold that, because, in 1833, an indictment, containing a charge similar to the present, but which also contained another charge, went without objection to the jury, therefore this is a decided point; but I do think it of importance, looking to the date of that case, that such an indictment did pass without objection; and the matter is rendered stronger by what your Lordship says, that you have frequently tried such cases without objection. Then, it is very important, that the statute does not say the base money is to be passed as genuine; because if these words are not to be found there, it is a reasonable inference, that the words *as genuine* are not necessary to make an indictment relevant. But, then, the question is, does the statement in the minor satisfy the provision of the statute? Now, what does the statute say—‘false or counterfeit coin, resembling, or apparently intended to resemble or pass for, current coin,’ knowing the same to be false or counterfeit. Now, all these words are satisfied by the minor of the present indictment, for the pannel got the value of a good shilling by the resemblance of the counterfeit coin to a shilling, and so he passed off his bad one. He did therefore tender, offer, and put off a counterfeit coin; and if the insertion of the words ‘as genuine’ is unnecessary, then he committed the statutory crime. As to the expression ‘resembling,’ I agree with your Lordship that it is intended merely to be descriptive.

LORD IVORY.—I should like to consider the case.

The case was continued till this day.

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LORD IVORY.—When we look at the words of the act, I am quite satisfied that the indictment is good. The act is a consolidating act, and the decisions under it apply to the whole kingdom. In England, it has been decided —*Frank*, 1 Russell on Crimes, 78, 3d ed.—that the word ‘uttering’ may bear the signification given to it here, and that seems to me conclusive.

LORD COLONSAY.—I am of the same opinion. When this case was before us at Glasgow, we were not aware that any cases had occurred of a similar nature, and therefore thought it right to reserve it for the consideration of your Lordships; but it appeared to me then, as it still does, that the decision must depend on the meaning attached to the words of the statute. The question is, whether the expression ‘uttering,’ without any adjuncts, is to be held to cover more than the passing off of base money as genuine. In its own meaning, I think the expression is wider than that. The statute now before us does not use the words ‘as genuine,’ and the indictment sets forth circumstances which, I think, come within the expression ‘uttering.’ No doubt, everything which may, in one sense, be called uttering, is not uttering under the statute. If I give over a base coin to the Master of the Mint, that is not uttering in the sense of the statute. But I have little difficulty on that ground, because I think the present case truly comes within the meaning of that statute. The *sixth* section is directed against all trafficking whatsoever in base coin; and the party here is undoubtedly in possession of a coin which comes within the description of the statute, as resembling a coin of the realm, and he confessedly intends to pass that off instead of a genuine coin. He avails himself of that resemblance to get the value of the genuine coin, which it resembles. By reason of that resemblance, he substitutes the base for a true coin, and thus puts the base coin into circulation. This is a fraudulent dealing with the coin of the realm, which I think clearly brings the case within the meaning of the act. There is another point which I

should like to mention: This section of the act quoted refers to two crimes—the uttering of bad coin, resembling good silver coin; and again, the uttering such a second time within ten days. The indictment does not state which of these two things the pannel is charged with. It merely says that the pannel is guilty of the offences set forth in the section, or of one or more of them. But if it is intended to charge the second statutory offence, the time at which the second uttering took place should have been stated. No doubt the indictment says, ‘time above libelled,’—but this cannot mean at the very same moment, because the places are different. It appears to me that the indictment should have stated the precise time to which it refers.

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LORD COWAN.—This appears to me one of those cases in which the authority of the law of England ought to have great weight with us; and, accordingly, it appears to me, that the decision in the case of Frank truly removes all the difficulty which I should have felt had this been an open question. That case raised the very point now before us, for the words there were, ‘uttering or tendering in payment,’—and the question was, what was the meaning of *uttering*, apart from *tendering*; and the view taken was the same as that expressed by your Lordships. Though that is an old case, it has ruled the law up to the present time, and is referred to as an authoritative decision. I agree, therefore, in the construction which your Lordships have put on the act.

The SOLICITOR-GENERAL, by leave of the Court, struck out the words ‘or of one or more of them.’

The COURT, therefore repelled the objection, and found the libel relevant; but, on the motion of the Advocate-Depute deserted the diet *pro loco et tempore*.

ALEXANDER M'DONALD, Suspender—*Craufurd*.

AGAINST

WILLIAM LYON and JAMES MAIN, Respondents—*Mure—Watson*.

- SUSPENSION—IMPRISONMENT—POLICE—WARRANT.—Held, 1. That it is the duty of a Police-officer, who apprehends a person without a warrant, to take him before a magistrate, for examination, within as short a period as practicable.
2. Where a delay of sixty hours had intervened between a party being so apprehended and being taken before a magistrate, the Court granted liberation.

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M'Donald
v. Lyon
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Suspension.

THIS was a Bill of Suspension and Liberation, brought under the following circumstances :—

The respondents, who were respectively a police-officer at Kirkintilloch, and one of the rural police of the county of Dumbarton, were called, during the night of 11th August 1851, by one Milligan, to apprehend the suspender, on a charge of having broken open Milligan's house, and assaulted himself and wife. It appeared that one of the respondents had been awakened by the noise occasioned by the suspender, in his endeavours to obtain an entrance into Milligan's house. They accordingly apprehended the suspender at once, without any warrant, and confined him in a room below the Court-house.

The following day, the 12th of August, the Baillie Court was held at Kirkintilloch, and also a Small-Debt Court, presided over by the Sheriff.

The suspender was not taken before either of these tribunals, but kept incarcerated until Wednesday the 13th August, when he was taken to Dumbarton, and brought before the Sheriff, who ordered his discharge.

On the same day, a bill of suspension and liberation was presented, on which Lord Cockburn granted interim liberation, on caution being found to the extent of £5.

CRAUFURD, for the suspender,—admitted that the original apprehension might be lawful without a warrant; but the subsequent detention, for so long a period, before taking him before a magistrate, was illegal. By the 3d and 4th William IV. c. 46, under which the burgh officer acted, parties so apprehended were required to be brought before a magistrate within twenty-four hours; and at common law it was clear that prolonged imprisonment without a competent warrant, was an unwarranted act on the part of the police. In this case, there was no excuse arising from difficulty in taking the party before a magistrate; besides which, the place of imprisonment was an illegal one.

MURE, for the respondents.—The offence with which the party was charged, being of a more serious nature than those ordinarily tried before the Bailie Court, it was thought advisable that the case should be sent before the Sheriff. This at once relieved Lyon, who had no jurisdiction beyond the burgh of Kirkintilloch; and, in so far as the respondent Main was concerned, he had used every means in his power to obtain for the suspender an immediate hearing. He had been engaged at a criminal court in Stirling on the day of apprehension; and on the following day he had mentioned the matter to the Sheriff, when holding the Small-Debt Court, when it was arranged that the suspender should be taken to Dumbar-ton on Wednesday, which was accordingly done. In such circumstances, the respondents had done all in their power to insure a speedy trial, and the bill would fall to be refused. The place in which the suspender was detained, although not part of the jail, was ordinarily used as a lock-up.

The LORD JUSTICE-CLERK.—There can be no doubt in this case. I do not go so much upon the statute 3d and 4th William IV. which prescribes twenty-four hours as the longest period during which a person may be detained (if apprehended without a warrant), without being taken before a magistrate. That is only intended to define a

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limit which may not be exceeded, and is not at all intended to free the policeman from the obligation incumbent on him at common law, namely, to take the party before a magistrate at the earliest practicable opportunity. Here the suspender was apprehended at an early hour on Monday morning, and confined, not in a prison, but in a room under it, during the whole of that day. It is said that one officer was obliged to go to Stirling; but if so, why did not the other insure his being taken before a magistrate? It is not pretended that the charge was one that would have been incompetent to have been preferred before the Bailies; but, even had it been, it was the duty of the other officer either to have taken him to Dumbarton himself, or obtained the assistance of special constables for that purpose. The idea of keeping him in jail from Monday morning to Wednesday afternoon is preposterous; and I would not have thought it possible that such a delay could have occurred. I think that twenty-four hours would have been too long, under the circumstances. I think, therefore, that we must suspend, not on the ground that the constable had no warrant to apprehend—on the contrary, I hold that a constable, called up in the night, in consequence of a brawl in the street, is entitled, without a warrant, to seize any person whom he shall find engaged therein; but then, for that very reason, he must, as soon as possible, bring his prisoner before a magistrate, in order that the magistrate may decide whether he will at once dispose of the case himself, or send the culprit to the Sheriff.

LORD COLONSAY.—I am of the same opinion. Some little difficulty is made from the circumstance that the suspender was discharged before Lord Cockburn's warrant reached Dumbarton; but that seems to me immaterial. We must look at the case as though we were deciding it at the time when the original petition was presented to Lord Cockburn, and the pannel was still in custody; in which case there could be no doubt what course we

should pursue : most undoubtedly we should have granted liberation.

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The other Judges concurred, and passed the Bill of Suspension.

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Suspension.

ALEX. HAMILTON, W.S.—JOHN FORRESTER, W.S.—Agents.

ALEXANDER WATT, Suspender—*Logan*.

AGAINST

ANDREW HOME, Respondent—*Craufurd—Millar*.

INDICTMENT—THEFT—EMBEZZLEMENT—BREACH OF TRUST—RELEVANCY.—Held, that where yarn is given to a workman, for the purpose of being woven into a web, he is guilty of theft, if he appropriate the yarn to his own use.

BURGH COURT—COMPETENCY.—Held not to be a good objection to the sentence of a Burgh Court, that the party who acted as Assessor to the Magistrate was also joint Procurator-fiscal for the county.

THIS was a Suspension of a Sentence of the Burgh Court of Forfar, whereby a sentence of six months' imprisonment was imposed on the suspender.

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This conviction took place before the Magistrates, on a charge, setting forth that the suspender was guilty of theft, 'in so far as, on the 26th day of May 1851, or about that time, the said Alexander Watt, having received from James Moffatt, residing in Victoria Road of Forfar, and warehouseman to Charles Lucas and Company, manufacturers in North Loan of Forfar, from their premises in the north end of the North Loan of Forfar, in the burgh, parish, and county of Forfar, a certain quantity of yarn and tow for woft and weft, to be woven into a web, as therein mentioned, did, wickedly and feloniously, time and place foresaid, theftuously steal and away take the said quantity of flax, yarn, and tow, the property of, or in the lawful possession of, the said

Suspension.

No. 89. ' Charles Lucas and Company, or the said James Moffatt,
Watt v. ' their warehouseman, or one or other of them.'
Home.

High Court. LOGAN, for the suspender, objected to the conviction,
Dec. 8. inasmuch as the joint Procurator-fiscal had acted as
1851. assessor; but it appearing that the party in question was
Suspension. fiscal for the county only, this objection was overruled.

He then maintained that the charge was insufficient and irrelevant, inasmuch as the *species facti* set forth did not amount to the crime of theft, however this might have supported a charge of breach of trust or embezzlement. Here the material was given to be taken away and manufactured off the premises, and returned, not in *forma specifica*, but in the shape of a manufactured article. Had he woven the materials before appropriation, it would not have been theft, because the species would have been changed. But, if so, neither was the taking of the yarn theft, in the circumstances. Suppose one man in the country to borrow a quantity of yarn from a fellow workman, being short himself, would both be guilty of theft? Such cases were of frequent occurrence; and it was not alleged that the yarn given to the suspender was of any peculiar quality or value. (Cases of *Brown*, Swinton, vol. ii. p. 394; Bell's Notes, p. 9; *Bradley*, 6th February 1850, *ante*, p. 301.)

CRAUFURD.—The yarn was not woven, so that no change of species had taken place. It was given for a special purpose; and a felonious appropriation of property, under such circumstances, had been latterly held to be theft.

LORD WOOD.—I think this charge of theft a good charge, and relevantly framed. The yarn was given to the suspender, for a special purpose, viz. to be woven into a web, and then returned. Instead of weaving it, he appropriated it. Whether it would have made any difference had he woven it before taking it for himself, I do not say; but that was not done. I cannot see any sound distinction between this case and that of *Brown* and others. The appropriation of an article entrusted for a

special purpose only, and then to be returned, has been repeatedly held to be theft. That is just this case. The yarn was to be returned, though in the form of web. Many cases may be put illustrative of this: as, if a man is entrusted with a horse to sell, and to deliver the price to his master, could there be any doubt that it would be theft, equally whether he appropriated the horse before sale, or the price afterwards. In the one case it would be theft of the horse, and in the other of the money.

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LORD IVORY.—I concur. I cannot distinguish between this case and those put by Lord Wood. The yarn was given for a special purpose; and in violation of the obligation under which he received it, the suspender took it for himself. There is a plain distinction between such a case as the present and the case of a pledge. There the pledger parts with the property in the goods, and the broker acquires, by force of special contract, a *proprium jus* in them; so that not only cannot the pledger redemand them, except on repayment of the loan, but he may even steal them from the pawnbroker. This, however, is a totally different case.

LORD COLONSAY.—I concur. Perhaps there is no part of our law which is more involved in obscurity, as propounded by our elementary writers, than the distinction between breach of trust and theft. These matters have, however, been rendered more distinct of late; and I think the present case one of theft. The property was given for the special purpose of being returned, after a certain operation had been performed upon it. It was not subjected to that operation, but appropriated to the party's own use. I think this constitutes theft.

LORD COWAN.—I am of the same opinion on the facts, as stated. At the same time, I do not wish to commit myself to holding, that it would have made no difference in the nature of the offence, had the yarn been actually woven before the party took it. That point, however, does not occur here, and I agree with the rest of the Court.

No. 89. The LORD JUSTICE-CLERK.—I am of the same opinion.
 Watt v. In such cases as this, I am always glad to hear the opi-
 Home. nions of my brethren ; because, although the distinction
 High Court. between theft and breach of trust seems very much bro-
 Dec. 8. ken in upon by recent decisions, I have ever been of
 1851. opinion, that theft, under trust, was a known crime,
 Suspension. and that the property being under trust, constituted
 the offence an aggravated charge of theft. I have also
 been long of opinion, that we were too much in the
 habit of regarding such offences as embezzlement, and not
 theft ; and that breach of trust constituted the former
 crime, and not the latter. However, about the year
 1830, a series of cases began, in which the true nature of
 the crimes was carefully considered, and which led to a
 more accurate exposition of the law. One of the most
 frequent of these cases was, that of a person having
 handed over property to another, for a special purpose,
 defined by the owner, and for no benefit to the recipient
 except remuneration for his skill and trouble. In such
 cases, it could make no distinction where the work was
 to be performed, whether in the house of the employer
 or the employed. Neither can it be held to make any
 difference here, whether the weaver, when he got the
 yarn, was to weave it on his master's premises, or at his
 own home. He had it for a special purpose, as his mas-
 ter's servant, and had no separate possession of his own.
 Without entering into any niceties, as to whether there
 is any difference between custody and possession, it is
 enough for the present case to say, that I hold the work-
 man is just the hand of the master, for the purpose of
 temporary keeping and safe return ; and that, in such
 circumstances, if he make away with the article, he is
 guilty of theft. Even substitution of a similar article
 would be against the honesty of the transaction ; for
 whilst, in some cases, it might be as good, in others it
 might not, and the whole value of the manufacture
 might depend upon the use of the identical article given.
 It is therefore necessary to be very explicit on this point,

more especially if, as hinted, workmen are in the habit of lending each other yarns. Whilst I have no doubt this case is one of theft, in so holding, we do not interfere with the case we recently decided, arising out of pledge. In that case there was a special contract between the parties, and the rights arising therefrom were totally different from anything here. In such a case, embezzlement, or breach of trust, under the special contract, is the appropriate *nomen juris*.

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The Bill of Suspension was accordingly refused, with expenses.

WOTHERSPOON & MACK, S.S.C.—SANG & ADAM, W.S.—Agents.

Present,

THE LORD JUSTICE-CLERK,

LORDS COCKBURN AND IVORY.

JOHN SIMPSON, Suspender—*Ogilvy*.

AGAINST

ALEXANDER CRAUFORD and GEORGE DILL, Respondents—*Penney*.

SUSPENSION—STATUTE 2D and 3D WILL. IV. c. 68—WARRANT.—A conviction under the 2d Section of the Act 2d and 3d Will. IV. c. 68, set aside, in respect that the warrant for citing the accused did not bear that it proceeded on the oath of a credible witness, in terms of § 11 of the statute.

ON the 1st December, the respondents, ALEXANDER CRAUFORD, writer in Lauder, and GEORGE DILL, residing there, joint procurators-fiscal before the Justice of Peace Court for the district, presented a petition and complaint, founding on the act 2d and 3d Will. IV. c. 68, § 2, intitled, 'An act for the more effectual prevention of tres-

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‘ passes in pursuit of game in that part of Great Britain
‘ called Scotland.’¹

The petition set forth, ‘ That notwithstanding of said
‘ act, John Simpson, farm servant, now or lately residing
‘ at Huntington, in the parish of Lauder, and county of
‘ Berwick, has been guilty of the said crime specified in
‘ the said statute, actor, or art and part.’ The petition
concluded with a prayer to the Justices to grant warrant
to apprehend the said John Simpson, and to bring him
before any one or more of them, to answer the complaint,
and for the imposition of the statutory fine of £5, with
expenses, and failing payment, for imprisonment for a
period not exceeding two calendar months.

Following on this petition a warrant was granted in
these terms :—

‘ *Lauder, 1st December 1851.*—Having considered the
‘ foregoing petition, grants warrant to constables of Court
‘ for serving a copy thereof, and of this deliverance, upon
‘ the therein designed John Simpson, and for citing him
‘ to appear personally, to answer to it, within the Town-

¹ For Section Second, see *ante*, p. 463.

Section 11 enacts, ‘ That the prosecution for every offence punishable
‘ by virtue of this act, shall be commenced within three calendar months
‘ after the commission of the offence; and that where any person shall be
‘ charged on the oath of a credible witness with any such offence before
‘ a Justice of the Peace, the Justice may summon the party charged
‘ to appear before himself, or any one or two Justices of the Peace, as
‘ the case may require, at any time and place to be named in such sum-
‘ mons; and if such party shall not appear accordingly, then (upon proof
‘ of the due service of the summons, by delivering a copy thereof to the
‘ party, or by delivering such copy at the party’s usual place of abode
‘ to some inmate thereat, and explaining the purpose thereof to such
‘ inmate) the Justice or Justices may either proceed to hear and deter-
‘ mine the case in the absence of the party, or may issue his or their
‘ warrant for apprehending and bringing such party before him or them,
‘ as the case may be; or the Justice before whom the charge shall be
‘ made, may, if he shall have reason to suspect, from the information
‘ upon oath, that the party is likely to abscond, issue such warrant in
‘ the first instance, without any previous summons.’

' hall of Lauder, upon Wednesday the 10th day of
' December current, at 12 o'clock noon, and for citing
' both parties for the same time and place.

(Signed) ' A. VALENCE, J. P.'

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In obedience to this citation the suspender appeared, and after some procedure, was convicted and sentenced on the 10th December, to pay a penalty of £2, 10s. with 17s. 6d. of expenses, failing which, to be imprisoned for two months.

A bill of suspension and liberation having been presented,

OGILVY, for the suspender, pleaded, *inter alia*, that the whole proceedings were irregular and incompetent, and must be quashed and set aside, in respect that the warrant for the citation of the suspender did not bear to proceed on the oath of a credible witness, as required by § 11 of the statute. This was a statutory proceeding, and must be regulated strictly by the provisions laid down in the statute.—*Smith v. Forbes*, High Court, 22d July 1848, Arkley, p. 508; *Russell v. Lang*, High Court, 1st June 1844, Broun, vol. ii. p. 211.

PENNEY, for the respondent, argued, that the rule prescribed by § 11 of the statute was applicable only where the proceedings took place in the absence of the accused. Here the suspender voluntarily attended the citation.—*Philip v. Earl of Rosslyn*, 14th June 1833; *Scottish Jurist*, vol. v. p. 433. Besides, in *Smith's* case, the warrant granted was for apprehension, the petition also being founded on § 1 of the statute.

The LORD JUSTICE-CLERK.—There is no doubt that the Court must give effect to this suspension. The proceeding is entirely under the statute, and the rule laid down in § 11 is binding. There is no room for the construction that it applies only to cases in absence. The case of *Philip v. Earl of Rosslyn* was brought under the notice of the Court in *Smith v. Forbes*, and I remarked then that the circumstances of these cases were quite different. Lord Rosslyn had seized the boy, and he was

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kept in a cellar for the night ; he was afterwards tried under Section 1 of the act.

LORDS COCKBURN and IVORY, the other Judges present, concurred.

The Court suspended and liberated, with expenses.

JOHN COSENS, W.S.,—GIBSON-CRAIGS & Co., W.S., Agents.

GLASGOW WINTER CIRCUIT.

Dec. 22.
1851.

Judge—LORD COLONSAY.

HER MAJESTY'S ADVOCATE—*Fordyce A.D.*

AGAINST

WILLIAM CAMERON—*Hill.*

THEFT—AMOTIO.—In a charge of stealing a watch, the owner deponed that the pannel made a snatch at the guard-chain by which the watch was secured, so as to draw it out of his pocket ; but the chain was not broken, nor was anything actually carried off. Question, whether this amounted to theft ?

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William
Cameron.

Glasgow.
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1851.

Theft.

WILLIAM CAMERON was charged with Theft, especially when committed by a person who has been previously convicted of theft :

IN SO FAR AS, on the 6th day of October 1851, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, in or near Miller's Place, in or near Saltmarket Street of Glasgow, you the said William Cameron did, wickedly and feloniously, steal and theftuously away take from the pocket or person of Archibald Dove, upholsterer, then and now or lately residing in or near New Wynd, in or near Glasgow, a silver or metal watch, the property, or in the lawful possession, of the said Archibald Dove : And you the said William Cameron have been previously convicted of theft.

The pannel pleaded Not Guilty.

ARCHIBALD DOVE deposed: I know James Aitken. I was with him on Monday the 6th October, in the evening, in the Saltmarket. I saw a crowd at the corner of Miller's Place. I approached the crowd. I saw the prisoner there. He was at my left side, rubbing against me. I had a watch and guard-chain. The prisoner made a grip at the chain, and drew the watch out of my pocket. I caught it, and retained it. I called "Stop thief." The prisoner ran. Aitken and I followed. He was caught at the corner of a close by a policeman.

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Theft.

JAMES AITKEN.—I was with Archibald Dove, on the 6th October, at the corner of the Saltmarket. He had a watch and chain. At Miller's Place there was a crowd. Dove went into the crowd. I saw the prisoner near Dove, and press close upon him, and make a catch at the chain, and give it a pull. I did not see whether he got the watch or not. I observed the chain in Dove's hand. Dove called "Stop thief." We pursued the prisoner. A constable caught him.

This constituted the evidence on the part of the prosecution, with the exception of the previous conviction against the pannel.

HILL, for the pannel, argued that, as the chain was not broken nor the watch detached, this did not amount to the crime of theft, but merely to an attempt to commit theft, which was not an indictable offence.

FORDYCE, for the Crown, replied,—In cases of theft, the *amotio* was sufficient, when the thing had been moved, however slightly, from its place. Here the watch was removed from the pocket of the owner. It was of no importance that the chain was not broken, nor the watch carried off, any more than where a thief, after removing things from a shelf or press, is caught and prevented from carrying them away. The case of *Conolly*, Ayr, October 1849, where a precisely similar objection was repelled, ruled this case.

LORD COLONSAY, in charging the Jury, said that, although he was prepared to state the general principle of law which guided the point, still he thought it a question for the Jury, on the whole evidence, to say whether there was sufficient proof that the pannel had at any time got complete possession of the watch. He did not think it was enough to say that the pannel had got the chain in

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his hand. Were the Jury satisfied that the watch was removed by the pannel from the pocket, or had he it in his hand for any period, however short?

Theft The Jury found the charge Not Proven,

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1851.

Judge—LORD COLONSAY.

HER MAJESTY'S ADVOCATE—*Fordyce A.D.*

AGAINST

EDWARD YATES and HENRY PARKES—*Logan.*

RAPE—ASSAULT WITH INTENT TO RAVISH—PROCESS—INSANITY—

EVIDENCE.—1. In a charge of rape, as also assault with intent to ravish, the assault with intent found proven, on a girl who was alleged to have been a prostitute.

2. In a trial for rape, or assault with intent to ravish, the principal witness, who, at the time of the offence being committed, was of weak intellect, became insane a few days before the trial. Medical evidence having been adduced, to prove that she was not in a fit state of mind to give credible testimony, she was not examined, but was produced, for the purpose of being identified by the other witnesses.

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Edward
Yates and
Henry
Parkes.

EDWARD YATES and HENRY PARKES were charged with the crime of Rape, as also Assault, especially when committed with intent to Ravish, or with one or other of these crimes.

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The crimes were charged as having been committed on the night of the 20th or morning of the 21st of October 1851, at or near five different places, on the road or path leading from Airdrie, in the parish of New Monkland, to Calderbank, in the parish of Old Monkland, and upon 'Elizabeth Smith, sewer, now or lately an inmate of the New Monkland poor-house, in the parish of New Monkland aforesaid, a person who is of infirm intellect.'

The pannels pleaded Not Guilty.

The evidence material to the charge consisted of the testimony of three eye-witnesses, and was in substance as follows:—

These three persons were in Airdrie together, between eleven and twelve o'clock on the night of the 20th October. At that time they met the pannels coming into Airdrie, near Graham Street. The pannels spoke first, and told the witnesses not to go that road, as there was a man lying there nearly murdered. They desired the witnesses to stop a few minutes, as they were going for the police. The pannels shortly returned, and said that the police would not interfere, as it was not in their district. All the five men then went along the Gartlee road, towards Pit No. 3, until they came to the spot where the man was said to have been lying. They found no man there; but a little farther on, they discovered a woman lying on her back on the road, and her person exposed. 'She was the same as if she had been dead.' This woman the witnesses identified as being Elizabeth Smith, the girl alluded to. At first she appeared to be unconscious, and was unable to stand. She asked for some water, which one of the three witnesses gave her. She then seemed to come to herself, and complained of her breast. Looking round at the two pannels, who were present, she cried, 'Save me from these two men!' and clung to the three witnesses for protection. The latter then proceeded together along the footpath to a lodge near Gartlee Pit, No. 3, an uninhabited place, for the shelter of the men working about the pits. Before reaching this lodge, the two pannels rushed forward, pushed the girl and one of the witnesses down, and rolled over the girl, one of the two at the same time uttering expressions clearly indicative of a criminal intention. When the girl was pushed down, she screamed. She was then rescued by the three witnesses, and taken to the lodge referred to, and left there. The three proceeded homewards, but had not gone above thirty or forty

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yards, when they heard screams, as if of a female, proceeding from the lodge. On returning, and re-entering the lodge, one of the pannels and the girl were seen rolling on the floor. She was struggling to get away, and screaming; but being rescued by the witnesses, she got up and ran out. She was then pursued by both pannels, and thrown down, when a scene followed which, as detailed by the witnesses, shewed forcible connexion with both pannels, who, as the witnesses swore, assisted each other, by holding the girl, till each in turn accomplished his purpose.

About ten o'clock on the morning of the 21st, the girl went and lodged a complaint at the police-office, Airdrie. Her clothes were found to be much soiled and torn; and, according to a medical report, which was made *de recenti*, there was evidence of very considerable violence and depression of spirits.

Two medical men examined on the trial gave evidence that the girl, who had previously been of weak intellect, had become insane three or four days before the trial, and that she was not then in a fit state to give evidence. They, however, stated that the insanity, which was recent, might not be permanent.

In these circumstances the girl was not examined as a witness, but was simply shewn for identification by the other witnesses. It was, at the same time, explained to the Court, that the reason why the trial had not been postponed, on the fact of the girl's insanity becoming known, was, that besides the difficulty of knowing whether that insanity might not be permanent, the state of her intellect was such, as even at best to render it extremely doubtful whether she was at any time a competent witness for examination.

From evidence, as to the character of the girl, which was led in exculpation, it appeared that she was known to the police as a street-walker; and one witness expressly swore that he had known her as a prostitute for several years.

FORDYCE, on the part of the Crown, contended that the evidence was conclusive as to the commission of the crime. The nature of the assault—the state of exhaustion of the girl, and her screams, as detailed by the eye-witnesses—were amply sufficient to negative the idea of her having consented. Besides, her cries for protection against the pannels, on recovering from her unconsciousness, afforded the strongest evidence of violence on the part of the pannels, and want of consent on her part, even before the witnesses came up. The evidence on the part of the pannels was grossly exaggerated, and even if true, it was clear in law that rape might be committed on a prostitute.

LOGAN, for the pannels, argued, that as the principal witness could not be examined, the trial ought to have been postponed. Great hardship to the accused arose from her not being put into the witness-box; and it was therefore to be presumed, that, had she been examined, she would have admitted that she gave consent. The conduct of the alleged eye-witnesses was so extraordinary, as altogether to taint their evidence, and to raise the presumption, that they had grossly exaggerated the whole circumstances, and that they were utterly unworthy of credit. Moreover, the character of the girl was such as to imply that there had been no forcible connexion.

LORD COLONSAY charged the Jury to the effect, that if they believed the eye-witnesses, there could be no doubt of the character of the assaults; but, considering that their conduct was most extraordinary, in standing by without attempting to prevent an outrage such as they themselves described, it was for the Jury to say whether they could be altogether relied on, especially looking to the character of the girl, as spoken to by the witnesses for the defence, and the darkness of the night when the alleged acts were committed, when possibly the witnesses could not observe so minutely as they professed to do the facts relating to connexion having taken place. If the Jury, however, believed that forcible connexion had taken

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place, then rape was relevantly and properly charged, whatever the character of the girl. But, in his opinion, looking at her proved character—the uncertainty of vision in the darkness of the night—the extraordinary conduct of the witnesses, and also the fact, that the Court and the Jury had no opportunity of knowing from the girl herself the real state of matters—the safest course for the Jury probably was to find assault with intent.

The Jury found the pannels Guilty of one act of assault with intent to ravish.

In respect whereof, the pannels were sentenced to eighteen months imprisonment, with hard labour.

HIGH COURT.

Present,

THE LORD JUSTICE-CLERK,

LORDS WOOD AND COLONSAY.

JOHN PARK AND OTHERS, Complainers—*Sol.-Gen. Deas—Logan.*

AGAINST

THE RIGHT HON. JOHN HAMILTON DALRYMPLE, EARL OF STAIR,
Respondent—*Dean of Faculty Anderson—J. M. Bell.*

JURISDICTION—REVIEW, CIVIL AND CRIMINAL—STATUTE.—A conviction under the 9th Section of the Solway Fishery Act, 44th Geo. III. c. xlv., is not subject to review by the Court of Justiciary.

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Suspension.

THIS was a suspension of a conviction, followed by a sentence of imprisonment, obtained against the complainers at the instance of the respondent. The prosecution was founded on the Solway Fishery Act, 44th Geo. III. c. xlv. (local and personal), entitled, 'An act for the better regulating and improving the fisheries in the

' arm of the sea between the county of Cumberland, and
 ' the counties of Dumfries and Wigton, and the stew-
 ' artry of Kirkcudbright,' and also the fisheries in the
 ' several streams and waters which run into and com-
 ' municate with the said arm of the sea.'

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The Earl of Stair is heritable proprietor of the fish-
 ings in the water or river called the Cross water of Luce,
 which runs into and communicates with the arm of the
 sea described in the statute.

He therefore presented a petition to the Justices of
 the county of Wigton, setting forth sections 9 and 17
 of the statute.¹

¹ Section 9 provides—' That from and after the passing of this act,
 ' if any person or persons, not being the owner, occupier, or farmer of
 ' a fishery, or the agent, servant, or fisherman of some owner, occu-
 ' pier, or farmer of a fishery, or other person authorized by them, some
 ' or one or other of them therein lawfully authorized, shall at any
 ' time or times in the year, or by any ways, means, or device whatso-
 ' ever, take, kill, or destroy, or attempt to take, kill or destroy any
 ' salmon, grilse, sea-trout, salmon-trout, or whitling, otherwise herling,
 ' or any other fish whatsoever, or any of the brood, spawn, or fry
 ' thereof, in any river, rivulet, brook, stream, pond, pool, or other
 ' water, mill-lead, mill-dam, sluice, or cut, which runs into or other-
 ' wise communicates with the said arm of the sea, every such person
 ' or persons shall, for the first offence, forfeit and pay the sum of £5 ;
 ' for the second offence, the sum of £15 ; and for the third and every
 ' other offence, the sum of £20 ; and shall also forfeit and lose the fish
 ' by him or them taken, together with the baskets, creels, packages,
 ' rods and lines, nets, and all and every engine and device whatsoever
 ' which shall have been used by any such offender or offenders, in the
 ' taking, killing, and destroying, or attempting to take, kill, or de-
 ' stroy, any such fish ; to be distributed and disposed of, cut in pieces,
 ' or otherwise destroyed, in the manner hereinbefore directed with re-
 ' spect to forfeitures for fishing within the times hereby prohibited.'

Section 17 enacts—' That, in case sufficient distress or distresses shall
 ' not be found, or such penalty or penalties shall not be immediately
 ' paid, that then it shall and may be lawful for any such Justice or
 ' Justices of the Peace, or Sheriff, or Stewart-Depute, or their Substi-
 ' tutes, or other Magistrates aforesaid, and he and they is and are
 ' hereby respectively authorized, empowered, and required, for the
 ' first offence, to commit every such offender or offenders, to the gaol
 ' or house of correction for the county, shire, stewartry, division, or

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The complaint then stated :—

‘ That, notwithstanding of the said enactments, John Park or
‘ Parks, blacksmith, New Luce ; John Waugh junior, residing in the
‘ village of New Luce ; and Robert Dickson, also, residing in the said
‘ village of New Luce, did, all and each or one or other of them, in
‘ violation thereof, on Friday, the 18th day of July 1851 years, or on
‘ one or other of the days of that month, with a pointed stick or leis-
‘ ter, or some other weapon to the petitioner unknown, take, kill, or
‘ destroy, or attempt to take, kill, or destroy, a salmon-grilse, salmon-
‘ trout, or some other fish, in the Cross Water of Luce, in the parish
‘ of New Luce, and that without leave of the petitioner, or any other
‘ person, thereunto lawfully authorized, in terms of said act, whereby
‘ the said John Park or Parks, John Waugh junior, and Robert Dick-
‘ son, have forfeited the said penalty of £5 sterling each, together
‘ with the costs of conviction.’

The complaint proceeded :—

‘ May it therefore please your Honours to consider the premises,
‘ and to grant warrant for summoning the said John Park or
‘ Parks, John Waugh junior, and Robert Dickson, to appear
‘ before any one or more of Her Majesty’s Justices of the Peace
‘ for the county of Wigton, at such time and place as may be
‘ fixed by your Honours, to answer to this complaint ; and
‘ thereafter to fine and amerciate each of them in the sum of

‘ place, for which such Justice or Justices aforesaid shall act, for
‘ any time not exceeding three months, nor less than one calendar
‘ month ; for the second offence, for any time not exceeding six months,
‘ nor less than two calendar months ; and for the third and every other
‘ offence, for any time not exceeding nine months, nor less than three
‘ calendar months, there to be kept at hard labour, and be and remain
‘ without bail or mainprize.’

The same section farther provides—‘ That all and every the pecuni-
‘ ary and other penalties and forfeitures hereby inflicted, may be sued
‘ for, recovered, and adjudged, on all and every offence and offences
‘ against this act, heard and determined by and before any one or more
‘ Justice or Justices of the Peace, within that part of Great Britain
‘ called England ; or any Justice or Justices of the Peace, or Sheriff,
‘ or Stewart-Depute or their Substitutes, or Magistrates of Royal
‘ Burghs, within that part of Great Britain called Scotland, for the
‘ county, shire, stewartry, division, burgh, or place wherein any offen-
‘ der or offenders against this act shall be, or reside, or wherein or near
‘ to which the offence or offences shall be committed, by and upon the
‘ oath or affirmation of one or more credible witnesses, or by the con-
‘ fession of the party or parties themselves, in England, and, in like
‘ manner, by the oath or oaths of the parties themselves, in Scotland.’

‘ £5 sterling, with the costs of suit and prosecution, in terms
 ‘ of the said statute; and failing payment thereof, to grant
 ‘ warrant to commit them respectively to the prison of Stran-
 ‘ raer, or any other legal prison, for any time not exceeding
 ‘ three months, nor less than one calendar month, there to be
 ‘ kept at hard labour, unless the said respective penalties shall
 ‘ be sooner paid; also, to grant warrant for summoning wit-
 ‘ nesses for both parties.’

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The complainers were convicted, under this complaint, before the Justices of the Peace for the county of Wigton, at Stranraer. The following are the terms of the conviction:—

‘ The Justices having considered the complaint, and the proof ad-
 ‘ duced, find the complaint proven, and thereafter fine and amerciate
 ‘ each of the said John Park or Parks, John Waugh junior, and Ro-
 ‘ bert Dickson, in the sum of £5 sterling of penalty, with no expenses;
 ‘ and failing immediate payment thereof to the complainer, grant war-
 ‘ rant to commit each of the said John Park or Parks, John Waugh
 ‘ junior, and Robert Dickson, to the jail of Stranraer, for the period of
 ‘ three months from this date, therein to be kept to hard labour, unless
 ‘ the said penalty shall be sooner paid: Against which judgment, the
 ‘ defenders intimated their intention to appeal to the next Quarter
 ‘ Sessions of Wigtonshire.

(Signed) ‘ PATRICK MAITLAND, J. P.
 ‘ JOHN M'TAGGART, J. P.
 ‘ NATHL. TAYLOR, J. P.’

The warrant of imprisonment was in these terms:—

‘ Whereas, John Park or Parks, blacksmith, New Luce; John
 ‘ Waugh junior, residing in the village of New Luce; and Robert
 ‘ Dickson, also residing in the said village of New Luce; have respec-
 ‘ tively been convicted before us, three of Her Majesty's Justices of
 ‘ the Peace for Wigtonshire, of having, on the 18th day of July last,
 ‘ or on or about that time, with a pointed stick or leister, taken, killed,
 ‘ or destroyed, or attempted to take, kill, or destroy, a salmon, grilse,
 ‘ salmon-trout, or some other fish, in the Cross Water of Luce, in the
 ‘ parish of New Luce, and that in contravention of the ninth section
 ‘ of the act 44th Geo. III. c. 41, intituled, &c., and have been sen-
 ‘ tenced and adjudged to pay and forfeit, for the said offence, the sum
 ‘ of five pounds sterling each of penalty; the said several sums to be
 ‘ paid to the Right Hon. John Hamilton Dalrymple, Earl of Stair, the
 ‘ complainer; and whereas, the said John Park or Parks, John Waugh
 ‘ junior, and Robert Dickson, have failed to pay down to the com-
 ‘ plainer the said penalty and expenses, in terms of the said statute,

No. 92. ' warrant is hereby granted to commit the said John Park or Parks,
 Park and ' John Waugh junior, and Robert Dickson, respectively, to the jail of
 Others v. ' Stranraer, for the period of three months from this date, unless the
 The Earl of ' said penalty and expenses shall, respectively, be sooner paid; and
 Stair. ' warrant also to the keeper of the said jail to receive, detain, and
 High Court. ' liberate them accordingly. (Signed) ' NATHL. TAYLOR, J. P.
 Jan. 12. ' PATK. MAITLAND, J. P.
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Suspension.

A bill of suspension and liberation having been presented, proceeding on various grounds of irregularity and incompetency, answers were given in for Lord Stair, in which he objected, *in limine*, to the jurisdiction of the Court of Justiciary as a court of review in such cases.

J. M. BELL, for the respondent, objected to the competency of the bill of suspension. This was not a criminal process, but a conviction under a local statute, as to fisheries in the Solway. There was therefore no power of review in the Court of Justiciary. That this was not a criminal proceeding, was evident from these considerations: *1st*, The complaint did not proceed with the concurrence of the Procurator-fiscal, but was instituted by a party in the character of a common informer. *2d*, It was merely a contravention of a statutory prohibition. *3d*, So far was it removed from a criminal procedure, that the charge might, by § 17, be proved by the oath of the party accused. *4th*, The primary sanction of the act is a pecuniary penalty alone; the power of imprisonment is only subsidiary for recovery of the fine, and that power is at an end when the penalty is paid.

That this is the true nature of the procedure, is evident from the whole tenor of the act, and the provisions made by the various sections of it. In analogous cases, the Court has declined to interfere.—*M'Donald v. Gray*, High Court, Feb. 17, 1844, Broun, vol. ii. p. 107; *Dunlop v. Hart*, Court of Session, June 20, 1835, S. & D. vol. xiii. p. 1173; *Phillips v. Steel*, Court of Session, Jan. 12, 1847, D. B. & M. vol. ix. p. 318; *Somerville v. Hemman*, High Court, June 1, 1844, Broun, vol. ii.

p. 220; *Addison v. Stevenson*, High Court, July 22, 1848, Arkley, p. 505; *Robertson v. Collins*, Court of Session, Feb. 16, 1837, S. & D. vol. xv. p. 572; *Campbell v. Strathern*, High Court, Nov. 22, 1847, Arkley, p. 386.

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LOGAN, for the suspenders, argued that the cases cited by the respondent were inapplicable. He referred to *Clark v. Johnston*, Court of Sess. Dec. 7, 1787, M. 11,818. The subject of the statute is one of public importance—involving the protection, not of a small stream merely, but of a large arm of the sea. The statutes relating to salmon-fishing have uniformly been considered matters of public policy.

The LORD JUSTICE-CLERK.—The Court are of opinion that this case is entirely ruled by previous decisions.

I also observe, that in § 17, there is a distinction between the mode of proof in England and in Scotland. It would be very difficult, indeed, to view as a proper criminal procedure a charge which may be established by the oath of the party.

The COURT therefore sustained the objection, and refused the bill as incompetent, with expenses.

JOHN MURRAY JUNIOR, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

Present,

THE LORD JUSTICE-CLERK,

LORDS IVORY AND COWAN.

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HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Deas—Young, A.D.*

AGAINST

PATRICK QUILLICHAN—*J. Shaw.*

BIGAMY—RELEVANCY—FOREIGN LAW.—Held, that it was not a good objection to the relevancy of an indictment for Bigamy, where the first marriage was celebrated in Ireland, by a Romish Priest, that the Indictment did not set forth that both parties were Roman Catholics, if the Prosecutor could competently prove that by the foreign law the marriage was lawful.

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PATRICK QUILLICHAN was charged with Bigamy :

IN SO FAR AS, you the said Patrick Quillichan being lawfully married to Catherine Duffy or Quillichan, now or lately residing with John Finnan, a labourer, in or near Currie's Close, Grassmarket, Edinburgh, a marriage ceremony having been performed between you several years ago, and as the prosecutor believes in or about the month of April in the year 1843 or in the year 1844, the prosecutor being unable to specify the time more particularly, by the Reverend Patrick Dorrian, then a Roman Catholic clergyman in Belfast, in Ireland, and now or lately at Loughin Island, near Downpatrick, in Ireland, or by some other Roman Catholic clergyman to the prosecutor unknown, within the house in or near Donegal Street, Belfast aforesaid, then occupied by The Right Reverend Doctor Cornelius Denvir or Denville, then a Roman Catholic Bishop in Belfast aforesaid, or at some other place in or near Belfast to the prosecutor unknown ; and you having thereafter lived and cohabited with the said Catherine Duffy or Quillichan, as your wife, in Ireland, and also in various places in Scotland, and particularly in or near Perth, in or near Dundee, in or near Newburgh, and in or near Edinburgh, you the said Patrick Quillichan did, on the 2d day of March 1851, or on one or other of the days of that month, or of February immediately preceding, or of April immediately following, your marriage with the said Catherine Duffy or Quillichan being then subsisting, as you well knew, within or near Saint Mary's Roman Catholic Church or Chapel, Broughton Street, Edinburgh, wickedly and feloniously, enter into a matrimonial connection, under the name of Patrick Fox, with Mary Birron or Burns or Kelly, now or lately residing with John Kerigan, a lodging-house keeper, in or near Little Hamilton's Close, in or near Grassmarket, Edinburgh, the marriage ceremony having been performed by the Reverend William Mackay, then and now or lately a Roman Catholic missionary apostolic, or a Roman Catholic clergyman, and then and now or lately residing at or near Saint Mary's Roman Catholic Church or Chapel aforesaid.

J. SHAW objected to the relevancy of the indictment, in so far as it did not disclose that both parties were Roman Catholics at the time of marriage. This made the distinction between this and the case of *Purvis* (*ante*, p. 124), where the relevancy was sustained, inasmuch as in those cases the Court could see that the marriage was good though irregular. The Irish marriages acts were express that both parties must be Roman Catholics, to make

their marriage by a Roman Catholic priest legal.¹ And the presumption in law was, that a person belonged to the established religion, which was Protestant, in Ireland (*Rogers on Ecclesiastical Law*, pp. 657-660).

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YOUNG.—I have libelled a lawful marriage,—am I to go into detail of the facts and circumstances.

The LORD JUSTICE-CLERK.—Statutes may be quoted against relevancy.

YOUNG.—No doubt; but here I have libelled nothing opposite to statute law. I say the marriage was a lawful one, and that I am entitled to prove it so under the case of *Purvis*.

¹ The following are the chief statutory provisions regulating such marriages:—

The Irish Act, 19th Geo. II. c. 14, § 1 (1745), intituled, ‘An Act for annulling all marriages to be celebrated by any Popish priest, between Protestant and Protestant, or between Protestant and Papist,’ &c., enacts—

‘That every marriage that shall be celebrated, after the 1st day of May 1746, between a Papist and any person who hath been, or hath professed himself or herself to be, a Protestant, at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be, and is hereby declared, absolutely null and void, to all intents and purposes, without any process, judgment, or sentence of law whatsoever.’

The Irish Statute, 33d Geo. III. c. 21 (1793), entitled, ‘An Act for the relief of Her Majesty’s Popish or Roman Catholic subjects of Ireland,’ enacts, § 12,—

‘That nothing herein contained shall be construed to extend to authorize any Popish priest, to celebrate marriages between Protestant and Protestant, or between any person who hath been, or professed himself or herself to be a Protestant, at any time within twelve months before such celebration of marriage, and a Papist, unless such Protestant and Papist shall have been first married by a clergyman of the Protestant religion.’

The Statute, 3d and 4th Will. IV. c. 102 (August 29, 1833), entitled, ‘An Act to repeal certain penal enactments made in the Parliament of Ireland, against Roman Catholic clergymen, for celebrating marriages contrary to the provisions of certain acts made in the Parliament of Ireland,’ enacts, *inter alia*, § 3,—

‘That nothing in this act shall extend, or be construed to extend, to the giving validity to any marriage ceremony in Ireland, which ceremony is not now valid under the existing laws.’

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The SOLICITOR-GENERAL referred to the case of *Ben-
nison* (*ante*, p. 453).

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The LORD JUSTICE-CLERK.—I am of opinion that this indictment is relevantly framed. The objection runs counter to the broad principle on which the structure of an indictment, under the Law of Scotland, is based, and by which relevancy is decided. Independently of critical objections to expressions, or to the omission of requisite words, and the like, objections to relevancy generally are of two kinds:—1. Objections to the major proposition, as not correctly setting forth the offence intended to be charged, or as charging that as an offence which is not in law a crime; and, 2. Objections to the minor proposition, or specifications of the facts, as not, *if proved*, setting forth the crime charged;—*if proved*, for the objection must assume, that all that is averred is *fully* and *legally* proved,—proved in the way required by the law applicable to the particular case, as it may be disclosed in evidence. But the specification in the minor is only intended, *first*, to apprise the pannel of the facts to be proved against him; and, *secondly*, to set forth what is sufficient to *entitle* the prosecutor to prove all that the law *may* require, according to the turn which the case in proof may take.

Between the character of the objections competent against the major and minor propositions, there is a broad and marked distinction. The description, in the major, of that which is charged as a crime, must be *complete* in law. In many cases, that is accomplished unanswerably by certain legal terms which are established names for crimes—*voces signatæ*—as theft, murder, bigamy—or by quoting the words of a statute constituting the offence, or defining it. In other cases, the terms to be selected may be of great nicety, and the description of the acts may be very difficult: In such cases, the proposition must exhaust the law—that is to say, if any fair construction of the words in one sense leaves a matter which is not criminal, or if a plain requisite of illegality is omitted,

then something is set forth in the major of the indictment which, in fair construction, is not *necessarily* criminal, independently of any special defence in the particular case. I take the case which occurred some years ago, of a charge of obstructing a presbytery in the discharge of their duty. The objection was, that obstruction *might* not be an illegal, or wrongous, or violent obstruction,—it might have been by interdict. The answer was—*Obstruction*, in an indictment, being a word descriptive of hinderance, in point of fact, to duty, excludes all legal impediments, and denotes acts *via facti*—as obstructing of revenue officers, formerly a common charge in the days of illicit distillation.

In stating *such* objections to the major proposition, every line of argument is open to the pannel, whether founded on statutes or common law. The public prosecutor, by his major proposition, propounds, as it were, a thesis for objection. He throws down in the legal arena, as the schoolmen of old into the arena of metaphysics, his proposition as a challenge, and must meet every view of his proposition which can be stated. He throws open the whole field of legal argument by his challenge; and while some theoretical jurists ridicule our form of indictment, experience must satisfy every one, that, practically, it operates most beneficially, both for the elucidation and protection of the law, and for the liberty of the subject.

But, then, that proposition once sustained as being unassailable, his course in the minor is a much less ambitious and narrower one: He then comes to deal with a particular person, against whom particular acts are averred, as bringing him within the offence in the general charge in the major.

In objecting to the minor, the pannel's situation is at once reversed. He must object on the express condition, either that if the facts are *fully* and *legally* proved, they are not the offence charged, or that the statement is so framed, from defect or otherwise, as to omit what is essential, on the face of the indictment, to be averred,

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or to exclude the *right* to prove what, on the face of the indictment, is required:—Observe, *on the face of the indictment* essential for averment and necessary in proof. The pannel cannot travel out of the indictment in discussing the minor. The major is the law for the case, and rules the argument. Law, to be proved by statute, and facts which, if established one way, may raise a defence, are matters on the merits, and for the trial. No doubt, where such are clearly matters of law, or where the prosecutor knows and desires to take the facts hypothetically in one way, we often, for convenience, and to save a needless trial, take the matter by arrangement on both sides, in discussion on a wider basis; but that is matter of convenience only. The pannel, in the objections to the minor, cannot for the law of the case travel out of the indictment; and no state of facts which will prove a defence on the merits, is to be assumed as an objection to the minor. It is not enough, in objecting to the minor, to say, that one state of facts may render that innocent which the prosecutor avers. He must prove the facts averred, in such a way as to exclude the defence. But, in relevancy, the question is solely, Is he entitled to prove them? Now, these general views exclude the objection here stated.

The indictment charges bigamy: That crime consists in an attempt to marry a second time after the party has been lawfully married, and knows that such marriage still subsists. Then the minor has only to state what is sufficient to *entitle* the prosecutor to prove the facts. It avers, time and place libelled, that the pannel was *lawfully* married to a certain female in Ireland, by a Roman Catholic priest. *Lawfully* married. No specification of the rites, forms, or benediction of any marriage need be stated. It is distinctly said, that they were *lawfully* married. That is enough to entitle the prosecutor to prove his case. But it is said, that by certain statutes, the marriage will be void if both parties were not Roman Catholics, and the indictment should have averred

that they were both Roman Catholics. Now, if this particular marriage had required to be set forth in the major proposition,—or if this had been an indictment for celebrating the marriage illegally,—then it would have been necessary to make the major complete against all attacks, and an objection on statutes tending to shew, that in one state of facts, within the words of the major, the marriage was not valid, or the offence not committed, would have been quite competent against the major. But, in the minor, the prosecutor is only required to aver what is sufficient to *entitle* him to prove his allegations. It is not necessary for him, in the minor, to make out a legal proposition, complete in all its parts, against every supposable state of the facts. He knows the facts on which he has to sustain his indictment, and by which it must be proved. All that it is requisite for him to aver is, that the pannel was *lawfully* married in a particular way—viz. by a Roman Catholic priest—to a certain female in Ireland,—for that entitles him to prove all that is necessary to be proved, whatever that may be. The pannel, on the other hand, is not entitled to ask us now to inquire into what must be proved, or into what state of facts will make this first marriage bad. The prosecutor, at his own risk, says these parties were *lawfully* married. What he has to do is, simply to aver what *entitles* to prove that. Now, how can I say that the averment that they were *lawfully* married, is not sufficient to entitle him to enter on the proof of a lawful marriage of the kind which the facts may require, according to the law which may be *proved* to be applicable to these facts. Whether a Roman Catholic priest could not marry if both were not Catholics, is a matter of fact to be inquired into at the trial—matter of Irish law, it may be, but still matter of fact to us. It will form the subject of investigation if necessary. But it is incompetent to travel out of the minor to find out, by our guess at interpretation of Irish statutes, this matter of fact, which the indictment does not raise. Again, this objec-

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tion is stated on the assumption that it may turn out that both were not Roman Catholics. That is to be inquired into as matter of fact. On the supposition of a possible state of facts which may not be proved, we cannot say the indictment in the minor is wrong, when it is admitted that it will cover the opposite state of facts. If both must be Roman Catholics, how can it possibly be alleged that the prosecutor is not entitled to prove that fact under his averment that they were lawfully married, and to carry that out in proof? Again, I repeat, he need aver nothing but what entitles him to prove all that he requires to prove in the particular case. He has no legal definition to give in the minor—no proposition to round off and perfect as a complete legal description, in the abstract, of a crime: He has simply to aver that which is enough to cover and let in all the proof which his case requires; and what that proof must be, we cannot anticipate in order to let in an objection. The objection, then, is quite incompetent. The form of the indictment, and the course which the case will take, is exactly what occurred in that remarkable case of Bennisson. True, no objection was taken to the relevancy; but the Court did not hold, when the fact was said to be proved—viz. that the female was an Episcopalian—that if that state of facts were proved to the satisfaction of the jury, the indictment was bad, as for a charge of bigamy, which, on the argument now addressed to us, we ought. It was said and proved, that marriage in Ireland by a Presbyterian minister, between a Presbyterian Dissenter and an Episcopalian, was bad; and it was contended, that the proof made out that the female was an Episcopalian. The Court did not direct the jury, that if that fact was proved to their satisfaction, the minor of the indictment turned out to be defective, so as not to fit and cover the state of facts and law which had come out. On the contrary, holding this to be a proper defence on merits under such an indictment as the present, I left that matter of fact, with the concurrence of my

brethren, to the jury, with the direction, that they would consider whether a mere entry, at the date of the marriage, that the woman was an Episcopalian, derived no one knew how, was such proof as would be sufficient to void the marriage,—and if not, with the direction that the marriage was proved. Here it may be matter of fact, 1st, what is the law of Ireland; and, 2d, whether both were required to be, and were in point of fact, Roman Catholics. That is for the trial. The objection anticipates incompetently what may or may not be matter of fact for investigation at the trial. The indictment entitles the prosecutor to prove his allegations, and he takes his risk, that he has sufficient knowledge of the facts which it may be *shewn* he must prove.

This opinion may appear to enter too fully on general principles; but I have thought it the more right to do so, because the plausibility which the objection appeared to have, dropped from it the instant I came to attend to the fact, that it was an objection to a minor proposition.

LORD IVORY.—The objection is not a good one. Marriages between Roman Catholics being lawful, it is enough for the prosecutor to aver that the parties were lawfully married. That is sufficient to constitute a good charge of bigamy, whatever questions may arise on the evidence, in support of that charge.

LORD COWAN.—We have here an assertion that the marriage was a lawful marriage, that is, lawful by the law of Ireland. Having made that statement, it was not necessary for the prosecutor to go farther, and point out *how* it was lawful. It is unnecessary to set forth the particular statutes by which the marriage may, upon the evidence, turn out to be unlawful. The objection truly resolves itself into a matter of proof.

The objection was accordingly repelled.

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Bigamy.

Present,

Jan. 26.
1852.

THE LORD JUSTICE-CLERK,

LORDS COCKBURN, WOOD, IVORY, COLONSAY, AND COWAN,

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Deas*—*G. Young A.D.*

AGAINST

ELLEN FALCONER AND MARGARET FALCONER—*Ogilvy.*ROBINA M'LEOD AND JANE BRIGGS—*Scott.*

INDICTMENT—AGGRAVATIONS—COMPETENCY.—Held incompetent to charge a previous conviction of theft, or that the pannels are habite and repute thieves, as aggravations to a charge of robbery.

The pannels were charged with Robbery, aggravated by previous convictions of theft, and by their being habite and repute thieves; as also with Theft:

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and Others.
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1852.

Robbery.

IN SO FAR AS, on the 6th day of December 1851, or on one or other of the days of that month, or of November immediately preceding, or of January immediately following, in or near the house in or near Leith Wynd, Edinburgh, then and now or lately occupied by you the said Ellen Falconer and Margaret Falconer, or one or other of you, you the said Ellen Falconer, Margaret Falconer, Robina M'Leod, and Jane Briggs, did, all and each, or one or more of you, wickedly and feloniously, attack and assault Peter Aitchison, lately innkeeper, and now or lately residing with Michael Waugh, a plasterer, in or near Potterrow, in or near Edinburgh, and did jostle him, and knock him about, and scratch his face, and you did, then and there, all and each, or one or more of you, by force and violence, take from his person or custody, and did rob him of two sovereigns in gold, £2 : 10 : 6 sterling, or thereby, in silver, and twopence, or thereby, in copper money, and a handkerchief, his property, or in his lawful possession; OR OTHERWISE, time and place above libelled, you the said Ellen Falconer, Margaret Falconer, Robina M'Leod, and Jane Briggs, did, all and each, or one or more of you, wickedly and feloniously, steal and theftuously away take, from the person or custody of the said Peter Aitchison, the money and handkerchief above libelled: And you the said Ellen Falconer and Margaret Falconer are habite and repute thieves, and have each of you been previously convicted of theft: And you the said Robina M'Leod have been previously convicted of theft.

SCOTT, for M'Leod and Briggs, objected to the com-

petency of libelling as an aggravation of the crime of robbery either previous conviction of theft, or that the parties were 'habite and repute' thieves. This was the first time that any such attempt had been made, and it was opposed to every authority, and was equally opposed to principle, which required that previous convictions should only be used as aggravations in subsequent charges of the same offence. Robbery and theft were distinct crimes, importing different punishments.

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With regard to the aggravation of habite and repute, it had been decided that a charge of housebreaking could not be aggravated by habite and repute; cases of *Buckley*, 12th July 1822, Shaw's Justiciary Cases, p. 73; *Mary Bentley* and *Houston Cathie*, 27th Jan. 1823, Shaw's Justiciary Cases, p. 93. In the last case it had also been held, that previous conviction of theft could not be libelled as an aggravation of reset of theft. The decisions had always ruled that theft and robbery were different crimes. It had been held, that an indictment for robbery would not justify a conviction of theft where the violence was disproved; case of *Wallace*, Perth, 1821, Hume, vol. i. p. 106, Note a.

The LORD JUSTICE-CLERK enquired if there was any case to the effect, that where theft only was charged, and it was shewn to have been committed by violence, no conviction could follow?

SCOTT.—I have found no such case in the books.

YOUNG, A.D.—The whole matter was not whether robbery was identical with theft, but was a species of theft. If so, then the previous conviction could be used. Robbery, when defined, was 'theft by violence.' But violence was nowhere stated to be inconsistent with theft; Hume, vol. i. p. 57; Mackenzie, p. 160; Burnett, p. 145. There is violence in theft by housebreaking; and in that charge it is held competent to aggravate it by charging a previous conviction of theft. In the case of *Wilson Walker and others*, Glasgow Winter Circuit, Jan. 14. 1850, in a case of stouthrief, it was held com-

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petent to charge previous conviction of theft; the same in the case of *Daniel Sillers*, Inverary, Sept. 24. 1851.¹

The SOLICITOR-GENERAL.—As to practice, that is comparatively unimportant, as the prosecutor had, until lately, no interest to try the point, robbery being a capital offence; that made aggravations useless. Now, however, he has a clear interest in so charging, and is entitled so to do if the charge be not inconsistent with principle. In the case of *Melville Anderson*, High Court, Dec. 21. 1846, Arkley, p. 203, an opinion was intimated by the Court, that, although articles may have been taken by robbery, it is competent to charge the resetter of them with reset of theft.

LORD COCKBURN.—The conclusion to which I have come is in favour of this objection. I am glad that it has been taken, for it gives us an opportunity of settling the law on a question which has been very much discussed. If the question had arisen before any practice had occurred upon the subject, I would have held that the pro-

¹ The indictment in the case of *James Wilson Walker and others*, charged the pannel with ‘mobbing and rioting, especially when committed for the purpose of perpetrating theft or stouthrief; As also, Theft, especially when committed by a person who has been previously convicted of theft; As also, *Stouthrief, especially when committed by a person who has been previously convicted of theft*; As also, Robbery; As also, Assault, especially when committed to the effusion of blood, fracture of bones, severe injury to the person, and danger of life, and more especially still, when committed with intent to rob: In so far as, &c.

The Court (Lord Cockburn) found the libel relevant.

The pannels having pleaded not guilty, were remitted to an assize. The Jury found the prisoners guilty.

Daniel Sillers, was charged with ‘Assault, especially when committed on a man in his own house, to the effusion of blood, and imminent danger of life; As also, *Stouthrief, especially when committed by means of housebreaking, and by a person who has been previously convicted of theft*: In so far as, &c.

The Court (Lord Colonsay) found the libel relevant.

The pannel pleaded guilty of assault, without the aggravations of housebreaking, or of previous conviction.

Sentence—Transportation for fourteen years.

secutor was in the right. In principle, robbery is nothing else than theft by violence, just the same as stouth-
 rief is theft by violence, though violence of a different
 sort. On principle, therefore, I would have thought that
 a previous conviction of theft was relevant as an aggra-
 vation of a charge of robbery.

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I would have been the more inclined to take this view, that it is impossible not to feel the absurdity of our existing practice. A man is convicted of theft. If he commits another simple theft, that previous conviction may be appealed to as an aggravation of his new offence. But if, instead of a simple theft, he commits a much worse, a more daring theft, a theft by violence to the person, then he is not to suffer by the previous conviction.

But we do not sit here to make law; we sit merely for the purpose of interpreting it. I think the explanation of the previous practice has been correctly given by the Solicitor-General. Where robbery was capital, it was useless to charge previous conviction of theft as an aggravation. But that practice, is clear whatever may have been its origin. What the prosecutor is here endeavouring to do, is to introduce a very decided novelty; and on that ground alone I am for sustaining the objection. I rest my opinion solely on the practice, which is clear and uniform, though I am satisfied that that practice is not reconcileable with principle. Perhaps the evil might be avoided, and I would almost invite the public prosecutor to avoid it, by giving in an indictment in which facts amounting to robbery were charged as theft, both in the major and minor of the indictment, so as to raise at the trial the question, whether proof of violence would entitle the pannel to an acquittal. And if it be the law—a question on which I express no opinion—that the facts of robbery will not support a charge of theft, then that is a matter for the interference of Parliament.

I am for sustaining the objection.

LORD WOOD.—I concur as to what has been said as

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to robbery being nothing else in point of principle than theft charged by violence. I am for sustaining the objection, in respect of the long and inveterate practice.

LORD IVORY.—I am of the same opinion. It is not necessary to go deeper into the question than the mere fact of clear and uniform practice. But if the question had been open, I am not prepared to go so far as Lords Cockburn and Wood. I think that from the earliest times of our criminal jurisprudence, theft and robbery have been regarded as different kinds of crime, each having its appropriate *nomen juris*. They were so distinct, that a tribunal competent to try the one, was not competent to try the other. The change of practice, to which the Solicitor-General has referred, may be a good ground for going to the legislature. The change introduced by practice in the punishment of robbery, does not change the legal character of the offence.

LORD COLONSAY.—I concur in the opinions which have been delivered. It is not necessary to go into the question, whether theft and robbery are not legally distinguishable in point of principle. It is enough that there is a uniform and inveterate practice dealing with theft and robbery as distinct offences. Suppose theft were charged in the major proposition of the indictment, and the circumstances set forth in the minor amounted to robbery; or suppose, under an indictment charging theft, a robbery should be proved,—I do not know what would be done in such cases, and I express no opinion upon them.

As to the question of aggravations generally, our law rests entirely on practice. Previous convictions are relevantly charged as an aggravation when an offence of the same nature is again charged. In that case, and in no other, the criminal knows that the previous conviction will rise up against him.

As to the aggravation of habit and repute, to which allusion has been made in the course of the argument, our practice is still more limited. That is a very peculiar

species of aggravation, depending on very peculiar principles; and I should be sorry to extend it farther.

LORD COWAN.—I quite concur in the views expressed by Lords Cockburn and Colonsay. I reserve my opinion on the question, whether it would be relevant to charge robbery as theft by violence, or whether a charge of theft could be followed by a conviction if the facts proved shewed that it had been committed with violence.

LORD JUSTICE-CLERK.—I was very anxious to have this question tried. I cannot consider this as a mere question of principle. It is a question as to the usage and practice of this Court. In principle, the previous character of the pannel is not an aggravation; neither is a previous conviction, unless it be a previous conviction of exactly the same offence. The competency of going out of the actual facts charged, depends wholly on the practice and usage. We have always held that this particular crime of theft, which frequently is adopted as a trade or means of livelihood, is different from robbery. I therefore concur with your Lordships in sustaining the objection.

The COURT 'sustained the objection to the competency of the aggravations libelled, so far as they regarded the charge of Robbery.'

The pannels were convicted of the theft as libelled.

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and Others.
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Jan. 26.
1852.
Robbery.

Present,

THE LORD JUSTICE-CLERK,

Feb. 2.
1852.

LORDS COCKBURN AND WOOD.

HER MAJESTY'S ADVOCATE—*Claghorn A.D.*

AGAINST

ELIZABETH M^cWALTER OF MURRAY—*J. Shaw.*

INDICTMENT—RELEVANCY—AGGRAVATION—SWINDLING.—An indictment charged swindling, as also falsehood, fraud, and wilful imposition, aggravated by a previous conviction of swindling, and falsehood, fraud, and wilful imposition. Objection repelled, that in the former indictment under which the pannel had been convicted, *two* separate crimes were charged in the major proposition, viz. swindling, and falsehood, fraud, and wilful imposition; while there was only one *species facti* in the minor to which the pannel had pleaded guilty, and which could constitute only one of the crimes charged; that it was impossible to say to which crime the confession applied, while the pannel could not be held guilty of both; and that therefore it did not clearly appear that the conviction was for the same crime as that now charged.

Observed, That 'swindling' is not a proper *nomen juris*, and that the legal term is 'falsehood, fraud, and wilful imposition.'

No. 95.
Elizabeth
M^cWalter
or Murray.

ELIZABETH M^cWALTER OF MURRAY was indicted and accused—

High Court.
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1852.

Swindling,
and false-
hood, fraud,
and wilful
imposition.

THAT ALBEIT by the laws of this and of every other well-governed realm, swindling, as also falsehood, fraud, and wilful imposition, especially when committed by a person who has been previously convicted of swindling, and falsehood, fraud, and wilful imposition, are crimes of a heinous nature, and severely punishable. YET TRUE IT IS, &c.

Then followed a narrative of seven separate charges against the pannel. Among the productions was an extract or certified copy of a previous conviction obtained against the pannel, for 'swindling, and falsehood, ' fraud, and wilful imposition.'

J. SHAW, for the pannel, objected to the relevancy of the aggravation charged, on the ground of ambiguity.

On turning to the former indictment under which the pannel was convicted, it would be seen that the major proposition set forth two separate and distinct crimes, viz. swindling, and falsehood, fraud, and wilful imposition; while in the minor, only one *species facti* was narrated, to which the pannel had pleaded guilty. The conviction was stated to be for both crimes; but that was impossible, as the *species facti* set forth could amount only to one of them; and if the conviction was only of one crime, it could not be known to which of the two crimes it referred. It did not therefore appear whether the previous conviction applied to the present charge.

The LORD JUSTICE-CLERK.—She may have been found guilty of both charges.

J. SHAW.—She was found guilty in terms of her own confession.

LORD WOOD.—She must then be held to have pleaded guilty to both crimes. Both are here charged; and if both are proved, then the aggravation is applicable to both.

The LORD JUSTICE-CLERK.—We must assume the former confession to have been correct, and that the pannel was duly convicted of both crimes. It is true that she is not to be convicted of two crimes on the same *species facti*; but still she may be guilty of two crimes, under such an indictment as that produced, if indeed two distinct crimes are really charged. But, in truth, I do not very well know the meaning of the term ‘swindling.’ What is it but falsehood, fraud, and wilful imposition? No doubt the term was used in the case of *Hall* in 1788, but it was not used for a long time thereafter, and I see no reason why it should be introduced now, or in future. I think it would be better not to employ it. It is not a proper *nomen juris*; but is just the popular term for what is known in the law as falsehood, fraud, and wilful imposition.

The objection was therefore repelled.

No. 95.
Elizabeth
M'Walter
or Murray.
High Court
Feb. 2.
1852.
Swindling,
and false-
hood, fraud,
and wilful
imposition.

Feb. 20,
1852.

Present,

THE LORD JUSTICE-CLERK,

LORDS WOOD AND COLONSAY.

DANIEL BLYTH, AND AGNES TAIT OR BLYTH, Suspenders—*Dean of Faculty Anderson—Pattison.*

AGAINST

JAMES M'BAIN, Respondent—*Sol.-Gen. Deas—Logan.*

STATUTE 13TH AND 14TH VICT. CAP. 33—PROCESS—DEFENCE.—In a suspension of a summary trial for theft, under the General Police Act, 13th and 14th Vict. c. 33, the parties accused alleged that they were brought to trial without any summons being served upon them; that they were not made aware of their right, in virtue of certain regulations framed by authority of the statute, to apply for time to summon witnesses; and that no sufficient explanation was given to them to enable them to put their application for time into correct form. The Court, on advising a proof of these allegations, suspended the sentence, and ordered repayment of a pecuniary penalty which had been imposed on one of the parties.

No. 94.
Blyths v.
M'Bain.

High Court,
Feb. 20,
1852.

Suspension.

THIS was a suspension and liberation arising out of the following circumstances:—

The suspenders were, on the 13th day of December 1851, apprehended at the instance of the respondent, who was Superintendent of Police and Procurator-fiscal for the burgh of Galashiels, on a charge of theft, or reset of theft.

Of the latter crime, the suspenders were summarily convicted, before William Rutherford, one of the magistrates of the burgh of Galashiels, and sentenced as follows:—The female complainer, Agnes Tait or Blyth, to be incarcerated in the prison of Selkirk for twenty days from the date of conviction; and Daniel Blyth, to be fined and amerced in the sum of £10 sterling, with the alternative of imprisonment until the fine should be paid, but not exceeding thirty days.

It appeared that, under the authority of the General Police act, 13th and 14th Vict. c. 33, certain rules and

regulations, and forms of procedure, for the police court of Galashiels, had been framed and established by the sheriff of the county of Selkirk, and by the magistrates of the burgh. These regulations had, in terms of the statute, received the approval of the Lord Justice-General and of the Lord Justice-Clerk.

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Blyths v.
M^r Bain.
High Court.
Feb. 20.
1852.
Suspension.

The 6th and 7th of these rules and regulations, provide, *inter alia*,—‘ That, when any party applies for time to summon witnesses, the clerk shall make a note of such application, if it is refused, and the magistrate may, if he thinks fit, call upon the party to state the nature of the facts which he means to prove; and if he shall refuse, or is unable to do so, then the application shall not be marked. And, when any party offers proof at the time, the magistrate may require him or her to state the nature of the facts he or she proposes to prove; and if the proof is refused, the offer of proof, and the nature of the proof so offered, shall be marked by the clerk, and, that the magistrate may, at the desire of either party, delay procedure till a future court day, in which case, the defender or defenders shall be furnished with a copy of the complaint.’

It was alleged by the suspenders, that these regulations had been disregarded, in so far as they had been, without any previous service of the complaint, summarily brought before the acting magistrate, where the charge was at once proceeded with, and evidence led for the prosecution, terminating in the conviction which was now sought to be set aside. It was farther stated, that they had applied, in terms of the regulations, for time to summon witnesses, and to prepare their defence; and that this application had been refused, although there was no marking to that effect by the clerk.

They therefore argued, that the procedure in the Police Court being altogether illegal and irregular, ought to be suspended.

The COURT was of opinion that some enquiry must be made into the procedure before the Police Court, and

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Blyths v.
McBain.
High Court.
Feb. 20.
1852.
Suspension.

the alleged refusal of the magistrate to allow time for the defence. The following interlocutor was therefore pronounced:—

‘*Edinburgh, 12th January 1852.*—The Lord Justice-Clerk and Lords Commissioners of Justiciary, having heard counsel for both parties, in respect the suspender avers that he did distinctly apply for time to employ an agent, or for time to lead evidence on his behalf, which application, although not minuted by the clerk, was refused by the magistrate; before answer, allow the suspender a proof of said averment, and to the respondent a conjunct probation; and remit to the Sheriff-depute of the county of Selkirk to take such proof, and direct this interlocutor to be forthwith laid before him; and recommend to the Sheriff to take the said proof *quam primum*, and to bring the same to a close, without adjournment, unless such shall be necessary; and grant diligence at the instance of both parties for summoning witnesses and havers.’

Feb. 20.
1852.

Of this date, the proof ordered by the preceding interlocutor having been taken and reported to the Court—

The LORD JUSTICE-CLERK said, that the opinion of the Court would be best expressed by the judgment now to be pronounced.

The COURT pronounced this interlocutor:—

‘The Lord Justice-Clerk and Commissioners of Justiciary having resumed consideration of this case, considered the proof, and heard counsel for both parties, Find, That the evidence does not actually amount to proof of the specific allegation, in point of fact, contained in the interlocutor of 12th January; but find, That it appears that the suspender had not been aware that the case could be proceeded with without a summons, and warning thereby to be prepared, and that he did express some surprise or complaint that the matter could be then disposed of, and that the right to apply for time was not intimated to the suspender, to whom

‘ the new regulations were unknown, and hence, that he
 ‘ was not enabled to put his application into any correct
 ‘ form; and, under the whole circumstances, as there
 ‘ appears to have been some want of explanation, al-
 ‘ though unintentional and accidental on the part of the
 ‘ magistrate, in not making the purport of the new regu-
 ‘ lations more fully known: Therefore, pass the bill;
 ‘ Suspend the sentence complained of *simpliciter*, and
 ‘ ordain the fine awarded against and paid by the sus-
 ‘ pender, to be repaid to him: Find no expenses due,
 ‘ and decern.’

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 Blythe v.
 M'Bain.
 High Court.
 Feb. 20.
 1852.
 Suspension.

A similar interlocutor was pronounced in the case of the female suspender, except as to the fine, she having been imprisoned, but not fined.

JAMES SOMERVILLE, S.S.C.—ADAM PATERSON, W.S.—Agents.

Present,

THE LORD JUSTICE-CLERK.

March 16.
 1852.

LORDS COCKBURN, WOOD, COLONSAY, AND COWAN.

JAMES MIDDLEMISS junior, Suspender—*Logan*,

AGAINST

The Right Hon. LORD and LADY WILLOUGHBY D'ERESBY, Respon-
 dents—*Neaves*—*J. M. Bell*.

SUSPENSION—STATUTE 2D AND 3D WILL. IV. CAP. 68—MISNOMER—
 IDENTITY—NONAGE.—A party who was alleged to have been de-
 tected in the act of snaring hares, instead of his real name, which
 was *Alexander*, gave the name of *James*, being that of a younger
 brother, a child of two years of age. The complaint was directed
 against the said party by the name of *James*, but was served on *Alex-
 ander*. No appearance was made for *Alexander*; but it was ex-
 plained at the trial that the name of *James* applied only to the child.
 Sentence having been pronounced, which bore, *in gremio*, to be
 against *James*—Suspension at the instance of *James* (with concur-
 rence of his father) sustained, and sentence set aside.

THIS was a suspension of a sentence of the Justices
 of the county of Perth, proceeding on the act 2d and 3d
 Will. IV. c. 68, § 1, purporting to be against the suspen-
 der James Middlemiss junior, under the following cir-
 cumstances:—

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 Middlemiss
 v. d'Eresby.
 High Court.
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 1852.
 Suspension.

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Middlemiss
v. d'Eresby.
High Court.
March 16.
1852.

Suspension.

It was alleged that a brother of the suspender, aged eight years, had been detected by the keepers of the respondents in the act of snaring hares.

When apprehended and asked his name, he gave the name James Middlemiss junior, his true name being Alexander Middlemiss, and James being the name of a younger brother, about two years old.

In virtue, as alleged, of this information, a petition and complaint was presented against 'James Middlemiss junior,' which was duly served upon Alexander, the party sought to be convicted.

At the trial no appearance was made for Alexander, but appearance was made for the child James, and the actual state of the fact as to his name was explained.

There was another brother, of the age of six, at the time of his apprehension, along with Alexander, against whom also proceedings were instituted; but the sentence pronounced was not sought to be enforced so far as concerned him.

The following sentence was pronounced, viz. :—'That the two boys respectively designed as James Middlemiss junior, and Thomas Middlemiss, should be fined 20s. each, or in default of payment, to thirty days' imprisonment each.'

James Middlemiss junior, with concurrence of his father as his administrator-in-law, having brought a suspension :

LOGAN, for the Suspender, contended, that the suspender, James Middlemiss junior, had an undoubted right to have the sentence against him suspended, inasmuch as that sentence was directed personally against him, and was of such a nature as to give him right to have it set aside, as being a sentence incompetent and personal. Such a case as this was perfectly distinct from cases in which a pannel had given a false name, and was afterwards held bound by it. The suspender had never given a false name, and was entitled to be freed from all hazard of a sentence of fine or imprisonment being ever used

against him, which bore, *in gremio*, to apply expressly to the suspender and no one else; and whatever mistake in names had been previously made, the fact on this subject was fully cleared up before sentence was pronounced.¹

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¹ EVIDENCE FOR THE COMPLAINERS (IN THE INFERIOR COURT).

JAMES M'LAREN, *Game-watcher on the Perth Estate*.—Depones, That on Sunday the 25th day of January 1852, I found on the Muthill acres, the property of the complainers, the defender Thomas Middlemiss; there were two boys. I asked the other defender's name, and he called himself James Middlemiss, and a brother of the other defender Thomas Middlemiss: That the defender James Middlemiss will be about twelve years of age. I happened to go to the Muthill acres, which are tenanted by John M'Robbie, mason, and John M'Naughton, shoemaker, both residing in Muthill, in consequence of having received information that there were snares set there: That I do not see in the Court the party who called himself James Middlemiss, on the occasion above referred to: That the child in the keeping of the defender James Middlemiss senior, is not the person who called himself James Middlemiss, on the occasion referred to: That I believed the name which he gave me to be his real name.

JOHN FERGUSON, *Gamekeeper, Drummond Castle*.—Depones alike to, and concurs with the preceding deponent in all points: That James M'Laren, the preceding witness, was along with me on the occasion deponed to, and at the time when I asked the defenders' names and was informed what these names were.

NEIL SIME, *Sheriff-officer and Constable in Crieff*.—On being shewn the complaint, depones,—That he served the defenders with copies thereof: That he only identifies Thomas Middlemiss, the defender at the bar, as being the only defender present in Court: That the defender James Middlemiss junior, is taller, and may be about two years older than the defender Thomas Middlemiss: That he would know the defender James Middlemiss, if he saw him again: That he gave the copy to the said James Middlemiss junior, into his own hand: That the child now in Court, and in the charge of a female present, is not the person to whom I gave the copy as aforesaid.

Interrogated for the Defenders.—Depones, That the names of the defenders were in the citation. That the defenders were both sitting at the fireside of James Middlemiss senior's house, when he served the complaint: That he asked the mother, who is now present, the names of the defenders, when she stated that the one, pointing to him, was Thomas, and he asked if the other was James, to which she answered that that was not his name: That he left the copy for James Middlemiss junior in the hands of the eldest boy. There was a girl present, but no more boys. The deponent asked the mother if the eldest boy was the oldest she had, and she answered that he was.

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J. M. BELL, for the Respondents, argued, that as the true party caught snaring hares had been duly served with a summons, and was of an age, viz., eight years, to be an-

Re-interrogated for the Complainers.—Depones, That before serving the copies on the defenders, he was informed that the defender James Middlemiss junior had given a wrong name, and was instructed to serve the copy addressed to that individual on an elder boy than the other defender Thomas.

EVIDENCE FOR THE DEFENDERS.

ANN DEWAR OF MORRISON, *wife of John Morrison, saddler in Crieff.*—Depones, That the child in the keeping of its mother, and present in Court, is called James Middlemiss, and is James Middlemiss' only son of that name, and is about two years of age: That the defender, James Middlemiss senior, has three sons, the name of the eldest is Alexander, the second Thomas, and the youngest the said James Middlemiss junior: That she cannot state the age of Thomas exactly, but believes him to be about seven: That there were several that died between the eldest and Thomas, and cannot say what the eldest boy's age is.

Crieff, 10th January 1852.—The Justice having considered the proof led on the preliminary defence urged by the defenders,¹ and heard parties' procurators thereon, repels the preliminary defence stated, and decerns. (Signed) WM. L. COLQUHOUN, J.P.

The complainers proceeded to examine witnesses *in causa*, and re-called—

JOHN FERGUSON, who depones, That I went out on Sunday, the 25th day of January last, to protect the game on the Perth estate from poachers, in consequence of having learned, two or three days before, that snares had been set on the grounds libelled on: That about half-past eleven o'clock of the forenoon of the said Sunday, and while the bells were ringing for church, I arrived at the Muthill acres on the Perth estate, the property of the complainers, tenanted by John M'Robbie, mason, and John M'Naughton, shoemaker, both in Muthill: That, along with James M'Laren, game-watcher, I saw two boys on the said acres on the said occasion, going along the hedge bounding the acres on the east, when they appeared to be examining the hedge for snares: That, in advancing to where the boys were, I and James M'Laren kept the opposite side of the hedge where the boys were, and observed three or four brass wire snares in the hedge, in one of which was a hare, which was dead: That the boys went along the west side

¹ That, in respect that James Middlemiss junior, who is now present, is an infant of not more than two years of age, this Court cannot entertain this complaint, more especially, as it is admitted that the child was not present on the occasion libelled; and therefore, that the complaint against both defenders ought to be dismissed, reserving a new complaint.

swerable personally for his own delict; and, as he had given an assumed name; the respondents, who were thereby deceived, were warranted in presenting a complaint, and taking sentence against said party under such assumed name. *He* was personally barred from complaining against this, and, accordingly, *he* had presented no suspension. But, as the complaint had been personally served on him alone, and had never been used or intended to be used against any other party, it was *jus tertii* to any other party, like the present suspender, to raise a suspension of the sentence.

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NEAVES, on the same side, maintained the same argument, urging that identity of person, with correctness of name, was often not merely inconvenient, but impossible to be established in evidence.

The LORD JUSTICE-CLERK.—There is great force in what you say; but how do you prove the elder brother to have been in the field at all?

NEAVES.—There was no question in this suspension in

of the hedge above deponed to, and, in doing so, I observed them examining the hedge for snares: That when I came up to the boys I asked them what they were doing, when the eldest replied that they had seen some person setting snares the night before, and that they had gone there to look at them: That, before I came up to the boys, James M'Laren had a brass snare in his hands, which he stated he had taken from the eldest boy. I asked this boy where he got the snare, and he answered, 'in a slap of the hedge up there.' That I examined the slap referred to, and traced that a hare had been caught there some days previously. I asked the names of the boys, and the eldest boy stated his name to be James Middlemiss, and the youngest boy stated his name to be Thomas Middlemiss: That the snares that the boys had passed, as he observed by their fresh foot-marks, were all properly set. I had no doubt that the names given by the boys respectively were their correct names.

JAMES M'LAREN, recalled.—Depones alike to, and concurs with the preceding deponent in all particulars, with this addition:—That on reaching the boys, which he did before the preceding witness came forward, he had asked the boys what they were doing there, when the youngest of the two stated that he was doing nothing: That I then asked the same question at the eldest boy, as also whether he had any snares in his possession, when he answered that he had no snares: That I searched the eldest boy, and found a brass wire snare rolled up in his pocket.

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respect of the elder brother, against whom the respondents had a good answer if he should raise any suspension for himself.

LORD WOOD.—I observe you write letters to Alexander (as you contend), after you knew the true names of the parties. Why did you not write to the father instead of writing to James Middlemiss junior?

NEAVES.—If I once lay a competent complaint against a party, whose identity is clear, and whose name is only mistaken through his own falsehood, can any one say that sentence following thereon is inept? And can it further be said, that the father of the child whose name was wrongfully given, is entitled to suspend, because his elder child assumed his younger brother's name?

The LORD JUSTICE-CLERK.—In this case I am of opinion the suspension must be sustained. The mere pronouncing of a sentence against any one is a serious thing, and entitles the party to a suspension if wrongful. Here it is directed against James Middlemiss junior, and that after the parties knew of the boy Alexander's assumption of a wrong designation. When, on proof, they found they had made a mistake, they should not have moved for sentence. Unless they had been prepared to shew (what in England they call 'identity and diversity'), viz., that the boy Alexander was truly there, and gave his name James Middlemiss, they should have desisted from further proceedings as against James Middlemiss junior. Had the suspension been at the instance of Alexander, who falsified his name, I say nothing; but in the present case, I think the suspension ought to be sustained.

The other Judges concurred.

LOGAN moved for expenses.

The LORD JUSTICE-CLERK.—I think in all cases where a sentence has been moved for against a child *nominatim*, known to be two years old only, his father is entitled to come here and ask us to suspend such sentence, with expenses.

The COURT suspended the sentence *simpliciter*, with expenses.

SOUTH CIRCUIT.

DUMFRIES.

Judges—LORDS COLONSAY AND COWAN.April 19.
1852.R. THRESHIE, Appellant—*P. Fraser.*

AGAINST

JOHN SAFFLEY, Respondent—*J. Shaw.*

JURISDICTION—STATUTE 1ST AND 2D WILL. IV. C. 43—TOLL—EXEMPTION.—An appeal to the Circuit Court of Justiciary against a decision of the Sheriff, sustaining a claim of exemption from toll, dismissed as incompetent.

Observed—That the right of appeal from the Sheriff-substitute to the Sheriff is a right available to parties in all cases where such right is not clearly excluded by statute.

THIS was an appeal from a decision of the Sheriff of Dumfriesshire, arising out of the following circumstances:—

The respondent, who was a farmer in the neighbourhood of Dumfries, had, it appeared, been in the habit of driving his cattle to Dumfries market, by a parish labour road, which communicated with the turnpike leading to Dumfries, and thereafter driving them off the turnpike, on to another statute labour road which communicated with Dumfries. There was a side-bar on the road, which first communicated with the turnpike, and on the occasion out of which the present dispute arose, no toll was demanded for the passage of the respondent's cattle. Sometime afterwards, the appellant presented a petition and complaint to the Sheriff, praying to have the respondent found liable in the statutory penalty for evasion of toll, and alleging that the cattle had traversed 100 yards on the turnpike-road, before they were again driven on to the statute labour road.¹ The respondent lodged

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¹ By the statute 1st and 2d Will. IV. c. 43, § 37, it is provided, *inter alia*, 'That no toll shall be exigible for any horses, cattle, or car-

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answers, wherein he averred, that the distance travelled by the cattle was not so much as 100 yards; and, 2d, that, for time immemorial parties had been in the habit of passing along these roads without paying toll. The Sheriff dismissed the latter defence as irrelevant, and allowed the respondent a proof of his allegations as to distance, and to the appellant a conjunct proof. Thereafter a great variety of witnesses, chiefly surveyors, were examined, one-half of whom made the distance under 100 yards, and the other half made it 101 yards.

The Sheriff-substitute in these circumstances appointed the parties to meet him on the spot, in order that the distance might be judicially ascertained; and thereafter pronounced the following interlocutor, which was adhered to by the Sheriff on appeal.

Dumfries, 4th August 1851.—Having again considered these proceedings, after seeing the road in question measured, finds, That it is possible for cattle, horses, carriages, and others, so to traverse the space betwixt the Clouden Bar and the Woodlands Road, as not to travel so much as one hundred yards on the turnpike road; and that it is also possible for cattle and others, as aforesaid, so to traverse said space, as to travel more than one hundred yards on the said turnpike: Finds, That there is no proof that the cattle of the defender traversed said space in the manner last mentioned, and that they did not, accordingly, travel so much as one hundred yards on said turnpike: In these circumstances, finds, That the complainer has failed to prove his complaint; and that the defender has failed to prove his defence: dismisses the complaint; finds no expenses due, and decerns.
(Signed) ‘JOHN P. TROTTER.’

Against this judgment the present appeal was brought.

J. SHAW, for the respondent, objected to the competency of the appeal, in so far as it sought to review the decision

‘riages, which shall not travel altogether above one hundred yards on any road, in whole or in part, before or after passing any bar at which toll-duty is leviable for passing the same: Provided always, that if any person shall claim or take the benefit of any exemption, not being entitled thereto, every such person shall forfeit and pay a sum not exceeding four pounds; and in all cases the proof of exemption shall lie upon the person claiming the same.’

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of the Sheriff, which, by the section of the statute, was made final. The words of the statute¹ drew a marked distinction between a conviction taking place before the Sheriff, and one taking place before the Justices. In the latter case, an appeal was given to a Quarter-Sessions, which would there be final, and a decision of the Sheriff was equally so. It might be doubted if it were competent to appeal under the statute from the Sheriff-substitute to the Sheriff; and if not, the present appeal was not brought in time.

P. FRASER for the appellant.—The Sheriff had not pronounced any judgment in this case, and the present appeal only sought a remit to him in order that he might determine whether or not the distance was more or less than 100 yards. By the statute, the whole burden of proof was cast on the party seeking the exemption. The Court had full power to do this, and it was plainly necessary for the expiscation of the case. The right to appeal to the Sheriff from the decision of the substitute was not taken away by the statute; and the present appeal was

¹ Section 114 enacts—‘That any person who shall think himself or herself aggrieved by any judgment or proceedings of any Justice or Justices of the Peace, in the execution of this act, for which no particular relief has been hereby provided, may, within three months after such judgment or proceedings, but not afterwards, appeal to the Justices of the Peace at the Quarter Sessions, the appellant giving fifteen days’ notice of such appeal to the defender or defenders, and to the clerk of the said Justice, and the clerk of the Justices of the Peace, and finding caution to pay the expenses of such appeal; and where, by this act, the adjudging of any penalty, forfeiture, fine, or the determining the amount of any payment, damages, or expenses, or any other matter, is committed to any Justice, or Justices of the Peace, or to the Sheriff, or the Justices of the Peace assembled in their Quarter Sessions, originally or by appeal, all judgments, determinations, and proceedings of such Justice or Justices, not appealed from as aforesaid, and of such Sheriff or Quarter Sessions, shall be final and conclusive, and shall not be subject to review by advocacy, or suspension, or by reduction, or by any process of law or court whatsoever, any law or usage to the contrary notwithstanding.’

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taken in due time after affirmance by the Sheriff-principal of the decision of his substitute.

LORD COWAN.—I am of opinion that this objection is insuperable. It plainly appears from the deliverance appealed from, that there is an adjudication by the Sheriff, that the respondent is not liable to the appellant in the penalties sought to be enforced against him. This being so, it is immaterial on what ground the Sheriff arrived at his conclusion, as the statute declares in express terms that his judgment shall not be subject to review. We must therefore hold this appeal incompetent. As to the second point, the importance of the subject leads me to remark, that, in my judgment, the right of appeal from the Sheriff-substitute to the Sheriff-depute is a common-law right, available to parties in all cases, whether the process be under a statute or at common law, unless either by express terms, or by necessary implication, such appeal is taken away by statutory enactment.

LORD COLONSAY.—I am of the same opinion. In whatever way we regard the interlocutor of the Sheriff, it amounts to a judgment of absolvitor in favour of the respondent, and also determines the question of expenses. In so far, therefore, as the Sheriff-court was concerned, the process was at an end; and the act having declared that no judgment of the Sheriff shall be reviewable, it plainly follows that we cannot enter into the sufficiency or insufficiency of the reasons on which that judgment proceeds.

The appeal was dismissed with expenses.

R. THRESHIE—CHR. HARNES.—Agents.

NORTH CIRCUIT.

Spring, 1852.

PERTH.

*Judges—LORDS COCKBURN AND IVORY.*April 29.
1852.HER MAJESTY'S ADVOCATE—*Mure A.D.*

AGAINST

ISABELLA BLYTH—*Millar—Macpherson.*

MURDER—INSANITY.—Circumstances in which the Court interposed in the course of a trial, and intimated an opinion that a defence of insanity had been established by the evidence ; and the Jury, agreeing in this opinion, returned a verdict to that effect.

ISABELLA BLYTH, residing at Balbirnie Burns, in the parish of Markinch, and shire of Fife, was charged with the crime of Murder :

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IN SO FAR AS, on the 25th day of November 1851, or on one or other of the days of that month, or of October immediately preceding, or of December immediately following, within or near the dwelling-house situated at or near Balbirnie Burns, in the parish of Markinch, and shire of Fife, then and now or lately before occupied by the now deceased Grace or Grizzel or Girzy Duncan or Blyth, your mother, with whom you then and there resided, you the said Isabella Blyth, did, wickedly, maliciously, and feloniously attack and assault the said Grace or Grizzel or Girzy Duncan or Blyth, and did, with a pair of tongs, or other instrument or instruments, to the prosecutor unknown, strike the said Grace or Grizzel or Girzy Duncan or Blyth several, or one or more, severe blows on her head, and neck and shoulder, or on one or more of them, and other parts of her person, and did thereby fell or knock her down upon the floor of the said house, by all which, or part thereof, or by other violence to the prosecutor unknown, then and there inflicted on her, by you, the said Grace or Grizzel or Girzy Duncan or Blyth, was mortally injured in her head and brain, or one or other of them, and, in consequence thereof, lingered till on or about the 4th day of December 1851, when she died ; and was thus murdered by you the said Isabella Blyth.

The following special defences were put in for the prisoner :

The pannel's plea is, Not Guilty ; and she says, that

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'at the time the crime charged against her is said to have been committed, she was insane.'

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EVIDENCE FOR THE PROSECUTION.

GEORGE GRANT, *Esq.*, *Sheriff-substitute of Fifeshire*, and ALEXANDER BLACK, *Joint Procurator-fiscal, Cupar*, proved—That the prisoner's declarations, emitted on the 29th of November, on her apprehension, had been freely and voluntarily emitted by her, when in her sound and sober senses, and after the usual cautions given to prisoners in such circumstances.

It appeared that, before the prisoner had been examined, rumours had reached the officials to the effect that she was insane. Dr Grace, surgeon, Cupar, had been sent to see her, and had granted a certificate that there was nothing in her state to prevent her being judicially examined.

A deposition, omitted by the deceased, was then proved to have been taken down when she was fully aware of her dangerous state, and after she had been sworn, and cautioned to give her evidence as in the prospect of death.

ISABELLA MACMAIN or WILSON.—I knew the old woman; the prisoner is her daughter; they lived together during the last year or two. A little boy of mine, of six years of age, on the 25th November, told me something which led me to go to her house; a few minutes after nine. I found the children at the door; I put them aside, and went in. There is one room with beds, and a place behind, which gives it the appearance of two rooms. I heard moaning and groaning from the old woman, as if from the inner apartment. There was a knocking going on at the same time; I thought it proceeded from breaking of coal, or something of that kind; like an iron instrument knocking on something hard. I did not go to the inner room, but called out 'what's the matter?' I got no answer. I knew the voice of the groans to be the old woman's. I repeated the question; still, no answer. I then went and called Mrs Dalrymple; her house is close by. When I went back to her I still heard groans. There was no one in the outer room. I said to Mrs Dalrymple that surely there must be something wrong; I was alarmed at the continuance. The daughter came from the inner apartment, carrying a pair of tongs. I spoke to her, and asked what was the matter with her mother; she said, 'nothing.' I then looked into the bed, thinking the old woman was there, and the groaning; I found she was not there. Mrs Dalrymple asked where she was; the prisoner said, 'ben the house.' Mrs Dalrymple then told the prisoner to go and see what was the matter. The prisoner said, 'gang yersell.' The old woman then called out, 'Oh, come to me, for I'm killed.' I went in, and saw her stretched on the floor. I asked if she had fallen. She said, 'No; it was Bell that struck her with the tongs.' Bell was in the outer apartment at this time. I called to Mrs Dalrymple to go for assistance. She went, having first followed into the inner apart-

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ment. Some of the neighbours came, and helped me to lift up the old woman. There was blood proceeding from the left side of the head; she had a flannel cap on, through which the blood came. We took her to the outer room, and put her on a stool before the fire. We got her daughter-in-law, Mrs David Blyth. She came. The cap was then taken off; there was a muslin cap uderneath. There was a cut on the ear. The hair was coagulated with blood, and she saw no more wounds than the cut on the ear. We got water and bathed the wound. I and the neighbours went out and in during the day, and saw the old woman. She did not go to bed till afternoon; she was unwilling to go to bed. When we washed the hair, we found that there were wounds; but I did not examine them particularly. I thought a doctor should be sent for, but did not say so. The doctor was sent for, and came before next morning. The old woman said she felt herself a little unwell in the morning, and was going into the press to get a little spirits, and Bell followed her and knocked her down with the tongs. When I went back with Mrs Dalrymple there was still knocking as well as the groaning. The prisoner staid in the outer room the whole time. When we went back, Mrs Dalrymple said, 'Bell, What's this you've done to your mother?' Bell said, 'Did you see me?' I recollect no answer to that. I have lived there for ten years; for two years Bell had been at home. The mother and daughter lived on good terms. I saw the prisoner as a neighbour during those two years. She seemed in the same state of mind as other people about the place; I saw no symptoms of insanity about her. She was frequently in bed, and Dr Baillie occasionally attended her. That is the pair of tongs which is now shewn to me. The prisoner was standing about while we were dressing the mother; before the fire. She gave no assistance. She spoke once. When some one asked her to get a clean cap for her mother; she said she knew nothing about the caps. She went afterwards and got the caps.

Cross-examined for the Pannel.—She said her mother had told her where the caps were before she went. Grizzel was living at Balbirnie Burn before I went there. She was very old, nearly eighty, but able to go about. She was in the habit of going to the neighbours' houses and mine. The prisoner had been at service before she came home. She was not so much in the habit of going about as her mother. She did not seem to avoid strangers, but was not in the practice of going out and in to neighbours' houses. She latterly went much less out than she did when she first came home. She had been in my house recently, before her mother's death. I was often in her mother's house. Sometimes I did not see the prisoner. She was often in bed through the day. I have known her keep her bed for several days on end. She said she was unwell, and for that reason kept bed. The mother had spoken to me about the prisoner's health. She seemed anxious about it, and said the prisoner was restless at night, and she herself prevented from sleeping in consequence. I never heard the prisoner

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express ill will towards her mother. She was always dutiful, so far as I saw. A number of children were standing round Grizzel's window when I went there. The door was not fastened, but on the sneak. It made a considerable noise in the lifting, which any one in the house might easily have heard. I saw no one the first time or the second time I went in, till the prisoner came out with the tongs, and put them at the fire.

By a Jurymen.—No one in my hearing, so far as I remember, asked the prisoner why she had done it. There was nothing to have prevented her having escaped, if she had pleased.

ANN SCOTT or DALRYMPLE.—I live at Balbirnie Burns. I went to Grizzel's house on the 25th November. I heard groans, but heard no knocking. I called, 'What's the matter?' After a little, Bell came out with the tongs in her right hand, hanging by the middle. I said to her, 'Bell, what's the matter with your mother?' She said, 'You may go and see.' I spoke no more. Grizzel then said, 'O come to me, for I'm killed.' I did not see what the prisoner did then. Mrs Wilson went to the inner apartment. I asked the prisoner to go and bring 'but' her mother. She bid me go myself. She had put down the tongs by this time. I went in and found that Mrs Wilson had lifted her head, which was bleeding. I went for the neighbours to assist, and went back and brought the old woman to the front room. She said, 'O what would have come of me if this had happened through the night.' She said she had been unwell, and gone for spirits, and Bell had followed and struck her with the tongs. She did not say how she had been struck. Mary Mackie or Blyth was sent for. The head was dressed, and the caps taken off. I said, 'Bell, Bell, come look at your mother's head; come and see what you have done; did ever I think you would have done so to your mother.' She said, 'Did you see me do that?' I said no more. I never recollect hearing any one ask why she had done it. I never did. The prisoner spoke very little that day. I was out and in several times. The old woman did not go to bed till towards evening. Dr Baillie came next day. I was in and out assisting up to the time of her death. She died on Thursday of the following week, December 4th. The prisoner was about the house till she was apprehended on the Saturday. I never spoke to her about it. We never left Bell alone with her. She did assist sometimes to attend her mother when we were in. I have known the Blyths all my life, and the prisoner all her's when at home. She was pretty constantly in service till within two years of her mother's death, which were spent with her mother. I saw her often; constantly, when out of bed; she was a great deal in bed. I never saw her in my own house but once during the two years. I never saw her much out for a considerable time, but I saw her in her mother's house. I never thought that she was insane. I saw nothing wrong. I never heard it said by neighbours that she was wrong in her mind.

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Cross-examined for the Pannel.—The old woman sometimes came to my house ; very often. The prisoner was frequently in bed. When her mother came to my house, she would say her daughter wearied, and she did not like to be long away from her. I never did see any unkind treatment by her of her mother. When the prisoner came out of the back place, she stood about in the kitchen, and hung about in much the same place during the whole day.

CATHERINE MORRISON OF LAW.—I live at Balbirnie Burns. I remember the morning I was sent for, and went down and saw the old woman in the inner room. I saw Bell. I heard no one ask her about it. Others were more in the house than I was. I have known Isabella from a child. She lived at home during the last two years. I always saw her when at home. I did not see anything wrong about her mind. She conducted herself like other people in conversation and otherwise. I never heard that she was insane.

Cross-examined for the Pannel.—I saw her during the two years only in her mother's house. She had been in mine, but not often. She kept the house very much. It was matter of common remark among the neighbours, that she staid at home. She had no particular companions or friends. I sometimes found her in bed during the day. I never saw her ill-treat her mother. She was a quiet well-disposed woman.

MARY MACKIE OF BLYTH.—I am married to a son of the deceased. I heard that my mother-in-law had been injured, and went down. She was sitting by the fire. The neighbours were there, and the prisoner. She said nothing to me. I took off the caps, and washed the head. I saw blood and wounds. I dressed the head, and bound it up again. I did not ask how it had happened to her. I heard the mother say her daughter did it with the tongs. The prisoner was present, but said nothing. I asked her that day, after all were gone, why she had done it. She said it was a pity she had not been dead, meaning, as I understood, her mother ; she should have been dead long ago. I asked no more that day ; but next, when I went down about six or seven o'clock in the morning, I asked her again why she did it, and she said she did not know. On the Saturday she was apprehended. I attended more or less up to the death on the Thursday. Dr Baillie was not sent for till next day. The old woman did not rise again.

Cross-examined for the Pannel.—I have known the prisoner many years. I know that she was in service at Kirkcaldy in 1847, for three years before Martinmas 1847. She sometimes came to visit her mother at that time ; I cannot say how often ; pretty frequently ; the distance is seven miles. She always complained of a pain in her head. She then went to a situation in Edinburgh, Mr Chancellor's. She remained there six months, till Whitsunday 1848. She took a house of her own in Saunders' Street, Edinburgh. She gave up the place for her health. She did not think herself fit for the place. She thought her own health

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bad. She kept this house for six months, till Martinmas 1848. She then went to East Lothian, to the family of a Mr Brodie. I do not remember how long she remained. She went to Mr Aytoun's in Kirkcaldy, after coming from East Lothian. I do not remember whether she was at home in the interval. She went in April, and left in November 1849. She then came home, and remained till this happened. When she came she complained of her head, and always grew worse during the time she was at home. The first year she went about at times, though often she kept the house. She was sometimes in bed during the day, for weeks on end. She complained also of her back and her face, particularly of her nose. She spoke of her nose; she said there was a discharge coming from it; that she could not bear the smell; that it was falling off her face by degrees, and would soon be off altogether. She persisted in this. I saw no discharge, and her nose was not getting less. I saw nothing the matter with her face or nose. I noticed a change in her eyes occasionally; their expression was wild and excited. When she lay in bed, her fingers were continually twisting and working with the bed-clothes. She had no conversation except about her own health, particularly for some time before her mother's death. She seemed to shrink from the company of strangers. She was at one time very tidy, and latterly became careless and slovenly. Her mother said she was restless during the night, and could not sleep. She often came down to ask me to come at night, to see what I could do to soothe the prisoner. I thought the prisoner was affected in her mind; her mother said she thought so too. The family talked among themselves of her state of mind, and of sending her to a lunatic asylum, about six months before her mother's death. I was very frequently in the house. The prisoner never used harsh conduct towards her mother, and was always a dutiful daughter. I spoke to her about these faucies about her face and hands; but she was quite positive, she said, she heard a roaring noise in her head like thunder, and expected me to hear it too.

Re-examined for the Prosecution.—When sent for by her mother at night, I went down to see her, and found her in bed, complaining of the pain in her head and nose. For two years she complained so, but was worst at last. I spoke to her sisters and brother, and to my husband, about the state of her mind, and to Dr Baillie.

Re-cross-examined.—It was our wish to keep it quiet from the neighbours, and it was kept quite quiet. We always hoped she might get better.

The dying deposition of the mother was then read. In that deposition the deceased said of her daughter, 'She is not very sound of mind; she was generally quiet, but was sometimes excited;' also, that 'all of a

' sudden she took up the tongs, and struck me on the left side of the head two or three times. There was no quarrelling at the time, and I gave her no cause for striking me.'

In the prisoner's declaration, which was also read, she said, ' I assaulted my mother by striking her two or three times on the head with a pair of tongs. There was not much quarrelling between us at that time or before. I do not know what induced me to take up the tongs and strike my mother.'

WILLIAM BAILLIE, *Surgeon*.—I was called in on the 26th, and afterwards prepared a medical report. This is it [reads];¹ it is a true report. I attended the deceased till her death. A pair of tongs might have been the instrument with which the wounds were inflicted. I also made a *post mortem* report along with Dr Grace. This is it [reads]; it is also a true report. I knew the prisoner. I attended the prisoner for a year; she complained of bodily ailments; the greater part I considered to be imaginary. She went beyond hypochondria. She fancied that her nose was wasting off her face, and insisted on it; that her hands were becoming black, and wasting also. She insisted on all this; and I could convince her, neither by arguments nor by my medical opinion, that this was not so. These fancies extended more or less over all the year, particularly the last six months. She confined herself to bed, although I saw no necessity whatever. I had not seen her for about two weeks before her mother's death. These fancies were then strong. I formed the opinion that she was becoming insane, although she was not actually mad. I did not talk with her on general topics, but merely on the cause of my visiting, her ailments. Her mother was generally present. They seemed on good terms. After the death, I asked what this was she had been about. I got no answer, but a vacant stare. Sometimes she did, and sometimes she did not, know right from wrong.

Cross-examined for the Pannel.—She brooded on her supposed ailments, and her spirits at times were very much depressed. I noticed a strange expression of eye; it was rather wild and unsettled. This appearance formed an element in my opinion of her insanity; and I spoke to her mother of this, and told her my opinion, and she said that was her opinion also.

No. 99.
Isabella
Blyth.

Perth.
April 23.
1852.

Murder.

¹ This medical certificate had reference exclusively to the state of the deceased, and did not relate to the mental state of the pannel.

No. 99.
Isabella
Blyth.

Perth.
April 23.
1852.

Murder.

Dr Grace was the next witness called; but before he appeared in the box,—

LORD COCKBURN interposed, and said that, in the opinion of the Court, the defence of insanity had already been made out; and if the Jury were of the same opinion, it would be unnecessary to lead farther evidence.

The Jury thereupon deliberated, and immediately returned an unanimous verdict, ‘that the pannel killed her mother in the way and manner mentioned in the indictment; but find it proven, that at the time the pannel was insane, and deprived of her reason.’

The COURT then pronounced the following sentence:

‘In respect of the insanity and deprivation of reason found proven, the Lords found, that the pannel, Isabella Blyth, is not an object of punishment, and therefore assoilzied her *simpliciter*. But they decerned and adjudged her to be carried back to the prison of Cupar, therein to be detained and confined prisoner during all the days of her life, or at least ay and until farther orders of the Court of Justiciary with regard to her.’

HIGH COURT.

Present,

June 8,
1852.

THE LORD JUSTICE-GENERAL,

LORDS COWAN AND ANDERSON.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Neaves—Milne A.D.—*
E. S. Gordon A.D.

AGAINST

THEODORE DOWD and DARBY FURIE—*Adam.*

EVIDENCE—POLICE OFFICER—CONFESSION.—In the course of a trial, a police officer deponed, that some time after the apprehension of the pannel, he asked him whether, at the time libelled, he was at the alleged *locus delicti*. Objection sustained, that the pannel's answer was not admissible in evidence, as not being an ultroneous statement.

THEODORE DOWD *alias* PETER DOWD, and DARBY FURIE *alias* JEREMIAH HAGGARTY, were charged with Stouthrief, as also Theft, especially when committed by means of housebreaking, and by a person who has been previously convicted of theft; as also Assant, especially when committed on a man in his own house, to the effusion of blood, fracture of bones, and danger of life.

No. 100.
Theodore
Dowd.
High Court.
June 8.
1852.
Stouthrief.

In the course of the trial, Thomson, a police officer, deponed, that some time after the apprehension of the prisoners, he asked the pannel Dowd whether, at the time libelled, he was at the house where the crimes charged were said to have been committed, and that he answered in the affirmative.

ADAM, for the pannel, objected to this being received in evidence. The question was put to the prisoner some months after the commission of the offence, and he was not warned that what he then said might be used in evidence against him. It was not an ultroneous statement made by the prisoner to the officer; for the latter

No. 100. Theodore Dowd. had virtually assumed the office of a magistrate, and had taken a declaration from the prisoner without the usual warning, without which, even a declaration otherwise regularly taken, was inadmissible in evidence.

High Court. June 8. 1852. Stouthrief. The LORD JUSTICE-GENERAL.—If this evidence were admissible, it would come to this, that if, in his declaration, a prisoner denied all knowledge of the crime charged against him, it might be proved, that five minutes before, he had acknowledged his guilt, in reply to interrogatories by a constable to whose charge he had been committed.

The SOLICITOR-GENERAL, for the prosecution, agreed that the evidence objected to should be deleted.

HIGH COURT.

Present,

THE LORD JUSTICE-GENERAL,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE, MONCREIFF, COCKBURN, AND IVORY.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Moncreiff—G. Young A.D.*

AGAINST

JEAN KIELLOR¹—*Adam.*

CONCEALMENT OF PREGNANCY—STATUTE 49TH GEO. III. c. 14.—
VERDICT.—Terms of a verdict on a charge of concealment of pregnancy, in respect of which the High Court of Justiciary, on certification, pronounced a sentence of absolvitor.

No. 101. Jean Kiellor.

High Court. Nov. 20. 1850.

Concealment of Pregnancy.

At the Perth Autumn Circuit, Sept. 25. 1850, JEAN KIELLOR was indicted and accused :

¹ Accidentally omitted from its proper place in this volume.

THAT ALBEIT, by the laws of this and of every other well-governed realm, Child-Murder is a crime of an heinous nature, and severoly punishable: AND ALBEIT, by an Act passed in the forty-ninth year of the reign of His Majesty King George III., cap. 14, intituled 'An Act for repealing an Act of the Parliament of Scotland relative to Child-Murder, and for making other provisions in lieu thereof,' it is enacted, 'That if, from and after the passing of this Act, any woman in that part of Great Britain called Scotland, shall conceal her being with child during the whole period of her pregnancy, and shall not call for and make use of help or assistance in the birth; and if the child be found dead, or be amissing, the mother, being lawfully convicted thereof, shall be imprisoned for a period not exceeding two years, in such common gaol or prison as the Court before which she is tried shall direct and appoint.' YET TRUE IT IS AND OF VERITY, that you the said Jean Kiellor are guilty of the said crime of child-murder, actor, or art and part, or of the crime specified in the said statute: IN SO FAR AS, you the said Jean Kiellor having, on the night of the 4th, or morning of the 5th, day of July 1850, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, in or near the house or premises in or near Marywell village, in the parish of Saint Vigeans, and county of Forfar, then and now or lately occupied by John Doig, a mason, then and now or lately residing there, given birth to a living female child, did, immediately or soon after the birth of said child, in or near said house or premises, wickedly and feloniously, deprive said child of life, by shutting it into a chest or box, in or near said house or premises, or by otherwise excluding the air from said child, or preventing it from breathing, or in some manner, and by some means to the prosecutor unknown; and the said child was thus murdered by you the said Jean Kiellor: OR OTHERWISE, time and place above libelled, you the said Jean Kiellor did bring forth a living female child; and you did conceal your being with child during the whole period of your pregnancy, and did not call for, and make use of, help or assistance in the birth; and the said child was found dead, on or about the 10th day of July 1850, in a pond or quarry-hole at or near Abbeythan Quarry, in the parish of Saint Vigeans, and county of Forfar.

No. 101.

Jean
Kiellor.High Court.
Nov. 20,
1852.Conceal-
ment of
Pregnancy.

The libel having been found relevant, the pannel pleaded Not Guilty.

Evidence having been led for the prosecution, the Advocate-depute withdrew the charge of child-murder.

Counsel on both sides then addressed the jury on the proof, as to the charge of concealment of pregnancy under the statute—

No. 101.
Jean
Kiellor.

High Court.
Nov. 20,
1852.

Conceal-
ment of
Pregnancy.

LORD IVORY charged the Jury.

The following verdict was thereafter returned :—

‘ The Jury find that the pannel concealed her being
‘ with child during the whole period of her pregnancy,
‘ with this exception, that she told the reputed father of
‘ the child when she was two months gone, that she was
‘ with child by him : Find, that, she did not call for or
‘ make use of help or assistance in the birth, and find,
‘ that the child was afterwards found dead. But whether
‘ the matters thus found amount in law to the statutory
‘ offence libelled, the jury refer to the Court. If the
‘ Court shall hold that they do, the jury return a verdict
‘ of guilty as libelled. If the Court shall hold they do
‘ not, then the jury return a verdict of not guilty.’

In respect of the above verdict, Lord Ivory, the pre-
siding Judge, certified the case with the verdict, to the
High Court of Justiciary.

The diet having been called—

ADAM, for the pannel, argued—That under the statute,
it was necessary to prove concealment during the whole
period of the pregnancy, but that the jury had found that
she had disclosed her situation to the father of the child ;
that the act made no distinction between one kind of
disclosure and another, or the intention with which the
disclosure was made, or between a disclosure made to
the father, or to any other person ; that as the father was
the person bound to provide for the safety of the child,
he was the proper person to whom the disclosure should
be made ; and that the point was already decided under
the former act of 1690, case of *Marion Burnet*, March
1709, Hume, vol. i. p. 295.

The SOLICITOR-GENERAL answered—That the disclo-
sure must be made with a view to the safety of the
child, and that it was not sufficient that a mere disclo-
sure of the fact should be made ; that disclosure might
even be made with a view to accomplish concealment,
which could not be held a disclosure in the view of the sta-

tute; that the father of an illegitimate child had an interest in the concealment, and therefore a disclosure to him alone was not sufficient.

' The Court, on the report of Lord Ivory, having heard counsel *hinc inde*, in respect of the terms of the verdict, found the pannel not guilty, assoilzied her *simpli-citer*, and dismissed her from the bar.'

No. 101.
Jean
Kiellor.

High Court.
Nov. 20.
1852.

Conceal-
ment of
Pregnancy.

It may be doubtful whether this case can be held to have advanced in any degree the settlement of the question, for at least two of the Judges went on the special terms of the verdict, which expressly found, that there was an *exception* from the concealment, which being so worded, was inconsistent with the intended reservation, and so did not raise the point. It is believed that three Judges went on this view.

APPENDIX.

No. I.

ACT OF ADJOURNAL anent the Procedure and Records in the High Court and Circuit Courts of Justiciary, 1st August 1849.

The Lord Justice-Clerk, and Lords Commissioners of Justiciary, considering that by an Act passed in the 11th and 12th year of the reign of her present Majesty, cap. 29, intituled 'An Act to Facilitate and Simplify Procedure in the Court of Justiciary in Scotland,' the said Court is empowered, 'by Act or Acts of Adjournal, or otherwise, to alter the Forms of Interlocutors and Sentences at present in use in that Court, and to substitute others in their place in shorter or more convenient form; and such new Forms of Interlocutors and Sentences shall have the same force, operation, and effect, in all respects, as the Forms of Interlocutors and Sentences at present in use, in place of which they may be substituted;' As also, 'to make all such rules and regulations, by Act or Acts of Adjournal, as may be necessary for carrying out the purposes and accomplishing the objects of this Act,' do hereby ENACT and DECLARE the following Rules and Regulations, and the following alterations in the Forms of Interlocutors and Sentences at present in use, viz:—

1. That whereas, by the first section of the above-recited statute, printed copies, or copies partly printed and partly written, of all Indictments and Criminal Letters may be used as the Record Copies, so printed copies, or copies partly printed and partly written, of the Lists of Witnesses and Lists of Assize, respectively applicable to the same, may also be used as the Record Copies.

2. That Capital Sentences shall remain in their present form, in all respects.

3. That the Interlocutor of Relevancy shall remain in the present form, and be signed by the presiding Judge: And, in regard to all other Interlocutors, they shall be distinctly minuted or entered in the Record, and that entry signed by the Clerk, in all cases where, by the present practice, such Interlocutors have been in use to be signed by the Judge.

4. That when the panel, on being thereafter interrogated, shall plead guilty, his plea shall be recorded and signed, as at present.

5. That when the panel pleads not guilty, the Clerk of Court shall make an entry in the Record, that in respect that the panel pleaded not guilty, the panel was remitted to an Assize, and that the following Jurymen were balloted for and duly sworn to try the Libel, and he shall proceed at once to ballot for and swear the Jury.

6. That it shall not be necessary to enter at length in the Record, or for the Judge to sign, or the Clerk to read out the Sentences, as is at present the usage. That in regard to all Sentences, other than Capital Sentences, the Clerk shall make a distinct entry in the Record, signed by him, of the sentence actually pronounced by the Court, *exempli gratia* :—The Court sentenced the panel to ten years' transportation ; or, the Court sentenced the panel to fifteen months' imprisonment in the General Prison at Perth, or in the prison of Edinburgh ; and such entries of the Sentences, signed by the Clerk, shall be at all times full warrant and authority for all execution to follow thereon, and for the Clerk of Court to issue extracts for carrying the same into execution, according to the form and style of the extracts now in use, and in the same manner and to the same effect as they now are issued on the sentences as at present pronounced.

7. That the entry at the commencement of the proceedings, whether in Edinburgh or on Circuit, shall be in future written in English, and in the following or similar form :—At Edinburgh (*date*), present The Lord Justice-Clerk, Lords A. and B.—At Perth (*date*), present Lords A. and B.,—the record bearing on the first day of a Circuit that the Court was duly fenced, &c.

(Signed)

J. HOPE, *I.P.D.*

INDEX OF MATTERS.

AGGRAVATIONS.

1. Mode of libelling aggravations, which was found relevant where the major proposition of the indictment included several charges, to all of which the aggravations did not apply. *William Rait*, High Court, Nov. 17. 1851, p. 500.
2. Held incompetent to charge a previous conviction of theft, or that the pannels are habite and repute thieves, as aggravations to a charge of robbery. *Ellen Falconer and Others*, High Court, Jan. 26. 1852, p. 546.

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APPEAL.

1. Held (overruling *Wilson v. Cameron*, Broun, vol. ii., 284) that an appeal from the Sheriff is competent to the Circuit Court, before decerniture for the taxed expenses in the original suit. *Dundee and Union Whale Fishing Company v. Mavour and Paton*, Perth, Oct. 13. 1848, p. 15.
2. Objection to the competency of an appeal sustained, in respect it was not lodged within ten days after judgment, disposing of the merits and matter of expenses, although there was a subsequent interlocutor in the case. *Henderson v. M'Aulay & Co.*, Glasgow, April 26. 1849, p. 219.
3. Held. 1. That there is no statutory provision requiring a certificate that caution has been found in an appeal to the Circuit Court. 2. Circumstances in which, on an allegation that caution had not been found, the Court offered time to allow the necessary evidence to be produced. *Marshall v. Turner*, Glasgow, April 26. 1849, p. 222.
4. Held, that where a suit *ad factum prestandum*, concluded alternatively for payment of a less sum than £25, appeal to the Circuit Court was competent. *Wyher and Others v. Hendrie*, Glasgow, Sept. 17. 1849, p. 265.
5. Held, that in an action of multiplepounding, it is the amount admitted by the common debtor which determines whether an

APPEAL—*continued.*

- appeal is competent to the Circuit Court, and not the amount claimed by the respective appearers in the process. *Mathison v. The Monkland Iron and Steel Company, and Alexander W. Buttery*, Glasgow, Sept. 17. 1849, p. 266.
6. Held that an appeal might be presented within ten days from the interlocutor approving of the taxation of expenses. *Launders v. Mann & Co.*, Perth, April 24. 1850, p. 347.
 7. Held, that an appeal to the Circuit is competent against a judgment in an action of interdict. Opinion—That in all cases an appeal to the Circuit is competent, unless the party objecting can shew that the subject-matter at issue exceeds the sum of £25 sterling; and that the *onus* of proving this lies upon the objector. *Wilson v. Watson*, Perth, Oct. 1. 1851, p. 493.
 8. An appeal to the Circuit Court of Justiciary against a decision of the Sheriff sustaining a claim of exemption from toll dismissed as incompetent. Opinion—That the right of appeal from the Sheriff-substitute to the Sheriff, is a right available to parties in all cases where such right is not clearly excluded by statute. *Threshie v. Saffley*, Dumfries, April 19. 1852, p. 563.

ART AND PART.

Direction to a Jury, that where two persons were indicted for a criminal act, it would not be enough to warrant a conviction against either, that the Jury should be satisfied that it was committed by one of the two, unless the Jury could say by which, or were prepared to affirm, by a verdict, against both that they were alike guilty. *G. B. Pyott and W. B. Pyott*, High Court, June 16. 1851, p. 490.

ASSAULT.—See CULPABLE HOMICIDE, 3.

ASSAULT WITH INTENT TO RAVISH.

In a charge of rape; as also, assault with intent to ravish, the assault with intent found proven on a girl who was a prostitute. *Edward Yates and Henry Parkes*, Glasgow, Dec. 24. 1851, p. 528.

ATTEMPT TO STEAL.—See SUSPENSION, 8.

BASE AND COUNTERFEIT COIN.

1. Where two pannels were charged, *inter alia*, with having base coin in their possession at the time of uttering other base coin; 1st, Held that it was sufficient to establish the offence under the statute against both prisoners, to shew that they were acting under a common design in uttering, although one of them only had possession of the base coin. 2d; Direction to the Jury, that, in judging of the sufficiency of the proof of a charge of uttering base money, the Jury were entitled to take into consideration that the pannel had been previously convicted

BASE AND COUNTERFEIT COIN—*continued.*

of an offence against the coinage acts, as an evidence of guilty knowledge. *Mary Sutherland and Isabella Gibson or Murray*, High Court, Dec. 11. 1848, p. 135.

2. A counterfeit coin was substituted for a genuine shilling received in change, and another shilling demanded in exchange for it—Held, that this was sufficient uttering under the statute 2d Will. IV. c. 34. *John Mooney*, High Court, Dec. 8. 1851 p. 509.

BIGAMY.

Held, 1st, That in an indictment for Bigamy, it is sufficient in a question of relevancy to aver that the pannel was lawfully married to the first wife, although the circumstances set forth in the libel shew that such marriage must have been an irregular one. 2d, That the proper time to object to the validity of such marriage, is on the proof, if it be shewn that in truth the marriage is open to challenge. *James Purves*, High Court, Nov. 20. 1848, p. 124.

BREACH OF TRUST AND EMBEZZLEMENT.

Circumstances in which the Court directed the jury to find the pannel guilty of embezzlement, notwithstanding his accounts had been passed, wherein was shewn the true balance due by him. *Walter Duncan*, Perth, Sept. 26. 1849, p. 270.

CAUTION.

Held, 1. That there is no statutory provision requiring a certificate that caution has been found in an appeal to the Circuit Court. 2. Circumstances in which, on an allegation that caution had not been found, the Court offered time to allow the necessary evidence to be produced. *Marshall v. Turner*, Glasgow, April 26. 1849, p. 222.

CLOSED DOORS.

Held, that it was a relevant ground of suspension that the Justices had tried and sentenced the complainer in a court from which the public were excluded. *Finnie v. Gilmour*, High Court, June 11. 1850, p. 368.

COMPETENCY.

1. Held, that where a suit *ad factum prestandum*, concluded alternatively for payment of a less sum than £25, appeal to the Circuit Court was competent. *Wyher and Others v. Hendrie*, Glasgow, Sept. 17. 1849, p. 265.
2. Held, that in an action of multiplepoinding, it is the amount admitted by the common debtor which determines whether an appeal is competent to the Circuit Court, and not the amount claimed by the respective appearers in the process. *Mathison*

COMPETENCY—*continued.*

v. The Monkland Iron and Steel Company, and Alexander W. Buttery, Glasgow, Sept. 17. 1849, p. 266.

3. Objection to the competency of an appeal sustained, in respect it was not lodged within ten days after judgment, disposing of the merits and matter of expenses, although there was a subsequent interlocutor in the case. *Henderson v. M'Aulay & Co., Glasgow, April 26. 1849, p. 219.*

See also APPEAL—INDICTMENT.

COMPLICITY.—See ART AND PART.

CONCEALMENT OF PREGNANCY.

Terms of a verdict in a charge of concealment of pregnancy, in which the High Court, on certification from the Circuit, pronounced sentence of *absolvitor*. *Jean Kiellor, High Court, Nov. 20. 1850, p. 576.*

CONFESSION.

In the course of the trial a police-officer deponed, that some time after the apprehension of the pannel, he asked him whether at the time libelled he was at the alleged *locus delicti*—Objection sustained that the pannel's answer was not admissible in evidence, not being an ultroneous statement. *Theodore Dowd and Darby Furie, High Court, June 8. 1852, p. 575.*

See also EVIDENCE.

CONSPIRACY.

Held, 1st, That it is not objectionable in an indictment under the Act 11th and 12th Vict. c. 12, to libel a previous design as evidenced by subsequent overt acts. 2d, That it is enough, in charging a conspiracy, to state that the pannel had presided over a body formed 'for the illegal purposes libelled,' without charging him to have done so in pursuance of the common intent laid in the major. 3d, That the statute 11th and 12th Vict. c. 36, does not exclude the common law, and that it is competent to libel the same *species facti* as sedition at common law, as well as a contravention of the statute. 4th, That a conspiracy, to effect an alteration of the Constitution by force, is only an aggravated form of sedition at common law. *James Cumming, John Grant and Others, High Court, Nov. 7. 1848, p. 17.*

See also SEDITION.

CULPABLE HOMICIDE.

1. Circumstances in which the Court directed the Jury that, after the prosecutor had withdrawn the charge of Culpable Homicide, they were not entitled to find the pannels guilty of assault, to the danger of life. *James Flinn and Margaret M'Donald, Perth, Oct. 12. 1848, p. 9.*

CULPABLE HOMICIDE—*continued.*

2. Circumstances in which the Jury, under the advice of the presiding Judge, found a pannel not guilty of culpable homicide as libelled, it being charged that the act, whereby death was occasioned, was done wickedly and feloniously. *Robert Vance*, Glasgow, March 23. 1849, p. 210.
3. Held, that where death ensues from an unlawful blow, if it ensue therefrom in an ordinary and natural way, although, with proper management, the injury might have been cured, it is properly charged as Culpable Homicide. *Margaret Macmillan or Shearer*. High Court, Jan. 6. 1851, p. 468.

CULPABLE HOMICIDE,—CULPABLE NEGLECT OF DUTY,
&c.

Held, 1. That these were substantially one charge, whenever an accident happened which occasioned loss of life. 2. Direction to Jury, that when the Crown had proved an accident with loss of life in a vessel under the pannels' command, it lay on them to prove their innocence of all blame. *Thomas Henderson and Others*, High Court, Aug. 29. 1850, p. 394.

CRIMINAL LETTERS.

Held, 1st, That it was a fatal objection to criminal letters that the list of witnesses appended to the copy served, did not bear to be signed by the Advocate-depute. 2d, That, after a pannel had been declared exempt from trial, on the above objection, he could not competently be detained until fresh criminal letters could be served. *John Cameron*, High Court, Jan. 31. 1850, p. 295.

DECLARATION.

1. Held, that where a declaration is sworn to have been freely and voluntarily emitted by two witnesses unconnected with the fiscal's office, it may be read without calling the Magistrate who took it, even though one of the witnesses said the prisoner requested an alteration to be made, which did not appear to have been done. *George Howden*, Jedburgh, April 18. 1850, p. 351.
2. Circumstances in which it was held competent to prove by parole, that the actual date of a declaration was different from that which was inserted in the preamble or title as the date at which it had been emitted. *James Robertson*, Parth, July 28. 1850, p. 447.

DESCRIPTION.

Held, that in modern practice it was sufficient to describe the article stolen by a generic name, under which the party injured could identify it. *Daniel Fraser*, High Court, June 3. 1850, p. 365.

See also LOCUS—RAPE.

EVIDENCE.

1. 1st, When it was proposed to shew a witness a pamphlet said to have been published by an association of which the pannels were members,—ruled that this was competent without first proving that the prisoners were present at the meeting where the matter was discussed, reserving to them the right of shewing they were not concerned therewith. 2d, Question whether language indicative of a conspiracy could be proved against a pannel, as having been used by him on an occasion not mentioned in the libel. 3d, Held that it was competent to prove other expressions of a seditious nature, besides those charged in the libel, in support of the charge of sedition. 4th, Held that a letter could not be read in support of a charge of conspiracy, libelled as commencing at a date subsequent to that of the letter. 5th, Held, that where a letter relating to the alleged common design had been directed to one of the pannels, and found in the possession of another, it was competent evidence against both, although it was not shewn that the writer was a conspirator, or that the contents were true, or that it was ever seen by the party to whom it was addressed. *James Cumming, John Grant and Others*, High Court, Nov. 7. 1848, p. 17.
2. Circumstances in which the Court refused to allow the Jury to inspect the head of a pannel, in support of a plea of insanity, as to a mark said to have been occasioned by an injury, it not having been previously shewn in evidence that this mark was there before the pannel committed the act for which he was tried. *John Thomson*, High Court, Dec. 4. 1848, p. 129.
3. Held, that where a Procurator-fiscal, who had been employed as an agent in the Sheriff Court in a civil suit, out of which the prosecution arose, had been present when the pannel emitted two declarations, and had also acted on behalf of the Crown otherwise, he could not be examined as a witness on behalf of the Crown. *John Gordon Robertson*, High Court, Feb. 19. 1849, p. 186.
4. Circumstances in which the clerk to the Procurator-fiscal was held inadmissible as a witness, to matters out of his own department. *Helen Daly and Helen Kirk or James*, Dumfries, April 27. 1850, p. 354.
5. Circumstances in which a witness was held admissible, notwithstanding he had precognosed some of the witnesses. *John Barr*, Ayr, May 1. 1850, p. 362.
6. Circumstances in which the question was raised, but not decided, whether a husband is admissible as a witness against his

EVIDENCE—*continued.*

- wife, accused of forging his name. *Alexander Fegan and Elizabeth M'Kenzie or Hyde*, Glasgow, Sept. 15. 1849, p. 261.
7. Held, distinguishing from the case of *Maclure*, Arkley, p. 448, that a witness who had been present at the examination of another witness, was not disqualified on the ground of partial counsel, in respect that it appeared he had not thereby been made acquainted with anything of which he was not previously aware. *Hannah Mitchell*, High Court, Jan. 4. 1850, p. 293.
8. Two pannels were accused of stealing two £50 Bank of England notes, and a third was charged in the same indictment with resetting them. The alleged resetter was fugitated for non-appearance. Held, that statements made by him, and a letter written by him on his apprehension in London, in the act of passing one of the stolen notes, were admissible in evidence, to the effect of identifying him as a party whose house the two other pannels frequented. *Robina Burnet and Others*, High Court, Nov. 17. 1851, p. 497.
9. In a trial for rape, or assault with intent to ravish, the principal witness, who, at the time of the offence being committed, was of weak intellect, became insane a few days before the trial. Medical evidence having been adduced, to prove that she was not in a fit state of mind to give credible testimony, she was not examined, but was produced for the purpose of being identified by the other witnesses. *Edward Yates and Henry Parkes*, Glasgow, Dec. 24. 1851, p. 528.
10. In the course of a trial, a police-officer deponed, that some time after the apprehension of the pannel, he asked him whether, at the time libelled, he was at the alleged *locus delicti*. Objection sustained, that the pannel's answer was not admissible in evidence, not being an ultroneous statement. *Theodore Dowd and Darby Furie*, High Court, June 8. 1852, p. 575.

EXPENSES.

See APPEAL, 1 and 2.

FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.

1. (1.) In a charge of 'Falsehood and Fraud, particularly the
'fraudulently and feloniously obtaining the goods of others
'upon false pretences and appropriating the same, without
'paying, or intending to pay therefor:' Held, that it was not
necessary to allege that the pannel assumed any false character,
or that he used any other false pretence than that of under-
taking to make a cash payment of the price of the goods, 'he
'fraudulently and feloniously intending, nevertheless, that the
'said price should not be paid, and that he should appropriate
'the said goods to his own uses and purposes, without payment

FALSEHOOD, FRAUD, &c.—*continued.*

- 'being made therefor;' and having so appropriated them.
- (2.) A party had used, to a very small extent, the firm of 'J. Stevenson and Co.,' in Glasgow, where he had attempted to carry on business: he was not in business anywhere else; he fraudulently exhibited the signature 'J. Stevenson and Co.,' as acceptors to a bill for £200, dated at Manchester, in order that the bill might be used and uttered as a bill accepted by a Manchester firm, and the bill was so used and uttered; there was no such Manchester firm: Held to be a forgery. *James Hall, John Howie, and John Stevenson*, High Court, July 25. 1849, p. 254.
2. Direction to the Jury as to what was necessary to support a charge of Falsehood, Fraud, and Wilful Imposition. Held, 2d, That it was sufficient, in absence of counter proof, to establish that the Christian name of the prisoner was different from that which he had used on the forged instrument, that he had given another name to the Sheriff, and answered to the indictment framed conform thereto. *Menzies*, High Court, Feb. 5. 1849, p. 153.
3. Circumstances in which a cumulative charge of falsehood, fraud, &c., together with theft, was sustained as relevant on the same *species facti*. *James Chisholm*, High Court, July 9. 1849, p. 241.

FOREIGN LAW.

Held, that evidence of foreign law, deponed to by a skilled witness, was binding upon a Scotch Court, where the subject-matter related to the validity of a foreign contract. *William Bennison*, High Court, Aug. 1. 1850, p. 453.

FORGERY.

Held, that the crime of forgery is committed by the use of a false Christian name, if that be used with the intention to mislead. *Alexander James Petty Menzies*, High Court, Feb. 5. 1849, p. 153.

HEARSAY.

See EVIDENCE, 9.

HUSBAND AND WIFE.

See EVIDENCE, 6; also THEFT, 6.

INDICTMENT.

1. Held that there is no land in Scotland truly extra-parochial, and that in the case of a peculiar jurisdiction it is sufficient to libel the offence alternatively, as having been committed within one or other of the adjacent parishes. Question, whether it is a fatal objection when a wrong parish is named in the libel, if it be shewn in proof, that the locus mentioned is situate in

INDICTMENT—*continued.*

- another parish. *John Paterson and David Ritchie*, Stirling, Sept. 7. 1848, p. 1.
2. Held, 1st, That it is not objectionable in an indictment under the Act 11th and 12th Vict. c. 12, to libel a previous design as evidenced by subsequent overt acts. 2d, That it is enough, in charging a conspiracy, to state that the pannel had presided over a body formed 'for the illegal purposes libelled,' without charging him to have done so in pursuance of the common intent laid in the major. 3d, That the statute 11th and 12th Vict. c. 36, does not exclude the common law, and that it is competent to libel the same *species facti* as sedition at common law, as well as a contravention of the statute. 4th, That a conspiracy, to effect an alteration of the Constitution by force, is only an aggravated form of sedition at common law. *James Cumming, John Grant and Others*, High Court, Nov. 7. 1848, p. 17.
 3. Objection, that where two rooms had been mentioned in the indictment, and the charge was that the pannels had broken open a lockfast place 'therein,' without saying in which room, sustained, as too vague. *James Gibson and Malcolm M'Millan*, High Court, March 12. 1849, p. 191.
 4. Circumstances in which a portion of a minor was struck out, it being uncertain to which of the two majors it was applicable. *William M'Gall*, High Court, March 13. 1849, p. 194.
 5. Circumstances which were held sufficient to support a charge of theft by housebreaking, although the pannel was not charged with using any other violence than opening the attic door by means of false keys. *Christian Duncan*, Aberdeen, April 24. 1849, p. 225.
 6. Circumstances in which the Crown, on the recommendation of the Court, withdrew a charge of Wanton and Malicious Mischief, it appearing that in fact the prisoner's attempt had been abortive. *Ann Duthie*, Aberdeen, April 24. 1849, p. 227.
 7. Objection to the indictment, that the minor did not answer to the major, repelled. *John Elder Murdoch*, Perth, May 2. 1849, p. 229.
 8. Circumstances in which a cumulative charge of falsehood, fraud, &c., together with theft, was sustained as relevant on the same *species facti*. *James Chisholm*, High Court, July 9. 1849, p. 241.
 9. Circumstances in which the Crown were held not entitled to libel, after describing the person alleged to have been murdered, 'or some other person to the prosecutor unknown.'

INDICTMENT—*continued.*

- William Clark and Janet Gray or Thomson*, Aberdeen, Sept. 20. 1849, p. 267.
10. Circumstances in which an objection to the relevancy of an indictment, that it did not charge that the attempt to defraud had been successful, was repelled. *George Kippen*, High Court, Nov. 6. 1849, p. 276.
11. Held, 1st, That it was not necessary, in an indictment charging the sending of threatening letters, to negative the truth of the charges therein contained. 2d, That the *veritas* of the charges made could not be proved, either in justification or mitigation, by the pannel. *Alexander Fraser Crawford*, High Court, Jan. 6. and Feb. 11. 1850, p. 309.
12. Held, 1st, That it was a relevant charge against two pannels to aver that they 'both and each, or one or other,' acting in pursuance of an unlawful concert, and for a fraudulent purpose, adhibited the signature of one of them to the document; 2d, That, under the circumstances, the words at and near Edinburgh, and elsewhere, was not too vague a specification of the *locus delicti*; and, 3d, That, in respect of the above words importing the commission of an offence in Scotland, the Jury could not convict one of the pannels, who had never left England, as art and part of an offence committed in Scotland. *William Duncan and Alexander Cumming*, High Court, March 11. 1850, p. 334.
13. Held that in modern practice it was sufficient to describe the article stolen by a generic name, under which the party injured could identify it. *Daniel Fraser*, High Court, June 3. 1850, p. 365.
14. Held, that where an indictment omitted the usual words of style referring to conviction by a Jury, and only referred to his judicial confession as the ground of punishment, it was competent to object, after the Jury were sworn, to the trial proceeding, and that such objection was fatal. *Hugh McNeillage*, Inverary, Sept. 18. 1850, p. 459.
15. Terms of an indictment which was withdrawn, on the recommendation of the Court, as not being sufficiently precise. *Peter Galloway*, High Court, Feb. 14. 1851, p. 470.
16. An indictment charged swindling, as also falsehood, fraud, and wilful imposition, aggravated by a previous conviction of swindling, and falsehood, fraud, and wilful imposition. Objection repelled, that in the former indictment under which the pannel had been convicted, two separate crimes were charged in the major proposition, viz. swindling, and falsehood, fraud,

INDICTMENT—*continued.*

and wilful imposition, while there was only one *species facti* in the minor, to which the pannel had pleaded guilty, and which could constitute only one of the crimes charged; that it was impossible to say to which crime the confession applied, while the pannel could not be held guilty of both, and that therefore it did not clearly appear that the conviction was for the same crime as that now charged. *Elizabeth M'Walter or Murray*, High Court, Feb. 2. 1852, p. 552.

17. Where there were two charges of contravention of the statute 2d Will. IV. c. 34, the second of which was charged to have been committed 'time above libelled.' Opinion, That if the offence of repeated uttering within the space of ten days, was intended to be charged, the time of the second uttering should have been more distinctly stated, and that charge accordingly withdrawn. *John Mooney*, High Court, Dec. 8. 1851, p. 509.
18. Held, that it was not a good objection to the relevancy of an indictment for Bigamy, where the first marriage was celebrated in Ireland, by a Romish priest, that the indictment did not set forth that both parties were Roman Catholics, if the prosecutor could competently prove that by the foreign law the marriage was lawful. *Patrick Quillichan*, High Court, Jan. 24. 1852, p. 537.
19. Objection that a pannel designed as 'present prisoner in the 'prison of Glasgow,' could not be called on to plead to the indictment, in respect that there was another prisoner indicted for trial at the same Circuit, of the same name, and similarly designed—repelled. *John O'Neill*, High Court, June 2. 1851, p. 483.
20. Mode of libelling aggravations, which was found relevant, where the major proposition of the indictment included several charges, to all of which the aggravations did not apply. *William Rait*, High Court, Nov. 17. 1851, p. 500.

INTERDICT.

1. Held, that an appeal to the Circuit is competent against a judgment in an action of interdict. Opinion—That in all cases an appeal to the Circuit is competent, unless the party objecting can shew that the subject-matter at issue exceeds the sum of £25 sterling; and that the *onus* of proving this lies upon the objector. *Wilson v. Watson*, Perth, Oct. 1. 1851, p. 493.
2. Circumstances in which an application by a tenant for an interdict against a threatened sale of his effects, under a process of sequestration by the landlord, was held incompetent. *Smith v. Skinner*, Dumfries, April 8. 1851, p. 480.

INSANITY.

1. Circumstances in which the Court thought insanity sufficiently proved to bar trial. *Peter Peanver*, High Court, Nov. 16. 1850, p. 462.
2. Circumstances in which the Court interposed in the course of a trial, and intimated an opinion that a defence of insanity had been established by the evidence, and the Jury agreeing in this opinion, returned a verdict to that effect. *Isabella Blyth*, Perth, April 29. 1852, p. 567.

JURISDICTION.

1. Circumstances in which an objection to the jurisdiction of the Court was repelled. *William M'Gill*, High Court, March 13. 1849, p. 194.
2. Held, 1st, That it was a relevant charge against two pannels to aver that they 'both and each, or one or other,' acting in pursuance of an unlawful concert, and for a fraudulent purpose, adhibited the signature of one of them to the document; 2d, That, under the circumstances, the words at and near Edinburgh, and elsewhere, was not too vague a specification of the *locus delicti*; and, 3d, That, in respect of the above words, importing the commission of an offence in Scotland, the Jury could not convict one of the pannels, who had never left England, as art and part of an offence committed in Scotland. *William Duncan and Alexander Cumming*, High Court, March 11. 1850, p. 334.
3. Held, that where contravention of the 1st and 2d sections of 9th Geo. IV. c. 69, were not libelled cumulatively, the Court of Justiciary had no jurisdiction in the absence of two previous convictions. *David Bell*, Perth, April 25. 1850, p. 348.
4. A conviction under the 9th Section of the Solway Fishery Act, 44th Geo. III. c. 45, is not subject to review by the Court of Justiciary. *John Park v. Earl of Stair*, High Court, Jan. 12. 1852, p. 552.

See also APPEAL.

LETTERS OF INTIMATION.

Held, that where a party in prison applies for and serves letters of intimation under the act 1701, and thereafter before sixty days, is liberated on bail at his own request, he may be indicted anew after the expiration of sixty days, and that criminal letters are not necessary. *David Balfour*, High Court, July 20. 1850, p. 377.

LIEN.

Held, that an innkeeper had a right to detain the wearing apparel of a guest who neglected to pay his bill when demanded, even

LIEN—*continued.*

though payment was refused on the ground that the charges therein exceeded what had been agreed on. *M'Kichen v. Muir*, Dumfries, April 19. 1849, p. 223.

LOCUS.

1. Held that there is no land in Scotland truly extra-parochial, and that in the case of a peculiar jurisdiction it is sufficient to libel the offence alternatively, as having been committed within one or other of the adjacent parishes. Question, whether it is a fatal objection when a wrong parish is named in the libel, if it be shewn in proof, that the locus mentioned is situate in another parish. *John Paterson and David Ritchie*, Stirling, Sept. 7. 1848, p. 5.
2. Question, 1st, Whether, in the particular circumstances, the locus, where a rape was said to have been committed, was described with sufficient accuracy. 2d, Whether the description of the party said to have been injured was not too vague. *Dennis Connor and Edward Morrison*, Glasgow, Sept. 23. 1848, p. 5.

MASTER AND SERVANT.—See 4TH GEO. IV. c. 34.—SUSPENSION, 4.

MEDICAL JURISPRUDENCE.—See MURDER, 3.

MURDER.

1. Circumstances in which the Public Prosecutor was entitled to libel inconsistent modes of death in a charge of Murder. *Alexander Matson*, High Court, Nov. 27. 1848, p. 127.
2. Held, that it was not a good plea in bar of trial, that the pannel had been tried and convicted of a simple assault in the Police Court, for striking the same blows in respect of which he was charged with murder. *John Stevens*, Glasgow, Jan. 11. 1850, p. 287.
3. Circumstances in which a pannel was acquitted of Murder. *Thomas Hogg*, High Court, June 9. 1851, p. 483.

NIGHT-POACHING.—See STATUTE 9TH GEO. IV. c. 69.

NON-AGE.

1. Circumstances in which it was held to be incompetent to try children, of the ages of ten and twelve, in the Police Court, in the absence of their parents, whose residences were well known. *Meekison and Tutor v. Mackay*, High Court, Feb. 15. 1849, p. 159.
2. A party who was alleged to have been detected in the act of snaring hares, instead of his real name, which was *Alexander*, gave the name of *James*, being that of a younger brother, a child of two years of age. The complaint was directed against the said party by the name of *James*, but was served on *Alex-*

NON-AGE—*continued.*

ander. No appearance was made for *Alexander*; but it was explained at the trial that the name of *James* applied only to the child. Sentence having been pronounced, which bore *in gremio* to be against *James*—Suspension at the instance of *James* (with concurrence of his father) sustained, and sentence set aside. *Middlemiss v. D'Eresby*, High Court, March 16. 1852, p. 557.

PARISH.—See *Locus*.

POLICE COURT.

1. Held, 1st, that it is not necessary, in a summary case in the Police Court, that the pannel should have served upon him a written copy of the complaint before trial; and, 2d, that it is no ground of suspension that he was not allowed forty-eight hours to prepare his defence, he not having asked delay at the time. *Mackean v. Wilson*, High Court, Dec. 9, 1848, p. 132.
2. Held, that it was incompetent to proceed in a Police Court against a pannel who had been cited on the previous day to that on which the case was heard, to answer a different charge. *Craig v. Steel*, High Court, Dec. 20. 1848, p. 148.
3. Held, 1st, that that the Court of appeal would not direct enquiry in an appeal against a Police sentence, unless there was some irregularity patent on the proceedings, or an allegation that the Magistrate had exceeded his jurisdiction. 2d, That the Procurator-fiscal had equal privileges as the rest of the lieges in respect of offences where pecuniary penalties were alone sought to be recovered, and that a formal complaint was in such case unnecessary. *Burns v. Burnet*, High Court, June 12. 1850, p. 373.
4. Circumstances in which a sentence of a Police Court was set aside in consequence of the evidence not having been reduced to writing. *Phillips and Ford v. Cross*, High Court, Dec. 20. 1848, p. 139.
5. Held, that a Police magistrate has no jurisdiction to try an alleged offence, except upon a regular complaint. *Welsh v. Macpherson*, High Court, April 19. 1850, p. 345.
6. Held, that it was a good charge in a Police complaint to allege that the party had been guilty of a breach of the public peace, by behaving in a disorderly manner at a public meeting, and interrupting and obstructing the proceedings. *Sleigh and Russell v. Moxey*, High Court, June 12. 1850, p. 369.

POLICE-OFFICER.

Held, 1. That it is the duty of a Police-officer, who apprehends a person without a warrant, to take him before a magistrate, for examination, within as short a period as practicable. 2

POLICE-OFFICER—*continued.*

Where a delay of sixty hours had intervened between a party being so apprehended, and being taken before a magistrate, the Court granted liberation. *Macdonald v. Lyon and Main*, High Court, Dec. 8. 1851, p. 516.

POOR-LAW.

1. Held that a mother cannot acquire a settlement for her child by a former husband, by means of a joint industrial settlement with a second husband. *Dinwidie v. Knox*, Stirling, April 17. 1849, p. 215.

PROCEDURE.—See APPEAL—POLICE-COURT—PROSECUTOR.

PROCURATOR-FISCAL.

1. Held, that where a Procurator-fiscal, who had been employed as an agent in the Sheriff Court in a civil suit, out of which the prosecution arose, had been present when the pannel emitted two declarations, and had also acted on behalf of the Crown otherwise, he could not be examined as a witness on behalf of the Crown. *John Gordon Robertson*, High Court, Feb. 19. 1849, p. 186.
2. Circumstances in which the clerk to the Procurator-Fiscal was held inadmissible as a witness, to matters out of his own department. *Helen Daly and Helen Kirk or James*, Dumfries, April 27. 1850, p. 354.
3. Held not to be a good objection to the sentence of a Burgh Court, that the party who acted as Assessor to the Magistrates was also joint Procurator-Fiscal for the county. *Watt v. Home*, High Court, Dec. 8. 1851, p. 519.

PRODUCTION.

1. Circumstances in which the Court refused to allow the Jury to inspect the head of a pannel, in support of a plea of insanity, as to a mark said to have been occasioned by an injury, it not having been previously shewn in evidence that this mark was there before the pannel committed the act for which he was tried. *John Thomson*, High Court, Dec. 4. 1848, p. 129.
2. Held, that the Jury are not entitled in a *criminal case* to inspect the documents libelled on, and compare them with other productions, it being the part of the Crown to establish the case by evidence given in the box. *John Gordon Robertson*, High Court, Feb. 19. 1849, p. 186.
3. Circumstances in which the Court refused to allow the Jury to see the documents produced, in accordance with the rule stated in *Robertson*, p. 186. *William M'Gall*, High Court, March 13. 1849, p. 194.
4. Held, that an unstamped receipt was admissible to shew theft from an employer, although it was the only evidence against

PRODUCTION—*continued.*

the employer that his claim was discharged against the debtor. *Ebenezer Beattie*, Dumfries, April 28. 1850, p. 356.

PROOF.—See EVIDENCE.

PROSECUTOR.

Circumstances in which the Court swore in, *pro re nata*, the former Advocate-depute as Counsel for Her Majesty. Dumfries, April 19. 1851, p. 480.

RAPE.

Question, 1st, Whether, in the particular circumstances the *locus* where a rape was said to have been committed, was described with sufficient accuracy. 2d, Whether the description of the party said to have been injured was not too vague. *Dennis Connor and Edward Morrison*, Glasgow, Sept. 23. 1848, p. 5.

2. In a charge of rape, as also assault with intent to ravish, the assault with intent found proven, on a girl who was alleged to have been a prostitute.

3. In a trial for rape, or assault with intent to ravish, the principal witness, who, at the time of the offence being committed, was of weak intellect, became insane a few days before the trial. Medical evidence having been adduced, to prove that she was not in a fit state of mind to give credible testimony, she was not examined, but was produced, for the purpose of being identified by the other witnesses. *Edward Yates and Henry Parkes*, Glasgow, Dec. 24. 1851, p. 528.

RELEVANCY.

1. Held, 1st, That in an indictment for Bigamy, it is sufficient in a question of relevancy to aver that the pannel was lawfully married to the first wife, although the circumstances set forth in the libel shew that such marriage must have been an irregular one. 2d, That the proper time to object to the validity of such marriage, is on the proof, if it be shewn that in truth the marriage is open to challenge. *James Purves*, High Court, Nov. 20. 1848. p. 124.

2. Circumstances in which the Crown were held not entitled to libel, after describing the person alleged to have been murdered, 'or some other person to the prosecutor unknown.' *William Clark and Janet Gray or Thomson*, Aberdeen, Sept. 20. 1849, p. 267.

3. Held, that it was not a good objection to the relevancy of an indictment for Bigamy, where the first marriage was celebrated in Ireland, by a Romish Priest, that the indictment did not set forth that both parties were Roman Catholics, if the Prosecutor could competently prove that by the foreign law the mar-

RELEVANCY—*continued.*

riage was lawful. *Patrick Quillichan*, High Court, Jan. 24. 1852, p. 537.

See also INDICTMENT.

RESET OF THEFT.

Rule stated, that it was not enough to warrant conviction of a married woman of reset of theft, that she had endeavoured to conceal some of the articles from the police; the Jury being satisfied that she did this, not because she had been concerned in the reset, but merely to screen her husband. *John Hamilton and Mary Garden or Hamilton*, High Court, Jan. 2. 1849, p. 149.

ROBBERY.

Held incompetent to charge a previous conviction of theft, or that the pannels are habite and repute thieves, as aggravations to a charge of Robbery. *Helen Falconer and Others*, High Court, Jan. 26. 1852, p. 546.

ROGUE AND VAGABOND.

See SUSPENSION, No. 8.

SEDITION.

Held, 1st, That it is unnecessary to libel *intention* in a charge of sedition; and 2d, That when the Jury found the pannels guilty of sedition, in so far as they had used language 'calculated to excite popular disaffection, and resistance to lawful authority,' and explained that they had purposely omitted the word 'intended,' which was also charged in the minor, that the verdict was good, and sentence might competently follow thereon. *James Cumming, John Grant and Others*, High Court, Nov. 7. 1848, p. 17.

SENTENCE.

Circumstances in which a conviction was sustained, although the parties accused were not furnished with a list of witnesses, nor were allowed time to prepare defences, and no record was kept. *Chapman v. Colville*, High Court, Dec. 14, 1850, p. 466.

SOLWAY FISHERIES.

See STATUTE 44TH GEO. III. c. 45.

STAMP.

Held, that an unstamped receipt was admissible to shew theft from an employer, although it was the only evidence against the employer that his claim was discharged against the debtor. *Ebenezer Beattie*, Dumfries, April 28. 1850, p. 356.

STATUTE 1701, c. 6.

Held, that where a party in prison applies for and serves letters of intimation under the act 1701, and thereafter, before sixty days, is liberated on bail at his own request, he may be in-

STATUTE—continued.

dicted anew after the expiration of sixty days, and that criminal letters are not necessary. *David Balfour*, High Court, July 20. 1850, p. 377.

—— 44TH GEO. III. c. xlv.

A conviction under the 9th section of the Solway Fishery Act, 44th Geo. III. c. xlv. is not subject to review by the Court of Justiciary. *Park v. Earl of Stair*, High Court, Jan. 12. 1852, p. 532.

—— 3D AND 4TH GEO. IV. c. 34.

Held, that a judgment of the Quarter Sessions both discharging the servant and abating the wages, was unwarranted by the statute. *Methven v. Glass*, High Court, Dec. 20. 1848, p. 146.

—— 9TH GEO. IV. c. 69.

Held, that where contravention of the 1st and 2d sections of 9th Geo. IV. c. 69, were not libelled cumulatively, that the Court of Justiciary had no jurisdiction in the absence of two previous convictions. *David Bell*, Perth, April 25. 1850, p. 348.

—— 1ST AND 2D WILL. IV. c. 43 (TURNPIKE ACT).

See APPEAL, 8.

—— 2D AND 3D WILL. IV. c. 68.

Held, that a farm-servant in pursuit of game, on lands occupied by his master, was a trespasser under the provisions of the statute. *Earl of Selkirk v. Kennedy*, High Court, Dec. 14. 1850, p. 463.

See also WARRANT.

—— 6TH AND 7TH VICT. c. 68. See SUSPENSION, 9.

—— 6TH AND 7TH VICT. c. xcix. (GLASGOW POLICE ACT).

Held, that under the 203d section of the Glasgow Police Act, it was necessary to libel that the coals had been sold and delivered within the limits of the act, and a sentence proceeding on an alternative libel suspended. *Lockie v. M^rWhirter*, High Court, Feb. 15. 1849, p. 161.

—— 11TH AND 12TH VICT. c. 12. See SEDITION.

—— 11TH AND 12TH VICT. c. 42 and 43. See SUMMONS.

—— 11TH AND 12TH VICT. c. cxiii. (EDINBURGH POLICE ACT).

See SUSPENSION, 7. and 14.

SUMMONS.

Held that an English Summons, directed against a Scotchman, for an alleged English offence, must be executed by a Scotch officer, to justify any after proceedings had thereon in Scotland, by way of apprehension. *Jacob Tait and John Taylor*, Jedburgh, April 16. 1851, p. 475.

SUSPENSION.

1. Held, 1st, that it is not necessary, in a summary case in the Police Court, that the pannel should have served upon him a written copy of the complaint before trial; and, 2d, that it is no ground of suspension that he was not allowed forty-eight hours to prepare his defence, he not having asked delay at the time. *Mackean v. Wilson*, High Court, Dec. 9. 1848, p. 132.
2. Circumstances in which a sentence of a Police Court was set aside in consequence of the evidence not having been reduced to writing. *Phillips and Ford v. Cross*, High Court, Dec. 20. 1848, p. 139.
3. Held, that where a person has been cited as a witness, and precognosced as such, he cannot, on his attendance in obedience to his citation, be summarily put to the bar, and tried as being guilty of the offence, in respect of which he had been required to attend as a witness. *Ritchie v. Pibner*, High Court, Dec. 20. 1848, p. 142.
4. Held, that a judgment of the Quarter Sessions both discharging the servant and abating the wages, was unwarranted by the statute. *Methven v. Glass*, High Court, Dec. 20. 1848, p. 146.
5. Held, that it was incompetent to proceed in a Police Court against a pannel who had been cited on the previous day to that on which the case was heard, to answer a different charge. *Craig v. Steel*, High Court, Dec. 20. 1848, p. 148.
6. Circumstances in which it was held to be incompetent to try children, of the ages of ten and twelve, in the Police Court, in the absence of their parents, whose residences were well known. *Meekison and Tutor v. Mackay*, High Court, Feb. 15. 1849, p. 159.
7. Circumstances in which it was held, that the decision of the Police Magistrate was final, and that suspension of his decree was incompetent. *Graham v. Moxey*, High Court, Feb. 17. 1849, p. 168.
8. Held, refusing a Note of Suspension, that it was an offence cognisable in a Police Court, to put a hand into a passenger's pocket with intent to steal, and that a party would be properly convicted as a rogue and vagabond in respect thereof. *Etch and Golf v. Burnett*, High Court, March 15. 1849, p. 201.
9. Held (1.), That all interlocutors in a cause in an Inferior Court, must be properly signed as required by law, and that the Court will suspend if any material stage of the proceedings is left unauthenticated. (2.) That where the Court has original jurisdiction over the subject matter, they have also the power of review, although the proceedings are of a civil nature. *Giles v. Baxter*, High Court, March 15. 1849, p. 203.

SUSPENSION—*continued.*

10. Held that it was sufficient, in a police complaint, to aver that the suspender had resisted or molested officers of police in the execution of their duty, without setting forth what was the particular duty they were engaged in discharging. *Telfer v. Moxey*, High Court, June 2. 1849, p. 231.
11. Held, that where a complaint in the Inferior Court alleged contravention of bye-laws under a statute which were invalid, it was no answer to a suspension to aver that the alleged offence was penal at common law. *Veitch and Others v. Reid*, High Court, June 2. 1849, p. 235.
12. Circumstances in which it was held, that, where a man had been summarily apprehended without warrant or other intimation of the charge against him before trial, the conviction could not be sustained. *Jameson v. Pilmer*, High Court, June 2. 1849, p. 238.
13. Held that it was necessary that every sentence should be signed by two Justices; and a Note of Suspension passed, in respect the sentence under review had been signed by one only, although two were present when it was pronounced. *J. Lock and P. Doolen v. Steel*, High Court, Feb. 6. 1850, p. 307.
14. Circumstances in which the Court suspended a conviction in the Police Court, on the ground that the original complaint charged no cognizable offence. *Burns v. Moxey*, High Court, Feb. 21. 1850, p. 330.
15. Held, that it was a relevant ground of suspension that the Justices had tried and sentenced the complainant in a court from which the public were excluded. *Finnie v. Gilmour*, High Court, June 11. 1850, p. 368.
16. Held, that it was a good charge in a police complaint to allege that the party had been guilty of a breach of the public peace, by behaving in a disorderly manner at a public meeting, and interrupting and obstructing the proceedings. *Sleigh and Russell v. Moxey*, High Court, June 12. 1850, p. 369.
17. In a suspension of a summary trial for theft, under the General Police Act, 13th and 14th Vict. c. 33, the parties accused alleged that they were brought to trial without any summons being served upon them; that they were not made aware of their right, in virtue of certain regulations framed by authority of the statute, to apply for time to summon witnesses, and that no sufficient explanation was given to them to enable them to put their application for time into correct form. The Court, on advising a proof of these allegations, suspended the sentence, and ordered repayment of a pecuniary penalty which had been

SUSPENSION—*continued.*

imposed on one of the parties. *Blyths v. M^rBain*, High Court, Feb. 20. 1852, p. 554.

18. A party who was alleged to have been detected in the act of snaring hares, instead of his real name, which was *Alexander*, gave the name of *James*, being that of a younger brother, a child of two years of age. The complaint was directed against the said party by the name of *James*, but was served on *Alexander*. No appearance was made for *Alexander*; but it was explained at the trial that the name of *James* applied only to the child. Sentence having been pronounced, which bore, *in gremio*, to be against *James*—Suspension at the instance of *James* (with concurrence of his father) sustained, and sentence set aside. *Middlemiss v. D^rEresby*, High Court, March 16. 1852, p. 557.

SWINDLING.

Opinion—That 'swindling' is not a proper *nomen juris*, and that the legal term is falsehood, fraud, and wilful imposition. *Elizabeth M^rWalter or Murray*, High Court, Feb. 2. 1852, p. 552.

THEATRICAL REPRESENTATIONS.

See SUSPENSION, 9.

THEFT.

1. Circumstances in which it was held that the *amotio* was not sufficient to constitute the crime of theft. *James Hoyes*, High Court, Dec. 11. 1848, p. 134.
2. Circumstances which were held sufficient to support a charge of theft by housebreaking, although the pannel was not charged with using any other violence than opening the attic door by means of false keys. *Christian Duncan*, Aberdeen, April 24. 1849, p. 225.
3. Circumstances in which an objection to the relevancy of an indictment, that it did not charge that the attempt to defraud had been successful, was repelled. *George Kippen*, High Court, Nov. 6. 1849, p. 276.
4. Held that it was not theft in a pawnbroker to appropriate the articles which had been pledged with her. *Catherine Crossgrove or Bradley*, High Court, Feb. 6. 1850, p. 301.
5. Direction to the Jury, that if a party receive an article for the purpose of pledging it, he may be guilty of stealing the same, although he actually pledge it, if his purpose was all along to appropriate the advance thereon to himself. *Daniel Fraser*, High Court, June 3. 1850, p. 365.
6. A pannel, from whom certain articles had been purchased, received from the purchaser a one-pound note, in order that he

THEFT—*continued.*

- might retain the price, and return the balance. He appropriated the whole sum.—Held, that this was theft of the one-pound note, and not merely of the balance. *John Mooney*, High Court, Nov. 17. 1851, p. 496.
7. Held, 1. That it was criminal in a husband, who, by antenuptial contract, had excluded his right of administration, to appropriate surreptitiously a sum of money, a portion of an heritable bond, forming part of the wife's tocher. 2. That the indictment was relevantly laid as a charge of theft. *Joseph Kilgour*, High Court, Dec. 8. 1851, p. 501.
8. Held, that where yarn is given to a workman for the purpose of being woven into a web, he is guilty of theft if he appropriate the yarn to his own use. *Watt v. Home*, High Court, Dec. 8. 1851, p. 519.
9. In a charge of stealing a watch, the owner deponed that the pannel made a snatch at the guard-chain by which the watch was secured, so as to draw it out of his pocket; but the chain was not broken, nor was anything actually carried off. Question, whether this amounted to theft? *William Cameron*, Glasgow, Dec. 22. 1851, p. 526.

THREATENING LETTERS.

Held, 1st, That it was not necessary, in an indictment charging the sending of threatening letters, to negative the truth of the charges therein contained. 2d, That the *veritas* of the charges made could not be proved, either in justification or mitigation, by the pannel. *Alexander Fraser Crawford*, High Court, Jan. 6. and Feb. 11. 1850, p. 309.

TIME.

Where there were two charges of contravention of the statute 2d Will. IV. c. 34, the second of which was charged to have been committed 'time above libelled,' *observed*, that if the offence of repeated uttering within the space of ten days, was intended to be charged, the time of the second uttering should have been more distinctly stated—and that charge accordingly withdrawn. *John Mooney*, High Court, Dec. 8. 1851, p. 509.

TRESPASS.

Held, that a farm-servant in pursuit of game, on lands occupied by his master, was a trespasser, under the provisions of the statute. *Earl of Selkirk v. Kennedy*, High Court, Dec. 14. 1850, p. 463.

TRIAL.

1. Circumstances in which, on occasion of the illness of *one* pannel, the Court continued the case till a subsequent day, as against

TRIAL—*continued.*

both herself and another party charged as an accomplice. *Agnes Chambers or M'Queen and Helen Henderson*, High Court, July 25. 1849, p. 252.

- Opinion intimated, that it was not a good objection in bar of trial, that the Procurator-fiscal had obtained information from the pannel under a pledge that she should not be tried. *Archibald Miller and Susan Brown or Miller*, High Court, Jan. 3. 1850, p. 288.

VAGRANCY.

Circumstances in which the Court suspended a conviction in the Police Court, on the ground that the original complaint charged no cognizable offence. *Burns v. Moxey*, High Court, Feb. 21. 1850, p. 330.

VERDICT.

- Held, 1st, That it is unnecessary to libel *intention* in a charge of sedition; and 2d, That when the Jury found the pannels guilty of sedition, in so far as they had used language 'calculated to excite popular disaffection, and resistance to lawful authority,' and explained that they had purposely omitted the word 'intended,' which was also charged in the minor, that the verdict was good, and sentence might competently follow thereon. *James Cumming, John Grant and Others*, High Court, Nov. 7. 1848, p. 17.
- Terms of a verdict in a charge of concealment of pregnancy, on which the High Court, on certification, pronounced sentence of *absolutor*. *Jean Kilelor*, High Court, Nov. 20. 1850, p. 586.

WANTON AND MALICIOUS MISCHIEF.

Circumstances in which the Crown, on the recommendation of the Court, withdrew a charge of Wanton and Malicious Mischief, it appearing that in fact the prisoner's attempt had been abortive. *Ann Duthie*, Aberdeen, April 24. 1849, p. 227.

WARRANT.

- Held, 1. That it is the duty of a police-officer, who apprehends a person without a warrant, to take him before a magistrate, for examination, within as short a period as practicable.
- Where a delay of sixty hours had intervened between a party being so apprehended and being taken before a magistrate, the Court granted liberation. *M'Donald v. Lyon and Main*, High Court, Dec. 8. 1851, p. 516.
- A conviction under the 2d Section of the Act 2d and 3d Will. IV. c. 68, set aside, in respect that the warrant for citing the accused did not bear that it proceeded on the oath of a

WARRANT—*continued.*

credible witness, in terms of § 11 of the statute. *Simpson v. Crauford*, High Court, Dec. 22. 1851, p. 523.

WITNESS.

Circumstances in which a witness was held admissible, notwithstanding he had precognosed some of the other witnesses. *John Barr*, Ayr, May 1. 1850, p. 362.

