the defender in probation in favour of his decreet, and that the hail exception was proven be writ. It was likewise found in that cause, that ane baron's decreet may be put to execution incontinent after the pronounciation thereof, and that it needs not fifteen days delay. It was remembered, that in an action of the Laird of Wedderburn's, decided in December last, the LORDS found that it was lawful for ane baron to condemn ane man convict for blude in thair court in fifty pound, or to unlaw him in the like soume for non compearance. No 16.

Haddington, MS. No 2067.

1630. *July* 28. L. FREELAND *against* SHERIFF of Perth.

No 17.
A baron having unlawed his tenant for blood, the decree was found null, because the fact was not done upon the baron's ground, nor did the party hurt live within his jurisdiction, or make his complaint there.

ONE of the L. Freeland's tenants being unlawed in his baron-court for blood, and being therefore lawfully convict, and having paid the unlaw; this tenant being thereafter convened for the same blood before the Sheriff, and it being drawn in dispute before the LORDS, if that conviction, and payment conform thereto, done in his master's court, should liberate him, seeing the Sheriff alleged it ought not to free him, because albeit the baron might convict his own tenant, in his own court for blood, yet that right is only competent to the baron, where both the person committer of the blood, and the other party, whose blood is drawn, are both tenants to the baron; and so where they are both subject to the court, or else where, and when the fact is committed upon his own ground; but being done upon the ground, pertaining to another heritor, the baron had no power to cognosce thereupon. THE LORDS found, that seeing this fact was not done upon the baron's ground, and that both parties were not his tenants, neither did the party hurt complain to the master in the master's court, nor seek reparation there, *quo casu* the master might claim the process, if it had been so proceeded, albeit the committer was his tenant, yet that the Sheriff was only judge to try the same; and that the trial made by the master did not liberate him, but that the Sheriff might proceed, and ought to be preferred.

Fol. Dic. v. 1. p. 327. Durie, p. 536.

1672. *February* 6. SIR ROBERT MURRAY *against* MURRAY of Bruchtoun.

No 18.
A forgery commited in Scotland by a Scotsman may be challenged before the Lords, and improbation will pass.

THE late Earl of Annandale Murray having by his will made at London, bequeathed or legated his estate in Ireland to Sir Robert Crighton (he assuming the name of Murray) which is allowable by the law of England; and having before conveyed that same estate in favours of Richard Murray of Bruchtoun, by a conveyance, according to the law of England, whereby on the one day he grants a lease of the said estate to the said Richard, and on the next day there-

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against the deed, that it may be cancelled, tho' it relate not to any subject lying in Scotland, but be a conveyance of an estate lying in a foreign country.

after he grants a release, renouncing all right of the said estate contained in the said lease, in favours of the said Richard; thereupon after his death in *anno* 1662, the said Sir Robert Murray, with concourse of his Majesty's Advocate, raised an improbation of the saids deeds of lease and release, founding his interest upon the will, but nothing proceeded thereon; but thereafter he entered a suit in the Chancellary of Ireland against Bruchton, but was excluded; and now he returns, and insists in his former improbation, and craved that the defenders would either take terms to produce, or that certification should be granted against the saids deeds of lease and release, and that they should be false and feigned. The defender *alleged*, 1*mo*, No process nor certification, because this being an improbation of the right of an estate in Ireland, the Lords were not competent judges thereto; neither could they be judges, whether a will made there were a good title; for by the law of nations, the civil rights, especially of lands, in every kingdom, belong only to the several kingdoms, and cannot be judged in more than one, lest the sovereign courts should interfere and contradict one another; and so parties should be liable to renewed processes in different kingdoms; therefore for the good of mankind, the law of nations hath allowed every kingdom its distinct jurisdiction; and it is without doubt, that the lands contained in the rights in question lying in Ireland, the only competent judges thereof are the judges in Ireland; for albeit the forgery of a writ being done in Scotland, might be pursued criminally in Scotland, if the writ were produced; but being pursued for a civil effect, for annulling the writ, and consequently the right, in which improbation is but the medium, the Lords cannot be judges thereto, unless the improbation were a medium for some civil effect, competent to be judged by them; and in this process for the annulling of a right in Ireland, there is no civil conclusion competent to be judged by the Lords; and it is known that improbation comes in only before the Lords as *medium concludendi*, to annul a writ, because it is forged; and albeit a competent civil effect were libelled, yet there can be no process in the improbation, because Sir Robert Murray having betaken himself to the judges in Ireland, who are only competent, *res est judicata* there; and so he hath no further interest to insist any where in the same action; which though it were competent both in Ireland and here, as it is not, yet he having made his election, and the matter being judged there, he is for ever excluded both here and there. 2*do*, Albeit the Lords were competent, as they are not, the defender ought to be assoilzied, because he offers him to prove that this very question of the verity of these deeds is determined and decided, by a judgment and final sentence of the courts in Ireland, and so cannot be called in question here again. The pursuer *replied* to the first defence, That by the law and custom of Scotland, the manner of trying and judging of forgeries is first to pursue improbations before the Lords of Session, who not being clogged with a jury of persons ignorant in law, do most diligently search for the finding out of the forgery of writs, not only by the direct manner, as by the oaths of the witnesses

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insert, but also by the indirect manner, as by all evidences and circumstances that may convel the verity of the deed, which is a most laborious process, and could never be with any assize determined before the Criminal Court, which keeps but peculiar fixed peremptor diets; and therefore it cannot be shewn that ever a forgery did begin before them; but the forgery being determined by the Lords, it makes a plenary probation before the criminal Court and inquest; whereupon capital punishment doth immediately follow without hesitation, and so to that effect, the improbation ought to proceed before the Lords, though there were no civil effect; and though Sir Robert Murray's interest should cease, the King's Advocate *ad vindictam publicam* may insist in the improbation; for albeit he cannot insist in an improbation before the Lords, without a private interest, yet having once concurred with the private interest, though the same should collude, desert, or cease, the Advocate may proceed alone. 2*do*, There is not only a criminal effect that may follow this improbation, but also a civil effect, competent to be judged here; for where a a writ is forged in Scotland, the party leised thereby may call for the production thereof, to the effect it may be improven, cancelled, or torn, or the damages satisfied that the pursuer hath or may suffer thereby; in which case there is no regard to the contents of the writ, whether it contain a right of lands in Ireland, or any where else; in the same manner as if any party in Scotland had extorted by force a writ, and forced another party to subscribe the same, whereby he compels him to subscribe an alienation of lands in Ireland, that party might pursue for production of that writ, for annulling and cancelling thereof, not upon the particular interest therein contained, or upon the law of Ireland, which indeed is proper to the courts in Ireland, but *super communi medio juris gentium*, which is a common law every where against extortion and force; so here the writs in question being forged in Scotland, the pursuer may call for the production by improbation, for cancelling of the same; neither can the defender decline the Lords, whose jurisdiction is founded *in domicilio originis*, the defender being a Scotsman; and also *ratione loci delicti*, the forgery being committed in Scotland, whereupon the Lords do ordinarily sustain process against all Scotsmen, though residing abroad, and who are obliged to answer *in communi patria*, and to have procurators there for that effect, and are cited at the cross of Edinburgh, and pier and shore of Leith, though neither their persons nor estates be in Scotland, to the effect that their persons may be attached if they come into Scotland, and their estate also, if thereafter it be found there. And to the *second* defence, it was *replied*, 1*mo*, That the process having been first begun in Scotland, any judgment thereafter in Ireland cannot be accounted *res judicata*, to exclude this process, because it is not the same cause, the actions being diverse; for here the King's Advocate pursues, and there he did not; neither is the deed the same, for here the pursuit is chiefly *ad vindictam publicam*, that forgery may be punished, and there only for a private interest 2*do*, *Res judicata* is a dilator or declinator defence, *impediens ingressum litis*; for though it may be proponed two ways *dilatorie* to exclude process *ante litem contestatam*,

No 18. and *peremptorie*, to exclude sentence *post litem contestatam*, in the same way as prescription or improbation may be proponed; yet when it is proponed, to hinder a production or certification, then it is proponed *dilatorie*; and if the proponer should succumb, it does not determine the cause, but he may yet crave terms to produce; and therefore being thus proponed, it must be instantly verified, as all other dilators, otherways there should be two litis-contestations, and two probations in the same cause. The defender *duplied*, that there is nothing sufficiently alleged to found a competency in this cause, for *domicilium originis*, though it may found a competency for establishing a debt to receive execution in Scotland; yet neither it, nor *locus delicti* can found a competency either for a criminal pursuit, or for any right, not being in Scotland; for it is the common opinion of all lawyers, that *domicilium originis*, or *locus delicti non fundant competentiam, nisi delinquens deprehendatur in loco originis, aut loco delicti*; for albeit a present *civis* committing a crime, and flying, being recently pursued, when he hath *proprium domicilium* in Scotland, may be judged here; yet one who is but *origine Scotus*, though he commit a crime here, not residing here, he cannot be judged here, unless he be found here, much less a stranger committing a crime here can be judged therefor, unless he be found here; and so the defender, though *origine Scotus*, yet residing in Ireland, cannot be judged here upon an account of a crime, though committed here, unless he were attached here. 2*do*, Albeit ordinarily improbations begin before the Lords, and are used as probations before the criminal Court, yet the Lords have no criminal jurisdiction; and though they may and have used some kind of punishment incident in civil processes before them, against false witnesses, forgers of writs, or contemners of their authority, and that the style of improbation bears, that the forger may be punished; yet that gives the Lords no criminal jurisdiction, nor *merum imperium*, or *jus gladii*, because such punishments cannot free the party punished, but the criminal Judge may proceed to capital punishment; who though they do not ordinarily begin improbations, yet there is no law to hinder them so to do. To the *second* point the defender *duplied*, that *res judicata* might be proponed *peremptorie in initio litis* against the production, in the same way as prescription and improbation of the pursuer's title might be proponed, and needed not be instantly verified; but the defender is content to declare, that if he succumb, he shall have no terms to produce, but certification shall be granted, which is a decreet, and so the exception is *peremptoria causæ*; neither can the King's Advocate begin a process of improbation civilly, but there must still be a private interest with which he concurs, the effect of which concourse is, that if the writ be produced, he may proceed to improve the same *ad vindictam publicam*, though the private party should withdraw or be excluded; but if the private party insist not, the Advocate can never insist to crave certification, because that can have no effect *ad vindictam publicam*; and if it were otherways, the King's Advocate might open all the charter chests in Scotland, and search the defects thereof, on pretence of forgery, which there-

fore our custom hath never allowed. The pursuer *answered*, That the defender was liable here, because he was residing in Scotland the time of the forgery, where the same was committed, and he was attached by the summons in *anno* 1662, so that his withdrawing thereafter cannot alter the competency of the Court. No 18.

The Lords sustained the process at the instance of the private party and the Advocate jointly, and found that they might insist to improve these writs, that they might be cancelled, although they contained the conveyance of an Irish estate; but found not that the Advocate alone could insist for certification, if the private party's interest were taken off *per rem judicatam*; and as for the allegeance of *res judicata*, they would not sustain the same *in initio litis*, to hinder production, and therefore granted certification, but superseded the extract thereof till the last of February, that if the defender should produce the Irish judgment, they might decide anent the same; or if the defender would take a term to produce, they offered him the first of June, and either then, or at litis-contestation, they would admit the exception of *res judicata*; or if it were proponed after production and litis-contestation, they would give a term to prove it; but found it not competent *in initio litis*, unless instantly verified.

February 12. 1679.—The late Earl of Annandale having conveyed his estate in Ireland by testament to Sir Robert Crichton, he assuming the name of Murray. Sir Robert did raise a process of improbation before the Lords of Session, of the conveyance of the said estate by the said Earl to Richard Murray of Brughton, according to the English form, by way of lease and release, in March 1658; but he did not then insist in that improbation, but in a process for possession before the Judges in Ireland, in the Chancery there; wherein Brughton defending upon his lease and release, Sir Robert *alleged*, That the same were made up, and were not the true hand-writ of the Earl of Annandale; which not being cognoscible in the Chancery, the Chancellor, by a leading order, directed to the Judges of the King's Bench, to whom it is proper to cognosce the verity or forgery of writs, to try the verity of the said deed of lease and release, which was done by a jury according to their law; in which trial, two of the witnesses in the said deeds were examined, and did depone that they were true deeds, and that they were truly subscribed by the Earl of Annandale at Edinburgh, the day of March 1658, and that they were subscribing witnesses to his subscription. There were also many witnesses examined upon several points, both for astructing and improving the deeds, and particularly upon an allegeance, that the Earl was at Scoon that day that the witnesses deponed he subscribed these deeds, and several days before and after; for the deeds, according to the English form, are signed by the witnesses upon the back, in these words, *signed, sealed*, and *delivered in presence of*, unto which the witnesses subscriptions are adjoined, and the party's subscription is within the deed, at the joining of the seal. In which process, in Ireland, Brughton prevailed, where-

No 18. upon Sir Robert insisted in his improbation in Scotland, and obtained certification against these deeds, for not production; and thereupon raised a second pursuit against Brughton for damage, that he having made use of false writs, and thereby carried away the Earl of Annandale's estate in Ireland from Sir Robert, which writs, by the certification now obtained in Scotland, being holden and declared as forged, because Brughton would not produce them, and submit them to trial, therefore Brughton ought to repair Sir Robert's damage, which is the value of the estate in Ireland; by which he intended to affect Brughton's estate in Scotland; for eviting whereof Brughton raised reduction of the certification, on this reason, That it was pronounced the last day of the session, he being necessarily absent in Ireland; as being High Sheriff of the county there, whereby he could not leave the kingdom without licence, which being desired of the Lord Lieutenant, was refused; whereupon the Lords, and in respect Brughton produced writs, and did abide by the truth thereof, they did repone him against the certification; and thereupon he did *allege*, That being now reponed, he ought to be assoilzied from the improbation, because the truth or falsehood of the writs was *res judicata* by the Supreme Courts in Ireland, upon Sir Robert's own process; and it being *answered*, That this was no final determination, nor did exclude a trial of the forgery *ad vindictam publicam;* the Lords, by commendatory letters to the Judges in Ireland, desired their report, Whether this was a final determination, as to the truth or falsehood of these writs, or whether there might be a further trial? Who having reported that there might be a further trial, the Lords allowed the improbation to proceed, and Sir Robert gave in indirect articles of improbation. It was *alleged* for Brughton, That by the unquestionable law of this kingdom, the indirect manner of improbation is not competent where the direct is competent by the testimonies of the witnesses inserted, when they are alive; but, where the testimonies of the witnesses inserted are adhibited, and prove, no contrary probation is receiveable; otherwise all the rights and securities of the lieges should be rendered unsecure; for there being nothing more ordinary than to make use of any person, without consideration of their hability to be witnesses in bonds and dispositions, and therefore the servants of those in whose favour these are granted, are ordinarily adhibited; so that if extrinsic presumptions of the inhability of the witnesses, or of the subscribers, being *alibi*, were sustainable to canvell such writs, if astructed by the oaths of the witnesses inserted, who are presumed by law to be adduced as witnesses for both parties, there is no security that could remain unquestionable; and therefore the witnesses inserted having deponed and astructed the writ, if a contrary probation were admitted, it would not only infringe all security by writ, but also all sentences upon the depositions of witnesses; for still other witnesses might be adduced to improve their testimonies, whereby there could neither be security nor end of pleas. And as to all the pretences in the indirect articles now produced, they can import nothing, being but slight presumptions or probabilities, which, though

proven, could not prevail against the testimony of one witness, positively affirming the deed, much less against two instrumentary witnesses, there being but three in all, and the third dead; for it is true, that by the law of this kingdom any writ, bearing the name of a party, and the names of witnesses, is presumed to be true, if it be not improven; and therefore, after the death of the witnesses, there being nothing but a presumptive probation, that this is the hand-writ of the witnesses and parties, the direct manner not being then competent by the witnesses inserted, every presumption or probability is examined; but here the testimonies of the witnesses inserted being extant, and produced upon the Lords' letter, it were against the inviolable law of this kingdom to canvell *dicta testium*, by contrary probation, unless they were informed by contradictions, or by reprobators improving the *initialia*, or the *causa scientiæ*, wherein every witness is singular, deponing for himself, without the concourse of other witnesses; but if the substantials of the testimonies of concurring witnesses might be proven false by other witnesses, there could never be security nor end of pleas; so that this is no formality of process, but a necessary and material law. It is true, that though the exception *alibi* be not receiveable in civil processes, but in criminal, for safety of mens lives, yet it was never sustained at random, but circumstantiate, so as to infer a necessary conclusion; as if it were alleged that the writ was signed before the party was born, or after he was dead, or when he was beyond sea, or in prison, or *affixus lectui*, and that by more witnesses, and more famous; yet all that is here pretended, is to prove *alibi* at Scoon, within half a day's journey to Edinburgh, and that upon the memory of any witness that can be adduced, without condescending upon any writs then signed at Scoon by the Earl of Annandale, before witnesses, above exception, not depending upon the lubricity of their memory, but fixed upon the sight of their subscriptions, and the date thereof.—It was *answered* for the pursuer, That though ordinarily the direct manner doth proceed by the witnesses inserted, when alive, and examined in presence of the Lords; yet here the witnesses were examined, neither in the presence of the Lords nor by their warrant, but in another kingdom, who would regard no testimonies taken before us; and it is a principle in the law of all nations, that *acta judicialia non operantur extra territorium judicis;* and though the witnesses were examined here, yet it does not absolutely exclude all indirect articles, or otherwise the lives and fortunes of all persons were exposed to the hazard of two false witnesses, abiding by their own contrivances; but such witnesses might be pursued criminally, and proven to be false witnesses by others more famous, and more numerous witnesses, as if they should prove they saw the forged deed made up in absence of the subscriber; and it is not denied, but if the writ were before the birth, or after the death, or during the absence of the pretended subscriber, that he could not be present, but the writ would be improven, and the forgers punished.—The defender *replied*, That whatever the extent of judicial acts of other kingdoms may be, yet that says nothing as to the case in question, where the

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No 18. testimonies were taken by a sovereign judge, at the instance of the pursuer, in the same cause, and are signed by the witnesses themselves, and transmitted hither upon the Lords desire; whereas witnesses in improbations, in case of their sickness, are taken by commission by a Sheriff, and yet are abundantly probative.

The Lords found, That the testimonies taken in Ireland, and produced here, did not exclude pregnant articles of indirect improbation. *See* King's Advocate.—Process.—Proof.

Fol. Dic. v. 1. p. 326. Stair, v. 2. p. 60. & 690.

*** The sequel of this case is reported by President Falconer:

1683. *February* 14.—In the action of improbation pursued by Sir Robert Murray against Murray of Broughton, the Lords sustained indirect articles of improbation, notwithstanding that the direct were extant, and that the witnesses inserted had bidden by and approven, and upon the probation of the indirect articles, did find the witnesses, who had been examined in Ireland, false and feigned. But the speciality in this case was, that the witnesses themselves were dead, and not examined before the Lords of Session here, or by their commission, but allenarly the extracts of the depositions taken in a civil pursuit before the High Court of Chancellary in Ireland, translated here, and that the witnesses were *viles personæ*, and not of entire fame in this process. The Lords ordained the writs improven, which were a lease and release of certain lands in Ireland, to be torn and destroyed; albeit it was *alleged*, That the subject matter was lands in Ireland, and so not subject to the Lords' jurisdiction, and that there had been several sentences in Broughton's favours in the courts of justice in Ireland; which was repelled, in respect the writs were made in Scotland; and that by a return from the Judges in Ireland to the Lords of Session, the Irish Judges declared, that Scotland being the place where the writs were made, the Judges in Scotland were the most proper Judges for improving thereof in this process; likeas, in regard it did not appear by the probation, that Broughton had any accession to the act of forgery, but allenarly was user thereof, and had subscribed to bide by, the Lords refused, by this sentence, to find him art and part of the forgery, or to recommend him to the Justices. *See* Improbation.—Proof.

P. Falconer, No 49. p. 27.

*** Harcarse also reports this case:

The case between Sir Robert Murray and Broughton, February 12th 1679, being advised, wherein there were many indirect articles of improbation and approbation, the Lords found the deeds of lease and release false and forged, and ordained the same to be cancelled; although it was *alleged*, That these

deeds being the foundation of conveyances of land in Ireland made by Broughton to singular successors, whereupon verdicts and sentences had proceeded, the same ought not to be cancelled, but to be transmitted to the Judges in Ireland, by the law whereof they may stand as true deeds; because with us the direct manner of improbation not being extant, for that the witnesses had not been examined before their death by the Lords of Session, the deeds may be taken away by the indirect manner; but the witnesses having been examined, and the deeds confirmed by the Irish Judges, it is doubted if any indirect manner of improbation thereof can take place in Ireland. 2. Albeit Broughton had abidden *simpliciter* by the deeds as true, and deponed likewise that he was present when they were signed and sealed, yet the probation by indirect articles, not proving the defender's positive accession to the forgery, but inferring only a consequential accession by using thereof, the LORDS would not remit the defender to the criminal Judge, but left the pursuer to raise a criminal libel before the Judge competent, as accords; for the witnesses inserted examined in Ireland, depone, That the deeds were delivered to one Brown, a feoffee, in trust, although the defender deponed he was present in the room that day. No 18.

Harcarse, (IMPROBATION AND REDUCTION.) *No* 535. *p.* 148.

*** The same case is also reported by Fountainhall:

1678. *July* 24.—IN the improbation pursued by Sir Robert Murray, *alias* Crighton, against Richard Murray of Broughton (*vide* 6th Feb. 1672, *supra*), the LORDS repoined Broughton against the said certification upon his payment of 1000 merks Scots of expenses to the said Sir Robert, for the damage and delay he had sustained; and that in regard Broughton was, the time of pronouncing and giving thereof, in Ireland detained on public affairs, and Broughton offered to abide at the truth of the writs and deeds quarrelled; and the LORDS directed a commission to the Judges in Ireland to try what a certification imported with them, and how they tried false deeds there; and if these writs had been tried there and found true, and so that it was *res hactenus judicata* betwixt them.

1679. *February* 12.—IN the action Sir Robert Crighton, alias Murray, against Richard Murray of Broughton, (24th July 1678.) 'THE LORDS having, on the 4th current, considered the report returned from the Judges in Ireland, they found it was not *res hactenus judicata* there, so as to preclude a new trial of its falshood in Scotland.' Then it fell to be debated, whether the Lords could take trial by the indirect articles and manner of improbation, when the direct manner was extant, and the *testes instrumentarii et inserti* had already asserted and affirmed the verity of the writ, which bore the Earl of Annandale to have been at Edinburgh that day it was subscribed. And yet Sir Robert Murray proved by famous witnesses, that he was that day in Scoon; which will not conclude either, unless they say, 'all that day,' since he might be in both, there not be-

No 18. ing so great a distance betwixt the two. Likeas, Broughton *alleged*, Sir Robert's disposition signed at London by Annandale was false; but Dr Wedderburn was a witness in it. Yet the Lords, from a bias of equity, and a suspicion of Broughton, relaxed a little of their forms, *refragante præside*, and found, 'That notwithstanding the direct way of improbation by the witnesses insert is already tried, and they have abidden at the truth of the deed, yet in respect of the suspicion of these witnesses, they ordain Sir Robert to condescend on his indirect articles, that if they be pregnant, then the Lords will admit them, but if they be *leviuscula*, they will reject them; and the Lords declare they do not by this altogether enervate the direct way, but reserve to themselves to consider, at the advising of the whole cause, which of the two shall preponder, and be most pregnant.' See Durie, 7th July 1632, Renton, *voce* Improbation. For proving indirect articles of improbation, in the present practique, witnesses otherwise inhabile are receivable, because the Lords admit of any adminicle, and even receive exceptionable witnesses, and take all the trial they can get; and when the whole matter is lying before them, at the advising, they consider the incapacity and other qualities and defects of the witnesses, for laying the greater or lesser stress upon their testimonies. *See* Proof.

1680. *February* 13.—In Murray of Broughton's case, and Sir Robert Murray, (12th February 1679), the Lords before answer ordain witnesses to be examined anent the remorse which it is alleged Broughton's witnesses expressed before their death for deponing falsely, *ad levamen et exonerationem conscientiæ;* as also the Earl of Dumfries, if he heard Broughton say, 'I will not put on mourning 'for the Earl of Annandale, for I have got nothing by him.' It is true this is not relevant, for one might speak so dissemblingly; and a witness's retraction cannot annul his former testimony, and the *jus quæsitum* to the party thereby. *Vide L.* 3. *D. ad S. C. Silan.* But in falsehoods all points are admitted to probation though never so irrelevant, reserving the consideration what they shall operate at the advising.

1681. *February* 11.—The Duke of Albany and York came to the Session to hear a part of the debate in the cause between Sir Robert Murray, *alias* Crighton, and Richard Murray of Broughton, (*vide* 13th February 1680,) which did take up nine forenoons to the Lords, longer than ever I observed them bestow upon any cause whatsoever. In it there was great heat, and many reflections on the parties, and satyric repartees betwixt the King's Advocate and Sir John Dalrymple.

1683. *February* 13, 14, *and* 15.—These days were spent in advising that tedious improbation of the deeds of lease and release of the Earl of Annandale's estate in Ireland, at the instance of Sir Robert Murray against Robert Murray of Broughton, (mentioned 12th February 1679). 'The Lords found them

false and fenzied.' Broughton gave in a declinator against the Marquis of Athol, as having right to a part of the Irish lands, which was the subject matter of the controversy. He declined himself; but to shew he would take no advantage of Sir Robert Murray, he brought in the disposition and teared it before the Lords. ——Broughton's friends designed only to have the deeds found improbative and null, on these accounts. 1*mo*, This would have saved Broughton's reputation, and saved him from any hazard of punishment. 2*do*, Such a decreet as that would not have been regarded in Ireland; where they would have been looked on as only null for want of formalities or solemnities required by the Scots law, such as the writer's name, &c. noways founded on the *jus gentium ubique receptum*; but being found false, is a vice which is regarded *per totum orbem*. Some affirmed, that this was a dangerous decision. 1*mo*, To find a writ null upon extrinsic probation of being *alibi*, &c. where the two instrumentary witnesses insert did abide at the writs, as true and real deeds which they saw Annandale subscribe. Only the hazard of the preparative was the less in this, that these two witnesses, M'Lellan and Hownam, were *gravati et pessimæ famæ*; and no case will readily occur again with all Broughton's circumstances; and so it needs not be a precedent or leading case.——But this teaches us that great heed should be taken to get and adhibit famous honest witnesses to writs of importance. 2*do*, It was thought arbitrary to find the indirect articles of falsehood proven here; it being evident there was not one of them fully proven by two concurring unsuspected witnesses.——But it was *answered*, There being a *semiplena probatio* by one witness or more upon hearsay, in every one of them, &c. these imperfect probations being conjoined, they might amount to a conviction for satisfying the minds of the Judges that the deed was false. The second point advised was, if these deeds should be lacerated, cancelled and destroyed, they being now found false.——*Alleged* for Broughton, Many people in Ireland had gotten subaltern rights, who, not being called nor heard, the evident could not be torn. Yet these rights *resoluto jure dantis* must fall in consequence. Some of the Lords thought, that they should first by a letter acquaint the Irish Judges with it; but it was carried, that they should be clipped and torn whenever the decreet should be extracted. Then the King's Advocate urged, that the Lords might remit him to the criminal court to be punished capitally, as a falsary, and that they might presently secure his person in prison till that trial, for he had the confidence to be going publickly up and down the streets after they had found it false. The Lords thinking they had gone a great enough length already, and to give him a fair opportunity and occasion to escape, refused to remit or secure him; but allowed the Advocate himself, if he pleased, to insist against him criminally, and to lead what probation he thinks fit.——But if their decreet do not bear that it remits him, it will not be *probatio probata*, to the assize.—The reasons of this were; it was not proven, 1*mo*, That he was the fabricator himself, but only that he was in the other room when it is said to have been subscribed, and so he is only art and part in using it. Yet see act 22d

No 18.

No 18. Parliament 1621. 2*do.* The deeds were not found false on the direct manner of improbation, but only upon indirect articles conjoined accumulated together, which at best is but a presumptive and illative probation; it were very hard upon such presumptions to take away a man's life; and Durie 14th July 1638, Dunbar, *voce* JURISDICTION, tells, the Lords in such cases use to punish the falsaries, *pœna arbitraria*, by banishment, stigmatizing, setting them on the pillory, infamy, &c. without remitting them to the Justices. Yet I find Kennedy, in 1663, hanged for falsehood upon a decreet of the Lords, upon a very weak and presumptive probation.

1683. *March* 29.—SIR ROBERT MURRAY, in the case mentioned 15th February 1683, gives in a bill to the Lords, craving, that in regard the Judges in Ireland did not respect decreets written on paper without seals; that they would allow his decreet against Broughton to be drawn upon parchment, and the seal of the College of Justice appended thereto, and to be abbreviated, that one skin might hold it. THE LORDS refused to abridge it; but ordained it to be written on parchment by way of book, and their seal to be appended to it.

Fountainhall, v. 1. *p.* 11. 41. 85. 130. 218. and 230.

1673. *November* 18.

GORDON of Cardines *against* SIR ALEXANDER M'CULLOCH.

No 19.
Found that an action for scandal committed in Edinburgh, might be pursued before the Commissaries there, altho' the delinquent had his family in another commissariot, he himself having been in Edinburgh 40 days before citation.

IN an advocation raised at William Gordon of Cardines's instance against Sir Alexander M'Culloch, of a pursuit intented against him before the Commissaries of Edinburgh, for slanderous and opprobrious speeches uttered against him, in calling him a murderer, oppressor and warlock, before many famous witnesses here at Edinburgh, upon this reason, that the said William was not a residenter there, but had his domicil in the west country, and so was only liable to the jurisdiction of that commissariot where he lived; it was *answered*, That it was offered to be proven, that before the uttering of those scandalous speeches he had resided 40 days constantly at Edinburgh, and therefore the question being only as to a legal citation to answer before the Judge of that place where the scandal was committed, ought to be sustained and the cause remitted. THE LORDS having considered a former decision in the case of Panmuir, No 60. p. 4847, where upon that ground, that he had resided three months in Edinburgh, the Commissaries were not found to have the confirmation of his testament, but the Commissary of Brechin, under whose commissariot he had lived with his family before he came to Edinburgh, they did find, notwithstanding, in this case, that the cause ought to be remitted to the Commissaries of Edinburgh, as being the place where the scandal was committed and could only be proven, and that the question being only as to a legal citation, was different from that of the Earl of Panmoor's, which was as to the confirmation of his moveable estate.

Fol. Dic. v. 1. *p.* 327. *Gosford, MS. No* 633. *p.* 367.

*** See No 13. p. 4793.