

After this, on a reclaiming bill, the Lords advocated the brief to the macers, to whom they would adjoin some of their number as assessors ; and shunned the sheriff as suspect.

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1709. *December 20.* HAMILTONS *against* PRINGLES.

IN the competition betwixt Hamiltons on the one part, and Pringles on the other, both creditors to Daniel Nicolson, the Pringles produced two bonds, one for 4000 merks, in July 1693, and the other for 1000 merks, in February 1694. Against both which it was objected by the Hamiltons, that the 4000 merks' bond was holograph, and so did not prove its own date, and must be presumed to be on deathbed ; and the 1000 merk bond was ten days after he was sentenced to be hanged for his accession to poison and forgery, and within four days after that bond he was executed ; and so was materially granted on deathbed, when he could neither prejudge his creditors nor heir. Besides, it was a donation by an adulterer to his adulteress and her bairns, and so reprobated by law.

ANSWERED, *Imo*,—The law of deathbed only took place with us in case of sickness ; and being a custom peculiar to this nation, and neither known to the Romans nor our neighbours, it is not to be extended to the case of one sentenced for a capital crime, who is in perfect health, and who may be reprieved, or make his escape out of prison ; yea, if, by the fourth Act, Parliament 1696, he live sixty days after the granting the bond, he can never be interpreted to have been on deathbed. And the reason of law ceases ; for sickness clouds the mind and disturbs the judgment, so as exposes them to the solicitations, importunities, and impressions of those about them, nothing of which can be applied to one after the sentence of death. *2do*, If need were, thir bonds can be supported and adminiculated by onerous causes, besides their own narratives. Likeas, upon application to the Lords of Session by the Pringles, his oath was craved on the true, just, and onerous causes of these two bonds ; and he actually deponed that they were true, real debts ; which is a great confirmation of their verity ; and so, being *juratum*, cannot be now quarrelled. And if, though after condemnation, he can do no deed to prejudge the fisk, to whom there is a *jus quæsitum*, yet, *quoad* his heirs, he is at absolute liberty.

REPLIED,—It has ever been received as an uncontroverted principle, that a man, sentenced to die, *habetur pro nullo et tanquam civiliter mortuus* ; and is by the Roman law called *servus pœnæ*, being under the *maxima capitis diminutio* ; and so Horace calls *Attilius Regulus capite minutus et capitis minor* ; and so can do no valid deed ; as the Lords found on the *2d of January 1683, Colt* against *Somerveill*, that, he having charged after he was capitally sentenced, the charge was null ; and so freed him from his attesting a cautioner in a suspension. And the learned Craig, *lib. 1, D. 11*, is positive, that a man after condemnation can do nothing to burden his heirs ; and states sundry other parallel cases : as where one is shut up in a house infected with the plague, or is going to be cut of the gravel, or engaged in a duel, how far they are to be reputed *in lecto* in such circumstances. And seeing the Lords have sustained equipollent deeds to infer sanity, besides those common ones of going to kirk and market, such as playing at the foot-ball, going in a boat to shoot marrots, (as was found in Stewart of

Rossyth's case,) why may not equipollent cases be allowed to infer deathbed, as well as *morbus soticus* or real sickness? Is not the judgment of a man condemned, and in view of eternity, within a few days as much disturbed as any sickness can do?

Some thought the characters of a condemned person, being *servus pænæ et capite minutus*, given them by the Roman law, did not quadrate with the mildness and temper of the civilized nations now. The Lords, to shun deciding this nice point, if one condemned must be reputed on deathbed, ordained them, before answer, to adduce what adminicles they could, to astruct the onerous cause of the bonds quarrelled, and to produce his oath, taken by warrant of the Lords, to see how far the same may be forfeited thereby.

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1709. *December 22.* BOYLE and MONTGOMERY, Tacksmen of the Impost, against ROBERT DOUGLAS.

BOYLE and Montgomery, Tacksmen of the Town of Edinburgh's imposition of two pennies on the pint of all ale brewn within their liberties, pursue Robert Douglas, soap-boiler in Leith, for paying the foresaid duty, for any ale brewn within his tenement there.

ALLEGED,—That his brewing, (though situated locally within the Town of Leith,) was not liable to this imposition, for nothing was made subject thereto but what lay within the liberties of the town and its royalty, either in property or superiority; but his lands of Coatfield fell under none of these denominations, but were mortified lands holden of the Trinity Hospital and the Preceptory of St Antony's Chapel, and so fell not under the Town's gift. And their situation and designment, as lying *infra villam de Leith*, imported nothing; for so does the Yardheads of Leith, and yet are not subject to the Town but to the shire; and so is Caldtoun and the back of the Canongate reputed a part of the town, and yet belong to the Lord Balmerino, and never answer to the Town nor Canongate courts: and no more does his lands in which his brewery is built; for which he shows a charter flowing from the administrators of the hospital, as his superiors, and repeats a declarator of exemption and immunity from this servitude.

ANSWERED,—They opponed the Town's gift, comprehending the whole lands lying within the Town of Leith, which infallibly takes in his lands with the rest, and has borne cess and all other public burdens with the rest of the houses there; and seasine given to them is by the bailie sent thither by the Town of Edinburgh; and the clerk of Leith is notary thereto, so it is no special different case from the other houses in Leith. And its holding of the hospital signifies nothing to alter the case; for the Magistrates of Edinburgh are still his superiors. And there are sundry lands within burgh holden of Heriot's Hospital, and others again are Temple lands, holden of my Lord Haddington and Torphichen, and yet pay this two pennies on the pint of ale; so the holding of another superior does not exeme, if they lie within the Town's liberties.

REPLIED,—If the Town of Edinburgh's right to Leith be considered, it will be evident that his lands of Coatfield, (though situated within the Town of Leith,) fall not within their right; for the superiority of Leith being purchased by