fore in the magistracy, which some of these pursuers had not, and so no process can be sustained at their instance. 2*do*, *Esto* the debt be now greater than it was in 1693, yet they can rationally exculpate themselves by a great many emergent burdens the town has fallen under since that time, as an augmentation of their quota and proportion of the tax-roll, laid on by the convention of burghs; *item*, Their missive dues, the expenses in a debateable election, the reparation of Ancram bridge, and many other incidents, which has drawn them into so much debt. *Answered*, This can never palliate their smuggling-trade of preying upon the town's common-good; for they offer to prove, beside their constant revenue, they had their mills and ladle-custom to defray all these extraordinaries; and though the present Magistrates brag they have not enriched themselves thereby; yet it is all one, if by drinking, squandering, or negligence, they have drawn the town into unnecessary debts; for, by the title *D. De administrat. rer. ad civitat. pertinen.* it is evident Magistrates are liable not only *pro dolo et lata culpa*, but likewise *pro leve, et negligentia*; and the common-good of burghs coming from the crown, they are, by sundry acts of Parliament, to make yearly count how they have employed the same, as appears by act 36. 1491, and act 26. 1535. THE LORDS thought the point of general concern to all the royal burghs of Scotland; and therefore named some of their number to examine the accounts, and endeavour to settle the two contrary struggling factions in this burgh.

No 67.

Fol. Dic. v. 1. *p.* 496. *Fountainhall, v.* 2. *p.* 379.

1735. *February* 14. MONCRIEFF of Reddie *against* PATRICK MAXTON.

No 68.

THE right to a stipend is a civil right, and therefore the Court of Session has a power to cognosce and determine upon the legality of the admission of ministers, *ad hunc effectum*, whether the person admitted shall have right to the stipend or not. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 495.

1741. *Feb.* 19, & *June* 17. NEWLANDS *against* NEWLANDS.

No 69.
A person having absconded upon a complaint against him for subornation of perjury, the Court granted warrant for citing him to appear under pain of rebellion and putting to the horn.

IN a complaint at the instance of Barbara Newlands against Alexander Newlands, for a very heinous offence, no less than subornation of perjury on a commission from the Lords to London, the said Alexander having absconded, a question occurred, under what certification the Court could appoint him to appear, and in what manner? And the Lords Elchies and Arniston, to whom it was remitted to look into the books of sederunt for precedents, having reported and pointed out to the Court several cases, in which parties had been appointed to appear under pain of rebellion and being put to the horn; the

No 69. Lords, on the narrative of a former interlocutor directed to macers or messengers to search for and apprehend him, and of the execution returned by a macer, that he had searched for the said Alexander Newlands, and could not apprehend him, "Granted warrant for letters of horning directed to macers, messengers, &c. to command and charge the said Alexander Newlands personally, or at his dwelling-house, if within the kingdom, or if absent, furth thereof, at the market cross of Edinburgh, pier and shore of Leith, to compear against a certain day, with continuation of days, to answer to the matters contained in the said complaint, under the pain of rebellion, and being put to the horn; wherein, if he failed, that the said macers, &c. denounce him his Majesty's rebel, and put him to the horn, and escheat and in-bring all his moveable goods and gear for his Majesty's use, for his contempt and disobedience; and ordained this warrant to be inserted in the books of sederunt."

N. B. The Court was of opinion, that this criminal complaint could not be tried in absence of the party, to the effect of inflicting pains and penalties; for though in the case of falsehood, the Court may proceed in absence of the party to the effect of reducing the deed, yet not to the effect of inflicting pains and penalties on the criminal.

It was observed in this case, that hornings anciently could only proceed upon decrees *ad factum præstandum*, and that it was by act of sederunt that hornings were appointed upon decrees for civil debts; whence it was also observed, that though there were no such precedents as those before mentioned, there seemed to lie no objection to the Court's power of ordering horning in such a case as this was.

Fol. Dic. v. 1. *p.* 343. *Kilkerran*, (JURISDICTION,) *No* 2. *p.* 315.

*** Lord Kaimes reports this case.

1741. *June.*—A complaint being made to the Court of Session against Alexander Newlands, skinner, charging him with subornation of witnesses, the complaint was not only ordained to be answered, but warrant granted to apprehend Alexander Newlands, and to bring him before the Court in order to be examined. Alexander Newlands, dreading the storm, had retired out of the country before the complaint was presented, leaving a factory with Robert Bull to answer for him. Robert Bull gave in answers to the complaint, which had not the effect to clear him. The Court pronounced the following interlocutor: "Having again heard the foresaid petition and complaint of Barbara Newlands, and answers for Alexander Newlands, with the interlocutors directed to macers or messengers, to apprehend the said Alexander Newlands, and to bring him to the Court in order to his being examined, together with the execution returned by Francis Gibson, macer, that he had searched for the said Alexander Newlands, and could not apprehend him; they grant warrant for letters of horning directed to messengers, to command and charge

the said Alexander Newlands personally, or at his dwelling-place, if within Scotland, for the time; and if furth thereof, at the market-cross of Edinburgh, pier and shore of Leith, to compear before the Lords the third day of June next, in the hour of cause, with continuation of days, to answer to the matters contained in the said complaint, under the pain of rebellion, and putting him to the horn; wherein, if he fail, the said day being bygone, that the said messenger denounce him his Majesty's rebel, and put him to the horn, and escheat and in-bring all his moveable goods and gear to his Majesty's use, for his contempt and disobedience." And, it being reported to the Court, that the charge was given, as directed by the interlocutor, they proceeded to pronounce this other interlocutor: "THE LORDS having taken under consideration the cause, Barbara Newlands against Alexander Newlands, and his having been charged, by virtue of letters of horning, to compear before the LORDS the third day of June; and, having ordered their macer to call the said Alexander Newlands, both yesterday and this day thrice, and, he not compearing they ordain him to be denounced rebel, and put to the horn, and all his moveable goods and gear to be escheat and in-brought to his Majesty's use, for his contempt and disobedience, and ordain the horning and executions thereof to be thereafter registered." No 69.

As this form of procedure was not common, the Judges, before they took any step, remitted to two of their brethren to search for precedents. Several precedents were found, and laid before the Court, some of which follow.

11th June 1577. The Lords of Council *ex officio* ordained letters to be directed at the instance of our Sovereign Lord's Advocate, to warn Malcolm Bower and Henry Adamson to compear personally before the said Lords 21st instant, with continuation of days, to answer to such things as shall be inquired at them, under the pain of rebellion, and putting them to the horn.

21st October 1578. The Lords of Council assigned to Andrew Ker, notary, the 12th of November next, for exhibiting before the said Lords his procothol, under the pain of rebellion and putting him to the horn, with certification, if he fail, that letters will be directed accordingly.

22d June 1584. The Lords of Council ordain letters to be directed at the the instance of Thomas Martin, to command and charge John Herriot of Fingask to compear personally before the said Lords the first of July next, with continuation of days, to answer *super inquirendis*, under the pain of rebellion.

18th July 1584. The Lords of Council ordain letters to be directed to command and charge Mr William Brand, minister of Falkland, and David and James Ramsays, to compear personally before the said Lords the 21st July instant, with continuation of days, to answer to such things as shall be inquired at them, under the pain of rebellion, and putting them to the horn; with certification, if they fail, that letters shall be directed accordingly.

13th July 1586. THE LORDS understanding that Mr William Lumsden, parson of Cleugh, being apprehended by virtue of the King's letters past by deli-

No 69. verance of the Lords, in order to be brought before the Court, to answer certain points of falsehood, had made his escape, they grant full power and commission to Patrick, Master of Gray, Commendator of the Abbacy of Dunfermline, to pass, with convocation of the lieges, and, in his Majesty's name, to search for the said Mr William Lumsden, and to make the King's keys, &c. and, being apprehended, to produce him before the Lords of Council and Session, to answer to the said points of falshood.

1st November 1586. Our Sovereign Lord, and Lords of his Highness's Session and College of Justice, understanding that Andrew Semple, Bailie-depute of Paisley, has, in a fenced court, holden within the tolbooth thereof, in presence of 200 persons, or thereby, by words indecent, heavily murmured, injured, blasphemed, disowned and lightlied the judgment and proceedings of the Court of Session, and therethrough has incurred the pains contained in the acts of Parliament; therefore ordain letters to be directed to officers of arms, Sheriffs in that part, charging them to command and charge the said Andrew Semple to enter himself in ward, in the Castle of Blackness, within 48 hours after the charge, there to remain, upon his own expenses, under the pain of rebellion, and putting him to the horn, and, if he failzie, to denounce him rebel, put him to the horn, and escheat and inbring all his moveable goods to his Majesty's use.

1st December 1592. A charter-chest, which, by order of the Lords in a process, was exhibited in Court, and in custody of the clerks, was violently spuilzied and taken away, under the colour of a warrant obtained from Sir Richard Cockburn, Secretary of State; and a complaint being brought into Court upon this atrocious delict, the Lords, disregarding the Secretary's warrant, gave command to their macers to charge the said Sir Richard to enter his person in ward, within the Castle of Edinburgh, within three hours after his charge, and to charge the principal parties to enter their persons within the tolbooth of Edinburgh, within six hours after their charge; there to remain, under the pain of rebellion and putting them to the horn; and, upon their failzie, to denounce them rebels, put them to the horn, escheat, and inbring, &c.

After all, a petition was presented to the Court, in the name of Alexander Newlands, complaining of the foregoing proceedings as arbitrary and unprecedented; that, in matter of contempt, the Court had no power other than to hold the absent party as confessed; that the foregoing precedents belong all to a period when liberty and property were not well ascertained; and that such dangerous powers had been entirely given up in later times; evident from this, that not a single instance has happened since the 1592.

It occurred to the Court, at advising this petition, that, by our old law, even in processes purely civil, the defender was bound to attend personally in Court; and his moveables were attached till he should find caution to appear, and this practice gave way to a more equitable form, borrowed from the Roman law, of holding defenders as confessed; but that, even in cases purely civil, the old form must still subsist, where the defender cannot be personally apprehend-

ed, to be held as confessed: Much less doubt can there be that the old form must remain, with regard to matters of a criminal nature, where holding as confessed will not answer the purpose. It further occurred, that it is a privilege inherent in all courts, sovereign courts especially, to explicate their own jurisdiction, and to take all proper steps preparatory to judgment, such as obliging a man to answer personally to facts that are charged against him. And, if it be a necessary or useful step to examine a party accused, which is undeniable; it necessarily follows, that all legal compulsion may be directed by the Court to force personal compearance. No 69.

'Upon these considerations the LORDS refused the petition without answers.'

Rem. Dec. v. 2. No 19. p. 32.

1741. *July* 28.—1742. *June* 15. & 22.

HAMILTON *against* BOYD and Others.

No 70.
Found, that the crime of importing Irish victual was cognisable in the Court of Session, in lieu of the Privy Council abolished.

UPON advising a bill, with the answers, against an interlocutor of an Ordinary, finding the importation of Irish victual probable by oath of party, two preliminary points were stirred upon the bench, which were thought to merit a hearing in presence, viz. *1mo*, Whether the jurisdiction for cognizance of this crime was not by the act 3d Parl. 1672, privative in the Privy Council now abolished? and if it was, Whether any more is committed to the Judge Ordinary by the act 9th Parl. 1703, which ratifies the act 1672, than the power of convicting and transporting such offenders as are under the degree of heritors? *2do*, Supposing the jurisdiction in the Judge Ordinary, Whether, by said act 1703, the time for trying the offence be not limited to six months, which in this case were expired.

And upon hearing in presence, it was upon the 28th July 1741, found, 'That the importation of Irish victual, prohibited by the act of council 1668, ratified by subsequent statutes, is competent to be tried by the Judge Ordinary; and that the limitation of six months for trying the offence by the statute 1703 does only respect the superadded penalty of transportation:' But then, it was also at the same time found, 'that such importation was not probable by the oath of the party, and that therefore the offenders could not be obliged to depone against themselves.'

THE COURT was so unanimous upon the point of jurisdiction, that parties acquiesced; but it was much divided upon the other two points, of the prescription and proof by oath; and both parties having reclaimed, the LORDS, upon the 15th June 1742, 'Refused the defenders petition upon the prescription, and so far adhered;' but, upon answers, altered their former interlocutor as to the mean of proof, and 'found the offence probable by the oath of party,' and thereto again 'adhered' upon the 22d.

As it cannot be denied, that it had been reasonable enough for the Legislature to have extended the limitation in point of time to the whole offence, the