

1753. February 6.

DUKE of ROXBURGH and His MAJESTY'S ADVOCATE, *against* WILLIAM CHATTO,
Feuar in Kelso.

No 19.

In a criminal prosecution against one for forgery of a deed, it is not necessary to produce the deed said to have been forged.

THE defender, who holds certain lands in feu of the Duke of Roxburgh, having been extrajudicially warned to pay up some arrears of feu-duties owing by him for these lands, pretended that his Grace was debtor to him in a larger sum than that of the feu-duties demanded; for that the late Duke of Roxburgh, by a writing under his hand, became bound for himself, and his heirs, to grant a feu-charter, *gratis*, to Thomas Chatto (father of the defender), and to other feuars therein described; as also, to infest and sease them in their respective feu-lands at his own expense. The defender offered evidence to show, that the expense of this infestment exceeded the sum demanded of him in name of feu-duties; and, though he refused to produce the principal obligation above mentioned, yet he delivered, what he called a copy of it, to the gentleman who manages his Grace's affairs. A process was nevertheless brought, at the instance of his Grace, before his baron-bailie, when a procurator appearing with a mandate from the defender, pleaded the same defence. The baron-bailie ordained the defender to produce the principal obligation; and, on his refusal, decerned for payment of the feu-duties.

The Duke of Roxburgh, with concurrence of his Majesty's Advocate, raised a reduction and improbation of the above writing; in which process, certification was obtained against the defender, and the writing reduced and improved; but as this sentence could not affect the respective interests of the other feuars, in whose favour the obligation was said to have been conceived, and as suspicions of guilt in the premises appeared against the defender, his Grace insisted farther, that that principal writing was false and forged; and that the defender was actor, art and part, of forging, or of using it, knowing it to be forged.

The defender *objected* to the competency of this pursuit; and *pleaded*, That the law has devised sufficient security against false and forged writings, by the civil action of reduction and improbation; if the writings called for in such action be produced, the pursuer may proceed to have them improved, and if the case so require, may have the users of them punished as forgers; if the writings are not produced, certification is granted against them, they are held to be forged, and they are reduced and improved accordingly; but, farther than this, the law has not proceeded; that, as in this case, the writing said to be false and forged is not produced, no *corpus delicti* appears, and consequently it is not competent to proceed to trial of forgery; such trial would be as incongruous as it would be to proceed to a trial of murder, when it did not appear that any person had been murdered; nor is there any precedent of a trial of forgery, where the writing, said to have been forged, was not produced.

Answered for the pursuer ; It is *the crime libelled*, and not *the thing* on which the crime is committed, which, in criminal prosecutions, constitutes the *corpus delicti* ; thus, in trials of murder, the commission of the murder must be libelled, but the production of the person murdered is not required ; so also in this case, as the forgery of a certain writing is libelled, the production of the writing itself is not necessary ; indeed, were it otherwise, the law would be daily eluded ; and offenders, especially forgers, screened from punishment ; for that, according to the position laid down for the defender, a forger might, at any time, by destroying the forged writing, prevent all possibility of prosecution. There are also two precedents in point for the pursuer ; one in the case of Captain Barclay, mentioned by Mackenzie, Criminal Law, title FALSEHOOD, § 5. and more fully related by Stair, in his decisions, Barclay against Barclay, *voce* WITNESS ; and Lady Towie against Captain Barclay, *IBIDEM* ; and the other in the case of Gilchrist and Breadie, determined about thirty years ago. See IMPROBATION.

‘ THE LORDS repelled the objection.’

Act. R. Dundas, R. Craigie, Binning, & Advocatus. Alt. A. Pringle & Lockhart. Clerk, Pringle...
D. Fol. Dic. v. 3. p. 176. Fac. Col. No 60. p. 92.

SECT. VIII.

Crimen Falsi.

1747: January 20.

ANDREW LEITCH against ROBERT HALL.

THERE being a contention in the town of Rutherglen, about the election of their Magistrates at Michaelmas 1746, one of the parties obtained a sist on a bill of suspension of the rights to vote of certain coaliers, burgesses of the town, and intimated it at the time of the election ; but Robert Hall, notary-public, had added in the bill the names of three more coaliers not contained therein, when the sist was granted.

This occasioned a complaint, to which he pleaded youth, and ignorance of the offence ; and produced very ample certificates of his character from the Judges and practisers in the courts at Glasgow, where he acted as a procurator, and other persons of credit there.

No 19.

No 20.

A notary having filled up names in a past bill of suspension, which were not in it when presented, was deprived of his office.