1744. *November* 27. M'LAUCHLANS *against* M'DOUGAL.

No 218.

FOUND competent for a defender to propone improbation of the execution of the summons, notwithstanding his having proponed peremptory defences.

Fol. Dic. v. 3. *p.* 314. *Kilkerran,* (IMPROBATION.) *No* 5. *p.* 283.

*** D. Falconer reports this case:

1744. *Nov.* 28. JOHN M'DOUGAL of Dunnolick, being pursued by John and Patrick M'Lauchlans, creditors of his father, as representing him on the passive titles by possession of his estate, defended himself on his father's having been forfeited, and that he possessed by tolerance from the Duke of Argyle the superior. THE LORD ORDINARY, "in respect the possession was acknowledged, and that the defender did not shew a legal title by which he possessed, found the libel relevant, and the debt instructed by the writ produced, and the passive titles acknowledged, as said is, and decerned."

Afterwards the defender offering improbation of the execution of the summons; which, if he could take out of the way, prescription was run, the LORD ORDINARY, on the 16th instant, upon advice with the Lords, "found, That notwithstanding the peremptory defences, yet it was still competent for him to propone improbation against the execution quarrelled;" and to this the LORDS this day adhered.

Act. *H. Home.* Alt. *A. M'Dowal.* Clerk, *Gibson.*

D. Falc. v. 1. *p.* 10.

1753. *December* 21. The KING'S ADVOCATE *against* CHARLES STEWART.

No 219.
Whether it be competent to examine a man accused of forgery, after the complaint is laid against him.

WHEN a man is suspected of forgery, and application is made to the Court of Session for a warrant to incarcerate him till he be tried, it has been customary before a formal libel or complaint is exhibited against him, to examine him in Court, and to oblige him to answer proper interrogatories. See upon this matter *l.* 22. *C. Ad legem Cornel. de fals.* and M'Kenzie's Criminals, page 140. where it is said, that *in crimine falsi* the Court of Session has gone so far as to prove by the defender's oath.

A complaint for forgery being exhibited against Cameron of Fassefern, charging him with contriving a forged deed in his own favours, and claiming upon the same in a court of justice; and against Charles Stewart, notary public, charging him with being the forger, or at least with being accessory to the forgery; the question occurred with regard to the latter, whether it was competent to examine him after the complaint or libel was laid against him. Elchies gave his opinion, that though the defender's oath ought not to be demanded *ob metum perjurii*, the same objection lies not against an examination. It occurred

No 219.

to me, That if the complaint be laid *ad civilem effectum* only, viz. to annul the writ, there is no reason why the defender may not be examined as well as in any other civil cause; but the specialty of this case is, that the complaint is against an accessory, concluding against him the pains of law, and which is the only conclusion that can be against an accessory who has no interest in the writ challenged. I moved the above specialty, and expressed my doubt, whether, in such a case, an examination is competent either before or after a libel is exhibited; for this reason, that by the common law of this island, no man is bound to give evidence against himself; that this law is indeed altered in civil processes upon authority of the Roman law, but that the law remains entire in criminal actions. The majority, however, inclined to proceed to the examination upon this ground, that an examination would have been competent before the complaint was exhibited, and *ex paritate rationis*, that the same ought to be competent after. The obvious answer to this is, that in a case like the present, which is purely criminal, there is no good ground for an examination, either before or after the complaint. Mr Stewart's counsel, however, seeing his objection would be over-ruled, withdrew the same, and gave way to the examination.

Sel. Dec. No 61. p. 80.

1782. *November* 26. King's Advocate *against* James Macafee.

Justiciary Court.

No 220.
The uttering forged notes capital.

The pannel having been found guilty of fraudulently uttering five forged notes, in imitation of those issued by the British Linen Company, it was debated whether his crime was capital or not.

Pleaded for the pannel; Unless in particular cases, Reg. Majest. lib. 4. c. 13. the crime of forgery itself, by the ancient law of Scotland, Statut. Alex. c. 19.; 1540, c. 80.; 1551, c. 22. was not punished with death, but with 'proscription, banishing, and dismembering of the hand and tongue, and *other pains*.' By which last expression, according to the established rules of legal interpretation, no heavier punishments can be understood than those particularly mentioned.

Nor from the more recent practice of punishing capitally the actual forgery of writings of importance, particularly of the notes circulated by trading companies, will it follow, that the simple uttering, in its nature clearly different from the deliberation and criminality of the former, should be punished in the same manner. Upon this principle it is, that although the coining of false money is, by act 1696, c. 42. made capital, the using money so coined is attended only with an arbitrary punishment. In England, too, it has been thought necessary to extend the penalties imposed on forgers, to persons guilty of uttering, by an express enactment, 2d Geo. II. c. 25. in which, it is to be remarked, a special provision occurs, that it shall not be understood to relate to Scotland.