

No 20. THE LORDS, on the 15th, found the filling up the names of three persons more than were contained in the bill, to have been a practice illegal and unwarrantable, and highly dangerous to the public, and deprived him of his office of notary, and found him liable in the expenses of the complaint, and fined him in forty shillings Sterling to the use of the poor. And this day refused a petition, and adhered.

Fol. Dic. v. 3. p. 177. D. Falconer, v. 1. No 155. p. 197.

* * * Lord Kilkerran, p. 159, referring to this case, uses the following words: 'The adding the names of more suspenders to a bill of suspension, after it had passed the Ordinary's hand, found illegal, and punished.'

SECT. IX.

Theftboot.

1757. July 2.

JOHN WARRAND and JOHN M'DONALD *against* WILLIAM M'PHERSON.

No 21.
The transacting theft, but not concealing the crime, found not to be theft-boot.

JOHN M'DONALD having been robbed on the highway by Evan M'Pherson, for which Evan M'Pherson had been imprisoned, but liberated upon bail, William M'Pherson, a friend of Evan's, a few days after the bail, granted a bond for L. 26 to John M'Donald, which was the value of the goods lost, and of the expenses M'Donald had laid out in finding out the robber. In consideration of which, John M'Donald granted a disclamation of the following tenor: 'I John M'Donald, chapman in Stratherick, do hereby disclaim all action, instance, and execution that may be competent to me against Evan M'Pherson in Gargask of Badenoch, for and on whatever account, preceding this date; and particularly any criminal action that I might have against him, the said Evan, for and on account of a robbery and atrocious riot and attack committed by him upon my person, and merchant-goods, on the King's high-road, in the hill of Corrieyarrick, on the 4th June last, with all that may be competent to follow thereon, for now and ever.'

M'Donald, neither before nor after this, ever made any secret of the robbery; and Evan M'Pherson was afterwards tried, condemned, and executed for the crime, at the instance of the King's Advocate. M'Donald being cited, appeared as an evidence against him in the trial.

In an action at the instance of M'Donald, and Warrand, his assignee, against William M'Pherson, for payment of this bill of L. 26 Sterling, it was *objected* by William M'Pherson, That, in the above transaction, M'Donald had been

guilty of theft-boot, and thereby had forfeited any claim upon the bill in question.

No 21.

Answered for M'Donald; To make theft-boot, not only the transaction of a crime is required, but also the concealment of it, so as to be assisting in the defeat of justice, or putting the thief *fræ the law*, as the act James V. Parl. 1. cap. 2. expresses it. But here M'Donald only took payment of what he had himself lost; and he was so far from concealing the crime to defeat justice, that he told it to all the world.

'THE LORDS found, that action lay on the bill.'

Act. *Montgomery, Lockhart.*

Alt. *John Dalrymple, And. Pringle.*

J. D.

Fol. Dic. v. 3. p. 177. Fac. Col. No 33. p. 56.

SECT. X.

Riot.

1752. February 18. ELSPETH MARISHAL *against* MARGARET SEMPLE.

A RIOT pursued before the Sheriff of Lanark by Elspeth Marishal *contra* Margaret Semple, was, by bill of advocation, brought before the Lords, *inter alia*, on this ground, that the Sheriff's interlocutor was too extensive in finding the libel relevant to infer an arbitrary punishment, the riot being with such aggravations laid in the libel, particularly of its having been committed by way of hamesucken, that the sentence might, on proof, extend to corporal punishment or banishment; in order to either of which, it was necessary for the Sheriff to have proceeded by a jury.

This reason of advocation the Ordinary 'repelled,' and the Lords 'refused the petition against his interlocutor without answers.'

It was upon this occasion said, that there is no point less fixed than this, when a trial was to be by a jury, and when not; but so far was certain, that inferior judges, particularly the Magistrates of Edinburgh, are in use to judge in riots without a jury, even where banishment from the town, and whipping, has been inflicted.

Fol. Dic. v. 3. p. 178. *Kilkerran*, (DELINQUENCY) No 15. p. 164.

No 22.

Trial of a riot by a Sheriff without a jury, sustained.