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.

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Accordingly no instance can be adduced, where the crime of uttering alone has been tried capitally. In the case of William and James Baillie, in 1715, the pannels were accused of forgery, *and* using a false certificate. In that of Margaret Nisbet, in 1727, the verdict found the pannel 'guilty actor, or art 'and part, in the forgery libelled.' In the same manner, John Young, tried in 1750; John Raybould, in 1768; William Herries, in 1770; and David Reid, in 1780; were convicted of forgery, *as also* of uttering forged writings. In the trial of Andrew Adam, in 1709, the interlocutor on the relevancy found, 'That the pannel's actual forgery, or causing or enticing others to forge the 'subscription to a bond of cautionry, or his giving in the same *with his own* 'hand to the bill-chamber, inferred the pains of death; and that the pannel's 'use-making of the suspension obtained on the said bond of cautionry, was re-'levant to infer an arbitrary punishment;' from whence it may be justly argued, that the uttering, unless attended with circumstances which establish the actual forgery against the party accused, is never punished in the same degree with the fabrication. And Lord Stair, January 29. 1670, Lady Towie *contra* Barclay and others, *voce* WITNESS, reports the opinion of the Court, that the parties having used a forged bond for a great sum of money, were subjected only to banishment.

Answered; While the art of writing was confined to the Romish clergy, who were exempted from the jurisdiction of temporal courts, the nature of the crime of falsehood, in which is included that of uttering false writings, was not well ascertained. In the statutes quoted, a reference is made to the civil law, where it was punished *pro qualitate admissi, l.* 1. *et* 4. *C. Ad. Leg. Cornel. de Falsis.* Accordingly, so early as the year 1623, and in a variety of late instances, it has been attended with a capital punishment.

The condition of a person guilty of fraudulently using false writings cannot in reason be distinguished from that of the actual forger; nor can his punishment be mitigated, without affording in the same proportion impunity to offenders. In both cases, the degree of punishment, which in this country is very rarely regulated by express statute, must be accommodated to the particular circumstances of every offence. Nor can less than a capital punishment be deemed adequate to one so criminal in itself, and so fatal in its consequences, as that of which this pannel has been found guilty.

The pannel had been also found guilty of accession to the actual forgery of the notes in question; and a seeming informality in that part of the verdict gave rise to the foregoing argument. All the Judges, however, one only excepted, delivered their opinions, that the uttering in this case was capital. It was at the same time observed, that the pannel's uttering in Scotland the notes in question, which had been forged in Ireland, created a strong presumption of his participation of the forgery.

Sentence of death was pronounced against the pannel.

Act. *King's Counsel, Maclaurin, Crosbie.* Alt. *Geo. Fergusson, Adam Ogilvie.*

Fac. Col. (APPENDIX.) *No* 1. *p.* 1.