King William had named a bailie of regality in Sir William's place, he could have had the ordinary exercise of jurisdiction within the bounds, but not the disposal of escheats: *ergo*, these staid with the heritor.

The Lords shunned to take it on that nice point of Sir William losing his casualties, by not qualifying: but it was started, that, by his rights as a baron, he had it in his charters to dispose of escheats; and that lords of regality were no other but barons, with a higher degree of jurisdiction: as also, that this defender did not owe the donatar to the escheat a sixpence; and therefore should not extend his gift beyond the debt of the horning; at least no farther than his back-bond did: therefore they remitted to my Lord Royston, Ordinary in the cause, to hear them, how far Sir William, as proprietor, could claim these casualties, abstracting from his right as lord of regality; and to try if the gift was under back-bond, and the terms of it; for though in some cases donatars have prevailed to obtain gifts of escheat without the burden of back-bonds; yet the Lords thought that a singular and extraordinary practice, and not to be extended, neither against creditors nor debtors. *Vol. II. Page* 724.

1711 *and* 1712. JAMES ROBERTSON *against* JAMES LECKIE.

1711. *July* 5.—JAMES Robertson, in Glasgow, having obtained a decreet for the sum of ———— against John Leckie of May, he suspends; and one of his reasons is, that it was arrested at the instance of Andrew Forrester, on a bond of £118, owing by Robertson to Forrester. At discussing, Robertson offering to improve that bond as false, the same is abstracted: whereupon the Lords appointed a trial and expiscation to be made anent it; and, upon the examination of witnesses, it appeared that May had produced the bond and horning to the messenger, and caused him lay on the arrestment in his own hands. And Forrester being sent for, and disowning that ever Robertson owed him any thing by bond, May dealt with him to adhere to the verity of the bond, and depone as he should direct him, so as to liberate May from the suspicion of forgery, he should be plentifully rewarded; and that some of May's friends promised him a chopin-stoup full of dollars: which offers Forrester rejecting, when he was brought in to depone, he deduced the whole history, and how he was solicited by May and others to depone falsely; and which was confirmed by sundry others examined on the point.

Which probation coming to be advised, it was OBJECTED by May,—That no regard was to be had to Forrester's deposition, for he was only received *cum nota*; and what he said was to liberate himself, by laying it upon May; and that malice was proven against him, seeing it was deponed that he said to May,—"Either stick me, or I'll stick you;" and that Forrester truly delivered the horning to May to arrest upon it, and so might very fairly require him to abide by his debt, and expostulate with him for offering to retract.

ANSWERED by Robertson,—That the bond was certainly false; seeing Forrester, the pretended creditor, disclaimed it; and May, the user, durst not produce it, but immediately, when quarrelled, had destroyed it. As for the subornation, how is it possible in nature to prove such clandestine works of darkness

but by the parties practised on and to whom the offers are made? Likeas, the verity of the fact is fully adminiculated and confirmed by the concurring testimonies of others, which connects so, that it is incredible to think all this is only made up by Robertson.

The Lords found it proven, that May had impetrated and procured the arrestment to be laid on in his own hands, to stop Robertson's payment; and that he had tampered with Forrester to depone in his favours, and lay the crime upon Robertson.

It occurred to some of the Lords, that this was not actual subornation, unless he had prevailed with Forrester to depone as he bade him; and he refusing, it was only an attempt and endeavour to seduce; which, though a crime *in suo genere*, yet is not so punishable as if it had taken its full effect, by their false deponing. But the plurality of the Lords found, that it was actual consummated subornation, perfected as far as he could; and that *fecerat omne quod in se erat*, though it took not effect; and remembered that the 48th Act 1555, declares, That not only false witnesses, but their seducers, corrupters, and inducers, shall be punished by piercing their tongues, escheat of moveables, and infamy. And in the criminal adjournal books, in March 1605, I find one Cheyne and Croy executed for this crime. And again, in 1615, Graham of Langboddom and others hanged for subornation; and others of them scourged, burnt in the cheek, and banished. But the Lords could not find a forgery here; because the bond alleged to be false was not produced; and therefore they resolved only to inflict an arbitrary punishment; but, ere they could proceed to fine, they behoved to inquire into his circumstances, that it might be proportioned thereto. And, after trial, his condition appearing to be mean, and burdened with debt, they fined him only in 500 merks; 300 of it to Robertson, the party prejudged, and the other 200 merks to the kirk-treasurer of Edinburgh, for the use of the poor; and to go presently to the Tolbooth of Edinburgh, and thence to be transmitted, from sheriff to sheriff, to the prison of Glasgow, there to lie for three months; and that his sentence be publicly intimated when the Circuit Justiciary-court sits there in October next. Some were for causing him stand at the market-cross or trone with a paper on his brow; but this was waved: others desired he might be declared infamous; but the Lords thought this abundantly included within the sentence, without being expressly inserted therein; and, from commiseration, restricted it to fining, imprisonment, and confiscation.

Vol. II. Page 656.

1712. *February* 19.—In the case, Leckie against Robertson, mentioned 5th July 1711; another branch of it falls in this day, where Robertson comes in his tour to be punished and stigmatized, as Leckie was then. The case was, That Robertson had been tutor to one Gibson, whose father had a right from one Jack, to some tenements in Glasgow. Gibson dying, Leckie's wife was his nearest heir; but Robertson being master of all Gibson's papers, and resolving to invert the succession from Leckie to his own wife, who was Jack's sister, he abstracts Jack's service and his disposition to Gibson, his pupil, and serves his own wife heir to Jack, her brother; and then pursues for the rents of these lands for thirty-nine years back. They being surprised at this turn, perfectly knowing that Jack was denuded in Gibson her uncle's favours, and yet want-

ing the papers, they pursue Robertson in an exhibition; who compears and depones, in 1705, that he neither had, has, nor had fraudfully put away Jack's service and disposition, nor knows where it is; but produced, upon inventary, the papers and progress down to Jack, so far as did not make against his design of enhancing the lands. This put Leckie out of all hopes; so they submitted to my Lord Justice-clerk; who, by his decreet-arbitral, decerned Leckie to pay some money to Robertson, for his rights on that land. And this being afterwards quarrelled, the Lords found the decreet-arbitral could not be overturned, unless, in the terms of the regulations 1695, bribery, falsehood, or corruption were instructed. At last Leckie discovered a receipt the said James Robertson had given to Spreul of Milton, of Jack's service and disposition in 1701; and upon this raised a process of damages against him, for his subdolous and fraudulent concealing these writs, which had proved the loss of Leckie's cause, by a contrivance and complication of fraud, falsehood, and perjury, the like whereof can scarcely be paralleled; for he swears he knew nothing of that service and disposition, and yet gives a receipt for them a few years before; and by a most unaccountable conduct had arrested all Leckie's effects, to the ruin of his trade, though to little or no profit to himself.

Answered for Robertson,—That the receipt is signed by Wotherspoon, a cotutor, as well as by him, so that but one of them would get them; and *non constat* but Wotherspoon got them, though he signed jointly with him; for, in all dubious ambiguous cases, *interpretatio facienda est ut evitetur perjurium*: and at most it is but an oversight and lapse of memory, after such a distance of years betwixt the two; and so he might depone without any fraudulent design; and ought not to be aggravated by the frightful names of falsehood, perjury, and fraud. And when Leckie poinded his house, he might have carried away thir writs among the rest.

Replied,—There can be nothing more contrary to his oath than his receipt; and it stares his oath in the very face; and if it had been known then, he never had got a decreet against Leckie. And the receipts being granted by the other tutor as well as he, affords no excuse; for it is proven Robertson was the sole intromitter, and Wotherspoon was a mere name; and there could be no forgetfulness here, for he exactly minds all that makes for him, and forgets every thing that is to his detriment: so it is clear, to a demonstration, that he wickedly concealed these writs industriously, of purpose to seclude Gibson his pupil's true heir, *viz.* Leckie, and to make way to establish a false title to Jack, in his wife's person; which puts the perjury beyond question; in which the public is more concerned than Leckie; yet he must have his damages repaired; for *fraus sua nemini prodesse debet.*

Some started if this fell not under the Queen's indemnity, in April 1709? But the Act being read, it was found perjury was excepted. The Lords did not go the length to find it formal perjury; but all agreed it was a most pernicious fraudulent contrivance, to carry the right of these houses to his wife; and though they could not modify damages without loosing the decreet-arbitral, which ordained them mutually to discharge one another, yet they would not suffer it to escape without censure: and therefore sent him to prison; and to be carried next market-day, betwixt eleven and twelve in the forenoon, by the hand of the hangman, to the tron, and there to stand on the cock-stool, with a paper on his breast, bearing thir words in great letters,—For his fraudulent sup-

pressing of some writs. And ordered the magistrates of Edinburgh to see it executed; and fined him in 200 merks to be paid to Leckie. His poverty made the fine so small. Some proposed farther marks of disgrace; but they were waved. *Vol. II. Page* 726.

1712. *February* 26. ISOBEL ELEIS, Lady Innergelly, *against* SIR ALEXANDER ANSTRUTHER of NEWARK.

Lady Innergelly against Sir Alexander Anstruther of Newark. Isobel Eleis, Lady Innergelly, having a considerable land-estate from Eleiston, her father, she was persuaded to make over the right of it to Sir Alexander in 1698, as fitter to seek out merchants for it: and he grants a backbond to be countable to her for the price; and to pay her an annuity of £100 sterling, in the mean time, deducing always 10,000 merks, as a premium for his pains. The seeds of discord being afterwards laid betwixt Colonel Lumisden of Innergelly, her husband, and her, Sir Alexander sells her lands of Shawfield to Daniel Campbell, and makes sundry transactions with others, but shifts to count to her; and, instead of paying the annuity aforesaid, gives her suspensions yearly. So finding herself over-reached, she pursues an aliment, and obtains £50 sterling modified to her per annum, and the rest declared to accresce to her husband. While she was struggling under difficulties, Sir Alexander raises a declarator of exoneration of his trust against her; and, in absence, obtains a decreet Absolvitor; whereof she now raises a reduction.

ALLEGED,—No process; because *vestita viro*, and he does not concur: and, though his backbond declares her discharge of the annuity shall be sufficient without her husband, yet this clause, derogating *a jure communi*, can never be extended to judicial acts and pursuing of processes without her husband's consent.

ANSWERED,—There be few rules without some exceptions. Though a wife be *sub curatela mariti*, yet if he, after requisition, unreasonably refuse his concourse, or be legally dishabilitate, she may proceed; for, this being a privilege introduced in their favours, *non debet in earum perniciem trahi*; and he having renounced his *jus mariti*, she may remove this clancular decreet out of the way of claiming her full annuity; for, *concesso aliquo jure, omnia creduntur concessa sine quibus illud expediri nequit,—l. 2 D. de Jurisdict.* And, if I can discharge alone, then *a majore*, I may take this decreet out of my way alone, without my husband's consent.

REPLIED,—The Lords have never sustained such pursuits; seeing she is not *integra persona* without him; and so a wife was not allowed to reduce a horning; as Dury observes, *27th July* 1631, *Hay* against *Rollo*. And Haddington, *9th January* 1623, *Marshall* against *Zuill*, shows the Lords again refused it: but tells, the Parliament of Paris, in such cases, authorises one to be their *curator ad lites*.

And the Lords remembered they had done the same lately to the Lady Penkill, who, being separated from Dunbar, her husband (as the Laird and Lady Innergelly likewise are,) they having divided the jointure betwixt them; they