

pursuer, the Court altered the Lord Ordinary's interlocutor, and repelled the objections to the interrogatories put to the witnesses. No 267.

Lord Ordinary, Swinton.

Act, Lord Advocate Campbell, Solicitor-General Dundas.

Alt. Maclaurin, H. Erskine, Buchan Hepburn, Cullen.

Clerk, Orme.

C.

Fol. Dis. v. 4. p. 162. Fac. Col. No 173. p. 270.

1785. February 22. ELIZABETH CHALMERS against HELEN DOUGLAS.

In an action of defamation and damages, instituted before the Commissary Court, at the instance of Elizabeth Chalmers against Helen Douglas, the defence of *compensatio injuriarum* was pleaded, on account of a scurrilous composition conveyed to the defender in a letter, which she alleged had been sent by the pursuer. Accordingly, a witness having been asked, 'Whether she suspected who wrote the letter, or directed the cover?' deposed, 'That she did not suspect a person in her own mind; but as to having good cause for such suspicion, she could not say.' The witness being then required to name the person to whom she alluded, added, 'That her suspicions amounted to nothing more than conjecture, and were nothing more than a mere chimera of her own mind, which any person in her circumstances might form; but which she did not think sufficient, in her own opinion, to justify her naming any person as the writer of the letter or cover.' Upon which the Commissaries found, "That she was not obliged to give any more particular answer to the interrogatory." This judgment was brought under the review of the Court, when, in opposition to it, it was

*Pleaded*; It has been already decided, relatively to another witness in this cause, that such an inquiry is to be permitted, though at the time it may have no apparent reference to the party whose agency it is intended to disclose; (*see supra.*): Nor does it make any essential difference, whether a witness shall mention a fact as creating belief, or as exciting suspicion only, since those various states of mind may be produced in different persons by the same circumstances; and it is from these last, not their influence on the witness, that the opinion of a Judge is to be formed. In the present case, the witness has avowed a suspicion, which, together with the grounds of it, ought to be admitted into the scale of evidence.

*Answered*; The general investigation alluded to, if at all to be indulged, ought surely to receive no unnecessary latitude. Yet, were even the opposite rule to be adopted, it would be preposterous to oblige a witness to name a person as the subject of a suspicion, which is declared to be founded on no circumstances of probability whatever, but, on the contrary, to be a mere chimera.

Some of the Judges hesitated in giving their approbation to the decision mentioned above; and thought that the interrogatory under consideration ought not

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How far a witness may be required to particularise the grounds of his suspicion relative to the matter at issue?

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to be put. The ground of this opinion seemed to be the following argument : Whether a witness deposes to his knowledge, his belief, or his suspicion, the consideration of the Judge is more directed to the things themselves which fell under his senses, than to their influence on his understanding. In the present instance, a witness has testified that her suspicion, being a mere chimera, had arisen from no such circumstance ; and thus has already given a full negative answer to the interrogatory.

THE LORD ORDINARY, however, having pronounced this interlocutor : “ Remits the cause to the Commissaries, with this instruction, that they interrogate the witness in question, as to whether or not she knows or believes that the letter or cover, mentioned in the interrogatory, was written by the private pursuers, any of their family, or any other person immediately under their direction or influence ;”

To that judgment the Court adhered, with this difference only, that, instead of the phrase, “ knows or believes,” that of “ knows or suspects,” was substituted.

Lord Ordinary, *Alva.* Act. Lord Advocate Campbell, Solicitor-General Dundas, Maclaurin.  
Alt. *Crosbie, Buchan Hepburn, Cullen, H. Erskine.* Clerk, *Home.*

S. *Fol. Dic. v. 4. p. 163. Fac. Col. No 199. p. 312.*

1787. June 27.

THE PROCURATOR-FISCAL of the COUNTY of EDINBURGH *against* DAVID WILSON.

No 269.

Transgression  
of the act  
1707, against  
shooting  
hares, may be  
proved by the  
oath of the  
offender.

DAVID WILSON was sued before the Sheriff of Edinburgh, by the Procurator-fiscal of the County, upon the act 1707, c. 13. whereby persons shooting hares are subjected to a penalty of L. 20 Scots, *toties quoties*. The fact being offered to be proved by his oath, he

*Pleaded ;* The transgression of a prohibitory statute, even when it is attended only with a pecuniary penalty, infers such a degree of ignominy as must preclude the reference to the oath of party, agreeably to the rule, *Quod nemo tenetur jurare in suam turpitudinem* ; 4th December 1762, Stirling *contra* Chrystie, No 20. p. 9403. But the punishments annexed to the offence in question are not merely of a pecuniary nature. The shooting of hares was, in ancient times, a point of dittay, and punishable with death. Even by the statute of 1707, persons guilty of any of the offences to which it relates, may be sent abroad as recruits. To admit a reference to oath, in circumstances such as these, would be a great inlet to perjury.

*Answered ;* Where the facts alleged against a defender are of such a nature as to render him infamous, if proved, or where the prosecution has been brought in order to the infliction of a corporal punishment, it may be acknowledged, that, by our customs, agreeably to the civil law, a reference to oath has not