hurt or cause of fear of danger. Whereupon the major part of the Lords assoilyied from the whole libel.

When the cause was first consulted, Sir George Lockhart was mighty diffident of it, abusing Daniel, and telling it was impossible but the town would tyne it, and be found liable; and recommended to me to see the debts, hornings, captions, and arrestments were clear, that as little debt might be fixed upon the town as could be; yet, Mr. G. Norvell had ever hopes of it: but we had so good a care of the probation, and managed it so dexterously, that when we came back with the depositions to him to advise, he became more confident, and asserted, if the Lords judged aright, and considered all the qualifications of diligence proven, and especially that the prison, though it were insufficient, yet that it was in as good case now as at the first building or ever, they could not but assoilyie.

The president was in a great chaff, pretending the absolvitor was contrary to all law, and that if such slender grounds as these were sufficient to free and acquit magistrates from thir pursuits, there should never be magistrates found liable to the world's end; and that in the like cases there have been stronger condescendencies made, and more pregnantly proven, for defenders, and yet they condemned: and therefore would not insert it as a practique in his book he was composing of his daily observes.

The judgment and censure of the advocates upon this decision was various, (as it is in most other cases;) but many condemned it as strange and dangerous.

In case we had lost that part about his casual escape, we were resolved to have recurred and questioned the relevancy of that part of the summons wherein they craved not only the jailer and bailies of the Cannogate to pay them their respective sums, in respect they had suffered the rebel to escape, but also the provost, bailies, council, and commonty of the burgh of Edenbrugh, as lords superiors of the said regality and barony of Cannogate, and from whom the bailies thereof derive their power, authority, and jurisdiction, and so are liable for their malversation; and also as the persons from whom the said jailer has his commission, and to whom he has found caution, and so must answer for his negligencies and omissions; and which was entire unto us, in respect of a reservation contained in the act of litiscontestation, of all our other defences; which I think was scarcely regular: but we were not put to this dead lift.—*Pœnæ depensæ non solent repeti, lege* 42. *D. de condictione indebiti;* and so the bailies of the Cannogate could never in law have recurred upon the magistrates of Edenbrugh, their constituents. We were also resolved to have craved absolvitor from annualrents since the horning, on Durie's decision, marked 29*th June* 1626, *Haliburton,* &c.

Advocates' MS. No. 374, *folio* 153.

1672. *November.* GEORGE HOME *against* WILLIAM BROWN.

IN the same month of November, 1672, in an action pursued by George Home, merchant in Edinburgh, against William Brown, writer there, it fell to be debated, but not decided,—1*mo,* If a base right, with a pursuit for mails and duties thereupon some three days before the date of a public infeftment by confirmation, will be sufficient to prefer the said base right to the public infeftment,

especially seeing the intenting of a process for mails and duties can be no such qualification of possession as can clothe or prefer the said base right. This is very dubious.

Secundo, Quæsitum, in this process, if a bond or other writ be false in the date, as being antedated, whether that will so annul the whole deed as to make it fall *in totum,* or if they will be permitted to rectify the same; especially where the party-quarreller is found to have no prejudice by the changing or altering of the date, or to have no interest though it were of that date which he contendeth for. Yet Sir George Lockhart concluded such a deed would be utterly null. And it was remembered how in *Shaw* and *Calderwood's* case in *July* 1670, (which see *supra,* No. 60,*) where a disposition having been granted on death-bed, and antedated, and quarrelled on these grounds, and being proven to have been false in the date, and not subscribed at that time it bore, the Lords did annul and reduce it simply, as if it had been granted on death-bed; notwithstanding that the defender condescended upon the true date thereof, and offered him to prove that when it was truly subscribed the granter was not *in lecto,* in so far as he came to kirk and market unsupported after the same, and so the pursuer had no prejudice, nor the defender advantage, by the change of the date. Which the Lords repelled, as is said, and notwithstanding thereof found the said disposition null; which they judged necessary for the better coercing and restraining of that growing falsehood; and which though not punished hitherto, otherwise than by the annulling of the deeds, yet the danger may result to men's securities by such increasing boldness, seems necessarily to require some farther censure. And the pretence, that the party hath no prejudice by it, ought no more to be regarded here than by the 22d act of Parliament in 1621, the allegeance, that they only made a false writ, but never used it to the hurt of any, is not sufficient to liberate them from the punishment of forgery.

Neither was this a new decision; seeing Dury, at the 10*th* of *February,* 1636, *Edmiston* against *Syme,* observes the same to have been so found by the Lords then; as also, Craig, p. 156, is clear of this opinion: *Quod non est verum in data quam præ se fert, præsumitur non esse omnino verum, nec ullo tempore fuisse gestum.*

Advocates' MS. No. 375, *folio* 155.

1672. *November* 20. GEORGE AND DONALD CAMPBELL *against* THE EARL OF ARGYLE.

MR. GEORGE and DONALD CAMPBELLS, sons to George Campbell, Sheriff of Argyle, as executors to their brother, Mr. Archibald, who had right from his father to the bond undermentioned, pursued the Earl of Argyle for payment of the sum of 8000 merks, contained in a bond granted by him to the said George. The DEFENCE was, that he offered him to prove by George Campbell, the cedent's oath, that the bond was granted blank in the creditor's name to M'Naughtan, and that the same was granted *ob turpem et inhonestam causam,* and so was null,

* See it fully at the 11th of February, 1669, *Shaw and Handyside* against *Calderwood; infra,* No. 431, in November 1673, *Lady Grange; infra,* No. 578, § 4, [20th June 1677.]