the *exactio vectigalium*, or lifting of customs, is *inter majora regalia*, and not transmitted by a general jurisdiction, as *Sextinus de Regalibus* shows. And the erecting a sheriffship does not hinder her Majesty from granting fairs within that same bounds; as Sir George Mackenzie gives sundry examples of, in his Criminals,—*tit. Regalities.* To the *second*, My father's entering in tack with you, can never militate against me, who never owned your right. Likeas, The Queen's supervenient gift of this fair takes off any preceding homologation.

The Lords found my Lord Eglington's title, as sheriff, was no sufficient title to prescribe a right of exacting customs within another gentleman's property: and though in this cause it was *lis de paupere Regno*, yet it might be of consequence in other parts of the kingdom. *Vol. II. Page 538.*

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1709. *December* 8. JAMES PATERSON of WOODSIDE *against* WILLIAM HANNAY.

A COMPLAINT having been given in by Mr James Paterson of Woodside, against William Hannay, agent in Edinburgh, that he had impetrated a bond of 3000 merks from him, under a back-bond, declaring, it was but a trust to lead an adjudication upon it, against him; yet he had assigned this bond to James Hutcheson, writer to the signet, who had charged him with horning, and inhibited him thereon, contrary to common honesty and his trust: And this being remitted by the Lords to their committee for trying abuses, they, after hearing of all parties, found the diligence unwarrantable, and reponed Paterson against it, imprisoned Hannay, and declared him incapable of managing or agenting any process about the Session; but found Mr Hutcheson innocent and free. And, that this sentence might terrify others, they ordained it to be publicly intimated in the Outer-House, and affixed on the walls and doors of the Parliament House, that all may take special notice of such dishonest practices in time coming, to the scandal and reproach of justice, when they escaped unpunished after discovery. *Vol. II. Page 538.*

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1709. *December* 13. SIR ALEXANDER FALCONER of GLENFARQUHAR, Petitioner.

GLENFARQUHAR and Halkerton. The Lord Halkerton having been furious these eighteen or nineteen years bygone, and having, in his madness, killed a man; and Sir Alexander Falconer of Glenfarquhar, his nearest agnate and next heir, thinking his affairs not well managed, raised a brief out of the Chancery for cognoscing his furiosity, at his own house of Halkerton, by the sheriff and an inquest: My Lady, his mother, disappointed the first brieves, by taking him out of the Sheriff of Kincairden's jurisdiction into the Town of Montrose: Of which Glenfarquhar having complained, there is a new brief raised and executed, of which an advocation is presented, desiring it may be brought before the macers, and he brought over to Edinburgh; and that assessors might be adjoined, who would best judge if he was reconvalesced or not.

The grounds for the advocation were, 1*mo*, That the degrees of idiotry and

furiosity were very nice, and best cognosced by physicians; and so my Lord should be brought to Edinburgh, where *copia peritorum in illa arte* is to be had: and the intricacy is such, that Paulus Zacchias, *Quæst. Medico-Legal. lib. 2, tit. 1, quæst. 16, num. 3*, tells how Budeus and Menochius, two eminent lawyers, quite mistake in defining what makes a man furious and phrenetic; which cannot be tried at his own house in the country. *2do*, The sheriff and his inquest are incompetent judges to him, being a Peer; and so, by the articles of the Union, the plurality must be Peers; since the cognition touches his reputation, and tends to strike out one of their number. *3tio*, Where there is any dubiety about their condition, the Lords use to take a precognition and trial before themselves; as they did lately with Mr John Bonar of Gregston: And the Lords are in use to advocate such brieves; as in *Burton's* case, *19th July* 1681. *4to*, Glenfarquhar being a creditor, he may, by collusion, let his adjudications expire. Besides, the verdict must be *a quo tempore* he was furious, which may endanger many of the creditors' bonds which are granted at that time.

Answered,—That the 18th Act 1585, ordaining the nearest agnate tutor to fools and furious persons, has trusted that in the hands of the ordinary judges; so that the sheriff was most competent to the cognition: and whatever may be pretended when the furiosity is dubious, and noways publicly notour, there can no such thing be obtruded here, being known to all the country, and broke out in sad and fatal instances. And who can judge it so well as the neighbours upon the place, whom our old law calls *fideles homines patriæ per quos veritas melius sciri poterit?* And to bring over both the assize and witnesses here, would draw a great burden of expenses upon my Lord, and be uneasy to the gentlemen at this season of the year, and who probably would decline to come so far off. And, as to the incompetency, it is acknowledged, if my Lord were to be tried for a capital crime, he behoved to be judged by his peers; and even then, barons, being of the same degree with the nobility, would be capable to sit on him. But, here, furiosity is a misfortune, not a crime; and the design is not for punishment, but to his advantage,—to manage his estate; and so the Union privilege takes no place. And there is no shadow to fear Glenfarquhar can take any advantage of a legal; for, *1mo*, I doubt if it can expire against a furious person; it cannot run against a minor, and madmen have all the privileges of minors. *2do*, He is to be his tutor-in-law, as his nearest agnate, and must find caution *rem furiosi salvam fore*, and so can never take advantage of his trust. And the creditors posterior to the fury are not prejudged. For though the inquest must return a special answer to that head of the brief, when it commenced, yet this does not preclude them from proving that he was in a lucid interval, and *sanæ mentis*, when he granted their bonds. And Burton's case does not meet; for all the parties, members of inquest and witnesses, lived within Edinburgh; and his distemper was said only to be a deep melancholy. And as to the touching of my Lord's reputation, it would much more wound it, to bring him over than to try it at home.

The vote being stated, Advocate or not? the Lords were equally divided, seven and seven; so the President carried it in the negative, thinking it much fitter to be tried in the shire where he lives. Though these cognitions use to be at Stonehive, as the head burgh of the shire where the sheriff courts are usually kept, yet, for my Lord's ease and conveniency, they dispensed with the usual place, and appointed the inquest to sit at his Lordship's house of Halkerton.

After this, on a reclaiming bill, the Lords advocated the brief to the macers, to whom they would adjoin some of their number as assessors; and shunned the sheriff as suspect. *Vol. II. Page* 540.

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1709. *December* 20. HAMILTONS *against* PRINGLES.

IN the competition betwixt Hamiltons on the one part, and Pringles on the other, both creditors to Daniel Nicolson, the Pringles produced two bonds, one for 4000 merks, in July 1693, and the other for 1000 merks, in February 1694. Against both which it was objected by the Hamiltons, that the 4000 merks' bond was holograph, and so did not prove its own date, and must be presumed to be on deathbed; and the 1000 merk bond was ten days after he was sentenced to be hanged for his accession to poison and forgery, and within four days after that bond he was executed; and so was materially granted on deathbed, when he could neither prejudge his creditors nor heir. Besides, it was a donation by an adulterer to his adulteress and her bairns, and so reprobated by law.

ANSWERED, 1*mo*,—The law of deathbed only took place with us in case of sickness; and being a custom peculiar to this nation, and neither known to the Romans nor our neighbours, it is not to be extended to the case of one sentenced for a capital crime, who is in perfect health, and who may be reprieved, or make his escape out of prison; yea, if, by the fourth Act, Parliament 1696, he live sixty days after the granting the bond, he can never be interpreted to have been on deathbed. And the reason of law ceases; for sickness clouds the mind and disturbs the judgment, so as exposes them to the solicitations, importunities, and impressions of those about them, nothing of which can be applied to one after the sentence of death. 2*do*, If need were, thir bonds can be supported and adminiculated by onerous causes, besides their own narratives. Likeas, upon application to the Lords of Session by the Pringles, his oath was craved on the true, just, and onerous causes of these two bonds; and he actually deponed that they were true, real debts; which is a great confirmation of their verity; and so, being *juratum*, cannot be now quarrelled. And if, though after condemnation, he can do no deed to prejudge the fisk, to whom there is a *jus quæsitum*, yet, *quoad* his heirs, he is at absolute liberty.

REPLIED,—It has ever been received as an uncontroverted principle, that a man, sentenced to die, *habetur pro nullo et tanquam civiliter mortuus*; and is by the Roman law called *servus pœnæ*, being under the *maxima capitis diminutio*; and so Horace calls *Attilius Regulus capite minutus et capitis minor*; and so can do no valid deed; as the Lords found on the 2*d of January* 1683, *Colt* against *Somerveill*, that, he having charged after he was capitally sentenced, the charge was null; and so freed him from his attesting a cautioner in a suspension. And the learned Craig, *lib.* 1, *D.* 11, is positive, that a man after condemnation can do nothing to burden his heirs; and states sundry other parallel cases: as where one is shut up in a house infected with the plague, or is going to be cut of the gravel, or engaged in a duel, how far they are to be reputed *in lecto* in such circumstances. And seeing the Lords have sustained equipollent deeds to infer sanity, besides those common ones of going to kirk and market, such as playing at the foot-ball, going in a boat to shoot marrots, (as was found in Stewart of