

presented, and the Lord Defers the Diet. But Absence having
 allowed to pursue by their procurators with the concurrence of his
 Majesty's advocates. When the pursuer of a Criminal cause in
 his not, the Defendant may, if he hath sufficient Ground of
 Excusation summon him and his Majesty's Advocates, to be
 and for the Oath of witnesses taken in his Defense, to be
 contented, that the proof of his Excusation may not pass
 in the Interim process. *Harin. de Gestibus* qu. 76 n. 113 & 123
McKenzie Crim. part 2 qd. 22 & 26. But witnesses for
 the pursuer ought not to be so Examined ad futuram Rei Me-
 moriam Pross. *Harin. ibid. McKenzie ibid.* Because the proof
 a Criminal libel ought to be led before the Assizes in
 presence of the pannel Act 30 Parl. 11. J. 6. *Gestibus* not last
 monis *Pross.* And the pursuer may blame himself that
 the trial is Delayed; whereas the Defendant must wait his
 leisure.

When Neither pursuer nor Defendant appears, the former
 Cautions is Unlawful for not reporting the Criminal better,
 Defendant is outlawed, and his Cautions Unlawful for not re-
 porting him, and the Diet is Deferred.

In which case of the Defendants being denounced fugi-
 tive and Outlawed, or of the parties of either party Unlaw-
 An Act of adjournment used to be Extracted, against which the
 Denunciation, they may be Released and Relieved, upon pro-
 viding to the Lord setting forth sufficient ground to prove
 the parties of Continuity, as that they were necessarily Detained
 by sickness, or not in condition to travel &c. Which Effort
 or Excuse of sickness, must be proved by witnesses at the
 Bar, and not by Justification upon soul and Conscience; it being
 dangerous to allow such testimony that may be forged as
 118 Parl. 9 J. 1. *McKenzie* above on Act 118 Parl. 9 J. 1. & Do-
 combor 1601. This Justification upon soul and Conscience
 are sustained in all other Courts, as probative of an Excuse
 of sickness. But if either of the Persons above said put their

themselves to be denounced, they must be Released from the Court
 in Common form.

When both parties are present, the Assizes and witnesses
 are called, and each assize Act 166 Parl. 13 J. 6 or witness absent,
 fined in 100 Marks. These assizes or witnesses fined for absence
 by Acts of adjournment, may get themselves absolved, and their fines
 discharged by giving in bills to the Lord containing Reason and
 Excuses of their Absence. But if no such Application be made,
 or if the Defiance of their petitions be refused; horning and caption
 for payment will be issued forth of course upon such bills of ad-
 journal, and Denunciation at the Market Cross of Edinburgh
 will as effectually make the schedule fall, as if made at the
 head burgh of the shire where the parties dwell Act 126 Parl. 12
 J. 6 and such fines are to be exacted without any case or
 Composition. Act 126 which method of inflicting pecuniary
 penalties on assizes to oblige them to give due Attendance,
 doth not hinder further extraordinary Remedies: as the
 penalties appointed against Absenting witnesses, do not Ex-
 clude the taking them with Caption, *McKenzie* above on
 Act 94 Parl. 6 J. 4. But when Neither pursuer nor Defendant
 is present, or when either of them is absent, the Assizes
 or witnesses are not called upon to be Unlawful or fined, being
 in such a case the trial cannot proceed, and there is no use
 for assizes or witnesses. Again where Assizes had kept two
 diets of a trial, and no thing was done therein, the Justices
 discharged them from all Appearance thereafter upon that
 assize whereupon they took their oaths 9 December 1618
 the assize of Robert Campbelle.

Assizes Act 94 Parl. 6 J. 4 or witnesses not cited or
 forgot to be cited may be cited upon Act 100 at the Bar
 if their Names and Designations or Additions be for-
 turned in a list given to the party Accused 15 days before.
 If the witnesses be legally cited they are called upon by their
 Names, and if absent every one of them is Unlawful or fined
 in 100 Marks, and the Diet of Court will be continued
 to some other certain day, betwixt and which they may
 be brought in by Diligence. For such one Letter of Cap-