

the Crime of Rape, should be restricted to an Arbitrary punishment as in the case of a Riot & August 1718 John Haldan Collector of the Customs in protestant ^{Crimes} But an aggravating quality or Circumstances of the Crime may be past from. Thus where a Libel was raised upon the Act 27 Parl. 4 J. 5 for Appression, by having beat the pursuer a Magistrate in the Exercise of his office, the Justices having found that the pursuer who had not taken the Declaration (act 3 sess. 3 Parl. 1 Ch. 2) could not in the Construction of law be esteemed a Magistrate, the pursuer was allowed to Justify against the Defendant for beating, since the quality of Magistrate was but an Aggravation of the Crime of beating. 11 November 1672 Robert Carnegie of Newgate. For ever Sir George Mackenzie (Crim. part 2, tit. 21 53) is not satisfied with this Decision: because the Libel did not bear that beating in General was punishable, nor Concluded at least the pannel was punishable for beating a free Liege as in other native Libels; and the Crimes of Appression and beating being Different, the quality of Magistrate made the person the Crimes and Medium Concluded to Vary. In the case of an Alternative libel, it is in the option of the pursuer to Justify upon either of the Alternatives, and to pass from the other. *Vide Supra pag.*

If the pannel hath a Counter process of Recrimination, where in the day of Comparance is after that in the principal process against him, the Lords will, upon his Application, continue the Diet of the principal process, to the Day of Comparance in the other process, that the trial in both, which are Naturally Connected may go on together.

26 January 1713 Gordon of Duffally Lippiean

That it may not be in the power of any pursuer for a Crime, (whether in a principal process, or in a Counter process of Recrimination) to put off the Defendant from proving his Exculpation or other Defence, by biting at Accomplish all such as might be produced as witnesses by him for that end; Justices to set or Decline them as Inhabile to bear witness in favour of a Person Delinquent: the court observes the Rules of the Lords of Session 24 Feb. 1662 Irving contra M' Lairtry. That is will, at the Defendants Desire, ordain his witnesses who are bit at and part of his Crime, to be first tried; that they, if found Innocent, may be allowed to bear witness for him 13 November 1682 John Loper and others. For the Regularity the Dicts of the Justices Court are peremptory, it is Necessary in many cases to continue the Diet, and law Joins to Necessity. But it is not left to the Arbitrament of a pannel to prove those Impannelled as *scij* Criminis to be first judged in order to be witnesses for him, without offering to prove some ground of their Innocence, as that they were *libi* &c. Thus a person indicted with others for piracy and Murder, was not allowed to be first tried, albeit he was bit by the rest as witnesses in their Exculpation: in regard there was no special ground of his Innocence or Exculpation assigned, why he should be previously tried; and to allow pannels at Random to prove others to be first tried, would disappoint all Criminal proceedings against Accomplish of the same Crimes. Albeit it was pleaded that, when persons are accused as *scij* Criminis who might be witnessed for Exculpating the rest, it should not be Necessary to propose any special Defence for them in order to their being first tried: being the very Denial of the Libel is sufficient, and their Innocence is presumed till guilt be proved, 13 March 1705 Captain Thomas Green & his Crew tried before the high Admiral & his assessors.

If the Defendant in one cause be outlawed, or the Diet against him Deserted or Continued, the process or Plea of Man of the Court orders to all another cause, conform to