

cannot be expected, but that persons never so guilty will, for their own safety deny all at the Bar; albeit the Deposition of witnesses taken by a procuration out of Court, could not be founded on as legal Evidence to the Jury: for it is not to be presumed, that witnesses will be so Impudent as to retract or contradict at the Bar, testimonies given by them before a Judge; which they are under no such obligation to do, as the parties are whose lives are at the stake. This Confession emitted and signed by a pannel out of Court before the Justice Clerk, was found to be judicial so as it could not be retracted or disavowed by him at the Bar 3 December 1669 *Finlay Mc Gibbon alias Macnab*. One was convicted and condemned to die for flatrator upon his own Confession subscribed by him and the Lord of Privy Council, in whose presence the Confession was emitted 5 Feb. 1631 for *Michael Preston*. And a Confession made before a Committee Appointed by the Privy Council to receive it, and at heard to in presence of the Privy Council was found to be judicial and such as could not be retracted 9 January 1678 *Mr James Mitchell*. Because the Privy Council was so far Judge of Crimes Computed that they took procuration thereof Modified and qualified sentences of the Justice Court, and Determined intricate cases in point of law Remitted to them by Justices. It hath been contraveried, whether a Criminal Judge competent may proceed upon a Confession emitted, or professed before a civil or Ecclesiastical Judge. It is a Received Maxim Among Lawyers that Confessio Emanata coram Judice Incompetente, non sufficit ad Condemnandum, licet sufficient ad Torturam, and has only the effect of an Extrajudicial Confession. *Maccard. de probat. Vol. 1. Conclus. 302. n. 1. Prosp. Garin. de res Confesso qu. 51 n. 186. 206.* Because Men will

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Acknowledge things before a Kirk Session V. G. to their Excommunication, that they would deny, if Capitally Accused. And some have also Confessed to heinous Crimes they were Innocent of, for private ends, as Adultery, in order to get a Divorce, and fornication to gain a parents Consent to Marriage. Yea, Confessions before an Incompetent Judge are liable to the like Objections as Extrajudicial Confessions. Nor would the Lords of Session sustain a Confession emitted by a Man before the Kirk Session as Exoneratorem Conscientie to Operate Against him in any other Courts because such a practice would be Effectual to hinder sinners, and keep them back from publick Repentance, *Whorrie Crim. part 2. tit. 24. 55.* This may serve for Answer to parallel question, if a person found Criminally may be sentenced to death, upon his Confession of a Crime taken judicially in another process: V. G. that he cannot be condemned on such a Confession, *Maccard. ibid. Conclus. 345 n. 21 to pagg. Conclus. 343 n. 1. Prosp. Garin. ibid. n. 219.* The Justices Refuse to sustain a pannel Confession emitted in presence of the privy Council, to be proved as post facto by witnesses, so find 1681 *Spurial Apothecary* in Glasgow. Because Confession of a Crime is of so great Importance to Mens lives and fortunes, and Witnesses may Mistake the sense tenor Context or Manner of Expression, which Mightily Differences the Import of it. Merit of Confession of a Crime with a quality, may be sustained to prove the Crime, without regard to the quality; unless the Criminal can otherwise prove the same. The Doctors Disting with over subtilly between a qualified Confession made in one Continued Sentence, as when one Confesses that he killed a Man in his own Defense; and a quality ascribed in a Different Sentence, as when one Confesses that he killed, but that he killed in his own Defense: Alleging, that the Confession cannot in the first case, but may