

Exculpation. 3^d The pursuer should have got a list of the Names of the Witnesses to be used in the Exculpation, that he may have been ready to object Against them; and its presumable that the Witnesses Graves to be so Examined, have been bribed or proff facts, forcing other ways the pannel had them from the Beginning. Contra It may be Alleged, the pannel might Perhaps have been in a Condition, he could not cite before those present at the time; by being Ignorant of their Names, whom knowing by their faces he forced to call out to be Examined, when he sees them in the Justice court. Besides he Might have omitted Cites as a privilege introduced in his favour; or possibly he knew not where they were to be found, or wanted Money to Cite them. 2^d The Allowing Unates Witnesses to Depose in Exculpations, doth not take off the Necessity of summoning Witnesses, which is very Necessary in cases where Witnesses are Unwilling to Appear or Refuse to go Abroad. 3^d Witnesses Names were ordained to be given in list with the Libel, in favour of the Defendant, which ought not to be turned to his prejudice. Nor is there such hazard of Corruption of Witnesses in Exculpations, whereby no Man is obliged, nor any estate to be forfeited, as in pursuits. Sir James M'Kenzie (Bum. part 2. tit. 22. 55) delivers his sentiment in that Matter very Inconsistently: for he first says, that Witnesses for the Defendant may be admitted, tho' not Cited; and thereafter adds, that he finds no such speciality in our law, Men being Generally more prone to favour the pannel, than the Accuser. But here it may be observed, that when the Defendants in Criminal causes were not allowed to Cite Witnesses for their Exculpation, persons present at the bar were once refused at the Desire of the pannel to be sworn and Examined as Witnesses for further Pleas in the Affire any Matters of fact libelled. 17 December 1623 John & Thomas Hartley's. Yet in Another case presented at the bar not Cited as Witnesses, were at the Desire of the pannel and Affire sworn and Examined

as witnesses 7 Aprile 1641 Janet Coisar. And now when letters of Exculpation are allowed to the pannel, who must Deliver a double thereof to the pursuer with a list of the Witnesses cited by Virtue thereof. Jam of opinion, that Witnesses not Cited may be Received for the pannel, if their Names was timely given up in list to the pursuer; tho' not fifteen days before the trial, a Reasonable time being sufficient. In Criminal Matters, witnesses are allowed to prove the Uttering of words, as promises, a Verbal Commission to Commit a Crime, 9 March 1671 Charles Robert for his bond M'kenzie Bum. part 1. tit. 35. 54. for a promise was sustained to be proved by Witnesses, in order to Convict one of perjury 10 January 1716 George Montgomery of Wrae or to subject the promisor to an Arbitrary punishment at Accostory to a Forfeiture 11 December 1695 George Lamb, M'addart & M'kenzie. The Reason why our law doth Allow the Naked Emission of words to be proved by Witnesses in Criminal, and not in Civil cases; may be partly, because Many Crimes Consisting in words, as Blasphemy, cursing of parents, Verbal Injuries &c. would other ways go Unpunished; partly, for that our law doth not favour the Negligence and Omission of parties to take Suit in Civil obligations when they Might have it, whereas Crimes Arise from the offenders own fact with out Consent of the Creditor or Debito, or party Injured. It being the Duty of all good subjects, to Concur and Assist when Required by publick Authority in the Discovery of all Crimes against the publick law, or tending to a Breach or Disturbance of the publick peace, and a high Contempt of Authority to Refuse or Shift to do so: where Witnesses summond and called in the Justice Court before the English Judges, being present refused to give Evidence Against a popish priest Accused of saying Mass upon the Act 120 Jan. 12. 6 they were for their Contumacy Committed to ward; but were thereafter set at liberty upon their swearing with this Condition and quality, that Nothing by them said and given in Evidence should be prejudicial to their own lives.