A

Collection and Abridgement

OF

CELEBRATED

CRIMINAL TRIALS

IN SCOTLAND.

FROM A.D. 1536 TO 1784.

WITH

HISTORICAL AND CRITICAL REMARKS.

BY

HUGO ARNOT, ESQ. ADVOCATE.

Quae scelerum facies, O virgo, effare, quibusve
Urgentur poenis? Quis tantus plangor ad auras?

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1812.

Archibald Macdonald, son to Coll Macdonald of Barisdale, as attainted of High Treason.

THE prisoner was not served with any indictment or summons of treason; but received intimation from the Crown lawyers, that he was to be brought before the Court of Justiciary on the 11th of March, in order to have execution awarded against him; or to show cause why execution should not be awarded. The Lord Advocate, in a petition to their Lordships, on the 5th instant, prayed for a warrant to cite witnesses to prove, that the prisoner was the identical person designed in the act of attainder, *son to Coll Macdonald of Barisdale;* and their Lordships granted warrant accordingly. 1754

His Majesty's Advocate depute represented to the Court, that, by an act of attainder against Alexander Earl of Kellie, and others, passed in the reign of his present Majesty (George II.) the prisoner stood attainted of high treason: that the Crown lawyers had received his Majesty's orders to insist with their Lordships for an *award of execution* against the prisoner, which, in the counsel's opinion, the printed act of Parliament, being a public law, sufficiently authorised: but, to remove all doubt, they had procured, and lodged with the clerk of Court, an *examplification* of the act of attainder under the Great Seal of England. The Advocate-depute, therefore, craved, that their Lordships would order the prisoner to be brought to the bar, and would appoint a day for his execution. He was brought to the bar accordingly, the act of attainder and exampli Scat ion thereof were read over to him,[1] the motion for his execution was renewed. The Lord Justice Clerk then asked the prisoner, if he had any cause to show why execution should not be awarded against him in terms of the act? He replied to the following purpose: That he did not understand himself to be the person attainted by this act. He was then a boy recently from school, and under the influence of a father unfortunately engaged in the late rebellion. Had not his father been able to justify or atone for his conduct and the prisoner's, could it be supposed that the father would pass unattainted, and his son, a minor, be devoted to punishment. His special defences then were: That there was no sufficient evidence of the act of attainder on which execution was craved: that he was none of the persons named in the act now read; for his name was *Macdonnell,* and his father was designed not of *Barisdale,* but *Inverie*. And that the condition under which the act of attainder could alone take place, never existed; for the prisoner surrendered himself to a justice of peace before the 12th of July, 1746.

[1] Rec. of Just. 2d, 5th, 11th, 13th, 20th, 22d March, 1754.

1754 Counsel were then heard for the prisoner, who enlarged on the defences he had stated, offered to instruct them by evidence, and requested that the Court would remit the facts undertaken to be proved, to the cognisance of a jury.

The lawyers for the Crown began by refuting the idle cavilling of the prisoner's counsel, at the evidence of the act of Parliament upon which the prisoner was said to be attainted. They next are successful in obviating the prisoner's objections of a misnomer. As to his plea of a surrender in terms of the act, they alledged it was surprising a defence so valid, if true, should, during his tedious imprisonment of eight months, be kept a profound secret, and now for the first time be urged in his behalf. But a surrender to a justice of peace, who, though nominated in the commission, had not taken the oaths to Government, nor officiated in that capacity, or a surrender made at an improper time, when the justice of peace could not commit such person to prison, would not be held good, as not having been made according to the intent of the act. Further, no testimony of the fact was admissible, but the record of surrender; and it could not be proved by *parole* evidence. They argued, that the prisoner's plea of a surrender was contradictory to his other plea of a denial, that he was the person meant to be attainted by the act. *Lastly,* They alledged it was not necessary, in this case, to try the prisoner's defences by jury; for, although trials by indictment must be by jury, yet incidental questions, such as the *lunacy of the prisoner,* or the identity of a criminal, who had made his escape after sentence of death had been pronounced upon him, are, by the law of Scotland, tried and judged by the Court, without any intervention of a jury: nor is the case altered by the statute 7th of Queen Anne, chap. 21. declaring, that trials for treason in Scotland should be the same as in England; for this was *not a trial* for treason, the prisoner being already '*tried,* convicted, and attainted by act of Parliament;' and that nothing now remained but to award execution of the sentence which the law had pronounced. And although, in England, the prisoner's exception at execution being awarded against him, would have been tried by a jury *de circumstantibus,* 'that can have no effect here, as the Court is not tied to the '*forms* of England in *the trial for treason*.'

The counsel for the prisoner replied, that the act of attainder is not absolute, but conditional; and he offered to prove, that the condition under which alone the attainder was to take place, viz. the prisoner's not surrendering himself before a day certain, never existed, for the prisoner did actually surrender himself to a justice of peace within the

time prescribed by the act. They argued, it was not necessary to prove that the justice of peace had taken the oaths, or officiated in that capacity, for these are not mentioned as requisites in the statute: that the prisoner had fairly submitted to justice; and Sir Alexander M'Donald, to whom he surrendered himself, was a gentleman of known affection to his Majesty's government, who at that very time was at the head of a considerable body of militia employed in his Majesty's service: that his not being committed to jail did not affect the validity of the surrender; for, even supposing it to have been Sir Alexander's duty to have committed him, it was absurd, that, by reason of Sir Alexander's ignorance, or neglect of duty imposed on him by the statute, the prisoner should incur the pains of treason: that the prisoner must be held as having been under the protection of government, not only from his surrender to a justice of peace, but likewise from his having received a pass from the Earl of Albemarle, commander of his Majesty's forces, by virtue of which he remained unmolested; but, in the month of August, 1746, he and his father, then in the country of Moidart, out of private pique, were seized by certain of the Clan Cameron, put on board a vessel, carried to France, and there kept in close custody for a twelvemonth. On their escape from France, and return to Scotland, both father and son were apprehended by a party of his Majesty's forces; the father died in confinement; but the prisoner, upon a just representation of these facts, was immediately set at liberty, and remained peaceably and openly at Inverie till July last: that, as to no testimony of the surrender being admissible but written record, no such requisite was prescribed by the statute; and it were strange if *parole* evidence could only be received in support of the prisoner's guilt, and not in vindication of his innocence.—*Lastly,* That trial by jury was the grand bulwark of our lives and liberties; and if, in any case, this mode is more specially requisite, it is in accusations of a direct offence committed against the crown. Anciently, attainders in absence were unknown, both in England and Scotland; but now, that the wisdom of the law had thought proper to introduce such attainders, various defences might yet be stated against awarding execution, especially where the attainder is not absolute, but conditional. By act 7th of Queen Anne, c. 21. the Scots treason-laws are totally abolished; and it is therein provided, that the Court of Justiciary, in cases of treason, shall proceed and determine in such manner as the Court of King's Bench may do by the laws of England: therefore, as it is not disputed that every defence, against awarding execution, proposed by the prisoner, before the Court of King's Bench, must be tried by jury, the like rule must be observed in the Court of Justiciary. This is made still clearer by act 22d George II. c. 48. which provides, that all defendants outlawed for high treason, or

misprision of high treason, in Scotland, shall, *as near as can be, have such and the like methods, remedies, or advantages, for avoiding, falsifiying, or reversing, such outlawry as may be had by the law and usage of England.*

1754

The Lords found the act of attainder sufficiently instructed by the statute-book, and examplification of the act produced in Court, and repelled the objections to its authenticity. They also repelled the objection of a misnomer of Macdonald for Macdonnell. With respect to the defence of a surrender, they ordained the prisoner to give in a more special *condescendence*[2] of the time, place, and manner, of his submitting himself to justice; also, a list of the witnesses by whom he was to prove the same; and found '*no necessity of proceeding in this manner by a jury.*'

Conform to this judgement, the prisoner gave in a *condescendence* of facts relative to his surrender, as already stated, and a long list of witnesses by whom it was to be proved; and the crown lawyers disputed the relevancy of the *condescendence;* by repeating, at great length, the objections to the surrender which they had already set forth. The Court having considered the import of the *condescendence,* and heard the debates, found the prisoner's plea of surrender, as therein set forth, not relevant, nor sufficiently qualified in terms of the act of attainder, *repelled the defence founded upon it, and refused the prisoner any proof of the fact.*

An objection was then made by the prisoner's counsel to the whole witnesses cited for the prosecutor, as the executions of summons against them had been returned to the Clerk of Court only that morning. It was answered by the crown lawyers, that the witnesses summoned upon a more early citation had absconded; it therefore became necessary to call this additional list. The Court repelled the objection; but adjourned the trial till Friday next, that the prisoner might have opportunity to see the list, and propose any legal objections to the witnesses adduced.

The prisoner being again brought to the bar on the 22d of March, gave in a declaration to the Court equivalent to an acknowledgement of his identity. The prosecutor, however, thought proper to lead a proof by witnesses of his identity. This being done, the Court pronounced judgement upon the prisoner, finding, 'That the said Archibald Macdonald is the same person who stands attainted of high treason by the act of Parliament above mentioned, by the name and designation of Archibald Macdonald, son of Coll Macdonald of Barisdale; and, therefore, and in respect thereof, adjudging the prisoner to be taken to the Grass-market of

[2] A state of facts.

Edinburgh, on the 22d May next, and hanged on a gibbet, to be cut down alive, his entrails torn out and burnt, his head cut off, his body quartered, and his head and quarters to be at the King's disposal.'[3] 1754

This sentence, and the interlocutors preceding, appear contrary to law in three respects, as they refuse to sustain the prisoner's defence of a surrender, and to allow a proof of the same; as they only find that the prisoner was the identical person pointed out in the act of attainder, but do not also find that he did not surrender himself in terms of the act; and as they refuse to admit the prisoner to trial by jury.

The judgements are illegal, as they refuse to sustain the prisoner's defence of a surrender.

[3] A petition of appeal to the House of Lords, against this sentence was drawn; but, while the prisoner's friends were adjusting some difficulty about the mode of presenting it, the necessity of a petition was superseded by a reprieve, and afterwards by a pardon. Since that, various petitions of appeal have been presented, particularly in the cases of Ogilvie, 1765, Mungo Campbell, 1770, Miller and Murdison, 1773; and, *lastly,* in the case of Bywater, A. D, 1781. And a solemn judgement of the House of Lords was pronounced, finding, that *no appeal lies from the Court of Justiciary to their Lordships.* The most mature consideration of this important subject that I am capable to bestowi—the laborious search that I have made into our criminal records from A. I). 1536 to the present times, have completely rivetted my opinion, that this judgement requires again to be considered,—that law and expediency both require it. While I am reluctantly obliged to deliver my sentiments, it affords me considerable satisfaction, that I am laid under no necessity of canvassing the arguments delivered on this topic before their Lordships, by the truly venerable Peer who presides in the Court of King's Bench. I have not to combat that noble Lord's opinion, but the report sent from this country to his Lordship, upon which, I apprehend, his opinion was founded. I did intend to publish an argument to show, *'That an appeal lies from the Court of Justiciary to the House of Lords;'* but, as I am at this minute doubtful if I shall be able to accomplish my original purpose, of presenting my argument in the form of an Appendix to this work, I trouble the reader with this note, expressive of my zealous wish, that if, upon a future occasion, a prisoner shall be advised of a sentence pronounced by the Court of Justiciary, affecting his life or liberty, being *contrary to law;* I say, that the prisoner implore relief from the House of Lords, by petition of appeal, craving their Lordships onc« more to admit this question to a solemn discussion; and to appoint a complete and accurate report to be laid before their Lordships, of the cases vyhich have been brought from the Court of Justiciary, before the Scottish Privy Council, his Majesty and the Estates of Parliament of Scotland, and the British House of Lords, from A. D. 1641 to the present times.

1754 Penal laws are, in general, prohibitory regulations designed for the order and security of civil society, discharging the people at large from certain actions, such as theft, murder, and the like. In the case of actual or meditated rebellion, a conditional act of attainder is provided for the security of the state, by ordaining, that suspected individuals pointed out in the act, shall perform certain conditions therein prescribed. In the *first* of these, the law is *general,* and the crime consists in *perpetrating things prohibited.* In the *second,* the law is *special,* and the offence consists in *omitting things commanded.* If one of the public is brought to trial for transgressing the former of these laws, it is the most valid of all defences, that *he did not commit the deed prohibited.* If an individual pointed out in the latter part of these laws is accused of not having done what was therein required, it is an equally valid defence, that *he did perform the condition prescribed.* Therefore, to doom a man to the scaffold on the former of these laws, who had not committed any theft, murder, or the like, is not more to *condemn without guilt,* than to consign to punishment, on the latter of these laws, one, who had absolved himself from the imputation of guilt, by surrendering his person or performing the other conditions required.

The sentence is illegal, or inefficacious, and null; as it only finds, that the prisoner was the identical person pointed out in the act of attainder, but does not also find that he did not surrender himself in terms of the act.

The persons whose names were engrossed in the act of attainder could incur the *declared presumption* of guilt, could become criminal, and amenable to punishment, only *by not performing* the conditions of the act. Therefore, the Cburt, in finding an undoubted, indeed notorious truth, that the prisoner was the person described in the act, and sentencing him to death on that account, without also finding that he did not surrender, in terms of the statute, did condemn him to death without any statutory guilt upon the part of the prisoner, or any statutory authority upon the part of the Court. This may be further elucidated by observing, that, by changing the words, 'Archibald Macdonald' into 'Alexander Earl of Kelly,' the like judgement might with truth have been pronounced, viz. that his Lordship was the person described in the act of attainder, and the like sentence of death been therefore passed upon that Lord, although he did publicly surrender himself to Government, and consequently was never challenged on account of the act.

The sentence is illegal, because the prisoner was denied the benefit of trial by jury.

It has already been observed, that penal laws are for the most part *general and prohibitory;* but that, in the case of

conditional acts of attainder, they are *special and mandatory*. If, then, the mode of trial by jury is the established law of a country, as that to which the life of a citizen can most safely be trusted, the same reason holds for adopting this mode, whether the prisoner be accused of *committing* what was *prohibited* by a general law, or *omitting,* what was *required* by an act of attainder. Further, had the prisoner been brought to trial in England, he would, beyond dispute, have been entitled to have had his defences tried by jury: but, by statutes of Queen Anne, and of King George II. the treason laws of England are extended to this country, and the same mode of trial (as near as may be) is prescribed; consequently, the prisoner was equally entitled to trial by jury, when brought before the Court of Justiciary, as if he had been brought before the Court of King's Bench. 1754

But it is by no means surprising, that the Court of Justiciary should have pronounced this judgement, refusing the prisoner a trial by jury, when we reflect upon the disposition which our courts of law have manifested to encroach upon, to annihilate this invaluable privilege. It appears that, by the old law of Scotland, trial by jury took place in matters both civil and criminal. Our civil judges have long since exalted their own dominion, by shaking themselves loose of the intervention of a jury; and I confess, in questions merely of property, I do not wish to see this mode of trial restored: for, so tedious are our forms of proceeding, that it would be impossible to decide matters of property by a jury, without effecting so great an innovation in our system of jurisprudence, as must be productive of inconvehiencies and perplexities which could not be removed but in a long course of practice. Nor do I think there is danger in trusting questions of right between man and man, to the sole decision of our judges; for, besides that redress may be sued for to the Supreme Court of the nation, it can but rarely happen that partiality towards a party or a cause, will, in civil matters, influence any of their Lordships. But, in a criminal court, when judges are actuated by a laudable zeal for the checking of enormous crimes, for bringing an obnoxious criminal to justice, it is less safe to trust the life of a prisoner in the hands of judges appointed by the crown, than in those of a jury chosen promiscuously from the prisoner's equals. Much less in accusations of treason or others of direct offence, by a subject against the sovereign; for in such, I apprehend, it must necessarily happen, that judges will, for the most part, lean towards the crown.

1754 On a late occasion, the Lords of Justiciary delivered a solemn opinion,[4] that, in criminal actions before inferior courts, in cases short of capital punishment, trial by jury is not requisite. But, unless their Lordships shall be disposed to pay more respect to this Opinion than they sometimes do to precedent, we may entertain a rational hope, that, in future practice, they will alter their judgement. Before delivering their solemn opinions, their Lordships heard Counsel on this point, whether the various degrees of corporal punishment, short of death, could be inflicted, but after trial by jury; and a report was, upon their order, made to them of the practice before the inferior judicatories, as well as the supreme tribunal of Justiciary. From the report made to them, it appears, that never were a set of judges, never a set of benches, more impartial, if an uniform discrepancy, and contradiction of practice, can be styled *impartiality*. The practice before the magistrates of royal boroughs, and that before the sheriffs, were diametrically repugnant to each other; and that of the Court of Justiciary fluctuated from the one side to the other like the ebbing and flowing of the tide.

By the report made of the practice before the magistrates of royal boroughs, in the trial of crimes not capital, it appeared, that, in the whole of these boroughs, *except one,* (the borough of Ayr,) the magistrates were in use to proceed without jury. The proceedings again, in the different counties, evinced, that, in all of them, *except one,* (the county of Edinburgh,) the sheriffs were *not* in use to inflict any corporal punishment without the verdict of a jury, imprisonment excepted. Upon these opposite modes of procedure, I must observe, that the magistrates of royal boroughs, in this country, cannot, in general, be supposed either to have studied the science of the law, or to have

[4] Records of Justiciary—Procurator Fiscal of the City of Edinburgh against Young and Weemyss, 19th March, 1783. When thjs cause was argued before their Lordships, Hay Campbell, the Solicitor-General, appeared as counsel for the prosecutor. He maintained, that the lesser trespasses, which were to be punished by fine and imprisonment, might be tried without jury, but did not plead that the severer punishments of pillory and banishment could be inflicted but after trial by jury. But their Lordships, in giving their opinion, said they were not bound to regard Mr. Solicitor's admissions. The Honourable Henry Erskine, who was counsel for Young and Weemyss contended, that no corporal punishment whatever could take place but after trial by jury.—As the nature of the work lays me under the necessity of presuming to give my own opinion, I must observe, that it coincides entirely with the plea maintained by the Solicitor General, viz. That such offences as fall to be punished by fine and imprisonment may be tried without jury, but that crimes *which are to involve a deeper consequence* may not.

enjoyed the benefit of an academical education; and that, in many of the decayed boroughs, it cannot be presumed that 1754
the magistrates are men of liberal ideas, or independent sentiment and situation in life: that the sheriffs again must be chosen from the bar. Thus, this opposite practice in sheriffs and magistrates, justifies the proverb, that the greater the ignorance the greater the presumption.

It appeared from an examination into the records of Justiciary, that one Dow, and his accomplices, in 1739, had been tried before the justices of peace of Linlithgow, for breaking into the brew-house and cellars of Mr. Hope of Craigiehall, and stealing quantities of wine, brandy, and ale: that they *confessed their guilt,* and were sentenced by the justices to be imprisoned, whipt, burnt on the back, and banished the county. Dow brought this sentence under re,view of the Court of Justiciary, alledging, that so severe a punishment could not be inflicted by any judge, unless the prisoner had been found guilty by the verdict of a jury; and the Court suspended the sentence, except as to the whipping.

In A. D. 1747, Robert Drummond, printer, was prosecuted before the magistrates of Edinburgh, for a defamatory libel against a person of the highest rank.[5] He admitted that the ballad libelled on was printed in his printing-house; but denied any knowledge that the blanks in it were meaned to be filled up with those names and characters which the prosecutor applied to them. The magistrates ordained the ballad to be burnt, the prisoner to stand an hour on the pillory, and to be banished the city, and deprived of his freedom as a burgess, for a twelvemonth.[6] Mr. Drummond brought the cause before the Court of Justiciary by *bill of suspension.*[7] He maintained, that the prosecutor had filled

[5] His Royal Highness William Duke of Cumberland.

[6] The intelligent reader is requested to think, whether the most arbitrary judge in England, since the accession of the House of Hanover, would have dared to try such an offence without jury.

[7] There are two forms of *writs* by which causes may be brought from inferior judicatories under review of the Courts of Session or Justiciary. The one is by *bill of suspension,* which may be presented after a judgement of the inferior Court is passed, and the decree extracted; the other, by *bill of advocation,* which may be presented to their Lordships any time between the party being served with a summons to appear before the inferior court, and the decree of that court being extracted. Both these writs pass the signet, and are signed by a writer to the signet: and, upon their being presented to one or more of their Lordships, they either *pass or refuse the bill.*

1754 up the blanks from his own conjecture, and that he, the prisoner, was altogether ignorant how they should be supplied: that, supposing him to be guilty, the sentence was unmeasurably harsh; and further, that, in a matter of such consequence, he was entitled to trial by jury. The Court *refused the bill without answers.*

In A. D. 1757, John Falconer was tried before the sheriff of Edinburgh for using of false keys, and stealing of victual. He was ordained to be kept in prison till payment of the expences of his prosecution, which amounted to £1 10s. and to be banished the county for life. He complained to the Court of Justiciary that he had been tried without jury, and they dismissed his complaint.

Alexander Flight was prosecuted before the baillies of Cupar, in June, 1767, for insulting the Provost, and was sentenced to a month's imprisonment, and banished from the town for three years: but their Lordships suspended the sentence as to the banishment.!

An action was brought before the sheriff of Edinburgh, by John Simpson, copper-smith, against Leonardo Piscatorie, teacher of music, (A. D. 1771.) It charged the defender with firing a gun or pistol, loaded with small shot, at the prosecutor, and maiming him so severely as to render him unable, in future, to earn his bread: and it concluded for *£500* of damages to the private prosecutor; and also, that the defender should be punished by pillory, whipping, or otherwise. Piscatorie claimed to be tried by jury; because the libel concluded for a corporal punishment. The sheriff refused his claim; upon which the defender brought the cause before the Lords of Justiciary, who pronounced the following judgement: 'Having considered the said bill and answers, with the criminal complaint before the sheriff, *find the libel referred to in the bill ought to have been tried by a jury,'* &c; and, therefore, ordained the sheriff to dismiss the libel; but reserve power to the pursuer to insist in a new indictment according to law.

The author who last travelled over the gloomy field of criminal prosecutions,[8] bestows a hearty and generous applause on this judgement. To me is left the unpleasing *piece of duty* to acquaint the public, that the next time this point was debated before their Lordships, they pronounced a judgement considerably different; and, soon after, they gave a solemn opinion directly opposite. For Archibald Tait, overseer (i. *e.* bailiff) to the Earl of Roseberrie, being convicted, in July, 1775, by the justices of peace of

[8] Maclaun's Criminal Cues, p. 723.

Linlithgow, of embezzling oats, hay, and straw, belonging to the Earl, and *under the defender's trust*, and being sentenced to be pilloried and banished the county for life, brought this judgement under review of the Lords of Justiciary. The following points were argued before their Lordships, both in pleadings at the bar, and in printed informations, *1mo,* Whether justices of the peace had a jurisdiction to try this crime? *2do,* Whether they could proceed in such trial without jury? And their Lordships, upon advising the cause, suspended the sentence as to the pillorying; but affirmed it in other respects. 1754

In the case of the procurator-fiscal of Edinburgh against Young and Weemyss, when the preceding report was laid before their Lordships, the indictment concluded, 'That they ought not only to be punished in their persons, *by whipping, banishment, pillory, imprisonment, or otherwise,* as to the magistrates shall seem meet,' &c. but ought also to be fined in the sum of *£50* Sterling each, payable to the complainer. Among other pleas which the defenders urged, why trial could not proceed against them, upon the libel raised before the magistrates, they maintained, that no sentence of corporal punishment could be pronounced, but after a verdict of a jury. The indictment was, in various respects, so illegal and absurd, that their Lordships would not sustain it: but they omitted not to express the special reasons why they ordained the magistrates to dismiss the libel. Lest an opinion should prevail, that trial by jury was necessary in prosecutions for a corporal punishment, each of their Lordships, in rotation, except Lord Gardenston, who was absent, delivered an opinion, that the lesser crimes could be tried, and the punishments of whipping, pillory, and banishment, inflicted, without trial by jury. It is not easy, however, for the mind to renounce, at once, doctrines which have long been respected, to *conquer prejudices* which have long been entertained. Of this the Court seems to afford a pregnant instance; for, on the same day, their Lordships gave judgement upon a bill of advocation from the sheriff of Edinburgh, at the instance of one Ballentine, finding that the libel or complaint 'referred to in the bill of advocation, which contains a charge of different acts of assaulting, wounding, and maiming, whereby the persons therein named were in danger of being murdered; and also charging, that, in pursuance of these assaults, the defenders forcibly seized, and theftuously carried off, 'certain effects belonging to the persons assaulted, *and concluding for punishment, by whipping, pillory, banishment, or otherwise, as to the judge shall seem meet,* ought to have been tried by a jury.'

This judgement, however, in so far as it is opposite to the one immediately preceding, is, in my humble opinion, a distinction without-a difference, or rather a manifest

1754 absurdity. This will be rendered the more apparent by stating the ground of this judgement, and the gradation of our criminal punishments.

Ground of this Judgement.

The ground upon which it proceeded was, that trespasses which are reckoned *inter leviora delicta,* may be tried without jury; but that the crimes which are reckoned *inter graviora delicta* cannot.

Gradation of our Criminal Punishments.

Imprisonment, whipping, pillory, and banishment, are almost the only corporal punishments in use with us, short of death. These, and pecuniary mulcts, are applied both to offenders who are guilty of the *leviora,* and the *graviora delicta,* according to the discretion of the judge.

To allot an exact gradation of punishment to the scale of guilt, even with the most accurate system of legislature, is perhaps impossible,—but to expect it from that *image* of jurisprudence which has been erected in the days of tyranny; from an image to which poetical fiction would attribute a leaden head, and hands of iron, is absurd. The tribunals of Fame, of Conscience, and of a Future State, may indeed apply a more exact dispensation of justice; but, if the punishment prescribed by law be the same, it is alike to the prisoner, as to *personal suffering,* whether he be convicted of a statutory trespass, or an atrocious crime. Therefore, in so far as personal safety is concerned, if there is to be any difference in the mode of trying crimes, the more solemn, the more guarded mode of trial, ought to be adopted, *rather in relation to the severity of punishment than to the atrocity of the crime.* But, in these bills of advocation by Young and Weemyss from the magistrates, and by Ballentine from the sheriff, the degrees of guilt charged were different, the punishment concluded for was the same,[9] the judgements of the Court of Justiciary were opposite; the distinction, therefore, which is made by these two judgements amounts precisely to this—*That a man may, without jury, be pilloried and banished for a peccadillo, but cannot, without jury, be pilloried or banished for an atrocious crime.*

The instances in which the Court affirmed or reversed the sentences of the inferior judicatories, inflicting corporal punishment without trial by jury, have been just recapitulated: and, besides the case of Macdonald of

[9] Except that, in the libel against Young and Weemyss, there was, besides other punishments, a conclusion for a fine of *£50* Sterling each, which was not in the libel against Ballentine.

Barisdale, the Court took upon them, in another capital offence, to decide without jury. It was in the trial of John Caldwall for robbery.[10] The plea of madness was urged in his defence; but, instead of remitting this plea, along with the indictment, to the cognisance of a jury, their Lordships were pleased to tear asunder the inseparable concomitants, *charge* and *exculpation*. The charge, viz. the accusation of robbery, and the proof thereof, they remitted to the knowledge of an assize; but the exculpation they themselves took previous trial of, examined witnesses upon the point, pronounced the madness affected, and then remitted the accusation of robbery to a jury. 1754

After such violent and repeated blows at the right of trial by jury, I cannot help expressing my apprehension, that the Court has already sapped the foundation, and that, unless prevented by the aroused suspicion, by the jealous eye of their country, it only remains for judges who may be possessed of more courage, or more temerity, totally to overturn the fabric.

I cannot, without some farther remarks, dismiss this momentous subject in a country where the shades of superstition retreat before the light of science;—where the liberties of mankind have been established at a vast expence of blood and treasure;—liberties which, perhaps, totter on the axis, and which, like the twilight, may accompany in its fall the setting glory of Britain. It is the established law of this country, that no prisoner can be tried before the whole Lords of Justiciary without jury. Is it not then contrary to all reason, that each magistrate of royal boroughs, many of which do not contain a single inhabitant possessed of wealth, of science, or of independence, shall enjoy a power which the law has denied to the collective body of the supreme judges of the nation? Shall it be said, that, because it is only the lower class of mankind which are commonly tried for petty crimes, that their liberties are not worth protecting? Or, will it be alledged, that scourging, pillory, and banishment, are not terrible punishments? Besides, the mean ideas of those *self-elected men,* who, in the decayed boroughs, fill the offices of magistracy, may often lead them to pass over heinous crimes, and to punish the lesser offences with unmeasurable rigour. In the month of September, 1784, one of the baillies of Edinburgh sentenced a woman, whom he had convicted of selling butter short of weight, to stand on the pillory, with a label on her forehead denoting her offence, on a market day, at nine in the morning, an hour when the streets swarm with labourers and apprentices, dismissed from their work to breakfast. No formality of a jury had been

[10] Records of Justiciary, July 13, 1737.

1754 used; the baillie had not so much as consulted the city's assessors, whose opinion it was his duty to have taken even in every civil case of the smallest difficulty or importance. What was the consequence? The rabble, in their rage at being cheated of an ounce of butter, attacked the unhappy woman with such fury, that, had she not been immediately taken from the pillory, they would have murdered her. *Yet the mob*, so enraged at a culprit for cheating in a few ounces of butter, in the month of June preceding, burnt a distillery worth £7000, and would have done infinitely more mischief, had they not been prevented by the repeated interposition of a military force: *yet the magistrates,* equally rigorous and informal in punishing the fraud of a silly woman, and dastardly in permitting the outrages of a vile rabble, suffered, without the smallest interruption, a puny mob to beat a drum through the principal streets of the city, nay, before the very door of the city-guard, for the professed purposes of tumult and conflagration.

These opinions, this practice of the Scottish judges, become the more alarming, when we behold the legislative body of the nation introducing a mode of trying offenders distinct from that of jury. In the southern part of the united kingdoms, civil liberty has, for a long period of years, been more respected than in Scotland. An author who has simplified the complex and cumbersome mass of English jurisprudence, whose *writings* have acquired the applause of his countrymen, not only as delivering a clear and comprehensive system of law, but as breathing a generous spirit of liberty, expresses himself with a noble ardour in favour of trial by jury.[11] He says,—'It is the most transcendant privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals; a constitution that I may venture to affirm has, under Providence, secured the just liberties of this nation for a long succession of ages; and, therefore, a celebrated French writer, who concludes, that, because Rome, Sparta, and Carthage, have lost their liberties, therefore those of England, in time, must perish, should have recollected, *that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.'* And again, 'The liberties of England[12] *cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it, by*

[11] Blackstone's Commentaries, vol. III. p. 379.

[12] Blackstone's Commentaries, vol. IV. p. 343.

introducing new and arbitrary methods of trial' &c. &c. I submit whether it may not excite a just alarm to see a statute, 1754
enacting 'new and arbitrary methods' of trying the delinquents of the East.[13] I submit whether this may not be one of those '*secret machinations which may sap and undermine trial by jury*.'

[13] Act for the better regulation and management of the, affairs of the East India Company, George III. An. 24. c.