sion, then the valuable Act might be little worth. Some observed, that the Parliament where that Act was made, rising on the 2d of February, and the Acts not being published and proclaimed for some days after, there were scarce forty days run when his commitment was ordered on the 20th of March, and so the Act did not oblige nor bind. But the interval of time relates to the other lieges, but not to the makers of the Act, who can never pretend ignorance.

It was alleged that the crime specified in this mittimus being capital, his offering of bail was justly refused, it not being a bailable crime. Others thought the warrant too general, for pernicious practices, and that they should condescend more specially, else the offer of bail may be always eluded by inserting a capital crime. And as he was found altogether innocent, and the suspicion against him groundless, so the Lords of Justiciary, on the trial of Thomson and Auchmuty, the principal actors, found them only liable to an arbitrary punishment, and that the crime was nowise in its nature capital. *Vol. II. Page 247.*

1704. *December* 19. GRANT of CORRIEMONY *against* LAUCHLAN MACINTOSH of that ilk.

Macintosh granted a blank bond, for 1960 merks, to Lieutenant-colonel Grant, and he fills up Robert Grant his natural son's name therein; who charging, the other suspends on compensation for a liquid debt due by the Lieutenant-colonel to him. ANSWERED,—This is not *inter easdem personas*, the charger being the son, and the compensation craved being for a debt of the father's. And on this the decreet goes out against Macintosh, on the last of July 1687. He now raises reduction and declarator against them, wherein he offers to prove his ground of compensation to be clearly *inter eosdem*, because he produces a back-bond under Robert's hand, acknowledging his name was only inserted and borrowed for the Lieutenant-colonel his father's behoof, to whom the bond was delivered blank; and this being *noviter veniens ad notitiam*, and not *dolose* omitted by him, but has been deceived by the Lieutenant-colonel's stratagem, therefore it is yet receivable.

ANSWERED,—He oppones his decreet of suspension *in foro*, where it is either competent and omitted, or proponed and repelled. Likeas compensation must be instantly verified, and cannot be proponed in the second instance; as appears by the 141st Act, Parliament 1652; yea farther, the Lords found a decreet in absence did exclude compensation, *25th July* 1676, *Wright* against *Shiels*.

REPLIED,—That Act of Parliament is no more but the ordinary exception of competent and omitted, which takes not place in decreets of suspension, as Stair observes, *lib.* 4, *tit.* 1; and the Lords, on the *18th of June* 1662, *Earl of Marishal* against *Brae*, found the said Act of Parliament did not extend to decreets of inferior courts, because competent and omitted is not receivable against such decreets; and Haddington, *voce Compensation*, in the case of *Ogilvy and Napier*, *20th November* 1610, says, the Lords thought the said Act of Parliament was wrong printed, or wrong understood, seeing compensation may ofttimes be proponed after sentence.

DUPLIED,—This was to shake the foundations of our law, where these were undoubted principles, That compensation must be *inter eosdem*, and liquid, and instantly verified, and not proponable after sentence; and that the granting a blank bond is a tacit renouncing of the defence of compensation; as was expressly decided, *27th February* 1668, *Henderson* against *Birny*.

The Lords saw there was nothing but *res judicata* here that stood in Macintosh's way, and therefore allowed the parties to be heard upon what nullities they could allege for opening the said decreet of suspension; for, if that could be turned into a libel, the Lords thought Macintosh's compensation both relevant and proven; but all the difficulty was, how to enter on the decreet *in foro*, which stood in his way. *Vol. II. Page* 248.

1704. *December* 21. ANDREW BRUCE of EARLSHALL'S CREDITORS-ADJUDGERS *against* JOHN BAIRDY.

THE Earl of Southesk, Sir William Bruce, and other Creditors-adjudgers of the estate of Andrew Bruce of Earlshall, pursue a reduction and improbation of an apprising led by Mr John Bairdy, minister at Paisley, against Earlshall, as transacted by the debtor himself, and paid with his means. The case was,—Mr Robert Alexander, one of the principal clerks of session, having married Sophia Bairdy, daughter to the said Mr John, the said comprising is disponed to him, in his contract of marriage, *nomine dotis*. In 1691, Mr Robert dispones the same to Sir David Arnot of that ilk; but, of the same date, takes his backbond to relieve him of a blank disposition, consigned in Mr Monypenny's hand, under irritant clauses and conditions, that, if the sum agreed and transacted for was not paid at the term limited, the said disposition should be delivered back again. The Lords, before answer, did, *ex officio*, take the oath of Mr Robert Alexander; and it emerging, that Sir Robert Grierson of Lag was an interposed trustee in this case, for Earlshall, he was likewise examined. And their oaths, with Arnot's backbond, coming to be advised, it was ALLEGED for Arnot, That the bargain made by Mr Bairdy with Lag, bearing, if he did not pay in the 3500 merks betwixt and Whitsunday thereafter, then Lag should lose what he had already paid, and the disposition should be retired, and Mr Bairdy be in his own place; the rest of the money was never paid, and so the irritancy was incurred; and Arnot is not obliged to stand to the said transaction, but is fully reinstated in the right of the said expired apprising.

ANSWERED,—The irritancy being clearly penal, and never declared by any sentence, the same is still purgeable on payment of what remains.

REPLIED,—By the canon law, all lawful adjections to the pactions of parties must take effect in their precise terms; and so have the Lords declared, by their Act of Sederunt, 27th November 1592, even in clauses irritant. And though *pactum legis commissoriæ in pignoribus* be rejected as usurious, and found purgeable, yet in other cases the Lords have found such irritancies not purgeable; as *20th February* 1680, *Jameson* against *Waugh*; and lately in the case of the *Duke of Athol*, then Earl of Tillibairn, against *Campbell of Glenlyon*. Yea, where a thing was to be performed within nine score of days, the Lords found the purgation of the failyie could not be admitted; and here there were two years allowed for purging.