

THEFTBOOT.

1756. December 29, and 1757, June 29.

WARRANT against M'PHERSON.

John M'Donald, a travelling chapman, on his road to Fort-Augustus, with a parcel of merchant goods purchased at Glasgow, was attacked on the hill of Corryerach, by Evan M'Pherson and ——— Kennedy, who robbed him of his goods, and handled him otherwise very roughly. Upon a warrant, he got them both apprehended and incarcerated in the tolbooth of Inverness. A transaction was there made betwixt M'Donald and M'Pherson. M'Donald claiming £.26 as the sum he was out of pocket by the robbery, partly the price of his goods, and partly the expense of the search, apprehension, and incarceration. To reimburse him of this sum, a bill was drawn upon William M'Pherson, merchant in Inverness, payable to him or order; and of even date with the bill, he gave to M'Pherson the robber, a writing, "Disclaiming all action and execution that might be competent to him against Evan M'Pherson, for whatever cause preceding the date; and particularly, disclaiming any criminal action against Evan, on account of a robbery and atrocious riot committed on his person and merchant goods." This transaction, however, did not save Evan M'Pherson. He was tried at the instance of the public; and, at the Circuit Court at Inverness, was convicted chiefly by the oath of M'Donald, who was called there as a witness.

The aforesaid transaction bore date 27th July, 1771; Evan M'Pherson was executed in autumn 1751; and the bill was by M'Donald indorsed to John Warrant merchant in Glasgow in January 1752. The indorsee having proceeded to diligence on this bill, the acceptor William M'Pherson suspended the same upon the following ground: That the bill was granted *ob turpem causam*, viz. for concealing the robbery. The charger answered, That if a premium be given to conceal theft, or not to prosecute, it is *turpis causa*, and an action will not be sustained to make the premium effectual, *L. 4. § 1. De Conduct. ob turp. caus.*; but that in the present case, the bill was not a premium, being granted for no greater sum than what M'Donald was out of pocket by the robbery; that M'Donald had a good action for this sum; that if he could pursue, he could take payment or security without a process; and that his disclamation could not hurt his claim,

No. 1.

What is sufficient to qualify theftboot?

No. 1. because he was not bound to prosecute the robbery ; and his disclamation was not preventive of the public prosecution.

The Court was at first a little gravelled about this point. But at last they found the transaction *contra bonos mores*, and that no action lies upon the bill for the following reason : Theftboot originally was a crime against the public, because, upon condemnation by the public, all the goods of the criminal were confiscated, including even the goods stolen or robbed. Though this practice was altered as to stolen goods by the act 26. Parl. 1661, theftboot, however, continues to be prohibited upon the head of expediency. It is lawful no doubt for the man who is robbed, to take back his goods ; but it is not lawful to take them back under a condition of concealing the theft or robbery, and passing from any prosecution ; because such condition tends to hide crimes, and therefore is *contra bonos mores*. And it was also the opinion of the Court, that this objection must operate even against an onerous indorsee. But upon a reclaiming petition and answer, the Court altered (29th June, 1757) for the following reason : That so far from concealing theft and preventing the course of justice, it was M'Donald who gave information against M'Pherson as guilty of robbery, and obtained him to be put in prison for that crime ; therefore, M'Donald was not guilty of theftboot, which consists in concealing the thief, or withdrawing him from justice.

Sel. Dec. No. 124. p. 177.

See APPENDIX.