

ment imported an obligation to refund expenses ; and ordained Sir Andrew to give in his account of disbursements and expenses in negotiating Mr Gordon's affairs, and how he would instruct the same ; and declared, after hearing objections, they would modify the same.

*Vol. II. Page 290.*

1705. *November 16.* SPENCE and TROOP, Agents for the MANUFACTORY of NEWMILLS, *against* JOHN BINNING of DRUMCORSE and ADAM OLIVER.

LORD Tillicoultry reported Spence and Troop, agents for the manufactory of Newmills, against John Binning of Drumcorse, and Adam Oliver, merchant in Jedburgh. Mr Binning having bought thirteen packs of wool from the said Oliver, he causes bring them to Queensferry, with a design (as he affirmed) to transport it to Fife, and sell it there. The doers for the manufactory, finding it lying on the rocks beside the shore of Quensferry, they seized it, and pursue John Binning before the sheriff-depute of Linlithgow for confiscation of the wool. And he founding on a permit, it was OBJECTED,—It bore only eleven packs, whereas he bought thirteen ; which disconformity proved the permit to relate to other wool ; *2do*, It mentioned it was to go to Borrowstounness ; whereas, this was taken unto the Queensferry.

ANSWERED,—The weight was the same, though the eleven packs were, by the carriers, for the ease of their horses, made up in thirteen ; and the touching at Queensferry was not much out of their way.

Then the managers offered to prove, by Binning's oath, that the wool was his own, (though he called it Oliver's,) and that it was laid down with a design to ship it in a fleet then ready to sail to Holland, to be exported ; contrary to the 9th Act of Parliament 1701. And he refusing to depone anent designs and intentions, as nowise relevant, the sheriff held him as confessed, and escheated the wool. Of which decret he raised suspension and reduction, on this reason, That he had not contravened the said Act of Parliament, which only prohibits actual exportation, and, to prevent mistakes and arbitrary seizures, determines the cases wherein only it shall be lawful, viz. where it is found on shipboard and water-borne, or when it is found at land, in cellars or houses, packed up in casks, barrels, or boxes. The law has made these *præsumptiones juris et de jure*, of a designed exportation ; none of which cases can be subsumed here ; but the same Act has sufficiently provided, when it is found within three miles of a sea-port, and you suspect it, you may cause weigh it, and put the owner to find caution that he shall not export it ; which is all that could have been done in this case : and yet this method prescribed by the law was not followed, but a most unwarrantable riotous seizure made, upon weak and frivolous presumptions.

ANSWERED,—That the Act of Parliament discharged exportation, which can never be effectually prevented if it must be first on shipboard ere it can be seized ; for here it was laid on the craigs, where the waves would have washen it away within an hour or two, if it had continued there. And Mr Binning had prevaricated all along and refused his oath ; which is a stronger manner of probation than those expressed in the Act, and more than equipollent acts ; and without this it shall be the easiest thing in the world to frustrate and evacuate the Act, and render it wholly ineffectual.

REPLIED,—This fell under no clause of the Act, and you cannot forfeit me of my property without a law; and this being a penal statute, and very rigid and unfavourable, it cannot be extended *de casu in casum*. And equipollencies cannot take place, no more than equivalent deeds were sustained, in Cleland of Faskine's case, to supply kirk and market, to elide deathbed; and he was not obliged to depone what he designed to do with it, because he might lawfully change and alter his resolution; and, *l. 18, D. de Pæn. Cogitationis, pœnam nemo patitur, et nuda cogitatio crimen non est, nec ideo quisquam puniendus*, except in treason or the like.

DUPLIED,—Here was no extension, but a case clearer and directer in the eye of the law than those expressed. And it was more than a mere design, there being an *actus proximus* or an ouvert deed, (as the English call it,) which can admit of no other rational construction; and if it can, you was allowed by your oath to apply and explain it; which you refusing to do, you was justly holden as confessed.

The Lords, by a plurality of eight against five, found the presumptions of exporting so pregnant that they sustained the decret confiscating the wool, and found it within the sense of the Act of Parliament; which, though it prescribes some ways, yet does not exclude other methods of discovery, equally clear with those mentioned in the Act. *Vol. II. Page 291.*

---

1705. November 23. WALTER CLERK of BRIDGEHEUGH *against* ELISABETH ELLIOT, Relict of John Turnbull.

THERE being an agreement betwixt Sir Andrew Ker of Greenhead, and Robert Elliot, merchant in Selkirk, to sell some lands near Selkirk, for £1000 Scots; Robert advanced 1000 merks of it to Sir Andrew, and died before the bargain was reduced into writ; and, leaving Elisabeth, his daughter, an infant, James Elliot, her father's brother, and her tutor, prosecutes and perfects the agreement, and pays up the remaining 500 merks of the price to Greenhead, and gets the disposition to the lands in his own name, and is thereupon infest; but at the same time, in 1668, grants a backbond to Elisabeth, his niece, narrating the foresaid matter of fact; and, therefore, obliges himself either to repay her the 1000 merks advanced by her father, or to denude of the lands in her favour, upon her refunding the 500 merks he had disbursed to perfect the price. The said Elisabeth, when she comes to age, raises an inhibition, on this backbond, against her uncle, and pursues a declarator and count and reckoning that he is paid of his 500 merks by his intromissions; and, therefore, ought to denude. James, the uncle, during this dependence, makes a sale of the lands to Walter Clerk, and he procures himself infest, and thereon pursues the said Elisabeth to remove.

ALLEGED,—She could not be obliged to remove, because she not only possessed the land as apparent heir to Robert, her father, who had advanced the greatest part of the price, but, likewise, James, her uncle, by his backbond aforesaid, had acknowledged the purchase was to her behoof; and she serving inhibition against him before he denuded, in favour of Walter Clerk, the pur-