1742. *June* 16.

HAMILTON of Lady-land, Surveyor-General, *against* ROBERT BOYD, &c. kippers in Irvine.

No 19.
Importation of Irish victual found probable by oath of party, see No 17. p. 9398.

IN the process at Mr Hamilton's instance against the said skippers for importing Irish victual, the LORDS pronounced the following interlocutor: "Find the importation of Irish victual prohibited by act of council, ratified by subsequent statutes, competent to be tried by the judge-ordinary; and find that the limitation of six months for trying the offence, as by the statute 1703, does allenarly respect the superadded penalty of transportation; but find, that such importation is not probable by the oath of parties; and therefore, that the offenders cannot be obliged to depone against themselves."

Thereafter the LORDS "Found the importation of Irish victual probable by the oath of party." Against which last interlocutor the skippers reclaimed, and *pleaded*, That all civilians agree in this proposition, That in criminibus ubi pœna corporis afflictiva irrogari potest, the oath of party is an incompetent mean of proof; a rule founded on the principles of justice and equity. It is true, in causes criminal, parties are obliged to depone where the punishment does not reach beyond pecuniary fines, upon the same principle as they are obliged to depone in matters purely civil; but there is no analogy from thence to other criminal cases, whereupon sentences of forfeiture, or *pœna corporis afflictiva*, may be imposed. The rule of the civil law was, Sanguinem suum quoquo modo redimere licere. And temptation of perjury would be so strong, in cases where such high penalties might be imposed, the laws of all countries have made this to be a rule; and where expediency made it necessary to make an exception in particular cases, because of the public interest, a special statute has been thought necessary on that account. Neither is there any thing in the statute 1703, which obliges the defender to depone against himself; for as to the words whereby the crime is made probable *prout de jure*, they signify no more, than to be probable as accords of the law, that is, by every competent mean of proof; and the common acceptation of these words imports no more than this, to be probable by witnesses, in opposition to a proof by writ or oath of party: Thus, in pronouncing acts, or allowing proofs before answer, these words are never made use of, but in order to denote that the point is probable by witnesses. See Faber. in Cod. lib. 4. tit. 1. defin. 43.; Mathæus de criminibus, tit. de probationibus, cap. 7. Sir George Mackenzie in his criminals, part 2. t. 25. 38th act Parl. 1661.

Pleaded for the pursuer, If a loading of meal is taken in Ireland, and brought to Scotland, how shall it be proved? The master and all the mariners are, by the law, liable to punishment *ut socii criminis*; so not by their own oaths against one another, can they be convicted; if people see them land in Scotland, which may be easily avoided, yet those who see them land cannot swear from

what place the meal was brought; how then is it to be proved? If by witnesses from Ireland, how are they to be come at? In short, if the oath of party is not competent, the law may be repealed as useless. No doubt, there are cases where a party is not obliged to give his oath; but where the offence is not *inter crimina atrociora*, it is no uncommon thing, to oblige the party to purge himself by oath; which is a proceeding far from being against natural justice, as the person is thereby made his own judge, of which he cannot complain. And the only reason, why, in all cases, an oath cannot be administered is, lest an occasion be ministered to perjury. The law does think it hard, that a man should be convicted by oath, more than by writing; for it supposes, that it is just that offences should be discovered and punished; and therefore the temper in this matter is modelled by the law itself: And it cannot be said to be unjust, when neither life nor limb are concerned, which indeed are great temptations upon a party obliged to depone. And as to the words of the act, declaring the delinquency may be proved *prout de jure*, it means no more than a direction to judges to sustain the delinquency probable by all kinds of proofs; and such is the common acceptation in interlocutors pronounced every day; and so it has been decided, 29th January 1712, Justices of the Peace of Ayr, No 17. p. 9398. Nor is it any objection, that persons under the degree of heritors, if convicted within six months, may be transported, and that it would be flagrant to suppose the delinquency probable by their oaths; because none of the punishments in the act touch life, limb, or fame, no more than in the cases of wood-cutting, or stealing bees. And if the law has thought it necessary, that they should discover, not thoughts, but criminal facts committed by them, they cannot complain. See Lord Stair, lib. 4. tit. 44.; Faber in Cod. lib. 4. tit. 1. Defin. 43. l. 9. § 2. De jure jurando; and statute 1703, prohibiting the exportation of Irish wool.

No 19.

THE LORDS adhered.

Fol. Dic. v. 4. *p.* 22. *C. Home, No* 193. *p.* 323.

*** Kilkerran's report of this case is No 70. p. 7335, *voce* JURISDICTION.

1762. *December* 4. ARCHIBALD STIRLING of Keir, *against* JOHN CHRISTIE.

No 20.
Not relevant to prove a fact by oath of party, where penalties are concluded for.

MR STIRLING of Keir brought an action before the Justices of Peace, against John Christie, one of his tenants, for cutting some young trees on his farm, founded on the statutes of the years 1685, cap. 9. and 1698, cap. 16. and the statute of the 1st Geo. I. session 2. cap. 18. He proved that six trees, above ten years old, were cut by Christie, or those in his family, and ten by persons unknown. The Justices decerned for L. 20 Scots for each of the sixteen trees, the penalty contained in the two first of those statutes.