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 Pœn. 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 decreet 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 infeft; 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 infeft, 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-

suer, and having intented an action against him, the affair was rendered litigious, so she cannot be removed till her uncle's backbond be fulfilled to her; and, in the mean time, she must retain the possession.

ANSWERED,—She had no title to possess by her right on her uncle's obligement, being merely personal, or may afford an action against her uncle, the granter, to implement and fulfil; but what says that to Mr Clerk, the pursuer, who is a singular successor, purchasing for an onerous adequate cause, and standing infeft, and who is not concerned in his author's personal backbond? It is true the inhibition may be a ground whereon she may raise a reduction of his posterior right; but, when she shall insist in that process, he will either instruct nullities in her inhibition, or that, by her possession of the lands, she is overpaid of the 1000 merks advanced by her father. And an inhibition was never sustained as a defence against one standing infeft, and craving a removing, seeing it is only a negative prohibitory right, and gives no positive title to lands, except there be an adjudication led for the ground of the debt in the inhibition; which she has neglected to do. So, in this possessory judgment, she can never obtrude it to maintain her clandestine precarious possession into which she has intruded herself; nothing but a real right being capable to defend her against his infeftment.

The Lords thought, if James, her uncle, had pursued this removing, his backbond would have militated against him; but her affair was with his singular successor, who was not bound to know his author's backbond: Yet he seemed not to be a *bona fide* purchaser; because, if he had searched the registers (as he ought to have done,) he would have found the inhibition against his author; and therefore they refused to remove her, and found she had the election of the alternative in the backbond, either to accept of the 1000 merks paid by her father, or to require his disponing the lands; but, in the last case, she behoved to fulfil and implement her own part of the backbond, in refunding to her uncle the 500 merks he paid. And some thought it hard to keep the assignee out of the possession, on the pretence his author was paid by intromission, which might resolve into a tedious count and reckoning; and, therefore, proposed that she should find caution, (as defenders in removings use to do for the violent profits,) to fulfil her part of the terms of the backbond; otherwise to remove. But this not being reported, nor informed on, it was not decided at this time. Not only the backbond and inhibition moved the Lords, but likewise that the matter was rendered litigious by processes before Clerk's bargain, which he was not ignorant of; and James, the uncle, had acted as tutor and protutor, and had great intromissions during her minority. It is true, an inhibition, where adjudication has not followed on the ground of the debt, is no defence against a removing, the natural action resulting from it being a reduction of deeds posterior thereto, and not to give any a title to possession; but the Lords went on the foresaid separate grounds, in their decision of this circumstantiate case.

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