

goods sent was tallow, for which the cautioner can never be liable, because the export thereof is prohibited by the 12th Act 1621; and he being his cautioner, in his public character and capacity, it can never extend to what he acted unwarrantably and illegally, for wrong can have no warrant; and the meaning of his bond of cautionary could only make him liable for staple goods transported, and not for what stands prohibited by express law, though merchants venture on such prohibitions on the prospect of gain; and cautioners cannot be judges, nor known to all the goods they export.

ANSWERED,—*1mo.* That act is plainly in desuetude, as appears by the 37th Act 1661, where the exporter of tallow is obliged to bring home bullion; *2do.* In the book of rates there is an imposition upon exported tallow, which is an evident dispensation with its export.

The Lords repelled the cautioner's allegiance, in respect of the answer.

Then, *2do.* He ALLEGED,---That the said Patrick, the factor, was recalled and discharged by the boroughs from his office in July 1675, at which time most of these goods now pursued for were in his hands unsold, and so the cautioner cannot be countable therefore; because, from the date and period of his being exactorator, the bond of cautionary fell and ceased, it enduring no longer than the boroughs trusted him in that office.

ANSWERED,---It was not the sale and disposal of the goods that made the cautioner liable, but the time of his receipt of the same, at which time it is not pretended he was discharged; and in all thir cases *initium est spectandum*: and it were ridiculous for a cautioner, for a tutor, curator, or chamberlain, to pretend he is free, because, though he intromitted with the victual during the standing of the office, yet he had not sold it till his office was ended; even so here.

REPLIED,---He wrote to some other merchants there, to secure his goods when he heard Patrick Suity was put off; which was an evidence he looked on the cautioner as free.

DUPLIED,---Whatever prudential caution he used to secure the goods, it can never liberate you; but, as a cumulative security, it was a favour done to the cautioner.

The Lords likewise repelled this second allegiance, and decerned against Young the cautioner.

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1703. *February 27.* JOHN GRAHAM of DOUGALSTON *against* CAPTAIN SANDERSON.

CAPTAIN Sanderson, being heritor of the lands of Balvy, did grant a factory, by way of contract, to John Graham of Dougalston, for uplifting the rents of these lands, during his abode in Ireland; and the Captain, coming to Scotland in 1702, gave in his double to be registrate, and took out horning thereon; but, after inspection, Dougalston found the double given in as a principal was but a copy, and had neither of their subscriptions; and thereon raised improbation against Captain Sanderson, as the user of a false writ.

ANSWERED,---It was very true the writ he gave into the register proved only to be a mere copy; but it is as true, that was the paper he got from Dougalston

as a principal, and he always esteemed it such till he inspected narrowly the subscriptions: and he could have no temptation to forge a paper, when there was a principal extant, especially where it does not differ in one syllable from the true principal; for falsehood is ever contrived to the advantage of the forger, which is not here.

REPLIED,—It is as little to be supposed I would have given you a copy instead of a principal; for *cui bono* could that be, when I had an original in my own hand?

The Lords finding much humour on both sides; for allaying of heats, they found, That Captain's Sanderson's registrating and charging on the said double was a pure mistake, and therefore assoilyied him from the improbation, and found no ground to insist upon any forgery in this case; as also found, there was no manner of suspicion to infer that Dougalston had given this copy to Sanderson, or that there had been the least indirect dealing upon his part; but ordained the said copy given in to the register to be torn and cancelled. Dougalston insisting to have the Captain made sensible of the injury he thought was done him, by craving him pardon; and the Lords thinking he was fully vindicated without that; he entered his appeal to the Parliament, and protested for remedy of law and reparation of his honour.

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1703. *June 5.* DANIEL SIMPSON *against* SIR WILLIAM BRUCE and OTHERS.

HELEN Spence, being infest in an annualrent of £40 yearly out of the lands of Grangemuir, pursued a pointing of the ground: wherein Sir William Bruce, heritor of the land, compearing, ALLEGED preferable rights to exclude her; and a term being assigned, and accordingly a production made, but the same having been taken up, there was a circumduction pronounced conditionally, allowing if they were reproduced within fourteen days; after which, the decret of circumduction is extracted, and Daniel Simpson, writer to the signet, having acquired right thereto, and charging thereupon, suspension and reduction is raised thereof at the instance of Sir George Nicholson and Weyms, subsequent heritors, who had purchased the lands from Sir William Bruce; who insisted, on thir reasons, That the decret was extracted disconform to the minutes, and so was null, there being no minute of the date of the decret, mentioning that the writs had been once produced and taken up again, but only a simple circumduction; neither is there any decret put up in the minute-book of that day's date, in December 1687, which is the date of the decret, as ought to have been. And the Lords having ordained the minutes and warrants of the decret to be produced, and the parties being this day heard thereupon, it was ANSWERED for Spence and Simpson,—That their decret *in foro* could not be quarrelled now, after sixteen years, in so summary a way: Decreets alleged unwarrantably extracted, and recently quarrelled, may be brought back; but where it is not *de recenti*, as here, they ought to go on *via ordinaria* in their reduction.

But the Lords having both the decret and its whole warrants lying before them, they received and took in the reduction *hoc loco incidenter*, the production being held fully satisfied; and found the decret null, seeing it was taken out