

ed, to be held as confessed: Much less doubt can there be that the old form must remain, with regard to matters of a criminal nature, where holding as confessed will not answer the purpose. It further occurred, that it is a privilege inherent in all courts, sovereign courts especially, to explicate their own jurisdiction, and to take all proper steps preparatory to judgment, such as obliging a man to answer personally to facts that are charged against him. And, if it be a necessary or useful step to examine a party accused, which is undeniable; it necessarily follows, that all legal compulsion may be directed by the Court to force personal compareance.

‘ Upon these considerations the LORDS refused the petition without answers.’

*Rem. Dec. v. 2. No 19. p. 32.*

1741. July 28.—1742. June 15. & 22.

HAMILTON against BOYD and Others.

UPON advising a bill, with the answers, against an interlocutor of an Ordinary, finding the importation of Irish victual probable by oath of party, two preliminary points were stirred upon the bench, which were thought to merit a hearing in presence, viz. *1mo*, Whether the jurisdiction for cognizance of this crime was not by the act 3d Parl. 1672, privative in the Privy Council now abolished? and if it was, Whether any more is committed to the Judge Ordinary by the act 9th Parl. 1703, which ratifies the act 1672, than the power of convicting and transporting such offenders as are under the degree of heritors? *2do*, Supposing the jurisdiction in the Judge Ordinary, Whether, by said act 1703, the time for trying the offence be not limited to six months, which in this case were expired.

And upon hearing in presence, it was upon the 28th July 1741, found, ‘ That the importation of Irish victual, prohibited by the act of council 1668, ratified by subsequent statutes, is competent to be tried by the Judge Ordinary; and that the limitation of six months for trying the offence by the statute 1703 does only respect the superadded penalty of transportation.’ But then, it was also at the same time found, ‘ that such importation was not probable by the oath of the party, and that therefore the offenders could not be obliged to depone against themselves.’

THE COURT was so unanimous upon the point of jurisdiction, that parties acquiesced; but it was much divided upon the other two points, of the prescription and proof by oath; and both parties having reclaimed, the LORDS, upon the 15th June 1742, ‘ Refused the defenders petition upon the prescription, and so far adhered;’ but, upon answers, altered their former interlocutor as to the mean of proof, and ‘ found the offence probable by the oath of party,’ and thereto again ‘ adhered’ upon the 22d.

As it cannot be denied, that it had been reasonable enough for the Legislature to have extended the limitation in point of time to the whole offence, the

No 69.

No 70.

Found, that the crime of importing Irish victual was cognisable in the Court of Session, in lieu of the Privy Council abolished.

No 70. LORDS, who were for the interlocutor on that point, would willingly have been for that construction of the statute; but they could not bring themselves to think that the statutory words could bear it. Besides, there is a clause in the after part of the act which did not appear to be consistent with it. It is that which declares the vessel, though not seized when the importation is first made, to be seizable at any time within two years thereafter; a reasonable enough limitation, on supposal that action lay for the trespass, but not so consistent that the vessel should be seizable for two years, if the offence itself ceased in six months as to all other effects.

And as to the other point, the mean of proof, as the expression in the statute, to be proved *prout de jure*, is in the constant stile and language of the Court, a proof of all kinds, by oath, writ, and witnesses, and as such, may be said to have received a determined signification, with which no one can suppose the penman of the statute to have been unacquainted; so it had been idle to have mentioned any thing of the proof at all in the statute, if no more had been intended, but that the offence should be proved as accorded of the law: Nor is there any instance of a statute providing any thing as to the proof, except where something is intended to be ascertained, which might on the strictest rules of proof have been disputable. It was also in itself reasonable, that this offence should be probable by oath, for, in many cases, it would have been very difficult to prove it otherways

It may at the same time be true; that, were this mean of proof inconsistent with the principles and genius of the law, it might be hard from technical words to draw such construction; but it is far otherways: For with us all the *crimina leviora*, the breach of the penal statutes as they are called, as woodcutting, breaking orchards, stealing bees, &c. are probable by oath; and in general, in all cases where the punishment is not *corporis afflictiva*, the crime is thus probable; and, though in one particular in the statute, there is the penalty of transportation, yet that affects only the lower rank of men. And we even have other instances, where, notwithstanding the punishment be transportation, the offence is probable by oath, viz. The exportation of wool, which the statute declares to be probable by oath and otherways, as accords of the law; so that all the question was, Whether the technical words in this statute should not receive that construction, which is agreeable to their known import.

*N. B.*—It must at the same time be admitted, that the authority of this as a decision will be the less when it is remembered, that both points were carried by a small plurality: That for proof by oath, by the narrowest majority, when some of the Lords were absent, who had been for the prescription and against the oath; and that against the prescription first and last, but by one vote.

*Fol. Dic. v. 3. p. 343. Kilkerran, (DELINQUENCY.) No 7. p. 157.*