No 264.

To conclude, it is of no import, what is alleged from the British act, 12th of Queen Anne; for that act determines nothing, as to the method of probation; and if there is a greater latitude in the manner of proof in England than here, it will not follow, that we are tied down to their manner of proof; the pursuer might, with the same reason, plead, that this case, as to the proof, ought to be tried by a jury, because such is the custom in England. All the British statute can be alleged for, as to this question, is, in so far as concerns the definition of the crime, what facts are comprehended under the law, and what not; for as to the manner of proof in the several parts of the united kingdom, for establishing the facts inferring the crime, that remains entire as formerly, to be prosecuted agreeably to the forms and genius of the law in each country.

"The Lords found the libel probable by other habile witnesses, as well as the instrumentary witnesses."

Fol. Dic. v. 2. p. 233. Rem. Dec. v. 1. No 43. p. 84.

1742. *June* 22. Hamilton *against* Boyd, &c.

No 265.

The Lords found, that in trying the crime of importing Irish linens, the offence was probable by the oath of the offenders.

Fol. Dic. v. 4. p. 162. Kilkerran.

*** This case is No 70. p. 7335. *voce* Jurisdiction.

1752. *February* 18. Kennoway *against* Ainsley.

No 266.
That a document of trust was destroyed by the granter, proveable by witnesses; and a *semiplena probatio* of the tenor sustained.

George Ainsley, portioner of Newbottle, by disposition in 1721, conveyed his tenement of land and acres in Newbottle to his daughter Jean, with absolute warrandice. He thereafter, in 1723, conveyed the same subject to Robert Ainsley, his brother.

Of this second disposition William Kennoway, son and heir of the said Jean, pursued a reduction, as having been granted in trust, and under back-bond, and that Robert had unduly got up the back-bond, and destroyed it; and, for proof, appealed to the deposition of the deceased Peter Middleton, writer in Edinburgh, and of William Junkieson, merchant in Dalkeith, emitted in an exhibition of said back-bond pursued against Robert, and against the present defender, John Ainsley, to whom Robert had conveyed the subject.

In that exhibition Peter Middleton deponed, 'That George Ainsley, portioner of Newbottle, did, *in anno* 1723, dispone and make over the subjects in 'Newbottle, and others belonging to him, in favour of Robert Ainsley, his 'brother; and that, of the same date, the said Robert granted back-bond to George, declaring the same to be in trust to him, for the behoof of the said

'George; and which back-bond proceeded on this narrative, That although 'the disposition granted by George to him did bear, that he had paid certain 'sums of money therefor; yet the truth was, that he paid no sums therefor, 'but the same was granted to him in trust by his brother, in order to prosecute 'an action of count and reckoning against one Porteous, who had a wadset 'right upon the subjects disponed; and, therefore, he obliged himself to de-'nude. Which back-bond was lodged by George, the disponer, in the depo-'nent's hands, where it remained several years. But when George was upon 'death-bed, Robert, the disponee and granter of the back-bond, came to the 'deponent, and told him that his brother wanted to see the back-bond; upon 'which the deponent gave it to him, and knows not what afterwards became 'of it.' No 266.

And William Junkieson deponed, 'That he has heard the deceased Robert 'Ainsley say, that he had granted a back bond in favour of his brother George, 'and has heard him also say, that the said back-bond was lodged in the hands 'of Mr Peter Middleton; but the deponent never saw the said back-bond, nor 'does he know the nature thereof; but heard the granter say, that he got it 'from Mr Peter Middleton, and had burnt it.'

On advising this proof, the Ordinary, who had considered the case as of a trust, which could not be proved by witnesses, "Repelled the reasons of reduction, and assoilzied the defender."

But, upon advising petition and answers, the Lords took the case in a different light, namely, that the allegeance was not of a trust to be proved by witnesses, but of the fraudulent destroying a back-bond, and that this is a fact probable by witnesses; and this fact appeared to the Lords to be proved by the witnesses, the one witness, Middleton, being positive, and the other swearing to more than a hearsay, when he says, that Robert himself told him that he had got it up from Peter Middleton, and burnt it. And though the second witness says nothing of the tenor of the back-bond, concerning which Middleton is particular, that was thought not to be material; for that where a man is proved to have destroyed a deed, the law will make a tenor for him. And as little was it thought material that the proof had not been taken in this reduction, but in an exhibition, as that exhibition was against the same defenders.

Accordingly, the LORDS "Found the reasons of reduction relevant and proved."

Fol. Dic. v. 4. *p.* 162. *Kilkerran*, (PROOF.) *No* 15. *p.* 448.

1784. *July* 28. ELIZABETH CHALMERS *against* HELEN DOUGLAS.

No 267.
How far, in an action of defamation, such ques-

HELEN DOUGLAS, being pursued in an action of defamation and damages, before the Commissaries, by Elizabeth Chalmers, alleged compensation, on account of certain printed writings, of an injurious tendency, ascribed by her to