

obliged to answer to inferior courts. *2do*, He was not taken saying mass ; and the clothes and ornaments were not his, but belong to the Lady Seaforth ; neither can it be proven that he is a priest, but has lived these many years in Edinburgh, without giving offence to the government or any others. *3tio*, The libel against him was not proven ; for all the witnesses adduced were the constables, and a servant woman in the house where he was seized. Now the constables are inhabile ; for they have a premium and reward for their discovery ; and so are parties that can tine or win. And, as to the woman, she is most incompetent in a matter that dips so near to treason.

ANSWERED for the Town,—That they were sufficiently empowered to banish him out of Scotland, by the Queen's late proclamation against Papists, in August 1709 ; whereby she requires the Justices of Peace, and all her other Judges, to put the laws against Popish priests punctually to execution : and it is the interest of our religion how many judicatories be empowered to execute these laws ; especially seeing the Privy Council is now suppressed. *2do*, It is not pretended he was taken in the act of saying mass, for that is capital by our law ; but only that he is a seminary priest ; and which they need not refer to his oath, because, by dispensation, they have express allowance to swear, with this mental reservation, that they are not priests, meaning they are not priests of Baal or of Jupiter ; and this they call an innocent invention, for easing their oppressed consciences : but they use a short process, by offering him the test and formula against popery, ingrossed in the Act of Parliament 1701 ; and which he refusing to sign, it is *probatio probata* against him. As to the *third*, about the inhability of the witnesses,—if the constables were rejected, this crime could never be proven ; and they being public officers of justice, whatever share befall them, none can be fitter. And, as to the woman, in latent cases *et ubi est penuria testium*, they are every day received.

The Lords repelled the reasons of suspension in respect of the answers ; and ordained him to enact himself to remove, betwixt and a day, out of the kingdom ; and, in case of refusal, to be imprisoned till a ship was ready to transport him.

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1711. November 7. THOMAS SCOT against WILLIAM BAILIE.

THE Lord Polton, probationer, (in the room of Lord Anstruther, deceased,) reported Scot against Bailie. James Baillie of Glentirring being debtor to Scot of Gilesby in 100 merks, by bond, in April 1696 ; Thomas Scot, the creditor's son, having right thereto by assignation, pursues Mr William Baillie, advocate, as representing his brother on the passive titles, for payment.

ALLEGED,—The bond being usurious, he must be assoilyied from the debt ; in so far as it is dated the 23d of April 1696, and yet is made to bear annual-rent from the Martinmas 1695 preceding, which is five months and twelve days ; and does not bear the usual clause and declaration accustomed to be inserted in such cases, where money is borrowed betwixt terms, that the money was truly lent, given, and received at the preceding term, notwithstanding its date posterior thereto.

ANSWERED,—Landward writers know not all these subtleties ; but it is plain

there was a preceding cause of debt prior to the date of the bond ; and which was not borrowed money ; for it bears no such thing, but allenarly that it was resting owing. Now, it is a known principle that usury takes properly place *in mutuo*, which this is not ; for, though law reprobates the exorbitant profits of money, which, of its own nature, is barren, and has confined and reduced it to a certain moderation and quantity, yet this is only in money borrowed and lent ; for, in the matter of goods and commerce, the *fœnus nauticum et pecunia trajectitia* may very justly exceed these rules, because of the apparent risk and hazard they run ; as in policies of insurance, contracts of bottomry and the like. And the ground of this bond has certainly been a bargain of goods, and no lent money.

REPLIED,—Usurious oppression has appeared under many different shapes ; and, as it broke out, it was nipped by sundry Acts of Parliament ; such as, Act 52d 1687, Act 222d 1594, Act 247th 1597, and Act 28th 1621 ; and has been often discouraged by the Lords ; as, 30th July 1673, *Stevenson* against *Wilkison* ; 2d January 1677, *Hepburn* against *Nisbet* ; and 1st December 1680, *Johnston*. It is true, the canon law discharged annualrents as usury ; yet this was but a mere pretence ; for they allowed me to buy an annuity on my neighbour's land, which was every whit as grievous, and the same thing except only the name, and was the rise of our infestments of annualrents. By the old Roman law, and an article of the twelve tables, all then exacted was *usura unciaria* ; but, in process of time, it grew to six or eight, and sometimes to ten *per cent*. And the English allow it aye till it equal the principal sum, and then it stops ; and Justinian did the like.

The Lords found there was no usury in this case ; and it occurred to some, that, though it had, the same was fully taken off by the act of indemnity. Others said, though that took off the penal part, yet it did not dispense with the private party's damage. But there was no necessity of recurring to this defence, seeing the clause was not found usurious.

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1711. November 10. JOHN BUCHANAN *against* LAWRENCE CRAWFURD of JORDANHILL.

JOHN Buchanan being a creditor to Keiry *alias* Craigengelt of Gogar, he arrests some rents belonging to him, in the hands of Sir George Mackenzie of Coull, and pursues a forthcoming. In which Lawrence Crawford of Jordanhill compears, and craves preference ; because he had adjudged these lands, whereof the maills and duties were craved, long before Buchanan's arrestment.

ALLEGED,—No respect to your adjudication : 1mo, Because you are never yet infest upon it to this hour. 2do, You have been *in morâ et culpâ* ; in so far as though you be ten years prior to my arrestment in date, yet you have never done any diligence to affect the rents, nor have you raised a process for maills and duties ; and therefore the Lords, in a parallel case, 14th February 1623, *Saltcoats* against *Broun*, found a posterior arrestment preferable to a prior comprising ; where they had been negligent for many years, and neither taken infestment nor done diligence thereon.

ANSWERED,—That the apprising was a legal assignation, and so needed not intimation, but carried the maills and duties without any more. And though,