

No 32. probation, and the term circumduced against them for not proving thereof; and, therefore, that the same ought not to be admitted again to the cautioner's probation; and this was found, albeit the cautioners were not called, nor compared in that process, where the same was proponed by the Executors; and albeit he *alleged*, That what was done there ought not to prejudice him, he not being then party, and that their omission ought to burden none but themselves, and ought not to take the benefit of this lawful defence from him; which was repelled, as said is.

Act. *Nairn and Mowat.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 351. Durie, p. 54.

* * * Haddington reports this case :

ARCHIBALD WOOD of Craig having obtained a decret against the executors of his debtor Carre, because they having proponed an exception of exoneration, suffered the term to be circumduced, Craig pursued Mr James Wood, cautioner for the executors in Wood's testament, to pay the sum contained in the decret, obtained against the executors for whom he was caution. He comparing, proponed the exception of exoneration, which the executors had proponed, and failed to prove, and he offered to verify the same. THE LORDS repelled the allegiance, because the admitting of it would have made the decret against the executors null, and frustrate Craig of all his decret and action, whereas Mr James Wood had his action of relief against the executors.

Haddington, MS. No 2709.

1623. March 8. KING'S ADVOCATE against MORISON.

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One who had stipulated more than legal interest, had obtained decree for payment. Afterwards sued for usury, the decree was not held to be *res judicata* so as to protect him.

IN a pursuit at the King's Advocate's instance, against one Morison in Dumblain, to hear him decerned to be punished as an usurer, for taking of more than ten for the hundred, conform to the act of Parliament; because the contract, which was given to the defender, for the security of his money, which was lent by him to Douglas of Mains, who provided him to a victual annualrent, and prices therein liquidated, far exceeding ten for ilk hundred, which was recovered by Morison, and payment made thereof to him by Mains; this pursuit was sustained, and the defender found to have incurred the pain statuted against usurers; notwithstanding that it was *alleged* for him, that what he had received, and was paid to him of the victual, and price thereof, the same was decerned in his favours by decret and sentence given *in foro* against the Laird of Mains his debtor, whereby the LORDS found his letters orderly proceeded against this party, for payment of the prices of the victual conditioned in his decret; so that he having a decret of the Sovereign Judge for his warrant, the same should

not be a snare to make him to be punished as an usurer ; especially seeing, in that same process, the party proponed a reason of suspension, founded upon this same act of Parliament, whereby he desired to be freed of payment, of any greater profit than ten for the hundred, and which was then repelled by the Lords, and so ought not now to be produced in this action against him. This allegiance was repelled by the LORDS, and the pursuit sustained.

Act. *per se.*Alt. *Kinross.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 351. Durie, p. 57.*

. Haddington reports this case :

THE King's Advocate pursued one Morison for the unlawful taking of usury frae William Douglas of Maines, to wit, aucht pund for ilk boll of three score bolls of victual, liquidate in a back tack set be Jackson to Maines of lands wherein he was infest by Maines for 3000 merks. It was *excepted*, That the LORDS had sustained *in foro contradictorio* the said back tack as lawful, for the years 1611, 1612, 13, 14, and 1615, and 16. It was *answered*, That the Lords had not then taken cognition of the unlawfulness of the tack; and that the want of payment had made them to allow the greater prices, having also respect that the prices of these years were not great; and therefore they repelled the exception, in case the King's Advocate should prove that the defender had received payment, but would not condemn him for making the contract, if no payment had followed, or that he had only received lawful annualrent, not exceeding ten for the hundred, albeit the contract contained unlawful paction.

Haddington, MS. No 2805.

1623. July 9. ARNOT against HUME of Manderston.

ARNOT having recovered decret against the Executors of one Hume, for payment of a sum addebted by the defunct, after he had denounced the Executors to the horn, by virtue of that sentence, and sought their moveables to have poinded them; and, finding nothing, neither moveables nor lands, of the executors' poindable, or to be comprised; thereafter Arnot pursues Manderston, who was cautioner for the Executors in the confirmation of the defunct's testament, to make the goods furthcoming for satisfaction of this sentence; wherein the cautioner, who was convened, compeared, and *alleged*, That all the goods and gear contained in the testament, were exhausted by a lawful decret recovered *debito tempore* before the pursuer's sentence, at the instance of another creditor for a lawful debt of the defunct's, to whom payment was made. This exception was found reelevant by the Lords, albeit the pursuer *replied*, That it could not be admitted against the decret standing, obtained at his instance against

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Where exhausting was omitted by the executor, it was admitted for the cautioner being instantly verified.