

allegiance founded upon the contract betwixt the Commissioners of Excise for the shire, and the good town, in the year 1676.

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1711. *July 21.* Sir ANDREW KENNEDY, Conservator, &c. Supplicant, *against* Sir ALEXANDER CUMING of Culter.

SIR Andrew Kennedy gave in a bill representing, that the decret pronounced against him in favours of Sir Alexander Cuming, 9th December, 1707, was, upon the petitioner's appeal, reversed by the Lords Spiritual and Temporal in Parliament assembled: who, 19th April last, declared and adjudged, that the commission granted by her Majesty to Sir Alexander Cuming is void, and that the commission granted the petitioner and John Vere Kennedy, his son, is still subsisting in full force; and ordered the Lords of Session to direct the expenses in these suits to be taxed according to the course of their Court, and paid to the petitioner by Sir Alexander Cuming. Pursuant to which decree of the House of Peers, the petitioner, 14th of June last, caused intimation to be made under form of instrument to Sir Alexander Cuming, that he was to insist, before the Lords in Scotland, the fifth of July instant, conform to the said judgment of the Lords of Parliament. Therefore the petitioner craved, that the Lords, in compliance with the said ordinance of Parliament, would please to direct and tax the said expenses, conform to an account extending to L.1500 Sterling in gross, and decern Sir Alexander Cuming to make payment thereof to the petitioner.

Some of the Lords were of opinion, that they might proceed to tax the petitioner's expenses without citing Sir Alexander Cuming, by order of their Lordships. Because it is not left to the Lords to determine if expenses shall be modified or not; but they are ordered to tax the expenses according to the course of their Court, which is to modify expenses *postquam conclusum est in causa*, before extracting decret, without any new citation to the party to be decerned: and considering the connexion of the process first intended before the session, with the appeal, judgment, and order of the Peers to tax the expenses; both parties are now before the Session in the same state as if Sir Andrew Kennedy had prevailed against Sir Alexander Cuming in that Court. Besides, Sir Alexander Cuming being present in the House of Peers at pronouncing the decree, he was warned, *apud acta*, that the Lords of Session were to tax the expenses; which he was farther certiorated of, by the notorial instrument. But the plurality of the Lords refused to enter upon the consideration of the petitioner's expenses, till Sir Alexander Cuming be legally cited by an order of the Session, that he may come prepared to object against the quantity of the expenses to be modified: There being no process in dependence before the Session, the same having terminated by an extracted decret; and the order to the Lords is not to tax expenses, but according to the course of their Court, which is by process upon lawful citation. Sir Alexander's hearing the decree of the House of Peers was no legal certioration, the

day of compearance not being therein prefixed. Again, the intimation by a notary was insufficient; that being only a private deed, without any authority. And Sir Alexander's private knowledge cannot be considered as equivalent to a citation. *Vide June 26, 1711.* *Page 532.*

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1711. *July 21.* The MAGISTRATES of EDINBURGH, *against* THOMAS MACKIE, Priest.

THOMAS MACKIE being charged upon a decret, obtained against him as a priest, upon the Act 3. Sess. 8. and 9. Par. K. W. and her Majesty's proclamation 2d September, 1709; before the Magistrates of Edinburgh, as Justices of Peace within the liberties and privileges thereof; at the instance of Mr. Samuel Gray, their procurator-fiscal, to remove himself furth of Scotland within a certain short space; with certification, that he should incur the pain of death, in case of returning: he offered a bill of suspension upon these grounds: 1, The said Act 3. empowers only the Lords of Privy Council or Justiciary to banish popish priests convicted; and therefore now, when the Privy Council is taken away, the Lords of Justiciary are the only proper Judges to send priests into banishment. So that the sentence against Mr. Mackie is *a non suo judice*. For her Majesty's proclamation, 2d September, 1709, requiring Justices of Peace to put the laws in execution against papists, gives no new jurisdiction, but only continues what the law had formerly given them within their respective districts. 2. The decret is intrinsically null for want of probation, in so far as the constables were admitted as witnesses, who were the accusers, and to be gainers in the event; 500 merks being appointed by Act of Parliament as a reward to the discoverer of any popish priest, jesuit, or trafficking papist. Women were also admitted to bear witness. 3. The trial proceeded without an inquest; which ought not to have been done in the case of a crime inferring so severe a punishment.

ANSWERED for the chargers.—Whatever might be said of laws referring the cognition of matters to the Privy Council with discretionary powers; yet, in present case, where law hath determined the nature, proof, and punishment of a crime, and hath left only the execution to the Privy Council; the suppression of that Court cannot be reckoned an abrogation of the other heads of the act 1700; but the execution thereof becomes the province of every Judge and Magistrate within his particular jurisdiction. For it is upon the account of executing the laws, that they are invested with powers and jurisdiction: which execution is universal, except in so far as it is restrained by the special privilege or competency of any other jurisdiction; and when that is suppressed, the ordinary jurisdiction, as freed of that restriction, takes effect universally for executing the laws. Nor is it any absurdity that the Magistrates of Edinburgh, who have but a territorial and circumscribed jurisdiction, should banish out of Scotland: because,