

No. 24. the less it be, it speaks the more covetous humour. Neither can it be palliated and excused as a mistake; for he has wrote on the back of the discharge with his own hand, that he had allowed three quarters retention, whereas it was due that whole year; and processes of usury have been sustained for less before the Justices, as in the case of Purdie in the year 1666, where the excess only amounted to threepence or thereby; and the like, 28th November, 1668, Hugh Roxurgh. The Lords thought it had happened purely by mistake, and therefore repelled the reason of suspension, and found no usury in this case; but ordained him to restore the exresce, or else default and allow it out of the next year's annual-rent.

Fountainhall, v. 2. p. 346.

1709. *January 26.* COLVIL *against* IRVINE.

No. 25.

A bond for a perpetual annuity above the legal annual-rent, redeemable by the debtor on payment of the principal sum and by-gone annuities resting at the time, was found to be usurious, although the principal sum was sunk *quoad* the creditor, who could not charge for payment thereof upon the bond.

Forbes.

* * This case is No. 6. p. 6825. *voce* INDEMNITY.

1711. *November 7.*

THOMAS SCOT in Castlemains of Crawford, *against* Mr. WILLIAM BAILLIE of Glentewing, Advocate.

No. 26.

One suing on a bond which acknowledged the granter to be justly addebted and owing to the pursuer's cedents a certain sum, and obliged him and his to pay the same to the pursuer, his heirs and assignees, at the time therein mentioned, with annual-rent

Thomas Scot pursued Mr. William Baillie, as heir to James Baillie of Glentewing, for payment of a bond dated 23d April, 1696, whereby James Baillie acknowledged himself to be justly addebted and resting to Robert Scot of Gilesby, the pursuer's author, 100 merks, which he obliged himself, his heirs and executors, to pay to Robert Scot, his heirs, executors, or assignees, at the term therein mentioned, with annual-rent from Martinmas preceding 1695.

Alleged for the defender: The bond is usurary and null; the debtor being obliged to pay annual-rent five months and twelve days before the date, without any declaration (as is usual when money is borrowed betwixt terms) that the money was lent at Martinmas, for this is like the taking annual-rent before hand, which imports usury, December 1st, 1680, Johnston *against* L. Haining, No. 18. p. 16414; and the many different shapes that usurious oppression has broken forth in, should be a prevailing motive to check the least appearance of it.

Replied for the pursuer: Usury by our law is the taking a greater interest for money than the act of Parliament allows, or taking fore-hand payment of interest;

neither of which can be alleged in this case; for the words "justly addebted and resting" do not argue necessarily, or imply, that the money was borrowed and received at the granting the bond; but it is to be presumed, *ut actus valeat*, that the bond was granted for money owing by the granter to the receiver at Martinmas; and it was reasonable to make it bear annual-rent from the time the money fell due; and though the bond be uncautiously written, for not expressing when the money was first due to the creditor; this oversight cannot be sustained as a ground to charge the guilt of usury upon the pursuer, who is not the original creditor, but an assignee for an onerous cause, especially considering, that no annual-rent hath been paid as yet.

The Lords found, that the pursuer is not guilty of usury, and therefore repelled the defence.

Forbes, p. 537.

No. 26.
from a term five months and twelve days before the date of the bond, not guilty of usury, because the money was supposed to have been borrowed at the said preceding term.

1714. *January 29.*

The TOWN of ABERDEEN *against* ROBERT MARTIN of Burnbrae:

In the discussing of the suspension of a charge at the instance of the Town of Aberdeen against Robert Martin, for payment of L.1000, and bygone annual-rents thereof contained in a bond granted by the said Robert Martin to the Dean of Guild of the said burgh; the Lords found usury not incurred by the granting one discharge for a year's annual-rent of the said L.1000 from Lammas 1709, to Lammas 1710, and another discharge of annual-rent thereof from Whitsunday 1710, till Whitsunday 1712; for the granting of two discharges for one year's or term's annual-rent by mistake, doth not oblige the discharger to impute the additional sum received in payment of the principal, whereas usury is the taking wittingly more annual-rent for one year or term than law doth allow.

Forbes MS. p. 70.

No. 27.

1718. *February.*

SINCLAIR of Barrack *against* SUTHERLAND of Little Torbol.

Murray of Clairden and Sutherland of Ham, were conjunctly bound, *anno* 1700, to pay £.1600 Scots by bond, which came by progress into the person of Sinclair of Barrack. In November 1714, the aforesaid principal sum and all the bygone annual-rents being due, Barrack demanded his money from Clairden, and Sutherland of Little Torbol, the representative of Ham, the other obligant; but they not being ready at the time, agreed, upon the creditor's superseding any demand till Candlemas 1715, to pay him the whole sum, with the annual-rents thereof due at that term, and failing of payment, to accumulate all the interests, with the principal

No. 28.
Usurious paction.