*** This case is reported by P. Falconer:

No. 21. Robert Cuningham having granted a wadset of the links of Kinghorn to David Dowie, redeemable upon payment of £.1000, which wadset bore, That the granter of the wadset should pay the public burdens; there is a summons raised at the instance of Cuningham against Dowie, craving that Dowie might count for the superplus duty of the lands over and above the annual-rent, and that from the date of the wadset, in regard the wadset was improper, the granter of the wadset being obliged to pay the public burdens, and that there was no hazard that the same could be waste, it being grass lying at the port of Kinghorn, which the town could not want; the Lords found, that there were other hazards, viz. plague and war, which were mentioned in the act of Parliament, and which the wadsetter was liable to, and had no relief from the granter of the wadset, and therefore found him liable to count it not from the date of the wadset, but from the date of the offer of caution.

Therefore it was alleged, that the wadsetter behoved to be liable at the least from the date of a minute of agreement betwixt the pursuer and defender, whereby the wadsetter did restrict his wadset money for 1100 merks, which the granter of the wadset obliged himself to pay at Martinmas thereafter, and which 1100 merks the wadsetter was obliged to accept, and renounce the wadset, at the least he ought to count for the annual-rent of 400 merks, or a proportion of the mails and duties of the wadset lands effeiring to the 400 merks, being compared with the 1100 merks yet standing upon the wadset. The Lords found, that the restriction did not alter the nature of wadset, therefore found him only liable to count from the date of the offer of caution, and declared, that from that time he was only to have allowance of the annual-rent of the 1100 merks to which the wadset was restricted, and to count for the superplus duty.

P. Falconer, No. 114. *p.* 79.

1697. *February* 9.

ISOBEL M'CULLOCH *against* WALTER ROSS, Provost of Tain.

No. 22. A bond was quarrelled as usurious, because it was dated in the beginning of August, and payable at Whitsunday thereafter, with a year's annual-rent then, which made it bear interest a full quarter of a year before the date of the bond, contrary to the express tenor of the 222d act 1594. Answered, If the bond had borne to have been for borrowed money, this would have been a good objection; but its onerous cause was "that where she is justly addebted and resting owing," which presupposes a debt *ab ante*. Replied, The words being in the present time, in propriety of grammar, cannot be retrotracted; else this would make *is* and *was* owing all one. The Lords sustained this to purge the presumption of a crime

of usury unless they would prove by the creditor's oath, that it was not resting at the Whitsunday before. No. 22.

Fountainhall, v. 1. *p.* 765.

1697. *July* 23. BANK of SCOTLAND *against* MURRAY.

No. 23.
Stipulation to pay an additional *per-centage* in case of not payment at a day fixed.

Patrick Murray, collector, having borrowed £.200 Sterling from the Royal Bank of Scotland, upon bond bearing 4 *per cent.* but if he failed to pay within 30 days after the term, when charged, he should be liable in the full annual-rent of six; he having failed, and being charged, suspends on this reason; that he can be liable in no more annual-rent but 5 *per cent.* because, by the acts of Parliament, all the lieges have the privilege of retention. Answered, He cannot found on these acts against the Bank, which is a society erected by law, with the privilege of making by-laws and constitutions of their own; and seeing you have an evident ease of 2 *per cent.* in case of punctual payment, the exacting six is but like a penalty or termly failing in a bond, and cannot be reputed usury. Replied, Private pactions cannot derogate from the public law; and if this were allowed, then what hinders but they might insert a forfeiture of 7 or 8 *per cent. et quod directo non licet nec per ambages permittendum est*, otherwise *fraus fieret legi.* The Lords were divided on this point as new; but the plurality found the whole six due, not as annual-rent, but as damages liquidated betwixt the parties.

Fountainhall, v. 1. *p.* 789.

1706. *July* 25. DONALDSON *against* The TOWN of BRECHIN.

No. 24.
A trifling overcharge not punished as usury.

John Donaldson, Chamberlain to the Earl of Panmure, charges the Magistrates of Brechin for 1200 merks contained in their bond. They suspend on this reason, that he had forfeited the sum, the one half to the fisk, and the other to them as discoverers, conform to the act of Parliament against usury, because he had exacted £.45 Scots as a year's annual-rent of that sum from Lammas 1703, to Lammas 1704, conform to his discharge produced, bearing that sum; whereas the annual-rent for that year, retention being allowed, was only £.44. Answered, This was but a mere mistake and wrong counting; for no man in his right wits would endanger his sum for 20 shillings Scots, which was all the excresce here; and the law says, *de minimis non curat prætor;* and there could be no *animus delinquendi*, where there is no temptation; and the town-clerk having drawn the discharge, has so framed it, either by mistake or design, to ensnare him; and the not allowing of retention is not usury, except when demanded and refused, which cannot be pretended here. Replied, The case is plain, he has taken more annual-rent than law allows, *et majus et minus non variant speciem, et justicia non consistit in quantitate;* and