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

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 excresce, 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 Crawfurd, *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;