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.

No. 27.

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.

1718. *February.*

SINCLAIR of Barrack *against* SUTHERLAND of Little Torbol.

No. 28. Usurious paction.

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. sum which should be due at Candlemas, extending to the sum of £.2854; which accumulated sum was to bear interest from the said term of Candlemas: And in the terms of that agreement, a bond is extended, and duly signed the last day of November 1714; wherein the interest is computed to the Candlemas thereafter, payment of the whole sum is superseded till that term, and the accumlated sum bears interest then, and no sooner. Sutherland of Little Torbol being charged upon this bond, obtained suspension upon the head of usury, in respect that here was a paction, making annual-rent bear annual-rent before it fell due, expressly against our laws, Lord Stair, Lib. 1. Tit. 15. § 8. near the end; for though accumulations *præteriti temporis* are allowed, accumulations *futuri temporis* are undoubtedly usurious: And there is this reasion in it, If pactions be sustained, making annual-rents not yet due bear interest, it shall be in the power of creditors directly to stipulate compound interest by making such a general paction as this, "That every term's interest bear interest from the time it falls due;" which is expressly in the face of the law, that allows only of simple interest. Nor is there any thing in the act 28, 1621, against the suspender; which was only intended to rectify a common abuse of retaining a term's annual-rent from the debtor at the time of lending the money: It allows indeed the annual-rent to be added to the principal, both to be payable at one term; but it does not permit the annual-rent which is added to be accumulated with the principal into a capital, bearing annual-rent after the term of payment.

In answer to this it was observed, That by putting off the accumulation till Candlemas, the debtors, in place of losing, had a visible advantage: For if the principal sum and bygone annual-rents due at making the bond the last of November 1714, had been accumulated at that date into a principal sum bearing annual-rent from the date, as lawfully they might have been, the debtors would have paid interest for fourteen years annual-rents, from November to Candlemas; which interest is saved to them every penny, by putting off the accumulation to Candlemas, notwithstanding the date of the bond. This being premised, if the matter be considered to the bottom, it will be found, that our severe laws against usury, tend only to curb the exorbitancy of lenders of money, who profiting of the borrowers their necessity, would urge them to harder conditions, and higher usury than the law allows: Wherefore it may be taken as a certain rule, "That any paction of what nature soever, is not usurious, or reprobated as such by our law, unless it impose higher interest on the debtor, and harder conditions, than the creditor in law could demand." From this view of the matter, it will be clear, that the argument used by the other party will by no means hold in this case, since the reason of reprobating the provision of annual upon annual, is, that thereby the creditor has by the *primary* and *original* obligation a greater interest than the law allows; whereas in the case now in hand, the creditor has not exacted so much as by law he might have done, by making the debtors pay or accumulate at the date of the bond, as has already been observed: And indeed it would be extraordinary to imagine, that the judges by interpretation (for their is no express sta-

tute determining it to be usurious) should annul a paction, for the relief of a debtor, when the debtor can complain of no hardship thereby, but on the contrary, must acknowledge himself eased of greater severities, which by law he would be subject to. This much the pursuer has to say upon the head of equity, which must justify him, though he had not the forementioned act to speak in his favours; which at the time of lending the money, and making of bonds, allows the annual to be added to the principal, and of consequence, the whole to bear annual-rent after the term of payment; which is precisely the present case. No. 28.

"The Lords repelled the objection."

Rem. Dec. v. 1. *No.* 11. *p.* 21.

1718. *July* 18.

JOHN DOUL, Writer in EDINBURGH, *against* The CREDITORS of YOUNG of Winterfield.

No. 29.
The characteristics of proper and improper wadsets.

In the year 1653, John Hepburn of Wauchton, for the sum of 24,500 merks, received from Walter Young, dispones to him, under reversion, the lands of Winterfield, with all provisions accustomed in proper wadsets; and after assignation to the mails and duties, subjoins the following clause: "And the said John Hepburn of Wauchton binds and obliges him and his foresaids to make the foresaid acres and lands called Winterfield, to be worth yearly twelve chalders good and sufficient bear; and what shall not be duly paid yearly by the tenants thereof to the said Walter Young, &c. the said John Hepburn shall make the same up out of the first and readiest of the best bear he has paid him out of any part of the rest of his lands, and shall deliver the same to the said Walter, &c. yearly, at the ordinary time, for paying the farms and duties in the country, or else shall pay the ordinary price yearly for ilk boll that shall happen not to be delivered: And for the better effectuating thereof, it is hereby agreed, that the said John Hepburn, notwithstanding of the said Walter Young's being in possession of the said land, and uplifting of the farms and duties thereof, shall have power to output and input tenants at his pleasure, and the said Walter Young shall concur with him thereanent." John Doul, writer in Edinburgh, having acquired right to the reversion of these lands, intented reduction and declarator of extinction of the wadset, upon this medium, that the reverser here undergoing the hazard of the rents, the wadset is thereby in its nature improper; and the sum for which it was granted, being satisfied and paid by intromission with the rents of the lands, the wadset-right is extinguished.

The defenders observed, That the wadset does not provide, that the reverser shall make the rents of the lands worth the annual-rent of 24,500 merks, but only that the lands shall be worth yearly twelve chalders, and that the reverser shall make up to the wadsetter what the tenants are deficient in paying of that quantity: Now, if it was possible that twelve chalders of victual should, by lowering the