1724. *January* 7. James Mitchell *against* William Petrie.

No 264.
Usury may be proved by witnesses, and the proof not restricted to instrumentary witnesses.

James Mitchell, upon the 15th of March 1723, granted bond to William Petrie, for the sum of L. 2034 Scots; of which bond he insisted in a reduction, upon the head of usury, narrating, That this bond was made up of several former debts, some of which were not payable till Whitsunday and Martinmas 1723; and condescended upon the following particulars, 1*mo*, That the creditor exacted payment upon the said 15th of March, of annualrents that were only to fall due at Whitsunday thereafter; 2*do*, He exacted a bill at the same time, for the annualrent that was to fall due only at Whitsunday 1724, which was paid in a few days thereafter, notwithstanding the debtor had likewise paid L. 20 Sterling of the principal sums; so that there was not only a fore-hand payment of annualrent, before it was due, but the exaction of the annualrent of L. 20 Sterling for a year, more than the new bond was granted for: All which particulars the pursuer offered to prove by witnesses present at the transaction, who assisted in the calculation of the annualrents, and saw the money paid; one of which is likewise an instrumentary witness in, and writer of the bond craved to be reduced.

It was *objected* by the defender, That by act 7th, Parl. 16. James VI. usury is only probable by instrumentary witnesses, and not by extraneous witnesses.

The pursuer *insisted*, That the genius of our law has favoured the easy proof of usury so far, as even to allow the oath of the person guilty to be taken against himself, contrary to the practice in other crimes; yea even to allow the oath of the debtor to be taken in conjunction with other proof, and that because of the nature of the crime; and if there be not a greater indulgence given in the proof, that oppressive practice would be carried on with impunity: And it cannot be thought ever to have been the intention of our law, to allow such a latitude in some respects as to the proof of this crime, and in other points not to allow a pursuer the benefit of such proof as by our own practice, as well as the law of nations, is competent in the proof of any other delinquency, since every other crime may be proved by witnesses, even the emission of words. And although the proving the delict may have an influence as to the taking away a writ, (which our practice allows not directly to be taken away by witnesses) that does not at all hinder the delict to be proved by witnesses: And so it is known, that in reductions upon the head of force, the violence may, and is every day proved by witnesses, even others than instrumentary witnesses: Just so in the case of fraud, the previous communings, and communing that passed at the time of granting the deed, may be proved by any witnesses, more especially where there are circumstances that make it appear that such witnesses were communers, and had any concern in the transaction; and indeed were it otherwise, such things could not be proved at all. The Lords have had lately several actions for avoiding bills elicited by force and fraud, and indorsations of

bills, where the indorser's name hath been fraudulently filled up; in all such cases, they have not only allowed, and most justly, a proof of the direct fact of extorting the bill, eliciting it by undue means, or unwarrantably filling up an indorsee's name; but they have allowed a proof by witnesses of circumstances from which such things might be inferred, notwithstanding the pretence that writ could not be taken away by witnesses The Lords do not indeed allow payment of a bond by witnesses, where the bond itself appears undischarged and uncancelled, because of the most pregnant presumption, that a debtor will not pay, without retiring his obligation, or getting a discharge: But as to the cause of granting of writings, as to the way and manner of extinction of writings when they appear cancelled and retired, and as to the manner of eliciting of writs, those things are proved by witnesses every day; for were it otherwise, there would be an utter impossibility of detecting any of these under-hand dealings, it being easy so to manage as to leave no evidence by writing. In the case of usury, there is yet more occasion for full liberty of proof than in any other, because it is more latent, and exacted generally in such a manner, that it is impossible even the instrumentary witnesses can know any thing of it: Besides, it is in every case easy to evade this method of proof by instrumentary witnesses, for the usurer has no more ado but to take a bill or holograph bond. As to the act 7th, Parl. 16. James VI. upon a narrow view it will be found nothing for the defender, being far from confining the proof of usury to instrumentary witnesses: For explaining of which, let the act 251st, Parl. 15. James VI. be considered, intituled, 'It is not leisum to take mair annualrent or profit nor ten for the hundred:' By that act it is statuted, "That all usurious bonds, &c. made in defraud of the statutes of usury, should be null and of none avail, and the nullity receivable summarily, as well by exception and reply as by way of action, and to be tried by the oath of party, and all other lawful probation conjoined therewith, competent of the law, whereby the said unlawful oker may be verified to the judge." This clause of the act rendered it doubtful, if the oath of the party from whom the usury was exacted was not a necessary part of the proof of usury, so as that even where there was other lawful evidence, there was a necessity to take the oath of party. The act 7th, Parl. 16. was made, as the title bears, to explain that former act: What it declares is, "That it shall be leisum to prove the taking unlawful exorbitant profit for sums of money, by writ, or oath of party receiver of the unlawful profit, and by the witnesses insert in the securities made for the sums, without receiving of the oath of the party giver of the saids unlawful profits." All then that this act determines is, that it should be leisum to take a proof by oath of the creditor, or instrumentary witnesses, without the oath of the debtor; that is, it takes away the necessity of the debtor's oath, which the former act seemed to have imposed, but does not tie down the proof to be by instrumentary witnesses, or oath of th creditor. It might with more colour of reason be argued, that other

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No 264. proof could not be taken without the oath of the debtor, and that where the proof is not either by the oath of party or instrumentary witnesses, there the probation must proceed in the terms of the former act, Parl. 15. by the oath of the debtor, and other lawful proof conjoined: Such reasoning would be more congruous to the words of the act of Parliament, though it is acknowledged, the law has not been so understood; the act 7th of the Parliament 16. has been looked upon as an alteration of the law in that point, that the oath of the debtor is not to be received; but on the other hand, it never was thought, that the last law took away all proof by witnesses, other than instrumentary: The words say no such thing; if the law has taken away that of the oath of the debtor, it has left the other lawful proof entire, which by the former law was to be conjoined with the debtor's oath. And indeed it is worth observing, that the law of the 15th Parl. does not tie down the judge to any kind of proof, or any number of witnesses, but such proof as may verify to the judge that the usury has been taken. And therefore Sir George Mackenzie, in his chapter on Usury, lays it down as a rule, that it may be proved by oath, writ, or witnesses, without mentioning instrumentary witnesses. And were there any difficulty in the case, as indeed there seems to be none, it is obviated by the act, the 12th of Queen Anne, whereby usury in the two kingdoms is reduced to the same standard: It were strange, if after this act, the same person convened in Scotland for usury should be assoilzied, and in England for the individual same fact should be condemned, though in both nations the trial were upon the same statute; surely the Legislature never designed such an absurdity; and therefore, since if Petrie had been pursued in England upon this libel, witnesses would have been admitted, they ought likewise to be admitted, when the process is carried on in this place.

It was *answered* for the defender, The act of Parliament is directly for him, in spite of the gloss put upon it by the pursuer; the first statute that regards the present question, is the act 251, Parliament 15. James VI. which, as to the manner of probation of usury, says no more than "that it shall be tried by the oath of party, and all other lawful probation conjoined therewith, competent of the law." This act, as appears by the preamble of the act 7. Parliament 16. James VI. made within three years of it, bred such disputes about the generality of the phrase, "oath of party, and all other lawful probation," that an explication by statute was necessary; and therefore in the 7th act two things are cleared, 1*mo*, That by the oath of party, is meant the oath of the receiver of the usury, and not of the giver; and, 2*do*, That by the words all other lawful probation, is meant writ, and the evidence of instrumentary witnesses. The words are, "It shall be leisum to prove, &c. by writ or oath, of party-receiver of the said unlawful profit, and by the witnesses inserted in the said security, made for the said sums, without receiving the oath of the party-giver of the said unlawful profit." By the first act, the words all other lawful probation included witnesses of all sorts, by the general force of them, though a good deal of reason stood

against allowing any witnesses but instrumentary; there could then, on that article, be no doubt, but what was occasioned by the opposition betwixt the force of the general words, and the reason of the thing; and when, by the subsequent law, that doubtfulness is cleared, by directing that proof should be made by the instrumentary witnesses, it is contrary to all rules of interpretation to imagine, that other witnesses may also be received, especially when the disposition of our law, that forbids writ to be taken away by witnesses, and the public utility, require the restriction to instrumentary witnesses only, in the words of the statute. And truly in cases of usury, where an estate is to be gained by proving the single act of paying, receiving, or retaining L. 5 Scots irregularly, if witnesses picked up by chance were receivable, all the securities of the nation would be at mercy, and could last no longer, than till a wicked debtor should find two witnesses, no honester than himself, to prove what indeed would be equal to a discharge of the debt. Now this reasoning excludes not instrumentary witnesses, because they are presumed to be chosen by both parties, to testify the truth of the transaction; but if the evidence is allowed to go beyond them, it may go on *in infinitum*. It is allowed, that what the defender is pleading, tends to restrict and make it more difficult to prove usury; but there is a solid answer to this, the fear that usury pass unpunished is not a consideration sufficient to admit of proof by foreign witnesses, because, where in fact there are no witnesses, to the retaining or receiving a premium, usury of course must be left unpunished; and it is constantly in the power of the usurer, and generally practised by such vile people, to take their premiums privately; so that except by the most heedless of that gang, there is no possibility of discovery left. How then does this question come out? An usurer generally takes his premium in a private manner, and always will, if he is under any jealousy of complaints; so that hereafter there shall never be a possibility of detecting usury truly committed, but by producing witnesses, who shall swear to what they never saw; and in that case, proof by witnesses not instrumentary, will be altogether fruitless toward the end proposed, viz. the detection of real usury; but if such proof is nevertheless allowed, every honest creditor in the nation is at the mercy of false witnesses; and that kind of proof, that cannot, with any expectation of success, be brought against a real usurer, who deals according to his profession darkly, may be made mischievously a mean to defeat the best and most innocent securities. In short, such a mean of probation cannot, with any probability, be successful to discover frauds, and yet the allowing it opens a door to frauds of the greatest nature, which our law has constantly guarded against; and as the possible advantages of it, in cases of real usury, bear no proportion to the probable and apparent disadvantages that might reach the justest debts by it, it is submitted to the judges, whether it is fit, by a decision in this matter, to expound the law so, as to subject all the deeds in the nation to the oaths of false witnesses, when, as the defender apprehends, no such thing, but rather the contrary, results from the statute upon which this question arises.

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To conclude, it is of no import, what is alleged from the British act, 12th of Queen Anne; for that act determines nothing, as to the method of probation; and if there is a greater latitude in the manner of proof in England than here, it will not follow, that we are tied down to their manner of proof; the pursuer might, with the same reason, plead, that this case, as to the proof, ought to be tried by a jury, because such is the custom in England. All the British statute can be alleged for, as to this question, is, in so far as concerns the definition of the crime, what facts are comprehended under the law, and what not; for as to the manner of proof in the several parts of the united kingdom, for establishing the facts inferring the crime, that remains entire as formerly, to be prosecuted agreeably to the forms and genius of the law in each country.

"The Lords found the libel probable by other habile witnesses, as well as the instrumentary witnesses."

Fol. Dic. v. 2. p. 233. Rem. Dec. v. 1. No 43. p. 84.

1742. *June* 22. Hamilton *against* Boyd, &c.

No 265.

The Lords found, that in trying the crime of importing Irish linens, the offence was probable by the oath of the offenders.

Fol. Dic. v. 4. p. 162. Kilkerran.

*** This case is No 70. p. 7335. *voce* Jurisdiction.

1752. *February* 18. Kennoway *against* Ainsley.

No 266.
That a document of trust was destroyed by the granter, proveable by witnesses; and a *semiplena probatio* of the tenor sustained.

George Ainsley, portioner of Newbottle, by disposition in 1721, conveyed his tenement of land and acres in Newbottle to his daughter Jean, with absolute warrandice. He thereafter, in 1723, conveyed the same subject to Robert Ainsley, his brother.

Of this second disposition William Kennoway, son and heir of the said Jean, pursued a reduction, as having been granted in trust, and under back-bond, and that Robert had unduly got up the back-bond, and destroyed it; and, for proof, appealed to the deposition of the deceased Peter Middleton, writer in Edinburgh, and of William Junkieson, merchant in Dalkeith, emitted in an exhibition of said back-bond pursued against Robert, and against the present defender, John Ainsley, to whom Robert had conveyed the subject.

In that exhibition Peter Middleton deponed, 'That George Ainsley, portioner of Newbottle, did, *in anno* 1723, dispone and make over the subjects in 'Newbottle, and others belonging to him, in favour of Robert Ainsley, his 'brother; and that, of the same date, the said Robert granted back-bond to George, declaring the same to be in trust to him, for the behoof of the said