

No 18.

The Court, in general, seemed to adopt the argument of the pursuer; which they did not consider as obviated by that of the defender.

THE LORD ORDINARY had repelled the defence; and on advising a reclaiming petition, with answers,

THE LORDS adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Westball.*

A& Hen. Erskine.  
Clerk, Hume.

Alt. W. Stuart.

*Stewart.*

*Fol. Dic. v. 3. p. 75. Fac. Col. No 74. p. 113.*

\* \* \* See Barbour and Blackwood against Hair, Fac. Col. No 62. p. 95. 8th February 1753, *voce* HUSBAND and WIFE.

See Dowie against Millie, Fac. Col. No 254. p. 390. 2d February 1786, *voce* LEGACY.

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#### S E C T. IV.

#### Of Bills with clauses stipulating Annualrent and Penalty.

No 19.

1727.

INNES against FLOCKHART.

A BILL bearing a penalty and annualrent, from a term preceding the date, found null; and no action competent against the acceptor upon it.

\* \* \* This is the import of the above case as stated in the printed pleadings in Thoirs against Frazer, Sect. 8th of this Division. The statement of it in the case below is different.

No 20.  
Bills are sufficient, tho' bearing annualrent from the date, and before the term of payment.

1727. December. HENDERSON of Gairdie against SINCLAIR of Quendal.

SINCLAIR of Quendal being debtor for some feu-duties to Henderson of Gairdie, upon the 2d February 1725, accepted a bill for the bygones, payable 1st October thereafter, bearing interest from the date.

Against this bill, an objection of nullity was made; as not being of the proper nature of a bill; because it bore annualrent *in gremio*, not from the term of payment, but from the date. And it was urged, that bills are *stricti juris* writs of a certain form and tenor, against which there is no liberty to transgress: But here the clause objected against, is even contrary to the nature of bills; which bear annualrent after the term of payment only, *ob moram*; but never from the date. And the case was cited betwixt Innes and Flockhart, determined January 1727, (*supra.*) where a bill was found null, 'as bearing annualrent from the term of payment,

' and a fifth part of the sum as penalty.' And if it be a nullity to stipulate annualrent from the term of payment, much more from the date.

*Answered;* That it is agreeable both to practice, and the nature of bills; that they contain clauses for annualrent from the date. And now that debts betwixt creditors and debtors are frequently transacted by way of bills; since, by the acceptance, the acceptor acknowledges himself debtor, it is an easy transition, that he also binds himself for annualrent. And were not this sustained, it would go harder with debtors; for instead of giving a long day to pay, this would oblige creditors to draw their bills payable upon sight, in order to bear annualrent. In the decision cited, it was the penalty alone, that prevailed upon the Judges not to sustain the bill; for a penalty is, in every view, contrary to the nature of a bill; the essence of which consists in its being a permutative, and strictly onerous contract: Nor is it a good answer, that penalties are generally restricted to the expence and damage; for this is a stretch *ex nobili officio*; and if an adjudication were led upon such a bill, the whole penalty would be accumulated: And, therefore, if a bill with a penalty were sustained, there would be the same reason for sustaining a donation by way of bill, or an obligation *ad factum præstandum*; for they are all equally contrary to the design and nature of bills. That it was the penalty alone that annulled the bill, will further appear, in that annualrent was only stipulated from the day of payment. Now, whatever be said with respect to a clause of annualrent from the date, it can never do harm to stipulate annualrent from the term of payment, ' for whatever follows from the nature of a writ, ' may surely be expressed in the writ.'

THE LORDS repelled the objection upon the nullity.'

*Fol. Dic. v. 1. p. 96. Rem. Dec. v. 1. No 99. p. 192.*

1730. December 3.

THOIRS against FRASER.

IN this case it was found, that a bill bearing annualrent *and penalty*, being null, an indorsation on it was of course ineffectual. See The particulars in Section 8th of this Division.

*Fol. Dic. v. 1. p. 96.*

1737. June 28.

THOMAS DINWOODIE against WILLIAM JOHNSTON.

ON the 2d February 1728, Johnston drew a bill upon Dinwoodie, payable at Martinmas thereafter, with annualrent from the date; the acceptance of which, in regard Dinwoodie could not write, was adhibited by a notary before two witnesses. Of this bill he intended reduction on the following reasons: *1mo*, Because it was accepted by a notary: *2do*, In regard it bore annualrent from the date: And, in support of the first, it was observed, That regularly no writing is valid,

No 20.

No 21.

No 22.

Found in conformity with No 20. *supra.*

Bills may be signed by notaries.