

very oppressive to the debtor, but which ought not to be extended further; besides, the term of payment, mentioned in the act, may be very properly understood, only with respect to the term of payment of the bond itself. Further, it is impossible to suppose there could be any usurious intention in the present case, as the profits arising to the creditor, from receiving before hand seven merks and a half Scots (interest of one term) does not exceed three half-pence, for the benefit of which no person should be supposed so mad or foolish as to risk the forfeiting his debt. Besides, it is probable, there has been some mistake in the date, as it is usual in the first month of a year, to continue the number of the year which is past; so that the receipt has truly been of date 1735.

Answered: The act intended to prevent the oppression of straitened debtors; by anticipating the payment of annual-rents before the same fell due; whereby, as the debtor wants the use of his money to the said term, so the usurer, by lending it out, gets in effect more annual-rent than was pactioned by the bond; and whether it happens at the time of the loan, or term of payment of the bond, but before the term of payment of the annual-rent exacted, is one and the same thing in the eye of the law; and the defenders mistake the meaning of the words of the act, "discharging the craving or receiving of annual-rents of the sum lent, until the term of payment appointed by the bonds;" for it is not the term of payment of the capital that the act speaks of, but the term of payment of the annual-rents. And, by the 222d act, Parl. 14, James VI. whether the gain be great or small, receivers shall be deemed usurers.

As to the observation with respect to the date, it was answered, That though it may be common in the first days of a new year, to continue the date of the former; yet this rarely happens so far down as the very last day of January; besides, the particular stile of this discharge, shows plainly that this could not be the case.

The Lords found there was no sufficient evidence of usury, so as to annul the bond in this case.

C. Home, No. 176. p. 294.

1745. July 13.

ABERCROMBY against The EARL of PETERBOROUGH.

In the year 1730 the Earl of Peterborough, then Lord Mordaunt, granted bond at London after the English form, to Dr. William Abercromby, the condition whereof bore, "That the sum of £.210 was then advanced to the Lord Mordaunt, and if he should happen to survive the Earl of Peterborough his grandfather, he was to pay to the Doctor, within the space of two months after the Earl's death, the sum of £.840, or if the Lord Mordaunt died in the lifetime of the Earl, the obligation was to be void."

Upon the death of the Earl of Peterborough, which happened in about five years after the date of the bond, an action was brought against the Lord Mor-

No. 35.

Exorbitant
profit pactioned
from
the debtor.

No. 35. daunt, now Earl of Peterborough, for payment, for whom it was alleged, *1mo*, That the bond was usurious; *2do*, Supposing it not to fall directly under the law of usury, it was reducible on fraud and circumvention. It was thought material to know what the practice of England was in cases of this nature, as in all cases contracts are to receive their construction from the law of the country where they were made, in whatever country action be brought upon them; and it was made appear from a variety of reports, that by the practice of England no more than the principal sum and interest is given upon such unconscionable bargains; one of which particularly deserves notice, as it was the first, and was thereafter followed.

It is 2d Vernon, fol. 14. Hilary 1686, *Berny versus Pitt*, Esq. where the plaintiff, a young man, who had a narrow allowance from his father, on whose death a great estate was to descend to the plaintiff in tail, having, in the year 1675, borrowed £.1000 Sterling from the defendant, became bound, in case he survived his father, to pay the defendant £.5000 Sterling within a month after his father's death, with interest thereafter; but that if the plaintiff did not survive his father, nothing was to be repaid. The plaintiff's father having died in the year 1679, he brought his bill to be relieved of this fraud and working upon his necessity when in straits; which came first before the Lord Nottingham, who decreed the plaintiff to pay the £.5000 with interest; but the cause coming to be re-heard before Lord Chancellor Jeffries, it was insisted, that the inserting the clause that the defendant should lose his money if the plaintiff died before his father, did not in reason difference the case from any other bargain made by the plaintiff or other tenant in tail, to be performed at their father's death; for that in these cases, if the tenant in tail died before the father, the debt would be lost of course, and therefore the expressing it particularly made the bargain rather worse, as being done to colour a bargain which appeared to the defendant himself unconscionable: And though there was no proof of any practice used by the defendant to draw the plaintiff into this security, yet merely in respect of the unconscionableness of the bargain, the Lord Chancellor discharged the Lord Nottingham's decree; and as the report further bears, decreed the defendant to refund to the plaintiff all the money he had received from him, except the £.1000 originally lent, and interest thereof.

Some of the Lords were of opinion, that even abstracting from the practice of England, the pursuer had claim to no more than the sum truly lent, and interest thereof; for that the further demand, to which the pursuer saw at last proper in this case to restrict his claim, of a consideration on account of the risk the pursuer run, was, in other words, to pray that the Court might make a new contract for him, because the contract he had made for himself was an unjust one, whereof he could not ask full implement. Others seemed to think, that should a question of the like kind arise upon a contract in this country, it were just to allow a consideration for the risk; for that as the relief arises from equity, it ought to go no

further than equity carries it, and equity could never refuse some consideration for the chance of the absolute loss of the money. No. 35.

But as all agreed that the practice of England was to be the rule in this case, and that the defender was no otherwise entitled to his relief than upon payment, the Lords, on the 12th July, 1745, “repelled the objection of usury, and unanimously found that the bond in question should only subsist for the principal sum and interest, and that upon payment thereof against the term of Whitsunday next, the same should be discharged; but in case payment were not then made, they decerned for the whole sum in the bond, the same being redeemable at any time by the defender upon payment of the principal sum and interest, and expenses hereafter incurred by the pursuer.”

Kilkerran, No. 4. p. 364.

* * D. Falconer's report of this case is No. 23. p. 4894. *voce* FRAUD.

1753. *February 7.* SIR MICHAEL STEWART *against* EARL OF DUNDONALD.

No. 36.

William Cochrane, at a time when his elder brother, having two sons, was alive, who were all preferable in succession to the estate and honours of Dundonald, granted a bond to John Stewart, proceeding on a narrative of a certain sum advanced, and obliging himself to pay 100 guineas as soon as he or his heirs should succeed to the estate and dignities of Dundonald. The condition having been purified in the year 1725, and a process brought on the bond in the year 1745; the Lords found the bond void and null, reserving to the consideration of the Court, whether the money which had been advanced ought to be repaid, on proof of the amount.

Fac. Coll. Sel. Dec.

* * This case is No. 61. p. 9514. *voce* PACTUM ILLICITUM.

1760. *July 9.* SIR WILLIAM MAXWELL *against* JOHN PRINGLE.

Sir William Maxwell, when not quite major, purchased from Mr. Charles Murray two rings; for which he granted an obligation of the following tenor: He sets forth, That Mr. Murray had instantly sold and delivered to him two rings, in value upwards of £.40 Sterling; for which he binds himself, and his heirs, to pay to him 150 guineas at the first term after his marriage or death, with penalty and annual-rent after that term; and he farther binds himself to renew the bond after his majority, when required.

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No. 37.

A minor gets two rings worth about 40l. and grants bond for 150 guineas, payable at the first