

not be a snare to make him to be punished as an usurer ; especially seeing, in that same process, the party proponed a reason of suspension, founded upon this same act of Parliament, whereby he desired to be freed of payment, of any greater profit than ten for the hundred, and which was then repelled by the Lords, and so ought not now to be produced in this action against him. This allegiance was repelled by the LORDS, and the pursuit sustained.

Act. *per se.*Alt. *Kinross.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 351. Durie, p. 57.*

\*.\* Haddington reports this case :

THE King's Advocate pursued one Morison for the unlawful taking of usury frae William Douglas of Maines, to wit, aucht pund for ilk boll of three score bolls of victual, liquidate in a back tack set be Jackson to Maines of lands wherein he was infest by Maines for 3000 merks. It was *excepted*, That the LORDS had sustained *in foro contradictorio* the said back tack as lawful, for the years 1611, 1612, 13, 14, and 1615, and 16. It was *answered*, That the Lords had not then taken cognition of the unlawfulness of the tack; and that the want of payment had made them to allow the greater prices, having also respect that the prices of these years were not great; and therefore they repelled the exception, in case the King's Advocate should prove that the defender had received payment, but would not condemn him for making the contract, if no payment had followed, or that he had only received lawful annualrent, not exceeding ten for the hundred, albeit the contract contained unlawful paction.

*Haddington, MS. No 2805.*

1623. July 9. ARNOT against HUME of Manderston.

ARNOT having recovered decret against the Executors of one Hume, for payment of a sum addebted by the defunct, after he had denounced the Executors to the horn, by virtue of that sentence, and sought their moveables to have poinded them; and, finding nothing, neither moveables nor lands, of the executors' poindable, or to be comprised; thereafter Arnot pursues Manderston, who was cautioner for the Executors in the confirmation of the defunct's testament, to make the goods furthcoming for satisfaction of this sentence; wherein the cautioner, who was convened, compeared, and *alleged*, That all the goods and gear contained in the testament, were exhausted by a lawful decret recovered *debito tempore* before the pursuer's sentence, at the instance of another creditor for a lawful debt of the defunct's, to whom payment was made. This exception was found reelevant by the Lords, albeit the pursuer *replied*, That it could not be admitted against the decret standing, obtained at his instance against

No 33.

No 34.

Where exhausting was omitted by the executor, it was admitted for the cautioner being instantly verified.

No 34.

the Executors ; which reply the Lords respected not, seeing the cautioner could not be prejudged by that decret against the Executors, wherein he was neither party called nor convened, and he could not by that sentence *inter alios* be prejudged of his lawful defences, specially seeing he instantly verified the same without delay, which was found sufficient to absolve the cautioner ; for the payment made, conform to the sentence, was a fulfilling of that whereto the cautioner was bound, and being once done and performed, he could not do it over again, and so thereby was freed of his cautionry, and which was competent to him to allege, albeit the executor should omit the same. This decision seems contrary to the decision made betwixt Wood of Craig, and the Executors of Carre, and their cautioner, whereof mention is made 4th March 1623, No 32. p. 14049.; and 5th December 1623, Rocheid, No 28. p. 2190 ; except that in that decret against the Executors in that process, the Executors compeared, and proponed that exception, and succumbed therein, which was not here alleged by the executors.

Act. Nicolson.

Alt. Belshes.

Clerk, Gibson.

Fol. Dic. v. 2. p. 351. Durie, p. 71.

1623. December 11. EARL OF WIGTON against PARISHIONERS of STOBO.

No 35.  
In a spuilzie of tiends, it was found, that the principal tack having been reduced, when the sub-tacksman was not called as a party, the sub-tack, notwithstanding, could not defend him, altho' there were years to run of both tacks.

IN an action of spuilzie, at the instance of the Earl of Wigton against the Parishioners of Stobo, the LORDS found, that a sub-tack, set by a principal tacksman, there being years to run both of the principal tack and sub-tack, the years to run of the sub-tack could not defend the sub-tacksman being defender, in this process of spuilzie, where the principal tack was reduced before ; albeit that the defender *alleged*, That he was not called to the reduction of the tack, as he contended that he ought to have been, being, at the time of the reduction, of before, and sinesine, in real possession of the teinds libelled, and not being called, the sub-tack behoved to liberate him from the spuilzie, he being *bona fide* possessor ; notwithstanding whereof the allegiance was repelled, in respect of the reply, founded upon the reduction of the principal tack, to the reduction whereof the LORDS found no necessity to call the sub-tacksman, and that he could not be *in bona fide*, in respect of the inhibition libelled, which interrupted his possession.

Act. Hope.

Alt. Cunninghame.

Clerk, Gibson.

Fol. Dic. v. 2. p. 351. Durie, p. 91.

\* \* \* Haddington reports this case :

A PRINCIPAL tack, containing a clause irritant, being sought to be reduced *super eo capite*, he who has a sub-tack is not necessary to be called, unless he