No 20.

'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.

No 21.

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.

No 22.
Found in conformity with No 20. *supra*.

Bills may be ſigned by notaries.

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 intented reduction on the following reaſons: 1*mo*, Becauſe it was accepted by a notary: 2*do*, In regard it bore annualrent from the date: And, in ſupport of the firſt, it was obſerved, That regularly no writing is valid,

No 22. unleſs it be either holograph, or duly ſigned before witneſſes; from which rule, bills of of exchange are excepted, for the ſake of commerce. It is true, if a perſon cannot write, the law allows notaries to ſign for him; but then it is neceſſary, in order to render ſuch an obligation valid, that the witneſſes be inſert; of conſequence, if the writing does not admit the inſerting them, which is the caſe of bills, it is illegal to attempt to ſubſcribe ſuch writings by notaries: And here the notary ſeems to have been ſenſible of this difficulty, as he has attempted to introduce a new form, not practiſed in the ſubſcription of regular deeds ſigned by notaries; namely, to inſert the witneſſes names and deſignations in his doquet, which does not come up to the law, it not being in the body of the writ, but *in græmio*, as it were, of the party's ſubſcription, for ſuch the notary's declaration is, when regularly gone about. In ſhort, this writing does not come under any known deſcription in law, as it is neither holograph, nor bears the writer's name and witneſſes, nor is a bill, ſuch as people are generally acquainted with.

With reſpect to the *second*, it was *pleaded:* That bills are not deſigned to be ſtanding or abiding ſecurities; therefore they ought not to be ſo conceived, as to bear intereſt from their date, and thereafter, during the not payment; as that is plainly exceeding the proper uſe, for which they were at firſt introduced; and altering the very nature of them: *e. g.* bills, though carrying intereſt *ex lege*, after the term of payment, are ſimply moveable; and, as ſuch, fall under the *jus mariti* and *relictæ;* but a bill, in this form, would be heritable in theſe reſpects, as carrying intereſt *ex pacto*. And, though the acts 1681 and 1696 do not, in expreſs words, prohibit ſuch a ſtipulation; yet it is plainly enough implied, by enacting, That bills ſhall carry intereſt from the term of payment; which ſhows it was taken for granted, they are not a ſecurity carrying intereſt *ex pacto;* therefore this clauſe, as incongruous to the nature of the writing, muſt be fatal to it, in the ſame manner, as if it had born a penalty, which is only a greater deviation from the deſign of bills.

Answered to the *first:* That, as bills are a kind of ſecurity, which were introduced by cuſtom, and not by ſtatute, they do not fall under any of the regulations, neceſſary to be obſerved, in the form of other writings; conſequently, arguments, drawn from the ſtatutes regulating the form of other deeds, are not in point. At the ſame time, it may not be improper to obſerve, That the ſubſcription of one or two notaries is, in all things, equiparate to the ſubſcription of the party; therefore, where nothing but the ſubſcription of the party is requiſite to conſtitute a valid obligation, it follows, that a notorial ſubſcription is equivalent. Nor is there any thing in the obſervation, That the witneſſes are not deſigned in the body of the writ, ſeeing the acceptance is part thereof, and the notary's docquet ſubjoined to it, is likewiſe to be conſidered as part of the writ, as much as the clauſe in other writings, *in witness whereof*, &c. It is true, the form of this bill is uncommon, yet it is not ſo on account of any thing bad, but for being deviſed in a way, which, if enjoined by law, would, in a great meaſure, take away the cauſe of that *odium*, which many have to bills: For, inſtead of a mark,

inſtead of initials, which are ſufficient to validate ſuch a writing, there is here the ſubſcription of a notary, whoſe faith, in the affair of bills is great; and two witneſſes, ſpecially required to his being deſired to ſubſcribe, both fully deſigned, and ſigning with him: So that there is no room left to doubt of the tranſaction's being fair and honeſt, as well as valid. No 22.

To the *ſecond*, it was *anſwered:* That there is no reaſon for annulling a bill, becauſe it bears a ſtipulation for intereſt from the time of the loan; as it is very common to accumulate the annualrent, from the date to the term of payment; and ſo render it a *ſors*, bearing intereſt, in caſe the acceptor does not pay at the day prefixed; although it is plain he is thereby put in a worſe condition: How hard then would it be, for the defender to loſe his debt, for want of ſkill to cover the tranſaction? If the thing be lawful, it is not the worſe for being fairly and openly expreſſed. As to the ſtipulation of annualrent on a bill before the term of payment's being diſcharged by the acts referred to, it was anſwered, 1*mo*, Granting it were true, ſtill the adjecting ſuch a ſtipulation is not ſufficient to annul ſuch a writing, but only that the ſtipulation ſhould be ineffectual; for, notwithſtanding ſuch adjection, it would yet remain a bill, as having all the eſſentials of one, a drawer and an acceptor: So that the rule, *Utile per inutile non vitiatur*, behoved to take place. And, as to the inſtance of a bill with a penalty being found null, it does not touch the preſent queſtion; ſince a penalty may be ſaid not to be the ſubject of a bill, more than a legacy or donation. But, 2*dly*, Neither of the acts will bear ſuch a conſtruction, the deſign thereof being only to authoriſe charges of horning to paſs upon bills, which before were only the ſubject of an ordinary action; and therefore we are not to look there for a deſcription of ſuch deeds.

THE LORDS repelled the reaſon of reduction, founded on the notary's acceptance, and likewiſe the objection, That the bill bore annualrent from the date.

See WRIT. *Fol. Dic. v.* 1. *p.* 96. *C. Home, No* 61. *p.* 106.

1738. *December* 13. JOHN GILHAGIE *againſt* JOHN ORR.

JOHN GILHAGIE of Kennyhill was ſued before the Magiſtrates of Glaſgow by John Orr of Barrowfield, for payment of 200 merks and annualrents, contained in a bill drawn by Jean Fleming upon, and accepted by, Gilhagie's father. It was dated May 1721. It contained *in græmio* a ſtipulation for payment of annualrent from the date, and was payable at the Whitſunday thereafter. No 23. Found in conformity with No 20, p. 1418.

Mr Orr's title was that of executor-creditor to Thomas Orr, the huſband of Jean Fleming, drawer of the bill. Jean Fleming had executed a general aſſignation in favour of her huſband; and it was ſeparately contended, that his *jus mariti* comprehended the bill.

After the proceſs had depended for ſome time before the Magiſtrates, a new proceſs was brought before the Commiſſary of Glaſgow, becauſe an objection had