

1790. February 12. JOHN DUN *against* WILLIAM COLHOUN.

No. 42.

A bill for the amount of annualrents, in which were included accumulations of interest made half yearly, set aside, action being sustained for principal and annual-rents as payable by the original obligation.

Colhoun, at the term of Martinmas, 1774, granted to Dun a bond for £.1000, payable at the succeeding Martinmas, with the legal interest for that first year, and until payment.

Some years after, when the parties came to settle accounts, Dun stated interest separately for each half year, upon which different sums he again reckoned interest; and he obtained from Colhoun a bill for £.473, partly composed of those accumulations of annual-rent.

An action having been brought for payment both of the bond and of the bill, the defender

Pleaded: By act of Parliament in 1621, Cap. 28. money lenders are prohibited from "craving or receiving annual therefor, until the term of payment of their bonds be first come;" and it is declared, "that the contraveners of this statute shall be punished as unlawful usurers;" in which punishment is included the annulling of the obligation for the debt. In this case however the pursuer has, during a long period, craved, and in effect received, annual-rent half a year before the term of payment, so that he falls under the description of this statute.

Again, it is by act 12th of Q. Anne, C. 15. enacted, "That all bonds for payment of money lent, whereupon or whereby there shall be received or taken above £.5 in the £.100 for a year, and so after that rate for a longer or shorter time, shall be utterly void, and that the receiver shall forfeit the treble value of the money lent." Now the pursuer has evidently "taken more than after the rate of £.5 in the £.100 for a year," that being the term before the expiration of which no interest was due by the bond.

Answered: The object of the act 1621 was not to prevent the payment of interest half yearly, or for any period already past, but merely to prohibit a whole year's interest being received at the time of lending, by which means a rate of annual-rent higher than the legal one would be exacted. That enactment, however, is now circumscribed by the statute of Q. Anne.

The last mentioned statute is likewise calculated to debar lenders from extorting more than the legal annual-rent for the time of the forbearance of payment; and accordingly when the rate of interest for a year is mentioned, it is added, "and so after that rate for a shorter or longer period." This rate the pursuer has not exceeded. Nor is there any thing usurious or improper in reckoning annual-rent of half-yearly interests, which is justified by the ordinary practice of bankers and others. Vid. Bacon's Abridgement, *voce* USURY.

But although the receiving of interest in this case had been usurious, and had subjected the pursuer to the penalty of treble value, which, in the present action, is not even claimed, yet the bond or the bills themselves, as they bear no unlawful stipulation, would not be forfeited; for those obligations only are declared to be void, "whereupon or whereby above £.5 in the £.100 shall be taken." Such

has been uniformly the decision of the English courts. *Hawkin's Pleas of the Crown*, 247. § 14. No. 42.

Replied: In *Atkins' Reports*, 3. 154. *Adlington versus Carr and Andrews*, 3d July, 1744, the opinion of Lord Chancellor Hardwicke to the contrary is stated.

The Lord Ordinary at first pronounced the following judgment: "Finds no sufficient cause for applying the penal statutes against usury in this case; but finds sufficient ground in law and equity for reducing and restricting the pursuer's claim to the original principal sum and annual-rent, without any accumulations."

His Lordship having afterwards reported the cause, the Court in effect adopted the same interlocutor by the following:

"The Lords repel the defences pleaded against payment of the bond pursued for; and find, that no action can lie upon the bill, in respect the same was in part made up of undue exactions; and that the pursuer's claim must be restricted to the principal sum contained in the bond, and annual-rent thereof."

Reporter, *Lord Gardenston.* Act. *Dean of Faculty.* Alt. *M. Ross.* Clerk, *Home.*
S. *Fac. Coll. No. 114. p. 215.*

1790. June 30.

WILLIAM GLEN *against* The CREDITORS of WILLIAM MACALPINE.

In April 1785, Macalpine, the owner of a small coasting vessel, having received £.175 in loan from Glen, conveyed to him the property of the half of his vessel. He also became bound to pay interest at the rate of 10 *per cent.* Mr. Glen being excluded from the profits arising from the ship.

Both parties were authorised, after giving two months notice, to withdraw from the bargain, which was also to cease at the death of Macalpine, or on his selling the vessel. It was farther provided, that if the vessel was lost, the creditor was to have no claim for the sums advanced; but in case of salvage, he was to have a rateable interest in the articles saved.

At the desire of Macalpine, Glen procured insurance on the vessel to the amount of £.300. Afterwards, on its being lost, Macalpine having become bankrupt, a competition for the insured sums arose between Glen and the other creditors; who, in an action brought in the Admiralty Court, which was afterwards transferred to the Court of Session, called in question the legality of the above-mentioned agreement, and

Pleaded: In contracts of bottomry or at *respondentia*, where the creditor betakes himself to the security of a ship, or the goods on board of it, during a particular voyage, it is permitted to take more than the usual rate of interest, the extraordinary premium being accurately proportioned to the particular risk. But the agreement in question was very different. The right of the lender was not of the nature of a security, but a vendition, the property of one half of the vessel having

No. 43:

An obligation to pay more than the ordinary rate of interest, legal, where an unusual risk is run.