

of usury unless they would prove by the creditor's oath, that it was not resting at the Whitsunday before. No. 22.

*Fountainhall, v. 1. p. 765.*

1697. July 23. BANK of SCOTLAND against MURRAY.

Patrick Murray, collector, having borrowed £.200 Sterling from the Royal Bank of Scotland, upon bond bearing 4 *per cent.* but if he failed to pay within 30 days after the term, when charged, he should be liable in the full annual-rent of six; he having failed, and being charged, suspends on this reason; that he can be liable in no more annual-rent but 5 *per cent.* because, by the acts of Parliament, all the lieges have the privilege of retention. Answered, He cannot found on these acts against the Bank, which is a society erected by law, with the privilege of making by-laws and constitutions of their own; and seeing you have an evident ease of 2 *per cent.* in case of punctual payment, the exacting six is but like a penalty or termly failing in a bond, and cannot be reputed usury. Replied, Private pactions cannot derogate from the public law; and if this were allowed, then what hinders but they might insert a forfeiture of 7 or 8 *per cent.* *et quod directo non licet nec per ambages permittendum est, otherwise fraus fieret legi.* The Lords were divided on this point as new; but the plurality found the whole six due, not as annual-rent, but as damages liquidated betwixt the parties.

*Fountainhall, v. 1. p. 789.*

1706. July 25. DONALDSON against The TOWN of BRECHIN.

John Donaldson, Chamberlain to the Earl of Panmure, charges the Magistrates of Brechin for 1200 merks contained in their bond. They suspend on this reason, that he had forfeited the sum, the one half to the fisk, and the other to them as discoverers, conform to the act of Parliament against usury, because he had exacted £.45 Scots as a year's annual-rent of that sum from Lammas 1703, to Lammas 1704, conform to his discharge produced, bearing that sum; whereas the annual-rent for that year, retention being allowed, was only £.44. Answered, This was but a mere mistake and wrong counting; for no man in his right wits would endanger his sum for 20 shillings Scots, which was all the excesse here; and the law says, *de minimis non curat prator*; and there could be no *animus delinquendi*, where there is no temptation; and the town-clerk having drawn the discharge, has so framed it, either by mistake or design, to ensnare him; and the not allowing of retention is not usury, except when demanded and refused, which cannot be pretended here. Replied, The case is plain, he has taken more annual-rent than law allows, *et majus et minus non variant speciem, et justitia non consistit in quantitate*; and

No. 23.

Stipulation to pay an additional *per centage* in case of not payment at a day fixed.

No. 24.

A trifling overcharge not punished as usury.