

1766. *December 2.*WILLIAM MACKECHNIE, (or M'KENZIE) *against* JAMES WALLACE.

No. 38.

Action for usury, not limited by the act 31st Elizabeth.

*Fac. Coll.** * This case is No. 342. p. 11144. *voce* PRESCRIPTION.1768. ———. CREDITORS of PITCAIRN *against* FOGGO:

No. 39.

The Creditors of George Pitcairn brought a reduction and declarator of usury against Samuel Foggo, banker in Edinburgh, for setting aside a state of accounts, in which was a charge to Pitcairn's debit of £.40 for commission during the period of the account. The suit concluded for reduction and for the penalties of the statute 12th Queen Anne, Cap. 16. against usury. The Lords having remitted the question as to the practice of charging commission to several of the most eminent merchants and bankers in Edinburgh, on advising their report, "That the universal established practice over all Europe authorises the charge of a commission not exceeding a half *per cent.* on all money transactions for account of another," found that there was no foundation for the charge of usury; and assolizied the defender.—See APPENDIX.

*Fol. Dic. v. 4. p. 393.*1773. *December 13.*

The objection of nullity of a bill on the head of usury found not competent to an onerous indorsee.—See APPENDIX.

No. 40.

*Fol. Dic. v. 4. p. 394. T. MS.*1775. *January 19.*JAMES WILSON, Procurator-fiscal of the Sheriff-court of Paisley, *against* JAMES JACKSON, Farmer in the Parish of Eastwood.

No. 41.

The Procurator-Fiscal brought an action before the Sheriff-court of Paisley, in his own name, and in that of George Park, the person to whose prejudice the offence had been committed, against James Jackson, concluding, in terms of the statute of the 12th of Queen Anne, that the defender had forfeited treble the value of the sum of £.50 Stirling, which he had advanced and lent to George Park, the private complainer, and should be decerned and ordained to make payment of the one half thereof to the procurator-fiscal, for his Majesty's behoof, and the other

How, and before what court, competent to be tried—If triable without a jury, and at the instance of the procurator-fiscal

No. 41.
alone, in case
the private
party dis-
claims the
process.

half to the complainer ; and that the defender ought to produce the bill of £.52 5s. Sterling, upon which the usury had been taken, and diligence raised thereon, and the same ought to be delivered up to George Park, it being an usurious writ ; and, further, the defender ought to make payment to George Park of the sum of £.2. 5s. exhorted from him, together with £.50 Sterling of damages and expenses.

The facts upon which this prosecution was grounded, as stated by the Procurator-Fiscal, were these :

Park was indebted to Jackson the defender in the sum of £.30 Sterling ; but, after having contracted this debt, finding his business as a manufacturer not answering to his expectations, he resolved to betake himself to the profession of a maltman and brewer. As, by this means, he had occasion to lay out some money, particularly in building a malt-kiln, Jackson thought this a proper opportunity of demanding the sum he owed him, intending thereby to force him into such terms as he was pleased to dictate, in order to procure a little delay.

Accordingly, when the demand was made, Park represented the difficulty he was under, of raising money at that time to answer necessary demands ; but he offered George King, brewer in Pollockshaws, the person upon whose ground he was to build the malt-kiln, as surety for the money. Mr. Jackson, however, positively declared, that he would lend his money upon no other terms than that of receiving 7 and a half *per cent.*

Park's circumstances, at the time, were such as obliged him to comply ; and the way the transaction was carried into execution was as follows :—The defender, August 21, 1771, drew a bill on Park, and George King as his cautioner, for £.52. 5s. Sterling, payable twelve months after date, which was accepted by them ; and the value given for this bill was delivering up the voucher of debt for the £.30 formerly due, and giving Jackson's acceptance to Park for £.20 Sterling, also payable twelve months after date ; and the remaining £.2. 5s. is exactly the interest, at the rate of $7\frac{1}{2}$ *per cent.* of the £.30 formerly due ; for there could be no interest stipulated on the £.20. contained in Jackson's bill to Park, as it was not payable till the same day upon which the bill granted by Park and King to Jackson fell due. The sense and understanding of the parties is therefore clear, that this was a real loan of £.30 Sterling, for the interest of 7 and a half *per cent.* though endeavoured to be concealed under the mask of a bill of £.50 being granted, and £.2. 5s. stipulated as the interest thereof.

Further, by way of *covin*, as the statute terms it, Jackson alleged that he agreed to uphold the kiln that was to be built for a year, in consideration of his receiving 7 and a half *per cent.* for the money due to him : But that this was mere affectation, appears from this circumstance, that, when the twelve months were expired, altogether forgetting the sham agreement about upholding the kiln, the defender granted a receipt, bearing that he had received £.2. 5s. as the interest of £.30 for one year, at the rate of 7 and a half *per cent.* in the following terms: “ *Eastwood-kirk, 23d January, 1773.*—Then received from George King and George Park, the sum of

£2. 5s. Sterling, being the interest of £.30. for one year; from 21st August 1771, to 21st August 1772, at the rate of 7 and a half *per cent.*”

With regard to this receipt, besides the circumstance of its being of the handwriting of Park himself, the defender objected to it, as being an improbative writing; and, though he denied not that the subscription thereto subjoined is his name, yet he alleged, that, being unsuspecting, illiterate, and ignorant of business, he did not read it, never dreaming of the design formed at taking it. *2do*, It bears no reference to the only other written evidence produced by the pursuer, viz. the bill of £.52. 5s. which on the face of it, is a fair bill, bearing expressly to be granted for value, and therefore proves full value to have been received for it. And, in fine, he pleaded, there was not the least ground for challenging, as usurious, a transaction of this nature, which was not properly a loan, but a contract of a mixt nature, by which the defender might have sustained a considerable loss from the heavy burden which he undertook, to be at all the expence of repairing and upholding the kiln, which was erected upon a piece of ground wadsetted to himself by King.

The Sheriff allowed a proof to both parties of what passed at the time of making the bargain; and, having afterwards given judgment against the defender, he moved the cause by advocacy into this Court, and procured from the private complainer a disclamation of the process. But the Procurator-Fiscal having insisted for his Majesty's interest, the Court pronounced the following judgment:

“ The Lords repel the objections to the competency of this action before the Sheriff-court, and that the same was not tried by a jury: Repel also the objection, that the same is carried on before this Court by the Procurator-Fiscal, as sole pursuer; and, upon the merits, find that the bill challenged is usurious, and the defender guilty of usury: Find the bill void; and also find the defender liable in treble value of the principal sum in said bill, and decern him to make payment of the one half of said treble value to the Procurator-Fiscal, for his Majesty's interest: Find the defender liable in the expense of extracting the decret, and decern.”

The Procurator-Fiscal afterwards applied, by petition, to find the defender liable in the expenses of the prosecution carried on at his instance against him; and the defender, besides answering that petition, reclaimed on the merits, which was refused as incompetent, being without the reclaiming days; and, on the Procurator-Fiscal's petition, a deliverance was given, finding no expenses due by Jackson; but remitting to the Lord Ordinary to hear parties, how far the disclamation can liberate Park from being liable in a part of the expense of process.

Act. *Cha. Hay.*

Alt. *G. Wallace.*

Clerk, *Tait.*

Fac. Coll. No. 151. p. 13.