

1676. *February 8.* WILLIAM AIKMAN *against* JAMES OSWALD.

MASTER William Aikman having obtained decret, *cognitionis causa*, against James Oswald, upon his renunciation to be heir, pursues adjudication of certain tenements; which being called, and given out to see, was given back without a return,—the advocate who saw it, declaring that he was not for the defenders; and, being called by the clerk, in presence of the ordinary, he obtained a decret of adjudication: whereupon there is a bill given in to stop the same, craving that it might be given out to be seen, and returned and enrolled.

It was ANSWERED for Aikman, That the defender's mother had insisted in an adjudication before the sheriff, and obtained the same by collusion; and therefore, now, Aikman having obtained decret before the Ordinary, though in absence, the defender should not, by collusion, delay him, but immediately answer; otherwise the Lords are not obliged to stop or delete his decret.

The Lords, in consideration of the collusion, refused to delete the decret; but allowed a sight in the clerk's hands, and to answer before the Ordinary.

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1676. *February 9.* DRUMMOND *against* STIRLING.

STIRLING of Ardoch having granted bond of 2000 merks to the Lady Glenurchie; Ednample, as her heir and executor, assigns the same to Rickartoun; who thereupon pursues Ardoch for payment; who ALLEGED, No process; because, this bond being heritable, there is no retour produced, serving Ednample heir to his mother; but only a special service, serving him heir to her in another annualrent, which contained no general service.

It was ANSWERED, That the annualrent being to heirs whatsoever, the special retour, in that annualrent, imported a general service.

Which the Lords sustained.

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1676. *February 9.* NICOL RONALDSON *against* JOHN BRYDEN.

NICOL Ronaldson having charged John Bryden for payment of a bond of 300 merks, he suspends, on this reason:—That he ought to have compensation of three stone of cheese, paid yearly, over and above the annualrent for nineteen years.

It was ANSWERED, *Non relevat*, unless there had been a price made, or promise of payment; otherwise the cheese must be understood to be a gratification or free donation. *2do.* The bond pursued upon is of a late date, and the former bond is discharged; after which, there is no ground to come back upon cheese given so many years since.

It was ANSWERED, That *debitor non præsumitur donare*; and, therefore, the cheese must be understood to have been in part of payment; otherwise it might

infer usury, if, with the annualrent of 300 merks, being but twelve pounds yearly, three stones of cheese were yearly delivered, over and above the annualrent: or, if it had been expressly in name of donation or gratification, it would open a door for eluding the law against usury; and, therefore, seeing it cannot be presumed to be usury or donation, it must be presumed to be in satisfaction. And, as to the renewing of the bond, it was upon caption, without any transaction or abatement.

The Lords sustained the compensation being instantly verified and liquidated by the charger's oath, and would not sustain such a preparative to be a cloak for usury.

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1676. *February 15.* AUCHTERLONY *against* The MAGISTRATES of ABERDENE.

THE Laird of Morphie having been incarcerated in the tolbooth of Aberdene, upon a debt due to the town, he produces a protection under the king's hand, upon payment of the annualrents, unto the messenger, and offered to pay the annualrents; yet the messenger put him in prison; wherein, he was arrested at the instance of Auchterlony; but thereafter, the magistrates having gotten a security for their relief, let him go. Auchterlony pursues the magistrates for his debt, as suffering the rebel to escape; who ALLEGED Absolvitor; because, he having protection under the king's hand, and offering the annualrent to the messenger, he unwarrantably incarcerated him; and therefore, they might warrantably let him go, notwithstanding of the subsequent arrestments; seeing they were accessory to the first error, and could not have been laid on, if that had not preceded.

It was ANSWERED, That the pursuer, having a caption, might have incarcerated him, being out of the tolbooth, or arrest him, being in it, without considering how he came there: and though he had had reason to have been liberated, by charges to set at liberty, as he had not, yet the magistrates were no judges, much less was the messenger judge, to the protection and offer of the annualrent; nor did he any wrong in refusing the same.

The Lords repelled the defence.

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1676. *February 16.* DOCTOR BORTHWICK *against* The EARL of CRAWFORD.

THE Earl of Crawford granted bond to Elizabeth Corstorphine and _____ Gourlay, mother and grandmother to William Borthwick, bearing the sum received in the name of the said William; and obliging the Earl to pay the same to the mother and grandmother, in liferent, and to William, after their decease, his heirs and assignees. But in the same bond, there is a precept of seaisne for infesting the grandmother and mother in fee; and seaisne given to them accordingly, without mention of William. But thereafter, the mother and grandmother dispone the annualrent to William, acknowledging that they were infest