

sions, as 20th July 1664, Laird of Clerkington against Stuart, *voce* SUCCESSION; and 23d June 1680, Hamilton *contra* Borthwick, No 10, *supra*. *Answered*, He opposed the bond granted by him when *major sciens et prudens*, and whatever the wife and children might quarrel the same as *contra pacta dotalia et fidem tabularum nuptialium*, yet it was always good against the granter and subscriber; as was found, within these two years, betwixt Hamilton of Hill, and Hamilton of Raplock. THE LORDS sustained the bond against the husband who granted it.

No 11.

*Fol. Dic. v. 2. p. 20. Fountainhall, v. 1. p. 725.*

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S E C T. IV.

Gratuity taken from a Debtor.—Taking gratification to become Cautioner.—Bond granted by a Criminal on condition of the Creditor using his interest to obtain the Granter a pardon.—Bill granted to Magistrates by a Prisoner.—*Respondentia* Bond confirmed by Collateral Securities.

1677. January 2. NISBET *against* The LAIRD of Humbie,

Sir PATRICK NISBET having charged the Laird of Humbie for payment of some bonds, he suspends, and alleges payment, by delivery of certain goods to the charger, especially two coach-horses, and horse-corn; which being referred to his oath, he deponed that he received the horse-corn, but that it was gifted to him; but as to the coach-horses, his oath was not clear, and he was appointed to be examined at the advising of the oath. This question occurred to the LORDS, Whether a creditor might take any gift from his debtor, except it were in remuneration, or for some special favour or beneficence distinct from the debt.

THE LORDS found he could not, or otherwise there could be no guard against usury, if the creditor might take any thing, either for the delay of the principal sum, or of the annualrent; otherwise the law for six of the hundred might be totally elided; for indigent debtors not being able to make present payment, would in like terms gift things upon consideration the creditor may give delay by way of favour, though not by way of contract, and so might get double annual, so long as the debtor was not able to pay; and they did remember that they had lately done the like in the case of a creditor, who had gotten

No 12.

A donation from the debtor to the creditor, will be imputed towards payment.

No 12.

yearly two stone of cheese, and deponed that it was by way of gift, yet the LORDS allowed the same in part of payment of his annualrent.

*Fol. Dic. v. 2. p. 20. Stair, v. 2. p. 484.*

1696. June 3.

SUTHERLAND *against* SINCLAIR.

No 13.

An assignation to a tack was reduced, being granted of the same date with a bond of borrowed money, and acknowledged to have no other onerous cause.

IN the concluded cause, Sutherland of Eusdale against Sinclair of Dumbeth, a debate arose in the advising of an oath, whether a tack was not the onerous cause of the bond charged for, and he having deponed it was not, but given him gratuitously over and above, the LORDS thought this looked very like an usurious paction, seeing it has been found, that the accepting of some stones of cheese, above the ordinary annualrent, to continue the sum, implied usury; and though men were not restrained from gifting, yet, at the time of such bargainings, it did not seem to be a free gift. Yet, there being no process of usury depending, the LORDS decerned, reserving the pursuit upon the usury, which they recommended to the advocate present to insist in. Some contended, it might be taken in summarily, by way of exception, seeing the acts of Parliament allow the debtor the half of it, in case he be the first revealer, and make it receivable summarily, by way of exception.

June 20.—THE LORDS having of new heard the parties, in the case mentioned 3d current, between Sutherland and Sinclair, they found the allegiance of an usurious paction might be summarily received *quoad civilem effectum*; and shunned to brand the assignation to the tack as direct usury; yet they reduced it as null, being of the same date with the bond for borrowed money, and acknowledged in his oath to have had no other onerous cause but a gratuity, to make a good understanding between them as to other differences; but in regard he deponed, it was agreed to betwixt them, before any mention was made of borrowing the money, the LORDS looked on this as an extrinsic quality, and only *palliata usura*, therefore did not regard it, unless they subsumed on some obligation in writ, by which he might have been compelled to perform it. And the LORDS have been very severe on this point, 2d January 1677, Sir Patrick Nisbet against Humbie, *supra*, where they would not so much as allow creditors to take gifts from their debtors, else this crime of usury might be under such pretences easily evacuated and eluded.

*Fol. Dic. v. 2. p. 20. Fountainhall, v. 1. p. 717. & 722.*