

under the indemnity, but only in so far as the prosecution may be criminal by inferring pain or punishment: *Prodest enim hujusmodi principis indulgentia reo, quoad pœnam corporalem avertendam, non etiam quoad pœnam et interesse; Perez. in Codic. 4to*, The indemnity concerns only the contravention of any law or custom of Scotland, whereby the Sovereign only is prejudiced, and not the contravention of foreign treaties, the law of nations, and a particular contract in favours of the royal boroughs and the nation, which Sir Andrew is charged with; nor can it be imagined, That her Majesty intended to answer the complaints of foreign states, with an indemnity to the person that injured them. *5to*, The indemnity could only take away involuntary transgressions in office; whereas Sir Andrew's malversations were voluntary and deliberate, *lucri faciendi gratia*. Nor can indemnities alter or change the nature of a person, so as to make a man that has often betrayed his trust, fit to be trusted again, more than it would render one convicted of habitual perjury a habile witness. *6to*, An indemnity doth not restore against legal or implied irritancies, which, in the construction of law, are the same; cannot be extended to recognition, escheat, or the double avail of marriage; or the like, which are penal: As it would not hinder the deprivation of a messenger notoriously malversing, or continue a minister guilty of simony, or support marriage dissolved by adultery. Besides, though an indemnity pardons, it doth not restore persons to their forfeited offices.

Answered for Sir Andrew, There is no parity betwixt extending the indemnity to legal irritancies and feudal delinquencies, whereby the interest of private parties would be prejudiced, or to simony, which is regulated by a superior authority, and the extending it to exculpate from malversations inferring deprivation of an office. *2do*, 'Tis frivolous and a metaphysical stretch to pretend, that malversations which may deprive a person of his office and property, and also reach his reputation, fall not under the verge of the indemnity; as if, forsooth, the taking a man's bread from him, and his good name, that is dear to an honest man as his life, were no pain or punishment.

THE LORDS sustained the defence founded on the indemnity, to exculpate for any malversations preceding the 16th day of March 1703, which was the date of the act of indemnity.

Fol. Dic. v. 1. p. 462. Forbes, p. 198.

. See Fountainhall's report of this case, No 7. p. 4433, *voce* FOREIGN.

1709. January 26.

MR JAMES COLVIL Advocate against ALEXANDER IRVING of Drum.

In an action at the instance of Mr James Colvil against the Laird of Drum, for payment of bygone annuities contained in a bond granted by the defen-

No 6.

Found in conformity with M'Micken against Kennedy, No 4. p. 6824.

No 6.

der's predecessor to the pursuer's author by progress, in the which bond the debtor acknowledged the receipt of L. 1000 Scots, and obliged himself, his heirs or assignees to pay to the creditor, his heirs or assignees heritably the sum of L. 80 money foresaid yearly, at two terms of the year by equal portions, with L. 13 of penalty for each term's failzie; with this provision, that the debtor might free himself and estate of the said burden, by payment of the L. 1000 and the arrears of the said annuity resting at the time; but no clause, whereby the creditor might demand payment of the said L. 1000 or charge for it.

Alleged for the defender; He ought to be assoilzied from the sums pursued for, because the bond is usurious, seeing L. 80 of annuity is thereby payable for L. 1000 of stock, which is 8 *per cent.* for ever.

Answered for the pursuer; Here is no usury, because no *mutuum*, but only an annuity or rent of L. 80 bought for 1000 Scots of stock, which was sunk, and could not be required back again by the creditor; and such an annuity was found not to be usurious in the case of Dame Christian Stuart, Lady Kettingstoun against Sir Alexander Home in *anno* 1676, See USURY, yea annuities at 8, 10, or 12 *per cent.* are allowed by law, and warrantably bought. *2do*, Where the creditor undergoes any loss or hazard, law hinders not the taking more than the ordinary interest, as is in the case of a proper wadset; and the pursuer not only runs the hazard of the debtor's insolvency, and the raising of annualrents higher than 8 *per cent.* but also loses his principal sum. *3tio*, *Esto* the bond was usurious, the penalty of usury is taken off by the Sovereign's indemnity.

Replied for the defender; *imo*, If this were allowed under the notion of a sale, the laws for preventing of usury would be eluded; all covetous lenders would take this method with necessitous borrowers. It imports nothing that the creditor could not exact his principal sum; for usury is not founded in the creditor's having a faculty to require the principal, but in taking more annualrent for the use of money than is allowed by law; and it is usury in an improper wadset, to take more than the ordinary annualrent, though requisition be suspended for many years. Besides, albeit the creditor cannot directly charge for the principal sum; yet he hath directly insured to himself the payment of it, by having put it in the power of the debtor to redeem upon payment, which the exorbitant yearly usury will oblige him to do how soon he is able. And though liferent annuities above the legal interest might be allowed, where the stock is sunk, because of the hazard depending upon the creditor's life, perpetual annuities of that kind are justly reprobated. *2do*, It is only *periculum juris* that excludes usury, where the creditor has no person legally obliged for any loss he may sustain, as in proper wadsets and tacks that may fall under the value of the annualrent; but where the debtor stands obliged, any accidental risk by his turning insolvent will not excuse the taking more than the ordinary annualrent.

THE LORDS seemed to be clear that the bond was usurious; but found the penalty of usury taken off by the indemnity. See USURY.

No 6.

Fol. Dic. v. 1. p. 461. Forbes, p. 312.

1710. July 26.

HASWELL against The MAGISTRATES of Jedburgh.

HASWELL having incarcerated his debtor in the tolbooth of Jedburgh, and he having made his escape, Haswell pursues the Magistrates by a subsidiary action to pay the debt. *Alleged, imo*, This did not happen during our time; and though we be liable *ratione officii*, yet you must call the Magistrates, during whose administration the fault was committed; for they may have defences to elide the pursuit which are unknown to us. *Answered*, He is concerned with none but the present Magistrates; and if they please they may recur for relief against their predecessors; but it has been found, this allegiance could not stop their being decerned. THE LORDS repelled this defence. *2do, Alleged*, This action arising *ex delicto vel quasi*, being either the fraud or the fault of the Magistrates and their goaler that their prisoner escaped, either *dolo* or *lata culpa quæ dolo æquiparatur*, the same is pardoned by the Queen's last indemnity, this escape being prior thereto. *Answered*, The Queen did pardon all fines or forfeitures arising to her by crimes, but never intended to take away the interest of private parties; and here the Magistrates came directly in the place of the rebel imprisoned, and become liable as he was; and no casualty by this escape arising to the Crown, it can never be reputed to be remitted; and when it was pretended that denunciations prior to that indemnity were taken away as to their penal consequences and effects, the LORDS found they fell not under the indemnity. And, upon these grounds, the LORDS likewise repelled this second defence, and found the indemnity did not comprehend this case.

Fol. Dic. v. 1. p. 462. Fountainball, v. 2. p. 593.

1712. February 22.

MRS MARGARET ROBERTSON Supplicant against ALEXANDER ROBERTSON of Strowan, her Brother.

UPON a complaint offered by Mrs Margáret Robertson, against Strowan her brother, for violently invading her during the dependence of a process at her instance against him, for payment of her proportion of the provision stipulated by their father to the younger children in his contract of marriage; and craving that in the terms of the act 219, Parliament 14, James VI. sentence might be given in her favours against the invader, as having thereby lost the plea, the LORDS found, That the act of indemnity did not acquit Strowan from the

VOL. XVI.

38 F

No 7.

In an action against Magistrates for allowing a prisoner to escape, the Lords repelled the defence that the delict was pardoned by a subsequent act of indemnity.

No 8.

Batter. *pendente lite* not pardoned by an act of indemnity.