

'The Court' adhered,' and found Mr Burton liable in the expence of the answers, &c.

No 36.

Lord Ordinary, *Swinton*.  
Clerk, *Menzies*.

For Common Agent, *D. Cathcart*.Alt. *Hay*.*Fac. Col. No 200. p. 480.**Davidson.*

1722. December 20. HENDERSON against GRAHAM of Kilmardinny.

AN adjudication being led upon several grounds of debt, it was *objected* against some of the bonds, That they were null, upon the head of usury, in regard annualrent was pactioned, from terms prior to the dates of the bonds, and yet no evidence given, that the debtor received the money at these terms; on the contrary, the bonds bearing the receipts of the money indefinitely, the present time only could be understood.—THE LORDS found the objection against the bonds, not sufficient to annul them, as usurious; but sustained it, to open the legal of the adjudication, and cut off the penalties and accumulations of the said bonds; and sustained the adjudications for the principal sums, penalties, and accumulations of all the bonds whereon the adjudication proceeded, except the bonds quarrelled.

No 37.  
Usurious itipulation.

An adjudication restricted, as to bonds, on which more interest than appeared to be due, was charged; and yet sustained in full effect, as to other bonds.

\* \* \* Here the case was cited, determined a year or two before, betwixt Halyburton of Newmains, and the Lady Monboddoo; where an adjudication having been led upon a bond, without deducing the retention, betwixt Martinmas 1672 and 1673, which was a trifle, and by oversight; the Lords did reduce it to a security, for principal, annualrents, and necessary expences, not only as to that debt, but as to several others, against which no exception could be made.

*Fol. Dic. v. 1. p. 9.*

1724. June 12.

THE CREDITORS of RODERICK FORBES of BRUX, against Sir JAMES GORDON of Park, and JAMES ERSKINE, brother to Pittodrie.

IN the ranking of the creditors of BRUX, it was *objected* to the adjudications produced by Sir James and Mr Erskine, *imo*, That they were led for sums which were not in their persons, at the time when they charged their debtor's representative to enter heir in general to him; and therefore, as to such sums, they were void. *2do*, That the charter from the King, under the Great Seal, upon Mr Erskine's adjudication, was void, as flowing *a non habente potestatem*, in respect that the lands held of the late Earl of Mar; and on the 18th June 1718, at which

No 38.  
An adjudication annulled, because the sums were not in the adjudger's person, at the time of charging the debtor's represen-

No 38.  
Exorbitant  
penalty.

time the charter was expedite, the rights belonging to the said Earl, were, by the act Quarto Georgii, vested in the person of the Commissioners of Enquiry.

THE LORDS sustained both objections.

Aff. Alex. Nairn.

Alt. John Ogilvie.

Clerk, Mackenzie.

Fol. Dic. v. 3. p. 4 Edgar, p. 48.

No 39.  
Exorbitant  
penalty.

An apprising led for termly failzies, in an infestment of annualrent, sustained only to the extent of the true interest and damage of the apprifer.

1677. November 29.

ORROCK against MORRIS.

WILLIAM ORROCK of Balram, having used an order of redemption of several apprisings against his estate, pursues a declarator against David Morris, That the apprisings, in so far as not satisfied by intromission within the legal, are yet unexpired by the order, and satisfiable by payment of the surplus; which coming to an account, it was *alleged* for the pursuer, That the sums whereupon these apprisings proceeded, were secured by infestment; which, though they bore requisition, yet in the clause of requisition, there was only an obligation to pay the principal sum, annualrent, and penalty; but not to pay any termly failzies; and yet the apprisings were led for all the termly failzies, which should have abidden declarator; albeit they had been in the clause of requisition. *2do*, Such failzies, even after apprisings, are modifiable by the Lords.—The defender *answered*, That penalties in bonds, after apprisings, which is the ultimate diligence, are not accustomed to be modified, or the apprising to be quarrelled on that ground; and the termly failzies are but a penalty for the annualrent.

THE LORDS found, That if the termly failzies were not mentioned in the clause of requisition, for which the apprising proceeded, they should not at all be sustained in the account, but deduced; and though they were in that clause, that they ought to be modified according to the true damage and interest of the apprifer, and that they were not in the case of ordinary penalties in principal sums.

Fol. Dic. v. 1. p. 9. Stair, v. 2. p. 568.

No 40.  
Exorbitant  
penalty.

A penalty on a principal sum, where exorbitant, was restricted to the tenth part of the principal sum; and this after ad-

1680. November 30.

EARL OF PANMUIR against DURHAM.

THE Earl of Panmuir having wadset Durham of Grange's lands, for 26000 merks of principal, and 5000 merks of penalty; containing a clause, That seeing Panmuir had supported him in money, and lent him in his necessity, that if he happened to sell his land, he should give my Lord the first offer, and prefer him, he paying as great a price as another would give. Panmuir adjudges for the same sums, and pursues for removing. The defender offers the principal and annualrent at the bar, and so much of the penalty, as the Lords should modify, providing that the pursuer should renounce the clause of preference. The pur-