

1741. July 15.

CLELAND *against* HAMILTON.

No. 34.

How far
usury is taken
off by an in-
demnity, or
by the death
of the party?

Before the statute 12^{mo} *Annæ*, an indemnity not only took away the penal action, but also the objection of nullity, as was found January 26, 1709, Colvil against Drum, No. 25. p. 16420. All that remained to the objector after an indemnity, was a deduction on account of any excess of payment beyond the ordinary annual-rent. Another case to the same purpose was that in June 27, 1706, M'Michan against Kennedy of Glenour, No. 62. p. 524. And these decisions were agreeable to the law for the time; for though by act 251, Parl. 15, James VI. usurious bonds, contracts, &c. were "declared null and of none avail, as gif the samen had never been made;" yet the following part of that statute explains this to have meant no more than that action should not lie to the usurer himself. But as the bond still subsisted to give the King action thereon for the principal sum and legal interest, the barring the usurer from action on it, was only considered as a penalty, which was taken off by an indemnity, and ceased by the death of the party.

Now indeed the case is different; for, by the act 12^{mo} *Annæ*, usurious bonds, contracts, &c. are declared to be utterly void, which being a statutory nullity, is equally good against the heir or assignee of the usurer as against himself; nor would any indemnity restore the bond. But still, even after this statute, usurious bonds, &c. are only declared null where the usury is *pars contractus*, but not where it arises from taking forehand payment of annual-rent upon a bond, which in itself is not usurious. And that kind of usury, *quoad* the penal effects, still ceases by the death of the party, and no more is competent against his heir but deduction or repetition of any excess of payment made beyond the ordinary annual-rent; and so it was found in this case.

Kilkerran, No. 2. p. 591.

* * This case is reported by C. Home:

Gavin Cleland granted a bond to James Hamilton of Newton, for 300 merks, the annual-rents of which he paid for many years; but thereafter he brought a reduction thereof, on the head of usury, and the *species facti* he condescended on, was the receiving annual-rents before hand, or before it was due; for verifying of which, he produced an holograph discharge of annual-rents of James Hamilton the creditor, of date the 31st January, 1734, discharging all annual-rents due on the bond till Lammas thereafter; and after the creditor's decease, he awakened the same against his executors.

The defences for the executors were, That the species of usury complained of was not comprehended in the 28th act, 23d Parl. James VI. by which the only custom intended to be restrained, was the taking annual-rent at the time of lending the money, which it seems was then an ordinary practice, and was no doubt

very oppressive to the debtor, but which ought not to be extended further; besides, the term of payment, mentioned in the act, may be very properly understood, only with respect to the term of payment of the bond itself. Further, it is impossible to suppose there could be any usurious intention in the present case, as the profits arising to the creditor, from receiving before hand seven merks and a half Scots (interest of one term) does not exceed three half-pence, for the benefit of which no person should be supposed so mad or foolish as to risk the forfeiting his debt. Besides, it is probable, there has been some mistake in the date, as it is usual in the first month of a year, to continue the number of the year which is past; so that the receipt has truly been of date 1735.

Answered: The act intended to prevent the oppression of straitened debtors; by anticipating the payment of annual-rents before the same fell due; whereby, as the debtor wants the use of his money to the said term, so the usurer, by lending it out, gets in effect more annual-rent than was pactioned by the bond; and whether it happens at the time of the loan, or term of payment of the bond, but before the term of payment of the annual-rent exacted, is one and the same thing in the eye of the law; and the defenders mistake the meaning of the words of the act, "discharging the craving or receiving of annual-rents of the sum lent, until the term of payment appointed by the bonds;" for it is not the term of payment of the capital that the act speaks of, but the term of payment of the annual-rents. And, by the 222d act, Parl. 14, James VI. whether the gain be great or small, receivers shall be deemed usurers.

As to the observation with respect to the date, it was answered, That though it may be common in the first days of a new year, to continue the date of the former; yet this rarely happens so far down as the very last day of January; besides, the particular stile of this discharge, shows plainly that this could not be the case.

The Lords found there was no sufficient evidence of usury, so as to annul the bond in this case.

C. Home, No. 176. p. 294.

1745. July 13.

ABERCROMBY against The EARL of PETERBOROUGH.

In the year 1730 the Earl of Peterborough, then Lord Mordaunt, granted bond at London after the English form, to Dr. William Abercromby, the condition whereof bore, "That the sum of £.210 was then advanced to the Lord Mordaunt, and if he should happen to survive the Earl of Peterborough his grandfather, he was to pay to the Doctor, within the space of two months after the Earl's death, the sum of £.840, or if the Lord Mordaunt died in the lifetime of the Earl, the obligation was to be void."

Upon the death of the Earl of Peterborough, which happened in about five years after the date of the bond, an action was brought against the Lord Mor-

No. 35.

Exorbitant
profit pactioned
from
the debtor.