*** Kilkerran reports the same case:

No 22.

The estate of Keith being exposed to voluntary roup, conform to articles, whereof one, as usual, was, 'That Keith obliged himself, that the lands were 'to become the property of the highest bidder,' &c.; and several offerers having appeared, who raised the price considerably above what it had been set up at, they were at last all over-bid by David Maule, who was preferred, and declared purchaser. And the creditors having arrested in Mr. Maule's hands, and pursued a furthcoming, his defence was, That he had been but an interposed person for Keith himself; who, by his letter of the same date with the sale, had desired him to go the length of 27 year's purchase; and if the lands fell in his hands, obliged himself to relieve him thereof.

This defence the Lords 'sustained,' on this ground, that the arresters were only personal creditors, as all Keith's other creditors were; and that none but such as had a real *lien* on the estate could plead a real interest in the roup. But this much this reasoning supposed, and was expressed to suppose; that in any case where creditors have adjudications, an offerer at a roup preferred, could not avail himself of such private release from the debtor; a practice which was much condemned as *contra bonos mores*.

Kilkerran, (Fraud.) *No* 2. *p.* 216.

No 23.
A bond taken in England for more than double the sum lent, on an uncertain condition, was found not usurious; but the advantage being exorbitant, was restricted to the principal and interest.

1745. *July* 13. Dr Abercromby *against* The Earl of Peterborough.

Dr Abercromby of Westminster lent to the Lord Mordaunt, who had attained the age of majority, L. 210 Sterling on a bond for L. 1680 conditioned for the payment of L. 840 with interest, on the death of the Earl of Peterborough, whose grandson and heir-apparent Lord Mordaunt was.

The Earl lived about five years after, and the Doctor pursued his debtor before the Court of Session in Scotland, he having an estate there; where the defence was 1*st*, That the bond was usurious, and consequently void; 2*do*, It was reducible upon the head of fraud and circumvention.

Pleaded for the pursuer; The defender was of age, and not *dolo inductus* of the pursuer to the bargain; but actually solicited him for more advances of the like kind; which were refused, as appeared by his letters in process. There was a chance of his predeceasing his grandfather, and therefore it was lawful to take a profit on that account more than the interest of the money; which exeemed the contract from falling under the statutes concerning usury. Nothing was more common in England, than to lay out money on annuities for lives; and though the value of these was capable of being calculated; yet it would not hinder a bargain of that sort to stand, that it was not precisely equal; if no fraud were condescended on, since parties in these cases judge for themselves.

No 23.

The *fœnus nauticum* was allowed by the Roman law, and was in daily practice by bills of bottomry; and contracts of insurance were of the like nature.

Many authorities might be brought from the law of England, the place of the contract, to prove that the laws concerning usury did not regulate bargains, where the principal was hazarded; Hawkin's Pleas of the Crown, lib. 1. c. 82. Tit. USURY, § 15. & 16.; Wood's Instit. fol. 432; Shepherd's Epitome, fol. 1076. § 6.; Shartly *versus* Hurell, § 12.; Cotterell *versus* Harrington.

As there was no usury, so neither was there any fraud condescended on; and therefore the bond ought to be sustained.

Pleaded for the defender; That the laws against usury had place wherever it was intended to be covertly taken; and therefore so exorbitant an advantage as this was on so small a hazard, as a very old man's outliving his young grandson could be nothing else but usurious. Suppose a man made a contract to pay a great sum on condition he outlived the next day, there would be some chance, and yet it would not legitimate an usurious bargain. By bills of exchange, more profit than the interest of money was made, but *cambium siccum* was not allowed; and if any bargains, with relation to trade, as insurances or the like, were entered into, purely to be a cover for usury, they would be set aside.

Contracts of this nature entered into with young heirs, expectants of great estates, were most fraudulent, and of most pernicious consequences; nor was it necessary to set them aside; that the contracter had been minor, for there another remedy would be competent; and it was of no consequence, though the borrower should have made the first application; since dealers in this way have methods of making the prey fall into their shares, and seeming to be solicited to what themselves have contrived.

Bonds of this nature, which were in England called *post-obit bonds*, had been frequently set aside by the Chancery, and the claim restricted to the sum really advanced, with interest, as in the case of Berny *versus* Pitt, Vernon, fol. 14. Hilary Term 1686. This case came first in before the Lord Nottingham, who sustained the bond, such contrivances being then new; but Lord Jeffries, on a re-hearing, set it aside; and his determination had since been held the rule in cases of the same, or a similar nature, as Williams, fol. 330, case 80., Easter, 1716., Twisleton *versus* Griffiths; 2. Vernon, fol. 77. Trinity 1688. case 71. Lamplugh *versus* Smith; 2. Vernon, fol. 121. Hilary 1690. case 122., Wiseman *versus* Beake, Cases, *tempore* Talbot, fol. 3. Trinity 1735, Proof *versus* Hynd; a case not reported, but set down by Solicitor Ross, Mohun *versus* Lingwood, 1734; where the Chancellor Talbot gave an injunction, stopping procedure on the bond at law, and declared, That, if the creditor insisted for a decree on the merits of the case, he would give it against him with costs. This was a case in point, and so much stronger than the present, that the debtor's life was not so good as the person's to whom he was heir. A case Sir William Stanhope *versus* Roberts and Cope, which was taken up by recommendation of the Chancellor.

No 23.

On the first report, the Lords inclined to think the security ought to be reduced as *contra bonos mores*, but that it might be sustained to the extent of the sum really advanced, and interest; and some thought an allowance ought also to be given on account of the chance of the Lord Peterborough's surviving his grandson, which might be calculated; but as the contract was executed in England, they desired to be informed of the practice there; and, seeing by the above precedents it was ordinary to restrict such bonds to the sum advanced with interest;

They repelled the objection of usury, but found that the bond in question should only subsist for the principal sum and interest; and that upon payment thereof, against the term of Whitsunday then next, the same behoved to be discharged; but in case payment was not then made, they decerned for the whole sums in the bond, the same being redeemable at any time by the defender, upon payment of the principal sum and interest, and expenses incurred by the pursuer after this judgment.

Reporter, *Lord Murkle.* Act. *Lockhart.* Alt. *A. Pringle.* Clerk, *Kilpatrick.*

D. Falconer, v. 1. *p.* 120.

*** This case is reported by Kilkerran, *voce* Usury.

1748. *December* 17. Chrysties *againts* Fairholms.

No 24.
A person, induced to sell his goods upon the security of a bill, which afterwards turned out to be forged, was preferred on the price to the other creditors of the purchaser.

Robert Chrystie and Company, merchants in Glasgow, agreed to sell to George Anderson, merchant in Alloa, a quantity of tobacco, upon his procuring Robert Drysdale, merchant there, to accept a bill with him for the price: Whereupon he transmitted a bill to them with the name Robert Drysdale adhibited thereto, and desired them, as they had obtained the security they had chosen, to forward the tobacco; which was accordingly delivered, and put on board a ship for exportation, where it was arrested by Anderson's creditors.

Anderson and his creditors agreed that the tobacco should be consigned to John Dunlop in Rotterdam, which was done, and the bills of loading taken in name of the creditors; and, on its arrival at the port of delivery, Anderson, by his missive to Thomas Fairholm and Company, Dunlop's correspondents in Edinburgh, consented that the proceeds should be divided amongst the arresters.

Messrs Fairholms raised a multiplepoinding; and Messrs Chrysties having discovered that the subscription to the bill sent them was not Robert Drysdale's, compeared and craved to be preferred on the price.

Pleaded for the Chrysties; There was here no transfer of the property: *Dolus dedit causam contractui*, which is therefore null; and the delivery can have no effect, seeing *fides non erat habita, de pretio:* The Chrysties could vindicate the tobacco, if it were *in medio*, and must be preferred on the price, as coming in its place.