

infer usury, if, with the annualrent of 300 merks, being but twelve pounds yearly, three stones of cheese were yearly delivered, over and above the annualrent: or, if it had been expressly in name of donation or gratification, it would open a door for eluding the law against usury; and, therefore, seeing it cannot be presumed to be usury or donation, it must be presumed to be in satisfaction. And, as to the renewing of the bond, it was upon caption, without any transaction or abatement.

The Lords sustained the compensation being instantly verified and liquidated by the charger's oath, and would not sustain such a preparative to be a cloak for usury.

Vol. II, Page 413.

1676. *February 15.* AUCHTERLONY *against* The MAGISTRATES of ABERDENE.

THE Laird of Morphie having been incarcerated in the tolbooth of Aberdene, upon a debt due to the town, he produces a protection under the king's hand, upon payment of the annualrents, unto the messenger, and offered to pay the annualrents; yet the messenger put him in prison; wherein, he was arrested at the instance of Auchterlony; but thereafter, the magistrates having gotten a security for their relief, let him go. Auchterlony pursues the magistrates for his debt, as suffering the rebel to escape; who ALLEGED Absolvitor; because, he having protection under the king's hand, and offering the annualrent to the messenger, he unwarrantably incarcerated him; and therefore, they might warrantably let him go, notwithstanding of the subsequent arrestments; seeing they were accessory to the first error, and could not have been laid on, if that had not preceded.

It was ANSWERED, That the pursuer, having a caption, might have incarcerated him, being out of the tolbooth, or arrest him, being in it, without considering how he came there: and though he had had reason to have been liberated, by charges to set at liberty, as he had not, yet the magistrates were no judges, much less was the messenger judge, to the protection and offer of the annualrent; nor did he any wrong in refusing the same.

The Lords repelled the defence.

Vol. II, Page 415.

1676. *February 16.* DOCTOR BORTHWICK *against* The EARL of CRAWFORD.

THE Earl of Crawford granted bond to Elizabeth Corstorphine and _____ Gourlay, mother and grandmother to William Borthwick, bearing the sum received in the name of the said William; and obliging the Earl to pay the same to the mother and grandmother, in liferent, and to William, after their decease, his heirs and assignees. But in the same bond, there is a precept of seaisine for infesting the grandmother and mother in fee; and seaisine given to them accordingly, without mention of William. But thereafter, the mother and grandmother dispone the annualrent to William, acknowledging that they were infest