where the Court found the objection cut off by an indemnity, which it could not, if it annulled the debt; and Arniston seemed inclined to be of that opinion; though now since the act 12th *Annæ*, where the usury is committed in the original contract, it voids the contract; yet usury committed afterwards does not annul the bond; and Earl Ilay observed, that we had all overlooked that the discharge does not specify the particular sum received, and if the interest of the interest was discounted, there was no usury. We found no sufficient evidence of usury.

No. 2. 1742, Jan. 5. BLAIR *against* BLAIRS.

THE Lord Kilkerran, Ordinary, found that taking an heritable bond in 1709, and infeftment of annualrent thereon for an annualrent, at the rate of 6 *per cent.* was not usury, because the statutory interest then was 6 *per cent.*; only the debtor was allowed retention of a half *per cent.* 2dly, That the creditor's exacting 6 *per cent.* downwards to 1722, though it was usury, yet he being dead, the penal consequences ceased, and his heir was only bound to discount the sums overpaid; and this day we adhered, and refused a reclaiming bill without answers.

VIRTUAL.

No. 1. 1736, Feb. 14. ANN JOHNSTON *against* JAMES AFFLECK.

THE Lords adhered, and found that a general discharge did not include the debt formerly assigned, though the assignation was not intimated.

No. 2. 1749, Jan. 17. PRENTICES *against* CATHERINE MALCOLM.

FIND that the heirs of Jean Prentice have no election, nor no action for the L.1000 sterling.

No. 3. 1753, Feb. 15. MR HALDANE *against* THE DUKE OF DOUGLAS.

THE Marquis of Douglas having given his daughter, Lady Jean, bond of provision only for 20,000 merks, the Duke her brother, in 1719, augmented it to 50,000 merks, payable at her marriage, but with annualrent from the date, but reserved a power to revoke and alter as to the additional 30,000 merks; and in 1728, Lady Jean having occasion for some money, the Duke lent her at different times L.700, for which she gave him two bonds in the usual form, with annualrent and penalty; and in 1736, after the death of the Marchioness her mother, he gave her a bond for an additional annuity of about L.161 sterling, making, with the interest of the 50,000 merks contained in the former bonds (which are therein shortly mentioned) L.300 sterling, which he obliged him during his pleasure to pay her at four terms in the year, but reserved to himself

power to revoke that bond so far as concerned the additional annuity, and reserving also power to impute any payments made by him in part and to account of the said bonds of provision. Differences having afterwards arisen between the Duke and his sister, she was forced to apply to other people for credit, and in 1743 Mr Haldane became bound for her in L.500 sterling; and Mr Robertson, about 1747, lent her L.200 sterling; and for their payments she assigned to Mr Haldane her father's bond of provision of 20,000 merks, on which he pursued the Duke, and also arrested in his hands, and pursued a forthcoming. The Duke had stopped payment of her annuity for a good many years, and in June last executed a formal revocation of his own two bonds; and his defence was, that the 30,000 merks, and the annuity bond, were both of them revokable and revoked, and the annuity only payable during pleasure, and these 20,000 merks compensed. Answered: That the bond of annuity mentioned the bond of 30,000 merks, but took no notice of its being revokable, and thereby ensnared the pursuers, and induced them on the credit thereof. 2dly, That the revocation of the annuity could not operate *retro* before its date, and therefore the preceding annuities are still due. And the Lord Advocate quoted a case betwixt James Marquis of Annandale and the Marchioness, touching lands to the extent of L.500 yearly, given by Marquis William to his son, reserving a power to revoke, and which Marquis William afterwards revoked *via facti*, by uplifting the rents himself; yet because there was no formal deed of revocation, the House of Lords, 21st December 1721, found Marquis William's executrix chargeable with the rents so uplifted by him. 3dly, No compensation on the Lady's two bonds, which the Duke in effect passed from, by paying the annuities, at least not for the annualrents of these bonds, because he reserved power to impute them only as receipts in payment and to account of the whole 50,000 merks. 4thly, The revocation could not operate *retro* before its date as to the interest of the additional 30,000 merks. The Lords sustained the defence against the whole annuity, because the obligement was only to pay during pleasure. 2dly, They sustained the defence on the revocation of the principal sum of the 30,000 merks bond, and the compensation on the two bonds in 1728, both principal and annualrents. 3dly, They repelled the defence on the revocation as to the annualrent of the additional provision of 30,000 merks that fell due before the revocation in June last. Against the first was only Kames; but neither Kilkerran nor Murkle would vote. And for the third interlocutor were Milton, Justice-Clerk, Shewalton, Kames; and against it were the President, Minto, Strichen, Woodhall, and Elchies; and Murkle would not vote,—28th December 1752.

(The case is again stated thus:)

Lady Jean Douglas (now Stuart) had a bond of provision by the Marquis of Douglas, her father, for 20,000 merks, and in 1718, the Duke, her brother, gave a bond for an additional provision of 30,000 merks, payable to her and heirs of her body, or assignees, by contract of marriage, with interest, but reserving to himself power to revoke. In 1728 and 1731, he lent her at two different times L.750 sterling, on two bonds of borrowed money in common form; and in 1736, after the Marchioness their mother's death, he gave her a bond for an additional annuity of L.161 sterling, on the narrative, that the interest of the two bonds of provision was not sufficient to aliment her, making, with that

interest, L.300, which he obliged him to pay her quarterly during his pleasure; and it contained also a separate express power to revoke, and reserving power if he should think fit, to impute any receipts of payment he had from her. Mr Haldane, in his own right, and as trustee for William Robertson, were creditors to Lady Jean in L.700 sterling, and in security she assigned them to the 20,000 merks bond; on which they sued the Duke, who pleaded compensation on Lady Jean's two bonds, and interest thereof, which was all yet resting, whereas the Duke had regularly paid up the L.300, (which included the interest of 20,000 merks) till Whitsunday 1749 inclusive. Therefore Mr Haldane arrested in the Duke's hands, and pursued forthcoming, which being conjoined with the other process; and the Duke having produced a formal revocation in June 1752,—sundry questions arose; 1st, Whether any of the additional annuity of L.161 was due, or could be sued for after the term of Whitsunday 1749, when it was last paid? 2dly, Whether the interest of the 30,000 merks could be claimed from that term till the revocation? 3dly, Whether compensation on Lady Jean's two bonds should be sustained against the 20,000 merks bond granted by her father, or if it must be imputed proportionally to that sum, and to the 30,000 merks now revoked? 4thly, Whether any compensation should be sustained on the bygone interest of Lady Jean's two bonds, or if they were not tacitly and by implication discharged by the Duke's paying her annuity of L.300 for her aliment? And the Court were of different opinions on all those points. As to the two first, some thought *(inter quos ego)* that an obligation to pay *si voluere*, or *quidcunque voluere*, could not give an action against the granter. Others thought that the obligation was binding till it was revoked, especially as it was alimentary; and however it might be revoked in time coming, the revocation could not operate *retro*; and quoted the case betwixt this Marquis of Annandale and the last Marquis, her stepson, where Marquis William, who liferented the whole estate, whereof his son had the fee, renounced for his aliment the liferent of lands, yielding about L.500 sterling rent, but reserving a power of revocation; but differences arising betwixt father and son, caused his factor uplift the rents, and insert it in his rental, and continued so to do during his life. After his death, the son sued the Marchioness, his widow, for those rents uplifted by his father, and the defence was, that the pursuer's right was revocable and revocked by the Marquis's uplifting those rents. 2dly, A revocation of a posterior date was found among the Marquis's writings after his death. Answered: It was only revocable by a writing under the Marquis's hand; and to the second, that the revocation was a latent deed, not notified to the son. And the Court repelled the defence, and found the Marchioness liable during her husband's life. But the House of Lords, 21st December 1721, found the Marquis's uplifting the rents no sufficient revocation, but sustained the defence from the date of the revocation. A third opinion was, that the L.161 annuity being only payable during pleasure, no action could lie on it; and though that bond contained also a separate clause, reserving power to revoke the obligation, it could be no stronger than if it had not that separate clause. But I thought an obligement containing a power to revoke at pleasure, seemed to be of the same import as an obligement to pay during pleasure, and that I perceived no difference betwixt the capital and the interest of the 30,000 merks; if the reason of difference was, that the term of payment of the interest was passed, it was so also as to the capital; and none of the Judges, nor even the pursuer's lawyers, doubted

that *quoad* the capital it was revocable and revoked;—and as to the Marquis of Annandale's case, Mr Craigie observed a difference betwixt an obligation to pay a sum of money revocable, and an assignment to rents of lands revocable; and that a precarious right is a good right, and a good title of possession, till recalled; and the rents, when they became due and payable, became the sons. The Lords, 12th January last, sustained the defence against the additional annuity since Whitsunday 1749, but repelled the defence against the interest of the 30,000 merks till the revocation in 1752, and sustained the defence on Lady Jean's two bonds, and interest thereof, to compense the said annualrent of the 30,000 merks, and annualrent, and of the 20,000 merks. Mr Haldane reclaimed against all the points given against him;—and the Lords altered the interlocutor as to the annuity of the L.161, and found it due till revoked,—*renit. inter alios* Milton *et me.* And after the interlocutor was pronounced, the defender's counsel produced a letter from him to his agent and cashier in town, Mr Stuart, in July 1749, discharging him to make any more payments to Lady Jean, of which he sent notice to Lady Jean in France, and produced a letter to him from her also in July 1749, acknowledging her having got that notice;—and thereupon we found these annuities not due after Whitsunday 1744;—and we adhered to the former interlocutor as to the other points, 13th Feb. 1753.—31st July, Adhered as to the compensation on Lady Jean's two bonds, and interest thereof. *Renit.* Drummore, Kilkerran, and Justice-Clerk.

VIS ET METUS.

No. 1. 1749, Feb. 24. BAXTERS OF CANONGATE AND LEITH *against* TENANTS OF WINTON.

THE Rebels in 1745 having sequestrated that estate and appointed one Arrot factor, who compelled them to pay their rents under pain of military execution; they ordered under the like pain three baxters of Leith (who had been in use to make biscuit for the Government) to bake 600 bolls of their Winton wheat into biscuit for their army; and they received the wheat or part of it, and granted their receipts to the tenants. Other 300 bolls they sold to six Canongate baxters at L.6. 6s. per boll, though the current price then was L.8 or L.9; and this they also received, and gave receipts to the tenants. These tenants pursued both for the current prices of the whole wheat; and the defence being force and fear, a proof was allowed *hinc inde*, and this day advised. The Leith baxters produced the order on them to manufacture into biscuit under the foresaid pain, and brought proof of their applying for and obtaining delays of the delivery, and they also proved that they had manufactured and delivered the biscuit to the Rebel army, but could not prove the quantities nor the identity, only there was one parcel received by them on 31st October, which could not have been manufactured before the Rebels went off November 1st. We sustained the defence for them, they giving their oaths in supplement that they had manufactured the whole into biscuit and given it to the Rebels, but as to the last parcel ordered them to condescend how they disposed of it. The Canongate