

(DUE *ex pacto.*)

it; for they found, That annualrent being once promised, the debtor was still liable therefor, until payment; albeit the promise did bear no such thing.

Fol. Dic. v. 1. p. 37. Gosford, MS. No 81. p. 29.

No 13.

1676. December 19.

DAVID CARNAGIE of Balmachie *against* DURHAM of Omachie, and his TUTOR.

No 14.

The same found.

IN a pursuit at Balmachie's instance, against Durham of Omachie, as representing his grand-father, for payment of the sum of 3000 merks, as the remainder of the wife's tocher, contained in a contract of marriage; as likewise for the payment of some nolt and sheep delivered to Omachie, or some by his order.—It was *alleged* for the defender, That he ought to be assilzied for the annualrent of the sum due in the contract, because it did bear no obligation to pay annualrent after the term of payment; and as to the annualrent of 1000 merks, it was not payable until after Omachie's decease, and so could not bear annualrent, his heirs nor executors not being bound.—It was *alleged* as to the price of nolt and sheep fold and delivered, that not being pursued within five years, conform to the late act of Parliament, it was not probable, but *vel scripto vel juramento*.—It was *replied* to the first, That albeit the contract did not bear annualrent, yet the pursuer producing a fitted account, stated by Omachie himself, not only for the principal sum resting, but for the whole bygone annualrents, with a subscribed ticket to make payment of both at a certain day; it was a sufficient ground for annualrent thereafter; use and payment of bygones being sustained by our law, without any obligation in write; and for the thousand merks, payable after Omachie's decease, albeit none can be craved but since his death, yet it being a part of that same principal sum of 5000 merks of tocher, by stating himself debtor in annualrent for all that was due in his own time, it was a just ground to make that sum bear annualrent since the term of payment.—It was *replied* to the second, That the delivery and price of the goods libelled was probable, *prout de jure*, being before the late act of Parliament, which did only extend *ad futura*; whereas, before that act, bygones of that kind were only probable by witnesses within forty years.—THE LORDS did repell the first defence, and found the whole remaining sum of the tocher to bear annualrent, in respect of the fitted account, and subscribed ticket produced, which were far stronger obligations than was naked use and custom; and likewise found, that the last 1000 merks, payable after Omachie's decease, should bear annualrent, as being a part of the total for which he had acknowledged annualrent to be due, as likewise because it was a part of the tocher contracted *ad sustinenda onera matrimonii*, for which the law allows annualrent *ex mora*. As to the second, the LORDS did sustain the pursuit probable *prout de jure*, the delivery being long before the late act of

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No 14. Parliament, which they found was correctory of the common law, allowing always before that time, probation of such bargains by witnesses, and declaring that it should only extend *ad futura*.

Fol. Dic. v. 1. p. 37. Gosford, MS. No 925.

1669. *January 13.* GEORGE HUME *against* SEATON of Menzies.

No 15.
A debtor by a missive, having obliged himself to pay annualrent for the time bygone, annualrent was found due also in future.

GEORGE HUME, as assignee by the Earl of Wintoun, to a bond granted to the Earl's factor, for his behoof, having charged thereupon, the creditor suspends; in discussing whereof, it was *alleged* for George Hume, that he ought to have annualrent, because the suspender, by a missive letter produced, written to the umquhile Earl of Wintoun, obliged him to pay annualrent for the time bygone; and therefore ought to continue the same till payment.—The suspender *answered*, It contained nothing as to the annualrents in time coming.

THE LORDS found annualrents due from the beginning, both before and after the letter, though they exceeded the principal sum, seeing once annualrent was promised for some terms.

Fol. Dic. v. 1. p. 37. Stair, v. 1. p. 580.

No 16.

A contract of marriage contained an obligation only to pay a sum at a certain term, with one year's annualrent. Annualrent decerned for, for all terms bygone, since the date of the contract, in respect it was for tocher.

1629. *February 16.* KEITH *against* BRUCE.

KEITH pursued Bruce, cautioner for Conn, who was to give to Keith in tocher-good, 2500 merks. The question was about the annualrent of the sum, since the date of the contract, which bore no annualrent as long as it should remain unpaid; only it reported, that he obliged himself to pay 2500 merks at Martinmas, with one term's annualrent.—THE LORDS found annualrent to be due for all terms bygone, in respect it was for tocher-good.

Fol. Dic. v. 1. p. 37. Spottiswood, (USURY.) p. 353.

1696. *July 17.* NAIRN *against* LINDSAY.

No 17.
In a bond of provision, the term at which annualrent should commence, not being fixed, but to be determined afterwards by

MR THOMAS NAIRN of Craigton against Lindsay of Dowhill; whose father, in the son's contract, had reserved a faculty to burden the lands with 20,000 merks for his younger children's provisions; and having accordingly exerted this power, the question arose anent the term of payment, and *a quo tempore* it should bear annualrent:—Craigton *contended*, Seeing it was not expressed, it became *statim* due; for in all pure obligations, which are neither *ad diem*, nor conditional, if they bear no commencement, (as in some tacks) *pro præsenti tempore præsumitur*.