

(DUE *ex passu*.)

1676. December 20.

CARNEGIE of Balmachie *against* DURHAM of Anachie.

No 11.

The same
found.

THE LORDS found, That albeit by the common law, annualrent be due for tocher; yet, by our custom, it is not payable, unless it be so provided by the bond or contract for the same; but, in the case in question, they found the defender liable to pay annualrent, in respect the debtor had been in use of payment, at the least, had promised to pay annualrent for certain years bygone; and annualrent once paid, implies a tacit paction to continue the payment of the same.

Reporter, *The saurer-depute*.*Fol. Dic. v. 1. p. 37. Dirleton, No 408. p. 200.*

1628. December 2.

ZAIR *against* RAMSAY.No 12.
Annualrent
stipulated for
one term,
found ever
due till pay-
ment.

IN a pursuit *Zair contra* Ramsay, for payment of the by-gone annualrents, of a sum contained in a bond, which was of this tenor, that the debtor was obliged to pay 1000 pounds at the term in the bond, and in case of failzie, to pay 100 pounds for annualrent and profit thereof, with 300 merks of expences, if the creditor should be compelled to seek and charge for the same; this bond was found to be heritable, and the debtor was found subject to pay the whole byrun annualrents, yearly since the term of payment, albeit the bond bore only the debtor to be bound to pay one year's profit and a penalty, and not to pay yearly that annualrent, so long as the sum was unpaid.

Fol. Dic. v. 1. p. 37. Durie, p. 403.

1669. January 13.

EARL of WINTOUN *against* SEATOUN of Minnes.No 13.
The same
found.

GEORGE SEATON of Minnes, having borrowed from the Earl of Wintoun's grand-father, the sum of L. 400, and given ticket to one Heriot his servant, payable at Lambmas 1650, and by a missive letter at Martinmas thereafter, directed to the Earl, excusing himself for not payment at the term, and promising to pay annualrent for the time that the Earl had lyen out: This Earl of Wintoun, as having right from the executors of Heriot, did pursue both for principal and the whole annualrents, extending to as much as the principal sum; which the LORDS did sustain, notwithstanding it was *alleged*, That the missive letter was only obligator for payment of annualrent the time preceding, but not for the future; and therefore, the defender was not *in mora*, having offered by the said missive to pay the same to the Earl of Marshall, if the Earl of Wintoun would so order

(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.

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

No 14.
The same
found.