

and perpetual annuities out of lands. And, seeing the principal sum is here for ever sunk and passed from, it was but reasonable that some acknowledgment should be paid beyond the ordinary fixed annualrent, in compensation for the loss of my principal sum : and, if the debtor think it heavy, he can redeem this burden when he pleases, by paying back the principal sum.

Some of the Lords thought the bond usurious, but that the penalty is discharged and remitted by the several acts of indemnity passed since the year 1667, when it was granted, unless it had been exacted since 1703 ; which is the last indemnity we have, pardoning all preceding usuries ; and, therefore, they were for restricting the bond to the current annualrent.

The pursuer offered to restrict to the current annualrent, to take off the usury objected.

Others argued, that an annuity payable for the lifetime of one or more, has never been condemned, though far above 6 per cent. As, for instance, I give one L.1000 sterling, providing he pay me 2000 merks yearly, during my lifetime, and, after my death, the principal sum is to be his own : no law reprobates this bargain, because it is a hazard depending on my life ; which may be long or short, though it is near the double of the ordinary annualrent ; and, by the same rule, a perpetual annuity must be as lawful.

Some thought this allowance would open a great door to extortion of indigent debtors and usury.

The *second* defence was,—This bond is not only usurious, but superstitious, in so far as it is offered to be proven that this sum was truly mortified for the use of the capuchin monks at Paris ; and the creditor's name inserted was no more but a trust, to cover and palliate the fraud : and, for this, they produced some letters from the provincial of the order to astruct this presumption ; and the very creditor's name filled up in the bond was a monk, and so by their rules incapable of any gift, but it, *ipso momento*, accresces to the society of that monastery.

ANSWERED,—They opponed the bond bearing no such story ; and further, *esto* it were a mortification to the Scotch capuchins abroad, it is before the Act of Parliament, in 1700, declaring all such donatives null to these *cætus damnati* ; even as legacies left to the *collegia illicita* were repudiated by the Roman law.

REPLIED,—It is a great mistake to think these donations to popish colleges were valid before the Act in 1700 : for, by the act of annexation of kirk-lands to the crown, in 1587, all these mortifications turn *caduca*, and fall to the King ; and, therefore, her Majesty's advocate should be heard for her interest.

The Lords, on this, forbore the decision at this time. *Vol. II. Page 485.*

1709. *February 4.* VINCENT TANQUI and HARY HENDERSON'S EXECUTORS
against ABRAHAM BAGGOT and GILBERT STEWART.

VINCENT Tanqui and the Executors of Mr Hary Henderson against Abraham Baggat, merchant in Amsterdam, and Gilbert Stewart his factor. Baggot freights a ship of Marseilles, called the Happy Amadié, with goods to Amsterdam ; but the ship, being driven into Inverness by storm, is there disabled from

accomplishing her voyage ; and, by the admiral's order, the goods are roused, and the ship disposed of. Baggot and his factor raised reduction of the admiral's decret, and insist on thir reasons, That he committed iniquity in repelling this defence, That Tanqui, the owner of the ship, did not obtemper the charter-party in sailing *en droiture*, in a straight course to Amsterdam, but touched first at Cadiz, and then at Brest ; by which diverting of the voyage the ship came, by unseasonable weather, to be driven and broke on the north of Scotland.

ANSWERED,—When you, Baggot, freighted my ship, you saw 102 tuns of Provence wine stowed in it for the use of the French king's cellars, to be unloaded at Brest ; so my going there was neither a surprise to you nor a diverting of the voyage.

The Lords repelled this reason of reduction ; and found their unloading at Cadiz and Brest no diverting of the voyage, nor contravening the charter-party.

The *second* reason of reduction was, That the Admiral had found the merchants, owners of the cargo, liable for the damage that happened to the ship at Inverness ; which was unjust, seeing it was occasioned by the fault of Tanqui and Andry, for whom they were noway liable.

ANSWERED,—You gave a commission to Jean Swart to oversee the ship, and to bring your goods safe to land at Amsterdam, either in that ship when it should be refitted, or in another ; and by his negligence the ship came to be lost, and so you must be liable for his deeds.

REPLIED,—All the power he had from the merchants was to preserve the cargo, they having no right to give him directions about the ship, which belonged to Tanqui and Algiari, the proprietors ; and therefore they can never be reached for the damage that happened to the ship.

The Lords, by a scrimp plurality, found the merchants not liable for the prejudice the ship sustained ; but reduced the admiral's decret as to that point, and turned it into a libel.

Swart did likewise allege, That the damage was not by his fault ; because it appeared, by the depositions of the witnesses taken at Inverness, the seamen refused to obey him : and this was said, by the maritime laws, to be a sufficient ground to assoilyie the skipper from the seamen's process, craving their wages from him.

Vol. II. Page 487.

1709. February 10. ALEXANDER GORDON of AUCHINTOUL against DUFF of BRACCO.

THE deceased Duff of Bracco being debtor to Alexander Gordon of Auchintoul in £1000 Scots by bond, Bracco's son, after his father's decease, sends his servant with the haille money, principal and bygone annualrents, to Auchintoul's house ; and, in presence of the said creditor, on the 21st February 1707, offers him the money, and counts it down on the table, in specie current at the time ; and, upon his refusal, he consigns it in the hands of one Grant of Ruddy, to lie there, to be forthcoming to his use ; and takes instruments on the offer and consignment, and protests he may be free of annualrent in time coming ; and if