

No. 11.

1666. *February.*LORD LEY *against* PORTEOUS.

In a declarator of redemption pursued at the instance of the Lord Ley against Mark Porteous, there being an allegiance proponed, That there could be no declarator, unless the Lord Ley should grant a three years tack of the lands to the defender, for 100 merks yearly, conform to the condition of the tack, the lands being worth 300 merks of yearly rent, the Lords repelled the allegiance, in respect of the act of Parliament 19th K. James II. (1449), and found all such tacks null, by way of exception, and so revived the foresaid act, which was gone in desuetude.

*Newbyth MS. p. 56.*

1669. *January 26.*LADY BRAID *against* EARL of KINGHORN.

No. 12.

Found usurious to stipulate that each term's annual-rent is to bear annual-rent, after due.

There is a bond of £.10,000 granted to the Earl of Buchan principal, and the Earl of Kinghorn cautioner to umquhile ——— Morison, of Darsie, and Dame Nicolas Bruce, now Lady Braid, then his spouse, bearing annual-rent, and a clause stating the principal sum after ilk term, as a stock to bear annual-rent, and termly penalties in case of failzie. This being called *in presentia*, it was alleged for Kinghorn, that annual of annual was a most usurious paction, rejected by all law, and our custom, and cannot subsist in whatever terms it be conceived, otherwise by the like paction, the annual of that annual might bear annual, and so perpetually multiply; and if this were sustained, there would never be a bond hereafter in other terms. It was answered, that bonds of corroboration, stating annual-rents into principals by accumulation, have ever been allowed, and though that be done after the annual-rent is become due, making it then to bear annual-rent, there is no material difference to make it bear annual-rent by a paction *ab ante*, but not to take effect till the annual-rent be effectually due. It was answered, that custom had allowed the stating of annual-rents after they were due, into a principal, because then being presently due, they might instantly be exacted; but law and custom hath rejected the other case. The pursuer further alleged, that she being a widow, and this her livelihood, annual-rent at least should be due for the annual-rents, seeing she is ready to depone, that she borrowed money to live upon, and paid annual-rent therefore, or otherwise the termly failzies ought to be sustained.

The Lords sustained the defense, and found no annual-rent due of the annual, nor termly failzies, seeing there was no charge at the pursuer's instance against this defender, and that he was a cautioner, but modified for all £.100 of expenses.

*Stair, v. 1. p. 593.*

Gosford reports this case :

No. 12.

The deceased Earl of Buchan, as principal, and the Earls of Kinghorn and Rothes, as cautioners, having given bond to ——— Dick and the Lady Baird, in life-rent, and their heirs, in fee, for £.20,000 of principal, and annual-rent termly, and in case of failzie, to pay not only penalty, but the annual-rent should be stated in principal sum, and bear annual-rent thereafter; whereupon she did pursue the Earl of Kinghorn for payment of the annual-rent of the said annual-rents. The Lords found the bond as to that clause null and void, conform to the civil law *De usuris*; notwithstanding it was alleged, That the pursuer being a life-renter, and having no other subsistence, for want of the annual-rent, was forced to borrow money for her entertainment; and that it was lawful for a creditor to take bond for by-gone annual-rents, which was not reprobated by our law; so, upon that same reason, it was lawful to the pursuer to make use of that same obligatory clause for the payment of annual-rents of the annual-rents not paid at the term.

*Gosford MS. p. 33.*

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1669. February 19. RELICT of SKINK against EARL of ROXBURGH.

No. 13.

Umquhile Cornelius Skink pursues the Earl of Roxburgh upon a bond; and the Earl having alleged that the bond was partly paid by Skink's intromission with the Earl's pay in Holland, and partly made up of exorbitant usury, of 16 *per cent.* monthly, as appears by a count of the same date, with the bond subscribed by Skink, and whereunto the bond relates, there was an act of liti-contestation *in anno* 1659, sustaining the allegiance as to the intromission and usury after the bond, but repelling the same, as to what preceded the bond, and appointed a count and reckoning. Skink being dead, his relict as executrix having transferred the act, craves now the count to proceed conform thereto. The defender answered, that he ought to be reponed against the act, in so far as it repelled the allegiance, upon the usury preceding the bond, as being unjust. The pursuer answered, that she opposed the act of Parliament, confirming the judicial proceedings in the time of the Usurpation, and specially ratifying acts and interlocutors of the Judges. The defender answered, that this act was unwarrantably extracted, there being a posterior interlocutor, which is now produced under the hand of the President, at that time, ordaining the count to be not only upon the exorbitant usury after the bond, but also before the same.

A new accounting ordered, where usury alleged.

The Lords ordained a new act of count and reckoning to be extracted, allowing the defender to be heard upon the exorbitant usury before the bond also before the auditor, in respect of the said posterior interlocutor.

*Stair, v. 1. p. 610.*