

(DUE *en pacto.*)

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.*

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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.

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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.*

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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*.

(DUE *ex pacto.*)

§ 2. *Instit. de verbor. obligat.* 4th December 1629, Oliphant *contra* Peibles, (Durie, p. 472. See PRESUMPTION.)—On the other hand, it was *alleged*, That annualrent was provided in children's bonds of provision instead of aliment; so, where they are alimented, they ought to have no annualrent, it being unreasonable to give them both; and, *ita est*, the father and mother alimented the younger children during their lifetime; and the term not being fixed, neither in the contract nor bond of provision, but left as the father should afterwards determine, which he never did, the Lords, *tanquam boni viri*, came in his place to supply it.—And having balanced all the presumptions on both sides, they found no annualrent due for their portions till after both the father and mother's death. That it did not commence during the father's life, the LORDS were unanimous: But not in the second; for some were of opinion, that his death was the true term of payment, after which annualrent became due; but it was decided *ut supra*.

*Fol. Dic. v. 1. p. 37. Fountainhall, v. 1. p. 729.*

1702. February 27. SIR JOHN HOUSTON *against* SIR JOHN SCHAW.

SIR JOHN HOUSTON pursues Sir John Schaw of Greenock, for payment of L. 2500 Scots, contained in his ticket.—*Alleged*, *imo*, Absolvitor from annualrents, because the ticket bears none.—*Answered*, It ought to be repelled, because it is made payable at a precise day; and if not then, Greenock is obliged to grant bond for it bearing annualrent.—*Replied*, You should have required me to grant that bond after elapsing of the day.—*Duplied*, In all these obligations *dies interpellat pro homine*, and it was your part to have offered it.—THE LORDS found annualrent due.—*2do*, Greenock craved compensation, because you became cautioner for my Lord Blantyre, in a suspension of a greater sum he owed me, and I have discussed the suspension, and obtained a decret against Blantyre, which he produced extracted.—*Answered*, No liquid compensation, because the principal is not yet discussed, and I condescended on an estate both heritable and moveable, belonging to him, to be subject of discussion.—*Replied*, By your bond of caution you became obliged to pay the sum, how soon the principal suspender shall be found debtor therein, and so no need of discussion.—*Duplied*, Wherever cautioners are not bound conjunctly and severally, they are only *subsidiarie* liable, and has been always so found by a constant tract of decisions; and though the last case, 16th December 1698, Sir John Dempster against Bayne of Tulloch, (Fount. v. 2. p. 26. See CAUTIONER.) be adduced as contrary, yet it had no contingency with this, for it was against the attester of a cautioner in a bond of presentation.—THE LORDS found Houston only *subsidiarie* liable. Some started, what was meant by discussing the principal suspender before access to

No 17.  
the father;  
he having  
died without  
fixing it, it  
was found  
that the chil-  
dren being al-  
imented dur-  
ing the lives  
of their fa-  
ther and mo-  
ther, annual-  
rent could not  
begin till af-  
ter the death  
of both.

No 18.  
A party hav-  
ing given  
ticket for a  
sum, payable  
at a precise  
day, and if  
not then paid,  
obliging him-  
self to grant  
bond for it  
bearing annu-  
alrent; al-  
though the  
creditor, after  
the day elap-  
sed, did not  
require the  
bond, yet an-  
nualrent was  
found due.