(DUE *ex pacto.*)

1662. *December* 11. GEORGE LOGGIE *against* PETER LOGGIE.

No 20.
No back tack-duty or annualrent having been mentioned in a wadſet. In the particular circumſtances of the caſe, declarator of redemption allowed, without payment of annualrent.

GEORGE LOGGIE having borrowed 800 merks from Peter Loggie, his brother, gave a wadſet therefor. The ſaid George being an old man, without hope of children, the reverſion was only granted to George, and the heirs of his own body, and his liferent of the wadſet lands was reſerved, without mentioning of any back-tack duty, or annualrent. George having uſed an order and conſigned the 800 merks, obtained declarator.—Peter ſuſpends, and *alleges* no redemption ought to have been, till the annualrent were conſigned with the principal.—The charger *anſwered*, That the contract of wadſet bore no annualrent.—The ſuſpender *replied*, That albeit it did not, yet he having lent his money in theſe terms, in hopes of ſucceſſion, and his brother having now married a young wife, he ought not to take advantage of him, ſeeing the annualrent is due, in equity, for the profit of the money.

THE LORDS, in reſpect of the tenor of the contract of wadſet, found the letters orderly proceeded, without any annualrent, and that in this caſe it could not be due, without it had been ſo pactioned and agreed.

Fol. Dic. v. 1. *p.* 38. *Stair, v.* 1. *p.* 149.

1699. *July* 12. Mr ALEXANDER CARNEGY *against* KINFAUNS.

No 21.
A party, by a reſerved faculty in his contract of marriage, is allowed to provide to a ſecond wife in liferent, and the children in fee, a certain ſum, without mention of annualrent. Annualrent found due from the diſſolution of the ſecond marriage by the huſband's death.

IN the contract of marriage between Mr Alexander Carnegy, ſecond ſon to the Earl of Nothesk, and Anna Blair, heireſs of Kinfauns, his father engages for L. 40,000 of patrimony with his ſon. Kinfauns diſpones his eſtate to his daughter, and the heir-male of the marriage, with this quality, that if Alexander ſurvive and enter into a ſecond marriage, it ſhall be lawful for him to burden the eſtate of Kinfauns with 20,000 merks in favours of a ſecond wife, and the heirs of that marriage; which caſe exiſted, and the ſaid 20,000 merks being affected by his relict and her ſon, it was firſt debated, that the faculty was extinct, never being ſpecifically exerced;—this the LORDS repelled 23d June 1698 *, and found the entering into a ſecond marriage a ſufficient exerciſe and equipollent. Then Crawfurd of Monorgan, Alexander Peter, the Earl of Northeſk, and other creditors of the father's, craved preference to the ſon, becauſe this being *in bonis* of their debtor, was both affectable, and actually affected by them, and he could have diſcharged it in whole or in part; and ſo being fiar, his ſon can have it in no other way but as heir to him, and muſt, *eo nomine*, be ſubject to their debts, and they preferred *quoad* this intereſt.—*Replied*, This faculty was never purchaſed nor acquired by their debtor's means, but was given in contemplation of the L. 40,000 the Earl of Northeſk, his father, contracted with him, and though he might accept or repudiate, (which is the nature of every faculty,) yet

* *See* The caſe alluded to, between the ſame parties, Fount. v. 2. p. 5. *voce* FACULTY.

No 21.

he could not aſſign it to any ſtranger, nor apply it to any other uſe but the ſpecific deſtination of his ſecond Lady and children, who did not repreſent him in it; but on his exerciſing the faculty, it became a debt, and the children of the ſecond marriage creditors for it.——The Lords found it perſonal, and therefore preferred the children to the creditors; though in moſt caſes creditors are more favourable, and that it might open a door to fraud; but the Lords could not evite the *jus quæſitum* that ſeemed here to ariſe to the ſon of the ſecond marriage.

Then Kinfauns *alleged*, That, however the Lords had found him liable for the principal ſum, yet it could bear no annualrent, which is only due *ex lege vel pacto*, neither of which took place here; ſo that it could never bear annualrent till it were uplifted, or he denounced for payment.—*Anſwered*, The nature of the faculty and proviſion imports annualrent; for 20,000 merks being provided for a wife of a ſecond marriage and her children, that muſt neceſſarily be underſtood to be to her in liferent, and to her ſon in fee; and a proviſion even to a baſtard daughter was found to bear annualrent, though not mentioned, 25th June 1664, Margaret Inglis *contra* Inglis, (*infra*, *h. t.*)——The Lords found this ſum bore annualrent from the firſt term after the diſſolution of the marriage by Kinfaun's death, for the relict's uſe, even as ſhe entered to her other liferent.

Fol. Dic. v. 1. *p.* 37. *Fount. v.* 2. *p.* 59.

No 22.
A ſum was provided in a contract of marriage, to the huſband and wife in conjunct fee and liferent, and to the heirs in fee; whom failing, to be at the diſpoſal of the wife. No annualrent being ſtipulated, found to bear none; and to be heritable, and excluſive of the *jus mariti*.

1733. *June* 16. Miller *againſt* Sinclair and Murray.

One, in his contract of marriage, bound himſelf to provide a certain ſum to himſelf and ſpouſe, in conjunct fee and liferent, and to the heirs of the marriage; but, in caſe of his predeceaſing without heirs of the marriage, his ſpouſe was to have power to diſpoſe of the ſum: This event happened, and the queſtion occurred, whether the ſum bore annualrent, which would entitle her ſecond huſband to the *jus mariti* only? No annualrent was ſtipulated in the contract; but it was *argued*, That the proviſion of liferent was virtually a ſtipulation for annualrent.——The Lords found the ſum heritable, and that it fell not under the *jus mariti* of the ſecond huſband.

Fol. Dic. v. 1. *p.* 37.

No 23.
A pupil's ſtepfather gave bond to the tutor, to be

1630. *July* 21. Tutor of Vallange *againſt* Dr Forrester.

Umquhile Robert Vallange, burgeſs of Glaſgow, in his teſtament, nominated his ſpouſe tutrix to his bairns, and other two friends with her; who alſo nominate her executrix teſtamentar; by virtue whereof, ſhe intromits with his goods and