

(DUE by CONSIGNATARS.)

1728. *February.*WALLACE *against* CUNNINGHAM.

No 100.
A consignatory found liable in annualrent.

MR WALLACE of Ingliftoun, in the year 1713, sold lands to Sir James Dick, and certain incumberances remaining unpurged, 2000 merks of the price was consigned in Ballandallock's hands, who gave an obligation to the feller, declaring, That the money was put in his hands to be expended in perfecting and completing the rights and diligences affecting the purchase, and therefore obliging himself to count to the feller for the said sum; and, if any overplus remained, after completing the diligences, to pay the same on demand. In the year 1728, Ingliftoun having raised a process, against the present Ballandallock, for recovering the said sum consigned in his father's hands, the LORDS found the defender liable for annualrent as well as principal.

Fol. Dic. v. 1. p. 41.

ANNUALRENT due by TRUSTEES.

1738. * *January 4.*TRUSTEES of COLONEL JOHNSTON'S CREDITORS *against* The CREDITORS.

No 101.

A DEBTOR having conveyed his effects, to certain trustees, to be converted into money for the behoof of his creditors, the trustees, in counting with the creditors, were found not liable for annualrent of the sums that, from time to time, came into their hands during the course of their management.

Fol. Dic. v. 1. p. 41.

Whether ANNUALRENT due to Creditors upon a Bankrupt Estate after a Sale?

1713. *June 25.*WALTER CARMICHAEL *against* THOMAS LOCKHART, Her Majesty's Land-Surveyor at Leith.

No 102.
After a judicial sale, a creditor, whose debt did not bear

THE estate of Muir of Annistoun being sold, by a judicial roup, to the Earl of Hyndford, in the year 1700; and, in a ranking of Annistoun's creditors, competing for payment out of the price in the purchaser's hand, Walter Carmichael,

(DUE TO CREDITORS UPON A BANKRUPT ESTATE.)

who had right to a personal debt not bearing annualrent, upon which inhibition was used, being preferred to the rest, in the year 1707, the LORDS found, That Walter Carmichael, the inhibitor, being no real creditor affecting the subject of the estate at the time of the sale, hath no right to annualrent of the sum, for which inhibition was used, preceding the ranking, he not having adjudged till after it.

Albeit, it was *alleged*, for Walter Carmichael, That *utcumque* the purchaser be not obliged to pay the price to any creditor till he make up a real title for his security; yet the *quota* of the price, among the creditors themselves, is determined according to the ground of preference. So that he being classed with preference in the decret of ranking, simply upon the foot of his inhibition, that entitled him to a share of the price as it lay in the purchaser's hand at the time of the sale; and consequently to draw annualrents thereof as accessory to the stock. Had Walter Carmichael adjudged, never so short while before the sale, he would certainly have drawn his share of the price, with annualrents of it from the date of the sale: And yet his preference could not have proceeded upon the adjudication, which had been posterior, by the space of several years, to other adjudgers. Now, how could he lose the annualrents of his share of the price for not adjudging, and yet could not be preferred upon an adjudication, but only upon his prohibitory diligence of inhibition? The case is to be supposed, as if the price were immediately to be divided at the sale, seeing the ranking was declaratory, and added no new right: If, then, the price had been divided at the sale, the inhibitor would have been preferred for the sums secured by his inhibition, and the purchaser's power of retaining, for his own security, till the other had established a real title, is *jus tertii* to the creditors.

In respect, it was *answered*, for Thomas Lockhart, That, had Walter Carmichael adjudged a little before the sale, he would have got annualrent because of his adjudication, though late, and drawn the principal, by virtue of his inhibition, out of the hands of prior adjudgers, *cum omni causa*, or with its accessory, that is annualrent falling due by the subsequent adjudication: But the inhibition entitled him to preference for no more than the sum therein, which did not bear annualrent; and the ranking him *fictione brevis manus* gave him no new right. Let it be supposed that the price of a common debtor's lands were to be divided among his creditors at the sale, the adjudgers would properly get the whole price, as a *surrogatum* of the subject affected by their diligence: All a personal inhibitor could do, if he did presently insist, were to force the adjudgers, posterior to his inhibition, to pay him his money; and if he did not insist, but lie off for the space of seven years, (which is the present case), he would still get no more than his money. Again, had the ranking preceded the sale, no doubt the inhibitor insisting had got his money either *brevis manu* from the purchaser, or *longa manu* from the adjudgers, after they had drawn the price, and then might have lent it for annualrent. But still so long as he doth not insist for payment, his money can bear

No 102.
annualrent,
had adjudged,
and was preferred
upon
an inhibition:
Found to
have no claim,
but for payment
of his
sum without
annualrent.

ANNUALRENT.

(ALLOWED *ob favorem.*)

No 102.

no annualrent more than it would have done against the debtor, while there was no sale intended. The inhibitor hath no right to the lands or rents, and therefore no right to the annual rent of the price which belongs to the adjudgers, as the annualrent of the price of their lands.

Fol. Dic. v. 1. p. 44. Forbes, p. 689.

ANNUALRENT allowed *ob favorem.*COLQUHOUNS *against* L. of LUSS.

No 103.

AN heir of tailzie being bound to pay to the heirs female a sum at their perfect age, was decerned to pay the annualrent thereof after they were past twelve years old, though not mentioned.

Fol. Dic. v. 1. p. 44. Colvill, MS.

MINISTER OF NORTH BERWICK *against* HOME.

No 104.

MONEY left in testament to the poor found to bear annualrent from the death of the testator.

Fol. Dic. v. 1. p. 45. Arskine, MS.

1624. *March 23.*HAMILTON *against* LIVINGSTONE.

No 105.

Found that, notwithstanding the disposition of the Roman law, annualrent for tocher is not due by our custom, unless expressly so provided.

IN an action betwixt Hamilton and Livingstone of Belfane, who being obliged to pay to Hamilton 1000 merks, in tocher with his daughter, at a certain term, of long time past; to the effect the same might be employed upon land or annualrent, for yearly profit to Hamilton and his spouse; and being pursued for the yearly annualrent of all terms since the term of payment: The LORDS found, That, albeit, by the destination of the contract, the defender was obliged to pay the sum, to the effect it might be so employed by the pursuer; yet seeing the defender was not obliged himself to employ it, and that the pursuer had never sought it, after the term of payment, before this present pursuit; and that the defender was specially obliged in the contract, in case of failzie of payment at the term, to pay only a liquidate sum for penalty, that the defender was not holden to pay annualrent.

Añ. ———.

Alt. *Miller.*Clerk, *Gibson.*

Fol. Dic. v. 1. p. 45. Durie, p. 123.

* * * See *Carnegie against Durham*, No 11. p. 484. and No 14. p. 485.