

(DUE TO CAUTIONERS, &c.)

No 64.

THE LORDS found, That the defenders were not liable to pay the annualrent, for the sum decerned, from the time of the designation; seeing *usura debentur* only *ex pacto vel mora*. Albeit it may appear, That that relief that is due *ex lege* is at least also effectual, as if it were *ex pacto*; and the very notion of relief imports that the party should be relieved of all damage sustained by him: And the pursuer was prejudged, not only by the want of the value of what he was to be relieved of, but of the interest of it.

Clerk, Gibson.

Dirleton, No 352. p. 168.

No 65.

Found, That an answered letter of credit, with the possessor's receipt thereon, did bear interest like a bill of exchange.

1682: *March.*SIR JOHN FALCONER *against* L. of GRANT.

FOUND that an answered letter of credit, with the possessor's receipt thereon, did bear annualrent, like a bill of exchange, from the time of the advancing of the money, though Major Grant, the receiver thereof, was dead, and the writer of the letter of credit had no prospect of relief; and that the letter of credit did not prescribe in twenty years, as a holograph missive letter, the same being of a date anterior to the act 1679, and not so many as twenty years elapsed since the act. (*See PRESCRIPTION VICENNIAL.*)

*Fol. Dic. v. 1. p. 44. Harcarfe, (BILL of EXCHANGE.) No 160. p. 35.*1683: *March.*CORNET MURRAY and his LADY *against* her SON.

No 66.

FOUND, that when a tutor pays out sums of his own for his pupil's affairs, he ought to have allowance of annualrent, till the time he had or might get in the pupil's annualrents; as was found in Patrick Tailfer and Sandiland's case.*

*Harcarfe, (TUTORS and CURATORS.) No 974. p. 276.*1714. *December 1.*BAILIE SMITH'S CHILDREN *against* The EARL of WINTON.

No 67.

The managers for a person of quality abroad, advanced money to a man to travel to him on business.

THE said James Smith having served the late Earl of Winton for many years in quality of factor, or chamberlain, the present Earl being beyond seas when his father and brother died, and not having even then returned, it was concerted at a meeting of some of his Lordship's friends, That Seton of Tough, and upon his declining the office, Sir Walter Seton, one of their number, should go abroad in quest of the Earl, in order to inform him of the state of his affairs, and to ac-

* Examine General List of Names.

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quaint him that there was an absolute necessity of his Lordship's presence to manage his own business. At which federunt they also resolved Sir Walter should have L. 100 Sterling for defraying the charge of his journey, out of the first and readiest of the rents of the Earl's estate. After James Smith's decease, his children, as having right by a general disposition, pursue the Earl for payment of the L. 100 Sterling, and annualrents thereof, advanced by the Bailie, in manner, and for the end foresaid.

Answered for the Earl, That Sir Walter had no mandate from his Lordship, nor was he under any character that could found such a repayment. *2do*, A *negotiorum gestio* must be necessary and profitably done, otherwise the negotiator hath his labour for his pains; and he that set him on work must pay his expences. And if a man undertake what is *insolitum*, or unusual, he runs the risk thereof himself if it miscarry; negotiations of this nature requiring the most exact diligence that can be proposed: So that if Sir Walter had no other errand but to give an account how matters stood, this might have been done to as good purpose by a letter.

Replied for the defenders, That they did not contend there was any express mandate, but a *negotium utiliter gestum* for the Earl, and that not undertaken by Bailie Smith at random, but with concurrence of the friends of the family. And, therefore, (in answer to the *second*) this advance of money was both necessary and profitable, as well in the effect as in the design; the design having been to give his Lordship a particular account of his circumstances, and to solicit his home-coming; and the effect (though it did not immediately follow) yet that the friends, by Sir Walter's journey, got knowledge where his Lordship was, so as to communicate with him by letters, and send him bills, which effectuated his return. And as to this *negotium*, its being *insolitum*; *answered*, That when a person absent falls to a considerable heritage, and it not being known where he is, and he keeping no correspondence, his affairs going to confusion, without orders that those interested should take rational methods to prevent those inconveniences which may turn to the ruin of the absent's affairs, is not at all *negotium insolitum*, though it may rarely fall out; but it is a necessary procedure when fallen out for the right administration; for *insolitum* is not what rarely falls out, but the undertaking of a new sort of business not in the way of usual administration.

THE LORDS found the Earl liable to refund the L. 100 Sterling advanced by Bailie Smith to Sir Walter Seton.

January 18. 1715. In this debate, as mentioned the 1st December 1714, the Lords having found the Earl liable to refund the L. 100 Sterling advanced by the Bailie to Sir Walter Seton, but having given no answer as to the annualrents thereof, though also libelled, the Children now apply for these also to be decerned for, and that,

No 67.

The party found obliged to refund the money, but no interest on it.

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No 67.

Because the money was advanced upon the Earl's account; wherefore it ought to be refunded *cum omni causa*; this being the natural effect of money expended in *negotii gestione*, that the advancer be fully reimbursed since 'tis *contra bonam fidem locupletari cum alterius jactura*.

Answered for the Earl, That *usura non debentur nisi ex pacto vel lege*.

Replied for the pursuers, That the rule admits of several exceptions, where annualrent is allowed for damage and interest. Thus, in the case of a cautioner's paying for a principal, where the principal stands bound for the interest, after the cautioner's making payment, though the original bond did not bear annualrent, as was found, 4th December 1629, Laird of Cockpool *contra* Johnston, (Durie, p. 473, *voce* CAUTIONER.) which is founded upon the general principle, That a *mandatorius* or *negotiorum gestor*, is to be refunded *cum omni causa*.

D.plied for the defender, That the decision adduced did not meet the present case, since there the annualrents are due *pacto* by the clause of relief, whereby the principal stands bound to relieve the cautioner of all cost, skaith, and damage, under which the annualrent of the annualrent, paid by him, is comprehended; since, for the most part, cautioners are obliged to borrow money upon annualrent, to pay for the relief of their cautionry.

THE LORDS affoizied from the annualrents.

A&c. Falconer.

Alt. Horn.

Clerk, Gibson.

Fol. Dic. v. I. p. 44. Bruce, p. 17. & 37.

1736. December.

AUBRAY and CULLEN, Factors in London, *against* EXECUTORS of ROSS.

No 68.

A FACTOR allowed annualrent for his several advances upon his constituent's account, from their respective dates, according to *l. 12. § 9. Mandat.*

Fol. Dic. v. I. p. 44.

* * * The same case is thus reported by C. Home :

1737. January 13.

WILLIAM AUBRAY, &c. Factors in Blackwellhall, *against* The EXECUTORS of ANDREW ROSS.

Interest found due on a current account for money advanced by a factor abroad, for behoof of his constituent in Scotland.

THE deceased Andrew Ross, who carried on a cloth manufactory at Muffelburgh, entered several years ago into a correspondence with the said Messrs Aubray, &c.; in course whereof he was in use to send to them his cloths and stuffs, which they sold for his behoof, and transmitted the proceeds to him; also they were in use to furnish him with such tools and materials as he had occa-