

(DUE *ex mora.*)

No 33.

Annualrent is due *ex mora*, in *rebus mercatoriis*, and on open accounts.

1756. December 14. Competition, CREDITORS of DICK of Frackafield.

DICK of Frackafield obliges himself, by missive, 'to pay to Mrs Brower at Rotterdam, in August or September 1741, 4620 guilders 1 stiver, as the price of goods furnished by her, or to apply that sum towards the paying of what she might contract for betwixt and that time, in her option.' A partial payment was made to her at the time appointed; but there does not appear to have been any further correspondence between them. Upon the renunciation of Dick's heir, Brower obtained decret of adjudication *cognitionis causa*, in December 1746, for L. 373 : 11 : 1 Sterling, the balance then due, with annualrent from September 1741, together with L. 20 Sterling, as the expences of the decret of constitution which preceded the adjudication.

In a ranking of Dick's creditors, it was *objected* to Brower's adjudication, *imo*, That she ought not to be ranked for the annualrent prior to the decret of adjudication; for it does not appear that there was any undue delay upon the part of Dick; Brower does not pretend to prove that she made her election of having the money paid to her at Rotterdam in August or September 1741; but whatever effect this delay, if there was any, might have against the debtors themselves, it can have none in a competition with onerous creditors.

2do, With regard to the L. 20, *objected*, That it was a sum given at random, as expences of a decret of constitution, where there was no litigation, and which went in absence upon the renunciation of the heir.

Answered for Mrs Brower: It is incumbent upon the other creditors to show, that she gave contrary orders for paying the money otherwise than at Rotterdam. No such orders are alleged, and even a partial payment is made there at the time agreed upon. Annualrent is due *ex mora*, especially in *rebus mercatoriis*; and it has been found, that merchants are entitled to annualrent upon an open account of furnishings, after expiry of a year from the date of the last article, even without any docketed account, or obligation from the debtor.

2do, As to the L. 20, she was obliged to bring the process of constitution, in order to make her debt effectual; nor can the sum be thought extravagant, she being obliged to pursue for it in a foreign country, though payable by paction at Rotterdam.

THE LORDS found annualrent due upon the balance of L. 373 : 11 : 1 Sterling from September 1741; but found her not entitled to the L. 20 Sterling *nomine damni*, decerned to her in the decret *cognitionis causa*.

For Brower, *D. Rac.*
Walter Stewart.

Alt. *Ch. Hamilton-Gordon.*

Clerk, *Justice.*

Fac. Col. No 233. p. 323.