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 Whether ANNUALRENT be due by CONSIGNATARS?
 

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1624. *January 31.*DOUGLAS *against* WEDDELL.

IN an action betwixt James Douglas and Weddell, and the Earl of Morton, The LORDS found, That a depositar, in whose hands money was consigned for redemption of land, was not holden to pay profit for any consigned money, albeit the party against whom the redemption was to be used, and to whose use the money was consigned, offered both at the time of the order and consignation, and also at the calling of this action, which was intended by him against the depositar and the party consigner, for his interest, for the delivery to him of the money, with the profit thereof, to renounce and give over the land, desired to be redeemed; and albeit also, that the reason libelled, for the which he craved the depositar to be decreed to pay profit, was, because he instantly, at the very time of the alleged consignation, gave back the money again to the party consigner, who had made use thereof continually synfine; neither whereof was respected to sustain the action against the depositar, for paying of profit; but he was assolizied therefrom.

A.C. *Hoppe & Oliphant.*Alt. *King.*Clerk, *Scot.**Durie, p. 103.*

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A consignatory of money for redemption of land, found not liable for annualrent on the sum.

1716. *July 20.*ALEXANDER BARKLAY *against* CARRUTHERS of Dormont.

THE Earl of Nithsdale having some years ago used an order of redemption of a wadset of some lands, and consigned the money in the hands of Alexander Barklay, then bailie of Dumfries, there happened thereafter a dispute betwixt Maxwell of Barncleugh and Carruthers of Dormont, touching the liferent of the money, &c.; which process is yet in dependence; but, in the mean time, Barklay infits in a multiple-pounding, in which both the contending parties compearred and concurred, and *alleged*, That Barklay, the consignatar, ought to pay annualrent for the sum consigned in his hand, in regard he had lent out the same upon interest, and that the money was depositate as a species, not as a fungible.

*Answered* for Mr Barklay: *imo*, That annualrent is only due *ex pacto, vel ex lege, vel ex mora*, neither of which can be pretended here; and this seems to be confirmed by the act of Parliament 1695, anent the price of bankrupts estates,

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Found as above; but the consignatory entitled to no indemnification for intermediate diminution of the value of money.

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which, on a very special case, appoints annualrents to be paid by a consignatar; and therefore *exceptio confirmat regulam*, &c. *2do*, By the nature of the contract as to the configner, the money is to lie ready to be made forthcoming to all having interest; and as to the consignatar, the same is to be paid at a call; but as to his lending out the money, the parties having interest have no concern therein, since the consignatar runs the risk of all accidents by breaking of the borrower, &c. *et quem sequuntur incommoda, eundem sequi debent commoda*. *3tio*, By the common law, *usuræ, in depositi actione, sicuti in caeteris bonæ fidei judiciis, ex mora venire solent, l. 2. c. depos.* which *mora* is not so much as pretended here. *4to*, This is enforced by our own practices, 29th January 1624, Douglas against Weddel, No 98. p. 555.; and lately in a case betwixt Harry Douglas and Mr John M'Kenzie, clerk\*, where this very allegiance, that the money was lent out by the clerk, was disregarded. *Replied* for Dormont to the *first* and *third*: That annualrents are here due *ex lege*, though not by any special statute, yet by the common and consuetudinary law, and by the analogy of law taken from parallel cases, and the very nature of the thing: Thus, by the analogy of the common law, and without any express constitution, annualrents were due where the depositar lent out consigned money, as in *l. 29. § 1. ff. Depos.* is most expressly said: 'Ex permisso meo deposita pecunia, is, penes quem deposita est, utatur, ut in caeteris bonæ fidei judiciis, usuras ejus nomine præstare mihi cogitur;' and, *l. 4. c. eod.* 'Si deposita pecunia, is qui eam suscepit usus est, non dubium est, etiam usuras debere præstare.' And so Perezius on that title well explains it: 'Quemadmodum,' says he, 'etiam si, incio aut invito domino, depositarius quantitatem depositam in suos usus convertat, has usuras præstabit, cum hoc ipso moram faciat, et furtum committat.' And Voet. on that tit. in the Dig. says, That interest is due, 'five mora in reddendis rebus fungibilibus depositis commissa fit, five pecuniam depositam in suos proprios usus convertant, five de usuris per depositarium præstandis pactio fit apposita.' In all these cases he says, 'usurarum queque rationem habendam esse.'

*2do*, That this is plain from the nature of the thing; for *1mo*, If the lending out of the money be looked upon as an unwarrantable intromission, interest is due because of the fraud; *2do*, If we consider the depositar as a trustee, the nature of the trust obliges him to communicate to the person that intrusted him, all the benefit arising from the subject intrusted; or, *3tio*, If we consider that the money remains the property of the person who depositates it, the interest given for the use thereof is an accessory or *fructus*, and so belongs to him to whom the money itself did belong.

To the *second, replied*: That money being lent out contrary to the terms of the trust, though it be on the lender's risk, yet that is no reason for his getting the profit, since the hazard becomes his for his fault; but the profit, as an accessory, is still the owner's. *2do*, If the consignatar's debtor, and also himself, had become insolvent after lending the money, it would have been lost to the true

\* Examine General List of Names.

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owner, and therefore it was properly lent on his risk ; which, if it had not been lent, could not have happened, but the owner could have recovered it *rei vindicatione*.

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*Duplied* to this last : *imo*, That this is too remote a consideration to have any influence in this cause ; for, whether the money had been lent out or not, the case would still have been the same, if the consignatar had turned insolvent. *2do*, It is to be considered, that even such accidents are not upon the owner's risk, but upon the peril of the configner.

To the *fourth, replied* : *imo*, That with respect to clerks, custom hath established that to be law, perhaps contrary to the common rule ; *2do*, There is a very great difference betwixt clerks, who *ratione officii* are obliged to receive consignations, and a private depositar who voluntarily becomes so ; for so it was common to the Romans, that when consignations were made in public offices, or *apud argentarios*, no annualrent was due, though the *argentarii* made use of the money ; for the configner was supposed to consent thereto.

' THE LORDS found no annualrent due by the confignatar for the sums configned in his hand.'

IN the above cause the confignatar having demanded allowance for the fall of the rate of the guineas after the union, he having received a great part of the sum in that coin :

To this it was *objected* by Dormont, *imo*, That he could have no deduction, because he had disposed on the specie ; and therefore, since now he cannot return the *corpora*, he must pay the sum ; *2do*, The receipt he granted is simply of such a sum of money, without mentioning the specie ; *3tio*, It was his fault to receive it in guineas, these not being, at that time, a coin current in Scotland by authority.

*Answered* for the confignatar : *imo*, That the loss cannot fall upon him from the nature of the contract, whereby a confignatar, if he keeps the specie, can be liable only to make forthcoming the same as he received it ; *2do*, It is certain that guineas were then the current coin which passed, in all bargains, at a certain denomination, which ought the rather to be regarded in this nation, that all other different species were received, such as dollars and crowns of foreign countries ; and yet it was never heard that any confignation was rejected upon this account, that it was made in a foreign specie ; and since *officium nemini debet esse damnosum*, especially where he had no premium, and run the risk of the custody, this deduction is founded on both law and equity.

' THE LORDS found the confignatar could have no allowance, or deduction, for loss occasioned by the fall of guineas, but that he must pay the configned sums at the bar.'

Act. *Grahame*.Alt. *R. Dundas*.Clerk, *Justice*.*Fol. Dic. v. 1. p. 41. Bruce, No 21. p. 26. & 28.*