

(DUE BY FACTORS.)

1760. January 2.

DUKE OF GORDON and his CURATORS *against* his MAJESTY'S ADVOCATE.

THE Duke of Gordon and his curators, granted a factory to Macdonald of Lochgary, for uplifting the rents of some of the Duke's lands. Lochgary became bound as principal, and Gordon of Glenbucket as cautioner for him, conjunctly and severally, 'That Lochgary should not only do exact, punctual, and timeous diligence for recovering payment of the rents, but also make just count, reckoning, and payment of his intromissions, to the Duke and his curators, whenever called thereto.'

The Duke brought a process against Lochgary and his cautioner Glenbucket, to account for his intromissions; and Lochgary having thereupon fitted accounts, the balance due by him to the Duke amounted to L. 9241 Scots; for which sum he granted bond, bearing annualrent from Whitfunday 1742.

The Duke proceeded in his process against Glenbucket, and obtained a decret, finding him, as cautioner for Lochgary, liable for the foresaid balance of L. 9241 Scots, and decerning him to make payment of that sum. The summons concluded for payment of principal and interest; but the decret makes no mention of interest.

Glenbucket having been attainted of high treason, the Duke of Gordon entered a claim in terms of the vesting act, for the said sum of L. 9241, with annualrent thereof from Whitfunday 1742.

No objection was made to the debt; but his Majesty's Advocate objected to the claim for annualrents.

Pleaded for the claimant, That Glenbucket being equally bound with Lochgary, is liable in every obligation incumbent on him. Lochgary was certainly bound to pay the annualrent claimed; for this is implied in the nature of a factory or mandate, that the factor is faithfully to account to his constituent for the money that comes into his hands, as soon as a demand is made upon him; and if he detains it, he must be liable in the interest *nomine damni*. So it was laid down in the civil law, l. 10. § 3. *De Mandato*. The same rule was observed in a case determined 6th December 1752, *Campbell contra Rose*, No 53.

Though, in the decret against Glenbucket, no particular mention is made of annualrent; yet, as it was specially charged in the libel, and is founded in the nature of the engagement, and not disallowed by any interlocutor, the decret must be constructed in terms of the libel, in a thing which was merely accessory, and liable to no objection.

Answered for his Majesty's Advocate: As no annualrent was stipulated in the obligation granted by Lochgary and Glenbucket, none can be claimed upon it, unless a horning and denunciation had followed. The act of federunt, by which factors named by the Court of Session are bound to pay annualrent from a year

No 54.

A cautioner for a factor found not liable in annualrent *ex mora*, where no annualrent was decerned for, nor diligence used by horning and denunciation.

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No 54.

after the rents fall due, plainly supposes, that at common law they would not be liable for annualrent. The text quoted from the civil law, *l. 10. § 3. De Mandato*, only proves, That a mandatary is liable in annualrents *ex mora*. And annualrents are likewise, by the law of Scotland, due *ex mora*; but then the law has pointed out what is necessary to put the debtor *in mora*, so as to establish a claim for annualrents; which is nothing less than a denunciation upon a charge of horning.

Supposing a claim in equity lay against Lochgary for annualrents, as having had the use of the money; yet cautionary obligations are *strictissimi juris*; and therefore this demand ought not to be extended against Glenbucket, who was no gainer by Lochgary's delay. In the case of Campbell against Rose, the question was not with a cautioner, but with the factor himself, who had intromitted with the money.

The decret against Glenbucket, finding him only liable in the sum of L. 9241, without mention of annualrents, though the libel concludes for annualrents, is in effect a *res judicata* as to this claim. If, for these reasons, no annualrent could have been found due against Glenbucket, far less can they in a question with the crown, as the crown is never *in mora*, but always ready to pay the claims of lawful creditors, when properly ascertained.

'THE LORDS found no annualrent due, none having been decerned for in the decret, nor a registrate horning produced.'

For the Claimant, *Ferguson.*For the Crown, *Macqueen.*Clerk, *Kirkpatrick.**Fol. Dic. v. 3. p. 29. Fac. Col. No 205. p. 367.**W. Nairn.*

ANNUALRENT due to CAUTIONERS, FACTORS, MANDATARS,
TUTORS, &c.

As a Recompence for advancing their own Money upon
their Constituent's Account.

1623. *March 25.*

BAILLIE against NISBET.

No 55.
Elapsing of
the term of
payment and

IN an action of suspension betwixt Sir James Baillie and Nisbet, Sir James being cautioner for the defender, in certain sums, and after registration of the