

(DUE by *lucrati.*)

No 89.

Patrick Vanse *replied*: That his father was liable to the same duties and obligations in every respect with other tutors; as was determined 4th February 1665, Beg, (Stair, v. 1. p. 264. See TUTOR and PUPIL.); where it was found, That the father was liable for annualrent of his own third of moveables, which his son claimed in the right of his mother: And the same thing ought to take place here; as it would not be denied, that the Colonel laid out the money profitably, either upon annualrent or purchasing land. Neither can the difficulty with respect to the aliment which occurred in determining the first point, have any influence upon this; seeing, however that had been decided, still this demand, with respect to the annualrents, would have remained, at least in part.

THE LORDS found both defences sufficient to liberate from the claim of annualrents.

C. Home, No 27. p. 51.

1748. June 25. PARKHILL *against* BATCHELOR.

No 90.
Where one has in his hands another person's money, not as a debt, but as that person's property, annualrent is due as the profit of the money.

IN the question, whether annualrent be due, there is a material difference, whether the money be due as a debt, or if it be due as the pursuer's property in the hands of the defender. Where it is due as a debt, then regularly no annualrent is due upon it *sine pacto*. But where one has got into his hands another person's money, then annualrent, as the profits of the money, is no less due than the money itself.

For which reason it was, that in this case Charles Batchelor having got 500 merks from John Parkhill's wife, during her marriage with John Parkhill, which the law presumed to have been her husband's money, he was decerned to repeat to Parkhill, not only the 500 merks, but the interest of it from the time he got it. (See HUSBAND and WIFE.)

The like was some years ago found, Mr Thomas Rigg *contra* John Cunningham of Enterkine.

Fol. Dic. v. 3. p. 30. Kilkerran, (ANNUALRENT.) No 3. p. 29.

1767. January 21.

WILLIAM ELLIOT and OTHERS, Creditors of Edward Atchison, *against* GEORGE MALCOLM.

No 91.
Interest found not due on sums arrested.

EDWARD ATCHISON possessed the farm of Ewislees, and, on quitting the possession, sold the stocking on the farm to George Malcolm at an appraised value; and part of the price was, soon after the purchase, paid to the proprietor for rents due;

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the remainder was arrested in Malcolm's hands by sundry of Atchison's creditors, which obliged Malcolm to raise an action of multiplepoinding, in order that he might be safely exonerated of the balance in his hands.

No 91.

In this process the creditors appeared, and sundry proceedings were had, by which the process was kept depending about a year before their respective interests were settled; which being done, they insisted, that Malcolm should be found liable in interest upon the balance in his hands; and the Lord Ordinary decreed for interest at the rate of 4 per cent.

Malcolm applied to the Court by petition, and *pleaded*, That he was interpellated by the diligence of the competing creditors from paying the balance: That he was bound to have it ready at a call, to be distributed among those who should be found to have right to it: That it was not enough to say, he might have lent out the money; if he did so, it was at his own risk. An executor uplifting sums not bearing annualrent, and laying out a balance at interest, was not liable to account for such interest; July 1730, Creditors of Thomson *contra* Monro, No 74. p. 534. Trustees for creditors are not liable in annualrent for such sums as from time to time come into their hands in the course of their management; 4th January 1730, Trustees for Colonel Johnston's Creditors, No 101. p. 558. This was none of those cases where interest is due either *ex lege* or *ex pacto*; nor do the circumstances of the case render it proper for the Court to interpose its equitable powers.

Answered for the Creditors: Had Mr Malcolm assigned the money, they would have put it in banker's hands, who would have paid interest for it; by not doing so, he was *lucratus*, by having the use of the money; and, in such cases, annualrent was due; Fol. Dic. *voce* Annualrent, p. 42.; and, therefore, both on principles of law and equity, annualrent ought to be paid in this case.

THE LORDS altered the Lord Ordinary's interlocutor, and found no interest due.

For Malcolm, *Ilay Campbell.*For Creditors, *D. Armstrong.**Fac. Col. No 112. p. 383.**A. Elphinston.*

Whether due, *in conditione indebiti.*

1628. January 25. HOUSTOUN *against* DONALDSON.*In conditione indebiti, usura non debentur.**Fol. Dic. v. 1. p. 43. Auchinleck, (ANNUALRENT.) MS. p. 10.*

No 92.

Annualrent
not due *in*
conditione in-
debiti.