

(DUE TO CAUTIONERS, &c.)

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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.

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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-

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sion for in the way of his trade. During the course of which negotiation, he fitted three several accounts with them in the 1718, 1719, and 1720; in all which they stated interest on the different balances: After the last of which, the correspondence went on as usual, until the 1732, when it ended. Whereupon the factors transmitted to him an account of their negotiation since last clearance, with interest on the respective articles thereof from the time they were in advance, conform to the former accounts; which he having refused to pay, they now insist in a process against him, for payment thereof, and which, upon his death, was transferred against his executors.

The arguments *urged* for the defenders were: That this being a current account, there lay no claim for interest; and although it may be true, that, by the custom among merchants, annualrent is due where the reciprocal advances are brought to a balance, and the same demanded, either by drawing a bill therefor, or otherwise, if a refusal ensued; yet, whilst an account is current, and not brought to a balance, whilst there was a continued series of payments *hinc inde*, and whilst there remained a course of advances and reimbursements, without noting the particular balance, or making a demand for the same, it was contended, in such a case, that interest had no currency, even by the mercantile custom, seeing it would be productive of many dangerous and unjust consequences, more especially here, where the defender was not acquainted by the pursuers what was the state of the sales; and of consequence cannot be deemed *in mora*, for not paying a balance which was neither demanded nor liquidated: Nor was it justifiable in the pursuers to carry on a claim for interest above twelve years, without making up the accounts, or demanding any interest, which, had they insisted for at any one period, might have been paid.

It is true, their situation as merchants is favourable, as being attended with an equity which allows them interest for their advances *loco damni*; but such is likewise the defender's case, who being a dealer, it was equally inconvenient to him to pay interest, where it was not necessary: It must therefore be acknowledged to be very unjust, that he should innocently, and without any fault or neglect of his, be drawn into such an expence; and that the pursuers, by abstaining to state the account, and make a demand for the balance, should raise to themselves a claim for interest.

It is indeed pretended, That they made a demand; and, in evidence thereof, appealed to a letter from them to the defender, wherein are these words: ' You are sensible there is a great deal of money owing to us from you, and that it should ly dead for so long a time is a great prejudice to us; and therefore desire you would remit L. 200 in a post or two.' But, from this paragraph, it is plain, *imo*, That the pursuers did not expect interest for their money; on the contrary, they observed the same lies dead, which, they say, is a prejudice to them. *adò*, This

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demand is for no more than L. 200; whereas the sum, on which it is pretended interest was then current, is no less than L. 1200.

Neither can the practice of allowing interest on the advances in each year's account, preceding the 1720, infer any argument for allowing it in one account for above twelve years together; seeing, at fitting these annual accounts, the defender might have been conscious of the advance, which, together with the smallness of the sum, might possibly induce him to pass the article as stated: But, when no demand was made upon him in the regular way, nor any intimation of a balance, for the space of twelve years, it would be exceeding hard if he should be liable in a claim he had no notice of.

Besides, it is a rule in ascertaining of interest, That it is not the damage the party may have sustained, or to what greater profit he might have turned the money advanced, which is to be considered; but whether there has been any interpellation, or *mora*, on the part of the person for whom the advance was made in the repayment thereof; *usura enim, non propter lucrum petentium, sed propter moram solventium, infliguntur; l. 17. ff. De Usur.*

Answered for the pursuers: That, as the advances were made on the defender's account from time to time; so, from the nature of the thing, interest behoved to be due thereon; seeing, by the custom of merchants in this and all other trading countries, annualrent is allowed amongst them upon advances *nomine damni*, in respect they can employ their money in the way of trade to much better advantage than common interest. And a merchant, who carries on a trade in that way, by making a correspondent abroad advance money on his account for purchase of goods, is likewise supposed, by such trade, to draw more profit than the common interest; therefore it were highly unjust that the employer should draw the whole mercantile profits; and, on the other hand, that the factor should advance his money without any advantage at all, which, as it would not be equitable, so it can never be supposed to be the view of merchants. Nor can any reason be assigned why a factor abroad should advance his own money upon no profit, or only upon the small allowance of commission-money which is given for pains, and is due from the moment the commission is executed, without any regard to the period when reimbursement is to be made. It is true, there may be a difference betwixt the case of a correspondence between two merchants, where each of them transmits and sells to the other the goods in which he deals, and the case of a factor's advancing money on account of a merchant or clothier, in order to purchase goods for his use; seeing, in the first case, where one merchant sells to another, the profit he gets by the sale may make up to him the interest of the money with which he either purchased or manufactured the goods sold, until a moderate time, at which his account is supposed to be payable: Therefore, where there is not a long delay of payment, he may not have so strong a demand for the interest of the price of the goods sold; and there a reasonable time may be

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justly reckoned until the accounts are fitted, or a demand made to do it, and that there is a refusal or neglect on the buyer's part. But it is quite a different affair, where a factor is employed to purchase goods for the behoof of a correspondent who employs him; seeing, in that case, he does not sell his own goods, and so hath no profit thereon, but advances his money for the use of his employer; therefore he ought to have interest, otherwise he hath no just profit for employing his money in that way. Now, such was the pursuers' situation, as their business was to buy for the defender such goods as he commissioned, or to pay for scouring and dressing, &c. his stuffs; whereby they were always in considerable advance: So that the only question here is, Whether they ought not to have interest therefor, from the time of their advance to the time of their reimbursement, by receipt of the price of the defender's goods? *2do*, It is a constant custom, That, when factors in Blackwellhall advance money for their correspondents, interest is allowed to them for the same; and the practice of particular places must always regulate that matter. (See 8th December 1677, Apperon, *Stair, v. 2. p. 573. voce FOREIGN.*)

But there is no occasion to resort to such arguments in the present question; as it is plain, from the three fitted accounts produced, it was understood betwixt the parties that interest was due for such advances. As to the observation upon the letter, it can have no weight, seeing merchants justly reckon their money is lying dead, supposing it bear common interest, when they have not the opportunity of employing it upon trade. Besides, their money might properly be said to be lying dead, in so far as the interests upon the advances bore no annualrent, which otherwise might have been employed: At any rate, the letter is a plain notification to the defender, that he was highly in arrears, as it imports a demand of payment.

Lastly, As to the argument drawn from the *l. 17*, it does not concern cases where interest arises either *ex lege* or *ex pacto*; but applies only to the case where the *mora* solely produces the interest, seeing that is what the lawyer is there stating: Therefore, when the interest arises *ex mora*, the quantity is not computed from the gain the claimer might have made, had he got his money; because the interest is not *in lucrum* of him, but is stated according to the legal interest, seeing it arises from the *mora* of the debtor, which, as to the quantity, is only to be considered, suppose the creditor's gains would have been greater.

THE LORDS found interest due on the several advances from their dates.

C. Home, No 48. p. 84.