
 ANNUALRENT due *ex pacto*.

No 8.

Annualrent once paid, implies a pactio to continue payment of the same.

1628. *March 4.*FORRESTER *against* CLERK.

IN an action betwixt Forrester and Clerk, where an executor to a legatar, being pursued for payment of a sum left in legacy to the legatar, with the annualrent thereof for diverse years since the death of the legatar, *super hoc medio*, because the defender, debtor of the sum left in legacy, was in use to pay annualrent yearly to the legatar, during his lifetime; which use being *alleged* by the defender *not to* be any ground in law, whereby he might be compelled to pay annualrent for that, for the which he was not otherwise obliged to pay annualrent, except by the foresaid use; seeing the pursuer ought to have done diligence, to have sought the legacy, and should have pursued therefor; and so being by his own negligence, whatever he had done to the legatar, could not be a reason, forcing him to continue in that which was voluntar, and whereto he could not be compelled in law.—This allegiance was repelled, and the reason of the use of payment of annualrent by the defender, and his not paying of the sum, at the term of payment, to the which it was continued, in respect of the profit of the annualrent, whereby he was *in mora*, was sustained by the LORDS, as a sufficient reason to make the defender debtor in annualrent, for all terms during which he retained the principal sum, and had the use thereof.

A&. *Nairn.*

Alt. ———.

Clerk, *Hay.**Fol. Dic. v. 1. p. 37. Durie, p. 353.*

Spottiswood states the same case thus:

FORRESTER having charged Clerk for the principal sum of 600 merks, and the byrun annualrent for five or six years, *alleged*, That he ought not to pay any annualrent, because the bond bore none to be paid.—*Replied*, That ought to be repelled, in respect he had been in use of payment of annualrent for the space of four or five years; and so, as long as he kept the principal sum in his own hand, he could not discontinue it.—THE LORDS repelled the exception, in respect of the reply.

Spottiswood, (USURY.) p. 353.