

(DUE by *lucrati*.)

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.

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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.*

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Annualrent
not due *in*
conditione in-
debiti.