

No 14.
for payment
at the adjudg-
er's instance,
he was not
obliged to
produce the
principal
bond and as-
signation.

who *alleged*, That he was not *in tuto* to pay her, as Robertson's legal assignee by adjudication, because his bond is produced, without which he cannot safely pay, especially seeing it is assigned by Leslie, and none of the mid-couples are *in campo*, and so, if the progress be defective, he may be forced to pay it over again.—*Answered*, I being a singular successor and adjudger, I neither had, nor was obliged to have my debtor Robertson's heritable bond, nor the mid-couples and progress thereof; it was my debtor's evident, and so he could keep it up and abstract it from me with all his art and power; and I am no more bound to produce it than an arrester is, where the debtor's oath, acknowledging the debt in a furthcoming, is sufficient to make him liable, without producing his bond. But, *2do*, I instruct him debtor *scripto*, (which is more than I am bound to do) by a submission and decreet-arbitral, wherein this 1000 merks bond due by Macaulay is expressly mentioned; which furnishes a sufficient document and evidence of the debt against him.—*Replied*, That the decreet-arbitral can never constitute a debt; for, *1mo*, It is suspended, as being *ultra vires compromissi*; *2do*, It can only prove a moveable personal debt against him, which can never be carried by her adjudication; and she has an easy remedy, to take a diligence and recover her author's right thereby.—THE LORDS thought it hard to burden her, and therefore repelled Macaulay's defence; and found the decreet would be a sufficient warrant for his payment; especially seeing there was no other creditor competing with the said Anna Campbell for her sum.

Fol. Dic. v. 2. p. 49. Fountainhall, v. 2. p. 353.

1711. January 25.

WILLIAM BAILLIE of Lamington *against* SIR WILLIAM MENZIES of Gladstains.

No 15.
An annual-
renter's in-
tromissions
applied not
only for sa-
tisfving the
bygone an-
nualrents,
but even for
extinguish-
ing the prin-
cipal sum for
which the in-
feftment of
annualrent
was granted,
although that
infestment
was then in
the person of
a singular
successor,
who had ad-
judged it.

IN the competition of the Creditors of Begbie, betwixt Sir William Menzies, as having right by progress from Alexander Baillie to an infestment of annualrent, and Lamington, as having right to a subsequent apprising; the former pleaded preference upon the priority of his right; which Lamington alleged was extinguished by payment, in so far as he offered to prove by witnesses that Alexander Baillie, Sir William's author, did enter to the total possession of the room of Hillend in the year 1667, and continued therein till the 1680.

Answered for Sir William Menzies; By constant practice in all processes relating to extinction of debts by payment, money rent is proved *scripto vel juramento*, and the victual *prout de jure*; for as our law doth not allow witnesses to be received, where writ is, or ought to be adhibited; so the payment of money, which is subservient to all uses, and the common fungible that supplies the place of every thing prestable, is not to be proved by witnesses, but only by writ or oath of the receiver, since by-standing witnesses may be apt to mistake the occasion and design of the payment.

Replied for Lamington; Though payment of money should *regulariter* be proved by writ or oath, because obligations to pay money are commonly so.

constituted; yet witnesses may be allowed to prove that a creditor entered to a total possession at a certain time, and continued therein so many years; especially in this case, where Sir William took himself (beyond what his right did carry) to a total possession for the space of 13 years; and where he thereafter, in evidence that he was paid both of his principal sum and annualrent, did quietly and voluntarily cede his possession to the common debtor; which is confirmed by Sir Thomas Hope in this Title PROBATION, and by several practicks, as 15th December 1622, Declarator of the Laird of Foulis's escheat, *vocce* PROOF; 16th December 1626, Finlayson *contra* Executors of Lauder, *IBIDEM*; 20th January 1627, Ross *contra* Fleming, *IBIDEM*; 11th July 1628, Arbuthnot *contra* Lighton, *IBIDEM*; 4th February 1671, Wishart *contra* Arthur, No 3. p. 9978. *2do*, There is the same hazard in misapprehending the design of delivering victual, as there is of mistaking the reason of paying money; for persons who see victual delivered cannot know what was *actum et tractatum* betwixt the giver and receiver, more than in the case of money; seeing the former, as well as the latter, may be delivered upon many accounts, as in payment, in loan, or for security of performance of some deed; so that there is a notable difference betwixt proving payment of a sum contained in a bond for extinguishing the right and this case; for though the witnesses depone that such a sum was delivered *de manu in manum*, it were impossible for them to clear upon what account that was done, as not falling *sub sensu*. But here Lamington doth not so much pretend to prove payment of Sir William Menzies's heritable bond by witnesses, as only to prove his author's entry to the total possession of a certain piece of land, to oblige him to answer for the known rental thereof, which in consequence will extinguish the infeftment of annualrent, unless the possession can be ascribed to another title, or otherways compted for and balanced by the intromitter.

Duplied for Sir William Menzies; The practick 4th February 1671 is but a single decision, which is over-ruled by subsequent contrary practice. Unless we distinguish betwixt possession within burgh, which can be no other than money rent, and possession in the country, which may be either of money or victual; *2do*, The reason why money is not probable by witnesses, holds equally in a total, as in a partial possession; for though the argument from the total possession may hold in the case of an appriser or wadsetter, who have a title to possess; it cannot be of any weight against an annualrenter, who had no title to possess, and whose possession can never be presumed to exceed his annualrent.

Triplied for Lamington; He is not arguing from presumptions, but from a clear proof, that Sir William and his authors have uplifted the rents, and therefore must compt for the same; and it is wild to think, that an intruder without a title should be in a better case than those who by law are authorised to possess.

THE LORDS found probation by witnesses of a total intromission of 12 or 13 years possession of victual or money rent, where there is no intromission by the

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common debtor or co-creditor, and the intromitter ceding possession to the common debtor, relevant to make the intromitter comptable for the rental both of money and victual.

Thereafter, 20th February 1711, It was *alleged* for Sir William Menzies, That his author's intromission and ceding the possession to the common debtor, cannot be extended to extinguish the principal sum for which the infestment of annualrent was granted, in prejudice of Sir William, a singular successor thereto by adjudication, but only to extinguish the bygone annualrents; the annualrenter having *paratam executionem* by poinding to recover these, but no execution for recovering his principal sum. If latent receipts and discharges, or, which is worse, intromission with rents, should extinguish infestments, *quorsum* did the act 16th Parl. 1617, appoint renunciations of wadsets and grants of redemption to be null, if not registered. True, an annualrenter having up-lifted his debtors effects to the value of his principal sum, will be excluded *personali objectione* from seeking twice payment; but a successor can only be barred from the principal sum by a registered renunciation, 7th January 1680, M'Lellan *contra* Mushet, No 10. p. 571.; and in the case of Mr Mark Learmonth's Children *contra* William Gordon, (No 13. p. 9989.)

Answered for Lamington, *imo*, No law requires a renunciation of an infestment of annualrent to be registred, and though registrarion were necessary, an infestment of annualrent may be extinguished, without a renunciation, by the creditor's intromission, Wishart *contra* Arthur, No 3. p. 9978, as adjudications and apprisings, though recorded, may be so extinguished. Besides, the intromission here was fully as public a mean of extinction as a registered renunciation. The decision betwixt M'Lellan and Mushet doth not meet; for there the Lords decided *secundum ea quæ proponebantur*; and the other decision betwixt Lermonth and Gordon shall be answered particularly when Sir William doth more particularly demonstrate the decision by its date, and where to be found.

THE LORDS found, That Alexander Baillie the annualrenter's intromissions are not only to be applied for satisfying the annualrents of the principal sum in the infestment, but even for extinguishing the said principal sum, notwithstanding that infestment be now in the person of a singular successor.

Fol. Dic. v. 2. p. 51. Forbes, p. 488.

1713. February 13.

The EARL of DALHOUSIE *against* LORD and LADY HAWLEY.

No 16.
Rents applied
by the appa-
rent heir, for
purchasing an
adjudication,
become pay-
ment and ex-
tinction.

IN the reduction and improbation at the instance of the Earl of Dalhousie against the Lord and Lady Hawley, mentioned 13th November 1712, *voce* REPRESENTATION, the pursuer called for production of an adjudication of the estate of Dalhousie, led at the instance of William Paton merchant in Edinburgh, contained in a bond granted to him by William Earl of Dalhousie,