

P A Y M E N T.

1628. *January 26.*ADIE *against* GRAY.

No 1.

AN executor is empowered, *virtute officii*, to apply his intromissions for payment of the defuncts debts; and as he may pay *primo venienti*, so, if he himself be a creditor, he may of course retain for his own payment. It is true, an executor cannot safely pay without decree; but, as he cannot take a decree against himself, he must either be allowed to pay himself without decree, or not at all. And this was found in a case, where an executor, *qua* nearest of kin, had intermeddled before confirmation, and was pursued as vitious intromitter; but having thereafter confirmed within the year, which purged the vitiosity, the confirmation was drawn back, and sustained to found the executor in his right of retention, equally as if he had been confirmed before intromission.

In the same cause the executor was allowed retention of a debt he had paid as cautioner for the defunct, before intenting of the above process against him.

But an executor was not allowed to exhaust the testament by debts, wherein he was cautioner for the defunct, unless he had made actual payment before being interpellated by other creditors; yet he was allowed to plead his claim of relief thus far, to come in *pari passu* with the creditors doing diligence against him.

Fol. Dic. v. 2. p. 50. Durie.

. This case is No 193. p. 9866. *voce* PASSIVE TITLE.

1662. *January 24.*Mr JAMES RAMSAY *against* EARL of WINTON.

No 2.

MR JAMES RAMSAY, as having right by translation from George Seaton, assignee constitute by my Lady Semple, to a bond due by the umquhile Earl of Winton, pursues this Earl for payment, who *alleged*, No process, because

No 2.

the time of the assignation taken by Sir George Seaton, he was one of the defender's tutors, and so it is presumed that the assignation was purchased by the pupil's means; and as the tutor could have no process thereupon against the pupil, till he had made his tutor's accounts, so neither can his assignee; seeing *in personalibus* all exceptions competent against the cedent are competent against the assignee.

THE LORDS found the defence relevant, unless the pursuer would find caution to pay what should be found due by Sir George, by the tutor's accounts, as they had done before betwixt Grant and Grant, January 15. 1662, *voce* PRESUMPTION.

Fol. Dic. v. 2. p. 50. Stair, v. 1. p. 87.

1671. February 4. ALEXANDER WISHART *against* ELIZABETH ARTHUR.

No 3.

An infestment
of annualrent
found extinct
by the annualrenter's
intromitting
with the rents
of the lands
equivalent to
the principal
sum.
See No 13.
P. 9989.

UMQUHILE Mr William Arthur being infest in an annualrent out of some tenements in Edinburgh, and having entered in possession; by lifting of mails and duties, some of his discharges being produced, Alexander Wishart, as now having right to the tenements, pursues a declarator against Elizabeth Arthur, only daughter to Mr William, for declaring that the sum, whereupon the annualrent was constitute, was satisfied by intromission with the mails and duties of the tenements. The defender *alleged*, That this was only probable *scripto vel juramento*, and not by witnesses; for an annualrenter having no title to possess, out-put and in-put tenants, cannot be presumed to uplift more than his annualrent, especially seeing his discharges produced for many years are far within his annualrent, and it were of dangerous consequences, if witnesses, who cannot prove an hundred pounds, were admitted, not only to prove intromission with the rents, so far as might extend to the annualrent, but so much more as might satisfy the principal, and thereby take away an infestment; for albeit that probation has been sustained to extinguish apprisings, which are rigorous rights, yet not to take away infestments of annualrent. It was *answered*, That albeit witnesses are not admitted where writ may, and uses to be admitted, *in odium negligentis*, who neglected to take writ; yet this is no such case; and, therefore, in all such, witnesses are admitted; for, if the pursuer had insisted against the defender, for intromitting with his mails and duties, of whatever quantity and time within prescription, witnesses would have been admitted; the defender could only have excepted upon his annualrent, which would have been sustained *pro tanto*; but the pursuer would have been admitted to prove further intromission; which being by virtue of his security for a sum, and in his hand, would compensate and extinguish that sum, which is all that is here craved, and whereupon the witnesses are already adduced.