

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.

THE LORDS sustained the probation by witnesses for the whole intromission, to be imputed in satisfaction of the principal sum and annualrents. See PROOF.

No 3.

Fol. Dic. v. 2. p. 51. Stair, v. 1. p. 714.

* * * Gosford reports this case :

WISHART being infeft in annualrent out of lands, and thereupon having entered to the possession, by uplifting the mails and duties of the lands, there was a declarator raised at the heritor's instance, to hear and see it found, that he was satisfied by his intromission, not only of the whole bygone annualrents, but also of the principal sums, the duties of the lands exceeding far the annualrent. It was *alleged* for the defender, That the principal sum being founded upon a contract and infeftment, could not be taken away, but *scripto vel juramento*, and not by witnesses proving his intromission, which could only be sustained as to the bygone annualrents. It was *replied*, That intromission with mails and duties was probable by witnesses; and, if they did exceed both the principal sum and the annualrents, they ought to extinguish the infeftment and annualrent, unless the defender could ascribe his possession to some other cause.—THE LORDS did sustain the summons, notwithstanding of the defence, and found, that an infeftment of annualrent not being a sufficient and proper title for uplifting of mails and duties, but only for pointing of the ground, or resting in the tenant's hands; that his intromission therewith was probable by witnesses; and that he was in the same condition with another person that had possessed *sine titulo*; in which case intromissions are always sustained to be probable *prout de jure*; and therefore, the total of the intromission extending to all that was due by the infeftment, the defender was debtor in so much, and it ought to extinguish his annualrent, unless he would ascribe it to another right; but, if a creditor had comprised the right of annualrent, or gotten a right thereto before the declarator, that intromissions, besides the annualrents, would have satisfied the principal sums; it is thought, that they compearing for their interest, the case would have altered, and that the annualrenter's intromission would not have prejudged them, or taken away the heritable infeftment, and could only have made the intromitter personally liable.

Gosford, MS. No 328. p. 148.

1675. December 21.

CLARK *against* ROBERTSON.

ROBERT ROBERTSON having apprised some tenements in Edinburgh, Mr William Clark, as having right to three posterior appraisings, insists for declaring the first apprising void by intromission. It was *alleged* for the first appriser, That he had counted with the common debtor, and had paid him the surplus of his intromission more than his annualrent, and that before any of the

No 4.