

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

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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 appraised some tenements in Edinburgh, Mr William Clark, as having right to three posterior appraisings, insists for declaring the first appraising 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

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posterior apprisers had denounced or apprised, which he might lawfully do. It was *answered*, That intromission by an apprising being the proper and peculiar way of satisfying and extinguishing of it by a special statute, it was equivalent to a renunciation or discharge of the apprising *pro tanto*, which could not be given back to revive the apprising.

THE LORDS found, that the first appriser might restrict himself to his annualrent, or might repay the superplus more than his annualrent to the debtor, before any other apprising or denunciation.

Fol. Dic. v. 2. p. 49. Stair, v. 2. p. 389.

. Gosford reports this case :

1675. December 17.—IN a suspension of multiplepointing of a tenement of land belonging to William Ruthven of Garnes, there being a competition betwixt the said parties, as having both comprised the tenement, it was *alleged* for William Clark, That he ought to be preferred, notwithstanding that his comprising was posterior, because he offered him to prove, that Robertson's comprising was satisfied by intromission, and so was extinguished; for which there being an act of count and reckoning and receipts produced, granted to the tenants by Robertson, for their whole duties, it was *alleged*, That, notwithstanding of those receipts, yet Robertson did only intromit with as much as paid the annualrent of his money, and what he had disbursed besides for public burdens, and for reparations of the tenement, and gave in the Laird of Garnes and his tutors the superplus, upon their receipts, and so could not be liable for farther intromission, especially at Clark's instance, whose comprising was posterior to all the years of his intromission, for which he had counted, as said is. It was *replied*, That Robertson having intromitted by virtue of a comprising, and having taken discharges under the common debtor's hand, and his tutor, in prejudice of a second comprising, ought to be liable.—THE LORDS did find, that the intromission being before the second comprising, and it being lawful to the first comprising to intromit or not, or to restrict his comprising, having to do with none but the common debtor, it was lawful for him to retain no more than the annualrents and true disbursements, and the second comprising had no interest to quarrel the same, but for years subsequent to his comprising.

Gosford, MS. No 825. p. 520.

1676. June 28.

GIBSON against FIFE.

No 5.

ELIZABETH GIBSON pursues Fife for 100 merks lent by her to him, and referred the same to his oath. He deponed that he received the sum,