

1687. February 5. LADY NEWMILLS *against* ISOBEL and ESTHER SMITHS.

No 11.

FOUND that a right acquired to a defunct's bond before the acquirer became tutor or pro-tutor, &c. to the debtor's son, is not presumed taken to the pupil's behoof. But compensation was sustained upon this ground, that the tutor had not compted for his intromissions with the defender's means; for which a process was depending at the defender's instance against the tutor's representatives, and ready to advise; the same *nox liquidandum*. See TUTOR and PUPIL.

Fol. Dic. v. 2. p. 50. Harcarse, (TUTORS & CURATORS.) No 990. p. 279.

1688. February 15. LORD CHANCELLOR *against* BROWN.

No 12.

AN improper wadsetter having given the reverser a back-tack, for payment of a tack-duty equivalent to the annualrent, and upon failure of payment, having apprised the lands for the tack-duties resting owing; and upon that title having uplifted sufficient to extinguish, not only the apprising, but also the wadset sum; this irregular intromission was found not equivalent to real payment, so as to extinguish the wadset, and consequently to hinder the ward to fall by the wadsetter's death.

Fol. Dic. v. 2. p. 51. Harcarse.

. This case is No 8. p. 3012, *voce* CONFIRMATION.

1705. January 2. The HEIRS of LEARMONT *against* GORDON.

No 13.

SUPERINTROMISSION was not imputed in extinction of the debt, where the question was with a singular successor, who had acquired an infeftment of annualrent for an onerous cause; for intromission *sine titulo* is not legal payment to operate a real extinction. The debtor has his option to demand payment of the rents from his creditor, as intromitted with *sine titulo*; and if a personal objection lie against the creditor, making the intromission equivalent to payment *quoad* him, but not *quoad* the debtor, this cannot militate against a singular successor. See No 3. p. 9978.

Fol. Dic. v. 2. p. 51.

. This case is No 12. p. 574, *voce* ANNUALRENT, INFETMENT OF.

1707. February 27. CAMPBELL *against* MALCOLM MACAULAY.

No 14.

ALEXANDER ROBERTSON couper in Leith, being debtor to Anna Campbell, relict of Adam Gordon, merchant in Leith, in a certain sum; she, for her payment, adjudges from him the right of an heritable bond granted by Macaulay skipper in Leith, to John Leslie, and by him disposed to Robertson her debtor, being 1000 merks; whereupon she pursues Macaulay for payment of her debt,

A party assigned an heritable bond which thereafter was adjudged from the assignee. In a process

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.