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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 infeftment 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 infeftments, *quorsum* did the act 16th Parl. 1617, appoint renunciations of wadsets and grants of redemption to be null, if not registrated. True, an annualrenter having uplifted 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, 1*mo*, No law requires a renunciation of an infeftment of annualrent to be registred, and though registrarion were necessary, an infeftment 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 infeftment, but even for extinguishing the said principal sum, notwithstanding that infeftment 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 apparent heir, for purchasing an adjudication, become payment and extinction.

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,

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the Lady Hawley's father, whom the pursuer represents as heir-male, upon a decreet *cognitionis causa*, against George Earl of Dalhousie, as charged to enter heir to the granter of the bond, which adjudication was purchased from William Paton by Earl George's factor, with the rents of the lands adjudged that were *in hæreditate jacente*, and a disposition taken thereof blank in the assignee's name, that continued in the factor's hand till the year 1701, after Earl George's death, when William, last Earl of Dalhousie, brother to Earl George and to the Lady Hawley audited the said factor's accounts, and allowed to him what was paid to William Paton for the disposition, and filled up his own name in the blank. The Lady Hawley claimed right to this adjudication, as served heir of line to Earl William her brother.

The pursuer insisted to reduce the adjudication upon this ground, That the creditor adjudger having got payment out of the very subject adjudged, his debt and diligence became extinct.

Answered for the defenders, 1*mo*, She the Lady Hawley had a bond or disposition of tailzie from her brother Earl William, last deceased; whereby, failing heirs of his body, he is bound to resign the estate in favour of her *nominatim*, which plainly excludes the pursuer's title. In regard the granter having been more as three years in possession, the pursuer, who past him by, is liable to pay and fulfil his debts and deeds in the terms of the 24th act, Parl. 1695; consequently cannot quarrel the right standing in the Lady's person; now *frustra petit qui mox est restituturus*; and *lites non sunt multiplicandæ*. 2*do*, No man hath right to declare an adjudication extinct, but he that hath right to the reversion, who either must be a creditor, or heir to the reverser; and the pursuer hath none of these capacities: He doth not pretend to be a creditor, nor is he heir to the reverser; for since Earls George and William died in the state of apparency, without entering heirs in the estate to their father the debtor, upon whose bond the adjudication was led; the acquiring the adjudication for the behoof of Earl George in the year 1691, made no confusion or consolidation of the reversion with the property, and could not extinguish it in his person; nor doth it alter the case, that the adjudication was acquired with the rents *in hæreditate jacente*; for these being uplifted by Earl George's factor, and become his property as apparent heir before acquisition of the adjudication, the factor's applying the same to purchase the adjudication, could no more extinguish it than if payment had been made out of Earl George's other effects; because, albeit an apparent heir's intromission with the rents of his predecessor's estate might infer a behaviour, and subject him to the payment of his predecessor's debt; yet his applying the rents to acquire an adjudication upon the estate, could not hinder that acquisition to subsist in his person a good title to possess the estate by, as if he had been a stranger, to exclude a remoter apparent heir; though it did not hinder creditors to redeem within the legal.

Replied for the pursuer, 1*mo*, He hath good interest to reduce and extinguish the adjudication, because served heir to Earl William his cousin, the granter of the bond on which it was led, and so personally liable for the debt; nay fur-

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ther, since the pursuer stands infeft in the estate adjudged, he hath good title to reduce all real rights affecting the same, whatever force the tailzie may have as a personal obligement against him. *2do*, An apparent heir hath no property in the rents, but only a faculty to continue his predecessr's possession, and intromit when no better right competes. Besides, Earl George having renounced to be heir in favour of Paton, who adjudged *hæreditatem jacentem* in satisfaction of his debt, the estate and rents of it belonged to him till he was paid, and simply if not paid within the legal; and Paton being paid by the factor out of these rents, the adjudication became extinct. The disposition of the adjudication was in that case no more but an instruction and voucher of the payment whereupon extinction followed *ipso jure*; or like an assignation to the debtor of his own bond; and Earl George being *passive* liable to Paton the creditor, by the intromission with the rents as apparent heir, payment of the debt by the Earl's factor did extinguish it *ipso facto*.

The Lords found, That the pursuer being heir to the granter of the bond, on which the adjudication was led, and served in special to him in the estate adjudged, hath good interest to extinguish the adjudication by payment, notwithstanding of the disposition to the defender by her brother, the last Earl William, without prejudice to her using the said disposition or any other right as accords; and found, That the adjudication being led on a decree *cognitionis causa*, Earl George's factor's purchasing and retiring it by the rents of the lands adjudged, which were *in hæreditate jacente*, and Earl William's admitting and accepting that article in the said factor's accounts, to exoner him of his intromissions with these rents, is relevant to extinguish the adjudication by payment.

Fol. Dic. v. 2. p. 49. Forbes, p. 666.

1713. *December* 10.

James Halyburton of Fodderance, *against* Mr James Cook of Ardlaw.

No 17.
Circumstances inferring payment.

James Halyburton of Fodderance sold a piece of land to Mr James Cook, who, 1st February 1707, granted bond to Fodderance for 33,500 merks as the price, with this provision, that whatever sums Mr Cook had advanced, either to him, conform to his bills, bonds, or receipts, or paid to his creditors by his order or warrant, should be allowed in part payment. Mr Cook being charged upon this bond, suspended; and, at discussing of this suspension, had paid not only 7,500 merks to Fodderance himself, but also to Turnbull of Smiddiehill, his creditor, L. 1000 secured by an heritable bond and infeftment, and L. 220 by another heritable bond, and to one Jack, another creditor, 1000 merks; of all which, the suspender craved allowance, and produced discharges to vouch the payments.

Alleged for the charger; The discharges granted by Smiddiehill and Jack bear receipt of the money from Fodderance himself.