

1751. February 22.

MARGARET SYMOUR *contra* DOIG of Cookston.

MR JAMES KER, minister of Dun, having formed a project for purchasing the estate of Balrouny, did, in the year 1721, acquire right to an infestment of annualrent for 2500 merks, granted by John Livingstone of Balrouny, in the year 1696, and thereon he obtained himself infest.

In the year 1729, he acquired from Helen Arnot, relict of John Livingstone of Balrouny, with the reservation of her liferent, a translation to an irredeemable disposition of the estate of Balrouny, to which she had succeeded as heir to her brother Sir John Arnot, in whose favour John Livingstone, having no issue, had granted the said disposition, reserving his own liferent.

About the same time he purchased from one Beaty an adjudication that had been led for a debt of L. 1360 Scots, due by the said John Livingstone; and, on this adjudication, which *ex facie* was expired, as also on the resignation of Helen Arnot, he expedite a charter under the great seal, and was thereon infest.

These were the titles in Mr Ker's person, when, upon the death of Helen Arnot, he entered into possession of the estate about the year 1730; and, after he had been some time in possession, he, in 1731, acquired right from Margaret Symour, a minor, with consent of her mother and curatrix, to an heritable bond for 2000 merks granted by David Livingstone of Balrouny, and to which she had right as heir to her grandfather, the creditor therein.

David Doig of Cookston, upon the title of an adjudication of the estate of Balrouny, for a debt of the said John Livingstone, pursued a reduction, about the year 1740, of all the rights in Mr Ker's person, and prevailed. The disposition from Helen Arnot, which conveyed the property, was reduced, the side-scriptions having been proved to be forged; and Beaty's adjudication, the other right of property, was restricted to a security. In consequence of this, Mr Ker was ordained to charge and discharge himself in terms of the act of sederunt; and, upon the account the whole debts in his person were found to be extinguished.

While this process was in dependance, Margaret Seymour pursued also a reduction against Mr Ker, of the disposition made by her in her minority of her annualrent-right; and much about the same time that David Doig prevailed, as has been said, she also prevailed upon the head of fraud and circumvention. She had also libelled minority and lesion, but obtained no judgment upon that ground, not being able to prove herself within the *anni utiles*.

Margaret Seymour thus restored to her right as against Ker, now pursues a pouding of the ground upon her infestment, in which David Doig, now proprietor by his said adjudication, and some other titles unnecessary to be mentioned, compares, and objects, That her debt was extinguished by Mr Ker's intromissions while it stood in his person as her assignee, and was so found to be in his said process of reduction against Ker: That it may be true, that, in that

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Where an intromitter has no other right in his person, than that which was the title of his possession, although *bona fides* cannot save from extinction of that right, it will save from repetition of surplus intromissions; but such surplus intromissions ought to apply to extinguish every other right in the intromitter's person.

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process, he, in respect of his charging himself short, was charged in the double upon the act of sederunt; but that he did not insist on; for, upon a new account in the present process, made out by appointment of the Ordinary, the whole sums, principal and annualrent, were found extinguished by his actual intromissions, and that a judgment upon the relevancy was all he wanted.

*Answered* for the pursuer, That if Mr Ker managed his process ill, that cannot hurt her: That it was competent for him to have pleaded; or, be that as it will, it is now competent for her to plead, that, as his possession was taken up upon Beaty's adjudication, *ex facie* a right of property, the legal being expired, not to mention the disposition from Helen Arnot, the pursuer's heritable bond afterwards acquired, never was the title of his possession: That whatever surplus intromissions one may have beyond the title of his possession, these are considered to be *bona fide percepti et consumpti*, and cannot therefore apply to extinguish any separate right that may have been in his person; for which a decision was appealed to, Guthrie *contra* Gordon, Feb. 2. 1711, p. 1020.

*Replied* for the defender: That the decision is single, and but indistinctly marked; but, be that as it will, were there twenty such decisions, they would be so many instances of iniquity, as they would authorise the pursuer's demanding payment twice, a second payment to herself, after payment had been already got by her assignee; he was, by her assignation, impowered to receive payment, and he has accordingly received it, and the payment got by him, as assignee, must be no less available to exoner the debtor, than if it had been got by him upon a factory to be accountable to the pursuer.

THE LORDS found, 'That Mr James Ker's intromissions are to impute in extinction of the pursuer's debt, principal as well as annualrent; and remitted to the Ordinary to proceed accordingly.'

N. B. A creditor in an annualrent-right cannot have a poiding of the ground for more than the annualrent; but wherever a creditor obtains possession, his intromissions will impute in extinction of every right in his person, as well as of the right that was originally the title of his possession; and so it was found in the case between Bailie of Lamington and Sir William Menzies, observed by Forbes, p. 347. *voce* PROCESS; and so it is remembered since that time to have been found, in the case of Duncan of Strathmartin, Forbes, p. 350. *voce* DILIGENCE, Prestable by Assignees.

It is true, that, where an intromitter has no other right in his person than that which was the title of his possession, however the *bona fides* cannot save from extinction of that right, it will save from repetition of the surplus intromissions; but it were unjust that such surplus intromissions should not apply to extinguish every other right in the intromitter's person; for otherwise, as was pleaded for the defender, the intromitter would draw payment twice.

*Kilkerran, (ANNUALRENT, INFECTMENT OF.) No 2. p. 31.*