

and long thereafter, and in corroboration of the foresaid right, having infest them in the like annualrent, effecting to that same principal sum, out of the lands of Gartinkeirs, whereof she was in possession; this last infestment being reduced *ex capite inhibitionis*, she pursues a poinding of the ground out of the lands of Sauchie, which was sustained; notwithstanding that it was *alleged* for Clackmaman, that he was publicly infest, and the pursuer's infestment of Sauchie was base, never clad with possession; because she being in possession of the annualrent out of Gartinkeirs, which was granted in corroboration, it was sufficient to make the infestment out of Sauchie public by possession, the payment of annualrents, *quocunque modo*, being sufficient to make them clothed with possession.

No 61.

Gosford, MS. No 26. p. 10.

1678. November 6.

MILN against HAY.

UMQUHILE MR JOHN STUART of Kettleston, granted an infestment of an annualrent out of his lands of Kettleston, to Alexander Miln; and another annualrent out of Kettleston and Alderston, to Sir George M'Kenzie; whereunto Mr Thomas Hay hath right. Both annualrents were base; and in a competition betwixt them for poinding of the ground, the LORDS found the first possession did give the preference. Mr Thomas Hay produces a discharge to the tenants of Alderston; and Provost Miln a poinding of the ground of the lands of Kettleston, but posterior to the discharge.—It was *alleged* for Miln, That he ought to be preferred as to the lands of Kettleston, because he had the first possession of it by his decret.—It was *answered* for Mr Thomas Hay, That his annualrent being both out of Kettleston and Alderston's possession, by lifting his annualrent, either from the heritor, or from the tenants of any part of the lands, is sufficient for the whole, as taking off the presumption of *simulation retentæ possessionis*.—It was *replied*, That albeit payment by the debtor might have referred to both tenements, or if the tenements had been united locally or by union; but here Alderston is in East Lothain, and Kettleston is in West Lothain.—THE LORDS found the base infestment of annualrent, out of two tenements discontiguous and not united, validated as to both tenements, by uplifting of the annualrent from the tenants of either.—Provost Miln did then offer to satisfy Mr Thomas Hay's right, providing he would dispone to him his infestment of annualrent, out of both the tenements; or otherwise would declare that Mr Thomas would affect Alderston *primo loco*, wherein he *alone is infest*, and Kettleston *secundo loco*, in which both are infest; but if he should affect Kettleston *primo loco*, with his whole annualrent, there would nothing remain for Miln; and it was ordinary for the Lords in competitions, to ordain the party preferred to take satisfaction, and to dispone his whole right.—It was *answered*, That every man may use his right at his pleasure, and cannot be obliged to take satisfaction; and assign; but where there is a

No 62.

A base infestment of annualrent, out of two separate infestments, is validated as to both, by uplifting mails and duties from tenants of either.

No 62. reversion or redemption to be used, it can only import a renunciation, but not an assignation: And though the Lords have sometimes ordained parties preferred to take payment, and dispone; yet that is only *ex nobili officio*, upon the general ground of charity *quod mihi prodest et tibi non obest*; but they never did it, where the party could have any detriment by so doing; as in this case Mr Thomas Hay being cautioner for Kettleston, and having adjudged Kettleston and Alderston for his relief, therefore may lawfully affect Kettleston for his annualrent, and both by his adjudication.

THE LORDS found, That the party preferred was not obliged to dispone upon satisfaction, in prejudice of his other right acquired before the competition. See DEBTOR AND CREDITOR.

*Fol. Dic. v. 1. p. 91. Stair, v. 2. p. 644.*

1678. November 28.

No 63.

WILLIAM REID *against* BRUCE of Newton and BRUCE of Clackmannan.

IN the pursuit at the instance of William Reid against Bruce of Newton and Bruce of Clackmannan, 'THE LORDS found, That Newton and Clackmannan being *correi debendi*, the payment of annualrent by Clackmannan clothed Reid's right with possession against Newton, to give him preference to other creditors.'

*Fol. Dic. v. 1. p. 91. Fountainball, v. 1. p. 26.*

Competition of a base infestment with a liferent escheat. See ESCHEAT.

Confirmation, in what cases it makes infestment to hold of the Superior confirming. See CONFIRMATION.

See PERSONAL and TRANSMISSIBLE.

See COMPETITION.

See PACTUM PRIVATUM.

See INFESTMENT.

See PRESUMPTION, Rights when presumed simulate.

See RIGHT IN SECURITY.