

seeing the desuetude and out-lying of the pursuer out of the possession, was by the liferenter's right and possession, she living, and being possessor above 30 years and more, which suspended both parties rights and possession; that prescription could not run against them *medio tempore*; and the defender's possession, since her decease, was not sustained to exclude this pursuit. See PROOF.

No 8.

Act. *Cunninghame.*

Alt. *Gilmor.*

Clerk, *Gibson.*

Durie, p. 672.

1634. July 12.

SIR JAMES OLIPHANT'S CREDITORS.

In a double poiding, which of Sir James's creditors should be answered of the duties of these lands, which were apprifed by some, and who being publicly infest therein, craved therefore to be answered of the said duties of the crop 1632; which was then controverted; and on the other part, Patrick Oliphant, who craved to be preferred to John Fairholm, the compriser; because long before his comprising and denunciation, he was infest in an annualrent out of the said lands, for a principal sum addebted to him by the said common debtor; which infestment proceeded upon a procuratory granted by the debtor, for taking infestment, either to be holden of the granter, or of the king, the debtor's superior; and albeit he was seized to be holden, only of the granter, yet his infestment was registered in the secretary's register, and so made public before Fairholm's denunciation: As also the same was confirmed by the King, before Fairholm's comprising was complete; in the which confirmation, the King declared the said saine to be as sufficient as if he had been infest to be holden of the King.—And it being *answered* for the compriser, That the annualrenters right was base, and was not clad with possession, neither could be clad with possession, seeing the payment of the annualrent was not conferred till the year 1633, to be the first term of payment of the annualrent; and the confirmation nor registration made not the same public, so that still the infestment remained a base right, and could not be respected against the public, which instantly was to take effect, and to receive present possession. And the annualrenter *answering*, That albeit his infestment could not take present possession, seeing the term of payment was not before Whitfunday 1633; yet that was not a ground of law to annul his right thereby, seeing it was a true and lawful debt, and lawfully constitute, *ubi cedeat dies, licet non venit, et licet non peti possit*; neither could it be reputed base thereby to extinguish his right, being registered and confirmed; which took away all suspicion of fraud or clandestine dealing; for the public registration took away all these suspicions, which gave the cause of any acts of Parliament, made against private rights; and he has beside done all lawful diligence to make his infestment notour, by intending action thereupon, and executing of arrestment before this compriser; which must have force, as if he had obtained possession, seeing both the parties are but yet contend-

No 9.

A base right, though registered and confirmed, but without actual possession, postponed to an apprifing. A circumstantial case, and doubtful decision.

No 9.

ing *de adipiscenda possessione* ; and if his infestment had been public, and had the term of payment conferred to a subsequent term, as this infestment quarrelled does, yet being prior to the compriser's right, albeit thereby he might be secluded from the term controverted, which precedes the term of his payment, yet thereby his infestment could never fall for any years subsequent, when the term of his right should come ; but then in reason it ought to have effect, and be preferred to the compriser. Notwithstanding of this allegiance for the annualrenter, the compriser was preferred, and the annualrenter's right was found base : But here the question, as said is, was for a term, whereto the annualrenter could not claim right, being before his terms of payment ; and so for that term he was excluded ; and the dispute was not for terms, whereto his infestment might give him right ; although the Lords, by their interlocutor, found his right base, and so did exclude him for ever.

Aét. Oliphant.

Aét. Canninghame.

Clerk, Hay.
Durie, p. 726.

No 10.

A base infestment of annualrent was granted, to take effect after the granter's death, upon which a decree of poinding the ground followed, during the granter's life. This decree, upon which possession could not follow during the granter's life, was held sufficient to make the base infestment public.

1662. February. DOUGLAS of Morton *against* the TENANTS of KINGLASSIE.

IN an action of mails and duties pursued by Douglas of Morton, against the tenants of Kinglassie ; wherein, for Morton there was produced an infestment of annualrent granted by Hamilton of Kinglassie, to Hamilton his second son, author by progress to Morton, with a decret of poinding the ground thereupon:—It was *alleged* by the creditors comprisers, That the infestment and decret could furnish no action or interest in their prejudice, because the infestment was base, holden of the granter, wherein the annualrent was suspended during the granter's lifetime ; whereas, long before the term of payment, and before any decret could be effectually given thereupon, for poinding of the ground, they were infest, holden of the superiors. And if they had been compearing, they would have alleged, that no such decret for poinding the ground could have been granted during old Kinglassie's life ; seeing the annualrent was only payable after his death, and the ground only then poindable therefor.—It was *answered*, That though the annualrent was suspended, yet the citation of the tenants and heritor for poinding the ground, and decret following thereupon, made the right so public, that no posterior infestment whatsoever could be preferred thereto. And though the decret was not to have present execution, yet the ground might be decerned poindable, the term of payment being first come, and bygone ; just as when an infestment of that nature is granted for an annualrent payable at the very next term : The party infest, may raise his summons and obtain decret and sentence before the term.

THE LORDS repelled the allegiance, and preferred the annualrenter. See LEGAL DILIGENCE,

Fol. Dic. v. 1. p. 88. Gilmour, No. 40. p. 30.