

bound himself to give that infestment for love and favour, and whereby he hath not left place to presume upon a donation, or against the same, or to leave place to ascribe that to his liberation, which himself hath *specifice* exprest, and ascribed to his donation; attour albeit he had not so exprest the same, yet if the husband be of a competent substance, it may be in law affirmed, that that infestment should not be interpreted to be done for implement of his contract, which he hath not so interpreted himself; whereas if he had been of a mean estate, and that he had not exprest a special cause himself, *eo casu* it might have tholled a more favourable construction, viz. that it might have been ascribed to the fulfilling of the contract:—As also in this case controverted, this decision may be thought more hard, because the infestment foresaid, and bond whereupon it proceeded, was conceived for infesting of this woman in liferent, and the special bairns therein named, which were then procreated betwixt them heritably, (for this woman was his second wife, and he had no bairns of a prior wife), for whose provision chiefly this infestment was expedite; so that these bairns being heritably provided to these booths, whether the wife had her liferent thereof or not, it was all alike to the executors charged; for if she had not the same, the bairns provided thereto will have the full right thereof, both liferent and property; and as the infestment of property would not exclude the bairns provided thereto to seek the fee of the sums whereof now the relicr craves the liferent; and as if they were seeking the same, they would not be excluded from the fee by giving of that infestment, which would not be admitted against them as any part of implement of that contract *pro tanto*, no more it ought to be admitted against the liferenter, for any part of liberation of her liferent of the whole contract, yet it was so decided *ut supra*. See PRESUMPTION.

Act. *Stuart & Gibion.*

Alt. ———

Clerk, *Hay.**Fol. Dir. v. 1. p. 368. Durie, p. 621, & 624.*1634. *March 22.*WRIGHT *against* LAUDER.

JAMES WRIGHT being infest heritably in some tenements in Lauder, by disposition of — Ker of Redpeth, pursues a removing; and the defender's *alleging* a prior disposition of his liferent made by him, albeit without sasine, by virtue whereof one of the defenders was in possession, the LORDS preferred the prior disposition without sasine, where it was clothed with possession, albeit there was not a liferent in the disponent's person, distinct from the property, but that he was then fiar; neither was it respected, what the pursuer alleged, that the defender's disposition of the liferent made to him, was not clothed with possession, before the pursuer's acquiring of the heritable right, as he replied it ought to be, seeing both the parties rights were made within these two or three

No 41.

A prior disposition of liferent without sasine was preferred to a posterior right to the fee.

No 41.

years last bypast, and the prior right acquired, and being now clothed with possession the time of this pursuit, was sustained without sasine, as said is; but the disposition of the liferent not clothed with possession, albeit prior, was repelled, because the sasine and this pursuit gave preference to the same, even as if there had been two dispositions made, the prior last intimated, or not intimated at all, would have been postponed to the second disposition first intimated.

Act. Stuart.

Alt. —

Durie, p. 715.

1637. July 19.

L. INNERWEIK *against* LA. SMEITON.

No 42.
Found in conformity with
Kinnaird against Yeaman,
No 40.
P. 5469.

UMQUHILE L. Smeiton being obliged to pay to L. Innerweik, a yearly annuity of 1700 merks, during Innerweik's lifetime yearly, which bond registered being transferred in the Lady Swinton, as executrix to her husband, granter of the bond, reserving her defences, and she suspending, that she as executrix, could not be subject to pay a yearly duty, for years and terms to come, after the decease of her husband, who was the debtor, for that was a fact only prestable by the heir, who ought to be convened therefor, and not by the executor, and the most that the executor could be liable thereanent, was only for so many terms bygone of that annual rent duty, as were owing the time of her husband's decease, and that she ought not to be subject to payment in time coming, the LORDS repelled this reason, and found, that the executor was subject to pay the yearly duty in all time to come, during the creditor's lifetime, *usque ad vires inventarii*, wherein the LORDS found both the heir and executor liable to the creditor, as he pleased; and found, that there was no necessity to the creditor to charge and discuss the heir *primo loco*, before the executor could be charged, as if it were proper to be first paid by the heir, and that if any otherwise the executor could be subject, the same was but *in subsidium*, after the heir was first discussed; which was repelled, seeing they found, that they were both obliged alike principally to the creditor, as said is; and here the charger insisted against her as executrix, at the least intromissatrix with the defunct's goods and gear; but the dispute run upon this ground, as if she had been executrix; for she *alleged*, that the intromissatrix could be liable no further than an executrix, which ground was holden as granted, and so disputed, as said is.

Act. Stuart.

Alt. *Advocatus.**Fol. Dic. v. 1. p. 368. Durie, p. 853.*