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the apparent heir, without a cause onerous, it is *præceptio hæreditatis*; and if the father were dead, it would make the defender liable as heir; and therefore, now he cannot make use thereof, in prejudice of the pursuer. *2do*, The pursuer offered to prove, that his annualrent was clad with possession, before the defender's infestment, in so far as he received the half of the annualrent, which is sufficient to validate the infestment for the whole; seeing there are not two annualrents, but one for the whole sum; and seeing the pursuer could do no more, the one half of the annualrent being suspended till his father's death.

THE LORDS found this second reply relevant, and found the possession of the half was sufficient to validate the possession for the whole; but superceded to give answer to the former reply, till the conclusion of the cause, not being clear, that the defence upon the defender's infestment could be taken away summarily, though he was apparent heir, without reduction upon the act of Parliament 1621.

*Fol. Dic. v. 1. p. 91. Stair, v. 1. p. 517.*

1668. July 9. MARGARET ALEXANDER *against* LAIRD OF CLACKMANNAN.

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Possession upon an infestment of corroboration, was found to validate an original infestment of annualrent, which was granted out of other lands.

MARGARET ALEXANDER being infest in an annualrent out of the lands of Sauchie; by a posterior infestment, in corroboration of the former right, she was infest in that same annualrent, out of other lands, whereof she was in possession; but this posterior infestment being reduced upon an inhibition prior thereto; the pursuer poynding of the ground of the lands of Sauchie, upon the first infestment.—It was *alleged* for Clackmannan absolvitor, because the pursuer's right of annualrent is base, never clad with possession, and now he is infest in the lands, either publicly, or by another infestment clad with possession.—The pursuer *answered*, That the infestment in the lands of Sauchie was sufficiently clad with possession, in so far as the posterior infestment of annualrent in corroboration thereof, was clad with possession; and as payment made by the heritor, by himself or his tenants, or by assignation to mails and duties of other lands, in satisfaction of the annualrent, infers possession; so payment made by his tenants, by the posterior infestment in corroboration, can be no worse than an assignation to the mails and duties of these lands; which, as it pays some terms annualrent of the first infestment, so it must clothe it sufficiently with possession.—It was *answered*, That here being two distinct infestments at several times, albeit for the annualrent of the same sum, yet the possession of the last cannot relate to the first.

THE LORDS repelled the defence in respect of the reply; and found, That possession by the last infestment, did from that time sufficiently validate the first.

*Fol. Dic. v. 1. p. 91. Stair, v. 1. p. 550.*

\* \* \* Gosford thus reports the same case :

THE Laird of Sauchie having infest Margaret Alexander in liferent, and her children in fee, in an annualrent of 160 merks out of the barony of Sauchie;

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.

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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

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