1665. *November* 25. WHITE *against* HORN.

No 44.
Found in conformity with the preceding case.

IN a competition betwixt White and Horn, the one having right by progress to the property of a piece of land, and the other to an annualrent furth thereof; it was *alleged* for the proprietor, 1*mo*, That the annualrent was prescribed, no possession being had thereupon above forty years; 2*do*, The original right produced to constitute the annualrent is but a sasine without a warrant; and albeit the common author have given charter of ratification thereof, yet it is after the proprietor's sasine, given by the common author to his daughter *propriis manibus*. It was *answered* for the annualrenter, to the *first*, That the prescription was interrupted by citations produced, used upon a summons of poinding of the ground, before the Bailies of the Regality of Dunfermline, where the lands lie; As to the *second*, That the confirmation granted to the annualrenter is prior to any charter, precept, or other warrant granted to the proprietor; for as for the sasine *propriis manibus*, that has no warrant produced. The proprietor *answered*, that the interruption was not relevant, because the executions were null, in so far as the warrant of the summons bears to cite the defender personally, or otherwise upon the ground of the land, or at the market-cross or shore of Dunfermline, whereupon such as were out of the country were cited, and not upon sixty days, but twenty-five; which reasons would have excluded that decreet, and therefore cannot be a legal interruption. As to the other, albeit the pursuer's first sasine want a warrant, yet it hath been clad with natural possession, and the annualrenters hath not.

THE LORDS repelled both these allegeances for the proprietor, and found the executions sufficient to interrupt, albeit there were defects in them that might have hindered sentence thereupon, especially *in re antiqua*, the lands being in regality, where the custom might have been even to cite parties absent out of the country at the head burgh of the regality and the shore next thereto; and as the proprietor's right was not established by prescription, so they found, that possession could not give a possessory judgment to the proprietor against an annualrenter, which is *debitum fundi*. See PRESCRIPTION.

Fol. Dic. v. 2. *p.* 90. *Stair, v.* 1. *p.* 314.

1668. *January* 9.

The OLD LADY CLERKINGTON *against* CLERKINGTON and the YOUNG LADY.

No 45.
An annualrent has not the benefit of a possessory judgment against a prior annualrent.

THE old Lady Clerkington being infeft in an annualrent of seven chalders of victual out of the mains of Clerkington for thirty-six years bygone, she pursues a poinding of the ground. It was *answered* for the Laird and his mother, That the pursuer having been so long out of possession, cannot make use of a possessory judgment, but must first declare her right; 2*do*, The young lady is also

infeft in an annualrent, and hath been (by virtue thereof) more than seven years in possession, and so hath the benefit of a possessory judgment, till her right be reduced, and cannot be dispossessed by the old lady's posterior infeftment. No 45.

THE LORDS repelled both the defences, and found that an annualrent is *debitum fundi*, and is not excluded by possession of a posterior right, and needs no declarator, and that an annualrent hath not the benefit of a possessory judgment against a prior annualrent.

Fol. Dic. v. 2. p. 91. Stair, v. 1. p. 500.

1668. *February* 20. FORBES *against* INNES.

No 46.

POSSESSORY judgment is not competent against a purchaser, who after eviction of the principal lands, recurs to the warrandice lands, unless the possession had been seven years after the eviction.

Fol. Dic. v. 2. p. 81.

*** This case is No 53. p. 1322, *voce* BASE INFEFTMENT.

1668. *July* 15. EARL of WINTOUN *against* the TENANTS of LETTERFURY.

No 47.
Possessory judgment runs against minors. Minority is excepted only in the long prescription, extinguishing the right.

THE Earl of Wintoun being infeft in the lands of Letterfury, which were comprised for Lady Seaton's tocher, did intent action for mails and duties against the tenants *in anno* 1656, and seven years thereafter did raise a wakening of the said summons, where this allegeance was proponed, That the Tenants had made payment to their masters, who had gotten feus of the said lands from Letterfury, and by virtue thereof had been seven years in peaceable possession. This allegeance was sustained, notwithstanding of this reply, that the feuar's possession was interrupted by the first summons, before they were seven years in possion; and being once interrupted, they could not have the benefit of a possessory judgment, by seven years possession after the interruption, especially seeing the pursuer was content to pass from the tenants, as having *bona fide* paid. 2*do*, It was *replied*, That the first summons was raised when the Earl of Wintoun was minor, and continued so the most part of the seven years, and therefore prescription could not run against him; which was likewise repelled: And LORDS found, that the benefit of a possessory judgment did run against minors as well as majors.

Gosford, MS. No 32.

*** Stair's report is No 15. p. 10627, Sect. 2. *h. t.*