

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.

* * The same case is reported by Stair :

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In a competition betwixt the Creditors of Hamilton of Kinglassie, it was *alleged* for William Hoam, who had right to an annualrent, That he ought to be preferred to Joseph Lermont, who stood publicly infest in the property, in anno 1655; because albeit the annualrent of itself was base, yet long before, it was validate by a decree for pointing of the ground. It was *answered*, That there was no way to make a base infestment valid, but by possession: Here there could be no possession, because the annualrent was granted to take effect only after the granter's death, and the decret thereupon was obtained long before his death, and so could be repute no possession.

THE LORDS were of opinion, That the foresaid decret of pointing of the ground, upon the base infestment, ordaining the ground to be pointed, (the terms of payment being come and bygone) was sufficient to validate the base infestment; and that thereby it remained no more a priyate clandestine infestment.

February 27. 1662. In the competition betwixt the Creditors of Kinglassie, mentioned the former day, the dispute about the base infestment, made public by the pointing of the ground so long before the term of payment, being reasoned before the Lords *in presentia*, they sustained the same as before.

Stair, v. I. p. 105. 109.

1666. June 30. MARTIN STEVENSON against DOBBIE.

DOBBIE being tenant to James Stevenson of certain lands, he gets an infestment of annualrent out of the same lands, before Whitsunday; but the first term's payment of the annualrent was Martinmas thereafter; after Whitsunday, and before Martinmas, Martin Stevenson apprises the land, and charges the superior, and thereupon pursues for mails and duties. Dobbie excepts upon his infestment of annualrent. The pursuer *answered*, That the infestment was base, and before it was or could be clad with possession, he had charged the superior; which was equivalent to a public infestment. The defender *answered*, That a public infestment intervening, before the first term of payment of the annualrent, did not prejudice the base infestment, which could not be presumed to be private, or simulate for want of possession, till the term came, at which possession might be attained, or pursued for. 2dly, The defender being in natural possession, from the very date of his sasine, *intus habet*, and he may retain his own annualrent, which begins to become due from the date of his sasine, *de momento in momentum*, albeit there be a term appointed to pay accumulative; so that as the getting payment from the possessor of any part of the annualrent, or his obligation for the

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A tenant obtained from his landlord, an infestment of annualrent out of the lands, before Whitsunday. The first term's payment of annualrent was the next Martinmas. In the interim a creditor apprises, charges the superior, and infests for mails and duties. The tenant preferred. *Intus habuit.*