

No 5.

am to him under reversion, granted back again to Letham, containing a greater sum than that whereupon the infestment of the annualrent was redeemable; in the which greater sum, whereupon the last reversion foresaid was granted, the sum contained in the first security, for the which the annualrent is now acclaimed, was expressly comprehended, and was a part thereof; by the which last security the first sum was in effect satisfied to the pursuer, and the first security was absorbed; and consequently the pursuer could not return and desire to poind the excipient's lands by virtue thereof. This allegiance was found relevant to affoilzie these defenders; for the LORDS found, That by the acceptation of this posterior security by the pursuer, viz. by the making of a contract, perfected betwixt Letham and him thereupon, and subscribed by them, and delivered to the pursuer, with a charter conform thereto, albeit he was not seised, which he might be when he pleased, in the which last security the first sum as compted, the pursuer could not mis-know to the same, and return to poind for the annualrent of the first security, so long as the last contract stood and remained in its own force; especially seeing, in this last security, the pursuer had acknowledged that the excipient's lands were disposed to them in feu before, and had therein obliged him to procure the renunciations of their rights, and to deliver them to Letham at the time of the redemption of the lands; and so the LORDS found, That the posterior security, wherein the sum is comprehended, whereupon the first was granted, absorbed the first, that he could not return thereto, so long as the last stands; albeit it was alleged, that the last was not effectual, because, before the same, all the lands were overburdened with prior wadsets, which exhausted all the profits and rent of the land. See VIRTUAL. See PRESCRIPTION.

A&amp;f. Nicolson.

Alt. Hope.

Clerk, Gibson.

Fol. Dic. v. 1. p. 87. Durie, p. 169.

No 6.

A base infestment was preferred to a public one, where neither party was in possession, the base being in implement of a prior obligation, although gratuitous, upon which inhibition had been used.

1631. March 2. L. GARTHLAND against LO. JEDBURGH.

In this cause, of which one branch is reported No 45. p. 915. and another *voce* LEGAL DILIGENCE, the L. of Garthland craved the tenants to be decerned to pay him his back tack-duty. Compeared Sir James Ker, who being cautioner for the Lord Jedburgh, author of the pursuer's infestment, was, for his relief and security of the sums which he had paid as cautioner, infest in the same lands by the Lord Jedburgh, by a public infestment, and *alleged*, That the pursuer's infestment granted to him, was not public, but base; and therefore contended that he ought to be preferred to the pursuer, ay and while these sums were paid to the excipient; especially seeing the pursuer's infestment was granted to him *ex mera donatione*, without any onerous cause, and could not be respected against the right, made to the defender, a lawful creditor, and for a most onerous cause of debt; the pursuer being son-in-law to the granter of his right, and granted to his son in fee, who is oye to the granter, and so most conjunct persons; and

done voluntarily, *et sine causa*, in prejudice of the excipient, a true creditor, at the time of the purchasing of the pursuer's right, who he could not prejudice by any voluntary deed, done gratuitously to his own oye, for love and favour.—THE LORDS repelled the allegiance, and sustained the pursuer's infeftment, albeit base; and albeit the defender's was a public right, and albeit it was done *inter personas conjunctas*, and without a cause onerous, (for none of the parties were in possession of the lands, but now were disputing their rights,) seeing the same was done for implement of a bond before the defender's infeftment granted to him by the Lo. Jedburgh, and whereupon he had served inhibition before the defender's infeftment; so that this bond and inhibition preceding, was a sufficient warrant to prefer that infeftment depending thereon to the excipient's right, acquired after that inhibition, albeit the same was public, and the pursuer's base, and albeit the same was done without an onerous cause; yet it was sustained, and preferred to the other infeftment excepted on, given to the creditor *ex causa onerosa*, seeing, at the time of the granting thereof to the pursuer, the granter was not then, nor yet is bankrupt, neither was then unanswerable to pay any debt owing by him; so albeit that then, and at the time of the pursuer's bond foresaid, the defender was his creditor, yet the donation voluntarily made by the Lord Jedburgh the debtor, might validly and lawfully have been made; and cannot be quarrelled upon that ground by the creditor, he having done no deed by inhibition, to prohibit the said infeftment, and donation, and bond, albeit done for love and favour.

A. & Neilson.

Alt. Sandilands.

Clerk, Gibson.

Durie, p. 575.

1633. January 22.

GORDON against M'QUEEN.

ONE being infeft in lands by a base infeftment redeemable, to be holden of the granter; and having set a back-tack to his author of the said lands, for payment of a silver tack-duty, answerable to the annualrent of the money, whereupon the land was wadset; of the which silver duty he had received payment diverse years since the date of this wadset; and thereafter, the defender having acquired the heritable irredeemable alienation of these lands, from the same author to the pursuer, by a public infeftment, holden of the superior; and by virtue thereof, being ten or twelve years last bypast in actual possession of the land, the pursuer never claiming right thereto all this time, neither by virtue of the heritable wadset, nor by the sub-tack, but being still silent, and these rights being obscure and unknown to the defender, who acquired the lands from the heritor, being then possessor: It was found in an action pursued by the pursuer, upon his foresaid heritable base right, for payment of the mails and duties of the lands, of all the bygone years preceding this year 1632, viz. by the space of 12 or 14 years bypast, and sicklike in time coming; and which pursuit he retrenched to

No 7.

A person was infeft in lands by base infeftment redeemable. He let the lands to his author by back-tack, for a money-rent, of which he received payment some years. His author sold the lands to another irredeemably. The creditor in the base right demanded no rent from the purchaser of