

No 7.
several years.
His right, not-
withstanding,
found good
and entire.

the said back tack-duty ; that the said pursuer ought to be paid of the same by the defender, who was possessor and heritor all these years, not only in time to come yearly, but also of all these said bygone years ; albeit the pursuer's right was but base, and that the defender's right was public, and clad with so long possession ; and albeit, the pursuer had been so long out of possession, and had never done diligence all that time, to recover payment of his back tack-duty ; seeing his right was once clothed with possession : Which the LORDS found, gave him preference to the posterior public right for bygones, as well although they had been owing these 20 or 30 years bygone, as for the time to come ; and found, That the defender's uplifting of the duties of the lands, of the said years bypast, by virtue of the said title, which was *titulus verus et non putativus, et ubi fructus erant bona fide precepti et consumpti*, did not liberate him from the said bygones ; and found, That the pursuer ought not to be put to reduce the defender's right, as he alleged he ought, in this judgment, which he alleged to be of that same nature, as if he were in a removing, which was repelled. See BONA FIDE CONSUMPTION.

Aft. *Cunninghame.*

Alt. *Mowat & Gilmor.*

Clerk, *Scot.*

Durie, p. 665.

1633. February 14. CHARTERS against L. BALMAGHIE.

No 8.

A person holding a base right, attained possession for some years. A liferenter was preferred to him in the possession for 36 years. A person, in virtue of a public right, then held possession for five or six years. The original base right being once good by possession, remained so even after 40 years, and was preferred accordingly.

ONE Charters pursuing removing against the Laird of Balmaghie, the pursuer being infest in the lands libelled, as heir to his father, who was infest by Alexander Livingston of Airds, above 45 years since, by an infestment to be holden of the granter, and by virtue thereof was divers years in possession of the land, ay and while the relict of the said Alexander Livingston, being liferenter of the lands, after her husband's decease, by virtue of that her liferent right, became in possession thereof, wherein she continued by the space of 36 years, or thereby, ay and while the time of her decease ; after whose decease, immediately, the L. Balmaghie defender, apprehended the possession, and hath continued therein now by the space of five or six years bypast, he being infest by progress from his predecessors and authors, by five several heritable infestments, in five several his author's persons, flowing from that same Alexander Livingston, common author to both the parties, and all by public infestments, to be holden of the superior ; whereby it was *alleged*, That in this judgment possessory, the public infestment ought to defend against the base right, which was now extinct, being out of possession these 40 years bypast, and so prescribed.—THE LORDS nevertheless repelled this allegiance, in respect that the pursuer's base right was alleged once to be clothed with possession, whereby it was once a good right, and ought to be preferred to the posterior right, albeit public ; and found, That this possession, albeit after so long time, (and albeit tending to destroy the public infestment with so long progress,) was probable by witnesses, and receivable *hoc ordine*, without reduction ; and found, That the prescription had no place in this case,

seeing the desuetude and out-lying of the pursuer out of the possession, was by the liferenter's right and possession, she living, and being possessor above 30 years and more, which suspended both parties rights and possession; that prescription could not run against them *medio tempore*; and the defender's possession, since her decease, was not sustained to exclude this pursuit. See PROOF.

No 8.

Act. *Cunninghame.*

Alt. *Gilmor.*

Clerk, *Gibson.*

Durie, p. 672.

1634. July 12.

Sir JAMES OLIPHANT'S CREDITORS.

In a double poiding, which of Sir James's creditors should be answered of the duties of these lands, which were apprifed by some, and who being publicly infest therein, craved therefore to be answered of the said duties of the crop 1632; which was then controverted; and on the other part, Patrick Oliphant, who craved to be preferred to John Fairholm, the compriser; because long before his comprising and denunciation, he was infest in an annualrent out of the said lands, for a principal sum addebted to him by the said common debtor; which infestment proceeded upon a procuratory granted by the debtor, for taking infestment, either to be holden of the granter, or of the king, the debtor's superior; and albeit he was seized to be holden, only of the granter, yet his infestment was registered in the secretary's register, and so made public before Fairholm's denunciation: As also the same was confirmed by the King, before Fairholm's comprising was complete; in the which confirmation, the King declared the said saine to be as sufficient as if he had been infest to be holden of the King.—And it being *answered* for the compriser, That the annualrenters right was base, and was not clad with possession, neither could be clad with possession, seeing the payment of the annualrent was not conferred till the year 1633, to be the first term of payment of the annualrent; and the confirmation nor registration made not the same public, so that still the infestment remained a base right, and could not be respected against the public, which instantly was to take effect, and to receive present possession. And the annualrenter *answering*, That albeit his infestment could not take present possession, seeing the term of payment was not before Whitsunday 1633; yet that was not a ground of law to annul his right thereby, seeing it was a true and lawful debt, and lawfully constitute, *ubi cedeat dies, licet non venit, et licet non peti possit*; neither could it be reputed base thereby to extinguish his right, being registered and confirmed; which took away all suspicion of fraud or clandestine dealing; for the public registration took away all these suspicions, which gave the cause of any acts of Parliament, made against private rights; and he has beside done all lawful diligence to make his infestment notour, by intending action thereupon, and executing of arrestment before this compriser; which must have force, as if he had obtained possession, seeing both the parties are but yet contend-

No 9.

A base right, though registered and confirmed, but without actual possession, postponed to an apprifing. A circumstantial case, and doubtful decision.