

1636. February 24. OLIPHANT against OLIPHANT.

PATRICK OLIPHANT being infeft in an annualrent of 250 merks out of the lands of Kildony, by Sir James Oliphant, pursued a poinding of the ground for the same annualrent. *Alleged* by John Oliphant of Bachilton, These lands could not be poinded for the annualrent libelled, because he stood infeft in them by a public infeftment holding of his Majesty, and by virtue thereof in possession. *Replied*, Not relevant, because the pursuer's infeftment was before his. *Duplied*, The pursuer's infeftment ought not to be respected, because but base, and never clothed with possession; and so his public infeftment, although posterior, must be preferred. *Triplied*, He offered to prove that his infeftment was clothed with possession, viz. by payment of a term's annualrent. *Quadruplied*, Not relevant, unless he allege that he received annualrent since his infeftment; for albeit he had got a term's annualrent before his infeftment, that cannot make his subsequent infeftment to be clothed with possession, in prejudice of a third person having a public infeftment clothed with natural possession. *Quintuplied*, His getting of a term's annualrent, albeit before his infeftment, must give him the benefit of possession to make the subsequent infeftment good, especially seeing he did all legal diligence, after his contract, to get himself infeft; for his contract of disposition of the said annualrent being in December 1631, he is infeft therein in June 1632, soon after the term, which infeftment is likewise confirmed by the King before the defender's infeftment, which was not till September 1632. And there having only intervened one term between the pursuer's disposition and the defender's infeftment, he cannot be said to have done diligence; and, for any possession since, the defender cannot clothe himself with it, because it hath been litigious, and is still, till once it be found which of them hath best right; in regard of all which he ought to be preferred.—THE LORDS sustained the exception proponed upon the public infeftment, and did not respect the pursuer's possession alleged, in regard it was before the infeftment, and therefore could not be thought to be by virtue of the said infeftment.

Spottiswood, (POINDING.) p. 232.

1662. June 26. ADAMSON against BALMERINOCHE.

FOUND in conformity with the principle of the case Watson against Reid, No 17. p. 10510. that the benefit of a possessory judgment is not pleadable against an annualrent right, which is *debitum fundi*, consequently a poinding of the ground must take effect against whatever possessor.

. This case is No 3. p. 3346. *voce* DEBTOR and CREDITOR.

No 12.

In a competition, a prior base infeftment, not clothed with possession, was found to be no title to poind the ground, where there was a public infeftment, though posterior.

No 13.