

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, *1mo*, That the annualrent was prescribed, no possession being had thereupon above forty years; *2do*, 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 pointing 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 decret, 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 allégeances 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 pointing 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; *2do*, The young lady is also