

* * The same case is reported by Stair :

No 10.

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 priate 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

No 11.

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.*

No 11.

same, would be a possession sufficient; so the defender having the same in his own hand as possessor, it is equivalent.

THE LORDS found this member of the defence relevant, and had no necessity to decide the other point, whether the intervening public infestment, before the first term, would exclude the base infestment, without possession; wherein they thought that there was great odds, if the appriser's infestment, or diligence, had been before Whitsunday, in respect the first term of the annualrent, was not the next term after the same; and so if it might pass one term, by the same reason it might pass ten terms, and be valid; because, in neither case, could possession or action proceed thereon, and therefore might be suspected of simulation; so that if the appriser's diligence had been before Whitsunday, the annualrenter could have no right to that term; and so the appriser would attain to the possession, and could hardly be excluded thereafter.

Fol. Dic. v. 1. p. 88. Stair, v. 1. p. 384.

* * * The same case is reported by Gilmour :

JAMES DOBIE in Dalkeith having a tack from James Stevenson; the heir of an acre of land, for some years, and ay and while he should be paid for 500 merks owing to him by Stevenson: Martin Stevenson, brother and creditor to the said James for a debt, comprises the said lands, and some other lands, from his brother; charges the superior to infest him; and thereupon raises summons against the said James Dobie for mails and duties; who having proponed upon the tack, his allegiance was repelled, in regard the years of his tack were expired; and the clause *ay and while* is null, wanting an ish.—Thereafter he did *allege*, That for the said debt, and some other debts, owing by the debtor, he was infest in an annualrent, before the pursuer's comprising and charge.—*Answered*, No respect to be had to the infestment, being base, not clad with possession; nor could it be clad with possession, because the comprising and charge were prior to the term of payment of the annualrent; yea, and to the term from which the annualrent began to be due; and so the pursuer having a right public, (the charge against the superior being equivalent to a public infestment,) he ought to be preferred.—*Replied*, That the defender was in possession of the land, out of which the annualrent was to be uplifted; and so, as possessor, he was heritor of the mails and duties, and consequently, of the annualrent payable furth of the mails, which is equivalent, as if his infestment were formally clad with possession; nor was it necessary for him, before the term, to seek a decret for poinding the ground, seeing he behooved to poind his own goods in that case; *et intus habuit* to pay himself by the mails.

THE LORDS preferred the infestment of annualrent. See TACK.

Gilmour, No 186. p. 136.