

No 81. pursuer hath produced sufficiently, and that his right was clad with possession, in the person of his mediate author, before the years in question. To the *second*, This pursuer hath the benefit of a possessory judgment by his infeftment, clad with possession, and is not obliged to dispute, whether his author were deputed or not, unless it were in a reduction.

THE LORDS sustained the pursuer's title, unless the defender produced a right anterior thereto; in which case, they ordained the parties to be heard thereupon, and so inclined not to exclude the pursuer, upon the allegiance of a possessory judgment; but that point came not fully to be debated: It is certain that a possessory judgment is not relevant in favours of a proprietor, against an annualrenter, to put him to reduce, because an annualrent is *debitum fundi*; but, whether an annualrenter possessing seven years, could exclude a proprietor, until he reduce, had not been decided, but in this case the LORDS inclined to the negative.

*Fol. Dic. v. 1. p. 183. Stair, v. 1. p. 437.*

No 82.

1674. June 16.

BROWN against INNERVEIK.

In a competition betwixt two base infeftments flowing from different authors, the Lords preferred that right which was in possession, tho' the right upon which the process was founded was of an older date, and refused to sustain the reduction without a progress from the King, or a common author, or prescription; for the defender argued, that he, being in possession, and producing any infeftment as a title, cannot be affected but by a prior complete right.

ROBERT BROWN pursues a reduction of the right of a two merk and a half merk land, being a portion of Blackburn, against John Innerveik: In which pursuit, the pursuer produces a base infeftment from John Duns, in favours of William Wallace, of the said whole portion; *Item*, An infeftment in favours of James Wallace, as oye to William, and the pursuer's infeftment from James. The defender produces an infeftment from Chirnside of East-Nisbet to Innerveik, with a contract of division between Innerveik and John Wallace, son to William, bearing, 'That Chirnside had given right to either of them of the equal halves of the said tenement, and that Innerveik had right from Duns, the pursuer's author;' he produces likewise a discharge from Duns to Chirnside of the price of the said lands. Hereupon the pursuer repeated his reason of reduction, viz. 'That his right from Duns by progress began in anno 1575, and the defender's first right produced is but in anno 1603, from Chirnside;' so that both being but base rights, and the pursuer's long prior, it is preferable. The defender *alleged*, That the reason so conceived was not relevant, for he being in possession, and producing any infeftment as a title, it cannot be taken away but by a prior valid right; and so the pursuer must libel and instruct that Duns his author had right immediately or mediately from the King, the first fountain of right; or that the defender derives his right from Duns, as common author to both, and so cannot quarrel Duns' right; or that the pursuer or his author since the act of prescription had possessed by virtue of their rights 40 years without interruption. It was *answered* for the pursuer, That where the defender could allege none of these titles himself, it was sufficient for the pursuer that his right was equally good, and more ancient. *2do*, He instructs Duns

o be the common author, as being author to Chirnside by Duns' discharge, and by the contract of division. It was *replied*, That such acknowledgments of authors will not prejudge their singular successors, unless their infestments be produced, which can only show a progress from a common author; otherwise no singular successor could be secure against such acknowledgments or writs not contained in the investiture; and, as to the contract of division with John Wallace, it operates nothing, because the said John Wallace was never infest, but his son James Wallace was infest, as heir immediate to his good-sire.

THE LORDS found the reason of reduction not relevant upon the prior base infestment, without a progress from the King, or a common author, or prescription; and found the acknowledgment did not instruct a common author, without production of the progress of infestments; and that the contract of division was not effectual, unless that Wallace the son were instructed to have been infest, or that he is represented by this party, who thereby is obliged to fulfil his contract of division.

*Fol. Dic. v. 1. p. 184. Stair, v. 2. p. 272.*

1684. February 1.

ANDERSON against CRICHTON.

IN the action for making arrested goods furthcoming, pursued by John Anderson against William Anderson's tenants, and the said William for his interest; it was *alleged* for one Crichton and other arresters, That he ought to be preferred, because his arrestment was prior to John Anderson's. It was *answered* for John Anderson, That he ought to be preferred, because his arrestment was founded upon a debt due by George Anderson, son to the said William, and that the said William was denuded by disposition of the tenement, whereof the mails and duties were now in controversy; and, that Crichton's arrestment was founded upon a debt of William the father, who had no right to the tenement, or mails and duties thereof. It was *answered* for Crichton, That he being anterior creditor to the father, had raised reduction of the son's right to the tenement *ex capite inhibitionis*; and upon the act of Parliament 1621, as being granted by the father to the son, without any onerous cause; and that he held the production satisfied, and repeated his reason, *ex capite inhibitionis*, against the son's right; which being reduced, the arrestment for the son's debt fell in consequence; and that the mails and duties being un-uplifted, and in the tenant's hands, ought to be decerned and made furthcoming to the said Crichton. It was *duplicated*, That although the son's disposition were reduced instantly, yet it could only take effect from the date of the decret; so that the creditor of the son, who had arrested, ought to be preferred to the mails and duties that were due before the decret of reduction. THE LORDS found, That the decret of reduction did only take effect from the present date thereof, and preferred the arrester upon the son's debt, to the mails and duties due before the decret of reduction, albeit they were extant in the tenant's hands un-uplifted.

VOL. VII.

16 P

No 82.

No 83.

In a competition of arrestments of rents, founded on the debts of different proprietors of the same tenement, the right of one of whom was reduced; found that the reduction took effect, only after decree, so that the arrester upon the debt of the defender in the reduction was preferred.