

1676. July 26.

ELLISON *against* CARMICHAEL.

CAPTAIN ELLISON being infest in an annualrent out of the lands of Thurstoun in September, White of Thurstoun gave an infestment to Thomas Dalrymple, his good-brother, in November thereafter, for the behoof of himself, Bailie Carmichael, and other creditors; to which infestment Bailie Carmichael hath now right: Likeas White did put the said Thomas in possession of the most part of the lands that were in his own labouring, in December thereafter; and both infestments became public, by confirmations, upon the same day. There is now a competition betwixt the infestment of annualrent, and the said infestment of property. It was *alleged* for Bailie Carmichael, That his right of property must be preferred, because it was clad with natural possession; and the infestment of annualrent had no possession. It was *answered* for the annualrenter, That an infestment of annualrent, or any other base infestment, is a right of itself, without possession; but a public infestment is preferred thereto, as being a private simulate right, *retenta possessione*; but not when there is no ground of simulation, being granted to a stranger and a real creditor, and when there could be no possession attained, because there intervened the infestment of property, clad with possession before Martinmas, which was the first term of payment of the annualrent; which hath been formerly sustained: Likeas there is great reason for it, since the act of Parliament for registration of sasines, *whereby they are null, if not registered within 40 days*.

THE LORDS preferred the annualrenter, and found, That there having been no delay of attaining possession, or ground of simulation, the base infestment was valid, being prior and preferable to the posterior base infestment clad with possession.

There was also much debate concerning the way of the base infestment of property its obtaining possession, as being granted by a notour bankrupt *in fuga*, who could not prefer one creditor to another: All which was denied; but the Lords proceeded not upon that ground, and so referred it not to probation.

*Fol. Dic. v. 1. p. 87. Stair, v. 2. p. 460.*

1686. December 9.

RAMSAY *against* KINLOCH and CHAPLAIN.

CARSE reported the case betwixt Sir Andrew Ramsay of Abbotshall, and Alexander Chaplain and Kinloch, who objected against one of the apprisings he produced, That the decret of comprising, and the charter and sasine, were all upon one day, *viz.* the 29th of June 1655, which was impossible. *Answered*, That the act bringing in all comprisings, led within year and day, not being then made, creditors used great haste to be the first appriser, (the second carrying nothing but the *jus reversionis* of the first); and, therefore, before the court of com-

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Found in conformity with  
No 5-P. 1272.

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A base infestment was taken on a certain day, and a public infestment on a comprising the next. The compriser alleged the base infest-

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ment could  
not be cloth-  
ed with pos-  
session till a  
term preced-  
ing, and there  
was a *medium  
impedimentum*.  
But possession  
having been  
attained at  
that term,  
the soonest  
possible, the  
base right  
was prefer-  
red.

prising was held, they had the decret of comprising, and the charter extended *in mundo*, ready for the subscribing; and then they had but fifteen miles to ride to Waughton to take safine; so all this was done in June, when the day is at the longest.—THE LORDS sustained the comprising and diligence, unless they would offer to improve it as false.

January 25. 1687.—The case of Sir Andrew Ramsay of Abbotshall, *contra* Mary Kinloch and Alexander Chaplain, mentioned 9th December 1686, was reported by Carle. This was a competition between a base infestment, taken on the 28th of June 1655, and a public infestment on a comprising, taken the very next day thereafter; and so preference was craved on it, as being public before the base infestment had apprehended possession, or could be clothed therewith, which, at the soonest, was Martinmas 1655; and so it was a *medium impedimentum interveniens*.—*Alleged*, The 105th act 1540, against base infestments, was only where they were simulate, which this was not; and it is offered to be proved, that it was clad with possession at the term of Martinmas subsequent to the safine; which was as soon as *per rerum naturam* could be, and so he was not *in mora*.—THE LORDS inclined to sustain this as relevant to prefer the base infestment, in respect of several former decisions, viz. Durie, 13th February 1624, No. 4. p. 1276.; and 2d July 1625, Raploch, No 5. p. 1277.; and Stair, 26th July 1676, Ellifon, No 12. p. 1285. Then Abbotshall *alleged*, That he only possessed by virtue of his assignation to the mails and duties, before his safine; which was repelled in Durie, 24th February 1636, Oliphant, No 24. p. 1294. *Ido*, That the term of payment of the rents in that barony of AuldCambus was Lambmas, by their taeks; and so he was *in mora*, not being clad with possession at the Lambmas 1655.—THE LORDS ordained this last point to be further heard: But Abbotshall, of consent, found his first allegiance relevant, that he was clad with possession at Martinmas 1655.

*Fol. Dic. v. 1. p. 87. Fountainhall, v. 1. p. 436. & 442.*

\* \* Harcarle reports the same case:

1687. February.

Henry Kinloch having uplifted mails and duties at Whitfunday 1654, from the Tenants of Waughton, by virtue of an heritable bond (in form of) a proper wadset in January preceding, containing an assignation to mails and duties; and having taken a base infestment, June 28, 1655, Sir Andrew Ramsay both led and was infest upon an apprising the day after.

In a competition, it was *alleged* for the apprifer, That he was preferable, as having the first public right.

*Answered*: That the wadsetter is preferable, as having the first infestment; and his right is public by possession before and after infestment. *Ido*, The wadsetter's right was clothed with possession at Martinmas 1655, the first term after the infestment.

*Replied:* Any possession anterior to the infestment could not clothe it. *2d.* Whatever favour may be indulged to annualrenters doing all possible diligence, at the first term, to be preferred, no such thing can be claimed by Henry Kinloch, a proper wadsetter, who was *in mora* for not taking infestment sooner, especially in a competition with Sir Andrew's legal diligence, that is more favourable than a voluntary right.

*Duplied:* No difference is to be made between a base right of property and a right of annualrent; nor is it material whether the intervening public right be voluntary, or a legal diligence, since the year 1617, when all infestments became some way public by registration; which is a better notification to the lieges than a citation, or paying a term's annualrent upon discharge, which, though latent, will clothe an annualrent with possession.

THE LORDS preferred the wadsetter, as having done sufficient diligence at Martinmas.

\* \* Sir Patrick Home reports the same case:

November 1686. Sir Andrew Ramsay, as being publicly infest in the lands of AuldCambus, pursued a reduction against Henry Kinloch, of a wadset, granted by the Laird of Waughtoune, of a part of these lands, upon these reasons: That albeit the defender was infest upon the infestment wadset, one day prior to the pursuer's public infestment, yet the defender's right being but a base infestment, not clad with possession before the pursuer's public infestment, it was null and reducible by the 105th act of Parliament 1540; by which, base infestments, not clad with possession, are presumed to be simulate, and posterior public infestments are declared preferable thereto, and was so decided, 24th February 1636, Oliphant, No 24. p. 1294. where the Lords preferred a posterior public infestment to a prior base infestment not clad with possession.—*Answered,* That the defender being infest, albeit but a day before the pursuer's public infestment, yet his base infestment cannot be reduced, as not being clad with possession before the pursuer's public infestment, seeing there was not a term intervened at which he could have gotten payment of his annualrent before the pursuer's public infestment; and the presumption of simulation is only in that case, where a party is infest base, and that term passes at which he might have used diligence for recovering payment, and clothed his right with possession, and was negligent; but that there was no term past after the base infestment, and before the public infestment. As, in this case, the pursuer's public infestment being the very next day after the defender's base infestment, it was impossible for the defender to have gotten payment of a term's rent; but at the next term thereafter he did use diligence and got payment of the term's rent; which was sufficient to clothe his right with possession, and to prefer his right to the pursuer's; and which has been several times so decided, and particularly the 2d July 1625, Hamilton of Raplock against the Tenants of Letham, No 5. p. 1277.; and 26th July 1676, Captain Ellifon against Carmichael, No 12. p. 1285.: and the case of Oliphant.

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against Oliphant, No 24. p. 1294. does not meet the case, because in that case the first base infestment had not obtained possession by payment of a term's annual-rent subsequent to the sasine; but only had received payment of a term's annual-rent, due by the bond preceding the base infestment; and the party was that publicly infest had attained to the possession, and gotten payment of the rents for the next term subsequent to the infestment, and several years right thereafter. —THE LORDS preferred the base infestment, the defender proving, that he got payment of the next term's rent, subsequent to the infestment at that term, or shortly thereafter.

*Sir P. Home, MS. No 805.*

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S E C T. III.

Publication by Process of Mails and Duties, and Poinding of the Ground.

1605. June 19.

DOUGLAS against DOUGLAS.

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A man gave infestment of annual-rent to a conjunct person, to be holden of himself. The receiver raised letters for poinding the ground; yet as no possession followed, and the party was *in mora*, a stranger buying the land excluded him.

DOUGLAS, brother to Kilspurdie, perfewed Alex. Douglas Maiffer, to heir and sie the ground of his lands of Crawford poynded for ane annuel-rent analied furth thair of, be the Laird of Kilspurdie, to this perfewar, his brother, be the space of 26 yeirs fyne or thairby. It was *alleged*, That this perfewar could have na process for poinding of this ground, becaus his titill wes ane privat sasine, never authorised be possession, and thairfore could not give action agains this defendar, having conqueised the propertie of thir lands from Kilspurdie *titulo oneroso*, and had obtained publick heritabill infestment thair of, holden of the superioure, and possession be virtue thair of. It was *ansred*, That the perfewar had raised letters to search, seik, poynd, and appryse, the readiest gudds, being upon the saids lands lang befor the said Alexander's infestment, and sua his infestment could not be reput privat; notwithstanding whair of the LORDS fand the allegiance relevant, and wald not grant letters to poynd the ground. At this tyme wes remembred the lyk practik betwix auld William Crichton, servitour to my Lord Chancelaer, and the Laird of Drylaw, and betwix Sir Robert Stewart and Hali-burton and Logane\*.

*Haddington, MS. No 825.*

\* Examine General Lift of Names.