

fine followed, and consequently payment made *quocunque tempore* makes the same public, and the real right clad with possession, the fine being prior to the donatar's right.

No 27.

Fol. Dic. v. 1. p. 89. Gosford, MS. p. 29. & 37.

1682. *January.* NISBET *against* SIR DANIEL CARMICHAEL.

JOHN NISBET, merchant in Edinburgh, being infest in an yearly annualrent of L. 72, out of the lands of Lumsdean, having pursued a poiding of the ground; and there being compearance made for Sir Daniel Carmichael, another creditor, it was *alleged* for him, That he ought to be preferred, because John Nisbet's right of annualrent being but a base infestment, Sir Daniel had led a comprising of the lands before the base infestment was clad with possession, and so was *medium impedimentum*, and could not be drawn back to the date of John Nisbet's infestment, in prejudice of his comprising; especially seeing he was thereafter publicly infest upon his comprising.—*Answered*, That the comprising being after John Nisbet's infestment of annualrent, and the discharge of a term's annualrent, albeit after the comprising, yet being before Sir Daniel was publicly infest, must be drawn back to the date of the infestment of annualrent, to clothe his right of possession; so that he having the first complete right, he ought to be preferred; a naked comprising being but equivalent to a personal right, was not such a *medium impedimentum* as to hinder the discharge of a term's annualrent to be drawn back to the date of the infestment; just as when a party grants an infestment of annualrent, and thereafter should grant a disposition of the lands to another person; if the infestment of annualrent be first clad with possession, before the party be publicly infest upon the disposition, or before a base infestment be clad with possession, the infestment of annualrent will be preferred.—THE LORDS preferred John Nisbet upon his infestment of annualrent.

No 28.

A party was infest in an annualrent base. Before he attained possession, another adjudged. The infester having got a year's annualrent, before the adjudger was publicly infest, the Lords preferred the annualrenter.

Fol. Dic. v. 1. p. 89. Sir P. Home, v. 1. No 103.

* * See Nisbet against Carmichael, No 586: *voce* COMPETITION.

1695. *February 15.* KEITH of Badincoth *against* FALCONER.

WHITELAW reported Helen Keith, and Gordon of Badincoth, her husband, *contra* Sir Alexander Falconer of Glenfarquhar and Scot of Logie, about the clothing of a base infestment with possession.—THE LORDS found Sir John Falconer's paying a year's annualrent of it, though he took no discharge but an assignation, and though he was not debtor in the annualrent, but had only purchased the lands out of which it was upliftable, was sufficient to make it public, even against Sir John's singular successors.

No 29.

An heritor paid a year's annualrent to a base infester, and took assignation to it. This found equivalent to a discharge,

No 29.
 he being he-
 ing heritor
 and possessor
 of the *fundus*,
 which was
 properly
 debtor in the
 in the an-
 nualrent.
 A very slight
 possession is
 sufficient a-
 mong stran-
 gers, the law
 being chiefly
 directed a-
 gainst con-
 fident per-
 sons.

December 20.—THE LORDS re-advise the debate between Helen Keith, Lady Baldincoth, and Sir Alexander Falconer and Scot of Logie.—THE LORDS having found the base infestment sufficiently clad with possession by Sir John Falconer's paying *two* years annualrent, and taking assignation thereto, which they found equivalent to a discharge, he being heritor and possessor of the *fundus*, which was properly debtor in the said annualrent; many things were subtly urged against this interlocutor, that *actus agentium non operantur ultra eorum intentionem*; and it could never be Sir John's meaning to prefer this annualrent to the apprisings and other rights then standing in his person, and which, if they had belonged to a third party, in a competition, would clearly have excluded this annualrent, and much more when they came to divide; and the apprisings are conveyed to Glenfarquhar and Logie, his singular successors. But the LORDS adhered to their former interlocutor, and found the assignation was all one with a discharge, and the annualrents coming in his person, were incompatible with his rights of property, *cum res sua nemini serviat*; and though he might defend on more rights as titles of possession, yet this servitude was no such title. See Stair, v. I. p. 402. Earl of Southesk against the Marquis of Huntly, *voce* PERSONAL and REAL. And they thought any thing was sufficient to clothe a base right with possession, seeing the 105th act of Parliament 1540, introductory of that distinction, was levelled only against fraudulent alienations made among near friends, and where there was ground to suspect simulation; and the distinction became unnecessary after the act 16th of Parliament 1617, for registration of fines, and is now wholly abrogated by the act 1693, c. 13: And found Sir John's taking the assignation, made his other rights then in his person accresce, inferring a *non repugnantia*; so that neither he, nor any coming in his right, can object against the same; and so preferred the Lady; though some thought it only a personal objection secluding Sir John himself from quarrelling it, in respect of his tacit acknowledgment, but not his singular successors.

Fol. Dic v. I. p. 89. Fountainball, v. I. p. 670. 690.

No 30.
 The Lords
 found a base
 infestment
 sufficiently
 clothed, by a
 discharge
 bearing only
 receipt of the
 annualrent of
 a personal
 bond, with-
 out any rela-
 tion to the
 heritable
 right on
 which the
 fine follow-
 ed, and paid
 out of other
 lands.

1696. February 21. CREDITORS OF CUNNOCHIE against MALCOLM.

MERSINGTON reported Mr William Arnot, and other Creditors of Cunnochie, against Malcolm of Balbedy. The question was, Whether a base infestment was sufficiently clothed with possession, so as to make it public, by a discharge bearing the receipt of the annualrent of the personal bond, but having no relation to the heritable right on which the fine followed, and being paid out of other lands, and not those out of which it was upliftable.—*Answered*, By the 105th act, 1540, base infestments were annulable, because of the suspicion of simulation, which could not take place here; for *perinde est* to what ye ascribe the payment, if it was posterior to the fine, whether to the personal obligation, or real right; and *esto* the debtor paid the money out of his pocket, without relation to the