

1705. *January 2.*SIR WILLIAM HOPE, and the HEIRS of MR MARK LERMONT, Advocate, *against*  
MR WILLIAM GORDON of Balcomy.

## No 12.

An infestment of annualrent, is a *species feudi*, which cannot be vacated to the prejudice of a singular successor, unless by some deed entering the record; although a resignation *ad remanentiam* be not necessary.

THE LORDS advised Sir William Hope, and the heirs of Mr Mark Lermont, advocate, against Mr William Gordon of Balcomy. Mr Robert Lermont having several infestments of annualrent, out of the lands of Balcomy, in his person, he disposes them to Mr Mark Lermont, who transfers them to Sir William Hope; and he, in the ranking of the creditors of Balcomy, craving preference on these rights, it was *contended* by Mr William Gordon, That Sir William could never compete on these infestments; because Mr Robert Lermont, his author by progress, had a long possession and intromission with the rents of the lands for many years together, by which not only his current annualrents, but even the stock and principal sums in his infestments were more than paid; and which, being proven, must extinguish not only against him, the intromitter, but likewise against Mr Mark Lermont and Sir William Hope, though they be singular successors, for onerous causes.—It was *alleged* for Mr Mark's heirs, and Sir William Hope, That whatever Mr Robert's super-intromissions above his annualrents might operate against himself, to make him liable, or to extinguish his rights; yet that can never meet the defenders, who are his singular successors and assignees for onerous causes; for an infestment of annualrent is a *species feudi*, and constituted by a saine in a public record, and cannot be destituted nor taken away, but by some deed going to a register, for securing of purchasers, seeing *unumquodque eodem modo dissolvi debet quo colligatur*; and the 16th act of Parl. 1617, imports it, though it does not expressly mention infestments of annualrent; and Sir George M'Kenzie, in his observations on that act, affirms they are comprehended under the words of "renunciations" of wadsets, and grants of redemption; and if it were otherwise, our registers, which are the peculiar glory of our nation, should be very defective and unsecure; and the nature of this right imports as much, that an annualrenter can intromit no farther than for his current annualrents, and if he uplift *ultra*, then it only resolves in a compensation against himself and his heirs, that *exceptione doli* he must impute it to his principal sum, or else be liable to refund it to the other creditors, annualrenters or adjudgers, who can make him repay what he uplifts above his own annualrent; but it can never be obruded against his singular successors; yea, the Lords have been so nice, that it has been debated, that a registrate renunciation could not extinguish an infestment of annualrent against a third party, without a resignation *ad remanentiam*; and though the Lords sustained the registered renunciation without a resignation, yet this shews there must be some public deed going to a register, necessary to certiorate the lieges who acquire such infestments of annualrents; and that thus it was found, 27th July 1626, Anstruther against Black, Durie, p. 230. *voce* ASSIGNATION; 23d November 1627, Dunbar against

Williamson, No 9. p. 570. ; and 7th January 1680, McLellan against Musket, No 10. p. 571. It is true, redeemable rights of property, wadsets, and apprifings, may be extinguished by super-intromiffion, against fingular fucceffors ; but then both our ftatutes and the nature of the right allow them to intromit towards their fatisfaction, which is not fo in infestments of annualrent.—*Answered* for Mr William Gordon, That there did not feem to be a more incontestet principle in our law, than that super-intromiffion extinguished annualrents *in toto* ; and this is confonant both to the analogy of the Roman law, the current of our decifions, and the opinion of our best lawyers. As to the first, we have it in *l. 1. 2. et 3. C. de pignorat act. Fructus ex pignore percepti, si sufficient ad totum dissolvendum, tunc imputantur in debitum, cessat actio, et redditur pingus.* As to the second, there is a clofe and pointed decifion, 4th February 1671, Wishart *contra* Arthur, Stair, v. 1. p. 714. *voce* PAYMENT ; where intromiffion even with money-rent was found probable by witnesses, to extinguisht even the principal fum contained in an infestment of annualrent. And for the opinion of our lawyers, Stair is very distinct on the head, *lib. 2. tit. 2.* and *tit. 5.* that fingular fucceffors in annualrents cannot be secure by inspecting the registers, but run the hazard of extinction of the rights by their author's intromiffion.—THE LORDS considered this case had not yet been *in terminis* decided ; for that of Arthur was against the intromitter's heir, and not in the case of a fingular fucceffor ; and therefore they laid down these points that were uncontroverted, that they might come to the precise and neat question. *1mo*, It was yielded, that a registrate renunciation without necessity of a resignation, extinguished an infestment of annualrent *quoad omnes effectus, et contra omnes mortales*, as well fingular fucceffors as others. *2do*, It was also conceded, that super-intromiffion was relevant to extinguisht against the party himself and his heir. *3tio*, The question here was not, where one infest in an annualrent gets payment out of an extrinsic subject, and a different fund from the rents of the lands out of which the rent is upliftable ; but the precise case was, Whether intromiffion of an annualrenter with the mails and duties of the lands wherein he stands infest, more than pays his current annualrents, will be imputed to absorb and exhaust his principal fum against a fingular fucceffor ? For that it will extinguisht his annualrents, even in a competition with his assignee for onerous causes, was yielded ; but the LORDS, by plurality, found such super-intromiffion above his annualrents, was not imputable *in sortem*, in prejudice of a fingular fucceffor ; for some thought it hard that private latent discharges, whereof there was no known way to bring them to the knowledge of purchasers of such infestments of annualrents, should extinguisht the right when it came into their persons ; and if so, then much less intromiffion to be proven by witnesses ought to do it, especially after a tract of thirty year's silence. Though Moses's judicial law permits every thing to be established on the testimony of two or three witnesses ; and the delivery of victual falls more under the senses than payment of money-rent, which can be done very clandestinely, and requires the presence of none but the debtor and creditor allenary ; See President Gilmour's Decisions,

- No 12. Whitekirk *contra* Ednem, (No 33. p. 25. *voce* COMPENSATION.—RETENTION.) But the LORDS found nothing but a public regiftrate writ could here militate againft a fingular fucceffor. (See LEGAL DILIGENCE. See PAYMENT.)  
*Fol. Dic. v. 1. p. 46. Fount. v. 2. p. 253.*

1714. June 8.

PATRICK M'DOWAL of Freugh, *against* WILLIAM FULLERTON of that Ilk, and His TUTOR.

No 13.

A creditor in an infestment of annual-rent, conveyed it by affignation; but before intimation of infestment by the affigee, discharged it. This discharge was found *funditus* to extinguish the infestment.

ROBERT FULLERTON of Craighall, having granted an heritable bond, for 2000 merks, in the year 1635, to William Fullerton, his brother, upon which he was infest in the year 1691, William, 4th February 1702, granted a bond for the like sum of 2000 merks, to Patrick M'Dowal of Freugh, containing an affignation and disposition to the foresaid heritable bond and infestment, in security thereof, but without precept of fine, and procuratory of resignation. And 1st June 1706, the said Patrick M'Dowal procured from the said William Fullerton a new bond corroborating the former bond and affignation, with a precept of fine, whereupon he was infest the 22d of the said month. Robert Fullerton disposed his lands of Craighall, to the said William Fullerton, 3d June 1702; and the foresaid sum of 2000 merks was allowed out of the price, and expressly discharged.

William Fullerton of that Ilk, acquired right, by progress, to two heritable bonds, granted to his authors, by the said William Fullerton of Craighall, and cloathed with infestment anno 1704, whereof one was for 5700 merks, and the other for L. 1623:13:4.

In a ranking of the creditors of William Fullerton of Craighall, Freugh craved to be preferred to Fullerton of that Ilk, upon his right by affignation to the old heritable bond, granted by Robert Fullerton to the said William Fullerton, in the 1685, completed by infestment in the 1691, several years prior to the contracting of his competitor's debt.

*Answered* for Fullerton of that Ilk: That Freugh could never compete upon his affignation to that bond; because *imo*, Though infestment thereon followed, in the person of William Fullerton, before the date of the bonds, whereupon Fullerton of that Ilk doth compete; yet before Freugh was infest upon his affignation thereto, or that affignation made public any manner of way, by intimation or possession, the debt was extinguished by payment; or, which is the same thing, by the lands being disposed by Robert Fullerton, the debtor, to William Fullerton, the creditor; and that sum allowed and discharged as part of the price: *2do*, *Esto* the debt had afterwards subsisted in the person of William Fullerton, yet it would accrue to Fullerton of that Ilk, and support his infestment, which were complete long before any infestment in the person of Freugh: It