

more than a year since the date of any of the two infestments; for the pursuer's infestment of the annualrent was in January 1623, and the defender's infestment of the property was in April thereafter, the same year; and that immediately after that first term, subsequent to both their infestments, which was Whitsunday, and before the which first term, the annualrenter, who is pursuer, could have no action to seek the annualrent before the term was past; she immediately after the said term intended this action, whereby she had done all lawful diligence to make her right public; and before the which diligence so done by her, the defender could not possibly apprehend any possession, which might so authorize his right, or lawfully acquire possession, there being no terms intervening before the pursuer's diligence and summons, as said is, which could derogate from her anterior right; and what possession he had, if any was, since the summons, the same ought not to be respected.

No 4.

Act. Paip.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. I. p. 87. Durie, p. 109.

1625. July 2.

L. RAPLOCH against TENANTS.

AN action was pursued at the instance of the good-man of Raploch against the tenants of Letham, for pointing of the ground, in satisfaction of an annualrent, disposed out of the lands, by Hamilton of Letham, heritor of the lands, under reversion of a certain sum of money addebted to Raploch by Letham; after the which infestment of the pursuers, the defenders had acquired a feu of the same lands, which the Lords finding not to be sufficient to exclude the pursuer's right and action, because they being both base infestments, the pursuer's being anterior was preferred; neither was the defenders right respected, albeit they *alleged*, That the same was clad with possession, and that the pursuer's right, although prior some days to their right, yet not having possession, ought not to be preferred to give him action to point the lands feued to them, whereof they had real possession, further than for the feu-duty contained in their charters. Which allegation was repelled, in respect that the pursuer's right was prior, and that he had done all lawful diligence which was requisite to obtain possession, by intending action to point the ground, after the first term was bypast, subsequent to his infestment; for there is no action to point the ground, while a term's duty be owing, and the term bypast; for before the term be bypast and bygone, he could not have any action; and the defenders being tenants of the ground, and so continuing possessors thereof, as they were many years before, their possession cannot be ascribed to their infestment of feu, to derogate any thing from the pursuer's prior right and diligence foresaid. Thereafter the defenders *alleging*, That the pursuer had accepted a posterior right from Letham of the same lands, whereout the foresaid annualrent was first disposed, there being many more lands both in his first and second rights, beside these lands feued to the excipients, after his first right foresaid, and after the defenders feu, whereby the lands were disposed by Leth-

No 5.

In a competition between an annualrenter and a feu, where both infestments were base; the one, whose infestment was prior in date was preferred, having done diligence *sine mora*, although the other first attained possession.

No 5.

am to him under reversion, granted back again to Letham, containing a greater sum than that whereupon the infestment of the annualrent was redeemable; in the which greater sum, whereupon the last reversion foresaid was granted, the sum contained in the first security, for the which the annualrent is now acclaimed, was expressly comprehended, and was a part thereof; by the which last security the first sum was in effect satisfied to the pursuer, and the first security was absorbed; and consequently the pursuer could not return and desire to poind the excipient's lands by virtue thereof. This allegiance was found relevant to affoilzie these defenders; for the LORDS found, That by the acceptation of this posterior security by the pursuer, viz. by the making of a contract, perfected betwixt Letham and him thereupon, and subscribed by them, and delivered to the pursuer, with a charter conform thereto, albeit he was not seised, which he might be when he pleased, in the which last security the first sum as compted, the pursuer could not mis-know to the same, and return to poind for the annualrent of the first security, so long as the last contract stood and remained in its own force; especially seeing, in this last security, the pursuer had acknowledged that the excipient's lands were disposed to them in feu before, and had therein obliged him to procure the renunciations of their rights, and to deliver them to Letham at the time of the redemption of the lands; and so the LORDS found, That the posterior security, wherein the sum is comprehended, whereupon the first was granted, absorbed the first, that he could not return thereto, so long as the last stands; albeit it was alleged, that the last was not effectual, because, before the same, all the lands were overburdened with prior wadsets, which exhausted all the profits and rent of the land. See VIRTUAL. See PRESCRIPTION.

A&f. Nicolson.

Alt. Hope.

Clerk, Gibson.

Fol. Dic. v. 1. p. 87. Durie, p. 169.

No 6.

A base infestment was preferred to a public one, where neither party was in possession, the base being in implement of a prior obligation, although gratuitous, upon which inhibition had been used.

1631. March 2. L. GARTHLAND against LO. JEDBURGH.

In this cause, of which one branch is reported No 45. p. 915. and another *voce* LEGAL DILIGENCE, the L. of Garthland craved the tenants to be decerned to pay him his back tack-duty. Compeared Sir James Ker, who being cautioner for the Lord Jedburgh, author of the pursuer's infestment, was, for his relief and security of the sums which he had paid as cautioner, infest in the same lands by the Lord Jedburgh, by a public infestment, and *alleged*, That the pursuer's infestment granted to him, was not public, but base; and therefore contended that he ought to be preferred to the pursuer, ay and while these sums were paid to the excipient; especially seeing the pursuer's infestment was granted to him *ex mera donatione*, without any onerous cause, and could not be respected against the right, made to the defender, a lawful creditor, and for a most onerous cause of debt; the pursuer being son-in-law to the granter of his right, and granted to his son in fee, who is oye to the granter, and so most conjunct persons; and