

No 26.
annualrent; though the infestment was not specified; and though more than the sum of annualrent was due, upon a personal bond, before the date of the infestment.

ed by the debtor of the annualrent, which did instruct the annualrenter was in possession before the apprising, by uplifting the annualrent from the debtor: It was *answered*, That the sum was of fourcore merks, which was far within a term's annualrent, and that it related only to the personal bond, and not to the infestment, and that there was more than this sum due of annualrent by the personal bond, before the date of the infestment, to which only it behoved to be imputed: It was *answered*, That the receipt being general in part of payment of the annualrent, he that paid the sum might impute it to what term he pleased, and so would impute it to a term after his infestment: It was *answered*, That, before that discharge, the pursuer's apprising was led, though no infestment thereon, after which so small a part of the annualrent could not be impute to any but the first annualrent due, and could not validate the base infestment.

THE LORDS found it sufficient to validate the base infestment, notwithstanding of what was alleged on the contrary.

Fol. Dic. v. 1. p. 89. Stair, v. 1. p. 480.

1669. January 14.

CLARKSON *against* MILNE.

No 27.
Payment of a term's annualrent of a bond, whereupon sasine did not follow till after the payment, was found to make it public, *quoad* a donatar of liferent escheat, whose right was posterior.
See No 24.
P. 1294.

ROBERT MILNE, as donatar to the liferent escheat of Hamilton of Bathgate, whereupon he had obtained a decret of special declarator: There is a reduction raised at the instance of John Clarkson and his children, upon this reason; that they were infest in an annualrent out of the said lands, long before the rebellion or gift; and their right, albeit base, was clad with possession; for instructing whereof, they produced a discharge granted to Bathgate, of a term's annualrent preceding the sasine taken upon the heritable bond, and before the liferent escheat fell.—To which it being *answered*, That the discharge being for a term preceding the sasine, could only be ascribed to the personal bond, and did not make the infestment public. *2do*, The discharge was most suspect, and could not instruct payment, being written by Clarkson himself, and his son being one of the two witnesses, who was fiar of the annualrent.—THE LORDS, before answer, ordained Clarkson to prove by some other witness, that the money was truly paid by Bathgate, and the discharge delivered to him, *et quomodo* Clarkson had recovered the discharge out of his hands.

February 6. 1669.—THE reduction mentioned on the 14th January being again called, and a condescence given in by Clarkson, bearing that he offered to prove by witnesses the true delivery of the annualrent by Bathgate, and the delivery of Clarkson's discharge at the very same time.—THE LORDS did sustain the same as relevant to make Clarkson's base infestment clad with possession, albeit it was for a term before the sasine, seeing the sasine was before the donatar's gift; for a sasine of an annualrent, is a good right to pursue a poiding of the ground for all preceding annualrents, after the heritable bond, whereupon the

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 Lumfdean, having pursued a pouding 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,