

S E C T. XI.

Whether Possession of a Part validates as to the Whole.

1630. *January 14.* HUNTER *against* His TENANTS.

No 59.

In a competi-
tion betwixt
a prior base
infestment,
and a poste-
rior public
one; the
latter ha-
ving never
attained pos-
session, but
the former
having pos-
sessed the
greater part
of the lands;
this was
found suffi-
cient to de-
fend, against
the public in-
festment, for
the lands of
which the
defender was
never in pos-
session; the
infestment
being indivi-
sible.

IN this action, mentioned 16th December 1629,* the pursuer's infestment being public, the defender alleging a base infestment of lands, whereof the lands libelled were acknowledged to be a part by both parties; which base right was anterior to the pursuer's public right, and by virtue whereof he was in possession many years of a part of the lands contained in his infestment, (for the infestment was of a quarter of the lands of Cadislie,) and the rest which he possessed not, viz. the lands libelled, he *alleged* pertained to him by that same right of his prior infestment; and the tenants possessors, now defenders, ought not to be decerned to remove at this pursuer's instance, seeing he allowed that possession.—And the pursuer *replying*, That albeit the defenders base right was anterior to him, and clad with possession of a part of the lands, yet the same ought not to defend against his public infestment for these lands now libelled, whereof he was never in possession.—THE LORDS found, That the base right being prior, and clad with possession of a part of the lands therein contained, the possession being of more than the half of the lands, was sufficient to defend against the pursuer's public right, for these lands libelled, whereof the defender was never in possession, as well for the lands whereof he was in possession; and sustained the same to assilzie the defenders; albeit they had never been the defenders tenants; nor never had acknowledged him before the warning; nor never had paid him any duty; seeing he now allowed their possession; and found, that possession of the most part of the land contained in his infestment, was sufficient to sustain the same for the whole therein contained, the same being allenary of one quarter of the land, and not of diverse tenements; and found, that the same was enough to sustain the infestment, which was not divisible.

Act. Baird.

Alt. Belsbes & Hart.

Clerk, Hay.

Fol. Dic. v. 1. p. 91. Durie, p. 480.

No 60.

A f...
infest his se-
cond son in
an annual-
rent out of
his lands, cor-
responding to
an accumu-
lated princi-
pal sum; the

1668. *February 5.* ROBERT KER *against* HENRY KER.

ROBERT KER of Graden having infest his second son Robert Ker in an annual-rent out of his lands of Graden and others, upon a contract betwixt them, whereby Graden for the sum of 6000 merks addebted by him to his son, viz. 3000 merks of borrowed money, and 3000 merks for his portion, (accumulatory, and extending together as said is,) was obliged to infest the said Robert in 360

* Durie, p. 474. *voce* OBLIGATION.

merks, as the annualrent of the said sum of 6000 merks; beginning the first term's payment of the half of the said annualrent, being for borrowed money, at the first term after the contract; and of the other half, being for his patrimony, after his father's decease. The said Robert the son, pursued a pointing of the ground for bygones, and in time coming, the terms of payment being past. Henry Ker, the pursuer's eldest brother, compar'd, and *alleged* his ground could not be pointed, and that he was infest therein by a public infestment; at least that his infestment was public by possession; and that the pursuer's infestment was base.—It was *replied, imo*, That the said Henry, his infestment of the lands, was posterior to the pursuer's infestment, and granted not only by a father to a son, a conjunct person, who, by the foresaid right, *præcepit hæreditatem*; and though he cannot be pursued upon the passive title of *titulus lucratiuus* during his father's lifetime; yet his mouth is stopped, so that he cannot question any deed of his father, preceding his right; and that he is in the same case, as if his infestment had been given with the burden of prior rights. It was further *urged* by the pursuer, That the defender condescending upon his entry and *initium possessionis*, he offered to prove that his right was clad with possession before that time.—It was *duplicated*, That his infestment could not be clad with possession, but as to the annualrent of the 3000 merks of borrowed money; so that it was base as to the other 3000 merks of his portion.—It was *triplicated*, That the infestment was of an entire annualrent of 360 merks, as appears by the contract and sasine; and that the right being of an annualrent, though payment of the half of the same be suspended, the right being a joint and indivisible right, could not be *ex parte* private, and *ex parte* public.

THE LORDS found, That the infestment of annualrent, if it should be proven to be clothed with possession as to the half, is public *in solidum*, and admitted the reply of possession: But as the second reply, *viz.* That the defender was *bæres per præceptionem*, and could not question any prior right granted by his father. THE LORDS found it of difficulty and consequence; and reserved the debate and decision until the end of the process.

Mr. Thomas Lermont.

Alt. Sinclair.

Clerk, Hamilton.

Dirleton, No 154. p. 61.

* * The same case is reported by Stair :

ROBERT KER of Graden having granted bond to Robert Ker his son, for 3000 merks of borrowed money, and 3000 merks of portion; for which sum he did infest him in an annualrent of L. 240 yearly, suspending the payment of the one half of the annualrent till his death; wheteupon Robert pursues a pointing of the ground:—It was *alleged* for Henry Ker, (the eldest son, who stands now infest in the lands) absolvitor, because he stands infest in the lands before this infestment of annualrent, being but base, took effect by possession.—The pursuer *answered, imo*, That the defender's infestment, being posterior, and granted to

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one half of which was borrowed money, and the other his portion. Found, that the infestment, if clothed with possession, as to the borrowed money, was public, *in solidum*: The son could not attain possession of the other half during his father's life.

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the apparent heir, without a cause onerous, it is *præceptio hæreditatis*; and if the father were dead, it would make the defender liable as heir; and therefore, now he cannot make use thereof, in prejudice of the pursuer. *2do*, The pursuer offered to prove, that his annualrent was clad with possession, before the defender's infestment, in so far as he received the half of the annualrent, which is sufficient to validate the infestment for the whole; seeing there are not two annualrents, but one for the whole sum; and seeing the pursuer could do no more, the one half of the annualrent being suspended till his father's death.

THE LORDS found this second reply relevant, and found the possession of the half was sufficient to validate the possession for the whole; but superceded to give answer to the former reply, till the conclusion of the cause, not being clear, that the defence upon the defender's infestment could be taken away summarily, though he was apparent heir, without reduction upon the act of Parliament 1621.

Fol. Dic. v. 1. p. 91. Stair, v. 1. p. 517.

1668. July 9. MARGARET ALEXANDER *against* LAIRD OF CLACKMANNAN.

No 61.

Possession upon an infestment of corroboration, was found to validate an original infestment of annualrent, which was granted out of other lands.

MARGARET ALEXANDER being infest in an annualrent out of the lands of Sauchie; by a posterior infestment, in corroboration of the former right, she was infest in that same annualrent, out of other lands, whereof she was in possession; but this posterior infestment being reduced upon an inhibition prior thereto; the pursuer pinding of the ground of the lands of Sauchie, upon the first infestment.—It was *alleged* for Clackmannan absolvitor, because the pursuer's right of annualrent is base, never clad with possession, and now he is infest in the lands, either publicly, or by another infestment clad with possession.—The pursuer *answered*, That the infestment in the lands of Sauchie was sufficiently clad with possession, in so far as the posterior infestment of annualrent in corroboration thereof, was clad with possession; and as payment made by the heritor, by himself or his tenants, or by assignation to mails and duties of other lands, in satisfaction of the annualrent, infers possession; so payment made by his tenants, by the posterior infestment in corroboration, can be no worse than an assignation to the mails and duties of these lands; which, as it pays some terms annualrent of the first infestment, so it must clothe it sufficiently with possession.—It was *answered*, That here being two distinct infestments at several times, albeit for the annualrent of the same sum, yet the possession of the last cannot relate to the first.

THE LORDS repelled the defence in respect of the reply; and found, That possession by the last infestment, did from that time sufficiently validate the first.

Fol. Dic. v. 1. p. 91. Stair, v. 1. p. 550.

* * * Gosford thus reports the same case :

THE Laird of Sauchie having infest Margaret Alexander in liferent, and her children in fee, in an annualrent of 160 merks out of the barony of Sauchie;