

No 49.

prising, proceeding upon a decret of liquidation of the avail of Glenegies' marriage, which was *debitum fundi*, and prior to the defender's wadset. It was *duplied* to the 1st, That albeit the wadset was a base right, yet the defender upon the first terms of payment, having done all diligence, and entered into possession, the intervening comprising could not be preferred, which is only allowed where those who have base rights are negligent, and may enter to the possession before the posterior public right; and, as to the comprising upon the decret of the liquidation upon the avail of the marriage, it is no real right of its own nature, but a constitution of a debt, whereupon a comprising may follow, and there being no infetment, it cannot prejudice a posterior wadset, whereupon infetment followed and possession. THE LORDS did find, that the comprising and infetment intervening betwixt the wadsetters base right, and first term of payment, was preferable in law, notwithstanding that the wadsetter could do no diligence before the term, and likewise, that the comprising upon the liquidation of avail of the marriage, was preferable to all base rights, albeit clad with possession, the same being *debitum fundi*, and due to the superior after liquidation, after which it became as real to affect the lands, as a feu-duty against all singular successors who were not confirmed by the superior.

Gosford, MS. No 650. p. 379.

No 50.

1675. July 15.

BOYD against JUSTICE.

A second comprising not liable for by-gone mails and duties to a first comprising, till he be cited, but cannot crave the benefit of a possessory judgment against a first comprising.

In a pursuit at Bailie Boyd's instance, for mails and duties, as being publicly infet upon a comprising, it was *alleged* for the defender, That he had possessed by virtue of an apprising at his instance, and so could not be liable for by-gones, being *bona fide* possessor. It was *replied*, That the pursuer being first infet by a public right had good interest to pursue for the whole mails and duties since his comprising, and as the common debtor would have been liable, so ought the second comprising, who had only *jus reversionis*. THE LORDS did sustain the defence notwithstanding, and found that a second comprising entering to the possession, was not liable for any mails and duties before citation. It was farther *alleged*, That the defender had the benefit of a possessory judgment, and so could not be decerned for mails and duties, until his right were reduced. It was *replied*, That the case being betwixt two comprising, and not betwixt two heritors who had several dispositions of one and the same lands, nor betwixt the pursuer and the annualrenter who had comprised for by-gone annualrents, the defender could not crave the benefit of a possessory judgment. THE LORDS did repel the defence, and found, that a second comprising having only *nudum jus reversionis* of the first comprising, albeit as to by-gones he was *bona fide* possessor, yet he could not crave the benefit of a possessory judgment, not being in the case of an annualrenter, who had compris-

ed for bygones due before the first compriser, or in the case of a second heritable disposition, who might justly defend upon seven years possession, until the right were reduced.

No 50.

Gosford, MS. No 782, p. 186.

*** Stair reports this case :

JOHN BOYD having apprised certain lands, pursues the tenants for mails and duties. Compearance was made for Bailie Justice; who *alleged*, That he or his authors were infeft in the lands in question, and by virtue of their infeftments, were seven years in possession before intending of the pursuer's cause, and thereby had the benefit of a possessory judgment to possess it, till their rights be reduced, which was found relevant in general, reserving *contra producenda*. And now the defender produceth an infeftment of annualrent out of the lands in question, and an infeftment upon the property thereof upon an apprising; against which the pursuer *alleged*, That the infeftment of annualrent could not give the benefit of a possessory judgment, because it is no right by which the lands can be possessed, but only an annualrent out of the lands; and being *debitum fundi*, a possessory judgment of property will not exclude an annualrent, neither can an annualrent be the foundation of a possessory judgment.

THE LORDS found, that the annualrent could not be the ground of a possessory judgment.

The pursuer further *alleged*; That the infeftment upon the apprising produced by the defender could not be the ground of a possessory judgment, to exclude his apprising, being led within year and day of the defender's apprising, and therefore he must come in therewith *pari passu*, according to the proportion of the sums. It was *answered*, That the defender having possest seven years by virtue of his apprising, had thereby the common benefit of a possessory judgment competent upon all infeftments of property, until *in petitorio* the pursuer declared his apprising should come in *pari passu*. 2do, Though the pursuer could come in summarily for his proportion since the citation, yet the defender having bruiked by his infeftment, was *bona fide* possessor, and cannot be comptable for the bygone fruits before citation.

THE LORDS found, that the pursuer without declarator had access to a proportional part of the mails and duties since the citation, in respect of the tenor of statute 1661, betwixt debtor and creditor, declaring apprisings within year and day to come in *pari passu*, as if one apprising had been deduced for all, and therefore the infeftment upon the first apprising, is a common infeftment for the rest; but found, that before citation, or being put *in mala fide*, the defender possessing, was *tutus exceptione*, and not comptable to posterior apprisers for the duties, which were to be imputed in his sums.

Stair, v. 2. p. 351.