

No 18. Besides, that so long as the papers were deposited, they were in effect as not granted, nor could give any right to Provost Gibson, either to possess or intro- mit with the rents, and therefore could not debar Hardgray from either ; so that he must still be liable for the rents ; this method being far from performing the obligation that lay upon him by his back-bond, viz. to do all possible diligence to sell the lands for payment of debts, &c.

Replied for the defender, That a deposited disposition, and no disposition, greatly differ, at least as to the pursuer ; for, where mutual writs are deposited, not to be recalled at the option of the granters, but put in a third party's hand, till certain articles be performed, they are *quodam modo* delivered, and the *deposi- tar* is considered as a common *sequestrator* for them both ; and, upon performance of the terms of deposition, the writs are as if *retro* delivered of the date ; and thus during the deposition, the subjects are understood sequestrate ; and here, had the Captain implemented the terms of the deposition, the rents would have *retro* belonged to the Provost, and the annualrents of the price to the Cap- tain. Nay, the present particular case is much stronger, for the defender hav- ing consented to a sale of the lands, and the terms of deposition being pres- table by the Captain himself, he cannot be admitted to plead his own fault, to subject the defender to diligence ; for if he had relieved the defender, the price had come for clearing the defender's engagements, and the disposition would have been effectually delivered, nor was there any obligation upon the defender after the subject was disposed by the Captain's own consent, to do further di- ligence thereanent.

THE LORDS found Hardgray not liable for the rents, unless it were instructed that he had entered to the possession.

Act. *Elphinston.*

Alt. *Sir John Fergusson.*

Clerk, *Sir James Justice.*

Fol. Dic. v. I. p. 238. Bruce, No 93. p. III.

S E C T. III.

Diligence Prestable by Annualrents.

1662. February 15. LADY MUSWALL, Elder, *against* LADY MUSWALL, Younger.

No 19.

IN a contention betwixt the Ladies Muswall, elder and younger, upon two annualrents out of one barony,

THE LORDS ordained the first annualrenter to do diligence within twenty days after each term; that, after that time, the second annualrenter might do diligence; or otherwise, at her option, ordained the lands to be divided conform to the rents, proportionably as the two annualrents. The second annualrent and the first to take her choice.

Fol. Dic. v. 1. p. 238. Stair, v. 1. p. 101.

*** Gilmour reports the same case :

IN the double pointing pursued by the tenants of Musewel, against the old lady and young lady thereof, both of them being infest in annualrents furth of the lands; and the tenants and young lady complaining, that they were oppressed by several pointings; and the young lady, when she came to point, she was always debarred by the old lady;

THE LORDS found, That unless the old lady should point within twenty days after each term of payment of the tenants' duty, the young lady should point without any impediment from the old lady. *Gilmour, No 34. p. 25.*

1662. July 26. SIR JOHN AITON against ADAM WATT.

ADAM WATT being first infest in an annualrent out of Whitland's estate, comprised for some of the bygone annualrents; Sir John Aiton being infest after him in an annualrent of the same lands, *alleges* that Adam hinders him to uplift the duties or point the ground for his annualrent, and yet lets them ly in the common debtor or tenant's hands until his apprising expire, and therefore *alleges* that Adam Watt ought either to intromit, and do exact diligence, and impute the same in his comprising, or suffer Sir John to do diligence, or at least, that both may do diligence effeiring to their sums.

THE LORDS found, That Adam Watt ought to be liable for diligence in time coming, in uplifting the rents to satisfy his apprising; and as to the annualrent, found, That after 40 days after each term in which Adam, as the first annualrenter, might point the ground, it should be liesom for Sir John, as the second annualrenter, to point the same, without respect to Adam Watt's prior infestment, if he did not diligence thereon within 40 days after ilk term.

Fol. Dic. v. 1. p. 238. Stair, v. 1. p. 138.

1671. January 26. CASSE against CUNNINGHAM.

AN annualrenter is not liable for diligence farther than for payment of his annualrents, though he exclude others.

Fol. Dic. v. 1. p. 239. Stair.

*** See This case Sec. 1. b. t. No 6. p. 3474.

No 19.

No 20.

In a competition of two annualrenters on the same lands, the first was allowed 40 days after each term to do diligence, after which it should be lawful for the second to do diligence.

No 21.