

No 3.

as in the construction of law are liable as other heirs; which is the Earl of Dundonald's case in consequence of the act 1695.

Answered, The act 1695 was introduced allenary for the security of creditors, and to prevent their being disappointed of their money, where they contracted upon the faith of the apparent heir their debtor's being three years in possession; but by no means in favour of an heir, so as to give him relief of any debts to which he is liable *qua* heir served; nay it might even be thought a question, 'If the creditor himself could have any benefit from the act, in such a case where the debtor hath an heir served, on whom an estate hath devolved sufficient for payment of his debt.' But be in that what will, it is enough to say, that the act of Parliament introduced only an accessory security for the creditors, and from a principle of equity made an estate, which really was not the debtor's, liable to his debt, because of his possession, and the *bona fides* of the creditor: But if the person to whom the estate truly belonged made the creditor secure, by paying him his money, there was nothing in law to hinder him to have his recourse against the proper heir of the debtor, either for relief, or by taking assignation, and insisting in name of the creditor.

'THE LORDS found the Marquis of Clydesdale obliged to relieve the Earl of Dundonald.' See HEIR APPARENT. See VIRTUAL. See PASSIVE TITLE.

Fol. Dic. v. 1. p. 87. Rem. Dec. v. 1. No 70. p. 138.

* * * See Ross against Elliot, Durie, p. 491. *voce* PROOF. See Auchinleck against Cathcart, Durie, p. 647. *voce* OBLIGATION.

SECT. II.

Base Infestments are preferred to one another, and to Public Ones, according to date, if steps have been taken, *sine mora*, to attain Possession.

No 4.

A base infestment preferred to a public one, as being in date prior; the base infester having, *sine mora*, proceeded in diligence to render his right public.

1624. February 13.

A. against B.

IN an action for pointing of the ground of a tenement of land, which was holden of the Baron of Burghton, conform to an infestment of an annualrent, granted to the pursuer by the heritor of the tenement, to be holden of the granter; after the which infestment of annualrent, the heritor of the land, granter thereof, resigned the lands in the superior's hands for infestment heritably, to be given thereof to the defender, and who upon the superior's precept was infest; and by virtue of this public infestment the defender compeared, and would have excluded the pursuer's action, founded upon the base infestment; to the which he *alleged* he should be preferred, in respect of the act of Parliament, seeing that conform to his public infestment, he alleged he had acquired a year's possession of the land. This allegiance was repelled, and the base infestment of the annualrent preferred to the public infestment of the property, because it was no

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.