

S E C T. VII.

Whether a Father's possession validates a base right in favour of his Son.

1634. June 26.

BRUCE against DURIE.

No 42.
A father infest his son of a first marriage, by base right, reserving his own liferent. He afterwards infest his second wife by public right, for her future maintenance. She had no conventional provision. She was preferred.

ONE Durie of Craighluskart having infest his second wife, called Margaret Bruce, in some lands in liferent after his decease, by a public right confirmed, in the which lands he had long before infest his son, begotten of a prior marriage, in fee, by a base right, reserving his own liferent: After the husband's decease, at the next term, the relict pursues the tenants for the mails and duties of the land; the son compearing, and by virtue of his prior right claiming preference: THE LORDS repelled this allegiance, and preferred the relict, whose right being public, and the son's right being but base, albeit prior, yet not being clothed with possession, nor no deed done, nor no diligence to apprehend possession, it was not found to be of force, to hinder the effect of the posterior public right, granted by the husband to the wife, for her liferent and sustentation; albeit the son *alleged*, That he could not have done diligence to get possession, before his father's decease, who was liferenter, who died but at the term immediately before this pursuit, in which pursuit, he now timeously compeared to claim the benefit of his right; which was not respected but repelled.

July I.—IN this pursuit, mentioned before upon the 26th of June 1634, for mails and duties of the lands of Badrig, at the instance of Margaret Bruce, relict of umquhile George Durie, who was infest therein in liferent by her said umquhile husband, holden of the superior; and James Durie son to the said umquhile George of a prior marriage, compearing and alleging, that she had no right thereto, but he ought to be answered of the duties of the said lands; because the said umquhile George, his father, long before the pursuer's right, had infest his umquhile mother in liferent, and umquhile John Durie, eldest son procreate betwixt them, in fee in these lands, to which John is heir, reserving also the father's liferent, whereby he has the better right; and albeit it was but a base infestment, yet seeing the father's possession and the mother's was continued, so long as they lived together, whose liferent is also constitute by that same infestment of fee, their possession must be repute his: Likeas, this pursuer's right is but a poor and naked donation by the husband to the second wife, having no preceding necessary cause, which might have produced that effect; and albeit public, yet being posterior to his, & *sine causa*, and never clad with possession year and day, as is required by the act of Parliament, Ja. 5. *anno* 1540; therefore he ought to be preferred. This allegiance was repelled, and the pursuer's right, albeit posterior, was preferred, seeing the husband had provided her to no other means whereby to live, he

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being obliged by her contract of marriage, to as great provision as the avail of these lands yearly extended to; which not being done, the LORDS sustained this infestment, seeing she had nothing for her provision but the same: And it was not respected that her infestment had no relation of being made for implement of her contract of marriage, nor made mention thereof.

No 42.

A& Bruce.

Alt. Nicolson.

Clerk, Hay.

Fol. Dic. v. 1. p. 90. Durie, p. 721, 722.

1635. July 17.

Lo. CRAIGHALL against BOTHWELL.

THE Lo. Craighall pursues reduction against Mr Adam Bothwell and his son, and Mr Adam having infest his son, being then an infant, in his lands of with reservation of his own liferent, by a base infestment to be holden of the granter; and so the father continuing in possession of the lands, while thereafter that he sells the same to the Lo. Craighall, by a public infestment, to be holden of the superior, by virtue whereof the Lo. Craighall became year and day in possession of the said lands; upon which public infestment, so clothed with possession year and day, he intents reduction of the said prior base infestment, upon the reason of the act of Parliament, Ja. 5. anno 1540, Par. 7. cap. 105. which annuls base infestments, where there is a public right made to one for onerous causes, and which is clothed with possession year and day, as said is; albeit posterior to the said prior base right, made by the father to the son; which reason being referred to the LORDS (the party being absent) and the production being satisfied by the pursuer's self; the reason was found relevant, and the reservation of the father's liferent contained in the infestment granted to the son, and the father's possession according thereto; was found no possession; to warrant that right made to the son, as if the son's right and infestment had been thereby clothed with possession; but the public infestment was sustained; and also because this action was both a reduction and improbation, and that the pursuer satisfied the production in the reduction, by production of an extract of the writ called for to be reduced, which was enough, so far as concerned the reduction libelled; and that the pursuer insisted for production of the principal writ itself, and for improbation of the same:—THE LORDS, in respect the principal was not produced, to satisfy the improbation, decerned the same to make no faith, for not production; which certification the LORDS found ought to be granted, albeit the extract was produced by the pursuer's self *quoad reductionem*, and that he acquiesced therewith in the reduction, the production whereof was found no impediment to stay the certification against the principal of that same extract *quoad improbationem*; and therefore it was decerned to make no faith. The like reason of reduction was found relevant betwixt Cant *contra* L. Lawriston. See PROCESS.

No 43.

A son being infest, holding of his father, the father's possession upon a reserved liferent was not found to validate the son's right. The Lords held, that creditors would not be secure, if possession by such reservation betwixt father and son, were sufficient.

A&. *Advocatus*, present.

Alt. *Absent*.

Clerk, *Scot*.

Fol. Dic. v. 1. p. 90. Durie, p. 772.