

BASE INFESTMENT.

SECT. I.

Whether Possession be requisite to give effect to Base Infestment.

1663. *January 16.*

TENANTS of Kilchattan *against* LADY KILCHATTAN, MAJOR CAMPBELL, and
BAILIE HAMILTON.

OLD KILCHATTAN, in his son's contract of marriage, disposes the lands of Kilchattan to his son young Kilchattan, and his Lady in conjunct-fee; whereupon there was infestment taken, in favour of the husband and wife, to be holden from the disponent, and of the King; but the same was not confirmed till the year 1662: At which time, Major Campbell procures a confirmation of the conjunct-infestment, and sasine thereon; which confirmation hath a clause insert, bearing the same to be only in so far as may confirm and establish the right of an annualrent granted by young Kilchattan to the Major; and thereafter the Lady confirms the conjunct-infestment simply. In *anno* 1654, young Kilchattan infests Major Campbell in an annualrent out of the lands; thereafter Hugh Hamilton apprised from young Kilchattan, and was infest upon this apprising about that time.—It was *alleged* by the Lady, that she ought to be preferred, because she being joined with her husband in the conjunct-fee, and thereupon infest; it is sufficient to give her the right of liferent, which is but a personal servitude.—It was *answered, first*, That Major Campbell having procured the first confirmation, which is expressly limited unto his annualrent, must be preferred to the Lady, and that such limitations might lawfully be, because it being free for the superior to confirm, or not, or to confirm a part, and not the rest, he might confirm it to what effect he pleased; and his confirmation being extended no further, the Lady cannot crave preference, because she is now only infest in the lands in question in warrandice, that her principal lands shall be worth so much, and it is not yet declared in what way they are defective.

THE LORDS, in respect the Lady's right was not confirmed, preferred the Major as to his annualrents.

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No 1.

A base infestment is not null for want of possession, although it may be excluded by a public infestment before possession.

No 1.

It was *alleged* for Hugh Hamilton, That he must be preferred to the annual-renter, because he being publicly infest upon his apprising, before the infestment of annualrent, at least before it was cled with possession, whereby it became a valid right, the King's charter upon the apprising, is virtually and equivalently a confirmation of Kilchattan's infestment, especially in favours of a creditor, who could not perfectly know his debtor's condition; which if he had known, and given in expressly a confirmation to the King, it would have been accepted, seeing the King respects none; and therefore the King's granting of a charter upon the apprising must be interpreted equivalent.

THE LORDS found, That the charter upon the apprising was not equivalent to a confirmation.

It was further *alleged* for Hugh Hamilton, That the confirmation obtained by Major Campbell, behoved to accresce to him, who had the first complete right, by public infestment upon the apprising; and albeit that base infestment upon the annualrent granted by Kilchattan to Major Campbell, was prior, yet it was null till it was cled with possession; and therefore, if it was not cled with possession before Hugh Hamilton's infestment, the confirmation must accresce to Hugh Hamilton's infestment.

THE LORDS found, That the base infestment was not null for want of possession, albeit it might be excluded by a public infestment before possession; but found, that Hugh Hamilton's public infestment was not complete in itself, because it put Hugh Hamilton only in the place of young Kilchattan, who had a null right till confirmation: Which confirmation they found did not accresce to the base infestment, being cled with possession at any time before the confirmation; for at that time it became a complete right; at which time the apprising and infestment was no complete right; and therefore the confirmation, albeit it had not had this restriction accresced to the base infestment, as being the first complete right *in sue genere*. See VIRTUAL CONFIRMATION. See CONFIRMATION. See JUR. SUPERVENIENS, &c.

Fol. Dic. v. I. p. 87. Stair, v. I. p. 156.

No 2.

Base infestment, without possession, is sufficient to exclude the teree; for as to the husband's heir or relict, it is a sufficient right.

1669. January 27. BELL of BELFORD against L. RUTHERFOORD.

BELL of Belford being infest in an annualrent by the deceased Lord Rutherford, out of certain lands, pursues a pointing of the ground. Compearance is made for my Lady Rutherford, who *alleges* she ought to be preferred, as being infest in an annualrent of 2000 merks yearly, upon her contract of marriage, before this pursuer: *2dly*, That she ought to be preferred, for an annualrent of 2000 merks yearly of additional jointure, wherein she stands also infest publicly; and albeit her infestment be posterior to the pursuer's, yet his infestment being base, not cled with possession before her public infestment, she is preferable.— The pursuer *answered*, That before the Lady's infestment on her additional jointure, he had used a citation for pointing of the ground, and is now infisting