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till it attain effect, posterior accomplished rights will be preferred, otherwise a denunciation to apprise would be equivalent to an inhibition; so that the denunciation is only valid to prefer, if an apprising follow upon the day denounced to; and therefore some time must be required; that an apprising should proceed further than a charge, by compelling the superior to enter, or his superior to supply, at least within a year, otherwise a comprising and charge should insecure all purchasers, and make useless registers of sasines; for though of late allowances of apprisings be ordained to be registered, the certification is only *that a posterior apprising first registered shall be preferred*; which says nothing as to voluntary rights, nor to any right before that act, and would necessitate all purchasers to look after all apprisings, whether they had a charge or not; so that this appriiser having been supinely negligent for four years, the wadset is preferable, and the heritors possession by the back-tack validates the wadset.

THE LORDS found the heritors possession by the back-tack, did not validate the wadset, unless payment of the back-tack duty were obtained; but as to an apprising with a charge, whether it required any more diligence to prefer, the Lords resolved to hear it in their presence.

Fol. Dic. v. 1. p. 90. Stair, v. 2. p. 591.

S E C T. IX.

Possession of the Principal Lands held to be Possession of the
Warrandice Lands.

No 52.

1666. January 9. ELIZABETH BROWN against JOHN SCOT.

In this case, where the infestment of warrandice was of the same date with that of the principal lands; the Lords found, that possession of the principal lands validated the base right of the warrandice lands. This was posterior to the act 1617, ordaining the registration of sasines.

THERE being an infestment feu granted of the lands of Inglisfoun, as principal, and of the lands of Fingland; in warrandice thereof long ago, and infestment taken of both principal and warrandice lands, in one sasine, registrate in the register of sasines, since the year 1617; thereafter the warrandice lands were disposed to the Earl of Traquair; and he, being publicly infest, gave a subaltern infestment to his vassal, who assigned John Scot to the mails and duties; who having arrested, *insisted* to make furthcoming: And likewise Elizabeth Brown having, after the eviction of the principal lands, arrested the rents of the warrandice lands, *insisted* to make the same furthcoming to her.—It was *alleged*, That the original infestment whereupon the said Elizabeth Brown's right is founded, is a base infestment; and as to the warrandice lands, never clad with possession, and the Earl of Traquair's right, whereon John Scot's right is founded, is a public infestment holden of the King, which is always preferred to base infestment, without consideration whether the public infestment has attained possession or not,

or how long; but much more in this case, where the public infestment has attained possession, not only by year and day, but many years; and therefore is directly in the case of the act of Parliament 1540, cap 105. preferring public infestments to prior base infestments, not clad with possession.—It was *answered*, That base infestments are of themselves valid, and before the said act of Parliament, the first infestment made always the best right, whether it was holden of the disponent or of his superior; but that act of Parliament is correctory of the common law and feudal custom, which by the act itself, appears then to have been constant, and is only altered by the statute, upon the presumption of fraud; which is clear, both by the title against double fraudulent alienations, and by the narrative, that diverse persons, after they have given private state and saine to their heirs or friends, do thereafter give, for causes onerous, infestment to other persons, and therefore such onerous posterior infestments, if they attain possession year and day, are preferred to the said private infestments; but in this case there is no presumption of simulation. *2dly*, By several decisions alleged and produced, it is clear, that the Lords did prefer base infestment of annualrent to posterior public infestments of property, which intervened before the next term; so that the infestment of annualrent could not attain possession; but if base infestments, without possession, were invalid rights, the Lords could not have found so. *3dly*, The Lords have allowed indirect and interpretative possession to be sufficient, not only in the case when liferents are reserved, that thereby the liferenter's possession is the fiars, though he never possessed himself, but even when liferents are not reserved; but that the base infestment is thereby excluded from possession: So base infestments granted to wives are preferred to posterior public infestments, though the wives do not, nor cannot, possess during the husband's life; yet the husband's possession is counted the wife's possession; and if a person, infest by a base infestment, should pursue for mails, or duties, or removing; and were excluded by a prior liferent, constituted by the pursuer's author, though not reserved in his right; that very action would be sufficient to validate the base infestment without possession. *4thly*, Whatever might have been alleged, before the act of Parliament 1617, for registration of saines, there is neither law nor favour since, for posterior acquirers, who might have known the prior infestments: And therefore, in infestments of warrandice lands, the possession of the principal lands is accounted possession of the warrandice lands; neither is there any ground to oblige a person who takes a feu of lands, to demand a more public infestment of the warrandice lands, than of the principal.—It was *answered*, That albeit the narrative of the statute mentions fraudulent alienations, yet the dispositive words are general, that wheresoever an infestment hath been public, by resignation or confirmation, and hath attained possession year and day, the same shall exclude any prior base infestment attaining no possession; and if the said act were only to be measured by fraud, then, if it could be alleged and ascribed, that the first infestment, though base, was for a cause onerous, and without fraud, it should be preferred; which yet never hath been done. And, for the practices, they meet

No 52. not this case, nor the act of Parliament, because the posterior public infestment hath attained no possession.—It was *answered*, That now consuetude had both interpreted and extended the foresaid act; for thereby posterior public infestments, though they be not for cause onerous, or clad with possession year and day, are ordinarily preferred contrary to the tenor of the statute; and base infestments, *retenta possessione*, where the obtainer of the infestment is negligent, are accounted simulate *præsumptione juris, et de jure*, but where there is no delay, nor ground of simulation, the base infestment is preferred, whether the posterior public infestment attain possession for year and day, or not.

THE LORDS having heard this case at length, and debated the same accurately among themselves; in respect they found no preceding decision, whether base infestments of warrandice, where there was possession of the principal lands, were valid, or not, against posterior public infestments; they found this base infestment of warrandice valid against the posterior public infestment; the infestment in warrandice being *simul* with the principal, and not *ex intervallo*, and being after the act of Parliament 1617; but did not decide the case to be of general rule for warrandice, *ex intervallo* before the said act.

Fol. Dic. v. 1. p. 91. Stair, v. 1. p. 335.

* * * Dirleton reports the same case :

IN the case Brown *contra* Veatch and Scot, it was found, after contentious debate *in præsentia*, at the bar, and betwixt the Lords, That an infestment of warrandice base, to be holden of the granter, should be preferable to a public infestment of property granted thereafter, holden of the superior, and clad with possession divers years: And that the possession of the principal lands should be interpreted the possession of the warrandice lands. Some of the Lords were of another judgment upon these grounds; *imo*, By the act of Parliament, Jas. V. Par. 7. cap. 105. (entitled, Provision and Pains of them committing fraud in alienation and otherwise) a public infestment is preferable to a base not clad with possession, though anterior: And both the *verba* and *ratio legis*, do militate in favour of the heritor by a public infestment; the intention and end of the law being to obviate fraud and prejudice by latent infestments: And it being all one, as to the interest and prejudice of the party who acquireth lands, whether the private and latent infestment be a right of property or warrandice, seeing an infestment of warrandice, when the principal lands are evicted, becometh an infestment of property.

2do, The act of Parliament foresaid, of King James V. is not taken away by the act of Parliament King James VI. 1617, anent registration of sasines; in respect, an infestment of property being base, though registrate and anterior, will be null in prejudice of a party, who has acquired a right by a posterior public infestment: And both the said acts of Parliament being *remedia quæ tendunt ad eundem finem*, though the hazard be not so great, as to the prejudice by latent and

private infestments, since the act of Parliament anent registration of sasines; the said act of Parliament 1617, doth not derogate from the act of Parliament King James V.

3^{tio}, As to that pretence, that the possession of the principal lands is the possession of the warrandice *fictione juris*, it was *answered*, That there is no such *fictione* warranted by any law; and so it is *fictione*, but not *juris*.

Secundo, It is a *fictione contra jus, et cui jus resistit*, in respect the heritor by the public infestment of property being in possession, no other person can be said to be in possession, seeing there cannot be two *domini in solidum*, nor two possessors by distinct rights, having no subordination or dependence one upon another, as liferenter and fiar, superior and vassal, master and tenant; or such like.

4^{to}, It is clear, that the possession of the principal lands cannot be thought the possession of the warrandice; seeing, if after forty years, the principal lands should be evicted, and a pursuit for warrandice and recourse should be intended upon the right of warrandice, though prescription cannot be obtruded; yet if there be any defect in the infestment of warrandice, as *v. g.* the disposition is subscribed by one notary, or such like, the same may be alleged; whereas, if that infestment were clad with forty years possession, the right would be prescribed, and could not be questioned upon any ground whatsoever, but falsehood.

In this process, it was *questioned*, Whether the heritor, who had the public infestment, having been in possession above seven years, should have the benefit of a possessory judgement, until a declarator and a decret *in petitorio*.

Some of the Lords thought, that in the case of warrandice, the heritor should not have the benefit of a possessory judgment against the pursuer, upon an infestment of warrandice, *quia non valebat agere*; but the question was not decided.

Dirleton, No 15. p. 7.

* * * Gilmour also reports the same case :

THE Earl of Traquair having feued to umquhile Mr James Lawson and Elizabeth Brown, his spouse, the lands of Inglifton and Maidenhead, and the lands of Fingland, in warrandice, by an infestment holden of himself; they did possess the principal lands many years, till of late Sarah Cockburn, spouse to Mr Patrick Gillespie, upon a prior infestment of annualrent, has gotten a poiding of the ground for an annualrent, exhausting the whole duties of the principal lands; whereupon Elizabeth arrests the rents of the warrandice lands in the hands of Richard Vetch, tenant, and pursues to make furthcoming. Compearance is made for John Scot, who is assigned to the duties by John Stewart, who stands publicly infest in the warrandice lands, and *alleges*, That he ought to be preferred, in respect of his public right, and clad with possession; whereas the pursuer's right is only base, holden of the granter, and not clad with possession. It was *answered*, That the allegiance ought to be repelled; and the public infestment cannot be obtruded against a base infestment of warrandice, though not

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clad with possession of the warrandice lands, because there could not be a title for possession of the warrandice lands, until the principal lands were evicted; but in the mean time, the principal lands being possessed, makes in effect the infestment of warrandice to be clad with possession thereof, just as an infestment of warrandice lands doth not prescribe, but from the eviction of the principal; and a base infestment being, of its own nature, a legal and valid investiture, wanting no solemnities, though not so sovereign as an infestment holden of the superior, it ought not to be invalidate for want of possession, which, for the time, it was not possible to attain to; the pursuer, immediately after the distress, doing all diligence for possession; especially considering, that since the act of Parliament was made for the registration of sales, acquirers of land may as well come to the knowledge of base infestments as public, by the registers.—It was *replied*, That by our law and practiques, there is no difference betwixt infestments of warrandice and others; but, *indistincte*, a base infestment is postponed to a public (being especially year and day in possession); and if this were not sustained, then infestments given to cautioners for their relief of debts, though base, should be preferred to public infestments, though not clad with possession till a distress. Likeas, the procurer of a base infestment might have helped himself, and caused the disposer infest him holden of the superior, or otherwise, not to have purchased the principal lands; or might have raised a declarator of his right of warrandice, or intimated the same to the tenants, which would have made it equipollent to a possession before eviction.—*Duplied*. That the pursuer opposed his infestment and reply, and added, that the principal and warrandice lands were within the body of the same disposition, charter, and sale, holden of the same granter and superior; neither can any man be blamed to acquire a feu or infestment of lands, to be holden of the granter, being superior, though he be but a sub-vassal, and his feu not so noble as the principal vassals is, yet he is a lawful vassal by a lawful and valid right: And if no fault can be imputed to him, by taking the principal laws so holden, no more the warrandice which succeeds in the place of the principal, both being in one infestment, and in one barony, at least by annexation.

THE LORDS having heard the matter in their haill presence, sustained the infestment of warrandice. *Nota*, Though they thought there was a difference betwixt infestments of warrandice of this nature, and infestments of warrandice for relief of cautionry, yet if that had been the question, I know not what decision they would have given.

Gilmour, No 173. p. 124.

No 53.
In this case,
the infest-
ment of war-
randice was

1668. February 20.

MR JOHN FORBES *against* INNES.

MR JOHN FORBES insisted in the cause against Margaret Innes, mentioned on the 8th of January last, for mails and duties, as assignee by Margaret Allardice,