

bound to acknowledge such a right because unconfirmed, then much less this, which had not only the defect and want of confirmation, but also seaisne taken after denunciation, and no possession attained before the annual rebellion was elapsed. But the Lords at last found such a base infestment preferable.*

See the informations of that case beside me, where the case of Milne and Clerkson is cited.

They urged always, I might add to my allegiance, that the said right was clad with possession before year and day was outrun to make it relevant; but I contended I was not bound to that, but that my allegiance as it stood simply conceived, was most relevant, *videlicet*, that she was infest within the year upon a bond granted before the denunciation. And Dury has a practique of it at the 23d of January, 1627, between Wallace and Porteous, where this may clearly be found by consequence; for there though a rebel may not dispone *currente rebellion*, not even to satisfy a personal debt prior to the horning, yet he may, if it be for implement of a specific obligation to dispone and infest prior to the horning, which is the very case in hand.—[See the Case below.]

Advocates' MS. No. 413, folio 223.

1676. *June.* COCHRANE of Babachlaw *against* JANET SAVAGE.

[See the Case above.]

IN the action mentioned, *supra*, at No. 413, in July, 1673, between the tenants of Bathgate, Janet Savage and Andrew Crawford, donatar to the laird of Bathgate's escheat and liferent, the Lords there found Savage her base infestment (though taken posterior to the denunciation of the horning,) preferable to the gift of escheat; both because it was within four days after the denunciation, and so far within year and day, as also because it depended upon a precept of seaisne contained in an heritable bond long prior to the charge of horning. (*Vide infra*, November, 1676, Mr William Weir, No. 509.) Of this decret, Cochrane of Babachlaw, assignee by Crawford the donatar, raises reduction and suspension, upon this reason, that the decret was wrongously and surreptitiously extracted, against a stop by deliverance upon a bill referring the matter of new to my Lord Strathuird, who heard the clause formerly; the bill craved a farther hearing upon that ground, set down *ubi supra*, that the donatar by a decret *in foro contentioso*, in anno 1667, was already preferred to this annualrenter, and to one Clerkson, who was in a stronger case than this Savage, in so far as he was infest base before the denunciation, *et si vinco vincentem te, tunc te vinco*. See M'Keinzie's Observations on the act 1621, p. 165. Now this allegiance was proponed, discussed, and repelled in Savage her decret of preference, in 1673, only it made no mention of the bill and stop and second reference. Craigie, before whom the case fell, was much scandalized; his tibubancy was, how to reconcile two of the Lords their decreets *in foro in terminis*

* But suspension and reduction being raised of this decret, the Lords, in *June*, 1676, preferred the donatar, albeit seaisne had been taken before denunciation, as it was not, unless it had been confirmed and acknowledged by the superior, or made public by possession, not civil, but natural or legal. See more in *June*, 1676, *numero* 479

interfering and clashing, one of them behoved to be unjust, and so condemn his Majesty's letter of protection to the Lords, in May, 1674, discharging the quarrelling of any of the sentences of the Session upon iniquity. He takes it to the Lords' answer, which of the two contrary decreets they would acknowledge and legitimate. They adhere to the first decreet, and prefer the donatar of the liferent escheat not only to Savage, (who was infest in an annualrent after denunciation, but the heritable bond was prior,) but even to Clerkson, or any who were basely infest before the denunciation. The reason of which decision lies in this,—that it were unreasonable to defraud and exclude the King, or respective superiors, of the liferent and escheat of their vassals, falling and incurred through their contumacy, and lying year and day unrelaxed at the horn; the creditors might have relaxed him within the year, and that had saved them, by private clandestine deeds, which they, as superiors, had never owned nor acknowledged, by adhibiting their consent, either in accepting a resignation, or granting a charter of confirmation; without which deeds and consent of his own, the *jus quasitum* to him by the rebellion could not be stopped. And yet thir casualties of superiority, being odious and unfavourable in law, are not to be extended beyond their due limits, and lawful and honest creditors are not to be wronged thereby; only they should know the condition and capacity of him with whom they contract: l. 19. D. *de Regulis Juris*. *Vide supra*, numerum 446, [Earl of Aboyne, 28th February, 1674;] *item*, numerum 445, anent quarrelling sentences of the Lords as unjust, in Almond and Dumfermling's case. *Item*, numeros 122, [Earl of Argile *against* Cambell, 2d February, 1671,] and 156, [Hamilton *against* Bell, 25th February, 1671.] And upon thir grounds the Lords found the donatar preferable; unless we would either say, the superior had consented, acknowledged, and confirmed Savage's infestment before the gift, or that we had made it public by possession any time before the expiring of year and day. And when I offered to prove possession of that term's annualrent preceding the elapsing of year and day, Craigie forced us to allege, it was either legal possession, by obtaining a decreet of poinding of the ground against the tenants within the year; or by natural possession, receiving it from the tenants, labourers of the ground, before the year expired: and that it was not sufficient to say, made public by civil possession, of receiving the annualrent from the heritor, since that respected not *jus fundi*, and such payment might be ascribed to the personal obligation. *Vide supra*, numero 297, [16th January, 1672;] *item*, the case of Hew Sinclair's Creditors, at the foresaid 413th Number.

On the 8th of June, 1677, the Lords having advised the probation led by witnesses and discharges, to prove the possession within the year *currente rebellione*, they found the same not proven; and so preferred the donatar to Savage, the annual-renter: only, since the maills and duties were not proven against the tenants, they could not decern against them till they were proven.

Advocates' MS. No. 479, folio 247.

1676. June. ROBERT MACMORRAN *against* THOMAS ROBERTSONE.

ROBERT MACMORRAN, as assignee constituted by Mungo Wood, college-treasurer of Edinburgh, who, *eo nomine*, was confirmed executor *qua* creditor to Isobel