

No 54.

possession of the warrandice, and is presumed to be the heritors possession, as well as the principal, it being singular and noways quadrating with a base infestment of lands, without real warrandice. It was *answered* to the third, That the act of Parliament 1617 does noways innovate the first act of Parliament, being only made to take away private latent real rights, by ordaining public registers, whereby all acquirers may have inspection of the condition of their authors, whether they be denuded; or notwithstanding thereof the first right made public or clad with possession is always preferred to a prior base right. It was *answered* to the fourth, That albeit the son's right was made on death-bed, which is denied, yet that is only a ground of reduction to an apparent heir, who is prejudged; whereas, in this case, the right was made to the apparent heir himself, who had undertaken to satisfy his father's whole debts, exceeding the true worth of the lands, among which Crammond's debt and cautionry being insert, if he should quarrel this right, it were to take away his own security. THE LORDS did consider this as a new case undecided, and of an universal concernment; and, after much debate among themselves, did at last find, that Crammond's base right, never being clad with possession of the land, nor diligence done upon any distress to affect the same, and that there was no discharge produced, but of the annual-rent of his own private debt, they did adhere to their first interlocutor, finding him only preferable as to that special debt; and, as to his cautionries, did find that he could only come in *pari passu* with the comprisers in competition, as being all in a like condition, by virtue of Mr Patrick's right, which was granted for them all, and by virtue whereof he had been year and day in possession; which appears to be founded on good law and reason: Seeing, that if base rights upon an obligation to relieve, not having been made public, should be found preferable upon private latent discharges, without any real diligence, it would open a door to manifest fraud and circumvention, and overturn the undoubted law and practice; whereby all just creditors, or acquirers, who have got public infestments, might be frustrated, and their rights made void and null. *See DEATHBED.*

*Gosford, MS. No 980.*

1682. February.

BRUCE of NEWTON against The CREDITORS of CLACKMANNAN.

No 55.  
Found, that a base infestment of relief, being a complete right *in suo genere*, is preferable, without possession, to a posterior public voluntary infest-

THE Laird of Clackmannan having, in December 1677, granted a base infestment of relief to his cautioners, with a provision, That they should not enter to possess till after distress and payment of the cautionry, and proportionally: he, long before the Whitsunday thereafter, made a resignation in favour of his personal creditors, on (which) there was a charter expedite in Exchequer: that same day the cautioners applied to the exchequer for a confirmation of their right; but the resignation was preferred, and the confirmation delayed for some hours: yet both were infest on their respective charters before the term of Whitsunday.

The cautioners now crave preference, for these reasons, *1st*, Their base right is anterior to the resignation, and it could not, and they could not apprehend possession till the next term at soonest, and not then, unless they had paid the defender upon distress; and an intervening voluntary deed cannot be preferred: February 13. 1624, No 4. p. 1276.; July 2. 1625, No 5. p. 1277. *2dly*, They applied to the Exchequer *debito tempore*, and though out of respect to the King's Commissioner, who was present, they did not take instruments upon their being delayed; yet they offered to prove *per membra curiæ*, that they applied and were delayed.

*Answered* for the creditors: The cautioners might have made their base infestment public before the confirmation, by raising a pouding of the ground, or a declarator for that effect.

THE LORDS found, That the base infestment of relief, being a right competent *in suo genere*, is preferable to the posterior public voluntary infestment; and therefore preferred the cautioners.

*Fol. Dic. v. 1. p. 91. Harcarse, No 585. p. 162.*

\* \* \* The same case is reported by Sir P. Home :

BRUCE of Clackmannan having granted a base infestment of relief to Bruce of Newton and Bruce of Powfoulis, for relief of several sums of money particularly condescended upon, in the right for which they stood engaged as cautioners for him; and thereafter Clackmannan having granted disposition of the lands to his personal creditors whereupon they were publicly infest: Newton and Powfoulis pursue a declarator against the creditors upon this ground, That the pursuers being infest in the lands for their relief, albeit base, yet being prior to the creditors, their public infestment proceeding upon Clackmannan's resignation, they ought to be preferred to the mails and duties, ay and while they were relieved of their cautionries.—*Alleged* for the defenders, That the pursuer's infestment being but base, and never clad with possession before the defenders public infestment, they ought to be preferred.—*Answered*, That the pursuer's right being an infestment of relief, albeit base, and not clad with possession, yet in law is preferable to a posterior public infestment; there being a great difference betwixt infestments of relief and infestments of property: For an infestment of property being a present title for possession, if it be base and not clad with possession, law presumes it to be simulate *hoc ipso*, that the disponent continues in possession; which cannot be alleged in the case, for an infestment for relief, which is not granted nor intended as a present title for possession, but for relief, after distress; and particularly in this case, the right was so qualified, that the pursuers were not entered into possession.—THE LORDS found, That the base infestment being a right of relief, and a competent right *in suo genere*, is preferable to the posterior public voluntary infestment; and therefore preferred the pursuers.

*Sir P. Home, v. 1. No 121. p. 192.*