

S E C T. X.

Whether Infestments of Relief are valid without Possession.

No 54.

A base infestment, granted for relief of cautioners, found not valid without possession; therefore such is not in the same case with base infestments of warrandice, where the possession of the principal lands is, *fictione juris*, possession of the warrandice lands.

1677. June 26.

INGLIS *against* The TENANTS OF EAST-BARNS.

IN the multiple-pounding pursued by the tenants of East-barns, the LORDS having found, after full hearing, that Crammond's infestment was clad with possession, after the date of the discharge granted by him, but found in case Mr Patrick Inglis was infest, and in possession before the date of his discharge, the creditors who had apprised his right were preferable; wherein the utmost favour being allowed to Crammond, his infestment not being of a yearly annualrent, but as a right of property; yet nothing, as appears, being able to satisfy Crammond, but the ruin and prejudice of the whole other creditors, he hath given in a bill, craving the last part of the interlocutor to be helped, 'In finding that Mr Patrick's right being clad with possession, before the date of the discharge, was preferable to Crammond's.' Whereupon the LORDS desired that the general point might be cleared, whether a base infestment of relief before distres, was preferable to a posterior public infestment, or base infestment apprehending possession before the date of the distres. And as to which it was *alleged* for Crammond, *1st*, That the only foundation whereupon it is required, that a base infestment should be clad with possession, is the 105th act, Par. 7. King Ja. V.; and which act proceeds only in the case of infestments of lands or annualrents, but not in infestments of relief. *2dly*, The said act proceeds likewise where there is presumption of simulation, whereas the onerous cause of Crammond's infestment is instructed and acknowledged. *3dly*, That a base infestment for relief before distres, cannot apprehend possession; and so the want of possession can infer no simulation. *4thly*, By the act of Parliament, *anno* 1617, The distinction of base and public infestments is altogether taken off, the registers being now patent, so as base infestments wanting possession may be known and discovered. *5thly*, A base infestment with relief is alike with infestment of warrandice, which has been found preferable after eviction of the principal lands upon the same ground of law, that it could not apprehend possession before eviction, which *ex paritate rationis* should be extended to infestments for relief. *6thly*, Though it were otherwise in the general, yet there are here many specialities, such as that Mr Patrick had granted a bond of corroboration of Crammond's right, and so Mr Patrick's possession *in ipso momento* did accresce to Crammond. *2dly*, The creditors got payment of their annualrent, which did clothe Crammond's right with possession. *3dly*, His right was upon death-bed, and made by a father to a son

in prejudice of Crammond, who is an anterior creditor. It was *answered* for the creditors, That the pretences insisted on are of no weight, and altogether insufficient to subvert that established and fundamental difference the law, and the inviolable practice has ever acknowledged, that a base infestment not clad with possession, cannot be preferred to a posterior public infestment, or other base right clad with possession; and certainly the overturning and confounding of that difference, were a prejudice both to the superiors, creditors, and purchasers: For, *1st*, Sub-feodations, or base infestments, are ever reputed in law simulate and unfavourable, being always transacted betwixt the granter and the receiver, without the least consideration of the true superior; whereas public infestments cannot be but by the act and deed of the superior, and can neither be granted, nor taken away, but by the intervention of the superior's act. *2dly*, Albeit the act of Parliament King Ja. the 5th, does require possession by the space of year and day, to prefer a public infestment to a prior base right; yet so odious and unfavourable are base infestments not clad with possession, that custom and the inviolable practice has dispensed with any such quality. *3dly*, It is frivolous to pretend that the act of Parliament King Ja. the 5th, does not extend to base infestments for relief, seeing the statutory words are general, and an infestment of relief is an infestment of lands. *4thly*, It were more dangerous to dispense with the want of possession in the case of infestments for relief, than in case of any other infestment, because there is greater hazard of simulation and contrivance in the case of such rights; infestments of relief usually running in general terms, for all debts, sums, engagements, and cautionaries; and though it were special as to debts, yet great contrivances may be committed; and there is nothing more ordinary than, upon payment made by the debtor, to take blank assignations. It was *replied*, That this argument is of no force; and the receiver of the infestment has an easy remedy by making it public; and if all infestments which cannot apprehend possession, be simply preferred to posterior public infestment, and to infestments clad with possession, it would lay a foundation for all contrivances, and must be extended much farther than to infestments for relief; and the same must also hold in infestments granted for security of sums, whereof the terms of payment are suspended for many years; and if this pretence hold, there needs no more but in the body of the infestments to provide, that the entry to the possession must be suspended for many years: And it is certain, and known by common experience, that possession is of great moment for discovering of private and latent rights; and even where base infestments cannot apprehend possession, besides the remedy of making them public, there is place to use diligence *per modum declarationis*: But that a simple base infestment for relief, without the least qualification of possession or diligence, should be sustained, were a preparative of most dangerous consequence: And how is it possible that any weight or moment can be laid upon the point of distress, thereby to give preference to posterior, public, or base infestments clad with possession; since the haver of the base right is also master of the distress given to himself, and so may abstract it of purpose to get

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preference to posterior public, or base infestments clad with possession; and which fraud and contrivance is impossible to be obviated; and the Lords of Session have ever been jealous of base infestments wanting possession, even though they could not apprehend the same, and which has been so expressly decided, July 12. 1634, Creditors of Sir James Oliphant, No 9. p. 1281. And as to that pretence, that by the introduction of registers, the difference betwixt base and public infestments is now taken off, it is *answered*, it is a gross mistake, and there is nothing more evident by the current and tenor of decisions, than since the establishing of registers, that the difference hath ever been tenaciously observed, and adhered to; and there is evident reason why it should be so, since public infestments are no less ordained to be registrate than base; and so of their own nature being more public, as being constituted by the superior's act, or if base, corroborated with the first possession, they are still preferable and privileged beyond private, base, and latent infestments, not clad with possession; and certainly the interest of superiors, purchasers, and executors, is greatly concerned, that they should not be exposed to snares from private and latent infestments; and registers are not sufficient to avert the hazard, not only in respect of their loss and confusion; but also having no ground from parties possession, they know not where to seek, or begin, or end at registers; and neither creditors nor purchasers, when they intent improbation for clearing of rights, do follow a rule, but to try who are, or have been pretenders to possession: And of all infestments, those for relief are most dangerous, and wherein the greatest fraud and simulation may be committed, both from payment of the debts, and abstracting of the distresses, and the like. And whereas it is *urged*, That an infestment of warrandice, though base, yet after eviction, is preferred to a posterior public, or base infestment, clad with possession; it is *answered*, 1st, It is, and has been ever the opinion of our lawyers, that infestments of warrandice, as to the point now in question, have been a special case, and yet the point has never been decided in the general, but only in special cases. 2^{dly}, The reason of difference is, because the possession of the principal lands, is, as Sir Thomas Hope observes, reputed *fictione juris* possession of the warrandice lands, which cannot in the least hold in the case of infestments of relief, or others of that nature. 3^{dly}, There is no possibility that there can be so much simulation and contrivance in the case of infestments of warrandice, as in those for relief; seeing parties cannot be presumed to quit the principal lands upon collusion; and besides the distress must be by process; and parties having interest may consider the eviction and grounds of the same, and discover the collusion, if any be; and infestments of warrandice are very favourable, that parties should have recourse, being excluded from the possession of the principal lands; and an infestment of warrandice is but a conditional right, and depends upon a contingent hazard; and upon which account a base infestment of warrandice in wardlands imports no recognition before eviction; which is clearly otherways in an infestment of relief; which is no conditional infestment, as to the point of right, and so would infer recognition, albeit it is no present title for possession, until dis-

trefs be used; and so there being so great disparities betwixt the one and the other, there is no ground of extension of a special case of warrandice to infestments to relief. And as to what is urged from the specialities, they are of no weight; and though Mr Patrick did corroborate Crammond's infestment, yet it was before Mr Patrick's own right, and before Crammond was infest, and is only a personal corroboration; and *sibi imputet*, that Crammond did not make his right public, or use diligence thereupon by inhibition or declarator, as he might have done. *2dly*, Though Mr Patrick's right had been upon death-bed, yet being for a true onerous cause, and for his relief of his engagements for his father, which can be instructed; it is not quarrellable, neither upon the reason of death-bed, nor upon the act of Parliament 1621; Crammond's own debt being a part of the sums for which it was granted. *3dly*, It is an impertinent conceit to pretend that payment of the annualrent to the creditors, does clothe Crammond's infestments with possession; that being a notional and metaphysical possession, which law never understood, and certainly the creditors have no right to Crammond's infestment; and payment to the creditors can no more clothe his right with possession, than the diligence of the creditors could clothe his right with possession; and law understands no other possession, but where the party infest is either in the natural possession by real and actual detention; or in civil possession, by uplifting of the duties, and getting payment of his annualrent, where it is an infestment of annualrent; and the utmost has been already allowed to Crammond, in sustaining payment of annualrent to himself, and his discharge, to clothe his infestment with possession: And as there is no specialities urged for Crammond, which are of any moment, so there are great and pregnant specialities against him. As *1st*, That his disposition was seven years before Mr Patrick's right, whereupon he did not so much as take infestment, but suffered the common debtor to possess; whereas if he had been infest, the failzie had been committed, as *de facto* it was, annualrents not having been paid to the creditors yearly, which was the condition of his right, and upon the failzie whereof he was allowed to enter to the possession. *2dly*, Crammond has got payment of all his bygone annualrents, and a third part more; whereas the other creditors, some whereof are at the point of starving, by lying out of eight years annualrent, their condition is most favourable; and it is most unjust and invidious for Crammond, who is full-handed, to debar and exclude so many just creditors, he having thirteen chalders of victual yearly for 10,000 merks of cautionry; whereas the other case is so calamitous, that the other competitors, and the apprifers, have but possession of eight chalders of victual for forty or fifty thousand merks. Likeas Crammond has acknowledged and homologated Mr Patrick's right, both as being witness thereto, and as having confirmed the same as commissioner for the superiors.

THE LORDS found, That Mr John Inglis having, in the same writs, an infestment for security of a sum due to him, and for relief of several sums, for East-barns, privileging him to enter to possession till he were satisfied and relieved, whereby he might either pursue the possessor for his annualrent only, or for both principal

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and annualrent; or any intromitter with the rents; or might take payment from either; that having gotten payment from his debtor's son, who was in possession of the lands, thereby his base infestment was clad with possession, and preferred to the posterior infestment of the son, or his creditors; but the LORDS found, that the infestment for relief, being base without possession or diligence, no annualrents being paid to Mr John Inglis of these sums, that the base infestment to the debtor's son, before relief of several creditors, having attained the first possession, was preferable. See DEATH-BED.

Fol. Dic. v. 1. p. 91. Stair, v. 2. p. 527.

* * Dirleton reports the same case :

MR CORNELIUS INGLIS being debtor to Mr John Inglis of Crammond in the sum of 3500 merks; he did give to Crammond, for security of the said sum, and for relief of cautionries for him, extending to towards 10,000 merks, a bond for payment and relieving him of the said sums; with an obligation to infest in the lands therein-mentioned, for his security and relief of the said sums; and a precept of sasine, whereupon infestment followed: And thereafter, Mr Patrick Inglis, the said Mr Cornelius his eldest son, did grant a bond to Crammond, relating expressly to the said former bond and right of relief, and in corroboration thereof, and the infestment thereupon, containing an obligation for payment and relief of the said sums.

Thereafter the said Mr Patrick did obtain from his father, a right and infestment of the said lands, upon that narrative, that he had undertaken the payment of his father's debts; and that he was engaged for him; and that the said right was granted to him for his relief; whereupon he obtained possession; and, before any diligence, at the instance of any of the other creditors, he did pay some annualrent to Crammond upon a discharge, relating to Crammond's right and infestment foresaid.

Thereafter, there being a multiplepounding raised against Crammond, and some of the creditors, who had deduced a comprising against the said Mr Patrick of his right; the creditors *alleged*, that they ought to be preferred, because Crammond's right was only base, and the said Mr Patrick's right was clad with possession, before any pretence of possession in the person of Crammond; and that they having comprised Mr Patrick's right, are thereupon preferable to Crammond. Whereunto it was *answered*, That Crammond's right, being a right of relief, could not take possession *ex natura* of the right, until a distress; and because it was provided by the right itself, that Crammond should enter to the possession in case of distress; and in case he should not be paid of his annualrent; which he could not do before declarator: And that the LORDS had diverse times found, that infestments of warrandice, whereupon there could be no possession before eviction, should be preferred to posterior infestments; and that infestments of annualrent, being anterior, should be sustained in a competition with posterior

base infestments clad with possession; because the first term of payment of the annualrent was not come, when the posterior infestment came to have possession; and that the competition was not betwixt Crammond's and the compriser's infestment upon the comprising, but Mr Patrick's own infestment; and that Crammond's infestment was clad with possession before the compriser's right and interest, by payment of the annualrent of the said sum due to Crammond himself; as appeared by the discharge accepted by Mr Patrick relating to Crammond's right and infestment foresaid: And that base infestments, by the common law, being valid; and by the act of Parliament K. Ja: 5th, *in anno* 1540; it being provided, that for obviating fraud by granting private and latent infestments, in prejudice of posterior infestments that are public, being either holden of the superior, or by possession; the said act of Parliament cannot be extended to this case; in respect Crammond's right cannot be said to have been fraudulent and private as to Mr Patrick; in respect he did not only know the same, but did ratify and corroborate the said right as said is, both before his own right and after the same; and before the interest of creditors, he did in effect ratify and homologate the same, by making payment conform thereto, as said is.

THE LORDS, in respect the case was of moment, as to the preparative, ordained that it should be debated among themselves: And upon the debate they decided these points: *1^{ly}*, That the said act of Parliament K. Ja: 5th being general, and there being no exceptions of infestments of relief, the said act is comprehensive of the same: *2^{dy}*, Though the act of Parliament, anent registration of sales, does secure singular successors; yet the said act of Parliament K. Ja: 5th is not taken away; though in some cases, the Lords are apt to favour prior infestments, where there is no presumption of fraud: And therefore, when there is any possession, as in the case of infestments of warrandice, they found that *secundum iuris*, the possession of the principal lands, is the possession of the warrandice: *3^{dy}*, That albeit Mr Patrick could not question Crammond's right, for the reason foresaid, yet the comprisers, being singular successors, may question the same:

THE LORDS therefore preferred the creditors: And yet sustained Crammond's infestment, in so far as concerns the sum foresaid due to himself, and not as to cautionries; in respect the said discharge was only of the annualrent of the sum due to himself.

This decision appears to be hard; upon these considerations: *1st*, Because Crammond's infestment, though base, as to the point of right, by the common law is preferable: And as to the said statute, it introduces only a *presumptio juris*, that base infestments, not clad with possession, are presumptively fraudulent: And the question, Whether Crammond's infestment was fraudulent, was to be considered in relation to Mr Patrick and his infestment, and not to his successors: And the said presumption was taken away by Mr Patrick's deed foresaid, having corroborated, as said is, Crammond's infestment; which was verified by a writ subscribed by witnesses, and which was found to militate, even against the creditors, and to clothe Crammond's infestment with possession. *2^{dy}*, Crammond's

No 54. right being *jus individuum*, though upon distinct grounds, it could not be fraudulent and private *ex parte*, and *ex parte public*.

A. Sir John Cunninghame, &c.

Alt. Lockhart.

Dirleton, No 461. p. 224.

* * * Gosford reports the same case thus :

IN the multiplepointing, betwixt these parties, wherein there was an interlocutor upon the 13th of December 1676, (See CAUTIONER.) finding that Crammond's discharge of the annuallrents was prior to Mr Patrick's right, or the compriser's, that then he should be preferred ; but if Mr Patrick was infest, and in possession, before his discharge of the sums due to himself, or the creditors to whom he was bound, that then the compriser from Mr Patrick, who had obtained infestment, were preferable ; thereafter, upon a bill given in by Crammond for a new hearing upon this point, that albeit his discharges were posterior to their right, whether clad with possession, or made public by the superior's confirmation of the creditors comprifings ; yet, in law, he ought to be preferred, because his infestments being prior to Mr Patrick's, and being an infestment of relief *quocunque tempore*, he was distressed, and obtained discharges upon payment ; it ought to be drawn back to the date of his infestment to make it public : Both parties were ordained to be heard *in presentia* upon that, as being of a general concernment, and a case not formerly decided. It was *alleged*, for Crammond, that his right was preferable, upon these reasons : 1st, That before the act of Parliament K. Ja. 5th, the Parl. 7. cap. 105. there was no distinction of base and public infestments, but they were preferred according to the dates of their rights and safines ; and by the said act, which did innovate the case of law, as appears by the Rubrick, the cause thereof was for preventing all simulations and contraventions, as the only cause of making that statute ; whereas that reason cannot militate in this case, Crammond's own debt, and his cautioners, being all instructed and acknowledged to be just and truly resting to Mr Cornelius Inglis, his creditor, by Mr Patrick his son, who did corroborate his infestment of relief before the creditors comprisers, who are now in competition. 2dly, Notwithstanding of the said act of Parliament, where lands are disposed in warrandice of principal lands, only base, and never clad with possession, before that another acquire a right thereof, who is publicly infest, or in possession year and day, before any distress against the acquirer of the principal lands, yet that intervening right doth not hinder the distress, upon an eviction, to be drawn back to the infestment of the principal lands, and thereupon to get eviction of so much, as the distress of the principal lands amounts to, notwithstanding of a public right or possession year and day ; but so it is, that Crammond's infestment being for relief of all cautioners, it is of that same nature as an infestment of warrandice, and ought to have that same effect, seeing his distress could not occur, until the creditors to whom he was bound cau-

tioner pleased to execute the law against him, and until then he could not pursue a declarator, and enter to the possession of his lands; and so it not being his fault, in law and reason, upon the existence of distresses, he ought to be preferred to all intervening creditors and comprisers. 3^{dly}, By the act of Parliament 1617, anent the registration of sasines, all creditors or buyers of lands being thereby put in a capacity to know all infestments, and the condition of their debtors, who dispone to them any rights of lands; and all subjects put *in tuto*, by looking in to the public registers; the reason and effect of the first act of Parliament in K. Ja. 5th his time, is fully taken away, and all infestments ought to be regulated according to the priority of the date of sasines. 4^{thly}, Mr Patrick his son's infestment, from whom the creditors, in competition, comprised, was not only made upon death-bed, but by a father to his apparent heir; which could not prejudice prior creditors, who may reduce the same. It was *answered*, to the first, That the act of Parliament K. Ja. 5th was opposed, which bears no distinction, but in all cases prefers the first public right, or a base right clad with a year's possession; as to the Rubrick, albeit it bears that special reason of fraud and simulation, which, before that time, was a common practice, yet the law and statute is general without any exception; so that if Crammond hath done no diligence upon his base right, either by declarator, or pursuing for mails and duties, by the space of many years, which was in his power before the comprisers were publicly infest, it was his own fault, and he hath justly forefaulted the benefit of his right; and the creditors who have done diligence, and obtained their right to be made public before him, are thereby secured; and he can never evict any part of their lands but by using an order of redemption; especially seeing he himself, by a commission from the superiors, did subscribe precepts and charters for infesting them, to be holden of the superiors; and if this principle were taken away, it would open a door to manifest fraud and circumvention of true creditors who have done diligence, and all buyers of lands for a just price; seeing, upon private bonds, and obtaining of discharges from the debtor himself, or from other creditors whose debts were satisfied, or public rights, they might be in hazard by evictions; and in this case there is great presumption of simulation, the parties being so near related, and all the deeds whereupon he now founds being latent for so long a time. It was *answered* to the second, That infestments of warrandice are, of their own nature, far different from the case now in question, which is only an infestment of relief which is not out of warrandice lands different from the principal; so that there being no possession at all of any lands before the comprisers had a public right, upon a supervenient distress for payment of annualrents; there being neither declarator, nor diligence done to enter before the public right; the same can never be prejudged; payment of annualrent being only a personal act, and no real deed; whereas there being an infestment and possession of principal lands before any eviction; as Hope observes, and in the constant Practique, THE LORDS have decided, that, by a supervenient eviction, the heritor hath recourse to the warrandice lands *pro tanto, quia, fictione juris*, the possession of the principal lands is the

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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.