

1636. *March 29.*E. ANNANDALE *against* JOHNSTON.

## No 44.

A person infest his grandson, to hold base, reserving his own liferent. He afterwards sold the lands; in which the purchaser was publicly infest. The grandson, although he afterwards attained possession, was decerned to remove.

IN a removing, one Johnston of ——— having infest his oye in the lands of ——— by a base infestment, holden of himself, reserving his own liferent; and thereafter the goodfir having made disposition of the lands to the Earl, and upon his resignation he being publicly infest by the King, and becoming thereafter in the goodfir's lifetime in possession of the lands; while that after the goodfir's decease, and in the absence of the Earl, the oye by virtue of his base infestment apprehends possession; by virtue of which right and possession he defends against the removing, pursued against him by the Earl, and *alleges*, That no possession acquired by the Earl in his goodfir's lifetime can prejudice his right, which albeit base, is clothed with natural possession, and the possession of his goodfir must be his possession, his liferent being reserved in his fee.—THE LORDS repelled the allegiance, in respect of the pursuer's reply upon a public right, clothed with possession in the granter's lifetime, and that the excipient's right was base, and was granted by the goodfir to the oye; and there was no lawful manner qualified, how he apprehended possession; but he might be decerned as succeeding in the vice; and so he was decerned to remove notwithstanding of that exception.

A.G. *Advocatus.*Alt. *Johnston.*Clerk, *Scot.**Durie, p. 809.*1666. *June 14.*SIR HENRY HOME *against* SIR ALEXANDER HOME.

## No 45.

Found in conformity with No 43. p. 1311.

IN the cause between these parties, *Stair, v. 1. p. 375. voce* POSSESSORY JUDGEMENT; it was further *alleged*, for Sir Alexander Home, That the rebel had not only five years possession, but was infest by an infestment holden of his father, which was clad with possession, before the apprizer's charge against the superior; in so far as the infestment bore a reservation of the father's liferent; and so the father's possession was the rebel's possession, and was sufficient to validate the base infestment; seeing there could be no other possession attained, during his father's lifetime; or at least, there was reserved to the father an yearly rent, and the rebel gave his father a warrant in writ to continue his possession, of such of the lands for the same.

THE LORDS ordained the donatar to condescend, whether the rebel's infestment proceeded upon his contract of marriage; and he declaring that it was by a distinct right, thereafter,

THE LORDS found the possession of the father not relevant, it being betwixt conjunct persons, private, and suspect: For they thought, if possession by such reservation, betwixt father and son were sufficient, the creditors would hardly be secure.

*Fol. Dic. v. 1. p. 90. Stair, v. 1. p. 376.*