

No 52.

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 hail 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,

who being infest in liferent in principal lands and warrandice lands; and the principal lands being evicted, she and the pursuer, (her assignee) return upon the warrandice lands, wherein Margaret Innes is infest in liferent by her husband; who stood publicly infest therein, upon the resignation of Margaret Allardice's husband; and who alleged absolvitor, because the defender and her husband being infest, and in possession these twenty years past, have the benefit of a possessory judgment, and so cannot be put from her possession, till her right be reduced.—The pursuer *answered*, That the benefit of a possessory judgment can take no place against a pursuit, upon an infestment in warrandice, unless the possession had been seven, or more years, after the eviction; for before the eviction, there could be no pursuit upon the infestment of warrandice in the same case, as an infestment of liferent is not excluded by a possession during the husband's lifetime, when the wife could not pursue.—The defender *answered*, That the pursuer ought, in a petitory judgment, to have declared the distress, before he could put the defender from her possession.—The pursuer *answered*, There was no declarator required; but only the eviction, which gives immediate recourse upon the warrandice lands.

THE LORDS repelled the defence, and found no need of a declarator, or reduction to attain recourse; and that a possessory judgment was not competent upon any possession, anterior to the eviction.

The defender further alleged absolvitor, because this pursuit is founded upon Margaret Allardice her infestment in warrandice, which is base holden of her husband; and the defender and her husband's infestments are public, holden of the superior, and albeit posterior to the infestment of warrandice, yet are preferable; the infestment of warrandice being base, never clad with possession.—The pursuer *answered*, That infestments in the warrandice are sufficiently validate by possession of the principal lands, especially now when all sales must be registrate, as was lately found in the case of John Scot, No 52. p. 1318.: And the said Margaret Allardice has not only been in possession of the principal lands since her husband's death, but her husband was in full possession of both, which is more than sufficient.—The pursuer *answered*, That in Scot's case this was singular; that in John Scot's case, both the principal and warrandice lands were granted in an infestment; and so the person infest being in possession of the principal lands, his infestment could not be partly public and partly private; but this infestment in warrandice is *ex intervallo*.

THE LORDS repelled also the defence, and found the infestment in warrandice (though base) sufficient, the person infest being in possession of the principal lands, albeit the infestment in the warrandice lands was *ex intervallo*.

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

No 53.  
granted *ex intervallo*, and not at the same time with that of the principal lands; yet possession of the principal lands was found to validate the former.