

No 1.

It was *alleged* for Hugh Hamilton, That he must be preferred to the annual-renter, because he being publicly infest upon his apprising, before the infestment of annualrent, at least before it was cled with possession, whereby it became a valid right, the King's charter upon the apprising, is virtually and equivalently a confirmation of Kilchattan's infestment, especially in favours of a creditor, who could not perfectly know his debtor's condition; which if he had known, and given in expressly a confirmation to the King, it would have been accepted, seeing the King respects none; and therefore the King's granting of a charter upon the apprising must be interpreted equivalent.

THE LORDS found, That the charter upon the apprising was not equivalent to a confirmation.

It was further *alleged* for Hugh Hamilton, That the confirmation obtained by Major Campbell, behoved to accresce to him, who had the first complete right, by public infestment upon the apprising; and albeit that base infestment upon the annualrent granted by Kilchattan to Major Campbell, was prior, yet it was null till it was cled with possession; and therefore, if it was not cled with possession before Hugh Hamilton's infestment, the confirmation must accresce to Hugh Hamilton's infestment.

THE LORDS found, That the base infestment was not null for want of possession, albeit it might be excluded by a public infestment before possession; but found, that Hugh Hamilton's public infestment was not complete in itself, because it put Hugh Hamilton only in the place of young Kilchattan, who had a null right till confirmation: Which confirmation they found did not accresce to the base infestment, being cled with possession at any time before the confirmation; for at that time it became a complete right; at which time the apprising and infestment was no complete right; and therefore the confirmation, albeit it had not had this restriction accresced to the base infestment, as being the first complete right *in sue genere*. See VIRTUAL CONFIRMATION. See CONFIRMATION. See JUS SUPERVENIENS, &c.

Fol. Dic. v. I. p. 87. Stair, v. I. p. 156.

No 2.

Base infestment, without possession, is sufficient to exclude the teree; for as to the husband's heir or relict, it is a sufficient right.

1669. January 27. BELL of BELFORD against L. RUTHERFOORD.

BELL of Belford being infest in an annualrent by the deceased Lord Rutherford, out of certain lands, pursues a pointing of the ground. Compearance is made for my Lady Rutherford, who *alleges* she ought to be preferred, as being infest in an annualrent of 2000 merks yearly, upon her contract of marriage, before this pursuer: *2dly*, That she ought to be preferred, for an annualrent of 2000 merks yearly of additional jointure, wherein she stands also infest publicly; and albeit her infestment be posterior to the pursuer's, yet his infestment being base, not cled with possession before her public infestment, she is preferable.— The pursuer *answered*, That before the Lady's infestment on her additional jointure, he had used a citation for pointing of the ground, and is now infisting

for a decret thereupon, which must be drawn back to the citation, and is sufficient to validate the base infestment, that it be no more from that time furth reputed clandestine.

Which allegiance the LORDS found relevant, and preferred the pursuer to the Lady's additional jointure.

It was further *alleged* for the Lady, That she was served, and kened to a terce of the lands in question, and must be preferred, as to a third part of the profits of the lands, conform to her infestment upon her terce.—The pursuer *answered*, That her service, kenning, and infestment of terce, are posterior to his infestment of annualrent, and posterior to his citation foresaid thereupon.—It was *answered* for the Lady, That her terce being a right constituted by law, by the death of her husband, albeit it be served and kened after, these acts are but declaratory of her right by her husband's death, and do constitute her right, not from the date of the service, but from her husband's death, which was before the pursuer's citation; so that his infestment, granted by her husband, before his death, not having been cled with possession in the husband's life, it remained at his death as an incomplete right, which cannot exclude her from her terce.—It was *answered*, That a base infestment is of itself a valid right, although by a special act of Parliament posterior, public infestments are preferred thereto, unless the base infestment hath been cled with possession; which cannot be extended beyond the terms of the act of Parliament, and so cannot be extended to a terce; but as the base infestment would have been a sufficient right, against the husband and his heirs, so it must be esteemed as *debitum reale*, affecting the ground; and his Lady can have no more by her terce than a third of what was free unaffected before his death.

THE LORDS found the base infestment sufficient to exclude the terce *pro tanto*, and that as to the husband's heir or relict, it was a sufficient right. See TERCE. See Sect. 3. h. t. *Fol. Dic. v. 1. p. 87. Stair, v. 1. p. 594.*

* * * Gosford reports the same case :

IN a competition for preference to the mails and duties of the lands of Rutherford, the Lady insisting not only for her conjunct-fee provided by her contract of marriage, as to which she was preferred, but likewise for an additional jointure and for a terce for which she was kened; and the Lord Ballenden and Bell of Belford craving preference upon their infestments of annualrents out of the said lands:—THE LORDS did prefer them to the Lady as to the additional jointure, being a mere donation, and tacitly revoked by the said infestments for annualrents granted to lawful creditors; as likewise did prefer them to a right of terce; notwithstanding it was alleged for the Lady, that their infestments were base, never cled with possession, nor made public during the Lord Rutherford's lifetime; for they did find, that infestments being granted by a husband, albeit base did divest of the right of property, or did affect the same, being infestments of

No 2. annualrents, so that a Lady tercer could have no right but with the burden thereof. See TERCE.

Gosford, MS. p. 34.

1726. January, 26.

MARQUIS OF CLYDESDALE *against* EARL OF DUNDONALD.

* * This great cause consists of various branches. That part of it which regards Base Infestments is distinguished by the marginal note opposite. The other subjects will be referred to in the particular Titles to which they belong. It has been thought best to record the whole case together, where it first occurs.

BRANCH I.

Clause of Return.

No 3. THE estate and honours of the family of Dundonald being provided to heirs-male in the year 1716, John Earl of Dundonald having only one son, William, the last Earl, from whom he had no great expectation of issue, executed a deed, by which, ' failing heirs-male of his own body, he obliges himself to provide ' and secure his estate in favour of Lady Anne Cochran his eldest daughter, and ' the heirs-male of her body; whom failing, to his other daughters, in their order,' &c. Earl William having died in his minority, without issue, the Marquis of Clydesdale, only son to Lady Anne Cochran, brought an action to have it declared, ' That the heirs-male of the said Earl John's body having failed, ' he the Marquis, as heir-male of the said Lady Anne's body, was heir of provision to the said Earl his grand-father; and craving that the present Earl of ' Dundonald might be decerned to make up his titles to the estate, and convey ' the same in his favour.' On the other hand, this Earl of Dundonald, the heir-male of the family, brought a counter action of declarator by way of defence; among other conclusions, insisting that it might be found, ' That William, first Earl of Dundonald having conveyed his estate to heirs-male, with a ' clause of RETURN to himself failing heirs-male, this imported a prohibition to ' alter; and therefore the said Earl John had no power, by a gratuitous deed, to ' alter the conveyances and course of succession which their ancestor had established for the preservation of his name and family.' These conveyances stood thus: The said William first Earl of Dundonald, by diverse deeds, in the years 1653, 1656, and 1657, settles his estate upon ' William Lord Cochran his eldest ' son, and the heirs-male of his body; whom failing, to return to himself.' And in the year 1680, by a procuratory of resignation; and 1684, in his grand-son's contract of marriage, the same Earl William, after the decease of this son, renews the settlement ' in favour of John Lord Cochran his eldest grand-son, and ' the heirs-male of his body; whom failing, to William Cochran of Kilmarnock, ' his second grand-son, (father of Thomas the present Earl) and the heirs-male