

No 47.
as in this case
there was no
room for the
suspicion of
simulation.

It was *answered*, that albeit, in competition betwixt base infestments, granted to children, and infestments granted to strangers upon onerous causes; the childrens infestment, though prior, and though reserving the father's liferent, uses to be preferred; yet here that holds not, for both infestments are granted to children, both of one date, and neither of them to strangers, or upon onerous causes; and therefore the reservation here is without suspicion of simulation, and the father's possession must validate both the second son's annualrent, and the eldest son's property.

Which the LORDS found relevant, and that the father's possession by this reservation, did sufficiently validate both the sons' infestments; and that the possession of one after his death, or of any succeeding in his right, did not exclude the other, or his singular successor.

Fol. Dic. v. I. p. 90. Stair, v. I. p. 546.

* * * Gosford reports the same case:

DAVID CHRISTIESON, heritor of the lands of Barfilly, did infest his eldest son, and apparent heir, in the fee of the said lands, reserving his own liferent; as likewise, at that same time, did infest his second son in an annualrent out of the same land, with the like reservation of his liferent, both which infestments were granted base to be holden of himself. James Christie, writer to the signet, having comprised the right of the fee from the eldest son, as being infest by the Earl of Rothes' superior, and George Shein having adjudged the right of annualrent from the other son, they did both pursue upon their several rights for possession. — THE LORDS preferred the adjudger, notwithstanding it was alleged that the compriser was publicly infest, and in possession; because the LORDS found, that the father, who was common author to both the sons, by reserving his own liferent, both the rights were clad with possession and became public; and being of different natures, were consistent, and had no respect to the infestment granted by the superior, which was null, both the infestments being base holden of the father.

Gosford, MS. No 12. p. 5.

1669. July 10.

GARNER *against* COLVIN.

No 48.
Found in
conformity
with No 46.
P. 1313.

JAMES COLVIN having apprised the lands of Lady-kirk, and some tenements in Ayr, and being infest therein; Garner's wife and bairns raise a reduction, and *allege*, that the appriser's right is null, as to the tenements in Ayr, because John Garner had never right thereto, but the right was originally granted to young John Garner the pursuer, by his mother's brother. The defender *answered*, that the said right must be affected with his apprising, as if it had been in the father's

person, because young Garner was then an infant in his father's family; and albeit the right be granted by his uncle, yet it is necessarily inferred to be acquired by the father's means, because it bears not for love and favour, but for sums of money, and the uncle had bairns of his own. It was *answered*, that albeit the right had been acquired by the father's means, yet it is anterior to the apprising, and sums on which it proceeds, whereupon nothing can be taken away but what is posterior thereto, albeit there were a declarator and reduction intended for that purpose, as there is none.

THE LORDS sustained the allegiance, and reduced the apprising as to these tenements.

2dly, The pursuer *alleges* the apprising (as to Lady kirk) must be reduced, because the pursuers produce a prior infestment granted by John Garner to his wife in liferent, and his bairns in fee. It was *answered*, that the said infestment was base, never clad with possession. The pursuers *replied*, that the father's liferent not being reserved, the continuation of possession was as lawful administrator to the pursuers bairns, and if need be, it is offered to be proven he had a factory from them. The defender *answered*, that a father's possession being continued, was never found to validate a base infestment granted to his children, albeit his liferent were expressly reserved; but it is ever accounted a latent fraudulent deed, and a factory can be of no more force than a reservation, otherwise it were impossible to obviate fraudulent conveyances betwixt fathers and children. The pursuer *answered*, that albeit such reservations are not valid in rights freely granted by fathers, yet it meets not this case, especially where there was an anterior onerous cause; John Garner being obliged by his contract of marriage, that what lands he should acquire, should be to his wife in liferent, and to the bairns of the marriage.

THE LORDS found that the bairns infestment granted by their father, albeit he had possess by a factory from them, was not clad with possession, or sufficient, to exclude a posterior public infestment, and that the clause in the contract was but to substitute the children heirs to their father in the conquest.

Here it was not alleged, that the factory was made public by process founded at the father's instance, or otherwise in this process. The defender, to satisfy the production of an assignation, upon which the apprising proceeded, which the pursuers offered to improve as false in the date, now produced another assignation of the same date, and declared he abode by the same as of that date; and that it being amissing, he had caused the cedent to subscribe another of the same date with the first, which did expressly bear reservation of another assignation formerly subscribed, which he did also abide by, as truly subscribed, but not of the date it bears, but of the date of the true assignation insert therein.

No 48.

THE LORDS sustained the assignation now last produced, and quarelnrdtoi the other assignation, though another date was insert, than when it was subscribed, for the cause foresaid.

Fol. Dic. v. 1. p. 90. Stair, v. 1. p. 633.

1630. January 16.

BARCLAY of Busbie *against* GEMMEL.

No 49.

A FATHER'S possession upon a reserved liferent, held to support a base right in favour of an infant daughter, in opposition to public rights of posterior date; and this prior to the act 1693, c. 13.

Fol. Dic. v. 1. p. 90.

. See the particulars of this case, taken from the Session Papers in Advocates' Library; *voce* FACULTY.

. By the act of Parliament 1693, chapter 13. it is enacted, ' That all infestments, whether of property of annualrent, or other real rights, whereupon seifins for hereafter shall be taken, shall in all competitions be preferable, and preferred according to the date and priority of the registrations of the seifins, without respect to the distinctions of base and public infestments, or of being cled with possession, or not cled with possession, in all time coming.'

Acts of Parliament, v. 3. p. 390.

☞ There remain four Sections more of the title BASE INFESTMENT. See VOL. IV.