

1666. December 18. LORD NEWBEATH *against* DUNBAR of BURGIE.

THE Lord Newbeath having right from James M'Ken, who had apprised the lands of Burgie, pursues reduction and improbation against young Burgie and John Waton; and insists on this reason, that any rights they have are null, and fraudulent, being contracted after his debt; and the right granted to young Burgie is null, as being but a base infestment, not clad with possession, before the pursuer's public infestment. The defender *alleged*, that his infestment was clad with possession, in so far as his father's liferent was reserved thereby, and his father possessing by virtue of the reservation, did validate his infestment. *2dly*, Albeit the father's own possession could not be sufficient, yet the father having transmitted his right to Waton, and Waton possessing, the suspicion of simulation ceased; and there is a disposition produced by the father to Waton, which though it bear to be of the fee, yet can import no more, but to be of the liferent, seeing the father had no more; neither needs it have an infestment, seeing it hath but the effect of an assignation to a liferent. It was *answered*, that if the father had expressly assigned his liferent, reserved in the base infestment, it might have been the ground of a question, whether the assignee's possessing so, would have validate the base infestment? But since the father has not taken notice of the reservation, but disposes as heritor, it clears that he did not possess by the reservation, but by his own prior right.

THE LORDS found the reason of reduction and reply relevant; and that the father's possessing by himself, or Waton's possessing by himself, could not validate the base infestment.

Fol. Dic. v. 1. p. 90. Stair, v. 1. p. 414.

1668. June 30. GEORGE SHEIN *against* JAMES CHRISTIE.

DAVID CHRISTISON of Bassallie, gave an infestment to his eldest son, of the lands of Bassallie, and to his second son, of an annual rent of 86 merks forth thereof, both of one date, and both reserving the father's liferent. James Christie hath right by apprising, led against the eldest son, in his father's life, to the lands. George Shein hath right by adjudication, against the second son, to the annual rent, and pursues a pointing of the ground. It was *alleged* for James Christie, that Shein's author's right was base, never clad with possession, and so null; whereas his right was public by an apprising, and had attained to possession. It was *answered*, that the father's liferent being reserved, the father's possession was both the sons' possession, and did validate both their rights. It was *answered*, that a disposition by a father to his own children, reserving his own liferent, though infestment follow, is always accounted simulate, and never accounted clad with possession, by the father's possession, as hath been frequently decided.

No 46.

Found again that a father's possession, on a reserved liferent, did not validate a base right of the fee granted by him to his son.

No 47.

A father granted, at the same time, two base infestments to two of his sons, reserving in both his own liferent. In a competition betwixt singular successors in these base rights, the father's possession was found sufficiently to validate both,

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