

BASE INFEEFMENT.

1304

possession, which she might have done after her husband's decease, if her right had been lawful; but suffering the party to break the said victual conform to the decret arbitral, so that now she cannot obtrude that right. Which reply the LORDS admitted to the pursuer's probation. See ESCHEAT.

No 32.

Ae. _____

Alt. Scot.

Clerk, Gibson,

Durie, p. 25.

1628. July 23.

LA. EDNAM *against* The LAIRD.

In an action for pointing of the ground, Lady Ednam, the LORDS found, That a saine of an annualrent, taken at any part of the barony, out of which the annualrent is disposed to be uplifted, where all the lands of the barony ly contiguous, doth affect all the lands and others belonging to the barony, the same lying contiguous as said is; albeit the said saine be not taken at the place definite and appointed for taking of saine in the charter and evidents of that barony, made and granted to him, who is the granter of the annualrent; and there being exception proponed, that the defenders had a tack of the lands, set for an onerous cause by him, who was the pursuer's author, and before the pursuer's right, whereby they *alleged*, That the ground could not be pointed for any more at the pursuer's instance, but for the duty of their tack; seeing, conform to their tack, they were in possession of the land, diverse years before the decease of the fetter, and had paid the tack duty to the fetter, and had reported his discharge thereon: This exception was found relevant, notwithstanding of this *reply*, That the pursuer's saine was given for implement of her contract of marriage, and so was the more favourable; and the same was more real than a tack, which tack could not maintain the excipients, except it had been clad with possession before her saine; for her husband's possession was her possession, and no subsequent possession of the tackfman, after her right, could make the tack to subsist against her: Which reply was repelled, and the tack sustained, being set for an onerous cause to lawful creditors, and before her saine; which tack being clad with possession in the fetter's lifetime, albeit not before the pursuer's right, was found sufficient; and found, that the defenders needed not to allege possession before her right, and so the said exception was admitted. See UNION.

Fol. Dic. v. 1. p. 99. Durie, p. 393.

1631. February 15.

LADY HUTTONHALL *against* L. of TOUCH.

THE Lady Huttonhall being infeft in the lands of Gauldstream, upon her contract of marriage, she, for payment of her husband's debts, consents to the alienation of the same lands, and renounces her liferent therein in April 1621; at

No 33.

A tack was preferred to a base infeftment, granted afterwards by the landlord to his wife, though her saine was taken before the tackfman obtained possession.

No 34.

Found in conformity with No 31. P. 1299.

No 34.

which very time, her husband gives her infestment in Huttonhall, in recompence of the former. After this, in 1624, the L. of Touch, and Alexander Cranston of Moriston, comprise Huttonhall for a debt paid by them for Huttonhall, before the infestment given to his wife of Huttonhall, and are infest therein, and in possession six or seven years. After Sir John Home of Huttonhall's decease, his Lady pursued the tenants for mails and duties of the lands.—*Alleged* for the comprisers, She could not seek the mails this way, *brevi manu*, she never having been in possession before; but she ought to seek a declarator to hear and see it found, that their infestment upon their comprising should sleep, and take no farther effect during her lifetime.—THE LORDS repelled this alleigance.

Next *alleged* her infestment was base, and had never apprehended possession, and so could not prejudice their public infestment clothed with seven years possession.—*Replied*, Her infestment, though base, was given her in recompence of a former one which was public; and as to possession, she could have none as long as her husband lived, but how soon he died she was seeking it; and any infestment they had was posterior to hers.—*Duplied*, Albeit their infestment be posterior to her's, yet the cause of it precedes her infestment.—*Triplied*, Notwithstanding of any debt owing by her husband, he might lawfully give his wife infestment in his lands, not being inhibited before.—*Quadruplied*, Albeit he was not prohibited *per prohibitionem judicis*, yet he was *per prohibitionem legis*, whereby he could do no voluntary deed in prejudice of his creditors; which prejudice is clear by felling of the lands burdened with her liferent, and to burden other lands with the same, that were free before; which only made the defender's become cautioners for her husband, knowing always of a relief out of other lands unburdened.

THE LORDS repelled the exception, in respect of the reply, that her infestment was given in recompence of her former of Cauldstream.

Fol. Dic. v. 1. p. 89. Spottiswood, (CONJUNCT FEE.) p. 59.

No 35.

A wife's infestment for security of her jointure, cannot be clothed with possession during her husband's life; therefore the husband's possession is understood to be her possession, and her infestment accordingly preferable according to its date.
See No 1. p. 1259.

1663. January 15. CAMPBELL against LADY KILCHATTAN.

MAJOR WILLIAM CAMPBELL being infest in an annualrent out of certain lands belonging to the deceased Ninian Stewart of Kilchattan, pursues a poinding of the ground, and obtains decret, which is suspended against him on the one part, and the Lady, liferentrix of Kilchattan on the other part.—It was *alleged* for the relict, That she is infest in the property upon her contract of marriage, whereby she was provided to the lands by old Kilchattan her father-in-law, and her husband; to whom and her, the father-in-law was obliged to grant infestment in conjunct-fee, and she is accordingly infest.—It was *answered*, That any infestment that she and her husband had, it was only base, to be holden of the superior not confirmed; whereas the charger was infest and in possession, not only by uplifting his annualrent, but by a decret for poinding the ground, which could