

not be prejudged by a not confirmed infestment, being null before the confirmation.—It was *replied*, That the charger could not obtrude the nullity of her husband's and her infestment, seeing her husband was his own author.—*Duplied*, That the charger had obtained a confirmation of her husband's right, *ad hunc effectum* allenary, to make his infestment of annualrent valid.—*Triplied*, That the confirmation of her husband's infestment did confirm her's also, notwithstanding of any such clause.—*Quadruplied*, That the confirmation being past only to secure the charger, and on his own expences, *actus agentis non operatur ultra ejus intentionem*, just as if there had been a procuratory of resignation in favour of both husband and wife, and the resignation had been made only in favour of the husband and not the wife.—*Answered*, If it had been so, the infestment would have operated in favour of the wife, as was found in the case betwixt Lochinvar and the relict of the Laird of Blairquhan, wherein resignation being made and past, and infestment thereupon in favour of Blairquhan and his Lady, nevertheless sasine was only given to the Laird, and not to the Lady; the Lords nevertheless found that the sasine was profitable to the Lady. See HUSBAND and WIFE.

THE LORDS found the relict's infestment sufficient against this charger. And withall, they considered what was not alleged for her, viz. That *in favorem* of a relict's infestment upon her contract of marriage, for her liferent right, a base infestment to be holden of the superior not confirmed, was sufficient against a singular successor, as has been formerly decided.

Fol. Dic. v. 1. p. 89. Gilmour, No 61. p. 43.

1664. November 23.

ELIZABETH NISBET, against MURRAY.

ELIZABETH NISBET pursues a poinding of the ground, of certain lands wherein she was infest, by James Wood, her husband. Compearance is made for Patrick Murray, who *alleged* that he is infest by her husband, his debtor, in the same lands, and ought to be preferred.—It is *answered* for the Lady, That she ought to be preferred; because both their annualrents being base, albeit her infestment be posterior, yet her husband's possession being her possession, and she being infest before Patrick Murray's infestment was clad with possession, must be preferred. It was *answered* for Patrick Murray, *first*, That a husband's possession should be the wife's possession, cannot be understood in an annualrent, because her husband never possessed an annualrent, but the property.

This the LORDS repelled, and found the possession of the property, as *jus nobilius*, to contain the annualrents *eminenter*.

2dly, Patrick Murray *alleged*, That the husband's possession being the wife's, is only introduced in favour of contracts of marriage, *favore dotis*: That because wives cannot possess, during their husband's life, therefore his possession is accounted theirs. But this infestment in question, is not founded upon the contract of marriage, but upon a posterior charter, of a different tenor. *3dly*, Patrick Murray

No 35.

No 36.

A wife's base rights, flowing from her husband, in security of her future liferent provisions, although not constituted by contract of marriage, as she cannot possess during his life, are validated by his possession, which is accounted her's.

No. 36.

used citation before Candlemas next after the Lady's infestment, and thereupon obtained decret in March, which must be drawn back to the citation: So that the husband could have no possession betwixt the Lady's charter, and his diligence, there being no intervening term.—It was *answered* for the Lady, That this privilege is allowed to wives; that their husband's possession is theirs during their marriage, *favore dotis*, which may be without a contract.

2dly, The husband being in present current possession, from the very date of the wife's *safine*, his possession is sufficient to validate hers.

THE LORDS found the Lady's infestment to be first validate by possession.

It was further *alleged* by Patrick Murray, that this infestment was *donatio inter virum et uxorem*, not being founded on the contract of marriage, which was satisfied before; at least it is to the prejudice of him a lawful creditor, who was infest before the Lady; and therefore seeing the Lady's infestment is so free and lucrative, both parties being now disputing the possession and power therein; the Lady's infestment cannot prejudge him. That the contract of marriage was satisfied, he condescends thus; that the husband was obliged to infest his wife in certain lands, and to make them worth eighteen chaldars of victual, or otherwise, at her option, to infest her in an annualrent; *ita est*, she made her option, and was infest in the property, after which she cannot return to this annualrent in question.—It was *answered* for the Lady, That the clause being conceived in her option, must be interprete her option not to receive the infestment, but to enjoy either of the two she pleased. *1st*, A *safine* cannot import her choice, which might have been given by her husband, without her knowledge upon the precept, contained in the contract of marriage, unless it were instructed, that she did accept the same by a *safine*, *propriis manibus*, or otherwise; and that her infestment was a valid effectual infestment. *2dly*, Albeit that article of the contract of marriage were satisfied by taking her choice; yet she being thereafter infest, upon her charter produced, in her *liferent* lands, and in the annualrent in warrandice thereof, or with power to her to make use of the annualrent itself, *principaliter*, at her option; albeit her choice once made, will exclude her from the annualrent, *principaliter*, yet not in so far as she is infest therein, to warrant and make up the principal lands; which can be accounted no donation nor deed, in prejudice of a creditor, because it doth but make real and effectual the personal obligation of warrandice contained in the contract.—It was *answered* for Patrick Murray, That these allegeances *non competent hoc loco*, but he must only point the ground, until the Lady obtain a declarator of what is defective of her *liferent* lands; but cannot come in by way of reply.

THE LORDS found, That the Lady's acceptance of the *liferent* infestment, satisfied the obligation in the contract of marriage, and did not sustain the posterior charter, to give her any further choice; but sustained the right of annualrent constitute therein, in warrandice of the *liferent* lands *hoc loco*; and ordained the Lady to condescend upon the several rooms, what they paid, and what was

wanting, that she might be preferred in the first place, and Patrick Murray in the second place. See HUSBAND and WIFE, *Fol. Dic. v. 1. p. 89. Stair, v. 1. p. 230.*

No 36.

1667. July 18.

LADY BURG against HER TENANTS, and SIR JOHN STRACHAN.

THE Lady Burg pursues the tenants of her liferent-lands to remove; compearance is made for Sir John Strachan, who alleges that he stands publicly infest in this land, and in possession, and will not suffer his tenants to remove.—It was replied, That the pursuer's infestment in liferent is long before Sir John's, and could take no effect till now that her husband is dead.—It is answered, That the Lady's infestment is base, and, therefore, though it be prior to Sir John's public infestment, it cannot be preferred thereto; unless it were alleged it was clad with possession before the public infestment, either by the Lady's own possession, or at least by her husband's possession; but she cannot allege either, because these parties were in possession from the date of her infestment, till the date of this public infestment.—It was answered for the Lady, That she offered to prove her husband was in possession after her infestment, and before the defender's infestment, by himself, or at least by those who derived temporary, or redeemable rights from him, or his authors, as liferents, wadsets, and unexpired comprisings.—It was answered, That albeit *favore matrimonii* the husband's possession, though common author, be counted the wife's possession, yet the possession of a wadsetter, or appriker, are neither said to be the wife's possession, nor the husband's, because they possess *proprio jure*, and the husband had only a reversion.

No 37.
The husband's possession is accounted the wife's possession, so as to validate her base right; although it be not the natural possession, but by tenants, wadseters, &c.

THE LORDS found the allegiance relevant for the Lady, that her husband possessed after her infestment, and before the public infestment, either by himself, or by any deriving a temporary right from him, or his authors.

Fol. Dic. v. 1. p. 89. Stair, v. 1. p. 475.

* * Dirleton reports the same case :

A base infestment given by a husband to a wife, was sustained after the husband's decease, as public, and clad with possession, albeit the husband was not in possession the time of granting the right: In respect, either he, or others, by redeemable rights and tacks given by him, came in possession thereafter.

Dirleton, No 100. p. 39.

1672. February 21.

JAMES REID against COUNTESS of DUNDEE.

MR. JAMES REID being infest in an annualrent by the Earl of Dundee, pursues a pointing of the ground; compearance is made for the Countess of Dun-

No 38.
A wife's base right, flowing from her husband, was