

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

No 38.  
held to be  
good by the  
husband's  
possession, al-  
though not  
the natural  
possession ;  
which was  
enjoyed for  
the time by  
his mother, a  
liferenter.

dee, who produces her infestment by the Earl her husband, of the lands in question in liferent, and that in lieu and place of certain other lands, whereunto she was provided by her contract of marriage, and which she renounced at her husband's desire ; and bearing, because the Earl's mother was infest in the same lands in liferent, that in place thereof the Countess should be infest in other lands, during his mother's liferent, and thereupon craves preference.—It was *answered*, That the Lady's infestment is base, not clad with possession, whereas the pursuer's infestment is public ; and albeit the husband's possession is ordinarily holden to be the wife's possession, yet that is only as to infestments for implement of contracts of marriage *in favorem matrimonii*, but not as to any other infestments. *Ita est*, This infestment is not for implement of the contract of marriage, but in place of the lands so provided and renounced. *2do*, The act of Parliament anent public and private infestments, allows only base infestments clad with possession ; and though custom hath extended that statute, that although the wife possess not, yet the husband's possession shall be reputed hers, which is introduced by custom in favour of wives that cannot otherwise possess ; yet custom hath never extended it further than to the natural possession of the husband ; and here the husband's mother being in natural possession, the husband cannot be said to possess, unless he did either possess by himself, or by his tenants, or chamberlains ; but a possession derived from his father or himself, to a wadsetter or liferenter, cannot be said to be his possession ; these possessing *proprio jure*, and not being in his power ; and though a liferenter's possession might be interpreted to be a civil possession for the fiat, yet that is but *fictione juris*, and there cannot concur two fictions in the same point, otherwise there could be no end ; for if the mother had given a distinct right, and that party had been in possession, that party's possession would be the mother's possession, and the mother's possession would be the son's possession, and the son's possession, as husband, would be this Lady's possession ; and albeit if the old Lady's right had been constituted by a reservation in this Lady's right, the old Lady's possession might be interpreted as flowing from this Lady's right ; yet here it is not constituted by reservation, but is only related as being already constituted.—It was *replied* for the Lady, That by the constant custom the husband's possession is understood to be the wife's possession, to all effects and purposes ; neither is there any distinction, what kind of possession it be ; and albeit by the act of Parliament, base and private infestments, without possession, be postponed to posterior public infestments, yet that is expressed in regard of the fraudulency and latency thereof ; but where there is no fraud, but an onerous cause, the least possession is sufficient, as the possession of warrandice lands is sufficient by possessing the principal lands ; and infestment of annualrent is valid against public infestments before the term at which the annualrent is payable, because the annualrent cannot be accounted latent while it cannot act ; so this Lady's infestment being not only for an onerous cause, viz. in lieu of an equivalent infestment renounced ; but also being most favourable, being a wife's provision, which creditors have good reason to inquire after ; and cannot be said

to be latent, though there were no contract of marriage, it being both ordinary and due by husbands who have ought to provide their wives; and this being in place of the provision by the contract of marriage, hath the same privilege and favour therewith; but whatsoever might have been pretended against base infestments, as latent and fraudulent, before the act of Parliament anent the registration of sasines, this infestment being granted after that act, no creditors can pretend that it was latent, or they deceived thereby.

THE LORDS sustained the liferenter's infestment, and preferred the same to the creditors posterior public infestment.

*Fol. Dic. v. 1. p. 90. Stair, v. 2. p. 74.*

\* \* \* Gosford reports the same case :

MR JAMES REID, as being infest in an annual rent of lands in the parish of Innerkeithing, did pursue a pouding of the ground against the tenants, wherein comparance was made for the Countess, as liferenter of the said lands, who *alleged*, That albeit her infestment was posterior, yet it being given her in remuneration of the lands provided to her by contract of marriage, which she had renounced, and she being in possession by virtue thereof, in so far as her husband being Earl of Dundee, and heritor, did possess the same by his mother, who was liferenter of the same lands, and uplifted the mails and duties during her lifetime. — It was *replied*, That albeit the proprietor of lands, out of which a liferent is given, is able, by the liferenter's possession, to defend against prescription, or to give the benefit of a possessory judgment to the heritor; yet a third party getting a right from the heritor, who is not in natural possession, but only *fictione juris*, by the liferenter's possession, as said is, the third party's right can never be said to be clad with possession by such a reservation, out of the author's right; which were of a most dangerous consequence; seeing those who *bona fide* acquired a right to lands, can never be in security, if such private rights, not clad with natural possession, but by subtle reservation, should be sustained. — THE LORDS did, notwithstanding, prefer the Countess, albeit the lands in question were only given in remuneration of those contained in her contract of marriage, upon this special ground. That her infestment did bear, that the lands being affected with the old Lady's liferent, therefore, during her lifetime, she was provided to the like rent, out of the barony of Glassary, which did import a reservation of the old Lady's liferent; and so her possession was the Countess's possession, and made her right public. That by act of Parliament, ordaining all sasines to be put in the public register, creditors who contracted with the husband, might easily know what infestments of liferents were given to their wives, either of lands contained in the contract of marriage, or given in remuneration.

*Gosford, MS. No 479. p. 249.*

No 38.

\* \* Dirleton reports the same case :

AN infestment granted to the Lady Dundee by her husband, in recompence of a former provision she had by her contract of marriage, and which she had renounced, was questioned by a creditor, who also was infest; upon that ground, that the Lady's right was base; and though rights granted to wives, upon their contracts of marriage, or after marriage when they have no provision, or in recompence of former provisions, are sustained albeit base, because the husband's possession is the wife's possession; yet the right in question ought not to be sustained upon that ground; in respect the husband was not in natural possession, the lands being liferented by his mother; and, by the act of Parliament, the possession whereupon base rights are sustained, is only to be understood of natural possession:—THE LORDS preferred the Lady, and repelled the said defence, upon these considerations, that infestments given to wives, in the cases above-mentioned, are construed to be public, and are not presumed to be fraudulent: And wives are not in the condition of other creditors who may perfect and make their rights public; whereas wives can do nothing themselves; and it is to be presumed that wives are provided by their husbands; so that those who are to acquire rights from them, ought to enquire if their wives be infest, especially seeing, since the act of Parliament 1617, anent registration of fines, they may easily know the same.

Act. Cunninghame, &amp;c

For the Lady, Lockhart &amp; Lermonth.

Dirleton, No 161. p. 65.

No 39.

1685. March 17. LADY EARLSTON *against* COLONEL MAYNE and Others.

A Lady's right of liferent was reserved in the body of her husband's right; but his charter and fine did not mention it, yet it was preferred to donatars of his forfeiture.

MARY HOPE, Earleston's Lady, competing with Colonel Mayne, Ogilthorp and Cornwal, the three English donatars of her husband's forfeiture, on this ground, that her right of liferent was public, in so far as it was reserved in the body of her husband's infestment:—*Answered*, The charter and fine, which only make a right public, bears nothing of her liferent.—*Replied*, The charter related expressly to the conditions and provisions contained in the procuratory of resignation, whereof her jointure is one.—THE LORDS, in respect of the favour of a jointure, found this general reservation equivalent to a confirmation; and so preferred her to the donatars, who, in strict law, had much to say.

Fol. Dic. v. 1. p. 90. Fountainball, v. 1. p. 353.