

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. Cuninghame, &c

For the Lady, Lockhart & 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 Cornwall, 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.