

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 pointing 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 pointing the ground, which could

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 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.