

1670. February 22.

The COUNTESS of CASSILIS *against* The EARL of CASSILIS.

By contract of marriage betwixt the deceased Earl of Cassilis and his lady, he is obliged to infest her in certain lands, with absolute warrandice, and obliges him that the lands did pay then, and several years before, 6000 merks of yearly rent, beside kains and customs, and over and above teinds and feu-duties; and, if it shall please the lady, within six months after the Earl's death, rather to choose 6000 merks of free rent, than to retain the possession of the land, and to give a tack to his heirs and successors of the liferent lands; then and in that case, he obliges his heirs and successors to pay her 6000 merks yearly. Therefore the Countess has made it in her option, and offers to take, and pursues the Earl her son, to pay yearly the said sum of 6000 merks of free rent; who *alleged*, that albeit that clause be mentioned to be free rent, yet he must have allowance of cess, maintenance, and other public burdens; because by free rent can only be understood, free of teinds and feu-duties, in respect that this being a tack-duty for the liferent lands, the lady thereby can be no further free, than if she enjoyed the whole lands, which the Earl is only obliged to make worth 6000 merks of yearly rent, over and above teind and feu-duty; but neither does it bear generally of free rent, much less of public burdens, and therefore the subsequent clause for the tack duty, albeit it bear free rent, yet can it only be understood to be free of teind and feu-duty, and not to be free of public burden, which is further cleared by the act of Parliament 1646, ordaining all liferenters to bear proportional burden for any annualrent, or tack-duty, belonging to them in liferent, unless they were expressly freed of maintenance. It was *answered* for the Countess, That she oppones the clause of her contract, bearing free rent, without limitation; and contracts of marriage are to be extended in favours of women; and as to the act 1646, the same is repealed, and not revived again.

THE LORDS found, That by the contract of marriage, the Countess was not free of cess and maintenance, which were the only points at interlocutor; but if any debate arose concerning the ordinary taxation, or the outrikes, or allowance to militia horse, the LORDS would hear the parties thereanent; and accordingly the next day found the clause did free my Lady of the ordinary taxation, militia, and so much of the cess as the tenants of the lands paid to my Lord.

*Fol. Dic. v. 1. p. 144. Stair, v. 1. p. 673.*

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

THE Countess being provided, by her contract of marriage, to her conjunct fee lands, which were designed, and the Earl her husband obliged to make them worth of free rent yearly the sum of 6000 merks; as likewise obliged his heirs,

No 5.  
A wife being provided to a certain yearly sum of *free rent*, it was found that this must be over and above the teind and feu-duty; but that it did not free her from the cess and maintenance.

No 5. in case the Lady should make her election, to pay 6000 merks yearly, at two terms in the year, at her own dwelling-house; she having declared her election, did pursue the Earl her son for the said 6000 merks, for bygones and in time coming. It was *alleged* for the defender, that he ought to have deduction of cess and taxation, which was prior to the contract of marriage, and of all public burdens for the militia. It was *replied*, that conjunct fee lands, bearing an obligation to be worth of free rent 6000 merks; and the said sum of money, in case of her election, which she now hath declared, being to be paid her entire, without any burden, it cannot be subject to cess or any other public burden.

THE LORDS having considered the conception of the contract, which did not mention public burdens, but did bear only free rent, which had respect to the lands whereof the teinds did not belong to the Earl of Cassilis, at least the Lady was only provided to the stock, they found that she was liable to cess conform to act of Parliament 1646, anent liferenters; but declared her free of all taxations prior to the contract of marriage. And as to the burden of the militia, they did likewise declare her free; albeit there was no reason, but as a liferenter, she should be liable in these as well as cess. But, in respect of the clause of the contract, which was conceived as said is, it was carried by plurality of votes, that she should be free of the burden of the militia.

*Fol. Dic. v. 1. p. 144. Gosford, MS. p. 110.*

No 6.  
A party being bound to obtain himself *validly and sufficiently infest*, the Lords found this imported a public infestment.

1678. July 18. JA. BUCHAN of Ockhorne *against* MARJORY JAMIESON.

ONE being obliged by minute to infest in lands, the LORDS found it behoved to be a public infestment, a base not securing against feudal delicts, and the mediate superior.

*Fol. Dic. v. 1. p. 144. Fountainball, MS.*

1682. March. BUCHAN *against* JAMIESON.

No 7.  
Found in conformity with the above.

MARJORY JAMIESON, relict of the deceased Mr John Alexander, advocate, by contract betwixt her and Andrew Alexander, being obliged to obtain herself infest in the lands of Artbothic, validly and sufficiently, and being infest, to dispoise the same in favours of Andrew Alexander her husband's brother; and which contract being assigned to James Buchan, and he having charged the said Marjory Jamieson, she suspended upon this reason, that she was already infest, in which case the LORDS found, that the suspender being obliged to obtain herself infest did import a public infestment.

*Fol. Dic. v. 1. p. 144. Sir P. Home, v. 1. No 232.*