

No 1.

standing whereof, it was found conquest of an annual rent, and that she should be infeft therein. The husband had conquered the wadset of a tenement in Aberdeen, wherein she was also ordained to be infeft, and in case of redemption that the money should be re-employed to her behoof during her lifetime.

Fol. Dic. v. 1. p. 196. Haddington, MS. No 2814.

1628. *March 12.*LA. DUMFERMLING *against* The EARL.

No 2.

A husband was bound by his contract of marriage to infeft his wife in all lands and heritages he should conquest during the marriage, and having, during the subsistence thereof, first acquired tacks of certain lands, and some years thereafter, the heritable right thereof, she was found to have right only to the rents of the lands as payable to by these tacks, but, not to the profit accruing from the tacks, in respect there was no express stipulation in the contract, providing her to the liferent of tacks or other securities purchased during the marriage.

IN an action by the Lady Dumfermling against her son, as heir to his father, for fulfilling of that part of her contract of marriage, whereby her husband was obliged to infeft her with himself, in all lands and heritages, which he should conquest the time of their marriage; it being controverted betwixt the parties, if that clause of the contract, of the tenor foresaid, (for that was the tenor of the same) did extend to lands or teinds, whereof the umquhile Earl, her husband, since their marriage had acquired an heritable right to himself and his heirs; the same lands and teinds before that heritable right, being acquired by her said husband, in tack and assedation also since the marriage, and before the heritable right acquired by him two years at least, in respect whereof he being tacksman, and the tack being set for longer space, that would endure longer than the Lady's lifetime; the defender *alleging*, that the posterior acquiring of an heritable right could not be found, such a conquest, as might compel the heir, to give the relict infeftment thereof, as of lands whereof she could be effectually infeft, as conquest lands, the same being under so long tacks procured before, which ought of reason to stay the effect of the infeftment, so far as might extend to the profit of the lands, which would only pertain to the heir, by reason of the preceding tacks; and the pursuer *replying*, that if this should have place, all contracts bearing such clauses should be eluded, and the wives defrauded of their provision introduced in their favours; for, to prejudge the infeftment, which is provided to the wife, it should be then lawful to the husband who minds to conquest lands, whereby the wife would receive the benefit of infeftment, to defraud her thereof, by taking a preceding long tack of the same, whereof he shortly thereafter takes an heritable right, though the preceding tack is acquired also since the marriage, yet he might elude that clause of infeftment, if shortly after the tack he had also acquired infeftment, which is against the mind of the contract, appointing her to be infeft in all which he should conquest; this exception was sustained, notwithstanding of the reply; for the LORDS found, that the acquiring of an heritable right by the husband, of that whereof he had acquired tacks two years of before, of the endurance foresaid; and albeit the tacks were also acquired by the husband since the marriage, they could not be repute a conquest, which might compel the heir to give the relict infeftment profitably, or of any greater benefit concerning the lands so acquired by her, except so far as was further acquired by the heritable

right, in yearly profit, than was contained in the tack, viz. for the tack-duty allenary, if the infestment did free the receiver of that tack-duty; for, albeit the heir ought to give her infestment thereof, as of a purchase, yet it was found it ought not to be so simply given, but with exception and reservation of the tack foresaid, and the benefit thereof to the heir; and, as concerning the destituting of the party of the mind of the contract, which intends to give the wife her liferent of all which the husband should acquire; this contract was not of that tenor, but did only bear, to infest her in all lands and heritage the husband should conquer; and, if parties agree to provide the wife to liferent of tacks or bonds, or other securities and benefits purchased by their husbands, the same ought to be so expressed; but not being expressed by the parties in writ, could not be extended otherways than they agree in the words of their contract.

No 2.

Act. Aiton & Stuart.

Alt. Hops, Nicolson & Burnet.

Clerk, Hay.

Fol. Dic. v. I. p. 196. Durie, p. 359.

1629. February 20.

DOUGLASS against WHITE.

A HUSBAND being obliged to his wife in his contract of marriage, to infest her in liferent in all lands and annualrents, which he should conquer and acquire the time of their marriage; and he having lent out some monies to certain debtors by obligations, whereby they were obliged yearly to pay to the creditor 10 for 100, ay and while the principal sum were paid; the saids bonds neither bearing a clause of infestment therefor, nor of paying annualrent as well not infest as infest, but being of the foresaid tenor, to pay annualrent ay and while the principal sum were re-paid; it was found, That the heir of the husband, albeit he could not give her infestment and sasine of the said annualrent, he neither being infest therein, nor the creditor bound to give him infestment, yet that the heir should give her her liferent right *habili modo*, of the said sums, albeit the tenor of the contract proports as said is.

No 3.
A husband was bound to infest his wife in the conquest of all lands, annualrents, &c. He lent out money upon annualrent, bearing no clause of infestment, yet it was found that the clause comprehended this subject.

Clerk, Hay.

Fol. Dic. v. I. p. 197. Durie, p. 428.

* * Spottiswood reports the same case: .

By contract of marriage passed between James Douglas and Elizabeth White, he was obliged to infest her in all lands and annualrents conquest by him during the marriage. After his decease, she and Mr Thomas Reidpath, her second husband, pursued the heir of the first marriage, Robert Douglas, to infest her in liferent, in the annualrents of certain heritable bonds acquired by umquhile James in his time. *Alleged*, That clause in the contract was only to be under-