

not be sustained, while there were a precognition first taken, for trial in what state it was the time of the acquiring of the defender's liferent tack, and what would repair the same; and also it being *alleged*, That this action could not be sustained against the liferent tacksman, seeing the act of Parliament, which is the ground of the pursuit, extends not to such rights, but only to conjunct fees, or such infeftments of liferent, and cannot be extended to tacks, for it is not proper against them; and any who conduces with an heritor to take a tack of lands or houses, ought not to be burdened with these burdens, the like whereof was never sustained; for a conductor can never be holden to this; but, on the contrary, a conductor more properly may have such action against the setter, especially this pursuer himself being full proprietor, and his property no ways affected with a liferent infeftment; attour he *alleged*, That such an action was never heard, neither pursued nor sustained against the donatar to a tacksman's liferent; for the King could not be in law holden to this reparation, and consequently not his donatar, no more than the King or his donatar are holden to pay the rebel's debts. These allegiances were all repelled, and it was found there needed no precognition; and also it was found, that a liferent tacksman was as well subject to this reparation as one infeft in liferent, seeing it was a tack granted by a contract, by the which the whole property was granted by the father to the son, and the son again grants a liferent tack to the father, without any payment therefor; and it was not as a tack set *inter locatorem et conductorem*, which had a competent duty to be paid therefor by the tacksman, in which case the argument had been more considerable; and also it was found, that the donatar to the liferent was subject, as well as the tacksman's self, to pay the charges which should be tried necessary to this reparation, in so far as it was worse now than it was at the time of the acquiring of his liferent escheat, and declarator thereupon; and that the said donatar should keep the same thereafter, as it should have been when it was repaired; which the LORDS found, either he should be holden to do, or else to quit his right, of either of which he had his option.

Act. *Advocatus, Nicolson, et Gibson.*Alt. *Stuart et Cunningham.*Clerk, *Hay.**Durie, p. 744.*

1663. June 18. MARGARET FLEMING *against* JAMES GILLES.

MARGARET FLEMING being infeft in an annualrent of 700 merks, out of houses in Edinburgh, in liferent, with absolute warrandice from all dangers, perils, and inconveniencies whatsoever, pursues declarator against the said James Gilles, as heritor, for declaring that her annualrent should be free of all public burden, since the rescinding of the act of Parliament 1646, whereby liferenters were ordained to bear proportional part of their annualrents with the

No 35.  
The liferenter of an annualrent found liable in public burdens proportionally with the *fiar*.

No 35. heritors. The defender *answered*, The libel was not relevant, for albeit the act of Parliament was rescinded, the justice and equity thereof remained, that whatever burden were laid upon land, should lie proportionally upon every part thereof, and every profit forth of it.

Which defence the LORDS found relevant and assoilzied.

*Stair, v. 1. p. 191.*

No 36.

1682. *January.*

WILKIE *against* MR HENRY MORISON.

A TENEMENT in Edinburgh, out of which the heritor was obliged, by his contract of marriage, to infest his spouse in an annualrent of 400 merks, having sunk so after the dissolution of the marriage, that it was demolished by order of the Magistrates, for fear of falling upon people; the relict pursued the heir to rebuild the tenement, and pay her the 400 merks yearly, since it was ruinous and uninhabited.

*Answered*; The defender was only obliged to warrant the right of annualrent against eviction; and there was no personal obligation in the contract to pay the 400 merks.

THE LORDS found the defender liable in the terms of the libel, and decerned him to rebuild the tenement, and to pay the bygone annuities since it became uninhabitable, in respect it was not demolished *casu fortuito* by fire or otherwise, but upon the account of the natural decay thereof.

*Harcarse, (LIFERENTS.) No 667. p. 190.*

\* \* \* Sir P. Home reports this case :

By contract of marriage betwixt ——— Morison and Agnes Wilkie his spouse, he being obliged to infest her in an yearly annualrent of 400 merks, out of a tenement of land, during her lifetime; and the said Agnes having pursued Mr Harry Morison, as having represented the said ——— Morison his brother, upon the warrandice in the contract, for payment of her annuity yearly; *alleged* for the defender, That he could not be obliged to pay the annuity, because there was no personal obligation in the contract for payment thereof, but only to infest her, which was accordingly done; and if this tenement has become ruinous, she ought to repair it herself. *Answered*, That, by the clause of warrandice in the contract, the defunct was obliged to warrant the annualrent land and tenement to be free and sure, for her liferent use, from all evictions and burdens that might befall thereto; and the tenement having become ruinous, and taken down by the Dean of Guild's order, the defender ought to be liable to the pursuer for her annuity, ay and while that tenement be rebuilt.—THE LORDS found the defender liable for the bygone annuity, and