

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 The defender *answered*, The libel was not relevant, for albeit the act of Parliament was rescinded, the justice and equity thereof remained, that whatever burden were laid upon land, should lie proportionally upon every part thereof, and every profit forth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

yearly in time coming, ay and while the tenement were rebuilt, that she might affect the same for her annuity.

No 36.

*Sir P. Home, MS. v. I. No 247.*

1733. December 18. CUNNINGHAM *against* CUNNINGHAM.

No 37.

IN a process against the representatives of a liferentrix, founded upon the statute and common law, she having suffered the mansion-house, during her possession, to go into disrepair, the question occurred, if it was necessary for the pursuer, in order to estimate the damages, to bring a distinct proof, by two witnesses, of the condition of the houses at the Lady's entry, which was now become impracticable by the lapse of time; or if it was sufficient to bring a proof, as far back as the memory of man could go, which must presume *retro*, unless the defender would prove reparations *ab ante* bestowed by the liferenter. THE LORDS found, that the pursuer must prove the condition of the mansion-house, both at the time of the entry of the liferentrix, and the time of her death. See APPENDIX.

*Fol. Dic. v. I. p. 550.*

1742. February 9. CREDITORS OF MITCHELL *against* WARDEN.

No 38.

JOHN MITCHELL merchant, who stood bound by his contract of marriage to secure his wife Janet Warden in a liferent of 500 merks yearly, made a purchase of an old tenement, and of a waste area adjoining to it, taking the disposition 'to himself and wife, and longest liver of them, in liferent and conjunct fee.' And, upon this disposition, infeltment was taken in name of both. Mitchell's scheme in making the purchase, was to have a sufficient area, upon which to build a large new tenement. He accordingly razed the old tenement to the very foundation, and erected a large new tenement, for which he got a rent of L. 60 Sterling, thrice the rent of the old tenement. Mitchell became bankrupt, and, after his death, there ensued a competition about the rents of this new tenement, betwixt Janet Warden the relict, and the adjudging creditors. She claimed the rents of the new tenement, to the extent of the liferent provision contained in her contract of marriage, upon this footing, that the liferent settled upon her of the old tenement and waste area, must be understood to be performance *pro tanto* of her husband's obligation to secure her in a liferent of 500 merks yearly.

A husband took a disposition to himself and his wife in liferent and conjunct fee, in implement of, an obligation in his contract of marriage, to secure her in a certain sum yearly. He demolished the house, and built a new one on the area, which brought a higher rent. The wife, in competition with creditors, found to be preferable, to the extent of the sum in her contract.

The creditors, on the other hand, *contended*, that the old tenement being *funditus* demolished, her liferent of the same was at an end; and that nothing remained to her, but a personal claim against her husband for recompense or for damages. And for this the Roman law was appealed to, 'Eo amplius con-