

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-

No 38.

‘ stat, si ædes incendio consumptæ fuerint, vel etiam terræ motu, vel vitio
‘ corruerint, extingui usum fructum, et ne aræ quidem usum fructum deberi.’

It was *answered* for the relict, That her case comes not under the rule laid down in the Roman law; and that there is a material difference betwixt the *interitus rei casu fortuito*, and demolishing the tenement *dedita opera*, in order to rebuild. It was observed, that if a liferenter himself demolish the house, and rebuild the same, his liferent subsists in the new house as it did in the old, which is in effect the present case. Mitchell could not demolish the old tenement without his wife’s consent, and her consent must have the same operation as if she herself had erected the tenement. In effect, they clubbed together to the work, and they were to be sharers in the benefit, in proportion to their respective interests. It is true, it was the husband who laid out the money, which procured the wife a more extensive liferent than she had before; but then he stood bound, by his contract of marriage, to give her a more extensive liferent, to wit, 500 merks yearly, to which she restricts her claim of liferent upon the new tenement. She does not pretend to compete with the creditors as to the surplus; seeing this surplus may fall under the description of a *donatio inter virum et uxorem*.

The relict was found entitled to the rent of the tenement, to the extent of the sum for which she was creditor by her contract of marriage.

Rem. Dec. v. 2. No 26. p. 42.

. C. Home reports this case:

THE said John Mitchel, in his marriage-contract with Janet Warden, became bound to pay her the yearly liferent-annuity of 500 merks, in case of children of the marriage, the event that happened; thereafter he, *anno 1731*, purchased an old tenement, which had fallen to his wife and her two sisters, by their brother’s decease, and the disposition was taken to himself and wife, and longest liver, in liferent and conjunct fee; as also it sets forth, that he had paid 4900 merks to them, as the price of the same, whereof each grants, for their own part, receipt. Mr Mitchel razed the old tenement, and built a new large one in its place, which cost him a great sum of money; and, having become bankrupt, he died in the year 1735. Thereafter his creditors led adjudications against his apparent heir, upon which a competition ensued betwixt them and the relict, about the rents of this new tenement.

Pleaded for the Creditors; That the liferent right, settled on the widow by the disposition, was a *donatio inter virum et uxorem*, revocable and revoked by the husband’s posterior contractions; notwithstanding thereof, the creditors were willing to yield their preference in the new tenement, to the extent of the yearly rent of the old, wherein she was infeft, which, it is believed, amounted to about L. 20 Sterling; and as to the superplus rents, the creditors *argued*, That the liferent of the old tenement, granted by the husband to his wife *stante*

matrimonio, was a donation revoked by the husband's after-contractions; and if her right to the old tenement was revoked, she could lay no claim to the new. *2dly*, Supposing the liferent to be a remuneratory provision, and not revocable; yet, the tenement being thrown down and demolished, her liferent ceased, and she could have no claim to the new one, further than to make up the loss she sustained, by demolishing that wherein she was infeft.

Pleaded for the relict; That she had no other fund to trust to, for implement of the provisions of her contract of marriage, but the rents of this new tenement; and that, when she disposed her third part of the fee to her husband, alongst with her sisters, with the burden of the liferent of the whole, that liferent was all she got for the disposition of her third part; so that she purchased the same for an onerous cause; it was therefore no donation, and so not revocable. And as to the narrative of the disposition, where she acknowledges having received her third share of the price, it was *inter conjunctas*, and false in fact, as could yet be proved. It remained therefore to be considered, whether any improvements or meliorations upon the subject did accrue to her, during the subsistence of that liferent-right; as to which it was certain, by the principles of law a liferent gave a full title to every benefit and profit arising from the subject during the continuance thereof. That in this case, as it was granted to take effect at the dissolution of the marriage, it must be understood to be granted *tantum et tale*, as the subject eventually proves to be, at the time the liferent is to take place. If the subject is deteriorate *sine dolo malo*, the liferentrix must sustain the loss; if meliorate, she is entitled to the profit. *2dly*, If needful, it can be proved, that Mr Mitchel touched of his wife's money, (besides this tenement) above 8000 merks, by means of which he was enabled to build this new tenement; so that, in effect, it was built with the wife's money. But, supposing that the creditors were entitled to reduce the liferent-infeftment *quoad* the excrescent value of the rents of this new tenement, over and above the L. 20 Sterling, which was the rent of the old tenement, in as far as the benefit thereby given to the wife could be construed to be gratuitous; yet she would certainly be entitled upon the same principles as is obruded against her, to support her liferent, to the full extent of every claim of debt whereby she was an onerous creditor, not only for the L. 20 yearly, as the acknowledged rent of the old tenement, seeing she was a most onerous purchaser of her liferent right, *quoad* that extent, but likewise for the 500 merks of liferent annuity, to which she was entitled by her contract of marriage.

Replied for the Creditors; That the disposition bears expressly, she got her share of the price; and although the narrative of a deed *inter conjunctas*, may not prove against third parties; yet, where the question is amongst the parties themselves, there is no reason why it should not prove. But supposing it true she had not got her share, as it was a bargain of sale for a price agreed on in money, she could have demanded it any time; and if she had brought a process

No 38.

against her husband for payment, he could have had no defence. It was therefore owing to her own neglect that she did not receive it; so that the liferent right he granted to his wife was not a remuneratory provision, since the man got nothing from his wife but what he stood bound to pay a full price for. Neither does it appear that the relict has any claim for the superplus rents in strict law, more than in equity; for the rule *in ædificatum solo, &c.* will not apply to the present case. If a man should take it in his head to build on a common, in which he is a joint proprietor, the other heritors might stop the work; but, if they do not, they have no interest in the house, further than to make up the damage by the loss of ground. In like manner (as here) where a man builds upon his liferented property, with a view to profit, or for his own conveniency, without any intention to benefit the liferentrix, she may oppose the building, but will not, it is thought, have any claim, further than for damages. See l. 8. and l. 5. § 2. *Quib. mod. Usufr. amit.* 15th December 1704, Adamson *contra* Nicolson, *voce* PERICULUM.

THE LORDS found, that the wife was entitled to the rent of the house, to the extent of the sum for which she was creditor by her contract of marriage; and, before answer as to other points, remit to be heard, how far the husband was *lucratus* by the wife's succession to her brother. See PRESUMPTION.

C. Home, No 190. p. 315.

1755. *March 5.* DAVID SCOT *against* PHOEBE FORBES.

No 39.

A liferentrix, on entering to possession, finding the house liferented ruinous, it was questioned, whether she or the fiar was obliged to repair it. Found, that neither of them was bound to repair it; but that, upon the liferentrix repairing it, her heirs, at the end of the liferent, would have a claim for the whole expense laid out.

THE deceased John Scot, the pursuer's brother, disposed in liferent to Phœbe Forbes his second wife (as an additional provision to those in her contract of marriage) 'the mansion-house of Hedderwick, gardens of the same, with that park called Clayland, consisting of about ten acres; which liferent right he binds and obliges him and his heirs to be good, valid, and sufficient to her against all mortals.'

The roof of the mansion house was entirely ruinous; and the question was, whether John Scot the heir, or Phœbe Forbes the liferenter, should be at the expense of repairing it?

THE LORDS, on the 28th of January 1755, found, "That the roof of the main body of the house of Hedderwick must be sufficiently repaired at the joint expense of Mr Scot of Hedderwick, and Mrs Phœbe Forbes the widow; and that he is obliged to contribute two thirds of the expence of said reparation, and she the one-third thereof; and that the materials of the present roof, and produce thereof, must be applied towards said repair; and that the said repair shall not exceed the sum of L. 60 Sterling, over and above the materials of the present roof; and ordained the said repair to be made by the said Mr Scot, at the sight