SECT. IX.

Fiar and Liferenter.

1672. *February* 2.

Captain GUTHRIE *against* LAIRD of MACKERSTON and his BROTHER.

No 74.
A jointure-house being burnt *casu fortuito*, the Lords found the heir not liable to rebuild it.

CAPTAIN GUTHRIE having married the Lady Mackerston, pursues the Laird of Mackerston for his aliment, during the time that his mother entertained him, both before her marriage and after, as belonging to the husband *jure mariti*, and by a particular assignation, and also for the aliment of his brothers and sisters, whom he was obliged to aliment; and pursues themselves likewise for their own aliment. The defender, Mackerston, *alleged*, That, for his own aliment, *non relevat*; because, his mother liferenting all the estate he had, she was obliged in law to aliment the heir, he having no other means; neither was he obliged to entertain his brothers and sisters, he having no means to entertain himself. And for the remanent children it was *alleged*, Absolvitor from their aliment, during their mother's viduity; 1*mo*, Because she was obliged, by the law of nature, to aliment her children, who had no other means; 2*do*, Though they had had means, yet the law presumes that she entertains her children *ex pietate materna*, especially seeing she never made any agreement for their entertainment with themselves or their friends; 3*tio*, As to the entertainment after her marriage, it being the continuance of the entertainment before her marriage, and her husband having declared nothing of his mind, it is presumed to have been *puro animo donandi*. The pursuer *answered*, That *pietas materna* takes only place where the children have no means; but if they have, the presumption ceaseth; and though no agreement was made thereanent, yet the LORDS ought to modify *secundum valorem*; and the third ground holds not at all *contra vitricum*; for then the mother being married, she had no power to exhaust her husband's means, by alimenting her children; but she only aliments, and is in the condition of any other stranger alimenting; 2*do*, There supervened 1000 merks to some of the children by legacy; and as for the heir, he had a considerable estate unliferented, standing in trust in the Earl of Roxburgh's person, who is now denuded in favour of the heir. It was *answered*, That what the Earl of Roxburgh has disponed to Mackerston his oye is out of mere favour, and that there was no trust declared, nor was there any access thereto upon that ground the time of the alimenting.

THE LORDS found the defence and duply, proponed for the heir, relevant to liberate him; and as for the other children, they found, that so long as they

No 74. were alimented by their mother, without any agreement, that the same was presumed to be *ex pietate materna*, by free donation, if they had no considerable estate; and that the having of 1000 merks of stock, as to persons of that quality, did not take off the presumption: They found also, that the entertainment of any person being of discretion, after pupillarity, without any agreement or signification to the party to remove, or otherwise to be liable, did presume that the entertainment was freely gifted, and infers no obligation, whatever means the party entertained have; but found, that a stepfather or stranger entertaining persons within pupillarity, though without paction, or declaring their mind, were not presumed to gift, but that the party alimented was liable *secundum valorem*.

The pursuer further insisted against Mackerston for the expenses of the melioration of the minister's manse, which the act of Parliament makes a real burden upon the heritor, and being paid by the liferenter, she hath in so far profited the heritor, and he ought to repay her. It was *answered*, That the burden of reparation of kirks and manses doth not affect the heritage or ground, neither is it *debitum fundi*; but doth only affect the heritor for the time, and no singular successor: *Ita est*, Mackerston was not then heritor, but the Earl of Roxburgh.

THE LORDS found the defence relevant, that the reparations was not *debita fundi*, affecting singular successors. The pursuer insisted, 3*tio*, For the reparations of the Lady's jointure-house, which being burnt by accident in the Lady's widowity, was repaired by the husband. It was *answered*, That the heir not being obliged *pro casu fortuito* to repair the jointure-house, the reparations thereof are *inædificata solo alieno*, *quæ cedunt solo*, and are presumed to be gifted by him, who knew *solum esse alienum*. It was *answered*, That the law allows the expenses of the materials and workmanship, or at least power to demolish and dispose of the materials; 2*do*, The general principle of law, *quod quisque tenetur in quantum lucratus est*, must necessarily take place, whether the repairer knew or knew not the ground to be another's.

THE LORDS found that the pursuer could not demolish or take away the thing that was *solo affixum*, nor crave any thing therefor, unless the house repaired be a house accustomed to be set to tenants for mail, and, in that case, found the heir only liable *in quantum lucratus est*.—*See* PERSONAL AND REAL.—PRESUMPTION.—RECOMPENCE.

Fol. Dic. v. 2. *p.* 61. *Stair, v.* 2. *p.* 57.

*** Gosford reports this case.

IN a pursuit at Guthrie's instance, as assignee by his wife, the Lady Mackerston, for alimenting three sons of her first marriage with the Laird of Mackerston, it was *alleged*, That the children having no visible estate of their own when their father died, the mother, without any paction with the child-

ren's tutors or friends, having alimented them until her second marriage, and the pursuer, after he had married her, continuing likewise to aliment them, the law presumes that what the mother did was *ex pretate materna*; and Guthrie being *vitricus*, by marrying the mother, continuing likewise that they should remain in family, without craving any thing for their aliment; it was a tacit consent and homologation of the continuance of the mother's *pietas materna*; and so, during the mother's lifetime, nothing being craved, and her assignation to Guthrie being but a little before her death, and not being special as to any thing due for the children's aliment, he could have no action for the same. It was *replied*, That mothers-in-law not being obliged to entertain their children, but only their father, *ex linea paterna*, their voluntary doing thereof hinders them not to pursue for the same; and if it were otherwise sustained, it might take away the benevolence of mothers, and expose the children to starving; 2*do*, Albeit a mother could seek nothing from children, when they had no means of their own, yet they getting a supervenient estate, albeit after the time of alimenting, they ought to be liable for the same; 3*tio*, A second husband suffering the children to remain in family, he cannot be presumed to do it *ex pretate*, being a stranger.—THE LORDS did, notwithstanding, sustain the defence; and found, that, albeit children had means of their own, yet, where a mother does aliment them without any paction, she can crave nothing for it during her widowhood; neither can a second husband, who marries her, if he does not intimate to the friends or tutors, that he will put them out of the family, and make an agreement with them, or that he do so to the children themselves, after they come to the years of discretion, and that they had an estate at that time. No 74.

It being likewise libelled, That the mother had paid for her liferent lands to the Minister, for reparation of the manse; which being profitably done for the son, who was apparent heir, and is now infeft, and in possession of the said estate of Mackerston; it was *alleged*, That he not being heritor for the time, but the Earl of Roxburgh, who then stood infeft, he was only liable for the said reparation, which not being *debitum fundi*, could not affect the defender, who was a singular successor.—THE LORDS did sustain the defence, and found the expenses of reparation of manses not to be *debitum fundi*. 3*tio*, It was libelled, That she had built a house on her liferent lands; and, therefore, that he ought to be refunded of the expenses, or have liberty to take away the materials. It was *alleged*, That there being a house there before, which was burnt during the liferenter's possession, albeit she had built a better house, the expenses were not due, seeing she had the benefit thereof during her lifetime, *et quiquid ædificatur in alterius solo, solo cedit*.—THE LORDS did sustain the defences; and found, that this house being *prædium urbanum*, and not in use to be let for mail and duty, whereby the fiar was not *locupletior factus*, the liferenter, or her assignee, could not crave back the expenses, nor any materials that were fixed work; but might take away that which was moveable and loose.

Gosford, MS. No 456. *p.* 337.