

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-