

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

of a tradesman to be named by the said Mrs Phœbe Forbes, betwixt and the first day of August next to come ; and failing thereof, allowed the said Mrs Phœbe Forbes to make the said repairs at the sight of a person to be named by the said Mr Scot, if he thinks fit to name any such ; and failing such nomination, the same to be made at the sight of the Sheriff of Forfar, or his substitute ; and the said repairs being made, found, that the said Mrs Phœbe Forbes is obliged to find caution in terms of the act of Parliament ; and decerned and found moderate expenses due to the said Mrs Phœbe Forbet, and ordained her to give in an account thereof."

Both parties reclaimed ; and it was *pleaded* for the heir, That it was optional for him to desert the house, and therefore he could not be bound to repair it. A liferent right is only a servitude, and binds the fiar to no more than *nuda patientia* ; so the fiar cannot be bound to repair. The civil law bound the liferenter to repair, and to find surety called the *cautio usufructuaria*, to leave the subjects in as good condition as he found them. *Quoniam igitur omnis fructus rei ad eum pertinet, reficere quoque eum ædes per arbitrum cogi, Celsus scribit, l. 7. § 2. D. De usu fructu.* The act 1491, James IV. P. 3. cap. 25. which is ratified by act 1535, James V. P. 4. cap. 15. bound the liferenter ' not to waste and destroy the subjects, but to hold them in sicklike kind as they are in at the time he gets and receives the same, he taking his reasonable sustentation or using in needful things without destruction or wasting thereof.'

Pleaded for the liferenter ; That as the disponent bound himself and his heirs to give her the liferent of a house, so he must have meant that house was to be made habitable. That indeed after it was made habitable, it was not unreasonable she should bear the *minores impensæ* for keeping it wind and water tight, and should find caution for that effect ; but never could it be expected, that she should lay out the *majores impensæ* of repairing a ruinous roof, far less of putting on a new one. This is expressly the doctrine of the civil law in the place above-mentioned, where, to what is recited, it is added, *Hactenus tamen ut usufructuarius sarta tecta habeat, modica refectio ad eum pertineat.* And although it is there also said, *si qua tamen vetustate corruissent, neutrum cogi reficere*, this was agreeable to the particular doctrine of the civil law ; by which it was held, if the liferent of a house was given in legacy, and the house fell, the liferent determined ; for the liferent of a house did not include the liferent of the area. But this is not held to be the law of Scotland. The acts 1491 and 1535 relate only to the not abusing or wasting liferented subjects, by altering the form of buildings, plowing pasture grounds, or felling woods.

In this case the Court seemed to agree, that none of the parties were bound to put a new roof upon the house ; so the question came to be, In case the liferenter should repair, how far she could have repetition from the heir ? Upon this the Court was almost equally divided ; some were of opinion, that, if the liferenter should repair the roof, she and her heirs would at the end of the life-

No 39. rent have no further claim from the heir than *in quantum esset lucratus*. Others said, this was entailing a law-suit.

Upon the first of March 1755, the LORDS found, "That neither Mr Scot, nor Mrs Phœbe Forbes, are obliged to repair the roof of the house in question; but that she is entitled to repair the same, and that the said reparation, if made, ought to be at the sight of the Sheriff of Forfar, or his Substitute, at whose sight also the account of expenses of said reparation is to be made up; and found, that, at the issue of the liferent, Mr Scot is liable to repay to the heirs of the liferentrix the whole expenses of the said reparation, conform to the accounts to be made up; but, as to the expenses of process, adhered to the former interlocutor."

And, upon a reclaiming petition by Mr Scot, praying for an explication of some things in this interlocutor,

"Found, that the expense of repairs must not exceed eighty pounds Sterling; and that the liferentrix must find caution immediately with respect to the gardens and inclosures, as also with regard to the house, after the repairs are made, in the words of the act of Parliament, and modify the account of expenses given in to £. 24 : 10s. Sterling, and decern; and also decern for the expenses of extracting the decret."

Act. Lockhart.

Alt. Wedderburn.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 386. Fac. Col. No 148. p. 220.

1755. August 7.

Major THOMAS COCHRAN, and Others, Trustees appointed by the deceased CHARLES COCHRAN, Esq; of Culross, *against* Major-General JAMES COCHRAN.

No 40.
A person getting the liferent of a house, and of the furniture thereof, must use the furniture in that house only.

CHARLES COCHRAN of Culross, by a disposition, to take effect after his death, vested his estate, heritable and moveable, in certain trustees for uses; and, by the same deed, he gave the liferent of the house of Culross, and household furniture, gardens, and inclosures, to his brother Major-General James Cochran; who, after the death of Charles, attained the possession of these subjects.

The Trustees brought an action against the General, for having it found, *1st*, That he could only use the household furniture in the house of Culross. *2dly*, That some very fine table-linen, of Dutch damask, cut and shaped in 1663, but never sewed, nor used, did not fall under the liferent grant of household furniture; and, therefore, that the General ought instantly to restore them to the Trustees.

It was *plcaded* for the defender, against the *first* conclusion of the libel; That, as he had got right to the liferent of the furniture in the house of Culross,