

No. 2. terest of that arrear, the capital being a burden upon the children themselves, as having right to the fee of the estate.

The Court therefore found, "That the burden of the arrears of annuity falling due to Mrs. Hay, and, during the subsistence of the marriage between Mr. Borthwick and Mrs. Lunn, ought to be borne by Mrs. Lunn and her children, in proportion to their respective rights of liferent and fee in the estate of Alexander Hay, the granter of the annuity."

Lord Ordinary, *Meadowbank.* Act. *Campbell.* Agents, *Riddell & Gillon*, W. S.
Alt. *Baird.* Agent, *Bain Whyt*, W. S. Clerk, *Mackenzie.*

J.

Fac. Coll. No. 238. p. 536.

1807. February 10.

LAIRD *against* FENWICK.

No. 3.

Whether a liferenter is entitled to the benefit of improvements made upon the subject by the fiar?

PATRICK HONEY purchased a field in the immediate neighbourhood of Perth, and took the disposition to himself and his wife Elspeth Laird, in conjunct fee and liferent, and in the event of her surviving, for her liferent use. Some years afterward, he borrowed £80, for which he and his wife granted heritable security over it. His affairs having afterward gone into disorder, his estate was sequestrated, and the trustee having exposed it to sale, it was purchased by William Fenwick.

In the disposition granted to Fenwick, it was provided, that he was to be burdened with the jointure to which Elspeth Laird was entitled, in the event of his surviving her husband, in so far as it affected the subject disposed.

Fenwick erected a large tenement upon this piece of ground, besides laying out considerable sums of money in meliorations, so that at the death of Patrick Honey, which happened a good many years after his bankruptcy, this subject had become much more valuable.

Upon the death of her husband, Elspeth Laird raised an action of mails and duties before the magistrates of Perth, against the tenants and possessors of the subjects, in the course of which the question occurred, Whether she was entitled to the liferent of the subject, as it stood at the date of her infeftment, exclusive of the consequent meliorations, or was entitled to take the subject as it stood, with the benefit of those meliorations.

Upon this point the Magistrates pronounced the following interlocutor (21st May 1805 :) "Find, That the pursuer's right of liferent in the yard mentioned in her infeftment, does not entitle her to the liferent of the valuable tenements of houses since erected thereon by the defenders, and with the money of her husband's creditors, but that she is entitled to the full value yearly of what that yard would now bring, if it were now to be let in the state in which it was when she was infeft therein, that is, to the full yearly value of what a yard of the extent it then was, exclusive of the buildings, is now worth, all circumstances considered."

The cause was afterward brought by advocacy before the Supreme Court, and was taken to report by the Lord Ordinary. No. 3.

The liferentrix

Pleaded : A liferenter, from the moment his right begins to operate, has a right to the actual possession of the subject, and to the enjoyment of all its fruits, in so far as they can be taken, *salva rei substantia*. The pursuer is entitled to the rents arising from the buildings erected on the ground which she liferents, *quia inedificatum solo cedit solo*, and as this liferent appeared upon the face of the purchaser's titles, he must have erected these buildings in the full knowledge of his right, and in the belief that it was his interest to erect them even under this burden. The purchaser, therefore, has no right to a recompence, on the footing of a *bona fide* possessor ; Kames' Principles of Equity, p. 114 ; Campbell of Otter, 16th February 1666, No. 5. p. 8241.

Answered : The pursuer's liferent is expressly limited to the garden-ground, and therefore cannot be extended to houses built on a part of it with the funds of others. Her husband's creditors were not barred, in the event of his insolvency, from taking possession of this garden-ground on account of an eventual contingency which depended upon her surviving him ; and had the pursuer then come forward with her claim, all that she could have insisted on was, that the creditors should find security for payment of her liferent, after which the creditors were at liberty to employ the subject in the most advantageous way, by building houses or otherwise ; Craig de Licit. § 13 ; Crawford against Mitchell, June 22, 1743, No. 31. p. 8266 ; Creditors of Mitchell against Warden, February 9, 1742, No. 38. p. 8275. And if a recompence is due *in quantum lucratus* by a person who builds *mala fide* on another's ground, Stair, B., 1. Tit. 8. § 6. the defender, who acted *bona fide* in building these houses, must, in every view of the case, be entitled to the interest of the sums laid out on these buildings, or the pursuer must be satisfied with the value of the garden ground before they were erected.

The Lords (17th December 1806) “ find, That the pursuer Elspeth Laird “ is entitled to the liferent of the subject in question, with the benefit of the “ houses built thereon by her husband, but under deduction of the interest of “ the bond of £80 Sterling granted by her husband, and duly ratified by her, “ to those having right to receive the same : Find, That William Fenwick, one “ of the defenders, is to be considered as a *bona fide* possessor, and is entitled “ to the annual interest of the meliorations made by him on the said subject, “ under which burden the pursuer must take the right of liferent ; and remit “ to the Lord Ordinary to proceed accordingly.”

And afterward, the Court refused, without answers, a reclaiming petition for the defender.

Lord Ordinary, Justice Clerk.
Alt. Hagart.

Act. Cranstoun.
Agents, Macritchie & Little.

Agent, W. Inglis, W. S.
Clerk, Walker.