

1682. *January 4.*RACHEL WILKIE *against* HENRY MORISON.

## No 75.

A wife being infest in annuity out of a house, the Lords found the husband's heir liable to make it habitable, and personally liable for the annuity, till habitable.

IN an action pursued by Rachel Wilkie against Mr Henry Morison, as representing her husband, Henry Morison, for fulfilling of her contract of marriage, *viz.* for employing of 20,000 merks for her liferent use; and also, in regard there was an obligation in the said contract, for infesting of her in an annualrent of 400 merks, to be uplifted out of several tenements belonging to her husband in Edinburgh, which tenements became ruinous, and were taken down by the defender, by order from the Dean of Guild, she did conclude, that Mr Henry, as heir to her husband, ought to be liable to her for the said yearly annualrent. And it being *alleged* for the defender, That he, as heir to her husband, could not be liable personally for payment of the annualrent, in regard there was no personal obligation for payment in the contract, but altogether personal obligation for infesting, and which was fulfilled, she being infest accordingly:—THE LORDS found, that this being a contract of marriage, which was *contractus maximæ bonæ fidei*, the husband was liable to make the tenement habitable; and, therefore, the tenement having become ruinous by time, they found the defender, as heir to the husband, was liable for the bygone annualrent, and in time coming, till the tenement was rebuilt, and made so that she might have tenants thereto.

*Fol. Dic. v. 2. p. 61. P. Falconer, No 15. p. 7.*

\* \* Harcarse and Sir P. Home's reports of this case are No 36. p. 8274.  
*voce LIFERENTER.*

1704. *December 15.*REBECCA ADAMSON *against* DEAN of GUILD NICOLSON.

## No 76.

A house, in the possession of a liferentrix, was casually burnt. The Lords found the heir liable to the liferenter in no more but the annualrent of the sum to which the price of the waste ground was liquidated, and at which he had sold it.

LORD TILlicOUNTRY reported Rebecca Adamson, relict of George Graham, merchant, against Dean of Guild Nicolson of Trabroun. The said Rebecca charges the Dean of Guild on a liferent-tack of a house at the entry to the Parliament Close, to put her in possession of the same. He suspends on this reason, that the charge is most unwarrantable, seeing the tack bears she was in possession at the very time of the setting, and so there was no clause warranting a summary charge; *2do*, Though it were turned to a libel, yet this house being burnt down by that dreadful fire on the 3d of February 1700, the Magistrates cognosced the value of the ground, and appraised his fee and property to four years purchase, at which rate he sold it; and so it being now rebuilt, he can be liable in no more but the annualrent of the price he got since the time he received it; for it being consumed *vi majore*, without his fault, as the property ceased during its lying in rubbish, so must her usufruct, and all other

servitudes do, *ubi perit subjectum*: *Answered*, She only insists for repossession, being put from it by the fire; and as to the share she may acclaim, there is a notable rule laid down by the 10th act of Parliament, 1551, for rebuilding the burnt tenements in Edinburgh consumed by the English, after the victory obtained at Musselburgh, in the last article whereof it is provided, that liferenters of such burnt lands, now rebuilt, shall have right to a third of the rent which the house paid before the burning; and she subjoins, that her houses paid 500 merks yearly; and so the Dean of Guild must pay her the third of that mail ever since the rebuilding, and yearly in time coming; and this rule has been followed by subsequent Parliaments, as by act 58th, 1573; act 226th, 1594; and act 6th, 1663. *Replied*, The act 1551 was but a temporary regulation, and concerns ground-annuals due to chaplains, and other kirkmen, by mortifications; and though Mr William Clark's waste land at the Cross, and some others, were valued higher, at six or seven years purchase, yet he could get no more but four years, and is willing to give his oath there was neither collusion nor concealment, and he always offered her the annualrent of that sum.—The Lords found the charge unwarrantable; but, in respect of the suspender's consent, they sustained it as a libel; and found him liable in no more but the annualrent of the four years purchase, to which the price of the waste ground was liquidated, and for which they decerned during the liferenter's lifetime. The Dean of Guild's son, and Thomas Boys, writer, being cautioners in the suspension for him, they applied to the Lords by a bill, and represented, that the charge being found unwarrantable, and only turned to a libel, of consent, otherwise she behoved to have raised a new pursuit, they were, by the law and practiques of the nation, liberated of their cautionry; and, therefore, craved up their bond.—The Lords found them free, and this conform to prior decisions, cited by Stair, in his Institutions, Lib. 1. Tit. 17.

*Fol. Dic. v. 2. p. 61. Fountainhall, v. 2. p. 247.*

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## S E C T. X.

### Hazard of the rising or falling of Money.

1540. May 12. *MR JAMES FOULIS against JAMES CRAIG.*

GIF ony landis be annalzeit under reversioun, contendant ane certane sowme of gold and silver, he to quhom the reversioun is maid may redeme the landis,