

consent of the merchants, he may ask reparation, but when it is overturned by storm, piracy, or accident, it infers no contribution.

No 21.

THE LORDS found no contribution in this case, and assolizied from the libel, except only as to the skipper's and company's disloading, and keeping the goods on the shore, for which they modified L. 300 to be paid proportionally by the merchants, according to their proportions of the goods in the ship, and if they prove not their proportions, that they shall all pay equally.

Stair, v. 2. p. 737.

1706. February 20.

WILLIAM HALIDAY, Burgess of Edinburgh, and ARTHUR TEMPLE, against
ADAM GARDINE of Greenhill.

IN the action at the instance of William Haliday, assignee by Arthur Temple, liferenter of a tenement of houses in Edinburgh, against Adam Gardine the fiar, for declaring the said tenement affected with, and adjudged for payment of the expense wared out by the cedent, in repairing and rebuilding thereof, after it was demolished by occasion of fire;

Alleged for the defender; No law obligeth any fiar of houses demolished by a public calamity to rebuild or repair the same for the use of a liferenter, who ought to suffer loss by the misfortune as well as the fiar; and, therefore, the whole expense of rebuilding and repairing cannot affect the property; for liferenters of houses are bound to preserve them in the condition they receive them, and no fiar *tenetur ob casum fortuitum*. If the tenement were affected with this bygone reparation, and should happen again to be burnt in the liferenter's time, the sum affecting the area would exhaust the value before the fiar succeed, and so the liferenter get the property by the reparation; yea, the very reparation will fail in time, and perhaps be of no great value to the fiar at the liferenter's death. *2do*, *Esto* the fee of liferented tenements, demolished by fire, were affectable by the expense of rebuilding and reparation laid out by the liferenter; this could only be extended to what was necessary to put them in as good case as they were in before the burning. *3tio*, By the Act 10. Article 5. Par. 4, Q. M. a liferenter making necessary and profitable reparations, his executors get only a third part thereof, and for so much only can affect the tenement.

Answered for the pursuer; The necessity and quantity of the expenses of the reparation being cognosced and proved by the Dean of Guild's warrant and decret, the same ought to affect the ground-right and property, as *in rem verso* to the fiar; and the liferenter's case is as favourable as that of any *negotiorum gestor*.

No 22.

The fee of a tenement, repaired by the liferenter, affected with the principal sum expended in the repairs thereof, but not burdened with annual-rent of the repairs during the liferenter's life.

No. 22.

THE LORDS found the fee of the tenement is affected with the sum employed for reparation thereof; but ordained the parties to be heard, whether the liferenter or fiar should be liable for the annualrent of that sum, during the former's lifetime.

1708. February 17.—IN a process at the instance of William Haliday, assignee by Arthur Temple, liferenter of a tenement of houses in Edinburgh, against Adam Gardine of Greenhill, the fiar, for declaring the said tenement affected with, and adjudged for the expense wared out by the cedent in repairing and rebuilding thereof, after it was demolished by occasion of fire, the LORDS, February 20. 1706, found the fee of the said tenement affected with sums employed for reparation thereof. The pursuer now *insists* against Alexander Cuninghame, as come in place of Greenhill by a right from him, for payment of the annualrent of the said sum, expended on reparations during the liferenter's lifetime.

Alleged for the defender; *1mo*, *De jure* fiars or proprietors are not obliged to uphold or repair lands or tenements liferented, it being incumbent on the liferenter, both by the civil law and ours, to use the liferented subject *salva rei substantia*, and to find caution that they shall leave the same in as good condition as they got it. And though there be a difference betwixt ordinary reparations, and extraordinary damages happening by fortuitous calamity of fire, or the like, yet it is reasonable, even as to these, that both parties should bear the loss *pro rata*, effecting to their interest in the subject; seeing the proprietor has no advantage by the repaired tenement during Arthur Temple's lifetime, it were absurd to burden him with annualrent for the reparations during his lifetime, or to affect the fee of the tenement with the same; for *quem sequitur commodum, eum sequi debet onus*; especially considering how, in tenements within burgh, the interest of liferenters and fiars are estimated; the fee or property, though unliferented, being ordinarily valued at ten, and rarely at twelve years purchase, and the liferent valued at seven, and sometimes higher. *2do*, By the Act. 10. Art. 5. Par. 4. Q. Mary, the executors of a liferenter get only a third after his death of profitable and necessary reparations, without any annualrent for the interval of the liferenter's lifetime; and by the present custom of Edinburgh, the liferenter of a burnt tenement pays two parts, and the fiar a third of the expenses of reparations.

Answered for the pursuer: Though liferenters are bound to uphold and preserve the subject liferented, and may be charged to find caution for that effect, it was never pretended that a liferenter was obliged to rebuild or repair a house when burnt *casu fortuito*. Nor is the fiar at any more prejudice by paying annualrent to the liferenter for the reparations expended by him, than if a third party had been at these expenses, which no doubt would have affected the fee as *in rem versum*. *2do*, Queen Mary's act of Parliament was only an interim regulation.

when the town was burnt by the English, and never since observed, as Sir George Mackenzie tells us.

No 22.

THE LORDS found that the annual rent of the reparations could not affect or burden the fee during Arthur Temple's lifetime, while he or his assignee enjoy the rent of the tenement.

Fol. Dic. v. 2. p. 319. Forbes, p. 106. & 243.

1710. June 29. Lord SALTON against JOHN RITCHIE.

LORD SALTON having bought a callash in 1690, and Mr John Ritchie having a ship lying in Leith road, going to sail to the north, he put his callash in that ship; but a French privateer, from Dunkirk, having boarded them by the way, did keep Ritchie prisoner till he should pay L. 55 Sterling, which was the ransom put upon the ship and goods, though some of them were embezzled and carried way by the privateer, but my Lord's callash was saved and delivered to him. One of the merchants owners of the goods in the ship, pursues before the Water-Bailie of Leith for restitution. There it was contended for the rest, That the whole cargo behoved to be valued, and bear a proportional burden of the ransom, which the Bailie did, and accordingly L. 5 Sterling was put on my Lord's chariot; which he being charged for, suspends on this reason, that he was not cited to the decret, and so it was *res inter alios acta quoad* him; and though it was restored, yet it was deteriorated, wanting some of the seats and cushions belonging thereto; and *non constat* what the ransom was, and it was against equity to make the goods saved bear a proportion with those taken away. Answered, That the owners of the goods put aboard being dispersed *per omnes regni angulos*, it was next to impracticable to cite them, the expense overgoing the profit; but the Bailie took a full probation of the value, upon the oath of the crew, and in such accidents something is always rifled and spoiled; and the ransom-brief is now produced, with a translation by a sworn interpreter, which instructs both the capture and price exacted by the pirate; and it is the constant practice in the maritime law to make the goods saved pay a proportion of the contribution as well as those taken away, otherwise one might lose his whole goods, and another save all his, which is against all rules of law and common justice. THE LORDS repelled the reasons, and found my Lord Salton liable for his proportion, but, in regard the Ordinary had modified and reduced it to L. 30 Scots, as in the case of average, therefore they adhered to his interlocutor; though some of the Lords saw no reason for restricting the sum, but that my Lord should have paid the whole. See Section 6th.

No 23.

A ship was taken by a privateer, and the supercargo detained till he paid a sum as ransom. He paid it. One whose goods were saved found proportionally liable.

Fol. Dic. v. 2. p. 319. Fountainhall, v. 2. p. 581.