

APPENDIX.

PART I.

IMPLIED ASSIGNATION.

1777. June 17

ROBERT DOWNIE, and the Creditors of the deceased JAMES WALLACE, Adversaries
Wright in GREENOCK, against MARION ALEXANDER, Relict of the said
James Wallace.

WILLIAM ALEXANDER, father to the defender, not long after her marriage to James Wallace, disposed to her in liferent in case of her surviving her husband, and to the said James Wallace his heirs and assignees in fee, a certain area in the town of Greenock; but reserving to himself the high story of any tenement to be built upon that area by the said disposess. Under this reservation, the defender in liferent and her husband in fee, were regularly infeft in this subject, and the infeftment duly recorded. A tenement of about £10 annual value, independent of the high story, had been erected upon this subject previous to James Wallace's death, which happened in July 1772, and his affairs having been left in confusion, the creditors adjudged his right to the subject, and brought an action of mails and duties, in which Marion Alexander, who had retained possession since her husband's death, appeared.

The case having been reported to the Court, it was pleaded for her: She stood infeft in virtue of an onerous disposition from her father in liferent of this subject, which was intended as a small provision for her, in case of the death of her husband; and at the time this disposition was granted, it was understood that her husband was to build on the area, and which accordingly he immediately did. Indeed, the liferent of a vacant area could never have been intended by the parties, as it could not have been of any service to her. This was the only provision which she had, and was not equal to what, from the situation of her husband's affairs, at the time

No. 1.

Disposition of an area in liferent, found to include a tenement afterward erected upon it.

See No. 16. p. 6316.

No. 1. of the marriage, she was well entitled to : The intention of parties to give the defender the liferent of the tenement in question was validly effected, by merely erecting it upon the liferented ground ; for *inædificatum solo cedit*. As the proprietor of the ground acquires the property of whatever is erected upon it, so must the liferenter acquire the liferent. If it were a question with the husband's heir, there could be no doubt that she was entitled to the liferent, and as the creditors could not found upon any fraud in this case, they cannot be in a better situation than her husband's representatives ; and her infeftment being on record, her husband's creditors were sufficiently apprized, that his right to that subject was qualified by her liferent.

Answered by the creditors : This building having been erected by her husband upon the liferented area, falls clearly as a *donatio inter virum et uxorem*, which was virtually revoked by his having afterward contracted debt ; and they were still willing to allow the widow the annual value of the area before the building was erected : The principle of *inædificatum solo cedit* does not apply at all to liferenters, but solely to proprietors ; but supposing that it did, the universal maxim of *nemo debet locupletior fieri alterius jactura*, would certainly render the liferentrix liable for the value of the tenement built upon the liferented subject : There is a distinction where a house is built upon an estate in the country, and upon an area in town. In the one case the house, as being of small value to the land, accresces to the estate the more valuable subject ; whereas an area, being of very small value in proportion to the tenement erected upon it, should accresce to that tenement as much as the property of the canvas to the painter : There was even room for this distinction in the Roman law, L. 8. D. De Usuf. ear. rer. quæ usu consum,—and L. 5. § 2. D. Quib. mod. Usuf. vel usus amit. That such distinction was acknowledged in this country, was argued from the following cases ; 15th December 1704, Adamson, No. 76. p. 10140 ; Halket against Watt, 24th Jan. 1672, No. 18. p. 13412. a case founded on by both parties ; 9th February 1742, Creditors of Mitchell against Warden, No. 38. p. 8275.

Upon report of Lord Anker ville, and having advised the informations, the “ Lords prefer Marion Alexander upon her liferent infeftment produced, to the rents mails and duties in question, and decern in the preference, and remit to the Lord Ordinary to proceed accordingly.”

Lord Reporter, *Anker ville.*

Act. *Elphinstone.*
Clerk, *Mackenzie.*

Alt. *Morthland.*

D. C.