

called *Præfectus vigilum*; and he, in l. 3. § 1. D. De offic. Præfect. vigil. has declared, that *incendia plerumque fiunt culpa inhabitantium*: So the presumption lying against the Lady, she must purge herself, and shew her diligence, or that it arose *extrinsecus vel casu fortuito*; especially seeing her negligence can be qualified; *1mo*, That she laid on too great a fire, and having given over the house, she left not the key with some neighbours, that when others came to see the house for taking it, they might have access; *2do*, That chamber having taken fire before, she was then advertised of the carelessness of her woman, and so put *in mala fide*. Vid. l. 27. § 9. D. Ad leg. Aquil. which makes us answerable for what our servants do in *proprio ministerio, seu officio cui deputantur*. And law sometimes, ob *bonum publicum*, makes parties even not accessory to crimes, liable for them; as the heads of our clans, for the depredations of their dependers; masters for their tenants resetting rebels on their ground, or if violence be offered to the minister, or a conventicle held on their land: And in England the Sheriff and county are to answer for any robberies committed within their district between sun and sun; and a preparative making masters liable for the damage occasioned by servants, will only cause us be more exact in chusing faithful and honest servants, and will deter bad ones.—Yet, at this rate, the negligence or malicious revenge of a servant, may ruin his masters in one night; and the Roman law in *delictis servorum*, bound only the master alternatively, either to compensate the damage, *vel servum noxæ dare*; since *noxæ caput sequitur, et pœna suos tantum debet constringere auctores*; and in the Roman law, there was much more reason to make the masters liable than in ours; for by it, they had *jus vitæ et necis* over them, and all they acquired *ne momento quidem consistere poterat in persona servi*, but instantly accresced to the master; which prerogatives Christian mansuetude hath now abrogated.

This debate being advised on the 24th of February, the LORDS, before answer to so dangerous a preparative, ordained the witnesses to be examined upon the whole matter of fact, and as to the advertisement given her, and the way and manner of the rising of the fire, and what negligence was in it.

Fountainhall, v. 1. p. 341.

1736. December 14.

SUTHERLAND of Rearquhar, against Mr FRANCIS ROBERTSON, Minister at Clyne.

REARQUHAR sets to the Mistress of Gees, and the said Robertson, her son-in-law, his lands and mansion-house of Rearquhar; the chief articles of which, so far as concerns the following dispute, were; "That they should leave the mansion-house in as good condition as they received it; and likeways the lands, at their removal, in as good tenantry as they got the same: As also, Rearquhar obliges himself to keep them in peaceable possession of the lands, &c. during

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Found that one, who was bound with another to leave a house in the same condition they received it, was liable, it being burnt by the fault of the other.

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the currency of the lease ; for the which causes, and on the other part, the said Mrs of Gees and Mr Robertson, for himself, and as taking burden in and upon him for her, bind and oblige them conjunctly to content and pay, &c." Pursuant to this tack, the Mrs of Gees entered to the possession of the Mains and mansion-house of Rearquhar ; which last being soon thereafter burnt down, Rearquhar brought an action against her and Robertson for repairing the damage ; wherein " the LORDS found, upon advising the proof adduced for both parties, That the defenders were *in culpa*, in ordering fire to be put to a heap of rubbish, or crumbs of peats near to the house, and suffering the same to continue burning for several days together, immediately before, and on the day the house was burnt ; and, no other cause of burning the house being proved, find it must be presumed to have been occasioned by the burning of the said heap ; and therefore," &c.

Robertson reclaimed, and *pleaded* ; That, as he resided in his parish of Clyne, twelve miles distance from the house, and had no knowledge of, nor accession to burning the same, he could not be liable for damages arising from the Mrs of Gees' delict. To enforce which, it was argued, *1mo*, That, when a house possessed by a tenant is burnt down, he is not thereby, without any thing further, liable to make good the heritor's damages : The general presumption of innocence throws the *onus probandi* upon the heritor, and, if he fails, the loss must lie on himself ; a principle which is also established by the above interlocutor. And, as a consequence of this, it was argued, *2do*, That, though a tenant is bound to keep the houses in a habitable condition, and to leave them so at his removal ; yet such obligation will not subject him to the damages arising from fire, the import thereof being no more than *sartum tectum servare* ; *3tio*, Where a tenant's house is burnt down by the deed of a third party, he is not bound to make good the damage, no more than if the conflagration had happened by lightning ; for instance, a tenant is not liable for the delict of his servants, *noxā tenet suos auctores* ; and, *4to*, Upon this principle, when it appears by the conception of the tack, and the situation of the parties, that it was not intended the tacksmen should possess by himself, but only by others ; in such a case, if the houses should happen to be burnt by the act and deed of the possessors, they, and not he, would be liable : Now, to apply these things to the present case, it is obvious, from the clause in the tack, " whereby the tenants are obliged to leave the lands at their removal in as good tenantry as they received the same ;" that it was not understood the tacksmen should enter to the natural possession, seeing, with respect to himself, it could not be the duty of his office necessarily charging him to attend his charge at twelve miles distance from Rearquhar ; so that this lease was rather an assignation to the rents, than a proper tack of the lands ; wherefore, as he would not have been liable, if any of the tenants had wilfully or carelessly burnt their houses, so he ought not to be answerable for the delict or *culpa* of the Mrs of Gees, who, though joined in the tack with him, does not sign it ; and, although he put her in possession of the house and

Mains, it does not follow that he ought to be liable for her delicts any more than he would have been answerable for the *culpa* of any other tenant. It is true, that, if she had allowed the house to go into disrepair, he might have been liable *ex contractu*; but here the casualty arose from the delict; consequently it can affect none but herself.

Answered for the pursuer; By the tenor of the tack, it was plain, both Mr Robertson and the Mrs of Gees were conjunct tacksmen of the whole lands, &c. and that they might have taken the same into their possession, the pursuer being bound to maintain and protect them therein; nay, the clause obliging them to leave the lands in as good condition at their removal, &c. was calculated for that very purpose, viz. in case they should turn out all the tenants, that, in such an event, they became bound to bring in others as good as them in their place; but, allowing the fact to be, that the tacksmen were not to enter to the natural possession, it cannot avail Robertson, seeing, with regard to the mansion-house, both of them were bound to leave it in as good condition as they received it; and it is obvious, that, as he took the whole burden on him, and is the only signing party to the tack, so he was looked on as the sole tacksmen; a security without which the pursuer would not have entered into the bargain, considering the Mrs of Gees's circumstances are so low, that it would have been improper to have relied on her; in consequence, therefore, of this obligation, the defender was bound to take care that no damage, arising either from his own or her fault, should befall the house, and to provide against every accident which might have been easily prevented. And here the Mrs of Gees ought to be considered as a sub-tenant for whom Robertson is answerable, conform to the doctrine laid down, L. 11. De loc. cond. and by Sande, Lib. 3. Tit. 6. De fin. 9. It is in vain then for the defender to shelter himself under the brocard, *noxā tenet*, &c. since he came under the same obligation with her, viz. to prevent, to the utmost of his power, the ruin of the house; nor can his living at some distance palliate the neglect, seeing he ought to have inquired often about the condition of the farm, which, if he had done, the fatality that happened might have been prevented. Neither is there any foundation for distinguishing betwixt the present case, and the allowing the house to go into disrepair; seeing what the pursuer insists upon is, That, by virtue of the defender's personal obligation, he became bound equally with the Mrs of Gees, as for himself, to take care to protect the mansion-house from all dangers and hazards whatsoever; and, as he would have been liable in the case figured, because of her *culpa*, for the same reason, the like judgment falls to be given in the present question; especially as he cannot pretend that he acted the part of a diligent man, in allowing the house which had been set to him, and consequently under his care and protection, to be in such imminent danger for upwards of twelve days, the time which the peat-dross continued to burn.

No 63. THE LORDS found Mr Francis Robertson conjunctly and severally liable with the Lady Gees.

C. Home, No 43. p. 76.

1760. March 3.

HARDIE against BLACK.

No 64.

THE tenant of a room of an upper floor having erected a comb-pot for dressing wool, without taking the proper precautions generally used in such manufactures to prevent fire, by which means the house was burnt down, was found liable in damages to the proprietor.

Fol. Dic. v. 4. p. 220.

* * This case is No 69. p. 10133, *voce* PERICULUM.

SECT. XI.

Whether one is liable for the malversation of those under his authority?—Complaint raised in name of another without his authority.

1590. November. LAIRD OF LUDQUAIRN against EARL MARISCHAL.

No 65.

▲ man found liable for the violent act committed by his wife in his absence.

THE Laird of Ludquhairn pursued the Earl Marischal and his Lady for the demolishing and down-casting of a mill and dam thereof. *Excepted* by my Lord, That he could not be convened for any deed done by his Lady, because, in the mean time, he was forth of the country, and knew not what was done by her. Likeas, by the law, *ne maritus pro uxore, aut uxor pro marito, &c.* it is plain. *Replied*, That my Lady, in his absence, was *præposita negotiis*, and had my Lord's household servants at the down-casting thereof. THE LORDS found, That my Lord might be convened notwithstanding of his absence at the time. Next, it was *alleged*, That there was no wrong in the down-casting thereof, because my Lord having all the Lordship of Innerrugy pertaining to him in heritage, together with the mills and multures thereof, with the thirlage of the same lands to the mills of Innerrugy, *licuit ei uti suo jure*, and stop any other mill to be bigged. *Replied*, That the pursuer's mill had gone for the space of fifteen days, without any stop or impediment; so that the defender could not have stopped her but by order of law, *quia non potest sua*