

curred; *imo*, On whom the damage done to the house was to lie; on the proprietor or the *colonus*. On the one hand, it was *casus fortuitus quem non præstat colonus*; on the other hand, *culpa præcederat casum*, in not praying for the King and Royal Family.

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But as that was not a *culpa*, naturally or justly productive of the *casus*, which was in itself an irregular action, and not a lawful consequence of not praying for the King, the Lords "found the defenders not liable for the damage."

The next question was, Whether they were to be liable for the rent for the year between April 1. 1746, and April 1. 1747? Former years the defenders did not controvert; and longer they could not be bound, as in that year the process was raised, wherein the defenders pleaded not liable, which was a sufficient upgiving.

Upon the one hand it was said, that they should be liable for that year, as they had retained the keys, and not given up the possession till they did it in the process, as has been said, which was not commenced till some months after the year was begun.

On the other hand, a difficulty was suggested from the Bench, That as it was now found, that the landlord was to bear the damage, the tenant could not be liable for the rent, when the landlord had not repaired the house, till which was done, it was not habitable. But it being also observed from the Bench, that there had been no requisition to the landlord to repair, who had therefore reason to think that the congregation was to do it, and to retain the expense out of the rent, and which was said to apply to every case of a repair incumbent upon the landlord; the Lords "found the defenders liable for the rent of the year between April 1746 and April 1747."

Fol. Dic. v. 4. p. 63. Kilkerran, (PERICULUM.) No 7. p. 381.

1762. July 16. FOSTER and DUNCAN against ADAMSON and WILLIAMSON.

In January 1755, Foster and Duncan let to Adamson and Williamson a salmon-fishing in the river Tay, opposite to Errol, on the north side of a shallow named the Guinea-bank, to endure for five years. The river there is broad; but the current, being narrow, past at that time along the north side of the bank, the rest of the river being dead water. As one cannot fish with profit but in the current, the tacksmen made large profits the first two years, and were not losers the third; but the fourth year the current changed, which frequently happens in that river, and instead of passing as formerly along the north side of the bank, it past along the south side, which was a part of the river set to other tacksmen; by which means the fishing let to Adamson and Williamson became entirely unprofitable the remainder of their lease.

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What degree
of sterility
will relieve
from the
tack-duty.

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The granters of the tack having brought a process against the tacksmen for L. 36 Sterling, being the tack-duty for the two last years, the defence was, a total sterility by the change of the current as aforesaid; and a proof being admitted, the facts appeared to be what are above mentioned.

It is admitted for the pursuers, that the extinction of the subject must have the effect even at common law to put an end to a lease; because the lease having a special relation to a subject which is to be possessed for rent, it cannot subsist when there remains no subject that can be possessed; as for example, when land is swallowed up by the sea, or when a river totally changes its course, and never returns to its former channel. The case is different in sterility whether of land or of fishing; for there the subject remaining in existence, is still capable to be possessed by the lessee; and consequently the lease subsists and the rent is due, however unprofitable the possession may be. If therefore there be any relief in the case of sterility, it must be upon equitable considerations; and whatever may be thought with respect to a total sterility during the whole years of the lease, or during the remaining years after the lease is offered to be given up, the sterility here was temporary only; for, as the stream of the river Tay is extremely changeable, it might have returned to its former place in a month or in a day; and as the tacksmen adhered to the tack, and did not offer to surrender the possession, they certainly were in daily expectation that the current would take its former course. That such a temporary sterility cannot afford a defence in equity against payment of the rent, will appear from the following considerations; *1mo*, A lease puts the lessee in place of the landlord as to profit and loss; the profit is his without limitation, and so ought the loss: *Cujus commodum ejus debet esse incommodum* is a rule in equity that holds with the greatest force in a lease where the lessee draws all the profit, if it should be ten times his rent, and on the other hand can never lose more than his rent. *2do*, There can be no equity in sustaining the defence after the lease is at an end; for at that rate, the tenant has a fine game to play: If the sterility continue to the end of the lease, the tenant takes advantage of the equitable defence to get free of the rent; but if fruitfulness be restored, he takes advantage of the lease, and makes all the profit he can. The landlord by this means continues bound, while the tenant is free, which is repugnant to all the rules of equity as well as, of common law. *3tio*, At any rate, the tenant cannot pick out one or other sterile year to get free of that year's rent; if he have any deduction in equity, it must be upon computing the whole years of the lease; for if he be a gainer upon the whole, which is the present case, he has no claim in equity for any deduction. It carried however to sustain the defence of sterility, and to assoilzie the defenders from the rent due for the last two years of the tack.

Though this judgment seems not better founded in equity than at common law, it was however easy to discern what moved the plurality. In a question betwixt a rich landlord and a poor tenant, the natural bias is in favour of the

latter : The subject in controversy may be a trifle to the landlord, and yet be the tenant's all. I urged this in Court, and put a case opposite to that under consideration. A widow woman, with a numerous family of children, has nothing to depend on but her life-rent of a dwelling-house and of an extensive fruit orchard. These she leases to a man in opulent circumstances, for a rent of L. 15 for the house and L. 25 for the orchard, which he possesses with profit on the whole. The orchard happens to be barren the two last years of the lease, and he claims a deduction upon that account. No man would give this case against the widow. So much do extraneous circumstances influence the determinations of a Court, even where the Judges are not sensible of being influenced by them.

I am not certain but that some of the Judges considered this as a *rei interitus* to afford a defence at common law ; a very great mistake, as a thing cannot be understood to be totally destroyed, where we have daily hopes of its being restored to its former condition.

Fol. Dic. v. 4. p. 62. Sel. Dec. No 199. p. 263.

1768. *March 3.* HARDIE *against* BLACK.

A FIRE having broke out in a room of an upper floor, where the tenant had erected a comb-pot for dressing wool, and consumed the house, an action was brought by the proprietor for indemnification.

It appeared, that it was not unusual, however dangerous, to erect such furnaces, even in the upper floors of houses ; but that certain precautions were generally used to prevent the fire from being communicated to the house, which had been neglected in this case. It also appeared, that the proprietor was in the knowledge of the use to which the room was applied, some time before the fire happened.

The defender *contended*, That it was not every degree, even of neglect, that would subject the person to damages, in whose house a fire broke out ; and, in proof of that proposition, referred to *L. 2. De Incendio* ; *L. 2. D. De peric. et commod. rei vend.* ; *Voet. ad tit. Ad leg. Aquil. num. 20.* In England, there is a special statute, 6th Ann. ch. 30. which declares, that no action shall be competent for damages against any person in whose house, or chamber, a fire shall *accidentally* begin. In Scotland, there seemed to be no necessity for any such statute. No action was understood to lie, except in the case of wilful fire, as may fairly be concluded from this, that no action ever was attempted upon that medium, till the case of Sutherland *contra* Robertson, 14th December 1736, where the negligence of the tenant was exceedingly gross. See APPENDIX.

Answered, The defender was guilty of neglecting the precautions commonly used in such cases, for preventing the danger of fire ; and must, therefore, be liable to make up the loss which has been sustained, in terms of the statute

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A fire having broke out in an upper floor, where the tenant had erected a comb-pot to dress wool ; the Lords found the tenant liable in the damage, because the usual precautions to prevent fire had not been taken.