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

DILIGENCE—PERICULUM.

Fire, occasioned by the negligence of the Tenant, subjects him in damages to the Proprietor.

[*Faculty Collection, IV.* p. 305; *Dictionary*, 10,133.]

HAILES. This question is to be determined upon the *species facti.* Black, and his partner Clark, must be considered as one. Clark was told, by the person employed to erect the comb-pot, that the method proposed was insufficient and dangerous; yet he persisted in having it erected in that method: the consequence was, that the house took fire. *Who* ought to pay the damage? He who, by his obstinacy in a matter relating to his own art, occasioned it. This does not imply that the lessee is liable for any damage occasioned by his own negligence, and much less by the negligence of his servants. If a colour-man should be tenant in a house, and the house should be burnt by the accidental boiling over of an oil pot, he would not be liable in the damage; but, if the colour-man should fill the oil pot up to the brim, and then set it on the fire, and leave it to boil over and burn the house, although he ought to have known the consequence, and although he was warned of the consequence, then he would be liable in the damage; because he ought to have known, and was forewarned of the danger. The same is the case here; and, by finding Black liable in damages, we will not introduce an inequitable or dangerous precedent.

MONBODDO. I am of the same opinion, and upon the principles just now delivered. Negligence of servants is not enough to make a master liable. But here there is more—a neglect in an artist. Hardie, the lessor, did not know the danger attending the trade of wool-combing. Black did: And yet he neglected to take the plain and necessary precautions.

COALSTON. I doubt as to Hardie's knowing the purpose of the lease, or the danger of wool-combing. But he *allowed* the comb-pot to be erected. *This* brings the case to the general point. In order to subject a man to so deep consequences, I would require strong proof. If the *conductor* is guilty of supine negligence, he must be liable for the whole damages; but the case is different where the negligence is less. The English Act of Parliament quoted, is a reasonable one. The comb-pot might have been constructed in a better form, but still that better form was not altogether safe. Black did not all that he might have done; but still, had he done more, there would have been a risk. In this case the fire was occasioned by the fault of the servant, in covering the fire without extinguishing it.

PITFOUR. *Here* are two questions; one of law, one of fact. I do not think that *levissima culpa est præstanda* in the case of fire, so as to subject a man to the negligence of servants. Every man will, for his own sake, take care of his

own house, his goods, his life: *Res quæcunque perit suo domino* is a general rule. As to the fact, I do not see any gross fault on the part of Black.

AUCHINLECK. Suppose that only the floor had been damaged, instead of the room being burnt, would not Black have been liable? Had that been the case, his defence would have been as good as it is now, and yet it would not have been listened to. Hardie might have stopt the work. Any neighbour might have stopt it as a nuisance. Black then was doing an illegal thing. He ought to have been upon his guard in erecting the comb-pot. A certain thickness of clay was necessary for preventing the fire from going through to the wood floor, but this was obstinately neglected.

KENNET. The construction of the comb-pot was improper. The defender knew this, and yet would not have it obviated.

KAIMES. When a man does a wrong wilfully, he is liable for all consequences; but when from a *culpa*, he is no further liable than as to direct consequences. In the case of *Sir Ludovick Grant* and *Robertson*, where there was no *dolus*, only direct damage was found due. I am relieved by this consideration. In *locatio conductio*, a man must use the house let as if it was his own. Black would have done just as he did, if the house had been his own. Here the work stood a month, and no harm was done, so that the fire must have happened through the carelessness of servants. A master is liable for the carelessness of servants in the *negotium* where he employs them. If I am liable myself, I must be liable for him whom I employ.

GARDENSTON. This is a hard case on either side. I am not alarmed with the consequences. In this case the single question is, Where a damage by fire has arisen from the fault of a man professing a trade, and that too of one who was forewarned.

On the 3d March 1768, the Lords "found the defender liable in damages," and ordained an account to be given in; which they modified.

Act. D. Armstrong. *Alt.* A. Wight.

Diss. Coalston, Pitfour, Elliock.

1768. *March 5.* LIEUTENANT JAMES GRIERSON *against* CATHERINE CAMPBELL and OTHERS.

PRISONER.

An Officer of the Navy is not obliged to assign his half-pay on a *cessio bonorum*.

[*Faculty Collection, IV. p.* 130; *Dictionary,* 11,784.]

PITFOUR. I cannot understand the clause so strictly as to imply only *misfortunes* by fire, water, and the like. It means *all misfortunes* to which we are subject in common life. The half-pay is not the debtor's; it is for a particular purpose, like wages to a servant for service and clothes.