

less the pursuers had *replied*, that the heritors got rent that year, and had been burdened with the probation thereof. *2dly*, The order of Sir John Smith's general commissary, and also of the provisors of the army, bearing the provisors to have furnished such provisions want witnesses, and might have been made up since they were out of their offices.

THE LORDS adhered to the act, and found the defence of total devastation yet relevant in this manner, that the heritors got no rent; and granted commission to receive witnesses, at the head burghs of the shires, for each particular heritor, to prove their particular devastations; and sustained the order of the general commissary, he making faith that he subscribed an order of the same tenor while he was in office.

Stair, v. 1. p. 184.

No 55.

1667. January 2.

FRANCIS HAMILTON *against* —

FRANCIS HAMILTON having suspended a decret, obtained against him for house-mails, on this reason, that his wife only took the tack, which could not oblige him; it was *answered*, that his wife keeping a public tavern, was evidently *præposita huic negotio*;

Which the LORDS sustained.

Another reason was, that the house became insufficient in the roof, and the defender, before the term, required the pursuer to repair the same, which he did not; and the neighbouring house, called, *The Tower of Babel*, falling upon the roof, made it ruinous. It was *answered*, That was an accident without the pursuer's fault, and the tenant ought to pursue those whose tenement it was that fell.

THE LORDS found the reason was not relevant to liberate from the mail, unless the suspender had abstained to possess; but found it relevant to abate the duties in so far as he was damnified.

Fol. Dic. v. 2. p. 60. Stair, v. 1. p. 422.

No 56.
The damage sustained by the tenant of a house, in consequence of the fall of a neighbouring house allowed out of his rent.

1667. November 20. TACKSMEN of the Customs *against* GREENHEAD.

THE customs of the Borders being set in sub-tack to Greenhead and others, by the Tacksmen of the hail customs of the kingdom; Greenhead is pursued as representing his father, one of the sub-tacksmen, for the duty the year 1650. It was *alleged*, That the sub-tack was altogether unprofitable, upon the occasion of the English invasion; so that beasts and other goods were not im-

No 57.
Abatement was allowed to the tacksmen of the customs, in consequence of the invasion of an enemy.

No 57.

ported, nor exported that year, as they had been in use formerly. It was answered, That albeit in *prædiis rusticis*, in case of sterility, vastation, and such other calamities that cannot be avoided, there may be abatement craved *et remissio canonis*; yet in this case the subject being *conductio rei periculosa et jactus retis*, the sub-tacksmen ought to have no abatement, and are in the same case as tacksmen of salmon fishing, who will be liable for the duty, albeit no profit arise to them.

THE LORDS found, that sub-tacksmen should have abatement; but the question being most *quatenus*, and concerning the proportion; because, though the sub-tacksmen had undoubtedly loss, yet it was not total; there being some commerce betwixt the kingdoms for that year, some months; it was found in end, upon hearing of parties, that the half of the duty should be abated.

The law is very clear, *D. Locati*, and the Doctors upon that title, not only in *prædiis* but in *conductione vestigalium*, and the like, in case of an insuperable calamity, *remittitur canon et merces*; but they are not so clear as to the *quatenus* and proportion of the abatement, when the detriment is not total; but it is just, the abatement should be proportionable to the loss; and accordingly the LORDS decided.

Act. Lockhart et Cuninghame.

Alt. Sinclair.

Clerk, Hay.

Fol. Dic. v. 2. p. 60. Dirleton, No 108. p. 45.

No 58.

The landlord of an upper-tenement unroofed it. The tenant of the under tenement, belonging to a different proprietor, was found entitled to abatement of his rent.

1681. December 15. JAMES DEANS against ALEXANDER ABERCROMBY.

JAMES DEANS having set the uppermost lodging save one of a tenement to a vintner, whereof a great part happened to be rendered useless to the tenant, by the heritor of the uppermost house his taking off the roof, and heightening his own house, which subjected the lower house to rains and other inconveniences, for four or five months during the building; the vintner, when pursued for the rent, craved allowance of the *lucrum cessans*, and whole damage he had through the change of the roof.

Answered; The said damages having happened without the landlord's fault, they must be imputed *casu fortuito*, to which the tenant is liable. *2do*, The accident not having taken away the use and benefit of the whole house from the tenant, it is not in the case of *vastatio*, which by the common law makes the damage rest upon the landlord.

“THE LORDS sustained the defence for the tenant, and ordained him to condescend on the damage, reserving the modification to themselves;” albeit in another case, incommoding the entry to a tavern in Wilkie's land, by the stone and rubbish of the next house that was demolished, was not sustained relevant to diminish the rent.