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 liferent 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. No 68.

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.

No 69.
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.

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

No 69.

1426. c. 75. Various passages were also referred to from the civil law, particularly from the title *Ad legem Aquiliam.*

But it is unnecessary to be more particular. The principles upon which the decision proceeded are fully pointed out in the interlocutor.

'THE LORDS found, That the comb-pot was erected in an improper manner, and that proper precautions had not been taken to prevent fire; and, therefore, found the defender liable in damages to the pursuer, and in expenses of process.'

Reporter, *Coalston.* Act. *Arnustrong.* Alt. *Wight, Buchan-Hepburn.*

G. F. *Fol. Dic. v.* 4. *p.* 63. *Fac. Col. No* 65. *p.* 305.

1778. *July* 3. FACTOR on SHARP'S SUBJECTS *against* LORD MONBODDO.

No 70.

ALTHOUGH the tenant is allowed an abatement of rent, where any part of the subject perishes by unforeseen accident; the LORDS found, That a tenant who had merely the use of a well, was not, on account of its failure, entitled to any deduction. See APPENDIX.

Fol. Dic. v. 4. *p.* 63.

1797. *July* 5.

ROBERT MACLELLAN *against* JOHN KERR and WILLIAM IRVINE.

No 71.
The lessee of a malt-kiln found liable in damages, where it was burned in consequence of his negligence.

JOHN KERR and William Irvine hired a malt-kiln from Robert Maclellan, at a guinea and a half, for three months; and obliged themselves to leave it in as good order as when they entered to it.

The upper part of the pot of the kiln, or place where the fire is put, was constructed of lath and plaster.

The kiln had not been used for some years; and on the second night of its being used by the lessees, their maltster left it at 12 o'clock, while there was malt, and a fire in the furnace. Next morning the kiln was discovered to be on fire, and was totally consumed, owing, it was supposed, to the lath having been kindled by the heat.

Maclellan brought an action of damages against Kerr and Irvine.

A proof was taken.

THE LORD ORDINARY found damages due, 'in respect it is proved, by the oath of Bryden, the manager, that he was informed part of the kiln was finished with lath and plaster; and on the night on which it was burned, he left it at 12 o'clock at night, without any other person to watch it.'

A petition against this interlocutor was followed with answers.

The pursuer founded both on the express obligation of the defenders to leave