cover, that person must see more clearly than he could, who could see the way out of the difficulty; and therefore it would be more satisfactory if the parties would consider whether they could settle this without further litigation; and if Davidson suffered by this, he must recollect that he had not put it in their Lordships' power to relieve him. July 4, 1815. BILLS OF EXCHANGE.—PARTNERS.

Interlocutors appealed from *reversed*, and the cause remitted, with instructions to receive such evidence as might be properly offered with respect to the two bills, and particularly of the facts alleged as to the procuration, or the power of Mason, B. and Co. to transfer the first bill to Andrew Davidson, without the indorsement to Lockwood, or by striking it out, or otherwise, without making the Lockwoods liable as indorsers.

Agent for Appellant, MUNDELL.
Agents for Respondents, DUTHIE; RICHARDSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION. (2d. DIV.)

BAYNE,—*Appellant.*
WALKER,—*Respondent.*

WHERE a farm-house was burnt by accident, it was held by the House of Lords, reversing a judgment of the Court of Session, that the landlord was NOT bound to rebuild. Feb. 27, Mar. 22, May 12, July 3, 1815.

The Lord Chancellor seemed to doubt whether the having a bed with a wooden frame, and with straw in the bottom, LANDLORD AND TENANT.

Feb. 27, Mar. 22, May 12, July 8, 1815.

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hanging down through the interstices of the spars below, placed within about 40 inches of the fire-place, where there was no fender, did not amount to culpable negligence; and if it was culpable negligence, the generality of the practice, he said, only made it the more necessary so to determine.

Farm-house burnt.

BAYNE was Proprietor of the Farm of New Miln, of which Walker was Tenant. In March 1806, the farm-house was consumed by fire; Walker gave in a summary petition to the Sheriff-Depute of Fife-shire, setting forth "that on the morning of the

Petition to the Sheriff of Fife to find the landlord liable to rebuild.

"fourth current the dwelling-house on the farm of "New Miln, *possessed* by the petitioner, unfortu- "nately took fire, and *was burned to the ground*, "along with almost every article in it belonging to "him: that by this accident the petitioner and "his family are presently lodging in the house of a "friend, at the distance of some miles: that the "petitioner applied to William Bayne, Esq. of New "Miln, *the proprietor*, to rebuild the house, which "he refuses to do. The present application is there- "fore necessary." And the conclusion is as follows: "May it therefore please your Lordships, after ser- "vice of this petition on the said William Bayne, "Esq. *to find that he is liable to rebuild* the fore- "said dwelling-house on the farm of New Miln, "and to put it in the situation it was before the "said fire took place, and to decern him imme- "diately to do so; and failing of his so doing, to "grant warrant to the petitioner to rebuild and re- "pair the said house, and to *find the said William "Bayne liable in the expense thereof*, and to allow

"the petitioner to retain his rent until the said ex- "pences are paid; and lastly, to find him liable in "the damages and expenses." Feb. 27, Mar. 22, May 12, July 3, 1815.

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Bayne, the landlord, stated two defences; first, that the fire was occasioned by culpable mismanagement and negligence in the tenant: second, that suppose it had happened by accident, the landlord was not bound to rebuild. The Sheriff after proof decided that the fire was accidental, and that the landlord was bound to rebuild. Bayne then removed the cause by bill of advocation into the Court of Session, where the case was argued at length, and the Court finally decided in favour of the tenant on both points. From this judgment the landlord appealed.

Judgment of the Court below that the landlord was bound to rebuild, May 30, 1811.

As to the first point, it appeared in evidence in the cause that there was a bed where the fire was supposed to have commenced, in a corner of the kitchen, within 45 inches of the fire-place. This bed had a wooden frame, and there was straw in the bottom of it, where there were openings between the boards so as to permit the straw to hang down. For the landlord it was contended that it was culpable negligence in the tenant to have a bed with such materials so near the fire-place, and it was insisted that the fire must have been occasioned by a live coal starting from the fire-place, where there was no fender, to the straw under the bed. For the tenant it was contended that the fire must, in all probability, have been occasioned by a live coal or cinder carried to the bed on the back of a cat, which was in the habit of lying among the ashes and in the bed, and that it was common in farm-houses in

Feb. 27, Mar. 22, May 12, July 3, 1815.

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Scotland, to have a bed in the kitchen of such materials, and in such a situation. The circumstances connected with this point are so far stated on account of an observation of the Lord Chancellor on the subject of negligence which deserves to be noted.

But the point chiefly to be attended to is the second, viz. whether when a farm-house is burnt by accident, the landlord is by the general law bound to rebuild. In the Court below, and at the bar of the House of Lords, the maxim of the Roman law, *res locata perit domino*, was much relied upon for the tenant, and the cases of *Swinton v. Macdougal*, Fac. Coll. January 1810.—*York Building Company v. Adam*, C. Home, July 5, 1741.—*Sinclair v. Hutchinson*, Kilk. November, 1751.—*White v. Houston*, Fount. 1707.—*Clerk v. Baird*, Kilk. July 10, 1741, were cited. The cases where the decision was against the tenant, *Hardie v. Black*, March 1768.—*Maclellan v. Kerr*, July 5, 1797, and *Sutherland v. Robertson*, C. Home, December, 1736, proceeded upon the ground of *culpa* in the tenant. The case of a life-renter, it was argued, was altogether different from that of an ordinary tenant, and depended on different principles. In the argument for the landlord, the applicability of the maxim, *res locata perit domino*, was admitted; but it was insisted that the meaning of it was that the subject perished both to tenant and landlord according to the interest of each in the property, and *Guthrie v. Lord Mackerston*, Stair, 1672, and *Adamson v. Nicholson*, Fount. 1704, (cases of life-renters) were cited to show that such had been the construction of the maxim. The cases of *Hamilton v.* ——,

June 2, 1667.—*Deans v. Abercrombie*, Dict. vol. ii. p. 60.—Case of *Edrington Mills*, July 5, 1809, were also cited, to show that the landlord was not liable to rebuild; and it was said that the authorities referred to on the other side went no farther than to exonerate the tenant, to entitle him to renounce, or to have an abatement of rent, but that none of them went the length of finding the landlord liable *ex lege* to rebuild, which was the only object of the present action. There was some discussion about certain admissions and specialties in the contract, not necessary to be noticed here, as the decision turned on the dry point of law.

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Lord Redesdale. The questions for your Lordships' consideration in this case, which is one of great importance, are, first, whether the fire happened through the negligence of the tenant or of others in his employment, or by accident: second, whether if it happened by accident, the landlord is bound to rebuild. As to the question whether the fire had happened through the default of the tenant, or was merely accidental, there is a great deal of evidence, and there may, perhaps, be some doubt about it; but the sheriff found that the fire was accidental, and I do not think it necessary to discuss that part of the case. The important question is, whether the decision of the sheriff could be supported, supposing the fire to be accidental. Assuming then that the fire was accidental, I conceive that the tenant is not entitled to the remedy which he here seeks; for he does not here claim any abatement of the rent, nor permission to abandon his tack, but that

Judgment. Mar. 22, 1815.

The important question is whether, supposing the fire accidental, the landlord is bound to rebuild.

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the landlord should rebuild the house, and put it in the same situation as before the fire, and if not, then that the tenant might be enabled to rebuild and repair, and compel the landlord to pay the expence. The reasoning on which this is founded proceeds on a mistaken view of the rule of law, that where a loss is accidental *res unaquæque perit suo domino*, and this is the rule upon which the decision appears to be founded. But that is a misapplication of the rule of the civil law, as applied to subjects in the occupation of a tenant and to a house, which is part of a larger tenement, such as a farm.

The meaning of the maxim, *res perit domino*, is that the subject perishes to each according to his interest in it.

The meaning of the maxim, *res suo perit domino*, is that no person is bound to answer the consequences of the accident. As to all those who had an interest *res suo perit domino*, every one being *dominus* according to the nature of his interest. That appears to be the law in Scotland, and in other countries where they are guided by the civil law, and applies as much to tenant for years as to tenant for life, and others. It would be impossible otherwise that a proper line of distinction could be drawn. It would apply to leases for 1000 years, as much as to leases for 10, 15, or 19 years; and can it be conceived that if a lease were made for 1000, or for 95 years, and the farm-house were consumed by accidental fire, the maxim *res suo perit domino* could be applied so as to compel the reversioner to rebuild? And yet that must be the case unless the rule were qualified, which I do not see the means of doing so as to answer the purposes of complete justice. A case was stated where it was held that, in the case of a life-renter where the property ceased *vi majore*,

the usufruct likewise ceased, and this applies as much in the present case. As the landlord's property ceased, so did the tenant's usufruct, no one being responsible, there being none by whose misconduct the loss had happened. Otherwise see what would be the consequence. If the tack is long, the interest of the tenant is so much the greater; if short, it is so much the less. If the rule that the landlord must rebuild applied to tacks of 19 years, and not to tacks beyond that length, though that appears to rest on no principle, in the first year the obligation would be one thing, in the last year quite another thing, and yet the landlord would be as much bound to rebuild in the last year of the term, as in the first; so if the tack were for 1, 2, or 3 years, the obligation would be the same as if it were for 19 years. It appears therefore, judging as far as the civil law is concerned, that the meaning of the maxim *res suo perit domino*, as applied to accidents, is this, that all should bear the loss according to their interests. This will be more clear when it is considered in what circumstances the property may often be placed. A life-renter might grant a lease for years, and it was unquestioned that a life-renter was not bound to rebuild for the reversioner, nor the reversioner for the life-renter. What then becomes of the life-renter who lets for years?

The next question is whether, from the nature or terms of the instrument, or the nature of the contract, express or implied, the obligation is imposed on the landlord to rebuild in case of accidents by fire. A missive of tack had been granted to the tenant, but was consumed in the fire, and was not

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Implied contract between landlord and tenant.

forthcoming; but it was admitted that there was a contract by which the tenant was bound to uphold the houses on the farm as tenantable and habitable during the term, and to leave them so. This was according to what was implied between landlord and tenant, the landlord on his part covenanting that the tenant should enjoy during the term. Now the contract to uphold in this way bound the tenant, whatever might happen, to leave the buildings tenantable and habitable. But it was said, and truly said, that it had been held that this did not extend to losses by unavoidable accident; and why is it so in the law of Scotland? Because the interest of the tenant does not extend so far. Then why should the landlord's covenant that the tenant should enjoy extend to rebuilding houses destroyed by unavoidable accident during the term? It is certainly not more strong, perhaps less so, than the covenant on the part of the tenant. The landlord does not covenant for good seasons, or that the taking shall be prosperous for the tenant; and if the tenant's engagements can be qualified by legal presumption, there appears no good reason why the engagements of the landlord may not be so qualified. Another view of the subject is that the loss may be a very different thing as to the landlord and the tenant; for in case of accidental fire the landlord may have to consider whether the house was exactly suited to the farm, and whether it might not be more advantageous to throw that and another farm into one. The loss of the house does not entirely destroy the value of the farm, and the inconvenience would be entirely different according to the length of the term. The

loss might possibly be trifling to the tenant, but to the landlord it might be a great inconvenience to rebuild, and he might not have the means of so doing. There is no equal justice in supplying or qualifying in the one case and not in the other. If the principle that the landlord must rebuild were to be applied in its full extent, see what would be the effect in different situations. A life-renter might be 30 years of age, or he might be 80. He lives till 80, and lets for 10 or 12 years, and though he could only enjoy for a few years, he would be bound to rebuild. It would apply in the same way in other cases:— "Whoever lets is bound to rebuild in case of acci- "dental fire." That is carrying the maxim to an extent which would render it altogether unjust and unequal, and it is not warranted by any authority that I can find. As far as I can find by reference to the laws of those countries where the civil law is applied, the rule amounts to this, that if a tenant is not bound by covenant to remain, notwithstanding loss by accidental fire, distress of enemies, &c. the consequence is that he may abandon, as he cannot enjoy the subject as before: he therefore has the right of *migration* as they express it. The justice of the matter amounts to no more than this, that the tenant should have an allowance equal to the diminution in value of the subject, by the loss of the house during the term. But the suit here is to compel the landlord to rebuild, or to pay the expense of rebuilding. Looking at the cases cited, it appears to me unquestionable that, in cases of accident, the Courts in Scotland have generally applied the rule as I conceive it ought to be applied. In *Guthrie v. Mackerston*, 1672, Stair, a jointure

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house having been burnt *casu fortuito*, it was held that the heir was not liable to rebuild; and why? because it perished to all. Another case is reported by Fountainhall, where a house in possession of a life-renter was burned, and the heritor was found liable only for the annual rent of the price of the waste ground during her (the life-renter's) life. That I take to be according to the provisions in the statute, that the reversioner might take the property and rebuild, giving the life-renter the value as it stood at the time of the accident; and Fountainhall says that the plea here sustained was "that it being consumed "*vi majore* without his fault, as the property ceased "during its lying in rubbish, so must her usufruct." That I take to be the true interpretation of the maxim: as the property ceased so did the usufruct. Another case was quoted from Stair, where a place called the Tower of Babel, falling upon the roof of a neighbouring house, made it ruinous, and the reason was found relevant, not to relieve entirely, but to abate the duties in so far as the tenant was damnified, or to the extent of the injury suffered. The next case depended on particular circumstances, but it appeared to be understood generally that the principle was that every one must bear the misfortune which falls on himself, without the fault of another. In the case of the *Edrington Mills*, the tenant had become bankrupt, and the creditors surrendered the lease to the landlord upon his engagement to pay them 22*l.* a year, for every year the tack had to run. The landlord let the mills to another tenant, and they were burnt. The question was, whether the landlord was bound to pay the 22*l.* In that case, if this had been a rent, it would

Adamson v. Nicholson. 1704.

1594. c. 226.

Hamilton v. ——, 1667. Stair.

Deans v. Abercrombie, 2 Dict. p. 60. 1809.

upon the principle have perished to all according to their interest, and the rent would have gone with the subject. It was not however a rent, but the consideration for the surrender of the lease, and enabled the landlord to make a new lease with which the creditors had nothing to do, and he was therefore answerable, notwithstanding the destruction of the mills. None of the cases have gone much beyond what I have stated, except that of *Sinclair v. Hutchinsons*. But what was it that was decided in that case? That the landlord, where letting an urban tenement, was impliedly bound to repair, the tenant delivering the subject back entire at the expiration of the tack. The reverse, however, as to the obligation to repair, was the rule with respect to a farm-house. But in that case the tenants were found liable for the rent even during a time when they could have no enjoyment of the subject: and why? because they never applied to the landlord to repair, nor abandoned when they could not enjoy the property as before. These appear to me to be the only cases in point, and I do not think they afford sufficient authority for this decision; I do not find any authority to show that, in cases of loss of a farm-house by inevitable accident, the landlord is bound to rebuild, and there is no ground in reason for carrying the obligation of the landlord to this extent. There is no formal judgment to support that view of the subject, but the cases are rather the other way, and neither the reason of the thing, nor the maxim of the civil law, by any means warrant the decision. The question whether the tenant is entitled to satisfaction, or has a right to

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Kilk. 1751.

There is no case nor authority of any description in the law of Scotland to show that, where a farm-house is destroyed by unavoidable accident, the landlord is bound to rebuild.

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abandon, is out of the present case. As to abandoning, he has not done so, and as to an abatement of rent because the subject could not be enjoyed as it was before, that is a distinct question, as the summons proceeds on a different ground. Under these circumstances it appears to me that the interlocutors ought to be so far reversed. As to the rule in future, if your Lordships were to decide as the Court of Session have done, the landlord must always have a special covenant in the contract of lease, and the principle would be productive of the greatest inconvenience to those letting lands or tenements, whether life-renters, or tenants for years underletting, or whatever might be their situation.

May 12, 1815.

Lord Eldon (C.) In this case two different questions have been raised. The first was whether there had been negligence on the part of the tenant; and it has been made a question whether a red-hot cinder had started from the fire, there being no fender, into this straw bed which stood near the fire, or whether the cinder had been carried there by this cat. The Court below was of opinion that no negligence had been proved; but I should have found it difficult to concur with them, if I had been bound to give an opinion upon that point; and if the circumstances did amount to negligence, it would be only the more wholesome so to determine, if such negligence happened to be too general. But this is too narrow a view of the present case, which I am desirous rather of looking at on the general ground. It is not my intention, however, at this time to enter at large into the reasons which induce me to think

First point, Negligence.

Second point, Whether the landlord is bound to rebuild.

that in such cases the landlord is not bound to re- May 12, 1815.
build. But the landlord is placed in a perilous situation, if, to protect himself against rebuilding, he is bound to prove negligence in the tenant; for then, if your Lordships cannot make a distinction according to the nature and extent of the interest, if a man makes a lease for 599 years, and while the tenant is in possession the house should be destroyed, the landlord, though his interest should be worth nothing, would be bound to rebuild. So a tenant for life, making a lease in the last year of his life, if the house should be burnt down only six months before the termination of his life and interest, he would be bound to rebuild. And so if tenant for life of the best mansion-house in Scotland were to let the grounds about it, and happened also to let the house at little more than a nominal rent, merely for the purpose of keeping it in good order, if the house were burnt, the tenant for life would be bound to rebuild it at an expense perhaps of 100,000*l.* This decision proceeds on the maxim, *res suo perit domino;* but the noble Lord who before addressed himself to this question has explained that the meaning of this is that where there is no fault any where, the thing perishes to all concerned; that all who are interested constitute the *dominus* as to this purpose; and if there is no fault any where, then the loss must fall upon all, and neither the Scotch nor the Roman law would support a judgment that in all these cases the landlord is bound to rebuild. How the tenant is to be indemnified where there was no fault in him is a different question, and one with which in this case we have nothing to do; for the demand here is

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Perilous situation of landlords, if bound to rebuild.

Meaning of the maxim, *res perit domino.*

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that the landlord should rebuild, and if that demand cannot be supported there is an end of the case. I concur, then, in opinion with the noble Lord, and shall submit at a future day a formal judgment disaffirming the principle of the landlord's obligation to rebuild, being desirous that your Lordships should decide upon the general question of law, rather than confine your judgment merely to the point of negligence. They avoided all these questions in England by express covenants, and it is the fault of the parties themselves after this judgment, if they do not shut out all such questions. If the landlord is to be bound to rebuild, then let them say so in the lease. If there is a doubt about it, then why not remove that doubt, instead of inserting their general covenant as to keeping tenantable and habitable, and then disputing about who is to rebuild in case of fire. In the judgment in this case the general law will be laid down, and it will be the fault of the individuals themselves, if they do not so stipulate in their contracts as to make the judgment of law attach upon their cases, in such manner as they by their conventions may choose that it should attach. It will be better and more satisfactory, therefore, in this case to decide upon the general principle, because otherwise, where the Court of Session has differed from itself once at least, and the House of Lords gave no opinion, it would be impossible for the parties to know with certainty what really is the law upon the subject.

July 3, 1815. Formal judgment.

"The Lords Spiritual and Temporal in Parliament "assembled, find that the Respondent by his petition "to the Sheriff-depute of Fifeshire required that it

" might be found that the Appellant was liable to re- July 9, 1818.
" build the dwelling-house on the farm of Newmiln, LANDLORD AND TENANT.
" and to put it in the situation in which it was
" before the fire in the proceedings mentioned; and
" that the Appellant might be decerned immediately
" to do so; and failing of his doing so, to grant
" warrant to the Respondent to rebuild and repair the
" said house, and to find the Appellant liable in the
" expense thereof, and to allow the Respondent to
" retain his rent until the said expenses should be
" paid: and the Lords are of opinion, and find, that
" the Appellant is not liable to rebuild the said dwel- The landlord not bound to rebuild.
" ling-house, as prayed by the said petition, supposing
" there was no culpable negligence on the part of
" the Respondent; and, therefore, in as much as no
" other relief is sought by the said petition, the Lords
" find that it is not necessary for them to consider
" whether there was or was not evidence of culpable
" negligence, on the part of the Respondent, suffi-
" cient to subject him in the expense of rebuilding the
" said house; and it is, therefore, ordered and ad-
" judged that the several interlocutors of the She-
" riff-depute of Fife, and the several other interlocu-
" tors complained of in the said appeal, be, and the Judgment of the Court below *reversed.*
" same are hereby, reversed; and that the Defender
" be assoilzied in the process before the Sheriff, with-
" out prejudice to the question whether there was
" culpable negligence in the Respondent; and with-
" out prejudice to any question whether the Respon-
" dent is entitled to any other relief than the relief
" prayed in his said petition to the Sheriff-depute
" of Fifeshire."

Agent for Appellant, CAMPBELL.
Agent for Respondent, SPOTTISWOODE and ROBERTSON.