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 periculosæ 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 inconveniencies, 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. 2*do*, 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.

1688. *January.*—A VINTNER pursued for the rent of the second story of a tenement possessed by him as a tenant, claimed allowance in the rent for damage sustained through Sir James Cockburn, heritor of the two superior stories, his taking off the roof, which occasioned the rains to damnify his plenishing and his wines, and to spoil his change. No 58.

Answered for the pursuer; That any damage sustained by the defender was casual, and not by the pursuer's fault.

THE LORDS decerned for the whole rent without deduction, reserving the defender's damages *contra* Sir James as accords. And they were of opinion, that Sir James could not be liable, the reparations being useful to all the stories.

Thereafter it was *alleged*, That the locator consented to the reparations, in so far as he was present at the dean of guild's visitation, and did not reclaim. And it was *alleged* against Sir James, That his reparations were not usual, in respect he took off the roof and raised the walls, and made a good story more with a flat roof, which occasioned much rubbish, and laid the roof open for three or four months.

THE LORDS found both Mr Deans and Sir James liable for the damage, which they proportioned. See PROPERTY.

Fol. Dic. v. 2. *p.* 60. *Harcarse*, (TACKS and RENTALS.) *No* 948. *p.* 267. & *No* 956. *p.* 269.

*** P. Falconer reports this case:

1681. *December* 15.—MR JAMES DEANS having recovered decreet before the dean of guild of Edinburgh against Alexander Abercrombie, for payment of his house-mail; there was suspension raised at Abercrombie's instance, upon this reason, That the dean of guild had committed iniquity, in so far as he had repelled the defence following, viz. That Sir James Cockburn being heritor of the tenement above the suspender's lodging, by warrant of the dean of guild, took off the roof off the house, and heightened the same, wherethrough the suspender's lodging was exposed to the stones and rubbish that fell down upon him the time of the building, and being a vintner, no person would sit in his rooms, whereby he was damnified through want of his change, and his wine spoiled. THE LORDS finding that the damage proceeding from the nature and quality of the inferior tenement, and that the heritor of the superior tenement was not bound to keep the tenement of the inferior tenement skaithless, therefore they sustained the reason of suspension.

P. Falconer, No 40. *p.* 4.

*** This case is also reported by Sir P. Home:

1681. *December.*—JAMES DEANS having obtained a decreet against Alexander Abercrombie vintner, before the bailies of Edinburgh, for a house-mail

No 58. possest by him; Alexander Abercrombie did raise a summons upon this reason, That the bailies committed iniquity in repelling this defence; that albeit the charger having set the house to the suspender, he was obliged to maintain it wind and water tight, and to havemain tained him in possession; yet he suffered Sir James Cockburn, who was heritor of the upper story, to take off the roof and to heighten the same, whereby the suspender did sustain a considerable damage, by the loosing of the use of his rooms, and the spoiling of his wines through want of change, the suspender having only taken the house to keep a tavern; as also he sustained loss, by spoiling of his furniture by the lain and lime during the time of the building of the house, which lasted for several months; which damage, albeit it had been accidental and casual, yet being *sine dolo vel culpa conductoris*, he ought to have allowance thereof in the fore-end of his rent; for in such cases, law allows *remissionem mercedis*, at least in so far as the damage sustained will amount to. *Answered*, That the damage allowed, not being occasioned *culpa vel facto locatoris*, but being only causual, extrinsic and accidental, through the fact and deed of another person, who in law might heighten his own house and the charger could not have hindered him, the suspender can have no deduction of the rent upon that ground; and therefore, the bailies did most justly repel that defence, reserving action against Sir James Cockburn as accords; for albeit the common law allows deduction of the rent, in case the lands be laid waste by warfare or some extraordinary storm or other accident, by which the hail rent of the land perishes, or the greatest part thereof; but not in other small extrinsic accidents, especially such as follow the nature of the thing locate, for these are always to be understood, *periculo conductoris*, such as the reparation of the house, nam modicam incommoditatem, quæ ex necessaria refectione accidit, ferre debet colonus. Leg. 27. Digest. Locat., et Conduct. et æquo anno ferre debet modicum damnum, cum non auferatur lucrum immodicum, leg. 25. par. 6. Digest. eodem. And evenin the case of fire, war, sterility, or the like accident, the law does not allow the remission of the rent, if, by the fertility of other years, the loss be made up, leg. 15. Digest. and leg. 8. Cod. eodem. And it is offered to be proven in this case, the defender has gained more by keeping of his change, than all the rent of the house. THE LORDS sustained the reason of suspension; and found, that the damage having proceeded from the natural quality of the inferior tenement, and that the heritor of the superior tenement was not liable for the same; therefore, found the charger as landlord liable to the suspender for the damage.

Fol. Dic. v. 2. p. 60. Sir P. Home, MS. v. 1. No. 31. p. 43.

*** This case is also reported by Fountainhall:

1681. *December* 16.—JAMES DEANS writer, his decreet against Alexander Abercrombie vintner in Edinburgh, for his housemail, was this day, on Redfoord's report, turned into a libel; and Abercrombie ordained to condescend on

the damages he had sustained, through Sir James Cockburn's taking off the common roof to both houses; and 'tis like the LORDS inclined to give him a proportional abatement of his rent effeiring to the rooms he wanted, or at least which were incommodated to him, considering the space they were so; the law allowing *remissionem mercedis*, even for accidental damages, though existing *sine culpa vel dolo locatoris.* No 58.

Fountainhall, v. 1. *p.* 167.

1696. CRAWFORD *against* His MAJESTY'S ADVOCATE.

A SUPERVENIENT law having diminished the tacks-mans profits, it was found that this did not irritate the tack, but only afforded ground to ask an abatement, though it was the King who let the tack. No 59.

Fol. Dic. v. 2. *p.* 60.

*** This case is No 19. p. 7866. *voce* KING.

1699. *June* 16. WILSON *against* DAVID MADER.

No 60.
In a lease of a coaliery, the coal ceasing, no rent was found due.

WILSON in Culross, as assignee by Balfour of Wester-Beath, charges David Mader in Inverkeithing, on a tack, whereby Beath did set to him all the coals and coal-seems within his lands for three years, and took him bound to keep no more but only four coallieries, and to pay L. 42 Scots for each, extending yearly to L. 160 of tack-duty. Mader suspends on this reason, that in the end of the second year of the tack, the coal, the subject set, totally failed, and notwithstanding all the pains and expense both of them were at, no more coal could be found in that ground, which being equivalent to a total vastation, sterility, or deficiency, there was neither law nor reason to compel him to pay the tack-duty, no more than if the coal had been swallowed by a chasm, or if a salmon fishing were set, and it should be found, that no salmon swimed within the bounds of that river set in tack: And Dirleton observes, on the 20th November 1667, Tacksmen of the customs of the Borders *contra* Ker, No 57. p. 10121, that abatement was due because of the devastation then happening by the English invasion in 1650; and lately, George M'Kenzie got an ease of the tack-duty of the excise, because of the dearth and the supervenient law. *Answered*, This was a bargain of hazard, where he took the coal *per aversionem* whether existing or not, and is like that which the law calls *jactus retis*; and therefore, the failing or non-existence of the coal cannot liberate him from the tack-duty, seeing he might have as much profit the two years it lasted, as may pay the whole three years duty. THE LORDS sustained the reason of suspension in this circumstantiate case, and found it not such a bargain of hazard as