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cause being called, at the advising of the report, it was *alleged*, That the defender ought to be assoilzied from the damage and interest, because he being only a compriser of a liferent-right, and that for an inconsiderable sum, which would not have taken down the turnpike and built the same, and if the liferenter deceased in the interim, he would be put from the possession of his tenement without payment of the sum for which he comprised; and in law, the liferenter is only obliged to keep the tenements and houses in as good order as he finds them when he entereth to the possession thereof; especially seeing the pursuer convenes John Littlejohn as appriser of the liferent-right, and does not convene the heritors of the said lands; and those that comprised the same from him to the effect he might have gotten relief of the heritors: To which it was *replied*, That a compriser of a liferent-right being in possession, is obliged to keep his neighbour safe and harmless, and consequently to repair the ruins occasioned by the defender's house whereof he was in possession: To which it was *duplied*, That the defender is not obliged to repair the ruinous house, unless the fiar had been called as well as the liferenter. THE LORDS found Littlejohn, the compriser of the liferent, liable for the damage and interest; and found it not needful to the pursuer to have required the defender to repair his house, it being proved that the house was ruinous; and reserved action to the defender against the feuars, or those that had comprised the feu, for his relief as accords.

Newbyth, MS. p. 87.

1685. February 13.

Dr SIBBALD against Lady ROSYTH.

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If the person in whose house a fire breaks out, is liable for the consequential damage; debated, but not determined.

IN an action at the instance of Dr Sibbald against the Lady Rosyth, for damage he had sustained in the burning of his house when possessed by her as a tenant;

Alleged for the defender; That this action is a novelty, and not relevant, unless it be alleged, that the fire was raised *culpa lata* or *levi* of the defender or her servant; for *ex natura contractus locati conducti*, the defenders are not liable for *culpa levissima*; *2do*, By the act 75. Parl. 4. King James I. a servant that racklessly, *i. e. culpa* and not by chance, raises fire, is to be punished, and not the master; *3tio*, By the 54th chapter, *Leg. Burgor.* where fire passeth out of one man's house and burns his neighbour's, no hurt should be done to him where the fire was first raised, but that the authors of such burning shall tyne their service; which implies, that the author was a servant, and *in culpa* too.

Answered for the pursuer; The difficulty of discovering the true cause of fire raising, is the reason why such actions have not been pursued. And though *ex natura contractus locati conducti*, parties are not liable *ob culpam levissimam*, they are so liable *ex Lege Aquilia*; *2do*, Though the said act 75. punisheth the

servant *primarie*, yet if he have not *in bonis* to repair the damage, it doth not hinder but that the master should be found liable *subsidiarie*, masters being liable for their servants, as *nautæ, capones, stabularii*, are liable for damage done by the *culpa levissima* of their servants; *3tio*, The burgh-laws are not authentic law with us; and the answer to the act of Parliament is repeated; *4to*, Fire is presumed *oriri ex culpa*, unless the contrary be proved, and *plerumque incendia fiunt culpa inhabitantium*, L. 3. § 2. D. De officio præfecti vigilum; so that it should lie upon the inhabitants to prove their innocence. And though lawyers say, that *debet constare de persona determinata*, yet seeing it is impossible for strangers to know what is done in a man's house, it is incumbent on the master of the house *demonstrare personam*; and if his own servant be the delinquent, he ought to be liable in our law for the damage. For though by the Roman law, masters had the privilege to free themselves from accounting for the delicts of their servants (who were slaves, and generally hated their masters) *noxæ caput dando*; yet with us servants, who are free men, are generally so affectionate towards their masters, that they may be cast from being witnesses for them. And masters, by choosing careful servants, may prevent such damages; and if they make an ill choice, they only should suffer by it. Again, the defender ought the rather to be liable, because she had once before endangered the house, by firing of a cushion left upon the hearth; and the fire might possibly have been prevented, had not she or her servant unnecessarily carried away the key of her chamber, though she had a closet to have locked up all things in; or if she had left the key, as she was desired to do, that such as came to see the house, which was to be set, might see it.

Replied; If inhabitants were to be presumed culpable without the pursuer's proving of the particular person guilty, the probation had been so easy, that this had not been the first process (as it is) that was ever raised about fire. But it seems the late advocate, Sir John Nisbet, who is a knowing lawyer, knew no such easy remedy of repairing his loss by the burning of his, or else he would have raised such another process for damages against French, the stationer, in whose shop the fire broke out. To allege that masters are liable *subsidiarie*, is a mere conjecture and divination, without any ground in law. And it is nothing absurd to leave the masters free, and chastise the servants; for, as the master of the house where fire doth first break out in, has always great loss, their own interest is sufficient to make them careful in the choice of, and watchful over the behaviour of their servants. And law has sufficiently provided against wilful fire-raising, by making it treason. There is a specialty in the case of *nautæ, capones, stabularii*, who (in respect of the necessity that people are under to trust these with the custody of their goods) are made liable for greater care, diligence, and fidelity in their servants. And lawyers are clear, that the pursuer should prove the *determinata persona*, that the master might exculpate himself by instructing, that either he had no such servant, or

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that his servant was absent, or the like. As to the specialties of fact, they import nothing, for the cushion was accidentally fired; and the defender having lost something on that occasion, which the maid was suspected to have stolen, that occasioned the defender to take away the key. And the defender having but a third chamber, if the vent took fire by being foul with soot, it was to be imputed to the setter and not to her, who had a considerable loss in her goods, which any body might think she failed not in ordinary diligence to preserve.

THE LORDS, before answer, ordained the points of fact to be tried; and recommended to some of their number to settle the parties.

Fol. Dic. v. 2. p. 343. Harcarse, (SUMMONS.) No 912. p. 256.

* * * Fountainhall reports this case :

1685. February 13.—SIR ROBERT SIBBALD, Doctor of medicine, having pursued the Lady Rosyth, at Privy Council, for his damage incurred by the negligence of herself and her servant-woman, in burning his house in Edinburgh, in April last; the Council, because of the novelty of the case, remitted it to the Session; though it had been more proper that the Council had imposed an arbitrary fine; and this forenoon it was debated in presence.—It was *alleged* for the defender, That no law could make the masters liable for refunding the loss arising from fires occasioned by their servants' negligence; that the negative argument of silence was of great import and moment here; for, though the case of such fires had oft occurred in Scotland, yet a pursuit was never once raised against masters to make up the damage *ob delictum famulorum*, from a mere conviction and acquiescence that they were not liable; and that the case was clearly decided in our municipal statutes, viz. acts 71. and 75. Parl. 1426, where *incendium deliberatum et dolosum*, wilful fire-raising, is made treason; but if it happen racklessly, and through mis-governance, i. e. *ex culpa levi vel levissima*, the servant, who is the cause of it, if they have goods, must refund the skaith; *aut si non habet in ære, luit in pelle*, by whipping and banishment; and if a man shall negligently burn his own house, then he is banished for it; if a tenant, then he shall amend the skaith, if he be the author of it himself; but he is not made liable when it is occasioned by his servants: And though, by the Pretorian edict, *nautæ, caupones, stabularii*, are made accountable for their servants' delinquencies, yet that was *jus singulare*, because of the necessity of committing our goods to ships, taverns, and stables, in our transportation from one place to another; and therefore *extra casus in jure expressos non est trahendum ad consequentias*; and by cap. 54. Leg. Burgor. De combustione domorum, et toralium (i. e. kilns,) masters are not made liable for their servants. *Answered*, for Doctor Sibbald, That he was founded in *jure communi*; for that politic nation the Romans had a Magistrate of purpose to oversee fires,

called *Præfectus vigilum*; and he, in l. 3. § 1. D. De offic. Præfect. vigil. has declared, that *incendia plerumque fiunt culpa inhabitantium*: So the presumption lying against the Lady, she must purge herself, and shew her diligence, or that it arose *extrinsecus vel casu fortuito*; especially seeing her negligence can be qualified; *1mo*, That she laid on too great a fire, and having given over the house, she left not the key with some neighbours, that when others came to see the house for taking it, they might have access; *2do*, That chamber having taken fire before, she was then advertised of the carelessness of her woman, and so put *in mala fide*. Vid. l. 27. § 9. D. Ad leg. Aquil. which makes us answerable for what our servants do in *proprio ministerio, seu officio cui deputantur*. And law sometimes, ob *bonum publicum*, makes parties even not accessory to crimes, liable for them; as the heads of our clans, for the depredations of their dependers; masters for their tenants resetting rebels on their ground, or if violence be offered to the minister, or a conventicle held on their land: And in England the Sheriff and county are to answer for any robberies committed within their district between sun and sun; and a preparative making masters liable for the damage occasioned by servants, will only cause us be more exact in chusing faithful and honest servants, and will deter bad ones.—Yet, at this rate, the negligence or malicious revenge of a servant, may ruin his masters in one night; and the Roman law in *delictis servorum*, bound only the master alternatively, either to compensate the damage, *vel servum noxæ dare*; since *noxæ caput sequitur, et pœna suos tantum debet constringere auctores*; and in the Roman law, there was much more reason to make the masters liable than in ours; for by it, they had *jus vitæ et necis* over them, and all they acquired *ne momento quidem consistere poterat in persona servi*, but instantly accresced to the master; which prerogatives Christian mansuetude hath now abrogated.

This debate being advised on the 24th of February, the LORDS, before answer to so dangerous a preparative, ordained the witnesses to be examined upon the whole matter of fact, and as to the advertisement given her, and the way and manner of the rising of the fire, and what negligence was in it.

Fountainhall, v. 1. p. 341.

1736. December 14.

SUTHERLAND of Rearquhar, against Mr FRANCIS ROBERTSON, Minister at Clyne.

REARQUHAR sets to the Mistress of Gees, and the said Robertson, her son-in-law, his lands and mansion-house of Rearquhar; the chief articles of which, so far as concerns the following dispute, were; "That they should leave the mansion-house in as good condition as they received it; and likeways the lands, at their removal, in as good tenantry as they got the same: As also, Rearquhar obliges himself to keep them in peaceable possession of the lands, &c. during

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Found that one, who was bound with another to leave a house in the same condition they received it, was liable, it being burnt by the fault of the other.