No 66.

Suspended, for that the rebels, when in possession of the country where these lands lie, did uplift the cess due out thereof; as also did impose on the lands certain sums proportioned by their valuation, or instead thereof, did appoint a soldier to be furnished them out of the said valuation of land; which the tenants were obliged to pay; and indeed paid the same by the charger's order.

The tenants failed in proving the order.

Pleaded for the suspenders, If rebels or enemies shall take possession of an estate, and levy the rents thereof, the tenants ought not to be liable to pay them again to their master; and their taking the rents is not the same thing with taking an indefinite sum from the tenant; cess is payable by the heritor; and tenants paying it are entitled to deduct it out of their rents; so that the rebels taking the cess was in so far taking the rent: As also was their taking the levy-money, which was imposed by them to be raised out of the land.

Pleaded for the charger, Rebels are to be considered as robbers, not as fair enemies; and for what they take, the person from whom they take it must suffer; nor will their declared intention found him in relief; cess is due to the King; and the argument used for the tenants would avail the heritors to retain it from him, which is not allowed them; the levy-money was imposed upon the tenants, as it was to redeem them from personal service; it cannot be said either of these sums was imposed upon the charger, though the execution went against his tenants; as the rebels concussed him to renounce his factory or tack of these lands, and took them into their own possession.

"THE LORDS found no allowance was due to the suspenders."

Act. *R. Craigie.* Alt. *Lockhart.* Clerk, *Justice.*

Fol. Dic. v. 4. *p.* 62. *D. Falconer, v.* 2. *No* 208. *p.* 251.

No 67.

An episcopal non-jurant chapel having been demolished by the King's army during the rebellion 1745, the congregation, who held the house in lease, were found liable for the rent, *quia culpa præcederat casum*, in not praying for the King.

1751. *November* 13. SINCLAIR *against* HUTCHISON.

THE treasurer of the Episcopal congregation in Elgin, for himself, and in name and for the behoof of the said congregation, became tacksman of the mason-lodge there in the year 1734, for the space of 5, 7, 9, or 11 years, in the option of the said congregation, commencing from April 1. 1734, at 100 merks of yearly tack-duty; and the house was to be delivered back at the expiration of the tack, whole and entire in lights, &c.

It happened that the King's army, in their march to Inverness, demolished this meeting-house, broke the glass and timber of the windows, and did otherways considerable damage to the house.

In the action brought in 1747, at the instance of Robert Sinclair the then master of the lodge, against Thomas Hutchison, then treasurer to the congregation, for three years' rent precediug April 1747, and thereafter during their possession, and for the damage done to the house; the following questions oc-

curred, *1mo*, On whom the damage done to the house was to lie; on the proprietor or the *colonus*. On the one hand, it was *casus fortuitus quem non præstat colonus;* on the other hand, *culpa præcederat casum*, in not praying for the King and Royal Family. No 67.

But as that was not a *culpa*, naturally or justly productive of the *casus*, which was in itself an irregular action, and not a lawful consequence of not praying for the King, the LORDS "found the defenders not liable for the damage."

The next question was, Whether they were to be liable for the rent for the year between April 1. 1746, and April 1. 1747? Former years the defenders did not controvert; and longer they could not be bound, as in that year the process was raised, wherein the defenders pleaded not liable, which was a sufficient upgiving.

Upon the one hand it was said, that they should be liable for that year, as they had retained the keys, and not given up the possession till they did it in the process, as has been said, which was not commenced till some months after the year was begun.

On the other hand, a difficulty was suggested from the Bench, That as it was now found, that the landlord was to bear the damage, the tenant could not be liable for the rent, when the landlord had not repaired the house, till which was done, it was not habitable. But it being also observed from the Bench, that there had been no requisition to the landlord to repair, who had therefore reason to think that the congregation was to do it, and to retain the expense out of the rent, and which was said to apply to every case of a repair incumbent upon the landlord; the LORDS "found the defenders liable for the rent of the year between April 1746 and April 1747."

Fol. Dic. v. 4. *p.* 63. *Kilkerran,* (PERICULUM.) *No* 7. *p.* 381.

1762. *July* 16. FOSTER and DUNCAN *against* ADAMSON and WILLIAMSON.

No 68.
What degree of sterility will relieve from the tack-duty.

IN January 1755, Foster and Duncan let to Adamson and Williamson a salmon-fishing in the river Tay, opposite to Errol, on the north side of a shallow named the Guinea-bank, to endure for five years. The river there is broad; but the current, being narrow, past at that time along the north side of the bank, the rest of the river being dead water. As one cannot fish with profit but in the current, the tacksmen made large profits the first two years, and were not losers the third; but the fourth year the current changed, which frequently happens in that river, and instead of passing as formerly along the north side of the bank, it past along the south side, which was a part of the river set to other tacksmen; by which means the fishing let to Adamson and Williamson became entirely unprofitable the remainder of their lease.