

S E C T. X.

De damno infecto. Damage by fire.

No 61.

An action of damages for a tenement injured by the fall of a neighbouring tenement, was found competent against an appriser of a liferent of the fallen tenement.

1666. February 16. JOHN HAY of Knockondie *against* LITTLEJOHN.

JOHN HAY pursues Littlejohn for the damage sustained by a house belonging to Littlejohn falling on the pursuer's house. It was *alleged*, The defender was only appriser of a liferenter's right, and this behoved to lie upon the fiar, who was obliged to uphold the liferenter's house.

THE LORDS found the defender liable, seeing he possessed as appriser sixteen years; and also intromitters with the profits of the house, are liable for the damage sustained thereby, seeing both fiar and liferenter were obliged to uphold it, and are liable *de damno*.

1666. December 14.—HAY of Knockondie pursues Littlejohn for the damage sustained by him by the fall of Littlejohn's house, called the Tower of Babylon, whereby the pursuer's house, adjacent, was broken down. The defender *alleged*; 1st, The libel was not relevant, unless he had been required to find caution *de damno infecto*, as is required by the civil law; whereby, if that caution was not required, there is an express text in the Title *De Damno Infecto*, that there shall be no action; but the party shall impute his loss to his own negligence. Likeas, we have two special statutes concerning ruinous houses, which prescribe the method of preserving them and making up the damage, none of which being followed, the defender is not liable.

2dly, Whatsoever might be alleged against the heritor of the said house, the defender is only an appriser of a liferent-right, for a small sum; and the liferenter was not obliged to repair a tenement manifestly ruinous, that could not be preserved but with great expense and re-building, much less the appriser who hath but a small sum on it. The pursuer *answered* to the *first* defence, That his libel was most relevant, damage upon any fault being due and repairable by the law of nature; and, as for the civil law, it hath no effect with us in this point, our custom neither giving nor requiring such caution, much less refusing action if it be neglected; and as to our own statutes, though they be very convenient ways for securing damage, yet they are not exclusive, nor have they any clause, except in these cases, and in that method damage shall be irrecoverable. To the *second*, it was *answered*, The pursuer was not obliged to know, or inquire whether the defender was heritor or not; but he finding that he was a neighbour, behaving himself as heritable possessor, by uplifting the duties, he did pursue him, and if need be, offers him to prove, that he did.

require him to keep him skaithless, though he took no instrument thereon. The defender *answered*, That he was not obliged to take notice of such requisitions, not being solemn by instrument.

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THE LORDS found the defender liable, albeit there had been no requisition verbal or otherwise, it being proved that the ruinousness of the tenement that fell, was notour and manifest to the defender himself, whereby he was obliged, either to demolish the house, if it was not reparable, or to have quit his possession to evite the imminent damage of neighbours.

Fel. Dic. v. 2. p. 343. Stair, v. 1. p. 358. & 413.

* * * Dirleton reports this case :

LITTLEJOHN having comprised the liferent-right of a tenement in Leith, the said tenement became ruinous ; and by the fall of a part of it, did crush a part of the next house adjoining to it, belonging to John Hay of Knockondie. In a pursuit Knockondie against Littlejohn, for damage and interest,

THE LORDS sustained process ; the pursuer proving that the house was manifestly ruinous ; without necessity to libel or reply that the pursuer had required the defender to repair his house ; it being sufficient that the case of the house was such as did really require and call for reparation, in order to his own interest, and for preventing his neighbours ; so that it being his fault, that he did not repair the same, he was liable to refund the pursuer's damage ; and albeit by the act of Parliament, liferenters may be urged to find caution to keep their liferent lands *sarta tecta*, and in the condition they found them at their entry ; and by the civil law, neighbours may be urged to find caution *damni infecti* ; the said remedies are not privative, in case any prejudice be done before they be taken.

Dirleton, No 66. p. 23.

* * * Newbyth reports the same case :

1666. *January 12.*—JOHN HAY of Knockondie, heritor of a tenement of land in Leith, contiguous to that house called the Tower of Babylon, possessed by John Littlejohn, compriser thereof, pursued the said John Littlejohn, before the Dean of Guild of Edinburgh, for damage and interest, *alleging*, That the fall of the said John Littlejohn's house, or turnpike thereof, has demolished or casten down a fore-stair and chimney, lum-head, and some windows ; whilk action being advocated to the Lords, there was a commission granted by them to the Bailies and Dean of Guild of Edinburgh, to visit the said houses, and make report what damage and loss Knockondie sustained by the foresaid fall ; which commission was retoured, and the report bears, That John Hay was damnified in the sum of 300 merks, by and attour the want of the house-mails. The

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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.

No 62.

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