

1685. February 26.—In Mary Erskine's pursuit against Thomas Robertson and Robert Miln, (mentioned 28th January, 1685,) Thomas adducing Mr. James Smith, and some other masons as witnesses, the Lords, on Castlehill's report, sustained the objection against Mr. James, that he was Robert Miln's good-son, though he was not related to Thomas Robertson, *ab continentiam causa*; but repelled the objection against the rest, viz. that they served Robert Miln on day's wages as masons, and allowed them to be received as witnesses.

1685. November 27.—At advising the cause between Mary Erskine and Bailie Thomas Robertson, mentioned 26th February, 1685, it was alleged, *1mo*, What he did was *auctore prætoris*, by the Dean of Guild's jedge and warrant, she being cited; *2do*, That any damage her house suffered was *ex vitio intrinseco ipsius ædificii*; for it being near the Cowgate old loch, they had not taken the foundation of her gavel below the bottom of the slimy channel of the loch, and had only built the lowest story of it of mud, or cat and clay. Answered, The Dean of Guild, in ordering a house of 14 story high, to be pinned to mine, to crush it, was not *prætor* but *prædo*; and every one cannot build strong work, but must build as their purse can; and if you saw my wall tender, you should not have digged under its foundation, but kept so many feet distance, as in the Roman law; *L. 3. C. Finium regund.* The Lords demurred on the point of right, that nothing could impede Bailie Robertson *in suo ædificare*, this not being properly *amulatio vicini*, where *mibi prodest licet alteri noceat*; but they recommended to some of their number, to move him to give the woman something by way of composition.

By that tryst taking no effect, the Lords advised the mutual probation, on the 17th of March, 1686, and found it proved, that the damage which the pursuer's house has received was occasioned by the building of the defender's house; and, before answer, as to the making up of the pursuer's damage, they allow a mutual probation to both parties, to prove the condition the pursuer's house was in when the defender began to build, as likewise what mail or rent the said house would give now, if it were in as good a condition as it was in at the time when the defender Robertson did begin to build his new house.

Fountainhall, v. 1. pp. 276, 334, 344, and 379.

1684. December 9.

FALCONER against KINNIER.

No. 97.

A reduction was raised, because the written depositions of the witnesses did not bear the words "as they shall answer to God;" nor were they signed by the witnesses, and they did not bear that the witness could not write. The witnesses being now dead, the Court would not open up the matter of proof.

Fountainhall.

* * This case is No. 46. p. 1766. *voce* BONA FIDE CONSUMPTION.