

No 82. if these acres had never been so much improved and meliorated, yet the quantity of the multure would not have been augmented, but continued still the same; so *quem sequitur commodum, eundem debet sequi et onus*. And here a partial loss can infer no diminution of the multure, seeing the acres remaining will do much more than pay the same, and the river may return to its former channel, and so the ground will be recovered again.—THE LORDS thought, if it had been only an acre or two overflowed, it would not have deserved any consideration; but being an *interitus rei* to the half of the whole subject, they, before answer, allowed a probation for taking trial, what was the quantity of the loss and damage.

*Fel. Dic. v. 2. p. 62. Fountainball, v. 2. p. 164.*

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## S E C T. XII.

Where a Builder upholds his Work.—PERICULUM between Master and Servant.

1775. August 1.

GEORGE CLERK and GEORGE IRVINE, Esqrs. *against* ALEXANDER LAWRIE.

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*Periculum*  
found to lie  
on the under-  
taker, bound  
by contract  
to uphold a  
bridge for se-  
ven years,  
which had  
fallen in the  
fifth year.

IN the year 1761, the Gentlemen of Lanarkshire came to a resolution of building a bridge over the Clyde, near Elwanfoot. Mr Clerk and Mr Irvine, the chargers in this action, were empowered to enter into agreements for building that bridge, and to receive the proposals of tradesmen. Upon this occasion, Alexander Lawrie, mason, presented a plan and estimate of the bridge, and was preferred to the other workmen, who had, at the same time, given in their proposals.

Matters, however, lay over for some years, when, in December 1766, a contract, agreeable to the estimate 1761, was executed between the chargers and Lawrie; in consequence of which, he proceeded to build the bridge, and completed it within a reasonable time. However, in November 1772, the bridge fell down, when it had only stood for five years; and, as seven years was the time stipulated for the undertaker to uphold it, application was made to him by the chargers to rebuild the bridge, at his own expenses, as soon as convenient. But finding him reluctant, a charge was given him for that purpose, which he brought under suspension; and a proof having been led, and a visi-

tation of the foundation of the bridge made by authority of the Lord Ordinary, the case was taken to report.

The reason of suspension was, that the suspender had implemented the contract on his part; and having implemented it, the chargers have no further claim against him; for though it is true, that, by the contract, he became bound to maintain and uphold the bridge for the space of seven years after it should be finished and found sufficient, and, in fact, it was destroyed at the end of five years, yet that accident is nowise imputable to him; for, being the effect of an uncommon speat, which it was impossible to resist or secure against, it can be viewed in no other light than if the bridge had been demolished by lightening, or thrown down by an earthquake; in either of which cases, the suspender would not have been liable, as he had done every thing in his power to implement his contract, and the work had been destroyed by an accident, which neither human power nor human prudence could provide against.

As to the obligation in the contract, founded on by the chargers, *argued*, All such obligations are to be interpreted according to the ideas suggested by right reason; and no law whatever will push their force the length of absolute absurdity. They will never be construed into an obligation to resist all powers, human and divine. If the work should be destroyed by the devastations of an enemy, no law will oblige the builder to restore it, far less will it oblige him to warrant it against the strokes of Providence, excited through the extraordinary efforts of nature, whether in the way of earthquake, of lightening, or of extraordinary and preternatural floods. In short, every extraordinary event that, in the common course of human affairs, could not be expected, is considered as barred in all contracts of this nature; for, as human prudence could not foresee them, it cannot be expected, from human care, that they should be particularly enumerated so as to be barred.

*Answered* on the part of the chargers; That the river rose higher, when the bridge fell, than what the suspender alleges he had been informed, can be no defence to him; because the bridge should have been sufficient to resist the flood, and he should have planned it so as to have made some allowance for accidents. But allowing the fullest force to the suspender's evidence, it appears in the proof, that the flood rose but a few inches higher than those floods, according to which the suspender pretends to have formed his plan; and that the suspender likewise acknowledged, that, if the foundations had not given way, the strength of the flood was not sufficient to have done any damage to the bridge.

High floods cannot be considered as extraordinary and unforeseen, as accidents of thunder or earthquakes; because, in building a bridge, a great allowance should be made for accidental floods, which may happen to be higher than any of which information can be got before the bridge is built.

The suspender might have some shadow of equity in his case, had the flood which happened when the bridge fell, brought down any extraordinary quanti-

No 83. ty of wood or ice along with it. But there is but little wood in that country growing above the bridge; and when it fell, there was no ice nor snow upon the ground.

Again, clauses, such as that upon which the suspender is charged, are necessary in all contracts of the nature of that under determination. Buildings may be constructed in such manner as to appear externally sufficient, whilst, at the same time, there are concealed defects of the most important nature.

In buildings, their standing or falling must be considered as the only criterion of the sufficiency or insufficiency of the work. When, therefore, the chargers received the bridge from the suspender, as a sufficient bridge, they did not receive it as intrinsically sufficient, but as apparently so only. They could find no fault with the external appearance of it; but the sufficiency of the work was to be determined only by its standing in good repair for seven years, the time stipulated in the contract.

Two witnesses only pretend to give any conjectural measurement of the height of the flood. The first witness says, that the flood, when the bridge was destroyed, rose about nine inches higher than a great flood he had observed about twelve years ago. The other witness says, that it rose nine or ten inches higher than what he had seen it; and these are the only witnesses who pretend to give any idea of the perpendicular rise of the flood.

There is not the smallest evidence that the fall of the bridge was owing to the force or pressure of the water. The true cause of its fall was the improper manner of laying the foundation of its pillars, which is evident from the gradual manner in which it was wasted by the floods, and the situation in which its foundations were when it fell.

Floods are the natural cause of the damage of every bridge, and must always be supposed to be circumstances particularly guarded against. Besides, the price which is to be paid for building depends very much upon the insurance to uphold it, and the length of the time specified. By such an insurance as the one in the contract, the suspender is certainly bound to insure against all accidents and misfortunes natural to bridges. In the case of a question about recovering insurance, would it be any defence to the insurers, that the fire had been communicated in an uncommon or extraordinary manner? or that the storm, which destroyed the ship at sea, had been the greatest known for many years? These are the natural misfortunes which the insurers against fire, or sea hazard, are bound to make up to the losers. By the same rule, floods are accidents natural to bridges, and which cannot excuse the workman from rebuilding, who contracts in this manner, and upon these conditions receives a certain price.

The Court were clear, upon the general principles, to give judgment against the suspender, in consequence of his obligation to uphold the bridge for the

number of years therein stipulated; and likewise seemed convinced, by the proof, that the foundation of the bridge was originally faulty.

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THE LORDS repelled the reasons of suspension.

Reporter, *Auchinleck*

Act. Geo. Clerk.

Alt. *Crosbie*.Clerk, *Tait*.

*Fol. Dic. v. 4. p. 61. Fac. Col. No 191. p. 121.*

1794. November 29.

DAVID WHITE against DAVID BAILLIE.

DAVID BAILLIE, a farmer in the county of Forfar, having hired David White, as his servant, for a year, the latter, after entering into his service, was seized with an illness, which prevented him from working during 11 weeks. No other servant, however, was hired to do his work during his absence.

White having afterwards brought an action against Baillie, for payment of his wages, the defender claimed a deduction, in proportion to the period of the pursuer's absence.

The Sheriff gave judgment in favour of the pursuer.

A bill of suspension having been passed, the suspender offered to prove, that it was the practice of the county where he lived, to make such deduction; and farther

*Pleaded,* As in the contract of location, the premium paid by the *conductor* is meant to be proportioned to the benefit received by him, it is reasonable, that when any unforeseen accident deprives him of the expected advantage, he should be allowed an equivalent abatement. This principle is recognised where the subject of the contract is a farm or a house; (*vide supra, b. t.*) and it should hold more particularly in the contract between master and servant, as there the amount of the deduction can be more easily ascertained; and although, from motives of humanity to the latter, every short period of absence would not be taken into account, yet where the inability to work has been so long continued as in the present case, the defence ought to be sustained. Accordingly, at an appeal heard at the Perth circuit, within these few years, it was found, that a master was entitled to make a deduction where the servant had been absent on account of sickness a quarter of an year.

*Answered,* Wherever a person pays a determinate premium for the use of a subject, he takes on himself the risk of the quantity of benefit to be received from it. Upon this principle, in the case of a farm, although the tenant is not obliged to pay any rent, where, from circumstances not imputable to him, no crop at all is produced, he has no claim for abatement, merely because the farm has been less productive than usual. The same should hold still more in questions between master and servant, as the duty of the latter consists not so much in performing any specific quantity of work, as in a general respect and

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A farmer found not entitled to deduct any part of the wages of a servant hired for a year, on account of his having been disabled by sickness from working during eleven weeks of that period.