

1549. December 19.

ABBOT OF HOLYROODHOUSE *against* Mr JOHN MONYPENNY.

No 80.

GIF ony persoun be debt-bund, or oblist to ane uther for payment of his teindis, he sall not be compellit to pay the samin, or ony part thairof, gif the cornis that grew upon the ground wer destroyit, waistit or consumit be force or violence, to the quhilk he wes not hable to resist, being ane host, armie or multitude of men.

Fol. Dic. v. 2. p. 62. Balfour, (TEINDIS OF BENEFICIS.) No 8. p. 146.

1563. July 29.

The CHAPTER of GLASGOW *against* The LAIRD of CESSFORD.

No 81.

WEIR standand betwixt this realme and Ingland, and the cornis of the bordouris beand schorne and stoukit, and the awneris thairof dar not leid nor put the samin in the barn zaird, for fear of burning thairof by the enemeis, gif the samin perish and rot for the maist part upon the fieldis, the tenentis awneris sould not be compellit to pay teind for the samin.

Fol. Dic. v. 2. p. 62. Balfour, (TEINDIS OF BENEFICIS.) No 7. p. 146.

1702. December 9.

JAMES AITKEN & ROBERT MAXWELL *against* The TENANTS of HALYWOOD.

No 82.

JAMES AITKEN and Robert Maxwell, the Earl of Nithsdale's millers at his mill of Clouden, pursue the Tenants of the Carse of Halywood for their bygone abstracted multure. *Alleged*, The lands out of which this multure was acclaimed were of old 26 acres; but now, by the overflowing of the water of Nith, they are so drowned and inundated, that there are near 13 or 14 acres turned to a sand-bed, and become a part of the channel of the river *per alluvionem*, and so wholly lost and useless to the heritors; and as this would be a sufficient ground for a tenant to seek deduction and abatement of his rent, so it is as good a defence against mill-multure. *Answered*, The duty acclaimed is not so much the hire of service as a dry multure, which is due, whatever become of the land; for when it was lee and in grass, the multure was never denied, though it bore no corn nor multure-grain; and whatever might be pleaded, if there was an *interitus totalis* of the subject out of which the multure is payable, yet a partial sterility can afford no defence, else this might be obtruded against the feu-duty, or an infestment of annualrent; for, as long as there remains as much of the subject as will pay these, they remain still due: And

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.

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.

No 83.

Periculum found to lie on the undertaker, bound by contract to uphold a bridge for seven 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-