*** C. Home reports this case:

No 65.

THE Earl pursued these Tenants for the rents of their possessions, crop 1733. The defence was, That there happened, in the month of June that year, an extraordinary storm of hail and rain, accompanied with thunder and lightening, which destroyed and laid waste almost their whole corns; that the calamity was general, though it fell with a particular violence on the defenders, in so much that scarce any of them reaped what was sufficient for defraying the expense of seed and labour; consequently, as there was no crop, the defenders could be liable in no rent. And a proof having been allowed, and led, the most of the defenders proved their defence. *Answered*, The whole of the proof was a circle of the several defenders deponing for one another; every man depones for his neighbour, and his neighbour for him. 2*dly*, It was said not to be a settled point amongst the Doctors, whether even a total sterility for one year does afford the tenant, who has a lease for several years, any claim of deduction on account of the sterility of that particular year? And whether he ought not to compensate the loss of one year with the profit of another, seeing, in all such matters, there is an evident chance, which each party runs the risk of? But as the pursuer is sensible the defenders suffered, he is willing to give the same allowance the rest of the gentlemen of the county gave to their tenants, *scil.* a half year's rent.

Replied to the *first*, That all the witnesses were persons of entire credit, men of substance for persons of their degree, and possessing by tacks; that none had sworn to his own loss, and swearing to his neighbours, could be no proof as to him; so the proof for each must be taken by itself. And to the *second*, it was *answered*, That what the defenders had reaped would not defray the expenses of seed and labour; consequently there was no crop, as nothing is be understood in law to be *in fructu*, until deduction of the charges of gathering and in-bringing the fruits. See l. 46. D. De usuris et fructibus. Voet § 25. tit. Locati. l. 25. § 6. eod. tit.

THE LORDS found no rent due by such of the defenders who proved, that they reaped no more than about the value of seed and labour.

C. Home, No 213. *p.* 354.

No 66.

No abatement was allowed to tenants out of their rent for exactions extorted from them by the rebels in 1745.

1751. *June* 13. JAMES STRACHAN *against* CHRISTIE and Others.

JAMES STRACHAN, tacksman of the lands of Fairnyflit and Largie, part of the forfeited estate of Marshall, under the York Buildings Company, took a baron decreet against his tenants therein, for certain sums, as arrear of their rents for crop 1745 and subsequent.

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-