to merks, allowing and deducting the £.20 deponed on as insufficient when they entered; and decerned him to pay the superplus he had poinded for, more than this restricted modification extends to, being the third of the whole sum decerned for. No. 139.

Fol. Dic. v. 2. p. 424. Fountainhall. v. 2. p. 405.

1741. *June 5.* YORK-BUILDINGS COMPANY *against* ADAMS. No. 140.

A tacksman who was allowed a pretty large sum by his tack for putting the subjects in repair, and was obliged to keep them so, was found not bound to repair the damage done by an extraordinary accident, such as a hurricane.

Fol. Dic. v. 4. p. 326. C. Home.

*** This case is No. 63. p. 10127. *voce* PERICULUM.

1760. *December* 17. MACDOUAL of Glen *against* MACDOUAL of Logan.

No. 141.
Clause obliging the heritor to repay to the tenant, at the end of the tack, what sums he shall lay out out in building fences, is effectual, altho' the tenant purchase the lands during the curreney of the tack.

Johnston of Kelton, in 1727, set a tack of the lands of Whiteside, &c. to Macdoual of Glen, for twenty-six years. The tack contained a clause, by which Mr. Johnston bound himself, and his heirs, to repay to the tenant, and his heirs, whatever sums he or they should lay out in building and making profitable dikes and fences upon the lands, not exceeding the sum of £.50 Sterling, and that at the end of the tack; the said expenses to be vouched by the said John Macdoual and his foresaids their honest word allenarly.

In consequence of this clause, Macdoual built a number of dikes, to the extent of about sixteen hundred roods, which were all completed in the year 1730.

In 1731, Mr. Johnston sold the lands; and Macdoual of Glen, the tenant, became purchaser. The term when the tack expired was at Whitsunday 1754; and, soon thereafter, Macdoual of Glen brought a process against Macdoual of Logan, as representing Johnston of Kelton, for payment of £.50 Sterling laid out upon inclosing, agreeable to the clause in the tack.

Pleaded for the defender: These expenses were to be repaid at the expiry of the tack by the proprietor; because he was to reap the benefit. The pursuer is now heritor, and enjoys the advantage of the fences; and therefore must pay for them. By a part of this clause, the tenant is obliged to leave the fences in a good condition. It is evident, therefore, that this money was to be paid, in consideration of the advantage that would accrue to the heritor, by having the lands raised when the tack was at an end. This advantage is now fallen to the pursuer himself; and therefore he must pay for it. Had any third party become purchaser, he, and not the defender, would have been liable to implement this clause. The

No. 141.

tack was certainly at an end at the time of the purchase; and therefore, if the money was ever due, it was at that period. At that time, the pursuer was assembling all the claims he had to exhaust the price, and yet he made no demand for this £.50; which demonstrates, that he was sensible he had no title to it.

Answered for the pursuer; Johnston of Kelton himself, his heirs, executors, and successors, are bound by this clause in the tack; and it could never transmit against a purchaser, without a special proviso for that purpose. The purchaser, no doubt, enjoys the advantage of the dikes; but then he pays for it, by buying the lands at a dearer rate; as it will be admitted, that lands inclosed will give a greater number of years purchase than those remaining uninclosed; and as the seller gets a higher price on account of such inclosures, he must undoubtedly pay the expense of making them. This is a personal debt of the seller, for which the purchaser never can be liable. The £.50 in question was not payable till the years of the tack were run; and therefore it was impossible for the pursuer to make the demand at the time he was accounting for the price.

"The Lords found the defender liable to the pursuer in the £.50 in question."

Act. *D. Dalrymple, junior, Miller.* Alt. *Garden.* Reporter, *Strichen.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 4. *p.* 326. *Fac. Coll. No.* 260. *p.* 482.

1765. *June* 25. GEORGE DALZIEL *against* LOCKHART of Cleghorn.

No. 142.

A sum of money being allowed to a tenant for the reparation of houses, it was found, provided the houses were put in a habitable condition, that the tenant was not obliged to account for his disbursements.

George Dalziel and Mr. Lockhart of Cleghorn having agreed about the conditions of a tack of certain lands belonging to the latter, one of which was, that a stipulated sum should be allowed to the lessee for the expenses he might be obliged to throw out in the reparation of the houses upon the farm, a process being afterwards commenced upon the different constructions to be put upon the terms of the tack, it was found unanimously, That the master could not oblige the tenant to produce a particular account of the expenses he had been at, provided he had fulfilled the terms of the tack, in properly repairing them, and putting them in a habitable condition.

Act. *Lockhart.* Alt. *Dundas & Wight.*

Fol. Dic. v. 4. *p.* 327. *Fac. Coll. No.* 18. *p.* 31.

1767. *June* 27. ANDREW FINNIE *against* WILLIAM MITCHELL.

No. 143.

The Judges were almost unanimous, That dung is none of the articles that may be sold by the tenant for paying his rent; its proper use being to meliorate land. *Ergo*, If not used, it goes with the land to the new tenant.

Fol. Dic. v. 4. *p.* 328. *Sel. Dec. No.* 256. *p.* 329.