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.

*** This case is reported in the Faculty Collection :

No. 143.

Andrew Finnie, tacksman of the lands of Swanston, having removed therefrom at Michaelmas 1764, left there a quantity of dung, collected by him from November, 1763, to the time of his removal.

After his removal, he brought an action against Mortonhall, his master, and Mitchel, the incoming tenant, for payment of the value of the dung.

Pleaded in defence; That Finnie, by his tack, was bound to labour and manure his farm properly; which if he had done, he would have laid the dung collected from November, 1763, to Whitsunday 1764, on his bear land; and therefore, although he had not done so, but taken a crop of bear without dunging the land at all, his mislabouring the ground in that manner could not found him in an action for payment of that dung, which, if he had managed properly, ought to have been laid upon his bear-land at Whitsunday 1764.

2do, It was pleaded, That although the tack had contained no such obligation, yet, from the nature of the contract, an outgoing tenant is bound to labour the ground the last year of his lease in the same manner he had been in use to do, during the former years, or if he had been to continue in possession.

And, *3tio*, It was contended, That as the farm which the pursuer had possessed was a steilbow farm, so far as respected the straw, it followed, of course, that the dung could not be carried off, in consistency with the obligation thence arising.

Answered for the pursuer, That the clause in the tack referred to by the defender must be understood according to the custom of the country; which has always been, to lay the whole dung made through the year upon the wheat-land, and none at all upon the bear-land; which he accordingly followed, by laying the whole dung made from November 1762, upon his wheat-land sown in November 1763; and therefore the dung he made after November 1763, was not laid upon the beer land in spring 1764, because it never had been his practice, nor the practice of his neighbours.

2do, The pursuer denied, that he had ever laboured the farm otherwise in former years than in the last year.

3tio, It was said, that the argument arising from the *third* defence went so far as to deprive the pursuer of the price of the dung collected after bear-seed time, as well as before it; which the defenders themselves had yielded he was entitled to.

" The Lord Ordinary found the pursuer entitled only to the value of the dung made after bear-seed time the year he removed from the lands."

To which interlocutor the Lords, on a reclaiming petition and answers, adhered.

Act. *Maclaurin.* Alt. *Rae.*

J. S. Tertius. *Fac. Coll. No. 51. p. 100.*