1803. *May* 14. DUCAT *against* COUNTESS of ABOYNE.

No. 147.
A new house, if not inadequate to the size of the farm, though larger than the old one, which had become ruinous, held to be a melioration, and to be paid at the end of the lease by the landlord, who was bound by the lease to pay for meliorations.

The Mains of Halyburton were let in lease to Charles Ducat, for thirteen years, at the rent of £.210, with a clause binding and obliging him to leave the houses and biggings of his said possession in a good, sufficient, and habitable condition at his removal, and to take the same under inventory; and "if the said houses and biggings shall be then found to have been ameliorated, the said Charles Ducat shall have allowance therefor from the said Countess of Aboyne."

Having another farm in the neighbourhood, Ducat did not at first reside at Halyburton; but, in 1788, he applied by a letter to the Earl of Aboyne, urging the necessity of building a new dwelling-house, and one of a larger construction than the former, for the accommodation of his family, as he meant now to reside there. The Earl, in reply, declined being answerable for any thing but repairs, in terms of the lease. Upon his pulling down the old house, and beginning the building, a protest was taken (10th June, 1788,) against him, that the proprietor should not be liable for the expense of the new building.

At the expiration of the lease, in 1798, valuators were appointed, who reported the value of the old houses at £.111 16*s*. 9½*d*.; of the new houses, £.225 8*s*. 1*d*.; the estimated value of the houses at the commencement of the lease having been £.122 2*s*. Ducat therefore brought an action for £.215 4*s*. 8*d*. before the Sheriff of Forfarshire. Of this sum, the dwelling-house amounted to £.137 15*s*. 9*d*.

A proof was allowed; from which it appeared, that the old house, consisting of two rooms and a kitchen, had become uninhabitable, and that it stood in need of a thorough repair; and that, in building the new house, which had two stories, only a small part of each gabel of the old house had been retained. It had not been necessary to occupy it since the tenant left the farm, as the proprietor had himself entered into possession of the ground; which, it had been explained to the tenant, would probably be the case, in the answer to the letter he addressed to Lord Aboyne.

The Sheriff, (6th July, 1802,) upon examination of the proof, found, that the houses built or repaired by the pursuer appear to have been necessary for the farm.

A bill of advocation against this judgment, with answers for the tenant, was reported to the Court; when they adhered (14th May, 1803,) to the judgment of the Sheriff, by refusing the bill.

The majority of the Court held, that, as the old house had become ruinous, the erection of a new house was necessary; and although this was twice the size of the former, still the addition was not considered unreasonable, as it did not make the house larger than was proper for such a farm; so that, in fact, it was a melioration. Others of the Judges, however, did not feel themselves entitled to consider so much what was proper and reasonable for the size of the farm, as what had been bargained between the parties. If the old house was ruinous, the erection

of a new one, of the same dimensions, would be a melioration, for which the landlord had agreed to repay the tenant; but in so far as it was larger, they considered it as a new subject, and not a melioration of the old. If he had repaired the old house, and built a new room, for this addition, they also thought, that he could not have expected, from the terms of the lease, to have been reimbursed. In all cases, they remarked, the Court should avoid making a bargain for the parties different from what they themselves have made, and acted upon. They were of opinion, therefore, that the tenant was entitled to the full expense of a house of the same dimensions as the old one, but to nothing more. No. 147.

Lord Ordinary, *Meadowbank.* For Ducat, *Hagart.* Agent, *Jo. Macritchie.*
Alt. *Baird.* Agent, *J. F. Gordon, W. S.*

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SECT. IX.

Privileges reserved to the Landlord.

1749. *June* 24. RUSSEL *against* JOHN and WILLIAM CLERKS.

No. 148.
The heritor's remedy stated when the tenant has no stock on the ground.

When William Clerk, father to the said John and William, purchased the mailing of Struthers from Naismith of Ravenscraig, Alexander Russel possessed it, upon a 19 years tack, whereof several years were to run, at the yearly rent of 9 bolls and £.40 Scots of money; but the purchaser, wanting to get rid of the tenant, in a most illegal and unjustifiable manner, broke up his barn-door, put a new key on it, disposed of the corns that were therein, his plow and plow-graith, and all this in the month of January, before the first year's rent he had right to became due, which was not till the Candlemas thereafter.

Russel brought a process of spuilzie against him, wherein he libelled so much as the value of his corns, plow and plow-graith, and so much as the profit he would have made of his tack for the years to run, but of which he was deprived by the said spuilzie, amounting the whole sum libelled to £.2209 3*s.* 4*d.*; and, upon considering this account, the Lords "allowed the pursuer his oath *in litem* on the said corns, plow and plow-graith;" and, on advising thereof, "found the defender liable in £.567 Scots;" which was accordingly paid.