No 63. tors. 3*tio*, From the clause in the tack, no such inference can be deduced, for this being a *bona fide* contract, must be constructed according to the usual meaning of parties; and as even in cases of ambiguity, the interpretation would go against the setter, in whose power it was *legem contractui dare*, it is plain, the tacksman's obligation can be no further extended than to such repairs as should become necessary, through the common and usual decay and waste of the materials; but surely, in no construction, can it be extended to comprehend an earthquake or hurricane, with the like of which, this climate never, or at least rarely, was ever affected.

THE LORDS found, that the tacksman ought to have allowance for the extraordinary damages sustained by the late hurricane, notwithstanding the allowance of a sum in the tack, for putting the houses in repair, and the obligation to keep them in repair during the currency of the tack; and allowed a conjunct proof as to the condition the houses were in when the tempest happened, and the extent of the damages. *See* TACK.

Fol. Dic. v. 4. *p.* 62. *C. Home, No* 168. *p.* 282.

1741. *July* 10. CLERK *against* SIR JOHN BAIRD.

No 64. A TACKSMAN of lands, whereon there was a little collection of houses, notwithstanding a clause in his tack obliging him to keep the houses in repair, was found not liable to repair the damage done by the hurricane, which happened on the 13th January 1739, as to such of the houses as were damaged to an extent exceeding the effect of storms in use to happen in this country; but as to such of the houses as were not damaged beyond what might be supposed to happen in an ordinary storm, he was found liable to repair.

Kilkerran, (PERICULUM.) *No* 1. *p.* 376.

1742. *December* 3.

EARL of EGLINTON, and his Curators, *against* The TENANTS of the Baronies of Kilmares, Roberton and Dreghorn.

No 65. What damage sufficient to free tenants from payment of rent.

AN uncommon storm of hail having happened in the year 1733, in that corner of the shire of Ayr, where the above baronies lie, whereby great damage was done to the Tenants who possessed corn-farms, and the Earl's Curators not thinking it safe for them to give deduction of the rents without authority, they pursued the Tenants before the inferior court; and the Tenants, after proof led, brought the matter before the Lords by advocation. At discussing whereof, it was found, "That no rent was due by such of the Tenants as had proved that they reaped no more than about the value of their seed and labour."

Kilkerran, (PERICULUM.) *No* 2. *p.* 376.

*** 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.