descends, that it was granted on account of 18 months' entertainment of the Colonel, and of the pursuer's personal attendance on him as a physician during that space: and he is bound to do no more: Perhaps he has done already more than was incumbent on him. "His compliance might be fatal, in point of precedent, to the established laws of every mercantile country."

On the 8th August 1766, "The Lords adhered."

Petitioner.—William M'Kenzie.

OPINIONS.

HAILES. The petitioner is very anxious for the law of merchants. This, however, is not a mercantile transaction,—a bill drawn by an officer of the army in favour of his physician.

1766. *August* 8. MRS ANNE and MARY SELLERS, Heirs-Portioners of Mr William Seller, Writer in Edinburgh, *against* JOHN BROWN, Merchant in Edinburgh.

TACK.

Construction of a clause in the lease of a brewery, binding the tenant to uphold the brewing looms and vessels, &c. and restore them in good condition at the end of the lease, tear and wear excepted.

In 1756, the deceased William Seller granted to the deceased Simon Bennet, brewer in Edinburgh, a lease of a dwelling-house, brewery, and pertinents, together with the brewing utensils therein mentioned, and that for the space of 15 years, from Martinmas 1756. William Seller "bound and obliged himself to uphold and maintain the roofs of the dwelling-house, brewery, and haill pertinents thereof, wind and water-tight, during the continuance of the tack." Simon Bennet, the lessee, and John Brown, his cautioner, "bound and obliged themselves, conjunctly and severally, to uphold and maintain all the brewing looms and vessels, and others above specified, and the going graith upon the well, in sufficient repair, during the currency of this tack; and to restore and deliver back the said brewing looms, and others above mentioned, and the going graith upon the well, all in good condition, at the expiry of the present tack, tear and wear always excepted, according as the same shall be determined by two men, one to be chosen by each part."

The lessee was allowed a breach at the end of each three years, upon a notification of six months. After the death of William Sellers, a question arose between Bennet, the lessee, and Seller's heirs, whether the brewing looms and appurtenances were to be maintained by the master or by the tenant? A submission, in terms of the tack, was entered into, but proved fruitless. Bennet withheld his rents, on pretence of repairs laid out by him. He died bankrupt: the heirs of Sellers charged his cautioner with horning, for payment of

the rent: he suspended upon this ground, that he was entitled to the expense of the necessary repairs laid out by Bennet, as a deduction from the rent.

On the 15th February 1766, the Lord Auchinleck, Ordinary, "Found, That, by conception of the tack charged on, the chargers are bound to uphold the roofs of the subjects therein mentioned; but that they are not thereby bound to uphold the utensils belonging to the brewery, the hair-cloth, or the going graith upon the well, particularly specified in the tack; and therefore repels the reasons of suspension, except in so far as relates to the alleged damage sustained through the charger's not having kept the roof of the brewery in repair."

On the 27th February and 12th June 1766, the Lord Ordinary adhered.

The suspender put in a reclaiming petition, to which answers were made.

Argument for the Suspender:—

In all cases, a sum is paid by the tenant for the use of the subject leased: and this sum is proportioned to the benefit which may arise to the tenant from such lease, and to the deterioration which the subjects may sustain from use. Hence, if nothing is stipulated to the contrary, the tenant is entitled to enjoy the subject in a reasonable manner, without being liable in more than the stipulated rent. On the other hand, the granter of the lease is bound to uphold the subjects, so as that they may be capable of the use for which they were let: this is laid down in the civil law,—*L.* 15, § 1 and 2,—*L.* 55, § 1, *D. Locati Conducti*; and it is agreeable to reason. Hence, if there be no express paction to the contrary, the granter of the lease must uphold the tenement leased. On this account it is that the rent of subjects is proportioned to the deterioration which they suffer by use, and to the expense of upholding and repairing them; hence houses are let at about six or seven per cent of their real value,—breweries at about 12 per cent: Because the expense of upholding houses is small,—the expense of upholding breweries is great. If, then, by this tack, there were no express obligation to the contrary, the landlord would be liable in all necessary repairs. It remains, then, to consider, Whether the obligation on the tenant, in this case, to uphold the brewing looms, is to be understood as making him liable to bestow such repairs only as may be requisite for preserving those utensils as long as they are capable of being so preserved, or as making him liable to furnish new utensils in place of those which have become useless; and not the granter of the lease.

The words of the lease are sufficient to show that the granter of the lease, not the tenant, is obliged to renew or replace the utensils. The utensils are granted for a particular purpose, and at an adequate rent: hence the utensils must either be such as can last during the whole term of the tack, or must be repaired by the granter, for otherwise the subject would no longer exist. By the lease the tenant is bound to uphold, and to restore, and deliver back; therefore, the same utensils which are upheld are to be delivered back. The tenant cannot be said to deliver back new utensils which he never received. Neither can he be bound to keep in repair and deliver back in good condition, at the end of fifteen years, what may become useless in the course of five years. The exception of *wear* and *tear*, imports that the tenant may use the subject in the common way; so that, if by *wear* and *tear* any part becomes useless, he is not bound

to restore it in good condition. The sum of the suspender's plea is, that, although the tenant be bound to uphold the utensils as long as they can be upheld, yet, if they become useless, they must be renewed by the granter of the lease. If they were not to be renewed at all, the lease would be at an end: if they were to be renewed at the expense of the tenant, he would pay a rent for the subject, and at the same time be allowed to purchase the subject for which he paid rent.

ARGUMENT FOR THE CHARGERS:—

Clauses like that in controversy are frequent in the leases of breweries, and they are extremely reasonable; for, were it not for such clause, a careless tenant might, in one year, bring a charge upon the proprietor equal to the rent of three years. The words of this clause are plain. Nothing is incumbent on the proprietor but to uphold the roofs. The words "tear and wear excepted," does not imply an obligation to maintain and uphold; neither do they apply to the currency of the lease, but only to its determination.

N.B. In this the Lords had an inquiry made into the practice of brewery leases; but no satisfaction was obtained from inquiry.

On the 8th August 1766, the Lords adhered.

Act. J. Swinton, junior. *Alt.* D. Rae.

OPINIONS.

AUCHINLECK. Considered the exception of tear and wear as being to take place only at the issue of the tack. It has indeed been asserted, that it was the practice for the master to uphold the utensils; but here there is an express paction to the contrary, and consequently usage is nothing.

PRESIDENT. Suppose a tenant bound to uphold and the house should fall, must he rebuild?

KAIMES. If a man takes a country farm, and the houses are destroyed by fire, &c. the loss falls upon the landlord; but a different case where the houses wear out, which is similar to the present *species facti.* The tenant must be presumed, on account of this burden, to pay so much less rent. As to the terms of this lease, the burdens are divided between the master and the tenant. Uphold and maintain is the obligation on each side, and must be explained in the same way. If the house or the brewing-looms be destroyed *casu fatali,* no rent can be paid; because *casu fatali* there remains no subject. In such case the master must rebuild or replace; otherwise he can have no claim for rent.

ALEMORE. By the clause the tenant is obliged to "uphold and deliver back, tear and wear excepted." The setters, therefore, are not liable for new utensils.

PITFOUR. It is dangerous for one to uphold what another uses. Tear and wear is excepted; but the clause will not oblige the tenant at the issue of the lease.

COALSTON. Where there is no special covenant, the setter upholds the subject. The question is, Whether has this rule been departed from in this case? The clause does not bind to this extent. The tenant is bound to keep in sufficient repair. It is of great consequence to know in what sense this clause is generally understood, and in what sense the parties understood it. If there

had been no special obligation, the setter would have been liable. Here there are not words sufficient to relieve him from that obligation.

1766. *August* 9. JAMES GRIERSON of Dalgoner, *against* ROBERT FERGUSSON of Isle.

WADSET.

In a Declarator of Redemption, at the instance of a Singular Successor of the Reverser, found not competent to the wadsetter to object to the pursuer's title to the right of reversion, which was not claimed either by the heir or creditors of the reverser.

UPON the 9th June 1663, James Grierson of Dalgoner granted a wadset of 10 acres to Mr William Black, minister of Dalgarnock, redeemable on payment of 900 merks, at any term of Whitsunday or Martinmas, even upon a premonition of 40 days. On this wadset Mr Alexander Fergusson, disponee of the son of the wadsetter, was infeft in 1694. Fergusson of Isle is his son and heir.

In 1679, William Grierson, under the character of eldest son and heir apparent of the reverser, granted a disposition of the estate of Dalgoner, comprehending the ten acres, in favour of James Grierson. In 1696, James Grierson, the disponee, deduced an adjudication in implement against William Grierson, the disponer. This adjudication bears, that William had been charged to enter heir in special to James Dalgoner, his father, and to ——— his goodsire, and to ——— his grandsire. Blanks are left in the summons, not only for the designations and names of those persons, but also for the date of the special letters, date of the execution, and messenger's name. In the production, as marked in the decreet, the letters of special charge and the executions, are said to have been produced, as of the date, tenor, and contents above-mentioned, that is, as mentioned in the libel. From the records of the Signet Office, it appears that the bill for the summons of adjudication is still blank as to the lands.

James Grierson, now of Dalgoner, served himself heir in general to the adjudger; and, having expede a charter of adjudication, premonished Fergusson of Isle to receive his money and consign it. Upon this he brought an action for having it declared that the wadset lands were redeemed, as at Whitsunday 1765.

The wadsetter objected to the pursuer's title, and also to the form of the redemption. The Lord Auchinleck, Ordinary, "repelled the objection to the pursuer's title, but sustained the objection to the order of redemption, in so far as to prevent its taking effect at Whitsunday 1765; but found that the order already used is sufficient for redeeming the lands libelled at Whitsunday 1766."

On the 28th July 1766, the Lord Ordinary, "having considered a representation and answers, and, specially, that the adjudication objected to is in implement of a disposition, and that the objection is not moved by the heir of William Grierson, or by any of his creditors claiming right to the reversion, which