No 102. 1730. *January* 21. Sinclair *against* Somervell.

Upon a verbal bargain about lands, the purchaser, in security of the price, deposited some bonds and bills with the seller. A creditor of the purchaser having arrested these bonds and bills in the seller's hands, and the bargain being thereafter completed in writ, it was found, That the arrestment fell, and that it did not convey the *locus pœnitentiæ* to the creditor, which was competent to his debtor the purchaser, nor was it any *medium impedimentum* to hinder completing the bargain. See Appendix.

Fol. Dic. v. 2. *p.* 80.

No 103. 1772. *February* 5. Arbuthnot *against* Sir James Colquhoun.

Clause in a tack, that the tenant, at his removal, shall be paid the expense of inclosing, is effectual against a singular successor in the land.

James Arbuthnot, proprietor of the lands of Finart, and others, let a part of these lands to John and Donald Frasers for nineteen years, from May 1751, by a tack which contained the following clause: "And it is hereby declared, that, in case the said John and Donald Frasers, and their foresaids, shall think proper to inclose any of the grounds of the saids lands with sufficient country-dykes, they shall, at their removal, upon leaving them sufficient, be paid a comprised price for the same, not exceeding one year's rent."

James Arbuthnot was succeeded in the estate of Finart by his brother Robert; and, in consequence of a destination made by him, upon his decease, the succession was taken up by Mr John Arbuthnot, then an infant. But it was afterwards judged expedient to bring the lands to a judicious sale before the Court of Session, and, in 1763, the estate was sold by authority of the Court, when Sir James Colquhoun became purchaser.

In 1765, an action was brought at the instance of John and Donald Frasers against Mr John Arbuthnot and his administrator in law, concluding, *inter alia*, that Mr John Arbuthnot should be obliged to pay them a year's rent, being L. 24 Sterling, which, by the above recited clause in their tack, they were entitled to lay out in building country-dykes round their farm; but the Court, by an interlocutor, 14th July 1769, "Assoilzied *hoc statu* from the claim, in respect that, by the tack libelled, the obligation on the master to refund such expense to the tenant, is not prestable until the removal of the tenant; reserving always action to the pursuers, or their representatives, against the defender John Arbuthnot, and his representatives, for the expense of such dykes, to the amount of L. 24 Sterling, in case such expense shall not be allowed by Sir James Colquhoun, or the proprietor of the lands of Finart for the time, at the determination of the said tack; and reserving to the said John Arbuthnot, and his representatives, their defences, as accords.'

No 103.

Upon the determination of the tack, Frasers insisted in their claim against Arbuthnot, who called Sir James Colquhoun in an action, concluding that he should be decerned to relieve him of the Frasers' demand, and of the expense he might incur in defending the same; and the processes having been conjoined, the LORD ORDINARY, on the 3d July 1771, pronounced this interlocutor: "Finds the said John Arbuthnot liable in payment to the said John and Donald Frasers of the sum of L. 13 : 12s. Sterling, with interest of the same, from the term of Lammas 1771, as the value of the dykes, according to the comprisement of the birlieman, in process, and against which no objection is offered, and decerns: But, in respect that there is no obligation in the tack to build the dykes; that the obligation to pay a sum not exceeding L. 24, for the dykes, when built, depended upon an uncertain event, and that it makes not mention of assignees, the LORD ORDINARY assoilzies Sir James Colquhoun, and decerns." And, by a subsequent interlocutor, November 28th 1771, "In respect that the clause in question, although contained in the contract of tack, is an obligation distinct from the contract of tack, and for the reasons contained in the former interlocutor, refused a representation for Arbuthnot, and adhered to his former interlocutor."

Upon a reclaiming petition, and answers, the Court held that this clause was effectual against a singular successor in the lands, (notwithstanding of the decision, December 17. 1760, M'Dowal of Glen *contra* M'Dowal of Logie, *voce* TACK, cited for the defender,) and therefore,

"THE LORDS altered the LORD ORDINARY's interlocutor, and found Sir James Colquhoun liable in payment."

Act. *John Douglas*. Alt. *James Colquhoun*

Fol. Dic. v. 4. p. 75. Fac. Col. No 4. p. 5.

1787. *February* 3.

Major WILLIAM MAXWELL MORISON *against* DAVID PATULLO, and Captain DAVID LAIRD.

No 104.
A tenant was by his lease allowed retention of rent on account of a building to be erected on the lands. Not found entitled to it out of rent due to

BY a lease of lands granted by Major Maxwell-Morison to Patullo, the latter became bound to erect on the lands a house of certain prescribed dimensions; for which it was stipulated, on the other hand, that he should have an allowance out of the rent of L. 50; a sum inadequate, however, to the value of the building.

Major Maxwell Morison sold the lands to Captain Laird, whose entry to them was to be at Martinmas 1783, and the rent due by the tenant for crop 1783 was not payable before Whitsunday 1784; between which two periods, the building of the house was begun and completed.