

to merks, allowing and deducting the £.20 deponed on as insufficient when they entered; and decerned him to pay the superplus he had pointed for, more than this restricted modification extends to, being the third of the whole sum decerned for.

No. 139.

Fol. Dic. v. 2. p. 424. Fountainhall. v. 2. p. 405.

1741. *June 5. YORK-BUILDINGS COMPANY against ADAMS.*

No. 140.

A tacksman who was allowed a pretty large sum by his tack for putting the subjects in repair, and was obliged to keep them so, was found not bound to repair the damage done by an extraordinary accident, such as a hurricane.

Fol. Dic. v. 4. p. 326. C. Home.

* * This case is No. 63. p. 10127. *voce* PERICULUM.

1760. *December 17. MACDOUAL of Glen against MACDOUAL of Logan.*

Johnston of Kelton, in 1727, set a tack of the lands of Whiteside, &c. to Macdoual of Glen, for twenty-six years. The tack contained a clause, by which Mr. Johnston bound himself, and his heirs, to repay to the tenant, and his heirs, whatever sums he or they should lay out in building and making profitable dikes and fences upon the lands, not exceeding the sum of £.50 Sterling, and that at the end of the tack; the said expenses to be vouched by the said John Macdoual and his foresaids their honest word allenarly.

In consequence of this clause, Macdoual built a number of dikes, to the extent of about sixteen hundred roods, which were all completed in the year 1730.

In 1731, Mr. Johnston sold the lands; and Macdoual of Glen, the tenant, became purchaser. The term when the tack expired was at Whitsunday 1754; and, soon thereafter, Macdoual of Glen brought a process against Macdoual of Logan, as representing Johnston of Kelton, for payment of £.50 Sterling laid out upon inclosing, agreeable to the clause in the tack.

Pleaded for the defender: These expenses were to be repaid at the expiry of the tack by the proprietor; because he was to reap the benefit. The pursuer is now heritor, and enjoys the advantage of the fences; and therefore must pay for them. By a part of this clause, the tenant is obliged to leave the fences in a good condition. It is evident, therefore, that this money was to be paid, in consideration of the advantage that would accrue to the heritor, by having the lands raised when the tack was at an end. This advantage is now fallen to the pursuer himself; and therefore he must pay for it. Had any third party become purchaser, he, and not the defender, would have been liable to implement this clause. The

No. 141.

Clause obliging the heritor to repay to the tenant, at the end of the tack, what sums he shall lay out in building fences, is effectual, altho' the tenant purchase the lands during the currency of the tack.