

causing the tenants do such service, for fencing the lands against the insalling of the Highlanders and their goods, as they have in former times been in use to do, and the unlaw is not exorbitant. No. 130.

The Lords sustained the acts of Court; but modified the £.5 of unlaw to 40s.

*Fol. Dic. v. 2. p. 423. Gilmour, No. 103. & 105. p. 78.*

1668. February 15. JAMES COLQUHOUN *against* WATSON.

James Colquhoun, pipe-maker in Glasgow, having got a tolerance from George Blair (heritor of Lunloch) to dig clay for pipes there, for certain years, excluding all others, there being an anterior tack of the lands, the tenants grant licence to one Watson for digging clay there for pipes; the heritor also concurs with Watson. Colquhoun pursues Watson for intrusion, and to desist from meddling with any clay there, and for paying the value of what he had meddled with. Watson alleged, Absolvitor; 1st, Because the licence granted to the pursuer, being exclusive of all others, was *contra bonum publicum*; 2dly, The licence was posterior to the tenants' tacks, who thereby had right to the whole profits of the ground, and accordingly gave tolerance to the defender; 3dly, The heritor having granted the tack, could not, in prejudice thereof, give power to the pursuer to break the arable ground, and there being much more clay than the pursuer could make use of, ought to give power to the defender to make use thereof for that effect. The pursuer answered, That a total and negative licence was legal, as well as any other total and sole right; and it was free to the heritor to grant the same, but could do no posterior deed contrary thereto, because he had bound up his own hands thereby; and as to the tack, whether anterior or posterior to the licence, it can only give right to the tenant, *uti frui ut colonus*, to manure the ground, and reap the profits thereof, but cannot give him right to any mineral under the surface, whether coal, limestone, clay, &c. which is reserved to the heritor, and he may make use thereof; which necessarily imports, that he may break up the ground to come at it, or else the right were not reserved to him; and he is most willing to satisfy the tenant's damage by opening the ground; neither need any reservation thereof be expressed, because it is implied in the nature of the tack, which gives only power of the surface, tillage, pasturage, and profits thereof; but the tenant has no power to take away part of the ground, or to give licence to any other so to do.

The Lords repelled the defences, and found the pursuer had the only right by the heritor's exclusive licence, and that the tenant, by his tack, had no right to this clay; and that albeit his tack was prior to the pursuer's licence, he could give licence to no other.

*Stair, v. 1. p. 527.*

No. 131.

A tack of lands was found to give the tenant no right to minerals under the ground.

Found not entitled to make pipes of the clay.