1741. *June* 5.

ANNUITANTS of the YORK BUILDINGS COMPANY *against* Mr WILLIAM ADAMS, Tacksman of the Baronies of Cockenzie and Tranent.

No 63.
A tacksman is not bound to repair damage occasioned by any extraordinary accident, though he oblige himself in the lease to put the houses in repair, and keep them so, and receive a sum certain on that account.

MR ADAMS having taken a lease of some estates belonging to the said Company, on which there were several coal and salt-works, &c. being charged for payment of the rent, suspended on this ground, That he had suffered great damage by the hurricane, which happened on the night between the 13th and 14th of January 1739, and therefore ought to be allowed retention of as much of the rent as was necessary for repairing the subjects damaged.

Answered for the chargers, That though it may be true, that, by law, a tacksman is only tied to ordinary diligence, so that, when houses on a farm are destroyed by thunder, lightning, or inndations, which could not be foreseen, or if foreseen, could not be prevented, the loss must affect the proprietor, and not the tenants; yet, where paction to the contrary has intervened betwixt the setter and taker, transferring the hazard upon the tacksman, such pactions ought to be observed, especially as in such cases as now under consideration, where the question is not upon such extraordinary events of thunder, lightning, &c. occasioning the total destruction of the houses, but a partial damage done to the houses on the farm by storms of wind, frequently occurring in this climate, though not so frequently in the same degree; and which therefore were probably under view of parties-contractors at the time of entering into this lease; see l. 15. § 2. D. Loc. Cond. l. 78. § 3. D. De contra emp. But, in the present case, it is not left upon a presumption; for, by a clause in the tack, L. 150 Sterling is allowed by the Company to the suspender for putting the houses in repair, upon which account, he is not only bound to put them in good repair, but to leave them so at the expiry of the lease. And if, by the above clause, any hazard at all is understood to be undertaken by the suspender, to be sure, it must be that of winter-storms, as being that which naturally would occur to both parties; and if this holds true, it will seem difficult to define the degree and extent of the storms he is to undartake, and such as he left upon the hazard of the proprietor.

Replied, By the nature of this contract, the tack-duty is the equivalent for the use of the subject set in tack, and the setter, before he can exact the tack-duty, must procure the tacksman possession, and maintain him in it. 2*do*, It cannot be controverted, that a tacksman should not be liable for such extraordinary damages as might be occasioned by the late unusual and extraordinary storm; see l. 28, C. De Locat. l. 15. § 2. D. De Loc. so that, it is plain, unless a tacksman did, in express terms, undertake to insure the subjects from all damages, by which they could be attacked, either in the ordinary way, or by whatever other extraordinary accident, then the rule of law must take place, that the loss and damage occasioned by those accidents must fall on the heri-

No 63.

tors. 3tio, 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.