1777. *July* 29. SIR ROBERT POLLOCK *against* THOMAS PATON.

SIR Robert Pollock, having set grounds to a tenant, for one year, tied him up from ploughing more than a certain part of them, under this declaration, that if he (the tenant) transgressed the prohibition, he was to pay £100 Scots for every acre over ploughed. The tenant did transgress, and did plough more than the part permitted: whereupon Sir Robert claimed the £100 Scots *per* acre for the ground over ploughed; and alleged, that this was due, not in the light of a penalty,—otherways, perhaps, it might have been subject to modification, on the footing of restricting conventional to real damage,—but that it was due to him as additional rent, and subject to no modification. At the same time, he owned, that the missive of tack did not expressly call it additional rent, or even rent, but set it forth in the terms above mentioned.

The point was reported by Mr Dalrymple, Lord Probationer. The Lords, 10th July 1777, thought it of great and general consequence. They ordered memorials; and this day, upon advising, they pronounced this interlocutor:—"Advocate the cause, (from the Sheriff of Renfrew, who had found the condition penal, and that therefore the same was to be restricted to real damage,) and find the defender, in terms of the clause in question, liable to the pursuer in £100 Scots *per* acre, and so proportionally for one acre, one rood, and 28 falls of ground over ploughed; but under deduction of a proportional part of the whole rent of the farm effeiring to said ground; which deduction, of consent modify to 20s. sterling *per* acre, and so proportionally; but find no expenses due, and decern."

As to this last point. The agreement with the tenant was inaccurate: it did not say that the £100 Scots *per* acre was additional rent, or even rent.—The Lords held it to be rent, but no additional rent, therefore they gave deduction of a proportion of the general rent.

See, on this point, *Ralfe* against *Peterson*, decided in the House of Lords, 18*th February* 1772.

See Principles of Equity, 3d edit. V. II, p. 54.

1778. *February* 10. BETHUNE of BALFOUR *against* WILLIAM TRAIL, late Tenant in Inchhaire, and PATRICK JERVIE the present Tenant.

IN a dispute betwixt these parties, Lord Elliock, Ordinary, 19th February 1777, "Found, that the property of the marle in question belonged to the master, and that the tenant had no right to use or dispose of it; but that the master had right to use it."

The marle was shell marle, a bed of which, of no great extent, was discovered after the tack was set: the tack was still to endure for 12 years, and contained no power to dig for marle, "but with liberty to lime or improve the lands, as the tenant should think proper; and, for that end, to win limestones upon any part of the lands where they could most conveniently be had." On

advising a reclaiming petition with answers, the Lords ordered memorials, and afterwards they adhered.

1775. *March* . WILLIAM CAMPBELL, Factor on Craigleith, *against* WILLIAM BROWNE.

HOUSES and offices are not contrived merely for the improvement of a farm, but are necessary for its occupancy: they are therefore considered as part of the farm; and it is established by usage, by common law, and the decisions of our Courts, that the tenant, if no special agreement is made to the contrary, is obliged to uphold them in a sufficient habitable condition during the currency of the lease, and to leave them so at his removal, or, at least, in as good condition as he got them. See Dict., *voce* Tack, V. II, p. 424.

It has been made a question, how far a similar obligation, at common law, lies upon a tenant with regard to those fences and inclosures which are upon his farm at the time when he enters to it. That he is bound to commit no waste upon his farm, is clear. (See Planting and Enclosing, *Stirling of Keir* against *Christie.*) And further, that, by the statute 1698, cap. 16, he is bound to preserve the trees and planting upon his farm, is equally clear; but still it remains a doubt, how far he is bound to be at actual expense in supporting inclosures; unless he comes under a special and actual obligation to that effect.

This point occurred in a question betwixt William Campbell, factor on the sequestrated estate of Craigleith, and William Brown, the tenant. The Lords remitted to the Ordinary, to pass a bill of advocation at the tenant's instance, in order that the point might be tried, along with certain other reasons upon which the tenant pleaded retention of his rent, and might receive a deliberate discussion; but this did not take effect, the question having been determined, not upon the footing of the common law, but upon a clause in the tack, which, though very indistinct, the Lords found laid the expense on the master.

In the case of—

1762. *November* 19. STIRLING of KEIR *against* CHRISTIE,

Lord Alemoor, Ordinary, pronounced the following interlocutor:—"That, as there are no limitations in the defender's tack, with respect to the method of cultivating the ground, the defender was at liberty to alter the usual manner of culture, provided that he did not thereby deteriorate the farm; and finds no sufficient proof that the ground was deteriorated by last crop: but finds it was unlawful and irregular in the defender to carry off his dung and fodder from the farm of Netherton, from Whitsunday 1759 to Whitsunday 1760, which dung ought to have been laid upon the ground for crop 1760; and finds him liable in 40s. as the value of the dung."