

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.

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.

1772. February 5. ARBUTHNOT against Sir JAMES COLQUHOUN.

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, "Assolizied *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."