

from his dole, or *culpa*, or negligence, as in this case; *remitter mercis*; as is clear, not only when the thing that is set is a subject not liable to so much hazard, but when it is contingent, as when gabells or customs are set, or fishings, or milns, or coals, if there fall out such an impediment, as doth interrupt the fruition and *perceptionem fructuum*, as if there be pest and war in the case of customs; or if herring should not be got at all; or if upon occasion of inundation, milns should be unprofitable; or coal-heughs should be drowned or burnt.

The Lords, before answer, thought fit, that there should be conjunct probation allowed to both parties, anent the condition of the coal, and the defenders desisting and ceasing from working thereof, and the occasion of his desisting, and if the impediment was insuperable.

*Dirleton, p. 103.*

No. 18.

1679. November 13.

MR. ALEXANDER SETON, Minister of Linlithgow, *against* ROBERT WHITE, Flesher there.

Found the date of a tack (quarrelled for wanting an entry) is sufficient entry, where no other entry is expressed; but ay and while a sum be paid is not a definite issue to sustain against a singular successor, as hath been oft decided; but if the tack contains a definite issue, the Lords will sustain the allocation of the tack duty to the debtor.

*Fol. Dic. v. 2. p. 417. Fountainhall MS.*

No. 19.

1681. February 3. MAXWELL *against* MONTGOMERY.

By contract betwixt Maxwell of New-wark and Mr. Zechiel Montgomery, New-wark set to Montgomery certain tenements and acres in and about Paisley, declaring his entry to have been at a term anterior to the minute, for which Montgomery was to pay a certain sum of money; and being charged, he suspends, on this reason, that the cause of payment of the sum charged for being a tack set to him by the charger, he was not liable, seeing the charger did not make void the tenement set, and enter him in possession, at least offer him the void possession. It was answered, That though it be true, that when a tenement of land is set to a tenant, to be possessed by laborage, the setter must remove the prior possessor, that the possession may be void; but that holds not in this case, where many tenements are set together, and the entry declared to be before the contract; it must import the meaning of parties, that the tacksman was only to have the mails and duties, and not the natural possession.

Which the Lords found relevant, and instructed by the contract produced; but declared, that if the tacksman, pursuing for the duties, or for a warning used by

No. 20.

A tack of tenements in a burgh, whereof the entry was anterior to the tack, was found not to oblige the Lessor to give the void possession to the tacksman.