from his dole, or *culpa*, or negligence, as in this case; *remittitur merces;* 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. No. 18.

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.

1679. *November* 13.

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

No. 19.

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.*

1681. *February* 3. MAXWELL *against* MONTGOMERY.

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.

By contract betwixt Maxwell of New-wark and Mr. Zechiel Montgomery, Newwark 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. him in the setter's name, he should be debarred, the charger should be obliged by his warrandice to refund his damage.

Stair, *v.* 2. *p.* 852.

1685. *February* 27. SIR PETER FRAZER *against* HOG.

No. 21.

An obligation to set a nineteen years tack, after a right of excambion should be redeemed, found lawful, and not to fall under the act of Parliament concerning tacks after wadsets. The tack-duty was but £.20, and the lands excambed worth 3000 merks.

Harcarse, *No.* 958. *p.* 263.

*** Fountainhall reports this case:

James Hog of Bleredreyn's reduction against Sir Peter Frazer, was reported by Boyne. The Lords, in respect there was a submission, by virtue whereof there was a communing betwixt the parties, and that Kinmunday, the defender's factor, acknowleges that the communing did but lately cease before the extracting of the decreet, therefore they reponed Bleredreyn against the said decreet, and sustained the order of redemption; but in respect, conform to the tenor of the reversion, there was not a tack consigned at the time of the order, therefore the Lords yet ordain the defender to exhibit a tack of the lands conform to the reversion, to commence from Whitsunday next.

Bills were given in against this interlocutor, but the Lords adhered; though it seems impossible to make the nineteen years tack begin only at Whitsunday next, and yet sustain the order; for if the order be valid and legal, the tack must begin when it was used in 1670, and so fifteen years of it will be run.

Fountainhall, *v.* 1. *p.* 344.

1715. *July* 5. CUNINGHAM of Enterkin *against* WILLIAM MILLAR.

No. 22.
Indefinite contract of tack of coal.

There being a mutual contract wherein Enterkin sets a tack of coal to Millar, and the tack-duty regulated by the number of coal-hewers to be employed by the tacksman, viz. if six were employed, then 600 merks to be the tack-duty; but if more or less than six, then 100 merks for each was to be added or deducted; and Enterkin having charged on this, the question, at discussing, turned on this single point, viz. Whether, by this tack, the tacksman is liable for 600 merks of yearly duty, though he employed no coal-hewers at all? And it was

Alleged for the charger, That as the suspender could not deny but he was obliged to work, since he had taken a tack of the coal, so also, by the nature of