No. 17. usually to take the wife's consent to such tacks of lands set by their husbands, for the tenants' either security or ignorance, who will not contract otherwise, ought not to prejudge the heir; and that conception to pay to the longest liver of them two cannot give her right, who otherwise had no right to the lands, and ought to be understood only to be meaned, and to have effect, that it should be paid to them, during their life-times together; specially seeing the relict his mother is sufficiently and well provided to a life-rent of 1700 merks, attour and beside this tack-duty controverted;—the Lords not the less preferred the relict, in respect of the conception of the tack, whereby the duty was ordained to be paid to her husband and her yearly, during the space of the tack, and to the longest liver of them; for the Lords found, that the clause should work something, and it could work nothing, if it should receive the construction alleged by the son, viz. that it should be understood only during their life-times together; for, as the husband might have appointed the tack-duty to have been paid to a stranger, so he might have agreed, that it should be paid to his wife; and so the relict was preferred, notwithstanding of her provision beside the tack-duty.

For the Relict, *Mouat.* For the Son, *Craig.* Clerk, *Gibson.*

Durie, p. 825.

1675. *January* 13. EDMISTON *against* Mr. JOHN PRESTON.

No. 18.
Consequence when possession of the subject let cannot be attained.

Wauchope of Edmiston and his lady, as executors to the deceased James Raith of Edmiston, pursued Mr. John Preston, lately of Haltrie, Advocate, for payment of the tack duty for a seam of coal, belonging to Edmiston, and set to him for certain years.

It was alleged for the defender, That he ought not to be liable for the years in question; because, having entered to the possession of the said coal, and having paid the duty for the time he possessed, he was forced to cease from working, in respect the said coal came to be in that condition that it could not be wrought, partly by reason of the defect of roof, so that the colliers neither would nor could work, without hazard, and partly by reason of bad air.

It was replied, That the defender having accepted a tack of a subject, liable to such hazards, *eo ipso* he had taken his hazard, and was in the case as if he had acquired a right to *jactus retis*.

It was duplied, That *alea* and *jactus retis*, and *spes in venditione*, may be, and are understood to be sold; but *in locatione*, *spes* and *alea* is not thought to be set, unless it appear by the contract, that the conductor should take the hazard; seeing it is *de natura* of contracts of location, that *fruitio* is understood to be given, and set; and that *merces* should be paid *ex fructibus*. And where the conductor cannot *frui*, upon occasion of an insuperable impediment, which does not arise either

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