tack of a room, to re-enter to the said room, which he had possessed by virtue of the said verbal tack, for the space of two years, and had renounced it the third. The tack was referred to the defender's oath. Alleged, although there had past such a promise between the defender and Alexander Keith, yet it could not bind him, unless writ had followed on it; for a tack being a real right, cannot be perfected without writ, no more than a bargain for lands; otherwise, if that were sustained for a five years tack, it might be as well for a nineteen years tack. Next, it was just that both parties should be alike bound to other, and that it should be as well in the power of the one as of the other to loose themselves of it; but so it is, that if Mr. Rodger, who is singular successor, were pursuing a removing against the defender, this alleged verbal tack, to be proved by Alexander's oath, would not defend him, *ergo*, no more should he be forced to keep this tack to his master, than his master would be to him. The pursuer contended, that there was no necessity of writ in making of this tack, and it being proved by the defender's own oath, was as good as if writ had intervened; as to that, that a singular successor such as the pursuer was, would not be bound to the tenant, answered, That this summons was pursued at Alexander Keith's instance as well as Mr. Roger's; which Alexander referred the verity of the tack set to the defender's oath. To meet this last, the defender debarred Alexander with horning, so that he had to do only with Mr. Roger, who was a singular successor. The Lords found the allegeance relevant against Mr. Roger.

No. 16.

Spottiswood, p. 328.

*** Durie's report of this case is No. 9. p. 8400. *voce* LOCUS PŒNITENTIÆ.

1637. *February* 14. HUME *against* HEPBURN.

No. 17.
A tack having been let by a proprietor and his wife, and the rent declared payable to the longest liver of them two, it was sustained, although the woman had no right to the lands.

In a double poinding, umquhile George Hume, and Margaret Hepburn, his spouse, sets a tack of the lands of ——— to ——— his tenant, for payment of certain bolls of victual yearly, during the years of the tack; which tack being set by the husband with consent of his wife, and subscribed by her, albeit she had no right to the lands, neither then nor thereafter, the tacksman is obliged to pay the duty yearly, during the years of the tack, to the longest liver of them two, and thereafter to their heirs and assignees. The husband dying before the expiring of the years of the tack, and this duty being thereafter in a double poinding questioned, if it pertained to the wife after her husband's decease, in respect of the conception foresaid of the words of the tack, or to the son of the marriage, heir to his father, who alleged the same to be due to him, and not to his mother; for albeit she had subscribed the tack, and that the duty was obliged to be paid to the husband and her, and the longest liver of them two, during the space of the tack, and thereafter to their heirs, yet that conception ought not to prejudge him, seeing she had never right to the lands; and albeit she had subscribed that tack, yet that ought not to be respected, seeing the ignorance of tenants, who are in custom

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