

the damages he had sustained, through Sir James Cockburn's taking off the common roof to both houses; and 'tis like the LORDS inclined to give him a proportional abatement of his rent effeiring to the rooms he wanted, or at least which were incommodated to him, considering the space they were so; the law allowing *remissionem mercedis*, even for accidental damages, though existing *sine culpa vel dolo locatoris*.

No 58.

*Fountainhall, v. 1. p. 167.*

1696.

CRAWFORD *against* HIS MAJESTY'S ADVOCATE.

A SUPERVENIENT law having diminished the tacks-mans profits, it was found that this did not irritate the tack, but only afforded ground to ask an abatement, though it was the King who let the tack.

No 59.

*Fol. Dic. v. 2. p. 60.*

\*.\* This case is No 19. p. 7866. *voce* KING.

1699. June 16.

WILSON *against* DAVID MADER.

WILSON in Culross, as assignee by Balfour of Wester-Beath, charges David Mader in Inverkeithing, on a tack, whereby Beath did set to him all the coals and coal-seems within his lands for three years, and took him bound to keep no more but only four coalieries, and to pay L. 42 Scots for each, extending yearly to L. 160 of tack-duty. Mader suspends on this reason, that in the end of the second year of the tack, the coal, the subject set, totally failed, and notwithstanding all the pains and expense both of them were at, no more coal could be found in that ground, which being equivalent to a total vastation, sterility, or deficiency, there was neither law nor reason to compel him to pay the tack-duty, no more than if the coal had been swallowed by a chasm, or if a salmon fishing were set, and it should be found, that no salmon swimed within the bounds of that river set in tack: And Dirleton observes, on the 20th November 1667, Tacksmen of the customs of the Borders *contra* Ker, No 57. p. 10121, that abatement was due because of the devastation then happening by the English invasion in 1650; and lately, George M'Kenzie got an ease of the tack-duty of the excise, because of the dearth and the supervenient law. *Answered*, This was a bargain of hazard, where he took the coal *per aversionem* whether existing or not, and is like that which the law calls *jactus retis*; and therefore, the failing or non-existence of the coal cannot liberate him from the tack-duty, seeing he might have as much profit the two years it lasted, as may pay the whole three years duty. THE LORDS sustained the reason of suspension in this circumstantiate case, and found it not such a bargain of hazard as

No 60.

In a lease of a coalery, the coal ceasing, no rent was found due.