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.

No 60.
In a lease of a coaliery, the coal ceasing, no rent was found due.

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 coallieries, 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 61. to subject him to the tack-duty, seeing he had not exceeded the number of coallieries, and if he had put in any more, he was proportionally to have augmented the rent; so it appeared to be the meaning of parties, that the coal ceasing, the tack-duty should also fall; though in some bargains the party may be liable whatever be the event, and though he get nothing.

Fol. Dic. v. 2. p. 60. Fountainhall, v. 2. p. 52.

1709. *July* 1.

The ADMINISTRATORS and TREASURER of HERIOT'S Hospital, *against* JOHN ANGUS, Tacksman of the Canonmills.

No 62.
A tacksman of mills not allowed abatement of his rent in consideration of a supervening declarator of immunity in favour of several, who, at the letting of the tack, were thought to have been thirled to the mills, and were in use to grind all their grain there, in respect no more was let but the mills and multures thereto belonging.

IN a pursuit at the instance of the Administrators and Treasurer of the Hospital, against John Angus, for payment of his tack-duty of the Canonmills possessed by him as assignee to a tack thereof set by the pursuers to the deceased Margaret Murray his former wife;

Alleged for the defender; At the date of the tack, the inhabitants of the Canongate of Edinburgh, were in use to grind all their grains for baking and brewing at, and thought to have been thirled to the Canonmills; which thirlage was, since then, restricted in a process against them, to what tholes fire and water within the sucken, and is now utterly evaded by kilning and cobling in Leith and elsewhere; therefore, seeing the extent of the multure is exceedingly diminished, the defender ought to have a proportionable ease or abatement of the tack-duty, conform to law, L. 9. Pr. L. 15. § 1. D. Locati Conduct. Stair Instit. Lib. 1. Tit. 15. N. 1. in fin.

Answered for the pursuers; No more was set but the mills, and multures thereto belonging, and the defender has all the multures that belong to the said mills; and if he was disappointed of his expectation by the Lords' interlocutor, that being no deed of the pursuers, can be no ground for any abatement of the tack-duty. The citations out of the civil law and my Lord Stair's Institutions, meet not the case, for these concern only eviction or perishing of the subject set; whereas here, the mills and lands are still extant and entire, and the constituted thirlage continued according to what the Lords found justly to belong to the said mills, and the pursuers set only the multures belonging thereto; besides, the LORDS have frequently found, That accidental loss through sterility or the like, are no cause for an ease of the tack-duty, more than extraordinary increase would occasion an augmentation thereof; seeing the mutual hazards of loss and gain redound by the nature of the tack to the setter or tacksman.

THE LORDS repelled the defender's allegeance in respect of the answer, and found no abatement due.

Fol. Dic. v. 2. p. 60. Forbes, p. 337.