affording a fixed and determinate profit, (as lands do,) or such as depend on many events, accidents, and chance; as coal, salt, salmon-fishing, gables, and customs, and all other casual rents, which are capable of alteration every day. Now, where parties hire such things, they are certainly understood to take their hazard, like one who buys a *jactus retis*, though no fish be drawn, yet he must pay what he pactioned: even so, where I take a salmon fishing, though they should all withdraw and desert that place, and go to another river, I will still be liable, because I took it *cum periculo*. Yet, see *the Town of Berwick's case* against *Riddel of Haining*, 1*st June* 1661; and the *Heritors of Southesk water*, complaining on *the Town of Brechin's damdyke hindering the fishes to swim up the river*. And the same will hold on a tack of customs; though they fail, yet the duty may be claimed. And the law seems to favour this, *l.* 6 and 25, *sec.* 2; *l.* 15, *sec.* 2 and 5, *D. Locati*; and *l.* 78, *D. de Contr. Empt.* where Bartolus, Gomezius, and others determine, *si quæ vitia ex ipsa re oriantur, ea damno coloni esse*, but not where they are from extrinsic accidents.

The *second* reason of suspension was founded on the clause of absolute warrandice in the tack, which presupposes his obligement *carbones ibi subesse*. ANSWERED,—The warrandice imports no more but that Balgowny was proprietor of the ground, and that none should interrupt or disturb them in working of the coal.

The *third* reason was, That the tack-duty was promiscuously both for the grass and the coal; and so, *esto* the coal failed, they are still liable. ANSWERED,—The profit of the grass is very inconsiderable, and not worth £100 of the tack-duty, which was mainly given in contemplation of the coal; and the grass but falls as a consequent thereof,—like the shadow of the ass hired at Athens, where the master pretended to a distinct hire, because he had set the ass, but not its shadow: and the suspenders are willing to pay whatever value the grass of the park shall be proven to be worth.

The *fourth* reason was, That, finding themselves disappointed of the coal, they delivered back the keys of the park to the charger's lady; which she accepted and took off their hands.

ANSWERED,—Balgowny was then absent in the north when they took this advantage, and she had no power nor commission for it.

The Lords considered the like case had occurred betwixt *my Lord Edmiston* and *Mr John Preston*, marked by Dirleton, 13*th January* 1675, about a coal-set, which was rendered unprofitable to the tacksmen by the damps of ill air, the falling in of the roof, &c. which though extrinsic accidents, and not arising *ex natura rei*, yet the Lords took trial before answer, allowing a joint probation anent the condition of the coal and its impediments: and followed the same course here, to try if ever there was a going coal, and what endeavours and diligence thir tacksmen used either to find or recover it; and to prove what the worth and value of the grass would be by itself, abstracted from the coal, and anent the delivering back of the keys. *Vol. II. Page* 310.

1706. *January* 18. DANIEL CAMPBELL *against* SIR ALEXANDER ANSTRUTHER of NEW WARK.

LORD Crocerig reported Daniel Campbell, collector at Port-Glasgow, against

Sir Alexander Anstruther of New Wark, clerk to the bills. Sir Alexander having some lands lying about Ruglen, he, by a minute, sells a part of them to the said Daniel; and afterwards offering the rest to the Duchess of Hamilton, she did not incline to bargain for any of them, except she got the whole; and Sir Alexander having signified this by a line to the said Daniel, he returns an answer in thir terms:---"I shall be sorry if your bargain with me shall obstruct your selling the rest; if her Grace be ambitious of that little bargain, she shall be welcome to it for some consideration." Sir Alexander, thinking himself free, enters into a second minute with the Duchess, whereby he dispones the whole to her Grace, even including that parcel formerly sold to Mr Campbell; who, getting notice of it, registrates his minute, and charges Sir Alexander to fulfil and implement it. He suspends, on this reason, That, by the foresaid clause in his letter, he had passed from the minute, and quitted the bargain; so he was *in bona fide* to enter into a new one with the Duchess, whose procurators likewise compeared, and founded on the posterior agreement with her.

ANSWERED,---The sense of the clause was altogether mistaken; for though he designed a compliment to the Duchess, yet he never designed to free Sir Alexander: but he fulfilling his minute, by an extended disposition, whereon he might perfect his right by infeftment, then he would make both his word and writ good, by offering to quit the bargain to the Duchess, for such a valuable sum as they could best agree; otherwise he would keep the lands to himself: and civil expressions in letters are not to be strained to obligations; as was found 10*th July* 1672, *Shaw* against *Bruce.*

REPLIED,---The words, in their natural and grammatical sense, can admit no other construction but a plain abandoning and derelinquishing of the bargain; and letters may be as obligatory as any other writs; *et verba sunt interpretanda contra proferentem,* and not to be called *verba officiosa,* and mere civilities. And law determines, that, as *emptio venditio* is *contractus consensualis,* so *contrario consensu dissolvitur*; *l. 35, D. de Reg. Jur. sec.* 4. *Institut. quib. mod. toll. obligat. Si Titius Seco vendiderit fundum Tusculanum centum aureis, pretio necdum soluto nec fundo tradito, placet inter eos a venditione discedere, tunc invicem liberantur;* which seems exactly to be Sir Alexander's case with Mr Campbell, especially being for liberation, *cujus causa semper est favorabilis.*

The Lords, by a plurality, found the letter was not an overgiving of the bargain, and so did not put Sir Alexander *in bona fide* to enter into a new minute with the Duchess; but that he must fulfil and perfect the first; which being done, Mr Campbell may offer it to the Duchess; and if his demand of a consideration be high, that will be subject to a modification *arbitrio boni viri.*

Vol. II. Page 314.

1706. *January* 31. POOR JAMES YOUNG *against* THOMSONS and OTHERS.

JOHN Thomson, in Cockeny, being debtor to the said James Young, in 600 merks by bond, and Young being overburdened with debt, the said sum is arrested by his creditors; and Thomson, on decreets of forthcoming against him, is forced to pay; and Young having gone as a soldier to Flanders, and at last returning, Thomson thought it more secure for him to get Young's discharge, than to rely on his several partial payments made on distresses to his creditors;