No. 20. him in the setter's name, he should be debarred, the charger should be obliged by his warrandice to refund his damage.

Stair, *v.* 2. *p.* 852.

1685. *February* 27. SIR PETER FRAZER *against* HOG.

No. 21.

An obligation to set a nineteen years tack, after a right of excambion should be redeemed, found lawful, and not to fall under the act of Parliament concerning tacks after wadsets. The tack-duty was but £.20, and the lands excambed worth 3000 merks.

Harcarse, *No.* 958. *p.* 263.

*** Fountainhall reports this case:

James Hog of Bleredreyn's reduction against Sir Peter Frazer, was reported by Boyne. The Lords, in respect there was a submission, by virtue whereof there was a communing betwixt the parties, and that Kinmunday, the defender's factor, acknowleges that the communing did but lately cease before the extracting of the decreet, therefore they reponed Bleredreyn against the said decreet, and sustained the order of redemption; but in respect, conform to the tenor of the reversion, there was not a tack consigned at the time of the order, therefore the Lords yet ordain the defender to exhibit a tack of the lands conform to the reversion, to commence from Whitsunday next.

Bills were given in against this interlocutor, but the Lords adhered; though it seems impossible to make the nineteen years tack begin only at Whitsunday next, and yet sustain the order; for if the order be valid and legal, the tack must begin when it was used in 1670, and so fifteen years of it will be run.

Fountainhall, *v.* 1. *p.* 344.

1715. *July* 5. CUNINGHAM of Enterkin *against* WILLIAM MILLAR.

No. 22.
Indefinite contract of tack of coal.

There being a mutual contract wherein Enterkin sets a tack of coal to Millar, and the tack-duty regulated by the number of coal-hewers to be employed by the tacksman, viz. if six were employed, then 600 merks to be the tack-duty; but if more or less than six, then 100 merks for each was to be added or deducted; and Enterkin having charged on this, the question, at discussing, turned on this single point, viz. Whether, by this tack, the tacksman is liable for 600 merks of yearly duty, though he employed no coal-hewers at all? And it was

Alleged for the charger, That as the suspender could not deny but he was obliged to work, since he had taken a tack of the coal, so also, by the nature of

the tack, having stipulated the liberty to work with six coal-hewers, Enterkin could have obliged him to employ these in the work; for contracts of this kind are mutual, and so, as Enterkin was obliged to allow him six coal-hewers, he also must be understood obliged to keep them at the work, if the coal-wall would serve; otherwise, he might have made the tack wholly elusory, even suppose he had gotten a sufficient coal-work; and therefore, this being the rule and standard which both parties fix upon, though with a liberty to the tacksman to employ more, as he thought fit, but with no freedom to keep under that number six, in the event that has happened, that must be the stated number, as being what the tacksman himself expressly stipulated liberty for, and for which he is obliged to pay the setter. Let the case be, a master setting a piece of ground, with liberty to sow six bolls of corn, and the decision will be very plainly in the master's favours, though the tenant never sow any: Now, the case is the same here, for the coal would have afforded as certain a product as the ground. No. 22.

Answered for the suspender, That, by the contract, he is not boun d to employ six coal-hewers, and consequently not to pay 600 merks of duty; but that, by the contract, he might have employed one or two coal-hewers, and then paid only 100 or 200 merks; and having employed none at all, he could not be liable in more rent than if he had.

Replied for the charger, That is by the suspender's fault that they did not work, since he never opened the ground; and as *qui dolo desiit possidere pro possessore habetur*, so since, by the suspender's fault, the coal-hewers were not employed, in so far as concerns the suspender, they must be held as workers.

Duplied for the suspender, That by the tack there was an express provision, that in case the tacksman should instruct, by the coal-hewers and oversmen's oaths, and producing of the account-books, that there were not the full number of six working, as also the time of any coal-hewer's absence, he shall be only bound to pay proportionally to the coal-hewers that worked; which imports a power to work with as many or as few as he thought fit; and so the number cannot be liquidated to six. And though the servants and books, &c. are agreed upon as a sufficient evidence of the deficiency of the number, yet the tacksman is not thereby precluded from other means of probation of this point.

Triplied for the charger, That this exception confirms the rule, that the suspender was expressly obliged to work with six; for the provision imports an exception, and an exception implies a preceding rule; and as the rule is hereby established, so the suspender is not in the terms of the exception, which only concerns the case where the coal was working, an oversman employed, a count-book kept, &c. which is the particular manner of probation fixed upon. But the suspender cannot subsume upon any such probation, nor does it in the least concern the case; for here the suspender has wrought none, and the provision is upon supposition

No. 22. of his working, which cannot be applied to the event which, by his fault, has fallen out.

The Lords found the letters orderly proceeded.

Act. *Boswel.* Alt. *Hay.* Clerk, *Gibson.*

Bruce, v. 1. *No.* 113. *p.* 141.

1742. *January* 15. LORD BRACO *against* SIR HARY INNES.

No. 23.
A verbal promise not to remove a tenant is not proveable by the master's oath.

Anno 1724, Lord Braco set a tack, for nine years, of his salmon fishing in the Spey, to Sir Hary; and, after the term was expired, charged him to remove. Sir Hary suspended, on this ground, That the charger had frequently promised not to remove the suspender so long as he paid the yearly tack-duty, and offered to prove it by his oath; so that the question resolved into this, How far or how long a verbal paction or promise, not to remove a tenant, may subsist and be effectual?

In support of the reason of suspension, it was urged, That though it be held to be the law of Scotland, that verbal tacks are only good for one year, and consequently may not be proveable by witnesses, so as to have effect for a longer space, or not to be good against singular successors, yet the present case is somewhat different, where the promise or paction not to remove the suspender is offered to be proved by the oath of the charger, which is not to create a real right without writing; but the suspender, being already in the natural possession of the subject, is entitled to continue therein, paying his rent by tacit relocation, until that be taken off by warning, &c. which has been used in this case: But the question is, Whether paction or promise, on the part of the pursuer, if the same shall be acknowledged, does not afford a sufficient exception in this action, so as to repel, *personali exceptione*, the pursuer from insisting therein, contrary to such paction. The rule *quoad pacta servanda*, &c. admits indeed of various exceptions; but this question does not fall under any of them; for here the promise is not to do or perform any thing, consequently the obligation resulting therefrom is completed, being no more than to abstain from warning or removing the suspender, while the charger continues heritor, and the tenant pays his rent duly. The point therefore comes to this, What shall be the effect of this promise? The suspender believes it reaches further than a year, and is not sufficiently implemented, by forbearing removing for a year after the ish of the written tack; because the matter of the paction went further than that. It was not circumscribed to any time, but depended on the payment of the tack-duty. See Spottiswood, REMOVING, p. 279.

Answered for Lord Braco, That writing was necessary to the constitution of a tack for a term of years, not only because such rights as tacks being heritable, and concerning lands, are reckoned matters of importance, but, when granted for a term of years, are alienations: Hence it is, that the promise to grant such