

ground in the links of Leith, whereon he has built sundry houses, and pays five merks of yearly feu-duty, besides stent and excise; as also, for reduction of a tack then set to him, of Leith links, for two 19 years, for 300 merks by year. The reasons of reduction were, *1mo*, The tack is *ipso jure* null, for it wants the act of Council, its warrant. *2do*, By the 36th act of Parliament 1491, the royal burghs may not set tacks longer than three years of any part of their common good, or town rents, without they be ratified and approven by the convention of burghs. *3tio*, It is set with evident lesion, for the links are worth 900 merks yearly; and, at a roup, Archibald Johnston bade 550 merks for them, and yet Paterson, the defender, has them for 300. *Answered* to the *1st*, The warrant is standing in the town's books, and by a diligence he will recover it from their clerk. To the *2d*, The act of Parliament is in desuetude; and though acts of convention are produced, ratifying such tacks, yet they are ancient and of an old date, and every day the Town Council of Edinburgh are setting tacks for longer space than three years, as the shops about St Giles's church, the burgh-loch, &c. To the *3d*, Johnston's offer was but *in emulationem*, and when he was put to it he resiled; so it was just the defender should have the benefit of the first tack, especially seeing, at the ish of the tack, the town were to have the houses he had built; and if they were not satisfied, he was content to renounce, on their refunding his expenses and meliorations. *Replied*, A two 19 years tack was *species alienationis*, which should not be allowed to administrators, who are but as tutors and curators to the burgh; and *esto* Johnston resiled from his offer, it was a malversation in the Magistrates to set it cheaper than the roup. Some of the Lords were for trying the value of the links before answer, that if there was a great disproportion between his tack-duty, and what it might really give at that time, the Lords might cognosce if there was lesion. But the plurality repelled the reasons of reduction, and sustained both the feu and tack.

THE LORDS afterwards allowed the value of the links to be tried before answer, and the custom of the convention of burghs ratifying tacks.

*Fol. Dic. v. 1. p. 156. Fountainball, v. 1. p. 818.*

1700. July 23.

MONCRIEF of Colfairgie *against* TOWN of Abernethy.

MR MATTHEW MONCRIEF of Colfairgie pursues George Balvaird of Ballomill, and the Inhabitants of the town of Abernethy, for abstracted multures. *Alleged*, By the charter of erection from the Earl of Angus in 1476, they are liable to no astriction nor thirlage, neither is this the mill of the barony. *Answered*, By a posterior charter in 1628, the whole burgesses are expressly thirled to the mill

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No 4.

This was contrary to act 36th Parl. 1491. But there had been a practice of obtaining the consent of the Convention of Burghs to such tacks, which it was said validated them. The Court, in a reduction, allowed, before answer, a proof of the custom. The pursuer had likewise alleged, that the subject was let at an under-value. A proof of the value was ordered.

No 5.

Found, that acceptance, by the Magistrates of a burgh, of a charter, containing thirlage to a

No 7.  
neighbouring mill, was sufficient to bind up the inhabitants from repudiating the charter, though they were not formerly subjected to the thirlage. But here the charter contained some new privileges in favour of the town.

of Farg. *Replied*, Though the Magistrates accepted of such a burdensome charter, yet that can never bind the whole community, without some act of homologation or acquiescence on their part. *Duplied*, Such charters do not require the explicit and direct acceptance of every burges; and their repudiating it *ex post facto*, after so long a time, cannot exsem them, especially where they had the privileges of fairs and markets given them in the same charter, which they have bruiked and enjoyed ever since, and so cannot *pro parte approbare et reprobare* the rest.—THE LORDS found the Magistrates' acceptance of the charter sufficient to bind the inhabitants from repudiating; but the possession was rendered unclear, by reason the heritor of Ballomill was for many years likewise tacksman of Fargmill, by which the possession became promiscuous, and if they came to his own proper mill, he never quarrelled them for abstracting from the Fargmill. There were other defences, as that some of them held of other superiors than the Earl of Angus. And, *2do*, That their houses were feued out to them before the charter in 1628, and so could not be astricted to this mill.

*Fol. Dic. v. 1. p. 156. Fountainball, v. 2. p. 105.*

1708. July 31.

ALEXANDER MONTGOMERY of Asloss, Tacksman of the Town of Edinburgh's Mills, *against* JEAN ALEXANDER, Relict of Adam Cleghorn Brewer in Edinburgh.

No 6.  
A burges brewer of Edinburgh, possessing a tenement of land there, found thirled to mills acquired by the town, and annexed to the royalty many years after the erection of it; burgesses being ordained by acts of the Town Council to go to these mills with their grain, under penalty of escheat of what should be abstracted, and payment of double milture.

In the action for abstracted miltures, at the instance of Asloss against Jean Alexander, the pursuer insisted against the defender, *alleging*, That she being a burges, possessing a tenement of land within Edinburgh, was obliged to go to the town's mills upon the water of Leith, which, by their charter, are annexed to the royalty; because, as the inhabitants of a barony are bound to go to the mill of the barony, so the inhabitants of the royalty are thirled to the mills of the royalty, which are in effect the Queen's mills, and have greater privilege than the mills of a barony. *2do*, Burgesses within burgh are obliged to obey the acts of the town-council made for the good of the burgh; and, by a tract of such acts, burgesses are ordained to go to the town's mills with their grain, under the pain of escheat of what is abstracted, and payment of double milture. Now, the acts of a Town Council are more binding than the acts of a Baron-court, being in effect like decreets-arbitral as to what relates to the Town's common-good, whereof the mills are a part. Which acts have been homologated and obeyed always, till the abuse of hand-mills or querns, contrary to law, crept in.

*Answered* for the defender, The mills of the water of Leith being no part of the original constitution of the royalty, but only purchased lately by the town,