

MORTIFICATION.

1694. July 25. The TOWN of EDINBURGH *against* SIR WILLIAM BINNY.

THE Town of Edinburgh *contra* Sir William Binny, for reducing a tack of Paul's-work, set by the Town of Edinburgh to Sir Thomas Kennedy, and John Trotter, and by them assigned to Sir William; *imo*, Because, by the set or decret arbitral of the town, the whole 14 Deacons extraordinary, and all must be present at the setting of tacks, which was not here.—THE LORDS thought that extended only to tacks of their common good, which this was no part of. *2do*, That, contrary to the act of Parliament 1633, they had inverted the destination, which was for an woollen manufactory, and had turned it to a linen one. *Answered*, The first decayed, and this flourished.—THE LORDS, before answer, ordained the mortification to be produced. *3tio*, That it was set to Magistrates and others then upon the Town Council, as partners, contrary to the acts of burghs, that Magistrates shall farm no part of the town's revenue or common good. This point was ordained to be further heard.

1695. February 5.—Philiphaugh reported the Magistrates of Edinburgh *contra* Sir William Binny, and the other tacksmen of the manufactory of Paul's-work, mentioned 26th July 1694. The first reason of reduction was, the tack is null, because set without consent of the extraordinary Deacons, conform to the articles of the set and decret arbitral of the Town. *Answered*, That relates only to the common good, and not to the extrinsic mortifications, whereof they are only made patrons and administrators. And the LORDS found it so, and repelled the nullity. The *second* was, That it wanted a tack-duty, it only mentioning the upholding the fabric, and maintaining and educating the boys.—THE LORDS found the duty might as well consist in the prestation of a fact, as in payment of money. *3tio*, That they did not keep that number of boys in it, and so inverted the pious design, contrary to the act of Parlia-

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A mortification was made for keeping idle boys at work. The Lords found, that the tuffing it from a woollen to linen manufactory, was an inversion of the mortification. They found also, that it was a lawful act of administration, and good management, to let the mortification in tacks, therefore sustained the tacks.

No 1. ment 1633.—THE LORDS thought the not-payment of tack-duty no irritancy of the tack, unless expressly so provided, as in feus *ob non solutum canonem*, but might be a ground to claim damages. *4to*, That it was set to actual Magistrates, and others then in office, who are declared incapable to receive such, both by the acts of the Royal Burghs, and acts of the Town Council of Edinburgh. *Answered*, This was no part of the Town's common-good, and the present Magistrates are partners in some tacks.—THE LORDS laid more weight on this than any of the former, and ordained the acts founded on to be produced.

1696. February 7.—The reduction pursued by the Town of Edinburgh against Sir William Binny, and other partners of the linen manufactory, in Paul's-work, of the tack set to them of the same in 1683, was reported. The reasons now insisted on were, *1mo*, That this house was founded by Thomas Spence, Bishop of Aberdeen, in the reign of King James II. for discipline and training of idle vagabonds, and dedicated to St Paul; and, by an act of Council in 1626, was destinate and mortified for educating boys in a woolen manufactory, and this tack had inverted the original design, contrary to the 6th act of Parl. 1633, discharging the sacrilegious inversion of all pious donations; *2do*, That it was contrary to the nature of a stock of money, (as this was) to be set in tack; and the commission in the tack to uplift it was revocable; *3tio*, Tacks of any part of the common-good, set to Magistrates, are null, by an act of the Royal Burghs at Kinghorn in 1600, else they might soon dilapidate the Town's patrimony; and it is also prohibited, *tit. D. De administratione rer. ad civitates pertinentium. Ita est*, several of the first tacksmen were on the Town Council, and cannot be *auctores in rem suam*. *Answered* to the *1st*, The tack did not deviate from the act 1626, save in turning a woolen manufactory into a linen one; for still boys were trained up in virtue and industry, as the main scope of the act seemed to require, only they were not presented by the Magistrates, for relieving them of so many of their own poor, &c.; *2do*, It thrives much better in the one art than the other; *3tio*, There was a *quorum* of the Town Council to set this tack, discounting the tacksmen; and now it is in the hands of singular successors, and that personal objection of their being Magistrates then, is not a *labes realis* to annul it in the persons of those who have now *bona fide* acquired right to it.—THE LORDS, on the *first* ground, (without proceeding to the rest) found such a discrepance betwixt the conditions of this tack and the act in 1626, as was sufficient to reduce it; though sundry of the Lords moved, that these clauses might now be adjected to this tack, and the same qualified and regulated thereby, without annulling the same *in toto*, being so good and profitable a work; but the plurality carried the contrary.

1698. *November 22.*—The reduction, mentioned 7th February 1696, at the Town of Edinburgh's instance against Sir William Binny, and the other tacksmen of Paul's-work, is this day resumed, and upon bill and answers advised; and it being stated, whether the turning it from a woolen to a linen manufactory was an inversion of the mortification, the plurality found in the negative, that it was not. Then the question being stated, if it was a lawful management and act of administration to set the said mortification in tack, in the terms this tack was conceived, the LORDS, by plurality of seven against six, found the setting it in tack no mal-administration; and therefore repelled the reasons of reduction, and sustained the tack, which recalls and rescinds the former interlocutor.

Fol. Dic. v. 1. p. 591. Fountainhall, v. 1. p. 637, 666, 709. & v. 2. p. 17.

See HOSPITAL.

See APPENDIX.