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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 acceptation of every burgess; and their repudiating it *ex post facto*, after so long a time, cannot exeem 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' acceptation 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, 2*do*, 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. *Fountainhall, 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 burgess 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 multure.

In the action for abstracted multures, at the instance of Asloss against Jean Alexander, the pursuer insisted against the defender, *alleging*, That she being a burgess, 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. 2*do*, 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 multure. 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,

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and annexed thereto, as a part of their common good, no inhabitants within the burgh are thirled to these mills, except such as have voluntarily astricted themselves, Earl of Morton *contra* Feuars of Muckart, *voce* THIRLAGE; or against whom a right of thirlage is acquired by prescription; neither of which can be pretended in this case. Nor, 2*do*, Can burgesses be restricted in their trade, without their consent, by the Town Council, but only by the laws of the nation. Magistrates, who are but administrators for the good of the inhabitants, may better their case, but cannot make it worse; more than they could exact two pennies for the pint of ale without a public law. And burgesses owe obedience to Magistrates only, when they are executing the Queen's laws, as Sheriffs in that part, and acting for the well or good government of the place; and not when they would limit and burden private persons' property by unwarrantable acts; For otherwise any Sheriff might at the same rate impose upon all within the shire.

THE LORDS repelled the defences; and found, that the tenement possessed by the defender is thirled.

Fol. Dic. v. 1. *p.* 156. *Forbes, p.* 278.

1711. *February* 13. Ross *against* The MAGISTRATES of Tayne.

No 7.
By statute, magistrates who grant bonds *virtute officii* without the warrant of a previous act of council, are bound to relieve the town, without prejudice to the right of the creditor. A bond by magistrates to the provost, without the warrant, found not actionable, until proof shown of the onerous cause.

WALTER Ross being provost in 1694, he gets a bond from them for L. 602 Scots. Elisabeth Ross his daughter confirms this sum, and with concourse of her husband, pursues the present magistrates for payment. *Alleged*, 1*mo*, The bond is null, because not only by acts of the convention of the royal burghs, but also by the 28th act of Parliament 1693, all things relating to the alienation of their common good, or contracting debts, (which may be a ground to affect them by diligence,) must be done in a full convention of the town council, both ordinary and extraordinary, with their deacons of crafts, and a previous act made, bearing the causes and uses for which it is borrowed; but so it is, this bond is not signed by the whole council in a full convention; nor is there any previous warrant; and which is the more necessary, that it was done in favours of one who was actually provost and chief magistrate at the time. *Answered*, This bond is signed by nine of the town council, which is the plurality, the whole consisting but of fifteen; and the certification of the act of Parliament is not the nullity of the deed, but that the subscribers shall be personally liable for the debt themselves, but prejudice of the creditor's right. *Alleged*, 2*do*, This bond is still null; for the narrative and the obligatory part are wholly discrepant and contradictory. The narrative bears, that the town was owing 700 merks to one Hew Bayne, whose right Provost Ross had acquired; and yet the bond is granted for L. 602, being 200 merks more. *Answered*, This is a pure mistake in the writer, by not mentioning the annualrents, which truly made up the L. 602. *Alleged* 3*tio*, We must have compensation; for the Provost, while