

No 61.

to subject him to the tack-duty, seeing he had not exceeded the number of coalleries, and if he had put in any more, he was proportionally to have augmented the rent; so it appeared to be the meaning of parties, that the coal ceasing, the tack-duty should also fall; though in some bargains the party may be liable whatever be the event, and though he get nothing.

*Fol. Dic. v. 2. p. 60. Fountainball, v. 2. p. 52.*

1709. July 1.

The ADMINISTRATORS and TREASURER of HERIOT'S Hospital, against JOHN ANGUS, Tacksman of the Canonmills.

No 62.

A tacksman of mills not allowed abatement of his rent in consideration of a supervening declarator of immunity in favour of several, who, at the letting of the tack, were thought to have been thirled to the mills, and were in use to grind all their grain there, in respect no more was let but the mills and multures thereto belonging.

IN a pursuit at the instance of the Administrators and Treasurer of the Hospital, against John Angus, for payment of his tack-duty of the Canonmills possessed by him as assignee to a tack thereof set by the pursuers to the deceased Margaret Murray his former wife;

*Alleged* for the defender; At the date of the tack, the inhabitants of the Canonigate of Edinburgh, were in use to grind all their grains for baking and brewing at, and thought to have been thirled to the Canonmills; which thirlage was, since then, restricted in a process against them, to what tholes fire and water within the sucken, and is now utterly evaded by kilning and cobling in Leith and elsewhere; therefore, seeing the extent of the multure is exceedingly diminished, the defender ought to have a proportionable ease or abatement of the tack-duty, conform to law, L. 9. Pr. L. 15. § 1. D. Locati Conduct. Stair Instit. Lib. 1. Tit. 15. N. 1. in fin.

*Answered* for the pursuers; No more was set but the mills, and multures thereto belonging, and the defender has all the multures that belong to the said mills; and if he was disappointed of his expectation by the Lords' interlocutor, that being no deed of the pursuers, can be no ground for any abatement of the tack-duty. The citations out of the civil law and my Lord Stair's Institutions, meet not the case, for these concern only eviction or perishing of the subject set; whereas here, the mills and lands are still extant and entire, and the constituted thirlage continued according to what the Lords found justly to belong to the said mills, and the pursuers set only the multures belonging thereto; besides, the LORDS have frequently found, That accidental loss through sterility or the like, are no cause for an ease of the tack-duty, more than extraordinary increase would occasion an augmentation thereof; seeing the mutual hazards of loss and gain redound by the nature of the tack to the setter or tacksman.

THE LORDS repelled the defender's allegiance in respect of the answer, and found no abatement due.

*Fol. Dic. v. 2. p. 60. Forbes, p. 337.*