1752. *July* 4. DEAN *against* The MAGISTRATES of Irvine.

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The magistrates and town-council of burghs may grant feus of lands which are the burgh's property, and may set them in tack longer than three years, if such feus and tacks are beneficial to the community.

ADJACENT to the burgh of Irvine there is an uncultivated muir of about four or five hundred acres, which is a part of the town's patrimony. The Magistrates, to make the most of it for the benefit of the town, feued some acres at an advanced rent, and of other parts gave leases for 19 years, upon condition of inclosing, &c. And because this management gave umbrage to the low people, who enjoyed what grass was in the muir upon paying a very small acknowledgment to the town for every beast that pastured there, the Magistrates found it necessary to bring a declarator concluding, 'that the administration of the lands belonging to the burgh is in them, and that they may lawfully grant these lands in feu-farm, or let them in tack, provided such feus or tacks be granted for the utility of the burgh, and for augmenting its revenues.' This produced a counter-declarator, 'that the Magistrates and town council have no power to grant feus nor tacks for longer endurance than three years, and that only by public roup.' The argument for the burgesses was the same that has been commonly used in the like cases, that their declarator was founded upon the act 36, p. 1491, prohibiting the setting of tacks for longer than three years. The Magistrates founded upon their right of administration, which is now no longer limited by the statute, because the statute is in desuetude.

When this case came to be advised by the Court, it occurred to me, that the meaning of the said statute had been generally misapprehended, and that it did not at all concern the present case.

The very best method for gathering the true intention of a statue is to examine the law as it stood at that time, thereby to discover the evil for which the statute was intended a remedy. From the *Iter Camerarii*, *cap.* 39. § 17. and 45. I observe that the common method of levying the rents and revenues of royal burghs, was to roup them annually to the highest bidder; and the same appears from the act 185th, Parl. 1593. This saved the expence of a collector, and the vexation of arrears; and in the administration of a public revenue, was perhaps the eligible method. And it deserves to be adverted to, that this method of administration was the same that was followed with regard to the King's revenues; for, down to the union, these were set by public roup from time to time to the highest offerers.

It is likely that there would be jobbing in setting a town's revenues, as well as in setting those belonging to the King. Magistrates will always be inclined to favour their friends or their faction; particularly in granting long leases of the town's revenues, when lucrative. To prevent this evil is apparently the intention of the statute 1491, enacting, 'That the rents and yearly revenues of burghs be not set but for three years allenarly.' This is scarce capable of a double meaning. The regulation extends not to lands, mills, fishings, which may be set in the ordinary way, but only to the rents which arise out of these

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subjects. And indeed there is a material difference betwixt these two. It is a prudent step of management to roup a town's revenues yearly, which is sure to draw for them as much as they will bear. But to subject to the same regulation the natural possession of land, the profit of which depends upon culture, would be very bad management.

It appears, then, that magistrates with regard to the management of lands belonging to their town, are under no restraint of granting long leases. And that they may also feu, though more extraordinary, will appear from the following consideration. By the very constitution of a royal burgh, the magistrates are empowered to distribute among the burgesses parcels of the common property to build upon; and which parcels are held of the King in burgage. Here is a power established in the magistrates to create a feudal holding of one kind; and it would require a very strong authority to bar the magistrates from creating a feudal holding of any other kind, provided it be equally beneficial to the burgh.

'THE LORDS accordingly found, That Magistrates have a power to feu and grant tacks. And remitted to the Ordinary to enquire whether the feus and tacks challenged are advantageous to the burgh of Irvine.'

Fol. Dic. v. 3. *p.* 140. *Sel. Dec. No* 14. *p.* 16.

*** The same case is reported in the Faculty Collection.

IN mutual declarators of the above parties, the question was, Whether the magistrates and town council of burghs may grant feu-rights of the burghs' property, or tacks of a longer endurance than three years?

Pleaded for Dean, &c. The property of the common good is in the community, and the magistrates are only administrators of it: they may exercise every act of rational administration, but they may not alienate, for that is the characteristic of property itself; nor can it be answered that the Magistrates of Irvine claim only a limited power of alienation, by providing that the feu-duty be without diminution of the rental; for neither does this alter the nature of the feu which is still an alienation, nor can it apply to this particular case, for the lands belonging to the community have never been rentalled. That no part of the common good of burghs can be feued out, is expressly asserted by Craig, *de feudis, lib.* 1. *dieg.* 15. § 16. and by Balfour, *Practics, cap.* 3. This also appears to have been the sense of the legislature; for it never would have limited to three years the endurance of every tack of the common property of burghs, and at the same time have left with the magistrates an absolute power of alienating the whole.

That magistrates of royal burghs may not grant tacks of the common property beyond the term of three years, is evident from the act 36th, Parl. 3d James IV.; and act 185th Parl. 13th James VI. These acts were supposed to be in

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force by Mackenzie, as appears from his observations upon the former of them, and from the decision, Jack against Town of Stirling, No 3. p. 1838.; and that of the 16th December 1735, Macghie against the Magistrates of Edinburgh, proceeds upon the same supposition, No 8. p. 2501.

It was *pleaded* separately for Dean, &c. That if the Magistrates be permitted to feu out the common property, the community, the heritors of the burgage-tenements, and those who possess in their right, will be deprived of that servitude, or that right of pasturage, of feal and divot, which they have immemorially enjoyed as parts and pertinents of their burgage tenements.

Answered for the Magistrates and Town-council; To grant in feu-farm or set in tack, for any term of years, the lands belonging to the burgh, is, in the magistrates, a rational act of administration: by no other method can they improve the common property, adorn the burgh, and increase its revenues; nor has any statute declared this to be illegal. It is evident that the magistrates of burghs were originally entitled to allocate the lands belonging to the community in burgage, and wherefore not in feu-farm? The two statutes cannot avail the inhabitants in their declarator, for they relate to tacks not of the lands of burghs, but of their rents; not to the *ipsa corpora*, but to the *proventus* of the common property; fot that such rents were very anciently set in tack, appears from the *Iter Camerarii, cap.* 39. § 37. agreeable to what has been said is universal custom; magistrates of burghs do not limit the tacks of the subjects belonging to the community to the term of three years, but vary their endurance as they see most expedient; and when the general utility requires it, they, instead of granting leases, grant feus of the common property.

To the right of servitude pleaded upon, it is *answered*, That the community cannot acquire any such right over lands which are its property; that inhabitants cannot, for that they have no permanent interest in the burgh; that burgesses cannot, for that, as such, they have no real estates in the burgh; heritors indeed might acquire this servitude; but the fact is, that they have constantly paid according to the number of their cattle, for the privilege of pasturage by them enjoyed.

'THE LORDS found the pursuers have a right to set feus and tacks for a longer time than three years; and remitted to the Ordinary to hear parties procurators, if these feus and tacks are set for the benefit of the community; and if or not the pasturage on the said commonty is thereby meliorated.'

Act. *Elliot, Brown, Hay et Lockhart.* Alt. *J. Grant, R. Dundas, Ferguson et R. Craigie.*
Reporter, *Strichen.* Clerk, *Kirkpatrick.*

D. *Fac. Col. No* 22. *p.* 42.