also have been given them. However, both of these were neglected in this case; they got no information about the witnesses who were to give evidence against them, and so could have no opportunity of objecting to their examination; and, in place of a fair trial by a jury, they were deprived of their liberty of citizens by a common sentence of the magistrates. It was also *contended*, That the sentence ought to be repealed, as the complaint had been sent to proof before any answer was made to it, and before any judgement upon the relevancy. No 387.

That the Magistrates had been equally precipitate in carrying the sentence into execution, as they had before been unjust to the defenders in denying them time to prepare for their defence: That, in the latter case, the interval of eight days, was most commonly allowed; and, in the former, the legal *inducia* of fifteen days were seldom refused.

'THE COURT refused the bill, and adhered to the Magistrates' interlocutors.

Act. *John Swinton* Junior.

A. C. *Fac. Col. No* 133. *p.* 312.

1771. *June* 13. DAVID GRAY *against* ROBERT REID.

No 388.
A burgh of barony (Kilmarnock) was found to be independent of the Baron.

KILMARNOCK was erected into a burgh of barony in the year 1591, by a charter under the Great Seal, which was soon after ratified by an act of Parliament. In 1690 and in 1700, the Earl of Kilmarnock, the superior, made a new grant to the burgh; by which the corporation was established to consist of two Bailies, nineteen Councillors, and other officers; 'with power to the 'said Bailies to hold and affix Courts within the said town, and to decide, determine, and cognosce, in all actions and causes, both civil and criminal; 'and, generally, with power to the said Bailies, &c. to act, in every affair 'relative to the said town, as freely in all respects as any other Bailies, &c. 'of any other free burgh within this kingdom are known to do, have done 'heretofore, or, by the laws of this kingdom, may do at any time coming.'

By the charters of erection and set of this burgh, it was appointed, that the Town Council present a leet of five of their own number to the Baron, on certain fixed days, preceding or following Michaelmas yearly; out of this leet the Baron elects two Bailies; and, if the Baron does not elect the two Bailies within the time limited, and in the manner established by the charters, then the Town Council have power to choose two Bailies for that year only.

The jurisdiction of this burgh fell under investigation and trial, in consequence of an action raised by Gray against Reid, for a debt of L. 5 Sterling; when, in a suspension of a decree for that sum, Reid stated an objection to the Bailies' jurisdiction, in respect the debt was above forty shillings, the limitation authorised by the jurisdiction act, 20th Geo. II. c. 43.

No 388.

In support of the jurisdiction, Gray, the pursuer, *pleaded*,

The statute founded on, which abolished the jurisdiction exercised by over-lords, by the 27th section, expressly provided, that the same should not 'take 'away or prejudice any jurisdiction or authority vested in or competent to 'the corporation or community of any burgh of regality or barony in Scot-'land, or to the Magistrates thereof; which is independent of the Lords of 'regality or barony respectively.' The town and community of Kilmarnock being, by their charters, a free burgh of barony, fell directly under this exception. The meaning of the clause was obvious; the reservation applied to whatever jurisdiction was independent of the Lord of regality or barony, and had no reference to the creation or election of the Magistracy, to whom the exercise of that jurisdiction was committed. Though the Earl of Glencairn, therefore, as coming in place of the Earl of Kilmarnock, the ancient superior, had reserved a right of nominating the Bailies of this burgh, out of the leet presented by the Council, yet this was merely an honorary distinction, and in no degree infringed upon the independent jurisdiction vested in the community by their charter, and ever since exercised by them without challenge. The reservation to the Council, of appointing the Bailies, in case the Baron failed, was not nugatory, as several instances occurred where it had been exercised; and what sufficiently marked the distinction, in the present instance, was, that the Earl of Glencairn had his own baron-bailie, who gave decrees for rents, and in causes under forty shillings; whilst the Bailies of Kilmarnock composed quite a different Court.

Pleaded for the defender,

By the 17th section of the statute, it was enacted, 'That no heritor or pro-'prietor of lands within Scotland, which had been erected into a barony, or 'granted with lower jurisdiction, or their Bailies, shall, by virtue thereof, 'enjoy jurisdiction in any criminal cause whatsoever, other than assaults, &c. 'and, as to civil causes, it shall not be lawful or competent to hold plea, or 'judge in any cause where the debt or damages shall exceed the sum of forty 'shillings Sterling.' The Legislature, it appears, had in view three degrees of jurisdiction; *1st*, Barons; *2d*, Grants with lower jurisdiction; *3d*, Their Bailies; *viz.* the Magistrates elected by the Baron to his own barony; and hence, if the present point rested upon the interpretation of this clause alone, the Bailies of Kilmarnock could have no competent jurisdiction. The argument, therefore, turned upon the 27th section of the act which contained the exception; and though, from a variation of the expression, that clause might at first mislead, yet, upon a careful comparison, both seemed to point at one and the same thing, and to restrain not only the jurisdiction of Barons, but also grants with lower jurisdiction, or their Bailies.

The exception in the statute, accordingly, related only to those Bailies or Magistrates who were absolutely independent of the Baron; but the Baron, in the present case, by his sole act of election, created the Bailies; so that no

greater degree of dependence could well be imagined. It was by the act of election alone that the Bailies had right and title to jurisdiction; and, as the first was confessedly dependent upon the Baron, the second, which was a necessary consequence of that act, must, with equal reason, be considered as standing in the same relation. No 388.

THE LORD ORDINARY "found the corporation or community of the burgh of barony of Kilmarnock, and the jurisdiction belonging to the Magistrates thereof, is independent of the Baron; and, therefore, repels the reasons of suspension."

The cause having been advised, upon a petition and answers, it was observed from the Bench, that though the jurisdiction, in this case, was not strictly and to the fullest extent independent, yet, as the Council was entitled to name, if the superior neglected, the community had an inherent right; and that the Baron possessed the mode only of nomination, not the radical right of jurisdiction.

The Court adhered. See No 15. p. 6313.

Lord Ordinary, *Auchinleck.* For Gray, *Boswell.* For Reid, *D. Dalrymple.*
Clerk, *Campbell.*

R. H. *Fac. Coll. No 90. p. 266.*

1790. *November* 30. MAGISTRATES of PAISLEY & JOHN ADAM.

No 389.
In respect of ancient usage, horning was found competent to pass on the extracted decrees of the Magistrates of Paisley, tho' only a burgh of barony.

A BILL of exchange having been protested at the instance of Adam, and the protest registered in the Court-books of the burgh of Paisley, on this registered protest a bill of horning was presented. In consequence of a doubt concerning its competency, started by the Clerk of the Bills, in respect that Paisley was not a Royal Burgh, the LORD ORDINARY "appointed the complainer to give in a short memorial, distinctly stating the nature and constitution of the burgh of Paisley, and in what respect horning is competent to pass upon the extracted decrees of its Magistrates, or on protests, or other writings registered in the books of that burgh."

Upon this the Magistrates sisted themselves, as parties, in support of their jurisdiction, and gave in the memorial required by the Lord Ordinary, who afterwards ordered them to prepare a memorial to the Court, in order to report: In this it was

Pleaded, The Town of Paisley was erected into a burgh of barony, by a charter of King James IV. in 1488; and, afterwards, the superiority of it was obtained by the Council and community, by whom it is held of the Crown.

The Magistrates have constantly exercised jurisdiction, both civil and criminal, with every privilege of a Royal Burgh, except that of sending a representative to Parliament; a jurisdiction which has been uniformly recogni-