light, the construction which the defender now puts upon them, will appear clear and evident. No 14.

" THE LORDS found the pursuer entitled to the interest that was due on the Marquis of Tweddale's bond at his father's death, extending to L. 175 : 11s. Sterling, and likewise to the further sum of L. 1000, and interest thereof from the first term after his father's death, and to expenses; and, on a reclaiming bill, they adhered without answers."

Act. *Lockhart.* Alt. *M'Kenzie, M'Queen.* Clerk, ——.
J. S. tertius. *Fac. Col. No 41. p. 71.*

1769. *March* 1.

EARL of GLENCAIRN *against* The MAGISTRATES, &c. of Kilmarnock.

No 15.
A baron feuing out his barony with baron-bailie powers, conveys no prilege to the vassal which is not specially granted in the feu-right.

IN the year 1591, the village of Kilmarnock, by a charter under the Great Seal, was erected into a burgh of barony in favour of the Earl of Kilmarnock; and, from that time down to 1695, the burgh was managed by a baron-bailie nominated by the Earl of Kilmarnock, and afterwards by two bailies and 19 counsellors.

In the year 1700, William Earl of Kilmarnock, for onerous considerations, disponed, and, in 1705, ratified his disposition of certain lands and tenements, with the whole common good, customs, and privileges of the burgh of the barony of Kilmarnock, to and in favour of the then Bailies and treasurer of the said burgh, for themselves, and in name and behalf of the council and community of the said town; in which, after reserving to himself the nomination of two bailies, regulating the mode of presenting leets, and divesting himself of several rights and privileges, he conveys 'power also to the said Bailies for 'the time, to chuse a town-officer to serve the town for the time;' and also, 'power to the said Bailies to hold and affix courts within the bounds of the 'said town, and to decide, determine, and cognosce in all actions and causes, 'both civil and criminal, and to pronounce decreets, and to put the same to 'due and lawful execution,' &c. and generally, to 'do and act in every affair 'relative to the said town, sicklike, and as freely in all respects, as any other 'free burgh of barony within this kingdom.'

In a declarator by the Earl of Glencairn, as superior of the town of Kilmarnock, to have it found and declared, that 'he has the sole power and privilege of appointing proper persons to exercise the offices of clerk and fiscal, and others dependent on, and belonging to the burgh of barony of Kilmarnock, excepting a town-officer, whom the said Bailies and council are specially authorised by their feu-rights to appoint;'—the question occurred in point of law, 'how far a baron, when he feus out his barony, in whole or in part, as a barony, or with baron-bailie powers, gives the vassal right to hold courts for payment of his

No 15. ' rent, and other matters falling within the jurisdiction of a barony, and to ' name clerks, officers, fiscals, and birlymen; or if the vassal has no right to ' name any of them, unless such power is specially granted in the feu right?'

Pleaded for the Earl of Glencairn; That though a simple baron, infeft *cum curiis*, upon feuing out his barony, with baron-bailie powers to his vassals, should, from such act, be understood to communicate the right of holding courts for payment of rents, naming clerks, &c. yet a superior, with a charter from the crown in his favour, erecting a certain district into a burgh of barony, with the sole power to him of naming bailies, and exercising the whole jurisdiction competent to a burgh of barony, was not to be supposed, by granting *nominatim* one privilege, to have conveyed all other privileges, and the right of nomination to all other offices, except these only which he had expressly retained to himself.

The sole, unlimited, and exclusive right of nomination to every office whatever within this burgh of barony, was at first an inherent right in the family of Kilmarnock; nor is it possible to maintain, that by feuing out a small part of the lands in the town, by creating bailies and council in this feu-charter, with jurisdiction over the whole town, and by conveying to them *nominatim* a right, which as superior was inherent in himself, that of naming a town-officer, the Earl of Kilmarnock, by granting one privilege, must be understood to have transferred and conveyed, to these bailies and counsellors, every other right and privilege in his person.

The power of naming a town-officer being *nominatim* conveyed, affords the strongest evidence, that the right of chusing a clerk, or any other officer, was never intended to be conveyed; since it were altogether inconsistent to suppose, that the privilege of naming an inferior officer should be expressly conveyed, while the right of nomination to a much higher office was to be considered as carried by implication. On the contrary, as the superior had an undoubted right to reserve to himself the right of nomination to every office in the burgh, he has as effectually retained what he has not expressly given away, as if he had reserved them in so many words.

Contended for the Magistrates and Council; That the burgh having purchased their lands and franchises for onerous causes, have a title to every right formerly competent to the superior, and not expressly excepted; as, where limitation was intended, it is clearly expressed. In a feu of lands, the superior, *qua* superior, has no right to minerals of any kind; these, unless specially reserved by the superior in the grant, pass to the vassal as part and pertinent of his property. So, in a feu of jurisdiction, jurisdiction being granted, every right necessary for expediting the same, must be considered as communicated and granted.

By the feudal law, when the King erects lands into a barony or higher dignity, the baron has thereby a jurisdiction, and a right to name all the officers of his court; and, if such baron shall feu out the lands of his barony, it is held by Lords Stair and Craig, that the sub-vassals, though they have not the *jus*

gladii, have yet *distringendi potestatem*, a right inherent in property, and expressly established by the old laws of Malcolm II. and David II., Stat. Malcolm II. cap. 8. § 8; and David II. cap. 17. No 15.

Had therefore the feudal grant to the town of Kilmarnock been simple, without an express conveyance of jurisdiction, it would necessarily have carried a power to hold courts within their own land and heritage; and it is impossible to find out a principle to debar them from the nomination of all officers in their own proper court. But the grant is here much broader and more extensive; it is a grant of courts and their issues, which has a clear and determined import in the law, and gives a proper jurisdiction over all those within the territory. The extent of such grant is clearly laid down by Craig. 'Cum curia concedunter etiam officiarii, adjudicatores, et executores judiciorum, sive eorum creandorum potestas; quia, concesso uno, ea omnia concedi videntur sine quibus jurisdictio illa exerceri non possit;' Craig, lib. 2. dieg. 8. § 30. These extend to all the *claves curiæ*, as they are called by Balfour and Skene, and so to a lawful clerk, who should inform the assize; for, as the Lord Stair sets forth, b. 2. t. 3. § 3., such grant is total exemption from the jurisdiction of the superior.

But not only from the legal import, but likewise from the intendment of the grants, and the analogy of law in similar cases, the Bailies and Council have the power of electing their own clerk and fiscal, as they were not expressly reserved by the superior; for though, in the charter of no burgh in Scotland, is there a right granted to elect a clerk and fiscal, yet all and each of them have and exercise that privilege and power.

Even where no other right is granted but a proper jurisdiction, it is, by the principles of law, inherent in every court or jurisdiction, to nominate their own clerk and fiscal. It holds universally in royal burghs. It was so formerly with Sheriffs till the statute of Robert III. C. 23. The like power was competent to the commissary-court till act 1609, C. 6.; to Justices of Peace, till 1686, C. 20.; to the Lyon King at arms by 21st act 1672, and July 5. 1728, Lord Lyon against Erskine, *voce* PUBLIC OFFICER.

That every privilege is conveyed, which is not expressly reserved, is clear from this, that notwithstanding the limitations by statute, of the powers inherent and competent to these courts, all of them, excepting the Commissaries, further limited by 1609, do still nominate and appoint their own fiscal; and all of them, in case of death or deprivation of the clerk, do, *proprio et ordinario jure*, appoint a clerk, whose acts and deeds are legal and valid, till a nomination by those having the statutory right.

The reservation by the granter clearly shows the intendment of conveying, with the jurisdiction, every ordinary and inherent right, except where it was expressly reserved, and consequently of giving the Magistrates and Council the nomination and election of their own clerk and fiscal. It is the reservation alone which gives right to the Earl of nominating two Bailies; without it, he would

No 15. have no power whatever of nomination or restriction, and, the community being free of that servitude, the Council would have had the free and uncontrouled liberty of chusing their Magistrates.

"THE LORDS found, that the right of nomination of the clerk and fiscal to the town of Kilmarnock, was in the Earl of Glencairn."

Reporter, *Auchinleck.* Act. *Walt. Campbell.* Alt. *Rae.* Clerk, *Gibson.*
P. C. *Fol. Dic. v.* 3. *p.* 298. *Fac. Col. No* 91. *p.* 167.

1777. *June* 17. DOWNIE *against* ALEXANDER.

No 16.
Disposition of an area in liferent found to include a building afterwards erected on it.

ALEXANDER disponed to his daughter, on her marriage with Wallace, a certain area to her in liferent, if she survived her husband, and to the husband and his heirs in fee, reserving to himself the under story of any tenement to be erected on it by the disponees. Wallace before his death built a house on the area, which was of L. 10 yearly value, independent of the under story. After his death, his widow continuing to possess the house, his creditors adjudged the subject as the property of the defunct. The widow claimed right to it in virtue of an onerous disposition from her father of the area in liferent; and as it was then understood, and the disposition itself proceeded on the idea, that the husband was to build upon it, the plain intention of parties was, that the widow should have the liferent of the building, which was indeed her only provision, and *inædificatum solo cedit.* *Answered*, The building being erected by the husband on this liferented area, was clearly a *donatio inter virum et uxorem*, which was virtually revoked by his afterwards contracting debt: That the maxim *inædificatum solo cedit*, applies only to proprietors not liferenters; and besides, though that rule might hold in country estates, where the ground is the valuable part of the property, it will neither hold by our law, nor the Roman, in areas within burgh; but just the contrary, where the area being of inferior value ought to accrue to the tenement built on it. THE LORDS preferred the liferentrix to the rents of the tenement. *See* APPENDIX.

Fol. Dic. v. 3. *p.* 298.