

1794. *May 27.*

The SHERIFF-CLERK of Renfrewshire *against* the MAGISTRATES and TOWN-COUNCIL of Greenock, for themselves, and the Feuers and Inhabitants of that Burgh.

**No 351.**

The burgh of barony of Greenock found to have been dependent on the baron at the date of the jurisdiction act.

No deed of the Baron, subsequent to the date of that statute, rendering a burgh independent of him, can revive its jurisdiction.

In 1635, John Shaw, proprietor of the barony of Greenock, obtained a charter from the Crown, erecting Greenock, then a village, into a burgh of barony. By this charter, the grantee had the power of naming the Bailies, and all the other officers of court, of having a prison, and of levying for his own behoof all the duties exigible in the burgh.

In 1670, another charter was granted to John Shaw, and his son, confirming the charter in 1635; enabling the grantees to nominate Bailies and other officers yearly, and to admit free burgesses; allowing merchandise, and a variety of trades, to be carried on in the burgh; and authorising the Magistrates to make by-laws for the good of the burgh, with consent of the superior.

In 1741, Sir John Shaw, upon the narrative of the inhabitants of Greenock having, with his consent, imposed a voluntary assessment, for the public use of the burgh, on all the malt ground at the mills of Wester Greenock, granted a charter to the feuers and sub-feuers of the burgh, empowering them to elect annually nine of themselves (the Bailie or Bailies of the said barony being always of the number) to be administrators of the produce of the said tax, and of every future assessment consented to by the superior. The charter further provided, that the eldest Bailie, and in his absence the second, should preside at all these meetings; and it concluded with a declaration, that it was granted and accepted under the express condition, that 'it should be without prejudice to the right of jurisdiction competent to Sir John Shaw and his foresaids, as barons of the said town and barony of Greenock.'

Such was the state of the burgh, when the act 20th Geo. II. c. 43. commonly called the jurisdiction-act, was passed.

In 1751, Sir John Shaw granted a new charter to the burgh, which, after mentioning the great increase of the town, and the necessity that its government and police should be put under proper regulations, gave power to the feuers to choose annually two Bailies, a treasurer, and nine counsellors, in place of the nine managers appointed to be chosen by the charter 1741; with power to them to make by-laws, admit merchants and tradesmen to be free burgesses, and with power to the Bailies to hold courts, and exercise jurisdiction within the burgh. The Bailie of the barony was however declared to have a cumulative jurisdiction with the Bailies chosen by the feuers. The charter concluded with a precept of sasine only.

The Magistrates of Greenock, upon the footing of its being a burgh of barony, independent of the superior, occasionally exercised the jurisdiction reserved to such burghs by the statute 20th Geo. II. c. 43. at least there was evidence

of their having done so down to the year 1758; and, after having disused it for some time, they began again, about the year 1789, to exert the same privilege.

No 351.

The Sheriff-clerk of Renfrewshire, finding that this diminished his emoluments, by preventing many of the law-suits arising in the burgh from coming before the Sheriff-court, brought an action of declarator, concluding to have it found, that the Magistrates of Greenock had no higher jurisdiction than that of ordinary baron-bailies.

In defence it was

*Pleaded, 1st,* The great object of the act 20th, Geo. II. c. 43. was to take away those heritable jurisdictions, formerly vested in individual barons, which had been found so extremely prejudicial to the regular administration of justice; while it reserved entire the powers of the Magistrates of burghs of regality or barony, which were independent of their superior. Now, from the narrative of the charters already given, it is evident, that the barony of Greenock, at the date of the statute, came under that description; 1771, Gray against Reid, No 388. p. 7685; 26th Jan. 1776, Begbie against Gibson and Brown, No 350. p. 7709.

*2dly,* At any rate, the charter 1751, conferring upon the inhabitants the free election of their own Magistrates, must render the charter inapplicable. The charters 1635 and 1670 vested in the burgh a jurisdiction flowing immediately from the Crown, as ample as was then competent to any burgh of barony; all that remained with the Baron being the nomination of the Magistrates, a power totally distinct from the jurisdiction itself, and in fact nothing more than a personal privilege which he might relinquish at pleasure. When he gave it up, therefore, he did not create a jurisdiction, but merely disencumbered it of that impediment, which alone brought it under the statute. Accordingly, although the statute anxiously guards against the revival of private heritable jurisdictions, it by no means prevents burghs then dependent, on obtaining their freedom, from recovering the jurisdiction they had formerly enjoyed.

*Answered, 1st,* The burgh of Greenock was clearly dependent on the Baron at the date of the jurisdiction-act. The prior charters were granted at his desire and for his behoof, and so far from diminishing, they contain an express reservation of his jurisdiction.

Even the charter 1751 did not render the burgh independent. All the privileges there granted are still to be held of the superior, and his baron-bailie is declared to have a cumulative jurisdiction with the Bailies chosen in terms of it. Now, as the superior, by granting a charter in favour of the burgh, could not extend the jurisdiction of his own baron-bailie beyond the limits of the statute, it follows, that the jurisdiction to be exercised by the Bailies elected by the inhabitants, must be limited in the same manner.

*But, 2dly,* Even if the charter 1751 had granted a jurisdiction to the burgh in the most unlimited terms, it could not have been effectual to a greater ex-

No 351.

tent than the jurisdiction reserved to the Baron-bailies. The burgh was, at the date of the act, dependent on the Baron ; and consequently its jurisdiction, to use the words of the statute, was ‘ abrogated, taken away, and totally dissolved ‘ and extinguished,’ by the public law of the land, and therefore no act of the superior could revive it. If the contrary doctrine were well founded, it would still be in the power of the lords of regality and barons, within whose territories there are dependent burghs of regality or barony, to rear up jurisdictions with very extensive powers, and thereby make large encroachments on the King’s courts, merely by granting new charters, making these burghs now independent ; which, so far from having been the intention of the legislature, is in direct opposition to the saving clause in the statute, which applies only to jurisdictions then independent of the superior.

The Lord Ordinary having reported the cause on informations, the Court, by a majority, found, ‘ That the present Bailies of Greenock, named and appointed by the feuers and sub-feuers thereof, and John Campbell, the Bailie named by the superior or Baron of Greenock, acted illegally in so far as they exercised a higher jurisdiction than that of Baron-bailies ; and that they and their successors in office are not entitled to exercise any higher jurisdiction than that of Baron-bailies, as laid down by 20th Geo. II. c. 43.’

A reclaiming petition was appointed to be answered, and afterwards a hearing in presence ordered ; and, upon advising the cause, a considerable majority of the Court were of opinion, that the charter in the year 1751 could have no effect in the determination of the cause, as the superior could not confer a jurisdiction on the burgh of which he himself had been previously divested.

The question therefore came to be, whether the burgh was independent of the baron, in the sense of the jurisdiction act, at the date of the statute ? And on this point there was a considerable diversity of sentiment.

Several of the Judges thought, that the statute, although not very clearly worded, applied only to villages within a barony which are not incorporated, and to burghs of barony having no Magistrate other than a Baron-bailie, removeable at the pleasure of the Baron, not to burghs such as Greenock, which, although locally situated within a barony, are incorporated by charter from the Crown. The erection of such a burgh (it was observed) is not so much intended for the benefit of the Baron as the inhabitants. The charter of erection has the effect of instantly creating a distinct political corporation separate from the Baron, with appendent privileges, which he can neither take away nor infringe. For instance, he cannot refuse to name Bailies, nor can he remove or controul them during the term of their office ; and although he may resign or convey his own baronial right, he cannot dispose of the burgh or its privileges, because he would thus be taking away the *jus quæsitum* of the burgesses.

On the other hand, a majority of the Court were of opinion, that the erection of a burgh of barony, within a barony previously created, is merely an amplification of the right of the baron, obtained by his own desire, and chiefly for

\* his own advantage : That the superior of Greenock, before granting the charter 1751, not only had the sole power of naming Bailies, and of receiving burgesses, but might, even at that time, have for ever resigned the burgh into the hands of the Crown, without the consent of the inhabitants : That burghs, in the situation of Greenock, had uniformly been considered as dependent on the Baron ; and that, as the statute was of a public nature, and had attracted general attention, it was not to be presumed, that any of its clauses would have received a construction different from what the legislature intended.

The COURT 'adhered.'

Lord Ordinary, *Henderland.* Act. *Solicitor-General Blair, Rolland, Montgomery.*  
 Alt. *Dean of Faculty Erskine, Cullen, Jo. Clerk.* Clerk, *Sinclair.*

R. D. *Fol. Dic. v. 3. p. 364. Fac. Col. No 118. p. 261.*

Power of the Court of Session of supplying defects in adjudications. See ADJUDICATION.

As to their power of supplying defects in other deeds. See ARBITRIUM BONI VIRI.

Jurisdiction of a burgh of barony. See BURGH of BARONY.

The different manners in which jurisdiction is founded. See FORUM COMPETENS.

Testaments where confirmable. See FORUM COMPETENS.

Jurisdiction in cases of forgery. See IMPROBATION.

Power of naming officers of Court. See PUBLIC OFFICER.

Jurisdiction in cases of salmon fishing. See SALMON FISHING.

Power of naming factors *loco tutoris*. See TUTOR and PUPIL.

See No 9. *voce* ABBEY of HOLYROODHOUSE.

See APPENDIX.

