

county. The Sheriff administers the benefit of the Act of Grace; and he, and the jailer, are liable for the escape of prisoners.

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1776. December 19. MAGISTRATES OF KILMARNOCK *against* The INHABITANTS.

THE common good of a royal burgh is vested in the Magistrates, as trustees and commissioners for the burgh, with powers of administration for the good of the burgh. Among these, a power of feuing has been established by decisions of the Court, in the case of *Renfrew*, not collected; and in the case of *Irvine*, collected, 3d July 1752. And it has been exercised in several instances, never controverted, much to the advantage of the burgh; as in the case of *The Town of Ayr and Others*.

See case of *Paisley*, *h. c. p.* 442; *Glasgow*, 4 *New Coll. p.* 328; *Heriot's Hospital*, 4 *New Coll. p.* 46.

Part of the common good of Kilmarnock, a burgh of barony, called the Green, had, from the year 1690 downwards, been used by the manufacturers of the Town for different purposes, of washing, bleaching, drying their wool, &c. It had been generally under tacks let by the Magistrates; and to the tacksmen the other inhabitants, who wanted the use of it as above mentioned, paid a small gratuity. The Magistrates, *anno* 1772, took a resolution to feu an eighth part of this green for building houses. Their doing so tended to increase a little the revenue of the burgh, but the inhabitants insisted that the feuing any part of it for building was prejudicial to their interest, and to the manufactures of the place. In a suspension, the Lord Gardenstone, Ordinary, pronounced this interlocutor:—"Finds, that the right of property of the green in question is only vested in the Magistrates as trustees and administrators for the benefit of the community; finds it sufficiently proven, That the manufacturers and inhabitants have always had the use of this ground for the purposes of bleaching, drying, &c.: Finds, That the Magistrates may, by fencing the ground, or other proper means, render it more useful for these purposes. And though granting feus may increase the public revenue under the management of governing persons, yet it is neither a proper nor a just act of administration to alienate this piece of ground, which the inhabitants have always occupied and used for the purposes of industry and manufactures in the village; therefore suspends the letters *simpliciter*, and decerns."

And, upon advising a reclaiming petition and answers, (19th December 1776,) the Lords adhered, and found the suspenders entitled to their expenses. They held, that although the Magistrates had a title to feu, where their doing so was for the advantage and benefit of the Burgh and of the inhabitants, yet, in a competition betwixt an increase of the revenue of the burgh and the benefit of the inhabitants in their manufactures, &c., they thought the last was to be preferred.

The Magistrates again reclaimed, gave in a condescence, and offered to prove that the inhabitants never had a servitude for washing, bleaching, &c. upon this green: that it was generally in tack, and, when so, that the inhabitants paid a consideration to the tacksmen for the liberty of the green; that

they could be better accomodated elsewhere, &c. And this condescence being answered, the Lords allowed a proof before answer.

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## CAUTION JUDICIO SISTI.

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1774. December 15. TELFER *against* MUIR, &c.

A WARRANT of commitment having been obtained against Muir, as *in meditatione fugæ*, he found caution that he should compear and answer to any action brought against him, or, in default thereof, that his cautioners should pay the debt. Action was accordingly brought against Muir for the debt, and against the cautioners, in the event of his not answering thereto. Decreet was obtained against Muir. It was extracted, and a charge given. This being without effect, the pursuer, Telfer, proceeded in the action against the cautioners; but as they were only cautioners *judicio sisti*, and as decreet had not only been pronounced but extracted, without any previous requisition to produce Muir, the cautioners were assoilyed, 15th December 1774.

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1776. June 21. SIR JAMES COCKBURN *against* INGLIS.

THE LORDS found, "That cautioners *judicio sisti* are liberated from their suretyship by producing the person of the debtor for whom they are cautioners, at all diets of Court, when required, or by decreet being pronounced in the cause; but if, before pronouncing decreet, application shall be made to the Court, and evidence brought that the debtor is still *in meditatione fugæ*, for the purpose of evading personal execution on the decreet when pronounced; find, that, in such cases, the judge may exact new caution for the debtor's continuing within the kingdom, under a proper penalty, even after decreet shall be pronounced for preventing this evasion of the law; and if the debtor refuse or neglect to find such caution, the Judge may commit him to prison, under such limited time as shall appear necessary."