not to this case. If the superior does not name magistrates, the community has the power of naming; so that there seems an inherent jurisdiction in the community. Such is the case in the *Burgh of Wick*, and such, in part, in the *Burgh of Aberbrothock*. There is a difference between the interference of a baron and a right created in favour of a baron.

JUSTICE-CLERK. The baron cannot recal the exercise of the jurisdiction, or change the bailies named. The statute relates to a jurisdiction momentually in the baron, and revocable every hour, whereby the exercise of the jurisdiction and the existence of the judge depended on the baron's pleasure. It was this unlimited and arbitrary power which the statute wisely abolished.

On the 13th June 1771, the Lords found that the community of the burgh of barony of Kilmarnock, and the jurisdiction belonging to the magistrates thereof, is "independent of the baron, and therefore repelled the reasons of suspension;" adhering to Lord Auchinleck's interlocutor.

Act. J. Boswell. *Alt.* D. Dalrymple.

1771. *June* 21. MRS MARGARET PORTERFIELD *against* HOUSTON STEWART NICHOLSON, Esq.

WITNESS—OBJECTION OF RELATIONSHIP—AGENCY.

[*Faculty Collection*, 160; *Dictionary*, 16,770.]

MONBODDO. Modern practice has so much relaxed the severity of objections to witnesses, that I am not sure how the law now stands. *Lady Maxwell* naturally took a share in the inquiry as to this affair: she ought not to have been called as a witness, both on account of relation, which is a good objection when there is no penury, and also on account of her acting as agent. She acted as an agent, and even improperly in that character, for she took down in writing what the witnesses said, and read it over to them, and asked them if they could stand to it. This was equal to a precognition, and was in a manner tying down the witnesses to adhere upon oath to their declarations.

GARDENSTON. Lady Maxwell was no agent; she only reported what she had heard or knew.

BARJARG. There is no *penuria testium*. The objection on account of acting as an agent is strong.

PRESIDENT. Many witnesses may have been examined in this cause; but there is an exceeding *penuria testium* as to the only fact wherein Lady Maxwell's evidence is desired.

KAIMES. I would reserve the question as to Lady Maxwell's oath to the end of the cause, so that the question may be tried without it, and then we may see whether there is any occasion for it.

JUSTICE-CLERK. The objection, on account of relation, is generally good;

but cases occur where necessity must get the better of the objection. From the number of witnesses, no proof arises that there is not a *penuria* as to a particular fact. Many of the witnesses may know nothing of this crime, in its own nature most occult. The examination sought, is now restricted to a fact, which, if not proved by Lady Maxwell, cannot be proved at all. As to her having been an agent, perhaps there were improprieties in her conduct, but not enough to set her aside altogether.

PRESIDENT. The objection of *relation* is nothing, because the fact sought to be proved by her depends altogether upon her testimony. *Proditio testimonii* nothing, because she spoke of it to the defender's father. As to the objection of *Agent*, it is the only material one. It was natural for Lady Maxwell to be intrusted in the inquiry concerning a fact said to have happened under her own roof. The inquiry commenced in presence of the defender's aunt. There lies no objection to her taking down, in writing, what the witnesses said, and reading it to them. This was necessary, in order to come at the truth: *interest reipublicæ ne crimina maneant impunita.*

PITFOUR. The objection flies off when the examination is restricted to the fact, already mentioned in Miss Henderson's oath.

On the 21st June 1771, "the Lords allowed Lady Maxwell to be examined as to the fact in Miss Henderson's oath, reserving all exceptions to her credibility; and remitted with this instruction to the commissaries."

Act. A. Lockhart, *Advocate.* *Alt.* J. Swinton, H. Dundas.

Reporter, Kennet.

Diss. Stonefield, Monboddo.

Non liquet, Kaimes.

1771. *June* 27. CHARLES HOPE VERE, Esq. *against* MR ALEXANDER BRUCE.

MEMBER OF PARLIAMENT.

Reduction of a decree of division of valuation, by which a freeholder's qualification was reduced below L.400 Scots, found to be a sufficient ground for striking him off the roll, though he had been upwards of four months enrolled.

[*Faculty Collection, V. p.* 217; *Dictionary*, 8824.]

MONBODDO. I have no doubt as to the merits. I would doubt of the competency were it not for judgments pronounced by this Court. It is plain that this special case has been omitted in the statute. Neither are there any general words which give us jurisdiction to supply the omission. Nevertheless, I would go on in the error until we are corrected by superior authority.

ALEMORE. I doubt how far we are tied down by precedents, when we are satisfied that they have interpreted the statute beyond its purview.