No 396.

1780. *January* 29. SCOT *against* GREGOR GRANT.

THE LORDS observing, that it was a practice in the Sheriff-court of Edinburgh to register protests against carriers, or other such persons occasionally within the territory, though having no domicile in it, nor being otherwise subject to the Sheriff's jurisdiction, were of opinion, that the practice was irregular and illegal; and they declared so, in order, that it might in future be corrected. See APPENDIX.

Fol. Dic. v. 3. *p.* 363.

DIVISION XX.

Act abolishing Heritable Jurisdictions.

No 397.

1748. *January* 7. The EARL of MORTON *against* The KING'S ADVOCATE.

THE Earl of Morton claimed a reasonable compensation for the jurisdiction of regality over the lands of Langton, part of the ancient regality of Dalkeith, disponed by the family of Morton with that right, and now returned to him again by progress.

THE LORDS found, that lands, part of a regality, disponed *cum jure regalitatis* had no claim to a recompence.

Fol. Dic. v. 3. *p.* 364. *D Falconer, v.* 1. *No* 225. *p.* 310.

1748. *January* 12.
The DUKE of DOUGLAS and Others, *against* The KING'S ADVOCATE.

No 398.
Recompence was found due for regalities granted since 1455, confirmed in Parliament, and for regalities and sheriff-

BY act 43d, Parl. 11. James II. it is statute, 'That all regalities that are now 'in the King's hands be annexed to the royalty; and that, in time to come, 'there be no regalities granted without deliverance of the Parliament.' And, by act 44th, 'That there be no office, in time to come, given in fee and heri-'tage.'

Several claims being presented to the Court of Session, to have the value of certain rights of jurisdiction ascertained, in virtue of the statute made for that

No 398. ships, whereupon infeftments had followed, and the grantees had been in peaceable and uninterrupted possession for forty years.

purpose, 20th George II. it was objected to them, that the grants were posterior to the acts above-mentioned, and consequently against law.

Answered, The rights claimed for were either ratified in Parliament, or have been possest past the years of prescription.

On the *first* point, *pleaded* for his Majesty's Advocate; Ratifications in Parliament cannot be sufficient, as not coming up to the conditions required by the statute, to wit, a grant with deliverance in Parliament; the meaning whereof is explained by act 41st of the same Parliament, concerning the annexed property, which is declared not to be lawful for the King to dispone, without advice, deliverance, and decreet of the hail Parliament, and for great, seen, and reasonable causes of the realm. This act requires the advice of Parliament previous to the grant; agreeable to which the practice has been of dissolutions, in order to the granting part of the patrimony to meriting subjects; and the other two acts, though not so fully expresst, are of the same nature with this, and the deliverance which is required precisely the same thing; and so was understood by Sir Thomas Hope, who, in his Major Practiques, mentions these two acts under the head of annexation, See APPENDIX; and by Mackenzie, in his Observations on acts 41st and 43d James II.; and, upon the 44th, he observes, that grants of heritable offices were discharged simply.

Ratifications cannot be considered as derogating from the enacting laws in these particular cases, in respect they were not past with that accuracy which other acts were, not being considered by the committee of the articles, as is testified by Stair, B. 2. t. 3. § 35. and 73., and B. 2. t. 8. § 35.; Mackenzie in his observations on these acts; and therefore the King's right is understood to be preserved by the acts *salvo jure*, which ordinarily past in the end of every Parliament; the one in the Parliament 1716 proceeding on this narrative, 'That several ratifications were past 'which might be prejudicial to particular parties' rights, and derogative to 'many and divers laws lawfully made and established of before; albeit the 'meaning of the estates be at this time, as it ever was in all preceding Parlia-'ments, that by no act of ratification any other party should be hurt or pre-'judged.' And, by act 31st, Parl. 1633, it is declared, 'That no particular 'act or ratification in that Parliament should prejudge his Majesty of the acts 'and statutes underwritten, made in favours of his Majesty;' and whereas, it may be alleged, that this extends only to four special acts of that Parliament, it is observable that the first of these acts was the King's revocation, which it was in vain to salve to him against the particular acts and ratifications, if the statutes of King James II. whereon it was founded, were not also salved.

Pleaded for the claimants; It is statute that regalities should not be granted without deliverance in Parliament, which qualification is sufficiently adhibited by a ratification; for it is to be considered, that these rights flow allenarly from the King, and must be granted by him, nor can the Parliament interpose in any other manner than by adhibiting their consent; and there is no law which says this must be previous to the grant. The case is the same with regard to offices;

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for though they are simply discharged, yet no statute could limit Parliaments, so as they might not consent to such grants. There is a distinction betwixt both these cases, and that of the annexed property; for there it is expressly statute, that the dissolution must precede the grant, act 233d, Parl. 15. Ja. VI. which act, with the following, to 236th inclusive, was only declaratory of the acts of annexation, being extended to preceding grants, and the point having been so declared by acts of sederunt in the year 1594.

The claimants cannot admit, that ratifications were not considered by the Lords of the Articles, which committee was a part of the constitution of Parliament, so ancient, that the original of it cannot be determined, and by means whereof business was brought into such a course, as that of necessity both public and private acts behoved to be prepared there, as the Parliament sat only the first and last days of its endurance, the whole business being done in the interim by their committees; and by act 218th, Parl. 14. James VI. by which four of every state were appointed to meet twenty days before the Parliament; the business of that convention was to receive supplications concerning general laws, or touching particular parties, which were to be delivered to the clerk-register, and by him presented to the estates, to the effect that things reasonable and necessary might be formally made and presented in a book to the Lords of the Articles in Parliament time; and, in the Parliament held 1633, the Articles on the last day reported not only the public laws, but ratifications, &c. with other particular acts and exceptions.

The act *salvo jure* saved only the rights of private persons who had no opportunity of opposing the particular ratifications; but the King's were not saved thereby, as his officers were always in Parliament, whose proper business it was to take care of his rights; and there was also another check appointed by act 79th, Parl. 11. Ja. VI. to wit, that no ratifications should pass, except upon composition paid to the treasuer, whereupon they were to be presented by him, or not to pass. The acts cited by the advocate to infer the contrary, come not up to the purpose for which they were adduced; for, though the act 1606 proceeds on the narrative of ratifications derogative to many and divers laws, yet the enacting part saves only the rights of private persons; and that 1633 declares his Majesty should not be prejudged of four particular statutes made in that Parliament, which exception shews the rule to be otherwise; and whereas, it is said, one of these acts is the King's revocation, which it were of no use to salve, unless the statutes were salved whereupon it proceeded; it is *answered*, the salving thereof makes it not stronger than it was before. It is also observable, that King Charles I. transacted several rights to hereditary Sheriffships after the prohibition for large sums; and, for that purpose, a commission was granted in Parliament 1617, by King James VI. to deal anent the surrender of offices, and anent a competent satisfaction in honour, and otherwise, to be given for the same; a sure sign, that either the laws of King James II. were looked upon as in disuse, or the grants valid by the ratifications. Add to all, that if rati-

No 398. cations do not exclude the King, they are of no use whatever, as it is agreed they do not affect the interests of private persons.

Observed on the Bench; That ratifications might serve a purpose, though not derogative to the King's right, they might afford a defence to the minister who advised the grant, or the party who exercised an illegal jurisdiction; or they might be grounds of prescription.

On the other hand, that this could not be a question of the power of the Parliament to validate these grants, it was only a question of their intention; and it might be of use to consider what apprehensions were entertained of the force of private acts by our judges and lawyers, that it appeared it had been doubted, whether the Court of Session could judge in the reduction of rights confirmed in Parliament, which, upon their application, was determined in the affirmative, by act 18th, Parl. 1. James VI. This was really the first act *salvo jure*, though not so intitled; afterwards they became ordinary, and were past every Session of Parliament; notwithstanding whereof, when the express import of a private act was derogative of another party's right, and could not be explained otherwise, the Lords did not think themselves impowered to decide against an act of Parliament, Durie, 22d December 1622, Rothes against Gordon of Hallhead, *See* Appendix; and several other decisions there pointed out. There could no other meaning be put on the ratifications, than that the Parliament intended to authorise the grants, and therefore, according to these decisions, they ought to be sustained.

On the *second* point *pleaded* for the claimants, by act 12th Parliament 22d James VI. it is a statute, 'that whoever should bruik their lands and heritages in virtue of their infeftments, peaceably without interruption for forty years, should not be troubled in the right and property of their said lands and heritages, by his Majesty, or others their superiors and authors, nor by any other person pretending right, upon no ground, reason or argument competent of law, except for falshood.' Lands held in regality, and heritable offices, are heritages; the statute gives security against the King, it excludes all objections except falshoood, consequently the objection of a grant after the statues of King James II.; and therefore the claimants who have possest for more than forty years without interruption, are safe; Stair, b. 2. tit. 12. § 23., M'Kenzie's observations on this act, and on act 14th Parliament 16th James VI.

It is plain this act has been understood by the King, and the whole members of the Government, to extend to the rights in question; for it allowing the space of thirteen years for interrupting possessions, continued for forty years before its date, and the King having 1625 executed a general revocation of grants in prejudice of the crown, comprehending these rights, as it was afterwards explained by act 9th Parl. 1st Charles I. and being willing to interrupt the prescription which was running in their favour, he wrote a letter, 29th November 1629, to the Court of Session, requiring them to insert

it in their books, and to declare it to have the force of a legal interruption, and to direct letters of publication thereof; all which was accordingly done, by act of sederunt 30th March 1630, insert and registrate in the books of Privy Council 26th May 1630, and ratified and approved by act 12th Parl. 1st Charles I. This interruption was never followed out with regard to heritable jurisdictions, which having been possest forty years since the date thereof, are now unquarellable; and so was found 19th July 1738, and 19th January 1739, the Earl of Galloway against the heritors of the priory of Whithorn. *See* APPENDIX. No 397.

In King Charles II's reign, when the heritable Sheriffs were found to be averse to the execution of the laws made against conventicles, it was not imagined their rights were not good; but it was declared by act 18th Parl. 1681, that the King might, in virtue of a cumulative jurisdiction, name other Sheriffs to act within their districts; a needless step, if the grants were reducible, since grants prior to James II. were too few to merit consideration; which act, as encroahing on private right, was declared to be a grievance at the Revolution, and repealed by act 12th Parl. 1690. These jurisdictions are also reserved by the articles of the Union, and the present act appoints a satisfaction for such as were lawfully possest on the 11th November 1746. without impowering the Advocate to raise a reduction of any of them; although at any rate the possessors were entitled to hold them till reduced.

Pleaded for the King's Advocate, prescription only gives right to subjects of which grants may be lawfully made; but it is a rule that *quod non est alienabile non est præscriptibile*, as is laid down by M'Kenzie, Observations on act 41st James II. Now jurisdictions are not capable of being constitute by the King's sole grant, and therefore a right to them cannot be prescribed upon that title; hence M'Kenzie in the above place denies that the annexed property prescribes, as does Stewart in his Answers to Dirleton, word PRESCRIPTION; *Voet*, in the title, *De diversis et temporalibus actionibus*, says, *Juribus fiscalibus et majestatis non posse præscribi*; and Sandy, *De prohibita rerum alienatione, cap.* 6. denies that there can be prescription of those things which the prince cannot alienate.

It cannot be inferred from King Charles's act of interruption, and the ratification thereof, that rights of jurisdiction were acquirable by prescription; since the revocation contained grants of the annexed property, in respect of which the interruption was necessary; and when it was making, the other things were thrown in, without determining whether it could be effectual as to them or not, *superflua non nocent*.

The citations from Stair and M'Kenzie, that the statute of prescription extends to offices, and is of force against the King, do not come up to the point in dispute; for there are heritable offices granted by subjects, and such estates as might have been granted by the King, may be acquired, so as to be good against him by prescription.

No 398. It does not follow from the statute 1681, that the government then did not think grants after James II. reducible, but only they chose that as the more eligible method; on the contrary, there was a reduction raised in that very Parliament of the Earl of Argyle's jurisdictions. And the articles of Union only save such rights as were duly constituted; as the present act appoints a satisfaction to be paid for the same.

For the claimants, it is denied that the annexed property is not subject to prescription. M'Kenzie does not say so, but only that it should not prescribe. Dirleton says, the positive prescription is good against the King, and only doubts of the negative. But whether it be or not, the case is different with regard to the subjects in question, which are not *extra commercium*, but alienable *certo modo*; and the effect of prescription is to supply that, and introduce a presumption that it was really adhibited.

The claimants did not insist for an interlocutor on the effect of the ratifications of heritable Sheriffships; depending on their defence of prescription, as the possession was clear.

The Lords found, That grants of regality ratified in Parliament, though the same were posterior to the act 43d, Parl. 11. of King James II. founded on by his Majesty's Advocate, were legal and valid, notwithstanding that there was no deliverance in Parliament previous to the said grants; and therefore repelled the objection to such regalities founded on the said statute; and found, that the claimants upon such grants were entitled to a just recompence and satisfaction, in terms of the statute claimed on; and *separatim* found, That grants of regalities and Sheriffships, whereupon infeftment had followed, and whereupon the grantees and their heirs had been in peaceable and uninterrupted possession for the space of 40 years, were valid and sufficient rights, notwithstanding the said 43d and 44th acts of James II. also founded on; and found, that the claimants upon such grants were likewise entitled to compensation and satisfaction as aforesaid.

Fol. Dic. v. 3. *p.* 566. *D. Falconer, v.* 1. *No* 227. *p.* 311.

1748. *January* 20.

The Earl of Findlater *against* The King's Advocate.

No 399. Recompence due for a Bailiary over part of a church regality.

The Earl of Findlater claimed, as heritable Bailie of Regality over the barony of Strathilay, upon a grant from the Abbot of Kinloss, appointing his predecessor to be his Bailie within that barony, lying within the said regality; which was said to make him Bailie of Regality, as the barony was part of one; and this being a church regality, the Bailie's right, though not over the whole, was confirmed by the act of annexation; which plea was sustained.

Fol. Dic. v. 1. *p.* 504. *D. Falconer, v.* 1. *No* 228. *p.* 317.