

No 3. hear them farther thereupon ; and the indemnity was afterwards sustained to assoilzie from the fines.

Fol. Dic. v. 1. p. 461. Fountainball, v. 2. p. 215.

No 4. 1706. June 27. M'MICKEN against KENNEDY.

FOUND, That acts of usury were comprehended under the Sovereign's subsequent indemnity.

Fol. Dic. v. 1. p. 461. Forbes.

* * * This case is No 62. p. 524. *voce* ANNUALRENT.

1707. November 19.

SIR ALEXANDER CUMING of Culter against SIR ANDREW KENNEDY.

No 5.

An act of indemnity was found to exculpate the Conservator of the Scots privileges in the United Provinces from any malversations in his office preceding the date of the act, although he was called in question for the same before that act.

IN the reduction and declarator at the instance of Sir Alexander Cuming against Sir Andrew Kennedy, for reducing Sir Andrew's liferent right to the office of Conservator of the Scots privileges in the United Provinces, upon this ground, That he had neglected his duty at the Staple Port, and omitted to put the laws in execution against transgressors of the Staple, and been guilty of other malversations, the defender founded on the Queen's indemnity, dated 16th March 1703, to exculpate him from any malversations preceding that time. " In respect the said indemnity pardons, remits, and acquits all her Majesty's subjects of all breaches or abuses of, or malversations in public trusts, with all other crimes, delinquencies, or transgressions incurred by word, writ, or any other act, either of omission or commission, preceding the date, which directly or indirectly are, or may import the contravention of any law, custom, or constitution of Scotland ; and that in so far as the same may infer any pain or punishment, either in their lives, fortunes, estates, fame, or reputation.

Alleged for Sir Alexander Cuming. The Queen's indemnity cannot exoner Sir Andrew as to preceding malversations : Because, *imo*, Sir Andrew was prosecuted and complained on before the indemnity : And a person attainted of felony is not understood to be pardoned, without a special clause, remitting the prosecution and attainder, *Cromp. 115. N. 1. Lamb. 502. Dalton 245.*, and Julius Clarus gives an instance of one who was executed 1558, albeit *obtinuerat literas impunitatis a principe*, which bore not that *tempore impetrationis erat in carcere detentus*. *2do*, Sir Andrew continued not innocent after the indemnity, but re-acted the malversations complained of ; and the breaker of the peace after pardon, forfeits the same, and may be hanged notwithstanding, *Crom. ibid. Dalt. 247. 3.* The civil prosecution of deprivation falls not

under the indemnity, but only in so far as the prosecution may be criminal by inferring pain or punishment: *Prodest enim hujusmodi principis indulgentia reo, quoad pœnam corporalem avertendam, non etiam quoad pœnam et interesse; Perez. in Codic. 4to*, The indemnity concerns only the contravention of any law or custom of Scotland, whereby the Sovereign only is prejudiced, and not the contravention of foreign treaties, the law of nations, and a particular contract in favours of the royal boroughs and the nation, which Sir Andrew is charged with; nor can it be imagined, That her Majesty intended to answer the complaints of foreign states, with an indemnity to the person that injured them. *5to*, The indemnity could only take away involuntary transgressions in office; whereas Sir Andrew's malversations were voluntary and deliberate, *lucri faciendi gratia*. Nor can indemnities alter or change the nature of a person, so as to make a man that has often betrayed his trust, fit to be trusted again, more than it would render one convicted of habitual perjury a habile witness. *6to*, An indemnity doth not restore against legal or implied irritancies, which, in the construction of law, are the same; cannot be extended to recognition, escheat, or the double avail of marriage; or the like, which are penal: As it would not hinder the deprivation of a messenger notoriously malversing, or continue a minister guilty of simony, or support marriage dissolved by adultery. Besides, though an indemnity pardons, it doth not restore persons to their forfeited offices.

Answered for Sir Andrew, There is no parity betwixt extending the indemnity to legal irritancies and feudal delinquencies, whereby the interest of private parties would be prejudiced, or to simony, which is regulated by a superior authority, and the extending it to exculpate from malversations inferring deprivation of an office. *2do*, 'Tis frivolous and a metaphysical stretch to pretend, that malversations which may deprive a person of his office and property, and also reach his reputation, fall not under the verge of the indemnity; as if, forsooth, the taking a man's bread from him, and his good name, that is dear to an honest man as his life, were no pain or punishment.

THE LORDS sustained the defence founded on the indemnity, to exculpate for any malversations preceding the 16th day of March 1703, which was the date of the act of indemnity.

Fol. Dic. v. 1. p. 462. Forbes, p. 198.

. See Fountainhall's report of this case, No 7. p. 4433, *voce* FOREIGN.

1709. January 26.

MR JAMES COLVIL Advocate against ALEXANDER IRVING of Drum.

In an action at the instance of Mr James Colvil against the Laird of Drum, for payment of bygone annuities contained in a bond granted by the defen-

No 6.

Found in conformity with M'Micken against Kennedy, No 4. p. 6824.