

son of the third brother took up the estate as heir to his grandfather, and the question was, Whether he was liable for the provisions of the younger children.

The Lords found that these provisions were a burden upon the land, which accompanied it even after the redemption by the eldest son, and that, though he had chosen to make up his titles as heir, yet he would nevertheless have been liable for these provisions, because the title, *si quis omissa causa testamenti*, &c., takes place in our law; and, because these provisions affected the land, they found it was not sufficient that the younger children had got the value of their provisions out of the executry of their uncles, the first and second son, for they thought the provisions were a debt upon the estate and the possessor of it.

1748. January . CLAIMS OF JURISDICTIONS.

[See Elch., *voce Jurisdiction*, No. 41, &c.; and Falconer, No. 225, &c.]

FOUND, in the case of *Lord Morton*, that a regality could not be split by the lord of regality disposing part of the lands over which the regality extended, *cum libera regalitate*, and the disponent getting a charter of resignation in the same terms; reserving to future consideration, how far such a title, lame as it is, could be validated by possession. The *ratio decidendi* was, that a subject could not create a lord of regality, and that the charter of resignation was the deed of the Barons of Exchequer, and could give no more than was given by the disponent.

The Lords were unanimous in this interlocutor, though it was formerly decided in a case, observed by Durie, that part of a barony being disposed *cum libera baronia*, and a charter of resignation expedite in the same terms, a new barony was constituted in favour of the disponent. What the effect of a *novodamus, cum libera regalitate*, in favour of the disponent, would have been, was not determined; but such a clause in the disposition, and charter of resignation following thereon, was understood to import no more than an exemption from the lord of regality's jurisdiction, in the same manner as a clause *cum molendinis et milluris*, in a disposition and charter, gives only an immunity from thirlage. It was understood that the regality, notwithstanding the alienating a part of the lands, continued over the rest; and in fact it often happens that the jurisdiction is exercised even over the lands alienated, (without the clause of *cum libera regalitate*;) by giving infestment, holding courts, &c. It was likewise understood, that, if the whole regality was alienated, the right of regality would go to the purchaser, as well as the lands, and in the same manner to an adjudger; but *quære*, If a whole regality was sold in parcels, who would be lord of regality?

In the case of *Lord Sutherland* it was found that the Duke of Gordon, being made heritable bailie of the church regality of Spinzie, might grant an herit-

able deputation of bailiary to my Lord Sutherland for so much of the regality as lay within the county of Sutherland. But whether it was to be valued separately, or *in cumulo* with the bailiary of Spinzie, was not determined. It would appear from hence that a lord of regality might name as many bailies within his territory, or an heritable bailie as many deputes, as he pleased.

In the case of *Sir Andrew Agnew*, found, that an heritable bailiary of barony was not taken away by the Act, and consequently not to be valued.

In the same case, found that a constabulary of a castle was worth nothing, the nature of the office not being known or what power and jurisdiction belonged to it, though by the Act it was taken away. But, in the case of *The Duke of Douglas*, where the nature of the office, and the powers belonging to it, were exactly defined by a decree of the Court of Session, found a value due. The same in the case of *Lord Findlater*, where the nature of the constabulary was ascertained by possession.

In the case of those whose predecessors had made bargains with Ja. VI. and Cha. I., about their sheriffships, found that the value could be no higher now than it was then rated at, notwithstanding of the difference of the value of money; and therefore Lord Sutherland was obliged to accept, for the sheriffship of Sutherland, L.1000 sterling; and Cavers Douglas, for the sheriffship of Merse, L.20,000 Scots.

In the case of the Justiciary of Arran claimed by the *Duke of Hamilton*, the Court seemed to be of opinion that a justiciary could not, like a regality, be lost merely *non utendo*, but that there must be evidence that the subjects of the justiciary answered to the king's courts. For a regality has both a civil and criminal jurisdiction, holds head-courts, registers hornings and inhibitions, retours services and gifts escheats; so that, if in forty years there is no exercise at all of any act of jurisdiction, it is reasonable that it should be lost *non utendo*. But, in the case of a justiciary, the only exercise of jurisdiction is the trial of criminals, of whom there may happen to be none in forty years. Nevertheless, the Lords ordered what proofs of the exercise of the jurisdiction could be had, to be produced; for some of them said, that though the jurisdiction might not be lost *non utendo*, yet the value of it would be enhanced *utendo*.

January 21.—Found, in the case of *Sir John Bruce*, that the regality of Kinross was not lost by disuse, because the charter of the vassals bore the lands to lie within the regality, and there was one gift of escheat within the forty years.

January 21.—Found, in the case of *Lord Findlater*, That a lord of regality may name several heritable bailies, by which the regality is not divided, but only the exercise of the jurisdiction made more convenient; as in some counties, particularly in Ross-shire, there are two Sheriff-deputes, though but one Sheriff, and one sheriffdom.

N.B.—In this case, the regality was a church regality, and Lord Arniston gave it as his opinion, that a laick lord of regality could not make an heritable bailie.

January 21.—Case of *Lord Morton*. In the year 1581, the islands of Ork-

ney and Zetland were, by the authority of Parliament, granted to Patrick, Earl of Orkney, with the heritable office of Sheriff and Justiciary. Afterwards, these islands, by forfeitures, came into the hands of the Crown, and were, by Act of Parliament, made part of the annexed property, and erected into a stewartry. While they remained the estate of the Crown the rents were collected by a tacksman, who had from the Crown the power of stewart and justiciar. In the year 1707, these islands were, by Act of Parliament, dissolved from the Crown, and, by charter following thereupon, were granted to the predecessor of the present Earl of Morton, with the heritable office of justiciary, sheriffship, or stewartry, redeemable on payment of £30,000; and, by another Act in the 15th of his present Majesty, this right of reversion is discharged, so that this estate is now irredeemably vested in the present Earl of Morton, who claims, by virtue of the late Act, abolishing the heritable jurisdictions of Scotland, a compensation for the office of justiciary of the Orkneys, as importing a supreme criminal jurisdiction over those islands.

For the Crown it was said, That, by the grant of the office of justiciary along with the sheriffship or stewartry, it was not meant to give a separate office or jurisdiction, but only a criminal jurisdiction of the higher kind, such as is competent to lords of regality, or stewarts, by which they can try the pleas of the Crown; and it is the common style, in erections of regality, to give the power and jurisdiction of justiciary. And that such was the meaning of the grant 1581, is evident from the Act 1587, concerning the justice-airs, by which fourteen commissioners are appointed to take up dittay within the sheriffdom of Orkney and Shetland for the trial of offenders at the justice-airs, and, ever since, the Court of Justiciary has been in constant use to try offenders, and summon witnesses from that county, without any challenge; from all which, it appears that the Earl of Morton has only an inferior, subordinate jurisdiction, such as the justiciar of the neighbouring county of Caithness has, whose decrees are in use to be altered and amended by the High Court of Justiciary.

ANSWERED for Lord Morton,—That he has a grant of the heritable office of justiciary of the Orkneys, in the very same terms that the Duke of Argyle has the justiciary of Argyleshire, or the Duke of Hamilton the justiciary of Arran; and the Earl does not know why their justiciary should be interpreted a supreme criminal jurisdiction, and his nothing but what he should have had by the grant of the stewartry alone. That, in the language of the law, the office of justiciar denotes, as it has been explained in the case of Argyle and Hamilton, the office of supreme criminal judge, as appears both from the books of Majesty, and from our Acts of Parliament, Act 45, Parl. 2, Ja. I.; Act 5, *anno* 1440. By the constitution therefore of the Earl's right, he has a supreme criminal jurisdiction, as well as the Duke of Argyle and the Duke of Hamilton; and he has so far preserved this jurisdiction by his possession, that the Sheriff of Orkney never took up dittay, sent up lists of assizers, or in any way answered to the circuit courts; and there is no example of any criminal sentence of the justiciar of Orkney being reviewed by the Court of Justiciary. That it is true, by not being so vigilant as the Duke of Argyle, he may have lost an exclusive supreme jurisdiction in criminals; but he has not yet lost by disuse the coördinate supreme jurisdiction with the court of justiciary, such as the jurisdiction of a stewart within a she-

rifldom with a sheriff, or a baron with a sheriff, by which there is room for prevention betwixt them, but they cannot review one another's sentences.

The Lords found, that the Earl of Morton had no right to a supreme justiciary jurisdiction, either exclusive or co-ordinate, but only to such criminal jurisdiction as belongs to a steward.

January 22.—In the case of *Lord Torphichen*, found, that lands belonging to the Templars, and, after they were suppressed, to the Knights of St John of Jerusalem, were not church lands; in respect these orders were military orders, and the knights, though under a vow of chastity and obedience, were not churchmen; and the predecessor of Lord Torphichen sat, in virtue of the Templar lands in question, in Parliament as a baron, and not as a churchman. The same was decided in a case reported by Lord Fountainhall; and it was likewise so decided in the Parliament of Paris. In consequence of which, the Lords found, that my Lord Torphichen, as Preceptor of the Templar lands of ———, had a right to the regality annexed to these lands; which they found did not fall under the Act 13th, 1633, annulling all regalities belonging to *preceptors and other beneficed persons*, because, by *preceptors*, there, they understood churchmen, whose lands, by the Act 1587, were annexed to the Crown.

Eodem die.—Found, in the case of *Sir Robert Menzies*, that a bailiary granted by the King to one of Sir Robert's predecessors, extending over sundry other lands besides those belonging to Sir Robert in property, with a power of repledging from other courts, and an exemption from all other courts except the sheriff in civil matters, and the Justice-general and Justice-airs in criminal, was a bailiary of bailiary, or a bailiary-royal, entitled to a value by this act, and not a baron-bailiary. *Dissent. Arniston and Elchies.*

N. B. A steward and a bailie were both judges appointed by the King in his property-lands, differing only in name, and they were appointed indifferently over greater or lesser territories, lordships or simple baronies, notwithstanding of what Sir George M'Kenzie says; at least it appears that bailies were often appointed over lordships and great districts; for the bailiary of Cunningham is a jurisdiction of great extent, and was formerly an earldom, given by Robert Bruce to his brother Edward, King of Ireland, which afterwards returned by succession to the Crown; and there are stewartries of very small extent, such as Menteith; and there are only two in Scotland that are not parts of sheriffdoms, *viz.* the stewartry of Kirkcudbright and the stewartry of the Orkneys.* A steward or bailie has regality powers, that is, they can try the pleas of the Crown, but neither a lord of regality nor they can try treason; and the only difference betwixt them and a lord of regality is, that they have no escheats nor chapel and chancery, and they have no exemption from other jurisdictions, the consequence of which is a power of repledging,† but only a cumulative jurisdiction with the sheriff of the shire, or any other judge within

* Stewart and Bailie, in the statute language, synonymous. See Act of anno 1587, and Act 90, 1426.

† Sir George M'Kenzie and Dirleton say the contrary; but this is the opinion of Craig.

whose territory they lie, so that there is place for prevention, but no re-pledging.

Eodem die.—In the same case, found, that where the positive prescription was necessary to support a lame title, possession might be proved by witnesses as well as by the court books; and so, it was said, it has been several times adjudged.

January 21.—In the case of *Lord Findlater*, found, that in the case of a bailiary of a church regality, it was necessary to instruct a title to the bailiary, but not to show the church's rights to the regality, which did not fall to be in the hands of the bailie; and, besides, were presumed to be lost about the time of the Reformation.

January 24.—In the case of the *Duke of Gordon* and *Mr Carmichael*, it was debated, Whether a laick lord of regality could grant an heritable bailiary at any time, or a bishop, being lord of regality, after the act 1587, by which all church bailiaries granted before that time were saved?

It was ARGUED for the Crown, that *delegatus non potest delegare*; that the lord of regality has himself only a delegated power, which he cannot delegate to another; that there is a *delectus personæ vel familiæ* in constituting a lord of regality, and, though the King might trust one person or one family with such a power, it is not to be presumed that he meant to give it to any other; that, as to regalities belonging to bishops, according to the common principles of law, a bishop, being only a liferenter, cannot dilapidate his benefice, and it would be a dilapidation and an injury to his successor to grant an heritable bailiary of his regality; and therefore all heritable bailiaries of episcopal regalities, other than those saved by the act 1587, are null.

It was ANSWERED for the subject,—That a lord of regality, by the nature of his grant, has a power of delegation; and the constant practice is, that he exercises the jurisdiction by his delegate the bailie, insomuch that it is doubted whether he could sit and judge himself. The only question, therefore, is, Whether, as he can name a bailie for life, (as all judges ought to be named,) he cannot likewise give the office to him and his heirs? And that such heritable jurisdictions are frequently granted in Scotland, by subjects, is certain; for a man disposing a part of a barony *cum curiis*, to be held of himself, the vassal would have the jurisdiction of a baron, in the same manner as if he were heritable bailie of barony. These are the very words of a decision collected by Durie. And as to the *delectus personæ vel familiæ*, there is none in the case: the jurisdiction is annexed to the land, not to the person; and it is a rule of the law of Scotland, that every proprietor of land has jurisdiction of some sort. In a word, the practice in Scotland has been, that not only the King has granted heritable offices, but, in imitation of him, the subjects, lords of regality, and even barons, have given heritable bailiaries, and those heritable bailies have given heritable deputations, as in the case of Lord Sutherland, mentioned above. And as to episcopal bailiaries, those granted before the 1587 are said, by the act 1587, to belong of right to the proprietors; and so far the act is declaratory, not statutory: And as, by the act 1606, the estate

of bishops was restored, and the act 1587, so far as regarded them, rescinded, they were put in the same situation as they were in before the 1587, and had the same power of granting heritable bailiaries; and the bailiary in question was granted after the 1606: That a bishop, with his chapter, had the same power that any abbot had with his convent; and nothing was reckoned dilapidation by either but what diminished the rental of the bishopric or abbacy: That, if there was more doubt in this matter than there is, the practice of the nation has been so constant and universal, and so many heritable bailiaries have been constituted by churchmen (as many, it is believed, as there are church regalities,) without any challenge, that there cannot now be any doubt at all. And so the Lords found. *Dissent. Tinwald. Arniston non liquet.*

January 25.—In the case of the Duke of Gordon's bailiary of _____, being the bailiary of an abbacy-regality, legally constituted before the Reformation, the negative prescription was opposed.

It was ANSWERED,—That, in the year 1684, this bailiary was granted by the Crown, with a *novodamus*, which grant was ratified by Parliament in the 1686; and, since that time, there had been possession for five years, which had hindered the prescription to run.

Lord ELCHIES said, That the regality being annexed by the act 1587 and still subsisting in the Crown, the King might *de novo* constitute a bailiary in the 1684: neither would it fall under the Act of Ja. II. against heritable offices, but under the act relating to regalities; and so, according to the decision in the general point, the ratification in Parliament would have its effect.

The Lords sustained the bailiary. *Arniston, Tinwald, and Strichen non liquet.*

Eodem die.—In the case of the Duke of Gordon's bailiary of _____, found the bailiary lost *non utendo*, though there were documents of possession produced from the 1721 downward to the 1745, being five or six acts of jurisdiction, exercised at the distance of two or three years from each other.

The Lords thought that, if it was lost by disuse before the 1721, it could not be recovered by the possession after that period; nor did they think that possession such as to presume possession *retro*.

January 26.—An heritable bailie of regality having purchased from the lord of regality that part of the regality over which his bailiary extended, and taking it holding of the Crown,—the Lords, in the case of Lord Selkirk, found the bailiary extinguished; the lands being disjoined from the regality by being taken holding of the Crown. They probably would have found the same if the bailiary lands had been sold to any other and taken holding of the Crown, upon this general principle, that wherever the regality is at an end, there the bailiary must follow of course. But if the whole regality was alienated, as the purchaser would be lord of regality, it is believed the bailiary would subsist.

Eodem die.—In the case of a bailiary of the Duke of Gordon, found, that

by the exercise of a jurisdiction over part of a territory the jurisdiction over the whole was preserved: so that the Duke, by exercising his bailiary over lands in Aberdeenshire, preserved it likewise over lands in Merse.

N.B.—This decision is thought to have passed inadvertently.

February 2.—The Lords having, in the case of *Sir Robert Menzies*, allowed parole evidence of the exercise of jurisdictions,—which it was resolved should be a precedent in other cases,—they this day allowed proofs of this kind to sundry persons, but refused commissions, granting first and second diligences at the same time, to be reported, some in eight, some in ten, none in more than sixteen days, even though the witnesses were to be brought from Lochaber; the witnesses, when brought up to be examined by commissioners named by my Lord Advocate.

Eodem die.—The stewartry of Annandale was granted to the Marquis of Annandale's predecessor in the 1662; but as this grant was contrary to the Act of Ja. II., and not ratified in Parliament, it was necessary to support it by the positive prescription. Documents of possession were produced for about 30 years before the 1699. From that time to the 1715 there was a gap, in which no act of possession could be shown; but from the 1715, down to November 1746, the exercise of the jurisdiction was uninterrupted. The Lords, before answer, ordained the Marquis to produce further documents of his possession.

February 3.—In the case of *Lord Dundonald*, found that a grant of the church regality of Paisley to my Lord Dundonald's predecessor in the 1581, was null by the Act 13th 1633, and that a grant of the same with a *novodamus* in the 1642, was annulled by the Act 53, 1661, against new gifts of regality.

Eodem die.—My Lord Eglinton's predecessor, about the 1640, made a bargain with the Crown and surrendered into his hands the sheriffship of Renfrew and bailiary of Paisley for a price of L.5000; but this price not being paid, he got back the two jurisdictions in the 1642, redeemable upon payment of the price stipulated. The question was, Whether Lord Eglinton was entitled to L.5000 as the value of this particular jurisdiction, or only to the ordinary value that should be fixed for other jurisdictions of the same kind. And the Lords, upon a division of six to four, found the last: Though it may be said that it was but a reasonable and just compensation to my Lord Eglinton, (in terms of the statute,) to allow him L.5000 for his jurisdictions, the price which the Crown had agreed to give him in the 1640, for which they were mortgaged in the 1642, and which he had a right to demand for them before the late Act; so that by this means not only his jurisdictions are taken away by the Act, (which is common to him with others,) but likewise the value he had a right to ask for them, and the benefit he had by the contract 1640.

Diss. Drummore, Strichen, Shewalton, Haining.

In the case of *The Duke of Roxburgh*, found that the church bailiary of

Kelso, being exercised there, was preserved over lands in East Lothian, merely by the vassals being twice or thrice called in the suit-roll of the regality of Kelso, though their charters did not bear the lands lying within the regality.

February 6.—In the case of *The Duchess of Gordon*, the Lords found that a disposition of lands being made by a bishop to the Duchess's author together with the office of bailiary over these lands, that office was preserved, though there had been no exercise of it for 40 years, nor at any time before. It was said, that there was no doubt but vassals of a regality could prescribe an immunity from the superior's court by the lapse of 40 years, provided their charters did not bear that the lands lay within the regality; in which case they could not prescribe against their own rights: That in this case, the bailiary was over proper lands, and was preserved by the Act 29, 1690, and the Crown was come in place of the bishop; so that the question is, whether the Crown can plead that the jurisdiction of bailiary is lost *non utendo*, and reverted to the regality; (for that the lands lie within the regality is evident from the charter to the Duchess and her authors, bearing the lands to lie within the regality,) and it is plain the Crown cannot, because it accepts a *reddendo* yearly for the office as well as the lands.

This case, it is thought, will not apply to the case of a regality extending over a man's proper lands; which, notwithstanding of this decision, may be lost by disuse.

Eodem die.—Found, in the case of *Sir Robert Dixon*, that a disposition of part of a regality, *cum jure et privilegio regalitatis*, with exercise of jurisdiction for forty years, but not regality-jurisdiction, did not establish a regality. It was said for the decision, that the most ancient way of constituting regalities was in the *tenendas* clause, by saying *tenendas in libera regalitate*; for in that clause of old, all substitutions of heirs and rights and privileges belonging to lands, were inserted; but in later times, regalities were erected by erecting the lands into a regality, as into a barony or lordship; but it was only the split regalities that were given off *cum jure et privilegio regalitatis*, by which words was meant no more than the ordinary jurisdiction of a landlord in Scotland, and an exemption from the regality.

On the other side it was said that many undisputed regalities were constituted by the same form of words, particularly the regality of Paisley and many episcopal regalities.

The like found in the case of *Douglas of ———*, where, though there happened to be no particular act of regality-jurisdiction exercised during the forty years, yet the courts were constantly held all that time as regality-courts. But the Lords found, that an infestment *cum jure et privilegio* was no habile title of prescription; and, in the case of *Kilbucko*, they found that, though ratified in Parliament, it did not constitute a regality.

February 8th.—In the case of *Campbell of Blythswood*, found, that a bailiary of an episcopal regality, granted by the Crown in 1702, was improperly consti-

tuted, in respect that, by the Act, 1690, abolishing episcopacy, all bishop regalities were merged in the crown. The decision in the case of the *Duke of Gordon's bailiary*, January 25th, seems to have gone upon different principles.

Eodem die.—In the case of a *Bailiary of Orkney*, claimed by *Lord Galloway*, it appeared that the Bishop of Orkney, in the year 1614, resigned in the hands of the Crown his lands, being a regality, and got them back again without the regality.

February 10th.—In the case of the justiciary of Caithness, found, that, though by its original constitution it reached over Sutherland, yet, with respect to Sutherland it was lost by disuse, though preserved by exercise in Caithness, where was the seat of the jurisdiction. This seems contrary to what was found in the case of a *Bailiary of the Duke of Gordon*, January 26th.

February 14th.—Found, in the case of *George Lockhart of Carnwath* and ——— *Graham of Airth*, that a charter *cum privilegio et jurisdictione regalitatis*, was not a sufficient title of prescription of a regality; so that even forty years' exercise of regality-powers did not entitle to a recompense.

February 16th.—Found *Lord Dun* entitled to a recompense for the constabulary of Montrose, though he had given a deputation to the bailies of Montrose and their successors in office, by which he was entirely divested of any exercise of the office, and did not retain a cumulative jurisdiction, as a baron or a lord of regality does when he makes an heritable bailie. *Dissent. Arniston and Elchies.*

It was pleaded from the bar, and said by some of the judges, that the jurisdiction vested in the bailies by Lord Dun's deputation, would fall of course with Lord Dun's right from whence it flowed, and would not be saved by the *salvo* in the act in favour of royal burghs. But Lord Elchies thought otherwise.

Eodem die.—In the case of the *Sheriffship of Bathgate*, an unprinted Act of Parliament in the year 1507 was quoted, by which it was declared lawful to erect or divide sheriffdoms at pleasure.

February 17th.—*James Veitch*, as creditor and adjudger of the *Duke of Perth's estate*, now forfeited, claimed a jurisdiction belonging to the Duke, upon the clause of the jurisdiction act, empowering any body having any right, title, or interest in any jurisdiction, to claim it, in terms of the statute. It was objected that his adjudication was after the 1st August 1745, and so was null by the vesting act; neither had he yet entered any claim, in terms of the said act, so that he was merely a personal creditor, that could not be said to have any interest, right, or title in the jurisdiction, or to be a mortgager or incumbrancer, in terms of the act.

ANSWERED, That it was not Mr Veitch's fault, but the fault of the officers of the crown, who had not yet finished the surveys, that he had not entered his claim as directed by the vesting act, and therefore he must be considered as if he had entered it, in which case the entry of the claim would be held equal

to the adjudication, which by the vesting act is declared null, and the entry of a claim substituted in place of it; whereas, before, the common practice was for the creditors of forfeited persons to lead adjudications against the officers of state: That if this claim was not sustained, there would be a considerable part of the debtor's estate entirely lost to the creditors: for the jurisdiction, by the statute, is taken away, and if this claim is dismissed, no recompense could be had for it.

The Lords dismissed the claim.

Eodem die.—In the case of *Lord Braco's regality of Pluscardine*, the Lords sustained the regality, though of church lands, and in the 1591, consequently struck at by the Acts 1633 and 1661; in respect of the prescription of forty years, proved, partly by records of court, and where there were gaps in them, (as there were some of six years, and one of twelve,) by parole evidence. It was allowed that the prescription could not have been proved by witnesses alone, by whom the negative prescription might have been interrupted, but not the positive established; but parole evidence, Lord Elchies thought, might make up the deficiency of writ.

Dissent. Arniston and Tinwald.

It was allowed on all hands that this regality, being null by the Act 1633, required positive prescription to its establishment.

Eodem die. Found, in the case of *Lord Braco*, that a bailiary of barony, by its original constitution, could not, by any use of possession, be converted into a bailiary of regality.

February 22. In the case of a bailiary claimed by *The Creditors of —*, Lord Elchies gave his opinion, that an heritable bailiary of a church regality could not be granted by the Crown after the annexation, any more than the regality itself; since granting an heritable bailiary was in effect granting a regality, which was prohibited by the Act 1633. He was of this opinion, though it was shown that the Crown in many instances had granted such bailiaries, and that when regalities or earldoms fell to the Crown by forfeiture, they were not absorbed in it, but the King, as earl, for example, of such an earldom, granted charters to the vassals; and in the same manner it was argued, church regalities subsisted in the Crown after the annexation.

The Lords dismissed the claim in respect it was not supported by positive prescription.

In this case there was no ratification in Parliament, so that the Act of James II. against heritable offices struck against the grant, in the opinion of Lord Elchies, as well as the Act 1633. But he was of a different opinion as to both points in the case of the *Duke of Gordon's bailiary, January 25.*

Eodem die. In the case of *Sir James Dalrymple*, it was found that a bailiary granted by the prioress of Haddington and fourteen nuns, was only a bailiary of barony, in respect there was no evidence that this nunnery had ever a regality; and they found that this bailiary was entitled to no recompense in so far as it extended over lands not belonging in property or superiority to Sir

James; and so they had decided in the case of *The Duke of Athole*, and in other cases, though, by the words of the Act, only such barony jurisdictions seem to be allowed to subsist, as relate to property or superiority lands, and all jurisdictions over other men's lands are taken away, and consequently must be paid for.

February 26. In the case of *Urquhart of Meldrum*, found, that an heritable deputation of sheriffship might be granted by an heritable sheriff to a proprietor of lands over his own lands. The objection was, that, if a sheriffdom was parcelled out into different districts and subdivisions the king's writs could not be executed, brieves could not be served, inquests set, head-courts held, nor could the military power of the sheriff in raising the *posse comitatus* be rightly executed any more than the civil. ANSWERED,—That the principal sheriff, though he cannot grant a second deputation to exclude the first, (as was found in a case observed by Haddington, 1610, *Bothwell* against *Sesford*,) yet still retains in his own person a cumulative jurisdiction, (as is the case in regalities and bailiaris,) by which he can do all the public business of the county, and all the inconveniences above-mentioned are avoided; add to this, that deputy-sheriffships are expressly mentioned in the Jurisdiction Act.

And so much for particular cases of jurisdictions.

I shall now mention the decision of the Lords in the general question, how far heritable jurisdictions granted after the Acts of Ja. II. were validated by ratifications in Parliament or by prescription. The Lords found that regalities, prohibited by the Act 1454 to be granted without deliverance of Parliament, were validated by ratifications in Parliament, which they considered as the act and deed of Parliament; and it was proved by extracts from the records of Parliament, that before the Revolution, while we had Lords of the Articles, ratifications were taken in by these Lords, read, voted, and approven in Parliament; and after the Revolution, when the Lords of the Articles were taken away, they were read and approven in Parliament, and a list made out and signed by the Chancellor. With respect to sheriffships and other heritable offices, simply prohibited to be granted, by the other Act 1454, how far they could be confirmed by ratifications in Parliament, the lawyers for the subject required no judgment, and the Lords gave none. But they found that regalities, sheriffships, and, generally, all heritable offices, granted contrary to the Acts of Ja. II. or any other, might be validated by positive prescription;* and in the case of *Lord Bruce*, mentioned above, they found a grant of a church-regality after the act of annexation,—though, by the Acts 1633 and 1661, declared to be null, by way of exception or reply,—supported by the positive prescription, even where the proof of possession was partly by parole evidence. But, though they found that there might be prescription of a particular subject, contrary to the

* The chief argument for this was from the Acts of interruption used by Ch. I. (*Vide* Act 12th 1st Par. Ch. I.) for interrupting, among other things, rights of regalities and heritable offices granted contrary to the Acts of Parliament.

public law, yet they found that the law itself could not prescribe or go into disuse; and therefore they found that the Acts of Ja. II. were yet standing laws. The only remaining question concerning these jurisdictions is the value. The first scheme for the valuation of the jurisdiction was proposed by the lawyers for the subject, by which my Lord Murray's private bargain for the sheriffdom of Murray was made the rule. For this sheriffship L.2600 sterling was paid, which amounted (after deduction of the private jurisdiction, as shall be afterwards explained,) to sixty-four months' cess of the county. And this was made the value of the jurisdiction of a whole county; from which were deduced the private jurisdictions lying within the county, such as regalities, stewardries, bailiaries, to which was assigned a part of the whole jurisdiction of the county, correspondent to their respective proportion of the valuation of the county; so that a sheriff only got so much of the sixty-four months' cess as remained after deducing the value of the private jurisdictions within his county. The cess in this case was held a better rule for proportioning the value of the county jurisdictions among one another than the valuation, because the cess having taken its rise from the monthly assessments during the troubles, there was a proportion betwixt it and the real rent of the county: But the valuations of counties being made after the proportion of cess was fixed, the public had no interest in the matter whether the counties were high or low valued, and therefore there was no pains taken to keep up any proportion betwixt the valuation and real rent of different counties or betwixt the valuation and cess; all that was studied was to keep some proportion betwixt the valuation of the different lands of the same county; and that too was but ill observed, since people generally gave up their own valuations and made them higher and lower according to their fancy. From this account of the origin of the valuations it will not appear surprising that there should be great disproportion betwixt the valuation and cess of different shires, and that Roxburghshire, for example, should pay double the cess, and yet be no higher valued than Renfrew; or, *vice versa*, that shires should pay equal cess and yet one be double the valuation of the other. By this rule the total value of the jurisdictions came out about L.200,000 sterling.

To this scheme it was objected, *1mo*, That sheriffs, who besides their dignity as officers of the King, had the privilege of returning a Member to Parliament, were put upon an equal foot not only with lords of regality, whose superior and exclusive jurisdiction may be supposed to compensate in some measure the political privileges of the sheriff, but with bailies and stewarts, with whom, besides the prerogatives above-mentioned, he has a cumulative jurisdiction. *2do*, There is no proportion observed among the sheriffs themselves; for some sheriffs are paid extravagantly, such as the sheriff of Fife, who gets L.9000, while others, such as the sheriff of Cromarty, gets only L.700.

To remedy this inconvenience another scheme was proposed by some of the Lords, by which the sheriffs, for their dignity and political privileges, were to get a *præcipuum* of L.1000 each, except the sheriffs of the vice-counties, who were only to have L.500 each, and for their jurisdictions they were to get forty-two months' cess of their free territory after deduction of the private jurisdictions; and the lords of regality were to have forty-eight months' cess of their territory, &c. But as this scheme seemed to be merely arbitrary, founded upon

no certain reason or principle, the Lords have rather chosen to follow a scheme given them by Mr Francis Farquharson, accountant, which is as follows :—

The prices of the seven sheriffdoms bargained for by King Charles I. are added together ; and as the money then yielded ten per cent. the sum is converted into an equivalent sum at five per cent. (which is double,) and likewise into an equivalent sum at four per cent. The medium of each of these two sums is taken by dividing them by seven, which gives the value of each of the sheriffships one with another, the money being valued at five per cent. and at four. The prices then of the two private bargains for Murray and Caithness are added to the sum of the prices of King Charles's bargains, converted as is said above to an equivalent at five per cent. (money being at the time these private bargains were made at five per cent.) and being computed in money at four per cent., are likewise added to King Charles's prices valued at four per cent. Of those nine prices thus added together two mediums are struck by dividing by nine the two sums, one at five per cent. and one at four. The mediums of the whole bargains being thus gotten, are added to the mediums of the first seven bargains ; and of the sums two new mediums are struck by dividing each of them by two,—one of these new mediums at five per cent., the other at four ; which being added together and divided by two, produce the last and standard medium, being a medium betwixt the public and private bargains, (but showing more regard to the public,) and betwixt the five and four per cent., the value of money at this time being betwixt these two.

This medium is made the standard for valuing sheriffships, which, according to their extent, are divided into five classes, of which the first is estimated at one and a half of the medium, the last at one-half, and the intermediate ones at a rate betwixt these extremes. By this rule the heritable sheriffships are valued at about L.74,000. As to the regalities, those of them that have been rigorously exercised are valued at one and a half of their valuations, and such of them as have been faintly exercised at three-fourths. The stewardries and bailiaries, whether royal or of regality, are valued, if rigorously exercised, at one and a third of their valuations ; if faintly, at two-thirds.

The Duke of Argyle's justiciary is valued at what he asked for it, L.15,000 ; the constabularies at about L.7000 ; and the four clerkships for life, (for there are none heritable,) at L.4000 and odds : The redeemable sheriffships are valued at the redemption-money. All which together brings out a total of L.255,000 sterling. But this sum being judged extravagant, several diminutions were made of it, all which were exhibited in twelve columns, in each of which the values of the several jurisdictions were diminished five per cent., excepting only Argyle's justiciary and the redeemable sheriffships, the value of which was not altered : and the other sheriffships were only taken down twenty per cent ; so that the progression of their diminution went no farther than the fourth column ; but the regalities, bailiaries and stewardries, constabularies and clerkships, were lessened off to the twelfth column inclusive, that is, were diminished sixty per cent. Of these columns the Lords pitched upon the tenth, by which means the last-mentioned jurisdictions were taken down fifty per cent., and the sheriffships not redeemable twenty ; making in all, together with the unaltered value of Argyle's justiciary and the redeemable sheriffships, a total of L.164,000.

The objections to this scheme that appeared *ex facie* were these :—*1mo*, The rule for determining the value of all the jurisdictions besides the sheriffships was quite arbitrary. *2do*, The value of the sheriffships not redeemable, being only sixteen in number, is raised much too high by this scheme,—to no less than L.59,000; and the value of regalities, &c., which are above fourscore, sunk too low,—by the great draft of fifty per cent. made out of them, whereas the sheriffships suffer only a deduction of twenty per cent. *3tio*, There is no foundation in law or equity for the distinction betwixt regalities, &c. faintly exercised or dormant, and those that are not dormant; and there can be no good reason given why those claimants should be paid but half the value of subjects which the Lords have found to be their property. *4to*, There is no reason why the public should pay both for the regalities, &c. and the clerkships of those regalities, &c., which ought to be a burden upon the particular jurisdictions to which they belong, and not upon the public; and therefore it is absurd that there should be a separate article for them. But in the application of this scheme several difficulties have occurred, which make it appear that the Lords should have considered it better before they had approved of it or at least had fixed a sum: for, *1mo*, There are several regalities, and other jurisdictions, which lie within the heritable sheriffships :—now, shall both they and the sheriffships be paid the full value? or would not that be paying twice for the same territory? *2do*, It appears that there are several valuations of regalities, &c., amounting to near L.5000 sterling, understated or entirely omitted in the scheme, which must be now added.—*Quære*, Are these to be taken off the others? or must the sum for the regalities, &c. be enlarged so that they may be paid without taking anything from the rest? *3tio*, There are some of the jurisdictions supposed to be dormant by the scheme that are now found not to be dormant.—*Quære*, Out of what fund must the other half of their value be made up? *4to*, An additional consideration is demanded and seems reasonable for some of the Highland regalities, of great importance,—How is it to be paid?

In applying the distinction betwixt dormant and not dormant jurisdictions, the Lords would not admit of parole evidence to prove a jurisdiction awake, though they had admitted it to prove it alive, *i. e.* had found the positive prescription proved by witnesses; and, in the case of Lord Braco, whose title to the regality of Pluscardine they had sustained upon the positive prescription, instructed partly by records of Court and partly by parole evidence, they nevertheless found the regality dormant.

On the 17th March the Lords had a private meeting among themselves, wherein they first struck off the separate articles for the clerks and ordained them to be paid out of the value of the jurisdictions to which they belonged: then, they proceeded, without following any general rule, to take from one jurisdiction and give to another, but upon the whole lessening the sum-total L.13,000, and bringing down the L.164,000, the sum they had fixed on, to L.151,000, which they have reported to the King and Council as the value of all the heritable jurisdictions of Scotland.