No 18. nevertheless a reduction of the retour was thereafter sustained, at his Majesty's instance, after better information, because the wrong information and neglect of the officers ought not to prejudge his Majesty.

*Fol. Dic. v. 1. p. 324. Durie.*

*** This case is No 116. p. 6690. *voce* Improbation.

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1694. *January* 24.

James Crawford of Morquhanny *against* Sir Thomas Kennedy.

No 19.
The exception of *competent and omitted* does not bar the King from challenging decrees obtained against him.

This was a declarator that he ought to be liberated of his sub-tack of the annexed excise of Fife; because, by the supervenient law in 1693, imposing the additional excise of three pennies more on the pint of ale, the subject set in tack to him is considerably diminished, and the brewing given over by many, so that he cannot raise the half the tack-duty. *Answered*, This accident arises from no fact and deed of mine, nor by my default, but by a supervenient law, which I could neither foresee nor impede; and in locations, every deterioration of the subject does not liberate the tenant, but only a total devastation, such as by water, or overblowing, &c. for if they lose one year, they may gain as much another.——The Lords seemed all to be clear that it was no ground for a total liberation and evacuating the tack, by declaring it null; but they came to the second question, if it might be a ground for giving the sub-tacksmen an abatement, or deduction of their tack-duty; and it was remembered, that in 1690, they sustained the want of the subject to be a ground of defalcation, in the case of Robert Burnet, Commissary of Peebles, who had set a tack of his quota of testaments, in regard in 1689 judicatures did not sit.* But the Lords considering, that whatever they gave down to the subtacksmen, the principal tacksman would crave the same from the King, and that they would have no certain rule whereby to walk, in liquidating what should be the case; therefore they thought it more competent to remit it to the Lords of the Treasury and Exchequer, who *ex gratia* after trial might give them an ease, but the Lords, who were bound to decide by the strict rules of justice, could not do it.

1696. *July* 2.—The mutual declarators between Captain James Crawford of Morquhanny, and George M'Kenzie, on the one part, and Sir Thomas Kennedy on the second, and the Officers of State on the third, mentioned 24th January 1694, were again reported. It was now *alleged* by the King's Advocate, whatever ease or abatement the sub-tacksmen may get on account of their damages and losses by that supervenient act of Parliament, that Sir Thomas, the principal tacksman, could plead none; because they had given over their tacks on the emerging of the act, which he did not, though desired, and so took of

* Examine General List of Names.

new with that seen hazard. *Answered*, He stood engaged not only to these two, but to many other sub-tacksmen; so their renunciation could not liberate him from the rest, neither could the Lords of Treasury have been compelled in law to have accepted his tack; likeas he had absolute warrandice from the King, and gave none to his sub-tacksmen, but only from his own fact and deed; and the King's passing the subsequent law was a contravention of the warrandice in Sir Thomas's tack, and which his Majesty ought the rather to make up, that he had a considerable benefit by the said supervenient law of an additional excise; and if it be *grave fidem fallere* in any, much more *in principe*.——THE LORDS first considered, if this superveniency irritated the tacks so as to liberate them both; and they found it did not, but only afforded ground to ask an abatement; for there be many casual accidents befalling the subject set, which plead for an abatement, but no dissolution of the tack; as sterility, (which may be compensed by the uberity of other years), vastation by an hostile invasion, or by a plague, inundation, overflowing with sand, the infestation of houses by spirits, &c. No 19.

The next question was, if the sub-tacksmen ought to have an abatement in this case? The Lords thought, if their damage was considerable, they ought, otherwise not; for every fatality and fortuitous chance (where the damage was small and tolerable) was not to be regarded. Then the doubt arose what was to be reputed a considerable damage; and though this be generally in *arbitrio judicis*, and that some Doctors fix where they lose the *dimidium fructuum*, yet there is no certain rule. Some moved here that it should be stated at the loss of the 5th part, not of the tack-duty, but of the whole product of the tack. THE LORDS, before they would determine the quota, allowed the sub-tacksmen, before answer, to give in a condescendence of the damage and loss occasioned by the additional excise, and the brewers cessation and overgiving thereupon, which diminished their profit, and of the manner how they would prove and instruct the same, besides their collection-books; and after which trial, the Lords would consider, if it was such a loss as merited an abatement *et remissionem mercedis seu pensionis*. The King's Advocate *argued*, That *esto* the damage should be of that consequence in the shire of Fife, &c. as to move the Lords to give Morquhanny, the tacksman, an ease of his tack-duty, yet it could not operate for Sir T. Kennedy, the principal tacksman, who had the full tack-duty in the other shires and burghs, who gave not over at the making of the foresaid act of Parliament as these two did; and so his damage may be inconsiderable, or none at all, though it might be considerable in relation to these particular tacksmen; but the Lords forbore to decide this till they saw what the damages complained of might amount to.

1697. *January* 12.—THE LORDS advised the probation adduced by George M'Kenzie, sub-tacksman of the Excise of Aberdeen, and some other of the northern shires, for instructing there was a considerable diminution of brewing

No 19. after the supervenient act in June 1693, imposing the additional excise, whereby he had an evident loss. It was *objected*, The Lords had refused to give Morquhanny, the sub-tacksman of the shire of Fife, any abatement, though he had also proven his *damnum emergens*. Yet the LORDS, on balancing the two probations, found George M'Kenzie's much more pregnant, and therefore, by their first vote, found there were grounds in law, whereon he ought to have an abatement; and, by a second vote, determined the quota to the 6th part of the tack-duty, though the probation pointed that he was loser in a 5th part, which the LORDS thought such a *damnum notabile* as merited a defalcation, though others pleaded it should be *læsio ultra dimidium*.

1698. *February* 2.—THE LORDS advised that tedious cause between the King's Advocate and other Officers of State, and Sir Thomas Kennedy (anent which, *vid. supra*, 2d July 1696). The Lords having given George M'Kenzie, one of the sub-tacksmen of the excise, an ease of the 6th part of his tack-duty, in respect of the loss by the diminution of the brewing, through the superveniency of the act of Parliament 1693, imposing an additional excise; Sir Thomas, as principal tacksman, pursues a declarator against the Lords of the Treasury, setters of the tack; that, whatever abatement was given to George M'Kenzie against him, he might be allowed the same against the King. And after a kind of debate, alleging a disparity betwixt their cases; 1*mo*, Because George M'Kenzie offered to quit and give over his tack, which Sir Thomas never did; 2*do*, Though George had loss on his part of the tack, yet Sir Thomas had profit on the whole; and then passing from their compearance, Sir Thomas obtained decreet of declarator; whereof reduction being raised, it was *alleged*, It was in absence, and that the King had never been heard, nor was there any formal compearance for him, but what was only constructive, consequential and illative. THE LORDS found the compearance not positive and direct, yet sustained Sir Thomas' decreet to have the force of a *res judicata*. Against this interlocutor, the King's Advocate reclaimed, and founded on the 14th act of Parliament 1600, whereby it is declared, that the negligence of the King's Officers in pursuing or defending his actions shall not prejudge his Majesty, but he shall be reponed; and so their passing from their compearance, cannot debar the King from proponing his defences against Sir Thomas' declarator still; and though competent and omitted cuts off the lieges from these new defences, yet that cannot be obtruded against the King, who is secured by the privilege conferred on him by the foresaid act of Parliament. *Answered*, The act of Parliament founded on was never designed to give our Kings a privilege not to be tied by decreets *in foro*; such a prerogative as that being of a very dangerous and threatening consequence, and which would unhinge the subject's property, and there could be no security against his Majesty, but like minors he should ever be restored *in integrum*; whereas, all the design of the act was to liberate

his Majesty from the manacles of forms of processes, that he may quarrel any right summarily by way of exception or reply, without necessity of reduction, or abiding the order and course of the roll, and other such solemnities introduced by municipal law and custom; in which sense it is true, that *princeps legibus solutus est;* yet it is their glory, with Severus and Antonius, to say, *attamen legibus vivimus*; and that the act 1600 could never mean to repone the King against a sentence *in foro* is evident, for then *res judicata* was not brought to that consistency by our law, to be a firm and irrefragable defence; for it appears from Hope's Major Practiques,* (who wrote betwixt the 1630, and 1640,) book 6. tit. 36, of reduction of decreets, that long after this act of Parliament, *exceptio rei judicatæ* had no force with us, and that the Lords admitted new allegeances competent in the first decreet, though *parte comparente*, and omitted there. But the Lords observing the many inconveniencies following on this, did, by an act of sederunt in 1649, declare they would not for thereafter allow any such defences that had been competent in the first instance and omitted; from which it evidently follows, that if we had not the *exceptio rei judicatæ* in our law the time of that act of Parliament 1600, then it is impossible that the act was made to secure him against that which was not then in being. 2*do*, This is now cleared by the 19th act of regulations 1672, where a decreet *in foro* is made irreducible, either *super iisdem deductis*, or upon new allegeances; and, passing from their compearance, does not make it a decreet in absence; and here the King not being excepted, must necessarily be understood be included, as *pars civitatis* and head of the society; and in all such cases *utitur jure privati*, and has no more privilege than any of his subjects. And where it is intended the law should not extend to him, there he is specially excepted, as in the same act he is exempted from the order of the roll, which shews his Majesty was under consideration. 3*tio*, If the act 1600 repones the King against sentences, where he is compearing, then it may be pleaded it secures him against prescription; and yet this has never been acclaimed for the King, as Sir George M'Kenzie, then his Advocate, confesses, in his printed observes on that act 1600. *Replied*, The *exceptio rei judicatæ* is as ancient as any thing in our law, and is borrowed and adopted by us from the civil law; and the same Hope makes a distinction between decreets *via ordinaria*, and decreets upon suspension and registration; that in the first, competent and omitted had no place, and yet was allowed in the latter sort of decreets; and that the regulations 1672, could not extend to the King, because he was not expressly mentioned to be comprehended therein; and for prescription, it did run against him, because he was expressly named in the act of Parliament 1617. The King's Advocate was so sensible of the danger of pleading this too high, that he acknowledged, if a decreet passed against his Majesty, where he was fully heard, and the decision formal, then the act 1600 would not relieve his Majesty; but here, in Sir Thomas' declarator, the King was never fully heard,

No 19.



* See Appendix.

No 19. and passed from his compearance before sentence. But it was urged, if this were once allowed, this in posterior cases might be used to reverse the most formal and solemn decreets, on the pretence that it might have been better pleaded and illustrated, and more said for the King than was; and the true time of restraining these exorbitant privileges is under good Kings, as Pliny says to Trajan *in panegyrico*, *Et quæ summa tua gloria est, sæpe vincitur fiscus, cujus causa nunquam mala est nisi sub principe bono.* The Lords split in the vote, being six against six; and by the chancellor's vote, his Majesty was found to have the privilege of being reponed by the said act of Parliament against Sir Thomas' decreet, though contended to be *in foro*.

This is the first remarkable decision on the said act of Parliament 1600, now during the space of 98 years; and, if further urged, may have greater consequences. *See* PERICULUM.

*Fol. Dic. v.* 1. *p.* 524. *Fountainhall, v.* 1. *p.* 597. 725. 753. & *p.* 819.

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1694. *January* 25.

The EARL of LEVEN *against* The COUNTESS of WEMYSS and her TENANTS.

No 20.

PHILIPHAUGH reported the Earl of Leven against the Countess of Wemyss and her tenants, for their teinds, whereof he has procured a tack from the King as fallen into his hands, through the abolition of episcopacy. *Alleged*, She had a prior right by a charter from King Charles, bearing *cum decimis*, and though the King had not then any right to them, yet now it devolving in his person, must accresce to validate and fortify her charter. *Answered*, That the teinds have been cast in without adverting, and the negligence of the King's Officers cannot prejudge him; Neither knew he what he was then giving away, nor had he right to them; and the *jus accrescendi* cannot take place here, against a formal right given on knowledge, and after the teinds were legally returned to him. THE LORDS preferred the Earl of Leven's right.

*Fol. Dic. v.* 1. *p.* 524. *Fountainhall, v.* 1. *p.* 598.