had rendered his case worse by subscribing a *supersedere* to the common debtor, Skails.

Sommervell ANSWERED,—The restoring the bond was not sufficient; for though it was also in my name, and so I had *jus exigendi*, being *correus credendi*, as well as Robertson, yet, the horning and caption being in your name, I behoved to have a retrocession, which you never offered me; and, as to the *supersedere* of personal diligence, it was for other debts, and not for this.

REPLIED for Robertson,—You was *in mora*, in not seeking an assignation, which I would never have denied; and, as to the *supersedere*, it must only be ascribed to this debt, because your other debts were but *debita constituenda*, and not liquid at that time, as this was.

The Lords found Robertson liable in diligence; and that he had not implemented the trust, in regard he did not offer a retrocession; and that the *supersedere* did not exoner him; and therefore found he behoved to rest content with Skails's debt, and could not now offer it back to Sommervell, who was not obliged to accept of it. *Vol. I. Page* 797.

1697. *November* 12 *and* 26. DUNBAR of WESTFIELD *against* LUDOWICK GRANT of FREUCHY, or that ilk.

November 12.—DUNBAR of Westfield, as heritable sheriff of Murray, pursues Ludowick Grant of Freuchy, or that ilk, for reduction of a regality-right he had obtained to be erected within his heritable sheriffship, to the prejudice and diminution thereof; so that, the King's predecessors being long ago denuded of this jurisdiction, he could not, without his consent, erect a new one privative of the old, by that famous rule, *Quod meum est sine facto meo auferri non potest*,---*l.* 11. *D. de Reg. Jur.*

Grant ALLEGED,—The pursuer had not produced a sufficient active title to sustain his reduction; for the regality quarrelled flowed originally and immediately from the King, and he produced his charter and infeftment thereon; whereas all given out for the pursuer was only his retour as heir to his father, and seasine following thereon, so that nothing appeared of an original grant from the King; especially seeing his father's right was by an apprising; which are often led at random, and carry no more right than what is instructed to have been in the debtor's person, against whom the apprising is led.

ANSWERED,---It was notour that Westfield was heritable sheriff there; and a retour out of the Chancery was as good as a charter under the Great Seal; and, if need be, shall produce his author's right *cum processu*.

The Lords thought this dilator was not of that moment to stop process, but allowed the debate to go on, they producing, *medio tempore*, a right from the King, bearing the heritable sheriffship.

Then the pursuer repeated his former reason of reduction, and added farther, ---That, by the 44th Act 1455, all regalities, as prejudicial both to the people and crown, are discharged, unless granted by deliverance of Parliament; and whatever might have been pretended after the Act of Parliament 1681, asserting the King's accumulative jurisdiction with the ordinary ones already erected,

yet that being looked on as a stretch, and inserted amongst the grievances at the Revolution, it was repealed by the Act 1690.

The procurators for Grant ANSWERED,---That they, *primo loco*, insisted on a reduction of the sheriff's heritable right, as granted posterior to the 45th Act of that same Parliament 1455, prohibiting any office to be given in time coming, in fee or heritage. And Sir G. M'Kenzie, in his Observations on that Act, remarks this difference betwixt it and the former, that this simply annuls and discharges heritable offices; whereas the first Act only prohibits regalities, unless they passed by Act of Parliament; and as to which point the said Act is plainly in desuetude, except that they are, *ex post facto*, ratified in Parliament; and if that Act were *in viridi observantia*, it would reduce most of the regalities in Scotland, for few or none of them are granted in plain Parliament, but only by gifts and signatures under the King's hand, presented and passed in Exchequer. And the constant practice of the nation, (which consuetude is equivalent to a law,) has confirmed this. And how many regalities are erected within heritable sheriffships? as Borrowstownness to the Duke of Hamilton; Sanquhar, or New Dalgarno, to Queensberry; Buccleugh's regality; and many others: and yet the heritable sheriffs never complained, which acquiescence is a full evidence of the custom. Yea more, the Lord Craigy, in his Alphabetical Law Repertory, *verbo* Regalities, tells, that when the Lord Drumlanrig was passing his regality in 1664, at Exchequer, the Earl of Dumfries, the heritable sheriff within whose lands the regality was erected, opposed it, obtruding that Act in 1455, that it was not passed by deliverance of Parliament; which the Exchequer repelled, and passed the King's gift notwithstanding: and if this were once sustained, all the regalities within heritable jurisdictions, whether sheriffships, stewartries, or bailiaries, would fall to the ground, which would be of the greatest consequence. And what is the odds? for, of old, abbots, bishops, and other kirkmen had these privileges of regality, chapel, and chancery; and now, on their suppression, the Lords of erection and barons have got them. As this answers the Act of Parliament, so the other grounds of the King's being denuded are as weak and frivolous; for, if that were true, then the King could not erect a burgh royal within the bounds of an heritable sheriffship, much less make them sheriffs within themselves, as several burghs are; yea, which is still more absurd, he could not erect an heritor's land into a barony, within an heritable sheriffship, for that encroaches on the sheriff's power, and diminishes his jurisdiction *pro tanto*, yea deprives him of the emoluments of fines and blood-wits. And though the power of regality be greater, yet *majus et minus hic non variant speciem*. And that eminent lawyer, Sir Thomas Hope, in his Practicks, *tit.* 9. of Regalities, tells,—It was found by the Lords, that a regality granted by the King exemed the inhabitants thereof from the jurisdiction of the heritable sheriff or steward, though infeft and in long possession before the granting the said regality. And as to the third reason of reduction, That, the King's cumulative power being now rescinded, he cannot erect a jurisdiction anew, to the prejudice of the former,---it is clear all that the grievances and Act of Parliament 1690 condemn, is only an abuse, that, under the pretext of a concurring jurisdiction, the King gave commission to soldiers and officers to condemn and execute poor men, who would not answer ensnaring questions, and that without either jury, record, or trial: But that the King had a cumulative power, prior to the Act 1681, is clear from all our lawyers; yea Craig gives such a jurisdiction to a superior in concourse

with his vassals: And, by the 26th Act 1469, anent the partiality of Judges-ordinary, it is declared these jurisdictions shall not impede the King to take the decision of any matter at his pleasure; which plainly implies a cumulative jurisdiction in the King: which being yielded, then it cannot be denied but the King may erect a regality within the bounds of an heritable sheriffship.

To this it was ANSWERED for Westfield, the pursuer, That the Act of Parliament discharging regalities was never yet, *in foro contradictorio*, repelled; and the opinion of the Exchequer makes not *res judicata* to the Session; and they expressly reserved Dumfries's reduction: And Sir George Mackenzie, in his Notes on that Act, says, That if a lord of regality's vassals should, in a reduction, crave only to be answerable to the Sheriff, on that Act, he does not see how the Lords of the Session could repel it. And, though heritable Sheriffs have been silent, that makes no argument for regalities, unless, after a debate *in foro contradictorio*, regalities have been sustained; and some have amicably transacted with the lords of regality, and, of consent, have cantoned out their respective jurisdictions, and some have forborne on other respects. And, though none controvert the King's power of erecting baronies, or the Privy Council's commissions to try crimes within these heritable sheriffships, yet to argue, *a minore ad majus*, that he may establish regalities within my bounds, is against all the rules of logic; for a Baron has not a privative jurisdiction, but only preventive; whereas the other repledges and strikes at the root, and is a total subversion. If an heritable sheriffship were only a *nudum officium*, something might be pled of setting up a coördinate, or even a paramount superior power; but, where it is attended with emoluments, and given heritably *in perpetuum*, it becomes as much his property as any other part of his patrimony and estate, and can be no more invaded than the lands to which it is annexed by his charter. As for Hope's authority, it was not authentic, and was but a collection made by Carse, the son, out of Sir Thomas, the father's Observations, and was never finished. Neither did it bear the date of the decision nor the parties' names; *et non creditur referenti nisi constet de relato.*

Disinterested parties thought it would be a worthy thing if our Parliament would condemn and revoke both regalities and heritable sheriffships as only snares and temptations to oppression, and to draw them from the immediate dependence they owe to the King. And some urged this case was in part determined by the decision, *supra*, 18*th June* 1697, between *The Town and University of St Andrews*; where the Lords found, The King and Bishop, being denuded of the jurisdiction in favours of the Town, the Bishop could not erect the University with the same privileges he had given away already. And, as to the cumulative act, none could know its meaning and extent better than Sir George Mackenzie, who was King's Advocate when it was made. He, in the first book of his Institutions, *cap.* 2, first lays the act of cumulative jurisdiction in the King as a rule; and then, as a necessary consequence deducible from it, asserts the King may erect regalities within heritable sheriffships; which clearly implies he could only do it warrantably by virtue of that act; though, *de facto*, our Princes erected regalities both before it was made and since it was taken away: Likeas, our laws and practice since that time have explained it so; for, in the Commission of Justiciary granted for the Highlands, in 1695, the Earl of Argyle's heritable justiciary was excepted till he consented; which shows his consent is necessary: only, that was an heri-

table justiciary, and not a regality. Yet Sir George Mackenzie, in his Criminals, *tit.* Of the Power of Regalities, *num.* 4, thinks they may be erected within heritable sheriffships: And, *tit.* Of the Sheriff's Jurisdiction, he cites an unprinted Act of Parliament, in 1504, declaring, The King may erect, unite, or divide sheriffdoms, without authority of Parliament. But this may be understood of such sheriffships as are not heritable, but at the King's nomination and disposal. And what is urged by the lords of regalities against heritable sheriffships, that they diminish the King's power and the subjects' dependence upon him, returns with greater force against the regalities themselves. So that it is acting Samson's part, who, providing he destroy the Philistines, is content to be buried in the ruins with them. And, laying down this position, That the King may erect any man's lands into a regality, then the whole shire may be turned into regalities, that the heritable Sheriff shall have nothing to exerce his jurisdiction in, but *vacua se jactet in aula;* and the giving such privative jurisdictions is giving away the King's casualties in great, contrary to the Act of Parliament. And, in all the revocations of our Princes, regalities are always mentioned as one of the grievances; and in the Highlands they were yet more dangerous.

The Lords did not enter to advise it this day. *Vol. I. Page* 792.

November 26.—The famous cause betwixt Westfield and Grant, mentioned November 12, 1697, was advised. The Lords seemed to be clear that the heritable Sheriff could not simply reduce the Laird of Grant's regality; because the concession of a regality contains many things which the Sheriff could lay no manner of claim to,---such as the having a chapel and chancery, the right of the single escheat, &c.; so that the Sheriff could quarrel it no farther than it interfered with his heritable jurisdiction, and encroached on his property, or he could instruct himself lesed thereby.

It was moved by some of the Lords, That, being a matter of state and government, wherein there happened a clashing and contradiction between the laws and the received general practice, it might be most convenient to remit it to the decision and determination of the next session of Parliament To this it was ANSWERED by some others, That the Parliament would think it a strange question to be remitted to them, Whether the King had power to grant a regality, where so many concerned in such jurisdictions had a vote; and that the King likes not to have his power controverted. It was REPLIED,—The question was not simply, Whether the King may grant a regality or not; but, If he can do it to the prejudice of an heritable Sheriff, whose office is a part of his property. And though, at first view, it seems an enlarging the King's prerogative that he may erect regalities at his pleasure, yet, if duly considered, it is a diminution of the royal power to give away jurisdictions and casualties in great: and, to invest a power in the King to hurt his revenue, and give away jewels and pearls out of his Crown, is a noxious power, which every good Prince will desire to want rather than exercise.

The plurality of the Lords carried, That this case should be remitted to the King and Parliament.

Vol. I. Page 797.