1787. *June* 28.

SIR WILLIAM ERSKINE *against* ROBERT and HENRY DRUMMOND.

No 16.
In an action, in which the nephews by affinity of the Lord President were defenders, his Lordship declined judging. The Court unanimously repelled the declinature, and ordered their determination to be marked in the books of Sederunt.

IN the action depending between these parties, the Lord President suggested a doubt, how far he was at liberty to vote, on account of his connection with Mr Henry Drummond, who was married to his brother's daughter.

This declinator was unanimously repelled, and the determination was ordered to be marked in the books of Sederunt.

The statute 1594. c. 212. prohibited judges from voting where their father, or brother, or son, was a party. By act 1681, c. 13. this prohibition was extended to all relations in the first degree, whether by consanguity or affinity; and it was further provided, 'That no judge should sit or vote in any cause where 'he is uncle or nephew to the pursuer or defender.' But as the latter part of the act did not, like the former, particularly exclude uncles or nephews by affinity, it had been found, That a judge might vote in the cause of one who was married to his niece, unless where the niece was the proper party, and the husband only called for his interest; 31st January 1712, Calder *contra* Ogilvie, No 12. p. 197.

Nota, About the same period, Lord Alva refused to decide as an Ordinary, in a question in which Mr Carruthers of Holmains was a party. This gentleman was his nephew by affinity; and his daughter was married to his Lordship's son. But the Court altered the judgment, and remitted the cause to the Lord Ordinary.

C. *Fol. Dic. v.* 3. *p.* 135. *Fac. Col. No* 337. *p.* 518.

1788. *January* 29.

The LORD PROVOST and MAGISTRATES of EDINBURGH, *against* The FACULTY of ADVOCATES, and the SOCIETY of WRITERS to the SIGNET, in behalf of the COLLEGE of JUSTICE.

No 17.
The College of Justice found exempted from the payment of poor's money, and other taxations imposed by the Magistrates of Edinburgh.

THE COLLEGE of JUSTICE was instituted at first *anno* 1532, in the minority of James V. and during the regency of the Duke of Albany. For the purpose of obtaining a fund for its establishment, not less than from reverence to the Holy See, the government of Scotland had recourse to the authority of the Roman Pontiff; and Bulls were issued by Clement VII. and by his successor Paul III. ratifying the institution, and alloting for its support a portion of the revenues of the church. An exemption from taxes was likewise in the number of its destined advantages. The letters patent issued by the government, which were confirmed by the sanction of the last mentioned Pope, declare an immunity 'ab omni decima contributione, collecta, exactione, oneribusque ordinariis et 'extraordinariis.'

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In 1537, on occasion of the King's majority, an act of Parliament was passed in ratification and confirmation of the previous establishment of the College of Justice, the Judges of which consisted partly of churchmen; and it contains the following enactment: 'Attour, because the said persons maun await daily 'upon our said Session, except at feriate times, and should be therefore privi- 'leged above others, herefore we have exeemed, and by the tenor hereof exeem 'them, and every one of them, both spiritual and temporal, from all paying of 'taxes, contributions, and other extraordinary charges to be uplifted in any 'times coming, and from the bearing of any office or charge within burgh or 'outwith, but if it be their own free will and consent.'

In 1540, when the King had attained 'the perfect age of *twenty-five years*,' another statute was made, 'again approving and ratifying all the privileges 'granted to the College of Justice.' And in 1543, after the accession of Queen Mary, the Parliament enacted a similar ratification.

Meanwhile, as the religious houses afforded maintenance to the poor, every species of taxation for their support was unknown. Afterwards, when, upon the Reformation, the ample possessions of the church were wrested from it, the reformed clergy remonstrated against the now helpless condition of the poor, and insisted on a certain share of the ecclesiastical patrimony being appropriated for their benefit.

These circumstances gave occasion to the act of Parliament of 1579, cap. 74. which still continues the basis of the poor-laws of Scotland. This statute authorises the Provost and Bailies of burghs, and in landward parishes, certain judges appointed by the King, 'to tax and stent the whole inhabitants within 'the parish, according to the estimation of their substance, without exception 'of persons, to such weekly charge and contribution as shall be thought expe- 'dient and sufficient to sustain the said poor people.'

As the members of the College of Justice were not subject to be convened before any inferior jurisdiction, it is remarkable that the prescribed mode of enforcing this act, was 'to call such obstinate and wilful persons as refused to 'contribute to the relief of the poor, before the said Provost and Bailies, and 'judges in landward districts.'

There exists no evidence of the manner or extent in which this tax was levied; and of course none that the College of Justice was subjected to the payment of it.

In 1592, another act was passed, cap. 155. 'anent the taxation of burghs, 'watching and warding,' which was qualified with a caveat, 'that this act be 'not prejudicial to the members of the College of Justice, and to their privi- 'leges and immunities granted unto them, or whereof they have been in use 'in times bygone.'

In 1593, another statute again ratified every prior enactment in favour of the College of Justice, 'without any manner of diminution or derogation of the

No 17. ' same in any sort, by whatsomever other act or statute that may or can be ex-
' tended or interpreted in the contrary, either special or general.'

The important statute of 1597, cap. 279. followed. It is entituled, ' Of ' persons dwelling within burgh, subject to the help of the poor, to watching ' or warding;' and after setting forth that many of the inhabitants of burghs of reasonable substance had refused to contribute for the entertainment of the poor, watching and warding within burgh, it enacts, ' That all such as have ' their residence and dwelling within the said burghs, and may spend L. 100 ' of yearly rent within the same, or stented by the discreet neighbours to be ' worth 2000 merks in free goods, shall be subject to be burdened with the rest ' of the inhabitants, for the advancement of the glory of God, his Majesty's ' service, and well of the burgh where they dwell; providing always, that this ' act be no way extended to such as are exeemed for his Majesty's service, as ' one of ilk occupation for that cause; neither to any persons that are members ' of the College of Justice, and admitted by the Lords of Session.'

In the same year another act passed, imposing a general taxation, and expressly annulling all privileges and immunities tending to an exemption from it; but under the exception of those of the College of Justice.

From that period downward to the close of the following century, there is no evidence of any assessment having been laid by the Magistrates of Edinburgh on the College of Justice, for the maintenance of the poor. But in the mean time their privileges were repeatedly ratified by acts 1633, cap. 23.; 1661, cap. 23.; 1670, cap. 8.; and 1685, cap. 19.

Two different taxations had, in the interval, been obtained by the Magistrates of Edinburgh; one, an annual assessment for the provision of the ministers of the town, called annuity, and the other, a duty under the name of impost on liquors imported into town. In 1678, the Magistrates charged some of the members of the College of Justice for payment of these taxes, which produced an action declaratory of their privileges, in which the Court in 1687 gave judgment, ' declaring them free from the payment of these taxes;' and this decree afterwards passed into an act of sederunt. But in this process nothing was agitated with respect to the poors-money.

In 1686, an act of Parliament passed, authorising the Lords of Session, with the consent of the Magistrates of Edinburgh, ' to impose such taxes on all the ' inhabitants, as should be found necessary for cleaning the streets, and purging ' them of beggars.' By an act of sederunt, accordingly, the Court empowered the Magistrates to levy L. 500 *per annum* for three years; and in this act it is specially set forth, that the College of Justice had voluntarily submitted to this exaction; to which is added a salvo of ' their privilege of being free from all ' stents and impositions within the town of Edinburgh.'

In 1692, the Lords of Session gave their authority to another assessment for three years, on all the inhabitants, including the College of Justice, without any express salvo. And, in 1694, a similar assessment was imposed.

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In 1693, the Privy-council of King William issued a proclamation, requiring all the Magistrates of the kingdom, particularly those of Edinburgh, 'to execute 'effectually the several statutes relative to the poor.' On this occasion, the compulsitory of poinding was employed against some members of the College of Justice; but a bill of suspension being presented, 1st March 1695, it was immediately departed from. A few months afterwards, the statute 1695, cap. 43. was passed, 'ordaining the acts relative to the poor to be put to vigorous execution:' But still the Magistrates continued to desist from their proceedings against the members of the College of Justice.

In the beginning of the following century, however, the Magistrates again attempted, as before, to poind the effects of some individuals of that body; not however, it seemed, so much under the authority of the proclamation in 1693, or of any laws or statutes, as of the act of sederunt 1687, though expired. The bill of suspension formerly preferred was now passed (1710); but the question was not brought to any decision.

For the two years, from 1712 to 1714, an assessment was laid by the Lords of Session, in virtue of the act 1686, on the members of the College of Justice, of two per cent. upon their house rents; but this was done with the express consent of that body.

Again, a voluntary contribution took place for three years, from 1731 to 1734.

In 1749, seven years after the charity work-house of Edinburgh was established, a new scheme being projected for a poors-rate, the Magistrates, in several papers published by them on that occasion, acknowledged the exemption of the College of Justice.

At length, in 1787, a bill was brought into Parliament, for the direct purpose of subjecting the members of that body to the assessments imposed by the Magistrates. The bill meeting with opposition on the ground of private right, was thrown out; and the Magistrates, in order that the question of law might be brought to a determination, again employed the compulsitory of poinding, which was followed by suspensions in the name of different classes of the members of the College of Justice, and so the question came under the consideration of the Court.

Pleaded for the suspenders; By the act of Parliament in 1537, framed in conformity to the letters-patent, and the papal bulls, on which the constitution of the College of Justice was originally founded, there is an express exemption in its favour of all taxations whatsoever to be levied in time to come; an immunity repeatedly re-enacted or confirmed by the series of statutes enumerated above, and prior to 1579.

Until that year no tax had been imposed for the maintenance of the poor; and it is true, in the statute that was then passed, the general expression 'of all 'inhabitants in the parish, without exception of persons,' might seem at first view to comprehend the members of the College of Justice; but, when more closely examined, it will receive an opposite construction. *1mo*, They are to

No 17. be understood not as stated inhabitants in the sense of the statute, but as attendants on the Court, whose residence is in consequence occasional and transient. 2*do*, Those declared liable to the taxation, were persons subject to inferior jurisdictions, which they are not. 3*tio*, No privilege or right once granted, is to be resumed without a special enactment: *Speciali non derogatur generalibus;* and where the *salvo jure* is not expressed, it is always understood. 4*to*, There is not any evidence, that in fact the assessment by this statute was ever laid on the members of the College of Justice.

Accordingly, the statute of 1597, cap. 279. which was preceded by several other enactments recognising the immunities of the College of Justice, after subjecting, in comprehensive terms, all persons of a certain extent of substance, residing in burghs, to the support of the poor, subjoins an explicit exemption of that body. In the following statutes, down to the end of the last century, their privileges were ratified from time to time, while they themselves continued free from the corresponding burdens to which the other inhabitants were subject.

In this situation, the acquiescence of the Magistrates of Edinburgh demonstrated their consciousness of the validity of those claims which are now called into question. Nor was their silence with regard to the exaction of poor's-money, in that process of declarator which terminated in 1686 by so ample a recognition, in other respects, of the privileges of the College of Justice, to be otherwise accounted for, than by the notoriety of the exemption from that particular imposition; for this, it is evident, was at least as favourable a claim as those relative to impost and annuity, and, so far as it was founded on the express enactment of 1597, more clearly unexceptionable.

Thus, among the privileges of the College of Justice, originally founded on special statutes coeval with the constitution of the Court, and frequently renovated by succeeding grants, the exemption from any poor's rate imposed by the Magistrates of Edinburgh, appears supported by constant immemorial usage, uncontradicted by any record or tradition; to which is to be added, the explicit acknowledgement of the community itself; and all this even strengthened by the consideration of those other immunities being relinquished, or lost by disuse; while the desultory attempts to impede that uninterrupted possession, serve only to show it was not from negligence, but conviction of the right, that the Magistrates did not bring the question to a final issue.

Answered; The statute of 1579 formed at first, as it still forms, the basis of the poor's laws of Scoland. In clear and explicit terms, it subjects, without exception of persons, all inhabitants of parishes to taxation for the maintenance of the poor. To deny the appellation of inhabitants to persons inhabiting a town, merely because they are members of the College of Justice, seems a singular absurdity, and is inconsistent with the *salvo* in the acts of Parliament in 1592 and 1597 now founded on by the suspenders; because these plainly suppose, that the term *inhabitants* would have comprehended them, as otherwise the exception must have been superfluous and nugatory. The same proper ap-

plication of the term to the members of the College of Justice, occurs in the statute of 1690, respecting hearth-money; in 5th Geo. I. or the riot act; and in the statutes imposing a tax levied in Edinburgh, for keeping the highways in repair. No 17.

Neither is the inference just, that the suspenders draw from the clause nominating a particular jurisdiction for enforcing the assessment. Wherever a statutory jurisdiction has been created, the members of the College of Justice are comprehended, if not specially excepted; as, for example, the jurisdiction conferred on Justices of the Peace in offences against the revenue laws. But even their not being comprehended, would not debar the levying of an assessment from that body, to which the enactment of that clause was not essential; as it might be rendered effectual, like any other civil obligation, by the Court of Session. Accordingly, no such plea has ever been maintained by members of the College of Justice residing in other burghs, though they are equally entitled to decline inferior jurisdictions.

"With regard to the idea of a general enactment not being competent to undo a special privilege, it is contradicted by the practice of introducing saving clauses; and, when those are omitted, the privilege falls. Thus, to take a strong example from the case in hand, the act 1537 exempted the Lords of Session from bearing any share in extraordinary supplies imposed by Parliament for the support of government; and in every supply or land-tax act down to 1670, a special salvo of that privilege was carefully engrossed; but at length the privilege being to be discontinued, all that was necessary for effecting this, was to leave out that special exception; and, upon this footing alone are the members of the College of Justice at the present day liable to pay land-tax.

The other acts of Parliament, relative to the poor, are comparatively of little importance, and require no particular observation. With respect to the statute of 1537, which exempts the College of Justice 'from taxes, contributions, *and* '*other extraordinary charges*,' these were no other than the national taxes or supplies, which were properly termed *extraordinary charges*, as in those days they were seldom imposed by Parliament, and only upon very urgent occasions. For as to the ordinary established revenue of the Crown, which, besides the rents of the King's patrimony, consisted chiefly of the feudal casualties exigible from the Crown vassals, and of certain customs upon goods imported and exported, it never was supposed that any members of the College of Justice were entitled to an exemption.

Still less was it imagined, that the exemption of this statute had the effect to relieve that body in whole or in part from the ordinary burdens imposed upon property, either by the common or statute law, for special purposes; such as parochial assessments for building and repairing kirks, for establishing schools, for keeping in repair highways, for the maintenance of the poor, or for other purposes of a similar nature. A proof of this is the fact, that through all the rest of Scotland, except Edinburgh, the College of Justice have uniformly sub-

No 17. mitted to such burdens; whereas the exemption, if at all applicable to assessments of this kind, must have had an universal operation in every county, burgh, and parish of the kingdom. Indeed equity requires, that the object of such exemptions should be only national taxes, that the corresponding increase of public burdens may fall equally on the people at large, and not on any particular description of individuals, as the inhabitants of a burgh or of a parish. The subsequent statutes preceding 1579, it is evident, though they ratify, do not extend the privileges bestowed by that of 1537.

The statute of 1592 relates to such burdens as are peculiar to burgesses. As to that of 1597, although the entertainment of the poor is mentioned in its preamble, it could not be intended to establish any system for that purpose, which was already effectually served by the statute of 1579. Its object, in all probability, was, to subject the inhabitants described in it, though not burgesses, to the burden of watching and warding, which is expressly mentioned in the preamble; and likewise to those stents and assessments which the Magistrates of royal burghs were understood to have a right of imposing *virtute officii* for the utility of the burgh, of which an example occurs in the case of the Town of Aberdeen *contra* Lesk and others, No 16. p. 1866. In this view, a salvo of the privileges of the College of Justice may be esteemed very natural and proper. But, at any rate, the legal effect of a saving clause or exception from a statute, in favour of any person or persons, can go no farther than to save from the operation of that particular statute alone in which it is inserted; and the chargers are not founding their claim on act 1597, more than if it had never existed.

With regard to the alleged immemorial possession, of this there is no evidence. On the contrary, the College of Justice was repeatedly assessed by the Lords of Session under the authority of act 1686; and the salvo inserted on two of those occasions, without creating any new privileges, could only preserve such as already belonged to that body.

In point of law, no disuse of payment could establish an exemption for the future, prescription having no operation against any public burden created by statute. Though a particular estate had been overlooked in levying the land-tax, or it had been omitted to collect duties or customs within a certain district, such omissions could never prevent the due execution of the law in time coming. On this ground was decided a question respecting the non-payment of cess for time immemorial, Fountainhall, v. 2. p. 590. 21st July 1710, Town of Paisley *contra* their Vassals, *voce* PRESCRIPTION.

THE LORD ORDINARY reported the cause, when

The COURT unanimously suspended the letters, and assoilzied from the declarator.

Reporter, *Lord Braxfield.* For the Chargers, *Lord Advocate, Blair, et Alii.*
Alt. *Dean of Faculty, et Alii.* Clerk, *Sinclair.*

S. *Fac. Col. App. No 1. p. 1.*

*** On an appeal, The House of Lords, 25th March 1790, ORDERED that the appeal be dismissed, and the interlocutors complained of be affirmed. No 17.

1798. *May* 23.

JAMES MARSHALL, Procurator-Fiscal of the Society of Writers to the Signet, *against* ALEXANDER YOUNGSON.

No 18.
The offices of a Writer to the Signet, and of a Procurator of the High Court of Admiralty, are not incompatible.

ALEXANDER YOUNGSON, after serving an apprenticeship to a writer to the signet, was, in 1790, admitted a procurator before the High Court of Admiralty. In 1794, he was admitted a writer to the signet.

Some members of that body conceiving that he should no longer be permitted to practise in the Admiralty Court, brought the matter before the Society. At a meeting in 1796, they, by a narrow majority, 'resolved, that it is incompatible with the situation of a Writer to the Signet, to hold a commission as a 'procurator before the High Court of Admiralty, or to practise before any 'Court, the decisions of which are subject to the review of the Court of Session.'

Mr Youngson having complained of this resolution by suspension, Mr Marshall, the procurator-fiscal of the Society, in support of it,

Pleaded, The peculiar province of a Writer to the Signet, is the writing and expeding signet letters and signatures. By a by-law of the Society, in 1676, members who should act as agents, even before the Court of Session, were ordered to be prosecuted; and although this regulation has gone into disuse, the right of members to conduct law-suits can go no farther than practice has sanctioned.

A Writer to the Signet can neither be an Advocate, nor an Advocate's Clerk; and, if he be appointed a Clerk of Session, he can no longer act in his former capacity. These disabilities have been introduced from expediency; a reason which operates still more strongly for excluding Writers to the Signet from acting before inferior judicatures. Such a practice would lead to many abuses. The same person having emoluments from a cause in different courts, would be a temptation to bring actions before inferior courts, which ought to have come originally before the Supreme Court; and it would multiply advocations, suspensions, and reductions of small causes upon frivolous grounds. Accordingly, so opposite is Mr Youngson's conduct from what has been understood by the Society, that no similar attempt was ever made by any of its members.

Answered, The Writers to the Signet, so far from confining themselves to their peculiar duties, officiate in every department of law-business, except those from which they are excluded by the privileges of other bodies of practitioners. They act as conveyancers, notaries-public, commissioners, factors, &c. They also frequently act, in inferior courts, as clerks, and they conduct services be-