1678. *November* 13. THOMAS WYLIE and RICHARD LOTHIAN *against* FOULLER.

THOMAS Wylie and Richard Lothian, merchants in Edinburgh, against one Fouller, a skipper, for implement of his charter-party.

The Lords, in this case, approved of the Admiral's custom of taking caution *judicio sisti et judicatum solvi*, of sea-faring men; yet they caused try whether the defender was poor, and if the affair might be summarily discussed in a short time, in which cases they might have inclined to favour him with a dispensation; but in regard this matter would run to some time, and probably would require commissions for examining witnesses in Holland, therefore they refused to recede from the custom, but ordained him to find caution. See *25th July* 1678, *Williamson*. And Dury, *16th November* 1636, *Stewart*.

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1678. *November* 14. CLERK of PITTENCRIEFF *against* The TOWN of EDINBURGH.

IN Clerk of Pittencrieff's discharge, which he offered to the Town of Edinburgh, of their bond, and the decreet he had obtained against them; being minor, Sir G. Lockhart thought his tutors could not be forced nor obliged in law to cause him ratify at his majority, (as was demanded of them,) but only were bound to consent to his receipt of the money, if he was past fourteen, or acknowledge the receipt of it themselves, in his name, if he was within pupillarity. *De plenissima securitate obtinenda*, in paying to minors, see *Tit. Instit. quib. alienare licet vel non*, § *ult.*

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1678. *November* 20. The TOWN of EDINBURGH *against* The COLLEGE of JUSTICE.

THE Good Town of Edinburgh against Mr Thomas Learmonth, advocate, and the remanent members of the College of Justice, for their annuities. Though this cause took up four or five days pleading in the Inner-House, and the fame of it spread wide, yet I shall contract it, and shall only touch some few of the heads I made use of, in deducing the charge, and point at the rest of the debate.

It was ALLEGED for the Good Town,—That they judged it their misfortune to contend with so powerful an adversary as the College of Justice was; (for the Lords had only commanded Sir G. Mackenzie, the King's Advocate, and myself, to be advocates for the Town,) but the justice and piety of the cause was what balanced these disadvantages. That the cause was founded in religion, for the sustenance of their ministers, for whom all nations, even the very heathens, had made, by nature's light, honourable allowances; and it is no more but just, that they should participate of our temporal things. The Good Town, with much satisfaction, had its gates always open to receive in gentlemen's sons, and others, who came from all parts of the kingdom towards this illustrious society, and were no less glad to see them arrive at so great improvements of their fortunes. That, by a bountiful reciprocation, like the circulating of the blood in our veins, she, as a kindly mother, sends forth her colonies back to the country

again. Intreated them to remember Menenius Agrippa's Apologue, by which he reduced the Commons of Rome from their Aventine secession, by his witty demonstrating the bad consequences which issued from the discord between the belly and other members of the body. It is hoped the lawyers, who are the priests of righteousness and oracles of the nation, will not practise a *societas leonina*, which they condemn in all other cases: they will not take a share in the benefit of the Gospel, and cause the Town bear all the burden: *quem sequitur commodum, &c.* 'Tis true, the teinds are the proper and natural patrimony of the church; but where they cannot be had, then the *decimæ personales ex artificio et industria resultantes*, and the *ædium pensiones* succeed in place thereof, as in burghs; which leads us to speak of the annuities, a moderate and easy duty imposed upon the house-maills, for help towards paying the ministers' stipends.

The several ways how ministers were paid, from time to time, within the Town of Edinburgh, since the Reformation was publicly owned in 1560, were here at length related, the history whereof was gathered from the Town of Edinburgh's statutes.

Then was REPRESENTED what was the present settled and constant revenue and funds, out of which the Town paid their ministers, and how much short it fell,—that they were forced to encroach upon their common good, to make up the deficiency,—and that they now wanted the bishopric of Orkney. Then the Town's charge was urged, from the Act of Sederunt of the Lords of Session in 1637, whereby the advocates and other members of the College of Justice consented and bound themselves to pay that annuity at five per cent.

It was REPRESENTED,—That this was no clandestine act, nor any deed of the Town's, but standing recorded in the Lords of Session's books. That *nudæ verborum emissiones in stipulationibus* were not regarded, but suspected of levity, they not carrying so clear an impression and conviction of a fixed design to bind: but here was an act done with much deliberation, gravity, and seriousness, before the Lords, the supreme judges ordinary of this nation; and of which I may say what the Emperors Honorius and Theodosius use on another account, in *L.* 19 *C. de Testam. Omnes solemnitates superare videtur quod inter tot nobiles probatasque personas insertum, toto jure (quod in scriniis vestris quasi positum est) teste, principis conscientiam tenet.* This act was not done in a corner, and is now roborated with the peaceable possession of a grand prescription, never being once drawn in question.

The next remarkable step in the progress is the Act of Parliament 1649; and although it be a 49 act, and swept away by the rescissory one, yet it gives a moral reason of everlasting verity, *viz.*: "That none can withdraw or seek to exeme themselves from the provision of ministers, without contracting great guiltiness before God." And of the justice of which act the Parliament, in 1661, were so convinced, that they renewed it; and upon that act does the Good Town likewise found. And the College of Justice may be so kind as to consider, that much of the Town's debt is contracted upon their account. For their accommodation, they had built that noble fabric of the Parliament-House, and reared it on the place where their ministers' houses of old did stand, being St Giles's Church-yard. They built the Trone-Church, brought in the water by conduits, &c. &c. To whom were they doing it? Were they not making friendship thereby for their own souls? (if this expression may be pardoned, as some-

what Popish.) Is it not too the city of our solemnities, our metropolis and capital, the *communis patria* for citations and confirmations; erected in a royalty *a tempore antiquissimo*; adorned with many glorious concessions of our kings; complimented with badges of royalty and parcels of the sovereignty, as scarlet robes, a sceptre and sword; the chief magistrate made his Majesty's immediate deputy and lieutenant, and ordained, by his Majesty's own ranking, to take the precedency, within the Town's liberties, of all subjects, next to yourself, my Lord Chancellor. That this incorporation (like all other things,) was very inconsiderable in its commencement; and when the advocates were not above ten or twelve, it was reasonable to encourage them with privileges. When they were in their swaddling-clothes it was charity: but now to continue these fictitious and imaginary privileges, when they are turned so potent and formidable, is what will shock the common reason of mankind: for *cessante causa efficiente impulsiva et finale privilegii, cessare debet et ipsum privilegium.* See *Dissertat. Juris Bern. Sutholt. Dissert.* 1, § 16.

The speakers for the College of Justice were, Sir Andrew Birny, Dean of Faculty, Sir George Lockhart, Sir John Cunningham, Sir Robert Sinclair, and Sir John Dalrymple, who repeated their reasons of suspension; and ALLEGED, —That commonwealths, in all ages, had ever honoured advocates with the highest marks of respect; and cited *L.* 14 *C. de Advocatis Divers. Judicior. et L.* 4 *C. de Advoc. Divers. Judic. et Bourit. de Off. Advocat.* That the wisdom of our ancestors had not been wanting in this, but had cumulated it with many encouragements. That the Session is very old, being erected by King James I. by 65th Act of his 3d Parliament, in 1425. That, at the second model and constitution of the Session, in King James the Fifth's time, their privileges are again ratified to them, by Act 68th, Parliament 1537, called,—*The King's good mind anent the Lords of Session;* and though the privileges there indulged seem only *per expressum* to be given to the Senators, yet that's only a *synecdoche partis pro toto,* and the rest of the College are all included in the Lords' privileges, by participation and communication. So great has been the care our Parliaments have had of this august College, that they have met sometimes to do no other thing but to ratify the privileges of it: for, in Queen Mary's 2d Parliament, there is only one act, and it is in favours of the College of Justice. And in the Parliament held *in anno* 1593, there are two acts in that one Parliament ratifying the privileges of the College of Justice; and there is scarce any Parliament that hath not looked upon this as one of the great interests and concerns of the nation. And the 279th Act of the Parliament 1597 is remarkable, not only that it exemes the College of Justice from the prestation of either the *munera personalia* or *onera realia* within burgh; but also it expressly mentions some who lived within burghs at their own liberty, *neither knowing the magistrates in kirk nor policy.* And from all this, inferred that the Town's exacting annuity from them was an unlawful and irregular imposition, contrary to the general laws, and derogatory in particular to their immunities and exemptions from all taxes, impositions, &c. (of which, see Hope, in his larger *Prac. tit.* Of the Session.) And that they were founded in a clear law, *viz.* a printed public Act of Parliament, in 1661, ratifying all their privileges, in the most ample form that can be devised.

Then they ANSWERED to the Act of Sederunt, in 1637,—1*mo*, That it was a simulate, clandestine, patched-up act, the penult day of a Session, and after-

wards disclaimed by the most eminent lawyers. *2do*, It is not binding nor obligatory, neither upon themselves nor their successors. Not upon themselves, because not subscribed: and, in 1661, the Lords would not sustain a judicial act to prove one's consent without his own subscription, in the case between *Osburn* and *Buchannan*: neither can it bind their successors in the office; because, albeit they are a collegiate body, yet this is not in law the *habilis modus* to bind a corporation, so as to make the obligation descend, it not being in any affair depending on the nature of the University; and it being *in materia odiosa*, introducing a burden, it could not be without a preceding warrant under their hands, to authorise the said surrender, and to remain for a lasting monument and instrument of their slavery. As for the Act of Parliament 1661, bearing a ratification of the imposition of the annuity, and ordaining it to be paid by the members of the College of Justice, as well as others; they ANSWERED,—No respect was to be had thereto; because it was only a private and unprinted Act of Parliament, never read, debated, nor voted, but passed among the ratifications; although it is pretended that Sir John Gilmoir, then President of the Session, took it up and amended it in some particulars; and therefore, it clearly falls under the act *salvo jure cujuslibet*, and must stoop to the public law, in that same Parliament, ratifying the privileges of the Session: and Sir George Lockhart urged much from the words of the act *salvo jure*, in the Parliament 1633. That the Town is ill advised to contend with them, from whom they derive much, both of their grandeur and wealth. And if the Session deserted them, though only for a while, it would expose them not only to penury, but likewise to contempt.

To this it was ANSWERED for the Good Town of Edinburgh,—That they were far from envying the prosperity and flourishing of the College of Justice,—great and happy might they be,—part of the Town's concern being wrapt therein; but it behoved to be cautioned and qualified, as the acclamations to Pompey were in Rome,—*sit salva hujus civitatis libertate potens.* It is not fit the Session should, like a diseased spleen, grow too big for the body; that would discompose the whole politic frame. For ought we can know or conjecture, every gentleman's family in Scotland, that has more sons than one, are designing them to follow the profession of law; in the next generation the most part of the inhabitants in Edinburgh shall be members of the College of Justice; were it reason that they should plead immunity from the ministers' stipends, or that the far lesser part of the burgesses and inhabitants of the Town shall bear the whole burden thereof? Why do not members of the College of Justice, by this same very rule, refuse to pay any stipend in the places of the country where they have interest? If they have a privilege, why does it not defend them *ubique?* But this is a mere begging of the question, and is *gratis dictum.* Let them produce us one scrape of a pen for this so boasted a privilege of theirs; show us but where it stands recorded, and we will yield up the whole cause. The mistake is fundamental, and the error in the first concoction; they presuppose and beg a privilege, whereas there is no such thing *in rerum natura.* If they say the Act of Sederunt 1637 mentions their exemption by the Secret Council, the same is a narrative, framed by the lawyers themselves, to give a rise and colour to that Act, and is *funditus* convelled and redargued by the books of Secret Council produced, bearing the direct contrary, and ordaining all to pay annuity. *Qui fundat se super privilegio debet id docere. 2do*, The ministers

being in possession of their annuities, even from the members of the College of Justice, are in the case of *regula cancellariæ apostolicæ*, that *triennalis et decennalis possessor non tenetur docere de titulo in beneficialibus*, but his title *præsumitur;* and which, as it is unanswerable in law, so few or none of these gentlemen standing at the bar can or will deny but they have quietly acquiesced in the said Act, by paying their annuities to the Town's collectors till of late.

Whereas it is alleged the Acts giving privileges to the Lords of Session comprehend all the dependers and retainers, I crave pardon to differ: for, besides that statutes must be understood strictly, and *secundum literam*, upon perusal of the special privileges there enumerated, they will be found to be intransmissible and incommunicable, *et non egredi personas Dominorum.* And, *esto* they were included, exemption from taxes or impositions would not reach this, for annuities are no such thing. And Papon, in his *Recueille des Arrests des Parlemens*, shows, that *les gens de justice*, the lawyers, were found subject to the payment of a duty called *le refouagement* (like hearth-money.) All their brawling is not able to shake themselves loose of the Act of Sederunt. These gentlemen would be very angry if I should deny them to be a faculty and incorporation, vested with that same power to enter into pactions and contracts that any other collegiate meeting is. Now, in other societies do we not see that their own acts bind them? An Act of the Town-Council makes the Town and the succeeding magistrates liable for the debt therein. See Durie, 23*d December* 1626, *Peebles* against *Town of Perth.*

If your Lordships of the Session were to renounce your wadset right of the Cannon-mills, needed there any more but a judicial Act? If the consent and subscription of every one should be requisite in such a case, collective bodies should never come to an expedition of their affairs; for remeid whereof, they either bind themselves by their Act, or a syndick constituted by them. And Osborn's case meets not this, for there the judicial Act was made up *ex intervallo super reminiscentiâ judicis:* and do we not all know, that the appending the seal of the priory and metropolitan church of St. Andrews serves for a sufficient symbol of the consent adhibited in the administration of the deeds of the bishopric, without any subscription? Whereas they would thrust the Town's Act of Parl. in 1661, for their annuities, quite out of doors, because the privileges of the College of Justice are ratified also at the same time.

It is ANSWERED,—That *in toto jure generi per speciem derogatur*, L. 80 D. *de* R. F. That the Act of annuities is both posterior to theirs, *et posteriora derogant prioribus*, and does comprehend the specific case controverted, and has determined the members of the College of Justice shall be liable, and so must derogate from their general ratification, which expresseth no privilege at all but in the bulk; and it is unquestionable, if the Parliament had been demanded, whether they intended by that general ratification to exeme them from this annuity, but the legislators would have answered *negative.* And the 165th Act 1593, positively discharges, that no private Acts of Parliament prejudge ministers' livings. Neither is this Act of Parliament, ratifying the annuities, a private Act, nor does it fall within the compass of the Act *salvo jure.* For it is not the printing or not printing of an Act of Parl. that renders it either private or public, but it is the subject-matter and universality of its extent or sanction. And the Lords of Session are intreated to cast their eyes upon a decision observed by Durie, 10*th December* 1622, *The E. of Rothes* against *Gordon*,

where the Lords found a particular Act of Parliament (where there was no ambiguity resulting from the interpretation of it,) fell not within the Act *salvo;* and that the Lords had no power to decide whether it justly or unjustly statuted, but that the same ought only to be tried in Parliament. See also Dury anent the Act of Parl. rehabilitating Francis Stewart. And Haddington, in his *Pract.* 1611, tells, the Lords sharply reproved an advocate for debating the legality and justice of an Act of Parliament. So that the Lords will find that they are not empowered to meddle with this Act, much less to go over its belly and annul it. And it is with no small aversion that they contend with the College of Justice; but they cannot be otherwise answerable to that faithfulness required of them, they being only curators, overseers, and administrators of the Town's privileges, and none of which they have power either to transact or give up, being disenabled by the 112th Act, Parl. 1587, discharging burghs to dispose on their liberties without consent of King and Parliament.

Whereunto it was REPLIED, for the College of Justice,—That they needed not instruct a privilege, because, as to immunity from burdens, they are founded, not by privilege, but *jure communi*, as Anton. Faber in his *Codex Sabandus, tit. de Dignitatibus, Def.* 10, shows. The *Regula cancellariæ, Triennalis et decennalis possessor, &c.* loses its office wherever the title of the possession can be shown, as was found in *July* 1676, betwixt the *B. of Dumblane* and *Kinloch of Gilmerton;* and here *docemus de titulo vitioso et invalido, viz.* the Act of Sederunt, and Act of Parliament 1661, and so the rule fails. See *30th July* 1679, *Ewart.*

And, as for the possession that the Town has, 1*mo*, It is violent, by illegal poindings. 2*do*, The lawyers, what they give of that kind towards the sustentation of the ministers, will pay it as a benevolence; not as a debt that can, *ex necessitate juris*, be extorted. And, if the Town will pass from their compulsitors, the College of Justice will very cheerfully contribute and assist. And yet those gentlemen, the ministers, who deserve their stipends very well, need not be anxious that any thing will be deducted off their stipends, (as the Town of Edinburgh threatens them, if the College of Justice annuities be taken from them.) For, 1*mo*, All those who ought to have the name of the College of Justice, *viz.* The Lords, advocates, writers to the signet, and clerks, (excluding ordinary writers, notaries, messengers; the Lords', advocates', and writers' men; clerks of Exchequer, &c.) their annuities will be within 1200 merks by year, as, after trial and calculation, was found. 2*do*, The College of Justice offers to farm the annuity, and other rents which have been mortified and allotted for their ministers, and to pay their whole twelve ministers completely therewith, so that there shall be no deficiency; so that, of necessity, there has been either malversation or negligence in the bygone administration of it. Whereas it is pretended that this annuity is not an imposition, and so not comprehended in the Act exeming from impositions, it is desired they may give it another name. And Gasper Clockius, in his learned *Tract. Nomico-politicus de Contribut. et Collect. Imperii*, hath spent a whole section, *viz. c.* 15, to prove that *legum doctores et professores* are *immunes ab onere collectarum.* The Act of Sederunt 1637 can never be sufficient, without a consent in writ, to entail that servitude; neither will a naked Act of a Town-Council bind a debt on the Town, or a judicial Act of the Lords, renouncing any wadset they had for security of their mortified monies, oblige them; but, in both cases, there behoved to be a previous

Act subscribed for the warrant of both. The instance from the common seal of St. Andrews, in place of the chapter, signifies merely *ex instituto*, and in vigour of a special statute. See *4th November* 1671, *E. of Lothian, &c.* against *The Town of Edinburgh*, about the Lady Yester's mortification.

Besides, they had very pregnant reasons to think this Act of Sederunt was in 1643 past from by the Town; for they had scrolls of Acts under Mr David Herriot, advocate, his hands, and other memorandums, bearing, That the Town had restricted the said Act of the annuities, in so far as concerned the members of the Session, to five years; and they had exhibition depending for recovery of the principals, and craved the Town of Edinburgh might be so ingenuous as to exhibit their public Acts and records, which might give light to the truth, (which the Town did, but nothing was found in them to fortify their allegeance:) and that, in 1658, the College of Justice had obtained a decreet of declarator of their privileges against the Town; but the same was now lost, or abstracted, and not booked.

Then the lawyers repeated the heads and articles of their present declarator depending against the Town, *viz.* 1*mo*, Exemption from annuities. 2*do*, From all jurisdiction, civil or criminal, that the Town might not be their judges in any case. The King's Advocate seemed to yield, that the Town should only have *imperium* over them in case of riots committed in vacation time; for, during the Session, he thought the Lords were only to be applied to in such cases. Some thought this a too large and Cassandrian concession, for it pleased neither party. (See March 1671, No. 161.) 3*tio*, The College of Justice craved to be free from paying the small dues at the ports for their goods or plenishing brought in or out, which, by the Town's gift thereof, are destinate to mending and repairing the bye-ways and avenues leading to the city, which is a public good. 4*to*, Craved that it might be found lawful for them to keep tailors, masons, or other craftsmen, though unfree, within the burgh, to work their work in their own houses, without disturbance or molestation, or being seized on, and their work confiscated by the trades of Edinburgh and their deacons, on the pretence of their privileges contained in their several seals of causes, which seem contrary to public utility. 5*to*, That they may have convenient seats in the churches for hearing sermon; and that the meanest burgess may not be preferred to them, as has been hitherto done, in competitions. And here, when it came to a communing, they craved the high cathedral church to be appropriated for the Lords of Session, and the rest of the College of Justice, and to have their own minister, and they would pay him; but the Town of Edinburgh cannot part with any patronage within their bounds, in the undoubted right whereof they are stated. 6*to*, That in imposing of stents by the Town's own authority they be absolutely free. And, as for those laid on by Parliaments and Conventions, that, according to the Acts of the Town-Council of Edinburgh, and particularly in 1660, the College of Justice may have some of their number present, [to take care] that they be not unequally assessed and burdened for their lands. 7*thly*, That the imposition of two pennies upon the pint of ale may, conform to the contract betwixt the Good Town and the College of Justice, and the shire of Mid-Lothian, be managed with common consent; and that the Town may exhibit their count-books, to the effect it may appear whether it has been applied to the right use, for paying off and defray-

ing the Town's debts, or if it has been inverted. See, anent this, many things scattered up and down in other collections beside me.

Nota.—The mortifications the Town sets apart for their ministers' stipends, are, 1*mo*, The annuity, which commonly is rouped at about 11,000 merks. 2*do*, The rents paid for the seats in the church, rouped at 3,600 merks. 3*tio*, Their old kirk rents, being mortifications and ground annuals due to the chaplainries and altarages of St. Giles's collegiate church, amounting to 3000 merks. 4*to*, The merk upon the tun of all goods imported into Leith, set at 3,400 merks, making in all little more than 20,000 merks. Whereas the Town, without ever having got a charge of horning, or being pursued, past memory of man, pays 27,000 merks *per annum* to their ministers.

Another complaint of the lawyers was, That the Town's collectors poinded their houses summarily, without suffering the 15 days of the charge to expire before the poinding, as the Act of Parliament 1669 requires.

The President declared, the Lords would hear no other points till that of the annuities was first determined. *Vol. I. Page* 21.

1678. *November* 20. SETON *against* ———.

MR Alexander Seton, minister at Linlithgow, against ———. The Lords in this case found the same which they had decided formerly, That the allowance of a comprising was not absolutely necessary, but only in case of a competition, where it will give preference to the comprising allowed; but the debtor cannot object the want of it as a nullity. See Hope's *Min. Pract. c.* 10, and 25th July 1679. *Vol. I. Page* 25.

1678. *November* 30. JOHN MARISHALL *against* JAMES SCOT.

The Lords this day readvised the testimony of the witnesses adduced in John Marishall's cause against James Scot, and adhered to their former sentence, and found the contravention of the lawborrows fully proven; and that Scot's son was then *in familia* with his father, and was not merely making a visit to him. But, in respect Scot is not a freeholder, but only a feuar, they restricted the 1000 merks decerned for, to 500 merks, which is the only pains of contravening lawborrows imposed by the [act] 1593, *c.* 166. *Vol. I. Page* 26.

1678. *December* 3. ANENT MOVEABLES.

IT was questioned, if, in a disposition of moveables, the words *utencils* and *domicils* comprehend habilyiment of one's own body. And it was generally