

was incompatible with his duty as a soldier, seeing he could not attend both ; and, though he had enrolled his name, yet he neither wore the habit of the dragoons of that regiment, nor got their pay, but merely listed to shun diligence and defraud his creditors : and a distinct garb was rationally introduced, that, soldiers not being the best debtors in the world, men might not be ensnared to trust them, by their disguising and concealing their trade. And, though that privilege and exemption may be a great inducement for men to enlist themselves in the queen's service, and recruit her army, yet it is not nominal soldiers will do the business, but real ones, who are ready to go beyond seas, and serve in the armies there. And such sham soldiers have no more right to privileges than honorary burgesses to the liberties and profitable offices within a burgh : and, to put such a gloss upon it, is *fraudem legi facere, et salvis verbis mentem circumvenire*, seeing none can think the Queen and Parliament intended, by these acts, to protect and patronize bankrupts, against the law, and to defraud the other part of her good subjects, who pay her cess, without which she cannot pay her armies : and this is nothing but to encourage false musters, and to give her the empty name of soldiers, when truly she has none. And the Romans, who understood military discipline beyond all the nations in Europe, *l. 15 et 16, C. and l. 1, D. de Re Militari*, have discharged their soldiers to engage in any other employments, *ut armorum quotidiano exercitio se preparent ad bella* : and no others had the *beneficium competentiae* but such, *l. 6, D. de Re Judicata* ; and, when they had furloughs, their privilege ceased,—*l. 34, D. ex Quib. Caus. Major. Commeatu recepto, si domi est, reipublicae causa abesse non videtur*.

REPLIED,—This would downrightly frustrate and annihilate the privilege ; for it is denied that they list only to save and screen themselves, without doing the duties incumbent on soldiers : for they are ready, if her majesty requires it, to go and serve in the confederate army in Flanders. And their having other trades can be no incapacity, seeing many of the English soldiers are wrights, tailors, shoemakers, &c. and work in their respective trades when they have leisure.

The Lords found the case new, and the point delicate ; to be handled with great niceness and circumspection, not to discourage the recruits on the one hand, nor to defraud the monied men, who must bear the burden, on the other ; therefore they ordained it to be heard in their own presence, before they passed so great a precedent and preparative.

On the 23d February, the Lords advised this point, and found this soldier not in the case of the Act of Parliament, and so had no claim to the privilege.

*Vol. II. Page 491.*

---

1709. February 15. The EARL of HYNDFORD *against* The HAMMERMEN of EDINBURGH.

THE Earl of Hyndford against the Corporation of Hammermen of Magdalen's Chapel, in Edinburgh. When episcopacy was suppressed, in 1641, King Charles I. mortified a part of the bishops' rents to schools and colleges, and other pious and public uses ; and, among other donations, he gave the deaconry of the hammermen in Edinburgh £100 sterling yearly out of the feu and teind-duties belonging to the bishopric of Dunkeld, for maintaining some beadmen. This

gift proving ineffectual, Sir James Carmichael of that ilk, treasurer-depute, got it settled and secured, so as they were put in peaceable possession of it: Whereupon they, in gratitude, by their act in 1647, narrating the foresaid mortification, and his being instrumental in settling it, gave him and his heirs, *in perpetuum*, the presentation of one of the beadmen, providing he do it within six days after the vacancy is intimated to him. My Lord Hyndford, as the said Sir James's heir, pursues a declarator of his right against the hammermen; and that they should alimant a poor man presented by him.

ALLEGED,---Prescribed both in the positive and the negative way; my Lord's predecessors having never presented, nor they having received nor admitted any by the space of forty years bygone; and so it is lost *non utendo*.

ANSWERED,---Prescription could not begin to run but from the death of the person last presented, and the intimation of the vacancy; which was never done.

2do, ALLEGED,---The gift is now *ob causam datam causa non secuta*. The bishop's rents, which was the fund out of which they were paid, having ceased by the restitution of episcopacy in 1662, they cannot be liable to alimant his beadmen out of their own private pockets; for, *sublata causa, tollitur effectus*. But, if my Lord will prevail with the Queen, who has now the bishop's rents, to revive their old gift, they will willingly accept his presentation, otherwise no law can make them liable.

ANSWERED,---That mortification of £100 sterling out of the bishop's rents was not the sole motive of granting this gift; but it bears also, for other onerous causes; and so cannot cease with its partial cause, but must be a perpetual right.

The Lords repelled both their defences, and declared. Yet severals were for trying what beadmen the incorporation had, or if they were wholly decayed; and if there were any still remaining, and out of what fund and stock they were maintained.

*Vol. II. Page 492.*

---

1709. February 16. BRUCE of KINNAIRD *against* ELPHINSTON of QUARREL.

BRUCE of Kinnaird having a coal adjacent to Elphinston of Quarrel's coal; Quarrel, by an interposed trustee, gets a tack of Kinnaird's coal, and works a level partly through Kinnaird's ground, and partly through his own, to carry off the water from both their coals; but, this tack expiring in October last, Quarrel bigs up and closes the mouth of the said coal-level, by which the water, in speats, does regorge and restagnate on Kinnaird's coal, and is in hazard of drowning it. Kinnaird gives in a summary complaint to the Lords, craving,—That Quarrel may be ordained to remove the said stop, open the level, and let out the dam; and reponne all things as they were *in statu quo* in October last, at the expiring of the tack; there being *periculum in mora*, and he *in damno vitando*; whereas Quarrel was *in lucro captando*, that he, having the sole going coal in that part of the country, might have all the sale, and none to compete with him to keep down the price to a reasonable rate.

ANSWERED,—The coal-level now in controversy is all in Quarrel's ground, and was wholly made and wrought by himself, at his own expense, and for his conveniency, whereof Kinnaird ought not to plead the benefit; for, *quilibet potest facere in suo in propriam utilitatem*, and for his own advantage, though it conse-