APPENDIX.

PART I.

COLLEGE OF JUSTICE.

1800. *February 25.*

The SOCIETY of SOLICITORS before the COURT of SESSION, &c. *against* The KEEPER, COMMISSIONERS, and SOCIETY of CLERKS to the SIGNET.

No. 1.
The Society of Clerks to the Signet cannot increase their fees for writs passing the Signet.

THE Society of Clerks (Writers) to the Signet, in 1796, passed a regulation, increasing their fees for various writs passing the Signet.

And, in the same year, they made another regulation, entitled, "For correcting abuses," enacting,

1*mo*, That the privilege of subscribing gratis letters passing the Signet, be confined to the four writers for the poor.

2*do*, That no warrant by one member to another to sign for him be effectual, unless it be countersigned by the depute or under keeper, who are directed to keep a register of warrants, and not to countersign a new warrant till the former be returned; with a written declaration, subscribed by the granter, that all the letters subjoined to the warrant were subscribed for his own account, and for the established fees.

3*tio*, That such warrants shall continue in force for four months, in place of three months as formerly.

4*to*, That each member shall subscribe a declaration upon honour, against subscribing letters not drawn by themselves, their clerks or apprentices, or counsel employed by them, or by another member of the Society, and subscribed in consequence of a warrant from him.

That no member shall communicate his profits to any person not a member of the Society, or for lower rates than those required by the regulations, except the writers for the poor.

They have not an exclusive privilege of signing or preparing bills of suspension or advocation; nor of libelling ordinary summonses, for the formal part of which only they are responsible; but they alone can sign privileged summonses, and are entitled either to pre-

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pare or to revise them, and receive the full fees when they are prepared by others.

They may prohibit their members from entering into any copartnership, by which the exclusive privileges of the Society may be extended to persons not belonging to it; but they cannot prevent their entering into copartnerships with regard to other matters.

5to, That the letters of members shall be stopped at the Signet by the keeper and his deputies, till they obey these regulations. That delinquents be punished to the full extent of the powers of the Society; and that the depute and under keeper shall print and distribute the names of clerks and apprentices.

In 1798, the agents incorporated by a Royal charter in 1795, under the title of the Society of Solicitors of the Court of Session, Court of Commission of Teinds, and High Court of Justiciary of Scotland, presented a summary petition and complaint against these regulations, in which, and the subsequent papers, besides an objection on the part of the Clerks to the Signet to the title of the Solicitors to complain, and to the summary mode in which the matter was brought before the Court; the most material points at issue came to be,

1mo, How far the Society of Clerks to the Signet, with concurrence of the Keeper and Commissioners, have power to raise their fees for writs passing the Signet?

2do, How far they have an exclusive right of preparing and signing bills of suspension and advocation?

3tio, How far they have similar powers in the framing of summonses?

On another question, Whether a Clerk to the Signet can enter into partnership with a member of the complainers' society, there was little dispute, as it came to be agreed, that the regulations meant to prevent copartnerships only to the effect of hindering a participation of the exclusive privileges of the Society?

In support of their right to increase their fees, the Society of Clerks to the Signet, and in name of the Keeper and Commissioners, gave the following statement:

The precise origin of the Society of Clerks to the Signet is unknown; but prior to the institution of the College of Justice, they were a separate and distinct body, possessing the exclusive privilege of preparing all writs passing the Signet, under the protection and controul of the Secretary of State, who had the charge of the King's seal.

By the acts establishing the College of Justice, (1537, C. 36., 1540, C. 93.,) they were acknowledged as pre-existing, and were authorised not only to sign, but to write and prepare every writ or letter which passed the Signet. They became a component part of the College, and were about this time, if not sooner, a corporation, with the Secretary of State at their head, who named Commissioners for managing the ordinary affairs of the Society.

The Corporation had the usual powers of making by-laws, which, from its connection with the Secretary of State's office, would have more than common authority.

The Secretary of State of the united kingdom for the home department, continued to name a keeper of the Signet till 1746; but since that time, the keeper has been named by a special commission from the Crown, which gives

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him the same powers which the secretary formerly possessed in that department; and he appoints a deputy and commissioners as formerly.

Prior to the institution of the College of Justice, the Society would fix, and the secretary would controul, the fees exigible by the Clerks to the Signet, from a due consideration of the interest of the Society and of the public; and which fees of course would be increased by them when they became inadequate to the circumstances of the times.

If Parliament had never interfered, it must have been admitted, that the same power would still have remained with them, under the direction of the keeper, and controul of the Court of Session.

Now, the several statutes passed with regard to these fees, were evidently introduced merely for the purpose of correcting temporary abuses, and were not meant to affect the inherent right of the Society to regulate their fees.

Thus, the act 1537, C. 60. "anent bills of complaint and King's letters," prohibited Clerks to the Signet from taking more than eight pennies for a bill, then twenty pennies for a letter upon a decree of the Lords, with deliverance on it, nor more for other letters than was usual in the last King's reign. From this it is evident, that there had been previous customary fees.

The fall of the value of money soon made this act go into desuetude, in so much that it was not even mentioned in the next regulation on the subject, introduced by the Secret Council in 1606, and ratified in Parliament by 1621, C. 19. which proceeds upon the narrative of exorbitant charges having been made, and raises the fees for common letters passing the Signet from twenty pennies to 10s. Scots.

The act 1672, C. 16. § 29. states, that the act 1621 had become "frustrate," from the change of times; and § 33. fixes the fees for summonses, and all other letters that pass the Signet, at "only" 18s. Scots for the first sheet, and 12s. for the remainder. The sum thus limited was much greater than the allowances by the former statute, which had been increased with the rate of other things, and were now restrained, only so far as judged unreasonable. The restriction, however, was not meant to be unalterable when a change of circumstances should require it.

By art. 27. regulations 1672, the fees of advocates were fixed; by art. 28. parties were ordained to declare, and advocates to swear to the observance of them; by art. 29. fees of clerks of Session; by 30. those of clerks to the Bills, and 33. those exigible by clerks to the Signet for other writs executed by them were limited.

But all these regulations were rescinded, by an unprinted act in 1681.

By their abolition, it must have been intended not to revive the older allowances, but to leave the Clerks to the Signet to regulate their own charges under the same controul as formerly.

The regulations 1695, (Act Sed.) which were framed by Commissioners named by the King, with consent of Parliament, art. 31. indeed declare the

No. 1. act 1672 to be in full force, unless in so far as there altered; but from this a repeal of the act 1681 is not to be presumed; and even if the act 1672 be held as then renewed, both it and the regulations 1695 themselves are now in desuetude.

The latter (art. 29.) fixed the *maximum* of advocates' fees; but this is now in desuetude. Indeed, except the fees of clerks of Session, which have remained the same since 1672, from their being considered as sufficiently remunerated by the multiplication of proceedings, the fees of all other officers of Court have been augmented since 1672, and many fees altogether new have since been introduced, by the express authority or acquiescence of this Court, which, as the Court cannot repeal existing statutes, must be considered as public declarations, that the statute is not now in force.

The Society, in 1727, presented a repesentation to the Court, craving their concurrence and recommendation to Parliament for an augmentation of their fes. Accordingly, in 1728, a table of fees was made up under direction of a committee of the Lords, and approved of by the Court, as the ground of an application to Parliament. A bill was introduced in 1729, but was lost by a single vote, it is believed because it was considered that the Society had, of themselves, power to regulate their fees. From this period, every member charged what he thought proper, as before the respective former regulations.

In 1751, the Society resolved to fix their fees nearly in terms of the table approved of by the Court in 1728.

In 1772, they raised their fees in some particulars, and in 1773 they did so in others; at last they framed the table of fees in 1796, which are objected to, not as in themselves unreasonable, but only as *ultra vires* of the Society, though it has been shown, that the Society have inherent powers of regulating their fees, which they have uniformly exercised.

Answered: The Signet was, from an early period, kept by the Secretary of State. The Clerks to the Signet were the persons appointed by him to attend to the style and form of writs passing the Signet. They were therefore the mere clerks in a public office, of his appointment, and under his direction, and the fees for business performed by them fell naturally to be regulated by public authority. Accordingly, this has always been considered to be the province of the Legislature, as appears from the acts mentioned by the defenders.

The act 1537, c. 60. fixed their fees in some respects, and declared that others should continue according to the custom of the preceding reign.

The acts 1606, 1627, and 1672, are repeated enactments to the same effect. The latter, in particular, was meant as a permanent regulation; was renewed by 1695, and is still in force: So the Clerks to the Signet themselves understood, when they, in 1727, applied to the Court of Session for their recommendation to parliament to authorise an increase of their fees.

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The bill is admitted to have been lost, and of the assertion that this proceeded from the idea that the Society possessed inherent powers of fixing their own fees, there is no evidence.

If this had been the case, it would have been followed by an immediate regulation of the Society. No attempt of the kind, however, was made till 1751; but this and subsequent regulations were illegal in themselves, and can be binding only in so far as they have been acquiesced in.

On the second point, the Clerks to the Signet

Pleaded: From the exclusive privilege of the Clerks to the Signet in preparing all writs which pass the Signet, they of course can alone prepare letters of suspension and advocation, and on the same principle the bills on which they are founded, which are the applications for warrants to issue Signet-letters of a particular form. The Clerks to the Signet alone prepare other bills, upon which letters pass the Signet. They are the only persons vested with legal responsibility for making such applications, upon the same principle that advocates alone prepare pleadings before the Court of Session.

The Clerks to the Signet were in possession of this privilege before the Society of Agents existed, and at a period when there was no other body to exercise it.

By act 1537, C. 59. the Clerks to the Signet were sworn to fidelity and secrecy; by C. 60. they were prohibited from charging above the rates there fixed, under penalty of deprivation; by C. 61. it is enacted, That Clerks to the Signet shall not enter the council-house for delivering bills; that the deliverance shall be written by the writer of the countil; that the Clerk to the Signet who writes the bill, shall mark it with his own hand, and that it be returned to him on paying four pennies to the writer of the deliverance; from all which it is evident, that the Clerks to the Signet had the exclusive privilege of presenting bills on which Signet-letters were to pass.

Bills of suspension and advocation originally contained a very short statement of the case; parties were heard on them *viva voce*; and written pleadings were prohibited by act of sederunt 2d June 1675. These bills were then mere writs of form, like the warrants of any other letter passing the Signet.

In 1594, the Secretary of State issued a table of injunctions to the Society; by § 5. of which, members were prohibited from writing any letters whereof the warrant was not prepared by themselves, under penalty of suspension or deprivation; and, 5th November 1595, Alexander Gardner was suspended till the 20th January then next for disobeying it.

By 1537, no separate charge was allowed for writting the *letter*, while eight pennies were allowed for writing the bill.

By 1621, no charge was fixed for the bill; but 13*s.* 4*d.* was allowed for the first, and 10*s.* for other sheets of letters of advocation and suspension. Again, by the statute 1672, separate charges on bills were prohibited; yet the Legislature could not mean that any part of the business should be performed *gratis*, and

No 1. consequently must have understood, that the whole must have been performed by the person who passed the letter.

The exclusive privilege claimed, is expressly recognised by Spottiswood's Form of Process, p. 68. 82. 85. 123; Bankt. Vol. 2. p. 494, § 4. New Form of Process, p. 23, and asserted by various resolutions of the Society; see Records, 1603, 1657, 1666, 1694, 1699, 1722, 1762, 1780, 1789.

A search has been made among the warrants at the Signet-office, and no bill of suspension or advocation has been discovered signed by any other person than a Clerk to the Signet; though some, between 1699 and 1756, remaining with the Clerk of the Bills, have been found not signed at all; a few not having the writer's name marked on them, and a solitary instance of one signed by an agent; but these are just so many irregularities in practice, which cannot deprive the Clerks to the Signet of the right which they have so long possessed, more particularly in the form of a summary complaint; 12th February 1773, Sinclair against Sutherland, No. 28. p. 10610.

Answered: Advocates formerly performed the part both of counsel and agent. The duty of the latter afterwards devolved on the advocates' clerks, and a separate set of men as agents were debarred the Court by the regulations 1672. This was founded on the personal disrepute of the persons then acting, and proceeded from no intention of giving the employment to the Clerks to the Signet, who indeed were expressly prohibited from acting as agents by the Secretary's injunction in 1594, and subsequent resolutions of the Society; 21st December 1676.

As business increased, however, the separate profession of an agent became necessary, and the complainers have been recognized by repeated acts of sederunt, 10th August 1754; 10th March 1772, and 13th February 1787, and are now incorporated by royal charter. They must of course have right to act in the Bill-Chamber, where, indeed, they, without dispute, prepare answers and replies to bills of suspension and advocation, and why not the bills themselves, which, when refused, have no connection with the Signet, and when passed, the fiat of the Lord Ordinary is a sufficient warrant for preparing the letters in terms of them?

By 1585, C. 13. Clerks to the Signet were declared responsible for informal letters passing the Signet, and on that account directed to put their names on those prepared by them; and by 1694, their exclusive privileges were limited to the preparation of writs which pass the Signet. They have therefore no exclusive privilege as to bills. Accordingly, immediately subsequent to the act, many bills of suspension and advocation have been discovered neither signed by a Clerk to the Signet, nor even marked by him.

All other bills presented at the Bill-Chamber, such as applications for hornings, captions, or the like, may be signed by the party, or any other person for him, yet bills of suspension or advocation are of inferior importance. It is not even essential that they should be narrated at length in the letters; for the

defender is not served with a full double, but receives a citation merely in terms of the will of the letters. No. 1.

When the business of the agent was conducted by advocates, they appear to have prepared bills of suspension and advocation; 1537, C. 61. 1585, C. 13. 1672, C. 16. act of sederunt, 27th July 1599; 29th January 1650, and 9th November 1680.

The prior by-laws of the Society asserting exclusive privileges with regard to them, never were enforced; and if those in 1796 are, the complainers will either be excluded from business altogether, or at least it will become necessary for parties to give a double employment, and make a disclosure of their affairs to a person not otherwise in their confidence.

On the third point,

The Solicitors made a distinction between privileged and ordinary summonses, and between the libel and formal part of the latter.

Privileged summonses, they stated, pass on a bill presented to the Court, upon which a *Fiat ut petitur* is granted by the Lord Ordinary. They are therefore not so properly summonses as Signet-letters granted on a bill, like letters of suspension or advocation. They further proceed on shorter inducie than ordinary summonses; and to prevent the range of them from being extended, a fixed form is prescribed for them. Many of them materially affect land-rights, and are the foundation of progresses, such as summonses of adjudication, ranking and sale, and reduction improbation. Others require dispatch, as summonses of *cessio*, aliment, transcript, and the like. The defender is not served with a full double, because the bill, when passed, forms part of the record of Court, to which the defender may afterwards have access; and because they are always of the same form, as to which the pursuer has no option. For all these reasons, the preparation of them naturally falls under the exclusive privilege of Clerks to the Signet.

Ordinary summonses again pass without a bill, on the usual inducie. They relate to matters of injury or wrong, of which the pursuer complains, and are as various in their statement as the circumstances of the case. The pursuer is alone responsible for this statement, which he may give in any form he chooses, provided it is done in decent and respectful language. In these, therefore, the Clerks to the Signet have no exclusive privilege in the preparation of the libel or statement of facts, for which they are not responsible, but are exclusively entitled to prepare the formal part of the summons, comprehending the names and designations of parties, and the will or warrant for citation. Accordingly, the old practice was for summonses to be signeted, and even executed without the libel being filled up, and the defender was not furnished with it till after his appearance in Court.

The act of sederunt, 30th November 1647, provided, that the principal summons should be filled up before an act of intimation was given out; and the act 1672 fixed the fees for summonses, according to their length, but de-

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For the same reason, the act of sederunt, 8th July 1691, which ordained other signeted letters to be signed at the joinings, specially excepted summonses.

In 1722, the Clerks to the Signet proposed to the Court, that the libelling of summonses should be exclusively given to them; but all that followed was an act of sederunt in 1723, fixing, that summonses must be libelled before being executed.

The regulations of the Clerks to the Signet in 1751, shew their own understanding to be against their present claim; for they fixed the fee for a summons given out not libelled, at 2s. 6d. but *when libelled by a clerk to the Signet*, whether passing on a bill or not, at 5s. for the first sheet, and 3s. for the rest; and in accounts of expenses, in causes conducted by agents, the fees of the Clerks to the Signet came to be stated at 2s. 6d. while the fees for libelling the summonses were avowedly claimed by the agent himself.

In 1758, the Clerks to the Signet indeed passed a regulation, assuming to themselves the right of libelling summonses; but it was not enforced.

The claim is likewise opposed by attending to the origin of summonses. The original writ was a precept from the King's Chancery, commanding the attendance of the defender, on matter to be then laid before him; and after he came into Court, a libel or declaration was exhibited to him, which he was allowed a second diet to answer.

Upon the institution of the Court in its present shape, these precepts were signed by the ordinary clerks of Court, and were of course left blank, as the clerks of Court were necessarily ignorant of the pleas of parties. This privilege was afterwards taken from the clerks of Court and given to the Clerks to the Signet, but on the same terms. Summonses in the Teind-Court are still signed by the clerks of Court, and in all inferior judicatures.

Answered: Though clerks to the Signet are not responsible for the truth of averments in summonses, they are for the mode of statement, and their exclusive privilege includes all summonses without distinction; Stair, B. 4. Tit. 3. § 32. Bankt. Vol. 2. p. 495. Ersk. B. 4. T. 3. New Form of Process, p. 23.

Indeed, this right is evident from the admissions and distinctions made by the Solicitors themselves. Privileged summonses are enumerated in Act Sed. 21st June 1672, and Clerks to the Signet are prohibited from presenting any other as such. If agents could have prepared any summonses, there would have been a similar prohibition against them; and the same inference may be drawn from the Act Sed. 18th February 1721.

Wakenings and transferences are among the number of privileged summonses. These are merely accessory summonses, and it would be singular, if the Clerks to the Signet had not the same exclusive right to prepare the principal summonses.

If clerks to the Signet only can prepare summonses of adjudication, where payment of a debt is asked in lands, they ought to be in the same situation when payment is asked in money. No. 1.

When the summonses usually privileged are executed against persons out of Scotland, or residing in Orkney or Shetland, the inducia cannot be shortened, and no bill is required. Yet the Solicitors have not pretended a right to prepare them in those cases.

Summonses of reduction-improbation are in no respect privileged, yet the Solicitors admit they cannot prepare them.

In short, the object of the Solicitors is to renew the practice of issuing blank summonses, which was not countenanced by the early regulations; Reg. Maj. B. 1. p. 7. Lib. 1. C. 6. 8. Act Secret Council 1606, ratified by 1621, C. 19. The blanks mentioned in the act 1672, are not of the description now contended for, but those left for names, descriptions of lands, or the like. Blank summonses were unknown in Lord Stair's time. They were at all times considered as irregular; Bankt. Vol. 2. p. 604. § 24. and are not admitted by the present practice, Ersk. B. 4. T. 1. § 5. according to which, every page is signed by a Clerk to the Signet, and it would be absurd for them to sign what they did not prepare.

It is true, that by Act Sed. 11th July 1672, summonses containing two diets were directed to be signed by the Clerk-Register, or in his absence, by one of his deputes, or the ordinary Clerks of Session. This, however, was an infringement of the privileges of the Clerks to the Signet, and was abolished by 1695, C. 40. Nor is there any evidence that the summonses so signed were left blank. The regulations of the Society against blank summonses, in 1758, therefore, merely enforced their former privilege.

The Court, (31st January 1799) on advising the petition and complaint, with answers and replies, found 'The respondents, Keeper, Commissioners, and 'Clerks to the Signet, though entitled to all the privileges of a corporation, 'have no power by their own authority to increase their legal or established 'fees; and therefore prohibit and discharge them, in time coming, from de-'manding, or taking from the complainers the additional fees attempted to be 'established by their act and regulation complained of, dated the 1st day of 'February 1796: Found the respondents have the exclusive right and privilege 'of preparing and signing all Signet letters; and of signing all summonses pas-'sing the Signet; but that they have no exclusive privilege to sign or prepare 'bills of advocation or suspension: Found, That as they are answerable for the 'form and style of libelled summonses passing the Signet, they are entitled 'either to prepare or revise them; but found that they have no right to pro-'hibit the members of their society from signing libelled summonses, which may 'have been written or drawn by others, upon such members' receiving the full 'fees by law exigible by them, and being satisfied that such summonses are 'properly framed: Found, That the respondents have a right to prohibit the

No. 1. 'members of their society from entering into partnerships with agents or others 'not of the society, for carrying on any branch of business falling under their 'exclusive privilege as writers to the Signet; but found, That the members of 'the society may lawfully enter into partnership with others, for carrying on 'any branches of business separate and distinct from their exclusive department 'as writers to the Signet; and, in so far prohibit and discharge the Keeper, 'Commissioners, and Clerks to the Signet, from enforcing or carrying into 'execution the regulations complained of, dated the 11th day of July 1796, and 'decern.'

Both parties reclaimed.

The Lords (2d July 1799) found, 'That bills of advocation and suspension 'may be signed by the practitioner, whether writer to the Signet or Agent, by 'whom the same are drawn or presented, but must also have marked on them 'the name of the writer to the Signet by whom the letters are to be afterward 'expede, that the same, if passed, may be delivered to him by the Clerk to the 'Bills: Found, That the Writers to the Signet have the exclusive privilege of 'libelling, or preferring privileged summonses which pass upon a bill, but have 'no exclusive privilege of libelling ordinary summonses which do not require 'to be passed upon a bill, and that they have no right to prohibit the members 'of their society from signing any such summons, although that part of it which 'is called the libel, may be written or drawn by others, upon receiving the full 'fees by law exigible for revising or framing the formal part of the summons, 'and authenticating the same by their signature; and with these explanations 'and alterations, adhere to their interlocutors reclaimed against.'

And, on advising a second petition for the Clerks to the Signet, with answers, the Lords 'adhered to the interlocutor reclaimed against, and refused the de-'sire of the petition, with the following explanation, 1*st*, That the name of the 'Writer to the Signet, who is to expede the letters on a past bill of advocation 'or suspension, is only to be marked on the bill when it is carried to the Signet-'office to have the letters expede; 2*do*, That the exclusive privilege of the 'Writers to the Signet, of libelling and preparing summonses, extends only to 'those summonses which cannot pass the Signet without a bill.

For the Complainer, *Hope, W. Baird. H. Erskine, Jo. Clerk.* Alt. *Lord-Advocate Dundas,* Clerk, *Sinclair.*

D. D. *Fac. Coll. No.* 167. *p.* 377.

*** This case was appealed: The HOUSE of LORDS (7th April 1802) ORDERED and ADJUDGED that the appeal be dismissed, and the interlocutors therein complained of be affirmed, with £100. costs.