No. 1.

tended that the two alternatives optional to the pursuer, must be considered as entirely equivalent to each other; therefore the pursuer could sustain no injury by receiving a shilling for every days absence agreeable to one of these alternatives, and if he had received double service instead of the other, there is no doubt but that he must have allowed the deduction for maintenance; consequently in the other alternative, as being of perfect equality with double service, he must likewise allow the deduction of maintenance, as decided by the Ordinary. At all events, as the pursuer had concluded in his libel for extravagant sums in name of damages, &c. which rendered it necessary for the defenders to appear in order to get them restricted, in which they had succeeded, it seemed inconsistent to find them liable in the expenses of process. The Court found, "That the defenders are not entitled to any deduction, on account of "maintenance, from the one shilling for each day's absence for the said Arch. "Buchanan from his master's service, as found due by the Ordinary's interlo-"cutor, and, with this variation, adhered to the Lord Ordinary's interlocutors "reclaimed against, and *quoad ultra* refused both petitions." &c. A petition for the defenders, reclaiming against this interlocutor, was refused without answers.

Lord Ordinary, *Justice-Clerk*. Act. *Cullen*. Alt. *Craig*.

D. C.

1807. *November* 27.

JOHN MACKAY, ALEXANDER MUNRO, and Others, *against* The JUSTICES OF PEACE in the County of Ross.

No. 3.

Apprentices to artificers in a town are liable in the performance of statute labour upon the high roads.

MACKAY, Munro, and others, were apprentices to masons, shoe-makers, and other artificers in the town of Tain, in the county of Ross. In the month of February 1802, their names were reported as defaulters in performance of the statute labour of the preceding year; and a quorum of the Justices gave the following deliverance, (10th Feb. 1802.) "Having considered the written cer-"tificate and report, we do hereby grant warrant to constables to poind, in "terms of law, the readiest goods and gear of the within named and designed "persons deficient in the statute labour, for payment of the sums annexed to "their respective names."

Of this threatened diligence the apprentices pursued a suspension, wherein the Lord Ordinary (Polkemmet) pronounced the following interlocutor, (21st May 1805.) "In respect that by our acts of Parliament the Justices have a dis-"cretionary power as to the description of parties to be called to perform sta-"tute work upon the roads, that no particular exemption is by the said act "given to apprentices, and that it has been customary with other neighbouring "counties, in similar circumstances as to roads with Ross-shire, for apprentices

No. 2. " to be called out to that work; therefore repels the reasons of suspension, " finds the letters orderly proceeded, and decerns."

The cause came by petition and answers before the Inner-house.

Argument for the suspenders.

The regulations which the Justices of this county may have been in the custom of observing, with regard to the imposition of the statute labour, must be disregarded, excepting in so far as they coincide with the acts of Parliament on the subject. Neither can the varying usage of neighbouring counties be of any authority in abrogating or modifying the public law. From the acts of Parliament alone, and the decisions of the Court, must the rule be derived. But the acts of Parliament introducing this public burden were not intended to apply to artificers and mechanics.

Among the improvements in public police, which James VI. transferred from England to Scotland, was the institution of Justices of Peace; and with this institution came the first rude attempts towards a plan for making and repairing the high-ways, by the general contribution of the labour of the district.

In the year 1609, Justices of Peace were introduced; and by act 1617, C. 8. a set of instructions were issued to the Justices for repairing all high-ways to market-towns and sea-ports. From the existence and powers of heritable Sheriffs, from there being no accurate definition of the persons who were to be liable in this public burden, and no direction as to the mode in which the power of the Justices was to be exercised, these acts were attended with little success; neither does it appear that this measure was at that time enforced in a systematic manner.

By act 1669, C. 38. a set of instructions, substantially the same with the former, was again issued; but it would appear with no better success.

For, in the act 1661, C. 16. the subjects of repairing the high-ways and bridges appears, for the first time, to have received the deliberate attention of the legislature; and this may be regarded as the leading statute on this important matter. The statute, in its preamble, proceeds on the inefficacy of the former orders and instructions; and, after describing the persons to whom the enforcing of this branch of police shall be committed, enacts,—" Which per- " sons, or any one of them, to whom the particular portions of the saids high- " ways shall be committed, are hereby authorised and strictly required, to " call and convene all *tenants*, and cottars, and *their servants*, within the " bounds," &c.

By this statute a precise description of persons is pointed out on whom this burden is imposed, viz. *Tenants, cottars, and their servants.* The act 1670, C. 9. neither extends nor limits this description, and its object is merely to enable the Justices to receive a pecuniary commutation from those who were liable by the previous act.

In interpreting these successive statutes, the more precise and accurate provisions of 1669, C. 16. must explain and modify the more vague and indefinite

terms of its predecessors; and it is clear that the *bona fide* apprentices of tradesmen cannot be included under *tenants, cottars, or their servants.* No. 3.

The only general statute on this subject is the 5th Geo. I. C. 30. by which the Justices are authorised to convene "*the tenants, cottars, and other labouring men,* within their respective bounds," &c. In fair and rational construction, however, the addition of "other labouring men," when considered with relation to what precedes these words, must be understood to apply only to that class of country labourers who, without being strictly the servants of tenants, are habitually employed in the same sort of labour. The phrase "labouring men," is no doubt not *nomen juris*, or susceptible of exact legal definition, but it never has been held to apply to that class to which the suspenders belong.

The decisions of the Court do not throw much light on the subject, for they relate chiefly to disputes for exemption with the inhabitants of royal burghs.

Thus, in the case of Hamilton against Inhabitants of Kirkcaldy, 24th July 1750, No. 5. p. 13159. the only question of importance was, Whether those who claimed exemptions were of characters that would exeem them if they lived in the country: and it was observed, that a country man could not be exeemed though he sold trifles, and called himself a merchant. Their plea was over-ruled.

In the case of the town of Perth, 1st February 1757, No. 10. p. 13166. the question was, whether householders were exeemed, and their plea was overruled likewise, but it was not pretended that those who were not householders were liable.

In a similar question with the town of Paisley (11th January 1758, Trustees of Glasgow Turnpike, No. 11. p. 13170.) the Court pronounced an interlocutor, finding the whole inhabitants of the town of Paisley liable, reserving to any class of them who should think themselves aggrieved to apply for redress. It was thus determined, that although the mere residence in a royal burgh afforded no positive exemption, yet these were descriptions of persons on whom the burden could not be imposed.

This decision does not, any more than the former, affect the suspenders. The term *inhabitants*, like that of *labouring men*, is not a *nomen juris* to which a technical meaning is affixed. It is clear, however, that under it all the inhabitants of every rank and sex were not included. It was obviously intended to apply only to householders. This limitation indeed is necessarily connected with the institution of statute labour. For although, in those public burdens which are meant to have a general operation over the whole kingdom, the circumstance of living within the realm is sufficient to infer liability, yet in those which are of a local nature, it is only as an occupant of real property that an individual can be subjected. But none of the suspenders are householders, nor of that description which the Court had in view in using the term inhabitants.

But, farther, their peculiar legal character as apprentices, exempts the suspenders from such a public burden as that of statute labour. During the period

No. 2. of their indenture apprentices cease to be *sui juris*, and their time and industry are the property of their master, without whose direction they cannot be disposed of. Neither are apprentices considered as possessing any property arising from the application of that time and industry, which could be seized as a commutation for any public burden. Even the great duty of public defence, not to mention the obligation of enlistment, is suspended by apprenticeship; *a fortiori*, the duties connected with a local police must be incompatible with that character.

From England the system was borrowed, and the practice of that country ought to have authority. By 13th Geo. III. C. 78. § 35. apprentices are exempted from statute labour.

Argument of the chargers.

To ascertain the doubtful import of a public statute, the general practice which has ensued on it, and the interpretation which the general consent of the people has attached to it, cannot be disregarded. On this the observance of all law depends; by this they are silently abrogated and mod fied. It is therefore important to state, that by the uniform and immemorial practice of the county of Ross, and of the neighbouring counties, persons in the class of the suspenders have been subjected.

That the Justices have a discre ionary power is clear from the statute 1617, C. 8. whereby " the Justices must give orders *as they shall think most convenient, and with least grief to the subjects* for mending," &c. and the statutes subsequently passed arose out of this, and must be taken in connection with it. The Stat. 1661, C. 38. confers the same powers; and under this, as well as the former, the Justices act under a high responsibility.

That the class of persons designated by the immediately subsequent statute 1669, C. 38. as the subjects of this tax, was not confined to that of those engaged in predial labour, is established both by the practice of counti s and the decisions of Court. An exemption in favour of the inhabitants of towns, and of manufacturers and artificers, is not contained in that or any other act. Accordingly, in the first case which occurred, (24th July 1750, No. 5. p. 13159.) weavers, masons, wrights, coopers, &c. in the town of Kirkcaldy, were found liable, and the same argument was maintained as in this case *.

A few years afterwards a resistance on the part of the inhabitants of the town of Perth to submit to this burden, met with the like fate.—1st Feb. 1757, No. 10. p. 13166.

* The report No. 5. p. 13159, is taken from D. Falconer. Kilkerran mentions the same case, without names, *voce* HIGHWAYS, p. 253. in the following words: " The Lord Ordinary on the " bills reported a bill of suspension, presented by certain Burghers, inhabitants of the Town of " Kirkcaldy, shop keepers, sailors, weavers, masons, wrights, coopers, smiths, &c. of the sentence " of the Justices of Peace, ordering them out to work at the highways, or to pay 1s. 6d. for each " days absence, and the Lords directed him to pass the bill as to sailors, who go upon foreign voy- " ages, or coastways, but not as to fishers, or those who ply in passage boats, and to refuse the bill " as to those and the whole other suspenders."

The same was decided in a question with the town of Paisley, 11th January 1758, Trustees of Glasgow Turnpike, No. 11. p. 13170. No. 2.

From this consistent train of decisions, it is beyond controversy settled, that these statutes are not restricted to persons employed in predial labour, but equally include the inhabitants of royal burghs, artificers and tradesmen, as well as householders, who may be called out at the discretion of the Justices.

With as little justice can an exemption on the ground of apprenticeship be demanded. The statute makes no exception of apprentices. In every contract the parties are understood to have been aware of the public law, and of its relation to the obligations which they respectively incurred. The public statute now under consideration had an existence previous to the indentures of the suspenders, and had inferred an obligation paramount to any which they could incur. The master with whom they contracted must be understood to have stipulated for their labour, under a deduction of what might be demanded by this or any other public law.

That the obligation of enlistment is suspended by apprenticeship depends on different principles, and has no relevant application to the present question. The principle of decision there is, that no man after having undertaken one obligation, can voluntarily enter into a second, by which the first may be destroyed or dissolved. On the same principle, a hired servant cannot dissolve his obligation of service by enlistment, 29th June 1742, Wright against Lumsdens, No. 5. p. 586; 19th January 1799, Clarke against Murchieson, No. 41. p. 9186. But a hired servant is undoubtedly liable to performance of statute labour.

The law of England differs from that of Scotland on this subject, and cannot afford any ground for analogical reasoning. By the act of Parliament quoted by the suspenders, both apprentices and servants are exempted, whereas in Scotland servants are notoriously liable. But these exemptions arise from special enactments. The argument of the chargers, therefore, that in the silence of enactment, exemption cannot be presumed, is strengthened.

The interlocutor of the Court was, "Adhere to the interlocutors reclaimed "against." See PUBLIC POLICE.

Lord Ordinary, *Polkemmet.* Act. *Tho. Thomson.* Alt. *David Monypenny.*
Agents, *Joseph Gordon*, W. S. and *Wm. Mackenzie*, W. S. *Walker*, Clerk.

J. W. *Fac. Coll. No.* 11. *p.* 33.