

poned defences *in causa* without founding on his privilege, which the pursuer contended was a tacit renunciation of the privilege, since *primus actus judicii, est judicis approbatorius*. For the LORDS seemed to be of opinion, That this was not of the nature of an ordinary declinature, or like the privilege of exemption from answering before inferior courts, that is competent to members of the College of Justice, that may be renounced expressly or tacitly.

Fol. Dic. v. 1. p. 572. Forbes, p. 403.

No 5.
and proponed
peremptory
defences
without
founding on
the privilege.

1712. June 25.

KENNEDY against CUMMING.

SIR ANDREW KENNEDY having, in April 1711, obtained Sir Alexander Cumming of Coulter's decret reversed, and himself reponed to his Conservator office by the House of Peers, and obtained their remit to the Lords to tax his expenses, he applied in June 1711, to have them modified, and gave in an account of L. 1800 Sterling. But it being *answered* that Sir Alexander was out of the kingdom, and not bound to answer till cited, the Lords ordained him to be summoned on 60 days, which put off the summer session, and brought it to the 1st of November, at which time Sir Andrew Kennedy renewing his claim of expenses, Sir Alexander founded on his privilege as a Member of Parliament; which being allowed by the Lords, though the English Parliament was not then set down, Sir Andrew protested of new for remeid of law, and finding it would be tedious to bring it in formally, he was advised by the English lawyers to table it by way of summary complaint; whereon he obtained a deliverance, ordering the Lords of Session forthwith to tax his expenses, and direct their payment. On this he now gives in a bill to the Lords, deducing all the steps aforesaid, and craving their modification of expenses after 14 months delay. THE LORDS found, by this last ordinance the Peers had laid aside his privilege of Parliament, and therefore appointed Sir Alexander Cumming summarily to answer; for if it should be delayed till November, he would of new again found upon his privilege; but the Peers seem to have waved it as not competent in this case.

Fol. Dic. v. 1. p. 572. Fountainball, v. 2. p. 743.

. Forbes reports this case ::

1712. June 26.—SIR ANDREW KENNEDY set forth, in a petition, an order and decree of the House of Peers, dated 19th April 1711, reversing the Lords' decret in favour of Sir Alexander Cumming, and ordering their Lordships to direct expenses in the suits mentioned in the said order, to be taxed according to the course of the Court; pursuant whereunto he had, by appointment of their Lordships, 21st July 1711, summoned Sir Alexander Cumming. THE LORDS, 9th November 1711, upon Sir Alexander's pleading his privilege of Par-

No 6.

A party had
obtained re-
versal in the
House of
Lords, of a
decree of the
Court of Ses-
sion, with a
remit to that
Court to tax
the expenses.
The other
party pleaded
privilege as a
Member of
Parliament.
Disallowed.

No 6.

liament, sustained his plea, notwithstanding he had waved his privilege, by answering before the House of Lords, and could not reassume it, especially against the execution of a sentence passed upon compearance. This occasioned the petitioner to protest for remeid of law ; but, upon better advice, he gave in a summary complaint to the House of Peers, as a more expeditious and less expensive way to obtain remedy, who thereupon directed a second order to the Lords of Session, That they should forthwith tax the said expenses, and direct the same to be paid to the petitioner, pursuant to the order and judgment above-mentioned. Therefore the petitioner prayed their Lordships to resume the consideration of the affair, and his account of expenses, and forthwith to proceed to determine therein, and order payment thereof.

Answered for Sir Alexander Cuming ; He conceived himself not bound to answer to the petitioner's claim, unless he were cited, and had the *inducia legales*, as the Lords found last year upon the same question ; nor can the former summons support the present petition, because the Lords have determined upon a point of privilege belonging to Sir Alexander, as a Member of the House of Commons ; and Sir Andrew having protested for remeid of law, the Lords are *functi*, and he is out of the field, until that protestation be regularly discussed. For the order now insisted on, viz forthwith to tax, is to be understood in civil and habile terms, that is summarily, without abiding the course of the roll, but never without a citation and libel, which is essentially and previously necessary to the obtaining of any decerniture whatsoever upon the most summary complaints, even against persons present, unless there were an action depending, in which the complaint is receivable by way of incident, which cannot in this case be said, seeing the former dependence in the principal cause is determined by a decree.

THE LORDS found, That Sir Alexander Cumming must answer to the petitioner's claim of expenses, without necessity of any further citation.

Forbes, p. 604.

1713. November 28. Colonel JOHN MIDDLETON and his LADY, Supplicants.

No 7.
The Lords allowed a creditor to raise, use, execute, and register inhibition, without arrestment, and also to execute adjudication, against a cautioner, though a Peer of Parliament;

UPON a bill given in by Colonel Middleton and his Lady, representing that the Viscount of Kilsyth stood bound to them as cautioner in the requisition of an heritable bond for 12,000 merks, granted by the Lairds of Neistoun, older and younger, and that the seven years, within which, by the act 5th Parl. 1695, diligence is to be done against the cautioner, were here expired ; and craving, that notwithstanding the Viscount's privilege, as one of the sixteen Scots Peers of Parliament, the Lords would either allow suitable diligence, at the petitioner's instance, to pass against the Viscount, in the terms of the statute aforesaid, or else declare that the seven years mentioned therein is to be computed *tempus utile*, subducing therefrom the time of the privilege.