

No 19.

ordained him to crave the Council, and the said Sir William pardon, for calling the said Sir William, his master, capricious, though many thought the character true.

1680. *February 3.*—IN the action Mr William Hog *contra* Sir William Ker, (27th February 1679,) it was debated whether a master upon his servant's malversations might summarily remove his servant from his office, and put him to complain and purge his innocence, and seek to be reponed; or if the master must first apply, and complain; and the case of an apprentice was instanced, where the master may turn him out of his service for faults. THE LORDS finding Mr William already dispossessed, and that the Privy Council had found some ground for it, they waved the reponing him, and allowed Sir William to condescend on malversations, and *medio tempore* ordained Mr Hog to stand as he is. Though we say *via facti spoliatus ante omnia est restituendus*.

Fountainhall, v. 1. p. 45, & 81.

1681. *December.*

DAVID DENHOLM *against* SIR WILLIAM BRUCE and WALTER RIDDELL.

No 20.

Where the Clerk of the Bills had admitted a minor as cautioner whose bond was reduced, the clerk was notwithstanding bound to produce the bond, because there might have been an attestation on the back of it.

DAVID DENHOLM, as executor to William Denholm his father, having given in a bill of complaint to the LORDS against Sir William Bruce and Walter Rid- del, his servant, craving, that they may be found liable to him for a debt, in in respect they had admitted an insufficient cautioner in a suspension, being a minor, who had obtained the bond reduced upon minority and lesion; as also, that the bond of caution was abstracted; *answered* for the clerks of the bills, That they could not be liable for admitting a cautioner that was minor, he being otherways sufficient, seeing they were not obliged to know his age; and they cannot be liable upon that ground, that the bond of cautionry is not produced, because it being reduced at the instance of the granter upon minority, it can be of no use to the pursuer. *Replied*, That the clerk of the bills ought to enquire as to the party's age that he receives cautioner, as well as to his sufficiency, and he ought much more to be liable if he admit a minor cautioner, than if he admit an insufficient cautioner; because, that a party is minor, it may ordinarily be known by seeing of him, at least, may give a ground to enquire as to his age, whereas a party's sufficiency cannot be so easily known; and seeing the clerk of the bills gets such a large allowance, he ought to be liable for a more diligent and strict enquiry anent the condition of any person he receives cautioner; and albeit this bond be reduced at the instance of the cautioner upon minority and lesion, so that it cannot be effectual against him, yet the clerk must must be liable, unless the bond be produced, because there might have been an attestation upon the bond by another person, who, upon that ground, might be liable for the debt; and it is very-presumeable, that the

bond of cautionry has been attested, or otherways the clerk would not have received such a cautioner; but whether the bond may be effectual or not, is not the question, but the clerk ought to produce it, that the pursuer may make what use of it he pleases, otherwise the clerk should be liable for the debt. THE LORDS ordained Walter Riddel to produce the principal bond of cautionry betwixt and a certain day, otherways found him liable for the debt.

No 20.

Fol. Dic. v. 2. p. 293. Sir P. Home, MS. v. 1. No 39.

1684. February 12. WEDDERBURN against OLIPHANT.

IN an action of declarator, pursued by John Wedderburn, Clerk of the Bills, against Mr Henry Oliphant, who had received from Mr William Bruce, formerly principal Clerk of the Bills, a commission for being depute in loosing of arrestments and caution in lawburrows during his life, wherein he craved, that it might be found and declared, That Sir William's gift, not bearing a power to substitute, he could grant no gift to Mr Henry Oliphant but during Sir William's incumbency;—and it being *alleged* for Mr Henry, That he having his gift for onerous causes from Sir William Bruce, Sir William could not prejudice him by his voluntary demission of the said office, in favours of Sir James Anstruther, by whose death his office is come to this clerk; *2do*, That albeit *regulariter, delegatus non potest delegare*, yet where there has been a custom otherwise it does not hold; and it was offered to be proved, that the Clerk of the Bills, from time to time, both before and since Sir William Bruce's time, has been in use constantly to grant gifts of this tenor. THE LORDS found the first defence relevant, viz. That Sir William Bruce having voluntarily demitted, by which demission the right of this office, as Clerk to the Bills, came to this clerk, that the demission could not prejudice Mr Henry Oliphant, but that he ought to brook the office during Sir William's life, and therefore assoilzied Mr Henry from the declarator.

No 21.

Found that by custom, the clerk of the bill might grant sub-commissions, tho' no power to delegate had been conferred on him.

Fol. Dic. v. 2. p. 292. P. Falconer, No 81. p. 55.

* * * Fountainhall reports this case :

1683. November 30.—MR HARY OLIPHANT, Clerk to the acts of lawburrows, and allowances of comprisings, being discharged to officiate by Mr John Wedderburn of Blackness, Clerk to the Bills, he gave in a bill to the Lords complaining of it: They referred it to my Lord Carse to hear them, who reported the debate, viz. That he was only a servant, and during pleasure, and so removeable; and that the principal clerk was accountable for all under him, and so should have the disposal of them, seeing their errors may endanger him.

Answered, He had a gift from Sir William Bruce, and ratified by Sir James