

put in the master, and pay his salary, may, by their inherent power, turn him out as an ordinary servant, without rendering a reason for so doing.

No 26.

*Answered* for the suspender, Whether he be the Town's servant or not, he is not in the case of an ordinary hired servant, that may be put away at pleasure; and his commission, not bearing the clause *durante beneplacito*, gives him right to the office *quamdiu se bene gesserit*, as was decided in the case of the Town of Edinburgh against Mr Andrew Massy. And it would be ruinous to the instruction of youth, to allow of an arbitrary chopping and changing of Schoolmasters.

THE LORDS found, That the chargers could not arbitrarily remove the suspender from his office, but for reasonable causes, and found, that either ignorance or insufficiency was a sufficient reasonable cause to deprive him, without necessity to condescend upon malversations.

*Forbes, p. 386.*

1716. July 10.

JULIAN and BEATRIX DEWARs *against* The CLERKS of the Bills.

THE deceased Sir James Cockburn having suspended a charge given him by the said Dewars, upon juratory caution, did find his son, Sir William, cautioner, and consigned a disposition in common form; which suspension being discussed by the chargers against Sir William, they obtained the letters orderly proceeded; and having applied to the clerks of the bills for the bond of cautionry, it was amissing; but Sir William, at the said clerks' request, renewed the same, which, together with Sir James's disposition, they offered to the chargers, which they refused, and gave in a complaint to the Lords, wherein they *contended*,

No 27.

Where a bond of juratory caution had been lost, and another substituted, the clerks of the bills were found no further liable than *subsidiarie* for any damage consequent on the omission.

*1mo*, That the clerks were immediately liable, and not *in subsidium* only, because they were, by their office, obliged to receive a bond of cautionry, which, how soon the suspension was discussed, the complainers had interest to claim; and, if the clerks neglect to take such a bond, or (which is the same thing,) pretend that it is lost, they are liable for the debt and damage, as was found, 17th November 1680, Ogilvie against Riddel, *voce* REPARATION.

*2do*, That they were not obliged to accept of a new bond of cautionry in place of the old; because, whatever was given in to the clerks, at passing of the suspension, the complainers had right, at discussing, to demand the same *specifice*; and the clerks could not otherwise free themselves of that obligation to them, than by delivering the same specific writs which they got, and they are liable for the informalities thereof; for, if they should take a bond of cautionry, without date or designation of witnesses, the party would not be obliged to take the bond, but the clerks would be liable.

*Answered* for the clerks, to the *first*, That, since the first institution of their office, there was never an extract required of a bond of cautionry taken in the way

No 27. of juratory caution, so constantly and universally have they been looked on as mere formality; nor are the clerks bound to regard either the present sufficiency of such cautioners, or their becoming such; wherefore, (though the mislaying of a bond of this kind may be reckoned an omission of the utmost exactness, for which, perhaps, no office in the nation, nor no man can be sufficient), yet it were highly unreasonable, for so small an omission, to decern them in payment of the sum.

To the *second answered*, That the second bond must, in all respects, have the same effect with the first, and from the same date; because it is a full proving of the tenor, in regard the date of the bond of cautionry is proved by the signet letters of suspension, and by the disposition granted by Sir James, consigned in the clerk's hands, all which three writs must necessarily be of the same date; and, as to the tenor, it is a common unalterable form; so that the second is the very same with the first, as to all intents and purposes.

"THE LORDS founds the clerks can be no further liable than *subsidiarie* for damages, and sustained the defence, that, at the time of granting the second bond, Sir William Cockburn was in no worse condition than at the time of granting the first."

Act. Colvill.

Alt. M. Lumsden.

Clerk, M<sup>r</sup> Kenzie.

Fol. Dic. v. 2. p. 293. Bruce, v. 2. No 14. p. 17.

1724. February 7.

Mr JAMES PHILP, and the Moderator of the Presbytery of Ellon, *against* The HERITORS of the Parish of Cruden.

No 28.

The minister and heritors of a parish have the right to appoint a schoolmaster, whom failing the presbytery.

THE Presbytery of Ellon having deposed Mr Keith schoolmaster at Cruden, they duly intimated their sentence; and after elapsing of year and day, and public intimations made to the Heritors and others concerned, to nominate and present a person qualified for that charge, they proceeded to the settlement of Mr Philp; who having insisted for his salaries, it was *objected* to him, That his title was void, he being admitted to that office by the Presbytery without the advice of the Heritors and Minister of the parish, which, by the act of Parliament 1696, was necessary in the appointing of a schoolmaster.

It was *answered* for the Presbytery, That the act 1696, ordaining a schoolmaster to be appointed in every parish, could not, in the event of the Heritors refusing or neglecting to present one, be more habily executed than by the Presbytery, since former acts of Parliament, particularly act 22d sess. 4. Parl. William and Mary, (1693) had given the power of trying, inspecting and censuring of schoolmasters; and wherever a presentation does take place, the nature of the thing requires, that those to whom the presentation is to be made should have the power of filling up the vacancy, if the patron refuse or neglect to do.