

No 41. of the bills, upon the act of sederunt, 27th December 1709, concluding for damages, for accepting of an insufficient cautioner.

Pleaded in defence ; As the clerk of the bills cannot be acquainted with all the cautioners who are offered to him from every corner of Scotland, his practice is to inquire at the agent for the charger, and to take no cautioner who is not approved of by him. And he constantly follows this rule, unless where a copy of the bill is taken out by the charger, in which case, he thinks himself safe to take any cautioner, who is habit and repute good for the money, if he be not put upon his guard, by a caveat lodged at the bill-chamber. The cautioner in this case, an industrious tradesman, was believed to be abundantly sufficient, especially as there was reason to suppose, that the suspenders themselves were able to pay the money, since no caveat had been lodged by the charger.

The clerk of the bills is not bound as a subsidiary cautioner ; he cannot be made liable, unless he has been guilty of such a malversation in his office, as may subject him in damages.

"THE LORDS sustained the defenee, and assizied."

Act. G. Buchan-Hepburn.

Alt. Macqueen.

G. F. Fol. Dic. v. 4. p. 197. Fac. Col. No 90. p. 341.

1769. June 29.

HASTIE against CAMPBELL.

No 42.
Schoolmaster
of a royal
burgh re-
moveable
summarily by
the council,
upon just
cause.

Mr JOHN HASTIE was admitted rector of the grammer-school of Campbelton, by the Magistrases and Council, upon an examination by the Presbytery ; and, beside the allowance given by the town, received a yearly salary modified by the Commissioners of Supply.

After he had been some years in the office, a memorial was presented to the Council by Patrick Campbell of Knap, burgess, residenter in Campbeltown, for himself and others, residenters in Campbeltown, complaining that Mr Hastie was irregular in his attendance upon the school ; that he was in the practice of correcting his scholars in a cruel and barbarous manner, to the danger of their health ; and praying the Magistrates to inquire into the matter, and give proper relief.

This memorial was served upon Mr Hastie, who gave in answers, but afterwards withdrew his compearance ; and a proof having been taken, the Magistrates found all the articles complained of proved, and deprived him of his office.

Mr Hastie brought a reduction, and, objecting to the evidence, as led *ex parte*, contended, That the procedure was irregular in various particulars.

imo, Town-councils of royal burghs are no more than administrators of the common concerns of the borough, but they are no court, and have no juris-

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diction ; so that Mr Hastie's appearing and giving in answers could not infer prorogation. Even the Magistrates had no jurisdiction in this matter. By act 1693, c. 22, School-masters are declared " liable to the trial, judgment, and censure of the presbyteries of the bounds, for their sufficiency, qualifications, and deportment in their office." And the school of Campbeltown was not a mere establishment by the borough ; it was a parochial school also.

2do. There was no proper libel in this case. The memorial presented to the Council cannot be considered as a libel ; no particular fact being stated in it, and no conclusion inferred, nor any thing laid which could amount to a relevancy.

3to. Members of the Council were received as witnesses, and afterwards acted as judges ; indeed, as the pursuers are not designed, even parties may have been admitted to give evidence.

4to. The proceedings were carried on without the instance or even the concourse of a procurator-fiscal, an indispensable requisite in every criminal case. There is no officer who acts in the character of procurator fiscal for a town-council ; which is an additional argument to shew that they were not competent to the question.

Answered ; The whole argument proceeds on the mistake of considering Mr Hastie as a person accused of a crime, and brought to trial in order to satisfy public justice. But, admitting that the town-council was not competent to take trial of crimes ; that the memorial was not conceived in the form of a criminal libel ; that the proceedings were not agreeable to the strict rules of criminal procedure, in which the concourse of a procurator fiscal is necessary ; these things can have no weight in the present case. The question here is, whether Mr Hastie, the public servant of the borough, is not subject to the just controul of the Magistrates and Council, by whom he was admitted ?

It has been found, indeed, that schoolmasters, and other public officers, cannot be removed arbitrarily ; but in no case has the Court interposed, to counteract the discretionary power of removal, when exercised upon just and proper grounds ; and, it appears from the decisions of the Court, that, in such cases, magistrates are not tied down to observe the niceties of criminal procedure, or even the strict rules of legal evidence.

These principles were established in the case of the Magistrates of Montrose, No 26. p. 13118. and in other cases, mentioned above. They have been followed, in later decisions, as 10th November 1747, Foulis *contra* Vestry of Blackfriars-Wynd Chapel, No 2. p. 6581 ; 27th July 1756, Harvie *contra* Bogle and Kirk-session of Glasgow, No 36. p. 13126.

The act of 1693 seems to be confined to schools in the country ; and if it be extended to those in boroughs, can go no farther than to vest a jurisdiction in the presbytery cumulative with that of the Magistrates and Council.

THE LORDS " repelled the objection to the competency of the Magistrates and Council."

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Thereafter, the Lords having considered the proof, repelled the reasons of reduction, and assailed the defenders. Upon a petition, they altered their interlocutor, and reposed the pursuer to his office. But this judgment was reversed in the House of Lords.

Act. *Grosbie.*Alt. *Ilay Campbell.*Reporter, *Pitsour.*

G. F.

Fol. Dic. v. 4. p. 196. Fac. Col. No. 97. p. 351.

WADDEL *against* INGLIS.

No 43.

FOUND, That the principal Clerk of the Bills has power to grant a deputation to continue during the life of the depute, and that he has no right to exercise the office by himself, independent of a depute.

*** This case is mentioned in another, dated 26th February 1771, Inglis *against* Anstruther, *vōce* WARRANDICE.

1771. July 18. WILLIAM TOSHACK *against* ALEXANDER SMART.

No 44.

In the election of a parochial schoolmaster, heritors, who by their title-deeds are liable in payment of cess and parish burdens, have a title to vote, whether their lands stand separately valued on the cess-roll or not. The liferenter has the right of voting in preference to the fiar.

IN the election of an assistant schoolmaster for the parish of St Cuthberts, two questions occurred as to the right of voting. The pursuer maintained, that all the heritors whatsoever, who were liable in payment of cess and parish burdens, had a right. The defender, on the other hand, maintained, that the right was competent only to such heritors as were separately valued on the cess-roll. The pursuer also maintained, that the liferenter, whilst the defender affirmed that the fiar, had the preferable right of voting.

THE LORD ORDINARY pronounced an interlocutor, finding, "That every heritor or proprietor of lands or houses in the parish of West Kirk, who, by his title-deeds, is liable in the payment of cess and parish burdens, has a title to vote in the election of a schoolmaster of said parish, whether such heritor's lands stand separately valued in the cess-roll or not; also finds, that in the case of liferenter and fiar, the liferenter has a right to vote, and not the fiar."

In a reclaiming petition, Smart, the defender, *pleaded*;

The present question fell to be decided by the terms and meaning of the act 1696, c. 26. for settling of schools. By the first clause of that statute, it was enacted, that a schoolmaster shall be appointed by the advice of the heritors and minister of the parish; thereafter it was declared, that the heritors should meet and modify a salary, and that they shall stent and lay on the same conform to every heritor's valued rent. By considering the context, the heritors, mentioned in the first and last clauses of the statute, must be individually the same; and as the act expressly provided that the salary was to be proportioned