

No 13. tarily into the navy. If every seaman could, by entering into an indenture at land, save himself from being impressed, there would be an end to the impress service. This point was deliberately determined on the 28th July 1778, Chalmers against Napier, No 11. p. 574. when it was fixed, that the only exception is in the case of a person bound apprentice to sea for three years, who has not formerly followed that employment; an exemption introduced by 13th Geo. II. c. 17.

The Court unanimously repelled the reasons of suspension, and recalled the interdiction.

Lord Reporter, *Swinton*.
Clerk, *Sinclair*.

For the Suspenders, *D. Williamson*.

Alt. *Maconochie*.

Fol. Dic. v. 3. p. 32. Fac. Col. No 67. p. 144.

Davidson.

1796. January 19.

CUNNINGHAM and SIMPSON, against SIR GEORGE HOME, Baronet, and the COMMISSIONERS for raising Seamen at the Port of Leith.

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A master found entitled to reclaim an apprentice not bred to the sea, who had entered a volunteer for the Navy, with the Commissioners appointed by 35th Geo. III. c. 9.; but found not entitled to reclaim another, who had been at sea before the commencement of his apprenticeship.

AN apprentice of Cunningham and Simpson, silver-platers in Edinburgh, who had not formerly been at sea, entered as a volunteer for the Navy, with the Commissioners at Leith, appointed by 35th Geo. III. c. 9. § 5. After he was approved of by Sir George Home, the regulating officer, in terms of § 3. of the statute, but before he was turned over to the service, as directed by § 13. his masters obtained a warrant for his imprisonment from the Magistrates of Edinburgh; but being afterwards liberated upon the application of the Commissioners, his masters brought a suspension against them and Sir George Home; who, in defence,

Pleaded, imo, The contract of apprenticeship, like every other obligation of service, falls under the general contract of location, which, unless where the contrary is enacted by special statute, as in leases of land by the law of Scotland, gives no real right in the subject, but merely a personal action for implement, or for damages on failure; *Voet. loc. Cond. § 15. Stair, b. 1. tit. 15. § 4. b. 4. tit. 35. § 8.* Accordingly, an apprentice remains *sui juris* as much as any other servant. He may contract debt, or commit damage, and be imprisoned for it, and thus disable himself from fulfilling his obligation of service; or if he engage with a second master, his former one cannot reclaim him; nor will it make any difference that possession has followed on the first contract; for a partial implement of a contract of service creates no preference for what remains to be performed; the master, like the creditor in a daily pension, from receiving what has become due one day, has no better right to what is to become due the next, than if the obligation was then only to commence.

If this holds in a competition between two private masters, still less can the suspenders prevail against the Crown. An enrolment stamps a character, which is

indelible till a discharge be obtained. Specific implement can be enforced by military law; whereas a private master has no higher powers of coercion than an ordinary *pater familias*.—The utmost he can do is to imprison his apprentice, who, as soon as he is liberated, may be seized by the officers of the Crown; nor, from the personal nature of a contract of service, could courts of justice legally grant an interdict against their doing so; and therefore an obligation to serve the public, necessarily puts an end to a private indenture.

Besides, service in war, when the public safety requires it, is a duty incumbent on every member of the state, resulting from the political union, and paramount to all others. This duty, which it is the prerogative of the Crown to enforce, applies to landmen as well as to seamen; the latter are frequently impressed, and no contract of service exempts them from being so. The necessity of impressing landmen is only superseded by voluntary enlistment, and the obligation thereby contracted should therefore be equally supreme.

Accordingly, in various statutes it is evidently implied, that, at common law, apprentices may be impressed, or enter voluntarily into the public service; 2d and 3d Ann, c. 6. § 15.; 4th Ann, c. 19. § 17.; 12th Ann, § 13.; 13th Geo. II. c. 17. § 2.

2do, The statute, under which the chargers act, declares, § 31. That ‘no person who shall be enrolled in his Majesty’s service, by virtue of this act, shall be liable to be taken out of his Majesty’s service, by any process whatever, other than by some criminal process, for some criminal matter, punishable by the known laws of the land.’ The present, however, is not a criminal process; and as the act was passed on an emergency, and laid an embargo on the whole shipping of the country, till the number of men required by it was obtained, it was thought necessary that no previous civil obligation should be a bar to enrolment. Accordingly, in the county act, which was passed about the same time, where, from its giving an alternative of furnishing a specific number of men, or paying an equivalent in money, there was not the same necessity for dispatch, articulated clerks and apprentices are expressly excepted, provided they are claimed before any part of their bounty is advanced to them, or they are turned over to the service; which shews it to have been the understanding of the Legislature, that an express exception was necessary, where apprentices were not meant to be included; 35th Geo. III. c. 29. § 22.

Answered, 1mo, An apprentice is the bondman of his master, who is entitled to enforce specific performance. Indeed, this is the case in all obligations *ad factum præstandum*; the creditor is not obliged to accept of damages, nor even of the penalty stipulated in lieu of it; 27th December 1695, Beattie against Lambie, (Fount. v. I. p. 693. *voce* PENALTY.); 11th August 1753, Broomfield against Young, (Fac. Col. No 89. p. 134. *voce* OBLIGATION.)

When an apprentice deserts his service, his master may reclaim him, as formerly he might have done a collier, or a falter; 1606. c. 11. 1661. c. 56.; and in a competition between two masters, the rule is, *prior tempore potior jure*, parti-

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cularly when the first contract has been followed by possession ; and it can make no difference that the second master is the Sovereign, because, in supplying the Army and Navy, he is bound by the ordinary rules of common law. He is indeed entitled to press persons bred to the sea ; and it is a different question, how far a person liable to be impressed can acquire an exemption by entering into a posterior obligation of service with a subject. But, except in the case of invasion, or formidable insurrection, when every person becomes liable to military service, landmen enter into it only in consequence of their own consent, and therefore they must be under no previous obligation which prevents them from adhibiting it. The necessity of the times might perhaps justify a statute altering the common law, but can be no reason for an extension of prerogative, the limits of which are fixed, and which give the King as little right to take the apprentices as the money of his subjects.

Accordingly, it has hitherto been universally understood, that apprentices cannot, against the will of their masters, enter either into the Army or Navy, 29th June 1742, Wright, No 5. p. 586. ; and it is easy to see how detrimental the opposite doctrine would be to the interests both of masters and apprentices, and consequently to the manufactures of the country. The statutes quoted by the chargers, all relate to exemptions in favour of persons otherwise liable to be impressed, except the 12th Ann, which respects the case where the apprentice is not reclaimed by his master.

2do, If the statute in question had been intended to make so important an alteration on the common law, it would have contained an express enactment for the purpose. But the section appealed to by the chargers, so far from doing so, relates only to persons who are legally enrolled. Its object was to obtain a number of volunteers for the Navy ; it could not therefore mean, that persons, whose enrolment had been brought about by force or fraud, might be detained in the service ; and for the same reason it cannot apply to apprentices, who are not *sui juris*, and who, when opposed by their masters, are incapable of consent. According to the opposite doctrine, even deserters from the Army might be enrolled ; and although the 16th section prohibits persons who are not able bodied, and who are above or below a certain age, from being enrolled, even such persons, if once entered, might be kept in the service.

The clause of the county act is merely declaratory of the common law ; it also declares, that deserters, or persons already in the service, shall not be entered under it ; yet surely it will not be maintained, that without an express prohibition, such persons might have been enrolled.

The Lord Ordinary on the bills reported the cause on memorials, after which a hearing in presence took place.

When the cause came to be advised, the Judges present were equally divided in their sentiments. The grounds of the opposite opinions are stated in the argument for the parties. They were founded on common law, as well as on the statute.

APPRENTICE.

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From the Lord President having no vote, the bill was, (28th May 1796) refused. But upon advising a reclaiming petition with answers, ' the bill was passed,' by a casting vote. No 13.

Lord Ordinary, *Dregborn.*

For the Suspenders, *H. Erskine, Tait.*

For the Chargers, *Solicitor-General Blair, Maconochie.*

Davidson.

Fac. Col. No 196. p. 471.

* * * The Lords were unanimous in refusing a bill of suspension for the same parties, where the person enrolled had been bred to the fea, before becoming their apprentice.