

No. 2. ed for, which was not the case in the present.—The Court upon advising this petition with answers, adhered to the Ordinary's interlocutor, and allowed expense of extract.

Lord Ordinary, *Monboddo*.

Act. *M'Laurin*.

Alt. *J. Campbell*.

D. C.

1805. *March 1.*

MACDONELL *against* DIXON.

No. 3.

A servant under a previous contract of service, cannot enlist as a soldier.

MAJOR JAMES MACDONELL of the 78th regiment, in the month of August 1804, inlisted Patrick Devayne and William Kelly. Devayne was under articles of agreement to serve as a workman in the Dunbarton Glassworks, for the space of eighteen years, with a breach in his favour at the end of nine years. Kelly's engagement was, until he gave a month's premonition of his intention to leave the works.

John Dixon, the manager of the Dunbarton Glassworks, presented a petition to the Sheriff, praying, that Devayne and Kelly should be incarcerated, until they found caution to return and fulfil their respective services.

The Sheriff (20th August 1804) decerned in terms of Mr. Dixon's application.

Major Macdonell, on the other hand, applied to the Justices of Peace, complaining, that the men had been prevented from being attested and joining the regiment by the interference of Mr. Dixon; and praying for an order upon them to join the regiment.

The Justices, (3d September 1804,) 'In respect of the articles of agreement with Patrick Devayne, &c. adjudge and prefer the said Mr. Dixon to the service of the said persons, during the respective periods still unexpired, of their several indentures and agreements; adjudge and prefer the said Mr. Dixon, to the service of the said William Kelly, until he gives a month's premonition, according to the verbal agreement subsisting between them, as stated by himself in his declaration; and prohibits and discharges the complainer, Major Macdonell, from troubling or molesting the said Mr. Dixon, or any one of the said defenders accordingly; but without prejudice to him to claim them thereafter, if he shall be so advised; and decern.'

Against this judgment a bill of advocation was presented by Major Macdonell, and the case reported by the Lord Ordinary.

The advocator

Pleaded: A contract between a master and servant is a species of location, by which the service of the one is exchanged for the wages of the other. If the master is deprived of the services of the servant, by the interference of another, has he any power over his person to compel him to serve him? Do-

mestic slavery is now abolished. The contract of location gives merely a personal action for implement, or for damages on failure; Voet, B. 19. Tit. 2. § 15; Stair, B. 1. Tit. 15. § 4; Pothier, Vol. 2. p. 217. A person failing to perform what he has undertaken, cannot be obliged to find security *ad factum præstandum*; the only remedy is an action of damages, or *ad id quod interest*; according to the maxim, *Loco facti non præstibilis, vel non præstiti, succedit damnum et interesse*; Ersk. B. 3. Tit. 3. § 86. For the contract is altogether personal, conferring no real right; the claim, therefore, in consequence of non-performance, cannot extend beyond a personal claim. If a servant be unwilling to work, who can compel him? or how can he be obliged to remain in his master's service, if he be unwilling to do so? This is also the law of England; Bacon's Abr. vol. 4. p. 593; as well as formerly the law of France; Pothier, vol. 2. p. 254.

If workmen were entitled to bind themselves for any term of years, so as to give their masters a real right over their persons and services, which could not be compensated by a claim of damages, the army might be defrauded of those means of recruiting, which have hitherto supplied it, and which, in a time of public calamity, might be extremely prejudicial to the welfare of the State.

Answered: The Crown has no prerogative with regard to military service by land; so that an individual under a contract of service to a private person, cannot set himself free from his engagement by enlisting as a soldier. The nature of the royal prerogative gives the King a preference in claiming the service of an individual in the exercise of his ordinary department of business; but he has no farther preference. No person can be compelled to leave his ordinary trade, and pursue another for the King's behoof. If he engages to serve the King, it is just the same as if he had engaged himself to a private individual; so that, if he had come under a prior lawful contract, which disabled him from such service, the law will not allow him to commit a crime by deserting his prior engagements. Nor is the King vested with any special privilege of authorising individuals to violate their private engagements, for the sake of engaging in the military service by land; Clerk against Murchison, 19th January 1799, No. 41. p. 9186. Neither is there any thing unlawful in the length of the contract of service, which will validate the subsequent enlistment, without a regular reduction of the contract; Ersk. B. 1. Tit. 7. § 62; Blackst. B. 1. C. 14.

The majority of the Court held, that as this was merely a question between two masters, the validity of the contract could not be taken into consideration, till a proper action for trying such a point was brought; that in the mean time, while that contract stood unreduced, the servant was not at liberty to engage himself voluntarily with any other master, and that Devayne accordingly should be liberated, on finding caution to return to his service. But with regard to

No. 3: Kelly, the Court held, that the enlistment was a sufficient premonition to the master of his intention to leave him. So far as regarded him, accordingly, the bill was passed, but refused as to Devayne.

Lord Ordinary, <i>Cullen</i> .	Act. <i>H. Erskine, Forbes.</i>	Agent, <i>Coll Macdonald, W. S.</i>
Alt. Solicitor-General <i>Blair, Cathcart, Forsyth.</i>		Agent, <i>Wm. Callender.</i>
Clerk, <i>Colquhoun.</i>		

F.

Fac. Coll. No. 202. p. 449.

1806. May 28. THOMPSON *against* MILLIE.

No. 4.

Wages are due to a seaman during the period of the vessel's detention by an embargo in a foreign port.

ROBERT THOMPSON was hired to perform a voyage to Russia and back again, on board the *Resolution*, belonging to David Millie, manufacturer in Pathhead, at a certain rate *per* month. The ship having finished the voyage out, was lying in the harbour of Petersburg, when the Emperor Paul, taking umbrage at an alleged delay of Great Britain in the execution of a treaty, published a proclamation, (7th November 1800) which declares, that "his Imperial Majesty being determined to defend his rights, has been pleased to command, that an embargo shall be laid on all English ships in the ports of his empire, till the above-mentioned convention shall be fulfilled."

The sailors were marched into the interior of the country, under a Russian guard, and there detained prisoners. Commissioners were appointed for disposing of the British effects which had been sequestered, and for receiving the balances of all accounts.

A hostile confederacy was formed between Russia, Sweden, and Denmark, which was dissolved by the battle of Copenhagen, on 2d April 1801, and the death of the Emperor Paul. In the month of May, the British seamen were marched back to the coast, and, along with their vessel and cargoes, were liberated; but no indemnification was made by the Russian Government, either to the proprietors of the ships, for the loss they had sustained on account of the detention of their ships and cargoes, nor to the sailors, on account of their captivity.

Millie refused to pay the wages for the time during which the vessel had been detained, as during that time Thompson had not been on board the ship, nor employed in his service.

Thompson, therefore, brought an action against him before the Judge-Admiral, concluding for "the sum of £31. 13s. 4d. of wages, for the pursuer's service on board the said ship *Resolution*, from the 8th of November 1800 to the 30th May 1801."

The Judge-Admiral (8th June 1804) decerned against the defender.