

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.

his duty. It was further *pleaded*, That if this power was denied the Presbytery, there was reason to fear that few schoolmasters would be settled in the northern parts of the country.

No 28.

*Replied* for the Heritors, That as an act of Parliament was necessary to establish a *jus devolutum* in the Presbytery in the case of settling a minister, so had there been any such thing intended with respect to a schoolmaster, no doubt the legislature would have taken an opportunity to have expressed it: And as to the inconvenience which might arise from denying such a power to the Presbytery, it was not so great as to allow them to transfer to themselves the right which was competent to the Heritors; for, by application to the judicatories which have the execution of the laws in their hands, they would get the Heritors decerned to provide a schoolmaster in a competent time; and, if they failed, letters of horning would be directed against them for that effect.

“ THE LORDS found, that by the act of Parliament 1696, ordaining a schoolmaster to be settled in every parish with advice of the heritors and minister thereof, the nomination and presentation of the schoolmaster belongs to the Heritors and minister of the parish; but found, that if the Heritors and minister refuse to present, after due certioration by intimation from the pulpit for that effect, that then the Presbytery may proceed and settle the schoolmaster.’

Reporter, *Lord Pancaitland*. Act. *Jo. Dundas*. Alt. *Ja. Graham, sen.* Clerk, *Hall*.  
*Fol. Dic. v. 4. p. 195. Edgar, p. 25.*

1728. July 5. LORD LYON *against* ERSKINE.

No 29.

FOUND that the Lord Lyon has a power of naming his clerks during their lives. See APPENDIX.

*Fol. Dic. v. 2. p. 291.*

\* \* \* In whom the power of presenting the session clerk and precentor lies, see 4th December 1739, Kirk Session of Linlithgow against the Magistrates, No 48. p. 2304., *voce* CLAUSE. See No 33, *infra*.

1735. July 4. HOME of Slatehouse *against* M'KENZIE and JUSTICE.

No 30.

THE Clerks of Session are liable for writs amissing out of their respective offices, without necessity to prove fraud or negligence against them: For the clerks who have the custody of writs ought to exoner themselves of their trust, by proving the *casus fatalis*. See APPENDIX.

*Fol. Dic. v. 2. p. 293.*