No 42. Thereafter, the Lords having considered the proof, repelled the reasons of reduction, and assoilzied the defenders. Upon a petition, they altered their interlocutor, and reponed the pursuer to his office. But this judgment was reversed in the House of Lords.

Act. *Crosbie.* Alt. *Ilay Campbell.* Reporter, *Pitfour.*

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, *voce* 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 setling 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

conform to the valued rent, which could not be known or ascertained but from being rated in the cess-books, it was obvious, that by the term heritors, throughout the whole of the statute, was meant those only who were so rated. No. 44.

This construction was sanctioned, by considering that, according to the statute, the heritor, standing valued in the cess-books, was the only person who could be assessed, or from whom the schoolmaster could demand payment of his salary. If alienations had been made, or sub-infeudations granted, an application might be made to have the *cumalo* valuation divided by the Commissioners of Supply; but till this was done, the schoolmaster looked only to the cess-roll. It was in strict conformity also to just principles, that those who bore the burden should enjoy the privilege of election; nor could the purchaser complain of being refused a vote, as he had it in his power to apply for a division whenever he thought proper.

By several other statutes, independent of the act 1696, a valued rent was supposed and required as a necessary qualification in heritors to enable them to vote in parochial questions. Such was the enactment of the statute 1707, c. 9. by which it was declared, that the disjoining of parishes, and erecting of new kirks, should always be with the consent of the heritors, of three parts of four at least of the valuation of the parish.

The pursuer *answered*;

In the ordinary acceptation and language of the law, an heritor was defined to be one who had heritage in the parish; it did not signify whether this heritage was great or small; he was still an heritor in the terms and sense of the statute, and entitled to vote accordingly. This right was indeed founded on the obvious principle, that whoever had an interest in a parish had a right to vote in all matters relative thereto; and as this was an inherent right in every heritor previous to passing the statute founded on, he was not to be deprived of it by words of doubtful meaning, nor were ambiguous expressions to be construed to his prejudice.

Previous to the statute 1696, several enactments had been made relative to the settlement of schools. By act of Privy Council, 10th December 1606, the *parochinaris* were the persons mentioned as interested. By statute 1633, c. 5. the consent of the heritors, and most part of the parishioners, was mentioned as requisite. By the statute 1646, c. 17. heritors were specified, and the same term was repeated in the 1696. None of these statutes could be construed as depriving the heritor of his natural inherent right; nor was it any more qualified by or made to depend upon the circumstance of valued rent in the last enactment than in any of the former, when no such thing as valued rent existed.

The word heritors, in the act 1696, was used in the same sense in the statute 1690, c. 23. for removing the grievance of patronage. The term valued rent there also occurred, as ascertaining the proportion each heritor should pay for

No 44. the right of patronage. Under this act, accordingly, feuars and other heritors had at all times been admitted to vote in the calling and choosing of their ministers, whether they had separate valuations or not; and though the objection of not being valued in the cess-books had been frequently stated, it never had been allowed by the ecclesiastical courts.

The proposition, that those only who paid the salary should have a vote in the election, was not authorised by the statute, which gave the right generally to the heritors without distinction. Still less was there any ground to maintain, that being entered in the cess rolls was a necessary qualification. All that was provided was, that an heritor, before he could be subjected to payment of schoolmaster's salary, should have a valued rent; but if this valued rent appeared from his title deeds or otherwise, and if the statute did not expressly enact that it should appear from the cess-rolls only, declaring also the right of voting to depend on that alone, no reason could be assigned why the heritor should be deprived of a natural and acknowledged privilege.

Upon the second question, as to the fiar and liferenter, Smart, the defender, *pleaded*;

The fiar was truly the heritable proprietor or heritor, and was acknowledged as such by the statute. Had the statute meant that liferenters should have the right of voting, it would in explicit terms have conferred it, when it imposed upon them the burden of the salary; but as, instead of doing so, it styled the fiar the heritor, in contradistinction to the liferenter; and as it was the heritor alone who was authorised to elect, it of course followed that the liferenter could have no vote.

The pursuer *answered*;

As the liferenter was burdened with payment of the salary, it was most reasonable that he should enjoy the privilege of voting in the election. This was confirmed by universal practice, the liferenter being in this as in every other case, to all intents and purposes the heritor while he lived.

At giving judgment, July 18. 1771, several of the Judges were of opinion, that an heritor, who had a valued rent, was entitled to vote, whether he paid cess or not. The majority, however, thought it was best to adhere *simpliciter* to the Lord Ordinary's interlocutor.

Lord Ordinary, *Monboddo*. For Toshack, *A. Belscher*. For Smart, *Maclaurin*.
Clerk, *Gibson*.

R. H. *Fac. Col. No 96. p. 286.*

KEMPT *against* MAGISTRATES of IRVINE.

No 45.

THE LORDS found, that where a person, in consequence of advertisement in the newspapers, had offered himself as candidate for the office of teacher of the