

No 4. "THE LORDS found the beadies entitled to the dues claimed by them."

Act. *Lockhart et Henry Dundas.* Alt. *Montgomery et Rolland.* Reporter, *Kames.*  
A. R. Fol. Dic. v. 3. p. 372. Fac. Col. No 19. p. 37.

1773. November 17.

Sir JOHN NISBET of Dean, Bart. and Others, Heritors of the parish of St Cuthbert's, or Westkirk, against The KIRK SESSION of the said Parish.

No 5.

Heritors cannot vote in the election of a precentor and session-clerk. The sole right is in the kirk session.

THE question here at issue was, whether the kirk session have, by themselves, the exclusive right of electing the session clerk and precentor, or are they obliged to allow the heritors of the parish to have a joint voice in the choice of a person to fill these offices? This point was brought to trial in a suspension, at the Heritors' instance, of a resolution of the kirk session, to make choice of a person for these offices by themselves.

*Pleaded* for the Heritors, in the *first* place, That as the perquisites of the office arose from the Heritors, or their tenants, so, by the common law of Scotland, they fell to have a joint voice in the choice of the incumbent. *2do*, That the declaration of the act 1696, cap. 26, that the salary thereby appointed shall be by and attour the casualties which formerly belonged to the reader and clerks of the kirk session, seem clearly to shew, that the parochial schoolmaster was understood to be, *ex officio*, the reader and clerk to the kirk-session; and, accordingly it is so laid down by Lord Bankton, B. 1. T. 6. Par. 17. who cites a decision, Edgar, 7th Feb. 1724, Philp, *voce* PUBLIC OFFICER. It is clear, from these authorities, and particularly from the act 1696, that the heritors are entitled to a voice in the choice of a schoolmaster; and it is also clear, that the schoolmaster is entitled not only to the legal salary appointed by the act, but to the ordinary emoluments of the reader and session clerk. Can it therefore be supposed, that the kirk Session have a right to appoint a session clerk, to act separately from the schoolmaster, without any emoluments. This would be a very singular constitution; and, it is believed, has as little countenance from practice as from the statute. Whatever may be the case in burghs, it will be found, that, in the landward parishes, there is not any such thing as a session-clerk and schoolmaster being different officers.

*Answered* for the Kirk Session; Precentor and session-clerk was an ecclesiastical officer, and, as such, fell to be chosen by the church-judicatory, the kirk session; and the point has been always determined for the session; Magistrates of Elgin against Kirk Session, 4th Dec. 1740, *voce* PUBLIC OFFICER; and in the still later case between the Magistrates of Dundee and Carmichael, minister of Dundee, and the Kirk Session there, 19th November 1761.\* *2do*, That the act 1696 related only to the perquisites of the office, which had no concern with the election, and could only regulate those parishes where the offices of

\* Examine General List of Names.

schoolmaster, precentor, and session clerk, were united in one person. Both before and since the act, the offices of schoolmaster, session-clerk, and precentor, often were united in one person, and not without reason, as the dues of all the offices in many parishes are so inconsiderable as not to afford more than a sufficient maintenance for one person; but in many parishes where that is not the case, all these offices have been distinct; and it never was, nor could be the meaning of the Legislature, to enact, that in every case, they should be accumulated in one person. The act 1696 provides, the parochial schoolmaster shall have 200 merks of salary; and it was foreseen that the parochial schoolmaster would often be chosen session-clerk and precentor. The above clause respecting the salary was inserted to secure the schoolmaster in his 200 merks, over and above the dues he would be entitled to as precentor and session-clerk, and to prevent the imputation of these dues in payment of his salary as schoolmaster. But it was not, and could not be the meaning of the Legislature, by that act, to deprive all the session-clerks and precentors, then existing, of their offices, and vest them in the parochial schoolmasters, to be chosen in consequence of this act, or to enact, that, in all time coming, in every parish, whatever the circumstances might be, the schoolmaster should at the same time be precentor and session-clerk. And, *3tio*, As their minutes, appointing an election, related only to a session-clerk, the heritors had no right to interfere.

THE LORD ORDINARY 'repelled the reasons of suspension, reserving to all ' concerned a right to the perquisites of the office, as accords.'

And, upon advising a reclaiming petition from the Heritors, which likewise prayed to be allowed to repeat, in this process, a declarator of their right, and answers thereto, the COURT 'adhered to the ORDINARY'S interlocutor, and refused the petition.'

Act. *Ilay Campbell, Alex. Murray.* Alt. *M'Laurin.* Clerk, *Ross.*

*Fol. Dic. v. 3. p. 373. Fac. Col. No 91. p. 228.*

1779. *January 13.*

JOHN ANDERSON *against* the KIRK SESSION of Kirkwall and JOHN REDFORD:

JOHN ANDERSON was appointed by the kirk session of Kirkwall their clerk and precentor, in place of John Redford, who had removed to another part of the country. Redford having soon after returned, the kirk session dismissed Anderson from the offices of clerk and precentor, and reinstated Redford. Anderson brought a reduction of Redford's appointment, and declarator of his own right to hold both offices, in which he called the Kirk Session and Redford.

*Pleaded* for the pursuer; A person holding a public office is presumed to hold it *ad vitam aut culpam*, if there is nothing in his commission to the contrary, and usage has not established a different rule. On this ground, it has been

No 6

Precentor and session-clerk removeable at the pleasure of the kirk session.