

No 40.

several of the subscribers returned the copies delivered to them, and refused payment of the price,

Shaw having on that ground instituted an action against them,

THE COURT considered the author's total failure in performing a part of the work announced in his proposals, as sufficient to liberate the subscribers from their engagement to him; at the same time that the allegation of the other parts of the book being less perfectly executed than was to have been expected, did not, so far as *mala fides* or gross negligence was not implied, appear to be deemed a relevant defence.

THE LORDS therefore assoilzied the defenders.

Reporter, *Lord Swinton*.
Clerk, *Orme*.

Act. *Solicitor-General*, et *Tait*.

Alt. *J. Grant*, *W. Campbell*.

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Fol. Dic. v. 4. p. 13. Fac. Col. No 263. p. 401.

No 41.

A collier having enlisted after entering into a verbal agreement to serve his master for a year, the enlistment was found to be suspended till the expiration of his previous engagement.

1799. *January 19.* JOHN CLERK *against* LIEUTENANT KENNETH MURCHISON.

WILLIAM SAMUEL and John Cook, in summer 1798, entered into a verbal agreement, to serve John Clerk, as colliers, for a year, and received a guinea of their wages in advance. They had been for several preceding years in Mr Clerk's employment.

On the 18th October 1798, Samuel and Cook enlisted with Lieutenant Murchison. They were afterwards attested, and received a large proportion of their bounty.

On the 25th October, Mr Clerk presented a petition to the Sheriff of Edinburgh, stating, that Samuel and Cook were his indented servants, and considerably in his debt; therefore craving the Sheriff 'to declare them free from the said enlistment.'

The Sheriff found 'the said John Cook and William Samuel are bound colliers to the petitioner, and that the petitioner cannot be deprived of their services, by their having enlisted as soldiers with the defender, and therefore ordained them immediately to return to the petitioner's work, and to serve him faithfully thereat, till the expiry of their engagements; and failing of their doing so, ordained them to be imprisoned in the tolbooth of Edinburgh, until they find caution to that effect; reserving always to Colonel Murray of the Clanalpine Fencibles, or Lieutenant Murchison, the defender, either to claim from the said John Cook and William Samuel, immediate payment of the sums advanced to them for bounty and pay, and what expenses they have been put to, or to claim them as soldiers after the expiry of their present engagements with the petitioner.'

Lieutenant Murchison complained of this judgment, by a bill of advocacy, which the Lord Ordinary refused.

Lieutenant Murchison, in a reclaiming petition,

Pleaded, It has no doubt been found, that apprentices cannot be enlisted; See No 5. p. 586. ; but this privilege is competent to no other species of servants. The public safety requires, that many subordinate duties should give way to the performance of service in war. And as there are few of that rank who commonly enlist who are not under some contract for personal service, it is obvious, that if their enlistment were suspended till the expiration of their previous engagement, the army could not be recruited.

Answered, Enlistment is entirely voluntary. It implies, therefore, a power in the person enlisting to dispose of his service, which Samuel and Cook had not till the expiration of their engagement.* There is no prerogative in our constitution with regard to the land service, which prefers the posterior right of the Sovereign to the prior one of the master. The rule of common law, *prior tempore potior jure*, must of consequence take place. The admitted fact, that apprentices cannot be enlisted, proves the respondent's doctrine. For as they are not incapacitated by any statute, and as at common-law the obligation of apprentices does not essentially differ from that arising from any other contract for personal service, it necessarily follows, that enlistment must be postponed to every previous engagement which falls under that description; 2d May 1798, Guthrie against Taylor.*

Observed on the Bench, If a servant enlist after being hired, but before entering to his service, the contract remains *in nudis finibus*; and being a personal one, the rule *prior tempore potior jure*, will not apply. The master's only remedy is an action of damages against the servant. But after the servant has entered into his employment, the master can enforce the completion of his engagement, *remediis pratoriiis*. Enlistment, therefore, being a contract wholly voluntary, the rule, *prior tempore*, &c. must in that case take place, and the enlistment be suspended till the expiration of the servant's prior engagement.

THE LORDS refused the petition, on advising it, with answers.

Lord Ordinary, *Mishven*. Act. J. & W. Clerk. Alt. Corbet. Clerk, *Menzies*.
R. D. Fac. Col. No 103. p. 239.

* Not reported; See APPENDIX.