(M. 13,132.)

1772.

PATRICK CAMPBELL of Knapp, and Others, Burgesses and Inhabitants of the Burgh of Campbelton, - - - } *Appellants:*

JOHN HASTIE, Rector or Head-Master of the Grammar School of Campbelton, - } *Respondent.*

CAMPBELL, &c. *v.* HASTIE.

House of Lords, 14*th April* 1772.

PUBLIC OFFICE—SCHOOLMASTER IN BURGH—APPOINTMENT.—A schoolmaster, appointed by the Magistrates and Town Council of Campbelton, without any mention being made as to whether his office was for life or at pleasure: Held that it was a public office, and that he was liable to be dismissed for a just and reasonable cause, and that acts of cruel chastisement of the boys were a justifiable cause for his dismissal; reversing the judgment of the Court of Session.

The respondent was engaged as rector and head-master of the grammar school of Campbelton, which, belonging to

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portance, from a discussion regarding them, which has recently occurred, in a case now depending before the Second Division of the Court of Session, upon a report by Lord Wood. In the printed pleadings in that case, which has not yet been decided, the cases now referred to, havé undergone very ample discussion. This is the case of *M'Neill* or *Morison* v. *Yorston*, the printed pleadings of which bear date November 1849,* and one of which is drawn by Professor More: The circumstances are these:—In 1748, Neil M'Neill obtained a wadset over lands in the island of Gigha for £410 sterling. The wadsetter had four sons, Donald, John, Hector, and Malcolm, and two daughters, Janet and Mary. Heritable securities, which were followed by infeftment, were granted in favour of those sons and daughters, so as to create a subordinate security over the wadset right, to the full extent of £410 covered by it. Neil M'Neill, the original wadsetter, died in 1749, and was succeeded by his eldest son Donald M'Neill, who made up a title, as his father's heir, to the original wadset, and in 1775 he disposed this wadset to John Cowan. The lands of Gigha, over which this wadset extended, were sold to Sir Archibald Campbell, who also purchased the wadset from Cowan, and obtained right thereto in 1779. In the meantime the subordinate heritable securities which had been constituted in favour of Neil M'Neill's children, and which exhausted the £410 contained in the wadset, had been entirely overlooked by all parties; but, having been discovered upon a search of the records, Sir Archibald Campbell applied to Cowan to produce discharges of these heritable securities. An action of reduction and declarator of extinction of

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* It is understood that the death of one of the parties has prevented the Court from deciding this case.

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the corporation, was under the management and direction of the magistrates and town-council. He was admitted, of this date, and was to receive a salary over and above fees, these heritable securities was then brought against the children and representatives of Neill M'Neill, the original wadsetter, in which it was maintained, 1st, That the original wadset having been dissolved by a regular order of redemption, the subordinate heritable securities grafted on this wadset, fell to the ground, and ought to be set aside. 2dly, It was contended that the sums in these heritable securities had been paid and extinguished. This action was raised in 1791.

At first Lord Swinton, as Ordinary, pronounced an interlocutor finding that it was incompetent for a wadsetter to create a subordinate heritable security upon the wadset right; but he afterwards altered this interlocutor, and found that the wadsetter "had full "power to burden the said lands to the full amount of the principal "wadset;" and the Court adhered to the Ordinary's interlocutor, upon advising a reclaiming petition, with answers. It was thus decided, that such subordinate heritable securities were, like feu-rights, separate heritable burdens, ingrafted on the principal right. This case, so far as this point is concerned, is reported in the Dictionary, p. 16,555.

The case then turned upon the question, as to whether these heritable securities had been extinguished *by payment*, and after various proceedings before the Lord Ordinary, it fell asleep subsequent to 1799. But it ultimately turned out that there had been no payment of these securities, and in 1818 Mr. M'Neill, then the proprietor of Gigha, granted a precept of *clare constat* in favour of Neil M'Neill, the son of Malcolm M'Neill, who was the youngest son of the original wadsetter, as the *heir of line* of his said deceased father, and also of his deceased uncles, John and Hector, and of his aunt Janet, to the respective heritable securities held by them. And Neil M'Neill received payment of their shares of the heritable bonds. By the precept of *clare constat* Mr. M'Niell of Gigha admitted the subsistence of the debts, but it was overlooked that these heritable debts were payable, not to the *heir of line* of the creditors, but to the *heir of conquest*.

Consequently, Janet M'Neill or Morison, the daughter of Donald M'Neill, the eldest son of Neil M'Neill, the original wadsetter, being, in right of the father, the *heir of conquest* of these deceased creditors, and not having heard of the proceedings above mentioned till 1836, then wakened the process of reduction and declarator, and also, after serving herself *heiress of conquest* to her deceased uncles and aunt, raised an action for payment of the heritable debts due to them.

In defence against this action it is pleaded that any claim at her instance was cut off by prescription, in respect no proceedings had

of £30—£20 of which was to be paid out of the common good of the burgh, and the other £10 to be paid by the allowance made by the Commissioners of Supply for a parochial school. In consequence of neglecting his school, and the proper education of his pupils, and entering into occupations incompatible with its efficient management, and particularly, in consequence of severe chastisement and maltreatment of the pupils, to the great danger of their lives, the magistrates, after a due investigation and proof led of the facts, dismissed him, of this date. The proof led before his dismission went to show that he resorted to cruel methods to correct his scholars—that scarce a day passed without some of the scholars coming home to their parents with their heads cut, and their bodies discoloured. Instead of employing a taws

Aug. 18, 1767.

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been taken by her for greatly more than 40 years after the date of the securities. This raised the question, Whether the proceedings, in the reduction and declarator, to which she had been called as a defender, did not interrupt the prescription? and also, Whether the acknowledgment of the proper debtor in the heritable securities, as to their subsistence, (by the precept of *clare constat* alluded to,) though made to a wrong heir, did not also bar the prescription? Various other pleas were also stated, to which it is here unnecessary to advert. But it was pleaded, on the authority of *Robertson*, 27th November 1751, that Donald M'Neill, the father of Mrs. M'Neill or Morison, having acquired the original wadset, in right of his father, and being also the heir-apparent of the creditors in the heritable bonds above mentioned, the latter were extinguished *confusione*. It turned out, however, on a careful examination of the pleadings in the case of *Robertson*, that this case must have been erroneously reported, as the pleadings shew, that the decision must have turned not on the doctrine of *confusio*, but on the ground of the wadset in that case having been radically null, and so neither requiring, nor admitting of any title being made up to it.

Lord Wood, in reporting the case now referred to, says that "both "the plea of prescription and the other pleas of the parties, present "points of considerable importance, apparently not free from difficulty, and which deserve the consideration of the Court." He further says: "The Lord Ordinary is inclined to be of opinion that "prescription was interrupted. At the same time, the case of *Hay*, "9th March 1756, (M. 11,276,) and House of Lords, 24th April "1758, and of *Wright*, 11th December 1717, (M. 11,269,) may be "thought to be adverse to this decision. It, however, occurs to the "Lord Ordinary that there is room for soundly distinguishing be-"tween them and the present case."

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or strop, he beat the pupils with wooden squares, sometimes with a ruler, and sometimes with his fists, and used his feet by kicking them—knocked them on the head, pinched their ears with his nails, until the blood came—dragging them by the hair of the head. Under this maltreatment the boys often came home with cut heads and hands, swollen faces, bleeding ears, and discoloured bodies. He had also entered into the trade of cattle grazing and farming—dealt in black cattle—in the shipping business—and in herring fishing. There were too many holidays and play days given, and the hours were ill attended and much shortened.

In consequence of all these, the scholars were taken away from the school, and the school fell off.

The respondent brought an action of reduction to set aside his act of dismission, on the ground that the magistrates and town-council had no jurisdiction, as a court, to try the question, and therefore their proceedings were incompetent. The Lord Ordinary offered him a proof of his reasons and grounds of reduction; but this he declined, choosing rather to stand on the incompetency of the procedure, upon which informations were ordered to be lodged.

The respondent contended, that being formally admitted, without any limitation as to the pleasure of the magistrates, council, or heritors, the grant of his office was simple and absolute, and he must be considered to have held it *ad vitam aut culpam*. 2dly, That the town-council of Campbeltown are not competent, in a matter of this kind, having no jurisdiction civil or criminal. 3dly, That some of the members of the town-council had been admitted as witnesses against him, though they afterwards came to judge in his dismission. That it was not clear who were his prosecutors, the complaint being made in the name of gentlemen only, without mentioning who were meant to be comprehended under the word *others*, and perhaps the magistrates themselves, for aught that appeared, might be included under that term. The appellants answered, that he was appointed to the office of schoolmaster by the magistrates and town-council. He was subject to their control, as a public servant of the burgh, and consequently could be dismissed by them at pleasure. His act of admission neither bore the office to be for life, nor for any definite period. In removing him they have only exercised a just control over the sacred interest intrusted to their care. Had they done so without reason or cause, then the respondent might have

had some grounds for complaint; but, in the present case, there were very heavy and grave charges made against the schoolmaster; nor were these hastily listened to and summarily disposed of. The respondent was repeatedly warned and admonished of the danger and consequences of his conduct, ere the final act of dismission was resorted to. Although it was found, in the case of Magistrates of Montrose *v.* Strachan, their schoolmaster, where the latter enjoyed his appointment in similar terms to the present, that the Magistrates could not dismiss the schoolmaster at pleasure, yet the Lords found, "*that for any just and reasonable cause* "*they might*: And ordained the magistrates to condescend "on a *just and reasonable cause* for removing the sus- "pender." In the present case, the proof, as adverted to above, was the most just and ample reasonable cause that could possibly be adduced for warranting the magistrates to dismiss the schoolmaster. Other causes have occurred supporting the same principle.

Jan. 18, 1710. Magistrates of Edinburgh *v.* Sir William Thomson, Feb. 14, 1665. Foulis, Nov. 10, 1747. Harvey *v.* Kirk-Session of Glasgow, 1750.

The Court, of this date, (29th June 1769,) repelled the objections to the competency of the proceedings, and remitted to the Lord Ordinary to proceed in the cause.

A discussion then took place before the Lord Ordinary, chiefly on the effect and import of the proof.

Nov. 15, 1770. Of this date, the Court pronounced this interlocutor:— "Upon report of Lord Pitfour, and having advised the me- "morials, the Lords repel the reasons of reduction, and as- "soilzie the defendants, and decern."

A reclaiming petition being presented, pleading compassion, and praying the Court to take a middle course, and repone him to his office, with the punishment of being three years deprived of his salary, which would sufficiently atone for his errors. Whereupon the Lords, of this date, "reduce Dec. 21, —— "the decret of deposition, and repone the petitioner to the "office of schoolmaster of Campbeltown: But, in respect of "some irregularities in his conduct, find he is not entitled "to the bygone salaries of his office since his deposition, and "decerns and declares accordingly, and find no expenses "due." The appellants having reclaimed against this interlocutor, the Lords refused the prayer of the same, "and ad- Jan. 22, 1771. "here to their former interlocutor reclaimed against."

It was against these two last interlocutors that the present appeal was brought.

Pleaded for the Appellants.—The frivolous objections stated by the respondent against the proceedings before the

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magistrates, are now out of the question,—the respondent having aquiesced in the interlocutors repelling these objections. In law, the magistrates and town council of a burgh, having the appointment of a schoolmaster, and other servants, and exercising that right, without expressing in the admission, or appointment, whether it is to be for life, or pleasure, can remove them for *any just and reasonable cause.* This point has been settled by several decisions, and that the magistrates, besides, are the judges of this just and reasonable cause. The dismission, in the present case, was not without a just and reasonable cause, but proceeded from causes of the most just and serious kind, such as reasonably justified his deprivation. It is only necessary to refer to the respondent's barbarity and inhumanity in the punishment of his scholars, as exhibited by the proof adduced, to shew this. And the respondent, although repeatedly offered a proof, has never attempted to justify or excuse his conduct. Besides, his inattention and neglect of his scholars, arising from entering into engagements in business incompatible with that care requisite in a proper and efficient teacher of youth, was in itself sufficient to justify his dismissal.

Pleaded for the Respondent.—His engagements in trade and farming, which were so trifling, could not afford a just and reasonable cause for his dismissal, unless it led to the consequential neglect of the school, and his scholars; but, in place of this, when the school was examined by the clergy, it received the warm approbation of the examinators. And as to chastisement, it must be admitted that a schoolmaster ought to be allowed a certain power and control of chastisement for the purpose of discipline. Without it no school could exist; and the question is, how far this power ought to be exercised in cases of ferocious and rebellious behaviour on the part of the boys. In the present case, no excess was resorted to,—no inhuman barbarity inflicted; but when pupils, as in this case, turn round, and swear and curse at the master, and wrestle with him, some latitude must be allowed for smart correction on such occasions. Unless the discipline of a school is maintained by some means, the authority and usefulnes of a master are gone. He can no longer be a teacher of youth, and all learning will give place to insubordination and misrule. A schoolmaster, it is true, must not be a barbarian—must not maim his scholars, or treat them with heartless cruelty; yet, without corporal punishment to a a certain extent, no school can possibly exist. The respon-

dent submits, that he has not exceeded the proper bounds of chastisement conceded to all schoolmasters; and therefore his appointment, being in its nature one for life, he cannot be removed at the pleasure of the magistrates, without some more justifiable cause than has yet been established,

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After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be reversed.

For Appellants, *Ja. Montgomery, Henry Dundas, John Dalrymple.*

For Respondent, *Andrew Crosbie, James Boswell.*

JAMES CHEAP of Leith, and Others, Executors of THOMAS CHEAP, late Merchant in London, deceased, - - - - } *Appellants;*

ANDREW AITON and Company, Merchants, Glasgow, - - - - - } *Respondents.*

House of Lords, 11*th December* 1772.

DISSOLUTION OF COPARTNERY—LIABILITY OF REPRESENTATIVES OF A DECEASED PARTNER, FOR GOODS ORDERED IN COMPANY'S NAME BY ONE OF THE PARTNERS, IN ALLEGED IGNORANCE OF HIS DEATH.—Circumstances where representatives of a deceased partner not held liable for goods so ordered, and furnished after the death was known to the sellers. Reversing the judgment of the Court of Session.

The company of Messrs. Adair and Cheap, merchants in London, was dissolved by Thomas Cheap's death, who was killed in the expedition to Bellisle, in April 1761, and the account of his death published in the London newspapers of 23d May 1761.

His partner Adair had, on the 26th March previously, ordered by letter, signed in the social name of "Adair and Cheap," a considerable quantity of lawns and other goods, from the respondents, to which they answered on the 1st April; "The clear lawns you order, shall be sent as soon "as we have them from the bleaching," and addressed their letter to Messrs. Adair and Cheap.

On the 21st May, Mr. Adair gave a second order, in the name of "Adair and Cheap," he then being ignorant of the death of his partner. 1761.