[14*th July* 1837.]

The MAGISTRATES of ANNAN, Appellants.—*Attorney General (Campbell)—Dr. Lushington.*

JOHN FARISH, Respondent.—*Sir William Follett—Austin.*

Public Officer — Town Clerk — Possession.—A party was appointed conjunct town clerk for a period of five years, and was in possession of the office,—Held, in a suspension and interdict, (affirming the judgment of the Court of Session) not competent for the town council to remove him summarily, and without cause assigned, at the expiry of the five years; and a petition and complaint against him for not delivering up the books of the burgh to a new clerk, or to the magistrates, dismissed, in respect that he was willing to execute the duties of clerk.

2D DIVISION. Lord Moncreiff. BY the records of the burgh of Annan it appears that the office of town clerk of the burgh had been held at different times for a longer or a shorter period. Prior to the year 1829 this office had been generally held by a single individual; but, upon a vacancy in that year by the death of Mr. Richard Graham, the magistrates resolved to appoint Mr. Foot, (who had been in the habit of acting as the depute of Mr. Graham,) and to join with him the respondent, Mr. John Farish, in the appointment, as conjunct or junior town clerk, for a term of five years; and accordingly these gentlemen accepted the office conjunctly, under the following appointment: "At Annan, within the Town Council House of Annan,

" the 16th day of April 1829 years. The which day, " the magistrates and council being convened, the pro- " vost represented, that in consequence of the decease " of the late Richard Graham, town clerk, it became " necessary to elect a clerk in his place; whereupon the " magistrates and council, considering that it would be " of advantage to the burgh to elect two clerks, they, " by a majority of voices, elected and chose, and do " hereby elect and appoint, Messieurs John Foot and " John Farish, writers in Annan, to be conjunct town " clerks of the burgh of Annan, for the space of five " years from and after the date hereof, with the usual " salary of 3*l.* 6*s.* 8*d.* yearly, to be paid by the treasurer " of the burgh, in the proportion of two thirds thereof " to be paid to the said John Foot, and one third thereof " to Mr. Farish; and they further authorized and em- " powered the saids John Foot and John Farish to " uplift and receive the usual fees and perquisites attend- " ing the office of clerk, to be divided betwixt them, in " the same proportions, during the foresaid space of five " years."

In the year 1833 the statute 3 & 4 Will. IV. c. 76. was passed, by which the right of election of the town council is vested in certain inhabitants of the burgh; and under this statute the magistrates and town council of Annan were elected in November 1833, on which occasion the respondent, Mr. Farish, acted as conjunct town clerk with Mr. Foot, and was recognised in that capacity by each of the magistrates and councillors subscribing an obligation in his favour.

On the 4th April 1834, and immediately preceding the expiration of the five years for which the appointment had been made, " the council appointed a meeting

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" to be held in the Town House, on Friday the 11th
" instant, for the purpose of electing a town clerk or
" town clerks;" at which it was " moved by Bailie For-
" rest that the council do immediately proceed to the
" election of two clerks; which motion was seconded by
" Mr. Robert Dickson; whereupon Mr. Farish, one of
" the then town clerks, protested in a paper apart au-
" thenticated by the initials of the provost. The motion
" being put to the vote, and carried unanimously, Bailie
" Richardson then moved that Mr. John Foot, the pre-
" sent senior town clerk, be elected senior town clerk,
" for the period from the 16th day of April current,
" until the day of the annual election of magistrates and
" other office-bearers in November 1835, with the same
" share of the salary and emoluments of office which
" was provided for him by the minute of his election in
" 1829. This motion was seconded by Mr. James
" Little, and carried unanimously. Bailie Forrest next
" moved, that Mr. George Underwood, writer in An-
" nan, be elected junior town clerk for the same period
" as is before specified in reference to Mr. Foot, and
" with the share of the salary and emoluments of office
" which was provided to Mr. Farish by the minute of
" election of April 1829. This motion was seconded
" by Mr. James Little. Mr. Blacklock moved, as an
" amendment, that Mr. John Farish, the present junior
" town clerk, be elected junior town clerk for the period
" above specified as in reference to Mr. Underwood,
" and with the same share of the salary and emolu-
" ments which he enjoys at present under the minute
" of April 1829; which amendment was seconded by
" Mr. Wield. The amendment was then put to the
" vote and negatived. The motion was then put and

" carried, and Mr. George Underwood was elected " junior clerk accordingly for the period and on the " terms specified in the motion. Bailie Richardson " then moved, that it be a rule applicable to the clerks " now elected, that no depute shall be appointed by " them or either of them, but with the approbation of " the council; which motion was seconded by Mr. " Sawyer, and carried unanimously. The provost was " then instructed to authenticate this draft-minute by " his signature; and it was ordered that a copy of it " should be extended, under the direction of Bailies " Forrest and Richardson, for the signatures of the " council."

Against these proceedings the respondent protested at the time in writing in the following terms:—" Mr. " Farish, on behalf of himself, and without meaning any " disrespect to the provost, magistrates, and council, " but solely from a regard to his own rights and the " rights of his successors in office, represented that it " was ultra vires of the council to remove the present " clerks from office, or to elect others in their place, " as had been established by repeated decisions of the " Supreme Court, and particularly by the decision in " the case of Simpson v. Tod and others, 17th June " 1824, the report of which, as contained in the 3d vol. " of Shaw & Dunlop's Cases, pp. 150–2, Mr. Farish " then read to the meeting, and protested, for himself, " against all and any proceedings to which the council " might either now or hereafter have recourse, with a " view to deprive him of his office, and that he would " hold the present magistrates and council liable to him " in damages and expenses if such illegal proceedings " should take place; and, lastly, Mr. Farish respect-

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" fully declined writing any minute of deprivation or " election for the reasons above stated, and others to " be hereafter condescended on."

Having lodged this protest, the respondent presented a bill of suspension and interdict, in which he craved the Court of Session to " interdict, prohibit, and dis- " charge the provost, magistrates, and town council, and " all and each of the said several parties, from completing " or signing the said inchoate minute of the 11th April, " —from entering the same on the records,—from car- " rying the same in any way into execution,—from " making any minute or writing to the same effect,— " from taking any further steps or measures which may " in any way tend to deprive the suspender of his office, " or from molesting or troubling the suspender in the " lawful possession and discharge of his duty and exer- " cise of the several functions of town clerk; and also " to prohibit and discharge the said George Under- " wood from attending any meetings of the magistrates " as pretended town clerk,—from entering as such any " of the proceedings on record,—from subscribing any " extracts of minutes, deeds, or decrees,—or from exe- " cuting any burgage infeftments,—or from performing " any other duties incumbent on town clerks,—and " from interfering in any other way with the office of " town clerk to the prejudice of the suspender."

On the 28th of April, Lord Corehouse, on ordering answers, granted interim interdict; and, on the 3d of June thereafter, Lord Moncreiff passed the bill, and continued the interdict by an interlocutor, and issued a note in these terms:—" This case is of too much im- " portance to be disposed of summarily in the Bill Cham- " ber. On the same principle on which the complainer

" is removed, Mr. Foot might have been removed also. " There could be no difference, unless the respondents " were to go on allegations of sufficient cause for " removal, which would require the bill to be passed " of course. If the case should go to the Court " at present, it may be proper that they should be " informed that the same question has been raised on " the appointment of the town clerks of Glasgow, " though there has not been an actual removing in that " case; and that a bill of suspension has been passed, " and other cases of the same kind may very probably " arise."

After the lapse of a few months Mr. Foot died; and the respondent offered his services to the magistrates, which were refused; and at a meeting of the council on the 10th October 1834 they proceeded to elect Mr. Little, then one of the councillors, as successor to Mr. Foot in his character of senior town clerk, under the appointment of the 11th April 1834. At this meeting, on the 10th October 1834, " Mr. Dickson moved, " that Mr. Little, writer, Annan, be elected senior town " clerk in the room and stead of Mr. John Foot, with " the share of salary and emoluments provided to " Mr. Foot by the minute of his election of 11th April " last; the term of Mr. Little's service to commence " at the time when he shall be divested of his character " of a member of council in consequence of the notice " of resignation already given by him, and to continue " until the day of the annual election of magistrates " and other office-bearers in November 1835, and no " longer, unless re-elected; which motion was seconded " by Mr. James M'Lean; whereupon Mr. Thomson " protested from the 26th and the 28th sections of the

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" 76th chapter of the Burgh Reform Act for Scotland, " &c. (which sections are quoted at length); and the " motion being put to the vote was carried without " opposition, further than the protest above copied, " and Mr. Little was elected senior town clerk accord- " ingly."

This appointment of Mr. Little as senior town clerk was confirmed by the town council at their meeting of the 31st of October; and he entered on the duties of his office.

The magistrates having applied to the respondent for the books and papers in his possession as clerk, he wrote to them a letter on the 11th December 1834, in which he stated,—" I cannot, I am sorry to say, agree to your " proposal respecting the books and papers. The only " legal custodier of these, as has been established by " repeated decisions of the Court of Session, even in " questions with town councils, is the town clerk; and as " Mr. Little's alleged election is, in the opinion of the " Dean of Faculty and my other counsel, altogether inept, " I cannot be a party to any measure which might have " the effect, no matter for how short a period, of recog- " nizing him in his assumed character. He cannot, " therefore, any more than any other private individual, " or even than yourselves, have access to the books and " papers in question but through me as clerk; which " access, however, I am and have always been ready to " give in the usual manner on all proper occasions."

And in a subsequent letter to Mr. Little, dated 17th December, he said,—" What instructions you have " received from the magistrates and council I know " not; but this I know, (and my numerous letters to " them abundantly prove,) that there is and can be no

" necessity for their 'enforcing access to the minute-
" book, registers, and other documents belonging to
" the burgh,' in my possession as clerk, as I have all
" along expressed, and now once more express, my
" readiness to give them access to these books and docu-
" ments on all proper occasions in the usual manner.
" It is, however, another matter with you," &c.

In a subsequent letter to Mr. Little, dated 24th March 1835, he stated,—" As I have no doubt that
" your getting yourself appointed, accepting the ap-
" pointment, and continuing to act as 'senior town
" clerk,' is an aggravated contempt of court, it would,
" of course, be highly improper in me to recognize you
" in that assumed character directly or indirectly. If
" any inconvenience is suffered, or any risk incurred,
" by my adhering to the course pointed out to me by
" my counsel, I shall regret it; though, as I have for-
" merly offered, and once more offer, to discharge,
" whenever required, the duties of clerk, as empowered,
" not only by my original appointment, but by the
" express authority of the Court, whatsoever inconve-
" nience or risk there may really be, cannot, with truth,
" be chargeable upon, Sir, your obedient servant," &c.

In June 1835 a petition and complaint was presented against him and his partner in business, Mr. Dalgliesh, by the magistrates and council of the burgh, and by Mr. Little, praying the Court to find, first, That the
" complainers, as magistrates and councillors of the
" said burgh, are entitled to full access to the council
" minute-book, burgh registers, and whole other docu-
" ments connected with the burgh or the affairs there-
" of;" and, secondly, " That the complainer, James
" Little, is entitled to full access to and use of the

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" said minute-book, registers, and documents, as con-
" junct town clerk of the said burgh, equally with the
" said John Farish, during the dependence of the said
" process of suspension, and whilst the complainer con-
" tinues to fill the foresaid office; and further, to decern
" and ordain the said John Farish to give such access
" to and use of the foresaid minute-books, register,
" and documents, in terms of the foresaid finding, and,
" if necessary, to make such further orders or arrange-
" ments as may be requisite for securing the rights of
" parties, and carrying the said findings into full effect."

After the usual procedure, the Court pronounced the following interlocutor on the 5th December 1835: —" The Lords having resumed consideration of the " petition and complaint, with answers, replies, and " duplies, and whole proceedings, and heard counsel " thereon; in respect that the respondent John Farish " has all along declared his willingness to continue in " the regular discharge of his duties as town clerk of " the burgh of Annan, dismiss the petition and com-" plaint, as unnecessary on the part of the magistrates " and council, and as incompetent on the part of " James Little, and decern; find the respondents " entitled to expenses, allow the account to be given " in, and remit the same to the auditor to tax and " report in common form."[1]

A record having been made up in the process of suspension and interdict, the Lord Ordinary pronounced the following interlocutor on the 18th May 1836. " The Lord Ordinary having considered the closed " record, and heard parties procurators thereon, and

[1] 14 D. B. & M., p. 111.

" made avizandum, in respect of the express judgment " of the Court in the case of Simpson v. Tod and " others, June 17, 1824, in the process of advocation at " the instance of Simpson, and in respect that that " judgment, which was pronounced with great delibera- " tion, appears to the Lord Ordinary to be in con- " formity to what he had always understood to be a " general principle in the law of Scotland, finds that " the suspender, as a public officer, could not be re- " moved summarily from his situation of town clerk, " or common clerk of the royal burgh of Annan; " therefore suspends the letters, and continues the " interdict, and decerns; without prejudice to any " action of declarator which the respondents may be " advised to raise, and to the defences thereto, as " records: Finds expenses due, and remits the account, " when lodged, to the auditor, to be taxed.

" *Note.*—The Lord Ordinary is clearly of opinion " that there is no material difference, in regard to a " possessory question of this kind, between an appoint- " ment of a clerk nominally for one year; or for five " years, or during pleasure. If there be any distinc- " tion, the power of arbitrary removal is clearest in the " last case. But still the principle of law, indicated " throughout all our books, that a town clerk of a " royal burgh, as a public officer, holds generally his " office for life, and that it must lie with those who " think that there is an arbitrary power of removing " him in any particular case to show this in a proper " process of declarator, was very fully established in " the case of Simpson, referred to in the interlocutor. " It is said that that decision is of little weight, and the " respondents endeavour to explain it away. The

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" Lord Ordinary does not know why it should be of " little weight, being the judgment of the Supreme " Court in a matter of pure Scotch law. It was very " carefully considered. The Lord Ordinary knew it " well at the time, and has minutely examined the " papers in it; and there is this very marked point " involved in the judgment in the advocation, (which " is what the Lord Ordinary holds to bind him,) " that it was pronounced in the question of posses- " sion purely, waiving entirely the merits of the re- " duction and declarator, brought, not by the magis- " trates, but by Simpson, with a view to a claim of " damages, although the terms of the judgment in that " declarator, pronounced some time after, are also " exceedingly material in the present cause.

" Having this opinion on the state of the question " as presented in the suspension, the Lord Ordinary " does not think that it is necessary to enter into the " general argument as to the power of the magistrates " to remove the suspender. He has understood it to " be clear law in general, that a town clerk of a royal " burgh is not a mere servant of the town council, but " a public officer, having very important duties to the " community, and even to the State, to discharge, in " which he must hold himself as entirely independent " of the town council. In consequence of this, the " general law is, that it is a life office. Accordingly, " it did not fall, whatever were the terms of the appoint- " ment, even by the disfranchisement of the corporation " of the burgh, under the old rules. The respondents " have argued in this case, that because the term of " the appointment was limited to five years, the office " ceased, ipso facto, when the period expired, and a

" new appointment became essential. But, if this were " sound, the consequence would be very serious; for " if the council had dismissed the suspender, and " appointed no clerk in his place, it would follow that " the burgh might have ceased to have a clerk alto- " gether, and the public franchises of the people, as " well as the most important interests of the crown, " the corporation, and the burgage heritors, have been " defeated or essentially impaired. The Lord Ordinary " thinks, that from the nature of the office it could not " expire, ipso facto, under any terms of the appoint- " ment, which raises at once the peculiarity in prin- " ciple whereby the possessory question seems to him to " be ruled.

" The Lord Ordinary has also one observation to " make on the statute of 3 & 4 Will. IV. c. 77. It " seems to him that the twenty-sixth section of that act " distinctly recognizes the previously understood law of " Scotland on this point. It provides, 'That it shall " be lawful for the magistrates and council of any such " burgh or town to elect a town clerk for such burgh " or town for one year.' Why make this provision " that it shall be lawful so to do, if it had not been well " known that the previous law held a principle opposed " to the legality of such a limitation? At least, with " such a provision in the statute book, it must be diffi- " cult to say that there was no previous law on the sub- " ject, or that the case of Simpson was of no authority. " But the clause goes on more materially to touch this " possessory question. 'Without prejudice to his re- " election, and also without prejudice to the lawful " right of any existing town clerk in any such burgh

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" or town, to hold his office of town clerk, or clerk to " the magistrates and council, ad vitam aut culpam.' " The Lord Ordinary does not say that this determines " that in any particular case the clerk must hold his office " ad vitam aut culpam; but it most manifestly supposes " that there may be cases in which, notwithstanding an " appointment for one year (or for five years), only " now declared to be lawful, the clerk may be entitled " to hold the office ad vitam aut culpam. It leaves it " as a case to be tried and determined according to the " usage and circumstances, but with the strongest im- " plication, that, till a special case be shown, the general " law previously was against the legality of such an " appointment.

" The difference between the parties thus being, by " whom the declarator for trying any such question " ought to be brought, the Lord Ordinary is of opinion, " that it belongs to the respondents to do so, and that " the suspender is still entitled to the possessory judg- " ment.

" The suspender was not removed on cause assigned, " and therefore no such question can competently be " raised in this suspension.

The magistrates having reclaimed, the Inner House adhered to the Lord Ordinary's interlocutor on the 22d November 1836, and found expenses due.[1] The Magistrates then appealed against the interlocutors, both in the process of suspension and the petition and complaint.

[1] 15 D. B. M., 107.

Appellants.—1. With the exception of the case Simpson v. Tod[1], particularly referred to in the Lord Ordinary's interlocutor, there is no authority in the law of Scotland for holding that an appointment of town clerk to a royal burgh may not be made for a limited time, and that the clerk may not be removed as functus officio at the close of the prescribed term. The institutional writers furnish no grounds for such an assumption, and the authority of Lord Stair seems to be clearly against any such principle. He says "Amongst mandates all are offices, "which do ever imply a condition resolutive upon "committing faults; but not such as are light faults, "or of negligence; but they must be atrocious, at least "of knowledge and importance. Upon this ground "it was, that the town of Edinburgh having deposed "their town clerk from his office, which he had ad vitam, "the sentence was sustained, if the fault were found of "the clerk's knowledge, and of importance; and it "was not enough that no hurt followed, and that he "was willing to make it up. Feb. 14, 1665. Town of "Edinburgh against Mr. William Thomson."[2] If the words, "which he had ad vitam," be particularly considered with reference to the context, it will appear that Lord Stair regarded the right ad vitam as depending exclusively upon the terms of the appointment, and not as in the slightest degree arising from any intrinsic quality of the office.

The reason assigned by the Lord Ordinary for the town clerk's office being ad vitam is, "that a town "clerk of a burgh is not a mere servant of the town

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[1] 17th June 1824, 3 Shaw and Dunlop, 150. (p. 102, new edit.)

[2] Book i. title 12. sect. 16.

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" council, but a public officer, having very important " duties to the community, and even to the state, to " discharge, in which he must hold himself as entirely " independent of the town council. In consequence " of this the general law is, that it is a life office." This opinion is completely at variance with the doctrine which Lord Stair has founded upon the case of Thomson v. the Town of Edinburgh.[1] The town clerk of a burgh there is viewed in a totally different light, viz. as the mere servant of the magistrates.

The cases cited by the respondents do not support the interlocutor. The first of these is Harvie v. Bogle.[2] There had been anciently but one kirk session in Glasgow. Upon the increase of inhabitants that kirk session was, in the year 1649, divided into several particular ones, according to the number of churches. After this the particular sessions met sometimes about their own particular business; but when the interest of all was to be consulted, they formed themselves into one general kirk session upon the original plan. These sessions had one clerk, chosen by the general kirk session; and this clerk did both their particular and general business, for which he had emoluments to the amount of 50*l.* yearly. From the year 1606 till the year 1646 the clerk had been chosen from year to year, but from thence downwards the elections did not express whether they were for life or during pleasure; neither did use explain the duration of the office; for though, in general, those who got it enjoyed it during life, yet, on the other hand, there had been an instance of a clerk

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[1] 1 Stair's Decisions, 269 and 278; Morr. p. 13090.

[2] 27th July 1756, Morr. 13126.

turned out for malversation, and another of one removed in consequence of incapacity arising from disease. In the year 1750, Provost Millar, who then filled the office, resigned it into the hands of the kirk session, on condition of his getting from his successor 40*l.* a year for life. Harvie was chosen in his place, "but without express-"ing whether the office was given during pleasure or "not." The kirk session removed Harvie, and substituted another. Harvie brought a reduction, on the ground that the office must be presumed to be for life, unless that presumption were taken off by a contrary usage. To which it was answered, it was only during pleasure; being an employment, not an office. The report states that "the Lords took a middle course; "they held the office to be neither for life nor abso-"lutely during pleasure, but that the person possessed "of it was removeable, in terms of two decisions[1], for "reasonable causes, without the necessity of a charge "of direct malversation."

The effect of this case seems to have been neutralized by the case of Anderson v. the Kirk Session of Kirkwall.[2] Anderson had been appointed by the kirk session of Kirkwall their clerk and precentor; and having been removed, he raised an action, in which it was pleaded for him that he held his place ad vitam aut culpam; for that a person holding a public office is presumed to do so on such terms, if there be nothing in his commission to the contrary, and usage have not established a

1 18th Jan. 1710, Magistrates of Montrose against Strachan, No. 26. p. 13118; and 10th Nov. 1747, John Foulis against Vestry of English Chapel, No. 2. p. 6581.

2 13th Jan. 1779, Morr. 8017.

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different rule. The Court found that he held his office during pleasure.

The next case is that of the Magistrates of Forfar against Adam[1], which was settled by a compromise; and then comes the case of Simpson. It is a solitary decision; and all that was decided was that it was illegal to elect a town clerk during pleasure, but it is not stated that he may not be elected for a limited period of years. There is nothing in the nature of such an appointment, nor any principle of public policy, which requires that the office should be for life; and the respondent having accepted of it for five years is confirmatory of the general understanding in Scotland that the office is not ad vitam, and bars him from pleading that it is for life. So far from the Municipal Reform Act recognising life appointments, it does the very reverse, and shows that there is nothing in public expediency which requires that they should be for life.

2. The petition and complaint was rendered necessary by the respondent refusing to deliver up to the magistrates, or to Mr. Little as appointed by them, the books, &c. belonging to the council. Though the clerk of a royal burgh may be the legal custodier of the burgh records, still these records cannot be considered as withdrawn from the superintendence and control of the magistrates and council[2]; and as there is nothing in the terms of the appointment of the respondent to infer accretion on the death of his alleged colleague, nor did his interdict comprehend such a pretension, he was not entitled to assume the right to become sole clerk without

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[1] 14th May 1822, 1 Shaw, p. 403. (p. 376. new edit.)

[2] R. Spence v. G. Cuningham, 6th July 1830, 8 Shaw, 1015.

first establishing by some legal process his title to that character, and setting aside and suspending the nomination of Mr. Little. Mr. Little held a title perfectly compatible with that of the respondent, even assuming that the limitation in point of time was inept, as he aimed at nothing more than the right which had been held without any dispute by Mr. Foot, in whose place he was substituted. Had Mr. Foot been still alive, and had he concurred in the petition, not the slightest objection could have been taken to his title. Such being the case, a different rule cannot apply to Mr. Foot's successor in the absence of every thing like any judicial procedure, establishing or calculated to establish a subsequent exclusive title in the person of the respondent.

The right of the magistrates and council of this burgh to appoint two clerks is not questioned by the respondent, and is, indeed, incident to the power they must possess of making such regulations as shall have the effect of enabling them to see that the business is efficiently performed. Where two clerks are appointed, it must be presumed to proceed from a conviction that neither is to be entirely trusted with the affairs of the burgh, and the object must be that the magistrates may be able to apportion the business between the two, or assign it to either in their discretion, so as to have it transacted to their satisfaction. Having accepted a conjunct appointment, the respondent must be considered virtually to have subscribed to whatever might be necessary to render it effectual; and if the magistrates and council have neither access themselves to the records, nor can order them to be made equally accessible to both, they as the representatives of the community never can be assured that the clerks perform their duty. Both

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clerks have equal title to the custody, which ought to be joint; and if one of the two, having, by means fair or unfair, obtained possession of the records, exclude the access of the other, he virtually extinguishes the other office, as well as defeats the object of a joint nomination, which he must yet admit as the very basis of his own title. In the present case, Mr. Little was at least equally entitled to the custody of the burgh records with the respondent. He holds an appointment from the council as successor to Mr. Foot, and his title must be acknowledged till it is set aside, or at all events suspended by a competent authority. As coming in the room of Mr. Foot, if there be an inequality in the office, the superiority belongs to his successor; and to say, that because the respondent has got the actual possession of the records that he has got the legal right, is tantamount to saying he has got the whole right of office, while the title of Mr. Little has never been set aside; but Mr. Little has come precisely into the place of Mr. Foot, and is therefore entitled to all the rights which could have been competent to him. Under these circumstances, therefore, the prayer of the petition ought to have been sustained.

Respondent.—1. By the common law of Scotland, founded upon constitutional principles, the office of town clerk in a royal burgh is held ad vitam aut culpam; and in no case can that officer be dismissed by the magistrates and town council summarily, capriciously, and without reason assigned.

The grounds of this doctrine are to be found in the various and important functions attached to the office of town clerk, as separate and distinct from and independent of the offices of magistrates and town council-

lors. These functions may be contemplated in three different points of view, — as a municipal and political office[1], as a judicial office[2], and as a statutory and ministerial law office.[3]

In addition to the case of Simpson v. Tod, there are analogous authorities relating to other descriptions of public offices. In the case of Kemp v. The Magistrates of Irvine, "it was found, that where a person, in conse-" quence of advertisement in the newspapers, had " offered himself as a candidate for the office of teacher " of the English school at Irvine, and after trial of his " qualifications had been admitted to the office, and " continued to serve in it for several years, though " originally elected only for one year, he could not be " removed arbitrarily, or without just cause, such as in-" capacity, immorality, or malversation." The nature of a schoolmaster's office was also very distinctly declared in the opinions of the Court in the case of Adam v. The Directors of the Inverness Academy, 7th July 1815, reported in a note to the case of Gibson v. The Directors of the Tain Academy, 11th March 1836.[4] Their Lordships held in that case that schoolmasters enjoy their situations ad vitam aut culpam; and that they could not make a bargain that would deprive them of their right.

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1 See Acts of 1689; case of the Town Clerks of Edinburgh, 3d and 31st July 1746, Morr. 7447; Town Clerks of Inverkeithing, 25th July 1761; Hastie v. Gardner, 10th Feb. 1829 (Kilrenny); Day v. Bell, 11th March 1830 (Dundee); Philips, 18th Jan. 1832 (Dysart).

2 6 G. 4. c. 23.

3 Stat. 1567, c. 37.; 1681, c. 11. and 20.; 1698, c. 4.; 49 G. 3. c. 42.

4 14 D., B., & M., p. 710.

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In the case of The Magistrates of Montrose v. Strachan[1], the same doctrine was established; and in the case of Simpson v. Tod, "it was observed on "the bench, that it was inconsistent with law to elect "a town clerk during pleasure; that he was a public "officer entrusted with the performance of important "public duties; and that he ought not to be under the "apprehension that he was liable to be dismissed at "the pleasure, or perhaps caprice, of the town council." These observations were made by the Lord President, and concurred in by the other judges.

This case of Simpson is of great importance, as bearing directly upon the present appeal, inasmuch as Simpson's commission bore expressly to be during pleasure, whereas the respondent's commission bears no such qualification.

The principle which regulated the case of Simpson must regulate the present case. By the law of Scotland such a condition or qualification in the appointment of a town clerk as occurred in Simpson's case, and as was attempted in the appointment of the respondent, is illegal. This does not vitiate the appointment, but merely renders the condition or qualification ineffectual. The case of the appellants is founded entirely upon the illegal condition.[2]

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[1] 18 Jan. 1710, Mor. 13118.

[2] *Respondent's Authorities.* — (1.) Harvie v. Bogle, 27th June 1756, Morr. 13126; Magistrates of Forfar v. Adam, 14th May 1822, S. & D. vol. i. p. 400. (2.) Tod v. Simpson, 17th June 1824; Kemp v. the Magistrates of Irvine; Fol. Dict. vol. iv. p. 196, Morr. 13136; case of Schoolmaster v. Dunsyre, 1777. (3.) Case of Collector of Supply of Lanark, 2d July 1747, noticed by Lord Elchies in a note to the case, No. 11. of his collection, voce Public Officer. See also Lord Elchies' note. Drysdale, 30th June 1825, S. & D., vol. iv.; Abercromby v. the Incorporation of Goldsmiths, 19th Nov. 1802.

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2. The first part of the petition and complaint which related to the right of the magistrates and councillors of the burgh of Annan to have access to the council minute-book and other documents connected with the burgh, in the hands of the respondent, was unnecessary, as the respondent had never disputed that right, but, on the contrary, had always expressed his willingness to act under the magistrates and town council, and in that character to give them full access to all the documents in his possession. It is not alleged by the appellants that they ever required this access for themselves; on the other hand, the respondent, whilst he denied Mr. Little's right to have such access, and resisted his pretensions as a breach of interdict, invariably tendered his own services as town clerk to the magistrates, and admitted their right of access to the burgh records and papers through himself.

The second part of the prayer of the petition and complaint, which regarded Mr. Little, was incompetent, inasmuch as what was there required was directly at variance with the interdict which had previously been obtained by the respondent; and it was incompetent to evade that interdict, or indirectly to seek to remove or modify it, by a separate process of petition and complaint; and as the interlocutors appealed from relate to a matter of practice, they ought not to be disturbed, as was laid down by Lord Eldon in moving the affirmance of the decision of the Court of Session in the case of Lord Kinnoul v. Gray and Dalgleish.[1]

LORD BROUGHAM.—My Lords, there are two appeals in this case. One of them is from an interlocutor pro-

[1] 21st March 1805.

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nounced, on the 5th of December 1835, on a petition and complaint at the instance of the appellants the Magistrates of the burgh of Annan against Mr. Farish the respondent, praying that their petition might be served upon Mr. Farish, and also upon Mr. Dalgleish; and that it might be found that the complainers, as magistrates and councillors of the said burgh, were entitled to full access to the council minute book, registers, and other documents connected with the burgh; that James Little, as conjunct town clerk, was also entitled to full access to the council minute book, &c., and that Mr. Farish should be decerned and ordered to give access to the minute book, &c., and that Mr. Farish should be found liable to the expenses of the complaint and the whole proceedings thereon. This is connected with another action of suspension brought by Mr. Farish for the purpose of staying proceedings the object of which was to interfere, as he contended, with his rights as town clerk of the burgh of Annan, to which he had been appointed, as the town council contend, for the period of five years, but under which appointment, as he contends, he is entitled to hold the office for life.

I will in the first instance call your Lordships attention to the interlocutor appealed from in the first case, that of the petition and complaint of the Magistrates and Council. (*His Lordship then read the interlocutor quoted on page* 938.)

My Lords, the unanimous judgment of the Lords of the Second Division upon this case has naturally great weight in the recommendation which I feel it my duty to give that it should be affirmed, because the point involved is wholly one of practice. Your Lordships are always very slow to alter the judgment of any court in

such a case unless the clearest proof can be made that there has been a miscarriage. In Kinnoul v. Gray, Lord Eldon, though he would not go so far as to say that such a reversal might not take place, yet expressed himself strongly on the leaning which there ought to be against taking that course. "The House," said his Lordship, "will proceed in such cases with the utmost "caution, for it will give the Court below credit that in "points which regard their own practice they are right, "unless it can be shown beyond the shadow of a doubt "that they are wrong." This interlocutor, therefore, according to my humble judgment, ought to be affirmed, and with costs. My noble and learned friend, the late Lord Chief Justice of the Common Pleas, attended at the hearing of this cause; at that time he held the opinion I have now expressed, and I have no reason to think that his opinion is at all altered.

On the second of those appeals our opinion was equally strong in favour of the respondent. That opinion on my part has been since confirmed by reconsidering the case, and my noble and learned friend has seen no reason, I believe, at all to alter the opinion he originally formed.

It is clear that the only question raised in this case relates to the possessory title of Mr. Farish the suspender and respondent. Whether or not the magistrates had a right to remove him and to appoint another in his room —in other words, whether his office was one held at the pleasure of the magistrates or during good behaviour, is a question of great importance certainly, but which does not properly arise here, and which certainly the interlocutors appealed from do not mean to decide. That is a question which, I say, the interlocutor of the Lord Ordi-

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nary, Lord Moncreiff, affirmed by the Lords of the Second Division, did not mean to decide, because the full and luminous statement in the learned Lord Ordinary's note shows that he considered himself as dealing with the possessory question alone, although there are certainly parts of the interlocutor which might seem to imply that the general question was dealt with. I allude to the manner in which the case of Simpson v. Tod is referred to; and still more to the finding as stated to result from a general rule in the law of Scotland, that the suspender, the present respondent, as a public officer, could not be summarily removed from his situation of town clerk. It is true that the inference which might be drawn from this is rebutted by the reservation which follows, namely, "without prejudice to any action of reduction which the "respondent the present appellant may be advised to "raise." This coincides entirely with the views taken in the note, which the Lord Ordinary closed with stating that "the difference between the parties is by whom the "declarator ought to be brought for trying the question "by what tenure the office is held, and that this lies on "the respondents," (that is, the appellants here,) "the "suspender" (who is the respondent here) "being "entitled to the possessory judgment."

It must, indeed, be admitted that the case of Simpson v. Tod completely disposes of the present case, that is, of the possessory question. The decision in the advocation there was given in the question of possession, and it is justly observed by the Lord Ordinary in commenting upon it, that if there be any difference the present case is stronger for the judgment than the one referred to, where the appointment did not profess to be for a term of years, but during the pleasure of the Council

of Pittenweem. However, Simpson v. Tod appears in the other branch of that litigation to have gone beyond the possessory question, the decision given subsequently in the declarator having been regarded by the Lord Justice Clerk in deciding the present case as a general decision upon the nature and tenure of the office. But into that question it would manifestly be improper that we should enter upon this occasion; it is one of great importance, and as it was not disposed of by the Court below, so even if it could competently be raised here, your Lordships would do an unwise thing to discuss it, though it was certainly very fully argued at the bar. We are on the possessory title, and on that no doubt can, I think, be entertained that the Court below, in adhering to the Lord Ordinary's interlocutor, came to a right decision.

For the same reason, however, to prevent all possibility of mistake, to make it appear more clearly than it now does on the face of the interlocutor of the Lord Ordinary, that the possessory question alone is determined, and consequently to prevent this judgment of affirmance, which I shall humbly recommend your Lordships to pronounce, from being construed into a final decision upon the nature and tenure of the office of town clerk generally, it will be proper that the interlocutor should be altered; and the purpose I have in view will be easily accomplished by leaving out the words referring to the case of Simpson v. Tod, and the finding that the suspender as a public officer could not be removed summarily. The real object of the interlocutor will be perfectly attained, and the judgment will stand in every respect the same as it now does substantially, if it only suspends the letters and continues the

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interdict. This alteration, however, must be distinctly understood as not intimating the least opinion against the views taken by any branch of the Court below of the case of Simpson v. Tod, much less as impugning the authority of the decision on the declarator in that case. Your Lordships merely leave the question open, and confine your judgment of affirmance to the possessory right merely, the only proper subject of the judgment below; and the alteration made in the interlocutor is solely with the view of preventing this affirmance from appearing to conclude the other question. It will not follow, however, that because the interlocutor is thus varied, the appellants should not pay the costs of the appeal upon the question, and the only question between the parties, namely, the right of the respondent to a possessory judgment, on which there really is no doubt at all. The further question, if decided in his favour, would only make the strength of his case the greater, and if decided against him (which it could not be in this proceeding) would not alter his right to an affirmance of the interlocutor which he has obtained below in respect of the possessory right. The respondent must therefore have his costs of the appeal; and the alteration in the interlocutor of May 1836. will be to leave out the words after the word "avizandum" to the words "the law of "Scotland."

On the first appeal the House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred

in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

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On the second appeal the House of Lords ordered and adjudged, That the said interlocutor of the 18th of May 1836, complained of in the said appeal, be and the same is hereby affirmed, with the following variation; viz. by leaving out after the word "avizandum" the following words, "in respect of the express judgment of the court in "the case Simpson v. Todd and others, June 17th, 1824, "in the process of advocation at the instance of Simpson, "and in respect that that judgment, which was pronounced "with great deliberation, appears to the Lord Ordinary "to be in conformity to what he had always understood "to be a general principle in the law of Scotland": And it is further ordered and adjudged, That the other interlocutors complained of in the said appeal, regard being had to the above variation, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

A. M. M'CRAE—ARCHIBALD GRAHAM, Solicitors.