

## No 35.

Such matters fall under the cognizance of the Sheriff.

As the Lords did not think this petition sufficiently special, he afterwards charged the fact on Nathaniel Cooke quartermaster, commanding the party at Broughton, who thereon was ordered to be served with a copy.

Mr Cooke *answered*, that the fact was committed before he was appointed to the command, and that he had before the application replaced the goods upon the farm, and appointed a dragoon to take care of them. He also alleged, it was notorious James Sinclair was in the Rebellion.

“ THE LORDS being of opinion it was only competent to the Sheriff to have any intromission with the effects of rebels, they directed Mr Cooke to remove his guard, giving warning thereof 24 hours before hand to the Sheriff; but as Mr Pringle had rashly accused him, they gave him the expense of his defence.”

Act. *Lockhart.*

Alt. *Miller.*

Clerk, *Kirkpatrick.*

*D. Falconer, No. 135. p. 167.*

1756. *July 27.*

THOMAS HARVIE *against* MATTHEW BOGLE, and Kirk-Session in Glasgow.

## No 36.

The clerk of the general kirk sessions at Glasgow not removable at pleasure, though the office was not conferred on him either during pleasure, or during life.

ANCIENTLY there was but one kirk-session in Glasgow. Upon the encrease of inhabitants this one kirk-session was divided, in the year 1649, into several particular ones, according to the number of churches; after which the particular sessions met sometimes about their particular business; and 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; this clerk did both their particular and general business, for which he had emoluments to the amount of L. 50 yearly.

From the year 1606, till the year 1646, the clerk was chosen from year to year.

From the year 1646, till the year 1750, the elections of the office of clerk did not express whether it was given for life or during pleasure; neither did use explain the duration of the office: for though in general those who got it enjoyed it while they lived; yet on the other hand, in one instance, a clerk had been turned out for malversation, and in another for incapacity arising from disease.

In the year 1750, Provost Millar, the then clerk, resigned his office into the hands of the kirk-session, on a condition of getting, during his life, L. 40 Sterling a year from his successor in office; and the kirk session chose Thomas Harvie in his place, but without expressing whether the office was given during pleasure, or for life.

A few years after, the kirk-session, without assigning any reason in their act, removed Mr Harvie, and elected Matthew Bogle into the office.

Harvie brought a reduction of this election against the Kirk-session and Bogle.

The defenders condescended upon several gross neglects of Harvie in the exercise of his office, but did not allege them till the process was far advanced.

*Pleaded* for the pursuer; Public expediency requires that offices of labour and trust should be for life; and therefore the legal presumption is, that the office in question is for life, unless that presumption be taken off by a contrary usage: but such usage cannot be shown here; for, on the contrary, since the 1647, those who got the office have held it for life; particularly in the case of Provost Millar, the session was not at liberty to elect without his resignation; and the two exceptions of removing for malversation and incapacity, arose from necessity, and do not contradict the general tenor of a contrary usage.

*Answered* for the defenders; The clerkship in question is only during pleasure; it is an employment, not an office; it requires neither a particular education, nor particular abilities; the clerks to all the other kirk-sessions in Scotland are during pleasure. Provost Millar's resignation was an expedient thought of by his friends, when he grew old, to save the affront of a removal. Those who enjoyed the clerkship in question from the 1649 during their lives, held it by tolerance; for such tenor was not expressed in their commissions. The removal of one of them on account of his incapacity from disease, is altogether inconsistent with the notion of a tenure for life.

The Lords took a middle course; they held the office to be neither for life nor absolutely during pleasure, but that the person possessed of it was removable, in terms of two decisions, 18th January 1710, Magistrates of Montrose against Strachan, No 26. p. 13118., and 10th November 1747, John Foulis against Vestry of English Chapel, No 2. p. 6581., for reasonable causes, without the necessity of a charge of direct malversation; and that the neglects charged on the pursuer being reasons *ex post facto*, assigned in the course of the process, and not in the deed of Bogle's election, were not proved *debito tempore*.

“THE LORDS sustained the reasons of reduction of the defender's election, and declared Thomas Harvie clerk to the general and particular sessions of the town of Glasgow.”

Reporter, *Kames*. Act. *Elliot, Lockhart, Ferguson*. Alt. *J. Dalrymple, Millar, A. Pringle*.  
*J. D.* Fol. *Dic. v. 4. p. 196.* Fac. *Col. No 210. p. 307.*

\* \* Lord Kames' report of this case is No 2. p. 8012., *voce* KIRK-SESSION. A contrary decision was pronounced in the case of a precentor and session-clerk, 13th January 1779, Anderson against Bailies of Kirkwall, No 6. p. 8017., *voce* KIRK-SESSION.