

[Heard, 7th March. — Judgment, 5th August, 1842.]

THE GENERAL CONVENTION OF ROYAL BURGHS OF SCOTLAND,  
and the COMMON AGENT and PRESES of the Convention,  
*Appellants.*

CHARLES CUNNINGHAM, and CARLYLE BELL, Conjoint clerks  
to the Convention, *Respondents.*

*Public Officer.* — In the absence of any proof of usage to the contrary, *held*, that the appointment of clerk to the Convention of Royal Burghs, (a body of an anomalous character, partaking in some respects of corporate qualities) without any express term of endurance, did not necessarily import an appointment for life.

*Ibid.* — Where the salary of an officer of a public body, was the subject of an annual vote, — *Held*, that the body had a right to regulate the amount of salary, by increase or reduction, at its pleasure.

*Corporation.* — Whether the Convention of Royal Burghs is a corporation. *Query.*

THE General Convention of Royal Burghs of Scotland is a very ancient institution, recognized by various royal charters and acts of Parliament; and among others by the statute James III. Parliament 14th, cap. 111; the statute James VI. Parliament 5th, cap. 64; the statute James VI. Parliament 7th, cap. 119; the statute James VI. Parliament 19th, cap. 6; and an unprinted act of Parliament passed in the year 1607.

The Convention consists of commissioners or delegates appointed by all the royal burghs in Scotland, to administer the affairs and exercise the powers of the Convention. It has very important powers, privileges, and jurisdiction, which it has exercised for time immemorial; and, *inter alia*, it has been in use to make regulations with regard to the trade and shipping of

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burghs ; to protect the privileges of burghs and burgesses ; to decide in controversies between different royal burghs, and even between burghers and the magistrates ; to levy certain dues from the burghs generally, and to grant aid occasionally to burghs appearing to stand in need of it ; to impose fines upon its own members and upon burghs contravening its regulations. The sentences which it pronounces have been in use to be acknowledged by the courts as the sentences of a legal tribunal, and have been carried into effect by means of legal diligence. The meetings are annual, lasting only three days generally, and when the business is concluded, the meeting is dissolved, not adjourned ; and in the interval between this and the next annual meeting, the interests of the burgh are attended to by a committee of the Convention. What money is required for expenditure, is voted annually, and raised by an assessment upon the burghs, under the authority of the statute of James III.

Among other officers of the Convention, there used to be a clerk and recorder. The duties of the clerk were,— the issuing the annual missive calling the Convention together on a particular day, as directed by the previous meeting, — preparing for each meeting, by arranging all the books and papers, carrying to the place of meeting, and making out an abstract of the routine business to be laid before the preses, — superintending the election of preses, and swearing him into office, — scrutinizing the commissions of the members of Convention, who are 126 in number, and of seeing the requisite declaration by the members duly signed, — swearing in all the members, after their qualification for sitting as members has been duly examined and reported upon and minuted, — reading various acts of Convention which are directed to be read at each Convention, — reading the minutes of the annual committee, and minuting whatever enactments may be made thereupon, — giving attendance during the whole period of all meetings of the General

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Convention, and likewise at their annual or other committees, — framing the minutes of these meetings, in order to their being engrossed, and afterwards attesting the correctness of the record, — authenticating the sentences pronounced by the Convention, — certifying the annual missives to the burghs, and answering such queries as from time to time may be put to them by the individual burghs, on points regarding which they require information.

The duties of the recorder, again, were to record the proceedings of the Convention, and of the different meetings of the annual committee—to keep the record and productions in a safe place, and give access to them at all times to the members of the Convention, — to engross in the records of the sets such alterations in the different sets of the burghs as might be made from time to time — to prepare the business of each day's meeting, and make out the rolls and memoranda of the proceedings.

In the year 1808, Gray and Dundas were conjunct clerks of the Convention ; upon what terms did not appear. On the 13th of July, 1808, Gray resigned his office, and the Convention, by act of that date, appointed Gray, and Cunningham, the appellant, to be conjunct clerks, “ jointly with John Dundas, with sur-  
“ vancy to the longest liver of them the said John Gray, and  
“ Charles Cunningham,” “ with power to serve the said office as  
“ fully and freely in every respect as any of their predecessors  
“ could, or might have done, or which to the office of conjunct  
“ clerk to the Royal Burghs of Scotland, by law or custom, does  
“ appertain, giving and hereby granting to the said John Gray,  
“ the fees, salaries, and emoluments, belonging to the said office  
“ during his natural life.”

On the 9th day of July, 1816, on the occasion of the death of Dundas, the Convention appointed the appellant, Carlyle Bell, to be his successor in the same terms, *mutatis mutandis*, with the appointment of Gray and Cunningham.

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Previous to 1712, the salary of the clerk to the Convention, was L.40 per annum, and of his deputy, L.8, 6s. 8d. In 1712, the Convention passed an act in these terms: — “The Convention direct their agent to pay the salaries and gratuities following; and the assessor for the burgh of Glasgow protested against all gratuities and augmentations of salaries, and thereupon took instruments in the clerk’s hands; to which protestation the assessors of the burghs of Perth and Dundee, and the Commissioners for Aberdeen and Aberbrothick, adhered thereto. To the principal clerks, of ordinary salary, L.480 Scots, and L.240 Scots for their extraordinary pains. To the depute-clerk, L.100 Scots of ordinary salary, L.120 Scots for extraordinary pains.” These sums (being L.40 sterling of salary and L.20 sterling of gratuity to the principal clerks, and L.8, 6s. 8d. sterling of salary and L.10 of gratuity to the depute,) accordingly appeared in the acts of 1713, as included in the agent’s account. In 1713, there being by this time two conjunct clerks, the Convention passed the following act, “The Convention appoint their agent to pay to the two principal clerks L.50 sterling money equally betwixt them, as their salary for this year’s service, and the like salary yearly in time coming in lieu of all gratuity. Item, To James Naysmith, their depute-clerk, L.15 sterling money as his salary for this year’s service, and the like salary yearly in time coming in lieu of all gratuity.”

At the date of Gray and Cunningham’s appointment, the salary of conjunct clerk was thus L.25 to each. On the 13th of July, 1815, the Convention increased the salary to L.50 each.

On the 15th of July, 1824, the Convention abolished the office of recorder, and imposed upon the conjunct clerks the duties which had theretofore been performed by that officer. The salary which had been in use to be paid to the recorder, was L.50 per annum, but when his duties were transferred to the

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conjunct clerks, the transference of the office was not accompanied by a transference of the salary, nor by any increase in the emoluments of the clerks.

On the 9th day of July, 1834, the Convention passed an act, resolving, that its establishment of officers was extravagant and unnecessary, and on the 10th of July, they reduced the salary of the conjunct clerks to L.50 between them. The clerks protested against the making of this reduction at any future time under form of instrument, which was put upon the record of the Convention, but without disturbing the resolution of reduction for the current year.

On the 16th of July, 1835, the Convention farther reduced the salary of the conjunct clerks to L.35 between them.

In December, 1835, the respondents brought an action against the Convention, for reduction of those acts of date the 9th and 10th of July, 1834, and 16th of July, 1835. This action was served upon the common agent, appointed by the Convention, and their preses. The defence was, that the defenders had not been cited. To obviate this objection, the respondents brought a new action, which was served upon the Convention, while assembled, and concluded for reduction of the acts mentioned, and to have it declared, that it was “*ultra vires* of the Convention  
 “ to add to the duties of the pursuers, as conjunct principal  
 “ clerks of the Convention, except by their own consent, or in  
 “ any way to diminish or reduce their salary of L.100 between  
 “ them: That the pursuers had a vested life interest in their  
 “ office, and in the fees, salary, and emoluments thereof; and  
 “ that, accordingly, each of them was entitled to a salary of L.50  
 “ sterling for the current year, and for each succeeding year of  
 “ his life, unless he either should voluntarily resign, or should  
 “ forfeit his right to the office.”

The pleas maintained by the respondents in support of their action were : —

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“ I. The office of conjunct clerks, with the salary and other emoluments which were attached thereto, do by law and immemorial usage belong to the grantees thereof *aut vitam ad culpam*; and that office, with its salary and other emoluments, having been granted to and vested in the pursuers respectively, and neither of them having been guilty of any fault, the Convention had no power to deprive either of them of his office, or of any part of the salary which was attached thereto.

“ II. *Separatim.* — The pursuers having obtained from the Convention express grants of the offices, and of the emoluments thereto attached, and it having been expressed, or at least implied in these grants, that they were made during the lifetime of the grantees; these grants having been accepted and acted upon for a course of years, the Convention is not entitled to revoke or alter the same, or to deprive the grantees of the offices, or of any part of the emoluments so granted.

“ III. The acts, resolutions, and minutes under challenge, are null and void, in respect of their being contraventions of the rights so vested in the pursuers.

“ IV. The reduced amount of the sums which by these acts, minutes, or resolutions are proposed to be allowed to the pursuers instead of their full salaries, would not afford nearly an adequate remuneration for the performance of the duties, and the responsibility attached to their offices.

“ V. The acts, resolutions, and minutes under challenge, never were acquiesced in by the pursuers; but were always objected to and protested against by them.”

The defences maintained by the appellants, on the other hand, were : —

“ I. The acts done by the Convention within the powers conferred on them by their constitution, and in the regulation of their own affairs, as in the appointment of clerks, &c., or in fixing their allowances, are not subject to review in any court, but are of themselves final and conclusive.

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“ II. The appointment under which the pursuers hold their  
 “ offices is not for life or fault, nor is the salary unalterably fixed;  
 “ but they hold their offices during the pleasure of the Conven-  
 “ tion, and for such salary as the Convention may choose from  
 “ time to time to modify and allow, and, therefore, cannot ob-  
 “ ject to a reduction of the allowance, if the Convention see  
 “ cause, such reduction being made in exercise of the same  
 “ powers under which the Convention has at different times aug-  
 “ mented the salary.

“ III. The Convention of one year, being a representative  
 “ body annually elected, have no power to bind the Conventions  
 “ of any other years, or limit or contract their powers.”

The only evidence in regard to former appointment of clerks to the Convention, and the nature of the tenure under these appointments, was the following entries in the records of the Convention.

The first was an entry on the 6th of July, 1654, in these terms: — “ The same day, anent y<sup>e</sup> 9th act of the General Conventione  
 “ of burrowis, haulden at y<sup>e</sup> burgh of Edin<sup>r</sup>, the 12<sup>th</sup> of Aug<sup>t</sup>.  
 “ 1652, upon ane order frome the Commissioners frome the  
 “ Commonweall of England, anent the electione of William  
 “ Thomsons, common clark of Edinburg, to be sole gnall. clark  
 “ to the burrowis dureing thair pleasur, with power to him to  
 “ exercise the samyne, and granting to him all privileges, fies,  
 “ and casualties y<sup>rt</sup>o belonging, or w<sup>ch</sup> ever belonged to any of  
 “ thair former clarkes, and declairing all former actes maid in  
 “ favor of any former clark to be frome that tyme furth voyd,  
 “ null, and of no effect: The prnt. Commissioners of burrowis  
 “ now conveyned therefore approves and confirmis the said act  
 “ in y<sup>e</sup> hail headis and clausis, circumstances and conditiones  
 “ yairof, and ordeines y<sup>e</sup> same to stand in force and effect dure-  
 “ ing thair pleasure.”

Sir William Thomson having, it appears, deserted the service of the Convention, the Convention of 1665 elected a clerk

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in the following terms: — ‘ 6th July, 1665. — The same day,  
 “ the pn<sup>t</sup> Commissioneris of Borowes nominates and electis  
 “ George Chein to be their g<sup>nal</sup> clerk dureing this pnt. Con-  
 “ ventione, with power to him to extract and subscrivye all acts  
 “ maid y<sup>rin</sup>, and this to continow allenarlie dureing the borowes  
 “ pleasure, who compeired, accepted, and gave his oath de  
 “ fidei.”

On the 4th of July, 1666, there was another entry in these terms: — “ The q<sup>lk</sup> day the Com<sup>rs</sup> of the Royal Burrowes met  
 “ in a Gen<sup>l</sup>. Convention, taking to their serious consideratioun  
 “ that Sir W<sup>m</sup>. Thomsons, late town-clark of Edin<sup>r</sup>., was elected  
 “ clarke to the s<sup>d</sup> Convention dureing their pleasure allenerlie,  
 “ and that thereby it is in their power to declair the said place  
 “ vaccant, so often as they shall find it meat and expedient for  
 “ their service and affairis; and farther, that the s<sup>d</sup> Sir W<sup>m</sup>.  
 “ Thomsons has willfullie deserted his charge, by absenting  
 “ himselfe, and withdrawing his service at this tyme, without any  
 “ lawf<sup>l</sup> cause made known to the Convention, either be himselfe  
 “ or any other person in his behalfe: Therefor, and for sundrie  
 “ other weightie causes moveing them thereto, the s<sup>d</sup> Conven-  
 “ tion declaire the place to be vaccant, and at their disposall, and  
 “ all acts, ane or mae, for electing or continuing Sir W<sup>m</sup>. Thom-  
 “ sone, or any uther former clark, to be clark to the said Con-  
 “ vention, to be now, and in all tyme coming, voyd and null in  
 “ the hail heidis, articles, and clauses thereof.”

Sir William’s successor was elected by the following minute:—

‘ 4th July, 1666. — Act 3.

“ The s<sup>d</sup> day the Convention of y<sup>o</sup> Royal Burrowes of this  
 “ kingdom, taking to y<sup>r</sup> consideratioun y<sup>t</sup> be y<sup>r</sup> act of y<sup>e</sup> daite  
 “ of thir prnts. they have declared the place of clark to the  
 “ borowes vaccant and at y<sup>r</sup> disposal, and y<sup>t</sup> necessar it is y<sup>t</sup>  
 “ y<sup>e</sup> s<sup>d</sup> place be filled w<sup>t</sup> ane able and weill qualified persone,



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“ and being sufficientlie informed of y<sup>e</sup> abilities and uther good  
 “ qualifications of M<sup>r</sup> Thomas Young, toune clark of Ed<sup>r</sup>. for  
 “ y<sup>e</sup> discharge of y<sup>e</sup> s<sup>d</sup> office: Therefore they doe elect,  
 “ nominat, and appoynt the s<sup>d</sup> M<sup>r</sup> Thomas Young to be clark  
 “ to y<sup>e</sup> s<sup>d</sup> Convention of Burrowes of this kingdome, generall  
 “ and particular, dureing y<sup>r</sup> pleasur allenerlie. W<sup>t</sup> all privi-  
 “ ledges, liberties, and immunities y<sup>rto</sup>. belonging, w<sup>t</sup> power to  
 “ him, by himselfe, (or in caice of his necessar absence, upon  
 “ a sufficient excuse, to be allowed of be y<sup>e</sup> Convention for y<sup>e</sup>  
 “ time, by such person as he, w<sup>t</sup> consent of y<sup>e</sup> s<sup>d</sup> Convention  
 “ shall appoynt) to exerce the said office during the tyme fore-  
 “ said, and to uplift y<sup>e</sup> fies, dues, and casualties y<sup>rto</sup> belonging,  
 “ sicklyk and als freely as any uther clerk formerlie did, or  
 “ lafully might have done; who compeired, accepted, and gave  
 “ his oath *de fideli administratione.*”

Mr Thomas Young having died, the Convention of 1669 elected and nominated Mr James Roughead, town-clerk of Edinburgh, to be general clerk of the burghs “ during their pleasure; and grantis and allowis to him all casualties, fies, “ and immunities belonging thereto, with power to him by “ himself, or in case of his necessar absence, upone a sufficient “ excuse to be allowed of be y<sup>e</sup> burrowes for the tyme by such “ a person as he, with consent of the said burrowes, shall “ appointe, to supply y<sup>e</sup> said office dureing y<sup>e</sup> tyme foresaid, “ and to uplift the fies, dues, and casualties thereto belonging, “ sicklyk, and als freelie as ony oy<sup>r</sup> clerk formerlie did, or “ lawllie might have done; who compeired, accepted, and “ gave his aith *de fideli administratione.*”

The Lord Ordinary (*Cuninghame*) ordered cases to be boxed to the Court.

On advising the cases the Court (First Division) pronounced the following interlocutor: — “ The Lords having advised the “ mutual cases in the conjoined actions, decern and declare in

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“ terms of the libels of the original and supplementary actions :  
 “ Find the pursuers entitled to expenses, and remit the account  
 “ to the auditor to tax the same, and report.”

The appeal was against this interlocutor. In the papers in the Court below a very elaborate history of the Convention of Royal Burghs was gone into, with the view of shewing the very ample powers which that body had enjoyed from a remote date — powers of a legislative, ministerial, and judicial character ; and an argument was founded upon this, that the determinations of the Convention in matters properly within their jurisdiction being conclusive, and not subject to appeal, *multo fortiori* must their determinations as to the duties to be performed by, and the remuneration to be paid to, their own officers be conclusive, and therefore the Court of Session had no jurisdiction to entertain the questions raised by the respondents' action. This position, however, though mooted at the bar, was given up by the counsel for the appellants in their opening.

*Mr Stuart and Mr Gordon for the appellants.* — I. The foundation of the respondents' action is, that they hold their appointments for life, and to support this position they affirm the Convention of Royal Burghs to be a corporation, and a body therefore capable of conferring such an office. For this, however, there is no authority. However indisputable it may be that the bodies — the several Royal Burghs — who elect the members forming the Convention, are themselves corporations, that will not of itself constitute the Convention a corporation. A body of delegates, because its members come from corporations, does not therefore become a corporation itself. Although the powers conferred upon the Convention by the act 4 James III. cap. 111, ratified by 5 James IV. caps. 64 and 119, and preserved by the 21st art. of the Union, are very extensive, there is nothing in any of these statutes which confers upon it the

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characteristics of a corporation; neither is there any authority for saying that they have been acquired by usage. — 1. The Convention has not perpetual succession, an essential requisite to a corporation; its meetings are annual, lasting only for a few days in each year; the members are elected each year by the burghs which they represent, and on the last day of meeting in each year, the meeting is not adjourned, but dissolved. The body then ceases to have existence, and the members to have any character other than what they enjoyed previous to receiving their commissions. If any meeting should require to be held between the period of dissolution and the next annual meeting, it does not consist of the same persons who were members at the period of dissolution, acting under the commission which they then held, but is composed of persons acting under new commissions given for the occasion. 2. The Convention cannot hold real property, another essential requisite to a corporation. Supposing them to do so, in whom would the fee remain after the dissolution of the body, or who, in such a case, could be made liable for the prestations to the superior? 3. There is no instance of any contract or obligation entered into by the Convention, with the exception of one in 1692, between it and a Mr Buchan, referred to in *Buchan v. Brown's Supp.*, but so little did the parties trust to the validity of the contract in that case, that they had it ratified by Parliament by the act 1639 cap. 30. 4. The Convention, then, had no power to appoint the respondents for life, as this would have been an exercise of power incompatible with its own existence. If it had entered into any such contract, in what manner could it be enforced? the body has existence but for three, sometimes only two days; unless the creditor should accomplish his relief in that space of time, it is gone for ever, as the body has then ceased to have existence. That this is so is admitted by the manner in which the respondents obviated the objection to the citation in the first

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action; feeling that the common agent and the preses did not represent the body, that there was no other person who did, and that the only way of reaching the body was by service upon it while in actual sitting, they took that method of citation in their second action.

[*Lord Campbell.* — If the body is not a corporation, suppose the salary of the respondents not to be paid, would they have no relief?]

If decree were given in this action against the Convention, upon whom could the messenger serve execution, or what effects could he attach? the last Convention is dissolved, and the next is not yet created, and if it were, it does not represent the last. Each Convention meets with the powers given to it by the statute for the current year, and that only; and accordingly each Convention has a right to determine for itself what establishment of officers it will have, and upon what terms; and if the salary of the clerks were not paid, the claim for it might be good against the common good of the burghs, or perhaps against the individual members of the Convention as the members of a voluntary association, but it could not be made effectual in any way against the Convention itself.

II. In the acts of the Convention appointing the respondents to their office, there is nothing implying what is to be the term of its duration, while the only evidence of previous appointments shews that the office has been held during pleasure only, and there is nothing in the nature of the duties to be performed which should make it have a permanent character. No doubt town clerks have been found not to be dismissible at pleasure, but to hold their offices *ad vitam aut culpam*. That was upon the principle that they had duties to perform to the community of the burgh apart from those they owed to the corporation of the burgh, and that therefore they must be held to enjoy their

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office upon such terms as might ensure to the community a due performance of its duties. Even as to them, however, it is an open question whether their office is one for life, *Mags. of Annan v. Farish*, 2 *Sh.* and *M'L.* 930. But the respondents have no duties to perform except what they owe to the Convention itself, by which they are appointed, they cannot therefore be said to be even public officers, in the proper use of the term; they owe nothing to the public, and are the mere private servants of the Convention. It was therefore within the power of the Convention to make such regulation as to the endurance of the office, or its emoluments, as they might judge proper. Even if the respondents did hold a public office of such a nature as ought to be permanent, the Courts had not gone the length of finding that they would be entitled to hold it for life, or until fault proved, but only that they should not be dismissible unless upon reasonable ground. It is sufficient, therefore, to shew a reasonable cause why their salaries should be reduced. Previous to the reform act, the duties of clerk to the Convention were all but nominal, and such as they were, they were still farther reduced by that statute. The act of the Convention in 1815, increasing the salary, was not expressed for all time coming, and that act, and the other in 1713, shew that the Convention has been in use to regulate the salary according to the duty to be performed, and there is no allegation that the reduction of salary complained of was made fraudulently to defeat in substance the right to the office.

*Mr Attorney-General and Mr Maconochie for the respondents.*  
— I. The Convention of Burghs is an aggregate corporation, consisting of delegates from all the individual burghs, and created by statute for the performance of important public functions. Although in its creation it may not expressly be constituted a corporation, or be entitled to that character in respect of

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its composition, by the law of Scotland it is not necessary that there should be either charter or statute to give the right to act as a corporation. The Dean of the Faculty of Advocates may sue as such, and so may the General Assembly of the Church.

[*Lord Chancellor.* — Where are the instances of the General Assembly suing?]

*Robertson v. General Assembly*, 11 *S. and D.* p. 297, is an instance of an action against the Assembly; and Presbyteries, if not Synods, have maintained actions, though they certainly are not corporations. The Attorney-General also in this country may maintain a suit begun by his predecessor, though he is not a corporation.

[*Lord Cottenham.* — He is exercising the prerogative of the Crown.]

The Convention is at all events an important body politic, exercising public functions, judicial as well as ministerial acts, 1487, cap. 3, and 1578, cap. 64. When grants were wont to be made by Parliament to the Sovereign, a *cumulo* sum was laid upon the burghs, which was allocated upon them by the Convention, and to this day the Convention allocates the proportion of the land tax to be borne by the individual burghs. The powers of the Convention were confirmed by the act 1581, cap. 119, which directed that letters of horning should proceed against the absenting burghs on the certificate of the clerk of the Convention; the act 1607, cap. 6, also authorizes the same diligence on the acts and decreets of the Convention, betwixt burgh and burgh, and burgesses; and *M<sup>c</sup>Kenzie*, in his observations on the act 1581, cap. 119, says, that by an unprinted act in 1607, execution is to pass at the instance of the agent of the burghs. In the *Royal Burghs v. Burgh of Selkirk*, 3 *Brown's Supp.* 410, the Courts recognized the right of the Convention to appear in a corporate capacity, and in the records of the Convention there are many instances of similar proceedings. The present defence

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and this appeal admit the existence of the body for the purposes of the action, otherwise why are they maintained, and the action not allowed to work out its own cure. But the permanent existence of the body is shewn by its permanent establishment of office-bearers, its common agent or procurator-fiscal, and clerks, none of whom has been appointed by every Convention, but has enjoyed his office perennially. To deny the existence of the body is merely to confound its existence with the meetings of its members. And even if the body did not exist, that will not affect the right of the respondents to their office, as is shewn in the case of the clerks of the House of Commons, who retain their offices notwithstanding the dissolution of Parliament.

II. The officers of a body of the public corporate character of the Convention, must be considered as public officers; and as to these it has in several cases been found, that the clerks of individual burghs hold their offices *ad vitam aut culpam*, independent of the terms of their appointment, *Mags. of Forfar v. Adam*, 1 *S.* and *D.* 458; *Simpson v. Tod*, 3 *S.* and *D.* 150; *Farish v. Mags. of Annan*, 15 *S.* and *D.* 107. So in the case of the clerk of the general kirk-sessions of Glasgow, it was found, that he held his office for life, *Harvie v. Bogle*, *Mor.* 13126. Independently of this, the appointment of Cunninghame, in conjunction with Gray, gave Gray the fees for his life, and the benefit of survivorship to the longest liver; the grant is therefore for life to the two, by necessary implication. And with respect to the usage in regard to this particular office, Thomson's removal was for cause shewn, and with the exception of one or two instances after this, all the appointments imported a duration for life, and there is no instance of a removal at pleasure.

III. If the respondents held their offices for life, it is not within the power of the appellants to interfere indirectly with

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their enjoyment of them by any reduction of the salary ; a power to reduce the salary necessarily involves a power to deprive of the office, and it is somewhat surprising that an appeal should be brought to assert so extravagant a power.

[*Lord Brougham.* — I am not surprised when I see what the Court has done 'as to the last conclusion of the summons.

*Lord Cottenham.* — So that the Convention cannot add to the duties of the clerks without their consent ?]

This is an objection which comes by surprise, as it was not argued in the Court below, but it is susceptible of an answer. If the duties of the office increase, the clerks must of course submit, but the conclusion referred to applies to an addition, not an increase of duties.

[*Lord Campbell.* — You say the Convention may add to their labours, not their duties.]

Exactly so. The raising of the salary was equivalent to a new appointment, and though, when another appointment takes place, the Convention, if the office be not public and held for life, may be entitled to reduce the salary if they please, they cannot till then.

[*Lord Campbell.* — So far as salary is concerned, you rest on contract.]

Yes. As regards Mr Bell at least when he was appointed ; the salary complained of was in existence.

[*Lord Campbell.* — What evidence is there of immemorial salary ?]

There is no evidence certainly of that, but there is that the salary was L.25 to each from 1715. However, we put it on contract in either case, and say, that the Convention had no right to reduce the salary on any ground.

LORD BROUGHAM. — This was an action of reduction and declarator brought by the respondents to set aside a resolution of



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the appellants, reducing their salary as clerks of the Convention, and to have it declared that they held their office for life, and that the Convention had no power to increase or change their duties, any more than to alter their salaries. Mr Cunningham had been appointed in 1808, with Mr John Gray, to be together conjunct clerk with Mr John Dundas, “with benefit of survivorship,” and “with survivancy to the longest liver of them,” (Cunningham and Gray.) There was added the very usual clause, giving them the office “as freely and fully as any of their predecessors had held it;” and farther, the emoluments were declared to belong “to Gray during his natural life.” In 1816, Mr Bell was appointed to succeed Mr Dundas, and to hold the office “as fully and freely as Dundas or any of his predecessors could have done.”

The salary was raised in 1815. Having for above forty years before been L.25 for each clerk, it was now doubled; that is, when Cunningham was elected, the salary was L.25, when Bell was elected it had become L.50; and the interlocutors appealed from declare, not only that the Convention had no right to lower Mr Cunningham’s original salary, but that they had no right to take off the addition, which had been made in 1815, from him any more than from Mr Bell, who had been elected after that increase. So that, according to this decision, if any addition should ever on any account be made to the salary of the office, as in respect of additional trouble, this addition could never be taken off, even if the trouble entirely ceased which occasioned it.

Such a position seems to be wholly untenable. Accordingly, the Lord Ordinary plainly gives his opinion, that there is a great difference between the salary added in 1815, and the former salary; and he holds this difference to exist in Bell’s case as well as in Cunningham’s, not deeming it a matter of contest between Bell and those who appointed him, but regarding the question as

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turning upon the right of both to the office and its emoluments as fixed by the ancient usage and enjoyment of the office.

The Convention is a body authorized and regulated, though it might not be created by the statute of James III. (1487) chapter III, and it is appointed to meet yearly on the morrow of Saint James. It consists of commissioners or delegates from the royal burghs, and has the regulation of matters of trade within a narrow sphere, compared to what it formerly had. The meeting of the Convention seems never to have continued above three days, and of late years never above two. At each meeting it is not adjourned or prorogued, but dissolved, though a very few instances are to be found of intermediate proceedings. The business is very little in point of labour or importance; and the trouble of the clerks is proportionately small.

A body so chosen, and of a kind so peculiar, can with difficulty be compared to a corporation, and it is with difficulty that we can arrive at the conclusion that it should have the power of conferring an interest for life on any of its officers. The House of Commons, to which it has been compared in argument, and in order to shew that a representative body may have officers whose tenure depends not on its own existence, can hardly be considered as affording an appropriate example; for certainly no officer chosen by the House has any existence beyond a dissolution. The clerks are appointed by the Crown, the Speaker is chosen by the House, but chosen each Parliament.

However, it is unnecessary to inquire whether or not a body such as the Convention may or may not appoint to offices for life. A long and clear usage may possibly shew that this power exists, and that the office-bearer chosen by a body of delegates, who are themselves only called into existence for two days once a-year, and at the expiration of these two days cease to exist, hold their places for their own lives. It is conceivable, though barely conceivable, that the whole burghs being corporations of

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continued existence, this Convention of their delegates may be an incident to the corporate existence of the several individual burghs, or may be something growing out of that corporate existence, and may have the power in question. Such an anomalous thing may perhaps be conceived. But at least it must be admitted, that clear proof of this by long usage must be given, else the probability is, that such a body only chooses its officers occasionally, or at least continues them from meeting to meeting as long as it pleases, and though it may not each time elect them anew, the likelihood is, that the former nomination is assumed to continue as if a new one had taken place, until there be a new appointment.

But this question does not necessarily arise here. At least the main question meant to be raised as to the right of lowering the salary, may be disposed of without determining whether the clerks are removeable or not; and the clerks may be removeable by declarator without being liable to dismissal at the mere caprice of the Convention. As, however, there is a declaratory conclusion in the summons that the offices are for life, and as the Court has found in terms of that conclusion, we must observe, that there seems really no sufficient ground for holding that the office is a life interest. The usage seems to be the other way.

In 1664, William Thomson is appointed “during their pleasure.” In 1666, they remove him for neglect of duty, reciting that he held his office “during their pleasure allenarly, and that they could declare the place vacant as often as they found it meet and expedient for their affairs.” Thomson had been removed from his other office of town clerk of Edinburgh, and he resisted this removal successfully in the Court of Session. But he acquiesced in the dismissal from the place of clerk of the Convention.

Young, the successor of Thomson, was elected in like manner

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during pleasure, and held the office till 1669, when Roughead was chosen in the same terms.

There are no instances of any other appointment produced until we come to that of Mr Dundas, which is assumed by the Lord Ordinary to have been for life; but the papers do not in any one part afford any thing like precise evidence of what Mr Dundas's appointment was. The only reason for supposing that he had been appointed for life is to be found in the expression, "with benefit of survivorship," which occurs in Mr Cunningham's appointment; but this is quite inconclusive, for it may only mean, that Gray and Cunningham shall, while Dundas lives, be together joint-clerk with him, and that after his decease they shall be the two clerks without any successor being appointed to Dundas. Such a clause was quite consistent with none of the three holding for his own life. It is said that Bell was to hold the office on the same terms with Dundas. This construction of the gift made it of primary importance to ascertain the tenure of Dundas. But this is not done, otherwise than by referring to the equivocal clause of survivorship. But it is by no means clear that the words imply the identity of the tenure. They rather relate to the exercise of the office. He (Bell) "is to exercise the said office as fully and freely in all respects as John Dundas could have done, or which by law and custom appertains to the office of conjunct clerk." There is evidently here not an elliptical expression, but apparently an omission of certain words, for it says, "to exercise the said office as freely and fully in all respects as John Dundas could have done," and it must mean, "and to do things, or to receive emoluments, or to hold rights which by law and custom appertain to the office of conjunct clerk."

The clause respecting John Gray has also been much relied upon, but is liable to the observation made respecting the clause of survivorship. Indeed it is, when rightly considered, a pro-

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vision for survivorship. John Gray was in the office. It was not intended to remove him, but only to add Cunningham to him as joint conjunct clerk, in such manner that they two should be one clerk, with John Dundas as the other, and that whichever of the two outlived the other, should be the sole colleague of John Dundas. But the whole emoluments of this conjunct clerk were to be John Gray's. In other words, he was an elderly man, and Mr Cunningham was to be his successor, leaving the fees to him; John Gray, for his life. That is, the Convention had no intention of removing him while he lived. But if this clause were held to give John Gray a life interest, which he had not before, (a very erroneous construction,) or to prove that he had before a life interest, it shews nothing as to Cunningham; nay, it rather would exclude his claim to such an interest.

The claim of survivorship between him and Gray plainly proves nothing. But for that clause Cunningham's office would have ceased upon John Gray's death. It was only meant to continue him notwithstanding John Gray's decease.

It is not to be denied that the leaning of the Scotch law is towards affirming the interest of office-bearers in their offices, preventing summary ejections, without proceeding to declare the places vacant, and rather taking hold of circumstances to shew that the party is not removable without fault. Nevertheless, there must be something to shew that an office, which in its own nature appears to be one held during pleasure, is given for life. Where a body exists in the way we find this Convention constituted, a yearly meeting for two, or at most three days, of persons chosen only to attend such meeting, and then to cease holding any functions, falling back, as it were, into the several bodies which had deputed them for the special occasion, the last thing we naturally expect is, that such a meeting should appoint office-bearers for life. Nothing but a continued course of pro-

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ceeding can make us suppose that such is the nature of the office, and in this case that course appears to be wholly wanting.

Reference has been made to cases for the purpose of shewing that such offices must be for life, or it is possible it is only meant that they are for life unless the contrary be proved. These cases certainly prove nothing of the kind. What is laid down in the case of town clerks seems to proceed upon the nature of the office which the Court of Session has held to require a tenure other than during pleasure.

The strongest case is that of *Simpson v. Tod*, 3 Shaw and Dunlop, in which the Court said that the public duties of the office were important, and required the holder “to be under no apprehension of being liable to dismissal at the pleasure, perhaps at the caprice, of the Town Council,” and hence they rejected the words “during pleasure” in the appointment, as incompatible with the nature of the office. It is singular that the much higher office of Judge in the Supreme Court should, in the same country, have been held always during pleasure, even after it had ceased, and only ceased by statute, to be so holden in England:

But when the case of *Annan v. Farish*, in 2 *Sh.* and *M'L.* 930, came before this House by appeal, the judgment of the Court below, which proceeded only on the possessory question, was affirmed, with an alteration expressly made to shew that no opinion whatever was pronounced upon the tenure of the office. Indeed that judgment below, although containing words liable to misconstruction, and which were therefore struck out here, had also an express reservation of any right which the appellants might have to bring an action of reduction for setting aside the appointment.

When the respondents, in the present case, rely on prescription, they must rather mean something analogous to prescription, such as long usage. For certainly it is not easy to see how the

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emoluments of an office, held by personal election or nomination, can be the ground of prescription. In all the cases to which reference is made, either in this discussion, or by text writers, who mention fees of office as capable of prescription, the offices appear to be of an hereditary description, and so feudalized, or *quasi* feudalized, as almost all offices, and indeed almost every thing else became, in process of time, all over Europe, under the feudal system.

Thus the cases cited by *Erskine* to prove this position, Sheriff of Galloway *v.* Cassilis, 11th March, 1634, Douglas *v.* Jedburgh, 18th July, 1660, and Calendar *v.* Stirling, 11th July, 1672, were the cases of heritable sheriffs, and the first of them was a question respecting a servitude claimed in right of a landed estate, possessed with the servitude time out of mind; so too Cunningham *v.* Eglinton, 27th December, 1709, was the case of heritable sheriff of Renfrewshire, of which the grant being “cum feodis, &c.” the Court held “sufficient to ground a prescription.” Kinghorn *v.* Forfar, 18th July, 1676, was the case of an heritable constable; Murray *v.* Ness, 13th December, 1677, was the case of an heritable sheriff; and Hatter *v.* Dundee, 9th December, 1679, was a question between an heritable constable and a corporate town. No one can doubt, that owners of such property may validly prescribe for the emoluments belonging to it.

That a body like the Convention, by continuing to pay, not to one clerk, but to successive clerks, for forty years, a certain salary, thereby gives, not to one individual, but to every clerk who may ever after be employed, a prescriptive title to the same salary, appears to be a proposition neither consistent with the nature of such an office, nor of title by prescription.

The judgment below, therefore, appears to me, according to the best opinion I have been able to form upon this subject, to which I have certainly paid considerable attention, unsupported by the facts of the case, and irreconcilable with any legal

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principle; and I should recommend to your Lordships that it be reversed, and that the appellants (the defenders below) be assoilzied from the conclusions of the summons, with the costs below.

*Lord Cottenham.* — My Lords, I entirely concur in opinion with my noble and learned friend. The interlocutor appealed from is according to the conclusion of the summons. It therefore declares void the order of the Convention for reducing the salaries of the clerks. It declares that it is *ultra vires* of the Convention to add to the duties of the clerks, or to reduce their salaries of L.100 per annum between them. And it declares that the clerks have a vested life interest in their office, and in the fees, salaries, and emoluments thereof, and that each of them is entitled to a salary of L.50 for each succeeding year of his life.

Before adverting to the debateable grounds of the appeal, I cannot but observe, that it is only since the 11th of July, 1815, that the salary has been of the present amount, when it was raised from L.25 to L.50, by the voluntary act of the Convention, at which sum it has since been continued by the annual vote, and that the only act adding to the duties of the clerks is that of the 15th of July, 1824, which abolished the office of recorder, and threw the duties of it upon the clerks, in which they have ever since acquiesced, and they do not, by the present action, seek to be relieved from the effect of that order.

The pursuers have attempted to support their case, and the interlocutor appealed from, by insisting, *First*, That the General Convention of the Royal Burghs of Scotland is a corporation. *Secondly*, That their office of clerk is an office for life. And, *Thirdly*, That the salary is attached to, and constitutes part of the office, and therefore is held for life also.

Another point was raised at the bar, namely, that the pursuers were entitled by contract to the salary of L.100 per annum.



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But this I put out of the subject matter for consideration, because there is neither any allegation in the summons, nor any proof to support that proposition. I proceed, therefore, to consider the above three points.

If the pursuers should be found to have failed in any of these three points, their whole case must fail; I think they have failed in all three. But having formed a very decided opinion upon the two last, I abstain from putting my decision upon the first.

The term “corporation” is certainly used in a much more extended sense in Scotland than in this country; possibly, therefore, the term may, consistently with usage in other cases, be applied to the Convention; but when a question arises as to the powers and liabilities of the body, which must depend upon its continued existence, and other qualities incident to a complete corporation, the nature and qualities of the body, and not the term by which, in the looseness of language, it may have been designated, ought to be the subject of inquiry. In such a case, the term “*quasi* corporation” is much too indefinite to found any conclusion upon.

If it were necessary to give a decided opinion upon the first point, it would be to be considered, how a body of men, appointed for a particular purpose, and whose meeting is declared to be dissolved when that purpose is effected, can be considered as a corporation in that sense, which is necessary to enable them to bind by contract those who may in a subsequent year be appointed for a similar purpose.

The second point, whether the office of clerk be an office for life, unless decided by a negative of the first proposition, must be matter of evidence applicable to the particular office; for no aid can be derived from decisions, that town-clerks and other officers, having recognized public duties to perform, have a freehold in their office.

From the offices held by the pursuers they must be supposed

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to have access to all the evidence capable of being produced upon this subject; but they have not produced any one instance of a grant of the office for life. All the instances that have been produced (and some are of an early period) are expressed to be “during pleasure,” or “as fully and freely in every respect as any of their predecessors could or might have done, or which to the office by law or custom does appertain,” which appears to have been the more modern form, and which, by referring to the former appointments which were during pleasure, must have the same construction as if those words had been used instead of being adopted by the reference.

The appointment of 1808, under which Mr Cunningham holds the office, was said to be an exception, and it was argued that it amounted to a grant to him of the office for life. I think it is plain that this is not the true construction of the appointment. The object was to secure to Mr Gray, the old clerk, the emoluments of the office, and to procure for him the assistance of Mr Cunningham, who, in consideration for such unpaid assistance, was to succeed Mr Gray. The two, therefore, were appointed in the usual form, that is, to hold the office as fully and freely as their predecessors, that is, during pleasure, with survivancy to the longest liver of them, which was necessary to continue the office to Mr Cunningham after Mr Gray's death. And then, in order to carry the arrangement between the parties into effect, the fees, salaries, and emoluments belonging to the office were granted to Mr Gray during his natural life. This could not affect the nature of the office, but was introduced only to provide that Mr Cunningham should not receive any of the emoluments of the office so long as Mr Gray lived; and at most, it regarded only Mr Gray, and had no reference to the appointment of Mr Cunningham. It appears to me, therefore, that the second proposition, that the office was for life, is not only not

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established, but that the evidence proves, that it has at all times been an office during pleasure only.

But, thirdly, supposing the office to be for life, the pursuers had to prove that the salary in question was incident to the office. The question is not one of fees or perquisites, but of annual salary, which was raised from L.50 to L.100, in 1815, and which had been regulated by an act of the Convention in 1713. Before that time, the emoluments of the clerk were L.40, ordinary salary, and L.20 gratuity, and in that year the Convention directed their agent to pay L.50 salary for the future, in lieu of all gratuity; and the salary, so varied from time to time, and contended to be part of, or incident to the office, appears, upon investigating the proceedings of the Convention, to be the subject of an annual vote of the Convention, who annually continue the tax-roll and establishment to the following year.

The Convention having no property wherewith to pay their necessary expenses, what is so annually voted is raised by an assessment upon the different burghs; and if it were necessary to pursue the case so far, it would be difficult for the pursuers to shew how the right to which they are declared entitled by the interlocutor appealed from could be enforced, which is, in many cases, no bad mode of trying the validity of an alleged right. It is, however, sufficient for the present purpose to say, that it appears to me that the right of the clerk to the salary exists only in the vote, and does not extend beyond the period embraced in the vote.

For these reasons, it appears to me, that the pursuers have failed in the grounds upon which their case depended, and that the interlocutors appealed from ought to be reversed, and the defenders assoilzied from the conclusion of the libel, with expenses.

*Lord Campbell.* — My Lords, I am extremely sorry, that, in this case, I cannot agree with my noble and learned friends who

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have preceded me. I do not think that the interlocutor of the First Division of the Court of Session can be supported to its full extent; but I cannot concur in the proposed judgment, simply to reverse that interlocutor, with a decerniture that the defenders should be assoilzied from all the conclusions of the libels in the original and supplemental actions, the consequence of which would be, that the pursuers may at any time be dismissed from the office they hold, or that their salary may be reduced to a nominal amount.

In the first place, I can entertain no doubt, that, by the law of Scotland, the Convention of Royal Burghs is a corporation capable of appointing officers, and of suing and being sued. This body has existed from the most remote times, it has very important functions in the regulation of trade — it has the power of taxation, and although, of late years, it has only sat for two or three days in a year, there is no reason why it might not sit throughout the year, or at any periods when occasion might require. It therefore seems to me to be very much in the nature of the Municipal Corporations, with which we are so familiar. As to its being capable of suing and being sued, there are repeated instances of its having brought actions, and of actions having been brought against it, without its power of suing and being sued ever having been called in question.

Secondly, It is proved that the office of clerk has existed as an office under the Corporation from the remotest times, with fees and emoluments belonging to it. It is not disputed that the pursuers were duly appointed to this office; but a great question arises as to their tenure of this office. My opinion, formed after the best consideration I have been able to bestow upon the subject, is, that they hold it *ad vitam aut culpam*. I do not by any means yield to the argument, that, from the nature of the office, it must necessarily be held for life, or during good behaviour. I do not think that the authorities shew, that before the Scotch

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Municipal Corporations Act, the town-clerk of a burgh could not, in any case, be appointed yearly, or during pleasure; and if there had been such a rule applicable to the town-clerk of a burgh, it would not necessarily extend to this office under the Convention of Royal Burghs. I look to the manner in which this office has been held, and particularly to the appointment of the pursuers.

Three instances appear in the 17th century, in which the appointment was expressly during pleasure. Most of the other appointments appear to have been general, with power to exercise the office as fully as the predecessors of the party appointed had done, and with all fees, salaries, and emoluments, belonging to the office. Under such appointments the clerks have enjoyed the office for life, and in the case cited, of the removal of Sir William Thomson, although misconduct was alleged, the order removing him begins in these words:—“The royal burrowes  
 “ met in a General Convention, taking to their serious consider-  
 “ ration, that Sir William Thomson was elected clerk to the  
 “ said Convention during their pleasure allendarlie, and that  
 “ thereby it is in their power to declare the said place vacant so  
 “ often as they shall find it meet and expedient for their service  
 “ and affairs.” The reason assigned for their being able to declare the office vacant is, that he was appointed “during their  
 “ pleasure allendarlie.” I think the fair inference is, that although the Convention might appoint a clerk “during pleasure allendarlie” if they chose, a general appointment by them was to be construed an appointment for life.

But Mr Cunningham’s appointment I consider for life by express words. On the 13th of July, 1808, an appointment was made in the following terms:—“There was read a resignation  
 “ from Mr John Grey, writer to the signet, conjunct town-  
 “ clerk of Edinburgh, of his office of conjunct clerk to the  
 “ General Convention, agreeable to what he intimated yester-

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“ day, and the same having been accepted of, the preses moved  
 “ that Mr John Gray, and Mr Charles Cunningham, writer  
 “ to the signet, conjunct town-clerk of Edinburgh, be elected  
 “ into the office of conjunct clerk to the Convention, along with  
 “ John Dundas, writer to the signet, with the benefit of sur-  
 “ vivorship; which motion having been seconded by the Com-  
 “ missioner for Perth, and the roll having been called, and the  
 “ votes marked, it carried approve, by a majority of twenty-  
 “ six to eight. Whereupon the said John Gray, and the said  
 “ Charles Cunningham were duly elected into the office of con-  
 “ junct clerk to the General Convention of the Royal Burghs,  
 “ along with the said John Dundas, with survivancy to the  
 “ longest liver of them, the said John Gray and Charles  
 “ Cunningham; and the Convention granted, and hereby grant  
 “ power to them, or either of them, to exercise the said office as  
 “ fully and freely, in every respect, as any of their predecessors  
 “ could or might have done, or which to the office of conjunct  
 “ clerk to the Royal Burghs of Scotland by law or custom does  
 “ appertain; giving and hereby granting to the said John Gray,  
 “ the fees, salaries, and emoluments belonging to the said office,  
 “ during his natural life. Whereupon the said John Gray and  
 “ Charles Cunningham accepted of the said office, and gave  
 “ their oath *de fidei administratione*, and qualified to govern-  
 “ ment by taking the oath of allegiance, and signing the same  
 “ with the assurance.”

Gray was appointed with all fees, &c., during his natural life. How he should be entitled to receive the fees during his natural life, unless he was appointed during his natural life, I confess I do not understand. Gray being appointed during his natural life, Cunningham, the conjunct clerk, was appointed along with him, “with benefit of survivorship,” and “survivancy to the longest liver of them, the said John Gray and Charles Cunningham.”

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I hardly know what language could more strongly have expressed the intention to appoint both for life, and it does seem strange to me to suppose that Cunningham could have been discharged during the life of Gray; and still more so, that if he held during the life of Gray, he might be discharged upon his death, which hardly seems consistent with benefit of survivorship.

The appointment of the pursuer Bell took place on the 9th of July, 1816, and is thus recorded, — “The Preses acquainted  
 “ the Convention that a vacancy in the office of conjunct prin-  
 “ cipal clerk to the Royal Burghs had taken place, in conse-  
 “ quence of the decease of Mr John Dundas. The Commissioner  
 “ for Glasgow then proposed that Mr Carlyle Bell, writer to  
 “ the signet, and one of the conjunct town clerks of Edinburgh,  
 “ should be elected to fill the vacancy; which having been  
 “ seconded by the Commissioner for Aberdeen, the said Carlyle  
 “ Bell was unanimously elected into the said office; and the  
 “ Convention granted, and hereby grant, full power to him to  
 “ exercise the said office as fully and freely in all respects as the  
 “ said John Dundas, or any of his predecessors could have done,  
 “ or which by law and custom appertains to the office of con-  
 “ junct clerk to the General Convention of the Royal Burghs of  
 “ Scotland; giving and granting to the said Carlyle Bell the  
 “ whole fees, salaries, and emoluments belonging to the said  
 “ office. And the said Carlyle Bell being present, accepted of  
 “ the said office, and having been sworn *de fidei*, he qualified to  
 “ government by taking the oath of allegiance, and signing the  
 “ same with the assurance.”

Here, while Cunningham held the office of conjunct clerk for life, Bell is appointed as his colleague, “to exercise the said office  
 “ as fully and freely in all respects as John Dundas or any of his  
 “ predecessors could have done, or which by law or custom  
 “ appertains to the office of conjunct clerk to the General Con-  
 “ vention of the Royal Burghs of Scotland.” John Dundas

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does not appear to have been expressly appointed for life; but John Gray had been expressly appointed for life, and John Gray was one of the predecessors of Cunningham.

For these reasons I think that both the pursuers were appointed *ad vitam aut culpam*.

But it is said under the defenders' third plea in law, that the members of the Convention are fluctuating, that they are elected only for a short period, and that they cannot bind their successors by any such appointment.

I do not consider, my Lords, that there is the slightest weight in this objection, which was so much relied upon in the Court below. The individual members of the corporation are fluctuating, and are elected for a short period of time; but the corporation itself, the *ens legis*, is perpetual, and the lawful acts which it does are binding upon it, when the individuals through whose instrumentality the acts were done have ceased to be members. A municipal corporation would lose none of its powers or attributes, although by its constitution all the members of the corporation should be elected for one year only.

If the pursuers have a freehold in their office, it follows that they cannot be deprived of the just emoluments of it, any more than be arbitrarily dismissed from it. Now, I consider L.50 a year to the two jointly as the just emoluments of the office. A salary to this amount in lieu of fees and perquisites had been received by the conjunct clerks for a period of time much longer than is necessary to give a prescriptive right by the law of Scotland before 1815. It was then raised to L.100 a-year. But I do not think that the Convention were precluded from again lowering it at their discretion to the ancient amount, if they thought that this was just, from a diminution of the business to be done, or any change in the times.

The consequence would be, that the order of 1834, reducing the salary of Messrs Cunningham and Bell, for discharging the



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office of principal clerk to the Convention, to L.50, is valid, and ought not to be disturbed; but that the order of 1835, reducing the salary to L.35 a-year, is *ultra vires*, and should be declared void.

This is the view of the case taken by Lord Cunninghame, Ordinary, with whom I entirely concur. But the First Division of the Court have gone much farther, and “decerned and “declared in terms of the original and supplemental libels;” the conclusions being that both orders should be rescinded, and that it should be declared to be *ultra vires* of the Convention to add to the duties of the pursuers without their consent, and that they were entitled to hold for life at a salary of L.100 a-year.

I think the Convention cannot change the nature of the office; but it is possible that new duties as conjunct clerks might lawfully be cast upon them.

My humble advice to your Lordships, therefore, would have been to have altered the interlocutor of the First Division; but I cannot wish that your Lordships should not be guided by the advice of my noble and learned friends, who are so much more competent to come to a right conclusion; and I presume therefore, that the interlocutor must be reversed, with an absolvitor to the defenders on all the conclusions of the libels.

*Lord Brougham.* — My Lords, I take for granted, that although my noble and learned friend differs from us on one part of the case, there will be no difference of opinion as to the costs; but that if we reverse the interlocutor, and assoilzie the defenders, they ought to have the costs below; not the costs here, but the costs below.

*Lord Campbell.* — Clearly.

Ordered and Adjudged, That the interlocutors complained of in the appeal be reversed, and that the defenders in the action to which the appeal relates be assoilzied from the conclusions of the summons:

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And it is farther Ordered, That the pursuers in the said action do pay, or cause to be paid, to the defenders in such action the costs of the proceedings in the Court of Session: And it is also farther Ordered, That the cause be remitted back to the Court of Session in Scotland, to do farther therein as shall be just and consistent with this judgment.

RICHARDSON & CONNELL — SPOTTISWOODE & ROBERTSON,  
Agents.