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over the cautioners, and no direct claim, on the bond, lay against the defender himself. If he had been appointed to produce the debtor, the present litigation would have ensued before decree of constitution could have been obtained against him. The pursuer, therefore, did every thing which the circumstances of the case admitted of. If the defender had thought the intimation given him to produce Kelly too short, he ought to have applied to the Judge for delay.

The pursuer is not bound to qualify loss, in consequence of the defender's conduct, 7th December 1780, Gray against Magistrates of Dumfries, No 76. p. 11754. ; 13th June 1781, Bell against Magistrates of Lochmaben, No 78. p. 11756. ; 8th June 1790, Shortreid against Magistrates of Annan, No 83. p. 11760. At the same time, if the defender had not interfered, Mr Kelly would have been imprisoned on the 15th of August, and decree of constitution would have been sooner obtained, as he would then have had no interest to state dilatory defences against it. And to take the strictest view of the case, the pursuer had lost the presumed benefit derived from imprisonment of the debtor, on caption, for several weeks before he was presented.

The Lord Ordinary reported the cause on informations.

All the Judges seemed to be of opinion, that, in the whole circumstances, the defender, by accepting the bond in question, had put himself in the same situation as if he had himself become cautioner; but some thought the pursuer had lost her claim against him, by neglecting to obtain a judicial appointment for production of the debtor before decree.

THE LORDS (5th July 1798) repelled the defences; and, upon advising a petition, with answers, &c. they adhered.

Lord Ordinary, *Stonefield.*

Act. Solicitor-General Blair, D. Cathcart.

Alt. Lord Advocate Dundas, G. Fergusson, H. Erskine, Hay.

Clerk, Colquhoun.

D. D.

Fac. Col. No 121. p. 275.

1802. November 19.

ABERCROMBY *against* The CORPORATION of GOLDSMITHS of Edinburgh.

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A Corporation has no power to name an assistant to their clerk, without his consent, after having appointed him for life.

ALEXANDER ABERCROMBY, writer to the signet, was elected clerk of the Corporation of Goldsmiths of Edinburgh, in the year 1793; but, being frequently prevented by indisposition from attending their meetings, his partner, William Walker, writer to the signet, was in use to attend in his place, and was chosen to officiate as clerk at each sederunt.

At a meeting of the corporation, 11th August 1801, it was moved, "That as the state of health in which Mr Alexander Abercromby, our present clerk, had been for some considerable time past, has prevented him from attending the meetings of the Corporation, and it being uncertain, whether it may be in his power to give a punctual attendance in future, some person shall be appointed to officiate as clerk, at those times when it may be inconvenient or impossible

for Mr Abercromby to attend; that the person so to be appointed shall be regularly warned by the officer to every meeting, but shall take no concern whatever in the affairs of the corporation when Mr Abercromby is present; nor shall he have any claim to any part, either of the salary or perquisites, presently appropriated to the clerk; but as, in the execution of this office, the person who shall be appointed may be put to some trouble, he shall, in the event of the demise or demission of Mr Abercromby, be nominated as his successor, and shall be also intrusted with the management of the process of declarator, at the Corporation's instance, against Mr Alexander Cunningham, and others, presently depending before the Court of Session." After hearing this proposal, it was resolved, according to the rules of the trade, that the consideration of it should be deferred till next quarterly meeting. At this meeting, on the 24th of November, Walker attended as usual, who, after the motion had been read, and the votes were about to be taken, produced a bill of suspension and interdict, with a sist by the Lord Ordinary on the Bills, "prohibiting and discharging the said Mr Cunningham, and whole other members of the said Incorporation, from electing or nominating any person whatever, either as assistant or successor to Abercromby, in the said office of clerk to the said Incorporation, or from depriving him of any part of the fees or emoluments belonging thereto."

This bill having been advised, with answers and replies, was passed by the Lord Ordinary, (26th December 1801.) that the question might be fully tried, and the interdict was continued. Upon a remit having been afterwards made to his Lordship, to discuss the reasons of suspension upon the bill, he reported the cause. Abercromby

Pleaded, An office held *pro vita aut culpa*, cannot be taken away, either wholly or in part, except in consequence of some malversation. Every office of this sort, implies a power, in particular circumstances, of performing the duties by means of a proper substitute, for whose conduct the principal officer is responsible; and though there may be offices of such an important nature as to preclude the possibility of discharging them by substitutes, the clerk to a corporation is not among that number. When the person who holds such an office is prevented by sickness or old age from the active discharge of its duties, the corporation cannot deprive him of his place, if he provide a substitute properly qualified, to whose conduct and abilities there is no objection. Indeed, from the nature of the office, many parts of which must be performed by others, the clerk has a discretionary power, when circumstances require it, of employing proper persons to act for him; and being an office of responsibility, it cannot, consistently, be discharged by one obtruded upon him, in whose appointment he has no share, and for whose proceedings he cannot therefore be responsible. Accordingly, such a power of delegation was indirectly admitted, December 1681, Hog against Sir William Ker, No 19. p. 13106.; and was expressly found, Taylor against the Convenery of Trades of Aberdeen, July 17. 1767, No 39. p. 13128. In so far as the motion complained of related to the ma

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nagement of the process of declarator, it amounted to a diminution of the emoluments of the clerk's office, which the Corporation had no power to abridge ; for it is of great importance that their clerk should be independent in his office, that he may be impartial in the discharge of its duties.

Answered, There is a *delectus personæ* in the office of clerk to a Corporation, who must necessarily be acquainted with many particulars of a confidential nature. The Corporation, therefore, have a right to allow no person to attend their meetings in this capacity, except such as the majority may approve. But, if this power of officiating by a substitute be recognised to the extent here contended, a Corporation might be obliged to receive a stranger at every different meeting, so that the private deliberations, and the confidential business of the trade might be intrusted to any number of persons whom their clerk might chuse to substitute. The suspender has neither a title nor an interest to oppose the nomination of a permanent substitute, when he is himself unable to attend the meetings ; for, by the resolution complained of, no part of his office is taken away when he chuses to officiate, nor is he in any case deprived of its emoluments. The only decision quoted as sanctioning his right to object, relates to the election of a person to hold an office jointly with the principal officer ; but here, whenever Abercromby is disposed, he is entitled to attend, and to perform all the duties of the office himself. And so far as related to the management of the process of declarator, the Corporation *contended,* That the office of agent and clerk were by no means inseparable ; that, upon former occasions, they had been understood to be distinct offices ; and that, in point of fact, the process in question was not conducted by their clerk, but entirely by his partner.

The Court suspended the letters *simpliciter*.

Lord Ordinary, *Craig*.
Alt *Turnbull*.

Act. *Robertson*.
Agent, *S. Cunningham*.

Agent, *Wm. Walker*, W. S.
Clerk, *Ferrier*.

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Fac. Col. No 61. p. 139.

See *Ogilvie against Riddel*, and *Alston against Riddel*, &c. *voce* REPARATION.

Powers of the Court of Session to appoint interim Magistrates, and other public officers. See JURISDICTION.

Election of the common agent in a ranking and sale. See RANKING and SALE.

Clerk of Chancery. See CHANCERY.

Sheriff-Clerk substitute entitled to salary. See RECOMPENCE.

Dues of baptism and to whom they belong. See KIRK.

See APPENDIX.