[Heard 21*st July*, 1842. Judgment, 4*th September*, 1844.]

RIGHT HON. JAMES ALEXANDER, EARL OF ROSSLYN, and JOHN DUNDAS, ESQ., *Appellants.*

ROGER AYTOUN, ESQ., Director of Chancery, *Respondent.*

Public Officer.—A public officer holding his appointment for life, with power to appoint a subordinate officer, may validly make the appointment of such subordinate officer for life, though the appointment may thereby extend beyond his own life.

Ibid.—It is not competent for a public officer having power to appoint a subordinate officer for life, to make such appointment to two or more persons for their joint lives, with benefit of survivorship, there not being any usage to support such an appointment.

IN 1756 a commission was issued under the Great Seal, giving "Davidi Scott de Scotstarvit Armigero, pro et durantibus om-"nibus suæ vitæ diebus, et post ejus decessum dicto Davidi "Scott filio suo natu maximo pro et durantibus omnibus suæ "vitæ diebus, prænominatum Officium Directoris nostræ Can-"cellariæ in Scotia, cum omnibus privilegiis feodis proficuis "casualitatibus et emolumentis quibuscunq. ad idem spectan-"tibus, vel quæ ad idem pertinère et spectare dignoscuntur. "Cum plena et ampla potestate memorato Davidi Scott, seniori, "durante ejus vita et post ejus decessum dicto Davidi Scott, "juniori, durante ejus vita per semetipsos eorumque deputatos "substitutos et servos (quos nos potestatem illis nominandi "damus et pro quibus respondere tenebuntur), dicto Officio "Directoris nostræ Cancellariæ in Scotia, utendi et potiundi "tam libere in omnibus respectibus quam ullus alius Director "ejus eodem ullo tempore præterito usus et potitus fuerat, cum "omnibus honoribus privilegiis dignitatibus et immunitatibus "quibuscunq. quibus ullus Director nostræ Cancellariæ in Scotia "temporibus retroactis politi fueruut vel possesserunt."

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On the 17th of January, 1780, another commission was issued, which, reciting the previous one in favour of the Scotts, and the royal intention to give the reversion of the office of Director of Chancery to Sir James Erskine, granted him the office "una cum omnibus feodis, salariis casualitatibus proficuis "et emolumentis eidem pertinen et cum omnibus talibus po- "testatibus et privilegiis et in tam pleno et amplo modo omnibus "intentis et propositis quam dictus Davidi Scott nunc tenet vel "tenere debit et frui eod."

In 1787, Sir James Erskine, now Lord Rosslyn, being in possession of the office, gave Bethune the appointment of Clerk of Chancery for life, in consideration of a sum of money paid down. On Bethune's death in 1807, his Lordship gave the appointment to his brother John Erskine, who held it until his death in 1817. The appointment was then given to Ralph Dundas for his life, which terminated in 1824, when Lord Rosslyn appointed his son Henry St. Clair Erskine and John Dundas "jointly and severally *during their respective lives, and* "*the survivor of them*, to be sole writers and clerks, or writer "and clerk under me and my deputy in the said office of his "Majesty's Chancery in Scotland, with full power to the said "Henry Francis St. Clair Erskine, and John Dundas, jointly "and severally, and to the survivor of them, by themselves, or "the survivor of them or by others whom they or he may "employ as assistants or servants, for whom they shall be "answerable to me or my deputy, of exclusively writing, tran- "scribing, and extending all charters, &c., and in general of "enjoying and exercising the said office of writers and clerks, or "writer and clerk, of the said Chancery, *during their joint lives* "*and the life of the survivor of them*, with all the privileges, "liberties, and immunities belonging thereto, as fully and freely, "and with every other power as hitherto known to belong to the "office of writer and clerk of Chancery, or that any of their "predecessors ever enjoyed or exercised."

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Henry St. Clair died in 1829, and Lord Rosslyn then gave a new appointment to the appellants, the terms of which appear from the summons noticed below, to have been the same as those in the appointment of 1824 just quoted.

In 1817 the Act of the 57th George III., cap. 64, passed. By the 11th section of this Act, it is enacted, "That from and "after, and upon the termination respectively of the then exist- "ing interests in the several offices therein specified, and par- "ticularly in the said offices of Director of Chancery in Scotland, "and Clerk of the Chancery in Scotland, and so soon as the "said offices, or either of them, shall become vacant, the duties "shall be discharged by the officer appointed to hold the same in "person; and from time to time, as any of the said respective "offices shall become vacant, it shall be lawful for the said Lord "High Treasurer, or Commissioners of the Treasury, or any "three or more of them for the time being, and they are hereby "authorized and required to regulate the duties and establish- "ments of the said offices respectively, as they respectively "become vacant, so as that the several duties to be discharged "therein respectively shall be performed in person; and there- "upon and thereafter, such, and such number of fit and proper "persons shall be appointed, or shall be authorized and directed "to be appointed, as may be sufficient and necessary to perform "and execute the duties to be done, performed, and executed in "the said offices respectively, as the said commissioners shall "deem fit, with such salaries or allowances as shall be ordered "or appointed by the said Lord High Treasurer or Commis- "sioners of the Treasury in that behalf, regard being had in "every such case to the nature and extent of the duties to be "performed, and to the responsibility which may attach or "belong to the several and respective officers or persons exe- "cuting the duties of the said offices respectively; and all such "regulations, appointments, salaries, and allowances, when so "made and established, shall become and be in full force and

" effect in relation to the said offices respectively, anything con-
" tained in any Act or Acts of Parliament, or any law or laws,
" or usage, custom, or practice to the contrary notwithstanding:
" provided always, that any fees at present charged or chargeable
" for, or in respect of, any of the said offices respectively, shall
" continue to be received, and the same shall be applied in the
" payment of the salary or salaries, allowance or allowances,
" authorized by this Act to be granted or made in each of the
" said offices in which such fees shall be received; and if any
" balance of such fees shall remain, after paying and satisfying
" such salaries or allowances respectively, the same shall be paid,
" at least once in three months, to the receiver-general of Scot-
" land, and shall by him be paid and accounted for in the same
" manner with any public monies received and accounted for by
" him."

In January, 1837, James Earl of Rosslyn died. On the 11th of April in that year the Lords of the Treasury proceeded to exercise the powers given them by the statute, by declaring that the office of director and of clerk should be executed by one and the same person, and in consequence the respondent received a commission on the 1st of May, 1837, appointing him to the joint offices with a fixed salary.

In October, 1837, the respondent raised an action against the appellants, the summons in which set forth " That the said James
" Earl of Rosslyn had no right, title, or power to make or exe-
" cute any grant or commission to any deputies, substitutes, or
" other servants, and more particularly any grant or commission
" of the office of clerk, or of writer and clerk in chancery, to
" endure for any term extending beyond that of his own enjoy-
" ment and possession of the said office of Director of Chancery—
" or, at all events, for any term extending beyond that of his own
" natural life; and still more especially, and even during his
" own life, and possession of the said office of director, he had no
" right, title, or power to grant any commission, deputation, sub-

" stitution, or other delegation to and in favour of two or more " persons jointly with survivorship to the longest heir.

" That, notwithstanding, James Earl of Rosslyn had appointed " James Alexander Lord Loughborough, now Earl of Rosslyn, " and John Dundas, jointly and severally, during their respective " lives, and the survivor of them, to be sole writers and clerks, " or writer and clerk of chancery, in Scotland, under him and " his deputy, with full power to the said James Alexander " Lord Loughborough, Earl of Rosslyn, and John Dundas, " jointly and severally, and to the survivor of them, by them- " selves or the survivor of them, or by others whom they or " he might employ as assistants or servants, for whom they " should be answerable to the said Earl or his deputy, of exclu- " sively writing," &c., and generally of executing all the duties of the office, " during their joint lives, and the life of the survivor of " them."

The summons further set forth, that the commission to the appellants came to an end by the death of James Earl of Rosslyn, and thereafter the office of Clerk in Chancery became united in the person of the respondent with that of Director of Chancery.

The summons concluded, that it should be declared that James Earl of Rosslyn had " no power to grant any commis- " sion, deputation, substitution, or other delegation whatsoever, " of the office of clerk, or of writer and clerk in chancery afore- " said, to endure beyond the period of his own natural life; and " more especially, and even during his life, had no power to " grant any such commission, deputation, substitution, or other " delegation, to and in favour of two or more persons jointly, " with survivorship to the longest liver;" and that the commission to the appellants should be reduced and declared void as *ultra vires* of the granter, or, at all events, it should be found that the office held by the respondents, under the commission of James Earl of Rosslyn, expired upon his Lordship's death, and that the respondent had thenceforth a good and undoubted right

to exercise the office. There were then consequential conclusions in regard to the fees of the office which had been drawn by the appellants.

The appellants, in defence, stated, that from the earliest period the appointment of the Clerk in Chancery had been one of the most important privileges attached to the office of the Director of Chancery; that the patronage had been exercised without control; that the appointments had been for life, and upon such arrangements as the parties could agree upon.

The pleas in law stated by the respondent, in support of his action, were,—

1st. The commission in favour of the defenders contained words of limitation, according to which it did not endure for any longer period than the Earl himself and his deputy continued to hold the office of director, the commission appointing the defenders, during their respective lives, and the survivor of them, to be "writers and clerks under me and my deputy, in the said "office of his Majesty's Chancery in Scotland," and making them "answerable to me and my deputy" for the assistants or servants to be employed by them.

2nd. Such commissions, in so far as it is argued to be a commission in favour of the defenders for their joint lives, or the life of the survivor, irrespective of the principal's tenure of office, would have been, and is, at common law, and in reference to the terms of his own commission as well as otherwise, *ultra vires* of the Earl.

3rd. Further, in any sense, it was contrary to the provisions of the statute 57th Geo. III. cap. 64, the commission having been granted subsequently to the Act.

4th. The said commission, with all rights, powers, and privileges thereby conferred upon the defenders, or either of them, fell on the decease of the Earl.

5th. The pursuer, by virtue of his commission from the Crown, is now the only true and undoubted Clerk of Chancery, to the exclusion of the defenders and all others.

6th. The defenders are liable in repetition of all sums

uplifted and levied by them, in their pretended capacity of Clerks of Chancery, since the death of the said Earl.

7th. Generally, the pursuer is entitled, in the circumstances of the case, to decree, in all points, in terms of the libel.

The appellants, on the other hand, pleaded,—

1st. At common law, and independently of the provisions of the statute 57 Geo. III., the commission in favour of the defenders is not reducible, inasmuch as the late Lord Rosslyn did not exceed his powers as Director of the Chancery, in granting a joint appointment to them during their respective lives.

2nd. As all existing interests were expressly reserved by the statute 57 Geo. III., the power of the late Lord Rosslyn to name clerks was not affected by its provisions. At the date of the defenders' commission, his Lordship, in virtue of the reservations in that statute, was as fully empowered to grant it, as if the statute had not then been passed.

Cases were lodged for the parties which were reported by the Lord Ordinary to the Inner House, and on advising these papers, the Court required the opinions of the other judges.

These opinions were given at great length, and will be found in 3 *D. B.* and *M.*, 740, N. S.

On the 14th March, 1841, the Court (First Division) pronounced the following interlocutor:—"The Lords having advised "the mutual cases for the parties, together with the opinions of the "consulted judges, find, in terms of the first conclusion of the libel, "that the commission made and granted by the deceased James "Earl of Rosslyn, in favour of the said James Alexander Earl of "Rosslyn, and John Dundas, as joint writers and clerks in "chancery is void and null, and reduce, rescind, decern, and "declare the same to have been from the death of the said "James Earl of Rosslyn, void and null as aforesaid; and, with "respect to the remaining points of the case, of consent of "parties, recall the interlocutor of 26th June, 1840, in so far as "it resolved to take the opinions of the Judges of the Second "Division, and of the permanent Lords Ordinary on the whole

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" cause, and appoint parties to prepare short minutes of debate " to the said remaining points of the case, to be interchanged " by the first Box-day, and revised and boxed by the third " Sederunt day in May next."

The appeal was against this Interlocutor.

Mr. Attorney and *Mr. Solicitor-General* for Appellants.—I. The offices of Director and of Clerk of Chancery were, from a remote period, quite distinct, that is recognized by the 57 Geo. III., cap. 64. The director was appointed by commission from the Crown, while the clerk was appointed by commission from the director himself, who in exercising this patronage appears to have done it either gratuitously or for an onerous consideration, either in a price paid down or in receiving a proportion of the fees. The commission of the office of director was in several instances to two for their joint lives, with survivorship. And on the other hand, the commissions granted by the director, in several instances prior to 1787, when the Earl of Rosslyn was appointed director, were for the life of the grantee. In this there was no inconsistency, as the director himself held his office for life, and the two offices were quite separate, the one officer was not the mere deputy of the other; accordingly, in offices of a similar kind, such as Clerk of Session, Clerk of the Bills, Clerk of Justiciary, Lyon Clerk, and Admiralty Clerk, the grant of the office is for life, and in many instances to two for their joint lives. As to many of these offices, the power of appointment rests on usage merely, whereas express power is given to the Director of Chancery, by his commission, to appoint a clerk with the usual powers. If any doubt could be entertained as to the extent of this express power it is cured by the proof of the usage, and moreover is supported by the decision in Hogg *v.* Kerr, *Mor.* 13,106, where the Court refused to remove Hogg on a charge of malversation, and confirmed him in the tenure of his office, according to the grant of it, which was for life; and in Smith *v.* Kerr, the legality of the appointment, which was also

for life, was inferentially sustained, as otherwise all the other discussion which took place, and upon which the case was in terms decided, would have been superfluous. These cases are supported by others, in regard to similar offices. In Waddell *v.* Inglis, *Mor.* 13,134, a conjunct appointment for life to the office of deputy clerk in the Bill Chamber was sustained against a subsequent principal clerk, although the principal was liable for the acts of the deputy.

[*Lord Campbell.*—The validity of the joint appointment did not arise in that case.]

Objection was not taken to it, nor suggested, by the Court, which is material, as showing that none was considered to exist.

[*Lord Chancellor.*—Nothing is said in the opinions as to the appointment being joint. What is there to confine it to *two*,—if it be valid, what is there to hinder it being made to three or more?]

Every thing is to receive a reasonable construction,—when that case comes before the House it will deal with it,—but a joint appointment to two is supported by the old case Archbishop of Glasgow *v.* Commissary Clerks of Peebles, *Dict. Supp.*, vol. iii., p. 158, where a joint appointment was expressly sustained after objection taken.

II. Assuming the grant of the office to be valid in other respects, it is not affected by the 57 Geo. III., cap. 64. All "present existing interests" are expressly saved, and this power of appointing a clerk was as much an existing interest in the office of director, as that of drawing the fees of the office, or any other advantage appertaining to it.

Mr. Pemberton Leigh and *Mr. Aytoun*, for the Respondents, cited Tarbet *v.* Oliphant, *Mor.* 13,115.

LORD BROUGHAM.—My Lords, in this case my noble and learned friend is about to move an affirmance of the Interlocutor, for reasons which he is about to assign. I differ from the Court below, in the body of their argument, and I find one point

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insuperable, that the power has not been executed legally, that two lives have been put in without authority, and therefore, though reluctantly, I agree in the affirmance of this judgment.

LORD CAMPBELL.—My Lords, I am of opinion that this judgment ought to be affirmed.

I entertain no doubt, however, of there being a separate independent office of Clerk of the Chancery. The existence of such an office does not appear from the commissions to the Director of Chancery, and the express power given to him to appoint deputies and servants in his office, for whom he shall be answerable, must rather be taken to apply to the duties of the office of director than to the duties of the office of clerk. The latter office, like others of the same sort, probably took its origin from the appointment of an assistant to do part of the duties, the principal gradually becoming a sinecurist, and the substitute exacting a fee for his own trouble, in addition to those collected for the principal. But as early as the year 1677 there had grown up the office of Clerk of the Chancery, to which William Hogg was appointed, "during all the days of his lifetime, with "all fees pertaining thereto, sicklike as any of his predecessors "had bruiked and joysed the same."

As to this point the statute libelled on is quite conclusive, for it recites the office of Clerk of the Chancery as an office to be regulated in the same manner as the office of Director of the Chancery, and therefore we are not at liberty to consider the person appointed to act as clerk as a mere agent of the director, doing the duties of the director, and necessarily ceasing to have any interest or authority at the death of the director.

We are next to inquire as to the tenure of this office, and I am of opinion that the director had the power of granting it during the life of the grantee. There is not the slightest foundation for the argument, either on principle or according to analogy, that the director holding for life could not confer an interest in

the subordinate office beyond his own life. Many instances might be enumerated of a person holding an office only during pleasure being able in point of law to grant a freehold in another office. We are to look to the manner in which this office of Clerk of the Chancery has been granted and enjoyed, and the precedents of appointments to it for life, with possession under these appointments, and judicial recognition of their validity are, in my opinion, abundant evidence to show that the director, before the passing of the Act of 57 Geo. III., chap. 64, had authority to appoint a person to the office of Clerk of the Chancery for life, and that the person so appointed would have been entitled to hold the office after the death of the director who appointed him.

Nevertheless, I am of opinion that the appointment by the late Earl of Rosslyn, bearing date 29th July, 1830, of James Alexander Lord Loughborough, and John Dundas, and the survivor of them, to be Clerks of Chancery, was *ultra vires* and is now liable to reduction.

In the first place, I concur in the opinion so ably expressed by Lord Moncrieff, that after the passing of the Act of 57 Geo. III., chap. 64, a vacancy having happened in the office of Clerk of the Chancery, the right of the Treasury to regulate it accrued, and consequently the antecedent right of the director to appoint to it was gone. It must not now be forgotten that the statute treats the two offices of director and clerk as quite distinct, and enacts, "that upon the termination respectively of the then "existing interests in these offices, and so soon as the said offices "or any or either of them shall become vacant, it shall be lawful "to regulate the said offices respectively as they respectively "become vacant, any law, usage, custom, or practice to the "contrary notwithstanding."

The appellants rely altogether on the words, "upon the ter-"mination respectively of the present existing interest in the "said offices," and they say that although before the appoint-

ment in question a vacancy had happened in the office of clerk, the interests existing in this office when the Act passed had not terminated. And we are to say whether any interests in the office of clerk, which can fairly be supposed to have been in the contemplation of the legislature, continued.

Now it is plain, that the appellants had no interest in the office when the Act passed. It was then held by James Dundas, who is since dead, and both the appellants have been subsequently appointed.

Looking to the object and language of the statute, I cannot bring my mind to think that the right of appointing *to* the office was an interest *in* the office, which was to prevent the power of regulating it, after successive vacancies, during the lifetime of the then director, and until after the death of a young man of twenty-one, whom on his death-bed he might appoint to the office of clerk. This was an office which the legislature thought required regulation, as soon as possible, for the public good. I cannot think that the right of the holder of one office to appoint to another office was an interest in the latter office, which the legislature intended should defer the correction of the abuses which had sprung up in it.

It has been strongly urged upon us that some meaning must be given to the words "*existing interests*," and that they mean something beyond the mere occurrence of a vacancy. I think they are abundantly satisfied by regarding the interests in the different enumerated offices, which might exist under settlements, the offices being held in trust (as was often the case), or which might exist by grants in reversion, which were not uncommon. Under such circumstances, there were existing interests *in* the office, which were protected after a vacancy, on the resignation or death of the existing officer. But the right of patronage I cannot think was an interest in the office to be disposed of. It might, with more plausibility, be considered an interest in the office to which the patronage was annexed, but

the counsel for the appellants hardly ventured so to argue it; and I conceive that to be a bar to the regulation of the office, it must be an interest in that office which becomes vacant, and is to be regulated. But observe how the object of the legislature may be effectually defeated by the construction contended for. Suppose there were two offices which reciprocally appointed to each other, neither could ever be regulated to the end of time, unless by a rare accident both should become vacant at the same moment. But with regard to these two offices, the clerk collecting fees for the director, and receiving a boon from him, he has an interest in the office of director, if the director has an interest in the office of clerk, and the regulation of both offices may be indefinitely postponed.

If the office of clerk had not been saleable, I think there would have been no ground for saying that the patronage was to be preserved to the director; and I do not think that one construction of the statute is to be adopted where the office is not saleable, and another where it is saleable. In the recent Act of Parliament for abolishing the equity jurisdiction of the Court of Exchequer, the Lord Chief Baron was deprived, without compensation, of the valuable patronage of appointing masters on the equity side; and I am not aware of there being anything abhorrent to reason or justice in saying, that while it is for the public good that offices should exist, the holder of a particular office shall have the appointment to them, but then when the public good requires the abolition of these offices they may be abolished without compensation being made for the patronage of them. Whatever injustice might be done by withholding compensation in this case, if we see clearly that the right to regulate the office accrued on the death of James Dundas, we are bound to put this construction upon it, although the value of the office of director was thereby impaired.

But, independently of the statute, I am of opinion, that the joint appointment of the appellants, with benefit of survivorship,

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was *ultra vires* of the director. This objection is distinctly made by the summons, and by one of the pleas of law. It is strongly relied upon in the case of the pursuers below, and ably treated by several of the judges. There is no ground, therefore, for the suggestion that it is a mere after thought, resorted to when the real grounds of the action had failed.

Now, it is incumbent on the appellants to show a right to appoint two to the office, with benefit of survivorship, either, first, by showing that this office has been so disposed of, or, secondly, by showing that, by the law of Scotland, the office may be so disposed of, though never so disposed of before.

First, no joint appointment is shown until the year 1826, after the statute, when Henry Francis St. Clair Erskine and John Dundas were appointed during their joint lives, and the life of the survivor of them. It is said that, as there is no register for the commissions to the clerks, we may presume that there were previous appointments of the same nature. But in the absence of a general law, authorizing joint appointments, I consider it quite clear that the onus lies upon the appellants to prove, by positive evidence, that in former instances this office has been so granted and enjoyed; and the prior appointments being of a single person during his own life, we are bound to believe that, till the year 1826, there had been no joint appointment.

Secondly, the question then arises whether, by the general law of Scotland, such an office, though hitherto granted only to one person for his own life, may be lawfully granted to two and the survivor of them. This would be a very extraordinary law, and would require to be established by clear authority. There is certainly nothing resembling it in England. By usage, the very valuable office of Chief Clerk in the King's Bench might be, and always was, granted to two and the survivor of them, and therefore might be lawfully so granted; but the office of a prothonotary in the Common Pleas and other offices, which till lately were saleable in our courts of justice, which had been sold

and granted to one person during his life it is quite certain could not have been sold as against a succeeding Chief Justice to two and the survivor of them.

To make out the general law in Scotland usage with respect to other offices is relied upon. The offices cited are generally of a different nature, or there are words in the commission of the principal to authorize the joint appointment. But if the offices were of the same nature, I utterly deny the inference that, because there may have been joint appointments to some, there may have been joint appointments to others, which have been always hitherto held by a single individual. Could the right to appoint jointly to the office of Custos Brevium be inferred from the practice to appoint jointly to the office of chief clerk in the Court of King's Bench? It might as well be said that this office might have been granted for the first time by Lord Rosslyn in reversion, in the year 1826, because similar offices had been granted in reversion.

The authority mainly relied upon to show that by the general law of Scotland, such appointments are universally lawful, is Waddell *v.* Inglis. But, when properly examined, it seems to me to have no application to this case. There Inglis got an appointment for life as Depute Clerk of the Bills from Sir Alexander and Sir Philip Anstruther, joint clerks, and his appointment was *warranted* by both. Yet it was attempted by Waddell to turn out Inglis during the life of one of the Anstruthers, and an action was brought to that effect. That action was opposed by Sir Robert Anstruther; and Inglis objected that the person challenging his right had no title to remove him, being but one of two joint tenants to the clerkship. In these circumstances, the House of Lords held that Waddell had no right to turn him out. The question as to the effect of Inglis being appointed jointly with another did not arise between these parties, and could not be decided. There is, therefore, no ground for saying that this House has ever given its sanction to the doctrine contended for.

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In the absence of any authority in the law of Scotland, that two may be appointed to an office with benefit of survivorship, to which only one had been appointed for life, we must consider that ten might as well have been appointed, with benefit of survivorship, as two; and that, besides the injustice to the successors to the office in which the right of appointing is vested, there must be great danger that the duties of the office to which the appointment is made may not be adequately performed.

I most sincerely regret that the decision of the Court of Session should cause any loss or disappointment to the family of a most honourable, disinterested, and distinguished statesman, whose talents and virtues conferred great benefits on his country, and endeared him to all who had the advantage of knowing him in private life; but in the faithful discharge of my judicial duty, I feel bound to declare that, in my opinion, the Interlocutor of the majority of the Judges against those whom he appointed to this office, is correct, and ought to be affirmed.

I must observe, that we cannot be influenced by the consideration that the Treasury might sooner have interposed. The rights of the public may be enforced, even if they had been for a time neglected. But in this case it is to be remembered that, till there was a vacancy in the office of director, there must have been great difficulty in regulating the office of clerk. The object seems to have been to consolidate the two offices by the appointment of one officer, who was to do the whole of the duty at an adequate fixed salary, and this could not have been sooner accomplished.

For these reasons, I move your Lordships that the Interlocutors appealed against be affirmed.

LORD CHANCELLOR.—My Lords, this case has been a long time depending for consideration, and I have frequently directed my attention to it. I have never been able to get over the difficulty arising from the joint appointment; and I feel myself bound,

therefore, though reluctantly, to support the motion of my noble and learned friend.

Mr. Robertson.—I presume that no costs are given in the present case. I understand that the costs of the respondent were defrayed by the Lord Advocate of Scotland, on behalf of the Crown,—in fact, the whole prosecution was at the suit of the Crown; and as no costs are taken or given by the Crown, I presume that no costs are given upon this appeal.

Lord Campbell.—Is the Crown a party?

Mr. Robertson.—I do not know that the Crown is a party, but it was certainly communicated to me that the Lord Advocate paid the costs of this appeal on the part of the respondent.

Lord Campbell.—I should advise your Lordships not to give costs.

Lord Chancellor.—No costs. We have considered this case with great attention, because it is a question of very great importance.

Interlocutor affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the Interlocutor therein complained of be affirmed; and that with this affirmance the cause be remitted back to the First Division of the Court of Session in Scotland, to do further therein as may be necessary and just.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Agents.