

bond of cautionry has been attested, or otherways the clerk would not have received such a cautioner; but whether the bond may be effectual or not, is not the question, but the clerk ought to produce it, that the pursuer may make what use of it he pleases, otherwise the clerk should be liable for the debt. THE LORDS ordained Walter Riddel to produce the principal bond of cautionry betwixt and a certain day, otherways found him liable for the debt.

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*Fol. Dic. v. 2. p. 293. Sir P. Home, MS. v. 1. No 39.*

1684. February 12. WEDDERBURN against OLIPHANT.

IN an action of declarator, pursued by John Wedderburn, Clerk of the Bills, against Mr Henry Oliphant, who had received from Mr William Bruce, formerly principal Clerk of the Bills, a commission for being depute in loosing of arrestments and caution in lawburrows during his life, wherein he craved, that it might be found and declared, That Sir William's gift, not bearing a power to substitute, he could grant no gift to Mr Henry Oliphant but during Sir William's incumbency;—and it being *alleged* for Mr Henry, That he having his gift for onerous causes from Sir William Bruce, Sir William could not prejudice him by his voluntary demission of the said office, in favours of Sir James Anstruther, by whose death his office is come to this clerk; *2do*, That albeit *regulariter, delegatus non potest delegare*, yet where there has been a custom otherwise it does not hold; and it was offered to be proved, that the Clerk of the Bills, from time to time, both before and since Sir William Bruce's time, has been in use constantly to grant gifts of this tenor. THE LORDS found the first defence relevant, viz. That Sir William Bruce having voluntarily demitted, by which demission the right of this office, as Clerk to the Bills, came to this clerk, that the demission could not prejudice Mr Henry Oliphant, but that he ought to brook the office during Sir William's life, and therefore assoilzied Mr Henry from the declarator.

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Found that by custom, the clerk of the bill might grant sub-commissions, tho' no power to delegate had been conferred on him.

*Fol. Dic. v. 2. p. 292. P. Falconer, No 81. p. 55.*

\* \* \* Fountainhall reports this case :

1683. November 30.—MR HARY OLIPHANT, Clerk to the acts of lawburrows, and allowances of comprisings, being discharged to officiate by Mr John Wedderburn of Blackness, Clerk to the Bills, he gave in a bill to the Lords complaining of it: They referred it to my Lord Carse to hear them, who reported the debate, viz. That he was only a servant, and during pleasure, and so removeable; and that the principal clerk was accountable for all under him, and so should have the disposal of them, seeing their errors may endanger him.

*Answered*, He had a gift from Sir William Bruce, and ratified by Sir James

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Anstruther, and so without proving malversations they could not summarily turn him out. *Replied*, Sir William Bruce and Sir James Anstruther's deputations to him (especially they being but the Register's deputies themselves, and so could not delegate,) ended with themselves. THE LORDS ordained Mr Hary to continue in the exercise of his place, but allowed Blackness to go on in a reduction of declarator against him upon malversation, or other grounds as he thought fit.—The Under-Clerks of Session were very glad at this interlocator; for the contrary would have been a preparative for them to compone with every master that came in above them, though they had paid largely at their first entry.

But, upon a bill given in by Mr Wedderburn, on the 1st of December, bearing the grounds he went on, and that Hary being a member of the Session was obliged to answer summarily on a bill; the LORDS received his grounds *hoc loco*; and, in the mean time, during the dependence, desired Mr Oliphant to forbear exercising.—Then they altered this, and ordained him to find caution beyond exception for his fidelity in the office.

1684. *January 8.*—THE LORDS took in summarily Blackness's reasons of reduction against Hary's deputation, that it flowed *a non habente potestatem*, viz. Sir William Bruce, who was but a sub-delegate himself, and that his commission from Sir Archibald Primrose, Clerk-Register, gave him only power to exercise by himself, or his servants, and not to sub-delegate; that in offices *industria personæ eligitur*, that as they transmit not to heirs, so neither to substitutes, nor assignees; that *resoluto jure dantis resolvitur et jus accipientis*; that the permitting venality of offices is a reproach, *et prava corruptela, et non consuetudo*, and his paying money for it was a tacit allowance to sell it again, *qui emit vendat oportet. Vide Reusner. Symbola imperatoria class. 1ma*, learnedly explaining this. *2do, Solus delegatus principis potest delegare*, even though the delegate's commission empower him to substitute. *Answered*, Hary opposed his gift, and his possession, now these eight years; and that the Clerks of the Bill-Chamber have been in the constant use of giving deputations to servants under them, as to Walter Riddel, James Nicolson, &c. not only during their own time, but also during the receiver's lifetime; and so there is a *jus quæsitum* to him *quod non est ab eo tollendum, per regulam cancellariæ apostolicæ*; and he cannot be removed without either giving him back his money, or else proving malversations upon him, any of which two he was content.—THE LORDS on this debate in presence, ordained Hary to continue in the office, but to condescend presently on the custom of the Bill-Chamber preceding Sir William Bruce's time, as it was when Mr John Skeen, and Mr George Gibson of Boussie had it; if they were in use to give written commissions or deputations for the receiver's lifetime: But they inclined to think Hary Oliphant ought to have action reserved to him against Sir William Bruce, for repetition of his money, if he succumbed.

1784. February 12.—HARY OLIPHANT's probation against the Clerk of the Bills, in the case mentioned 8th January last, being advised, and finding he had not proved the custom, they fell upon a new knack to assoilzie him, viz. that his gift bore him to the office during Sir William Bruce's lifetime, whereas the debate upon both sides ran, not if it should defend and subsist during the granter's lifetime, but if during the receiver's; and this decision would cast the Clerks of Session loose at the death of the upper clerk their master-*do*, Sir William Bruce's death must be understood here not *naturaliter* but *modo civili*, when he ceased to be Clerk of the Bills by his demission, without specially reserving this deputation which he had given to Hary Oliphant.

*Fountainhall, v. 1. p. 247, 256, & 269.*

\*.\* Sir P. Home reports this case :

1683. November.

MR HARY OLIPHANT having a gift and commission from Sir William Bruce, Clerk of Bills, to serve as clerk in loosing of arrestments, receiving caution in suspension of lawburrows, and allowing of adjudications and apprisings, and being summarily discharged of his office by John Wedderburn, now Clerk of the Bills, and having given in a petition to the LORDS, complaining, that he being summarily removed from his office, without any order of law, and without alleging of any act of malversation against him, therefore craved he may be reponed. *Alleged* for John Wedderburn, the Clerk, That he might justly discharge Mr Hary of that office, because Sir William Bruce being but a depute, he could not appoint, it being a principle in law that *delegatus non potest delegare*; and however any gift and commission granted by Sir William Bruce might militate against himself, that he could not discharge Mr Hary Oliphant of his office without qualifying of some act of malversation against him, yet any such gift and commission cannot oblige the successor in the office, Sir William having made a full and ample demission of the office; and the gift of the Clerk of the Bills being granted to the defender and his servants, for whom he is answerable, it were unjust and unreasonable if the Clerk should not have it in his power to turn out any of his servants he thinks fit; for seeing he is liable for the malversations, it were unjust that any person should be imposed upon him but such as he makes choice of himself; and it is just and rational that every man should make choice of his own servants, seeing in such cases there is *electio industriae personae*; and Sir William Bruce having made a simple and absolute resignation, without any reservation in favour of Mr Hary Oliphant the defender, as Clerk to the Bills, has the full right to the office, and may exercise the same in his own person or by such servants as he shall think fit to employ. *Answered*, That Sir William Bruce, as Clerk of the Bills, having right to exercise the office by himself, and his servants, it is always in use for the Clerk of the Bills to appoint deputes in these inferior offices, and *consue-*

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*do et prescriptio immemorabilis jus facit, and pro jure habetur*; and Mr Hary having purchased that office from Sir William Bruce, for payment of a considerable sum of money, he cannot be turned out of the office without qualifying some act of malversation against him; and that rule in law, *quod delegatus non potest delegare*, takes only place in *materia jurisdictionis*, and not in offices and employments, which *jurisdictionem non habent annexam sed sunt nudi ministerii*; and even in the case of jurisdictions, that rule takes place with this exception, if the constant custom and practice be otherwise; so that even in the case of jurisdictions, if the party having right has been in use to sub-delegate, it would be sustained much more in offices *qui sunt nudi ministerii*, which are in *commercio*, and use to be acquired for equivalent sums of money; and this is evident in the case of the Under-Clerks of Session, who have deputations from the principals, and who cannot be summarily removed by the principal clerks at their pleasure, unless upon acts of malversation, albeit the principal clerks by their gifts from the Register have not power to constitute deputes; and Sir William Bruce's demission of the office, without any reservation of Mr Hary's right, cannot prejudice Mr Hary's gift, for that demission operates no more than this, that the defender may be provided to the place with the same liberties and privileges that Sir William enjoyed the same before, which was that when any of those offices did vaick, that he might gift the same to such as he pleased, and as Sir William and his predecessors had done before; but there being *jus quæsitum* to Mr Hary by his gift, which he acquired for onerous causes, and sums of money, he cannot be summarily removed from his office unless some acts of malversation were qualified against him that might be a ground of deprivation. THE LORDS, before answer, ordained both parties to adduce what evidence they could, by writ or witnesses, for clearing of the custom of the Bill-Chamber the said time, if before Sir William Bruce's time, or since, the Clerks of the Bill-Chamber did grant deputations to the servants of that Chamber during the receiver's lifetime or not. Mr Hary, for clearing of the custom of the Bill-Chamber, did adduce several witnesses, who did prove that persons who did officiate in the Bill-Chamber in those offices, under the Clerk of the Bills, continued in the same until the time of their decease, notwithstanding of the alterations of the principal clerks before Sir William Bruce's time; and since that time, the custom is clear from the gift granted to Mr Hary, Walter Riddell, James Nicolson, Mr William Eccles, and Mr Mungo Murray, Under-Clerks in the said office; which being advised, with the former debate, the LORDS sustained Mr Hary's gift during Sir William Bruce's lifetime; and found that Sir William Bruce's voluntary demission could not prejudice Mr Hary's gift, albeit not reserved in the demission, and therefore reponed him to his office.

Thereafter John Wedderburn having given in a petition to the Lords, craving, That Mr Hary might be ordained to find caution, in case he committed any malversation in the office, for the principal Clerk's relief, seeing he was

answerable for the servants in the Chamber; *answered*, That seeing there is no malversation alleged against him, he cannot be obliged to find caution any more than the other servants in the Bill-Chamber, and the Under-Clerks of Session; and neither the principal clerk himself, nor is it usual for any under-clerk in the kingdom to find caution; and this being a matter of trust, it will be difficult for any clerk in such a case to find caution. THE LORDS refused the desire of the bill.

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*Sir P. Home, MS. v. 1. No 492.*

1693: February 2. KING'S ADVOCATE *against* MONCRIEFF.

No 22.

MONCRIEFF of Redie having the King's gift, impowering him for ever to present one of the macers of Session, it was *objected*, *imo*, That the same was null, seeing *beneficium non vacans nequit conferri*, by analogy of the act 23. Parl. 1567; the LORDS repelled the objection, because a power of presenting is a different thing from an actual presentation; and if this was sustained, a right of patronage would lie under the same exception. *2do*, They repelled the objection, that Redie's gift was null on the act 69th Parl. 1587, that his Majesty's casualties shall not be given away in great; for they thought the King might lawfully annex the presentation of the macers to the judicatory of the Session for ever; and if so, why not to one man, which, though inconvenient, was not unlawful?

*Fol. Dic. v. 2. p. 291. Fountainhall.*

\*\*\* This case is No 2. p. 3460., *voce* DESUETUDE.

1693: December 15. Lord TARBET *against* OLIPHANT of Lanton.

No 23.

THE LORDS advised the competition, which arose for the clerkship, on the death of Charles Oliphant, between my Lord Tarbet, as Register, and Mr James Oliphant of Lanton, son to the said Charles, and conjoined with him in the same gift; who *alleged*, That though his father had restricted the gift, yet he could not renounce the *jus quæsitum* to him; and though conjunctions were against the act of Parl. 1685, yet survivances were not; and albeit they be odious in law, yet there are many instances in Scotland, as in commissaries, and in clerkships. Tarbet adhered to the LORDS' act of sederunt, made on the admission of Charles Oliphant; and that the LORDS had caused him to elect, and he had chosen rather to officiate himself, and had restricted the effect of his gift, and prejudged his son; who, being his heir, could not come against his father's deed; and that survivances were odious, and reprobated in law, as inducing *votum captandæ*: So these was no proper survivance here, but only what

Found that a grant of the office of Clerk Register could not exceed one life.