

ROBERT WADDELL, Esq., Conjunct Principal }  
 Clerk of the Bills, - - - } *Appellant* ;  
 CHARLES INGLIS, Deputy Clerk of the Bills, *Respondent*.

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WADDELL  
 v.  
 INGLIS.

House of Lords, 14th February 1770.

TWO CONJUNCT PRINCIPAL CLERKS OF THE BILLS APPOINTED A DEPUTY TO DISCHARGE THE DUTIES OF THE OFFICE—Held, on the deaths of both the Principal Clerks who appointed him, that the office of the Deputy did not thereby cease and determine, so as to entitle the new Principal Clerks to appoint other Deputies, or to enter into and perform the office of Deputy by one of their number, and to uplift the fees belonging to the office.

Upon the 23d July 1713, Sir Alexander and Sir Philip Anstruthers, then conjunct Clerks to the Bills, had concurred in granting a commission to Charles Inglis, writer in Edinburgh, the respondent's father, "nominating and appointing  
 " him to be their depute, for officiating under them, and  
 " their successors in office, during his lifetime, in all bills of  
 " suspension and advocacy, to be given in at their office,  
 " and presented before the Lords of Session, and to receive  
 " the bonds of cautionary, and uplift the ordinary dues of  
 " the said bonds of cautionary, and apply the same to his  
 " own use, and generally to act and do under them, the said  
 " Alexander and Sir Philip Anstruthers, and their successors  
 " in the said office of clerkship, in all and every thing as  
 " James Nicholson, or Henry Oliphant, former deputes, were  
 " in use to do."

In 1742 Sir Philip and Mr. David Anstruthers, then conjunct clerks to the bills, renewed this commission in precisely the same terms, to the said Charles Inglis and his son, the respondent, and the survivor of them, to be their clerks depute.

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It appears that this was the first instance of a grant of this nature to two persons, with the benefit of survivorship.

Charles Inglis the father, died in 1747 ; and thereupon a new commission was granted in the same terms to Charles Inglis, the respondent, by Sir Philip and David Anstruthers.

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In 1749, and on the death of one Cramond, who held office in the bill chamber, another commission was granted to the respondent Charles Inglis, and his brother Laurence, and to the survivor of them, *as their servants in the bill-chamber*.

Upon the resignation and subsequent deaths of the principal clerks of the bills above mentioned, Sir Robert An-

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struther and the appellant Robert Waddell, were appointed conjunct principal clerks of the bills. The appellant Waddell, who had been bred to business, resolved, upon his appointment, to attend and discharge in person the duty of that office, which had always for time past memory been performed by deputies. It was alleged that his chief motive for so acting, arose from a conscientious wish to discharge faithfully in person his duties, without delegating these on another, and thereby holding his own appointment as a mere sinecure.

This resolution on his part was communicated to Sir Robert Anstruther his colleague, and with his approval the same was communicated to the respondent Inglis, who objected, and who refused to allow either of the principals to have any concern in the office.

A reduction and declarator was then raised by the appellant Waddell alone, his colleague Sir Robert Anstruther declining to appear as a party, in consequence of the *absolute warrandice* contained in the *deputation*, which his father Sir Philip Anstruther had granted to the respondent, warranting the deputation to stand good, and be effectual to him during all the days of his life; and the respondent, on his part, apprehensive as to the duration of his commission, beyond the deaths of the parties who had granted it, raised a counter action of reduction and declarator, against Sir Robert Anstruther, as representing his father, upon the warrandice above mentioned, which lay aside to abide the result of this action.

The appellant insisted for reduction of the deputation granted to the respondent, by Sir Philip and David Anstruther, on the following grounds: 1st, The same was *ipso jure* null, as flowing from persons who never had power to grant such deputation, because the commission in their own name, bore only a power to them to exercise that office by themselves or servants, but no power for naming deputed for life. 2d, As the appellant, by his commission, is declared answerable for the deputed or servants who officiate in this office, he falls to have the nomination of them while answerable, and, therefore, that no deputation granted by his predecessors was valid, it being contrary to all law and justice that the appellant should be answerable for persons over whom (if such deputation was to stand) he had no power; and, 3dly, All deputations, being of the nature of factories or mandates by law, fall upon the death of the granters, and the granters being now dead, the same has fallen and at an

end. The Lord Ordinary made avizandum to the whole Lords of the whole cause, and ordered parties to lodge informations, which being done, the whole Lords repelled the reasons of reduction, and sustained the defences, and remitted to the Lord Ordinary to proceed accordingly. Against this interlocutor the appellant reclaimed by petition; and, upon answer, the Court adhered to their former interlocutor.

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The Court were much divided, six judges were for the appellant, and seven for the respondent. The appellant thereafter proceeded with the declaratory conclusions, namely, to have it found, that notwithstanding the said deputation in favour of the respondent, he had full power and liberty to officiate and exercise, in all and every branch of the business, in the said office, in conjunction with his colleague, and to keep all the records and papers belonging thereto; and that the respondent should only be assistant and subservient to the appellant in such branches of the business as the appellant should commit to him, and entitled to such fees only as were mentioned in the foresaid deputation.

The Lord Ordinary, after various procedure, took the case to report, and informations being lodged for the whole Lords, they found “ That the pursuer *in hoc statu* by himself, and without the consent of his colleague Sir Robert Anstruther, is not entitled to remove the records, books, bonds, and other writs belonging to the bill-chamber, from the custody of Charles Inglis; but that the same are to remain as formerly. 2. That as, on the one hand, the pursuer (appellant) is entitled to the whole fees, perquisites, and emoluments, which he has been in possession of, as conjunct principal clerk of the bills; so, on the other hand, the defender (respondent) is entitled to the whole fees, perquisites, and émoluments, which he and his predecessors in office, as depute clerk of the bills, have been in use to receive and enjoy, and that the pursuer has no title to intermeddle therewith. But before answer how far the pursuer is entitled to officiate in the bill-chamber along with Charles Inglis, remit to Lord Auchinleck to hear parties farther thereon; and appoint the pursuer to give in to the Ordinary a condescendence of the manner of his proposed attendance, and the regulations under which the same is to be given, with power to his Lordship to proceed in the whole cause.”

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On a further petition to the whole Court, the Lords “ re-  
 “ fuse the same, in so far as it reclaims against the former  
 “ interlocutor; and adhere thereto. And further, in re-  
 “ spect of what is set forth in said petition, and above repre-  
 “ sented, respecting the pursuer’s attendance at the bill-  
 “ chamber, on this express condition that he should be  
 “ entitled to the just and equal half of the whole profits  
 “ and emoluments presently payable at the office, they not  
 “ only recal the former remit to the Ordinary; but further,  
 “ they assoilzie the defender from the whole conclusions of  
 “ the pursuer’s present process, and decern.”

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—1. That the deputation of the office of bill-chamber clerk, being merely an appointment of one person to officiate in the place of another, must expire with the death of the principal who appointed the deputy; and, therefore, the respondent, after such death, has no longer right to hold the office under this deputation, which, on that event, ceases, and is at an end. And this is the more necessary, seeing that the nature of the office is one of trust and responsibility attaching to the principal clerks; and in order that they may have proper persons under them, for whom, by the express words of their commission, they are responsible, it is necessary that the nomination and removal of the persons for whom they are so responsible should be in their power. And no previous practice shewing that the depute clerks have been in the custom of holding their appointments after the death of the principal, can go against principle, and the express warrant of the commission.

Each of the principal clerks has a separate and independent commission; and being thereby constituted complete clerk to the bills, must be entitled to maintain such action as is necessary to protect or recover the rights and privileges of his office, and cannot be liable to control by his colleague, except where he abuses the duty of the office.

*Pleaded for the Respondent.*—The appellant being but a joint officer, cannot maintain this action without his colleague. The two grantees make one officer. The respondent has been bred up all his life in the office, having served first under his father, and in the performance of his duty has given general satisfaction. He paid a very large sum for his present commission, on the faith and distinct understanding that he was to hold the appointment for life, as all

his predecessors had done. This commission was regularly recorded in the books of Sederunt, and by an *Act of the Lords of Session he was admitted to the office*. His removal, in these circumstances, would both be unjust to him, and injurious to the public. Besides, the appellant bought his office of principal clerk of the bills, in the full knowledge of existing deputations, terminable only by the respondent's death, and the price paid by him demonstrates that these existing rights entered into the consideration. The appellant may, if he chooses, act and perform duty in the bill-chamber, in any of its departments; but the respondent submits that this cannot be done to the effect of depriving him of any of the fees which he has been accustomed to uplift.

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&c.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors therein complained of be affirmed, and that the appellant do pay to the respondent £100 costs.

For Appellant, *Al. Wedderburn, Tho. Lockhart*.

For Respondent, *J. Montgomery, Al. Forrester*.

*Note.*—Unreported in Court of Session Reports. *Vide* M. 16633, for case which followed.

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WILLIAM MILNE, Architect in Edinburgh, and	}	<i>Appellants;</i>
ALEXANDER BROWN, Merchant in Edinburgh, and ROBERT MILNE, Architect in		
London, his Cautioners,		
The MAGISTRATES and TOWN COUNCIL of Edinburgh,	}	<i>Respondents.</i>
inburgh,		

House of Lords, 15th February 1770.

**ARBITRATION CLAUSE—CONTRACT.**—A contract in regard to the execution of the works in building a bridge, contained a clause, referring all differences and disputes to two neutral men of skill, as arbiters to be chosen, and in case of them differing, with power to them to choose an oversman, whose determination was to be final. Held, on a preliminary defence being stated, to a summons raised for failure to implement the contract, founded on this clause, that an agreement to refer all disputes to arbiters, did not bar the present action in this court, and that the plea in this case, was irrelevant and inadmissible.