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hall, v. 1. p. 2. ARRESTMENTS; (*see* APPENDIX.) Stair, 2d Dec. 1680, Alston *contra* Riddel, *voce* REPARATION. In the case of Stannars, the charger's agent had appeared and taken out a copy of the bill, without lodging any caveat against the receiving of the cautioner, which was considered as a tacit approbation of him; and it is admitted, that the same defence would have been valid in the present instance; but no degree of acquiescence can here be shewn.

The Lord Ordinary "assoilzied the defender."

THE COURT, however, "altered the Lord Ordinary's interlocutor, and found the defender liable in damages and expenses to the pursuer."

The defender reclaimed; but his petition was refused without answers.

Lord Ordinary, *Stonefield*. Act. D. *Williamson*. Alt. H. *Erskine*. Clerk, *Menzies*.
S. *Fol Dic v. 4. p. 197. Fac. Col. No 201. p. 315.*

1795. *March 3.*

LORD FREDERICK CAMPBELL, Lord Clerk-Register of Scotland, *against* ANDREW STUART, Keeper of the General and Particular Register of Sasines at Edinburgh.

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The right of appointing the keeper of the general register of sasines belongs to the Crown, and not to the Lord Clerk-Register.

The Lord Clerk-Register has the right of marking the books of the general register, and of all the particular registers of sasines, and is also entitled to the ultimate custody of them.

THE Lord Clerk Register was originally Clerk of Parliament, and of the other great courts and councils, in which capacity he had the charge of the public records; and as Clerk of the Court of Session, a variety of records were, by special statutes, put under his care, 1597, c. 265, 1600, c. 13, 1696, c. 19.

Independently, too, of any statute, as the King's great clerk, he was the keeper of all records, the custody of which was not otherwise provided for. In this way, the artillery and army accounts, books of the expense of the King's works, books of rates, and many other papers of the like sort, were transmitted to him. Almost all records, too, of a judicial nature, such as notaries' protocols, sheriffs-books, and the like, were sent to him at stated periods, for preservation.

In former times, all those records were deposited in the Castle of Edinburgh, and more recently in the apartments below the Parliament-house, whence they have been very lately removed to the New Register-Office.

After various ineffectual attempts to establish a record of sasines, and other writs relative to feudal property *, the act 1617, c. 16. was passed, placing the registers of sasines on their present footing, and intrusting the care of them to the Lord Register. This statute, after enacting that there shall be a public re-

* See 1503, c. 89.; 1540, c. 79.; 1555, c. 46.; also two unprinted statutes in 1599 and 1604; Acts of Sederunt, (Edinburgh, 1790,) p. 29. and 35.

gister. This statute, after enacting that there shall be a public register, "in which all reversions, regresses, &c. shall be registrate, statutes and ordains the said registers, and registrations foresaid, to be insert therein, to appertain and belong to the present Clerk of Register, and his deutes to be appointed by him to that effect, and decerns and ordains the same registers to be annexed and incorporated with the said office; and that the Clerk of Register present and to come have the said office as an proper part and pertinent of the Clerk of Register his office, make and constitute particular deutes, one or more, for all the days of their lifetimes, or otherways as he shall think expedient, of good fame, literature, and conversation, for whom he shall be answerable, and who shall be resident within the towns and places after specified, at all times, to receive from the parties their evidents, and to registrate the same, &c.; and the said registers to be filled up by the said deutes, to be marked by the Clerk of Registers, and his deutes to be appointed by him, to that effect, with an note of the particular number of leaves that the same shall contain; and the said registers, after filling up of the same, to be reported to the said Clerk of Register, to remain with him and his deutes, and to be patent to all our Sovereign Lord's lieges, and extracts thereof to be given by him, and his deutes to be appointed by him, during all the days of their lifetime, or otherways as he shall think expedient to that effect, to all who shall have ado with the same;" &c. The statute then enumerates the different places where these registers were to be kept, and among the rest, "one in the burgh of Edinburgh, for the whole lands lying within the bounds of the sheriffdom of Edinburgh principal, constabularie of Haddington, Linlithgow, and Bathgate." The act then proceeds, "or in any other place or places more convenient, as the Clerk Register shall think most expedient, due intimation being made to the lieges of the same; and the said evidents to be registrate in the particular books appointed for the lands within the bounds of ilk sheriffdom, stewardrie, and bailliarie as said is, or in the option of the party in the books of register kept by the said Clerk Register himself, or his deutes to be appointed by him, during all the days of their lifetime, or otherways as he shall judge expedient to that effect in Edinburgh*."

* Whether what is now called the General Register of Sasines was first established by this clause, seems to be somewhat doubtful. From the manner in which the latter part of the clause is expressed, it may be thought that there was such a record then existing; and, notwithstanding the difference of phraseology, it is not impossible that it may have been no other than the books of Council and Session, in which, from the unprinted acts 1599 and 1604, it appears that the registration of the documents, mentioned in the statute 1617, was competent: On the other hand, the following doquet, prefixed to the first book of the general register, which commences 28th June 1617, affords a pretty strong ground for concluding, that this register, (at least in its present form) owes its origin to the statute 1617: "Att Edinburgh, upon the days after specified, the writs and evidents following were produced, and registrate in this buik, being the first buik of the register, or session, appointed for registration of sasines, reversions, and other writs, conforme to an acte of Parliament, made in the month of Junii 1617 years, be Mr Francis Hay, depute-keeper thereof, and his servands at his command."

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After the passing of this act, the Lord Clerk Register had the following appointments in his gift: The Keeper of the general register of sasines; and the Keepers of the twenty particular registers; the Principal Clerks of Session; the Clerks to the Commission of Teinds; the Keeper of the minute-book of the Court of Session; the Keeper of the general register of hornings and bills; and the Clerk to the admission of notaries; and he continued long to enjoy this extensive patronage. The commissions, however, granted to the different Clerk Registers, from 1677 till very recently, were during pleasure only, (and the same indeed was the case, except in one instance, with the commissions before the 1677,) which might have some effect in restraining any improper exercise of his power in disposing of these offices.

Occasional instances also occur, at an early period, of the Crown reserving the right of nomination as to some of them.

In 1676, during a vacancy in the office of Clerk Register, the King, by a letter addressed to the Lords of Session, (*Acts of Sederunt*, p. 124. Edin. 1790,) bestowed the right of appointing the Clerks of Session on the Court itself. And, accordingly, when Sir Thomas Murray was made Clerk Register, in November 1677, his commission, though it contained the power in general of naming deputies, bore the following limitation: "*Demptis duntaxit locis trium ordinarium clericorum Concilii et Sessionis, quos nos hactenus ordinavimus, in posterum locari per Dominos nostræ Sessionis.*" But afterwards, in 1670, this right was restored to him, as appears from the King's letter to the Court, (*Acts of Sederunt*, p. 146.) which explains the motives for returning to the former practice.

In the commission to Sir George Mackenzie, Sir Thomas Murray's successor, power is given him to name all deputies whatever. But in 1689, the office of Lord Clerk Register was bestowed on Lord Burleigh, (then Master of Burleigh,) and four others, and their commission bore the following reservation: "*Reservan. nobis solam potestatem nominandi et constituendi omnes in dicto regno clericos, de dict. officio pendentes.*"

Lord Burleigh and his colleagues remained only three years in office. Lord Tarbert in 1692 was appointed sole Clerk Register, and his commission, and every subsequent one till 1728, contained the power of naming deputies without any limitation.

In 1716, Lord Marchmont, (then Lord Polwarth,) was appointed Clerk Register during pleasure, with the usual powers of deputation, and with a salary of L. 444, which had been in 1708 granted for the first time to Lord Glasgow, then Clerk Register, and continued to his successors.

In 1728 the salary was raised to L. 1200, and a new commission, also during pleasure, was granted to Lord Marchmont, in which the right of naming all the subordinate officers was reserved to the Crown, in the same terms which had been used in the commission to Lord Burleigh and his colleagues in 1689

Ever since that period, the commissions have borne the same reservation. Prior to 1771, they have also been granted during pleasure, and with the same salary of L. 1200, except in the case of Mr Hume Campbell, who held the office for life, with a salary of L. 1600.

Lord Frederick Campbell has held this office since 1768. He was first appointed during pleasure, with a salary of L. 1200; but in 1771 he obtained a new commission, granting it to him for life, under the same reservation, however, as to appointing deputies, which is thus expressed in his commission: "Reservan. nobis, et hæredibus et successoribus nostris, solam potestatem nominandi et constituendi omnes clericos dependentes superdict. locum et officium clerici nostrorum registorum et rotulorum infra illam partem dicti regni nostri."

In 1670, Sir Archibald Primrose, then Clerk Register, appears to have granted two different commissions to Sir John Foulis; one appointing him keeper of the two registers of sasines in Edinburgh, viz. the general and the particular register; and the other appointing him the Lord Register's deputy and assistant, for marking all the particular register books of sasines, and of receiving them back into the general repository when filled up. These two offices, though distinct, became thus united in one person; and, in 1701, upon the resignation of Sir John, one commission for both offices was given to William Foulis by the Earl of Selkirk, then Clerk Register, which, for a time, seems to have created the idea of some connection between them.

Mr Foulis having died in 1737, the Crown, in virtue of the reservation in Lord Marchmont's commission, named Mr Baron Maule his successor. This commission, (which was probably copied from Mr Foulis's,) after the preamble, &c. proceeds thus: 'Nominamus prefatum Joannem Maule, armigerum, duran. omnibus suæ vitæ diebus, solum et unicum clericum et custodem generalem registri sasinarum, reversionum, remunerationum, resignationum, ad remanentiam, aliorumque scriptorum, registrarum apunctuatorum in Scotia, per decimum septimum actum vigesimi secundi Parlamenti Regis Jacobi Sexti, apud Edinburgum, 28 Januarii 1617, et subsequent, acta Parlamenti, et etiam solum et unicum clericum et custodem particularis registri reversionum sasinarum, aliorumque, infra vicecomitatus de Edinbutgh, principal. Haddington, Linlithgow, et Bathgate, duran. spatio prædict. et solum et unicum officiarum duran. spatii prædict. ad notandum omnia particularia registra sasinarum, aliorumque scriptorum, infra respectivas vicecomitatus, in quibus particularia registra custodiuntur; cum numero particulari foliorum quas continent, et recipere dict. libros, seu particularia registra quando implentur et redeuntur; eademque custodire pro usu subditorum nostrorum, et ex iisd. dare extracta omnium scriptorum et evidentiarum quas continebuntur, secundum priorem praxin et corresponden. legibus Scotiæ.'

On Baron Maule's death, Mr Andrew Stuart was, by a commission from the Crown, of the same tenor, named his successor, both as keeper of the general

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Lord Frederick Campbell conceiving that the commission granted to Mr Stuart was *ultra vires* of the Crown, brought an action of declarator against him, his Depute and Substitute, and likewise against the Officers of State, concluding to have it found and declared, *1st*, That, as Lord Register, he and his successors in office, and deputies to be appointed by them, were alone entitled to keep the general register of sasines ; *2dly*, That they had the sole right to mark the books both of the general register and of the particular register for the Edinburgh district, previously to their being filled up, and that Mr Stuart and his deputies should henceforth bring the books of the said particular register to be so marked, before writing in them.

On the other hand, Mr Stuart brought a counter action against the Lord Register and his Deputes, for ascertaining his right to exercise the whole functions vested in him by his commission, and, particularly, those which he had not hitherto exercised, viz. the right of marking by himself, or his deputies, the books of the whole particular registers of sasines, as well as those of the Edinburgh district, and of the general register, previously to their being filled up, and of receiving them back, and keeping them when filled up ; and, in general, of being the sole keeper, and alone entitled to give extracts from the whole books of all the registers of sasines, both general and particular, from the time of the institution of these records down to the present day. †

* The operation of marking is performed by the Lord Register thus : Before each book is given out by the Lord Register, or his assistants, to the keepers of the different particular registers, every leaf of it is numbered, and every tenth superscribed by one of these assistants. All the other leaves are likewise marked by the same assistant with the initial letters of his name. A docquet is also written on the first page, mentioning the number of leaves in the book, and giving general directions about the manner of ingrossing the writings. Another short docquet is written on the last page, specifying the number of leaves in the book, and each of these docquets is subscribed by the Lord Register's private man of business, (who has a commission for that purpose,) in order, probably, to check the number of books marked and given out by his assistants.

† These actions were brought chiefly in order to determine the question of right, it having been mutually understood by the parties, that, in whatever way they should be decided, no change was to take place, in regard to the persons who at present exercise and reap the benefit of the offices in dispute.

The actions were conjoined; and the Lord Ordinary having taken them to report, Lord Frederick Campbell, in support of that branch of his libel which related to his right to appoint the keeper of the general register,

Pleaded; The clause introduced in the commission to the Lord Registers since 1728, reserving to the Crown the nomination of "omnes clericos dependentes superdict. locum et officium," cannot have the effect of vesting the patronage of this office in his Majesty. The statute 1617 not only declares the registers of sasines "to belong" to the Clerk Register, and incorporates them with his office, * but also expressly empowers him to name deputes for taking care of them, and makes him responsible for their conduct, which he could only be, on the supposition that they were of his appointment. Although, therefore, it might be lawful for the Crown to reserve to itself the appointment of the Clerks of Session, and the other patronage which belonged to the Lord Register, independently of statute, no power short of the Legislature could deprive him of the right of naming the keeper of the general register; Bacon's Abridg. voce Prerogative.

Accordingly, Baron Maule, Mr Stuart's predecessor, was so much satisfied that his commission from the Crown, in 1737, was ineffectual, that, on 25th May 1739, he obtained a ratification of it from the Marquis of Lothian, then Clerk Register; and afterwards, on 4th March 1742, he altogether abandoned the Royal commission, and accepted of a new one from his Lordship, in the same terms. This transaction, too, besides showing how little faith the Baron had in the right of the Crown, effectually precludes Mr Stuart from founding on the possession of the Crown, beyond the date of his own commission in 1781. But even although the defenders could plead possession from 1737, the date of Baron Maule's commission, it would not avail them, as a statute meant to regulate the constitution and public police of the country, and not introduced from any temporary circumstances in the situation or manners of the people, cannot go into desuetude.

Answered; The prerogative of the Crown, in the distribution of public offices, can only be limited by consuetudinary law, or an express enactment of the Legislature; such limitation will never be presumed.

So far was it from having been the object of the Legislature, by the act 1617, to deprive the King of any part of his prerogative, with respect to the office of Clerk Register, that an unprinted act, passed that very year, (17th June 1617,) which, while it limited the King's power as to the number of Officers of State; (of whom the Lord Register is one,) who should have a seat in Parliament, in right of their offices, plainly acknowledges his right to split them in what man-

* Lord Frederick Campbell, in his libel, only claimed the right of naming the Keeper of the general register; but he admitted, that his argument went the length of disputing the Crown's title to appoint the keepers of the particular registers.

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ner he pleased, by "deputation, division, or otherwise." And, accordingly, his Majesty frequently exercised these rights, in the course of the last century, with respect to this very office.

Moreover, the Crown has been in uninterrupted possession of the appointment in question since 1737, the date of Baron Maule's commission. What is said of his first accepting a ratification, and afterwards a new commission, from the Lord Register, is of little moment: For, *imo*, As it is not pretended, that these writings were found in the Baron's repositories, there is no evidence that they were either asked or accepted by him; *2do*, Although the commission from the Lord Register concludes, like that from the Crown, recommending him to the Lords of Council and Session, to administer to him the oaths required by law, and "admit him to the exercise of the foresaid office," it is confessed, that it never was produced to the Court, nor did it ever become a part of the title on which the Baron held the offices; *3tio*, In 1761, the Baron having applied for, and obtained a salary from the Crown, of L. 200 yearly, the warrant, by which it is granted, narrates his commission from the King in 1737, and no other; and it appears from the grant, that the salary was bestowed on him as an officer directly appointed by the Crown.

Besides, although Lord Frederick Campbell only insists at present for annulling the defender's commission as keeper of the general register of sasines, his argument, if there were any ground for it, applies with equal force to voiding it, in so far as it appoints him keeper of the particular register for the Edinburgh district. For what the Lord Register calls the incorporating clauses are, at least, as strongly applicable to the particular registers as to the general one. The defenders, therefore, so far as the question can be affected by possession, are entitled to found on the continued series of appointments by the Crown, of the keepers of all the particular registers of sasines in Scotland.

On this branch of the cause it was

Observed on the Bench; Neither the words nor the spirit of the act 1617 support the construction put upon it by the Lord Register. Its object was to regulate and improve the records of the country, and by no means to do, with respect to this department, what has never been done with regard to any other, to take from the Crown all power of interference in the nomination of the subordinate officers who were to manage its different branches.

THE LORDS unanimously (22d May 1793) "sustained the defences pleaded for Mr Andrew Stuart, his Deputies, and the Officers of State, as to the first conclusion of the Lord Register's libel, which relates to the keeping of the general register, and assolizied him therefrom."

The Court remitted to the Lord Ordinary to hear parties further on the Lord Register's claim, to mark the books of the general register, and of the particular register for the Edinburgh district; and on Mr Stuart's claims, to mark the books of the general, and all the particular registers, and also to the ultimate custody of these books.

His Lordship afterwards pronounced an interlocutor, annulling both parties from the respective actions brought against them.

Against this judgment both gave in reclaiming petitions, which were appointed to be answered.

In support of his own claim, and in defence against Mr Stuart's, the Lord Register

pleaded; The act 1617 ordains: the registers to be filled up by the said deputies; to be marked by the Clerk of Register, and his deputies to be appointed by him to that effect. Here two sets of deputies are visibly distinguished. The words "said deputies" obviously refer to the deputies specified in a former part of the statute, and who were appointed for the purpose of keeping the different registers. On the other hand, the deputies last mentioned are, on plain grammatical construction, a set different from the former, and here spoken of for the first time. They are appointed for the special purpose of marking the books; and not only is their nomination expressly given to the Lord Register, but they are declared to be his deputies; or, in other words, the instruments or hands by which he was, in all time thereafter, to perform a material branch of his duty. Accordingly, although the commissions to the Lord Register, since 1728, have contained a reservation to the Crown of naming the keepers of the registers, not a word is said in them which can be construed to take away his right of marking the books, which must, therefore, be held to remain on its former footing. Were Mr Stuart, indeed, ever so far to prevail, as to be found entitled to continue to mark the general register of sasines, and the particular one for the Edinburgh district, it would be destructive of the very purpose for which the practice of marking was instituted, viz. the prevention of interpolations; for the same person would, in that case, both mark and fill up the same books.

The only foundation for Mr Stuart's claim, either as to marking the books, or to the ultimate custody of them, arises from the terms of his commission, which, no doubt, contains these powers; but this happened merely *per incuriam*. In 1701, the Earl of Selkirk, when Lord Register, granted to Mr William Foulis, in one commission, the different offices of keeper of the general register, of the particular register for the Edinburgh district, and of marking the books of all the particular registers, and receiving back the books of all the registers. While Mr Foulis held these offices, the Earl of Marchmont, in 1728, entered into a transaction with Government, whereby he consented, that the right of naming the keepers of the different registers should be reserved to the Crown; so that, when Mr Foulis died in 1737, the Crown had the right of filling up his office of keeper of the two registers, which it bestowed on Baron Maule; and the officer who wrote out his commission, having copied it from that of Mr Foulis, he naturally fell into the mistake of inserting in it not only his appointment to this office, but likewise the clause whereby he had been appointed, as private assistant to Lord Selkirk, to mark the books, and receive the ultimate

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custody of them. This clause has also been continued in Mr Stuart's commission; but what shows, if possible, still more clearly, that its insertion proceeded entirely from mistake, is, that neither Baron Maule nor Mr Stuart ever attempted to exercise any of the powers contained in it, excepting that of marking the books of the general register, and of the particular one for the Edinburgh district, of which they themselves were keepers. On the contrary, they have been in the uniform practice of transmitting, at the end of every ten years, to the Lord Register and his private deutes, the books of both the general register, and of the particular register for the Edinburgh district, to be placed by them in the general repository, in which the books of all the different registers are ultimately lodged.

Answered; Although it were granted, that the clause founded on by the Lord Register imported, that the deputy, who is to mark the books, must be different from him who is to fill up the register, there is nothing either in that clause, or in any part of the statute, which indicates that the Crown should less have the right of reserving to itself the nomination of the one officer than of the other. On the contrary, every expression in the statute, on which the Lord Register formerly founded, as incorporating with his office the right of naming all the subordinate officers employed in this department, occur in the clauses which relate to the deutes who are to fill up the registers.

At all events, therefore, it is clear, that Mr Stuart might name a particular deputy, in terms of his commission, for marking the books, providing he were a different person from him who fills them up. In truth, however, when the statute speaks of the books being marked by deputies "appointed to that effect," it only means, that the person who performs that operation must have a commission authorising him so to do, and not that he shall be incapable of, at the same time, keeping the register. Accordingly, since an early period of the last century, in so far, at least, as concerns the general register, and the particular register for the Edinburgh district, the offices in question have been always held by the same individual; which also shows, that their union is not inconsistent with the ends for which the practice of marking was introduced.

Further, as it is not denied that the functions, both of marking the books, and receiving them back when filled up, have, like many others, been long ago separated from the person of the Lord Register, by deputation, so it seems to be equally clear, that the Crown, not only by withdrawing the clause which, in his commission, gave him the power of appointing deputies, but by inserting an express reservation of that right, intended that these offices should thereafter be in its own gift. Accordingly, for a period of nearly 60 years, it has exclusively and expressly exercised the right of nomination, by granting them first to Baron Maule, and afterwards to Mr Stuart, both of whom have been in possession of the right of marking to a certain extent.

The sole reason why they have been so late in insisting for the ultimate custody of the registers was, that, until the new Register-house was finished, no

other place but the Lower Parliament-house could be found, where they could be lodged with safety, and of it the Lord Register's private assistants were in possession.

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Observed on the Bench; The word "deputes" is obviously applied in the act 1617 in two different senses, both to persons who were to hold offices which the Lord Register could only exercise by deputation, and to those which, if he had chosen, he might have performed in person. The reservation introduced in his commission relates entirely to the former; the latter cannot be separated from his office: And both the marking of the books of all the registers, and the ultimate custody of them, are of this nature.

The Court, accordingly, with respect to the action at Mr Stuart's instance, unanimously "adhered" to the interlocutor of the Lord Ordinary, assoilzieing the Lord Register from it; and, in the action at his Lordship's instance, they, with only one dissenting voice, "Found, That Lord Frederick Campbell has an inherent right, in virtue of his office of Lord Clerk Register of Scotland, to mark, by himself, or the deputes named by him for that purpose, the books kept in the general register of sasines, and also in the particular register for the counties of Edinburgh, Haddington, and Linlithgow, as well as the books of the particular registers in the other counties of Scotland; and also to receive and keep, when filled up, the books of all those respective registers, either by himself in person, or by deputies named by him, as aforesaid."

Lord Ordinary, *Dreghorn.*

For Lord F. Campbell, *Dean of Faculty Erskine,*

Montgomery, A. Campbell, junior.

For Mr Stuart, *Lord Advocate Dundas,*

Solicitor-General Blair, Sir W. Miller.

Clerk, Home.

R. D.

Fol. Dic. v. 4. p. 194. Fac. Col. No 165. p. 382.

1797. December 5.

THOMAS COUTTS and his ATTORNEY *against* SIR ROBERT ANSTRUTHER and THOMAS SMITH, Principal Clerks to the Bills.

THOMAS COUTTS and his Attorney obtained decree against John Tannahill, for L. 303, 19s.; and a bill of suspension having been presented, the chargers consented to its being passed, on caution. Four cautioners were offered, whom the minister of the parish, where three of them resided, certified in writing to be "to the best of his knowledge in good circumstances, and able to pay" the sum charged for.

The caution was immediately accepted by the Depute clerk of the Bills, without giving any intimation to the chargers.

The letters were found orderly proceeded, to the extent of L. 283, 19s.; and ultimate diligence having been done against the suspender and his cautioners,

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The Clerks to the Bills found not liable in damages, for accepting insufficient cautioners, the minister of the parish where they resided having previously certified in writing, that,