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I do not feel it to be my duty to offer any proposition, for an alteration of any other part of the decree, than that which I have already stated to be in my opinion too loosely framed for the ends of effectual justice between the parties."

On his Lordship's motion, the further consideration of the cause was adjourned till Wednesday next.

On that day his Lordship came, prepared with, and moved the following judgment:

Ordered and adjudged that the interlocutor of the 13th Dec. 1799, complained of in the appeal, be varied, by leaving out after the words (are to be), the words (so formed, constructed, and fixed, as to answer the purposes of cruive fishery, and agreeable to the practice of these fishings in the north of Scotland, where the cruives have been.) And it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to review this part of the said interlocutor, for the purpose of giving, and to give, precise directions to the parties for regulating the form and construction of the cruive dykes and boxes, and the construction and position of the inscales according to law. And it is further ordered and adjudged, that with the above variation to the said interlocutor, the several interlocutors be, and the same are hereby affirmed.

For the Appellants, *J. B. Maitland, Wm. Erskine.*

For the Respondents, *Wm. Grant, Wm. Adam, J. Burnett.*

NOTE.—This case is not reported in the Court of Session.

CHARLES STEWART, Writer to the Signet, *Appellant;*
ANDREW MILLER, Depute Clerk to the Bills, *Respondent.*

House of Lords, 25th Feb. 1802.

SALE OF AN OFFICE—PACTUM ILLICITUM.—Circumstances in which a party was appointed a Depute Clerk of the Bills, by an agreement which amounted to a sale of an office. The party was to pay £2700, one half in cash, the other by a right to two-fifths of the fees. Thereafter new fees were appointed to be exacted, increasing materially the returns of the office. Held by the Court of Session, that the agreement was good as to the old fees, but not as to the additional or new fees. The party acquiesced in this judgment, but his opponent took the case, as to the new fees, to the

House of Lords. Held in the House of Lords, that as the respondent had not appealed against the interlocutor, sustaining the legality of the agreement, no judgment could be pronounced on that question; but strong opinion indicated that such sales were illegal; and the interlocutors of the Court below were affirmed, without prejudice to that question.

The office of Principal Clerk of the Bills is an appointment of the Crown. Originally they were required to attend personally, and perform the whole duties of the office; but the business having increased, it ultimately came to be performed by Deputes, or Assistants appointed by the Principal Clerks; their commission entitling them "cum plena "potestate idem per semet-ipsum deputatos suos seu servos "per illum nominandos, pro quibus respondebitur, gerendi "et exercendi, et omnibus libertatibus privilegiis et immuni-"tatibus, profieuis, casualitatibus, emolumentis, commodis, "et omnibus aliis utilitabus quæ pertinuere seu pertinere "potuerunt ad ullum priorem clericum dictæ tabulæ peti-"tionum fruendi, vel quæ per ullum priorem usum seu ad "idem pertinere," &c.

It had been for some time the practice of the Principal Clerks of the Bills, when filling up a vacancy in the Depute Clerk's office, to sell the office, or to agree to appoint him on payment of a certain sum.

On the death of William Finlayson, Depute Clerk of the Bills, in 1795, application was made to Sir Robert Anstruther, through his commissioner, the appellant, and Mr. Smith, the Principal Clerks, on behalf of the respondent Miller; and after considering his qualifications and fitness, which were highly recommended, and which, to the Principal Clerks, seemed satisfactory, an agreement was entered into, by which it was arranged that the respondent was to pay £2700 as the purchase price of the office. But as he was devoid of the means of paying this sum, and as it was of importance to the public that his services should be procured, he being the only qualified person among all the applicants for the office, the appellant volunteered to advance one half of the price for the respondent, on condition that *he, his heirs and assignees*, should become partners in the office, and receive two-fifth parts of the whole Depute Clerk's fees, free of all risk and trouble, while the respondent, who was to advance the other half of the price, and to do the whole duty, as well as undertake the whole risk and responsibility, was only to have three-fifth parts of the fees.

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Accordingly the respondent, in consideration of the appellant's paying one-half of the said price, agreed to pay to him, his heirs and assignees, two-fifths of the fees; and further bound himself, in the event of his resigning the office, or failing to implement the obligation, "to content "and pay to the said Charles Stewart and his foresaids, one "half of whatever sum I may receive for said office on my "resignation; or in the option of the said Charles Stewart "and his foresaids, at least the sum of £1360 sterling, (be-"ing one half of the purchase money), and that on the day "of any such resignation, or my failing to implement this "present obligation, with the legal interest, &c."

Hitherto, the annual income of the fees of the Depute Clerk had amounted to £500 per annum. The agreement was gone into by all parties upon the distinct understanding that the fees yielded this sum annually. But, soon after the respondent's entrance into office, by various causes, among others, the operation of the small debt act, these did not yield one-half the amount; and the consequence was, looking to what he had to pay to the appellant, he was quite unable to meet demands. In these circumstances, he

Mar. 10, 1798. applied for relief to the Court; who, of this date, passed an Act of Sederunt, authorising him to charge certain new fees, with this special clause, that they should be applied to "*his own use alone.*" The present question arises from an attempt of the appellant, under the above agreement, to claim right to two-fifths of the new fees so allowed by the Court, which obliged the respondent to complain to the Court. Informations were ordered; and another point between the same parties was brought up by suspension of a charge upon the agreement.

Jan. 17, 1800.
Feb. 11, ——
Feb. 26, ——
Mar. 11, ——

The Court ultimately found, that the agreement to pay the appellant two-fifths of the old fees, was binding on the respondent; but that the appellant had no right or title to demand payment of two-fifths of the new fees.

The respondent acquiesced in these interlocutors; and the question, therefore, as to the legality of this agreement was not carried further; but against these the appellant brought the present appeal, in so far as they found that he had no right to the two-fifths of the *new fees* attached to the office subsequent to the date of the agreement.

Pleaded for the Appellant.—The contract entered into between the appellant and respondent, of which full implement, according to the comprehensive and general terms thereof, is now demanded by the appellant, is a lawful con-

tract, sanctioned by precedent, and entitled on principle to be supported. The terms and import of this contract are perfectly clear, and do not admit of dispute. It cannot be denied that it gives the appellant right to two-fifths of the new or additional fees payable in the Bill Chamber, as well as two-fifths of the old fees; because the agreement, in its terms, has general reference to all fees exigible in the Bill Chamber whatever. And it would be an unjust interpretation of the agreement, to hold that he was to take the risk of a material diminution of these fees, but not to derive any benefit from an increase or new set of fees, specially imposed on account of such diminution. The new fees were expressly imposed on account of a great diminution of these fees, by the small debt and other acts; and common justice demands, especially where it is manifest that these new fees are in fact a consolidation of the old fees, or come in place of such as were done away with, that he should be entitled to two-fifths of these also, in terms of the agreement.

Pleaded by the Respondent.—By the express terms of the Acts of Sederunt, the fees thereby granted are appropriated to the respondent's own use alone, so as to exclude the interference of any other person. Could any doubt have ever been entertained upon the words of those acts, with regard to the intention of the Court in passing them, none can now remain, their Lordships having unanimously declared, by two consecutive interlocutors, that they had in view the hardship of the respondent's situation, and that the new fees were intended for the respondent alone. Besides, part of the new fees in question are for the performance of duty which the respondent was not bound to perform, under the commission from the Principal Clerks of the Bills, and therefore were fees which, at the time of the agreement, could not be in the contemplation of the parties. That the Court, in granting these new fees, had power to limit the exaction to a particular person, is beyond dispute.

After hearing counsel,

LORD CHANCELLOR ELDON said,—

"My Lords,

"The question here has been agitated at great length, and with much ability. It involves questions of the highest importance. Some of them, after anxious consideration, I have so far altered my original opinion on, as not to deliver any opinion on them.

"The case originated in a certain obligation, executed by the respondent when he was appointed Depute Clerk of the Bills. It ap-

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pears that the Clerks of the Bills were at one period named by the Lord Clerk Register; afterwards by the Principal Clerks of Session and of the Bills, who were appointed by the Crown. The Depute Clerks of the Bills were then appointed by the Principal Clerks of the Bills.

"I do not find that the office was originally served by principal and deputy, but by themselves and servants, on fees demandable by the Principal Clerks—the servants receiving reasonable remuneration for their services, paid from part of the fees.

"No doubt, in process of time, the principal took on himself to appoint a deputy—an office now held for life—with distinct fees payable to him and the principal. But how this alteration was effected, whether by Act of Sederunt, Acts of Parliament, or by sufferance, is not clearly shown.

"As to the merits of this cause, you must consider the principal and deputy entitled to distinct fees. This seems undeniable, from the representations in the case of Inglis and Waddell, and in this cause brought up to your Lordships. It also appears, that these have frequently been made the subject of traffic, and bargain, and sale, in point of fact. I shall notice this when I come to state the point of law; meantime, there is nothing in the Court's judgment declaring that they *ought* to be sold. I shall afterwards propose an interlocutor for declaring, that this House does not decern so. The ends of justice will be answered, if your Lordships' judgment should express that your Lordships give no opinion as to this. I do not think it wholesome that I should express more.

Ante Vol. II. p. 205.

"The office began with Sir George Mackenzie, Sir Robert Anstruther, and Thomas Smith. The appellant states, in his case, that Miller, who seems a meritorious officer, was proposed for the office of Depute Clerk of the Bills, and, by an arrangement, which amounted to a sale of the office, he was preferred.

"It is a question, whether sales of offices are legal.

"The later decisions in this country have certainly gone this length, that where (I particularly allude to a judgment very ill reported, but most ably given, by a noble and learned Lord, whose assistance your Lordships have received so frequently in this House, I mean Lord Thurlow, when he held this principle, as a principle which probably governed his conscience as a judge) his Majesty empowered an officer, for the benefit of the public, to recommend a person to an office, not merely an office in the administration of justice, but an office in a much less degree affecting the public interest, that the law supposed the Crown to repose this trust in him, that he would appoint a person worthy to fill that place; that the law supposed that he would not permit his judgment to be influenced by lucre, or corrupted, by entering into a a consideration of the question, who would give most for his recommendation; that any traffic, therefore, which he entered into, to derive a benefit from the opportunity of recommending or appointing, was a traffic which a Court

of Equity in this country would cut down; and it would be very difficult, I think, if that principle be maintained, that a man shall for lucre recommend, that he shall for lucre, do that which is the strongest act of recommendation, appoint.

"The agreement, upon the very face of it, shows that it is not the law of any country that these offices are capable of sale; that there is in the very nature of the traffic, ground for contending that it ought not to be the law of any country; for a man cannot sit down to make such agreements, without expressing them in terms which, when your Lordships come to attend to them, point out directly the mischief of which such bargains are naturally productive. There is no proposition, I apprehend, more clear than this, at least in the law of this part of the island, that no man, executing a public office, is to be permitted on any account to take fees, other than those which the law has allotted to him; other than those which can compulsorily be demanded. But if you once establish that the officer is to buy his office, the fact that he does purchase the office, furnishes a temptation to forget that such is the language of the law; and immediately to address his mind to a consideration for this purpose, whether, besides the ordinary fees, he may not have voluntary fees, and extraordinary fees. And, accordingly, when parties sit down to form such a bargain as this, as he who sells wishes to make his bargain sure, and he who buys wishes to make his bargain advantageous, they look not only to the fee which the law does allow, but one looking to profit; and the other, taking care that he who purchases shall not have more profit than in proportion to the nature of the contract between him who buys and him who sells, he stipulates, that if there is profit beyond that which is ordinary, he shall participate in the extraordinary as well as in the ordinary profits.

"It has been stated to your Lordships, that this office has been frequently sold. It has been stated to your Lordships that the office of Principal Clerk of the Bills has been frequently sold; it has been stated, that the various offices relating to the administration of justice have been sold; and they give you the authority of an act of Sir George Mackenzie, of a Mr. Wedderburn's concurrence in the act, and other authorities which have been stated; and that the Court of Session, with reference to these cases, have given their authority by acts of council and acts of sederunt. I protest, for the honour of the Court of Session, against its being understood, that, by registering these bonds in their acts of council or acts of sederunt, they have ever given judgment upon their validity. These acts are done for the sake of execution, (if a question should hereafter arise, whether execution should be taken out upon such instrument), rather than considered as acts of publication, calling upon the Court to take notice, in the first instance, of the nature of them, and to decide upon them.

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"Sir George Mackenzie is the instance in 1683; and when I mention his name, I mention a name of a great person, certainly a great person with reference to any point of law in a question of this sort. But I think there are, in the transaction of Sir George Mackenzie, reasons to suppose he doubted of the authority of the act in which he was engaged.

"There is reason enough to justify this observation. But we are not to think, in this case, that the sale is legal, because it appears that there were many instances of such transactions in this and other offices.

"What are the facts? 1st. Sir Robert Anstruther asked £2700 or £2800 to appoint him. The appellant represents Sir Robert Anstruther, debtor to his son, for the purchasing of a commission. But instead of purchasing him a commission in the Guards, he purchases up a place in the Bill Chamber. The depute, Miller, is only able to advance £1300. The office is one requiring great merit, and is for the benefit of his Majesty's subjects. Miller, instead of taking the whole fees, which were given for doing the duty of the office, for which he was answerable in some degree to the public, agrees to take two-fifths of the fees, and to pay the rest to young Anstruther. Young Anstruther is ignorant of the bargain. They are to be paid to a trustee for him.

"The agreement shows that the law of Scotland is not, that offices are unsaleable, but shows that they should be made so.

"In this country no person is entitled to take fees that cannot be compulsorily demanded; but if once the purchase be allowed, why may not extraordinary fees, as well as ordinary, be exacted? He stipulates for both.—(Reads agreement.) The obligation is, to pay either legal, voluntary, or *extraordinary* fees. Mark these words. They surely mean something different from legal fees. It bargains for a participation in these, as well as the legal fees. On this point, I may say, it is proper to affirm the interlocutor. If Miller had taken the legal fees, the Court might have enforced this; but if he had gone farther, could the Court of Session have enforced this? The Court would have then said, you call on us not only to point out what such fees are, but also to say, whether Miller shall not restore to the parties these fees; and this goes to support the principle of the interlocutors.

"After the sale, a greater business might have raised the value of the office; but, in point of fact, this was reduced. Then the Court knowing this, and that nothing was more essential than that persons of sufficient skill should execute such offices, and that they must live the while, whether in the knowledge of this bargain or not, I stay not to enquire, passed the Act of Sederunt authorising certain new fees.

"I stay not also here to inquire, whether this was in the power of the Court to enact? as fees have rather arisen by practice than by statute. It is agreed, on both sides, that this question is not here.

(Reads Act of Sederunt, and particularly noticing the words, *to enable him to carry on the business.*)

"If the Court had power to pass this Act of Sederunt, I have already said, that the whole additional fees should go to him to carry on the business. There is thus a necessity to give the whole to him. And the Court, I am sure, would rather have allowed him to struggle on with difficulty, than have granted him such a sum, in order to hand over two-fifths of it to the appellant.

"I agree, you cannot oblige parties to say, that the agreement shall not attach to additional fees; but the Court may take care, in granting new fees, that these be duly applied as granted. The Court might have said to Stewart, you may have made what agreement you please, we have only given Miller as much as to enable him to carry on the office, and no more; and it is due to the public to say, that we would rather hold the act a nullity than let you participate in the fees.

"The Lords of Session make an Act of Sederunt, granting fees not within the scope of the agreement. (Your Lordships will never drag them into it.) Miller gets into difficulties, money is advanced by Stewart, and at last he prosecutes his claim for two-fifths of the old as well as new fees. Stewart claims two-fifths of the old and new. Miller contends that neither are claimable. The Court then inquires into the transaction, and then the truth comes out. The Court negatively sustains the validity of the agreement as to the old fees, but not as to the new. This was not a solemn judgment; but still it is necessary to take notice of this. I find this rather waived below than judged. Miller has not appealed against this part of the case—the point is therefore not directly before you; but is before you in another point of view.

"If you find the agreement bad as to the new fees, you might do it on the principle that would find the right to neither, and so remove this negative judgment.

"One ground would be to affirm the interlocutors, on the grounds stated by the Court; but I shall have occasion to give reasons why you should do more; namely, to guard against applying your judgment to larger grounds.

"The appellant has appealed against so much of the interlocutor as has respect to the new fees, on the head of the agreement; but this is against the principle of public policy, for he insists that the Court, which has said, that the fees are given to Miller to enable him to do the duty of the office, should be called on to lend its aid in a suit to disappoint the purpose for which they are created, to disable Miller from doing duty.

"The Court was unanimous, that this language could not be held in this way; and such language could only be held with propriety—that the share of the legal fees was his. He could not pretend to fasten on fees which were necessary to do the duty. The Court,

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therefore, was clear, that though the practice of such sales of offices existed, yet that their own act made it impossible for them to execute the agreement as to these fees.

"Then the appellant comes here saying, the Court don't know their own meaning.

"It struck me as a very strange thing to say so; and that we, as a Court of appeal, should be called on to say, that the Court below did not know their own meaning.

"They, on consideration and reconsideration, give a kind of negative assent to the first point; but, as to the second, you must seek it elsewhere.

"When first I heard this appeal, I had doubt if your Lordships ought not to have expressed, whether the sale of an office was good in law, and was to be supported. When the argument was concluded, I took time to consider this. But I now think it inexpedient to decide either one way or another, on a point of Scotch law, taking care, however, not to say, that we recognised legality.

"When sitting here as a Court of appeal, on Scotch law, you may be informed by the judgment under appeal, and by the discussion below, what was discussed; and I think the point, whether it was legal in Scotland or not, was not discussed.

There is a mode of disposing of this question; and this is a great question, it shall not be waived; but I do not see how this could be regularly done but by sending back the cause to the Court below. On the whole, without declaring an opinion as to the sale of offices in Scotland, (as I shall be specially careful not to decide this), with respect to the present interlocutor, I have to submit that it cannot be complained of, and, to save this judgment from being urged as a precedent, I have thought it proper so to mark it.

"With regard to costs, it is a difficult thing to say how much ought to be allowed. It ought not to be *vindictive* but *compensatory* costs. The application being for the interpretation of the Court's own words, the judgment ought to have been final, where prompt decision was looked for; and though, under such circumstances, we should indemnify the party against the expense of further litigation, yet this party must pay to the other party, whose means are inadequate, and I therefore think you should give £100 costs.

It was therefore

Ordered, adjudged, and declared, that the respondent not having appealed from the several interlocutors pronounced, there is sufficient ground to affirm the same, in so far as complained of by the appellant, without deciding upon any question touching the validity of the agreement originally entered into between the parties. And it is therefore ordered and adjudged, that the ap-

peal be dismissed, and that the interlocutors therein complained of be affirmed, with £100 costs: but without prejudice to any such question when it may arise.

For Appellant, *Ed. Law, M. Nolan, David Monypenny.*

For Respondent, *R. Dundas, Wm. Adam, Mat. Ross.*

NOTE.—Unreported in the Court of Session.

THOMAS FORSTER, JAMES KIBBLE, JAMES BUCHANAN, and PATRICK KILGOUR, Surviving Partners of the Bonhill Printfield Company, - - - - - } *Appellants;*

MRS. MARY PATERSON, Relict of the Deceased ROBERT ORR, Manufacturer, also Partner of the said concern, and Others, his Trustees, ... } *Respondents.*

House of Lords, 26th Feb. 1802.

COPARTNERSHIP — DISSOLUTION — SETTLEMENT OF PARTNERS' SHARE.—By a clause in a contract of copartnership, it was provided that a balance should be annually struck, ascertaining each partner's share of stock, and his share of profit and loss, and that this was to be signed and engrossed in the sederunt book of the company. No exact date was fixed for this; but the balance continued to be struck annually in May. There was another clause of the contract, which provided, in the event of the death or insolvency of any of the partners, it was optional in the survivors to wind up the concern, or to pay the representatives of the deceased partner, or the creditors of an insolvent one, his share in the concern, as it was ascertained by the last balance. The last balance struck in the concern in question was on 10th May 1796, amounting to £8522 of clear profit. There ought to have been another balance struck in the following May 1797, but was not done. Mr. Orr, one of the partners, foreseeing his own death as probable, had repeatedly required the partner manager of the concern to strike the balance for that year, and took a notarial protest against his refusing to do so. He died in the end of July following; and the company having contended that they were liable only to account for his share, according to the last struck balance; Held them liable according to the balance that ought to have been struck in May 1797 before his death. Affirmed in the House of Lords.

The appellants, and the deceased Robert Orr, were partners in the Bonhill Printfield, carried on near Dumbar-