

CHANCERY.

1759. August 8.

WILLIAM SMITH, Clerk of Chancery, *against* ROBERT KER, Esq; Director of Chancery, and JOHN RUSSEL, his Depute.

IN the year 1722, Lord Charles Ker, and his son Robert Ker, were named Directors of Chancery during their joint lives, and for the lifetime of the survivor.

In July 1732, Robert Ker granted a *lifereit* commission to William Smith to be first or chief servant, writer, or clerk, under Mr Ker and his deutes, in the Chancery Office, with a right to one half of the fees.

In December 1734, Mr Smith obtained a new *lifereit* commission from Robert Ker, by which he was named sole writer and clerk under the Director and his deutes, with power to receive the whole fees of the office. This commission was ratified by the Crown, with a *novodamus* in favour of Mr Smith; but by a back-bond Mr Smith became bound to employ John Irving, or any other person to be named by the Director, as one of his assistants in the office, and to allow him a certain proportion of the fees, upon his performing certain parts of the duty of the office.

In September 1758, Mr Smith had occasion to go to the country, where he was afterwards detained by sickness. He appointed George Moncrieff as an assistant to do the business of the office during his absence, and afterwards granted him a formal commission during pleasure, to act as his principal servant in the office, to receive the fees, and to have the possession and custody of the repositories and records.

John Irving, the other assistant in the office, took possession of the keys of the repositories which were entrusted to George Moncrieff, and refused to deliver them up to him; but, at the same time, he allowed George Moncrieff access to the records during the office hours.

Mr Smith complained to the Sheriff, and *insisted*, That the keys should be restored to him, and the person he had appointed; but the Director of the Chancery, and his deputy, having given authority to John Irving to retain the cus-

NOTE.

The Clerk of the Chancery was found to have a right to keep the keys of the Office, and not the Director of the Chancery, or his deputy, or one appointed under them.

No 1. tody of the records, they were made parties to the process before the Sheriff; and thereupon obtained an advocacy of the cause.

It was *contended* for the Director and his deputy, That they were the only persons who had a right to keep the keys of the Chancery Office: That this power was so naturally inherent in the office itself, that it seemed incongruous to suppose, that one could be Director of an office without having the custody of its records; more especially when in competition with a person who derived from the Director all the connection he had with the office: That all writs passing the office are signed by the Director and his deputy, and not by the clerk, who is only employed to copy these writings, and to record them in the books; and though, for conveniency, the records and warrants are usually committed to the custody of the servants; yet they have no right to keep them in competition with the Director himself: That Mr Smith had, no doubt, a right to all the profits arising from his office of clerk, in so far as not restricted by his back-bond; and the Director can do nothing to hurt him with respect to these fees; but no injury of this kind is intended; for he is allowed full access to the records by himself or his assistant, during the office hours, when all the business is, and ought to be transacted.

Answered, Mr Smith has always hitherto had the custody and keeping of the records, which is a strong evidence, that this was understood to be comprehended under the liferent commission granted to him. Mr Smith is appointed sole clerk and writer in the office, with power to nominate his assistants, servants, and under-writers, for whom he is answerable; and he is even made answerable for John Irving, or any other to be appointed in his place, by Mr Ker; nor can he execute the duty of his office, if the records are taken out of his hands. In particular, he is bound to see that the registers be filled up with a good hand, and each writ recorded within a quarter of a year after its date; and he is entitled to the fees for searching and inspecting the records. The office of Director has now become a sinecure. Every part of the business, except the signing the writs, is now devolved upon the clerk; though the Director, it is believed, originally was himself the clerk; and as the office of the clerk cannot be exercised without the possession of the records, and that Mr Smith has a right to the office of clerk by virtue of a liferent commission, he must have a preferable right to the custody of the records to the Director himself.

'THE LORDS found, That Mr Smith has a right to hold the keys of the office; and remitted the cause to the Sheriff.'

Act. *Lockhart, Ferguson.*

Alt. *Kennedy.*

W. Johnston.

Fol. Dic. v. 3. p. 122. Fac. Col. No 196. p. 349.

* * * See REGISTRATION.