

count of Arbuthnot's testament being now reduced, the nomination of the tutors fell ; and he was now the nearest agnate, on the father's side, past twenty-five years, and so fell to be tutor-in-law to his nephew's children ; and he intended to serve tutor before the Macers, but apprehended the Lady Arbuthnot and her friends would seek to pass an advocacy of it in the vacance, which would prejudice the pupils :—therefore craving the Lords would name some of their number to be Assessors to the Macers, to discuss any objections that may occur, so that the service may not be stopped.

It was ANSWERED,—This was a novelty ; for, though the Macers be competent judges to services of heirs, where their lands lie in several jurisdictions, yet it could not be instructed where they sat in the serving a tutor-of-law ; and they had no clerk to receive the caution.

The Lords, having considered this new case, and finding they had served Edmonston of Duntraith as tutor-in-law to his dumb brother, and likewise in the cases of idiocy and furiosity, they thought this was no altering of the styles and forms of the Chancery (which are inviolably to be kept ; ) therefore ordained the service to proceed before the Macers ; and added two of their number to be Assessors for discussing of objections ; and ordained one of the Clerks of Session to receive the tutor's caution.

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N. B.—*The Summer Session 1695 was discharged by the Parliament.*

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1695. *November 1 and 6.* The CLERKS of SESSION, Petitioners.

*November 1.*—THE first thing moved to the Lords was the executing that part of the new regulations anent the Clerks, and if they were recorded in the sederunt-books according to the order given at last meeting in summer ; and, finding the *quorum* had dissolved them before the warrant was got signed, the Lords renewed the order, and appointed them to be presently recorded in their books.

Then Mr James Dalrymple, as the oldest Clerk, and in name of the rest, presented a petition desiring they may be heard why they could not comply with these articles of regulation which concerned them ; in respect they inroached on their rights and properties established by former laws.

The Lords rejected this bill as general, and not condescending on the particular rights wherein they conceived themselves prejudged.

Then they produced a bill containing a more special representation of their grievances by the regulations, bearing, That, by a table of prices made in 1606, and ratified in the Parliament 1521, and the regulations established in 1670, and confirmed in the Parliament 1672, and by the 38th Act, 1686, their dues were settled in such manner that they were neither capable of alteration, dismembration, or diminution ; and that the Act of Parliament 1693, empowering the Commission to regulate judicatories, and particularly the Session, spoke only of trying abuses, exorbitancies, and corruptions. Now, their fees could come un-

der none of these denominations, being established by law; and consequently the Commission had not power to retrench these; and so had exceeded their mandate, and acted *ultra vires*.

The Lords found themselves not competent Judges to cognosce upon the actings of the Commission, which had the force of an act of Parliament; though it was urged that the Lords were judges to all cases of property, as this was. But it was ANSWERED, That, though their office might be called, in some respects, their properties, if any were putting them out, yet every perquisite and alleged due of it was not such. So the Lords waved it.

Then the Lords were desired to recommend them to the members of the Commission for redress or rectification of such articles as they thought heavy. The Lords shunned to do it in writ; but recommended their case, *viva voce*, to such of their number as were upon that Court.

November 6.—The Clerks gave in a new bill, craving to be exemed from the oath imposed by the regulations; seeing, by these made in 1672, it was found an ineffectual method to secure them; and therefore, by an Act of Parliament in 1681, the statute, in so far as it imposed an oath on Advocates and Clerks for observance, was rescinded; and that, by the claim of right in 1689, oaths seemed to be pointed at as a grievance and snare; and they, by their words of honour, would engage to keep with the salary prescribed.

Some Lords urged to forbear exacting their oaths till the Clerks might procure a meeting of the Lords' regulators to hear them. But the plurality carried, That they behoved either to give obedience, or the Lords must debar them from acting, which would cast the session loose.

Then the Clerks pleaded, That Clerks were only appointed to swear at their admission, which did not concern them who were admitted already. But it was thought that the regulations arising from complaints against the Clerks presently in office, it were strange if they were free, and only entrants to swear: So, whatever ambiguity was in the clause, the regulators having declared its meaning, they behoved, before officiating, to give their oaths.

Their next refuge was, That they craved it to be marked that their compliance with these regulations, and taking the oath, should not tie them up from craving redress and rectification of what they thought heavy upon them, according to law; and that the words of the oath, anent their holding themselves content with their salary, should import no more but their submission and acquiescence, and should bind them no longer than the law imposing it stood. This was yielded to by the Lords, and recorded in that manner in the books. Whereupon they were all sworn.

Then their servants, the under-clerks, being called for, they presented an address, showing how mean their allowance of £1000 *per annum* was; and that there was latitude for the Lords to augment them in some omitted articles. The Lords were sensible of the hardship; but found they could do no more but recommend them to the Commission to reconsider their case with all the favour they could.

The next thing was to settle a Collector; and the competition arising between Thomas Pringle, Stitchell's brother, and James Hamilton, brother to the Laird of Orbiston, the last carried it. And the Clerks were allowed to read all the bills which were in their hands the last session and then paid for without being marked by the Collector; seeing the lieges ought not to pay for them

again. And the Lords signed Mr Hamilton's commission; and he gave in a bond, with a cautioner, for his faithful counting; and gave his oath that he should exact no more but the dues allowed by the act. And, in regard it would be too burdensome for him to discharge it all in his own person, they permitted him to make use of servants under him, they being such for whom he would be answerable.

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1695. *November 8.* The MARQUIS of MONTROSE choosing CURATORS.

THE Marquis of Montrose compearing to choose his Curators *in præsentia*, the Lords, by the fault of their Macers, suffering the Lady Marchioness, his mother, and many with her, to enter within the inner bar, were necessitated to desire her to remove; and then caused signify it was the privilege of none to stand within but Dukes and Duchesses;—which my Lady obeyed. And the nomination being of his mother, William Hay of Drumelzier, Sir William Bruce, Graham of Urchill, &c. the Lords thought she, being clad with a husband, could no more be a curator than a minor could be, not having a person in law; though it was ALLEGED the Lady Wemyss, while married, was her son's curator (but that was not done before the Lords;) whereon the rest there present were sworn *de fidei*; and my Lady's nomination was forborne till it were better considered. Some ALLEGED curators were not obliged to swear but only in the presence of a judge, to sign the act of curatory. Then, a guinea being thrown in of instrument-money, the question arose, If the Clerks (who were so recently sworn to take nothing but their 4000 merks of salary, and that only from their Collector,) might meddle with it. Some affirmed, it being *qua* notary, they might. But these distinctions tending to evacuate the act, the Lords ordained it to be given in to the Collector; else clients, resolving to gratify the clerks, might take instruments on the pronouncing of every interlocutor or decret, and cast in two or three guineas, and so *fraudem legi facere* if this subterfuge were once permitted. And thus new laws and customs occasion many doubts.

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1695. *November.*—THE Lords called in the Dean of Faculty (Mr Hew Dalrymple,) and the Advocates, and caused read, in their presence, the articles of the new regulations relating to them; which are neither so strict as the former, in 1672, nor the present ones against the Clerks. Each have their turn. The old ones were mainly levelled against the Advocates, and the new against the Clerks. And the Lords intimated to the Advocates that they were to be careful to observe them in every point.

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1695. *November 12.* MARGARET MURRAY *against* ROBERT BURNET.

IN the reduction pursued by poor Margaret Murray, against Commissary Ro-