

answerable for the servants in the Chamber; *answered*, That seeing there is no malversation alleged against him, he cannot be obliged to find caution any more than the other servants in the Bill-Chamber, and the Under-Clerks of Session; and neither the principal clerk himself, nor is it usual for any under-clerk in the kingdom to find caution; and this being a matter of trust, it will be difficult for any clerk in such a case to find caution. THE LORDS refused the desire of the bill.

No 21.

Sir P. Home, MS. v. 1. No 492.

1693: February 2. KING'S ADVOCATE *against* MONCRIEFF.

No 22.

MONCRIEFF of Redie having the King's gift, impowering him for ever to present one of the macers of Session, it was *objected*, *imo*, That the same was null, seeing *beneficium non vacans nequit conferri*, by analogy of the act 23. Parl. 1567; the LORDS repelled the objection, because a power of presenting is a different thing from an actual presentation; and if this was sustained, a right of patronage would lie under the same exception. *2do*, They repelled the objection, that Redie's gift was null on the act 69th Parl. 1587, that his Majesty's casualties shall not be given away in great; for they thought the King might lawfully annex the presentation of the macers to the judicatory of the Session for ever; and if so, why not to one man, which, though inconvenient, was not unlawful?

Fol. Dic. v. 2. p. 291. Fountainhall.

*** This case is No 2. p. 3460., *voce* DESUETUDE.

1693: December 15. Lord TARBET *against* OLIPHANT of Lanton.

No 23.

THE LORDS advised the competition, which arose for the clerkship, on the death of Charles Oliphant, between my Lord Tarbet, as Register, and Mr James Oliphant of Lanton, son to the said Charles, and conjoined with him in the same gift; who *alleged*, That though his father had restricted the gift, yet he could not renounce the *jus quæsitum* to him; and though conjunctions were against the act of Parl. 1685, yet survivances were not; and albeit they be odious in law, yet there are many instances in Scotland, as in commissaries, and in clerkships. Tarbet adhered to the LORDS' act of sederunt, made on the admission of Charles Oliphant; and that the LORDS had caused him to elect, and he had chosen rather to officiate himself, and had restricted the effect of his gift, and prejudged his son; who, being his heir, could not come against his father's deed; and that survivances were odious, and reprobated in law, as inducing *votum captandæ*: So these was no proper survivance here, but only what

Found that a grant of the office of Clerk Register could not exceed one life.

No 23.

was necessarily consequential to a conjunct gift ; and if survivances were once allowed, there might be an entail of Lords of Session, clerks, &c. for 100 years to come, which was as unjust as the granting heritable offices, which was reprobate by the 44th act 1455 : And by the canon-law *expectativa beneficiorum* were condemned, *et beneficium non vacans non poterat conferri*; and all gifts of offices behoved to express the *modus vacandi*. THE LORDS unanimously found Mr James had no legal right by that gift, and therefore preferred the Register and his deputes ; and found there was a vacancy by Charles's death. THE LORDS would gladly have inclined to favour Mr Oliphant, if law would have allowed it.

Fol. Dic. v. 2. p. 291. Fountainhall, v. 1. p. 578.

1701. February 18.

TEMPLE against WALLACE.

No 24.

What the responsibility of the Clerks of the Bills relative to receiving caution ? The consequence of the interference of the Court in that matter ?

ARNISTON reported Mrs Martha Temple, relict of Mr Edward Ruthven, against Hugh Wallace of Ingliston, and Murray of Spot and his Lady. Mrs Martha being provided to a jointure of L. 200 Sterling, out of the lands of Corstorphin, by way annuity ; for her surer payment, she transacted with Ingliston, and quit it for L. 180 Sterling yearly, and when she charges him on his bond, he suspends, that it is arrested in his hands. *Answered*, They are only laid on upon depending processes against her, at the instance of John Baillie, apothecary, the Laird of Spot, Bailie Brand, and other creditors of her husband's, and so are loosable on caution, and she had offered sufficient caution, and yet the Clerk to the Bills had refused it. THE LORDS, to try if the claims on which these processes were founded were clear and liquid debts, allowed the arresters to be cited *incidenter* in this suspension ; and after hearing them, it being urged that she might have up her money on the caution offered, viz, Alexander Bruce, her agent, and Sir William Bruce as her attestor, the LORDS considered that they could not *hoc ordine* discuss the several arresters' interests, they not being cited to that effect, but only to clear the LORDS how far the caution might be receivable or not, and that it might be of dangerous consequence to interpose and judge as to the sufficiency of caution offered, that being the peculiar province of the clerks, yet if they should refuse cautioners beyond exception, no doubt the LORDS had power to over-rule them : Therefore they ordained the cautioner and his attestor to be received, and the consigned money to be given up to Mrs Martha. THE LORDS had, in July last, declared the caution offered by Colonel Erskine sufficient, but that was in the roup of the Earldom of Kincardine, where the creditors had the estate in security as well as the caution ; and the LORDS were remembered that for loosing an arrestment which was laid on upon a decret against Hay of Park, and allowing it to be done on caution, within these seven years, paid the debt to the