

another, but particularly Mr Mowat. The occasion was a comprising on the Earl of Seaforth's estate, standing in the name of Bethia Mowat, and Campbell of Barvolen, her husband, whereunto each of them were dealing to acquire a right, which made them charge one another with breach of trust, and buying of pleas, contrary to the Acts of Parliament: and Mr Mowat, in his bills, using rude expressions against Sir Alexander, as that of villanous contrivances, and having ruined Meldrum of Halton, his brother-in-law, &c. ; the Lords thought themselves obliged to notice the honour of the Court, to which such bills were offered, and called both to the Inner-House.

It was ARGUED,—That such verbal injuries *mutua compensatione tolluntur*, and Sir Alexander had been as bold in his assertions as Mr John: However the Lords found his excess deeper; and, having stated the vote, Punish by deprivation, or suspension, or only reprimand,—the last carried only by one vote: so the whole advocates being called in, the said Mr John got a public rebuke, and all were required to be more discreet and modest in their informations, bills, or pleadings, otherwise they would be more severely dealt with. But, as to the thing itself, and the *modus acquirendi*, and how fair this purchase was on any hand, the Lords remitted that to the Ordinary on the Bills to try; what they had censured this day, being only the injurious reflections Mr Mowat had inserted in his bills.

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*July 26.*—On the report of the Lord Anstruther, in the mutual reductions pursued betwixt Bethia Mowat and Campbell, her husband, with concurrence of Martin, and Sir Alexander Cumming, and Mr John Mowat, advocate, (*vid.* 1st July 1699;) the Lords found Mr John Mowat's right to that apprising was but a trust, and that, contrary to the Acts of Parliament, he had acquired a right to a depending plea; as also had falsified and broken his trust to Bethia Mowat, for whom he was advocate, in acquiring the right without any warrant from her, or Campbell her husband; therefore reduced his right, and, for example to others not to betray their trust, deprived him of his office; and, calling for the Dean of Faculty, and whole advocates, did intimate his deprivation to them, and required them to look so to the honour and reputation of their employment that the people might have no just cause of complaint against any of them. The Emperor Anastasius, in *L. 22. C. Mandati*, most justly statutes that no such purchasers shall claim any more than what they paid for the right, describing such cormorants as *alienis fortunis inhiantes ac insidiantes*; and Justinian, in the very next law, calls it *constitutio æquitatis et benevolentiae plena*, and ratifies Anastasius's laws in that point.

Mr Mowat, being heard in his own defence, did allege many circumstances tending to extenuate his fault and vindicate his fame. *Vol. II. Page 64.*

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1699 and 1700. The COUNTESS OF KINCARDIN *against* COLONEL ERSKIN.

1699. *July 28.*—THE Earldom of Kincardin being exposed to roup, Colonel Erskin, as the only bidder, got the same; and it being one of the articles of the sale, that the buyer and highest offerer should find caution within ten days, and those he designed to employ being out of town, and so the caution not being given in,—the Countess, by a bill, craved the roup might be declared null, and

he decerned in the penalty. The Lords having remitted the bill to Lord Crocerig, who, after hearing the offers of caution made, reported to the Lords, that Colonel Erskin and his brethren were creditors on the estate for 110,000 merks, and that he had the consent and concurrence of other creditors for £100,000 more; so that there was no more behind of the price to be found caution for, but only 140,000 merks; for which his own estate, and the fortunes of Pitmillie, Glaidny, and Mr William Thomson, the three cautioners offered, were more than sufficient, besides the land itself still liable to the creditors.

ANSWERED, *1mo.* That the caution not being found within the time prefixed by the articles of the roup, it is not now receivable; for if the Lords can alter one part of the roup, why not another, and so *in infinitum*, which might destroy that excellent Act. *2do.* The caution, in such cases, must be persons having estates to the value of the whole price, and a third part more; and it must not be patched up, and constrained by the consent of creditors, where the Lords could not know what rank of preference they had, or what share of the price would fall to them; for they may be such as can expect little or nothing of the price, and so their concurrence can import nothing; and the parties offered are not sufficient for the half of the price; and if such sham offers of caution were sustained, creditors would be very insecure.

The Lords considered the exacting of caution was not required by the Act of Parliament, but introduced by the Lords for making the sales effectual; and therefore some doubted if they ought to interpose, except where the clerks scrupled to accept of the caution, and were complained on, as refusing a security unexceptionably clear; there the Lords might meddle, otherwise not.

*2do.* It was REASONED,—That the caution offered needed not be worth the adequate value of the land, where the buyer was a considerable creditor himself, and had the concurrence of others; for this diminished the price *pro tanto*, and gave the creditors, not consenters, access against the cautioners before them, though otherwise not preferable by the decret of ranking.

The Lords, before they would determine this important case, what should be the standard of the sufficiency of such caution, recommended to the Ordinary to call for the ranking, and see in what order of preference these creditors stood who concurred with the buyer, and what was the extent of their sums; after which they would see if the caution offered was unquestionable *quoad* that part of the debts left behind; and shunned to lay down a preparative in so new and nice a point.

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1700. *July 6.*—John Cochran of Ochiltrie, brother-in-law to the Earl of Kincardin, gave in a protestation to the Parliament for remeid of law against the Lords' interlocutor, sustaining Colonel Erskine's caution, as he who bade most at the roup of that estate, (*Vid.* 28th July 1699,) and so was preferred; and it was urged to be inserted in the decret: But the Lords thought it needless, and that the clerk should only give them an instrument, bearing their protest; though, in the *Lady Castlehavens* against *Colinton*, it was engrossed in the decret.

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