

And it being objected against one of the witnesses adduced by Ferguson, husband to one of the Kennedies, that he was menial servant to Kilkerran, the pursuer's father;—ANSWERED.—*Non relevat*, unless he were his own servant; especially seeing the son is not *in familia* with the father, but forisfamiliaried by marriage. The Lords allowed him to be received *cum nota*; some were for taking him simply.

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1698. *January 5.*—The Lords resumed the consideration of the cause, mentioned 15th December 1697, between Kennedies and Ferguson and the Lord Bargeny; and Abercrombie, the notary, having deponed *in præsentia*, the Lords found, by his own acknowledgment, he had malversed in giving up that wadset, which now he deponed was a retired evident; and that he had done it in prospect of a bribe; therefore the Lords, on account of his prevarication, sent him to prison. Bargeny, in retaliation of this, loaded the defender, in the end of his information, with a *congeries* of tricks and cheats he had played in Carrick; and so *semel malus semper præsumitur in eodem genere*. Some of the Lords moved, if these were proven, it would fortify much Bargeny's accumulated presumptions of his fraud in coming by the right of this wadset. Others argued, thir facts condescended on were extraneous to the case in hand, and ought not to be tried here; but my Lord Advocate might pursue them as falling under the *crimen stellionatus*; and, *esto* he were guilty, what does that to the forfeiting his wife's and goodsister's right of the wadset, he having only a claim, *jure mariti*, to the annualrents of the half of the wadset sum? Yet the Lords inclined to take trial of these particulars; Lord Bargeny signing the accusation, (which he did immediately at the bar,) that, in case it were found calumnious, my Lord might be fined, in reparation of his good name now stained by this accusation.

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1699. *July 26.*—The Lords advised the cause, mentioned 14th July 1697, pursued by Lord Bargeny against Agnes Ferguson and Kennedy, her husband, anent the presumptions that the wadset of 3000 merks owing to Auchinblane, her father, was retired and paid; and they found the probation so pregnant that they reduced the bond, and found it extinct by payment. Most of the Lords were convinced, by this circumstance, that, in the minute of agreement whereby Auchinsoul sells the lands to Auchinblane, my Lord Bargeny's bond is mentioned as a part of the price; and, shortly thereafter, there is a bond for the equivalent sum given by Bargeny to Auchinsoul, which evinces the payment to a demonstration: for the Lords would not lay the weight of their decision on the testimony of the witnesses, in respect they should not be allowed against writ, especially where their fame is exceptionable, as Abercromby the notary's was here; and therefore the Lords proceeded mainly upon the evidences in writ, evincing that this bond was retired and satisfied.

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1699. *July 1 and July 26.* JOHN MOWAT against SIR ALEXANDER CUMMING of CULTER.

*July 1.*—THERE were mutual complaints given in by Mr John Mowat, and Sir Alexander Cumming of Culter, advocates, wherein they grossly reflected on one

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