

CAUTIO JURATORIA.

1588.

LORD FORBES *against* E. of HUNTLY.

THE Lord Forbes sought suspension of horning raised upon the execution of a decret arbitral, given betwixt him, his kin and friends, and the Earl of Huntly, his kin and friends, by the King's Majesty, as judge arbiter and amicable compositor, chosen betwixt the parties. Amongst the rest of the reasons of suspension, where he was bound and obliged for certain of his kin and friends, that they should desist and cease from the occupation of the lands of K—— and Monymusk, and that he should report sufficient discharges of all action of spuilzie, that he and certain of his friends might lay to the charge of the Gordons; and for fulfilling of certain other heads of the said decret, he offered *cautionem juratoriam*, together with infestment of his lands.—It was *answered* by the Earl of Huntly, That *cautio juratoria* could not be received from such a Nobleman as the Lord Forbes; but the use was to receive *cautionem juratoriam* from vile and miserable persons, that could get no other caution, because they were not responsal to relieve their cautioners; and as to the hypothecation of his lands and heritages, they were already hypothecated to the persons to whom he was obliged, and caution was always given in supplement.—It was *answered*, That in respect the Lord Forbes had given his oath that he could not get sufficient caution, and sundry who were offered by him being refused as not sufficient, he could not be astricted *ad impossibilia*; and as to the offer of his lands *tutius fuit semper agere in rem quam in personam*.—It was *answered* upon the other part, That it was *forma insolita* to receive hypothecation of lands, where caution of persons was sought, and against the law, *prout in L. 7. ff. De prætoriiis stipulationibus; verba legis sunt, 'Prætoriae satisfactiones personas desiderant pro se interventionem: et neque pignoribus quis, neque pecuniæ, vel auri, vel argenti depositione in vicem satisfactionis fungitur.'*—THE LORDS found by interlocutor, That the offer of the Lord Forbes of his lands, together with *cautionem juratoriam*, that he could no otherways do, was sufficient *licet bona pars dominorum in contraria fuerunt opinione*.

No 1.
Cautio juratoria was accepted from a person of quality, being joined with infestment of lands, although these lands were already much burdened.

Fol. Dic. v. 1. p. 121. Colvil, MS. p. 432. A. 3. 35.