

1683 and 1684. JAMES ALSTON *against* FRANCIS ROSS.

1683. *February 1.*—JAMES Alston against Francis Ross, pewterer in Edinburgh, reported by Castlehill. The Lords found the 8th Act of Parliament 1672, discharging Magistrates of Royal Burghs to arrest strangers, is only in favours of natives, not citizens, and not of foreigners; and that, notwithstanding of the said Act, such strangers may be arrested: but allow Ross the defender to prove it, as a relevant defence, that Macqueston, the person arrested, for whom he became caution, was *origine Scotus*, and had fixed a domicile here, forty days before he was arrested. Which being proven, they found the arrestment unwarrantable; seeing Alston had his bond for the debt, and so it was not merely due upon an account. And, before answer, ordained Ross to depone if he had any effects then in his hands belonging to Macqueston. *Vide* 8th January 1684. *Vol. I. Page 215.*

1684. *January 8.*—The Lords having advised the probation in James Alston's action against Francis Ross, the pewterer, mentioned 1st February 1683, found it not proven by Ross's witnesses that M'Queston was born a Scotsman, or did reside a year in Scotland before the date of his arrestment (which was quarrelled on the 8th Act of Parliament 1672, as now illegal,) and of Ross's bond of cautionry to present him to the Magistrates of Edinburgh: and therefore found the letters orderly proceeded against him. *Vol. I. Page 257.*

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1683 and 1684. SIR WILLIAM PURVES *against* JAMES KEITH and The EARL of MARISHALL.

1683. *December 20.*—Sir William Purves, his Majesty's solicitor his action against Mr James Keith and the E. of Marishall was advised. The case was, Sir William Purves long ago dispoed a comprising of my Lord Gray and Lord Marishall their estates, to James Allan, writer to the signet, who, in the warrantice, takes him obliged not only to warrant the formality and legality of the executions of the denunciation of the apprising, but also the reality, verity, and truth thereof. Thereafter, Mr James Keith, also a writer, having acquired the right of this comprising from James Allan, not for his own behoof, (as was thought,) but for the Earl of Marishall's use, he designedly, (as is affirmed,) to come back upon Sir William Purves for his special warrantice foresaid, causes another appriser of Marishall and Gray their estates, raise a reduction and improbation of Sir William Purves's apprising against Keith himself, as now having right thereto. And though, in law, after 24 years from the date of an apprising, one is not bound to produce the executions of his comprising, seeing the same messenger who denounces the lands, is oftentimes also judge to the decreet of apprising, and that they are loose papers easily exposed to perishing; yet if they be produced, they may be improven as false. And so Mr James Keith tamely produces the executions and all. And the two witnesses therein being examined, they depone, they do not remember that they were adhibited witnesses to that execution, or knew that messenger, or were ever upon the

ground of these lands. Whereon the Lords improved the execution and found it false, (which is hard :) and so, the apprising falling *in totum*, Mr James Keith recurs back upon Sir William Purves, on the special conception of his warrant-dice, which he had inadvertently given too large. On this Sir William Purves raises a reduction of that decret of improbation, on thir three grounds:—1mo, That Mr James Keith had lost his right, because, by the 214th Act 1594, members of the Session are discharged to buy pleas; *ita est*, there was a depending process on this when he took a right to it from James Allan.

ANSWERED, for Mr James Keith,—1mo, He was not then a writer, for he had deserted his employment about a year or two before. 2do, By his acquisition, *non fecit conditionem adversarii deteriore et durioem*, (which is the reason of law against these purchases;) for he had bought it from Mr Allan, another writer; and Sir William Purves, his author, was also a member of the Session; and so they were as ill with him; *et privilegiatus contra privilegiatum non utitur suo privilegio*. But, 3tio, *Esto* he were in the case of the Act of Parliament, the most that could be inferred from the Act, is not losing of the causes, but only deprivation; even as a beneficed person's tacks set for a longer time than is allowed by law, are not declared null by the act of Parliament 1617, but only the setters are declared infamous. See Dury, 16th November 1624, *Hope* against *The Minister of Craighall*.

And as the 133d Act, Parliament 1584, discharging ministers to be notaries, except in testaments, *non procedit annullando actum*; even so, here, all the certification adjected to the Act is only the deprivation of the buyer; as was decided by the Lords in 1611, *Maxwel of Drumcoltrain*; and on the penult. of July 1635, *M'Gill*, observed by Dury. See *Stair*, tit. 10, Of Conventional Obligations, § 64; and *Hope's* Tractate on Reductions; as also *Vinnius*, lib. 1, *quæst. illust. cap. 1*, who is clear *ubi lex procedit non annullando actum sed irrogando aliam pœnam*, that there the Act subsists, and the *pœna* is only due.

It was ANSWERED,—Though the said Act mentions only deprivation, yet the said emption must be also null: 1mo, Because the Act is conceived in thir terms: "It shall not be leisome," *id est, erit illicitum*. If so, then it is *contra legem, et ergo ipso jure nullum*; at least declarable to be null in a reduction. 2do, *Loco pœnæ succedit damnum et interesse partis*; which is here the whole cause and value of the plea itself. 3tio, *Vinnius, ibid.* says, *pœna nonnunquam adjicitur etiam annullationi actus*: and so it is both null and punishable.

Yet the Lords found the said Act of Parliament proceeded *non annullando actum seu emptionem, sed tantum ad irrogandam pœnam*; and that the tract of the Lords' decisions had hitherto expounded it so; and confessed there were great inconvenience in sustaining such sales, but they could not redress it, that being work for a Parliament; and that Judges, tied to the laws as they were, had not power to alter laws *ob incommoda* urged against them; and that arguments *ab incommodo* ought not to move Judges to recede from established laws.

*Queritur* if the Acts of Parliament discharging penal statutes, or the Act of Grace in March 1674, discharges also the penalty of this Act against buying pleas. 2do, If lands in dependance be gifted, the acceptation does not seem to fall under the compass of the prohibition of this Act. 3tio, If the disposition or assignation to a *res litigiosa* be *ex causa necessaria*, as for relief of cautionry or payment of debts, it will not hinder but I may purchase them.

*4to, Quæritur* where lands are under plea, and one takes a disposition to them to a member of the Session in trust upon a back-bond, if this would be a violation of the Act, seeing this is not a formal buying. Yet this course would elude the Act.

Sir William Purves's *second* reason of reduction was, That this transaction, made and acquired in by Mr James Keith, was to the Earl of Marishal the debtor's apparent heir's behoof. This being denied, the Lords, before answer, ordained Mr James Keith, the Earl of Marishal, and any others Sir William Purves condescended on, to be examined anent the trust.

The *third* reason of reduction was, That nothing should take away the executions of a comprising, especially *post tanti temporis intervallum* as twenty-six years, except the clear liquid and positive depositions of the messenger and witnesses denying that they were ever employed in such an act : but here they are not positive, but only as to their memory, which may easily forget after so long a time ; and that it is probable they were witnesses ; for they dwelt in the very next land to thir lands denounced and apprised, and it is ordinary to take the witnesses from the neighbourhood.

This third point was not then decided. *Vide* 10th January 1684.

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1684. *January* 10.—In the case between Mr James Keith and Sir William Purves, mentioned 20th December 1683; the Lords examined Sir George Lockhart, Sir John Dalrymple, Mr David Dewar, Mr George Bannerman, and the Earl of Marishal's other advocates, what they knew of the Earl of Marishal's trusting that comprising in Mr James Keith's name ; yea, what they believed in their private judgment, and to whose behoof they thought it ; which was to cause them depon on their fancy and opinion. But it was judged not convenient to shroud themselves under that privilege of advocates, *ne teneantur secreta clientum detegere* ; seeing this was the detection and expiscation of a fraudulent conveyance, which it is not an advocate's credit either to advise or conceal.

Mr David Dewar discovered all, that it was for the Earl's behoof ; and that he was against the acquisition of it.

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1684. *January* 11. DAVID SIMPSON *against* JAMES PITTILO.

THE Lords, upon Saline's report, in respect of the oath of David Simpson in Dysart, acknowledging that the 500 merks were allowed to him in part payment of the price of the lands disponded to him by M'Ghie, and so not chargeable on Pittillo, and in respect of the discharge of 400 merks granted by M'Ghie, before the assignation made by him to Simpson, they reduce the decret-arbitral as unjust ; reserving to Simpson to insist against Pittillo, on any other grounds, as accords of the law.

Then Simpson offered to improve the discharge as false. *Vol. I. Page 259.*