

No 47.

Sir William Purves' *second* reason of reduction was, that this transaction made and acquired in by Mr James Keith was to the Earl of Marishall the debtor's apparent heir's behoof. This being denied, the LORDS, before answer, ordained Mr James Keith, the Earl of Marishall, 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 26 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 these lands denounced and apprised; and it is ordinary to take the witnesses from the neighbourhood. This third point was not then decided.

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 Marishall's other advocates, what they knew of the Earl Marishall'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 depone 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.

Fol. Dic. v. 2. p. 24. Fountainball, v. 1. p. 252. & 258.

1713. *December 15.*

SIR PATRICK HOME, Advocate, *against* EARL OF HOME.

No 48.

Although a member of the College of Justice incurs the penalties of the act against buying pleas, the right acquired is not annulled.

IN the process of exhibition and delivery at the instance of Sir Patrick Home against the Earl of Home, the defender *alleged*, That the pursuer's title was null, as being purchased by a member of the College of Justice, after the subject was litigious, and insisted also by way of complaint upon the act 220th Parl. 14th Ja. VI.

Answered for the pursuer; The act of Parliament against buying of pleas by members of the College of Justice, does not annul such rights, but enacts a punishment in case of a contravention. viz. the loss of office, upon which the lawyers rest as sufficient to restrain the abuse intended to be corrected; and so it was decided, Richardson and L. Cranston Riddel *contra* Sinclair, No 34. p. 3210.

Replied for the defender; The statute declares, 'that it shall not be leisome,' &c. and *nullum est quod fit jure prohibente* l. 7. § 16. D. De pactis, l. 5. 6. C. De legibus. For though where a prohibitory act imposes a penalty upon the contravener, without declaring the deed unlawful, as if it had been conceived thus, 'If any member of the College of Justice purchase a plea, he shall tyne his office,' the deed contrary to the law might stand, and the penalty only be incurred; yet where a statute, as in this case, declares expressly, the deed to be unlawful, and adds a particular penalty upon the contravener, it both annuls the deed and subjects him to the penalty. If it were otherwise in this case, the design of the law would be frustrated, by making unjust acquisitions in favours of heirs, and concealing them till their death, when there is no place for depriving them of their office. Besides, the deprivation may happen *ex accidenti* to be a very great punishment to persons of eminence, who are least likely to transgress; it would be hardly a punishment to persons of employment of lesser form about the College of Justice who are most ready to be litigious. And the sanction of a law must be interpreted as it may effectually restrain all sorts of offenders.

THE LORDS repelled the objection founded on the act of Parliament anent buying of pleas by members of the College of Justice, and found that the certification therein doth not annul the right of the acquirer; and therefore sustained process at Sir Patrick's instance.

Fol. Dic. v. 2. p. 24. Forbes, MS. p. 12. 13.

* * A similar decision was pronounced 30th July 1635, Richardson against Sinclair, No 34. p. 3210. *vide* DEATH-BED.

SECT. X.

Factors and Agents purchasing Debts of their Constituents.

1632. March 28. L. LUDQUHAIRN against L. HADDO.

L. LUDQUHAIRN pursuing wrongous introumission of teinds, compeared L. Haddo, and *alleged*. that the tack, which was the title of the pursuit, was acquired by the L. Ludquhairn, he then being factor to his tutor, and so who ought to be reputed as his tutor in this, that he might do nothing in *re minoris*, to his hurt; whereby that his tack, which was of the teinds of the defender's own lands and heritage, albeit he hath acquired the same to his wife during her lifetime, and to the defender thereafter after her decease, yet it must be

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The factor named by tutors can no more take the benefit of the pupil's debts purchased by him, or of rights on the pupil's estate, than the tutor himself can.