No 46.

and prove it; and allow the defenders yet to produce the same betwixt and Tuesday next; and find the assignation taken from Ker by Mr William Weir is after the date of the decreet, and so is not a transgression of the act of Parliament against buying of pleas by advocates. And as to *pactum de quota litis*, (which differs from the buying of a plea) before answer, ordain Mr William Weir to be examined, in presence of the persons to be condescended upon by the defender, concerning the way and manner of acquiring that right, and what he gave for it. And ordain all other persons to be condescended upon by the defender to be examined upon oath concerning the having of any writs for verifying the allegeance *scripto*. And grant diligence to the defender for that effect; reserving to themselves to consider what the probation may operate."—*See* APPENDIX.

Fountainhall, v. 1. *p.* 104.

1683. *December* 20.

Sir WILLIAM PURVES, His Majesty's Solicitor, *against* Mr JAMES KEITH, and The EARL of MARISHALL.

No 47.
The right acquired by a member of the College of Justice, who buys a plea, is not null; but he incurs the penalties of the act of Parliament.

THE case was; Sir William Purves long ago, disponed a comprising of Lord Gray and Lord Marishall's estates to James Allan writer to the signet, who, in the warrandice, 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 warrandice foresaid, causes another appriser of Marishall and Gray's 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 messenger who denounces the lands, is oft times 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 improved 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 toto*, Mr James Keith recurs back upon Sir William Purves on the special conception of his warrandice, which he had inadvertently given too large. On this Sir William Purves raises a reduction of that decreet of improbation on these three grounds: 1*mo*, That Mr James Keith had lost his right, because by the 220th 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, 1*mo*, He was not then a writer, for he had deserted his employment about a year or two before: 2*do*, By his acquisition, *non fecit conditionem adversarii deteriorem, et duriorem*, (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 3*tio*, *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 cause, 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 16th November 1624, Hope *contra* Craighall, No 19. p. 7943. 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, Cuningham against Maxwell, No 41. p. 9495.; and Richardson against Sinclair, No 43. p. 9496. See Stair, Book 1. Title 10. § 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, 1*mo*, Because the act is conceived in these 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: 2*do*, *Loco pœna succedit damnum et interesse partis*; which is here the whole cause and value of the plea itself: 3*tio*, 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.——*Quæritur*, 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? 2*do*, If lands in dependence be gifted, the acceptation does not seem to fall under the compass of the prohibition of this act. 3*tio*, 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. 4*to*, *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.

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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 Deeember 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 priviledge 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. *Fountainhall, 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.