

1625. July 6. MOWAT *against* M'LELLAN.

No 42.

IN an action of spuilziation of six kine, pursued by James Mowat, writer, against M'Leilan, it was *alleged*, That he cannot be heard to pursue that action, being a Member of the Session, and being pursued only by him as assignee made by that person, from whom the kine were alleged to have been spuilzied, and so not competent to have been pursued by a Member of the Session, being a bought plea, conform to the act of Parliament; the LORDS sustained this action at the assignee's instance, notwithstanding of the allegiance, and act of Parliament, in respect that there was never any action intended upon that spuilzie at the cedent's own instance; and that the pursuer was not made assignee to an action, but to the deed of spuilziation.

Fol. Dic. v. 2. p. 23. Durie, p. 174.

1635. July 30. RICHARDSON *against* SINCLAIR.

No 43.

A DECLARATOR being only executed, but never called, nor any process deduced thereupon, the LORDS found, that the buying of the right in question, by a Member of the College of Justice, was not buying of a litigious right, which came under the compass of the act of Parliament.

Fol. Dic. v. 2. p. 23. Durie.

* * * This case is No 34. p. 3210. *voce* DEATH-BED.

1675. February 24. HUME *against* NISBET.

No 44.
A Member of the College of Justice, as trustee for an apparent heir, having purchased a debt due by the defunct, and thereupon adjudged the estate; and after the process was at an end, having conveyed the adjudication to the apparent heir, retaining a

KATHARINE HUME, apparent heir to John Hume in the lands of Sheffield, being in hazard to enter heir to him, did employ Mr Archibald Nisbet, writer, to purchase an assignation of a sum due by her brother to Mr James Keith, which he procured for 500 merks, the sum principal and annual extending above 6000 merks, whereupon he adjudged from her the lands of Sheffield, and obtained decret for the bygone duties thereof, intromitted with by Mr Alexander Hume, and thereupon apprised his estate, and was infest in both; and, after all, he gave a back-bond in favours of the said Katharine, to denude himself in her favours, being satisfied of the 500 merks he paid to Mr James Keith, and of 500 merks he expended in the process and infestments, and retaining to himself a fourth part thereof. Being charged on this bond, he gave in a bill of suspension, whereupon the cause was appointed to be discussed; and alleged that he could not denude till he was satisfied, conform to the back-

bond. The charger *answered*, That she was content to pay what he had debursed, and a gratification for his pains at the sight of the Lords; but alleged, that the detention of the fourth part is not allowable, being *pactum de quota litis*, which is not allowable to advocates, agents, writers, &c. who are prohibited to buy any pleas. It was *replied*, 1^{mo}, That *pactum de quota litis* was only reprobated in the case of advocates, *ne detur causa calumniandi*, as the law beareth, which quadrateth not with writers; 2^{do}, Acquiring pleas or pactions thereanent are only rejected when done *lite pendente*, for here *lis erat sopita* by sentences before the back-bond was granted; and the charger having no means of her own, and all being done upon the peril and hazard of the suspender, she hath neither ground of complaint in law nor equity.

THE LORDS found, that the plea being ended before the back-bond, the retaining of a fourth part was allowable.

1675. July 23.—Mr Archibald Nisbet having charged Margaret Hume upon a bond of 500 merks, she suspends, on this reason, that it appears by the bond, that Mr Archibald being intrusted to adjudge or apprise the estate competent to the suspender, as apparent heir to her brother; that, upon that consideration, she was obliged to pay him 500 merks, and he had right to retain the fourth part of her brother's estate, which is an unlawful paction *de quota litis*, and against the act of Parliament prohibiting Members of the College of Justice to buy pleas. It was *answered*, That the act of Parliament quadrates not to this case, because the bond is granted at that time Mr Archibald denuded himself *post finitam litem*; and the suspender being an indigent person, he did, at her desire, acquire a debt of her brother's, and thereupon adjudged, and run the hazard of his sum, and after all her process was ended, disposed the same in her favours for this obligation; which in no case could be prejudicial to the said obligation, although it might have been a foundation of censure against Mr Archibald, if he had transgressed, as he hath not.

THE LORDS having ordained Mr Archibald to depone, if *pendente lite* there was any agreement; he did depone there was none, but there was a communicating before he began the process, and that he got this bond after all was ended; whereupon the Lords sustained the bond.

1676. January 6.—Mr Archibald Nisbet having taken assignation to the sum of 2000 merks due by unquhile Hume of Sheffield, did thereupon adjudge the lands of Sheffield from Katharine Hume, as apparent heir to him, and likewise obtained decret against Hume of St Leonards, for his intromission with the rents of the lands of Sheffield, and apprised his lands thereon, and obtained decreets of mails and duties against the tenants of both, and entered in possession. After all process ended, he gave a back-bond to the said Katharine, obliging himself to denude in her favours, upon payment of 500 merks that he gave out for obtaining an assignation to her brother's bond, and getting the

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fourth part of the estate as a gratuity to himself, the Lords sustained the transaction after the process was at an end, and found, that it could not be considered as a *pactum de quota litis*.

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fourth part of the adjudication to himself, and his expenses. The said Katharine having pursued him to denude, as being intrusted by her, as appears by his back-bond, and that upon payment of his expenses only, without a fourth part, which is *pactum de quota litis*, not allowable; it was *answered*, That this *pactum* was only rejected as to advocates, *ne detur causa calumniandi*, which could not be extended to writers to the signet; *2do*, There was here no paction *pendente lite*; for the back-bond was granted after all process were ended. It was *replied*, That the parity of reason rejects such pactions, as to writers and agents, seeing thereupon occasion is given for pleas to vex and trouble the lieges; and albeit the back-bond be after the end of the process, yet the agreement was made before the ending of the process, during the dependence thereof, or before intending of the process, upon design to intent the same, which is equivalent, the inconveniency being alike in all. It was *duplied*, That the pursuer having no means of her own, durst not enter heir to her brother for fear of his debts; and, before any process, freely offered to Mr Archibald, that if he would buy in a sum of her brother's, and adjudge his estate, he should have the fourth part, and all his expenses, which might very lawfully be done, there being no plea, but a clear debt of her brother's, to affect his estate, which none could oppose; and yet the defender took the hazard, and had no security from her in case he should lose the sums given out by him; and denies any paction or agreement at any time before his back-bond, which could have obliged him to give this back-bond. Likeas, he had already deponed, that there was a free offer before any process.

THE LORDS ordained him also to be examined, whether there was any paction or agreement before, or during the process for implement, whereof he granted the back-bond, after the process was ended.

Fol. Dic. v. 2. p. 23. Stair, v. 2. p. 326. 361. & 390.

No 45.

1678. July 30.

The EARL of HUME against HUME.

THE Earl of Hume gave in a complaint against Mr Patrick Hume, advocate, bearing, that Mr Patrick had taken right to a plea, anent Coldinghame, depending against the Earl of Hume, and therefore craved that he might be deprived, conform to the act of Parliament against Members of the College of Justice buying pleas. The defender *answered*, That, both by the law, and this statute, there was nothing to impede persons to give or take in free gift, but only prohibiting them to buy, or to purchase pleas for money, while depending; but, in this case, the defender had a disposition from Frank Stuart, his cousin-german, of Coldinghame freely, without giving any thing therefor.

THE LORDS found the defence relevant, and refused the bill.

Fol. Dic. v. 2. p. 23. Stair, v. 2. p. 643.