

P A P I S T.

1707. July 22.

The MARQUIS of ANNANDALE *against* The DUKE of QUEENSBERRY.

A DECLARATOR and reduction of the Duke of Queensberry's gift and commission from the Queen to the jurisdiction of the stewartry of Kirkcudbright, during the Earl of Nithsdale's incapacity. The case was, the Earls of Nithsdale are heritable Stewarts of that stewartry; but he being a professed papist, is by many of our acts of Parliament disabled from using and exercising that jurisdiction; whereupon he disposed the right of it to the Duke of Queensberry in 1698, upon a back-bond, who enjoyed it, till of late he reponed the Earl, and re-disposed it, with a procuratory of resignation, which Nithsdale assigned to the Marquis of Annandale, and he makes resignation of it in the Exchequer, and obtains a past signature, and when he is going to expedite his charter under the Great Seal, it is borrowed up and abstracted for some weeks, in April last; whereupon the Marquis takes instruments, and protests that the stop may not prejudice his right and diligence; and in this interval, a gift comes down, passed under her Majesty's hand, of the said stewartry, in favour of the Duke of Queensberry, as devolved to her through Nithsdale's legal incapacity of being a professed papist; and which gift is passed and expedite, and the Duke infeft thereon, and put in possession of the jurisdiction, by holding of Courts, choosing of members, &c. against all which, the Marquis having protested, he raised a declarator, that his right was preferable, though stopped, because he had used all the remedies law provides against such partial qualifications; and likewise repeated his reduction against the Duke's gift, *imo*, That though our law has been so jealous and cautious against the growth of popery, that it disallows any of that profession to exercise any heritable office, yet none of these laws hinder papists to sell or dispose their lands and jurisdictions; and these acts of Parliament being penal, they are *strictissimi juris*, and so to be interpreted as not to be extended beyond their precise words; and they bear

NO I.

Found, that a papist may dispose his heritable jurisdictions, irredeemably, to a protestant.

No 1.

no clause restraining them to sell these offices ; and the Duke of Queensberry has understood it so himself, for he took a disposition of it from Nithsdale, and possessed nine years upon it ; and why might not the Marquis follow his example ? *quod quisque juris in alium statuerit, æquum est ut ipse eodem utatur.* 2do, The Marquis's right is prior *tempore*, and so *potior in jure* ; for his signature was past long before Queensberry obtained his, by subreption and obreption from the Queen ; and after his resignation was accepted and passed by the Exchequer, the Queen was so denuded, that she could not give a new right ; and although the Marquis's signature was stopped till Queensberry's came down, yet that can never prejudge him ; because, by the 66th act 1578, the Queen's compositors in Exchequer cannot deny confirmations or infestments to any of the subjects, the Queen being equally mother to them all, and they owing the same allegiance to her ; and if they give any partial preference or gratification, the protesting against them solves the party's right, and makes it be reputed in construction of law, as if it were actually passed and expedite the seals ; 3tio, Queensberry having denuded in favour of Nithsdale, with warrandice, that he neither had nor should do any fact or deed to the prejudice of that re-disposition, his taking a new gift from the Queen was a plain contravention of his warrandice. *Answered* for the Duke of Queensberry, That there was a great difference in our law betwixt the conveying and transmission of the rights of lands, and of heritable offices and jurisdictions ; and particularly in the case of the papists, it was the interest and security both of the religion and civil government, that not only they be disabled to exerce these jurisdictions, either by themselves or their deputed, but also that they may not convey or alienate them to confidants or trustees, though protestants, as appears by the act of Parliament 1693, for taking the oath of allegiance, and the act 1701, for preventing the growth of popery ; and if they be allowed to dispone these jurisdictions, it is just all one as if they named a depute ; for the receiver will on the matter be but his depute, and be wholly ruled and influenced by him. Likeas, by these acts, papists are declared incapable to purchase or acquire any such rights, and so the Duke of Queensberry's re-disposition of it to Nithsdale is null, and he could not transfer a *non ens* to Annandale. And it is plain all these heritable offices, during their continuing papists, return to the Crown, and are in the Queen's hands and disposal, only by her, and not by the Exchequer, no more than they can grant *novodamus*, and have never been disposed of by the papist himself, as appears by the jurisdictions belonging to the Duke of Gordon, and Earl of Panmuir, who, albeit a protestant, yet not having taken the oaths, the Queen disposes of his heritable jurisdictions. *Replied* for the Marquis, That law has made no distinction betwixt the transmission of papists' lands, which they are expressly permitted to sell, and their heritable jurisdictions, *et ubi lex non distinguit, nec nos distinguere debemus.* And he would gladly be resolved of two questions, *imo*, If Nithsdale might not have assigned Queensberry's back-bond to a protestant, and if he might

not have compelled him to denude? *2do*, If a creditor of Nithsdale's might not have adjudged this heritable office from him, as well as the rest of his estate? and if so, the rule of reciprocation is plain, that whatever is adjudgeable is disposable; and there is so far from any danger or inconveniency to the government, either in church or state, that papists be allowed to dispoise their offices, that it were to the benefit and advantage of this kingdom, that they were all of them totally denuded of these rights; and there is a vast difference betwixt this and their naming of deputes; for, in this last case, they are ambulatory, and a constituent can sit himself; but, by a total alienation, the radical right in the papist's person is extinguished and sopite.—THE LORDS having long argued on the state of the vote, and it being *urged* for Queensberry, That a papist may dispoise these jurisdictions without the Queen's consent; and it being *answered*, That the Queen had sufficiently consented, by her Lords of Treasury and Exchequer passing Lord Annandale's resignation, and that she is *signanter* and eminently present in her judicatories, and it is as legal as any subscription obtained from her personally by any of her Secretaries; therefore, the vote was stated, whether a professed papist may dispoise his heritable jurisdictions, irredeemably, to a protestant; or if the disposal of them accresces to the Queen? And the LORDS, by a plurality of eight against seven, found they might dispoise them, and so declared in Annandale's favour, and reduced the Duke of Queensberry's gift.

No 1.

Fol. Dic. v. 2. p. 25. Fountainhall, v. 2. p. 384.

1710. July 21.

ROBERT JOHNSTON of Keltoun, and other CREDITORS of the deceased ALEXANDER MAXWELL of Tarraughtie, *against* JOHN MAXWELL, Eldest Son to the said ALEXANDER and JOHN MAXWELL of Breckenside.

IN the competition for mails and duties of the lands of Tarraughtie, betwixt Alexander Maxwell's Creditors and John Maxwell his eldest son; the LORDS found an adjudication, led in the name of John Maxwell of Breckenside, a papist, upon a gratuitous bond granted by the said John Maxwell to him, null by the act 3d, Parliament 1700, for preventing the growth of popery; albeit the said adjudication was led for the behoof of the granter of the bond, who is a protestant. And it was *alleged* for him, That it was not the meaning of the statute to prejudice protestants, or to hinder them to employ papists as their trustees, except allenarly in the education of youth, and the management of their affairs; whereas the granter of the bond was major, and so not to be supposed that he could be seduced by the influence or converse of his popish trustees.

No 2.

Fol. Dic. v. 2. p. 25. Forbes, p. 432.