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of a real estate, by any person or owner, to any protestant purchaser, shall be avoided, by reason of disabilities or incapacities.

consideration of a real estate, by any person or owner, to any protestant purchaser, for the benefit of a protestant, shall be avoided, by reason of any of the disabilities or incapacities in the said acts incurred, or supposed to be incurred by the seller, unless before such sale the person entitled to take advantage of the incapacity, shall have recovered the lands themselves, or given notice of his claim to the purchaser, &c. And though this statute was directed upon doubts that had arisen upon an English act of Parliament, yet the statutory part was general, and being enacted by the legislature of Great Britain, it ought to affect and explain the Scots statute, which was of the same tenor with that of King William in England, for preventing the growth of popery.

It was *answered* to the 1st, That as Macartney lived till he was after fifteen years of age, and omitted to purge himself by taking the formula, it was sufficient, by the act of Parliament, to annul and void his title, or any right derived from him; and therefore it was pleadable at any time.

To the 2d, That the British act relates entirely to the English act of King William, and therefore cannot extend to Scotland.

THE LORDS repelled the defence, that a question was not moved, of Macartney's being a papist and not having taken the *formula* during his life; and repelled the defence upon the act of Parliament *tertio Georgii* in favours of protestant purchasers.

Act. Ch. Binning & Ja. Fergusson.

Alt. Ch. Areskine.

Clerk, Murray.

Fol. Dic. v. 4. p. 37. Edgar, p. 151.

1739. February 14.

SIDNEY against BAILLIE, and other Creditors of MAXWELL.

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THE LORDS repelled the objection made in a ranking on the act 1695 to an adjudication, that it proceeded on bills and promissory notes granted by the common debtor, who was a professed papist, and that the onerosity was not instructed in terms of the said statute; in respect the act of Parliament only respected dispositions or direct conveyances.

Fol. Dic. v. 4. p. 37. Kilkerran, (PAPIST.) No 1. p. 365.

\* \* \* C. Home reports this case :

SIDNEY having right to a bill and three promissory notes granted in England, by Sir George Maxwell of Orchardtown, to Morison of Prestongrange, upon which adjudication had been led against the estate of Orchardtown, after Sir George's death, brought a process of mails and duties, in order to obtain pos-

session. Against which it was *objected*, That Sir George being popish, the granting the deeds was in prejudice of his protestant heir, as tending to carry off the estate from him, contrary to the above act of Parliament; and, although they bear value received, yet, by that law, they are held gratuitous, unless the granter declare the same were for value.

*Answered*; The Scots act cannot regulate deeds done in England; *2do*, It only concerns gratuitous deeds, or dispositions in prejudice of their apparent heirs, and the benefit they may have by succession to the said popish persons; but neither the words, nor intention thereof, interdict papists from trade or commerce, or from borrowing of money, and contracting debt.

*Replied* to the *1st*; *Quodd* the solemnities of writs, the *locus contractus* is the rule; and, if the usual solemnities of the place where the deed is executed be adhibited, it will be probative *ex comitate* every where; upon which foundation it is, that promissory notes, granted in England, are probative here; but, with respect to the quality of the person, his capacity to dispose of his real estate, the laws of the country where it is situated are the only rule, wherever the party himself may happen to sojourn or reside; there is no place for what the Doctors call *comitas in statutis personalibus*, especially where such laws are prohibitory; surely it would be absurd to suppose a Scots papist could get free of the act by going abroad; and what the defenders now plead for is supported by analogy; thus, an estate in Scotland cannot be disposed of on deathbed, although the deed should be executed in England or Holland, where no such law obtains.

In the *next* place, it was *objected*; That the adjudication is void, as being led for annualrents of the bill and promissory notes, bearing to be payable on demand, and no evidence, by protest or otherwise, that any demand was made in Sir George's lifetime.

*Answered*; Though there is no statute enacting, That promissory notes shall bear interest, yet, by the act *3tio et 4to Annæ*, which extends the privilege of inland bills to promissory notes, it is declared, That, in any action thereon, the plaintiff shall recover his damage and costs of suit, in which damage is always included the interest of the value acknowledged to be received by the note, in the same way as in bonds for double of the sums received, wherein no interest is covenanted for; and, although the notes be payable on demand, there was no need to make any, as they bear value received; because it is the debtor's being possessed of the money, and the creditor's wanting the use of it, that gives rise to the damage.

*Replied*; By the foresaid act of Queen Anne, it is apparent that inland bills do not bear annualrent, unless protested within the time limited; therefore this bill, which was never protested, cannot bear annualrent, and much less can the promissory notes, which, at most, are but in the case of inland bills, bear any interest, since they never were protested; but it was unnecessary to enlarge on this head, seeing the Lords had the same question under their consideration this session, in the case of Murrays *contra* Murrays, where they

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found, that an English promissory note, not protested, did not bear annual-rent.

THE LORDS repelled the objection of Sir George's being papist; and, as to the *pluris petitio*, they found, that the interest before the citation was not due, and therefore must be struck off.

*Eol. Dic. v. 2. p. 25. G. Home, No 115. p. 184.*

No 5.

What method to be taken by the protestant heir to follow out his claim.

1745. July 7. CHARLES GRANT against JOHN GRANT.

THE investitures of the estate of Carron being limited to heirs-male, and Colonel Grant of Carron having died without issue, John Grant, son to Peter Grant in Dell, was the nearest heir-male; but he being a professed papist, and a fellow in the College of Jesuits at St Omers, a declarator was brought by Charles Grant, concluding that he the pursuer is the next protestant heir, and that the said John Grant is a professed papist, at least habit and repute such, and therefore incapable to succeed to the estate of Carron. After the libel was executed, the pursuer applied to the Court, setting forth, that the witnesses to prove his propinquity were very old men, and therefore craving an examination to lie *in retentis*. Answers were made by the heir of line, who had the papist's authority to keep possession of the estate, that the *induciæ legales* not being run, no instructions were come from Mr Grant at St Omers, about the defence of the process. For this reason, the Lords refused the desire of the petition.

After the *induciæ* were run, and the process called, the pursuer insisted to have a proof of his propinquity before the Ordinary. Certain objections were made, which, with the answers, were reported to the Court. It was *objected*, *1mo*, That, by the act 1700, it is incumbent upon the first protestant heir, to prosecute his right within the space of two years after the irritancy is incurred, otherways the right devolves upon the next protestant heir, and that this action was not brought within two years after Colonel Grant's decease; *2do*, That this method which the pursuer has taken to declare his right, as protestant heir, is not competent, having no foundation in the act of Parliament 1700, the only method there prescribed being by service; *3tio*, That, as the act founded on is penal, irritating the defender's natural right to the estate of his predecessor, it allows him to purge himself of popery in the manner therein directed; but so it happens, from an alteration in our constitution, that it is impracticable for the defender, or any other in his circumstances, to comply with the act, so far as it directs that the *formula* shall be taken before the Privy Council, which is now abolished, or before the presbytery of the bounds where the party resides; and in that case his renunciation of popery is appointed to be reported by the presbytery to the clerk of the Privy Council within forty days; and, as this