SECT. VIII.

Recissory Acts.

1672. *January* 9.

The COUNTESS of BRAMFORD *against* HOPE of Hopetoun and KERSS.

No 61
A forfeited person restored *in modum justitiæ*, found to be in the same condition as if he never had been forfeited, and consequently that orders or assignments by the public could not give right to any part of his property. Afterwards this judgement was so far varied, as to allow the acquirer to prove an onerous cause

THE Countess of Bramford and the Lady Forrester having insisted in the process against the intromitters with the monies and estate of the Earl of Bramford, (which was formerly decided against the Earl of Callendar, as to the principal sum, the 20th of December last *voce* HOMOLOGATION,) pursues Hopetoun and Kerss, upon this ground, that 23000 merks of the sums due by the Earl of Errol and his cautioners, was intromitted with by Kerss, as is instructed by a bond of warrandice given by Hopetoun, bearing, 'That he had received security for the 'said sum, upon the delivery of the general commissary's discharge for the 'like, and that in name and to the behoof of Hope of Kerss, and obliged him-'self and his heirs to warrant the said discharge to the general commissary, 'and to relieve the Earl of Errol and others obliged, of all hazard and da-'mage they might sustain through payment of the said sum.'

Which bond, the LORDS found to import an intromission, which would make Hopetoun and his heirs liable, albeit it was to the behoof of another, to whom he alleged he had made an account; and that thereby Kerss, to whom he had counted, could only be liable; but there being nothing to instruct Kerss's intromission,

THE LORDS found Hopetoun liable, until he produced sufficient evidents of his payment to Kerss, which might instruct against Kerss.

It was now further *alleged* absolvitor, because the defenders had not only all the grounds to defend their intromission, which were proponed for Callendar, but also these important differences: 1*mo*, That Callendar intromitted by an assignment from the Committee of Estates, and that long before a decreet was obtained at their instance against the Earl of Errol, so that then there was not *parata executio*; but the defenders delivered the general commissary's discharge, upon a warrant posterior to the decreet, and thereupon got payment. 2*do*, The cause of Callendar's assignment was for a gratification; but Kerss's warrant was for onerous causes, viz. 5000 merks borrowed from his father, *anno* 1640, and 4000 merks from other parties, by several noblemen, binding themselves, their heirs and executors, before they assumed any public authority, which were assigned to Kerss, whereof he got payment by the commissary's precept.

THE LORDS found, that in so far as Kerss's sum was for gratification or service, that it was in the same condition with Callendar's case; but, in so far as it was

No 61. for sums of money lent, they took it in consideration apart; and thereanent it was *alleged* for the pursuer, That whatever the causes of the intromission were, seeing the money received belonged to the Earl of Bramford, his right thereto could not be altered but by his own consent or deed, it being a general principle of property and right, *quod meum est sine me alienum fieri nequit;* and, it cannot be pretended, that Bramford did consent, neither that by any deed or delinquence he did forfeit his right; and therefore the money still remains his, seeing his forfeiture is rescinded by way of justice, and his pretended crime for assisting the King in England was his duty and honour, and his forfeiture was so palpably unjust, without all pretence, even upon the principles of those that forfeited him, he having never been in any opposition against the country, either in Scotland or England, that the same Parliament shortly thereafter, did restore him to his lands, but did not proceed to the like justice as to his sums, but now he is absolutely restored; and therefore, all intromitters with any part of his estate, are liable to those representing him, and are so found by act of Parliament 1670, declaring all the intromitters liable. The defenders *answered*, That the foresaid general brocard hath its own exceptions, 1*mo*, In the case of coined money, which, because it is the common standard of all commerce, is therefore for common utility's sake, by the common law of nations, found to be current without consideration whose it was before, even though it had been stolen and robbed; which not only holds when the intromitter receives the money in specie, but if he receive a precept to any party to answer him; if they accordingly give money or security, he is not obliged to enquire how the money became that party's who drew the precept, or by what means it became in the hands of him upon whom the precept is drawn; yea, though he should happen to know that the money did not arise upon a secure right, but that the granter or accepter of the precept, their right might be evacuate, or they made countable; yet he who, for onerous causes received the money, is absolutely secure by the law of this and all civil nations, which is established for securing of commerce amongst men; for albeit, if the intromitter had accepted an assignation, or any right from him who had an invalid right, his right would fall in consequence with his authors *resoluto jure dantis;* yet, if he take no right, and so in no hazard, but only receives the money for his own payment, even though he had refused an assignation, fearing the invalidity of the right, yet receiving payment or security, the intromitter thereby is absolutely secure. And though this general law and custom of nations hath an exception where the intromission is without a cause onerous; for then, by another common principle of law, *nemo debet cum aliena jactura locupletari;* and therefore, the intromitter with current money or by precept, is liable *in quantum lucratus est*, but no further, whereof there are innumerable examples; and there is no odds betwixt a party's delivering of current money and causing it to be delivered by his precept, which only saves the trouble of twice numeration; and, it were against all sense to imagine, that the sparing this pains would so far alter the

ease, as to make the intromitter liable to restore, if the title were found invalid, upon which the money arose. 2*do*, There cannot be here pretended any *mala fides* of the intromitter, who was a pupil. It was *replied* for the pursuer, That the defence ought to be repelled, because we are not here in the case of money delivered in specie, which only passeth and is current because it is distinguishable from other money; but, if it were known that the money belonged to another, that other would have right, but especially if there were *vitium reale* affecting the money, as if it were *res furtiva* or *rapta*, which follows it through all singular successors if it can be known; and here there is *vitium reale*, this money being taken from Bramford by force, and without any just ground, which was sufficiently known to Hopetoun procurer of the warrant, who, as he procured the warrant for a pupil, so his knowledge must be effectual against the pupil. And albeit current money intromitted with, might be secured, yet here there was no current money, the property whereof belonged to Bramford, but the right of wadset, *jus dominii et obligationis*. 2*do*, Albeit intromitters in this way could be secure, yet Hopetoun is liable by his own obligation for the Earl of Errol and other debtors, if they had not been liberate by the act of Parliament, in regard of the securities taken by them from the intromitters, they could not have been liable, for there is no exception as to them that could be relevant; and in their case, there is no exception from the general rule, *quod meum est sine me auferri nequit*; for there the pretence of commerce and current money could not be alleged; there were only one exception in that case *rei judicatæ*, by a sovereign authority, that were not reducible upon iniquity, in which case *res judicata habetur pro veritate, et justitia præsumptione juris et de jure*, and so *quod meum est sine me auferri potest*, which cannot be here pretended; because the authority of the Parliament 1644, which forfeited Bramford, being in itself null, as not called by the King's writ, is also declared null by the act rescissory; and so the decreet of forfeiture following thereupon falls in consequence, and is not only reducible upon iniquity, but null for want of authority; neither could the debtors allege payment made *bona fide*, because they were most conscious of Bramford's right, and secured themselves against the same by bonds of warrandice; all they did or could pretend, were, that they paid of necessity to an authority which they could not resist, which is not relevant; for, in all debts, *periculum est debitoris*; and though it might seem hard and unfavourable that they should be forced to pay twice, yet favour and law are altogether distinct; and they were as favourable, if, after the money was received from Bramford it had been lost by shipwreck, or had been stolen or robbed, or forced up by the eruption of an enemy; which yet could have been no defence *quia periculum est debitoris*, as to the principal sum, though public calamity might abate the fruits or annualrents. It was *duplied* to the *first*, That the privilege of *res furtiva* is peculiarly introduced by the Roman civil law, and is drawn in consequence to no other case, and holds not with us, where things bought in public market, though stolen, are safe; neither can it have

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No 61. any inference; for a public power being possessed of authority for many years, parties must be in *bona fide* to think, that what was done by such an authority for a cause onerous could not be questioned; and, that in the case of alterations of public authority, the law and custom of nations secures such acts; and if we had no act of indemnity, the law of nations would secure us for the most part; for it cannot be thought, that all the monies intromitted with for twenty years time, should revolve: And as to the bond of warrandice, it imports no more than the receipt of the money, which would infer warrandice if the receiver had no right.

The Lords repelled the defence in respect of the replies, but were not special by which of the replies; some being of the opinion, that the intromission by precept could not infer restitution, if *ex causa onerosa;* and others, that the debtors could not have defended themselves, and that so the intromitters are liable, not as intromitters, but by their bond of relief, which seems the clearest ground, and can least be drawn in consequence upon intromitters by precept or otherwise, for an onerous cause.

Stair, v. 2. *p.* 40.

*** Gosford reports the same case:

The saids Ladies (viz. Lady Bramford, and Lady Forrester her daughter) and Lord Forrester having insisted against Kerse, as representing his brother, for whose use the Lord Hopeton had uplifted 23,000 merks of the money due by the Earl of Errol and his cautioners to the Earl of Bramford; it was *alleged*, That the act of Parliament restoring the Earl of Bramford could be no ground of a pursuit against Kerse, because his case was far different from that of the Earl of Callander, 20th December 1671, *voce* Homologation, who obtained a precept from the public for a gratuitous service; whereas the Laird of Kerse was a true and lawful creditor to the public, by raising money for their use, upon his private bonds and security, and by lending money upon bonds granted by several persons in *anno* 1641, and preceding years, which he was forced to give up to the public, and in lieu and place thereof did receive precepts upon the general commissary, which being a most onerous cause, he was not bound to take notice to whom the money belonged for which he had precepts; but it was enough to him that the Earl of Errol's cautioners, or Kinnoul's friends, who were bound for them, did voluntarily transact and make payment, so that he was in the case of delegation; and by the law, when a debtor does delegate another debtor to him for payment of his true creditor, if the person delegated voluntarily gives bond and makes payment, he can never thereafter seek payment or repetition; so that the public having recovered sentence against the E. of Errol and his cautioners, constituting them their debtors, as they might have uplifted the same and paid it to Kerse, in which case Bramford could never have repeated the same; so Kerse receiving surety and payment,

which was no prejudice to Bramford, was in effect in that same case as if he had received from the general commissary; and he being but a young person under tutory, and not knowing to whom the same belonged, can by no law be obliged to refund; and if such actions were sustained, it would obstruct all commerce and trade with the public, or those having power for the time, which were of a dangerous consequence.—It was *replied*, That the Earl of Bramford being restored *per modum justitiæ*, and the act of Parliament declaring all intromitters with his estate liable to refund the same, his monies never having been brought into the public, but remaining in the Earl of Errol's hands upon an heritable infeftment, could never be taken from him, seeing it is a maxim in law *quod meum est sine facto meo auferri nequit;* neither can the defender plead to be in the case of a delegation, where a debtor, being delegate, makes voluntary payment; seeing neither Bramford nor the Earl of Errol, or his cautioners, did ever voluntarily become debtors to Kerse or the Lord Hopeton for his use; but on the contrary, decreets were most unjustly given against them, and they forced to make payment for eschewing the danger of an usurping power who were ready to sease their estate. And as to the inconvenience of hindering all commerce with the public, it is of no weight; seeing the furnishing of usurpers, and those who are authors of rebellion, ought not to be favoured; and the encouragement of loyal persons, who have suffered for their loyalty by restoring them against their unjust forfaultures, is of far greater and public concernment. No 61.

THE LORDS did repel the defences, and decerned for the whole sums intromitted with; and found, That a forfaulted person restored *per modum justitiæ*, is in that same condition as if he never had been forfaulted, and consequently, all orders or assignments by the public could give no right to any person to take away his estate, albeit he was a true and lawful creditor; and that the monies never being paid to the public were not *res fungibilis;* nor could the payment be called voluntary, there being a decreet given, against which Bramford nor his creditors could never help themselves, and that the public good was more concerned that loyal subjects should be indemnified, than that those who have commerce with usurping powers should be satisfied out of other men's estates, which they knew to be such as appeared by the bond of warrandice granted by Hopeton to the Earl Kinnoul's friends, who did pay the monies.

Gosford, MS. p. 226.

*** Fountainhall reports the sequel of this case:

1697. *February* 18.

THE LORDS advised the debate in the reduction, Sir A. Hope of Kerse against Mr Ruthven's sisters, and Murray of Spot, for his interest, and for repetition of 23,000 merks his father had received of the Earl of Bramford's money, (when he stood forfeited in 1645,) on a precept from the Exchequer, for payment of fees and other debts the public then owed him, and which the Lords, in 1672,

No 61. had ordained Kerse to repay. He, since the Revolution, obtained a remit from the Parliament to the Lords to review and recognosce that decreet, without regard to its being *res judicata*, and to consider its grounds, whether it was *bene* or *male judicatum;* without which dispensation the Lords could not reduce their own nor their predecessors decreets upon iniquity. And no informations having been given in for Spot, the Lords proceeded, and found it was unjust to decern him to restore that money he had received *bona fide* and for an onerous cause, and he was not to regard whether it was Bramford's or not; seeing, if he had not got payment out of this fund, he would have got it out of another, *et qui suum recepit condictione non tenetur.* Some were of opinion there was a hardship in the Lords' sentence in 1672, decerning Kerse not only to refund to Bramford's heirs the principal sum, but likewise the annualrents; but the Lords this day reduced the decreet *quoad* both; several of their number being unclear.

See this case fully debated in Stair's Decisions, 9th January 1672, (*supra,*) and in Sir George M'Kenzie's Pleadings.—One of the grounds insisted on by Kerse was, that Bramford's restitution in 1661 did not bear expressly *per modum justitiæ;* but though it had not these precise words, yet it had the equivalent, that justice required he should be restored, all his crime being his appearance for his Prince in the late troubles.

On the 22d July 1697, the Lords having again advised this case, inclined to find Kerse behoved to condescend he was a creditor to the estates for an onerous cause; and allowed either party to prove before answer; Spot, that it was but a gratification; and Kerse, that the cause was onerous. And, on the 15th February 1698, on advising that probation, they found it proven; and so assoilzied Kerse.

Fountainhall, v. 1. *p.* 768.

No 62. 1695. *February* 8. Bailie of Jerviswood *against* The Duke of Gordon.

A forfeiture having been rescinded by a special act, it was found, that the donatar, though possessing *bona fide*, was bound to make restitution to the heir of the rebel.

The Lords repelled the first defence against the title, in regard he was both executor and heir served, and his not being infeft was through the defender's fault, who being his superior refused to enter him, and so could never obtrude that defect. As to the *second*, anent his restitution of the bygone rents, it was founded not on the general act rescissory in 1690, but on his special act; and the Lords repelled the allegeance, that as *bona fide possessor fecerat fructus consumptos suos*, by virtue of a law then standing; for the special act proceeding upon nullities in his trial, and the probation adduced against him by witnesses, who were *socii criminis* unpardoned, and so under the terror and impression of death, they thought this sufficient to interrupt the Duke's *bona fides*, though others called this *durus sermo*.