

tain bar to the appellant to present any other during Mr. White's life, for otherwise the reservation imported nothing.

The appellant seems to be too hasty in praying that his right to present, and power to dispose of the profits during the vacancy might be declared and affirmed; for that with submission could not be done, even were the interlocutors complained of reversed; for it will still remain a question, if the appellant, (were his right of patronage established) have duly executed that right, and regularly presented. That question never was before the Court of Session, and is still open and undetermined; and so long as that remains a question, the appellant cannot pretend to have any right to dispose of the vacant stipends, because it does not, and cannot, appear there is a vacancy, till that other question be determined.

Judgment,
18 April,
1721.

After hearing counsel, *It is ordered and adjudged, that the said interlocutor of the 19th of February 1720, and so much of the interlocutor of the 6th of December as is contained in these words, "with this quality, that his right of presentation cannot take place during Mr. White's lifetime," and the interlocutor of the 30th of December 1720 in affirmance thereof, be reversed.*

For Appellant, *Rob. Raymond. Tho. Kennedy. Wm. Wynne.*
For Respondent, *Ro. Dundas. Will. Hamilton.*

Case 82. The Commissioners and Trustees of the
Forfeited Estates, - - - *Appellants;*
Mr. David Erskine of Dunn, one of the
Senators of the College of Justice, - *Respondent.*

19th April 1721.

Compensation against an Assignee.—Forfeiture for Treason.—A bond of Lord Panmure's was conveyed to an onerous assignee on 21st April 1716; by an act passed on 7th May 1716, his lordship was attainted of treason from November 1715: the holder of the bond, in January 1717, acknowledged upon oath, that he had purchased in April or May 1716, from Lady Panmure, as her husband's attorney, a quantity of grain, and had paid her the price: the trustees for forfeitures found that the bond was compensated against the assignee; and that an arrestment used on 9th May 1716, and a horning signeted on October thereafter, were no sufficient intimation: bus their judgment was reversed by the Court of Delegates, and such reversal affirmed upon appeal.

BY an act of 1 Geo. 1. which received the royal assent on the 7th May 1716, James Earl of Panmuir was attainted of high treason, from the 13th of November 1715, and his estate was vested in the appellants for the use of the public from the 24th of June 1715.

In

In June 1717, the respondent entered a claim before the appellants, upon the Earl of Panmuire's estate for the sum of 5000 merks, with interest, since Candlemas 1715, as assignee of a bond granted by the said Earl of Panmuire. The circumstances as stated by the respondent were, that the earl having borrowed from George Dempster, merchant in Dundee, the said sum of 5000 merks, the earl, for repayment thereof, granted Dempster his bond on the 5th of February 1715; and on the 21st of April 1716, Dempster, in consideration of the respondent's paying to him the principal and interest then due upon the said bond, assigned the same to the respondent; who thereupon arrested the rents in the tenants' hands, on the 9th of May 1716, and a horning was signeted the 26th of October thereafter.

To this claim, the appellants objected that Dempster, the assignor, had, upon oath before the appellants on the 24th of January 1717, acknowledged that in April or May 1716, he had bought from the late Countess of Panmuire, who was factrix for the earl, wheat and meal, to the value of 375*l.* 10*s.* 9*d.* Scots; and that he paid the price thereof to the Countess, and got her discharge for the same: that this payment, being after the forfeiture, was in Dempster's own wrong; and that consequently he stood debtor to the appellants in as much as would compensate the bond claimed on.

The appellants, by their decree in October 1719, "found that
 " no legal intimation was made of the said assignation by the said
 " George Dempster, to the trustees, preceding the date of the
 " said Dempster's deposition made the 24th of January 1716-17,
 " upon record in this court, and now read, whereby he acknow-
 " ledges that he, the said Dempster, received the sum of 375*l.*
 " 10*s.* 9*d.* Scots, out of the said estate, for crop 1715, and
 " other very considerable sums; and he not having yet accounted
 " to the commissioners and trustees for the same, the horning
 " produced for the claimant, though bearing date before the
 " time of the cedent's said deposition, yet is after the attainder
 " of the said late Earl, and no charge was used thereupon; and
 " therefore find the said sum of 5000 merks Scots money, with
 " interest thereof, so assigned by the said Dempster to the
 " claimant as aforesaid, to be extinguished by compensation, to
 " the extent of the said sums intromitted with by Dempster;
 " and do therefore dismiss the said claim, in so far as the same is
 " compensated as aforesaid, together with the penalty contained in
 " the said bond, which penalty is hereby absolutely disallowed:
 " but as to the residue of the said debt not thereby compensated,
 " the said commissioners and trustees do find that the same is a
 " just, true, and lawful debt, to which the said claimant is justly
 " entitled, as a lawful creditor on the said estate."

Against this decree, the respondent presented his appeal to the Court of Delegates; and after a hearing of the cause, and memorials given in by the parties, the Court of Delegates, on the 23d of December 1720, "reversed the aforesaid judgment and
 " decree of the said commissioners and trustees."

Entered,
3 Feb.
1720-1.

The appeal was brought from " a decree of the Lords Delegates of the 23d of December 1720."

Heads of the Appellants' Argument.

It is an undoubted principle of the law of Scotland, that where the same person is debtor in a sum, and has a counter claim against his creditor for the like sum, that those claims are mutually extinguished by compensation, in the same manner as if each claim had been paid and satisfied by the person who was debtor in it; and consequently, granting it were true (which the appellants know not) that the 5000 merks pretended to have been owing by the late Earl of Panmuire to Dempster, formed a true and lawful debt, yet the public being now in the room and right of the late Earl of Panmuire, and Dempster having become debtor to the public for the rents of the estate of Panmuire, equal to the extent of his debt, levied by him without just title after the forfeiture, that debt was thereby extinguished by compensation, or payment out of the effects of the debtor, and could not after that be lawfully assigned to the respondent, or any other person whatsoever.

It was objected, that Dempster's oath was not a good proof against the respondent, his assignee, for an onerous consideration: but the oath of the cedent is a good proof in many cases, even in prejudice of the assignee. Such as, first, if the debt be rendered litigious, before the assignation, which is the present case; since by the forfeiture all the debts on the forfeited estate were made subject to a question, and claimants were put under the necessity of proving their debts to be true debts, otherwise they could not be allowed as a charge upon the estate. The oath of the cedent is likewise a good proof against the assignee, where the assignation is not completed by being lawfully intimated to the debtor in the method the law directs, which is likewise the present case; for the respondent's assignment never was intimated in a legal way.

It was objected also, that Dempster's oath must be taken with all its intrinsic qualities; and at the same time that he swears to the receiving of the grain, he swears he paid for it to the late Countess of Panmuire. But the paying for the grain is not an intrinsic quality: if there was any payment, it was a considerable time after; his oath is a good proof against himself, but it can be no proof for him. If he did pay it, it was an unlawful payment; for the law directs the profits of forfeited estates to be answered and paid into the receipt of exchequer, not to the wife of a forfeiting person.

The time of Dempster's intromission, and pretended divesting himself of this and other debts, happening so precisely about the same time, is a convincing proof of the contrivance entered into by the parties to cover the estate from the public. It signifies nothing what was the date of this simulate assignation, but only of the time of the legal intimation; and in this case there was no legal intimation before entering the respondent's claim. An ar-

restment

restment in the tenants' hands was indeed used after Dempster's intromissions, but that was no notice to those concerned for the public, who came in place of the forfeiting person: Letters of horning were afterwards obtained in the month of October 1716 against the debtor, the Earl of Panmuire, which looks yet more extraordinary, he being then undoubtedly attainted. And all such processses used against forfeited estates, are already by act of parliament, declared to be void, and of no effect.

Heads of the Respondent's Argument.

As the only foundation for this demand against Dempster is his own oath, so that must be taken altogether, which is very far from establishing him a debtor to the late Earl of Panmuire; for he only swears, that he, as a merchant, in the ordinary course of his business, purchased from the late Countess certain quantities of grain, and thereupon made payment to her of the agreed price. So what he bought was from the lady, and he has paid for what he so bought.

Though the act for attainting the said earl did by a retrospect attaint him from the 13th day of November 1715, unless he should surrender himself on or before the last day of June 1716; yet in fact this bargain was made by the Lady Panmuire, factrix for her husband, and the money paid to her before ever that act of parliament passed into a law (a): so that were the debt even in Dempster's own person, it were a great hardship indeed to oblige him who had once paid the money, for the purchase he *bonâ fide* made, to pay it over again. If the appellants have any demand, it is against the Lady Panmuire; and in fact, the appellants do charge her with this very sum.

Whatever might have been said, in case the debt had still been in the person of Mr. Dempster, yet that cannot militate against the respondent, an assignee for an adequate valuable consideration, without any manner of notice of this pretended demand, or title of compensation: and were it the case, that Dempster had by his oath established himself a debtor to the late Earl of Panmuire, yet to insist that that debt should compensate and extinguish a debt against a just assignee, who paid a valuable consideration for it, were introducing a great hardship indeed.

Besides, compensation is never allowed against an assignee, but where the debt is liquidated and established against the assignor before intimation of the assignment. Now this debt is not yet liquidated against the assignor, for it cannot be said that his oath liquidates the debt, because he swears that the debt is paid; nor can it be done without an action between Dempster and the appellants.

The assignment was intimated by raising and executing arrestments on 9th May 1716. Dempster's oath was not made till January 1716-17, and nothing is more certain in the law of

(a) The act was passed 7th May 1716; Dempster's oath speaks generally to the time of his transaction with Lady Panmuire, as in April or May 1716.

Scotland, than that diligence by arrestment is as sufficient an intimation of an assignment, as a personal intimation under the hand of a public notary to the obligor; and this was the most proper way, since the obligor was not to be found; and a horning was likewise signeted thereon.

Judgment,
19 April
1721.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed: and that the decree of the Lords Delegates in Scotland, therein complained of, be affirmed.*

For Appellant, *Rob. Raymond.* *Rob. Dundas.*
For Respondents, *Charles Erskine.* *Will. Hamilton.*

Case 83. William Duff of Dipple Esq; - - *Appellant;*
George Gordon of Glastirum Esq; - - *Respondent.*
Et e contra.

21st April 1721.

Real and Personal.—A disposition is granted by a father to his son of the paternal estate, burdened with all debts contracted or to be contracted by the father; in a question between an onerous purchaser of the said estate, and an assignee of two personal bonds granted by the said disponent, the Court found that the debts were a real burden upon the subject disposed; but their judgment is reversed.

Writ.—The writer of a bond is designed “Patrick Gordon, servant to Mr. Alexander Dunbar;” the Court of Session found this a nullity. Upon this point the House of Lords did not decide, but dismissed the appeal.

Homologation.—It was alleged that the grantor of the bonds had homologated the same by payment of interest, &c; the Court found that such alleged homologation did not hinder the onerous purchaser of the estates before mentioned, from questioning these bonds: upon this point also the House of Lords did not decide, but dismissed the appeal.

BY a contract, executed previous to the marriage between Sir Alexander Innes, and Mrs. Jane Rollo, in 1678, Sir Alexander bound himself to settle the lands of Coxtown, and other therein particularly mentioned, upon the heirs male to be procreated of that marriage; whom failing to his heirs male of any other marriage, with several other substitutions of heirs. And Sir Alexander afterwards in 1707, by a disposition reciting the said marriage-contract, conveyed the said lands to his eldest son George, the heir male of the marriage, with other substitutions of heirs, with and under the burden always of payment of all the lawful debts contracted, or to be contracted by the said Sir Alexander Innes, and particularly of the payment of his younger children’s provisions: all which debts and deeds the said George Innes becomes by his acceptation of the said right, tied, bound, and obliged to satisfy, pay and perform, as if they were specially set down, and in the same manner as the said Sir Alexander is bound and obliged therefore himself, with and under which provisions and conditions the right and disposition is declared to be granted and accepted, and no otherwise.

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