

1671. December 20.

The COUNTESS of BRAMFORD and the LADY FORRESTER *against* EARL of CALLENDAR.

THE deceased General Ruthven, Earl of Bramford, being forfeited by the Parliament 1645, there was an assignment granted by the Committee of Estates to the Earl of Callendar for payment of L. 40,000, that was appointed for Callendar by the Parliament 1641, for his service in the pacification betwixt the King and his people at the Birks near Berwick, when the Scots army was at Dunse, whereof the Earl was then Lieutenant General, to be paid out of the sums due by the Earl of Errol to the Earl of Bramford; and there being a discharge of the said sum delivered by the Committee to Callendar, he lifted the money and gave his discharge, obliging him to warrant the Earl of Errol and his cautioners. Thereafter, there was a decret at the instance of the procurators of the estate against the Earl of Errol and his cautioners, and those who had bought his land, and had undertaken Bramford's debts for payment of the sum due to Bramford, being 120,000 merks principal; and thereafter, in *anno* 1647, Humbie, General Commissary, gave a discharge of the whole sum, bearing L. 40,000 paid formerly to Callendar as a part. The King and Parliament 1661, rescinded Bramford's forfeiture, and restored him in way of justice, but the act was stopped from being extracted till the last Session of Parliament 1670, and then it was appointed to be extracted of the same date as it was first pronounced. Bramford having made a right of this sum to his Lady, and to his only child the Lady Forrester, they pursue the Earl of Callendar and others, for payment of the said sums intromitted with by them; and insisted in the first place against Callendar, who *alleged, imo*, That the libel was no ways relevant, concluding against him as intromitter to repay, which would necessarily infer, that all intromitters with the monies belonging to persons unwarrantably forfeited, and restored by way of justice, should be liable therefor, which is without just ground; for, *imo*, The money belonging to forfeited persons, being a fungible, if it come to the hands of any party *bona fide*, and for a cause onerous, they are absolutely secure, otherwise all commerce among men might be interrupted; and those who received money upon just accompts might become diffident, whether that money did come to the party who delivered it upon a just and secure title; but, the favour of commerce hath been so effectual with all civil nations, that no man is obliged to question the title of any that delivers money; so that if the money in question had been in the hands of the Estates or General Commissary, and had been paid out to the defender, or any other party upon an onerous cause, for which they were obliged, though that were the Earl of Bramford's money, he was not obliged to know it, nor restore it, for in this a forfeiture rescinded hath no specialty more than any other colourable title; as if a party obtained gift of bastardy or *ultimus haeres*.

No 25.

A person was by statute restored to his estate, which had been unwarrantably forfeited. His taking possession was no homologation of claims, which had arisen in consequence of the forfeiture.

No 25. and thereupon recovered sums, and did deliver the same to any third party for an onerous cause, though an heir should be thereafter served, and the gift found void, the third party receiving the money *bona fide ex causa onerosa*, were free ; or if an heir served, or a party obtaining sentence, should pay money recovered thereby, though the service or sentence should be reduced as most unjust, and without all ground, a third party receiving it *bona fide* for an onerous cause, would be secure. *2do*, Though such sums were not actually delivered to the parties having these defective titles, but were established in their persons by sentences, having *paratam executionem*, and by them uplifted by precepts directed to the debtors to answer any third party for an onerous cause, that party is not obliged to know or enquire the right of him that gave the precept, but is to him in the same way as ready money ; and so in this case, the defender being creditor to the public for his service, getting payment either by the General Commissary or Estates, or their precepts, though their right cease, and the pretence thereof unwarrantable, yet he is secure, and was not obliged to enquire whether the money was theirs *jure* or *injuria* ; otherwise not only all the General Commissaries, but all that received money from them during the troubles, should be liable to restore, if simple intromission were sufficient. The pursuer *answered*, That albeit it be true that *numerata pecunia* be a fungible, and if it be delivered by the haver to any party *justo titulo*, the receiver is not liable, because it is impossible to distinguish or know current money whose it was, yet there is no other interest to secure the intromitter, who if he knew that it was *pecunia obsignata* or *furtiva*, and the very individual species, that it did not belong to the deliverer, he would be liable ; but there is no such thing in this case, for Callendar received assignments from the Committee of Estates to this sum, before any sentence against the debtors ; and, it is beyond question, that though a party for a most onerous cause, if he take assignation or other right, the same will fall in consequence with his author's right, *resoluto jure dantis*. *2do*, Callendar cannot pretend *bona fides*, who could not but know, and was obliged to know, that Bramford was most unjustly forfeited, not for any act done in Scotland, or against Scotland, but for his assisting the King in England, which had no pretence of justice, even upon the principles of that time, nor it cannot be called a cause onerous, being a gratification to him for an unwarrantable and unnecessary cause.

THE LORDS repelled the defence, in respect of the libel and replies foresaid, which they found proven by writs produced.

The defender further *alleged* absolvitor, because the Earl of Bramford was restored in *anno* 1647, with express provision, that there should be no question as to the sums libelled, which the said Earl did homologate, in so far as by virtue thereof he did enter to the possession of his estate. It was *answered*, That though he had entered to possess his estate, that could import no homologation of any other thing in the act, which was unwarrantable and several, for homo-

logation must import a free consent, which cannot be understood to be by the yielding to a power wherewith the Earl could not be able to controvert.

THE LORDS repelled this defence.

The defender further *alleged* absolutor, because he and all who acted in the time of the troubles are secured by the act of indemnity, by which no intromitters with public money are countable for public money, but only commissaries and collectors who had not made accompt. It was *replied*, That the act of indemnity contains an exception of preceding acts and sentences of Parliament. *Ita est*, This act rescinding the Earl's forfeiture, is anterior to the act of indemnity.

THE LORDS repelled this defence in respect of the reply, and did also repel a defence founded upon an act of Parliament 1662, appointing L. 15,000 to be paid out of the fines to the Earl of Bramford's successors, and in case the same were so paid, appointing the intromitters to be countable to the treasury, except Callendar and Kinghorn; in respect that that act was conditional, and took never effect as to the payment of the L. 15,000, and did bear, that if the L. 15,000 were not paid, access should be had both against the debtors and intromitters. See No 61. p. 4741.

Stair, v. 2. p. 29.

* * * Gosford reports the same case :

THE Earl of Bramford having assigned his lady and daughter to the sums of money due to him by the Earl of Errol, and his cautioners, for which he had an heritable infestment of the Lordship of Errol, did pursue the Earl of Callendar for payment of L. 40,000 of principal, intromitted with by him, with the annualrents since his intromission, *super hoc medio*, that albeit, the Earl of Bramford was forfeited by the Committee of Estates in *anno* 1647, yet the forfeiture being now rescinded by act of Parliament 1661, *per modum justitiæ*, and he restored to his whole estate belonging to him the time of the forfeiture, and by an act of Parliament 1670, the Earl of Errol, and his cautioners, who were debtors, being declared free, the whole intromitters with Bramford's money are made liable to refund payment of the principal, because the Earl of Bramford being forfeited by the authority for the time in being, and his money advanced to be paid into the public, the defender's intromission being by warrant of the Committee of Estates, whose money it then was, the defender was not obliged to take notice to whom it belonged; and money being *res fungibilis* of its own nature, and subject to change and permutation from hand to hand, a third party, who receives the same, is not obliged to answer whether it was justly or unjustly uplifted by the public; but the public being debtor to Callendar for his service, which was a just and onerous cause, he was in *bona fide* to take a precept from the General Commissary, and to transact with him, by taking assignation to the sums of money due by the Earl Errol, which being

No 25. uplifted, and spent, and consumed, no law can make the intrormitter liable, which were to destroy all trade and commerce. Likeas all lawyers who write upon that subject, viz. Clarus in his 78th question, and Farmaceus, and others, who treat upon that title, *De confiscatione bonorum*, and of restitutions *per modum justitiæ*, do all agree, that the goods forfeited being extant, may be repeated *rei vindicatione*; but if they be consumed after intrormission by a third party, they are not at all liable for the value thereof, and the public, who did forfeit the person restored, in justice is only liable for satisfaction; far more when moneys are uplifted by the public warrant, which in effect is the deed of the public, seeing *fictione brevis manus* is alike in law, when, by a warrant from the public, a third person uplifts sums of money which the General Commissaries are ready themselves to uplift, as if they had actually uplifted the same themselves; *quo casu* these sums of money being paid out by their order for an one-rous cause, *intuitu* of a bargain, or merchandize, or for payment of a just debt, never any lawyer did imagine that the receiver of these sums can be questioned. Likeas, by our law, where a person being retoured heir, or confirmed executor, upon any other title, recovers decreet, and uplifts sums of money by virtue thereof, which he applies for his own use, and gives out the same to a third party, albeit all those titles and decreets be reduced, and it be found that they had no right to uplift the same, they who receive these moneys can never be made liable to refund, but those persons only whose titles are found null and reduced. And, *lastly*, it was *alleged*, That, by the late act of indemnity, all persons, who acted by virtue of the standing powers for the time, are indemnified, and secured as to all intrormissions or other deeds which are not particularly excepted. It was *replied* for the pursuers, That, notwithstanding of all these reasons, the defender ought to be found liable, *ist*, Because law and lawyers having made the distinction betwixt restitutions of forfeited persons *per modum gratiæ* and *modum justitiæ*, make the great and only difference betwixt them to be, that in restituting, by way of grace, a third party, who acquires *bona fide* a right either to lands or moveables, is not prejudged by the restitution; but, where it is *per modum justitiæ*, the party restored is in that same condition as if he had never been forfeited; and as to all his estate, consisting either in land or moveables, or in securities or bonds, which are *nomina debitorum*, hath that same title to pursue *rei vindicatione* by a personal action, all intrormitters and possessors, as he might have done before the forfeiture; neither can it be said that the defender is here in the case of *res fungibilis*, or *pecunia numerata*, and paid in cash either really or *fictione brevis manus*, seeing the Earl of Bramford had real security by indentment out of the Earl of Errol's estate, which was never required by the public as coming in his place; but, on the contrary, the Earl of Callendar did accept of a right from the public, and transacted with Errol's cautioners, from whom he got a new security for that same debt, and did assign the same to his own creditors, who received payment of the saids sums, so that the case is far different from that where the public, or their Gene-

ral Commissaries, do actually uplift sums of money, and give out the same for commodities bought by them, or for payment of their debt: Neither can the act of indemnity be any ground of a defence, seeing, by two several acts of that same Parliament, the Earl of Bramford is restored *per modum justitiæ*, and the intromitters with his means and estate declared only liable to refund the same; and the Earl of Errol and his cautioners declared free from all payment.

THE LORDS having considered the whole debate in point of law, after a most contentious dispute, they declared the Earl of Bramford to be liable in payment of the principal sum, being moved thereto by these reasons, specially 1st, That the defender could not plead the case of *res fungibilis et pecunia numerata*, Bramford's debt being secured by an heritable infeftment, which was never loosed by requisition, nor the moneys uplifted; so that the defender knowing the nature thereof, and that it was a debt due to Bramford, who was only forfeited for his loyalty and adherence to the King, that being the only cause of the sentence of forfeiture which he was bound to take notice of, and that it might thereafter in law be questioned, as being an unjust sentence, and therefore ought to have craved payment of his debt from the public, for his service or debt. another way, and so they found him liable; 2^{dly}, If such conveyances and rights were sustained as flowing from the public, who, for the time, were a standing power and judicatory; it were a compendious way to enrich all those who carried on a rebellion against their King, and to ruin his faithful subjects; being by transaction and legal execution, it was easy to make the debtors to the forfeited persons, or their cautioners; to make payment of these debts, they having no remedy in law against the usurpers of lawful authority, who have the only power for the time, and are the authors of their distress, from whom no justice can be expected. 3^{dly}, They found, that the defender was in the case of an assignee by an heir, or otherwise, having a legal title standing, who had pursued, and upon decret recovered payment of the debt due to his author, *quo casu* his author's title being reduced, albeit he did acquire a right thereto *bona fide*, that would not defend him from repayment of the sums uplifted, as *bona fide percepti et consumpti*, by our law, or by any other, which make a third party only free where a party having no right, or by violence or rapine, having intromitted with a sum of money in contemplation of a bargain for merchandize, or any other contract, he gives the said money to one who is altogether innocent, and knows nothing how the same was acquired, but being in *bona fide*, makes use of these moneys for his own lawful affairs. 4^{thly}, These acts of restitution *per modum justitiæ* being so special, and statute in that same Parliament wherein the act of indemnity is made, with which they are inconsistent, the LORDS found, that the pursuers had thereby as valid a right as if they had been inserted as special exceptions in the act of indemnity.

Gosford, MS. No 427. p. 215.