There is no evidence of the leaſt unfair dealing in the whole tranſaction; the reſpondent repreſented the circumſtances of the eſtate according to the beſt of his knowledge and belief: if the appellant was not ſatisfied with theſe accounts, he was at freedom to have inquired more narrowly, which if he neglected, he has himſelf to blame, but that can be no ground for avoiding the tranſaction.

It was optional to the reſpondent to conſent to his daughter's marriage with the appellant or not, as he thought fit, and upon ſuch terms as he judged reaſonable, conſidering his own circumſtances; and if it was true that the appellant would not conſent to the marriage, and give the tocher with his daughter, that he actually gave her, without the appellant's quitting and making over any claim he might have had to the life-rent of the daughter's eſtate, there was no fraud in this, but a fair tranſaction. The appellant himſelf, in a petition given in to the Court in the name of his wife, does acknowledge in ſo many words, that he neither did allege nor prove any concuſſion or force uſed againſt him, though he had alleged and proved concuſſion uſed againſt his wife.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that ſuch part of the interlocutory ſentences or decrees, and the affirmances thereof as are therein complained of, be affirmed.* Judgment, 3 Feb. 1720-21.

For Appellants, *Rob. Raymond. Will. Hamilton.*
For Reſpondent, *Ro. Dundas. Tho. Bootle.*

The actions between theſe parties appear to have laſted upwards of 20 years.

John Paterſon, eldeſt Son and Executor of John Archbiſhop of Glaſgow, deceaſed, *Appellant*; The Commiſſioners and Truſtees of the Forfeited Eſtates, - - - *Reſpondents.*

Caſe 79.

20th *March* 1720-1.

Forfeiture for Treaſon.—1 *Geo.* 1. *c.* 20.—*Perſonal debt claimed on a forfeited Eſtate.*—The acts relative to forfeiture for treaſon having ſalved the rights of creditors innocent, dutiful, and loyal; a claim on a forfeited eſtate, by virtue of a perſonal bond, (which had been given up in the inventory by the claimant when confirmed to his father) is made by a perſon who had been confined in priſon upon ſuſpicion, but liberated without trial; this claim is rejected by the truſtees and Court of Delegates, but their judgment is reverſed.

IN February 1681 Charles Earl of Marr, deceaſed, as a principal, and George Earl of Panmure deceaſed, as cautioner, granted a bond to the appellant's father for 2000 merks Scots.

In

In September 1700, James late Earl of Panmure, attainted, executed a bond of corroboration of the former, obliging himself to pay the sum therein contained to the appellant's father, with interest from that date.

After the archbishop's death, the appellant was confirmed his executor, and exhibited an inventory of all his effects, wherein, inter alia, was mentioned the bonds in question, their dates, and the interest then in arrear; and this inventory was recorded in the commissary court-books, where the testament was confirmed.

John late Earl of Marr, son and heir to the said Earl Charles, and the said James late Earl of Panmure being by act of parliament attainted of high treason, the appellant, in pursuance of the act
1 G. 1. c. 50. 1 G. 1. c. 50. intituled, "*An act for appointing commissioners to*
4 G. 1. c. 8. "*inquire*," &c. and of the act 4 G. 1. c. 8. intituled, "*An act* "*for vesting the forfeited estates in trustees to be sold for the use of* "*the publick*," entered his claim before the respondents upon the said bonds, to obtain satisfaction of the said sum of 2000 merks, with the interest thereon then in arrear, out of the estates of the said attainted earls of Marr and Panmure.

After hearing counsel for the appellant, and consideration of memorials in writing given in on both sides, the respondents, on the 31st of August 1719, pronounced judgment, by which they found, "that the foundation of the claim being a personal bond, "not upon record before the attainder of the debtor attainted, "the claimant has no right to the principal sum and interest "claimed, either by the laws of Scotland before the Union of "Great Britain or since, unless he had continued in peaceable "and dutiful allegiance to his majesty during the late unnatural "rebellion: and therefore that the claimant, before his claim "can be affirmed, ought to produce testimonials either from "justices of the peace, or deputy lieutenants of the county where "he resided, or from other persons of credit in his neighbour-"hood, bearing that to the best of their knowledge and informa-"tion the claimant had continued dutiful and loyal to his ma-"jesty during the said rebellion. And the claimant having "insisted by his counsel that he ought to be presumed innocent, "and the commissioners and trustees having further considered of "the said memorial relative thereto, are also of opinion, *primo*, "that the bond, on which the claim is founded, not having been "recorded before the treason and attainder of the debtor, it is
1690, c. 33. "not saved even by the act of parliament 1690; and that it can-"not be binding against the public, (notwithstanding of its having "been confirmed in a testament prior to the said attainder,) in "respect that such confirmation, being only to establish a title of "succession, could give it no force, nor be the foundation of any "diligence or execution against the debtor, without the said "bond's being entered in the proper record, and its being other-"wise valid in law. *Secundo*, That whatever was the extent of "the said act 1690, as to saving of personal debts from being "extinguished by the attainder of debtors, yet that the said actions "from whence a want of duty and loyalty might be inferred,

" cannot be preſumed, but muſt be proved by a regular and legal " trial; are of opinion that a preſumptive evidence of duty and " loyalty, founded on teſtimonials, ſuch as are above mentioned, " may eaſily be obtained without any trouble or proof of parti- " cular actions by all who, according to the moſt favourable " opinion, or the moſt extenſive charity, are to be reckoned to " have continued dutiful and loyal: and that the criminal actions, " becauſe the weight of the punihment which attends the proof " of them, as to criminal and penal effects, require a very ſtrict " and regular proof by a jury of peers before they can have any " penal effect; yet as to a civil effect they may and ought to be " preſumed, where teſtimonials (ſo eaſily obtained by the really " innocent) cannot be obtained; eſpecially in a caſe where there " is ſo great notoriety, as is in that of the claimant, it conſiſting " with the knowlede of many thouſands that the claimant was " taken priſoner at Preſton with the others then in rebellion, and " was carried to London, where he lay in priſon till by the cle- " mency of the government he was delivered from the puniſh- " ment of rebellion and treaſon. Upon all which the ſaid com- " miſſioners and truſtees do find, that the claimant is not entitled " to the benefit of the act for encouraging all ſuperiors, vaſſals, " &c. and do therefore diſallow of the ſaid claim; and the ſame " is by this Court diſmiſſed accordingly."

Againſt this decree of the reſpondents the appellant preſented his appeal to the Court of Delegates (*a*) eſtabliſhed in Scotland; the Lord Advocate made anſwers to it; and after a hearing of the cauſe, and conſidering memorials for both parties, the Court of Delegates, on the 20th of December 1720, by a majority of one, " ordered and adjudged, that the decree complained of be affirmed, " and the ſaid appeal diſmiſſed."

The appeal was brought from "a decree of diſmiſſion of the " 31ſt of Auguſt 1719, made by the commiſſioners and truſtees " of the forfeited eſtates, of the appellant's claim, put in before " them, and an affirmance thereof by the Lords Delegates in " Scotland the 20th of December 1720." Entered, 19 Jan. 1720-1.

Heads of the Appellant's Argument.

As every man ought to ſuffer for his own fault, ſo it is the higheſt juſtice, that no creditor ſhould ſuffer by the rebellion of his debtor, nor any thing be forfeited to the Crown but what the forfeiting perſon had *deductis debitis*; and therefore the appellant's claim being for a debt admitted to be juſt, it ought to have been ſuſtained, and the ſame decreed to be paid out of the eſtate of the debtors, which are admitted to be much more than ſufficient to ſatisfy the debts upon the ſame.

This rule ſeems more agreeable to the law of Scotland, by which all eſtates deſcending to an heir are ſubject to the payment of all

(*a*) This Court of Delegates was appointed by the act of parliament 4 G. 1. c. 8 to hear appeals taken to judgments of the commiſſioners for forfeitures. They conſiſted of five of the Judges in Scotland appointed by his majeſty.

debts,

debts, even thoſe by ſimple contract; and there ſeems to be the ſame reaſon, that the eſtates ſhould be equally ſubjected to debts in the hands of the Crown.

1690, c. 33. It is expreſsly enacted, by the act 1690, c. 33. that forfeited eſtates ſhall be ſubject to all debts whether real or perſonal. The words are, "*That all eſtates forfeited ſhall be ſubject to all real "actions and claims againſt the ſame to all true and lawful crediiors, "whether perſonal or real.*" This certainly comprehends the appellant's caſe. It is true, in one part of the act are theſe words, "*ſo as the debts be upon record, or diligence done thereupon;*" but as that exception or proviſo is not in that part of the act where the forfeited eſtates are ſubjected to all debts in general, and where its proper place was, if any ſuch reſtriction had been intended, ſo the words inſiſted on are inſerted in a place where no mention is made of *debts*, but *leaſes* to tenants, and before any thing is mentioned with reſpect to creditors, and the judges have always ſo conſtrued this act, and never thought recording neceſſary.

But if recording were neceſſary, that part of the law is ſufficiently anſwered by the claims being upon record in the Commiſſary Court, and the intention of the law was ſufficiently attained; becauſe it can have no other view than to avoid fraudulent demands. Now the record of this debt does as ſufficiently anſwer that, as if the bond had been regiſtered.

The act of the firſt of the king, *for encouraging all ſuperiors, vaſſals*, &c. enacts, "That no conviction or attainder ſhall exclude the right or diligence of any creditor remaining peaceable and dutiful for ſecurity or payment of any true, juſt, and lawful debt contracted before the commiſſion of the crime." The appellant's debt is entirely within this deſcription, and ſo far appears to be a true debt, that it is contracted, not between the forfeiting perſons and the appellant, but between the fathers of the forfeiting perſons and the appellant's father; it is not diſputed but the debt is ſtill owing, and no part of it paid.

Nor will it alter the caſe, that the reſpondents pretend, that the appellant does not come under the deſcription of this act, in regard he was not peaceable and dutiful, becauſe nothing of that is proved, nor any attempt made to prove it: a crime is never to be preſumed; but innocence is, till the contrary be proved.

The caſe of the appellant and other creditors is ſtill more ſupported from the diſtinction made by the legiſlature itſelf between the caſes of ſuperiors and creditors; in the firſt, they have in very diſtinct lines ſet forth the deſcription and character of ſuch as were to have the benefit of the privileges introduced in favour of ſuperiors, vaſſals, and tenants, in theſe words: "provided always, "that none of his majeſty's ſubjects, whether ſuperior, or vaſſal, "or tenant, ſhall have the benefit of this act, excepting ſuch who "being lawfully called out or required to join with his majeſty's "hoſt, in oppoſition to the ſaid Pretender or his adherents, ſhall "do the ſame, or who (not being ſo called out or required) ſhall "continue peaceable and dutiful to his majeſty." Thus the law having

having introduced a reward, and (which was purely such in favour of superiors) very reasonably excluded such as did not fall within the particular description; but they have made no such particular provision in the case of creditors, where they were doing justice rather than a favour. Nor can it be expected, that the appellant should bring any proof of his not having acted undutifully or unpeaceably, nor is it possible for him to prove it, unless he could bring evidence of every action of his life, during the whole course of the late unnatural rebellion.

It has still been looked upon as a hardship to inflict the least censure or suspicion on bare suggestion; but harder must be the fate of the appellant to be involved in the forfeiture of his debtors, and be deprived of his just debt, for no other reason but because he did not adduce a proof that every moment of the rebellion he was in the practice of such duties as are incumbent upon a dutiful subject, which is not only impossible, but has hitherto been thought unnecessary, since innocence and dutiful behaviour are always presumed. If this doctrine be established, that every subject must be presumed to be disaffected, if he cannot by undoubted vouchers shew the contrary, it is too obvious how fatal the consequence may be.

Heads of the Respondents' Argument.

According to the plain words of the proviso in the act 1690, no debt can be set up against the forfeiture, or charged upon the estate forfeited, but such as is *recorded by being registrate, or diligence done upon it*, that is, suit or process carried on against the debtor or his estate; neither of which was done in the appellant's case. And the mentioning the debt in a list of the defunct's debts at the time of confirming his testament is no registration of the debt, since the obligations themselves were not so much as produced in those cases; indeed, the executor commonly is not master of them, he gives up in the list whatever he suspects may be owing, sometimes debts that never were in being, and frequently debts that are extinguished or satisfied by payment.

If the appellant could have any benefit from this act, it would only save his claim as to the capital sum, but not as to bygone interests, feu-duties, and all other annual prestations, which are expressly excepted in the act, and declared not to affect the estates forfeited.

This act, 1690, being made only in favour of *creditors innocent and dutiful*, the appellant can have no benefit by it, who *himself* was in the *rebellion*.

But this act is not now the rule for judging in questions of this kind, after the act 7 Ann. c. 21., intituled, "Act for improving "the Union of the two Kingdoms;" by which the laws of England in relation to treason, in so far as may concern the nature of the crime, the form of trial, and the punishment, are extended to Scotland; and persons committing treason in Scotland are declared subject to the same pains, penalties, and forfeitures, that 7 Ann. c. 21.

perſons committing treaſon in England are ſubject to. From whence it muſt follow, that as eſtates in England are forfeited to the Crown, without being charged with debts merely perſonal, eſtates in Scotland muſt be forfeited in the ſame manner.

1 Geo. 1. c. 20. The act 1 Geo. c. 20., *for encouraging all ſuperiors, vaſſals*, &c., ſeems likewiſe to make a material alteration in the ſaid act 1690, (if that act 1690 can be underſtood as the appellant explains it); for this act 1 G. c. 20. provides only for the ſecurity of creditors remaining *peaceable* and *dutiful*, which ſuppoſes that a creditor not remaining peaceable and dutiful can have no claim of debt out of a forfeited eſtate.

The appellant contended, that he muſt be preſumed to be innocent, and that the lapſe of three years, and the act of grace did bar all probation of guilt. But ſince the appellant claims the benefit of acts of parliament introducing privileges to perſons peaceable and dutiful, contrary to the ſtrict nature of forfeitures, and beyond what was competent by anterior laws, he muſt bring himſelf under the deſcription and intent of thoſe acts, by giving ſome evidence of his remaining peaceable and dutiful. The lapſe of three years, and the act of grace free him only from the puniſhment of his own treaſon; they do not put him in the condition of a man who was never criminal; nor can they be conſtrued ſo as to afford him any privilege, thereby to hurt the public, and leſſen the effects of the forfeiture of the late Earls of Marr and Panmuire.

The appellant entered his claim, and was by law obliged to do it, both before the act of grace and the lapſe of the three years; but he was at that time incapable of entering any ſuch claim, not having remained peaceable and dutiful; and if the claim was bad at the time of entering it, and at the time theſe forfeited eſtates were veſted in the reſpondents for the uſe of the public, it is to be conſidered as if no claim had been entered at all: and no after-act of grace or lapſe of three years can give life to a claim which was dead and uſeleſs at the time it was entered, and the eſtates ſo veſted in the reſpondents.

Judgment, 20 March 1720-1. After hearing counſel, *It is ordered and adjudged, that the decrees of diſmiſſion complained of in the ſaid appeal be reverſed; and it is further ordered, that the appellant ſhall have a ſatisfaction for the principal ſum and intereſt due upon the bonds in queſtion out of the forfeited eſtates in queſtion.*

For Appellant, *C. Talbot.* *Will. Hamilton.*
For Reſpondents, *Ro. Dundas.* *Richard Weſt.*

On the printed Caſes, from which this report was taken, it is ſtated in manuſcript that a diviſion of the Houſe took place upon this judgment, the numbers being 21 to 11.