

Case 127. Major Thomas Cochrane - - - *Appellant*;
 Robert Lord Blantyre - - - *Respondent*.

4th April 1726.

Costs and Expences.—Trust bonds granted conditionally, if the grantor should procure two commissions held by the grantee, of which he then executed resignations, are reduced upon the ground, that though the grantor held the said resignations in his hands, he did not procure the new commissions in virtue thereof, but in consequence of other means and considerations: but the Court having refused the pursuer his costs, the judgment is reversed, and it is ordered that the Court do cause these costs to be taxed and ascertained and forthwith paid to the pursuer.

Appeal.—The pursuer having craved that the bonds might be delivered up to him by the clerk, but the defender having stated that he meant to appeal, and the Court having ordered the bonds to remain in process, and not to be delivered up without a fresh warrant, their judgment is affirmed.

THE respondent being captain in a regiment of foot, commanded by General Whetham, and fort-major of Fort St. Philip in Minorca, in 1715, upon the death of his elder brother Lord Blantyre, left that island and returned to Great Britain. On the 9th of March 1715, the appellant and respondent bargained together for the said two commissions; the respondent put into the appellant's hands two several *demissions* of the same; and the appellant granted two bonds to the respondent for the agreed price, both dated the 10th of March 1715. The bond for the company run in the following terms: "I Cornet Thomas Coch-
 " rane, of the Royal Gray Dragoons, forasmuch as Robert Lord
 " Blantyre has, by his demission of the date the 9th inst. demit-
 " ted and resigned in my favour his post as captain in General
 " Whetham's regiment of foot; therefore I hereby bind and
 " oblige me, my heirs and successors, to make payment to the
 " said Robert Lord Blantyre, his heirs, executors, and assignees,
 " the sum of 600*l.* sterling money, and that immediately and how
 " soon a commission shall be issued in my favour upon the afore-
 " said demission." The other, with regard to the fort-majority, was to the same purpose, with this variation, that the sum thereby to be paid was 300*l.* in six months after the issuing a commission in the appellant's favour for the said post of fort-major, upon the respondent's demission.

The appellant soon after did procure a company in the said regiment, not that which the respondent had held, but one vacant by the promotion of a Captain Cope, whereas a Captain Stammers succeeded the respondent in his company. For the commission obtained by the appellant he paid 800*l.* to Captain Cope; the new commission was signed by the king upon the 23d of January 1716; and the appellant, on the 25th of December preceding, got a commission to be fort-major of Fort St. Philip. But disputes arising between the parties as to the means by which the appellant obtained these two commissions, he brought an action against the

the respondent before the Court of Session to reduce the said two bonds, upon this ground, that the condition on which they were to be paid, was, that the appellant should obtain the commissions upon the respondent's demissions, and that such condition had not taken place. The respondent brought his counter action against the appellant for payment of the sums contained in the bonds; and these two actions were conjoined:

The appellant on his part stated, that the respondent had been ordered to his post by the governor of Minorca, and, upon his disobedience of orders, he was dismissed the service; that his company was given to a Captain Stammers in October 1715, and the appellant thereupon entered into a treaty for the purchase of Major Cope's company, for which he paid 800*l.*; and that he obtained his commission as fort-major, after the respondent had been dismissed the service, upon the solicitations of his own friends.

The respondent on the other hand, contended, that the appellant having got these two demissions from the respondent, and having soon after obtained his two commissions, it ought to be understood, that he got them by virtue of the two demissions; especially since the appellant never returned them, nor intimated to the respondent that they had not been accepted.

Various witnesses were examined in this matter; by the evidence of General Whetham, Major Cope, and Captain Stammers, relative to the captain's commission, it appeared, that Captain Stammers paid nothing for the commission granted to him, then an officer on half pay, and that Major Cope had received 800*l.* for his company. Relative to the commission as fort-major, Sir Anthony Westcombe, secretary to the then governor of Minorca, deponed, that he wrote two letters in 1715 to the respondent to attend the service in Minorca, in one of which was inclosed a letter from the governor, informing him that he would be dismissed if he did not return to his duty; and that accordingly about the 5th of June 1715 the governor wrote a letter to the then secretary at war, to move his majesty for a commission to the appellant as fort-major.

The Court, on the 17th of July 1725, " Found it to be presumed, that the appellant purchased the company with his own proper money, and that the respondent's proof did not take off that presumption: and found it likewise to be presumed that the appellant obtained the fort majority upon the respondent's being dismissed from the service, and not upon his demission; but reserved the consideration till next hearing how far the appellant was in *bona fide* to accept of a commission in the above terms, on the supposition that he was employed to negotiate the demission for the respondent."

After a hearing upon this reserved point, the Court, on the 22d of July, " Found it not relevant to make the appellant pay the 300*l.* contained in the bond relative to the fort-majority, that he did procure a commission to be fort-major gratuitously after the respondent was dismissed the service,
" even

“ even though he had the demission in his custody, and had
 “ not acquainted the respondent of the way he obtained the said
 “ commission; and, therefore, and upon the grounds in their
 “ former interlocutor, reduced the said two bonds, and decerned;
 “ *but refused to allow the appellant his expences.*” Of these ex-
 pences he had presented an account, amounting to 217*l.* 19*s.* 2*d.*
 sterling.

The appellant afterwards applied by petition to the Court, praying, that the bonds might be delivered up by the clerk in court to be cancelled by the appellant; but the respondent having stated in answer, that he intended to appeal to the House of Lords from the decree of reduction, the Court on the 30th of July 1725
 “ Ordained the bonds to remain in the process, and not to be
 “ delivered up to either party without a warrant.”

Entered,
 28 Jan.
 1725-6.

The appeal was brought from “ so much of an interlocutor of
 “ the Lords of Session of the 22d of July 1725, whereby they
 “ refused to allow the appellant his expences; as also from an
 “ interlocutor of the 30th of the same July.”

Heads of the Appellant's Argument.

It is against all law and reason to deny a party his full costs, when by the wilfulness of his adversary, he is put to extraordinary charge.

Expences and costs of suit are more particularly to be allowed, where the fact contested is presumed to be consistent with the knowledge of the party who contests it. Now it appears by the evidence of Sir Anthony Westcombe, that many months before the appellant had either of the commissions, the respondent was ordered by repeated letters in March and May 1715 to repair to his post, and acquainted that if he did not, he would be dismissed the service.

The refusal to give up the bonds upon the respondent's pretending that he purposed to carry on an appeal, is unprecedented, and may be attended with bad consequences: nothing less than an order of the House of Lords, upon a petition and appeal, duly served upon the respondent, can stay proceedings upon any judgment or decree of the courts of justice.

Heads of the Respondent's Argument.

As the appellant was pursuer in the action of reduction, the respondent had good reason to defend it, until at least it should be proved, that the appellant got the commissions some other way than in pursuance of the demissions given him by the respondent; and until it was proved, that the respondent was dismissed his majesty's service, and that his demissions were not accepted of, the proof lay upon the appellant. As he was to make out facts which the respondent had no knowledge of, and had no reason to believe, since the appellant did not inform him of them, it were unreasonable, though the proof had been ever so clear, to have charged the respondent with expences. But the proof is so far from being clear, that the Judges do not find the fact proved, but
 only

only that it was presumed to be as the appellant stated it, from the evidence which was brought. The decree in favour of the appellant reducing the bonds, is equal to a discharge; and so long as that decree stands unimpeached, no benefit can be made of these bonds against the appellant, and they are equally safe for both parties, when in the custody of the Court, and not to be delivered out without a warrant.

After hearing counsel, *It is ordered and adjudged, that so much of the interlocutor of the 22d of July 1725, as is appealed from, be reversed; and it is further ordered and adjudged, that the Lords of Session do cause the appellant's costs and expences to be taxed and ascertained; and that the same, when so taxed and ascertained, be forthwith paid to the appellant by the respondent: And it is further ordered, that the other interlocutor complained of in the said appeal be affirmed.*

Judgment,
4 April
1726.

For Appellant,	<i>Dun. Forbes.</i>	<i>C. Talbot.</i>
For Respondent,	<i>Ro. Dundas.</i>	<i>Will. Hamilton.</i>

Dame Margaret Houston, Widow of Sir
John Houston, Bart., Assignee and Executrix of Dame Helenor Schaw, the
Mother of the Appellant and Respondent, *Appellant;*
Sir John Schaw, Bart. - - - *Respondent.*

Case 128.
Forbes,
5 Jan.
22 June
1709.
19 July
1711.

20th April 1726.

*Proving the Tenor.—Presumption.—Mutual Obligation.—*In an action by a mother against a son for proving the tenor of a deed executed by her during her husband's life, it is found that the pursuer's having the disposition cancelled in her hands, and never ratifying the same judicially, presumed that it was cancelled by herself.

This cancelling dissolved the obligations of a bond, granted by her husband in consideration of said disposition.

In regard the pursuer's counsel did not deny that the cancelled deed was in her hands, and refused to give their oaths of calumny thereon, the defender is absolved.

*Costs and Expences.—*These interlocutors pronounced in 1711, are appealed from after the death of the pursuer, by her daughter and executrix, but are affirmed with 50*l.* costs.

IN the process between Dame Helenor, and the respondent, relative to the annuity of 8000 merks claimed by her, and the proving of the tenor of the bond, by which the same was granted to her, which are fully stated in the other appeal, between the present parties (No. 126 of this collection), the Court of Session, on the 19th of July 1711, "Found that Dame Helenor
" having the disposition cancelled in her hands, and never ratify-
" ing the same judicially, presumed in law, that it was cancelled
" by herself, and therefore that the obligations on Sir John by
" the