Cafe 81. Sir Alexander Cuming, of Culter, Bart. - *Appellant*;
The Moderator and Preſbytery of Aberdeen, and Mr. Wm. Abercromby, - *Reſpondents.*

18th *April* 1721.

Writ.—A deletion, and a marginal note ſigned by the grantor of a deed, neither of which were noticed in the teſting clauſe, being held to be null, the judgment is reverſed.

Clauſe—A miniſter, who was alſo patron of his pariſh, being deprived of his benefice by the preſbytery, conveys his right of patronage to a purchaſer, reſerving his own right as miniſter or preacher: the Court having found that the diſponee had not, nevertheleſs, the right of preſenting during the grantor's lifetime, the judgment is reverſed.

IN April 1679, Lord Torphichen conveyed the advocation, donation, right of patronage, and teinds, of the church and pariſh of Maryculter, in the dioceſe of Aberdeen, to Mr. George White, then miniſter of the goſpel at the ſaid church: and infeftment was thereupon taken in Mr. White's favour in October 1683.

Mr. White being libelled by the preſbytery of Aberdeen, for having been guilty of ſcandal and treaſon during the late rebellion, in preaching and praying for the pretender, he was, after 55 years poſſeſſion, deprived by the preſbytery on the 4th of April 1717.

In Auguſt thereafter, Mr. White, by a diſpoſition bearing to be for an onerous cauſe, diſponed and conveyed to the appellant the aforeſaid advocation, donation, right of patronage, and teinds. Part of this diſpoſition was of the following tenor:

" Likeas I, the ſaid Mr. George White, by theſe preſents, " ſell, annailzie, and diſpone from me, my heirs, and ſucceſſors " whatſomever, to and in favour of the ſaid Sir Alexander " Cuming, his heirs and aſſignees, heritably and irredeemably, " but any manner of redemption, reverſion, or regreſs for ever, " all and haill the advocation, donation, and right of patronage, " of the pariſh church of Maryculter, with the haill fruits, " profits, and emoluments belonging thereto, lying within the " dioceſe of Aberdeen, and ſheriffdom of Kincardine; together " with all right, title, intereſt, and claim of right, that I, my " heirs, and ſucceſſors, predeceſſors and authors, had, have, or " any ways may have, claim, or pretend to the ſaid right of pa- " tronage, or to the teinds, great or ſmall, parſonage or vicarage, " in any manner of way in time coming, either as titular or " otherwiſe. Reſerving always to me;" After this, as the diſpoſition *had* been firſt engroſſed, ſtood the following words, " *My life-rent right of the benefice of the ſaid church during all the* " *days of my lifetime, as not acknowledging any vacancy therein.*" Theſe words, however, were drawn through with a pen, but ſo as ſtill to remain legible; and oppoſite to them, on the margin, was written

written this marginal note: " *To me, the ſaid Mr. George White,* " *all right, title, intereſt, claim of right, that I can pretend as* " *miniſter and preacher of the word of God in the ſaid church, during* " *all the days of my lifetime.*"

This deletion and marginal note occurred three times in the diſpoſition: the marginal note was duly ſigned by Mr. White, but no notice was taken of it, or of the deletion in the teſting clauſe. Upon this diſpoſition the appellant was infeft in September 1717.

The appellant afterwards tendered a preſentation of three or four perſons, or any of them that ſhould be approved of by the preſbytery and other church judicatories to ſerve in the ſaid cure, and applied to the moderator of the preſbytery of Aberdeen, to call a preſbytery and receive his preſentation. Having met with delay, he renewed his requiſition to the moderator, under form of inſtrument by a notary public. The appellant afterwards made application to the provincial ſynod, to interpoſe their authority, and order a preſbytery to meet *pro re nata*. But that ſynod having refuſed to do ſo, the preſentation was again tendered to the moderator of the preſbytery, and to the moderator of the ſynod in a full convention; and the appellant entered his proteſtation, that their ſo refuſing ſhould not prejudice his right of preſentation after ſix months, nor give the preſbtery the benefit of preſenting, *jure devoluto*.

After the lapſe of ſix months, the preſbytery preſented the reſpondent Mr. William Abercromby to this church and pariſh; and upon their preſentation he was accordingly inſtituted. The appellant again proteſted againſt this; and afterwards brought an action of declarator before the Court of Seſſion againſt the reſpondents, concluding that his right might be aſcertained, and that the proceedings of the preſbtery in preſenting Mr. Abercromby might be declared void; and that the appellant might be at liberty to diſpoſe of the intermediate profits of the living for pious uſes within the ſaid pariſh, in terms of the act of parliament in that behalf. 10 Ann. c. 12.

The reſpondents made defences ſtating, that the diſpoſition was null and void, by the deletion of ſeveral clauſes therein; and the marginal notes not being mentioned in the teſting clauſe, it was to be preſumed that the deed was vitiated *ex poſt facto*. That the ſaſine alſo appeared to have been razed, which afforded an additional argument againſt the diſpoſition. The appellant, in anſwer contended that it was *jus tertii* to the reſpondents to object to Mr. White's diſpoſition; that it and the ſaſine could never be taken away but by improbation. And Mr. White appeared judicially in proceſs, and declared that the deletions and marginal notes were done by his expreſs order, and duly executed by him.

The Lord Ordinary, having reported this matter to the whole Court, their lordſhips at firſt repelled the objection founded upon the obliteration and razure of the diſpoſition and ſaſine; and found that the appellant had the *right of patronage of the ſaid church of Maryculter*.

But

But the reſpondents having preſented a reclaiming petition, after anſwers for the appellant, the Court, on the 19th day of February 1720, "ſuſtained the defence proponed by the preſby-" tery, and aſſoilzied from the declarator."

The appellant thereupon reclaimed; and the reſpondents having made anſwers, the Court, on the 6th of December 1720, "declared the appellant's right, with this quality, that his right "of preſentation cannot take place during Mr. White's life-" time."

The appellant again applied by petition againſt this laſt interlocutor, and offered to prove, by the oaths of the grantor, writer, and inſtrumentary witneſſes, that the deletions and amendments were made by Mr. White's order before the execution of the deed: and the grantor at ſame time tendered his oath thereupon, and declared that he meant no more by the words deleted, or by the marginal notes added to the deed, and ſigned by him, than a reſervation of his right as preacher and miniſter; but did not pretend any right to the patronage. After anſwers for the reſpondents, the Court, on the 30th of December 1720, "adhered to "their interlocutor, and refuſed the deſire of the petition."

Entered, 23 Jan. 1720-1.

The appeal was brought from "an interlocutory ſentence or "decree of the Lords of Seſſion in Scotland, of the 19th of Feb-"ruary 1720, and from part of an interlocutor of the 6th of "December, and likewiſe from an interlocutor of the 30th of "December, 1720."

Heads of the Appellant's Argument.

There is no law, ſtatute, or cuſtom for making void any writing, by reaſon of any deletion, amendment, or marginal note, duly made and ſigned by the grantor. For all that the act of parliament, in relation to probative writs, requires, is, that the names and deſignations of the writer and witneſſes be inſert in the body of the writing, as they are in this caſe. And Mr. White has appeared judicially, and acknowledged the diſpoſition, as it ſtands, to be a true deed, *ſimul et ſemel.*

1681, c. 5.

Neither the reſpondents, nor any others who were not parties nor privies to the deed, could object or found upon the clauſe or reſervation in favour of the grantor; none but the grantor himſelf or his heirs could do this; eſpecially againſt his own declared will and intention. And Mr. White never pretended any right to the patronage, or to object to the appellant's preſentation, having only reſerved his right and intereſt as preacher of God's word at the ſaid church; of which he then conceived himſelf unjuſtly deprived.

Mr. White, the grantor, neither did nor could pretend, by the clauſes deleted, which now *pro non ſcriptis habentur*, nor by the clauſes on the margin ſigned by him in place thereof, any right, even as *preacher of the word of God* at the ſaid church, but ſuch a right as he had *de jure*; for it was never intended, that he ſhould reſerve a right which he had not. And it is ſurely very improper for

for the reſpondents to found upon any pretence of right he had; after they themſelves, as judges, had determined that he had forfeited his right.

As the reſervation of Mr. White's right as preacher of God's word, could not create any nullity in the appellant's title; ſo the preſbytery were not judges of the validity or nullity of the diſpoſition, which indeed they never ſaw nor looked upon, till the action was brought againſt them in the Court of Seſſion. And therefore that could be no motive for them, in contempt of the law, and even contrary to the very act of parliament which firſt inſtitutes preſbytery, to reject the appellant's preſentation; or an excuſe for their judging at any rate of the appellant's title, far leſs for condemning it prophetically, without ſeeing it. 1592. c. 116.

Heads of the Reſpondents' Argument.

The razure is in the moſt matetial part of the deed, relative to the preſent queſtion, which is, whether the appellant can preſent to this church or benefice during Mr. White's life? That entirely and ſolely depends upon the import of the words ſo razed.

Taking the words razed to have been what the appellant inſiſts, they are a ſufficient bar to his claim; for a reſervation of the benefice to Mr. White during his life, will as effectually prevent the appellant from preſenting during Mr. White's life, as a reſervation of the right of patronage, for life; for there ſeems no poſſibility in this caſe to diſtinguiſh them.

Though the appellant had given evidence, as he offered to do, by Mr. White the grantor, and the inſtrumentary witneſſes, that the razure was made, and marginal notes added, before the execution of the deed, yet that would not now ſupply the defect; ſince by the law and conſtant uſage of Scotland the deed itſelf ought to have mentioned the razure to have been made, and the marginal note added before the execution, otherwiſe it is null; nor can that defect be ſupplied by witneſſes.

Were evidence to be uſed, yet Mr. White's evidence in this caſe could not be admitted, for he was a party to the action, and the perſon for whoſe uſe it was carried on, and who, if the church could be kept vacant, would enjoy the profits of the living: and the inſtrumentary witneſſes are likewiſe ſuſpicious, ſince the one is ſon to the grantor, and the other ſervant to the appellant.

The appellant at firſt did not inſiſt, that theſe alterations were made upon the deed before its execution, but only before he ſigned the preſentation in queſtion; and indeed it appears from the very face of the deed, that the alteration was not made before the deed was executed. For the very ſame razure and marginal notes that are in the diſpoſition, are likewiſe in the ſeiſin, and yet this laſt is dated 40 days after the firſt.

Taking the words, as they ſtand on the margin, viz. "Reſerving to Mr. White all right, title, and intereſt, that he could pretend to as miniſter and preacher of God's word in the ſaid church during all the days of his lifetime," they are a certain

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 nor, 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