

1747. July 21.

JOHN CAMPBELL *against* SIR PETER HALKET.

No 312.

No action was found to lie on an obligation granted 50 years before, which from lapse of time and other circumstances, was presumed satisfied.

THE Privy Council of Scotland, 11th December 1688, "Recommended to the Lords Commissioners of his Majesty's Treasury, to cause pay to the Earl of Breadalbane the sum of L. 300 Sterling money, for defraying the expense of his journey to Court, his Lordship being sent thither by the Council to attend his Majesty, and to give an account of the late tumults and insurrections here." And to this recommendation lying in the Exchequer was found subjoined without date, this receipt, "Received by me from Sir Patrick Murray the contents of the above-written order. (Signed) Breadalbane." Sir Patrick Murray, 8th January 1693, granted the following receipt: "I, &c. his Majesty's Receiver, grants me to have received from the Earl of Breadalbane an recommendation from the Lords of his Majesty's Council to the Lords of the Treasury, for giving to the said Earl L. 300 Sterling, for the causes therein mentioned, dated in December 1688; which L. 300 Sterling I having now stated in my accounts, therefore I oblige me, when the same is allowed to me, and approved by the auditors of my said accounts, that I shall thereafter pay in the said L. 300 Sterling to the said Earl." A commission under the Great Seal was expedè, 18th November 1696, for auditing the accounts of the Treasury from 15th August 1688, and an account was accordingly settled, 16th December 1696, between the Auditors and Lords Commissioners of the Treasury, containing under the head of "Money paid for contingent expenses by Sir Patrick Murray, since 12th December 1688," this article, "Paid to the Earl of Breadalbane the sum of L. 300 Sterling, towards the expense of his journey to London in December 1688, being sent thither by order of Council, *per* reference thereof, and his Lordship's receipt accordingly."

John Campbell, cashier to the Royal Bank, assignee by the present Earl of Breadalbane, pursued Colonel Peter Halket as representing Sir Patrick Murray, pleading, it was evident from Sir Patrick's obligation to the Earl, that notwithstanding his receipt, Breadalbane had not got the money, but had granted it to be a voucher of discharge, and *spe numerandæ pecuniæ*.

The Lord Ordinary, 24th July and 12th December 1744, "Having considered the receipt and obligation founded on, sustained the defence of prescription pleaded for the defender, but prejudice to the pursuer to prove in habile terms that the receipt and obligation pursued on was holograph."

Pleaded in a reclaiming bill; That this action was not brought upon Sir Patrick's holograph obligation and receipt, but on a ground distinct therefrom, to wit, his obtaining credit in his accounts for so much money as paid to the Earl; and this was a ground which had its rise three years after granting the obligation, and was proved by other written documents, the only use of Sir Patrick's receipt being to afford a reply to the defence upon the Earl's receipt for the money, as to which it fell to be considered that the article of discharge was a

proof the Earl's receipt was lodged in Sir Patrick's hands before his accounts were audited ; and his own receipt, not retired at that time, was a proof that he had not paid the money ; neither could it be objected that this was prescribed, cum temporaria ad agendum essent perpetua ad excipiendum ; and no reason could be given why the Earl's holograph deed should give a perpetual defence to Sir Patrick, and not his a perpetual reply to the Earl.

Answered ; That in whatever manner the pursuer might, in terms, make his demand, the ground of it was no other than the holograph obligation, since, abstracting from it, the defender had a receipt for the money, and the claim was, that this receipt was given in trust, which was sought to be proved by a writ prescribed ; that prescription might be competently objected to a declaration of trust ; and it would render quite useless the vicennial prescription, if holograph writings could be insisted on for proof of facts from which obligations would arise, though the deed itself could not produce an obligation. Here it might be of use to consider the nature of this prescription, by which the action was not lost, but the proof ; so that the deed remained a proof of nothing. And the reason why the Earl's receipt was notwithstanding probative, was the different nature of the two writs, the one being a discharge, and the other an obligation.

THE LORDS, 14th January 1747, adhered.

They found, 19th February, " that the holograph declaration was probative of the facts therein contained."

As the Court varied much in the judgments which they gave in this cause, the parties were led into an enquiry into the method of clearing accounts, by the practice of the Treasury, either of the Receivers or of the Lords Commissioners themselves. It was *alleged*, That the accounts referred to in Sir Patrick Murray's receipt were not those fitted with the auditors under the Great Seal in 1696 ; that these were the accounts of the Treasury ; but his own accounts fell to be audited by the Commissioners, who were his immediate superiors, and whose allowance was a sufficient warrant for him to pay ; that accordingly, it was observable his receipt and acknowledgment mentioned only the recommendation of Council, but not the Earl's receipt of the money, which had been subjoined afterwards, to wit, upon the article's being allowed by the Treasury, and thereupon paid to the Earl, who was one of the Commissioners himself, and would not have suffered Sir Patrick to retain the money, which he knew was allowed on his account.

On the other hand, that the accounts referred to were no other than those fitted with the Lords Auditors, as by the practice of the Treasury the Receivers were not discharged in any other shape, though sometimes states of their accounts were made up between them and the Commissioners ; but that was not understood to be a clearance until auditing ; that the receipt was certainly subjoined to the recommendation, and delivered together with it ; for the recommendation alone would not have been a ground for stating the article as paid,

No 312. nor consequently of procuring it to be allowed: And besides, if it had been added afterwards, on receiving the money, it would not have been conceived without a date, which was the proper way, when it was not known when the money would be allowed; that before the clearing the Earl was turned out of the commission, viz. 3d June 1695, having sat there since 1693 or thereabout, during which time he could not obtain to have the article allowed, it not being done till 16th December 1696, when he had other things to take him up, as he was committed to the Castle of Edinburgh in June 1695, where he continued till the end of that year, and upon his liberation went to London, being never after concerned in public affairs; in these circumstances he could not expect the article would be allowed him, nor know that it had, except by information from Sir Patrick Murray, who died a short time after without informing him; and that the making the claim at all was owing to the present Earl's doers having found amongst his papers Sir Patrick's obligation, whereupon they made enquiry at the Exchequer, and found the article had been allowed; then the demand was made, which gave occasion to a submission in 1736, time enough to save from the long prescription, and afterwards to this process.

It was the custom at that time for the Receivers to take receipts for sums of money as paid to persons who had claims upon the Government, it being found easier to get a payment allowed of when made, than an order for it, particularly Sir William Sharp, who had been Receiver before 1683, was, when he cleared his accounts, found creditor in a balance of L. 115,494 Scots, which it was not to be thought he could have advanced in money; and there had actually been found his back-note to Major George Winram, 22d March 1693, for a precept of the Commissioners of the Treasury, together with a receipt for his pension, due at Whitsunday 1681; and whereas he, as his Majesty's cash-keeper, had got allowance of it in his accounts by the Lords Auditors thereof, obliging himself, when he received the balance, to pay to the said Major proportionally with others to whom he had given like obligations, being first satisfied of what was justly due to himself.

Sir William Sharp's accounts were fitted by auditors named by commission under the Great Seal 1681, for auditing the accounts of the Treasury; and the docquet bears, that the balance should be made good to Sir William Sharp his Majesty's cash-keeper, the accountant; and the tenor of these commissions was constantly to audit the accounts of the Treasury, general receivers and cash-keepers and other receivers and distributors of the revenue; and though the accounts were entitled, of the Treasury, yet still these inferior receivers were parties in the accounting. In the same manner, the auditors named 21st January 1684, audited 19th April the accounts of the Treasurer and Treasurer-depute, made by Hugh Wallace his Majesty's cash-keeper for their Lordships, from 1st May 1682 to 19th April 1684; and the after accounts audited by the commission 27th June 1687 are done in the same manner: Nor can any instance be observed, where the inferior receivers are finally discharged, unless

by these auditors ; and the very commission 1696, by whom this payment was allowed, was to call before them the Commissioners of the Treasury, general receivers, &c. and to discharge the accounts of the revenue : So that it was plain, it was a discharge from these auditors Sir Patrick had in view when he gave his receipt, there being then a commission existing, dated 14th July 1692, which was to subsist for a year ; and there never having been any Auditors in the Treasury till after the Union, he could not mean any such : Besides, these Commissioners did discharge the respective Receivers of their Majesty's rents for the time, their heirs and executors.

That Sir Patrick was a party in the accounting 1696, and that there had been no former clearing between the Treasury and him, appears from a further account fitted between him and the Lords of the Treasury, 21st December 1698, in which there is a note, importing, that some articles had been by the Auditors delete out of the scroll of the former account, as being laid out after the term to which the commission then extended, though afterwards prorogued so as to comprehend them ; which articles are therefore added to that account.

Answered ; That the Earl being sent to wait upon King James by the then Privy Council, the Treasury after the Revolution had not thought proper to comply with their recommendation for allowing him his expenses, the rather that the States, 18th March 1689, discharged the payment of any precepts : Hence it was plain, this money was not paid in 1693, when the Earl delivered the recommendation to Sir Patrick ; but it was by no means evident that it was not paid, upon being allowed by the Treasury before 1696, or that it was not on payment the receipt was granted. The pursuer, before he could make good his claim, behoved to shew, that not only a receipt from the Earl, but a precept from the Treasury was delivered to Sir Patrick, when he granted his obligation ; whereas that mentioned none of them, but only the recommendation, on which, as he said, he stated the sum in his accounts ; but it did not appear in what manner he had stated it ; probably blank in the reference to the voucher, which was afterwards filled up on getting the receipt, when the sum being allowed by the Treasury, which was equal to a precept, he paid it : That the Treasury precept, or allowing the article, was certainly a good exoneration to him ; and if they made any unnecessary expenses, it behoved to lie upon themselves, not the inferior officers, who acted by their warrant : That the pursuer had failed to shew a general custom of stating articles as paid, in hopes to have them afterwards allowed : Nor would the instance of Sir William Sharp's practice make it presumed to be so in this case ; for he gave in a large balance as due to him, which was a real evidence he had not advanced the money ; but Sir Patrick's debursments were not above his receipts, and at last he paid the balance in cash ; at the same time, Sir William's obligation to Major Winram shewed, that to enable him to state a sum in his accounts as paid, a Treasury precept was delivered to him.

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He had also failed to shew that the receivers' accounts were not fitted with the treasury, as they naturally fell to be, but with the auditors under the Great Seal, whose business was to adjust the accounts of the treasury. Shortly after the Revolution, Sir Patrick Murray was appointed receiver of the customs, foreign excise, and crown-rents, and continued in office till February 1693, a few days after the date of his obligation; at the same time Oswald of Fingaltoun was made receiver of the cess and inland excise, who was succeeded February 1691, by Sir George Hamilton and Sir Robert Anstruther, and 3d March 1692, the Earl of Breadalbane was made one of the Commissioners of the Treasury. There was an account fitted with the treasury in March 1693, from 1691, to 1692, by Sir George Hamilton and Sir Robert Anstruther, and one in the same year by Sir Patrick himself, for the balance in his hand after 1692, and he was discharged. There was one by Sir Alexander Ogilvy in August 1707, with respect to his receipts as sole receiver since 1704, and another 1707 by James Erskine and the Laird of Cavers; and as this method of accounting with the treasury was the practice, who afterwards accounted with auditors; so was it agreeable to statute 79th act 11. Parl. Ja. VI. which enacts, That inferior counts that should precede the treasurers counts, and must enter in it, be first heard, it would never be presumed Sir Patrick's accounts preceding the 1692, were not fitted, solely because they did not appear when the treasury were in a regular course of clearing with his cotemporaries, with himself and his successors; nor would the clause in his obligation be construed to refer to the Lords auditors under the Great Seal, who never audited an account but one from the Revolution to the Union, rather than to the Lords of the treasury, who, as appeared, constantly audited, and sometimes expressly discharged the inferior receivers, but if they did not, their docqueting the accounts, and taking in the instructions, was an implied discharge. These particular accounts entered into the treasury accounts, as not only Sir Patrick's but Sir Robert Anstruther's and Sir George Hamilton's did into that fitted 1690; and hence the auditors discharged the receivers, as if any mistake had been committed in calculating, or in omitting articles of charge, or in allowing unvouched articles of discharge, it might be rectified, but otherwise it could not be doubted, that they were sufficiently discharged by the treasury. The stile of the docquet on Sir William Sharp's accounts, proved nothing with regard to inferior receivers, who accounted with the treasury; for he was cash-keeper, that is, the hand of the treasury, his accounts were theirs, and it were incongruous they should have audited them.

Lastly, It was so far from following from the note on Sir Patrick's accounts 1698, that he and not the treasury accounted with the auditors, that the contrary appeared; a commission had been issued 27th December 1690, for auditing the accounts of the treasury till the preceding Martinmas, but as it sat in to 1691, some articles of that year's expenses were given in, and ordered to be delete, as not being within the power of the commission, and the account writ

over again ; the commission was afterwards superseded by a new one, which comprehended till Martinmas 1691, and so these articles might have come under its consideration, but not doing any thing, and several others being granted, at last the one in 1696 audited the accounts in which these articles once delete were not insert, the treasury having given in that account which had been in some measure adjusted by the former commission ; if Sir Patrick had been the accountant, he would certainly have inserted these articles of his own discharge, and as the treasury had, by omitting them, stated a greater balance as due by him than really was, he was entitled, in his subsequent account, to discharge himself, notwithstanding he had stated them to them in a former one.

There was a great probability the money was paid from the Earl's long silence, who had not given over business, but sat in Parliament in 1710, and in 1716 was confined on suspicion of treason ; but supposing him quite retired, he had doers at Edinburgh, the condition of the obligation by his plea was purified in 1696, and Sir Patrick lived till 1703 in good circumstances ; besides, at the Union, there was provision made for all the public debts of Scotland, which was a thing notorious to the whole kingdom.

Replied, That it was true the recommendation was by King James's Privy Council, which was the reason the Earl could never get it allowed, nor obtain a treasury precept for the money, therefore he neither did nor could deliver any to Sir Patrick, but only the recommendation and receipt, on which, as he himself said, he stated it in his accounts, that it was not denied the treasury fitted accounts with the receivers, but then it appeared from the docquets, this was no final clearance to them, till they were discharged by the auditors, as was regularly done from 1st May 1667, to 1st March 1692, and therefore Sir Patrick had reason to expect his accounts were to be so cleared, and refer to it in his back-note, when there was a commission for that purpose existing at the time ; Sir Robert Anstruther's, and Sir George Hamilton's were signed by the Lords of the treasury in 1693, without any discharge, and there was marked upon them, that they were perused by the Lords auditors in 1698 ; Sir Thomas Moncrief's were fitted in December 1698, without any discharge, and were marked with a note signed by himself, " the foregoing is a true copy of the principal, in charge and discharge, which I keep for my own exoneration, and this, with the instructions of the discharge, is given to David Callendar who writ the said principal account, to be kept by him, until the Lords auditors of the treasury accounts call for them." Sir William Sharp was designed receiver-general of his Majesty's rents, in one of the Exchequer records of audited accounts, and the other instances given by the defender, were since the Union, when the constitution of the Exchequer was altered.

The memorandum on Sir Patrick's account 1698, proved that he was the accountant in 1696, and gave in a scroll, out of which some articles were delete, which was inconsistent with a former cleared account.

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THE LORDS, 9th June, having advised the whole circumstances of the case found that now no action did lie for the sum pursued for; and, on bill and answers, adhered.

Act. *W. Grant, Haldane, Ferguson.* Alt. *R. Craigie, & Wedderburn.* [Clerk, *Forbes.*
D. Falconer, v. I. No 199. p. 264.

1749. June 28.

WEMYSS against CLARK.

No 313.

A man of business granted receipt for a discharge and bills. After upwards of 20 years, there was found to be no action on the receipt to account for the vouchers.

ON April 30th 1721, Alexander Clark granted a holograph receipt to William Wemyss of the following tenor: "I Alexander Clark, writer, in Inverness, grant me to have received from William Wemyss, merchant, there, a discharge granted by him to Mr William Robertson of Inches, for the sum of L. 80 Scots, contained in a bill drawn by Thomas Buchan, upon, and accepted by him, dated 29th July 1720, and indorsed by the said Thomas Buchan to him; as also another bill granted by John Monro, cooper, for the sum of L. 72 Scots, dated 19th December 1719, upon which diligence followed, and are lodged in my hands. Given under my hands at Inverness, the 30th day of April 1721." And at the foot of the receipt there is added, "I have also in my hands, another bill of Inches for L. 6 Scots.

In the year 1744, William Wemyss pursued Clark to restore his papers, or to pay him the sums, principal and interest, due thereon; and on Wemyss' death, the process was carried on by William Wemyss his son.

The defence made, was, that after so long time, the defender cannot be obliged to say what became of the papers, whereof he had granted receipt *ratione officii* as procurator or doer for the pursuer; that in such case, the long taciturnity presumes them to have been restored, or other satisfaction given for them; and were it otherways, the situation of writers and procurators would be very dangerous.

This defence, the Ordinary 'repelled,' in respect, the writs mentioned in the receipt, were not of that nature, as to be put into the defender's hand, merely in the character of a writer or procurator, viz. a discharge of a debt, and a bill on which horning had proceeded; and whatever might have been presumed, had the process been brought by William Wemyss the son, after the death of his father, or if it had been brought against the Representatives of Clark; yet as it was brought by William Wemyss the father in his own time, and against the granter of the receipt still alive, it was the opinion of the Ordinary, that the defender fell at least to give some probable account of the matter, which the taciturnity might be a circumstance to support, but that it was not enough for him to say, that *post tantum tempus*, he could give no account of the matter.