

1712. *January 18.*MR. JOHN MONTGOMERY of Wrae and Commissary WILLIAM ALVES, *against*  
WILLIAM MARQUIS of LOTHIAN.

No. 225.

Found that the acts of Parliaments requiring writer's name and witnesses, have no place in writings between officers of the army, relative to their pay.

In an action at the instance of Mr. John Montgomery and William Alves, against the Marquis of Lothian, for payment of £140 Sterling contained in his obligation dated 25th March 1697, whereby he obliged himself to procure to Major William Burnet precepts from or upon the receivers for the said sum before his departure from Edinburgh, and in case the Major should make interest with the receivers or any other merchants or person whatsoever, he obliged himself to allow it to the receivers out of the first and readiest of any precepts drawn by the treasury for the Regiment; to which obligation the pursuer's have right by progress from the now deceased Major Burnet; the Lords found that the acts of Parliament requiring writer's name and witnesses in probative writs, take no place in this writ; the same being a writ betwixt officers concerning their pay, and of the nature of a letter of credit.

Albeit it was alleged for the defender: The act of Parliament 1681, having expressly required the designing of the writer and witnesses, as an indispensable solemnity in all writs, the exceptions from that rule ought to be established by an equal authority. And decisions made use of to prove a desuetude of this solemnity in any particular writ, as bills of exchange, precepts, receipts betwixt master and tenants, receipts of Cess, Excise, and the like duties, are not to be extended beyond the particulars decided; seeing all lawyers agree that rules ought to be largely interpreted, and exceptions or derogations from rules strictly. Besides, custom founded upon the *auctoritas rerum perpetuo similiter judicatarum*, requires a frequency of deeds and length of time, especially when pleaded to abrogate or restrict positive law; for single decisions as to separate points are at most but arguments of authority in cases precisely the same. It is true that soldiers by the civil law were indulged in a great many privileges denied to others, as in the making of their testaments, that their courage might not be blunted with anxiety about their families; but that was restricted to the time they were *in procinctu*, when they could not have advice and assistance. And modern lawyers, particularly Voet. *De jure militari*, Cap. *De privilegiis militum*, doubt mightly, if these privileges be competent to soldiers now-a-days, even in those countries where the Roman law prevails. It is acknowledged that orders by general commanding officers to subalterns, or orders that pass according to the common course of business among soldiers, such as warrants directed to a paymaster or pay office, need no solemnities; but that cannot be extended to the ordinary obligations of soldiers, especially such as are made by them at home or in garrison, where they may have access to advice, and are not disturbed with the noise and toils of war. If every contract in relation to a soldier's pay, be allowed a dispensation from the ordinary solemnities; the same privilege might be pleaded in favours of a writ,

whereby one soldier, buying a commission from another, assigns the seller to his pay till the price be paid. To make an obligation granted by a soldier subsist against him, that would be null as to any other obligant, were to make soldiers more easily and strictly obliged than others; whereby *privilegium militare* introduced in favours of soldiers, would turn to their prejudice. This obligation cannot be considered as a letter of credit; seeing letters of credit have a different fixed stile and tenor, and take place only among merchants. Nor can it be reckoned such, from its affording a fund of credit, more than bonds, especially bonds of relief of debts to be contracted for the use of the granter, might be reckoned letters of credit. If the obligation in controversy import any thing, it imports a direct action to Major Burnet or his assignees, against the Marquis of Lothian; whereas a letter of credit furnisheth no action to the obtainer against the granter, unless the former can instruct that he lodged money in the hands of the latter, equivalent to the sum for which the credit was given; or that he sustained damage through its not being honoured. Besides, it may be observed that our late act of Parliament extending the privileges of foreign bills to inland bills and precepts, takes no notice of letters of credit, as not so necessary for inland trade.

In respect it was replied for the pursuer: The statute 1681 and other acts it relates to, concern only formal writs that used to have writer's name and witnesses adhibited before these statutes; and confirm by law what was formerly customary, though not necessary; but do not concern cursory obligations, (as this) written without previous concert, *pro re nata*, according to the exigence of the subject matter; as is clear not only from precepts, obligatory notes, and receipts betwixt master and tenants, managers and servants of manufactories, and writs used in expediting the business of all public offices and societies; but even from writs otherwise formal, as instruments of sasine and holograph bonds not bearing to be written and subscribed by the granter. Now, precepts or notes among soldiers relative to the pay of the regiment, are as little to be regulated by nice or rigorous form, as any other privileged writs. For as, by the Roman law, *ignorantia juris non nocet militibus, qui arma magis quam leges scire debent*; so in writs among them no solemnity is required quæ subtilitatem magis quam naturalem rationem sapit. They were not only privileged in the manner of making their wills, but exempted from most of the public statutes; particularly they could not be imprisoned for debt, and were no further liable than they were able to pay: They were not obliged *cedere bonis* in favours of creditors, nor could their goods be adjudged to creditors, or distrained, *cum reipublicæ defensionem sustinebant*: They were excused from tutory, and most other public officers: They were convenable only *coram magistro militum*; and could not be forced to bear witness. By the practice of Scotland, and other civilized nations, notes and orders for military discipline, or circulating the pay of a regiment, require no solemnity of writer or witnesses. The instance of an officer buying a commission, and assigning to the pay till the price be paid, is quite foreign; seeing the seller ceaseth to be soldier, and is *tanquam quilibet* to the pay-master; and the agreement is not cursory, but hath *tractum*

No. 225. *temporis* which requires a more formal settlement. But after all it may be argued, That an obligation by one officer to another, for the value of his commission, assigning to the pay of the regiment, would be effectual without writer's name and witnesses, to make the buyer liable personally, if he uplifted the pay after the assignation, though never intimated;—and how can the Marquis pretend exemption from warrandice from fact and deed, after he hath uplifted the money destined for the pursuers payment? *2do*, It cannot be controverted, without cavilling, That a writ of this tenor, whereby the granter becomes obliged to all persons who shall advance money upon the faith thereof, is of the nature of a letter of credit; though it be not a formal letter of credit; and by the by, our custom knows no fixed form or tenor of a letter of credit. Is there any thing more usual, than to give credit by missive letters or upon any emergent occasion? And the variety of human affairs makes it simply impossible to reduce letters of credit into any certain form; since credit is desired and given *pro re nata* according to the present exigency,

*Forbes, p. 577.*

---

1714. January 27. LESLY *against* MILLERS in Rosemarkie.

No. 226.

A receipt, subjoined to an account, probative, though wanting writer's name and witnesses.

In a process at the instance of John Lesly as executor confirmed to Abraham Lesly of Findrassie, against John and Hugh Millers, for payment of 152 bolls 2 firlots of bear sold by the said Abraham Lesly to the defenders, conform to a receipt subjoined to a particular account, bearing the tenants names from whom the victual was received, the Lords sustained the receipt as probative, though wanting writer's name and witnesses, being *in re mercatoria*; and found the defenders liable for the ordinary prices bear gave in that place of the country, when the bargain was made; albeit it was alleged by the defenders, that the price should be regulated by the fiars as the only standard when a certain price is not pactioned; because, though the fiars might be the rule betwixt master and tenant, when their farms are not demanded in due time, yet merchants are presumed to contract according to the current prices of the country where the bargain is made.

*Forbes MS.*

---

1728. February 22. STRACHAN *against* FARQUHARSON:

No. 227.

It was found, That a letter, not being holograph, was not sufficient to infer an obligation upon the subscriber, though it related to the tocher of a married child, and was insisted upon as coming in place of a contract of marriage, which is favourable. See APPENDIX.

*Fol. Dic. v. 2. p. 546.*