

Cases 3,
and 4.

Fountain-
hall, 18th
Nov. 1703,
22d Feb.
1709.

FIRST APPEAL.

Sir Alexander Brand, Knight, - - - *Appellant* ;

George Mackenzie, - - - *Respondent*.

From a Decree of the Commissioners of Treasury and Exchequer.

SECOND APPEAL.

Sir Alexander Brand, Knight, - . - *Appellant* ;

Sir Thomas Kennedy, Sir Wm. Binning, and
Wm. Baird, Gentlemen, - - - *Respondents*.

From Interlocutors of the Court of Session.

31st March 1710.

Society.—One partner disclaiming money due to the partnership, which in consequence is not paid, they have recourse against him.

Costs.—5*l.* given to one of the Respondents.

IN 1693, Sir Alexander Brand, the appellant in both appeals, entered into a contract with the Lords Commissioners of the Treasury in Scotland, to import into that country 5000 stand of arms, according to a pattern then agreed upon. Soon after, an agreement was entered into between Sir Alexander Brand, and Sir Thomas Kennedy and Sir William Binning, two of the respondents in the second appeal, that they should be copartners in the said contract. The arms were accordingly imported; and a memorial was presented to the Treasury, stating that these arms were of superior value to those contracted for in the original pattern. The matter was represented to his then Majesty, who in 1694 appointed the Viscount of Teviot, then General of the Artillery, to inspect the arms, and to give his opinion how much they were better than the pattern, and that an allowance should be made to the appellant accordingly. His Lordship having reported, that the arms were to the value of 1500*l.* better than the pattern, the Lords of the Treasury, by a minute on the 3d of May 1694, allowed the appellant the said sum of 1500*l.*, to be deducted by him out of his rent for the crown lands of Orkney and Zetland, of which he then had a tack.

Sir Alexander executed an acknowledgment or obligation, declaring that Sir Thomas Kennedy and Sir William Binning should have their shares of this additional allowance; but disagreements afterwards arising between the appellant and his partners, Sir Alexander inserted an anonymous advertisement in the Courant, informing the Treasury that they had been much imposed upon in a certain transaction, and offering to disclose the same if properly rewarded. This advertisement was answered by the Treasury, and Sir Alexander stated that he had been imposed upon by his copartners in claiming the said additional allowance, and that there

there was no ground for the same: and Sir Alexander mentioned to the Treasury that he deserved the said 1500*l.* for his great service to the government. Nothing however was at that time done by the Treasury on the subject. The respondents in the second appeal, Sir Thomas and Sir William, brought an action against him before the Court of Session for payment of their proportions of the said 1500*l.*, in which they obtained decret against him on the 24th of June 1704.

The appellant falling in arrear of his rents for Orkney and Zetland, he was sued for the same, before the Commissioners of Treasury and Exchequer, by the then Receiver-General, and afterwards by George Mackenzie, (the respondent in the first appeal) the grantee of the Crown. In 1705 he gave in to these Commissioners a statement of his accounts, in which he acknowledged "*that though he had formerly stated an article of 1500*l.* due to him as the surplus price of 5000 arms, yet having now discovered that there was no ground for any such allowance, he would not claim it.*" This statement of accounts was examined by a committee, who made report thereon; and an order or decree of these Commissioners of Treasury and Exchequer was made on the 27th of August 1707, disallowing the whole articles claimed as deductions by the appellant, and also the said sum of 1500*l.*, *because he had waved the same himself under his own hand*, and decerning him to make payment to Mr. Mackenzie of the arrears due of his rents.

The first appeal was brought from "an order and decree of the Lords Commissioners of the Treasury and Exchequer made the 27th of August 1707," and Mr. George Mackenzie the grantee of the Crown, as respondent, gave in answer thereto.

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Feb. 1708-9.

After the date of the said order or decree the appellant granted a bond to the respondent Sir Thomas Kennedy for his proportion of the said 1500*l.*, but refusing to come to a settlement with Sir William Binning, the latter gave him a charge of payment upon the decret obtained before the Court of Session in June 1704. The appellant brought a bill of suspension, and the Court of Session, on the 24th of December 1707, "decerned Sir Alexander Brand the suspender to pay to Sir William Binning the charger the sum of 416*l.* 13*s.* 4*d.* as his proportion of the said 1500*l.* after deducting all expences." And to this interlocutor the Court adhered on the 3d and 8th of January 1708. Sir William Binning afterwards assigned the said sum of 416*l.* 13*s.* 4*d.* to the respondent William Baird.

And the second appeal was brought from "several acts, decrees, and proceedings of the Lords of Council and Session made the 24th June 1704, the 24th of December 1707, and 3d and 8th of January 1708;" and Sir Thomas Kennedy, Sir Wm. Binning, and Wm. Baird, the assignee of the latter, as respondents, put in answer thereto.

Entered 26
January
1709-10.

Of the first Appeal.

The appellant's case contains a statement of the circumstances that had taken place in this transaction, and of the steps that had been taken against him in Exchequer, with the particulars of the account of discharge produced by him, consisting of nine articles, of which the 1500*l.* before mentioned is one, all of which had been disallowed. But no argument is made use of on his behalf; he merely craves that the proceedings, reports, and decrees against him may be set aside, and that his case may be recommended to the Queen, that he may obtain payment of the balance which he states to be owing to him by the government.

Judgment,
31 March
1710.

After hearing counsel, *It is ordered and adjudged, that the sentence or decree complained of be affirmed, except with regard to the first article claimed by Sir Alexander, being 677*l.* 3*s.* for fire-arms, &c. furnished by him to the government; and with respect to this article it is ordered, "that it be referred to the Court of Exchequer in Scotland whether the said arms were received by the government, and what value they were of, and that the Court do give the necessary orders in order thereunto."*

For Appellant, *William Atwood.*

Of the second Appeal.

Appellant contends, that though the said 1500*l.* was once allowed by the Lords of the Treasury, yet they had now refused the same; and it was unreasonable that he should pay to his copartners what he himself had no allowance of.

Respondents' Answer.

The Lords of the Treasury, in obedience to his late Majesty's letter, allowed the appellant in 1694 the said sum of 1500*l.*, to be deducted by him out of his rents; and he accordingly retained it in his hands, and the Lords of the Treasury acquiesced under the allowance of it till 1705; and though at this period the appellant, by his petition before-mentioned, voluntarily disclaimed the same, and it was accordingly refused by their Lordships, yet it was so refused upon this reason only, viz. *For that the appellant had by writing under his hand disclaimed the same.* But this was done, on his part, merely to defraud his copartners. But by the appellant's conduct in this affair he cannot be allowed to prejudice his copartners, who have an equal right with himself. So well convinced was he thereof, that, even after the said 1500*l.* had been disclaimed by him and refused by the Treasury, he granted bond to Sir Thomas Kennedy for his share, and afterwards paid him a moiety of the money.

After

After hearing counsel, *It is ordered and adjudged, that the petition and appeal of Sir Alexander Brand be dismissed, and that the several acts, decrees, and proceedings therein complained of be affirmed; and that the said Sir Alexander Brand shall pay or cause to be paid to the respondent Sir Thomas Kennedy the sum of 5l. for his costs.*

Judgment,
31 March
1710

For Respondents, *Da. Dalrymple.*
John Pratt.

Only one case in each appeal has been found.

Patrick Lord Kinnaird, and Lady Elizabeth
his Wife, - - - *Appellants;*
John Riddoch the Trustee of Catharine Lyon,
and the said Catharine Lyon, - - - *Respondents.*

Case 5.

24th January 1710-11.

Appeal.—An appeal dismissed and costs awarded, and directions given to levy the same against Appellants who had entered into no recognizance.

ON the 21st of March 1709-10, the appellants brought their appeal from a decree of the Court of Session of the 28th of February then last, by which the Court had preferred the respondents as creditors of the Earl of Aboyne deceased, to the rents of his Lordship's estates for the years 1707 and 1708, to the appellant Elizabeth, who had an annuity out of the said Earl's (her first husband's) estate. An order was made to put in answer to this appeal, and Riddoch accordingly answered on the 21st of December 1709; and upon his petition, it was ordered "that the cause should be heard on the 18th of January following, and that in the mean time Lord Kinnaird should enter into a recognizance to answer costs as usual (a)."

This order was served upon Lord Kinnaird at Aberdeen; but no notice was taken of it, nor did his Lordship enter into any recognizance, or appear on the day appointed for hearing. On the 24th of January 1710-11, the respondents presented a petition to the House, stating the above facts, and that the appeal had been presented merely for delay, and praying that it might be dismissed with exemplary costs: and along with this petition was presented this affidavit of service upon Lord Kinnaird.

After due consideration of this case, it is ordered, that the petition and appeal be dismissed; and it is further ordered, that the said Lord Kinnaird and his wife shall pay or cause to be paid to the

Journal,
24 Jan.
1710-11.

(a) Recognizances at that period were to be entered into according to the terms of the standing order of 20th November, 1680, namely, that the Appellant should, "before any answer to his petition," enter into a recognizance for 100l.

said