

cayed in so much that he did not know his oldest friends: that he would have craved his tenants for rents paid only the day before, &c.

The respondent answered, that the deeds bearing to be for onerous causes proved their recitals, unless the contrary was proved: that Sir Alexander was short sighted, of a very peculiar humour, and always craved his tenants for rent when he saw them: that the appellant's witnesses were persons of inferior degree, but that the respondent had proved by noblemen, gentlemen, and other persons of probity, that Sir Alexander conversed with them as rationally as ever, during the period in question.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the sentence or decree and the affirmance thereof complained of in the said appeal be affirmed.*

Judgment,
10 April,
1712.

For Appellant. *Edward Northey, Sam. Dodd.*
For Respondent. *Robert Raymond, David Dalrymple.*

William Dunbar, second Son of Sir William

Case 14.

Dunbar of Durn, - - - - *Appellant;*
Colonel John Erskine, - - - - *Respondent.*

16th May 1712.

Act of Parliament 1693, c. 9.—The accounts of a magazine keeper, taken and verified in terms of this act, need not be verified anew before the Court of Session.

Expences.—Expences of the Court below given against a Respondent.

THE Privy Council of Scotland, in 1690, by a proclamation ordained the Commissioners of Supply to furnish forage for the forces, then stationed in the several counties, to prepare magazines for keeping the same, and to appoint the Collectors of Supply to be magazine keepers. The appellant was Collector of the Supply and magazine keeper, for the county of Banff.

More money having been advanced in some parts of the kingdom for forage, than was due on account of the supply, in 1693, an Act of Parliament was made for discharging the same, and the method of proceeding and determining upon claims was laid down by that act.

1693. c. 9.

In consequence thereof applications were made to a committee of the Privy Council, on behalf of the freeholders of the county of Banff, and by the appellant who gave in a claim for 1727*l.* 3*s.* 10*d.* scots, due to him as magazine keeper. There being some difficulty in settling the proportions due to the several freeholders of the county for their furnishings, Sir James Abercromby and Mr. Duff, their two representatives in parliament, to whom they had given authority to act for them, assigned and made over the whole arrears, due for the county of Banff, to the respondent, amounting to the sum of 6200*l.* scots, in which was included the 1727*l.* 3*s.* 10*d.* claimed by the appellant with a power to receive the same.

The

The respondent solicited this business before the Privy Council; and among other claims, that standing in the name of the appellant, was approved of by the Committee of Privy Council, who had the examination of the same. After a report made by their Committee, the Privy Council on the 5th of December 1695, recommended to the Commissioners concerning the *Poll-Money*, appointed by the said act 1693, to make payment, among others, to the appellant of the said sum of 1727*l.* 3*s.* 10*d.* out of the *Poll-Money*. On the 6th of January 1696, these Commissioners did upon the said act of Privy Council, indorse their precept or bill directed to George Baillie of Jarviswood, then receiver general, “to pay out of the *Poll-Money* to Lieutenant Colonel John Erskine the sum of 1727*l.* 3*s.* 10*d.* contained in the within act, for the use and behoof of William Dunbar, magazine keeper in Banff.” And the respondent gave his receipt for the same, under the precept.

The respondent also received the other arrears due to the county of Banff, and he accounted for the whole sum to Sir James Abercromby and Mr. Duff before mentioned, who again paid to, or accounted for, the whole sum to the Commissioners of Supply for the county, including the 1727*l.* 3*s.* 10*d.* which had been stated in the appellant’s name; and these Commissioners on the 19th of March 1700, granted a discharge to Sir James Abercromby and Mr. Duff, and obliged themselves to warrant them from all actions that could be brought against them on that account.

In 1704, the appellant brought an action against the respondent, before the Sheriff of Edinburgh, for payment of the money received in his name as aforesaid; the respondent made objection to the jurisdiction of the Court, but the Sheriff gave his decree against the respondent, for the said principal sum of 1727*l.* 3*s.* 10*d.* with interest and 120*l.* scots of expences. In these terms the decree of the Sheriff was extracted, and a horning thereon executed against the respondent.

But the latter afterwards presented a bill of suspension to the Court of Session, and on the 26th of February 1706, the Court, “found the letters orderly proceeded, and decerned the same to take effect, and to be further proceeded in, until the respondent should pay to the appellant 1727*l.* 3*s.* 10*d.* of principal with interest from January 1696; but suspended the execution as to the expences, simpliciter: and of consent of parties procurators lifted all execution upon the said decret, till the Lord Ordinary should give orders in writing for doing diligence thereon, and allowed the suspender to retain in his own hands, 200 merks scots paid to the charger by Alexander Duff, who was cautioner for the suspender in the suspension;” and in these terms the decret was extracted.

The sist having been made upon the idea of an accommodation between the parties, when that was laid aside, the appellant applied to the Lord Ordinary, to have the sist taken off, and after sundry proceedings, and a hearing in presence, the Court on the

3d of January 1708, “ declared they would hear the matter upon
 “ the material justice of the cause, and remitted it to the Lord
 “ Ordinary to hear and determine, or report.”

The Lord Ordinary after hearing parties, ordered the procla-
 mation concerning the keeping of magazines and furnishing
 of troops, and the books kept touching the same, and also the
 account of furnishing, and losses for the shire of Banff, concerning
 the said furnishing stated and approved by the Privy Council,
 with their order upon the Commissioners of the Poll-Money, to
 be produced by the appellant. The appellant opposed this pro-
 duction, and after a report from the Lord Ordinary, the Court on
 the 15th of July 1709, “ found that whoever did furnish provisions
 “ and provide magazines for the forces, and instructed the same
 “ in terms of the act of Parliament, ought to have the money
 “ pursued for; and remitted it to the Lord Ordinary to hear the
 “ parties upon the point of furnishing the provision and maga-
 “ zines, and to determine or report; and in case the parties con-
 “ tenders could not instruct the furnishing and providing, ordain
 “ the money to be consigned in the clerk to the process hands.”

And on a reclaiming petition with answers, the Court on the
 26th of July 1709, “ found that the said decree was no definitive
 “ sentence, and adhered to their former interlocutors, with this
 “ quality, that regard ought to be had the charger’s expences
 “ in managing the magazine.”

The appeal was brought from, “ a decree of the Lords of
 “ Council and Session, made on or about the 26th day of
 “ February 1706, and an interlocutory order in the same cause,
 “ on or about the 15th day of July 1709, for stay of execution
 “ upon the said decree.”

Entered
 January 31,
 1711-12.

Heads of the Appellant’s Argument.

The appellant’s account for forage truly supplied by him, was
 stated to and allowed by the Commissioners of Supply; and it
 was afterwards revised, verified, and approved by and before the
 Committee of the Privy Council, and the Lords of the Privy
 Council, who by the said act 1693, concerning the Poll-Money
 were empowered, and had authority to decide and determine finally
 all questions and difficulties, which were by the same act unde-
 termined, or which might arise touching the matters therein
 mentioned, approved of the report of their Committee, and
 what they did was pursuant to the authority given by parliament.
 The Court of Session therefore had no authority to decree any
 account to be taken touching the said magazines and provisions;
 the decree extracted in this case was a definitive sentence, accord-
 ing to the articles of regulation concerning the Session, pursuant
 to an act of parliament in 1693, entitled *Commission for regulation*
of Judicatories.

1693. c. 34.

The respondent, in receiving the money in question was a
 trustee for the appellant and had no manner of interest therein,
 nor any just reason to withhold the same from the appellant, which
 he hath done above 16 years, and hath occasioned the appellant’s
 spending,

spending, in charges relating thereto, more than the said money decreed to him.

Heads of the Respondent's Argument.

The appellant himself never furnished any corn or straw towards the said magazine, but being keeper of the books of furnishing, instead of stating the accounts for furnishing, as due to the shire, or to the several furnishers, he stated them as due to himself; and the respondent received the money from the receiver general, in consequence of an assignment made in his favour by the representatives in parliament for the county of Banff, and not in virtue of any authority from the appellant himself.

The list which was agreed to by the consent of both parties, ought not to have been taken off, till a fair account were taken; it being unreasonable that the appellant's word only should be taken instead of regular and proper vouchers; which vouchers if he could produce would certainly be allowed, but it would be most unreasonable, that because the appellant who had the books in his own hands, and made up the accounts in his own name, though he had not furnished any thing, should by such means deprive the freeholders of their right who had actually furnished the same, and in truth and fact, if the appellant is obliged to produce vouchers for his furnishing it will appear plainly, that he had none, or at least very small interest in this money, and never was any money out of pocket in furnishing or providing corn and straw for the magazine, the same having been really furnished by the freeholders of the county.

Judgment,
16 May
1712.

After hearing counsel, *It is ordered and adjudged, that so much of the said decrees orders and interlocutors, as are complained of in the said appeal, and made in this cause, whereby the appellants execution was stayed, be reversed and set aside; and that the Lords of Council and Session in Scotland, do order execution to be forthwith issued for the sum of 1727l. 3s. 10d. scots money decreed to the appellant William Dunbar and for 120l. scots money costs, decreed to the appellant by the Sheriffs of Edinburgh, and that the Lords of Council and Session do also forthwith order interest to be computed and paid for the said sum of 1727l. 3s. 10d. scots money, for the time the same came into the hands of the respondent Erskine, until the same shall be paid back to the appellant, and also that the appellant shall have his full costs for all his subsequent proceedings before the said Sheriffs, and Lords of Council and Session, since the taxation of his costs by the said Sheriffs, and that execution be also forthwith issued for such interest, and subsequent costs, after discounting of the sum of 200 merks paid to the appellant by Alexander Duff, and mentioned in the decree by the said Lords of Council and Session, and that the said Lords of Council and Session do order the same to be done accordingly.*

For Appellant,	<i>P. Crawford,</i>	<i>Ro. Forbes.</i>
For Respondent,	<i>Rob. Raymond,</i>	<i>P. King.</i>