

Case 62. Grizel Lady Sempill, Widow of Colonel
 Forbes, Richard Cuninghame deceased, - *Appellant* ;
 22 July Alexander Murray of Broughton, Esq; - *Respondent*.
 1712. *Et e contra*.
 Fountain-
 hall,
 24 July
 1712.

4th March 1719-20.

Presumption.—In 1691, a Colonel gives his Lieutenant Colonel a draft on his agent for 250*l.* and also pays him 50*l.* in cash, for which a receipt is granted: in a statement of all the officers' accounts in 1692, the Lieut. Col. takes no notice of the transaction in 1691, but mentions that he had received 75*l.* 12*s.* 8*d.* on account of his pay, without stating from whom: in an action, after the death of the parties, in 1719, it is held that the draft for 250*l.* was not presumed to have been paid by the drawee, unless it was otherwise instructed; but that the 50*l.* paid by the Colonel was not included in the 75*l.* 12*s.* 8*d.* acknowledged to have been received by the Lieut. Col.

Writ.—An objection made to a receipt between officers, that it was void, being neither holograph, nor having the solemnities required by the acts of parliament relative to the testing of writings, is not sustained.

Was a deed written and executed at Dublin valid, which bore to be "written by Edward Dudgeon, Gentleman?" see note at the end of this case.

THE deceased Colonel Richard Cuninghame commanded a regiment of foot in Scotland from the 1st of January 1690 to the 1st of January 1691, of which James Hamilton was lieutenant-colonel.

The regiment was so ill paid during the year 1690 that the money issued by the treasury of Scotland was not sufficient for subsisting the private men, so that they lived in part upon the country where they lay; and the officers received a very small share of the pay due to them. The method of paying the regiment was by precepts or orders drawn by the Lords of the Treasury upon the Receiver-General, to pay to the colonel the sums therein mentioned for the use of the regiment; and of these precepts or orders two were issued, but not paid when the regiment was transferred from Colonel Cuninghame to his successor Colonel Buckam; one of these was for 982*l.*, which was paid on the 22d of January 1691, and another for 732*l.*, not paid till the 29th of June 1691, both to Colonel Cuninghame's agent.

The officers of the regiment conceived that they had a right to the arrears of the subsistence money for the privates, and on or previous to the 27th of June 1691 some arrangement had taken place between the colonel and lieutenant-colonel upon that subject. The evidence of this arrangement was an obligation, executed by Lieut. Colonel Hamilton, of the above date, wherein he declares, that he had received Colonel Cuninghame's precept or bill on Hugh Cuninghame, the agent, for 250*l.*, and declares that it, with other 50*l.* to be advanced by the colonel, was upon account of arrears, and obliges himself to refund proportionally of that sum, if any alteration were made in stating the accounts of the regiment.

regiment. It appeared by Lieut. Colonel Hamilton's receipt to Edward Bryce, on Colonel Cuninghame's account, that the 50*l.* were paid on the 17th of July 1691.

The payment of the arrears due to the regiment having been suspended, the officers, and among others Lieutenant Colonel Hamilton, in July 1692, assigned over to Colonel Cuninghame all their claims for service during the year 1690, to the end that he might solicit their payment; and by a back bond of the same date, Colonel Cuninghame declares, that the assignment was in trust for the use of the officers thereto subscribing, and obliges himself to make true, complete, and full payment to each of them according to the several sums there settled. Annexed to this obligation was a schedule or account of the money due to the officers and their companies, &c.; the first article of which is in the following words: "Imprimis to the lieutenant-colonel as such, and captain 25*l.*, whereof received by him 75*l.* 12*s.* 8*d.*, due yet to him 176*l.* 7*s.* 4*d.* Due on the company's account 255*l.* 3*s.* 4*d.* Rests 431*l.* 10*s.* 8*d.*" &c.; and it proceeds in the same manner with the claims of the other officers. In this transaction with all the officers, no notice is taken of the former arrangement between the colonel and lieutenant-colonel.

On the 12th of August 1693 Colonel Cuninghame assigned and conveyed to the appellant, her heirs, executors or assignees, all debts, sums of money, &c. owing to him by bond or otherwise. In virtue of this assignment the appellant claimed from the Barons of Exchequer in Scotland the arrears due to Lieutenant Colonel Hamilton, and payable out of the *equivalent*. In this claim she was opposed by the respondent, who claimed the arrears of the lieutenant-colonel by virtue of an assignment by the lieutenant-colonel to one M'Culloch on 2d February 1709, which M'Culloch had afterwards assigned to the respondent.

The Barons of Exchequer certified that there was due to Lieut. Colonel Hamilton a sum of 196*l.* for his personal pay; but his claim on account of the arrears for the privates' subsistence was entirely struck off. The parties having laid arrestments in the hands of the commissioners of the *equivalent*, these commissioners brought an action of multiple poinding against them before the Court of Session.

The appellant insisted that the deceased Colonel Cuninghame having given an order or bill to Lieut. Col. Hamilton for 250*l.*, payable by Hugh Cuninghame, and having likewise paid him 50*l.* in ready money, in part of his arrears, the appellant as claiming under Col. Cuninghame was entitled to the said certificate notwithstanding his back bond, in 1692, to account to Lieut. Col. Hamilton for what part of his arrears he should receive; Hamilton, having, as she contended, received from him 104*l.* more than the amount of the certificate from the Barons of Exchequer. The respondent insisted that though there was a bill drawn for 250*l.* by Col. Cuninghame, yet there was no proof that that bill was paid.

On

Appealed
from by Lady
Sempill.

On the 23d of December 1718, the Court “found that the
“precept drawn on Hugh Cuninghame for 250*l.* sterling, of
“which precept Col. Hamilton owned the receipt in his back
“bond, was not presumed to have been paid by Hugh Cuning-
“hame unless it was otherwise instructed.” And to this inter-
locutor the Court adhered on the 17th of February 1719.

Appealed
from by Mr.
Murray.

The appellant Lady Sempill then insisted that in all events, she
was entitled to 50*l.* of the arrears, since it appeared by Lieut. Col.
Hamilton’s receipt that the same was paid him by Col. Cuning-
hame. The respondent contended that this 50*l.* was a part of
75*l.* 12*s.* 8*d.* allowed in the stated account in 1692, and that
Col. Cuninghame consequently had already credit for the same.
The Court on the 3d of July 1719, “found that the 50*l.* was
“not included in the 75*l.*,” and to this interlocutor the Court
adhered on the 17th of the same month.

Appealed
from by Lady
Sempill.

And on the 2d of December 1719 the Court found “that the
“respondent Mr. Murray had right to the certificate of Lieut.
“Col. Hamilton for the sum of 196*l.* deducting therefrom 50*l.*
“sterling allowed and found due to the appellant Lady Sempill,
“and found that she had right to the said 50*l.* and interest thereof,
“and that the respondent Mr. Murray had right to the interest
“of the sum found due to him, and preferred them respectively
“in the above terms.”

Entered,
18 Dec.
1719.

The original appeal was brought from “two interlocutory sen-
“tences or decrees of the Court of Session of the 23d December
“1718, and 2d of December 1719:”

Entered,
23 Jan.
1719-20.

And the cross appeal from “two interlocutory sentences or de-
“crees of the Lords of Session of the 3d and 17th of July 1719.”

*On the Original Appeal.—Heads of the Appellant Lady Sempill’s
Argument.*

Lieut. Col. Hamilton received a precept from Col. Cuning-
hame deceased, for 250*l.* payable by Hugh Cuninghame, and 50*l.*
in ready money in part of his arrears. It must be incumbent
upon the respondent to prove that the 250*l.* bill was not paid,
since it appeared under Lieut. Col. Hamilton’s hand, that he had re-
ceived such bill, and he is taken obliged to account so as to repeat
the whole, or a proportion in the certain events therein mentioned.

There are several very pregnant presumptions, that the said sum
of 250*l.* was actually paid; for, one part of the money out of
which it was to be paid, viz. 982*l.* contained in the treasury pre-
cept first mentioned, was at the time of drawing the bill in the
hands of the person upon whom the bill was drawn, and the other
for 732*l.* came into his hands two days after; and the 50*l.*
was paid in a fortnight after. From that time till 1709, Col. Hamil-
ton made no demand either against Col. Cuninghame or this ap-
pellant.

Nor can the subsequent transaction between the colonel and
all the other officers in the least alter the case; for it is apparent
that the agreement between the colonel and lieut. colonel was

to be kept private, to prevent giving umbrage to any of the other officers; and this made it necessary to state the Lieut. Colonel's account as it stood, without any regard to that private agreement.

Heads of the Respondent's Argument.

The receipt granted by the Lieut. Colonel bears a proviso; first, that in case the funds and effects out of which these two sums were to be paid should be recalled by the Lords of the Treasury, then the foresaid precept for 250*l.* was to become void, and null, and the Lieut. Colonel was to repay the said 50*l.*; and secondly, in case the officers of the regiment should thereafter procure the said precepts from the Treasury, to be applied and proportioned towards their payment, then the Lieut. Colonel was to restrict the said sum payable to him proportionally with the other officers. And that the Lieut. Colonel did not get payment of that precept from Hugh Cuninghame the agent, is clear by vouchers given into the Court, by the appellant herself, under the hands of several officers of the regiment, bearing that each of them had received their proportions of the sums mentioned in the foresaid precept granted by the Lords of the Treasury, which exhausted the amount, so that 100*l.* did not remain for the Lieut. Colonel. If the 250*l.* had been paid to the Lieut. Colonel, there is no doubt but Hugh Cuninghame would have taken his receipt for the same, as Bryce did for the 50*l.*, and given it up to the Colonel at clearing accounts with him, that the same might be brought as a charge upon the Lieut. Colonel's arrears. The appellant prayed for liberty to prove that the 250*l.* was paid to the Lieut. Colonel, and six months were allowed by the Court for that purpose, but no proof having been made, the Lords circumduced the term against her.

By the settlement or transaction of July 1692, in which the whole officers were concerned, it is plain that all accounts between the Colonel and his officers were then under consideration and settled: for, if the 250*l.* precept had been actually paid to the Lieut. Colonel, as well as the 50*l.* paid by Bryce to him, then he had received more than was truly due to him: and it is not to be supposed that the Colonel would then have given him such a back bond, as before mentioned, without taking the least notice of any former payments.

On the Cross Appeal.—Heads of the Appellant Mr. Murray's Argument.

The receipt by Lieut. Col. Hamilton to Mr. Bryce for the 50*l.* is void by the law of Scotland, the same being neither holograph, nor subscribed before witnesses, nor the person who wrote it designed therein.

The receipt does not bind the Lieut. Colonel to hold count for that sum, but only owns the receipt thereof, and therefore discharges the same for ever, which imports that this was a debt due by the Colonel to him, and not for his arrears due by the government, which were no debt of the Colonel's.

This

This 50*l.* was certainly part of the 75*l.* 12*s.* 8*d.* received by him from the Colonel, the law presuming all partial payments to be included in a posterior full clearance; and more especially since the Lady Sempill never pretended to shew from her husband's or his clerk's books, how that 75*l.* 12*s.* 8*d.* was paid. The appellant's being possessed of the two receipts does not alter the case, the law has not tied the military to observe such exact rules in their transactions amongst themselves in relation to what concerns the management of their pay. And it does not appear from the Colonel's or his agent's books, that the Lieut. Colonel was indebted to him any sum upon that account.

Heads of the Respondent's Argument (a).

The 75*l.* 12*s.* 8*d.* stated by Lieut. Col. Hamilton as received, regards only what he had received from the Government, and cannot possibly comprize the 50*l.* which he received as a private advance from the Colonel, since the very intention of assigning his arrears to the Colonel was, (amongst other things) that the Colonel might be re-imbursed the 300*l.* advanced by him to Hamilton, whereof this 50*l.* was a part.

The nature of the transaction in July 1692, when the general account was made, did not allow this to be expressed, because that general account took the matter as it stood betwixt all the officers and the publick, and did not regard private agreements: and it might have broke off that treaty had it been known by the other officers, that the Colonel had been so partial to the Lieut. Colonel, as to have advanced him 300*l.* in private, when they could not come at a *shilling*.

Judgment,
4 March
1719-20.

After hearing counsel, *It is ordered, and adjudged that the said petitions and appeals be dismissed, and that the several interlocutory sentences or decrees complained of in the said appeals be affirmed.*

For Lady Sempill. *Rob. Raymond.* *Dun. Forbes.*
For Mr. Murray. *Ro. Dundas.* *Will. Hamilton.*

In a former part of the cause between the present parties, it came to be a question whether the description of the writer of the assignation, by Lieut. Col. Hamilton to M'Culloch at Dublin, which run thus "written by Edward Dudgeon gentleman," was valid or not. It appears from Forbes 22d July, and Fountainhall, 24th July 1712, that the deed was on that ground annulled. It is stated, however, in the Dictionary, Vol. II. p. 542., that the *designation was sustained*, and Forbes's MS. is referred to. From the present appeal, it appears that the Court must in some future period of the cause have sustained the deed as valid: and that they had afterwards reversed the judgments reported by Forbes and Fountainhall.

(a) Lady Sempill does not notice the objection to the validity of the 50*l.* receipt.