

No 2. THE LORDS found the Earl liable to refund the L. 100. Sterliug advanced by Bailie Smith to Sir Walter Seton.

Act. Falconer.

Alt. Horn.

Clerk, Gibson.

Fol. Dic. v. 2. p. 4. Bruce, v. 1. No 11. p. 17.

1725. July 20.

JAMES CAMPBELL of London, Merchant *against* The CREDITORS on the Equivalent

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A person who had acted as solicitor for the creditors on the equivalent, in carrying through some acts of parliament, found entitled to his commission, not only from those who had subscribed a commission to him, but from those also who had not dissented, not however from indorsees to debentures onerously purchased.

By the fifteenth article of the Treaty of Union between Scotland and England it was agreed, that an equivalent should be paid by England to Scotland, for such parts of the revenues of excise or customs, &c. payable out of Scotland after the Union, as should be applied towards the payment of the debts of England contracted before the Union; and that the said equivalent (whereof there was advanced in ready money the sum of L. 398,085. 10s) should be applied; *1mo*, Towards payment of the loss of private persons by rectifying the coin; *2do*, To re-payment of the proprietors of the Scots African, and Indian Company, their respective shares therein; *3tio*, Towards payment of the public debts of Scotland, and towards the encouragement of manufactures, &c.

Two acts past in the last parliament of Scotland, regulating the manner of stating and paying the said debts of Scotland, viz. the 15th and 16th articles of Union.

One act was also past in the first Parliament of Great Britain, *anno* 1708, for the better stating of what should be payable to Scotland by way of equivalent, and for stating the public debts of Scotland, in so far as the same remained undone, in pursuance of the said 16th act of the last Parliament of Scotland; whereby the Commissioners of equivalent were empowered to issue to each Creditor debentures for the sums due to them respectively, which were to carry five per cent. of interest till payment, which the Commissioners accordingly did to the extent of L. 230,308 : 9s : 10d.

In the year 1710, while the extent of the equivalent remained somewhat uncertain, and it was thought doubtful, if there would be a sufficiency of it for payment of the Scots debts, a considerable number of the Creditors on the equivalent granted a commission to the pursuer to solicit and agent for them, by proper applications to her Majesty Queen Anne, to the Treasury and Parliament, the procuring such farther acts of Parliament, as should be necessary for bringing the extent of the equivalent to a clear state, and for the due and regular application of it towards the payment of the Scots debts, and agreed by a clause in the commission to allow him for his pains and charges five per cent.

In the year 1714, an act of Parliament past, by which the Commissioners of equivalent were discharged of the sum of L. 381,509 15s 10d of the fore-said sum of L. 398,085 : 10s, as duly applied in terms of the former acts, and empowered them to cancel all the debentures formerly issued for debts not paid, and to issue to each Creditor new debentures for the several sums due to them, accumulating the interest become due on them after the rate of five per cent. per annum, from the time they had been issued to the 24th of June 1714.

In the year 1715, an act of Parliament past, appointing a new commission for stating the precise sum due to Scotland by way of equivalent, and for issuing one year's interest at 5 per cent. per annum to the Creditors, viz. from the 23d June 1714 to the 24th of June 1715, amounting to L. 15,822 : 8s

In the year 1717, another act past, renewing the former commission, and directing the issuing of two years interest, viz. from the 24th June 1715 to the 24th June 1717, amounting to L. 31,565.

In the year 1719, another act of Parliament past, suppressing and forclosing all farther accounts and demands as to the equivalent, and in place thereof appointing a sum of L. 10,000 as a perpetual fund of interest for the said Scots debts, at 4 per cent. redeemable by Parliament, together with L. 2000 per annum, for encouraging manufactures. &c. in Scotland, and empowering his Majesty to erect the said Creditors into a corporation, with powers to sue and be sued, &c. and settling a fund of L. 600 per annum for charges of management.

After all these settlements were made, the pursuer raised a process against the several creditors, who had signed his above mentioned commission, or who had been present at meetings of the creditors, where the same had been agreed to, and had not expressly dissented, and obtained decret against them for payment of the said 5 per cent. of their respective sums; and in this process he insisted against all others of the said creditors to whom debentures had been issued, for payment of 5 per cent. of their respective shares, and against such who were proprietors of debentures, who had not paid the said 5 per cent. on the following grounds :

imo, All the steps taken towards the complete settlement and payment of the creditors of the equivalent having been transacted in open Parliament, and regulated by acts of Parliament, every creditor must be supposed *præsumptione juris et de jure* to have known of them, and to have been duly advertised to take care of his interest and concern in them; on this foundation, even private acts of Parliament affect the interests and rights of private parties, without their being specially called or summoned to appear for their interest, every private person being, as above, supposed to know and bound to take notice of what is transacted concerning him in Parliament; the whole creditors of the equivalent therefore, and proprietors of debentures, are in the eye of law in the same case with those creditors who were present at meetings, where the pursuer's commission was agreed to, and did not expressly dissent, against whom decret was already obtained.

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2do, The pursuer has the *actio contraria mandati* against the defenders, he having managed and solicited their affair for them to their knowledge, without being interpellated, as is plainly expressed in l. 6. § 2. D. Mandati, in these words, ' Si passus sim aliquem pro me fidejubere vel alias intervenire mandati teneor.' The like is plain from § 1. Inst. De iis per quos agere possumus, in these words, ' Cuicumque permiseris rem tuam agere aut defendere, is tuus procurator intelligitur.'

3tio, The several creditors of the equivalent and proprietors of debentures were *re conjuncti*, and might be justly compared to proprietors of several parcels of land lying together, and subject to some inconvenience common to all, such as overflowing with water, &c. or to many heirs-portioners of the same estate, or to creditors on a bankrupt estate; in all which cases, what is reasonably and profitably done by some, for the common advantage, is binding upon all, at least upon those who did not expressly dissent, according to the known maxim, ' Qui tacet consentire videtur;' and the rule, ' Qui non prohibet cum prohibere potest,' not only ' consentire,' but even ' mandasse videtur.'

4to, The pursuer managed and conducted the defender's affairs on his own charges profitably and greatly to their advantage, in procuring them a clear and certain fund for their payment, settled by Parliamentary security; and it is very well known that it is a matter of no small difficulty to make a claim of debt against the public effectual; nor is it to be supposed that justice moves even the Parliament itself in so strong a way as to make them look after the concerns of private persons without any application from themselves, at least no instance can be given where payment of such a claim on the public (without a certain and acknowledged fund appropriated) was recovered only from the mere motion of the Parliament without management and solicitation, that being hardly possible where claims are to be adjusted, and accompts settled, in order to the very finding out of a fund; and the usefulness and great advantages of the pursuer's application and labours in this matter appear fully from the considerable use of the value of equivalent debentures, they being at present at *par* or upwards; whereas when his commission was granted, they sold at 50, 60, or upwards per cent. discount, because of the extreme uncertainty of the fund, and the doubt whether any or what future equivalent would be due to Scotland on the footing of the 15th article of the Union; and this uncertainty is the more evident, that after all the commissions and pains taken to state these accompts, though the Parliament has paid the debts charged on the equivalent, yet they have never directly acknowledged that any thing appeared to be due as future equivalent to Scotland on the footing of the said act. From all which it must be evident, that the pursuer has a well founded *actio negotiorum gestorum* against the defenders.

It was answered to the 1st, That the authority and binding force of Parliamentary proceedings over all subjects, and in all causes private or public, does nowise proceed on any presumption either *juris* or *de jure*, that all subjects are

present and heard for their interest in Parliament; on the contrary it supposes them absent, and yet entrusts the wisdom of Parliament as to the knowledge of the interest and right of every subject, and its justice, that it will do none of them wrong in their absence. But whatever be in that, the consequence from public Parliamentary proceedings will never follow nor apply to the private solicitations and managements of the pursuer, if any such there were. The defenders did notice and knew of the proceedings in Parliament, and thought they would be extremely in the wrong to the justice of Parliament, if they entertained any such notions as that they were in the least degree owing to the private management and solicitations of any body, much less of the pursuer, whose concern and share in the matter they are confident was not only unknown to them, but to the greatest part of the Members of Parliament. The nature of the Parliamentary proceedings in this case seemed to have left no pretension to the pursuer of having had any thing of such consequence to do as was worth naming. The Officers of the revenue were appointed by Parliament to keep separate and distinct accounts of the several branches of it, according as they were applied to payment of debts contracted in England before the Union, from whence a clear view of the extent of the fund readily arose; the Commissioners of Equivalent were appointed, with sufficient salaries, to issue debentures, and the Barons of Exchequer were empowered to state the debts, by which every one had opportunity of having his claim, in so far as it was just, sustained; and last of all, the Parliament appointed a new commission to state the accounts of what of the Scots revenues had been applied to payment of English debts from the revenue accounts. In none of all which the pursuer had the least share; so that, in effect, there was nothing left for him to do that can bear being named; at least, he had not yet been particular as to any one article, either of his managements or charges; and, therefore, it seems somewhat extraordinary to say, that they were such as the defenders are presumed, *præsumptione juris et de jure*, to have known.

Answered to the second, That the authorities from the civil law were extremely misapplied to the present case; for these laws do not say, that a presumed knowledge of one's acting for another will infer a mandate, but that a direct and immediate seeing and knowing may do it: And, by the answer to the first point, it was evident, that there was no legal ground of presumption of the defenders knowing any thing of the pursuer's acting for them; and it is most certain in fact, that they saw no occasion for it, and knew nothing of it, any otherwise than by general and uncertain hearsay, which they were not obliged to regard or believe. Besides, the misapplication of the above laws to the present case appears evident, in respect that what is insisted for by the pursuer is far distant from the nature of *actio contraria mandati*, which might possibly found the pursuer in recovering payment of what he had actually laid out reasonably on the defenders affairs by their permission; but could give no colour for so extravagant a demand as 5 *per cent.* upon no less a sum than L. 240,000 Ster-

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ling, which would amount to near L. 12,000 Sterling, and that for general articles of pains and charges, without mentioning any one particular article of either. It is sufficiently evident from *l. 1. § 4. D. Mandati*, in these words: 'Mandatum, nisi gratuitum nullum est; nam originem ex officio atque amicitia trahit; contrarium ergo est officio merces; interveniente enim pecunia, res ad locationem et conductionem potius respicit.' That the pursuer's case has nothing to do with the rules of law concerning mandates; these, in equity, may admit of a greater latitude in founding an action *ad indemnitatem*, which the law allows of, for fixing an obligation to pay considerable sums of money. There may be such a thing known in law as a tacit mandate; but a tacit *conductio operis* the defenders never heard of: If, therefore, the pursuer claims the benefit of the rules of mandates, he must submit to the duties of a *mandatarius*; which are, that he must state the particulars of his necessary charges, and show them to have been reasonably expended, and on occasions that, at least in appearance, required them, and confine his demands to these.

It was *answered* to the *third*, That the analogy from joint proprietors, heir-portioners, or creditors on bankrupt estates, might carry necessary charges, as in the case of mandates; but by no rule of law could they be obliged to pay a great sum of money, upon a general charge of pains and expenses: And, further, in such a case, the defenders *contended*, That no action would lie at the instance of the party employed against the parties who had not employed him, whatever the employers might have against them for what was usefully expended. And, as to the brocard, *Qui tacet consentire videtur*, there is no such general rule in law; but such expression, when used, is relative only to very particular cases, such as, that of *l. 12. D. De sponsalibus*, and the like; but will not hold in general, even with respect to those who are *re conjuncti*.

Answered to the *fourth*, That, admitting the argument of *negotiorum gestio* in its full extent, it would carry no further than the former two arguments, *viz.* to charges reasonably expended, whereof the particulars must be stated; and, *2do*, There can be nothing more improper than the pursuer's pretensions, that the Parliamentary provisions for payment of the debts upon the equivalent, proceeded, in any degree, from his interposition and management, the course of the acts of Parliament above mentioned do demonstrate the contrary. And, as to the pretention, that there can be no instance given where the Parliament had, of its own accord, made provision for payment of public debts due to individuals, for which no particular fund was appropriated; there are multitudes of instances, well known to the pursuer, to the contrary, such as Navy bills, originally due in small sums to seamen, the debentures due to Officers of the Army, both foreign and British, the sufferers in the Islands of St Christopher's and Nevis; in so much, that the very reverse of what the pursuer alleges in that particular is most certainly true: That no instance can be given of national debts due to individuals since the Revolution, which have not been duly provided for, and fairly paid or secured, without any such tax as 5 *per cent.* upon

them for solicitation and management, the particulars of which cannot be named; and though it be true, that no act of Parliament has directly declared a special sum to be due as equivalent, yet it is sufficiently evident, that there was a fund arising in Scotland fully corresponding, in terms of the 15th article of the Union, to what has been applied by Parliament towards payment of the debts due on the equivalent, and to other public uses peculiar to Scotland.

THE LORDS found all the Creditors of the Equivalent who did not expressly dissent when the pursuer did negotiate the affairs of the Equivalent before the Parliament, were liable for the same quota of premium as those who signed his commission.

THE pursuer further insisted against severals who were not original creditors, but to whom debentures had been indorsed for onerous causes for payment of debts; for whom it was *contended*, That the obligation for the premium to the pursuer being but personal, even as to those who had agreed to and signed his commission, it could not affect their onerous indorsees; much less could the implied consent, inferred from silence, affect the debentures in the hands of indorsees.

It was *answered*, That the commission and agreement was a notour and public deed, which lay in the Equivalent Office, and nobody who received debentures from thence could be ignorant of it; and, therefore, it ought to affect indorsees as well as original creditors.

THE LORDS found indorsees not liable.

The pursuer insisted likewise against some Gentlemen, who, as executors-creditors to a creditor on the equivalent, had confirmed their debtor's effects, particularly the debt due to him out of the equivalent, and had recovered payment thereof.

THE LORDS found them not liable to repeat to the pursuer.

Reporter, *Lord Royston.* Act. *Dun. Forbes Advocatus, Pat. Campbell, Ro. Dundas,*
Ch. Erskine. Alt. *Ja. Graham sen. Ja. Fergusson sen.* Clerk, *Dalrymple.*
Edgar, p. 194.

1726. June 21.

SIR WILLIAM JOHNSTON of Westerhall *against* The MARQUIS of ANNANDALE.

SIR WILLIAM JOHNSTON, upon an order from the Marchioness of Annandale, to raise money for defraying the late Marquis's funerals, by which order she obliged herself to indemnify him for the same, having uplifted the sum of L. 482 of bygone rents from Henderson, one of the late Marquis's factors; this Marquis brought an action against him, to account for this and other intromissions; and Sir William brought a counter-action against the Marquis, for cognoscing