

No 312.

THE LORDS, 9th June, having advised the whole circumstances of the case found that now no action did lie for the sum pursued for; and, on bill and answers, adhered.

Act. *W. Grant, Haldane, Ferguson.* Alt. *R. Craigie, & Wedderburn.* [Clerk, *Forbes.*
D. Falconer, v. I. No 199. p. 264.

1749. June 28.

WEMYSS against CLARK.

No 313.

A man of business granted receipt for a discharge and bills. After upwards of 20 years, there was found to be no action on the receipt to account for the vouchers.

ON April 30th 1721, Alexander Clark granted a holograph receipt to William Wemyss of the following tenor: "I Alexander Clark, writer, in Inverness, grant me to have received from William Wemyss, merchant, there, a discharge granted by him to Mr William Robertson of Inches, for the sum of L. 80 Scots, contained in a bill drawn by Thomas Buchan, upon, and accepted by him, dated 29th July 1720, and indorsed by the said Thomas Buchan to him; as also another bill granted by John Monro, cooper, for the sum of L. 72 Scots, dated 19th December 1719, upon which diligence followed, and are lodged in my hands. Given under my hands at Inverness, the 30th day of April 1721." And at the foot of the receipt there is added, "I have also in my hands, another bill of Inches for L. 6 Scots.

In the year 1744, William Wemyss pursued Clark to restore his papers, or to pay him the sums, principal and interest, due thereon; and on Wemyss' death, the process was carried on by William Wemyss his son.

The defence made, was, that after so long time, the defender cannot be obliged to say what became of the papers, whereof he had granted receipt *ratione officii* as procurator or doer for the pursuer; that in such case, the long taciturnity presumes them to have been restored, or other satisfaction given for them; and were it otherways, the situation of writers and procurators would be very dangerous.

This defence, the Ordinary 'repelled,' in respect, the writs mentioned in the receipt, were not of that nature, as to be put into the defender's hand, merely in the character of a writer or procurator, viz. a discharge of a debt, and a bill on which horning had proceeded; and whatever might have been presumed, had the process been brought by William Wemyss the son, after the death of his father, or if it had been brought against the Representatives of Clark; yet as it was brought by William Wemyss the father in his own time, and against the granter of the receipt still alive, it was the opinion of the Ordinary, that the defender fell at least to give some probable account of the matter, which the taciturnity might be a circumstance to support, but that it was not enough for him to say, that *post tantum tempus*, he could give no account of the matter.

But all this, notwithstanding, upon advising bill and answers, the LORDS found, "That after so long a time, there lay no action on the réceipt." No 313.

Kilkerran, (PRESUMPTION.) No 5. p. 427.

*** D. Falconer reports this case :

ALEXANDER CLARK, under the designation of writer, in Inverness, granted receipt, 30th August 1721, to William Wemyss, merchant, there, of a discharge by him to his debtor for L. 80 Scots, contained in a bill indorsed to him, and of another bill for L. 72 Scots, on which diligence had followed, and another for L. 6 Scots.

William Wemyss, in October 1744, inteded action against Alexander Clark, to account for these writs, which, on his death, was followed out by William Wemyss of Craighall, his son.

The Lord Ordinary, 23d November 1748, "found the defender liable either to produce the documents of debt contained in the receipt pursued on, or otherwise to account for the contents thereof."

Pleaded in a reclaiming bill; The defender, who is much failed in his capacity, can give little account of this matter; but as he got the papers as a writer, having given over the business of a messenger, which he formerly followed, it has either been to produce them in some court, or receive the money from the debtors, and in neither case ought he to be burdened with making them forthcoming at such a distance of time, since he satisfied his duty by producing them in Court, or if he gave them up to the debtors, he has paid the money to his constituent, and needed not to take a receipt for it, as there is in his receipt no obligation on him to restore the writs.

Answered, The obligation to restore the papers followed from his granting receipt for them. If papers given to a writer without receipt, may be restored or accounted for without one, yet when a receipt is taken, no writer will part with them without another; besides, the defender was a messenger, and got them to do diligence, which he ought to shew.

THE LORDS found, That no action could be sustained after so long a time on this receipt.

Act. *H. Home.*

Alt. *Hamilton-Gordon.*

Clerk, *Pringle.*

D. Falconer, v. 2. No 74. p. 80.

1751: November 22. Master FRANCIS SINCLAIR *against* SINCLAIR of Uibster.

GEORGE EARL OF SINCLAIR having acquired several apprisings led against his predecessors, and made them his title to the estate, dispoed it and his honours, 8th October 1672, to John Campbell of Glenorchy, reserving a liferent

No 314.
A disposition of an old date found sufficient to exclude a reduc-