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proof as may be received, or made under such liberty as aforesaid. And it is further ordered, That the appellant be for the present restored to his place in the roll of freeholders aforesaid, but with liberty for the Court of Session to ordain the proper officer to expunge his name from the said roll, in any stage of their proceedings, under this remit, in which justice shall appear to the said Court to require the Court so to ordain.

For the Appellant, *Sir Samuel Romilly, Fra. Horner.*

For the Respondent, *Thos. Plummer, R. Hamilton, James Wedderburn.*

NOTE.—Unreported in the Court of Session.

LIEUT.-COLONEL ALEXANDER MACDONALD of Lyndale, sometime Major and Com- mandant of the Caledonian Volunteers,	} <i>Appellant ;</i>
CAPTAIN GEORGE ELDER, late of the Cam- bridgeshire Militia, now a Captain in the Royal Rifle Regiment,	
	} <i>Respondent.</i>

(*Et e contra.*)

House of Lords, 24th July 1811.

CONTRACT—OBLIGATION—PROOF OF PAYMENTS—PAROLE—JUDICIAL DECLARATION.—(1.) Circumstances in which it was established by letters, &c., that the appellant had come under an obligation to procure the respondent a commission in the army ; and having failed to do so, was liable in a sum equal to procure an ensign's commission at the time. (2.) Held that it was incompetent to prove payment of money by witnesses, or otherwise than *scripto vel juramento*, and, therefore, that the appellant was not entitled to call for a judicial declaration from the respondent (pursuer.)

This was an action raised by the respondent against the appellant, in the following circumstances, as set forth in the summons :—“ That an agreement was entered into betwixt
“ the pursuer and the said Alexander Macdonald, whereby,
“ on the one hand, the pursuer was to raise a certain num-
“ ber of men at a certain rate, for said corps, and, on the
“ other, the said Alexander Macdonald was to procure or
“ present to the pursuer, a commission as ensign in said

“ regiment, free of any expense. That after having recruit-
 “ ed for some time, and raised a number of men, but not
 “ the full complement for which a commission free of ex-
 “ pense was to be given, a new agreement was concluded
 “ betwixt the parties, by which, in consideration of the men
 “ so raised, and of the sum of £100 sterling agreed to be
 “ paid by the pursuer’s brother, for which he granted bills,
 “ payable at different periods, the said Alexander Macdon-
 “ ald became bound, with all convenient speed, to procure
 “ the pursuer gazetted as an ensign in the said regiment of
 “ Caledonian Volunteers; and, immediately following, a
 “ new bargain was entered into, as to the sum to be allow-
 “ ed to the pursuer for every recruit he should thereafter
 “ enlist, which was to be at the rate of £15. 15s. per man:
 “ That notwithstanding of these agreements, and that the
 “ pursuer enlisted a great number of recruits for said corps,
 “ after said second agreement as to his commission, the said
 “ Alexander Macdonald has not only failed either to procure
 “ the pursuer gazetted as an ensign of said regiment of
 “ Caledonian Volunteers, or in any other regiment of the
 “ line, but has also refused to settle accounts with him for
 “ the men he raised for said corps, at the last mentioned
 “ rate of £15. 15s. sterling, per man.” And the summons
 concluded, 1st, For payment of the sum of £400, as the
 price of an ensign’s commission. 2d, For £71. 9s. as the
 balance due on the recruiting account. 3. For the sum of
 £205. 6s. 8d., as the balance of his pay due as an ensign,
 from 1st August 1796, when he received his beating order,
 to 24th August 1799, when he received a commission in the
 Cambridgeshire Militia. 4. For the sum of £500 in the
 name of damages.

The appellant, on his part, raised an action for the sum of
 £472. 12s. 10d. as the amount of the sums advanced to him
 on the recruiting service, and for £270, being a sum ad-
 vanced to Messrs. Rocke and Co., army brokers, to procure
 the respondent a commission, who became bankrupt, with
 the amount of it in their hands. These actions were con-
 joined.

It appeared that the appellant had undertaken to procure
 a commission, and the sum stipulated by him, namely, £100,
 was given to him by bills, as well as the recruiting service,
 as the consideration for the commission. He failed in pro-
 curing the commission in the regiment agreed upon; but in
 his letters promised to procure him one in another regiment.

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Steps were taken for this purpose, but the money was lost in the hands of the army brokers, who became bankrupt. Sometime thereafter the respondent obtained a commission through another channel, and without the aid of the appellant's interest. After production of correspondence and documents, the Lord Ordinary pronounced this interlocutor:

Jan. 20, 1802. —“ Having considered the mutual memorials for the parties, and whole process, with the letters of correspondence, and other writings produced, in respect of the indorsation by the defender, Lieut.-Colonel M'Donald, of the letter of service from His Majesty in his favour, addressed to Ensign George Elder of said corps, that is, the Caledonian Volunteers, commanded by the defender, of the receipt 10th March 1798, granted by the defender for two bills of £50 each, accepted by the pursuer's brother, declaring that these bills will be the balance due for your brother's ensigncy; finds that the defender, from the beginning, engaged to procure an ensigncy for the pursuer in said corps; and which obligation is put beyond doubt by the defender's letter of the 14th of August 1798, regretting his disappointment at not being able to procure said ensigncy, and adding, ‘ but, notwithstanding, I find myself bound to provide for you ;’ in consequence, he states that he had wrote to Rocke and Co. to provide an ensigncy in some other corps, for which I shall pay: Finds that the defender is liable for the price at which an ensigncy might have been procured at that period, deducting the amount of the two bills by the pursuer's brother; as also for a sum equal to ensign's pay, from the 14th August 1798, the date of the above letter, to the 24th August 1799, when the pursuer obtained a commission in the Cambridgeshire Militia, and decerns: And in respect the defender did not consult the pursuer, when he proposed to lodge, or actually lodged, the money with Rocke and Co., for which they agreed to provide an ensigncy, and that the pursuer's letters, expressing his anxious wish to get the expected commission, are not sufficient to discharge the obligation incumbent upon and undertaken by the defender: Finds that he cannot throw the loss arising from their bankruptcy, or their fault in taking the money without providing the commission, upon the pursuer, assoilzies from the counter action at the defender's instance, in so far as it concludes for repayment of that money, and decerns; appoints both parties to give in special condescendences of their mutual

“ claims, in so far as not decided by the interlocutor, and
 “ that *quam primum*.”

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Both parties having represented, the Lord Ordinary ordered informations to be prepared, in order to report the case to the Court, and the case having been reported accordingly, the Court pronounced this interlocutor: “ Having advised the mutual informations, with the letters of correspondence, and other writings produced, find that the defender, Colonel Alexander Macdonald, engaged to procure an ensigncy for the pursuer, George Elder, in the Caledonian Volunteers, particularly by the defender’s letter, of date the 14th day of August 1798; find that the defender is liable to the pursuer for the price at which an ensigncy might have been procured at that period, deducting the amount of the two bills by the pursuer’s brother; as also a sum equal to ensign’s pay from the 14th day of August 1798 to the 24th day of August 1799, and decern: Find that the defender cannot throw the loss arising from the bankruptcy of Rocke and Company upon the pursuer; assoilzies from the counter action at the defender’s instance, in so far as it concludes for repetition of that money, and decern: Find the defender liable in expenses to the pursuer, George Elder; appoint an account thereof to be given in to the Lord Ordinary, and remit to his Lordship to hear parties further on their mutual claims, so far as not decided by this interlocutor, and to do therein as he shall see cause.”

Jan. 23, 1803.

On reclaiming petition by the appellant, the Court pronounced this interlocutor, adhering. The cause then went back to the Lord Ordinary, who pronounced this interlocutor: “ Having resumed consideration of this process, &c. finds the pursuer entitled, as the price of an ensigncy, to £270, being the price to which Rocke and Company reduced their demand, and which the defender agreed to pay, but deducting £100, the contents of the two bills of the pursuer’s brother, with interest on the balance from 24th August 1799, when, without any assistance from the defender, the pursuer obtained an ensigncy in the Cambridgeshire Militia. Secondly, To ensign’s pay from 24th March 1798 to said 24th August 1799, at the rate of 4s. 8d. a day, besides 6s. a week for lodging, with interest from the 24th August 1799. Thirdly, To £60 sterling, as the balance originally admitted by the defend-

Feb. 7, 1804.

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 " 24th March 1799: Finds no other damage due to the
 MACDONALD " pursuer; repels the counter claims of the defender, and
 v. " decerns." On representation, the Lord Ordinary, by
 ELDER. " special findings, adhered to the above interlocutor, and fur-
 " ther found: " As to the counter claim set up, finds it in-
 " competent to prove payment of money by witnesses, or
 " otherwise than *scripto vel juramento*, and therefore that
 " the representer (appellant), is not entitled to call for a
 " judicial declaration from the pursuer; of consent, finds
 " that £1. 10s. falls to be deducted from the article £178.
 " 5s. 4d.; refuses the representation *quoad ultra*, and ad-
 " heres to the former interlocutor."
- Feb. 2, 1805. The appellant reclaimed to the Court of Session, but the
 Lords adhered, and remitted to the Lord Ordinary to mo-
 dify the account of expenses. He thereafter presented a
 June 14, 1805. bill of suspension against these interlocutors, which was
 refused.

Against these interlocutors the appellant brought the present appeal to the House of Lords; the respondent also bringing a cross appeal, in so far as the interlocutors did not find him entitled to all the sums concluded for in his summons.

After hearing counsel, it was

Ordered and adjudged, That so much of the interlocutors complained of as finds the pursuer entitled to six shillings a week for lodging, with interest thereupon, and to £60 sterling, with interest thereupon, be reversed. And it is further ordered, that the interlocutors, in all other parts, be affirmed, and the cross appeal dismissed.

For the Appellant, *Sir Samuel Romilly, M. Nolan.*

For the Respondent, *John Dickson, J. P. Grant.*

NOTE.—Unreported in the Court of Session.