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JOHN CAMPBELL, - - *Appellant;*
SIR PETER HALKET, - - *Respondent.*

CAMPBELL
v.
HALKET.

21st April, 1749.

PRESUMPTION.—VICENNIAL PRESCRIPTION.—An action being raised, after the lapse of nearly forty years, partly on a general claim for money had and received, and partly on a writing importing to be a receipt of money for the behoof of another, found that under the circumstances of the case, the claim must be presumed to have been extinguished.

[Mor. p. 11,634. Elchies *voce* Prescription, No. 29; Falc.]

JOHN, Earl of Breadalbane, for certain services per- No. 81.
formed by him, in 1688, obtained from the privy council of Scotland a recommendation to the Lords of the Treasury, for the payment of the sum of L.300, for defraying his expenses.

Sir Patrick Murray was then receiver-general, and continued so till 1693.

The recommendation of the privy council was delivered to Sir Patrick Murray by Lord Breadalbane, who wrote at the bottom of it the following receipt,—" Received by me, from Sir Patrick Mur-" ray, the contents of the above written order,"—signed, " Breadalbane,"—but this receipt bears no date.

On the other hand, Sir Patrick granted the following acknowledgment to Lord Breadalbane,—' I, Sir ' Patrick Murray, his Majesty's receiver-general, ' grant me to have received from the Earl of Bread- ' albane a recommendation from the Lords of his Ma- ' jesty's council to the Lords of the Treasury, for ' giving the said Earl L.300, for the causes therein

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'mentioned, dated December, 1688; which L.300 'I now having stated in my accounts; therefore I 'shall oblige me, when the same is allowed to me 'and approved by the auditors, that I shall there-" after pay in the L.300 to the said Earl," &c. dated 3d Jan. 1693. He was removed from his office of receiver-general the same year; but in his accounts, which were audited in 1696, the following article is allowed:—" Paid to the Earl of Breadalbane,. L.300," &c.

The Earl of Breadalbane died in 1717; and in 1736, his son, the then Earl, made a claim for this sum upon Sir Peter Halket, the representative of Sir Patrick, and founded upon the above receipt, and the allowance of the sum by the auditors in 1696. The matter was submitted to arbitration; but no award having been made, the Earl afterwards assigned his interest to Mr. Campbell (the appellant), who then brought his action against Sir Peter (the respondent) for the above sum, as money received by Sir Patrick Murray for the use of the late Earl.

The respondent, in his defence, *inter alia*, pleaded the vicennial prescription, in virtue of the act 1669, with regard to holograph writings. The Lord Ordinary (Minto), 24th July 1744, sustained this defence, and afterwards adhered, (12th Dec. 1744.) Upon advising reclaiming petition and answers, the Court adhered to the interlocutor of the Lord Ordinary.

The appellant again reclaimed, and pleaded that this action was not barred by the act, 1669. For that Sir Patrick's writing, founded on the Earl's receipt, is neither a missive letter, a bond, nor sub-

scription in an account book; and that the statute does not generally enact that all holograph writings whatever shall prescribe after twenty years; and being a correcting law, it must be strictly interpreted. It was farther contended, that the appellant's demand was not founded upon Sir Patrick Murray's holograph writing and receipt, but was for money had and received by Sir Patrick for the Earl of Breadalbane's use in 1696, three years after the date of Sir Patrick's obligation, and that the only use of this obligation was to show that the receipt granted to the Earl was not for money received *at the time*, but that it was given *spe nunerandæ pecuniæ*; and no reason could be given that the Earl's receipt should give a perpetual defence to Sir Patrick, but that Sir Patrick's should not afford a perpetual reply to the Earl—that in these circumstances, the long prescription of forty years was the only prescription pleadable against his demand, and this prescription was effectually interrupted by the reference to arbitration in 1736.

The Court, (February 19, 1747,) found, "That "the holograph receipt and obligement founded on "is probative of the facts therein contained."

But upon advising a petition for the respondent, with answers, their Lordships, upon considering the whole circumstances of the case, found (3d June 1747,) "that now no action does lie for the sum "pursued for," and they adhered (21st July).

The appeal was brought from "several interlocutors of the Lord Ordinary and Lords of Session, the last dated the 21st July 1747." Entered Feb. 1, 1749.

Pleaded for the Appellant:—1. It is evident, from the nature and circumstances of the transaction, that no money was paid to the Earl by Sir Patrick.

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Murray, at the time the article was stated in his accounts with the treasury; and it is equally evident that the Earl had given Sir Patrick his receipt before the article was or could be so stated.

2. Sir Patrick did not become indebted to the Earl by granting his receipt or declaration of 1693, for notwithstanding this, it was possible that he never might be indebted to the Earl. He only became indebted by the article being allowed in his accounts, in Dec. 1696, and by his having public money in his hands at that time, to make it good; and this would have made him liable to account to the Earl for so much money had and received for the Earl's use, although he had not granted the obligation in 1693;—the effect of which was only to show, that the receipt then given by the Earl was to answer a particular purpose, but not to serve as a voucher for Sir Patrick against the Earl.

3. As the appellant's claim is not founded upon Sir Patrick's receipt in 1693, but upon these two circumstances, viz. The article being allowed by the treasury in 1696, and Sir Patrick having public money in his hands to answer it, it could not fall under the vicennial prescription; nor is it reasonable that Sir Patrick's receipt, which was only intended to qualify the one granted by the Earl, should ever prescribe while that one could subsist.

4. The long taciturnity cannot create a presumption that the money was paid, in opposition to the written and real evidence arising from the circum stances of the case. The mere recommendation by the Privy Council, unless supported by a warrant from the Treasury, was no authority for Sir Patrick to pay; and the Earl could not have known that

the article was allowed, unless notice of this was given to him; and there is no evidence that Sir Patrick, who was the only person who could afford him this information, ever gave it to him. On the contrary, it may be presumed that he would be in no hurry to give it, when it appears that, upon passing his accounts in 1696, the Treasury made Sir Patrick several thousand pounds indebted to the public.

Pleaded for the Respondent.—This action is clearly founded upon Sir Patrick's receipt in 1693, and therefore no demand having been made upon it for the space of twenty years, the present action is barred by the act 1669.

2. As the Earl, by his receipt, acknowledged payment of the L.300 from Sir Patrick, and as the same was stated at the settlement of accounts in 1696 to have been paid by Sir Patrick to the Earl, this was full and legal proof in a question with the Earl, or with any one claiming under him, that the money had been actually so paid and received.

3. There is no evidence, nor reason to presume, that this receipt of the Earl's had been granted *spe numerandæ pecuniæ*, as necessary to furnish Sir Patrick with a voucher for that article in his accounts.

4. Neither can it be presumed that the Earl could look upon this as a debt justly due either by the Treasury or by Sir Patrick, no demand having been made for so many years for recovering the sum, though provision was made by law for payment of all the public debts.

The appellant, or those under whom he claims, have themselves to blame, if any doubt arises in ascertaining the true matter of fact, by their delay

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and neglect in bringing the action, or making any demand, for so many years after the death of the parties originally concerned, and of all others who could have thrown any light upon those matters.

Judgment, April 21, 1749.

After hearing counsel, "it is ordered and adjudged, &c. that the said petition and appeal be "and is hereby dismissed this House; and that the "several interlocutors complained of be, and the "same are, hereby affirmed."

For Appellant, *William Grant, C. Erskine.*

For Respondent, *W. Murray, Alexander Lockhart.*

AGNES STEWART and HUSBAND, - *Appellants;*
CHRISTIAN HERON, - - *Respondent.*

30*th May*, 1749.

PERSONAL AND REAL.—BONA ET MALA FIDES.—An onerous singular successor is not affected by a latent and personal ground of challenge, to which his author's right is subject.

[Elchies *voce* Fraud, No. 21, Mor. 1705.]

No. 82.

THE entail of the lands of Physgill having been set aside as being *contra fidem tabularum nuptialium*, (*supra* No. 71), and Agnes Stewart, the heir under the marriage contract, having been found entitled to the estate, and having entered into possession of it, the present question arose between her and her husband (the appellants) on the one part, and Christian Heron (the respondent) widow of the heir of entail, whose right had been set aside, on the other. During the life-