

1711. July 4.

JANET CUNNINGHAM, Daughter to the deceased ALEXANDER CUNNINGHAM,
Writer to the Signet, *against* JAMES AGNEW, Merchant in Edinburgh.

ALEXANDER CUNNINGHAM having paid a bill of L. 9 : 10s. halfpenny Sterling to Gavin Thomson, drawn upon him by James Agnew, and not bearing value in Cunningham's hand ; the LORDS sustained action of recourse to Janet Cunningham, as representing Alexander her father, against the drawer, for re-imburement : Notwithstanding that the defender offered to prove, by his own account-book, that Alexander Cunningham had accepted the said bill for the price of the merchant goods taken off by him from the defender, and was content to give his oath of verity in supplement of the count-book ; and cited *Gail Observ. lib. 2. cap. 20. Voet. Comment. in Pandect. tit. de Fide Instrum. § 12. Huber. Prælect. Ibid.* where merchant books are said to be fully probative, if confirmed either by the oath or death of the merchant : For the LORDS found, That the defender's count-book having been irregularly kept, is not probative ; and refused to allow the same to be adminiculated by his oath.

Fol. Dic. v. 1. p. 99. Forbes, p. 516.

No 114.

An acceptor paid a bill drawn upon him, payable to a third party, without bearing value in his hands. The Lords allowed his heir action of recourse for reimbursement.

1712. July 10.

GEORGE WILSON of Sands, *against* GEORGE M'KENZIE in Stonehive.

GEORGE WILSON insisted against George M'Kenzie, for re-payment of L. 60 contained in a bill drawn by George M'Kenzie, and directed upon Alexander Deuchar and George Wilson, payable to John Campbell, Deuchar's servant, and indorsed by him to the Treasurer of the Bank, who got payment thereof from George Wilson.

Alleged for the defender : He cannot be liable to this action of recourse ; because, *imo*, The bill was drawn by him only upon Alexander Deuchar, as a fund of credit to negotiate as he best could for his own behoof ; and the security being refused, when offered to the Bank, so directed and singly accepted by him, George Wilson's name was thereafter added to the direction by Deuchar, who prevailed with Wilson to accept the bill conjunctly and severally with him, upon his giving back-bond to Wilson to relieve him of all hazard from his acceptance ; and Deuchar, by his servant's indorsing the bill thus accepted to the Treasurer of the Bank, got up the money ; so that the defender had nothing to do with Wilson, who accepted not by any order from him, but upon the faith of Deuchar's obligation of relief. *2do*, As when a bill bears not an order to place the value to the drawer's account, (in which case the account is the rule) nor an order to pay as per advice, (in which case the letter of advice regulates) there is no recourse competent to the acceptor paying, against the drawer ; so when a bill is drawn, without bearing value in the hand of the person drawn upon, if he design to have

No 115.

Found in conformity with the above, that value is not presumed to be in the acceptor's hands, unless expressed.

No 114.

recourse ; he suffers the bill to be protested for not acceptance, and then accepts it for the honour of the drawer ; but if he simply accept, the presumption lies against him, that value was in his hand, and he cannot recur against the drawer. *3tio*, 'Tis clear by a signed declaration of eleven knowing merchants, that when a bill is drawn upon two persons, accepting conjunctly and severally, though it do not bear value in the acceptor's hands, one of the acceptor's paying hath no recourse against the drawer ; if he, the drawer, can qualify and instruct that he had value in the hands of the other acceptor : Now it is acknowledged, that value was in Deuchar's hand ; for he received the money from the Bank, and his bond of relief to Wilson acknowledgeth the same.

Replied for the pursuer : *1mo*, The want of a direction on the bill to Wilson, when first presented to the Bank, signifies nothing ; for it is presumed to have been added of consent *ex post facto*, since the bill bears it so ; and *in re veritate* it was added by M'Kenzie's own consent. *2do*, Though there had been no direction to Wilson, yet the defender is liable in repetition, because *causam damno dedit*, by his implicitly trusting Deuchar with the bill. *3tio*, Whatever respect may be had to the judgment of knowing merchants, more is due in this point to the decisions and opinions of Judges and Lawyers. The contract here betwixt the drawer and acceptor is *mandatum* ; and that betwixt the drawer and the creditor is *mutuum*. So that were a mandate given to two persons conjunctly to manage the constituent's business, would any exception competent to the constituent against the one mandatary, be competent against the other ? No sure, *Arg. l. 27. ff. de Pactis. l. 10. ff. de duob. reis* ; and yet this is all the import of the drawer's defence. This bill, in so far as concerns the pursuer, being truly a mandate *causa mandantis*, and for Deuchar ; both stood obliged to the pursuer. *4to*, As it would have been no good argument to George M'Kenzie, against the bank, who advanced the money to Deuchar upon the faith of the bill, that Deuchar got the money ; no more can it be obtruded against Wilson, who, by repaying the money to the bank, came in their right and place : Yea, Alexander Deuchar's getting the money from the bank upon the credit of the defender's bill, is so far from bearing any colour of defence for M'Kenzie, that it is a strong reason why he ought to refund the money to the pursuer.

THE LORDS found the allegiance, viz. That Alexander Deuchar signified to George M'Kenzie the defender, that the bank refused the bill, unless they got a co-acceptor, and that the defender consented that the pursuer should be added, relevant by the defender's oath of verity, to give the pursuer recourse ; and in case the defender depone negative, then found, That the pursuer having accepted upon the faith of M'Kenzie the drawer, and Alexander Deuchar being bankrupt, George Wilson and M'Kenzie must be reputed *tanquam correi promittendi*, and the sum equally divided betwixt them ; and ordained the pursuer to assign to the defender the half of the heritable bond of relief he got from Deuchar. See No 72. p. 1481.

Fol. Dic. v. 1. p. 99. Forbes, p. 616.

1792. May 23. WILLIAM HENRY RALSTON *against* JOHN LAMONT.

IN an action of multiple-poining, brought for authorising the distribution of effects which had belonged to a person deceased, Lamont claimed as a creditor, in consequence of his having honoured two draughts by the deceased upon him; the one dated in 1778, and the other in 1779.

Ralston, a competing creditor, objected to this claim, as cut off by the sexennial limitation of 12th Geo. III. cap. 72.; and, in support of the objection,

Pleaded: The enactment in general provides, that no bill of exchange, or inland bill, shall be effectual to produce action, unless within six years from the term of payment; and it is of no consequence whether the action is to be brought by the drawer against the acceptor, or by the holder against the drawer, acceptor, or indorsers, or by the acceptor against the drawer, for his relief. This seems no less evident from the words of the enactment, than from its object; which clearly was to limit all obligations arising from transactions of this sort, within such a short period as was suitable to their nature and general use.

Answered: The actions precluded by the statute, are those which naturally arise out of the bills, and in which the pursuers rest upon these documents as the sole foundation of their claim. Such are those brought by the drawer or holder against the acceptor for payment, or by the holder against the drawer or indorsers, for recourse. The present case is of a quite different nature, the production of the bill being only useful as a circumstance of evidence. The obligation itself, or the right of action, arises from the advance of the money, which may be proved in many different ways.

THE LORD ORDINARY repelled the objection.

In a reclaiming petition, besides the argument on the statutory limitation, it was contended, That the bills having been accepted in general terms, a presumption arose, that, at the time, the acceptor had in his hands effects belonging to the drawer. That presumption, however, appeared to be sufficiently obviated by the circumstances of the case.

After advising the reclaiming petition with answers,

THE LORDS adhered to the Lord Ordinary's interlocutor. See PRESCRIPTION.

Ordinary, Lord Justice-Clerk.

For Ralston, Montgomery.
Clerk, Menzies.

For Lamont, Macleod-Bannatyne.

Fac. Col. No 211. p. 443.

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The sexennial limitation of bills does not affect the claim of recourse competent to the acceptor of a bill against the drawer.