

No 204.

Action refused on a bill protested, but allowed to lie over about 20 years; there being presumption that it had been paid.

1768. August 5.

KER against KER.

ACTION was refused on a bill for 3000 merks, which had been protested immediately upon becoming due, but was allowed to lie over for about 20 years, when, after the death of both drawer and acceptor, an action was brought upon it, by the son of the drawer, recently after he had been decerned in payment of certain sums due by him to the son of the acceptor.

Other presumptions concurred in this case, particularly a clearance between the drawer of the bill himself, and the son of the acceptor, and another clearance with the drawer's son, after his death; in neither of which the bill was mentioned.

Reporter, Gardenston.
Ferguson.

A&T. Ilay Campbell,

Alt. W. Wallace.

Fac. Col. No 77. p. 323.

No 205.

1777. July 16.

ELLIOT against M'KAY.

COMPENSATION was proponed against a bill in the hands of an onerous indorsee, which had lain over two years after its date, and eighteen months after the term of payment, without any demand been made, or diligence used.—THE LORDS were of opinion, That the statute 12th Geo. III. ought to make an alteration of the former practice of the Court in similar questions; and therefore they found, That in the present case compensation was not proponable.

Eol. Dic. v. 3. p. 91.

See COMPENSATION.

No 206.

1787. February 6. ROBERTSON against M'GLASHAN.

FOUND, that bills retain their extraordinary privileges for six years, by act 12th Geo. 3. § 37.

Eol. Dic. v. 3. p. 91.

See The particulars voce PRESCRIPTION, SEXENNIAL.

No 207.

Action sustained for a debt vouched by a docketed account and a bill, both of the same date, after the latter was prescribed.

1797. May 19.

PATRICK CAMPBELL, against DUNCAN CAMPBELL and ROBERT STEUART, Trustees of Alexander Campbell.

PATRICK and ALEXANDER CAMPBELL were engaged in various joint concerns. On 15th May 1782, they settled accounts, and a balance of L. 490 was found to be due by Alexander; for which he then granted a bill to Patrick, payable three days after date.

To the account thus settled, the parties, at the same time, subjoined the following doquet :

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15th March 1782.

' This account, containing an abstract of the accounts paid and settled, of this date, being examined by the said Alexander Campbell and Patrick Campbell, it is found and declared, that a balance of L. 490 Sterling arises to the said Patrick Campbell ; for which the said Alexander Campbell has now granted his acceptance, payable three days after date, and which, when paid, is in full of the above.'

Alexander Campbell died a few months after the date of this transaction.

In 1793, Patrick Campbell brought an action against his trustees, for payment of the debt contained in the doquetted account and bill.

The defenders *pleaded* : The bill founded on, being prescribed, can afford no ground of action, and as little can the doquetted account. If the bill had been paid and retired, or had it been lost, the pursuer's claim would have been at an end ; and it must be equally so, in consequence of the bill being prescribed, as the law presumes, *presumptione juris et de jure*, that a bill in that situation has been paid ; 31st January 1787, Buchan against Robertson Barclay, Fac. Col. No 303. p. 467. *voce* PRESCRIPTION, SEXENNIAL.

Besides, by granting the bill, a *novatio debiti* took place, which put an end to the debt contained in the doquet ; 19th February 1779, Buchanan, &c. against Sommerville, Fac. Col. No 71. p. 135. *voce* DEBTOR and CREDITOR. Indeed, the interest of the parties was materially altered by the bill. The debt, in terms of the doquet, if it carried interest at all, carried it from the 15th March, but as due by the bill, it did so only from the 21st ; by the former, it was demandable any where ; by the latter, only at the place mentioned in the bill.

Answered : The action is founded on the doquetted account. The bill is produced merely as evidence, that the debt due by the doquet remains unpaid. Nor can taking the bill be held as a *novatio debiti* ; for the two documents were granted *unico contextu*. Novation indeed is never presumed ; Erskine, b. 3. tit. 4. § 22. And accordingly, where two obligations are taken for the same debt, the creditor is entitled to the benefit of both ; 6th July 1697, Hay against Hall, Fount. v. i. p. 782. *voce* PRESUMPTION ; 6th July 1706, Brand against Yorkston, No 128. p. 1549. ; 26th June 1711, Oswald against Gordon, Forbes, p. 511. *voce* PRESUMPTION ; 10th July 1713, Ramsay against Reid, Forbes, p. 702. *IBIDEM*. In this case the bill was granted, not to diminish the effect of the doquet, but to give the pursuer more easy access to payment ; and the bill was referred to in the doquet, in order to show, that both related to the same debt.

The Lord Ordinary took the cause to report on memorials.

Two of the Judges were of opinion, that the bill being prescribed, it could be of no avail towards establishing the debt ; and that as the doquet referred to

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the bill, it was *per se* ineffectual for that purpose. If a bill granted for the interest of a bond (it was observed) were allowed to prescribe, an action would not afterwards be sustained for payment of it, although no discharge were produced.

The rest of the Judges thought, that the subscribed doquet, joined with the production of the bill unretired, afforded satisfying evidence, that it was still unpaid, especially as the original debtor had died within a few months after the bill became due, and his representatives did not allege that they had paid it.

‘ THE LORDS ’ repelled the defences set up by the defenders to the sum of ‘ L. 490 Sterling, as the balance found and ascertained by the doquetted account ‘ pursued on.’ See PRESCRIPTION. See PRESUMPTION.

Lord Ordinary, *Craig*. A&C. *Cullen, Geo. Fergusson*. Alt. *M. Ross, Davidson*. Clerk, *Menzies, Davidson*.
Fac. Col. No 24. p. 59.

* * * In the Session Papers of the case *M’Kenzie against Urquhart*, No 137. p. 1561. it is mentioned, that in a case then in dependence, Mr David Coupar *against* Sir George Stewart of Gairntully, (*Examine General List of Names.*) Sir George, as drawer of a bill upon the deceased Earl of Cromarty his grand-father, indorsed to Coupar, was pursued for recourse *after twenty years*, though no protest had been taken against the Earl. The Court had found, that in respect of neglect of negotiation, the pursuer had no recourse against the drawer. But Coupar having, in a petition, averred, that the drawer had *no effects* in the Earl’s hands, their Lordships appointed an investigation into that matter.

* * * In the case *Sinclair against Sinclair*, No 13. p. 1377. where the penal consequences of battery *pendente lite* were refused, because the person assaulted had betrayed a premeditated intention to provoke the assault; the original action in dependence was a process of reduction and improbation of a bill and a bond. The bill was said to have been granted on death-bed; and that it had not been signed by the drawer, at the time of the acceptance. This last circumstance, it was argued, was of such importance, and, if proven, would have been so fatal to the document, that the dread of this consequence was held out as a probable motive for provoking the assault. See Div. I. Sec. 5. *b. t.*

Bills bear annualrent. *See* ANNUALRENT.

Bills affected by bankruptcy. *See* BANKRUPT.

Blank bill. *See* BLANK WRIT.

Obligations of co-acceptors and co-creditors in bills. *See* SOLIDUM *et* PRO RATA.

Bill probative of its date. *See* PROOF.

Bills blank in the drawer's name when accepted. *See* PROOF.

Bills granted on death-bed or as legacies. *See* PROOF.---DEATH-BED.---LEGACY.

Indorsee's private knowledge of exceptions. *See* BONA *et* MALA FIDES.

Sexennial prescription of Bills. *See* PRESCRIPTION.

Do bills of exchange fall *sub communiōe* ? *See* HUSBAND and WIFE.

Bill granted by a wife. *See* HUSBAND and WIFE.

See PROMISSORY NOTE. *See* LETTER of CREDIT.

See COMPENSATION, RETENTION.

See Carrick *against* Key, 6th February 1787, Fac. Col. No 310. p. 478.
voce WRIT.

See PRESUMPTION. *See* FRAUD. *See* WRIT.

See FACTOR. *See* PACTUM ILLICITUM. *See* VIS *et* METUS.

See No 87. p. 763. No 191. p. 1119. No 192. p. 1120.

*** When this Work had proceeded thus far, the Faculty Collection had been published to no later date than July 1798.—Cases prior to that date not formerly reported; cases posterior to that date, down to the close of this Publication; and a variety of cases relative to this Title decided in England, will be found in the APPENDIX.