

No 332. the assignee cannot be in a better situation than the cedent. Thus the same plea of compensation that could have been successfully used against the indorser of the bill in question, must be equally available against his indorsees. Erskine, book 3. tit. 2. § 37.

Answered, At any time prior to the year 1772, the defender's argument would have been of considerable weight; but as bills of exchange have since been declared, during six years, to be legal and probative documents, no reason can be assigned, why the duration of their extraordinary privileges should be limited to a shorter period.

The plea urged for the pursuer had been formerly recognised by the Court, though no precise determination had ever been given on the point.

THE LORDS adhered to the judgment of the Lord Ordinary, 'in repelling the defences.'

Lord Ordinary, *Rockville.* Act. *C. Hay.* Alt. *Geo. Fergusson.* Clerk, *Menzies.*
C. *Fol. Dic. v. 4. p. 103.* *Fac. Col. No 309. p. 477.*

No 333. 1792. May 23. WILLIAM HENRY RALSTON *against* JOHN LAMONT.

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

Fol. Dic. v. 4. p. 103. Fac. Col.

* * * This case is No 115. p. 1533. *voce* BILL of EXCHANGE.

No 334.

The sexennial limitation of bills, how far affected by relative writings during the six years, or afterwards.

1792. May 23. JAMES RUSSEL *against* JAMES FAIRIE.

FAIRIE, on 8th May 1782, granted to the mother of Russel a bill of exchange for L. 92, payable one year after date.

On the bill were marked a variety of partial payments, the latest dated in September 1788. Three of the markings were in Fairie's hand-writing; the last of these, however, was in 1786.

After Mrs Russel's death, there having been many transactions between her and Fairie, a correspondence took place between him and her son. In March 1789, Fairie desired Russel 'to send a copy of the bill, and the payments made 'on the back of it, so that he might settle the balance.' And in July 1789, after the expiration of the six years, he again wrote in similar terms.

At last an action was brought by Russel against Fairie, for the sums appearing to be due, after deduction of the partial payments as marked on the bill.

The defender *alleged,* That he had made other advances to the full amount, trusting that the creditor would have carefully noted them. At any rate, he

contended, that the bill was no longer a probative document, being cut off by the sexennial limitation of 12th Geo. III. cap. 72. No 334.

In support of the action, Russel

Pleaded; The purpose of the enactment 1772 was to introduce, with regard to bills of exchange, &c. the sexennial limitation of England; it being very expedient, that, in commercial transactions, the law should be the same in all parts of the kingdom. As in England, therefore, any writing, even within the six years, which recognises a bill as a voucher of a subsisting debt, is held to interrupt the currency of the prescription, the same rule ought now to be observed in this country. In particular, the marking of partial payments, in the hand-writing of the debtor, saves from the limitation; Douglas's Reports, p. 656, *Whitcomb contra Whiting*. And after the lapse of the six years, the most imperfect and general acknowledgment, such as that of an executor giving public notice of his intention to pay what his predecessor owed, has been held sufficient for that purpose; Chancery Reports, p. 385.

Even upon the footing of the shorter prescriptions known in Scotland, the circumstances in this case are more than sufficient to support the claim. It is true, that partial payments, when noted by the creditor, can have no weight. But where this is done by the debtor himself, it amounts to a clear acknowledgment of his obligation; and as the enactment of 1772, allowing the subsistence of the debt to be proved, after the six years, by the writing as well as by the oath of the party, does not say in what form the writing should be, or whether the date of it should be before or after the lapse of the six years; even the markings on the bill would, in this case, be *per se* sufficient to make room for the statutory exception. But the correspondence, after the expiration of the six years, in which a balance is admitted, and a reference made to the partial payments noted on the bill, for the amount of it, seems to put the question beyond the possibility of doubt.

Answered, In the enactment of 1772, there is no express adoption of the English law, and the rules it lays down are quite inconsistent with any intention of that kind. The sexennial limitation of England is not directed against the bill only as a legal voucher; it is an extinction of the debt itself; insomuch, that it cannot be afterwards proved by the oath of the party, which, however, is authorised with us by the late statute. It would therefore be incompetent, although it were for the evident advantage of the country, to substitute in this respect the law of England in the place of our own. Besides, it is far from being clear that we would derive any advantage from the alteration. Those circumstances particularly, which in England are admitted even after the six years to save from prescription, seem to be altogether inadequate and inconclusive. From thence it would follow, that the obligation to pay the testator's debts, imposed in all testamentary deeds, should revive every claim to which he might have successfully opposed the statutory limitation.

No 334.

The enactment in question was evidently intended to establish, with regard to bills and other vouchers of the same nature, one of the shorter prescriptions known in Scotland. These are founded on a presumption of payment, which, so far from being removed by such transactions as here occurred within the six years, is held to receive from thence additional force; Erskine, 3. 7. 39. And although extreme cases may be figured, in which the consequences may be thought hardly reconcileable to justice; for example, where, on the day before the lapse of the six years, the debtor marks a payment to the account of the bill, or perhaps of the interest due on it; this cannot derogate from the efficacy of a law, in general wisely calculated for the security of commercial intercourse.

No relative writings, therefore, during the six years, are admitted in practice to remove the prescription, because they are not absolutely incompatible with the legal presumption of payment on which it rests. As to writings after the six years, where they amount to an unqualified admission of a subsisting debt, every attention ought to be paid to them. But those referred to on the other side are not of that nature. They indicate a wish to settle the claim arising from the bill, as well as all other transactions occurring between the parties. But they do not necessarily imply, that a balance was due by the defender, more than by the pursuer; and therefore they cannot, in sound construction, be held as a proof, such as is required by the statute, 'by the oath or writing of the party,' that the debt contained in the bill 'is resting owing;' 3d February 1784, Scot *contra* Gray, No 328. p. 11126.; 31st January 1787, Buchan *contra* the Creditors of Bedlay, No 331. p. 11128.

THE LORD ORDINARY pronounced this interlocutor:

'In respect it has been decided by the Court, that receipts for partial payments within the six years do not bar the sexennial prescription of bills, when pleaded against an action brought on the bill after the lapse of the said six years; and also in respect that the defender's missive letters produced by the pursuer in this action, founded on the bill libelled, do not, in terms of the statute, prove the debt as libelled, or that the same is resting owing,' assoilzies the defender, &c.

A reclaiming petition was preferred, which was followed with answers.

A majority of the Court were of opinion, that the enactment of 1772 was of a similar nature with those introducing the shorter prescriptions of Scotland, and not an adoption of the English law with regard to the limitation of bills, &c.; and that neither the markings in the hand-writing of the defender, nor the relative correspondence within the six years, could save from the currency of prescription.

But the Lords found, 'That the letter in process, dated 22d July 1789, from the defender to the pursuer, after the sexennial prescription had run, does instruct, that the debt libelled was then resting and owing in part; and therefore repelled the defence of the sexennial prescription.'

A doubt was started by one of the Judges, whether an interruption of the sexennial prescription by writing, was to be considered as a renewal of the voucher, so as to make room for a new course of the same prescription, to be reckoned from the date of the interruption, as was found in the case of the septennial limitation of cautionary engagements, Gordon, No 233. p. 11037.; or whether the operation of the statute being thus completely done away, the bill would subsist as a legal instrument for 40 years, unless, from the circumstances of the case, there arose a presumption of payment. But it was not necessary to determine the point.

Ordinary, *Lord Eskgrove.* Act. *Maconochie.* Alt. *Armstrong.* Clerk, *Menzies.*
G. *Fol. Dic. v. 4. p. 103. Fac. Col. No 211. p. 444.*

No 334.

1793. November 19.

DOUGLAS, HERON & Co. *against* TRUSTEES OF ANDREW GRANT.

No 335.

THE sexennial prescription of bills runs from the last day of grace, and not from the day of payment.

Fol. Dic. v. 4. p. 102. Fac. Col.

*** This case is No 108. p. 4602. *voce* FOREIGN.

1795. March 3.

VISCOUNT ARBUTHNOT *against* JOHN DOUGLAS.

No 336.

IN 1770, Mr Douglas, on his son's marriage, conveyed to him the lands of Tilwhilly, under burden of his debts, and reserved to himself the lands of Inchmarlo, free of all burden.

IN 1772, he delivered to his son a list of his debts; but no steps were taken to authenticate it, as relative to the son's obligation. The son died in 1773, leaving the present Mr Douglas of Tilwhilly in infancy.

The list of debts was found in his repositories, marked in his own hand writing, "List of Debts, Tilwhilly elder, 1772."

In that list, the late Viscount of Arbuthnot was marked as a creditor for L. 6000 Scots, or L. 500 Sterling, and a Mrs Reid for L. 1800 Scots, or L. 150 Sterling.

IN 1775, Mr Douglas of Inchmarlo brought an action against his grandson, narrating the facts above stated; and concluding, that he should be ordained to relieve him of the debts contained in the list.

The Court allowed the different creditors to be examined on oath, as to the verity of their debts.

A decree of constitution, obtained by the debtor in a bill, within six years from its date, against a person bound to relieve him, found not to interrupt the sexennial prescription in favour of the creditor in the bill, although he had been examined on the verity of his debt in the process of constitution, and had, on that occasion, produced his bill.