

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.*

1793. November 19.

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

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.

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.

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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.

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Mrs Reid declared, that the debt due to her had been paid by the pursuer.

The Viscount of Arbuthnot, at his examination, produced, as his grounds of debt, two bills, the one for L. 521 : 5s. dated 28th September 1774, payable at Whitsunday 1775 ; the other, for L. 156 : 15s. dated 26th May 1774, and payable in twelve months.

The Viscount deponed, that the first of these bills had been granted for a debt of L. 500, contracted in 1769, the surplus in the bill being the interest due at its date ; and that the second had been granted on account of money advanced to discharge the debt due to Mrs Reid. Both bills were immediately returned to the Viscount.

In 1778, a judgment was pronounced, finding the pursuer entitled to payment of such of the debts as he had discharged since the date of the list, (among which that due to Mrs Reid was mentioned, but no notice taken of Lord Arbuthnot's having succeeded as a creditor in her place,) and obliging the defender to relieve him of those debts which were still unpaid, among which the debt of L. 6000 Scots to Lord Arbuthnot was ranked, but no notice taken of the bill which had been granted for it.

Mr Douglas of Inchmarlo died in 1791, and the late Viscount of Arbuthnot about three months after him.

The two bills above mentioned having been found in his possession, and without any marking of payment of interest on the back of them, the present Viscount of Arbuthnot brought an action against Mr Douglas of Tilwhilly, (who represents his grandfather,) for payment of them, in which the points at issue came to be ; *1mo*, How far, from the circumstances of the case, these bills must not be presumed to have been paid ; *2do*, How far, independently of this presumption, all claim on them was not cut off by the sexennial prescription.

On the first point, both parties founded on the general conduct and situation of their predecessors, and various pieces of evidence in support of their plea.

On the second point, the pursuer

*Pleaded* ; Prior to the act 1772, the Court were accustomed to deny action on bills of an old date, merely from the presumption arising against them from the long taciturnity of parties ; but what number of years was necessary to afford room for this presumption depended on the circumstances of each case. The sole object of the statute was to fix the period which should be required for this purpose. And as the presumption of common law applied only where there was a complete taciturnity on both sides, so the act of Parliament applies only in the same circumstances. Wherever this taciturnity has not taken place, and the parties have in any way acknowledged the subsistence of the debt, by a partial payment, a marking of interest on the back of the bill, a discharge for it granted on a paper apart, or otherwise, the Court are called on to judge of the effect of these circumstances, in the same manner as before the date of the statute. That this was its meaning, is evident from the distinction which it

makes between the bill and the debt for which it is granted; the former it declares to be at an end upon the lapse of six years, without diligence being done, or action commenced on it; while it allows the debt, even after that period, to be proved by the writ or oath of party. And still more must the case be taken out of the statute, where the debtor has expressly acknowledged the debt during the currency of the six years.

Now, the decree of constitution, in this case, if not a document of debt in favour of the creditors, is at least an acknowledgment of the subsistence of their debts. In that action, though the creditors were not nominally parties, they were materially interested. It was, no doubt, commenced in order to prevent them from insisting on payment from their debtor, on seeing him give up so great a part of his property. By means of it, they got two debtors instead of one. After its date, they might have brought a direct action against the present defender for payment, although he had not represented his grandfather, who, in fact, held the decree as trustee for his creditors, who, consequently, are entitled to the benefit of it, without the formality of an assignation.

*Answered*; The act 1772 declares, that no action shall lie on a bill, after six years from its date have elapsed, unless, in the mean time, diligence has been done, or action commenced on it; reserving to the creditor, after that period, to prove resting owing by the writ or oath of the debtor. In this case, twice the period of prescription had elapsed before a claim was made, during which no steps were taken to enforce payment, and no writ of the debtor is produced.

The sole object of the action of constitution was to authenticate the list of debts. The creditors were examined in it merely as havers. Betwixt the date of the list, and the commencement of the action, some of the debts had been discharged: By the decree, Mr Douglas of Inchmarlo was found entitled to payment of those in that situation, and to relief from the rest. In the list, only one debt of L. 6000 Scots is stated as due to Lord Arbutnot; and although it appeared from the proof, that the debt due to Mrs Reid had been discharged with money borrowed from the Viscount, the decree takes no notice of that transaction, nor, indeed, of either of the two bills now claimed on. And although it had, that circumstance would not have affected the present question.

Prescription may be interrupted, either by a claim made by the creditor for payment, or by the acknowledgment of the debtor. A claim to have that effect, must be judicial. And it has been found, even that a decree of registration, a horning without a charge, (11th December 1717, Wright against Wright, Div. 15. *b. t.*) or the production of a ground of debt in a reduction-improbation, that action being carried no farther, (9th March 1756, Hay against his Majesty's Advocate, \* Div. 15. *b. t.*) are insufficient for that

\* From the report of this case, as in the Faculty Collection, it would appear, that the contrary was found; but from what passed on the Bench, when the present case was advised, it is believed that that report is erroneous. See APPENDIX.

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purpose. In the present case, no claim was made by the creditor. And, with respect to the supposed acknowledgment of the debtor, although any act of acknowledgment will interrupt the long prescription, the short prescriptions can only be interrupted by a writing which proves resting owing, and constitutes in itself a valid document of debt. Hence, a partial payment, or a marking of interest, will not have that effect. The reason of the distinction is, that the former proceeds on presumed dereliction; whereas, the latter are founded on the jealousy of the law against informal obligations, and the consequent presumption, that parties will not allow them to stand long over. The decree in question would not have interrupted even the long prescription. It was *res inter alios* to the creditors; it might have been discharged gratuitously, without their consent, and was no better than a decree by one obligant against another, by which the right of the creditor cannot be affected.

The Lord Ordinary reported the cause on informations.

The Court, (13th February 1794.) "having considered the whole circumstances of the case, particularly the decret of constitution of the late Tilwhilly's debt," repelled the defences.

Upon advising a reclaiming petition, with answers, it was

*Observed* on the Bench; The sexennial prescription may be interrupted, like every other, by the debtor's acknowledging the subsistence of the debt during its currency. An indefinite partial payment, within the six years, may not have this effect; because, it affords no evidence that the rest of the debt was then due. It may have been extinguished by compensation, or otherwise. But a payment of the interest, during the currency of the six years, will interrupt the prescription, as affording evidence that the whole principal sum of the debt was then due. If, for example, such payment of interest should take place only a day or two before the lapse of the six years, the act certainly would not apply, as the Legislature could not have meant to introduce a prescription of a week or a day.

The decree in 1778 is to be considered as a judicial acknowledgment on the part of the debtor, that the debt now claimed was then due. The currency of the prescription, therefore, was interrupted by it, and the effect the same as if a new bill had been granted of that date; but, as the debt thus renewed is still constituted only by bill, a new period of prescription, of six years, began to run from the date of the decree, upon the same principle which was followed in a case of the septennial prescription, reported by Bruce, 19th January 1715, Gordon, No 233. p. 11037.; and as more than six years elapsed between the date of the decree, and the commencement of the present action, the bills in question are prescribed.

But the general opinion of the Court seemed to be, that the bills were prescribed on a different ground. Nothing interrupts the sexennial prescription, (it was observed,) in terms of the act 1772, except diligence or action raised on the bill, within six years from its date. No acknowledgment of the debtor

within the six years, whether by payment of interest, or otherwise, can have that effect, unless it be such as would of itself constitute a valid obligation against the debtor.

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Even supposing the decree of constitution had been obtained after, in place of before the lapse of the six years, the creditors were not parties, and are not entitled to found on it. It was intended solely for behoof of Mr Douglas of Inchmarlo, and would have been equally necessary, although he had himself, before that time, paid the whole debts. And although the debts were still outstanding, he might, on receiving payment from his son, have liberated him from the obligation of relief, and converted the money to his own use. He might even have discharged the obligation gratuitously, if, by doing so, he did not render himself insolvent.

THE LORDS, 18th November 1794, "sustained the defence of the sexennial prescription."

Upon advising a second reclaiming petition, with answers, a doubt was expressed, how far the decree did not support the debt for 40 years; but the LORDS, by a considerable majority, "adhered."

Lord Ordinary, *Henderland.*

Act. Lord Advocate *Dundas, John Dickson.*

Alt. Solicitor-General *Blair, M. Ross, Neil Ferguson, Tait.*

Clerk, *Gordon.*

D. D.

*Fol. Dic. v. 4. p. 104. Fac. Col. No 164. p. 377.*

1797. May 19.

AGNES and MARGARET LINDSAYS, Executors of George Lindsay, and their HUSBANDS, for their Interest, *against* JANE and MARGARET MOFFATS, Children of Thomas Moffat.

THOMAS MOFFAT, on the 27th April 1787, accepted a bill for L. 59, drawn by George Lindsay, payable at Candlemas 1788, which bore to be "for value in a bond presently delivered up to you."

George Lindsay died on the 25th January 1794. Agnes and Margaret Lindsays were his cousins-german by the father's side, and Thomas Moffat was related to him in the same degree by his mother. It having been by mistake supposed, that his nearest relations on both sides had an equal right to succeed to him, they made an inventory of the papers found in his repositories, which was subscribed by all of them, and particularly by Thomas Moffat.

This inventory, *inter alia*, mentioned the bill in question, as an outstanding document of debt due to Lindsay.

The inventory was dated 5th February 1794, being the last day of the six years, counting from 5th February 1788, the last day of grace.

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The sexennial prescription found to be barred by a writing signed by the acceptor of a bill, importing an acknowledgment of the debt on the last day of the six years.