

No 337.

Other seven of the Judges held a different opinion. They thought the statute rested on a presumption of payment ; and that, therefore, no acknowledgment within the six years, which did not wholly *élide* that presumption, could bar the statute.

THE LORDS, however, in the circumstances of this case, unanimously "re-  
pelled the defence of prescription."

Lord Ordinary, *Swinton*.Act. *Jo. Clerk, Gillies*.Alt. *J. W. Murray*.Clerk, *Menzies*.

R. D.

*Fac. Col. No 23. p. 56.*

No 338.

A bill of exchange, when prescribed, cannot authorise summary execution, though the debtor's oath afterward prove the debt.

1804. *May 16.*ARMSTRONG *against* JOHNSTONE.

WILLIAM ARMSTRONG was drawer of two bills on Thomas Johnstone, one for L. 26 : 2 : 9, dated 26th June 1777, payable at Martinmas 1777 ; and the other for L. 7, dated 28th August 1777, payable one day after date.

Payment was refused of the bills when they became due. They were protested, and the protests duly recorded. Horning was raised on the registered protests on 28th November 1778.

Johnstone having become bankrupt, he was not charged on the horning till 16th December 1789. This charge was not followed out.

Armstrong, understanding that some money belonging to Johnstone was in another person's hands, used arrestment, (20th June 1798,) in virtue of the warrant in the letters of horning. Another arrestment having been soon after used by a son of Johnstone's, a multiplepinding was brought, when it was *objected*, That the bills which were produced by Armstrong, as his interest, were prescribed ; and, being thus extinguished, could not be a foundation for the diligence of arrestment, even though the debt should be revived, by referring it to the debtor's oath.

THE LORD ORDINARY admitted the reference to oath ; and pronounced this interlocutor : (12th November 1802) " In respect it is established by the oath of the common debtor, that the bills pursued for have never been paid, but are still resting owing, finds, that the claim is not barred nor taken away by the sexennial prescription ; and that the respondent is entitled to a preference in this competition, according to the priority of the diligence used by him upon the said bills."

Johnstone reclaimed ; and

*Pleaded* ; By the common law of Scotland, as well as the *jus gentium*, bills of exchange were sustained as competent grounds of action, long before summary diligence could be obtained on them, without the previous decree of a Judge. When protests were made registrable by the acts 1681 and 1696, di-

ligence was allowed immediately to proceed on the protested bills duly registered; but where six months were allowed to elapse without registration, the decree of a Judge following on an ordinary action was still necessary to authorise diligence. It remained an arbitrary question, depending very much on the circumstances of each case, for what length of time bills ought to be recognised even as grounds of action; but as to summary diligence, by the later practice of the Court, it was limited to three years. The act 12th George III. c. 12. introduced a sexennial prescription of bills and promissory notes, cutting off all right of action or diligence after six years, making it lawful, however, 'to prove the debts contained in the said bills or promissory notes, and that the same are resting owing, by the oath or writ of the debtor.' Now, though the debt may be thus revived, yet the document of debt remains prescribed; at least, its extraordinary privileges must cease. It seems contrary to principle, that the executorial diligence of the law should be of no effect when taken out, but depend for its effect upon the result of an oath. The diligence of arrestment, in such a case, cannot be used on the bill, but must proceed either on the dependence of an action for payment, or on the decree when obtained.

*Answered;* The principle of the shorter prescriptions is not the annihilation of the document of debt, but merely a presumption of payment from lapse of time. This presumption is removed by the oath of the debtor, by which an interruption of the prescription takes place, and the debt becomes a subsisting debt during the period of the long prescription. As long as the debt subsists, being founded on a bill, it is entitled to the privileges of that document; and, consequently, to summary execution. By the debtor's oath, the objection to the validity of the debt, which is the foundation of the arrestment, is removed: it is just the same as if the drawer or acceptor had denied his subscription: this being removed by evidence, the prior diligence which had been raised would have become immediately effectual.

The Court (3d February 1804) "alter the interlocutor reclaimed against; find the summary diligence used by the respondent was inept."

To this judgment, the Court, though divided in opinion, adhered, (10th May,) on advising a reclaiming petition and answers.

Lord Ordinaty, *Cullen.*

Alt. *Corbet.*

For Johnstone, *Baird.*

Agent, *Wm. Johnstone.*

Agent, *Tho. Johnstone.*

Clerk, *Pringle.*

F.

*Fac. Col. No 158. p. 357.*