

1743. December 9.

DRUMMOND *against* GRAHAME.

No 27.

A bill bearing annual-rent and penalty, along with a parole proof of the circumstances of the loan, were not together found to afford sufficient evidence of a subsisting debt.

DRUMMOND of Deanston having lent 800 merks to Grahame of Mondowie, who was married to his sister, the document he took for the debt, was a bill dated 21st November 1717, in his own hand-writing, and regularly accepted by William Grahame. This bill was anxiously conceived to make it a firm security; for it bears a docquet in the following terms: 'Signed, date and place foresaid, before these witnesses, John and Walter Grahames, sons to the said William Grahame;' and, accordingly, these two young men subscribe as witnesses. After the death, both of the creditor and debtor, a process was brought, for payment, against the said Walter Grahame, as representing his father, whose defence was, That the bill was null, as bearing annual-rent and penalty. In order to support the bill against this exception, a proof was demanded, and several witnesses led to prove the circumstances of this loan. When the matter came to be advised, the pursuer insisted upon two topics; *1mo*, That the foregoing defence did not amount to an *ipso jure* nullity, or *denegatio actionis*; but only to an exception, which might be passed from by homologation or otherways; and that the defender, who is a subscribing witness to the deed, ought to be barred *personali exceptione*, from pleading this exception; seeing, in quality of witness, he must have seen his father, the debtor, subscribe; otherways be guilty of a crime. *2do*, That supposing the bill not *per se* a sufficient evidence of the debt; yet, in conjunction with the proof led, there is sufficient evidence to satisfy the Court, that there was a debt, and that the same is resting owing.

To the first it was *answered*, The defender was not above sixteen years old at the date of the bill, and cannot call to remembrance whether he subscribed the bill or not; and therefore cannot be barred *personali exceptione* from pleading the said defence.—To the second, There is no sufficient evidence to prove a subsisting debt.

'It carried, by a narrow plurality, that there is no sufficient evidence of a subsisting debt.'

Rem. Dec. v. 2. No 46. p. 74.

1744. June 10.

MARGARET LAUDER and Her Husband, *against* PATRICK MURRAY of Cherrytrees.

No 28.

A bill including interest from the date to the term of payment; and one including interest from the date until paid, both sustained.

THE pursuers having right to two bills, due by the defender to the deceased Mr Lauder, minister at Eccles, brought an action for payment.

Against the first bill, it was *pleaded*, That the defender had been hooked in by the said Mr Lauder, to grant a bill for the price of a watch, payable at his marriage; at a time when Mr Lauder was thought so old, as to be past thoughts of marrying; and for near five times the value of the watch. In such a case he