

No 200.

1762. February 10. SMITH *against* DOUGLAS.

A BILL had lain over for five years without diligence. It was found to have lost its privileges so as not to exclude compensation against an onerous indorser.

Fol. Dic. v. 3. p. 91.

See The particulars *voce* COMPENSATION

1766. June 13.

JAMES WEEMYSS, Goldsmith in Edinburgh, *against* JOHN M'NAUGHTON, Esq;
Inspector General of the Customs.

No 201.

Action refused on a bill which had lain over twenty-five years, the acceptor alive; but under reservation to insist for the acceptor's oath.

In July 1739, Mr M'Naughton accepted a bill to Thomas Erskine for L. 25 Sterling, payable two months after date. This bill Mr Erskine indorsed to James Moncrief, who indorsed it to Mr Weemyss; who, in 1765, brought an action against M'Naughton for payment of the bill.

The question came before Lord Pitfour, who made avisandum to the Court and appointed informations.

Pleaded for Weemyss the pursuer: By the common law of the country, there is no such thing as prescription known. Every right, legally constituted, subsists for ever; but as, in process of time, this unlimited endurance of rights or obligations was found to be attended with many inconveniencies, the exception of prescription was introduced by the act 1469, whereby an action not exercised, for the space of 40 years, was elided; and afterwards the legislature thought it expedient, by special statutes, to introduce sundry shorter prescriptions, as the triennial prescription of accounts, the vicennial prescription of holograph writs, &c.

But there was no statute limiting the prescription of bills, which must therefore subsist for 40 years. In some cases, it is true, the Court has refused action on bills that have lain over for a shorter time; but such decisions proceeded always upon the presumption of payment, and not upon the footing of prescription. And the pursuer *alleged*, that there was no room for presuming payment in this case, as the acceptor himself was alive, and did not condescend upon any particular time or place when payment was made.

Answered for M'Naughton the defender: That, though no particular law has, in this country, limited the prescription of bills to a short endurance, yet the Court has been constantly in use of denying action upon them after a long taciturnity; which appears agreeable to Lord Stair's opinion, titled *Probation by writ*; and Lord Bankton, treating of Bills of Exchange; and sundry decisions were referred to, where the Court had refused action upon bills, that had lain over for a number of years, though not near the years of the long prescription;

and, from these authorities and decisions, the defender pleaded that the taciturnity alone was sufficient to cut down the bill. No 201.

He acknowledged, that, in 1739, he borrowed L. 25 Sterling from Sir Charles Erskine of Cambo, and gave a bill for that sum to Sir Charles and his brother Thomas, then Sir Charles's factor, and from Thomas he received the money, and to him the bill was delivered; but, he alleged, that, when the bill fell due, he repaid the money to Sir Charles upon a receipt, but which receipt was not produced. And he farther *contended*, that he had been always in easy circumstances, and no demand ever had been made for payment of this bill, although Mr Erskine, the drawer, lived in the neighbourhood, and was in very straitened circumstances.

' On report of Lord Pitfour, the LORDS find no action lies on the bill in question; and therefore *affoilzie* and *decern*.'

And refused a reclaiming petition for Weemy's without answers, referring to him to insist for M'Naughton's oath, if he thought proper.

Reporter, Lord Pitfour.
Elphinstone.

For Weemy's, *And. Crosbie.*

For M'Naughton, *Jo. Monro.*
Fac. Col. No 37. p. 62.

1767. January 21.

JOHN MAXWELL *against* JAMES MAXWELL of Kirkconnell.

In February 1734, James Maxwell of Kirkconnell accepted a bill to William Maxwell of Crafwadda for L. 38 Sterling, payable 1st May thereafter. This bill was allowed to lie over, without being protested or registered, or any diligence done on it, till summer 1765; when an action for payment was brought, at the instance of Crafwadda's executor, against James Maxwell, then of Kirkconnell, as representing his father James Maxwell, the acceptor of the foresaid bill. The Lord Ordinary decerned for payment; the defenders reclaimed to the whole Lords.

Pleaded for the defender: In all commercial countries bills are limited by very short prescriptions. In France they prescribe in five, and in England in six years; and although in Scotland there is no express law limiting the endurance of bills to any particular period, yet, from the uniform tract of the decisions of the Court, as well as the opinion of our lawyers, a sort of prescription seems to be established, not indeed fixed to any particular period, the time differing according to circumstances, but considerably within the period which this bill has lain over; Lord Stair, b. 4. tit. 42. § 6.; Lord Bankton, vol. 1. p. 367. § 31.; Erskine, b. 3. tit. 2. § 37.; Lady Forrester *contra* Lord Elphinston, 13th November 1742; C. Home, p. 346. *voce* QUALIFIED OATH; Wallace *contra* Lees, 31st January 1749, No 189. p. 1613.; Moncrieff *contra* Sir Wil-

No 202.

Action sustained on a bill which had lain over 31 years. The acceptor was dead.