No 336.

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.

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.

No 337.
The sexennial prescription found to be barred by a writing signed by the accepter of a bill, importing an acknowledgement of the debt on the last day of the six years.

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.

No 337. It having been soon discovered, that Thomas Moffat had no interest in George Lindsay's succession, Agnes and Margaret Lindsays, his executors, after Thomas Moffat's death, brought an action against his children for payment of the bill, contending, that it was saved from prescription by the inventory, which amounted to an acknowledgment by Thomas Moffat, that, at its date, the sum in the bill was resting owing.

The defenders denied this; and further argued, that, even supposing the inference drawn by the pursuer, from the tenor of the inventory, to be just, yet, as it was dated before the six years had expired, it could not prevent the bill from prescribing;

Pleading; The 12th George III. c. 72. expressly enacts, that no bill shall be effectual, unless diligence be raised, or action commenced on it, within six years from the term of payment; and, therefore, an acknowledgment of resting owing, made while the six years are current, cannot save it from prescription. The statute proceeds on a presumption of payment having been made before the six years expire; and, therefore, the law presumes, that payment must have been made subsequent to such acknowledgment, and before the expiration of the six years.

It is vain to argue on the improbability of such payment having been actually made in this case, from the acknowledgment being dated on the last day required to complete the prescription: Public utility requires, that the period when this presumption of payment shall take place should be expressly defined; and being a *præsumptio juris et de jure*, no evidence can be admitted to redargue it; 23d May 1792, Russel against Fairie, No 334. p. 11130.

Answered; It is not disputed, that any writing of the debtor in the bill dated after the expiration of the six years, which proves it to be then resting owing, would bar the prescription. But there seems to be no good reason for giving effect to such an acknowledgment, and denying it to an act of the same kind within the six years. No such distinction is made by the statute 12th George III. nor is it founded on any solid principle of law, there being equal, or even more reason for presuming payment, after a longer space has elapsed from the constitution of the debt. In truth, the statute does not, as the defender supposes, proceed on a presumption of payment; on the contrary, it was made merely to remedy, as the act itself expresses it, "the great inconveniencies that have been found by experience from bills not being limited to a "moderate endurance." For this purpose, it precludes action upon the bill after the six years; but not a demand for payment of the debt for which the bill was granted, if the debt appear to be unextinguished. After the lapse of the six years, a common action of debt may still be brought against the granter of the bill, in which the Court will judge, by the ordinary rules of evidence, whether the existence of the debt be established, and although, in such an action, the bill *per se* would not prove the debt, it may serve as an adminicle of evidence; for that the bill is not rendered utterly void by the currency of the

prescription, is obvious from its being capable of revival, by an acknowledgement of the debt after the six years. No 337.

Further; the 12th George III. was made in imitation of the statute of limitations in England, 20th Jac. I. c. 17. which declares, that actions upon bills, and certain other contracts, shall be sued 'within six years next after the cause 'of such actions or suit, and not after.' Notwithstanding this provision, however, any acknowledgment of the debt, or partial payment, made within the six years, bars the limitation; Douglas's Reports, p. 652. Whitecomb against Whiting.

Replied; This arises from a peculiarity in the law of England, wholly inapplicable to ours, by which even a verbal promise to pay is considered as a new cause of debt; and, consequently, makes the bill run a new course of prescription from the date of the promise; Blackstone, b. 3. c. 9. § 3.; Carthew's Reports, p. 470. 471. Heylson against Hastings; Couper's Reports, p. 189. 28th January 1782, Hawkes against Saunders.

The Lord Ordinary "sustained the defence of prescription."

The pursuers presented a reclaiming petition against this judgment, which was appointed to be answered. When the cause came to be advised, there having been a considerable difference of opinion, with regard to the effect of an acknowledgment of resting owing within the six years, a hearing in presence, and afterwards memorials, were ordered.

When the memorials were advised, the Court entertained no doubt with regard to this special question, being unanimously of opinion, that the prescription was barred by Moffat's subscribing the inventory, the very day before the prescription had run, as that circumstance afforded most satisfactory evidence, that the bill was not paid within the six years.

But the opinions delivered by seven of the Judges, including the Lord President, attributed the same effect to an acknowledgment of resting owing made at any time within the six years. A distinction (it was observed) ought to be carefully taken between a bill, and the debt created by it. The statute cuts off the bill in six years; but the Legislature, by doing so, did not mean to annihilate the debt at the close of that period. Its existence after the six years falls in every case to be determined by the common rules of law. A clear acknowledgment of resting owing, after the term of payment of the bill, and within the six years, certainly proves the debt to be then due, and, of course, forms a new *terminus*, from which prescription must commence. To give no effect to an acknowledgment of resting owing within the six years in any case, where there is a possibility of the bill being paid before their completion, would be to introduce an indefinite and arbitrary course of prescription, unwarranted by the statute, the length of which would depend entirely on the time which was to run between the date of the acknowledgment, and the expiration of the six years, and which might be only a year, a month, a week, or a day, according to circumstances.

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 elide that presumption, could bar the statute.

The Lords, however, in the circumstances of this case, unanimously "repelled 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.*

1804. *May* 16. Armstrong *against* Johnstone.

No 338.
A bill of exchange, when prescribed, cannot authorise summary execution, though the debtor's oath afterward prove the debt.

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 multiplepoinding 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-