

‘ his predecessor, but as singular successor, there-  
 fore,’) be left out ; and it is hereby farther or-  
 dered and adjudged that with these variations,  
 “ the several interlocutors complained of be af-  
 firmed.”

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For the Appellant, *W. Grant, W. Murray.*

For the Respondents, *Al. Forrester, Ch. Ar-  
 skine.*

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ALEXANDER GARDEN of Troup, - *Appellant* ;  
 THOMAS RIGG of Morton, Advocate, *Respondent.*

28 January, 1748.

PRESCRIPTION. — INDEFINITE PAYMENT.

Two bonds due to the same party being prescribed, and the debtor in them having made an indefinite payment “ to ac-  
 compt,” during the currency of the prescription, it was found that the prescription of both bonds was not thereby interrupt-  
 ed, but that the debtor might impute the payment to either of them.

ANNUAL RENT.—Interest found to be not due upon a missive not bearing a clause of interest.

PERSONAL OBJECTION.—A bill of exchange being so framed as to afford a legal objection to its validity, it was found that the acceptor, having been confidential lawyer to the drawer, was barred *personali objectione* from pleading the objection.

BILL OF EXCHANGE.—Bills of exchange having lain over for twenty-eight years, without protest or demand, it was found by the Court of Session, that no action lay upon them, unless supported by the acceptor’s oath upon the verity of his subscription. *Reversed* on the circumstances of the case.

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[*Elchies voce* Prescription, No. 25 ; *voce* Advocate, No. 1 ; C. Home. Falc. Kilker. Mor. 1628, 10450, 11274.]

ARROT lent Rigg several sums of money, on the following among other documents : 1st, A bond

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for 1100 merks Scots, dated 25 January, 1697, and payable at Whitsunday following, and bearing interest. 2d, A letter of 12 October, 1697, acknowledging the receipt of 300 merks Scots, but this did not bear an obligation of interest. 3d, Two bills of exchange drawn by Arrot, and accepted by Rigg, the one dated 11 May, 1708, for L.560, 13s. 4d. Scots, the other 2 April 1712, for L.40 Sterling, and each bearing interest from its date, and a penalty of one-fifth in case of failure.

On the 4 October, 1698, Rigg paid L.7 to account; for which Arrot gave a receipt as “in part payment of what he is indebted to me, which sum I oblige me to allow him at account.”

In 1728, Arrot executed a settlement of his whole estate in favour of Alexander Garden of Troup, who in September, 1738, raised an action against Rigg for payment of the 1100 merks contained in the bond of 25 January, 1697, and of the 300 merks contained in the letter of 12 October, 1697. Defences were given in; but before judgment, Mr. Garden died; and his son, the appellant, in 1740, brought a new action, not only for the sums concluded for in his father's summons with interest, but also for the sums contained in the above mentioned bills.

With regard to the former, the defence was, that they had prescribed, before action was raised upon them; to which it was answered, That the prescription had been interrupted; 1st, By the partial payment in 1698; and, 2dly, By a submission, entered into by Arrot in 1728.

Replied for Rigg, that he had applied that partial payment of L.7 in part payment of the 300 merks, and not in extinction of 1100 merks, or the

interest thereof; and it was further insisted that the letter acknowledging the receipt of the 300 merks, not having a clause to that effect, ought not to bear interest.

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With regard to the *bills*, it was argued that as they contained a clause of interest and a penalty, they lost the privilege of bills of exchange, and were void.

It was answered, that Rigg, having been the man of business for Mr. Arrot, and the acceptor of the bills, could not plead this objection against his own act and deed, to the prejudice of his employer.

Upon the report of the Lord Ordinary, (Elchies) “ The Court (26 November 1743,) sustained the defence of prescription against the bond for 1100 merks, but sustained the interruption of prescription as to the 300 merks, in respect the defender had applied his indefinite payment to that debt; and they repelled the interruption founded on the submission, and found no interest due upon the letter for the 300 merks; and found that the defender being at the date of the bills ordinary lawyer and trustee to Mr. Arrot, he was thereby barred from objecting against the form of the bills; and remitted to the Lord Ordinary to proceed.” Thereafter the Court adhered.

Rigg pleaded that the two bills were prescribed, for although bills of exchange contrary to the ordinary rule of the law of Scotland, but in conformity to the practice of other trading countries, are now obligatory and do produce action, although not probative; yet this extraordinary privilege being allowed to them only while circulating, in order to facilitate commerce, must cease whenever

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they are suffered to lie over for a number of years, as permanent securities for money. In the present case, no claim having been made for so long a period, they cannot now be sustained without other evidence in support of them.

To this it was answered, that the above interlocutors repelling the objection against the form of the bills, virtually sustained the bills as sufficient and legal documents in every respect,—Rigg never having denied his subscription and acceptance.

The Lord Ordinary (13 December, 1743.)  
 “ In respect of the Inner-House interlocutor,  
 “ sustains the bills to the extent of the principal  
 “ sums and interest from the several terms of pay-  
 “ ment,” &c.

Upon a reclaiming petition, the case was reported, when, by a majority of one, the Court found (January 6, 1747) “ That no action lies on those  
 “ bills which have lain over so long a time, with-  
 “ out demand, unless supported by Mr. Rigg’s  
 “ oath upon the verity of his subscription to the  
 “ acceptance.” And upon advising another petition, in which it was pleaded, that there was no law or statute authorising the alleged prescription of bills; the Court “ adhered.” (February 11, 1747.)

The appeal was brought from these several interlocutors, in so far as they sustained the defence of prescription against the bond for 1100 merks; found no interest due upon the letter for 300 merks; repelled the interruption founded on the submission; and found that no action could be on the bills, unless supported by the respondent’s oath as to the verity of the subscription to the acceptance.

*Pleaded for the Appellant.*—1. The receipt for

Entered,  
 March 3,  
 1743.

L.7, expressly bore to be in part payment of what was due at the date of it; and at that time the respondent was indebted to Mr. Arrot in two sums only, viz. the 1100 merks, and the 300 merks. The partial payment, therefore, was applicable in terms of the receipt, in part payment of both these debts; and the respondent cannot, by any subsequent election, depart from the manner of appropriation stipulated by the receipt. If any part of the L.7 be applied in payment of the 1100 merks, the prescription of that debt is interrupted.

The rule as to the application of an indefinite payment is, that where there are debts bearing interest, it shall be imputed, in the first place, to extinguish the interest, and no election is afterwards competent to the debtor, especially when it is attempted, as in the present case, to evade a just debt, upon the odious defence of prescription.

2. The debt of 300 merks ought to bear interest, because the respondent being authorised by Mr. Arrot to receive that money on his account, he retained it and converted it to his own purposes, without Mr. Arrot's consent. It is clear that if he, being thus trustee or mandatory for Mr. Arrot, as to the sum, had taken it upon himself to lend it (having received it from a debtor of Mr. Arrot's,) to a third person, without interest, he would himself have been answerable for the interest, by way of damages; and he ought not to be placed in a better situation by having applied the money to his own use.

3. As to the bills, all writings which bear the essentials of a deed are probative. They prove themselves, and are presumed to be genuine till

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disproved, nor are they cut off by prescription till after a lapse of forty years; and all bills of exchange, whether foreign or domestic, are ranked in the same class. Though there are acts of parliament, introducing shorter prescription, yet these do not extend to bills of exchange, which have always been deemed probative for forty years; and if the privileges of these documents is not by law prescribed, the creditor cannot be deprived of it, and compelled to prove their authenticity *aliunde* on the single ground of his having delayed for a time to sue on them. Every circumstance of the present case tends to show that the bills are still resting owing. His first defence (their alleged nullity) implied an admission of their authenticity, and the plea of prescription likewise supposes that they had once been good documents of debt. In fact, the respondent has never expressly denied that he accepted them.

*Pleaded for the Respondent* :—1. As no action was instituted upon the bond, and no other legal document taken upon it for more than forty years, it is clearly prescribed.

2. No capital sum bears interest, except either where the law has so appointed it, or where it is expressly stated in the writing. In the present case, there is neither law nor paction to this effect.

3. Bills of exchange have peculiar privileges for the benefit of commerce, if they are demanded within such a reasonable time, as they may be supposed to lie over in the course of commercial dealings; but if they are allowed to lie over for a much longer period of time, without any demand being made upon them, they cease to have the same credit and privileges, or to be esteemed (con-

trary to the ordinary rule of law) sufficient proofs in themselves of a debt due, and of grounds of action. In the present case it cannot be presumed that the bills are still due, otherwise the appellant's father would undoubtedly have included them in the action which he raised for the two other sums, being undoubtedly possessed of them as well as of the other documents.

After hearing counsel, "it is ordered and adjudged, &c. that the said interlocutor of the 6th January 1747, whereby the Lords of Session found, 'That no action lies on those bills which have lain over so long a time without demand, unless supported by the respondent's oath upon the verity of his subscription to the acceptance,' be reversed; and that the interlocutor of the same Lords of the 11th February following, adhering to the said interlocutor, be also reversed, and it appearing that the said bills are not of a commercial nature, nor proper bills of exchange, it is further ordered and adjudged, that the interlocutor of the Lord Ordinary, of 13 December 1743, be affirmed; and it is likewise ordered and adjudged, that the interlocutors, or such part thereof as are complained of in the said appeal be, and the same are hereby affirmed."

For the Appellant, *W. Grant, W. Murray.*

For the Respondent, *James Graham, C. Erskine.*

Kilkerran, at the end of his Report, says, "This judgment was on appeal reversed; and, as is informed, not on the general point, but on the circumstances of the case; so that the general point may still be thought entire, should a question hereafter occur upon it."

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Judgment,  
28 Jan. 1748.