

No 49.

Elizabeth Cairns, grandchild and executrix to Minnibowie, obtained decret against Garroch for the last sum, and adjudged his estate; and appearing in the ranking of his creditors, it was *objected*, That the jottings on the back of the factory were not sufficient documents of debt.

THE LORD ORDINARY, 16th January 1745, ' Found that the jottings on the foot of the list of debts subjoined to the factory by Minnibowie to Garroch, were no sufficient or legal evidence that the L. 466 : 13 : 4 contained in the said list, was a subsisting debt, or still due.'

Pleaded in a reclaiming bill, That the jottings on the factory in Garroch's hand-writing, were an evidence that he got this sum, to be lent out upon security, and retained it for years, paying interest therefor. This was an obligation once fixed upon him, which behoved to continue unless properly taken off; and as there could be no doubt that if he had been pursued in a short time after the last accounting, he behoved to have been liable, so must he now, notwithstanding it be true that no action was brought till 1730; for it is as true that no action was raised against him on his bond for L. 600; Alexander Cairns, who succeeded his father, never having made up any titles, but received payments in general to account, all which had been allowed to Garroch out of the pursuer's claims.

Answered, That these notandums were no sufficient evidence of a subsisting debt, since it was probable Garroch had lent out the money afterwards, and delivered his uncle a bond therefor; at which time he had retired the receipt he had granted when he first got it.

Observed by the LORDS, That it was ordinary to put money in an agent's hand, without receipt, to be lent out, who delivered a bond, and got no further exoneration; and therefore it would be hard, upon any acknowledgement of his having once had the money, to make him accountable at a distance of time: But here the jottings proved he had retained it for years in his hand, and paid annualrent for it, after which it was proper he should discharge himself.

THE LORDS altered the interlocutor.

Act. W. Grant.

Alt H. Home.

Clerk, Hall.

D. Falconer, v. I. No 181. p. 244.

1788. June 13. JAMES RUSSEL, and Others, *against* PATRICK FRASER.

No 50.
Payment of a bill presumed from circumstances, tho' the sexennial prescription had not elapsed.

FRASER granted a promissory note to Alexander Boog, who lived five years and ten months after its date in 1780, without having made any claim upon it. Action, however, for the payment was raised by Russel, and other trustees of the heir of Boog. The defender stated a variety of circumstances, from which it appeared that the debt was already paid; and

Pleaded, It is true, the period of the sexennial prescription was not fully

elapsed ; but evidence of payment from circumstances is to be received against every document of debt ; Stair, b. 4. tit. 45. § 23. ; Bankton, b. 4. tit. 34. § 2. Nor can it make any difference, whether the law has established with respect to such documents a longer or a shorter prescription.

No 50.

Answered, When there was no other prescription of bills of exchange but that of 40 years, presumptions of payment were sometimes received against such as had stood unretired for a long tract of time, though less than the period of prescription. But the statute of 1772 seems to supersede every arbitrary determination in this matter, and to preclude all presumptions of payment, when the document is unretired, and the term of the statute not elapsed. The present, accordingly, is thought to be the first instance in which such an attempt has occurred.

THE LORD ORDINARY pronounced this interlocutor : ‘ The Lord Ordinary having considered, &c. is of opinion, that the circumstances founded on by the defender afford a strong degree of probability, that the contents of the promissory note libelled on were paid in the manner condescended on by him : But, in respect of difficulties occurring in the case, he does not think it proper for him, judging singly as an Ordinary, to cut down a clear valid obligation remaining in the hands of the creditor, and not of an old standing, upon arguments and presumptions alone, without legal or direct evidence of its extinction ; and therefore repels the defences.’

But the COURT, ‘ altered the interlocutor, and found sufficient presumptive evidence, that the promissory note libelled had been paid or accounted for by the defender to Boog.’

Lord Ordinary, *Esqgrove.* Act. *Hay.* Alt. *M. Ross.* Clerk, *Menzies.*
S. *Fac. Col. No 21. p. 36.*

S E C T. II.

Apocba trium annorum.—Taciturnity.

WEMYSS *against* LADY ST COLME.

IN an action of nullity of a tack pursued by David Wemyss, heritor of the lands of Dambursel, *contra* the Lady St Colme and her Son, the LORDS fand, That an exception of payment upon an acquittance of three terms was sufficient to induce a liberation of all bygones.

No 51.

Kerse, MS. fol. 58.