

1711. June 11. &amp; 12.

DONALDSON *against* WALKER.

No 508.

A DOCQUET in the following words, In witness whereof, I have subscribed these presents, &c. does not import the writ to be holograph; and, therefore, the party was forced to offer a probation of holograph, *comparatione literarum*, and by witnesses who saw it written and subscribed.

*Fol. Dic. v. 2. p. 258. Forbes. Fountainball.*

\* \* This case is No 188. p. 11511. *voce* PRESUMPTION.

1725. February.

MR JOHN KENNEDY of Kilhenzie, Advocate, *against* CAPTAIN HUGH ARBUTHNOT of London.

CAPTAIN ARBUTHNOT being sued, as heir to Kennedy of Baltersan, upon three bills accepted by Baltersan, at London, for value, payable to Thomas Kennedy, and which the pursuer Kennedy of Kilhenzie had right to, the defence was, "That Captain Arbuthnot being an heir, bills do not prove their date against him, but like holograph writs are presumed to be granted on deathbed; and therefore he is not liable, unless the pursuer instruct the bills were accepted while Baltersan was in *liege poustie*, or 60 days before his death."

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Bills prove  
their date a-  
gainst an  
heir.

It was *urged* accordingly for the defender, *imo*, There is even less reason that bills be allowed to prove their date, than holograph writs. *2do*, If bills were allowed to prove their dates, the law against deathbed deeds would be entirely eluded: For it were easy to get a sick man to antedate a bill; and all deeds on deathbed would come to be transacted in the way of bills. *3tio*, Whatever might be done in the case of foreign bills; with respect to inland bills, and these not among merchants, there is no reason for allowing them any privilege of this kind.

On the other side it was *pleaded*, That if bills prove not their date against the heir, it must follow that they prove not their date in any other case; for so it is as to holograph writs, from which the argument in the present case is drawn. Now, holograph writs prove not their date against any third party: See 14th January 1662, Dicky *contra* Montgomery, No 497. p. 12606.; 21st June 1665, Braidie *contra* Fairny, No 498. p. 12607. And for the same reason it must hold, if one becomes bankrupt in terms of the act 1696, whereby all his voluntary deeds, within 60 days of the bankruptcy, in satisfaction or security of any of his creditors, are void, all holograph writs, though bearing date long before, will be annulled by that statute, because they do not prove their dates. If then bills prove not dates, more than holograph writs, it must

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follow, if I owe a merchant in London L. 100 per bond, and he draws a bill upon me for L. 50 as part of the bond, which I accept payable to a third party, if this merchant shall afterwards assign my whole bond, the assignee will recover the whole from me; because it cannot appear otherwise than from the bill itself, that it was accepted prior to the assignation. In like manner, an inhibition against any man will cut off all bills accepted by him, though never so long before the inhibition; and if one becomes bankrupt, all bills granted by him in satisfaction of any of his creditors, of whatever date, will fall to be cut off by the statute 1696. Now if all, or any of these consequences did obtain, bills in a great measure would be rendered ineffectual, a loss irreparable in the matter of trade. But our practice runs directly contrary in every particular; it is an established rule, that no exceptions are good against an onerous indorsee, not even payment to the indorser, and far less any objection from the date. And accordingly, by the common custom of merchants, both here and elsewhere, bills are probative of their date, as well as of any other thing contained in them: See Forbes upon bills, p. *ult.* As to the defender's arguments: To the *first, answered*, Bills and holograph writs are in few things upon the same footing; holograph writs taken as securities for debts, to lie over for some time, are the more suspected, that it is easy for a creditor to get his security made firm by adhibiting two witnesses; but bills that are never designed to lie over, are less suspected when duly negociated, and so are more countenanced than holograph writs. To the *second*, It is allowed the want of formality in bills, may possibly give opportunity to sundry kinds of fraud; but any view of that nature, has never been judged by politer nations, as sufficient to balance the ease and benefit they produce in the subject of commerce. To the *third, answered*, There is no foundation for a distinction in this case; the privileges of foreign bills being in consequence of the late statute extended to inland bills as to every particular.

“ THE LORDS repelled the objection.”

*Fol. Dic. v. 2. p. 259. Rem. Dec. v. 1. No 57. p. 109.*

\* \* Edgar's report of this case is No 69. p. 1477. *voce* BILL of EXCHANGE.

\* \* A similar decision was pronounced, 12th February 1731, Johnston against Strachan, *see* APPENDIX.

1737. June 17.

SIR JOHN SCOT of Ancrum *against* SIR ROBERT DOUGLAS of Glenbervie.

No 510.

PRESCRIPTION being proponed against a bond, by the principal debtor who was sued for payment, the pursuer produced a holograph receipt for a year's