

1783. August 8. WILLIAM CLARK *against* JOHN ROBERTSON, and Others.

No 246.

Action, on a policy of insurance, not competent before the Court of Session, in the first instance.

An action founded on a policy of insurance, was brought before the Court of Session, in the first instance, by Clark, the insured, against Robertson, and certain other persons, underwriters.

A doubt concerning the competency of the jurisdiction, having occurred, both parties declared their readiness to prorogate it; and referred to the case of Ritchie *contra* Wilson and Company, determined July 5. 1780, No 244. p. 7527.

The Lord Ordinary reported the point to the Court; and, in consequence of the opinion delivered by their Lordships,

“ FOUND, that the case was maritime, and therefore that it could not, in the first instance, proceed before this Court; and therefore dismissed the action.”

Lord Ordinary, *Kennet.* Act. *Morthland.* Alt. *Solicitor-General, Campbell.*

S. *Fol. Dic. v. 3. p. 352. Fac. Col. No 119. p. 187.*

1784. June 23. JAMES GORDON *against* WILLIAM BOGLE.

No 247.

Found in conformity with A. against B., No 231. p. 7513. that the Court of Admiralty is competent to grant decree for a debt due by an inland bill.

JAMES GORDON pursued William Bogle before the Judge of the High Court of Admiralty, for payment of a bill of exchange, accepted, among others, by John Bogle, to whom the defender had succeeded as heir.

The admiral-precept, or warrant for citation, according to the usual form in that judicatory, made no mention of any particular debt; and before the action had been called in Court, when, for the first time, the libel was filled up, and the bill specified as the foundation of the claim, six years had elapsed from the term of payment.

The Judge-Admiral found the defender liable; who removed the cause, by a bill of advocacy, into the Court of Session, and

Pleaded; The present claim, however vouched by a document, originally introduced, and most commonly used among merchants, was the result, not of a mercantile transaction, but of a cautionary interposition by the debtors, who were landed gentlemen, in favour of a person of the same rank. The implied contract, too, arising from the defender's behaviour as heir, from which an endeavour is made to subject him to this debt, has not the most distant relation to trade. To the cognizance of matters such as these, the High Court of Admiralty was altogether incompetent, the concurrent jurisdiction assumed by it in causes not maritime, being strictly limited to those of a mercantile nature; Dictionary, *voce* JURISDICTION.

Nor were the proceedings in that Court, though competent to the trial of this claim, a proper interruption of the sexennial limitation of bills of exchange. The negative prescription is not founded merely on a supposed dereliction by

the creditor. The law presumes the debtor to have paid the debt, but to have neglected to preserve for so long a period the vouchers of his acquittance. Hence it is not enough that the claimant, within the limited time, has indicated a resolution to demand payment. The other party must likewise be made acquainted with that purpose, and thereby be put on his guard, so as he may secure those writings which are necessary for his release. Thus the registration of a deed, Erskine, b. 3. tit. 7. § 38.; the issuing of letters of horning, without a charge against the debtor, 11th December 1717, Wright against Wright, *voce* PRESCRIPTION; or the voluntary conveyance of the debt, have been found not to interrupt prescription; Kames's Elucidations, art. 23. § 344. On the same principle, a general charge to enter heir, Bankton, b. 2. tit. 12. § 57.; an arrestment, 16th February 1699, Menzies *contra* Forbes, *voce* PRESCRIPTION; and an action of mails and duties pursued by an adjudger on a trust bond, 14th December 1742, Scott *contra* Lord Napier, *IBIDEM*, do not save from prescription; because they convey no sort of interpellation with regard to any particular debt.

A summons executed before it is libelled, or what is called a blank citation, cannot be attended with stronger effects. When allowed by the forms, it may serve to intimate to the party cited, that a claim is to be brought against him, but cannot afford information either of its nature or of its extent. Accordingly, even when that mode of procedure was used in the Court of Session, it never was sustained as an interruption of prescription; 30th November 1739, Macdougall *contra* Macdougall, *voce* PRESCRIPTION.

Answered; Bills of exchange, from whatever transaction they may have originated, are considered as mercantile vouchers, and on that account exempted, in every instance, from the statutory solemnities which are requisite in other writings. In all cases, therefore, they may be competently tried before the High Court of Admiralty, which by inveterate usage, confirmed by decisions in the courts of review, has acquired a jurisdiction in every question of a mercantile nature; 19th July 1706, Anderson *contra* Turnbull, No 225. p. 7509.; A. against B. No 231. p. 7513. Nor could the jurisdiction of the Judge-Admiral be taken away by the death of one of the parties; otherwise, in matters strictly maritime, which are exclusively appropriated in the first instance to his cognizance, the death of the debtor would at once put an end to the ground of action. An heir, in the contemplation of law, is the same person with the predecessor, and to him debts, as well as rights, are transmitted, without the smallest alteration.

The practice of executing a summons, containing no specification of the pursuer's claim, is apparently inconsistent with the chief design of that form, which is, to enable the party cited to prepare his defence; and for this reason it has been abolished in all the courts in Scotland, except that of the Admiralty, the peculiar nature and objects of this jurisdiction requiring the utmost expedition and dispatch. As the statute 1696, c. 19. has directed all summonses executed not as the commencement of an action, but for the special purpose of

No 247. interrupting prescription, to contain "the grounds and warrants on which they proceed," a blank citation cannot be deemed a revival of a claim, in terms of that law. But where a prosecution of the right is intended, and the claim is regularly insisted in, and brought to a conclusion by obtaining decret, it cannot be imagined that a citation, agreeable to the forms of the court from which it is issued, should vitiate the whole proceedings. In this case, the bill of exchange was engrossed in the libel the moment the forms of court would admit; nor can the defender specify any other claim to which the citation could possibly apply.

THE LORD ORDINARY pronounced the following interlocutor :

"In respect that by long usage, approved by decisions of this Court, actions upon inland bills, as well as upon foreign bills of exchange, have been rendered competent before the Judge of the High Court of Admiralty; and that in this case William Bogle, defender and advocator, was cited (as were also the other acceptors of the bill in question) upon a precept issued from the said Court of Admiralty, at the pursuer James Gordon's instance, agreeable to the usual form and practice of that Court, before expiry of six years from the term of payment of the said bill; and in which precept the bill was *after* fully libelled upon, and the process called in Court, against the whole persons bound or liable for the bill, as soon as the diets of compearance were past; and farther, that the advocator has not alleged, that at the time of the said citation there was any ground of debt or claim subsisting between the pursuer and him other than the said bill, to which the foresaid precept and citation thereon could have applied; therefore remits the cause to the Judge-Admiral."

Upon advising a reclaiming petition, with answers, in which the pursuer urged, as an additional interruption of the prescription, that a decret had been obtained within the six years against one of the acceptors of the bill in question, the LORDS pronounced this interlocutor :

"Find, That by long usage, approved by decisions of this Court, action upon inland bills, as well as upon foreign bills of exchange, has been rendered competent before the Judge of the High Court of Admiralty: Find, That the execution upon a blank Admiral-precept does not interrupt prescription; but find, That the decret taken against one of the *correi*, before the six years were elapsed, interrupts the prescription as to all of them." See PRESCRIPTION.

Lord Ordinary, *Eskgrove.*
Arch. Campbell.

Act. *Maclaurin.*
Clerk, *Menzies.*

Alt. Lord Advocate *Campbell.*

C.

Fol. Dic. v. 3. p. 353. Fac. Col. No 160. p. 249.