

No 3.

Bruce presented a petition, praying the Court to find, that the bill in question was not a probative writ.

This petition was never advised.—Upon what authority, therefore, Lord Kames, in his abridged report of this case, supposes it to have been settled, that ‘ a bill or ‘ precept for the delivery of fungibles is not sustained as a probative writ,’ does not appear.

Fol. Dic. v. 1. p. 95. Session Papers in the Advocates’ Library.

** * * See No 8. p. 1403.*

S E C T: II.

Nature of a Bill.

1710. July 14.

MR MALCOLM M’GIBBEN *against* The MANAGERS of the Woollen Manufactory at Newmills.

No 4.

A bill ordering money to be paid out of a specified fund, accepted, ‘ when ‘ the fund ‘ comes to ‘ hand,’ found effectual, and preferable to a posterior arrestment of the same fund.

IN the competition between Mr Malcolm M’Gibben and the Managers of the Woollen Manufactory at Newmills, for sums due to Major General M’Cartney, out of the Equivalent; M’Gibben founded on a bill or precept drawn by the Major-General, 6th August 1700, upon James Ramsay, then paymaster of the regiment of Foot Guards, ‘ ordering him to pay thirty-three pound Sterling out ‘ of his clearings of the months of July, August, September, October, November, and December 1698, in full of his and Hautboies dues from the said regiment, when received.’ On which bill Mr Ramsay wrote, ‘ Accepts when the ‘ clearance comes to my hand;’ and it was intimated to the Commissioners of the Equivalent, 24th June 1707. The Managers of the Manufactory at Newmills, (who had used arrestment in the hands of the Commissioners, upon a registered bond granted to them by the said Major-General for L. 89 : 18 : 4 Sterling) claimed preference to M’Gibben, in respect their debt was unexceptionable; whereas his precept was conditional, payable out of a certain fund when received by Mr Ramsay; and the condition never being purified, could not be considered as an effectual conveyance, albeit it is a good instruction of the debt against the drawer: For the order to pay out of the clearance of such months, was intended to point out the fund of the creditor’s payment, and to free the acceptor from being liable to pay out of any other of the drawer’s effects.

Answered for M’Gibben: The precept does constitute a pure and simple debt against the drawer, though there be a condition adjoined to the acceptor’s payment. *2do*, Its being payable out of a particular fund, implies a virtual assignation thereto; for albeit the bill, in order to M’Gibben’s more conveniency, was made payable by Mr Ramsay when the fund came to his hand; yet the fund itself, though never received by him, must still be liable to that debt. And the bill intimated to the Commissioners of the Equivalent, long before the competi-

tor's arrestment, carries right to as much of the clearance in their hands, as will satisfy the same; just as if the Major-General had assigned it to M'Gibben, and for his better payment ordered Mr Ramfay to pay the same when received; and therefore M'Gibben ought to be preferred.

THE LORDS preferred M'Gibben, the creditor in the bill.

Forbes, p. 422.

No 4.

1721. February.

PATRICK, VISCOUNT OF GARNOCK *against* The DUKE OF QUEENSBERRY.

JAMES, Duke of Queensberry, deceased, did, in June 1708, draw a bill on David Earl of Glasgow, of the following tenor:

“MY LORD,

“Be pleased to advance to John, Viscount of Garnock, upon the account, and for the use of Patrick, Master of Garnock, his eldest son, ten shillings *per diem*, commencing from the first of June instant; and that ay and while the said Patrick, Master of Garnock, be provided with a company in her Majesty's forces.
“This from, my Lord, your humble servant,

“QUEENSBERRY.”

No 5.
An obligation to pay 10s. *per diem* until the person shall be provided with a company in the army, conceived in the form a bill, found null.

On this title, the said Patrick, Viscount of Garnock, pursues his Grace the Duke of Queensberry, as representing the late Duke his father, for the sum of 10s. *per diem*, since the first of June 1708, and in time coming, until he be provided with a company in the forces; and for damages for non-performance.

The *defence* was, That this is no proper bill, and therefore must fall, as wanting writer's name and witnesses. And it was *contended*, That it is not every writing that hath a drawer, a person on whom it is drawn, and a creditor, that can be reckoned to have the privileges of a bill; which will be plain, by reflecting, that the only reason why these privileges are indulged to bills, proceeds from this, that they are looked upon as bags of money, passing from hand to hand, as a necessary medium of trade. If then it appear from the deed, that it neither is or can be looked upon in this manner, it is not in the power of private parties to give it those privileges; so that indeed a proper subject, namely, a sum of money to be paid at a certain time, is as essentially necessary to the nature of a bill, as a drawer, acceptor or creditor. Now, by this writ, there never was any design to transfer money from hand to hand; this could be no view in the transaction, but barely to grant a security: Besides, it is entirely gratuitous, without an onerous cause in money or merchandise, which of itself is enough to defeat it, it being inconsistent with the nature of a bill to be gratuitous; and therefore, if this writing be allowed to pass as a bill, then marriage-covenants, jointures to wives, aliments, in short, every thing that can fall under an obliga-