

1743. December 9.

DRUMMOND *against* GRAHAME.

## No 27.

A bill bearing annual-rent and penalty, along with a parole proof of the circumstances of the loan, were not together found to afford sufficient evidence of a subsisting debt.

DRUMMOND of Deanston having lent 800 merks to Grahame of Mondowie, who was married to his sister, the document he took for the debt, was a bill dated 21st November 1717, in his own hand-writing, and regularly accepted by William Grahame. This bill was anxiously conceived to make it a firm security; for it bears a docquet in the following terms: 'Signed, date and place foresaid, before these witnesses, John and Walter Grahames, sons to the said William Grahame;' and, accordingly, these two young men subscribe as witnesses. After the death, both of the creditor and debtor, a process was brought, for payment, against the said Walter Grahame, as representing his father, whose defence was, That the bill was null, as bearing annual-rent and penalty. In order to support the bill against this exception, a proof was demanded, and several witnesses led to prove the circumstances of this loan. When the matter came to be advised, the pursuer insisted upon two topics; *imo*, That the foregoing defence did not amount to an *ipso jure* nullity, or *denegatio actionis*; but only to an exception, which might be passed from by homologation or otherways; and that the defender, who is a subscribing witness to the deed, ought to be barred *personali exceptione*, from pleading this exception; seeing, in quality of witness, he must have seen his father, the debtor, subscribe; otherways be guilty of a crime. *2do*, That supposing the bill not *per se* a sufficient evidence of the debt; yet, in conjunction with the proof led, there is sufficient evidence to satisfy the Court, that there was a debt, and that the same is resting owing.

To the first it was *answered*, The defender was not above sixteen years old at the date of the bill, and cannot call to remembrance whether he subscribed the bill or not; and therefore cannot be barred *personali exceptione* from pleading the said defence.—To the second, There is no sufficient evidence to prove a subsisting debt.

'It carried, by a narrow plurality, that there is no sufficient evidence of a subsisting debt.'

*Rem. Dec. v. 2. No 46. p. 74.*

1744. June 10.

MARGARET LAUDER and Her Husband, *against* PATRICK MURRAY of Cherrytrees.

## No 28.

A bill including interest from the date to the term of payment; and one including interest from the date until paid, both sustained.

THE pursuers having right to two bills, due by the defender to the deceased Mr Lauder, minister at Eccles, brought an action for payment.

Against the first bill, it was *pleaded*, That the defender had been hooked in by the said Mr Lauder, to grant a bill for the price of a watch, payable at his marriage; at a time when Mr Lauder was thought so old, as to be past thoughts of marrying; and for near five times the value of the watch. In such a case he

could not be blamed to plead every legal objection against the bill; and there was an obvious one, which lay to the form of the bill now pursued on; which had come in place of the original one; viz. that it bore a clause, 'with interest from the date;' which was urged to be inconsistent with the nature of a bill, before the term of payment, (which, in this case, was the term of Lammas after the date;) and that any clause thrown into a bill, foreign to the nature of it, vitiates the same, and renders it void and null. *2do*, That such a clause is not implied in the nature of a bill, but altogether extraneous to it: It is changing the nature thereof, from being a bag of money, to make it a permanent security, a *feodum pecunie*, like a bond; which behoved to exclude the *jus mariti* and single escheat.

With respect to the second bill, which was payable at the Whitsunday after its date; it was observed, that it bore a clause, *with interest from the date thereof until the same be paid*. But, in regard that this bill was better founded in equity than the first one, the defender declared he was always willing to pay it; only he submitted, Whether he ought to pay interest upon it, before the term of payment?

To the objection to the first bill, it was *answered*, That all bills bearing value in the acceptor's hands, at the time of the draught, do, by their own nature, carry interest along with them; and, when a suit is brought on such, interest is always awarded *nomine damni*.

*2dly*, A foreign bill, though it does not express interest, exchange, &c. yet, by dishonouring thereof, all these become due by law, and the practice of merchants.

*3dly*, It would be absurd to suppose, that the expressing in a bill, what is naturally implied in it, could vitiate it *in toto*.

*4thly*, It would destroy whole companies, amongst whom nothing is more common, than to include in the bill itself the annual rents, from the date till the term of payment; and this practice has been confirmed by a course of Decisions. See December 1727, Henderson, No 20. p. 1418. June 1737, Dinwoodie, No. 22. p. 1419. December 1738, Gilhagie, No 23. p. 1421.

And to the claim for interest on the second bill, it was *answered*, That, as the defender acknowledged the bill was well-founded in equity; it followed, that the pursuers were entitled in justice, to have the legal interest for their money. *2dly*, That Whitsunday 1712 is the term fixed for the payment of the bill; and the adjection of these words, *with interest thereof until the same be paid*, means no more, but that it should bear interest from the date, till the above term of payment, whereby it does not differ from the other bill.

THE LORDS repelled the objection to the first bill, and likewise to the second, in respect the defender acknowledged the debt to be just.