

“ THE LORD ORDINARY, in respect the note was of the hand-writing of the defender, decerned for the sum. Upon two reclaiming bills and answers, the LORDS adhered.”

No 315.

Act. Raz.
A. R.

Alt. Alex. Gordon, Junior.

Clerk, Home.

Fol. Dic. v. 4. p. 107. Fac. Col. No 31. p. 54.

1775. November 30.

CHEAP against CORDINER.

MARGARET CORDINER being sued at the instance of William Cheap, as factor appointed by the Court upon the sequestrated estate of Archibald Miller, merchant in Edinburgh, for payment of L. 9 : 19 : 0, for tow and lint, conform to an account produced, said to be furnished to her deceased husband on the 14th October 1764, afterwards amended to 14th October 1765, and interest thereof from that period, she pleaded the defence of prescription founded upon the act of Parliament 1579, cap. 83d, which runs in these words: “ All actions of debt for house-mail, servants’ fees, merchant’s accounts, and others of the like debts that are not founded upon written obligations, shall be pursued within three years, otherwise the creditor shall have no action, except he either prove by writ or oath of party.”

In order to elide the defence of prescription, Mr Cheap produced a letter from the defender’s husband, commissioning the goods, of date, Oldeer, 8th October 1765, concluding thus: “ And this shall oblige me to pay you, as others, upon the shipmaster’s receipt;” and, in a postscript, he says, “ as Mr Farquhar refused to carry this money to you, (*i. e.* L. 2 of a former balance,) as I thought he would have done, so draw upon me at Aberdeen or Oldeer, and I shall honour your order, and mind the needful.” The pursuer further produced, from Mr Miller’s letter book, a copy of the answer to this letter, in these words: “ I am favoured with yours of the 8th instant, and, conform to your orders therein, I have sent you *per* the Mary of Gardenston, William Sangster for Peterhead, *per* his receipt thereon, say eight matts tow, and 87½ lb. dressed lint, *per* account hereon, amounting to L. 19 : 19s. at your debit, and for which hereon is my draught on you, at six months, which please return accepted.”— From these letters, the pursuer *contended*, that this case falls under the exception in the act of Parliament, of accounts founded on written obligations.

Answered; It is very true that the act makes an exception of accounts founded upon writ, and declares that no other proof is competent after three years, except by writ or oath of party. Now, though it is very true, that the letter founded on by Mr Cheap does prove the commission of the goods, it does, in no shape, prove, that they were actually furnished, nor is there any acknowledgment produced from the defender’s husband, of the goods being delivered, nor an obligation upon him to pay the price. In that case, indeed, the defender could

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The triennial prescription of a merchant’s account not obviated by production of a written commission for the goods.

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see that the debt was founded on writ, and that the plea of the triennial prescription could not be received. But here, although there be a letter of commission, the debt is not constituted by it, but entirely left upon the open account. The pursuer mistakes the meaning of the act of Parliament, when he supposes, that letters commissioning the goods are sufficient to exclude the triennial prescription: That prescription was introduced upon a presumption, that open accounts, such as the present, if not pursued for within three years, have been satisfied and paid, and the act allows no evidence to the contrary but the writ or oath of the party. And, accordingly, the uniform style of a reference to oath in a case where the defender's oath can be obtained, is not whether the goods were delivered, but whether they are not resting owing. Surely the letter produced by the pursuer does in no shape prove resting owing; on the contrary, from the whole circumstances of this case, there is the greatest reason to presume the contrary. It is therefore hoped, that, as Mr Mitchel's oath cannot be now obtained, and nothing has been produced under his hand to shew the justice of this debt, which is now, at so great a distance of time, attempted to be reared up against his representatives, the Court will see good cause for assoilzieing them from it.

“THE LORDS found that no action lay for payment.”

In this case, the shipmaster's receipt was not produced.—The Court did not determine upon the statute, but upon the letter, bearing a bill to be sent;—which presumed payment.

Act. *M'Laurin.*Alt. *Cha. Hay.*Clerk, *Robertson.**Fac. Col. No 201. p. 141*

No 317.

1776. December 17. *MACGHIE against TINKLER.*

TINKLER, quarter-master to a regiment, was charged before the bailies of Dumfries by Macghie, for payment of L. 10 Scots, as the value of a boll of beans bought from the latter, and 1s. 6d. for drying and breaking another boll; and decret being given in terms of the libel, the defender, in a suspension, pleaded the triennial prescription; against which it was *urged*, That the defender having left the country with his regiment, and gone to England, the pursuer became *non valens agere*; for it would have been absurd to bring an action in a foreign country for such a trifle. THE LORDS sustained the plea of prescription. See APPENDIX.

Fol. Dic. v. 4. p. 105.