

No 11. account, when the merchant would only be entitled to his principal and interest from the time it fell due.

Answered for the pursuer; There is no solid distinction betwixt payments made on mercantile accounts, and those made on other debts by bond or bill. After the nine months for which credit was stipulated, the pursuer was equally entitled to interest on the price of the goods, as if he had taken a bond for the price. The pursuer deals only in buying and selling on commission, and he purchased with his own money the goods sent to this company. The interest of that money he would have received yearly, if it had not been bestowed in this manner; and, therefore, justice would not be done him, if the partial payments were not allowed to be applied, at the time they were made, to the extinction of the interest.

As 14 years have elapsed since the goods were furnished, the delay of payment is an additional reason for stating the partial payments to the extinction of interests. The pursuer likewise alleged, that the practice of merchants was in his favour.

As parties differed in their averments with regard to practice, the COURT 'allowed either party to procure proper certificates in England, of the usual mode of stating accounts, such as these in question, and periods of imputing the partial payments, and interest on the whole.' Certificates from merchants were produced by both parties.

THE COURT were of opinion, That no authority or practice had been shown to alter the fixed rule of law, and 'repelled the objection to the stating of the accounts.'

Lord Ordinary, *Justice-Clerk.* Act. N. Ferguson. Alt. Wight. Clerk, Campbell.

Fol. Dic. v. 3. p. 315. Fac. Col. No 75. p. 145.

No 12.

The creditor in an account, of which a part was prescribed, was found entitled to impute partial payments, in satisfaction of articles of his account, three years preceding the date of such payments; though these articles were part of those which had fallen under prescription.

1779. June 30. JAMES GOOD *against* CHRISTIAN SMITH.

JAMES GOOD, in his own name, and as executor decerned *qua* nearest of kin to David Stoddart, brought a process against Christian Smith, executrix decerned to Henry Wilkinson, for an account of wright work done by Stoddart and the pursuer to Wilkinson. The defender pleaded prescription on the act 1579, c. 83.; and it being disputed what part of these accounts was prescribed, it was found by a final judgment of the Court, (in 1776) 'That the accounts pursued for as due to Stoddart and Good fall under the statutory prescription, except for *three years* preceding the execution of the summons for payment of them.' An after question occurred relative to the application of certain partial payments made by Wilkinson to Stoddart, within the period of three years preceding the execution of the summons.

Pleaded for the pursuer ; In the case of an indefinite payment, the creditor is entitled to impute it to extinction of the debt worst secured. These partial payments, therefore, within the last three years, are not to be imputed in payment of the articles of the account for work done during that time. The pursuer is entitled to apply them respectively to the oldest articles of the account, within three years previous to the date of each payment ; Fleming, 6th Jan. 1565, No 1. p. 6801. ; 28th June 1717, Duck against Maxwell, No 7. p. 6804.

No action could be sustained now on these older articles, because prescription has run ; but, being good grounds of debt at the time the payments were made, they were sufficient to exhaust the payments so far as they went. On that account, the pursuer was under no necessity to bring an action for these articles within the years of prescription. He had the payments in his own hands to extinguish them.

Answered for the defender ; The pursuer's argument proceeds on the hypothesis, that the payments made during the last three years were indefinite ; but no payment can be held indefinite, unless it is established, in the *first* place, that there was more than one debt owing at the time. In this case, the only debt which it is possible to show ever existed, was that owing for work performed during the last three years. As to the other, supposed to arise from alleged articles of work performed previous to the three years, there is no room for evidence now of its ever having been due. The effect of the triennial prescription as to these articles, was to cut off every mean of proving their existence, except the writ or oath of the employer ; consequently, as he is dead, the payment must be applied to the work performed for the last three years, the only debt which is established to have been due when these payments were made.

But, in the applying of indefinite payments, it is the situation of the debt at the time of *demanding a settlement*, and not at the time of the *indefinite payment*, that is to be considered. Although, therefore, the older articles of the account were to be held another debt of Wilkinson's at the time of the payments ; yet, as they were not then applied to the extinguishing of these articles by the parties, and this only now required, it cannot be allowed. The supposed debt to which the payment is desired to be applied does not exist, and is as much at an end by the prescription, as if a discharge had been produced of it. If the pursuer's plea were good, the defender would, in effect, be found liable in the prescribed part of the account ; and it is evidently the same thing as if action had been sustained against him directly for more than three years work.

THE COURT found, ' That the partial payments made to Stoddart and the pursuers during the last three years of the accounts libelled, should be applied to the articles of these accounts, which were not prescribed at the time of such payments, but within three years of the date of such payments.'

Lord Ordinary, *Justice-Clerk*. Act. *J. Dickson*. Alt. *M'Laurin*. Clerk, *Menzies*.

Fol. Dic. v. 3. p. 316. Fac. Col. No 82. p. 158.