

No 320.

The LORD ORDINARY “repelled the defence of prescription, and found the defender liable in payment of the sums libelled.”

But the opinion of the Court was, That the prescription was not excluded, and so far they altered the Lord Ordinary’s interlocutor; but found the defender liable on a different ground.

Lord Ordinary, *Svinton*.Act. *J. Pringle*.Alt. *Russell*.Clerk, *Robertson*.

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Fol. Dic. v. 4. p. 108. Fac. Col. No 276. p. 277.

1794. November 18.

WILLIAM DOUGLAS against MARY GRIERSON.

No 321.

An account of furnishing, although instructed by a commission in writing from the purchaser, and by the carrier’s receipt for them, found to fall under the triennial prescription,

WILLIAM DOUGLASS, factor for a Company of soap-boilers at Leith, sued Mary Grierson, as representing her deceased husband Thomas Hislop at Wanlockhead, for the price of a quantity of soap, alleged to have been furnished to him.

In support of his claim, he produced a letter holograph of Hislop, ordering the soap; to which was subjoined, a receipt by the carrier, to whom it was delivered on his account.

The defender contended, that the account fell under the triennial prescription. The pursuer, on the other hand,

Pleaded; The sole object of the act 1579, c. 83, was to prevent the uncertainty which would attend the admission of parole proof as to facts of a remote date. The lapse of the three years, therefore, creates no presumption against the subsistence of the debt, but only a limitation as to the mode of proving its constitution. Before the three years are expired, it may be proved *prout de jure*, afterwards only *scripto vel juramento*; Stair, b. 2. tit. 12. § 30.; Ersk. b. 3. tit. 7. § 16.—18.; Mackenzie’s Observations; Bankton, b. 2. tit. 12. § 34. If the act proceeded upon a presumption of payment, it would follow, that no writing granted within the three years, could bar the prescription, because the debt might have been afterwards paid? and, contrary to the evident intention of the legislature, there would be no distinction during that period, between written and parole evidence.

That the act was meant to apply only to the constitution of the debt, is farther evident, from the different terms employed by the legislature, in the acts 1579, c. 81, 82, where a proper prescription was intended, and also from the act 1669, c. 9, which, in so far as it relates to the stipends of ministers, mulctures, and mails and duties, requires a proof of resting owing; but in so far as it relates to bargains concerning moveables, as it had a similar object with the act now in question, is framed nearly in the same terms.

Accordingly, in questions upon the triennial prescription, the point in dispute has been not so much whether the debts being constituted in writing, barred the application of the statute, as, whether the particular writings founded

on, were sufficient to establish the constitution of the debt; Ersk. b. 3. tit. 7. § 18.; 20th February 1708, Elliot against the Representatives of Veach, Div. 15. b. t.; 15th January 1766, Donaldson against Murray, No 315. p. 11110.; 7th March 1788, Carron Company against Bell; 14th February 1792, Hamilton against Cunninghame; 23d May 1792, Martin and Ker against Robertsons*.

No 321.

Answered; The triennial prescription applies to a species of debts, which are seldom constituted by writing, and which are generally soon discharged. No prudent man will allow his house-rent, the wages of his servants, or the bills of his tradesmen, to be long due. Founding on the usual practice, the act 1579 introduced a legal presumption, that such debts are paid within three years after they are contracted. After that period, parole testimony is not admitted, because the witnesses who saw the debt contracted, cannot be sure that it may not have been afterwards discharged. Written evidence, however, is still competent, because writing will not be adhibited, unless where it is meant by granting a legal voucher to take the debt out of the common case, and therefore the writing to bar the prescription must prove resting owing, or at least be sufficient to take off the contrary presumption; Ersk. b. 3. tit. 7. § 18. b. 4. tit. 2. § 11.; Mackenzie's Observations on act 1579; Bankt. b. 2. tit. 12. § 34.; Dirleton, *voce* QUALIFIED OATHS; Stewart's Answers, p. 214.; 11th November 1697, Stirling against Stewart, (*see* APPENDIX.); 21st February 1695, Dallas against Mackenzie, (*see* APPENDIX.); November 1682, Tutor of Craigievar against Gray, No 289. p. 11091.; 19th November 1784, Ross against Shaw, No 320. p. 11115.; 11th February 1724, Guthrie against Marquis of Annandale, No 304. p. 11101. *See* APPENDIX.

Accordingly, in subsequent statutes, (1669, c. 9. and 1772, c. 72.) introducing short prescriptions, the language of the law having acquired more precision, it is expressly declared, that after the years of prescription, the existence of the debt must be proved by writ or oath, although there can be no more reason for a presumption of payment in the cases to which they relate, than in those which fall under the triennial prescription.

Before the three years are expired, the creditor's books create so strong a presumption in his favour, that his oath in supplement only is necessary to establish his claim. After the three years, however, this proof is incompetent, merely because in the former case, the presumption is in favour of the subsistence of the debt, and in the latter it is against it.

Besides, many absurd consequences would follow from the opposite view of the statute. A person living in the same town with the tradesman he employed, would have the benefit of the triennial prescription; whereas, a person residing in the country, who (as in the case in question), must necessarily send a commission in writing to town for what he wants, would be deprived of it

* The three last mentioned Cases not reported; *see* APPENDIX.

No 321.

merely on account of the carrier's receipt, which as it was granted without his knowledge, he would never think of retiring. In like manner, although house-rents and wages of servants fall under the triennial prescription, it would be barred in the one case by the cess-books, and in the other by a written certificate of character, both of which completely establish the constitution of the claim.

The Lord Ordinary assolizied the defender.

The Court were much divided in opinion.

On the one hand, it was

Observed; The carrier in this case is to be considered as the servant of Hislop, and the question is the same as if the receipt had been granted by himself. The furnishing being thus established by written evidence, the act does not apply. Some confusion has arisen on this subject, from not attending to the distinction between the two kinds of evidence, excepted from the limitation of the statute, and an erroneous opinion of Mr Erskine on the subject. When reference is made to the oath of the debtor, he is entitled to depone to the existence, as well as the constitution of the debt; it being reasonable that he should be allowed to extinguish the debt in the same way, that it is constituted against him, and therefore payment before as well as after the three years expired, is an intrinsic quality in his oath. But where the creditor rests upon written evidence, it is sufficient that it prove the furnishing; for a debt intructed by writing, will, by the common rules of law, be presumed unpaid, while the writing remains in possession of the creditor, and no written document of extinction appears.

On the other hand, it was thought that the act was founded on the presumption, that debts due by open account are paid within three years after they are contracted, and was meant to oblige traders to enforce payment within a short time, or at least to procure such an acknowledgement of the debt in writing, as will prove, not merely the constitution, but the subsistence of it. Now, in the present case, (it was observed), the furnishing is proved *scripto*, but there is nothing to take off the presumption of payment, as neither the written order, nor the carrier's receipt, made any substantial difference upon the nature of the debt, which continued to be due by open account.

THE LORDS (22d November 1793) repelled the defence of prescription. But, on advising a reclaiming petition and answers, they (11th February 1794) sustained it; and this judgment being brought under review by a reclaiming petition with answers, they "adhered."

Lord Ordinary, *Henderland*.
Clerk, *Gordon*.

Act. *John Dickson*.

Alt. *Ja. Ferguson, jun. Cranstoun*.

D. D.

Fol. Dic. v. 4. p. 108. Fac. Col. No 130. p. 295.