

Thursday, June 5.

SECOND DIVISION.

[Lord Low, Ordinary.

GORDON v. JAMES FORD & SON.

Prescription — Triennial—Claim for Balance Due for Work Done—Allowance for Contra Account — Question of Accounting—Act 1579, c. 83.

An action was brought for payment of £186, being the balance alleged to be still due on three accounts for joiner, carpenter, and ironmonger work done more than twenty years before, after deducting £750 paid to account, and £758, the amount of a contra account for mason-work. The pursuer alleged that the contra account was greatly in excess of the amount due, but subject to reservation of his right to have it investigated and adjusted he gave credit for it in fixing the amount sued for. The defenders averred that the pursuer had been fully paid, and pleaded the triennial prescription. The pursuer maintained, in answer to this plea, that the triennial prescription did not apply, in respect that the question between the parties was in substance a question of accounting.

Held (aff. Lord Low, Ordinary—diss. Lord Young) that the triennial prescription applied.

Prescription — Triennial — Claim on Account for Sum Due under Extensive Building Contract—Act 1579, c. 83.

Held that the triennial prescription applied to an account for joiner, carpenter, and ironmonger work done, and material supplied, more than twenty years before under an extensive building contract.

Process—Proof—Diligence—Acceptance and Offer—Triennial Prescription—Written Contract—Act 1579, c. 83.

In an action for payment of a balance alleged to be still due for work done more than twenty years before under a building contract, the pursuer averred that the defenders had submitted a specification and schedules to the pursuer, who filled in the prices and undertook to execute the work for a certain sum, and that his offer was accepted by the defenders. The defenders pleaded the triennial prescription. The pursuer explained that while he could not say definitely whether the acceptance was in writing or not, he did not admit that it was not, and asked for a diligence under which he might recover a written acceptance of his offer if such a document existed. *Held* by Lord Low, Ordinary, and *acquiesced* in, that he was entitled to such a diligence.

This was an action at the instance of Allan Gordon, builder, Baltic Street, Montrose, against James Ford & Son, builders, Montrose, and John Alexander Ford, the indivi-

dual partner of said firm, as such partner and as an individual, and the trustees and executors of the deceased James Ford, the only other partner of said firm. The pursuer concluded for payment of (1) £2157, 19s. 7½d., being £4407, 19s. 7½d. under deduction of £2250 paid to account; and (2), (3), and (4) the sums of £1508, 15s. 6d., £146, 19s., and £9, 5s. 1½d., amounting together to £1664, 19s. 7½d., under deduction of £750 paid to account and of £728, 12s., the amount of an account for work alleged to be done and materials alleged to be supplied by the defenders, the said James Ford & Son, to the pursuer, leaving a balance of £186, 0s. 7½d. still due.

The pursuer averred—(Cond. 2) That in 1876 the defenders contracted with the Government for the making of certain alterations on Perth Barracks; that as the defenders being masons were not able themselves to execute the joinery, carpentry, and ironmongery work, "they submitted the specifications and schedule of quantities for said work to the pursuer, who filled in the prices, and he undertook to execute said work for the said defenders for £3911, 6s. 4d. The defenders' said firm accepted the pursuer's said offer, and accordingly the pursuer executed said work according to said specifications and relative schedule to the amount of £3911, 6s. 4d." (Cond. 3) That the pursuer, on the employment of the defenders, during the execution of the contract executed certain extra work not included in his contract, amounting to £441; and (Cond. 4) after the completion of the contract certain alterations not within the contract amounting to £54, 18s. 1½d.; that the total amount of his account for work done at Perth Barracks on the employment of the defenders was £4407, 19s. 7½d., and that the defenders had paid various sums to account amounting in all to £2250, leaving a balance due to the pursuer of £2157, 19s. 2½d., being the sum first sued for.

The pursuer also averred—(Cond. 5) That in 1878 he was employed by the defenders' firm to execute the joiner, carpenter, and ironmonger work on Montrose Barracks, for the erection of which the defenders' firm had contracted with Government; that for this work he was to be paid by time occupied and material supplied at the standard Government rates, and that he executed said work conform to account rendered, commencing 3rd January 1878 and ending 27th February 1879, and amounting to £1508, 15s. 6d. (Cond. 6) That during the period from 21st August 1876 to 19th January 1880, the pursuer, on the employment of the defenders' firm, executed joiner work and various jobbing work amounting to £146, 19s. (Cond. 7) That during the period from 23rd January to 4th March 1879 the pursuer, on the employment of the defenders' firm, executed a variety of jobbing work at Montrose Battery amounting to £9, 5s. 1½d.

The pursuer further averred as follows:—" (Cond. 8) The total amount of the three accounts in the three preceding articles is £1664, 19s. 7½d., to account of which the

defenders' firm have paid the pursuer £750. The defenders' firm are entitled, however, to credit for mason and relative work executed and materials supplied on the order of the pursuer. The defenders' firm have charged an account therefor to the pursuer of £728, 19s., but which is greatly in excess of what is properly due, and accordingly the pursuer reserves his right to have said account investigated and adjusted. On the assumption that the defenders' said account is correct, and deducting the amount thereof and the sum paid to account there remains a balance due by the defenders to the pursuer of £186, 0s. 7½d. (Cond. 9) The said two balances of £2157, 19s. 7½d. and £186, 0s. 7½d. are still due and resting-owing by the defenders to the pursuer."

The pursuer pleaded—“(1) The pursuer having executed the work and supplied the relative materials, all as specified in the foresaid accounts and schedules, on the order and employment of the defenders' firm, and the sums sued for, being the balances due thereon, being still due and resting-owing by the defenders to the pursuer, he is entitled to decree as libelled. (2) The defenders' plea of prescription is inapplicable.”

The defenders averred as follows:—“The pursuer has been fully paid for all work done, and the defenders are not due him any sum.”

The defenders pleaded, *inter alia*—“(2) The pursuer's claims having prescribed, they can only be proved by writ or oath of the defenders.”

On 22nd February 1902 the Lord Ordinary (Low), after hearing counsel in the Procedure Roll, pronounced this interlocutor—“Sustains the defenders' second plea-in-law in regard to the sums in the second, third, and fourth places concluded for in the summons: Allows the pursuer to lodge in process a specification of the documents he desires to recover, with a view to proving that the offer of the pursuer to perform the work, the price of which is first sued for, was accepted by the late James Ford in writing: Continues the cause: Reserves the question of expenses; and grants leave to reclaim.”

Opinion.—“The pursuer, who is a builder in Montrose, sues the defenders for balances which he alleges to be still due on four accounts, all of which were incurred many years ago. The defenders plead the triennial limitation.

“The first account relates to work done so long ago as 1876. In that year the defenders entered into a Government contract for the execution of extensive alterations upon the barracks at Perth, and they sub-contracted with the pursuer for the carpenter and iron work.

“The pursuer's averment is that the defenders submitted the specifications and schedules of quantities for said work to the pursuer, who filled in the prices, and he undertook to execute the said work for the said defenders for £3911, 6s. 4d. The defenders' said firm accepted the pursuer's said offer, and accordingly the pursuer

executed said work according to said specifications and relative schedule to the amount of £3911, 6s. 4d.’

“The pursuer then avers that he executed certain additional work, and that his total account amounted to £4407, 19s. 7½d., to account of which he was (upon a date not specified) paid by the defenders the sum of £2250. He now sues for the alleged balance of £2157, 19s. 7½d.

“The pursuer argued that the Act did not apply to the account of a contractor who had carried out a building contract of the kind averred, and if the question had been open I should have been very much inclined to take that view.

“I cannot, however, regard the question as open. It has long since been settled that accounts to artificers or tradesmen, such as wrights or masons, for work or wages, fall within the Act, and if an account is of that character it can make no difference that it is of large amount. Then there is the case of *Mackay v. Carmichael*, 14 D. 207, where it was held that the Act applied to the claim of a contractor who was employed under a verbal contract to excavate the foundations of a building at a specified price per cubic foot, and where the work required to be measured in order that the amount due might be ascertained.

“I am accordingly of opinion that if the contract averred was a verbal contract it falls under the operation of the Act.

“The pursuer, however, argued that the contract must be regarded as a written contract, because the specifications and schedules were handed to him and he filled in the prices. I do not think that that makes a written contract. I think that the filling in of the prices was an offer on the pursuer's part to execute the work at the prices stated, but if the offer was verbally accepted, that would not be a written contract.—(*Chalmers v. Walker*, 6 R. 199.)

“Now the pursuer merely says that the defenders accepted his offer. I think that the inference from that averment is that the acceptance was verbal, because if the pursuer meant that it was in writing he should have said so, and should have specified the nature of the writing by which the acceptance was made. The pursuer's counsel, however, stated that although his client could not say at this distance of time how the acceptance of his offer was made, he did not admit that it was merely a verbal acceptance, and therefore he asked that a diligence should be granted under which he might recover a written acceptance of his offer, if such a document existed. Looking to the very peculiar circumstances, I think that the proposal is reasonable, and therefore I shall allow the pursuer to lodge a specification of the documents which he seeks to recover.

“The three other accounts for which the pursuer sues are clearly of a kind which fall under the Act. It is not suggested that as regards them there was any written contract. The pursuer's averment is simply that he did certain work as a tradesman upon the employment of the defenders.

The total amount of the accounts was

£1664, 19s. 7½d. The pursuer admits a payment of £750, but he avers that a sum is still due him of £186, 0s. 7½d. That sum is arrived at by giving the defenders credit for the amount of an account which they had against the pursuer for mason work done upon his employment, and amounting to £728, 19s.

"In these circumstances the pursuer contends that the Act does not apply, because the question between him and the defenders as regards the three last-mentioned accounts is one of accounting.

"I do not think that the decisions upon which the pursuer relies are applicable here. The fact that some twenty years ago there were cross tradesmen's accounts between the pursuer and the defenders does not make this action an accounting. If the defenders had been suing the pursuer for payment of an account which had not prescribed, it may very well be that he would have been entitled to set off the old accounts for which he is now suing. But the defenders are making no claim against the pursuer. This is simply an action by a tradesman for payment of a balance which he alleges to be due to him upon accounts incurred twenty years ago. I think that the Act plainly applies."

The pursuer reclaimed against the Lord Ordinary's interlocutor *quoad* the last three accounts.

Argued for the pursuer—The 2nd, 3rd, and 4th claims resolved into a question of accounting, and the triennial prescription did not apply—*Napier on Prescription*, pp. 710, 714—*Hamilton v. Martin*, January 24, 1795, Mor. 11,120; *Brunton v. Angus*, December 3, 1822, 2 S. 61; *Boyes v. Gray*, June 30, 1829, 7 S. 815; *Murray v. Wright*, March 16, 1870, 8 Macph. 722; *M'Kinlay v. Wilson*, November 18, 1885, 13 R. 210, 23 S.L.R. 134. The delay in getting payment was caused by the defenders, as they had refused to make payment, though repeatedly asked to do so. The case of *Boyes* was essentially similar to the present, and it was approved of by Lord Mure in the case of *M'Kinlay v. Wilson*. The account second sued for was for work done in connection with an important Government contract—a long protracted undertaking—and in such circumstances the triennial prescription was inapplicable. A contractor's account was not a "merchant's account or other the like debt" to which the triennial prescription was applicable—*M'Kinlay v. M'Kinlay*, December 11, 1851, 14 D. 162.

Argued for the defenders—The work had all been paid for at the time it was incurred, and no work had been done by the pursuer for the defenders after 1880. The pursuer was here suing for a balance on four different accounts, each of which was prescribed, and not on a current account. The defenders' contra-account had also prescribed, so that on neither side was there any item of either account within the triennium—*Neilson v. Magistrates of Falkirk*, November 17, 1899, 2 F. 118, 37 S.L.R. 71.

The mere existence of contra-accounts did not create an accounting. The cases cited by the pursuer were inapplicable. *Boyes* was the case of an account-current; *Brunton* was an action of accounting. In the present case the accounts on each side were closed more than twenty years ago, and accordingly had prescribed. The triennial prescription had been held to be applicable to building contracts—*Mackay v. Carmichael*, December 17, 1851, 14 D. 207.

At advising—

LORD JUSTICE-CLERK—There are four sums sued for in this summons. As regards the first, the Lord Ordinary has allowed the pursuer to lodge a specification of documents, with a view to proving that the offer for the work which forms the basis of the claim was accepted in writing, and this part of the interlocutor is not impugned. But the pursuer reclaims against the interlocutor in so far as it is thereby found that the proof in regard to the other three sums claimed must be limited to the writ or oath of the defenders. He maintains that the question between him and the defenders involves an accounting. But I agree with the Lord Ordinary in thinking that this is not a correct statement of the case. The facts as averred come simply to this, that the pursuer many years ago did certain work for the defenders, that he received a payment of £750, but that after giving credit for this, and for £728, 19s. which he was due to the defenders for work done and material supplied by them, there is a balance still due to him of £186.

I am unable to hold that in these circumstances there is anything of the nature of an accounting between the parties. The case as put is for ordinary debt claimed by the pursuer. There is no claim being made by the defenders against the pursuer. His demand is simply for a sum remaining unpaid of a tradesman's account, he having to admit in making his demand that he can only claim a certain sum, because he is liable for goods supplied and work done by them on his employment at a different time. No doubt he makes reservations in regard to the account out of which this counter-claim arose. But in this case he gives credit for it, and his doing so cannot make this an accounting. There is nothing of the nature of an accounting put forward.

Numerous cases were referred to in debate by the pursuer, but an examination of these indicates that they are all essentially different from the present. They were none of them cases falling under the definition expressed by Lord Fullarton as indicating the kind of case to which the statute applies, viz., "the price of articles sold or services performed by the pursuer." This, as it seems to me, is a pure case of the latter description, and that the Lord Ordinary in so holding was right. I am therefore in favour of adhering to his judgment.

LORD YOUNG—I think this is substantially an action of accounting. It is not so in form, but on the record the pursuer avers that for more than twenty years he has

been doing work on the employment of the defenders, and that the defenders on their part have been doing work for him, that the accounts between them have never been settled, and that the balance upon the accounts is unascertained at this moment. If the pursuer be right the balance is in his favour; but it may be shown that the balance is otherwise. The Lord Ordinary has very properly, before determining any question of prescription, allowed a diligence with regard to the first item of the claim. With regard to the three others, the accounts being all of the same description, it appears that although the total accounts amount to thousands of pounds, the sum sued for is a balance of £186. Now, I should like to see all the correspondence between the parties before determining any question of prescription here. It is not necessary to pronounce a judgment as to whether prescription applies here or not; the general course is to allow a diligence. In the meantime, on the same principle on which the Lord Ordinary proceeded as to the first item, I should allow the diligence to extend to the other items also. It is a case where there have been business and mutual accounts going on between the parties, which have been settled partially, and I think there should be a general proof.

LORD TRAYNER—I have no difficulty in agreeing with the views of the Lord Ordinary. In considering whether the sums sued for are subject to the triennial prescription we must look at the statements of the pursuer and the case which he presents. Now, this is a case for recovery of a debt incurred for goods supplied and work done; and there is no doubt that the triennial prescription applies to such a claim.

The pursuer's only grounds for maintaining that these accounts are not subject to the triennial prescription are (first) that this is an action of accounting, and (second) that the sum sued for is part of a very large account, and for work done under an important contract.

The first ground is answered by the terms of the summons—it concludes for payment of a specified debt. There are no *termini habiles* upon which an accounting could be ordered or given effect to. The only thing said in support of an accounting is this—that from the three items last concluded for there falls to be deducted the amount of a contra account of £729. The pursuer says, no doubt, that while he gives credit for the account for £729, he reserves his right to have that account investigated and adjusted, but *quoad* this case it is an admitted payment to account, and a payment to account cannot change the pursuer's claim from an ordinary claim of debt into a claim for an accounting.

The second ground is that it is a large sum due under an important contract. Surely this is irrelevant—*Majus aut minus non variat speciem*. The account, large or small, is still “a merchant's account or other the like debt.”

The Lord Ordinary has allowed a diligence

to enable the pursuer to show that the sum first concluded for was incurred on a written contract, and therefore not subject to the triennial prescription. I think the Lord Ordinary has dealt generously with the pursuer in allowing him this diligence, for I should not have read the pursuer's record as averring any written contract. But I am not disposed to interfere with what the Lord Ordinary has done.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defenders and Respondents—Campbell, K.C.—W. Thomson. Agents—W. & J. Burness, W.S.

Thursday, May 29.

SECOND DIVISION.

[Bill Chamber—
Lord Pearson, Ordinary.]

MANNERS v. STRONG'S JUDICIAL FACTOR.

Judicial Factor—Administration—Discharge—Funds Lodged on Deposit-Receipt—Liability for Higher Interest—Loss on Loan on Heritable Security—Valuation—Three-Fourths of Valuation Lent—Allocation of Legacy to Particular Investment—Subsequent Payment out of General Estate—Trust.

In a petition for, *inter alia*, the discharge of a judicial factor, objections were stated by certain of the beneficiaries, upon the ground (1) that loss of income had resulted from sums having been improperly left on deposit-receipt; (2) that loss had resulted from an investment of £3250 on insufficient heritable security; and (3) that although in his accounts he had entered this investment as allocated and held to the extent of £1000 for a certain legatee, he had ultimately paid that legatee in full out of the general estate.

Circumstances in which the Court (*affirming* the judgment of Lord Pearson, Ordinary) *repelled* these objections, holding that the judicial factor's management had been proper, and that he had not been guilty of any breach of duty.

A petition having been presented for the appointment of a new judicial factor upon the trust-estate of the late George Gordon, and for the discharge of the late judicial factor, John Roxburgh Strong, C.A., Glasgow, objections to his discharge were stated by Mrs Margaret Gordon or Manners and others, being certain of the beneficiaries. These objections were three in number, namely, (1) to the loss of income resulting from the factor having held large sums on deposit-receipt for an unreasonable length