

1781. June 13.

JAMES BUTCHART and Others, Owners of the Ship Owner's Good Will of Aberbrothick, *against* ALEXANDER MUDIE and JOHN RENNY, Trustees for the Creditors of the deceased CHARLES KENNY, Master of said Ship.

CHARLES KENNY, master of the ship called Owner's Good Will, being shipwrecked on the coast of Norway in 1773, he himself, and all his papers were lost. Trustees were appointed by his creditors; and the pursuers claimed to be ranked upon his funds for their share of the freights earned by the ship, from April 1768, the date of their last clearance.

The triennial prescription, established by act 1579, was pleaded, *inter alia*, by the defenders, and the LORD ORDINARY sustained it as a good defence; but, upon a reclaiming petition, the LORDS remitted the cause to the Ordinary; and the same having been again brought before them by report, they

“Repelled the defence of prescription.”

A reclaiming petition was refused without answers.

The Court considered this as of the nature of an action against a factor, or *negotiorum gestor*, which could only be cut off by the long prescription.

Lord Ordinary, *Justice-Clerk.* Act. *John Ramsay.* Alt. *W. Nairne.*  
D. Fol. *Dic. v. 4. p. 106.* Fac. *Col. No 54. p. 94.*

No 318.

Act 1579, cap. 83, does not apply to accounts between the master of a ship and its owners.

1782. July 19.

RAMAGE *against* CHARTERIS.

RAMAGE, a merchant of York, had been in the use of furnishing sundry articles of thread manufacture to Charteris, who carried on trade in Scotland.— In 1780, he instituted an action for payment of a balance alleged to be due to him. In the account exhibited in this action, the last article furnished by him bore date in the year 1776; so that, in this view, the triennial prescription introduced by the statute 1579 had taken place. But the defender having furnished goods to him within the three years, he made these furnishings a part of his account, by which means it appeared to be current till within a year of commencing the action.

The question was, Whether the statute operated in the present case?

*Pleaded* for the defender; So long as a merchant continues to furnish goods to his employer, his claim, by the equitable interpretation of courts of law, is preserved from the effects of the statute 1579; Erskine, b. 3. tit. 7. § 17. It never can be imagined that in these circumstances he will take legal measures to effectuate payment of what is due to him; and the expression used by the legislature, excluding all intention of commencing the prescription from the date of each article, has afforded an opportunity of reconciling the enactment.

No 319.

Prescription of a merchant's accounts not interrupted by furnishings made by the other party to him.

No 319.

with what ordinarily occurs in practice. But whenever the furnishings cease, matters assume a different appearance. Then it must be supposed, that either the merchant has declined to give farther credit, or that the buyer has transferred his employment to another; and that in both cases the merchant will lose no time in insisting for his payment, if any thing remain unpaid. Hence, the moment the furnishings cease, the currency of the account is at an end, and the statutory presumption of payment, aided by the common practice of merchants, operates with full effect. Furnishings by the defender can in no way remove the statutory presumption. If they were made towards extinction of the debt due to the pursuer, it is an established point, that partial payments do not interrupt, but rather confirm the short prescription. If again, they were not made in that view, they have no relation to the pursuer's account; and therefore ought to have no influence in any question concerning it.

It has been found, that a plea of compensation, not having effect in Scotland, by the mere act of the law, does not interrupt prescription, Jan. 1719, Carmichael, No 139. p. 2677. Hence, had the present defender brought an action against the pursuer, for payment of the articles furnished, within the three years, the pursuer could not have defended himself by shewing, that at the period of advancing these articles, there was an account due to him, outstanding and unprescribed, which would more than satisfy the demand; and the decision must be the same in the present instance, unless it can be supposed, that the party pleading compensation, by assuming the character of pursuer, can create such a material alteration in the nature of his plea.

A decision favourable to the pursuer would go far toward a repeal of this beneficial statute. A merchant's books, having the appearance of being regularly kept, are probative in his favour. In rearing up a debt long ago paid, he has nothing to do but to insert within the years of prescription a furnishing made by the defender, which will sanctify a demand for any article ever furnished to him.

*Answered* for the pursuer; The method of keeping accounts between retail merchants, who are in the practice of mutual furnishings, is to make only one account for both, on the one side of which all the articles furnished by the one party are kept, and on the other those furnished by the other. In this way, matters can at any time be adjusted between them, by summing up these two sides; whereas keeping two separate accounts, stating the respective furnishings and payments made of the price, could tend to nothing but confusion.

From this mode of dealing, it is understood among merchants, that an account is current so long as either party has operated on it, whether on the debit or credit side, and that the prescription cannot apply till three years have elapsed without a furnishing by either party. A contrary idea would be attended with the most unjust consequences. Two merchants being in a course of mutual furnishings, one of them is considerably indebted to the other, and remits at different times goods to the credit of his account. Matters go on in

this manner for three years, without a furnishing on the part of the creditor. After this period, according to the plea now maintained, the debtor may sue for payment of the articles furnished, not only within the three years, but at any distance of time during which his account has continued current; when, on the other hand, the person who is truly the creditor, not having furnished any thing within the three years, can neither sue for his payment, nor defend himself from the demands of the other party.

THE LORDS gave opposite judgments; but finally "found the prescription run, and assolzied."

Lord Ordinary, *Westhall*.  
C.

Act. *Elphinston*.

Alt. *Geo. Wallace, Craig*.

Clerk, *Orme*.

*Fol. Dic. v. 4. p. 107. Fac. Col. No 57. p. 90.*

1784. November 19, JOHN ROSS against ALEXANDER SHAW.

Ross having pursued Shaw for payment of an account of goods furnished twelve years before, produced, in order to obviate the plea of the triennial prescription enacted by the statute of 1579, c. 83, certain letters of the defender's commissioning the goods. The defender admitted the furnishing, but asserted that payment had been made; and

*Pleaded*; An order for merchandise, given in writing, can never be construed into a written obligation in the terms of this statute; since it affords no proof of the goods being actually furnished, or, in other words, that any debt has been created. The present case then comes not within the exception of the statute; and, as that enactment is founded on the presumption of payment, the acknowledgement of furnishing alone is of no consequence.

*Answered*; The act of Parliament in question contains an express declaration, that it extends not to debts founded on written obligations; from which it is probable, that its object is the proof of constitution of debt; the plain language of the whole enactment being, that the accuracy of testimony in such matters is not to be confided in after three years from their date shall have elapsed. Hence the common idea of this statute's having established, on the expiration of that period, a presumption of payment which is not to be elided except *scripto vel juramento*, seems to be contradicted by its terms; the presumption thus introduced being truly against the constitution of debt, if not otherwise ascertained than by parole evidence. In the present case, however, the letters must remove the hazard arising from the lubricity of testimony, so as to render it admissible, according to Lord Stair, 5th July 1681, *Dickson contra Macaulay*, No 288. p. 11090. But in fact, the defender, by acknowledging the furnishing consequent on the written commission, has given to it the same effect as if at the time he had added in writing a declaration of the same import.

No 319.

No 320.

The triennial prescription of an account, not obviated by a written commission for the goods, joined to a judicial acknowledgement of the furnishing.